ARTICLE

TEXAS'S TRANSITIONING JUDICIARY:

A FEW APPELLATE & ETHICAL CONSIDERATIONS FOR APPELLATE COURT PROCEEDINGS

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As a result of the 2018 judicial elections, Texas has welcomed a historic number of new judges in trial and appellate courts.[1] In

1. *See* Mark Curridan, *Substantive Changes Coming to Courts of Appeals in Austin, Dallas & Houston*, THE TEXAS LAWBOOK, Nov. 12, 2018, https://texaslawbook.net/substantive-changes-coming-to-courts-of-appeal-in-austin-dallas-houston; Mark Curridan, *Updated – Democrats Seize Control of Dallas Court of Appeals, Win Houston Appellate Judgeships*, THE TEXAS LAWBOOK, Nov. 7, 2018, https://texaslawbook.net/democrats-appear-to-seize-dallas-court-of-appeals-dems-win-houston-judgeships-tx-lawyers-score-big-congressional-upsets.

both civil and criminal cases, a change in judgeship can raise questions about what a new judge may or may not do, and about the impact the change in judgeship might have on pending proceedings in the appellate courts. This article attempts to address some of those questions and identify potential ethical issues that might arise as a result of a change in judgeship in both civil and criminal cases.

I published an initial look at some of these issues at the trial court stage. That article is *Texas's Transitioning Judiciary: A Few Appellate & Ethical Considerations, Part I*, 86 THE ADVOCATE 51 (Spring 2019). In this second Part, I consider options for relief in the appellate courts. Appellate questions can arise for a number of reasons. If a newly elected trial judge reconsiders a prior judge's ruling, order, or judgment, or declines to do so, the non-prevailing party might consider pursuing relief in an appellate court. Additionally, if a newly elected trial judge has a different view of the case and changes course of the proceedings from when the prior judge was presiding, there might be options for relief in the appellate court. The type of relief that can be sought in an appellate court, and the proper procedure for pursuing that relief, generally turns on whether the case is a civil or criminal case and whether the order to be appealed is an appealable interlocutory order or, in a civil case, a final judgment. In other words, if the ruling, order, or judgment is appealable, a direct appeal is generally available. If not, an original proceeding in an appellate court can sometimes be an option to seek extraordinary relief.

I. OPTIONS FOR RELIEF IN THE APPELLATE COURT

A. Direct Appeals

One option for challenging a trial court's order or judgment is through a direct appeal. A "direct appeal" refers to the ordinary appellate process by which a party expresses its desire to challenge a trial court's judgment or other appealable action in an appellate court, usually a court of appeals but in some rare circumstances in the Supreme Court of Texas or Court of Criminal Appeals.[2] A party expresses its desire to challenge such appealable actions by filing a notice of appeal.[3] This article uses the term appealable "action" for purposes of including appealable interlocutory orders, final judgments in civil cases, and an order terminating prosecution or imposing or suspending a sentence in criminal cases. "Courts of appeals" refer to the fourteen intermediate courts of appeals, and

2. *See* TEX. R. APP. P. 31.2(a), 57, 71.
3. *See id.* R. 25.1(d), 25.2(b).

"appellate courts" include all courts of appeals, the Supreme Court of Texas, and the Court of Criminal Appeals.[4]

1. Civil Appeals. In civil cases, direct appeals in the courts of appeals are limited to appealable interlocutory orders and final judgments.[5] Appealability is ultimately an issue of appellate court jurisdiction, which generally corresponds with a party's right to appeal.[6] Courts of appeals' jurisdiction is created by the Texas Constitution, which authorizes the Texas Legislature to confer courts with judicial authority and appellate jurisdiction.[7]Because a party has no inherent or constitutional right to appeal, the Texas Legislature has given courts of appeals jurisdiction over appeals by statutorily giving individuals the right to appeal certain orders and judgments.[8] Generally, if a person has the right to appeal, the court of appeals' jurisdiction is mandatory, and the court of appeals must hear and decide the case.[9] The Legislature has given individuals the right to appeal from a final judgment and other specific interlocutory orders.[10] As noted above, if a new trial judge reconsiders a prior judge's ruling and changes course, the new judge's order may constitute a final judgment or an appealable interlocutory order.

a. Final Judgments. A party has a right to appeal from a final judgment.[11] A "judgment" typically refers to an order that disposes of a party's request for the ultimate relief sought in the case, either by denying, granting, or dismissing the request for relief.[12] So, under this definition, all judgments are orders, but not all orders are judgments. The test for whether a judgment is final and appealable as a matter of right turns on the test set out by *Lehmann v. Har-Con Corp.*[13] Under *Lehmann*, a judgment is "final" if: (1) it actually disposes of all claims and all parties in the lawsuit; or (2) states with unmistakable clarity that it is a final judgment as to all parties and all claims.[14] A judgment rendered

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4. *See* TEX. GOV'T CODE § 22.201; TEX. R. APP. P. 3.1(b).
5. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.012, 51.014.
6. *See* Black v. Shor, 443 S.W.3d 170, 178 (Tex. App.—Corpus Christi 2013, no pet.); McFadden v. State, 283 S.W.3d 14, 16–17 (Tex. App.—San Antonio 2009, no pet.).
7. Tex. Const. art. V, § 1.
8. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE §§ 51.011-51.016.
9. Michael J. Ritter, *Permissive Appeals in Texas Courts: Reconciling Judicial Procedure with Legislative Intent*, 36 REV. LITIG. 55, 115 n.343 (2017) (stating that court of appeals' jurisdiction is mandatory, unless the case is a proper permissive appeal)
10. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.012, 51.014.
11. *See id.* § 51.012.
12. BLACK'S LAW DICTIONARY, https://thelawdictionary.org/judgment.
13. 39 S.W.3d 191, 195 (Tex. 2001).
14. *Id.* at 192–93.

after a conventional trial on the merits is presumed to be a final judgment, but that presumption may be rebutted by specific language in the judgment or by the record of the trial.[15] Therefore, if a newly elected trial judge grants the relief ultimately requested in a case, either before or after a conventional trial on the merits, the judgment might be final and appealable.

b. Appealable Interlocutory Orders & Permissive Appeals. If the order a party desires to appeal is not a final judgment, the order may be appealed if the Texas Legislature has provided the party the right to appeal the order. Most of the orders that a party may appeal as a matter of right are contained in section 51.014 of the Texas Civil Practice & Remedies Code.[16] However, the Texas Legislature often buries the right to appeal within other statutes.[17] So, if a newly elected trial judge signs an order, section 51.014 or other applicable statutes might provide the right to appeal that order. Also notable is that when the Legislature provides that a party "may" appeal, the use of the word "may" typically confers the right to appeal.[18]

If the Legislature has not provided a right to appeal the order, there is an alternative discretionary procedure contained in section 51.014, specifically in subsections (d) through (f).[19] In those provisions, the Texas Legislature deviates from the general rule of appeals as a matter of right, and corresponding mandatory jurisdiction for the courts of appeals, by providing an alternative, discretionary review procedure in the intermediate appellate courts. Under this discretionary review procedure, a party may seek permission from the trial court to appeal an otherwise non-appealable order or judgment.[20] Generally, the trial court must conclude the order involves a substantial ground for difference of opinion as to a controlling question of law[21] and that an immediate appeal would materially advance the ultimate termination of the

15. *Id.* at 198.

16. *See* TEX. CIV. PRAC. & REM. CODE § 51.014.

17. *See, e.g.*, *id.* § 171.098 (providing the right to appeal certain orders regarding arbitration).

18. *See id.* §§ 51.012, 51.014.

19. *See id.* § 51.014(d)–(f).

20. *See id.* § 51.014(d).

21. The permissive appeal procedure is not a certified question procedure, but an ordinarily interlocutory appeal of an order that is not otherwise appealable. *See* Gulley v. State Farm Lloyds, 350 S.W.3d 204, 207 (Tex. App.—San Antonio 2011, no pet.) ("Under our reading of the statute, section 51.014(d) does not contemplate use of an immediate appeal as a mechanism to present, in effect, a 'certified question' to this Court similar to the procedure used by federal appellate courts in certifying a determinative question of state law to the Texas Supreme Court.").

litigation.[22] If the trial court grants permission to appeal, the party desiring to appeal must timely file a petition for permissive appeal in the court of appeals; the court of appeals then has the discretion as to whether to take the case.[23]

2. Criminal Appeals. In criminal cases, direct appeals are generally limited to the trial court's imposition or suspension of the defendant's sentence and appealable interlocutory orders.[24] Unlike civil cases, in which the appealable action is the written order or judgment that is signed by the trial judge, when the appealable action in criminal cases is not the signing of an interlocutory order, the appealable action is the imposition or suspension of the defendant's sentence.[25] If a newly elected judge imposes or suspends sentence, then the imposition or suspension of the sentence is the appealable action.[26]

If a newly elected judge changes course or otherwise makes another ruling, the appealability of the ruling turns on, initially, which party is seeking to appeal. A criminal defendant's right to appeal is provided in article 44.02 of the Texas Code of Criminal Procedure:

A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed, provided, however, before the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial.[27]

Interestingly, article 44.02 is different from the right to appeal conferred in civil cases and the State's right to appeal in criminal cases because it provides, unlike all the other relevant statutory provisions, that the defendant has the right to appeal "under the rules hereinafter prescribed," which appears to delegate to the Court of Criminal Appeals the authority to

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22. *See id.* § 51.014(d).

