# It Ain't Over 'Til It's Over: The Appellate Mandate in Texas Courts

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On November 13, 1956, the United States Supreme Court affirmed a federal district court judgment declaring unconstitutional the laws that required racially segregated seating on the city buses of Montgomery, Alabama.[1] Black citizens of Montgomery had boycotted the buses for over a year, but upon hearing of the Supreme Court's decision they could not end their boycott: the city could delay the effect of the Court's ruling by filing a petition for rehearing, and that's what the city did. Over a month later the Court denied that petition,[2] but not until a few days later did the Court's order finally arrive in the district court where the lawsuit had started, restoring that court's power to enforce its injunction against segregation.[3] The next morning, Martin Luther King and a white associate climbed on the first city bus of the day and sat down beside each other for a ride downtown.[4]

This footnote in the history of the Civil Rights movement illustrates the frustrating, end-game delays that the law of the appellate mandate incorporates into the appellate process. In short, the appellate contest doesn't end until the court of appeals issues a formal mandate, a document that constitutes that court's official command to the lower court to enforce the appellate decision. The mandate—an order or "remittitur" in some jurisdictions—generally issues a considerable time after the appellate court's opinion and judgment and thus is often all but ignored by litigators. To some extent the neglect is understandable: the opinion holds the intellectual substance of the appellate court's action, with a new rule of law or an intriguing twist on the applicability of an old rule, and the mandate often tracks verbatim the language of the appellate judgment and thus says nothing new. Indeed, for years the appellate rules considered the mandate so lacking in significance to the parties that the rules did not require the appellate court to give parties notice that the mandate had issued.[5]

This article attempts to explain how lack of attention to this important document can harm a client's interest. By understanding how the mandate functions in Texas state courts, attorneys can better prepare themselves and their clients for the long-awaited and sometimes unpredictable aftermath of the appellate court's decision.

### A. What exactly is the mandate?

The mandate is a document issued by the appellate court and delivered to the trial court, serving both as an official notice of the appellate court's action and as a command to duly execute the appellate court's judgment.[6] The rules require the appellate court clerk to issue a mandate "in accordance with the judgment" and send it to the clerk of the court to whom it is directed.[7] No standardized form is prescribed. The clerk typically drafts the mandate document on a single sheet of paper that recites verbatim (or virtually verbatim) the directions in the appellate court's judgment about affirmance, reversal, or modification of the trial court's judgment and any

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1 *Owen v. Browder*, 352 U.S. 903, *aff'g Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956).

2 *Owen v. Browder*, 352 U.S. 955 (1956).

3 While the Supreme Court will issue a mandate when it decides a case arising out of a state court, it issues an order when the case comes to it from a federal court. *See* SUP. CT. R. 45.3.

4 David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* (New York: Vintage Books, 1988), pp. 80-82.

5 In civil cases, as of January 1, 2003, rules 12.6 and 18.1 require the court of appeals clerk to give the parties notice that the mandate has issued. *See* Final Approval of Amendments to the Texas Rules of Appellate Procedure, Misc. No. 02-9237 (Tex. Dec. 23, 2002). Similar approval by the Court of Criminal Appeals is anticipated.

6 *See, e.g., Lewelling v. Bosworth*, 840 S.W.2d 640 (Tex. App.—Dallas 1992, no writ).

7 TEX. R. APP. P. 18.1.

limits on a remand. In short, the substance and appearance of the mandate may differ little from the appellate court judgment that has already issued with the court's opinion.[8]

That's a good thing. Traditionally, the ministerial task of preparing the mandate document has been assigned to a deputy clerk whose work may or may not be reviewed by a judge or staff attorney. The clerk usually has a ledger (separate from the case files themselves) containing a record of the mandates the court issues (a record that may now be on computer); after expiration of the appropriate time period, the clerk prepares the document and records its issuance in the ledger; the clerk then delivers the document to the lower court (by mail in the typical case); when the lower court clerk receives the mandate, that clerk files it and enters it on that court's docket.[9] In short, the standard procedure for preparing and issuing the mandate is routine and mundane and may not involve direct judicial supervision in the appellate courts.

**B. What does the mandate really do?**

Although the mandate (presumably) says nothing that the appellate court's judgment hasn't already said, it's not superfluous because it serves a critical role in the appellate process. One might say that whereas the appellate court's judgment is the official *record* of the appellate court's decision and informs the public of that decision, the mandate constitutes the official *command* that the lower court act in accordance with that decision. The mandate thus executes the decision announced in the judgment. In this regard, it works in much the same way as when your Mom said, "Girl, you'll be getting a spanking for that—when your Daddy gets home at 6:00."

