WHAT DO YOU HAVE TO LOSE?
PERHAPS YOUR APPEAL, IF YOU DON'T USE ERROR PRESERVATION TO SELL YOUR CASE AT TRIAL

By

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With many thanks to

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Hannah edited an earlier version of this paper
(If you find mistakes, it's because Steve ignored Hannah's advice, or
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1. Error Preservation: What Do You Have to Lose? Perhaps the entire appeal, if you don't preserve error and sell your case at the trial court.

Sometimes, parties take positions because they figure they have nothing to lose by doing so. Appellants might pursue a point on appeal as to which error was arguably not preserved at trial for that reason. Appellees might feel the same about challenging whether error was preserved on an issue. But the numbers seem to indicate that, with a few exceptions, they are both wrong The numbers seem to show that, with a few exceptions, finding yourself on the losing side of an error preservation fight correlates with an increased likelihood you will lose on the merits of your appeal.

For those of us who might be future appellants–which includes everyone–we can remedy this problem by taking advantage of the opportunity that error preservation provides us to sell our cases in the trial court. Every time our opponent objects to what you do, or tries to put the bum's rush on us, or does something which they should not do, they give us the opportunity to show the trial court–and perhaps the jury–not only that they are wrong, but that they are improperly trying to avoid the justness of your cause. But if we fail to raise these complaints about our opponent's actions in the trial court, we will not have the ability to raise those complaints on appeal, unless they are among the very few complaints which can be raised for the first time on appeal.

So let's take a look at error preservation, the opportunities it provides us, and the problems which result from initiating an error preservation fight which we lose. Let's start by looking at the general error preservation rule. That rule, TEX. R. APP. P. 33.1, not only lays out the predicate for preserving error, but it gives us carte blanche to do so in a way that sells our cases to our trial court audience.

2. Carte Blanche for selling your case while you preserve error: TRAP 33.1.

The general error preservation rule in Texas (for both civil and criminal cases) is TEX. R. APP. P. 33.1. It became effective September 1, 1997.

When you look at TRAP 33.1, you see that it is not merely a protective device–it is a magic wand which transforms your opponent's challenge or tactic into an open-ended invitation to sell your case while preserving error. It allows you to point out to the court that you are *mandated* to complain to the court and to *state the grounds on which you seek the trial court's ruling with sufficient specificity* to make the trial court aware of your complaint. TRAP 33.1. Not only that, it allows you to point out to the court that you need a ruling from the court on your objection, and that you have to object if the trial court fails to rule.

Specifically, TRAP 33.1 requires that, as a prerequisite to presenting a complaint for appellate review, the record must show:

1) the complaint was made:

   a) to the trial court;

   b) by a timely request, objection, or motion;

2) the request, objection, or motion must have

a) stated the grounds for the ruling being sought

i) with sufficient specificity to make the trial court aware of the complaint; or

ii) the specific grounds were apparent from the context; or

b) complied with the requirements of the Texas rules of evidence or civil or appellate procedures

3) the trial court:

a) expressly or implicitly ruled on the request, objection, or motion; or

b) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

TRAP 33.1(a). On trials to the court, legal and factual sufficiency complaints may be made for the first time on appeal. TRAP 33.1(d).

Now, let's look at the error preservation opportunities to sell a case which we allowed to get away. First, we will look at the universe of error preservation decisions in civil appeals, to see what trends and tendencies in those cases might tell us, and then we will look at specific examples of opportunities that got away.

3. The Opportunities.

A. The Universe: civil cases decided by the courts of appeals in Fiscal Years 2014 and 2015.

According to my interpretation of the annual reports from the Office of Court Administration, in fiscal years 2014 and 2015, the courts of appeals issued 4,690 opinions on the merits in civil cases.[1] In those same fiscal years, I found 862 opinions from courts of appeals which dealt with error preservation issues in civil cases. Collectively, those opinions contained 1,022 holdings concerning error preservation. I won't tell you I caught all the error preservation rulings by courts of appeals in civil cases in fiscal years 2014 and 2015. But I'm pretty sure I caught almost all, if not all, the opinions which cited TEX. R. APP. P. 33.1 (605). I also know I caught a lot of opinions in those fiscal years which ruled on error preservation issues without citing Rule 33.1 (257).