23. *See id.* § 51.014(f); *see generally* Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG, No. 17-0538, 2019 WL 406062 (Tex. Feb. 1, 2019) (holding a court of appeals does not abuse its discretion by denying a petition for permissive appeal even when the statutory requirements, but under former statute that applied, the supreme court may grant review to consider the appealed order even if the court of appeals denies review).

24. *See* TEX. CODE CRIM. PROC. arts. 44.01, 44.02.

25. *See* TEX. R. APP. P. 21.4(b), 26.1(a)(1).

26. *See id.* R. 21.4(b), 26.1(a)(1).

27. *See* TEX. CODE CRIM. PROC. art. 44.02.

determine by rule what else a defendant may appeal.[28] The Court of Criminal Appeals has, for example, promulgated Rule 31, which appears to authorize a criminal defendant to appeal certain bond and habeas rulings.[29]

The State may appeal as per article 44.01 of the Code of Criminal Procedure. Article 44.01 provides:

> The state is entitled to appeal an order of a court in a criminal case if the order: (1) dismisses an indictment, information, or complaint or any portion of an indictment, information, or complaint; (2) arrests or modifies a judgment; (3) grants a new trial; (4) sustains a claim of former jeopardy; (5) grants a motion to suppress evidence, a confession, or an admission, if jeopardy has not attached in the case and if the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case; or (6) is issued under Chapter 64.[30]

In addition to articles 44.01 and 44.02, as in civil cases, the Legislature has buried statutory rights to appeal within different statutory provisions in the Code of Criminal Procedure.[31] So, if a newly elected trial judge changes course from the prior judge and signs an order, articles 44.01 and 44.02 and other applicable provisions of the Code of Criminal Procedure might provide the right to appeal for that particular order.

3. Further Review in the Supreme Court of Texas & Court of Criminal Appeals. After the court of appeals decides a direct appeal, further appellate options exist in the Supreme Court of Texas and the Court of Criminal Appeals.[32] The procedure for pursuing further appellate relief in civil cases is by petition for review in the supreme court.[33] The typical procedure for pursuing further appellate relief in criminal cases is by petition for discretionary review in the Court of Criminal Appeals.[34] Although the procedure for criminal cases includes the word "discretionary" and the civil procedure does not, both procedures are discretionary review procedures and the high courts may decline to grant review

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28. *See id.*
29. *See* TEX. R. APP. P. 31.
30. *See* TEX. CODE CRIM. PROC. art. 44.01.
31. *See, e.g.*, *id.* art. 64.05.
32. *See* TEX. R. APP. P. §§ 3–5.
33. *See id.* R. 53.
34. *See id.* R. 66.

in their sole discretion.

B. Extraordinary Relief

Another option for challenging a trial court's ruling, order, or judgment is by initiating an original proceeding in an appellate court and seeking extraordinary relief.[35] "Extraordinary relief" typically refers to the issuance of an extraordinary writ, including writs of mandamus, prohibition, habeas corpus, and others.[36] A party may request that an appellate court issue an extraordinary writ by filing a petition in an appellate court, and equitable principles generally govern those original proceedings.[37] Technically speaking, extraordinary relief may first be sought in the supreme court or Court of Criminal Appeals because the proceedings are "original" proceedings.[38] But because the high courts will generally deny relief if a party has not first pursued relief in the court of appeals or showed that extraordinary circumstances justified not having done so, the typical practice is to pursue extraordinary relief in the court of appeals.[39]

The standards governing the issuance of extraordinary writs depend on the type of writ sought and whether the case is a civil or criminal case. Although there are other extraordinary writs, this article focuses on three: mandamus, prohibition, and habeas corpus. The purpose or function of writs of mandamus and prohibition are generally the same regardless of the type of case; a writ of mandamus compels an official to take an action, whereas a writ of prohibition prohibits an official from taking an action.[40] Writs of mandamus and prohibition are closely related and are governed by similar standards. Conversely, a writ of habeas corpus serves the purpose of challenging an order under which an individual is confined for being in contempt of court.

1. Writs of Habeas Corpus. One issue that can arise with any change in judgeship is a change in courtroom expectations. Although parties sometimes violate a judge's expectations, rules, or orders for courtroom conduct, judges in Texas tend to be somewhat reluctant to hold parties and attorneys in contempt. But it does happen occasionally. When a trial judge errs by holding a party or lawyer in contempt, an original proceeding in an appellate

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35. *See* Tex. R. App. P. § 52.1.

36. *See id.* R. 52.1.

37. *See generally id.* R. 52, 72; In re Medina, 475 S.W.3d 291, 297–98 (Tex. Crim. App. 2015) (orig. proceeding); Callahan v. Giles, 155 S.W.2d 793 (1941) (orig. proceeding).

38. *See* TEX. R. APP. P. 52, 72.

39. *Ex parte Ybarra*, 149 S.W.3d 147 (Tex. Crim. App. 2004.

40. *See* In re Medina, 475 S.W.3d at 297–98.

is the usual appellate remedy.[41] If the party or lawyer is not confined as a result of an order of contempt, the appropriate writ to seek is a writ of mandamus in the court of appeals.[42] If the party or lawyer is confined as a result of a contempt order, the appropriate writ to seek is a writ of habeas corpus in the court of appeals in civil cases or the Court of Criminal Appeals in criminal cases.[43]

The standards governing the issuance of writs of habeas corpus are generally the same regardless of whether the underlying case in which the contempt order arises is a civil case or a criminal case. "A criminal contempt conviction for violation of a court order requires proof beyond a reasonable doubt of: (1) a reasonably specific order; (2) a violation of the order; and (3) the willful intent to violate the order."[44]

2. Writs of Mandamus & Prohibition in Criminal Appeals. In criminal appeals, the issuance of writs of mandamus and prohibition are governed by the same general principles.[45] The relator must show: (1) a clear right to relief; and (2) the relator lacks an adequate remedy at law (or by appeal).[46] The first requirement generally mandates that the relator establish the trial judge had a mandatory duty to do something or refrain from doing something, but failed to comply with that duty.[47] This first requirement is alternatively phrased as an "abuse of discretion."[48] The Court of Criminal Appeals has explained that the modifier "clear" in the "clear right to relief" requirement is not a superfluous term; the alleged abuse of discretion must be clear as a matter of fact and as a matter of law.[49] If it is unclear from the record what exactly the trial judge did or failed to do, or if the law that applies to what the trial judge did is unclear, then a request

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41. In re Long, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding) (explaining that the only available means of review from a contempt order is via a petition for writ of habeas corpus or a petition for writ of mandamus).

42. *See id*.

43. *See, e.g.*, Cline v. Cline, 557 S.W.3d 810, 812 (Tex. App.—Houston [1st Dist.] 2018, no pet.); Ramirez v. State, 36 S.W.3d 660, 664 (Tex. App.—Waco 2001, pet. ref'd) (stating courts of appeals have no original habeas jurisdiction in criminal cases).

44. In re Mayorga, 538 S.W.3d 174, 178 (Tex. App.—El Paso 2017, orig. proceeding) (citing Ex parte Chambers, 898 S.W.2d 257, 259 (Tex. 1995) (orig. proceeding)); *see also* Ex parte Kearby, 34 S.W. 635 (1896) (orig. proceeding).

45. In re Medina, 475 S.W.3d 291, 297 (Tex. Crim. App. 2015) (orig. proceeding).

46. State ex rel. Mau v. Third Court of Appeals, WR-87,818-01, 2018 WL 5623985, at *3 (Tex. Crim. App. Oct. 31, 2018) (orig. proceeding).

47. Tex. Dept. of Corr. v. Dalehite, 623 S.W.2d 420, 424 (Tex. Crim. App. 1981).

48. *See, e.g.*, *id*.