Thus, if the appellate court has affirmed or modified the trial court's judgment or has rendered the judgment the trial court should have rendered, upon receiving the mandate the trial court need not make any further order or decree, and the trial court must enforce the mandate just as it would enforce its own judgment in any other case.[10] The mandate supersedes the trial court's former judgment and thereafter has the same effect as a trial court judgment that was not appealed.[11] The trial court enforces the mandate in accordance with the same rules of civil procedure regarding enforcement of the trial court's own judgments[12] or—in case of a remand—the assignment of cases for trial.[13]

In principle, the trial court's orders carrying out the mandate are purely ministerial; the trial court has no authority to rule that the mandate cannot be enforced by lawful means.[14] Indeed, the trial court not only has no discretion to modify or interpret the mandate but indeed has no *jurisdiction* to do so.[15] In other words, when Daddy gets home, regardless of what **he** thinks should be done, he's gonna have to give you that spanking. Yet the reported decisions show that Texas courts have cast off any presumption of naïve simplicity in enforcing this principle. For example, in one case a court of appeals concluded that the trial court had a right to exercise "reasonable discretion" in fulfilling the terms of the mandate. In that case, this meant that a party who had obtained a favorable appellate judgment on a specific performance claim could be given a brief period of time in the trial court to get its financing back together again in order to

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[8] TEX. R. APP. P. 48.1.

[9] TEX. R. APP. P. 18.4 (lower court clerk must file the mandate); *see* TEX. GOV'T CODE ANN. § 51.303 (Vernon 1998) (giving district clerk duty to keep records of all proceedings).

[10] TEX. R. APP. P. 51.1(b), 65.2.

[11] *Carter v. McHaney*, 373 S.W.2d 82, 86 (Tex. Civ. App.—Corpus Christi 1963, no writ).

[12] TEX. R. CIV. P. 621-679.

[13] TEX. R. CIV. P. 245.

[14] *Schliemann v. Garcia*, 685 S.W.2d 690, 692 (Tex. App.—San Antonio 1984, no writ).

[15] *Harris County Children's Protective Servs. v. Olvera*, 971 S.W.2d 172, 175-176 (Tex. App.—Houston [14th Dist.] 1998, writ denied); *Dallas County v. Sweitzer*, 971 S.W.2d 629, 631 (Tex. App.—Dallas 1998, no writ) ("Our mandate compelled the trial court only to execute that mandate. The trial court had no jurisdiction to award any additional relief . . .").

tender its performance obligation.[16] In another case a court of appeals concluded that the trial court had acted properly in issuing orders winding up a receivership under a mandate directing that the lower court take "no further action" in the case.[17] However, if the mandate directly conflicts with the opinion, the trial court must strictly follow the mandate.[18]

Remands "for further proceedings" are a further case in point. When a case is remanded for new trial, a trial court's authority is strictly limited to retrying solely those issues that the mandate specifies.[19] If the mandate does not expressly limit the scope of a remand for further proceedings, the case is reopened in its entirety.[20] Sometimes, however, a limitation on the scope of the remand may properly be gleaned from the court of appeals' decision.[21] Indeed, in other contexts the appellate courts have held that where the mandate is simply unclear, it must be construed in light of the appellate court's opinion.[22] In short, despite the rhetoric of strict compliance with the appellate mandate (noted above), the case law creates some leeway for the trial court faced with a confusing or unclear mandate.

### C. When does the mandate become effective?

The effective date of the mandate is important for two reasons.

First, the mandate can signal a certain *finality* regarding the lower court judgment.[23] For example, an appellate court has no jurisdiction to consider an application for writ of habeas corpus until the appealed judgment of conviction becomes "final" through receipt of the appellate mandate.[24] Similarly, although a probated sentence does not constitute a "final" judgment of conviction for purposes of enhancement under section 12.42 of the Penal Code unless probation is revoked, if the judgment revoking probation is appealed the sentence does not become "final" until the mandate has issued in that appeal.[25] Thus, in criminal cases the judgment of conviction that has been appealed is not "final" until the appellate court issues its mandate.[26] Nor is the appellate court's judgment binding precedent until the mandate has issued.[27] To be sure, the courts have not

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16 *Texacally Joint Venture v. King*, 719 S.W.2d 652, 653 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

17 *Bayoud v. Bayoud*, 797 S.W.2d 304, 311 (Tex. App.—Dallas 1990, writ denied).

