

ARTICLES

The Appellate Mandate: What It Is and Why It Matters

By Jennifer L. Swize

Just the other day, a trial team handling post-appeal matters on remand wanted to know the significance of the “mandate” that the court of appeals had issued. As those lawyers recognized, the critical stages of an appeal are typically thought of as briefing, presenting oral argument, and then waiting for a decision from the court. Once the decision issues, and assuming no party intends to seek rehearing, the appeal is generally considered over. But it is not. Even then, the case remains under the appellate court’s jurisdiction until it is officially closed, usually weeks or months after the decision was rendered. That necessary, final step is marked by issuance of the mandate.

In that sense, the mandate is merely a ministerial chore that has little consequence other than formally ending the appeal. But the mandate is important to remember because it affects when, and what, further action may be taken in a case. Importantly, if the appellate relief includes proceedings on remand, the mandate defines the scope of those proceedings.

This refresher on the appellate mandate addresses its basic, procedural aspects, as well as the substantive consequences of its issuance.

The Nuts and Bolts of an Appellate Mandate

At its most basic, the mandate is the device by which an appellate court closes an appeal and transfers jurisdiction to another court. Federal Rule of Appellate Procedure 41, with any modifications by local rule, governs procedural aspects of the mandate.

What the Mandate Looks Like

The mandate is usually an unassuming document. While an appellate court may prepare a new document to serve as the formal mandate, most courts simply issue the mandate by re-issuing other orders from the appeal. Rule 41 establishes this default procedure: “Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court’s opinion, if any, and any direction about costs.” Fed. R. App. P. 41(a). To make clear that the re-issued documents are the mandate, the court may stamp them as “mandate” or “issued as a mandate.” *See, e.g., United States v. Rivera*, 844 F.2d 916, 920 (2d Cir. 1988) (citations omitted) (explaining that “the clerk of the court signs her name on a copy of the judgment or order that is stamped ‘MANDATE’ at the top of the first page and ‘true copy’ at the bottom of the last page”). Unless extraordinary circumstances warrant judicial involvement, the clerk’s office, rather than a judge, prepares and issues the mandate.

When the Mandate Issues

Rule 41 governs the date the mandate issues, which is some time after the appellate judgment is



entered. The particular date depends on whether certain post-judgment filings are made—in particular, a petition for rehearing (whether panel or en banc) or a motion to stay the mandate. Where no party seeks either form of relief, the mandate “must issue 7 days after the time to file a petition for rehearing expires.” Fed. R. App. P. 41(b). The result of this 7-day period, in conjunction with the typical 14-day period under Rule 40 for filing a rehearing petition, is that the mandate usually issues 21 days after judgment if no party seeks rehearing or a stay of the mandate. (If it is a civil case in which the United States is involved, 45 days for any party to petition for rehearing are permitted, delaying the mandate’s issuance until 52 days after judgment.) By local rule, however, an appellate court may establish a different time for filing a rehearing petition and thus affect the date the mandate issues. *See, e.g.*, Fed. Cir. R. 40(e) (allowing 30 days for civil cases not involving the United States); D.C. Cir. R. 35(a) (same).

If a party seeks either a rehearing or a stay of the mandate, those requests automatically stay issuance of the mandate. A rehearing petition automatically stays issuance until that request is denied or, if granted, until the rehearing proceedings conclude. *See* Fed. R. App. P. 41(b) (“The court’s mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later.”).

Other post-judgment actions do not automatically stay the mandate. For instance, a motion to extend the time to file a rehearing petition does not automatically stay issuance of the mandate. Thus, if an extension request is granted, and that period exceeds the date for issuance of the mandate, the mandate will likely issue, even though a timely filed petition would have automatically stayed the mandate.

Because the filing of a rehearing petition automatically stays issuance of the mandate, the period between entry of judgment and issuance of the mandate could be several months or more. The time of issuance depends on how quickly the court acts on the rehearing request and conducts any rehearing proceedings. But, whenever those matters run their course, the same 7-day default period applies.

Although the default period typically applies, Rule 41 gives a court the authority to “shorten or extend the time” for issuing the mandate. Fed. R. App. P. 41(b). Parties may ask a court to exercise this authority. For instance, prevailing parties, relying on their success on appeal and circumstances particular to the case, may request an accelerated issuance. And some courts, in their local rules, have identified situations that automatically trigger a shorter or longer period, such as requiring immediate issuance of the mandate in cases dismissed for failure to prosecute. *See* Fed. Cir. R. 41 (order dismissing a case for failure to prosecute constitutes the mandate); 5th Cir. IOP 41 (“by court direction, the clerk shall immediately issue the mandate when the court dismisses a case for failure to prosecute an appeal”); 7th Cir. R. 41 (“The mandate will issue immediately when an appeal is dismissed (1) voluntarily, (2) for failure to pay the docket fee,



(3) for failure to file the docketing statement under Circuit Rule 3(c), or (4) for failure by the appellant to file a brief”).