49. *See* Simon v. Levario, 306 S.W.3d 318, 320-21 (Tex. Crim. App. 2009) (orig. proceeding).

for an extraordinary writ of mandamus or prohibition must be denied.[50] Although the Court of Criminal Appeals has framed the first requirement as an abuse of discretion, the most frequent abuse of discretion alleged is the misapplication of the law or a failure to apply the law, issues that are reviewed de novo.[51]

For the second requirement, there must be no adequate remedy at law (or by appeal).[52] "In some cases, a remedy at law may technically exist but may nevertheless be so uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective as to be deemed inadequate."[53] "To establish no adequate remedy by appeal, the relator must show there is no adequate remedy at law to address the alleged harm and that the act requested is a ministerial act, not involving a discretionary or judicial decision."[54] In criminal cases, Texas courts often note, "The extraordinary nature of the writ of prohibition requires caution in its use."[55] And they mean it. As a result, a writ of mandamus or prohibition might not address a newly elected judge's abuse of discretion in criminal cases unless the case is truly extraordinary. The same cannot be said for civil appeals.

3. Writs of Mandamus & Prohibition in Civil Appeals. To obtain mandamus relief in civil cases, the relator must show: (1) the trial judge abused their discretion, and (2) the relator lacks an adequate remedy by appeal.[56] Counterintuitively, although the first requirements for these extraordinary writs in civil and criminal appeals are phrased differently, they are very similar tests in application. And, although the second requirement is phrased almost identically in both the civil and criminal contexts, the standards for what constitutes lacking an adequate remedy at law or by appeal are very different.

In civil appeals, the first requirement is a "clear" abuse of discretion. Like criminal appeals, this issue ultimately boils down to whether the trial judge misapplied the law, failed to apply the law correctly, or failed to perform a ministerial duty, such as failing to rule on a properly presented motion. But unlike criminal appeals, and despite the words used to describe the standard, the

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50. *Id.*

51. *See* In re Dall. Cty. Pub. Def., 553 S.W.3d 926, 928 (Tex. Crim. App. 2018) (Newell, J., concurring) (explaining, in original proceedings, legal issues such as a statutory construction is reviewed de novo).

52. *Dalehite*, 623 S.W.2d at 424.

53. In re Ford, 553 S.W.3d 728, 732 (Tex. App.—Waco 2018, orig. proceeding).

54. In re Hesse, 552 S.W.3d 893, 896 (Tex. App.—Amarillo 2018, orig. proceeding).

55. In re State ex rel. Escamilla, No. 03-18-00351-CV, 2018 WL 4844100, at *3 (Tex. App.—Austin Oct. 5, 2018, orig. proceeding) (mem. op.).

56. In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

trial judge's abuse of discretion and the right to relief need not be clear.[57] The record must clearly show what the trial judge did or failed to do, but the law need not be clear. Instead, the Supreme Court of Texas has explained that clarifying the law on issues that do not tend to arise in the ordinary appellate process is one of the benefits, if not purposes, of the ready availability of writs of mandamus.[58] In civil cases, the law applicable to whether a trial judge abused their discretion may be unclear, but that lack of clarity is not a bar to the issuance of a writ of mandamus or prohibition as it might be in a criminal case.[59] In sum, in civil cases, the first "abuse of discretion" requirement often requires the court of appeals to conclude the trial court misapplied the applicable law, whatever the court of appeals eventually determines the law to be.

Conversely, the "no adequate remedy at law" and "no adequate remedy by appeal" standards are very different. On this requirement, the Supreme Court of Texas's jurisprudence has evolved so radically that the "no adequate remedy by appeal" standard in civil cases has become synonymous with there simply being no right to appeal.[60] In other words, according to the supreme court's most recent jurisprudence on this legal standard, if the Texas Legislature has provided a right of appeal, then a trial court's ruling, order, or judgment might not be challenged in the court of appeals in an original proceeding seeking an extraordinary writ. If the Legislature has declined to provide a right of appeal, a party may nevertheless seek review of the trial court's ruling, but it must be done through the alternative original proceeding process (which is often preferable to the regular appellate process because it sometimes produces a faster result at less of a cost to the parties).[61] In most cases in which the supreme court itself grants mandamus relief, it does not even address the second requirement, which sets a less stringent model for courts of appeals' analyses.

This trend in the supreme court's jurisprudence has

57. *Id.* at 135 ("[E]ven when the law is unsettled, the trial court's refusal to enforce the jury waiver was a clear abuse of discretion.").

58. *Id.* at 138 (stating mandamus is beneficial to address issues that generally evade the normal appellate process).

59. *Id.* at 135.

60. In re Sassin, 511 S.W.3d 121, 125 (Tex. App.—El Paso 2014, orig. proceeding) ("A non-party to a suit has no right to appeal a discovery order in that suit and therefore has no adequate remedy by appeal.").

61. *Fees for the Supreme Court of Texas, Texas Courts of Appeals, and Multidistrict Litigation Panel*, Misc. Docket. No. 15-0158, Aug. 28, 2015, www.txcourts.gov/media/1057441/fees-for-supreme-court-of-texas-coas-and-mdl.pdf (showing the fee for filing an original proceeding is $155, and $205 for filing a regular appeal).

essentially allowed every trial court ruling, order, or judgment in a civil case to be reviewable by the court of appeals in one way (by a direct appeal as a matter of right) or another (by a permissive appeal or an original proceeding in an appellate court). As a result, while there used to be some attempt to outline the specific rulings and orders for which an appeal was not an adequate remedy and those for which an appeal was an adequate remedy, writs of mandamus and prohibition now simply represent the flip side of appealability.[62] A party can obtain "extraordinary" relief in a civil case almost any time there is no right of appeal. In other words, for nearly every single ruling, order, or judgment a new judge might make or render, the order or judgment is either (1) an appealable final judgment or interlocutory as a matter of right, or (2) subject to the discretionary review proceedings of (a) a permissive appeal and (b) an original proceeding in an appellate court for a writ of mandamus or prohibition.

C. Conclusion

In both civil and criminal cases, if a newly elected trial judge reconsiders a prior judge's ruling, order, or judgment, the same general appellate options are available: direct appeals and original proceedings in the appellate courts seeking extraordinary relief. However, with the exception of writs of habeas corpus, trial court actions that are appealable and the standards governing obtaining relief in the appellate court will differ based on whether the case is civil or criminal.

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62. *See, e.g.*, Justice Marialyn Barnard, Lorien Whyte & Emmanuel Garcia, *Is My Case Mandamusable?: A Guide to the Current State of Texas Mandamus Law*, 45 ST. MARY'S L.J. 143 (2014) (providing a non-exhaustive list of recent issues subject to mandamus); *see also* In re Brown, No. 02-07-071-CV, 2007 WL 2460361, at *3 (Tex. App.—Fort Worth Aug. 29, 2007, orig. proceeding) (mem. op.) (explaining mandamus is an appropriate remedy when newly elected trial judge erroneously grants a motion for new trial).

II. RECONSIDERATION ("REHEARING") IN THE COURT OF APPEALS

This month, there was a change in judgeships for approximately one-third of justices in the courts of appeals.[63] Similar questions about reconsideration on appeal can arise with a change in judgeship on the courts of appeals. The Texas Rules of Appellate Procedure provide two methods for reconsideration or "rehearing" in the courts of appeals: a motion for panel rehearing and a motion for en banc reconsideration.[64] This Part addresses those options in the court of appeals when there is a change in judgeship. This Part also addresses the timeliness for such motions, but begins with a few notes about the terminology used by this article and the Texas Rules of Appellate Procedure (or TRAPs).

A. Terminology

The Texas Rules of Appellate Procedure refer to "motions for rehearing," "motions for en banc reconsideration," and motions for "rehearing en banc."[65] The TRAP Rules use "en banc rehearing" and "en banc reconsideration" interchangeably,[66] and both of these terms refer to the same type of motion: a motion for rehearing addressed to the en banc court. Unless context indicates a narrower meaning, a "motion for rehearing" includes both a motion for panel rehearing and a motion for en banc rehearing.[67] Some TRAP rules refer to a "motion for rehearing or en banc reconsideration," indicating that "motion for rehearing" refers to a motion for panel rehearing.[68] For clarity, this article refers to panel motions as "motions for panel rehearing" and en banc motions as "motions for en banc rehearing." Both motions for panel rehearing and motions for en banc rehearing are "motions for rehearing"; the primary difference is that motions for en banc rehearing are addressed to the en banc court and ask the en banc court to reconsider the panel's opinion and judgment.

B. Reconsideration of Orders that Do Not Dispose of the Appeal

Most of this Part addresses traditional motions for panel and en banc rehearing that are filed after a court of appeals has issued

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63. *See supra* n.1.

64. *See* TEX. R. APP. P. 49.1, 49.8.

65. *See id.*

66. City of San Antonio v. Hartman, 201 S.W.3d 667, 670 (Tex. 2006) ("[T]he appellate rules use 'rehearing' and 'reconsideration' interchangeably.").

67. *See* TEX. R. APP. P. 49, cmt. to 2008 change ("Rule 49 is revised to treat a motion for en banc reconsideration as a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration.").