18 *See Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 277 (Tex. 1996).

19 *Kahn v. Seely*, 37 S.W.3d 86, 88 (Tex. App.—San Antonio 2000, no pet.); *Hudson v. Wakefield*, 711 S.W.2d 628, 630(Tex. 1986); *Martin v. Credit Protection Ass'n, Inc.*, 824 S.W.2d 254, 256-257 (Tex. App.—Dallas 1992, writ dism'd w.o.j.);

20 *Graham Sav. & Loan Ass'n v. Blair*, 986 S.W.2d 727, 729 (Tex. App.—Eastland 1999, no writ).

21 *University of Texas System v. Harry*, 948 S.W.2d 481, 483 (Tex. App.—El Paso 1997, no writ).

22 *Garcia v. Martinez*, 988 S.W.2d 219, 221 (Tex. 1999); *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986).

23 In the trial court, the term "final judgment" refers to a judgment that resolves all claims as to all parties and is thus ripe for appeal—though subject to correction by the trial court for a limited time. In the sense used here, however, the courts often refer to a judgment as "final" when all opportunities for direct challenge to the judgment are exhausted.

24 TEX. CODE CRIM. PROC. ANN. art. 11.07, § 3(a) (Vernon Supp. 2003); *Ex parte Johnson*, 12 S.W.3d 472, 473 (Tex. Crim. App. 2000).

25 *Jordan v. States*, 36 S.W.3d 871, 875 & n.21 (Tex. Crim. App. 2001) (noting that a probated sentence that is revoked does not result in a "final" conviction until the appeal of the revocation order is resolved).

26 *Johnson v. State*, 784 S.W.2d 413, 414 (Tex. Crim. App. 1990) ("A conviction from which an appeal has been taken is not considered final until the appellate court affirms the conviction and issues its mandate."); *cf. United States v. Rivera*, 844 F.2d 916, 920 (2d Cir. 1988) (for purposes of Speedy Trial Act, 18 U.S.C. § 3161(e), an appeal becomes "final" upon *issuance* of the mandate).

27 *Roberson v. State*, 16 S.W.3d 156, 172 (Tex. App.—Austin 2000, pet. ref'd) ("*Johnson* is not yet final. The mandate has not yet issued. Thus, it is not binding precedent at this time.").

always distinguished between issuance and receipt of the mandate in this regard, and in at least one instance that confusion exists within the opinion.[28]

Second, the mandate returns to the trial court the *jurisdiction* that it lost during the appeal. In a civil case the trial court loses plenary jurisdiction a certain time after signing its judgment or overruling postjudgment motions.[29] Thereafter the trial court cannot modify its judgment in a civil case except pursuant to a petition for bill of review (where, e.g., the judgment resulted from fraud outside the proceedings) or a motion to correct a clerical error.[30] Trial court orders modifying the judgment, if rendered during the appeal but before issuance of the mandate, are generally void.[31] In a civil appeal the trial court normally cannot enforce a judgment that has been superseded by law or by appropriate security.[32] In a criminal appeal, most proceedings in the trial court are suspended upon the filing of the appellate record and until the mandate is returned to the trial court.[33]

Once the appeal is over and the time for issuing the mandate arrives, the appellate court must send its mandate back to the trial court that had original jurisdiction in the case.[34] The pertinent rules of appellate procedure generally provide that the trial court must proceed to enforce the appellate court's judgment upon *receipt* of the mandate. For example, the rules state: "Upon receiving the Supreme Court's

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[28] *See, e.g., Ex parte Dunn*, 976 S.W.2d 208, 211 (Tex. Crim. App. 1998) ("Based on this [appeal bond] language . . applicant had a duty to appear whenever the mandate was received . . . Thus, once the mandate issued and applicant did not appear in the trial court, he violated the terms of his appeal bond . . . Since applicant was incarcerated at the time the mandate was received, he could have satisfied the requirements of the bond . . . Therefore, applicant is not entitled to time credit from the date the mandate issued . . .").

[29] TEX. R. CIV. P. 329b(d), (e).

[30] TEX. R. CIV. P. 316, 329b(f).