B. Overwhelmingly, we took advantage of opportunities to sell our cases.

The numbers indicate that, as a rule, parties overwhelmingly agree as to what issues were raised in the trial court-i.e., we

[1] I include in this number the cases OCA designated as: Cases affirmed; Cases modified and/or reformed and affirmed; Cases affirmed in part and in part reversed and remanded; Cases affirmed in part and in part reversed and rendered; Cases reversed and remanded; and Cases reversed and rendered.

overwhelmingly agree as to what the case was about. In roughly 83% of the cases decided on the merits during 2014 and 2015, and roughly 95% of the issues in cases decides on the merits in those two years, the parties seem to agree there is no error preservation issue.

Why do I say that? Well, only about 18.4% of the cases decided on the merits during 2014 and 2015 involved error preservation–meaning that nearly 83% did not. As to the percentage of issues which involve error preservation, assume with me for a moment that, on average, civil appellate cases decided on the merits by courts of appeals during fiscal years 2014 and 2015 involved four issues. I cannot tell you that I kept track of how many issues were raised in the error preservation cases I profiled, much less in all the cases decided by the courts of appeals. But I can tell you that I published a summary of the issues raised in civil appeals in the Second Court of Appeals for about 12 years. Based on that experience, I believe that four issues per case is a safely conservative estimate. *See* *Issues Presented in Some Civil Cases Pending Before the Second Court of Appeals*, compiled and updated by Steven K. Hayes; copyright 2003 to present.

If each of the 4,690 opinions on the merits in civil cases handed down by appellate courts in Texas in 2014 and 2015 had 4 issues each (on average), that means the cases decided by those opinions raised about 18,760 issues. I only found 1022 issues (more or less) on which error preservation was challenged–i.e., only about 5% of the issues dealt with on the merits by the courts of appeals on civil cases in fiscal years 2014 and 2015. That means that the parties agreed that roughly 95% (or possibly more) of the issues on appeal were appropriately raised in the trial court. That's not bad.

C. However, when parties disagreed as to whether an issue was preserved, courts almost always held it was not.

The sobering news is that, in those 5% or so of the issues where the parties disagree as to whether error was preserved, the courts of appeals hold that error was not preserved about 81% of the time, for these reasons:

- 52.8%, complaint not raised at all in the trial court;
- 8.4%, complaint was not timely, or did not comport with other rules;
- 8.8%, failure to obtain a ruling or failure to make a record;
- 6.4%, complaint raised at trial is different than raised on appeal;
- 4.5%, complaint in the trial court was not specific enough.

Total: 80.9%, more or less.

Think about the foregoing numbers. More than half the time the courts of appeal held that error was not preserved because the complaint simply was not raised at all in the trial court. These were opportunities to sell our cases which we collectively missed. In yet another 19% of the error preservation decisions, the courts of appeals hold that error was not preserved because of what I refer to as "mechanical" deficiencies, to wit:

- the party did not raise the complaint in a timely fashion;
- the party did not get a ruling on

the complaint;

- the complaint failed to comply with the governing rule (e.g., TRE 103 concerning an evidentiary ruling, or TRCP 251-254 for continuances); or
- the record does not reflect the complaint or the ruling.

Nearly 10% of the time, the mere making of a record or obtaining a ruling might have preserved error.

Here is a table which compiles the foregoing numbers for the two years:

Table 1. Error Preservation Rates: Why Courts of Appeals Hold Error Was Not Preserved

Error was Preserved	Error Not Preserved	Obj. specific enough	Obj. not specific enough	Obj. not raised at all	Other (no ruling or record, not timely, d/n follow rules)	No record or no ruling	Issue on appeal diff. than at trial	D/n have to raise issue at trial
FYE 2014								
13.3%	81.3%	13.3%	5.8%	51.7%	18.9%	*	4.9%	5.4%
FYE 2015					Not timely, d/n follow rules**	No record, no ruling**		
10.4%	81.9%	10.6%	3.4%	53.7%	8.4%**	8.8%**	7.5%	7.7%
Both Yrs.								
11.7%	81.6%	11.8%	4.5%	52.8%	8.4%**	8.8%**	6.4%	6.6%

* I did not separately compile this data for FYE 2014; **Since data was not compiled separately for these components in FY 2014, these reflect only the 2015 data.

As you can see, these elements of error preservation remained remarkably constant over the two year. I will refer to these combined numbers for the two fiscal years as "The Unpreserved Average." First, we will talk about what that "Unpreserved Average" tells us about lost opportunities to sell our cases in the trial courts. Then we will look at error preservation decisions on specific topics to see if they might identify future opportunities for us to sell our cases while preserving error.

