

**WHAT NEXT?
THE INS AND OUTS
OF WRAPPING UP AN APPEAL**

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CHAPTER 9

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I. INTRODUCTION

So, your state court appeal is over. Or maybe it's almost over, but already, you're thinking, "What next?" Before you move on, give some thought to those final steps needed to wind up this appeal.¹

Tip: Many of the tasks and issues discussed in this paper involve information and documentation known and accessible to the trial lawyer. Accordingly, figuring out the "winding up" tasks is often easiest to do at the outset of an appeal. At the end of this paper, I have provided a handy-dandy template for an appeal initiation/completion checklist. Rather than setting forth the various deadlines and tasks you will face during the appeal, this checklist addresses the various deadlines and tasks you may face at the appeal's conclusion. The template is not intended to be exhaustive – it hits the highlights, as does this paper. Hopefully, it will provide a useful tool for incorporating the information in this paper into your everyday practice.

II. THE JUDGMENT

After you wade through the appellate court's opinion, take a look at the judgment. The judgment may be in need of some additional work – through a motion for rehearing and/or en banc reconsideration – before the court loses plenary power.

In the court of appeals, plenary power over the judgment expires:

- (1) 60 days after the judgment date if no timely filed motion for rehearing, for en banc reconsideration, or to extend time to file a motion for rehearing or en banc reconsideration is then pending; or
- (2) 30 days after the court overrules the last of all such timely filed motions.

TEX. R. APP. P. 19.1. The plenary power period expires without regard to issuance of the mandate. *See id.* During the period, however, the court of appeals retains plenary power over its judgment even if a petition for review is filed. TEX. R. APP. P. 19.2. And, if the court of appeals modifies its opinion or judgment during the period, the deadlines restart as of the date of the modified opinion or judgment. *See Bass v. Bass*, 106 S.W.3d 311, 315 (Tex. App.—Houston [1st Dist.] 2003, no pet.)

¹ In addition to the authorities cited throughout the paper, an excellent resource for many of the topics covered in this presentation is Samara Kline and Ari Cuenin's paper, "Loose Ends: Winding Up Your Appeal," presented at the 2010 State Bar of Texas Civil Appellate Practice 101 CLE.

If the court's plenary power has expired, you still are able to address clerical errors in the judgment or opinion. TEX. R. APP. P. 19.3. However, other changes will be beyond the court of appeals' reach.

A. Possible Dispositions

Rules 42, 43, and 60 provide for the types of dispositions that a court of appeals or the Texas Supreme Court may employ in their judgments. The appellate courts are limited to the dispositions described in the Texas Rules of Appellate Procedure. *See, e.g., Blair v. Fletcher*, 849 S.W.2d 344, 345 (Tex. 1993) (specifically addressing court of appeals' dispositions). Under Rules 42, 43, and 60, the appellate courts may:

- affirm the lower court's judgment in whole or in part;
- modify the lower court's judgment and affirm it as modified;
- reverse the lower court's judgment in whole or in part and render the judgment that the lower court should have rendered;
- reverse the lower court's judgment and remand the case for further proceedings;
- vacate the judgments of the lower courts and dismiss the case;
- dismiss the appeal as provided by the rules; or
- by agreement of the parties:²
 - render judgment effectuating the parties' agreement;
 - set aside the trial court's judgment without regard to the merits and remand the case to the trial court for rendition of judgment in accordance with the agreement; or
 - abate the appeal and permit proceedings in the trial court to effectuate the agreement.

The Texas Supreme Court also may vacate the lower court's judgment and remand the case for further proceedings in light of changes in the law. TEX. R. APP. P. 60.2(f).

Affirmance of a modified judgment or reversal and rendition of a different judgment may require both legal and practical analysis if the modification involves non-monetary relief, such as a declaration, injunction, or equitable remedy. How does the modified or new relief work, and what actions would satisfy (or

² Rule 42.1(a)(2) requires that the "agreement" authorizing these dispositions be "signed by the parties or their attorneys and filed with the clerk . . ." The "agreement" that is filed with the clerk does *not* have to be the settlement agreement setting forth all the negotiated terms and conditions. Also, be aware that the parties' agreement may not be conditioned in the appellate court's withdrawal of any opinion (as opposed to judgment) in the case. TEX. R. APP. P. 42.1(c).

alternatively, violate) the modified/new requirement? How do modified portions of the judgment interact with any other portions that were not modified?