[31] *Robertson v. Ranger Ins. Co.*, 689 S.W.2d 209, 210 (Tex. 1985) ("The consent judgment of the trial court is void since that court, as shown by the record, had no jurisdiction to render the judgment."). *Robertson* and the more recent supreme court decision in *In re Long* apparently overrule a line of case law suggesting that trial court orders signed after an appellate court judgment but before issuance of the mandate were simply voidable. *Compare In re Long*, 984 S.W.2d 623, 626 (Tex. 1999) (noting that where a district clerk appealed an injunction and lost the appeal, "the Clerk could not be held in contempt for violating the injunction until all appeals relating to the judgment were exhausted and a mandate enforcing the injunction was issued"), *with Brazzel v. Murray*, 481 S.W.2d 801, 803 (Tex. 1972) (appellate mandate rules are procedural and do not affect jurisdiction); *Continental Casualty Co. v. Street*, 364 S.W.2d 184, 188 (Tex. 1963) (order issued before return of mandate is a procedural irregularity, not fundamental jurisdictional error). *But see Universe Life Ins. Co. v. Giles*, 982 S.W.2d 488, 491-92 (Tex. App. —Texarkana 1998, writ denied) ("Nothing in the rules prohibits the trial court from enforcing the appellate court's judgment after it has been rendered but before the mandate has been received."). *Giles* should probably be considered overruled, given the supreme court decision in *In re Long*. One exception, of course, is that a trial court alone has jurisdiction to modify a permanent injunction based on changed circumstances, even if the judgment is based on an appellate mandate that affirmed the original injunction or that itself rendered the judgment for injunctive relief. *City of Tyler v. St. Louis S. Ry.*, 405 S.W.2d 330, 332 (Tex. 1966). With respect to the criminal courts, see *Berry v. State*, 995 S.W.2d 699, 700-701 (Tex. Crim. App. 1999) (trial court findings made after loss of trial court's jurisdiction and without proper abatement and mandate from appellate court were void).

[32] TEX. R. CIV. P. 24.1(f) ("Enforcement of a judgment must be suspended if the judgment is superseded."). In some civil cases, no security is required to stay the judgment. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 6.001-6.003 (Vernon 2002). The trial court retains power, however, to deal with issues regarding the amount and type of security. TEX. R. APP. P. 24.3. Thus, in some cases the trial court can refuse to permit suspension of a judgment pending appeal. *In re Long*, 984 S.W.2d 623, 625-26 (Tex. 1999) (noting that trial court has discretion to decline to permit some judgments to be superseded). If an appellate court orders additional security and the judgment debtor doesn't file it, the judgment can be enforced. TEX. R. APP. P. 24.4(e).

[33] TEX. R. APP. P. 25.2(f).

[34] *See* TEX. GOV'T CODE ANN. §§ 22.102, 22.226 (Vernon 1988); *see also* TEX. CODE CRIM. PROC. art. 11.07, § 5 (Vernon Supp. 2003) (in habeas corpus proceeding, appellate court directs its mandate to the trial court that issued the writ).

mandate, the trial court clerk must proceed to enforce the judgment of the Supreme Court's [sic] as in any other case."[35] In criminal cases, the court's practice appears consistent with the rule: trial court action before the receipt of the mandate, if not otherwise authorized by law, is void.[36] In civil cases, jurisdiction is returned to the district court upon *issuance* of the mandate, as the Supreme Court of Texas confirmed in *In re Long*.[37] This rule is consistent with the mandate rule in the federal courts,[38] as well as with the rule that a state court regains jurisdiction over a case removed to federal court when the federal district court clerk puts the order of remand in the mail for service on the lower court.[39] In civil cases the case law and the language of the rules combine to suggest that whereas the *power* to act is returned to the lower court upon issuance of the mandate, the lower court has no *obligation* to act until receipt of that mandate.