68. *Id.* R. 49.6, 49.7, 49.8, 49.11.

an order or judgment disposing of an appeal with a written opinion. The TRAP Rules regarding motions for panel and en banc rehearing contemplate that a motion for rehearing will be filed after the court of appeals issues its opinion and disposes of the appeal.[69] However, Texas appellate courts have traditionally entertained motions to reconsider other orders that do not dispose of the appeal. It is unclear whether such motions to reconsider are governed by the TRAP Rules that specifically govern "motions for rehearing." Although a court of appeals can reconsider and vacate orders while it retains plenary power over an appeal, it is not clear what rules and timelines—if any—govern motions to reconsider orders that do not dispose of the appeal. The rest of this Part addresses motions for panel and en banc rehearing of a judgment or order that disposes of an appeal with a written opinion.

C. Timeliness

TRAP Rule 49 provides deadlines for both a motion for panel rehearing and a motion for en banc rehearing.[70] A motion for panel rehearing "may be filed within 15 days after the court of appeals' judgment or order is rendered."[71] Similarly, a motion for en banc rehearing "must be filed within 15 days after the court of appeals' judgment or order, or when permitted, within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc reconsideration."[72] After a "motion for rehearing" is ruled on, "a further motion for rehearing may be filed within 15 days of the court's [ruling] if the court" changes its opinion or judgment.[73] "A motion for rehearing or en banc reconsideration may be amended as a matter of right any time before the 15-day period allowed for filing the motion expires, and with leave of the court, any time before the court of appeals decides the motion."[74]

Rule 49.8 provides that a party may file a motion for an extension of time to file a motion for panel and/or en banc

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69. This appears to be the intent of Rule 49 when all provisions are construed as a whole. Also, structurally, the rules are numbered in a sequence in which appeals generally proceed chronologically. *See generally id.* R. 20 (starting with initial filing fees and indigence) to R. 51 (ending with enforcement of judgment after mandate issues).

70. *Id.* R. 49.1, 49.7, 49,8.

71. *Id.* R. 49.1.

72. *Id.* R. 49.7.

73. *Id.* R. 49.5. Nothing in Rule 49 indicates that 49.5 uses "motion to rehearing" to refer only to motions for panel rehearing. Rather, a comment to the rule states, "Rule 49 is revised to treat a motion for en banc reconsideration as a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration." *Id.* R. 49.5, cmt. to 2008 change.

74. *Id.* R. 49.6.

rehearing "no later than 15 days after the last date for filing the motion."[75] The motion must comply with the requirements for all motions for an extension of time, which are set out in Rule 10.5(b).[76] Thus, reading Rule 49.8 together with the other provisions of Rule 49, a party may file a motion for an extension of time to file a motion for panel or en banc rehearing up to 30 days after the court of appeals' judgment or order is rendered. Unlike other rules regarding motions for an extension, the motion for panel or en banc rehearing need not necessarily be filed with the motion for an extension.[77]

D. Motions for Panel Rehearing

When it comes to a change in judgeship on the court of appeals, different rules might apply to motions for panel rehearing than the rules that apply to motions for en banc rehearing. Most significantly, Rule 49.3 appears to limit a newly elected judge's authority to vote to grant a motion for panel rehearing. Rule 49.3 provides, "A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied."[78] For cases decided by a panel with a former judge, the newly elected judge will not have "participated in the decision of the case."

One implication Rule 49.3 is that a change in judgeship can actually hurt one's chances of obtaining relief via a motion for panel rehearing. A newly elected judge's vote cannot count toward a majority required to grant the motion for panel rehearing, and the outgoing justice is unable to reconsider the case. Instead, in order for a motion for panel rehearing to be granted when there is a change in judgeship, the two remaining justices who participated in the decision of the case must both vote to grant the motion for rehearing. Otherwise, the motion for panel rehearing must be denied.[79] If there is only one new justice on the panel, a change in judgeship can reduce the chances of relief being granted on the motion for rehearing if the former justice was more likely to have voted to grant the motion for rehearing. And, it seems to be a logical consequence of Rule 49.3 that if more than one justice on the panel is now a former justice, the motion for panel rehearing likely cannot be granted under Rule 49.

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75. *Id.* R. 49.8.

76. *Id.* R. 10.5.

77. *Compare id.* R. 49.8, *with id.* R. 10.5(b)(2) (allowing a motion for an extension of time to file a notice of appeal), *and* R. 26.3 (authoring the appellate court to extend time to file a notice of appeal if the party has also filed the notice of appeal).

78. *Id.* R. 49.3

79. *See id.* R. 49.3 (requiring majority to grant, "Otherwise, it must be denied.")

One plausible workaround of Rule 49.3's limit on motions for panel rehearing is when a motion for panel rehearing convinces the panel, with the newly elected justice or justices, to grant rehearing on its own motion. By its plain terms, Rule 49.3 only limits when a "motion" for rehearing may be granted and when the motion must be denied. However, under Rule 19.2, "the court of appeals retains plenary power to vacate or modify its judgment" while the court of appeals has plenary power.[80] If the court of appeals vacates its judgment, the appeal remains pending in the court of appeals and the panel must proceed to issue a new judgment, which may or may not be the same as the prior judgment. However, a panel of newly elected justices might be unlikely to review the prior panel's decisions without an issue being brought to the panel's attention.

That said, if a panel cannot, as a matter of law, grant a motion for panel rehearing, the filing may be considered frivolous. Rule 3.01 of the Texas Disciplinary Rules of Professional Conduct (TDRPC) prohibits a lawyer from "bring[ing] or defend[ing] a proceeding, or assert[ing] or controvert[ing] an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."[81] A filing "is frivolous if the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law."[82] A party filing a motion for rehearing addressed to a panel with more than one justice who did not participate in the decision of the case might be unable to believe in good faith that the request could be granted due to Rule 49.3. But Texas Rule of Appellate Procedure 2 allows for most rules to be suspended for good cause. If there is a good faith belief that good cause exists under TRAP Rule 2 for suspending TRAP Rule 49.3, then depending upon the facts of the case, the ethical obligation in TDRPC Rule 3.01 might be satisfied.

There are a couple caveats about TRAP Rule 2. First, court of appeals rarely use Rule 2 because the TRAP Rules generally provide the standard procedure for appeals. Second, the use of Rule 2 might be even less viable in criminal appeals. Generally, in civil appeals, "good cause" has been construed broadly.[83] But for criminal appeals, the Court of Criminal Appeals has noted that "to

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80. *Id.* R. 19.2.

81. TEX. DISC. R. PROF. CONDUCT 3.01.

82. *Id.* cmt. 2.

83. *See* Kunstoplast of Am., Inc. v. Formosa Plastics Corp., USA, 937 S.W.2d 455, 456 (Tex. 1996) (holding TRAP Rules should be liberally construed so that the right of appeal is not lost); Mills v. Haggard, 17 S.W.3d 462, 463 (Tex. App.—Waco 2000, no pet.) (applying good cause standard under TRAP Rule 2).

expedite a case or other good cause" does not justify "lengthen[ing] procedural time limits . . . even in an effort to protect the substantive rights of litigants."[84] As a result, in criminal appeals, Rule 2 generally might be unavailable to alter procedures that would lengthen the duration of the appeal "absent truly extraordinary circumstances."[85]

E. Motions for En Banc Rehearing

Although Rule 49.3 applies to "motions to rehearing," and a "motion for rehearing" generally includes a motion for en banc rehearing, Rule 49.3 likely does not apply to all motions for en banc rehearing. Rule 49.3 limits when a motion for rehearing may be granted by justices who participated in the decision of the case. Unlike Rule 49.3, Rule 49.7, which governs en banc motions, provides: "While the court has plenary power, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision."[86] Motions for en banc rehearing are typically addressed to and often decided by justices who did not participate in the decision of the case (i.e. the justices who were not on the panel). It therefore seems Rule 49.3 applies only to motions for rehearing addressed to the panel that participated in the decision of the case or to the en banc court when the en banc court decided the case initially.

If a newly elected justice substitutes in for a justice who did participate in the decision of the case, Rule 49.3 does not appear to preclude the new justice's vote from being considered part of the majority of the court for an en banc motion because 49.7 is more specific to en banc motions and does not contain Rule 49.3's restriction. Reading Rule 49.3 otherwise would seem to effectively prohibit en banc reconsideration of a panel decision because the other justices did not participate in the decision of the case. Consequently, even if a newly elected justice's vote might not count towards a majority in considering a motion for panel rehearing, a newly elected justice's vote might count toward the majority for a motion for en banc rehearing.