Or if the case is being disposed by agreement, care must be taken to compare the judgment to the: (1) parties' agreement; and (2) the relief requested in the motion to dismiss. A motion for rehearing might address discrepancies between the papers filed by the parties seeking the agreed disposition. Alternatively, a motion for rehearing might be accompanied by amended papers correcting discrepancies between the court filings and the parties' settlement agreement, if any.

The type of disposition that produces the most complications is, in my opinion, remand. The scope of the remand varies. Determining the scope of the remand is step one, followed by analyzing whether this scope is consistent with the court's opinion and proper under the law.

Unless the issues in the case are severable, a remand generally must encompass the entire case. TEX. R. APP. P. 44.1(b); *Otis Elevator Co. v. Bedre*, 776 S.W.2d 152, 153 (Tex. 1989). It is possible that a case might be remanded on some, but not all, claims. However, within a claim, unliquidated damages may not be remanded separately from liability if liability is contested. TEX. R. APP. P. 44.1(b).

Because generally a remand will encompass the entire case, it is presumed that remand is unlimited unless it is limited by special instructions. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *Brewer & Pritchard, P.C. v. Johnson*, 167 S.W.3d 460, 465 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). As a result, if the remand in your case should involve less than the entire case, but the judgment does not so provide, you will need to move for rehearing for the court to consider adding limiting language. See, e.g., *Dallas City Limits Prop. Co., L.P. v. Austin Jockey Club, Ltd.*, 376 S.W.3d 792, 802 (Tex. App.—Dallas 2012, pet. denied (reh'g filed May 17, 2013)) (providing example of limiting language); *Brent v. Field*, 275 S.W.3d 611, 622-23 (Tex. App.—Amarillo 2008, no pet.) (same).

When the remand is limited by express language, the trial court may determine only the issues remanded. *Hudson*, 711 S.W.2d at 630; see also *Univ. of Tex. Sys. v. Harry*, 948 S.W.2d 481, 483 (Tex. App.—El Paso 1997, no pet.). On the other hand, when the remand is not limited, the entire case is reopened. *In re Marriage of Stein*, 190 S.W.3d 73, 75 (Tex. App.—Amarillo 2005, no pet.); *Harry*, 948 S.W.2d at 483.

An appellate court should not remand a case if it is capable of rendering judgment. Texas Rule of Appellate Procedure 43.3 requires that "[w]hen reversing a trial court's judgment, the court must

render the judgment that the trial court should have rendered, except when: (a) a remand is necessary for further proceedings; or (b) the interests of justice require a remand for another trial." Thus, for instance, when a court reverses because an award of damages or interest is incorrectly calculated, and the proper amount can be calculated by reference to evidence in the record, Rule 43.3 requires rendition of a judgment with the proper amount, rather than delegation of the re-calculation to the trial court through remand. See TEX. R. APP. P. 43.3; *State v. Crawford*, 771 S.W.2d 624, 630-31 (Tex. App.—Dallas 1989, writ denied) (on reh'g) (reversing and rendering judgment of \$18,269.70 because the proper net amount owed to the prevailing party could be ascertained by mathematical calculation); *Gorman v. Life Ins. Co.*, 859 S.W.2d 382, 390 (Tex. App.—Houston [1st Dist.] 1993, no writ) (on reh'g) (granting motion for rehearing, withdrawing remand for calculation of prejudgment interest, calculating prejudgment interest, and rendering judgment for calculated amount). To the extent the appellate court judgment remands a case that is capable of rendition, the prevailing party should move for rehearing. See *Crawford*, 771 S.W.2d at 630-31 (granting rehearing motion); *Gorman*, 859 S.W.2d at 390 (same). In the interest of caution, the moving party may want to request, in the alternative to rendition, correction of the opinion and judgment to provide very specific language limiting the scope of the remand, so that the entire case is not reopened based on a matter that could have been resolved without any remand at all.

B. Conformity.

1. With regard to the opinion

To the extent of any conflict between the language in the appellate court's opinion and its judgment, the judgment controls. *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 277 (Tex. 1996). For example, if the opinion reverses summary judgment as to one of several claims, but the judgment provides that the summary judgment "be in all things reversed," the judgment controls. *Id.* at 276-77. Likewise, if the Texas Supreme Court's opinion addresses the portions of a judgment applicable to three of four defendants/appellees, but the judgment reverses "the judgment of the court of appeals," the judgment controls (even though one of the parties did not petition for review). See *Fletcher*, 874 S.W.2d at 84 n.1 (addressing question in context of mandate). If the judgment is inconsistent with the opinion, the proper method to seek relief is through a rehearing motion. See *Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 918 (Tex. 2008). As a last resort, in the rare case, mandamus may be available to clarify a judgment that is ambiguous with regard to some aspect

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