**D. When does the mandate issue?**

In considering the delay that the appellate mandate builds into the appellate process, one might think in terms of the art of baking. When one removes a hot cake fresh from the oven, one has to let it cool a bit before cutting and frosting it—else it may be ruined—and one may even need to return that cake to the oven after probing it and determining that it's not quite done yet. By analogy, the delay in the issuance of the mandate allows the parties to assess the court's work product, to test it, and perhaps even to correct it before the final *oeuvre* is placed on the table for consumption. Such an intent is apparent from the time limits contained in the appellate rules, whereby the mandate doesn't issue until a considerable period of time after the date the court issues its judgment or after the overruling of a timely motion for rehearing.[40] If the appellate clerk complies with those time limits and waits the allotted time (and occasionally the clerk does not!), the mandate will not issue until a party has forgone the opportunity to file a petition for review in a civil case or to obtain discretionary review in a criminal case.[41]

But there are variations on this theme. The rules grant a court of appeals authority in a civil case to

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35 TEX. R. APP. P. 65.2 (emphasis added); *see also* TEX. R. APP. P. 51.1, 51.2 (trial court must enforce judgment upon *receipt* of mandate in civil or criminal case). The return of jurisdiction upon *receipt* of the mandate is the practice in some other states' courts. *See, e.g., Fry v. Village of Tarrytown*, 176 Misc. 2d 275, 276, 671 N.Y.S.2d 633, 634 (1998) ("Therefore, for this court to proceed, a copy of the remittitur must be entered in the County Clerk's Office."); *Morris v. Morris*, 226 Ga. App. 799, 799, 487 S.W.2d 528, 529 (1997) ("Until the trial court receives and files the remittitur, it does not have jurisdiction to act.").

36 *Compare* TEX. R. APP. P. 25.2(f) (action in criminal cases suspended until the trial court's *receipt* of the mandate), *with Berry v. State*, 995 S.W.2d 699, 700-701 (Tex. Crim. App. 1999) (confirming that once the trial court submits the appellate record to the court of appeals, the trial court loses its jurisdiction until receipt of an appellate mandate); *see also* TEX. R. APP. P. 51.2(b) (providing that upon receipt of mandate the trial court must issue capias to arrest a defendant who was released on bail pending appeal).

37 *In re Long*, 984 S.W.2d 623, 626 (Tex. 1999) (noting that where a district clerk appealed an injunction and lost the appeal, "the Clerk could not be held in contempt for violating the injunction until all appeals relating to the judgment were exhausted and a mandate enforcing the injunction was issued").

38 *Carlson v. Hyundai Motor Co.*, 222 F.3d 1044, 1045 (8th Cir. 2000); *United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996).

39 *Quaestor Investments, Inc. v. State of Chiapas*, 997 S.W.2d 226, 229 (Tex. 1999).

40 TEX. R. APP. P. 18.1. Moreover, the rules provide that if the appellate court changes its decision after issuing mandate, the original mandate has no further effect and a new mandate will issue. TEX. R. APP. P. 86(e), 186(c).

41 TEX. R. APP. P. 18.1(a). In a criminal case the time limit also gives the Court of Criminal Appeals time to decide whether to accept review on its own motion. TEX. R. APP. P. 67.1, 67.3. Thus, in cases where the supreme court declines to grant review, the mandate issues from the court of appeals. *See* TEX. R. APP. P. 18.5 (where supreme court declines to grant review, supreme court costs are included in court of appeals mandate). For a while at least, some appellate court clerks continued to issue mandates in conjunction with the old time limits for application for writ of error (30 days from date of the court of appeals' decision, rather than 45 days from that date), which meant that mandates were issuing a bit earlier than they should have issued.

issue the mandate with the judgment in interlocutory appeals.[42] In that case, the cake has just got to be eaten right away: presumably, pretrial proceedings have continued during the appeal and the trial date may be soon approaching. Nor do the rules provide much time for a party wishing to review a decision of the state court of last resort. The Supreme Court of Texas issues its mandate shortly after the time has expired for filing a motion to extend the time to file a motion for rehearing if no timely motion for rehearing or motion to extend time is pending.[43] This means that if a party wants to stay the mandate pending review by the U.S. Supreme Court, the party will have to specifically request a stay well in advance of the 90-day deadline for filing the petition for certiorari.[44] The same is true with respect to cases presented to the Texas Court of Criminal Appeals.[45]

Another variation is that the mandate can issue earlier by agreement of the parties or upon a motion showing "good cause."[46] No published opinion has defined "good cause" in this context, so it's hard to know what kind of circumstance might merit early issuance of the mandate. However, at the very least a moving party would probably want to satisfy the standard for obtaining injunctive relief: likelihood of success; imminent, concrete harm to the movant if the mandate does not issue immediately; insignificant harm to the respondent from a premature issuance of the mandate; and no harm to the public. Such might be the case where the party prevailing on appeal seeks to undo the damage resulting from a wrongful execution, or seeks to employ or avoid the res judicata or collateral estoppel effect of a trial court judgment that has been modified or reversed.[47] However, no reported case provides clear guidance on this point.