D. Other lessons from "The

Unpreserved Average": While in the trial court, make a record, get a ruling, and repeatedly contemplate what your case is about.

What do I take from "The Unpreserved Average?" First, "The Unpreserved Average" should remind us to make a record of, and get a ruling on, our objections. Rule 33.1 not only entitles us to both, it demands that we do both. That is a threshold reminder that might change the error preservation outcome a little less than 10% of the time. After all–why wouldn't we want a record to show us selling our case, and get some feedback from the judge on what we're selling? If nothing else, that feedback from the judge might give us a heads up about how to argue our case during the rest of the time it's in the trial court.

Much more than that, "The Unpreserved Average" suggests we might not spend as much time as we should thinking about all the issues our cases involve, or how to properly preserve and use them. When preservation was challenged, over 60% of the time parties apparently thought of an objection or complaint after it was too late to raise it. I am not going to say that lawyers can realistically anticipate every complaint that might arise at trial. No one can. And perhaps identifying the complaints involved in our cases 95% of the time is as much as we can realistically hope for.

But maybe we can do better. I categorized the error preservation holdings in 2014 and 2015. Here are those categories, listed in descending order (i.e., ranked in order of the most to the fewest error preservation holdings) for the two years combined:

Table 2. The Most Common Error Preservation Issues

Issue	2014	2015	Total	Running Total
Evidence	10.1%	11.1%	10.7%	10.7%
Jury Charge (incl. Jury Instructions)	5.8%	7.5%	6.7%	17.4%
Summary Judgment	7.9%	5.2%	6.5%	23.9%
Attorney's Fees	3.0%	5.4%	4.3%	28.2%
Legal Sufficiency	3.4%	4.5%	4.0%	32.2%
Affidavits	3.2%	3.6%	3.4%	35.6%
Expert Witness	3.9%	2.9%	3.3%	38.9%
Continuance	3.4%	2.0%	2.6%	41.5%
Discovery	3.0%	1.8%	2.3%	43.8%
Pleadings	1.7%	2.5%	2.2%	46.0%
Due Process	3.0%	0.9%	1.9%	47.9%

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Issue	2014	2015	Total	Running Total
Notice	1.1%	2.5%	1.9%	49.8%
Constitutional Challenges*	1.7%	2.0%	1.9%	51.7%
Factual Sufficiency	1.5%	1.4%	1.5%	53.2%
Sanctions	0.9%	1.8%	1.4%	54.6%
Jury Argument	1.5%	1.1%	1.3%	55.9%
Judgment**	1.5%	0.7%	1.1%	57.0%
Family Law***	3%	1.1%	2%	

* Not including Due Process claims

** This table does not list categories with fewer than 11 holdings for the two years.

*** I segregated some Family Law rulings because of the unique Family Law statutory and common law predicates they involved. I won't discuss those further in this paper.

Some things jump out from the foregoing table. The top twelve categories of error preservation issues–those which comprise nearly half of the error preservation issues the courts of appeals deal with–remained relatively constant, at least between the two years covered here. Seven of the ten most frequent error preservation categories relate to things it would seem lawyers have the time to prepare for (e.g., Jury Charge, Summary Judgment, Attorney's Fees, Affidavits, Continuance, Discovery, and Pleadings). That same thing can also be said about at least five of the next seven most common categories (Due Process and Constitutional Challenges, Notice, Sanctions, and Judgments). Maybe this indicates that it would not hurt for all of us to periodically spend some quiet time reflecting about our cases, and perhaps getting a second set of eyes or a sounding board to assist us in that exercise. Perhaps one way to couch our ongoing case reviews is to periodically ask ourselves the following questions on each aspect of our cases:

> What will I argue if the court disagrees with me on this?
>
> What will the other side argue in response to my position on this?
>
> What will the other side do to try to thwart my efforts to raise this issue, present this piece of evidence, or make this argument?
>
> How can I take these opportunities to sell my case?

Just a thought.

4. The Big Picture from looking at preservation rates as to the most common individual error preservation issues.

Error Preservation: What Have You Got To Lose?

