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## Preserving Error on Appeal in Texas Civil Cases: A Practical Guide for Civil Appeals in Texas Article Foreword.

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## ARTICLES

### PRESERVING ERROR ON APPEAL IN TEXAS CIVIL CASES: A PRACTICAL GUIDE FOR CIVIL APPEALS IN TEXAS

#### FOREWORD

JOHN CORNYN, III\*

The sporting theory of justice, the instinct of “playing the game according to the rules,” is deeply rooted in our Anglo-American adversary system of justice.<sup>1</sup> For this reason it is common to hear lawyers speak of judges as “umpires,” whose proper role is to see that the game is indeed played fairly, according to the rules.

For most persons, if asked the purpose of legal proceedings, my guess is they would say, “To find the truth.” Although some experienced lawyers would, in reverent and hushed tones, give the same answer, the search for truth necessarily competes with other goals of our system of dispute resolution.<sup>2</sup> Other important considerations include: cost effectiveness (both to the litigants and society); consumer satisfaction (including the catharsis that comes from having one’s day in court—win, lose or draw; and, the fundamental fairness of the proceeding), uniformity (that justice be “equal” under the law), and predictability (why gamble with a trial when you are able to predict the approximate results of judicial resolution of your dispute based on prior similar cases).

Of course, if we were to design a system of justice from scratch to

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\* Justice, The Supreme Court of Texas

1. Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, in S. LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 51 (1988).

2. R. POSNER, THE PROBLEMS OF JURISPRUDENCE 206 (1990).

achieve these goals, I seriously doubt we would design the adversary system of justice as we know it. But, in the immortal words of Justice Holmes: "The life of the law has not been logic, but experience." We stand on the shoulders of our forbears in the law and are largely left to incremental efforts to reform and improve our legal system, rather than effect revolutionary change. Indeed, the key rules of our "sporting theory of justice" are firmly ensconced in our United States and Texas Constitutions.<sup>3</sup>

Our English inheritance includes not only the substantive law, but also the rules by which the game has been played. Our inherited rules provided for numerous types of appeals, calling for different pleading and forms "full of dark mysteries, tripping and trapping the unwary."<sup>4</sup> Appellate procedure has remained technical and complex. In 1941, in apparent exasperation, Dean Roscoe Pound claimed he was "tempted to think that appellate procedure existed as a system of preventing the disposition of cases themselves upon their merits."<sup>5</sup>

In Texas, the advent of unified Rules of Appellate Procedure, effective September 1, 1986, controlling both criminal and civil appeals were viewed with an understandable mixture of suspicion and welcome.<sup>6</sup> There are those among the active appellate practitioners who believe the acronym for the Texas Rules of Appellate Procedure, TRAP, is an accurate one. However, one of the main goals of a separate unified codification was to reduce the complexity of the rules governing appeals. It should be of some solace to the harried appellate practitioner that the supreme court has repeatedly evidenced its desire in recent years to see cases decided on the merits instead of on procedural grounds.<sup>7</sup>

Nevertheless, a command of the rules by which the merits are presented will always remain an essential quality of successful appellate lawyers. Substantive law should control the disposition of a dis-

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3. See S. LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 136-39 (1988).

4. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 131 (1973).

5. R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 320 (1941).

6. Hambleton & Paulsen, *New Rules: A Pocket Introduction*, 49 TEX. B.J. 554, 554 (1986).

7. See, *Grand Prairie Indep. School Dist. v. Southern Parts Imports, Inc.*, 34 Tex. Sup. Ct. J. 743, 744 (June 19, 1991) (holding that court of appeals may not dismiss appeal because appellant filed wrong instrument required to perfect appeal without giving appellant opportunity to correct error).

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puted legal question, but the rules of procedure will always frame the issue for judicial determination. Knowledge of, and application of the rules governing preservation of error, for example, can determine whether the substantive question of law will be addressed by the appellate court or be deemed waived.

For those lawyers who rarely handle a case on appeal, as well as those who do so often, I commend John Cayce's article, *Preserving Error on Appeal: A Practical Guide for Civil Appeals in Texas*, to your use. It is a "user friendly" reference for experienced and inexperienced lawyers alike. I expect to find it helpful in my day-to-day work too.