### E. How do I enforce the darn thing?

It is the duty of the party prevailing in the appellate court to see that on remand the case proceeds in accordance with the appellate court's decision.[48] If the trial court refuses to enforce the mandate according to its terms, the appellate courts have enforced the mandate by appeal or, perhaps more frequently, by an original proceeding.[49] The court issuing the mandate is the court with power to enforce that mandate. Thus, where the supreme court has transferred a case to another appellate district, only the transferee court of appeals has authority to issue a writ of mandamus to enforce its mandate.[50] Although the transferee court generally has no power to issue a supervisory writ to a lower court outside of its appellate district, the power to issue a writ to enforce a mandate arguably arises from the appellate court's statutory power to protect its jurisdiction, jurisdiction conferred when the case was transferred.[51] A similar principle applies with respect to the supreme court: if a trial court errs in construing

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42 TEX. R. APP. P. 18.6.

43 TEX. R. APP. P. 18.1(b).

44 TEX. R. APP. P. 86(c), 186(b); *see also* 28 U.S.C.A. § 2101(f) (West 1994) (authorizing stay of mandate by U.S. Supreme Court); SUP. CT. R. 23 (providing means for asking U.S. Supreme Court to stay state court's mandate). Counsel should consider both state and federal authority when requesting a stay of the mandate pending review by the U.S. Supreme Court.

45 TEX. R. APP. P. 18.1(b), 69.4(a). See also federal authorities from *supra* note 44.

46 TEX.. R. APP. P. 18.1(c).

47 In civil cases the trial court judgment has immediate collateral estoppel effect, despite a pending appeal. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

48 *Lewelling v. Bosworth*, 840 S.W.2d 640, 643 (Tex. App.—Dallas 1992, no writ).

49 *Edgewood Indep. School Dist. v. Kirby*, 804 S.W.2d 491, 494 (Tex. 1991); *City of Garland v. Long*, 722 S.W.2d 49, 50-51 (Tex. App.—Dallas 1986, orig. proceeding) ("Only when the trial court affirmatively refuses to enforce our mandate will this Court issue a writ of mandamus."). Mandamus is the appropriate remedy in the federal system as well. *See Vando Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 428 (1978).

50 *Varner v. Koons*, 888 S.W.2d 511, 514 (Tex. App.—El Paso 1994, no writ).

51 TEX. GOV'T CODE ANN. § 22.221(a) (Vernon Supp. 2003) ("Each court of appeals or a justice of a court of appeals may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court.").

a *supreme court* mandate, the proper remedy is a writ of mandamus from the *supreme court*, not from the appellate court whose decision the supreme court was reviewing.[52]

There appears to be no time limit on the appellate court's power to enforce its mandate. The rules of appellate procedure provide for the expiration of the court of appeals' plenary power after a specific period of time, but that time period does not restrict the appellate court's power to issue or recall its mandate or to correct clerical errors in its judgment. Such actions can be taken at any time.[53] An appellate court apparently has jurisdiction to consider a motion to clarify its judgment even after the supreme court has denied a petition for review.[54]

**F. Practical suggestions.**

The following suggestions flow from the substantive law of appellate mandates.

- *Inform the client early in the appellate process that the mandate is what formally ends the appeal.* The client should be told early on in the case that it's not over 'til it's over. The client may wish to know when it will have to perform an adverse judgment; or how long it may have to pay premiums to the surety on a supersedeas bond; or when it can seek to enforce a favorable judgment superseded on appeal; or when he or she must begin a sentence of incarceration. The client should know that the appeal is not really "final" even when the motion for rehearing is overruled.

- *Consider the effect on your client of even slight delay.* Clients may wish to complete transactions whose imminent consummation the pending lawsuit has impeded; or they may wish to enforce a judgment as soon as possible; or they may need to file bankruptcy but wish to avoid doing so until the last possible moment. Communicating with the client about the delay effect of the mandate, and following the appellate process all the way through to the issuance of the mandate, will assist the client in making better business judgments about such matters.