Staying the Mandate Pending Supreme Court Review

Filing a petition for a writ of certiorari to the U.S. Supreme Court does not automatically stay the mandate. Nonetheless, certiorari petitions are a common basis for asking an appellate court to issue a stay. Rule 41 expressly contemplates such motions. A frequent reason for seeking a stay pending certiorari is where the relief on appeal includes a remand so that the remand proceedings do not begin before any Supreme Court review. But regardless of the strategic reason for seeking a stay, the party “must show that the certiorari petition would present a substantial question and that there is good cause for a stay.” Fed. R. App. P. 41(d)(2)(A). Some courts, by local rule, routinely deny requests for a stay based on a certiorari petition unless the petition is likely meritorious. *See, e.g.*, 4th Cir. R. 41 (“[o]rdinarily the motion shall be denied,” unless the party demonstrates that the motion “is not frivolous or filed merely for delay” and “present[s] a substantial question or set[s] forth good or probable cause for a stay”); *see also* 5th Cir. R. 41.1; 6th Cir. R. 41(a); 10th Cir. R. 41.1; 11th Cir. R. 41-1(a); D.C. Cir. R. 41(a)(2). If the appellate court grants the stay request, it may require the movant to secure the judgment by posting a bond or other security. And if the stay request is denied, the party may renew its request before the Supreme Court pursuant to Supreme Court Rule 23.

The longest stay that an appellate court can initially enter is 90 days from the date of judgment—which is the same period for seeking certiorari. *See* Fed. R. App. P. 41(d)(2)(A); *see also* Supreme Court Rule 13. If the party actually files a petition, it may obtain a further extension by notifying the appellate court within the period of the stay, and the stay would continue until the Supreme Court ultimately disposes of the case, either at the certiorari stage or on the merits. *See* Fed. R. App. P. 41(d)(2)(B). If the petition is granted, the appellate mandate issues, and jurisdiction is transferred to the Supreme Court. If the Supreme Court denies the petition, Rule 41 directs that the appellate court “must issue the mandate immediately.” Fed. R. App. P. 41(d)(2)(D).

The Seventh Circuit has identified several situations in which a stay request is not warranted, providing useful examples for litigants even in other courts. Stays pending certiorari may be denied where (i) the Supreme Court recently denied certiorari in a case on which the appellate court relied in the pending case (*Al-Marbu v. Mukasey*, 525 F.3d 497, 499–500 (7th Cir. 2008) (Ripple, J., in chambers)); (ii) the petition presents issues that were not preserved (*United States v. Warner*, 507 F.3d 508, 510-11 (7th Cir. 2007) (Wood, J., in chambers)); (iii) the petition does not present an issue of first impression or involve a circuit split (*Bricklayers Local 21 Apprenticeship & Training Program v. Banner Restoration, Inc.*, 384 F.3d 911, 912 (7th Cir. 2004) (Ripple, J., in chambers)); or (iv) the stay request does not show a likelihood of irreparable harm (*Indiana Protection & Advocacy Services v. Indiana Family & Social Services Administration*, 376 F. App’x 630 (7th Cir. 2010) (Hamilton, J., in chambers)).

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Recalling the Mandate

In extraordinary circumstances, an appellate court, by motion or on its own, may recall a mandate that has issued. Although Rule 41 does not expressly contemplate this authority and certain justices “have expressed doubt” about it, the U.S. Supreme Court has held that “the courts of appeals are recognized to have an inherent power to recall their mandates.” *Calderon v. Thompson*, 523 U.S. 538, 549 (1998). But, as the Supreme Court cautioned, because of “the profound interests in repose,” an appellate court is directed to “sparing[ly] use” this power, bearing in mind that “it is one of last resort, to be held in reserve against grave, unforeseen contingencies.” *Id.* Recall of the mandate is reviewed for an abuse of discretion. Among the extraordinary circumstances warranting recall are to resolve jurisdictional issues not previously raised so that the Supreme Court would not confront the issue for the first time without the benefit of a prior ruling on it, see *Alsamhoury v. Gonzalez*, 471 F.3d 209, 209–10 (1st Cir. 2006), and, less substantively but nonetheless important, to add instructions about post-judgment interest, see *Mars, Inc. v. Coin Acceptors, Inc.*, 557 F.3d 1377, 1378–80 (Fed. Cir. 2009).