Unlike a motion for panel rehearing, which is typically more appropriate for identifying clear errors by a panel, motions for en banc rehearing are generally regarded as requiring something more than a mere error. For example, Rule 41.2, which might appear to govern en banc consideration of a case in the first instance (as opposed to the case being first decided by a panel),

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84. Oldham v. State, 977 S.W.2d 354, 359–60 (Tex. Crim. App. 1998).
85. *Id.* at 360.
86. TEX. R. APP. P. 49.7.

provides that "en banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration."[87] As a form of consideration of a case, en banc reconsideration is regarded by some as being subject to Rule 41.2's requirements.[88] As a practical matter, it might not be clear to the en banc court until after a panel decides a case that the panel's decision is not in uniformity with prior decisions of the court or that the case presents circumstances sufficiently extraordinary to justify the resources of the en banc court.

When a court of appeals is determining whether to reconsider a case en banc, the court might determine whether the panel's decision conflicts with a prior decision of the court or whether other extraordinary circumstances justify en banc rehearing. And court of appeals justices might have widely differing views of what constitutes extraordinary circumstances or a sufficient lack of uniformity. In light of Rule 41.2's express statement that en banc consideration is "disfavored,"[89] the "uniformity" and "extraordinary circumstances" bases for en banc rehearing might be narrowly construed. Such a narrow construction might include, for uniformity, a panel's holding that conflicts directly the court's holding in a prior case, and for extraordinary circumstances, the inability of the panel to obtain a majority on the reasoning for its decision[90] or a panel error that will either likely impact the case substantially in its subsequent phases or result in a significant loss to the non-prevailing party.

F. Conclusion

In the vast majority of cases in which any motion for rehearing is filed, the motion is ultimately denied. When there is a change in judgeship on the court of appeals, in some cases this may further reduce the likelihood of success for a motion for panel or en banc rehearing. Newly elected justices' votes toward a motion for panel rehearing might not count toward a majority needed to grant the motion for panel rehearing, although the panel might be

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87. *Id.* R. 41.2(c).

88. *See, e.g.*, Guimaraes v. Brann, No. 01-16-00093-CV, 2018 WL 6696769, at *22 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet. h.) (Keyes, J., dissenting to denial of en banc reconsideration) ("I conclude that the case fully satisfies the requirements for en banc reconsideration set out in Texas Rule of Appellate Procedure 41.2(c).").

89. TEX. R. APP. P. 41.2(c).

90. If a panel cannot agree on the judgment, then the case may go en banc if there are more than three justices on the court. *See id.* R. 41.1(b). If a majority of the en banc court cannot agree on a judgment, the chief justice must request appointment of a visiting justice. *See id.* R. 41.2(b).

able to grant rehearing on its own motion. And for a motion for en banc rehearing, newly elected justices might either be disinclined to start reviewing decisions of their predecessors, or they might take a narrow view of what is sufficient to justify the resources of the en banc court to review a previously decided case.

That said, there has been some success in filing a motion for en banc reconsideration with an appellate court that has newly elected judges. In *State v. Rosenbaum*, the Court of Criminal Appeals decided a case by a vote of five to four.[91] The following month, two judges left the court and were replaced by two newly elected judges.[92] The newly constituted court granted a motion for rehearing, adopted the dissenting opinion, and flipped the prior judgment of the court.[93] *Rosenbaum* shows that newly elected judges may flip a prior decision of the court by granting a motion for rehearing.[94]

Even if an appellate court with newly elected justice is unlikely to grant a motion for panel or en banc rehearing, further appellate options include filing a petition for review in the Supreme Court of Texas in civil appeals, or a petition for discretionary review in the Court of Criminal Appeals in criminal appeals. A motion for panel or en banc rehearing in the court of appeals "is not a prerequisite to filing a petition for review in the Supreme Court or a petition for discretionary review in the Court of Criminal Appeals."[95] Such motions are also not required to preserve error for further review.[96]

III. SPECIAL APPLICATIONS & MISCELLANEOUS ISSUES

Although a change in judgeship generally does not change the appellate remedies that are usually available, it can affect how those appellate remedies are pursued. This Part addresses how a change in judgeship can change or alter the typical course of procedures in appellate courts.

91. 910 S.W.2d 934, 949 (Tex. Crim. App. 1994) (op. on reh'g) (Baird, J., dissenting).
92. *Id.*
93. *Id.*
94. *See id.*
95. TEX. R. APP. P. 49.9.
96. *Id.*

A. Newly elected trial judges usually must reconsider a prior judge's ruling before an appellate court will issue an extraordinary writ, such as mandamus.

In Part I, which addresses reconsideration in the trial court, this article notes that if error has been preserved with the former judge, the issue need not be preserved again with the new judge for error to be preserved on appeal. This is true for the ordinary appellate process because the law generally treats the trial court as an office and does not distinguish between officeholders. Writs are different.

1. Automatic Substitution of Judges under Rule 7.2. Elected judges are public officers. Under Rule 7.2(a), "When a public officer is a party in an official capacity to an appeal or original proceeding, and if that person ceases to hold office before the appeal or original proceeding is finally disposed of, the public officer's successor is automatically substituted as a party if appropriate."[97] Extraordinary writs, such as writs of mandamus, prohibition, and habeas corpus, are directed to the individual holding the office. Extraordinary writ proceedings in the appellate courts are "original" proceedings, which means that while they directly relate to the proceedings in the trial court, the proceeding and the parties are different.[98] The parties in an original proceeding are the relator—the party seeking relief—and the respondent—the public official against whom relief is sought, as well as the real party in interest.[99] Because an extraordinary writ is addressed to the individual officeholder to correct that officeholder's failure to carry out their duties, extraordinary relief usually cannot be granted against an officeholder who did not abuse their discretion. The Supreme Court of Texas explained in In re Blevins, "Although a particular respondent is not critical in a mandamus proceeding, the writ must be directed to someone. And generally a writ will not issue against one judge for what another did."[100]

If a petition for an extraordinary writ has been filed in the court of appeals, and the individual holding the office of the trial court changes, the new judge is automatically substituted for the prior judge, and the court of appeals abates the original proceeding under Rule 7.2(b) for the newly elected trial judge to reconsider the ruling, order, or judgment. Rule 7.2(b) provides, "If the case is an original proceeding . . . , the court must abate the proceeding to

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97. TEX. R. APP. P. 7.2(a).

98. *See id.* R. § 3 ("Original Proceedings in the Supreme Court and the Courts of Appeals").

99. *Id.* Rs. 3.1(f), (h)(2).

100. 480 S.W.3d 542, 543 (Tex. 2013) (per curiam) (orig. proceeding) (citation omitted).

allow the successor to reconsider the original party's decision. In all other cases, the suit will not abate, and the successor will be bound by the appellate court's judgment or order as if the successor were the original party."[101] If the newly elected trial judge vacates or changes the ruling, order, or judgment, then the court of appeals will typically dismiss the original proceeding as moot.[102] If the newly elected trial judge does not vacate or change the ruling, order, or judgment, then the original proceeding in the court of appeals does not become moot and will be reinstated.[103] The proceeding will remain in the court of appeals until the court disposes of the petition.

If the original proceeding continues in the court of appeals after the new trial judge takes office, then the new judge "is automatically substituted as a party if appropriate" under TRAP Rule 7.2.[104] Although the substitution should occur automatically, the relator may request that the new judge be substituted in the former judge's stead. But even if the proceedings following substitution are not in the name of the substituted party, "any misnomer that does not affect the substantial rights of the parties may be disregarded. Substitution may be ordered at any time, but failure to order substitution of the successor does not affect the substitution."[105] This discussion assumes, however, that the petition for an extraordinary writ is filed in the appellate court before the prior judge leaves office.

2. Petition Not Filed Before Prior Judge Leaves Office. The proper procedure is not immediately apparent for when a trial judge issues an order for which there is no adequate remedy by appeal and an adversely affected party does not file a petition for an extraordinary writ before that judge leaves office. Suppose, for example, Judge Pryor abuses her discretion and signs a non-appealable order on December 31st, and Judge Nu succeeds Judge Pryor and takes office on January 1st. A party contemplating filing a petition for writ of mandamus likely cannot, in good faith, request that court of appeals issue a writ of mandamus directing Judge Pryor to vacate the order because Judge Pryor is no longer able to exercise authority as a judge of the court. Conversely, the

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101. TEX. R. APP. P. 7.2(b).

102. Ex parte Pion, No. 04-15-00274-CV, 2015 WL 4638097, at *1 (Tex. App.—San Antonio July 15, 2015, no pet.) (per curiam) (mem. op.); In re Parra, No. 04-13-00123-CV, 2013 WL 1760676, at *1 (Tex. App.—San Antonio Apr. 24, 2013, no pet.) (mem. op.); In re Trevino, No. 04-12-00862-CV, 2013 WL 1342461, at *1 (Tex. App.—San Antonio Apr. 3, 2013, no pet.) (mem. op.).

