

# Appellate Practice

American Bar Association Litigation Section

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## The Mandate Rule: Determining and Enforcing Compliance with the Reviewing Court's Mandate

[Katayoun A Donnelly](#)

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In the midst of celebrating an appellate victory or regrouping after a loss, it seems easy to lose sight of the importance of the language in an appellate court's mandate. Lack of clarity and precise instructions in remand orders may result in disputes among the parties and issuance of orders in violation of the mandate during the remand proceedings, thus requiring additional intervention by appellate courts. This note discusses the standard of review and factors that appellate courts often consider in determining whether their mandates have been properly followed and the means available to address any noncompliance.

### Standard of Review

Appellate courts review de novo questions of interpretation of and compliance with an appellate court's mandate. *See, e.g., In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895) (“[I]t is for this court to construe its own mandate.”); *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 950 (Fed. Cir. 1997) (“Since here we interpret our own, not a trial court's order, it seems all the clearer that no deference is due.”); *United States v. Shipp*, 644 F.3d 1126, 1128 (10th Cir. 2011); *State v. Guder*, 293 Kan. 763, 765, 267 P.3d 751 (2012).

### Mandate Rule: A Specific Application of Law of the Case Doctrine

The mandate rule, a corollary to the law of the case doctrine, requires judicial and administrative bodies to comply with the mandate of the appellate courts that reviewed their orders. *See, e.g., In re Sanford Fork*, 160 U.S. at 255 (“When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is

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bound by the decree as the law of the case and must carry it into execution according to the mandate.”); *People v. Roybal*, 672 P.2d 1003, 1005 (Colo. 1983) (“The law of the case as established by an appellate court must be followed in subsequent proceedings before the trial court.”).

## Scope of the Mandate: General or Specific

Remands can be either general or limited in scope. *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999); *United States v. Lang*, 405 F.3d 1060, 1064 (10th Cir. 2005) (discussing the difference between specific and general mandates).

Limited remands usually create a narrow framework by providing specific instructions on how to proceed. *TransCanada Keystone Pipeline, LP v. Tanderup*, 305 Neb. 493, 503, 941 N.W.2d 145, 153 (2020) (“[W]hen a lower court is given specific instructions on remand, it must comply with the specific instructions and has no discretion to deviate from the mandate.”); *State Bank of Bishop v. Grebe*, 162 S.W.2d 165, 168–69 (Tex. Civ. App. 1942).

General remands, on the other hand, give district courts the authority to address matters as if the issue had not been tried. For example, if an appellate court issues a general mandate, the district court may “expand the scope of the resentencing beyond the issue that resulted in reversal and vacation of sentence.” *United States v. Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996). The U.S. Supreme Court long ago recognized this distinction. See *Rogers v. Hill*, 289 U.S. 582, 587–88 (1933) (finding that a “mandate would not prevent the District Court in the exercise of [its] sound discretion from allowing [a] plaintiff, were adequate showing made, to file additional pleadings, vary or expand the issues, and take other proceedings to enforce the accounting sought by his bills of complaint”).

Determining the scope of the mandate can be challenging if the appellate court does not provide specific instructions to clarify its intention. See, e.g., *Allard Enters., Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 571 (6th Cir. 2001) (disagreeing with the trial court’s analysis of whether the remand was general or limited in scope).

Courts and administrative bodies nevertheless must comply with the specific mandate they receive and “cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded.” *Sibbald v. United States*, 37 U.S. 488, 492 (1838); *State v. Collier*, 263 Kan. 629, 636, 952 P.2d 1326 (1998) (quoting *Sibbald*).

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It is therefore important, when faced with a mandate from an appellate court, to determine the scope of the mandate and to consider both the language and the spirit of the mandate, taking into account which issues had been properly raised and the reviewing court's respective ruling on each. Decisions abound on this issue:

- *Perkins v. Standard Oil Co. of Cal.*, 399 U.S. 222, 223 (1970) (“Our failure to make explicit mention in the mandate of attorneys’ fees simply left the matter open for consideration by the District Court, to which the mandate was directed.”)
- *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994); *Pangelinan v. Camacho*, 2011 Guam 9, ¶ 12 (Guam May 18, 2011) (“Absent specific instructions to the contrary, a trial court has the discretion to determine the nature of the required further proceedings.”)
- *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir. 1992) (Trial courts “may consider those issues not decided expressly or impliedly by the appellate court.”)
- *United States v. Pineiro*, 470 F.3d 200, 205 (5th Cir. 2006) (per curiam) (The mandate rule “prohibits a district court on remand from reexamining an issue of law or fact previously decided on appeal and not resubmitted to the trial court on remand.”)
- *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004) (“[T]he [mandate] rule bars litigation of issues decided by the district court but foregone on appeal or otherwise waived, for example because they were not raised in the district court.”); *United States v. Husband*, 312 F.3d 247, 250–51 (7th Cir. 2002) (same)

## Exceptions to the Mandate Rule

Exceptional circumstances can justify deviation from the mandate rule. Both state and federal courts have used some of the following factors to determine whether departure from the mandate rule is appropriate: (1) substantial change in controlling legal authority has occurred; (2) significant new evidence that was not earlier obtainable through due diligence has come to light; and (3) blatant error in the prior decision, if not corrected, would result in serious injustice. *See, e.g., United States v. Webb*, 98 F.3d 585, 587 (10th Cir. 1996) (discussing exceptions to the mandate rule); *Doe v. Chao*, 511 F.3d 461, 467 (4th Cir. 2007) (same); *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 812 n.14, 591 S.E.2d 728, 738 (2003) (same).

## Means to Remedy the Failure to Effectuate the Mandate

Litigants can file an appeal or a writ of mandamus to address any failure to give full effect to the appellate court mandate. *See, e.g., In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255–56 (1895). In rare cases, it might be also appropriate to request reassignment of the case to ensure compliance with the mandate. *See, e.g., Ute Indian Tribe v. Myton*, 835 F.3d 1255,

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1263–64 (10th Cir. 2016) (reassigning the cases was “required to ensure their just and timely resolution”).

### Conclusion

Resolution of disputes over what exactly the reviewing court ordered in its mandate can be costly. To avoid costly debates over the scope of the mandate, practitioners can request, in a petition for rehearing, that the appellate court provide more clarity regarding the scope of its mandate and that the appellate court both state its intention more explicitly and provide more specific instructions for remand proceedings. When necessary, this may protect your client from unnecessary disputes and additional attorney fees.