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Remedy: Remand, Render, or Retreat?

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I. INTRODUCTION: WHY REMEDY MATTERS

Neither substance nor procedure, remedy effectuates the win. If you win a legal issue on appeal but the relief in the judgment does not mirror the legal analysis in the opinion, the win is not a win at all. The judgment is what establishes res judicata. If you are entitled to a reverse and render but only get a reverse and remand, your path to what seemed like victory may be stymied. Even where you seem to get a rendition in your favor, it may be a rendition in name only if the judgment is not sufficient. For example, if an appellate court purports to reverse and render a case in favor of a party because the jury's answers did not establish a defense to the party's claim, but the judgment states no amount of recovery, it is no final judgment at all. It cannot be enforced. In the end, it's a communications issue. A judgment is like assembly instructions while the opinion explains how the court arrived at its disposition. While there are many cases scrutinizing trial court judgments, fewer cases address remedy and appellate judgments, though each potentially makes lively appellate fodder. Many errors in drafting appellate judgments go unnoticed. They can be messy and procedurally complex to fix. Can you return to the trial court if the court of appeals has lost plenary power to act? Can the Supreme Court of Texas correct the error?

Preparing your written appellate arguments with relief in mind is like drafting the complaint and working up a case with the jury instructions in front of you. Remedy is the roadmap on appeal as well as the destination. Understanding that an "affirm" or "reverse" does not necessarily dispose of and conclude the case improves the cards in an advocate's hand. Because of the structure of the appellate rules, practitioners may miss an advocacy opportunity to help appellate courts structure relief and draft effective judgments that would give their clients exactly what they seek.

This paper discusses remedies in civil appeals in Texas appellate courts. Remedies in original proceedings, criminal appeals, or in federal courts are outside the scope of this paper.

II. CONFUSION ABOUT APPELLATE REMEDIES

As shown by opinions discussed in this paper and as confirmed (informally) by our discussions with both practitioners and justices about this topic, confusion remains among our Bar and our Bench regarding the nuances of appellate remedies. There are, of course, the easy scenarios—like an appellant's request for a complete reversal and remand for new trial or an appellee's request for a full affirmance of the judgment. But when an appeal involves requests for partial, alternative, or multi-faceted forms of relief, the proper procedures and best practices may be murky, even for experienced lawyers. We begin by exploring why this is the case.

A. Not a focus of legal education.

If your law school experience was similar to the authors', you learned many interesting and helpful things about substantive law and procedural practice—but how to preserve, request, and obtain a specific remedy on appeal was not among them. Perusing current course offerings at Texas law schools shows that "Remedies" courses are focused on legal damages and equitable relief a party may request at trial, while "Appellate" or "Written Advocacy/Legal Writing" courses are focused on legal research, document structure, grammatical style, and persuasive writing

techniques. These are all valuable topics. But appellate remedies appear to be left out or perhaps covered in only a cursory manner.

The lack of legal education focused on appellate remedies generally continues in practice. Although CLE papers on mandamus remedies are abundant, papers and presentations focused on the available outcomes in a regular appeal are not. That is not to say this paper stands alone. We commend and hope to build upon the following, excellent articles: *"In Light of this Court's Opinion…" Drafting Unambiguous Appellate Judgments*, Hon. Charles A. Spain & Kevin H. Dubose, THE APPELLATE ADVOCATE Vol. 26 No. 1 (Fall 2013); *Appellate Court Judgments or Strange Things Happen on the Way to Judgment*, Hon. Robert W. Calvert, TEX. TECH LAW REVIEW Vol. 6 (1974-1975).

B. The Devil's in the details.

The Texas Rules of Appellate Procedure have specific provisions regarding appellate remedies and judgments, as cited throughout the paper below. However, confusion exists because the rules provide only the "big picture" of what must be done to preserve and request various remedies, and what the appellate courts have authority to do in response. The application of these rules is case-specific with nuances turning on whether and how error was preserved in the trial court, the manner and substance of relief requested by both parties on appeal, and the discretion of the appellate court in crafting the appropriate judgment. Hence, the Devil's in the details.

C. Gaps between briefing, argument, and judgment.

Problematically, consideration of the appropriate remedy is often an afterthought on appeal. First, practitioners often fail to consider the details of a requested remedy in advance, and hence fail to dedicate sufficient time when preparing a brief to research how the requested remedy has been applied based on similar circumstances in other cases. As a result, briefs often provide only a conclusory prayer without supporting authority to assist the court of appeals in understanding why a particular remedy is appropriate in the case at hand. And even when multiple alternative remedies are requested, many briefs fail to provide the court any analysis about how the court should navigate through them and why the court should arrive at a particular result.

Second, by the time an appellate court prepares its judgment, the parties' briefs and oral arguments are in the rear-view mirror. The court has dedicated significant time to researching and debating the proper outcome on the substantive issues. But unless a party focused the court's attention on the appropriate remedy and reasons for it, the court will be left to navigate this final path without a roadmap. By that time, the court no longer has the opportunity to ask questions about the proper remedy at oral argument, and any court would be understandably hesitant to request further briefing on the remedy when all other issues have been otherwise determined.

This paper encourages both practitioners and courts to consider and analyze the details of the remedy earlier in their briefing and case resolution process.

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