**Presented:**
23rd Annual Conference on State and Federal Appeals

June 13-14, 2013
Austin, Texas

# Settlement on Appeal

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Settling a case on appeal is very different from settling during trial court litigation. On one hand, there are fewer uncertainties on appeal: one side already has a judgment in hand, and the other already has a judgment against it. The issues on appeal may be more clearly defined. On the other hand, the appellate posture raises other issues. A judgment—and especially a written opinion—can bring with it unwanted publicity, precedent, and preclusive effects. Even those clients who are well-versed in settling cases at the trial court level often are not as familiar with the appellate system, so expectations need to be managed. There may be ancillary issues relating to ability to pay or even to supersede the judgment.

Appellate practitioners can, and should, play an important role when a case is settled on appeal. Once an appellate court takes jurisdiction of a case, settlement automatically becomes more complicated. No longer can the attorneys simply draft a settlement agreement, include mutual releases, and submit an agreed judgment to the trial court. Parties and/or trial counsel may be focused on settling the case, but often have not thought through the procedural mechanics of dismissing the appeal and the resulting effect on the lower court judgments, orders, or opinions. Appellate counsel should make sure that these considerations are taken into account during negotiations and when settlement documents are drafted. Appellate counsel also can provide valuable (and often more objective) insight into how the appellate courts will view the case through the lens of a cold record, standards of review, and reversible error requirements. The procedural steps of how to effectuate the settlement—exactly what to file in the appellate and/or trial courts—are also areas that often need the expertise of appellate counsel.

## I. State courts of appeals: how to dispose of the appeal and what relief you can seek regarding the trial court judgment and any court of appeals opinions.

### A. Methods for disposing of a state court appeal.

#### 1. Dismissing the appeal on the appellant's motion.

The Texas Rules of Civil Procedure allow an appeal to be dismissed upon the appellant's motion. TEX. R. APP. P. 42.1 (a)(1) ("In accordance with a motion of appellant, the court may dismiss the appeal or affirm the appealed judgment or order unless such disposition would prevent a party from seeking relief to which it would otherwise be entitled."). This is a very simple way to accomplish the dismissal, especially if you are the appellant.

The usefulness of this method is limited, though. It is not available if another party is seeking relief from the appellate court. TEX. R. APP. P. 42.1(a)(1). It allows the appellate court only two options: (1) dismiss the appeal or (2) affirm the appealed judgment or order. Either way, the trial court's judgment or order stands and there will be no judgment effectuating the settlement agreement. *See Robertson v. Land*, 519 S.W.2d 227 (Tex. Civ. App.—Tyler 1975, no writ). Any damages awarded in the judgment remain collectible unless an acknowledgment of satisfaction of the judgment is filed. *See* TEX. PROP. CODE § 52.005. Any injunctive relief remains in effect.

In some situations, however, an appellant may be quite willing to accept a monetary settlement and let the trial court's judgment stand (an individual plaintiff appealing a take-nothing judgment, with no further stake in similar litigation, might be an example). This method is easy and expeditious. Like any motion, it requires a certificate of conference, *see* TEX. R. APP. P. 10.1(a)(5), but otherwise can be accomplished by appellant's counsel alone once the settlement is consummated.

**2. Disposing of the appeal by agreement of the parties.**

In many situations, however, the parties will want or need a judgment effectuating the settlement agreement. A judgment is easier to enforce than a mere settlement agreement, which requires pleading and proof of an enforceable contract. *See Padilla v. LaFrance*, 907 S.W.2d 454 (Tex. 1995); *see also Univ. Gen. Hosp., LP v. Siemens Med. Solutions USA Inc.*, 2013 WL 772951 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (holding that when trial court rendered final judgment dismissing case due to settlement, and then later attempted to render an agreed judgment but did so outside its plenary power, purported agreed judgment was void and could not be enforced, and the only option was for the party to file a second suit alleging breach of the settlement agreement). If the settlement is reduced to an agreed judgment, it is enforceable as any other judgment. *McCray v. McCray*, 584 S.W.2d 279 (Tex. 1979).

An enforceable judgment can be helpful or necessary if payments are to be made over time, in cases involving injunctive or declaratory relief, in cases involving division of property or child custody, and in many other situations. If additional findings are needed to effectuate the settlement—such as if court approval is needed to settle claims of a minor, an incompetent, or class members—mere dismissal will be ineffective. Even if a new judgment is not technically needed, the losing party may not want the old judgment to stand for reasons relating to publicity, preclusion, or precedent.

Thus, the more common method in state court is to file a joint motion based on the parties' settlement agreement. This gives the appellate court more options. Texas Rule of Appellate Procedure 42.1(a)(2) provides for a dismissal by agreement. TEX. R. APP. P. 42.1(a)(2). The primary benefit to this method is that it results in a new, enforceable, final judgment.

The rule requires only that there be an "agreement" signed by all parties or their attorneys, so the appellant could file an unopposed motion attaching the agreement. The better practice is probably to file a joint motion. The joint motion should: (1) be signed by all the parties; (2) attach the signed settlement agreement, *see* TEX. R. APP. P. 42.1(2); and (3) specify the exact relief sought.[1]

The rule requires only that the settlement agreement, not the motion, be signed by the parties or their attorneys. TEX. R. APP. P. 42.1(a)(2). It is better practice to have all counsel sign a joint motion. *Cf. Nat'l Union Fire Ins. Co. v. United L.P. Gas Corp.*, 2003 WL 22310045 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (noting that one party had not signed motion, but holding that party approved settlement and did not object to motion, so requirements of rule were

[1] See *infra* Part I.A.3, for a discussion of what relief should be sought.

# Title search: Settlement on Appeal

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First appeared as part of the conference materials for the
23rd Annual Conference on State and Federal Appeals session
"Settlement on Appeal"