Substantive Aspects of the Mandate

The mandate has substantive purposes as well. The mandate controls which court has jurisdiction over the case and what can further happen in the case. Particularly where the appellate court has ordered further proceedings, being aware of the mandate is critical to preparing for those proceedings.

The Mandate’s Effect on Jurisdictional Matters

Technically, an appellate decision is directed to the lower court from which the appeal arose so that the court can effectuate the appellate judgment. The mandate, therefore, transfers jurisdiction to the lower court to take that action. For instance, if a district court’s decision is affirmed on appeal, the mandate returns the case for entry of judgment to the prevailing party. The mandate terminates the appellate court’s jurisdiction, and that court cannot be asked for further relief.

Until the mandate issues, however, the appellate court’s judgment is not final, and that court retains jurisdiction to decide rehearing petitions or otherwise amend its opinion or judgment. During this same period before the mandate issues (and, indeed, since the initiation of the appeal), the district court lacks jurisdiction, except for matters unrelated to the merits of the appeal or that are merely procedural, such as requests for attorney fees and costs or conferences to schedule anticipated future proceedings.

The Mandate’s Effect on Remand Proceedings

The mandate’s substantive aspects are most noticeable when the appellate court orders further proceedings on remand. Once it receives the mandate, the district court may conduct those proceedings, but it must do so in accordance with what happened on appeal. Known as the “mandate rule,” the mandate informs the district court of what it must do to implement the appellate decision on remand and limits further proceedings to the scope of the mandate. The

lower court “must comply strictly with the mandate rendered by the reviewing court” and “may not deviate” from the mandate. *Huffman v. Saul Holdings Ltd P’ship*, 262 F.3d 1128, 1132 (10th Cir. 2001); *see also, e.g., United States v. Rivera-Martinez*, 931 F.2d 148, 150 (1st Cir. 1991) (“When a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand.” (emphasis in original)). Relatedly, the parties generally cannot raise issues on remand that were not raised in the initial appeal. *See, e.g., Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999) (“An issue that falls within the scope of the judgment appealed from but is not raised by the appellant in its opening brief on appeal is necessarily waived.”).

The mandate rule is a form of law of the case—distinguished largely by its (almost-always) mandatory nature. Law of the case, a judge-made doctrine, generally refers to lower-court decisions that the court, in its discretion, may later change in subsequent rulings, although as “law of the case,” such decisions generally are adhered to throughout the district-court proceedings. The mandate rule is more exacting. As its name suggests, it is “mandatory” that the district court follow the appellate court’s rulings. The district court cannot take actions that are contrary to the mandate or revisit the appellate court’s conclusions. Thus, the issues decided by the appellate court and within the scope of the judgment are deemed incorporated within the mandate and precluded from further adjudication unless specifically remanded to the district court to address. *Engel Indus.*, 166 F.3d at 1382–84. The district court, however, has discretion to take actions consistent with or not covered by the mandate.

But as is often the case, even the “mandatory” nature of the mandate rule has exceptions. In certain narrow circumstances, the district court may revisit issues decided on appeal or covered by the mandate. For instance, the mandate may not preclude a district court’s reconsideration where there are subsequent factual discoveries or changes in the law. *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414–15 (4th Cir. 2005) (finding reconsideration of an appellate determination appropriate if there is a dramatic change in law, significant new evidence, or blatant error that would result in serious injustice); *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 796 (7th Cir. 2005) (finding reconsideration of an appellate determination appropriate where there has been an intervening change in law). Thus, the judge-made mandate rule is not wholly inflexible. *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993) (“After all, the so-called ‘mandate rule’ . . . is simply a specific application of the law of the case doctrine and, as such, is a discretion-guiding rule subject to an occasional exception in the interests of justice.”). For the vast majority of cases, however, the mandate rule limits the scope of what the district court may do on remand.

Often, appellate courts use general language in ordering remands, remanding for “further proceedings consistent with” or “not inconsistent with” its decision. If so, interesting and critical issues can arise about the scope of those proceedings. In these instances, the ministerial role of the mandate is significantly overshadowed by its ability to affect substantive issues in the case.



Initially, it is up to the district court to determine the scope of the mandate, and the parties may want, or be asked, to present their views on what the district court may consider on remand. The ultimate determination, however, belongs to the appellate court—the court that issued the mandate. *See Engel Indus.*, 166 F.3d at 1382. Thus, an appellate court reviews de novo any district-court ruling on the scope of the mandate.

Conclusion

The mandate is often no more than the appellate court's opinion and judgment stamped with the word "mandate," and it issues at the end of an appeal, long after the hard work of briefing and argument is over. The mandate's effect on jurisdiction and further proceedings, however, makes it important to factor into the schedule and next steps of a case.

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