103. In re Xeller, 6 S.W.3d 618, 623 (Tex. App.—Houston [14th Dist.] 1999, no pet.)

104. TEX. R. APP. P. 7.2(a).

105. *Id.*

Supreme Court of Texas has stated unequivocally that "[m]andamus will not issue against a new judge for what a former one did."[106] And, Rule 7.2's automatic substitution rule appears to apply only "[w]hen a public officer is a party in an official capacity to an appeal or original proceeding, and . . . that person ceases to hold office before the appeal or original proceeding is finally disposed of."[107] Because most extraordinary writs are generally governed by equitable principles, this situation likely does not leave an adversely affected party without any remedy at all. The answer might ultimately differ depending on whether the case is civil or criminal. In civil cases, extraordinary writs are extraordinarily flexible; but significantly less so in criminal cases.[108]

In a civil case, *In re Newby*, the court of appeals addressed a similar situation when a trial judge had been indefinitely suspended.[109] The court addressed the issue in the failure-to-rule context as follows:

> Here relator asks us to order Judge McCoy to rule on pending motions. But this is not possible since, under current circumstances, Judge Forbis and not Judge McCoy will preside over relator's case in the 100th District Court. The interests of the parties and judicial economy in the trial court and this court are not served if we merely await a final determination of Judge McCoy's suspension. Under the unique facts at bar we find the purpose of Rule 7 is best served by substituting Judge Forbis as respondent and abating the case so that relator may present his complaints to Judge Forbis. By ordering abatement of this proceeding, we express no opinion concerning the form or merit of relator's petition.[110]

Thus, *In re Newby* shows that when a party might lack a remedy under traditional mandamus principles, a court in a civil case might relax the rules to serve the interests of the parties and judicial economy.[111] However, in *In re Newby*, the court took judicial notice that a new judge had been appointed and taken office, and then substituted the new judge for the prior judge, and then abated for the new judge to consider the pending issues.[112]

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106. In re Baylor Med. Ctr. at Garland, 280 S.W.3d 227, 228 (Tex. 2008).

107. TEX. R. APP. P. 7.2(a).

108. In re Reece, 341 S.W.3d 360, 374 (Tex. 2011) (citing In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding)).

109. 280 S.W.3d 298, 300 (Tex. App.—Amarillo 2007, no pet.) (per curiam).

110. *Id.* at 300–01.

111. *Id.*

112. *Id.* at 301–02 (order on abatement) (per curiam).

3. Mandamus vs. Permissive Reconsideration. In theory, an abatement of an original proceeding in the court of appeals appears to provide a possible opportunity to bypass a newly elected trial judge's discretion not to reconsider a prior judge's ruling. In a prior section, this article addresses permissive reconsideration of a prior judge's ruling, order, or judgment, explaining that a new judge may exercise their discretion to refuse to reconsider a former judge's rulings, orders, or judgments. But TRAP Rule 7.2 appears to require a new judge to reconsider a prior judge's ruling, order, or judgment.[113] And even if Rule 7.2 did not apply, and a party were to file a petition for writ of mandamus challenging the former judge's ruling, a court of appeals may nevertheless exercise its discretion to abate for the new judge to reconsider the merits of the prior judge's ruling, order, or judgment.[114]

When an appellate court abates an original proceeding for a new judge to reconsider, the appellate court may simply order a party to pursue reconsideration from new judge by a certain date. Alternatively, the appellate court might actually direct the trial judge to reconsider the challenged ruling, order, or judgment. For example, in *In re Blevins*, the Supreme Court of Texas, apparently without a request from either party, ordered the following:

> We direct the trial judge assigned to the case to take whatever actions and hold whatever hearings it determines are necessary for it to reconsider the [challenged] order and those matters underlying it. We do not intend to limit the trial court to considering only the evidence on which the [challenged] order was based. The trial court is directed to proceed in accordance with this opinion and, subject to any requests for extension of time by that court, cause its order on reconsideration of the [challenged] order to be filed with the clerk of this Court . . . .[115]

And in *In re Baylor Medical Center at Garland*, the Supreme Court of Texas abated the original proceeding for the newly elected trial judge to reconsider the merits of a motion for new trial that the prior judge had granted.[116] The supreme court noted in *Baylor Medical Center* that if the trial court had lost plenary power, mandamus could not issue to direct the trial judge take an action that the judge lacked the authority to take.[117] However, as with permissive reconsideration, the supreme court concluded a trial judge should be able to reconsider any order so long as the trial

113. TEX. R. APP. P. 7.2(b).

114. In re Blevins, 480 S.W.3d 542, 544 (Tex. 2013) (orig. proceeding) (stating court of appeals has discretion to either deny outright or abate for reconsideration).

115. *Id.*

116. 280 S.W.3d 227, 228 (Tex. 2008) (orig. proceeding).

117. *Id.*

court has plenary power.[118]

Filing a petition for writ of mandamus in an appellate court when a new trial judge takes office might therefore be an alternative to seeking permissive reconsideration with the new judge. Such an attempt to bypass the trial judge's discretion to refuse to reconsider a former judge's ruling could raise an ethical issue in cases in which mandamus would clearly be inappropriate. As noted above, Disciplinary Rule 3.01 prohibits a lawyer from bringing a proceeding for which "the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law."[119] Here again, the assessment of frivolity will depend on whether the case is a civil case or a criminal case because the Supreme Court of Texas has all but eliminated the "no adequate remedy by appeal" requirement, whereas the Court of Criminal Appeals has not. For criminal appeals, there might be fewer rulings for which bringing a mandamus proceeding would be appropriate. But for civil cases, there are few rulings for which bringing a mandamus proceeding in an appellate court would be inappropriate. Unless there is a clear right of appeal for the objectionable ruling, order, or judgment, mandamus in a civil case might arguably be available. That said, an appellate court has the discretion, instead of abating for reconsideration by the new trial judge, to simply deny the petition for writ of mandamus.

Alternatively, a party could seek permissive reconsideration by the new trial judge before filing a petition for writ of mandamus. The procedure in such a case seems unclear, and this approach might have adverse consequences for a subsequent mandamus proceeding. As an illustration, suppose Judge Pryor abuses her discretion and signs a non-appealable order, and then leaves office on December 31st. In January, a party files a motion for reconsideration, Judge Nu hears the motion, and then Judge Nu denies the motion for reconsideration, refusing to reconsider at all. In a petition for writ of mandamus, there would be two possible trial court orders to challenge: (1) Judge Pryor's original order; and (2) Judge Nu's order denying the motion for reconsideration of Judge Pryor's order. Generally, a trial judge has no mandatory duty to reconsider a prior order of the court, and it might be difficult to view an order denying a motion to reconsider a prior order as an abuse of discretion. That does not preclude challenging the prior order as an abuse of discretion in an original proceeding in an appellate court. However, if the former judge has left office

118. *Id.*

119. TEX. DISC. R. PROF. CONDUCT 3.01, cmt. 2.

and cannot be directed to change the ruling, order, or judgment, the new judge has already declined to reconsider, and a petition for writ of mandamus has been filed in the appellate court, then the appellate court might simply deny the petition as opposed to abating for the trial judge to address the issue once again.

B. When the newly elected judge takes office, mandamus will not issue for a failure to rule without presenting the matter to the new judge.

In Part I, which concerns reconsideration in the trial court, this article notes that matters generally need not be presented again to a new judge for preservation of error purposes. But, as Part IV.A demonstrates, extraordinary writs and the original proceedings by which they are obtained are different because they are directed to the officeholder, not to the office. Consequently, when a prior judge has refused to rule on a motion, and a new judge takes office, the new officeholder has not necessarily abused their discretion and mandamus generally will be inappropriate until it is clear that the new judge has refused to rule on the motion within a reasonable time.

If the former judge refused to rule, and a new judge takes office, mandamus will not issue to require the new judge to rule until the relator presents the issue to the newly elected judge. This principle is demonstrated by *In re Cooper*.[120] In *Cooper*, a former judge held a hearing on an application for temporary injunction on November 7th.[121] The trial judge had not granted or denied the application by December 31st, when the judge left office.[122] The party applying for a temporary injunction filed petition for writ of mandamus in the court of appeals, seeking a writ to direct the newly elected trial judge to rule on the motion.[123] The court of appeals denied the petition for writ of mandamus because the mandamus record did not show the application for temporary injunction had been presented to the newly elected judge.[124] *Cooper* demonstrates that if a former judge abuses their discretion or fails to execute their ministerial duties to rule on a properly presented motion, and if a new judge takes office, extraordinary relief in the court of appeals will generally be unavailable until the issue is presented to the new trial judge, and the new trial judge also abuses their discretion by failing to execute their ministerial

120. No. 05-07-00015-CV, 2007 WL 80590 at *1 (Tex. App.—Dallas Jan. 11, 2007, no pet. (mem. op.).

121. *Id.* at *1.