- *If the judgment isn't clear about the relief granted, the mandate won't be any clearer.* The mandate will generally mirror the errors and ambiguities in the judgment. Because only a *nunc pro tunc* correction of the judgment is possible after the expiration of the appellate court's plenary power, one should act to correct any mistake or ambiguity in the judgment by filing an appropriate motion for rehearing or, if the time for doing so has expired, a motion to correct the judgment during the period of the court's plenary power.[55] That plenary power generally expires either 60 days after judgment or 30 days after the overruling of timely filed motions for rehearing.[56]

- *If the relief in the mandate doesn't mirror the judgment, ask the court to recall and reissue the mandate.* The rules do not specify a procedure for requesting a new mandate, but the proper action would be to file a motion to recall and

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[52] *Bilbo Freight Lines, Inc. v. State*, 645 S.W.2d 925, 927-928 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

[53] *See* TEX. R. APP. P. 19.3(a), (b); *Humble Exploration Co. v. Browning*, 690 S.W.2d 321, 327-328 (Tex. App.—Dallas 1985, no writ). The Court of Criminal Appeals has granted rehearing even after the mandate issued. *See, e.g., Ex parte McJunkins*, 954 S.W.2d 39 (Tex. Crim. App. 1997).

[54] *Western Casualty & Surety Co. v. Preis*, 710 S.W.2d 719, 720 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

[55] If the court of appeals fails to correct its ambiguous or incorrect judgment, the supreme court has power to do order the court to do so. *See, e.g., Texas Ass'n of School Boards, Inc. v. Bass*, 45 Tex. Sup. Ct. J. 1044 (July 3, 2002) (No. 01-1105) (ordering court of appeals to resolve ambiguity in its opinion and judgment).

[56] TEX. R. APP. P. 19.1. The appellate court's term begins and ends with the calendar year. TEX. GOV'T CODE ANN. § 22.218 (Vernon 1988); *Western Nat'l Bank of Rives*, 927 S.W.2d 681, 682 n.1 (Tex. App.—Amarillo 1996, writ denied). However, the end of the court's term does not affect the court's plenary power or its jurisdiction over a case that is still pending at that time. TEX. R. APP. P. 19.4.

correct the mandate. The court of appeals presumably has power to correct a clerical error in its mandate even after the expiration of the court's plenary power. A dearth of case law exists on this point. However, because the issuance of the mandate is in every respect a clerical act (whereas a trial court's act in signing a judgment can have both judicial and clerical components), in conceptual terms the appellate courts should probably treat a motion to recall and correct the mandate in much the same way that a trial court treats a motion for *nunc pro tunc* correction of its judgment.[57]

- *A supersedeas bond is arguably in effect until the mandate issues.* This means that a surety can undoubtedly charge for premiums up until the time the mandate issues; that a trial court's judgment, properly superseded, cannot lawfully be enforced (despite affirmance by the court of appeals) until the mandate issues; and that action taken to enforce the judgment before the mandate issues can and should be challenged. During a civil appeal, the proper action for correcting trial court error in enforcing a properly superseded judgment would be a motion for a writ of injunction or similar writ against the trial court in order to protect the appellate court's jurisdiction.[58]

- *Communicate with the appellate court clerk's office if timing is important.* In some cases, issuance of the mandate is improperly delayed or accelerated by the clerk's office. Sometimes this results from the clerk's heavy workload, and sometimes this results from carelessness or even ignorance about the rules or the procedural posture of the case. Since the routine task of issuing the mandate may be a relatively low priority, one may wish to make polite contact with the clerk's office so as to understand how the clerk intends to proceed with that task in the case at hand.

## WANTED: NEW EDITOR

The Editor of the Appellate Advocate is responsible for the timely preparation of the four quarterly issues of the section report of the State Bar of Texas Appellate Section. Responsibilities include the solicitation of articles, recruitment of columnists, and the editing and assembly of each issue. Under the section bylaws, an editor is appointed for a term of one year, and may be reappointed for up to two more.

While time-consuming, the Editor position is a great chance to meet wonderful lawyers and learn a lot about Texas appellate practice. If you are interested in serving as the next Editor of the Appellate Advocate, please email a brief letter and a resume to David Coale (dcoale@ccsb.com), who together with Helen Cassidy and Warren Harris are serving as the selection committee. If you are interested, your email would be appreciated by the end of February. Thanks!

**"Do not draw the conclusion from your apprentice studies that you have nothing left to learn, but rather that you have infinitely more to learn."**

**Blaise Pascal**

[57] *See* TEX. R. CIV. P. 316.

[58] *See* TEX. GOV'T CODE ANN. § 22.221(a) (Vernon Supp. 2003).