122. *Id.*

123. *Id.*

124. *Id.*

duties to rule on a properly presented motion.[125]

If a new judge hears and rules on motion that the former judge refused to rule on, then the new judge's ruling will moot out any issue about the refusal to rule. This principle is demonstrated by *In re Hatley*.[126] In *Hatley*, the former judge refused to rule on a motion for post-conviction DNA testing.[127] The new judge ruled on the motion.[128] The court of appeals did not grant relief because it concluded that the new judge's ruling on the motion mooted the complaint about the lack of a ruling.[129] Notably, the court in *Hatley* stated it was reinstating the mandamus proceeding, and the case history shows that the court of appeals had abated the proceeding.[130] Although it is unclear from the short opinion in *Hatley* why the court had to reinstate the mandamus proceeding, it is possible (if not likely) that the court of appeals abated the mandamus proceeding to give the new trial judge the opportunity to decide whether to rule on the motion. Even if *Hatley* does not itself support that a mandamus proceeding should be abated for the new trial judge to decide whether to rule, such a procedure might be an extension of *Blevins* and *Baylor Medical Center*.

If a former judge has refused to rule on a properly presented motion, a newly elected judge takes office, and a petition for writ of mandamus has not been filed in the court of appeals, then *Cooper* suggests the proper procedure is to present the request for relief to the new trial judge before seeking mandamus relief. If a former judge has refused to rule on a properly presented motion, a petition for writ of mandamus has been filed in the court of appeals, and a newly elected judge takes office, it appears the court of appeals may (consistent with *Blevins* and *Baylor Medical Center*) either follow *Cooper* and deny relief or follow *Hatley* and abate the mandamus proceeding for the new judge to have an opportunity to rule on the motion.

C. When a former judge was the factfinder at a bench trial in a civil case, and a newly elected judge takes office, the new judge cannot make findings of fact and conclusions of law.

In Part I.A, this article explains that generally, the law treats the trial court as an office and does not distinguish between officeholders, and the newly elected judge may exercise the

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125. *Id.*

126. No. 05-07-00460-CV, 2007 WL 2421549, at *1 (Tex. App.—Dallas Aug. 28, 2007, no pet.) (mem. op.).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

authority of the court to the same extent the former judge could have if the former judge were still in office. Part IV.A notes that original proceedings are one exception to this general rule. Findings of fact and conclusions of law after a civil bench trial present another exception.

The newly elected judge cannot make findings of fact and conclusions of law if the new judge did not preside at trial, but the former judge might retain the authority to do so even after the judge has left office. This principle was articulated recently by the Supreme Court of Texas in *Ad Villarai, LLC v. Chan Il Pak*.[131] In *Ad Villarai*, the former trial judge lost the primary election to the new judge, and then presided over a bench trial in the case in October and rendered a final judgment on November 24th. The proper procedure for obtaining findings of fact and conclusions of law was followed before the judge left office.[132] The primary challenger won the general election and took office on January 1st.[133] The new judge reviewed the record and timely made findings of fact and conclusions of law.[134] The court of appeals reversed and remanded for a new trial, holding that neither judge had the authority to make findings of fact and conclusion of law.[135]

The Supreme Court agreed that the new judge lacked the authority to make the findings of fact and conclusions of law, but disagreed as to the former judge.[136] The Supreme Court first rejected the applicability of TRCP Rule 18 and Civil Practice & Remedies Code section 30.002(b) because they govern when a trial judge dies, resigns, or is disabled.[137] The Supreme Court held that under 30.002(a), however, that the former judge retained the authority to file findings of fact and conclusions of law in the case, even if the trial court's plenary power had expired.[138] The Supreme Court noted that under section 30.002(a), a former judge who has left office may file findings of fact and conclusions of law if the end of the former judge's term falls within the forty-day period to file findings of fact and conclusion of law under the applicable rules of civil procedure.[139] The Supreme Court reversed the court of appeals' judgment, and remanded the case to that court with instructions for that court to abate the appeal and to direct the new judge to request that the former judge make findings of fact

131. 519 S.W.3d 132, 136 (Tex. 2017).
132. *Ad Villarai*, 519 S.W.3d at 136.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 137–41.
137. *Id.* at 139–40.
138. *Id.* at 140.
139. *Id.* at 142.

and conclusions of law.[140]

Ad Villarai involved a bench trial, and it is unclear whether the same rules would apply to hearings on pretrial matters involving disputed factual matters. Initially, the procedure provided in the Texas Rules of Civil Procedure for filing of the findings of fact and conclusions of law is not mandatory except for a bench trial.[141] Furthermore, while there generally may be only one trial on the merits in a civil and criminal case, a trial court has the authority to reconsider previously decided pre-trial matters.[142] *Ad Villarai* also involved preserved complaints about the authority and propriety of a former judge and a new judge making findings of fact and conclusions of law. It is unclear whether an appellate court is bound by findings of fact and conclusions of law that were made by the wrong judge and a complaint for appeal is not preserved. For example, in *AmWest Savings Association v. Winchester*, the court of appeals noted that the newly elected judge made findings of fact and conclusion of law on the appellees' affirmative defenses three months after trial.[143] *AmWest Savings*'s case history shows the trial in the case occured on November 28th. The court of appeals proceeded to analyze the sufficiency of the evidence to support the trial court's findings on the appellees' affirmative defenses.[144]

Considering *Ad Villarai*, the Fort Worth court of appeals recently addressed whether a newly elected judge may set aside findings from a jury trial over which the former judge presided. In *Estate of Luce*, the court of appeals rejected a challenge to a newly elected judge setting aside jury findings from a trial over which the new judge did not preside.[145] The court distinguished *Ad*

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140. *Id.* at 142–43; *see* 4 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEX. CIVIL PRACTICE § 20:12 (2d. ed. 1998). ("[C]ommon sense suggests that reliable findings and conclusions can not be obtained from a judge who did not try the case, and some case authority suggests that in this situation reversal and remand is the appropriate remedy."). It appears that the remedy for when findings of fact and conclusions of law cannot be obtained is a reversal and remand for a new trial. Corpus Christi Hous. Auth. v. Esquivel, No. 13-10-00145-CV, 2011 WL 2395461, at *2 (Tex. App.—Corpus Christi June 9, 2011, no pet.) (mem. op.); Liberty Mut. Fire Ins. v. Laca, 243 S.W.3d 791, 796 (Tex. App.—El Paso 2007, no pet.) ("Because the judge who handled the case has been replaced as the result of an election, we must reverse and remand the case for a new trial."); Roberts v. Roberts, 999 S.W.2d 424, 442 (Tex. App.—El Paso 1999, no pet.); Fed. Deposit Ins. Corp. v. Morris, 782 S.W.2d 521, 524 (Tex. App.—Dallas 1989, no writ); Anzaldua v. Anzaldua, 742 S.W.2d 782, 783 (Tex. App.—Corpus Christi 1988, writ denied).

141. IKB Indus. Ltd. v. Pro–Line Corp., 938 S.W.2d 440, 442 (Tex. 1997).

142. *See* U.S. Const. amend. V; *cf.* Tex. R. Civ. P. 320, 326 (permitting new trials only for good cause and providing new trial limiting the number of new trials to two); *see also* Tex. R. Civ. P. 306a(1).

143. No. 05-95-00374-CV, 1998 WL 51849 at *2 (Tex. App.—Dallas Feb. 10, 1998, pet. denied) (mem. op.).

144. *Id.* at *2–6.

145. No. 02-17-00097-CV, 2018 WL 5993577, at *16–17 (Tex. App.—Fort Worth Nov.

Villarai because the case at bar did not involve findings of fact and conclusions of law or the new trial judge deciding disputed factual matters.[146] The court in *Luce* explained that because the new judge was making a legal determination about the sufficiency of the evidence to support the jury's findings, *Ad Villarai* did not control and the decision fell within the new judge's authority as the judge of the trial court.[147]

It appears that *Ad Villarai* has very limited application. The procedure the Supreme Court approved applies only if the procedure for obtaining findings and conclusions of law is properly followed and the former judge leaves before the end of the forty-day deadline to file findings of fact and conclusions of law. Furthermore, the limits on newly elected trial judge's authority to making findings of fact and conclusions of law are not necessarily the same when the prior judge dies, resigns, or becomes disabled.[148] Additionally, as demonstrated by *Estate of Luce*, *Ad Villarai* does not appear to limit a newly elected trial judge's authority in a civil case to make matter-of-law determinations while the trial court retains plenary power. And, of course, because *Ad Villarai* was a civil case governed by the rules of civil procedure and provisions of the Texas Civil Practice & Remedies Code, it might not be instructive necessarily for criminal cases.

D. In a civil case, if a trial judge presides over a trial and leaves office before rendering judgment, the judge may not thereafter render judgment and a new trial might be required.

What if a trial judge presides over a trial, but does not render a judgment before leaving office and being replaced by a successor? A court of appeals addressed this situation in *Martinez v. Martinez*.[149] In *Martinez*, a district court judge presided over a trial.[150] Before rendering a judgment in the case, the judge was replaced by a successor judge through an election.[151] The prior

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15, 2018, no pet. h.) (mem. op.), *judgm't vacated w.r.m.* No. 02-17-00097-CV, 2019 WL 1285110 (Tex. App.—Forth Worth March 21, 2019) (no pet. h.) (mem. op.).

146. *Id.*

147. *Id.* at 17. These holdings are consistent with other case law, under which a newly elected trial judge may preside over a retrial of a case when a court of appeals reverse and remands the case for a new trial. *See, e.g.*, In re Marriage of Slanker, No. 06-11-00029-CV, 2011 WL 5600568, at *1 (Tex. App.—Texarkana Nov. 18, 2011, no pet.) (mem. op.) *judgm't vacated w.r.m.* No. 06-13-00049-CV, 2013 WL 6050943 (Tex. App. —Texarkana Sept. 18, 2013, no pet.) (mem. op.).

148. *See* TEX. CIV. PRAC. & REM. CODE § 30.002; TEX. R. CIV. P. 18.

149. 759 S.W.2d 522 (Tex. App.—San Antonio 1988, no writ).

150. *Id.* at 523

151. *Id.*

judge, after leaving office, rendered a judgment.[152] The court of appeals explained that "a district judge who has been properly replaced by a successor has the authority to sign a written judgment after he has been replaced, provided he heard the cause and entered his judgment in the docket sheet of the cause before the expiration of his term."[153] However, in *Martinez*, nothing in the appellate record indicated that the judge had rendered judgment before leaving office.[154] The court of appeals reversed and set aside the judgment of the prior judge, and remanded for a new trial before the newly elected judge.[155]

E. In a habeas corpus proceeding, a newly elected judge may make findings of fact and credibility determinations from a cold record.

Shifting between the civil and criminal contexts can sometimes seem like shifting between alternate universes. As noted above, a newly elected judge generally lacks discretion in a civil case to make findings of fact and conclusions of law from a cold record, at which the former judge presided. The same is not true in all criminal cases, where a trial judge (as well as the appellate courts) can make credibility determinations without live testimony. This principle is illustrated by *Ex parte McBride*.[156] In *McBride*, Donna Ruth McBride was charged with and convicted of aggravated sexual assault of a child.[157] McBride filed an application for writ of habeas corpus, arguing that she was entitled to an out-of-time appeal because her counsel rendered ineffective assistance.[158] The trial judge made fact findings and a recommendation to the Court of Criminal Appeals, which is the ultimate finder of fact in certain habeas proceedings.[159] The Court of Criminal Appeals determined the trial judge's fact findings were insufficient, remanded the case for more findings, and remanded a second time for further findings.[160] After the second remand, a newly elected trial judge took office, and the new judge entered findings of fact and conclusions of law after reviewing the

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152. *Id.*

153. *Id.* (citing Crawford v. Crawford, 315 S.W.2d 190, 192 (Tex. Civ. App.—Waco, 1958, no writ); Tex. Life Ins. Co. v. Tex. Building Co., 307 S.W.2d 149, 154 (Tex. Civ. App.—Fort Worth, 1957, no writ)).

154. *Id.*

155. *Id.*

156. WR-63,072-01, 2008 WL 11383718, at *2 (Tex. Crim. App. June 18, 2008) (per curiam) (mem. op.).

157. *Id.* at *1.

158. *Id.*

159. *Id.* at *3.

160. *Id.* at *2.

transcripts from the writ hearing.[161] The new judge recommended that relief be granted, but the Court of Criminal Appeals concluded otherwise, reasoning that although it found the attorney's explanation credible, there was no evidence that McBridge informed her attorney or the trial judge that she desired to appeal.[162] *McBride* shows how the criminal context can differ from the civil context on whether a newly elected trial judge can make findings of fact and conclusions of law when the former judge presided over and was a factfinder at a hearing where fact issues were disputed.

F. In a criminal case, a newly elected judge cannot refuse to enforce a plea agreement approved by the former trial judge.

Generally, a plea agreement between the prosecution and the defense that is accepted by the trial court is a binding contract, and the trial court must enforce the agreement. This principle is demonstrated by *Wright v. State*.[163] In *Wright*, the defendant and the State reached a plea agreement, which was approved by the trial judge.[164] The trial judge later rejected the plea agreement.[165] A newly elected judge took office and also refused to enforce the plea agreement, and the case went to trial.[166] The defendant was convicted.[167] On appeal, the court of appeals reversed the conviction based on the jury's verdict, rejecting the State's argument that the new judge simply carried out the former judge's disapproval of the agreement, which the State characterized as a withdrawal of its plea bargain offer.[168] The court of appeals explained that once a plea agreement is reached by the parties and approved by a trial judge, the defendant is entitled to specific enforcement of the plea agreement.[169] The court of appeals therefore reversed the judgment of the new trial judge and remanded with instructions to reinstate the defendant's plea of no contest to the charged offense and to re-sentence the defendant in accordance with the terms of the original plea agreement.[170] *Wright* demonstrates that in a criminal case, a newly elected judge cannot refuse to enforce a plea agreement approved by the former judge, even when the former judge would have done the same.

161. *Id.*
162. *Id.* at *2–4.
163. 158 S.W.3d 590, 595 (Tex. App.—San Antonio 2005, pet. ref'd).
164. *Id.* at 592.
165. *Id.*
166. *Id.* at 592–93.
167. *Id.* at 593.
168. *Id.* at 594–95.
169. *Id.*
170. *Id.* at 595.

G. A change in judgeship can affect the analysis of a defendant's speedy trial claim.

A change in judgeship can result in a change in pace of the docket, which can affect the analysis of a speedy trial claim in a criminal case. This principle is demonstrated somewhat by *Ennis v. State*.[171] In *Ennis*, the defendant complained on appeal that the numerous delays of his trial date violated his right to a speedy trial.[172] Speedy trial claims are governed by balancing four factors under *Barker v. Wingo*, one of which is the reason for the delay.[173] Deliberate delay by the State weighs heavily in favor in the defendant's speedy trial claim, negligence weighs against the State moderately, but a reasonably explained delay does not weight against the State.[174] In *Ennis*, the Dallas court of appeals rejected the defendant's speedy trial claim, noting that the reason for the delay was docket overcrowding, which could be a result of State's conduct.[175] However, the court of appeals noted the newly elected judge had significantly reduced the overcrowding of the docket, so this factor did not weigh heavily against the State.[176] Thus, *Ennis* demonstrates a change in judgeship can affect the analysis or weighing of the *Barker* factors when assessing a speedy trial claim.

H. A Note on Newly Elected Prosecutors

The cases involving newly elected officials in the judiciary include many cases related to newly elected prosecutors, who are part of the judicial branch in Texas. Many of the cases involved conflicts of interests from the newly elected prosecutor's prior law practice; thus, the number of these cases suggests that one of the most significant legal concerns for newly elected prosecutors will be conflicts issues.[177] However, the newly elected prosecutor retains prosecutorial discretion to decline to prosecute existing cases, including those on appeal. This principle is demonstrated by *State v. Rickhoff*.[178] *Rickhoff* stemmed from a civil quo warranto proceeding challenging the authority of district court judge.[179] The quo warranto proceeding was initiated by the District Attorney,

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171. No. 05-97-01638-CR, 2000 WL 420709, at *3 (Tex. App.—Dallas Apr. 19, 2000, no pet.) (mem. op.).

172. *Id.* at *2–5.

173. *Id.* at *2.

174. *Id.* at *3.

175. *Id.*

176. *Id.*

177. *See, e.g.*, Landers v. State, 256 S.W.3d 295, 303–04 (Tex. Crim. App. 2008).

178. 648 S.W.2d 409, 410 (Tex. App.—San Antonio 1983, no writ).

179. *Id.* at 409.

who appealed after not prevailing in the trial court.[180] While the case was on appeal, the newly elected District Attorney filed a motion to voluntarily dismiss the appeal over the former District Attorney's objection.[181] The court of appeals held the new District Attorney held the office, which had the authority to discontinue to the prosecution of the appeal, even over the former District Attorney's objection.[182] The court of appeals granted the new District Attorney's motion and dismissed the appeal.[183]

IV. CONCLUSION

With the significant number of new trial and appellate court judges who recently took office, a significant percentage of Texas's judges is relatively new, especially in courts in the Dallas, Houston, San Antonio, and Austin areas. Although the significant number of judges itself does not increase or decrease the appellate options available, a change in judgeship may affect whether and how the existing appellate options are pursued in civil and criminal cases. As with all conduct in court, attorneys should consider their ethical obligations in pursuing their appellate options with Texas's transitioning judiciary.

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180. *Id.*
181. *Id.* at 410.
182. *Id.*
183. *Id.*