I've compiled a table showing the preservation rates for the most common error preservation issues in Appendix 1. That table also compares, for each category, the error preservation rates for FYE 2014 and 2015. That table also shows whether, at least for the period from September 1, 2015 through May 18, 2016, the party which claimed error was preserved got won, or won in significant part, or lost on the merits of the appeal (I did not keep track of all those numbers in FYE 2014 and 2015). This comparison shows some things.

A. The appellate lawyer must ruthlessly evaluate the error preservation issue. Those who lose on the error preservation fight fair dismally on the merits.

Successful, seasoned appellate practitioners will advise their parties to ruthlessly pare their appeals down to their three or four strongest, most viable issues. We probably should follow that same advice when deciding whether to pursue an issue on appeal as to which there is an error preservation problem–and when deciding to challenge whether error has been preserved. It is a sword that cuts both ways. Let me tell you why I've come to that conclusion.

For this subsection of the paper, I want to set a baseline. In their exhaustive paper on why courts of appeals reverse trial courts, Lynne Liberato and Kent Rutter sliced and diced a year's worth of appellate decisions concerning why courts of appeals reverse–that is, why Appellants win. *See* Lynne Liberato and Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUSTON LAW REVIEW 994 (2012). Overall, they found there was about a 36% reversal rate on civil cases in Texas courts of appeals. *Id.*, at 999. For their study, a "reversal" meant the "court of appeals reversed a significant part [though not necessarily all] of the judgment," and an affirmance meant that the court of appeals at most "reversed or modified only a relatively small" part of the judgment. *Id.*, at 1024-1025. 36% is not a terribly high success rate–that's not an evaluation of the courts of appeals, that's just an observation that the odds are against the appealing party.

I do not have success rate numbers for 2014-2015 comparable to those Lynne and Kent compiled. But for the first nine months of FYE 2016 (through May 18, 2016), I kept track of whether the party claiming error was preserved won outright on the merits of the appeal, won in significant part on the merits, or lost outright on the merits. I realize that whether a party won in "significant part" an appeal is probably in the eye of the beholder, and the way I see that criteria may not match how Lynne and Kent viewed it. But what I can tell you is that, through the writing of this version of this paper (roughly May 18, 2016):

1) only about 1/3 of the most commonly seen error preservation issues correlate with a win on the merits at a level seen by Lynne and Kent in their study;
2) the average rate of success on the merits for the seventeen most commonly seen error preservation issues is about one-fifth less than the average success rate for appeals seen by Lynne and Kent; and
3) parties that unsuccessfully *challenge* error preservation see their opponents win on the merits at a rate

nearly twice the average success rate seen by Lynne and Kent.

The following tables show why I come to those conclusions:

Table 3. Correlating Error Preservation Issues With Success on Merits of the Appeals.

Issue	Percent of Error Pres. Decisions	Associated with success on the merits for party claiming preservation
Evidence	10.7%	22.0%
Jury Charge (incl. Jury Instructions)	6.7%	34.9%
Summary Judgment	6.5%	22.2%
Attorney's Fees	4.3%	39.1%
Legal Sufficiency	4.0%	37.5%
Affidavits	3.4%	25.0%
Expert Witness	3.3%	0.0%
Continuance	2.6%	14.3%
Discovery	2.3%	0.0%
Pleadings	2.2%	40.0%
Due Process	1.9%	0.0%
Notice	1.9%	0.0%
Constitutional Challenges*	1.9%	0.0%
Factual Sufficiency	1.5%	0.0%
Sanctions	1.4%	0.0%
Jury Argument	1.3%	0.0%
Judgment**	1.1%	42.9%
AVERAGE	**100.0%**	**30.3%**

* Not including Due Process claims

I feel certain that getting another year and a half so of data will affect the foregoing numbers. But, in the meantime, only five of the seventeen most common error preservation categories are associated with a winning percentage on the merits that rival even the average success rate found on appeal by Lynne and Kent. Those five categories are Jury Charge, Attorney's Fees, Legal Sufficiency, Pleadings, and Judgment, in

order of frequency. The remainder of the most commonly seen error preservation issues were associated with winning on the merits no more than about 2/3 as often as the average reported by Lynne and Kent–and, for this nine months' worth of decisions, most of the remainder were *never* associated with winning on the merits. And the *average* rate of success on the merits for the seventeen most common error preservation issues was about 30%–about a fifth less than the average success rate on appeal found by Lynne and Kent.

Let's flesh out this out a little bit by looking at the rates of success on the merits for those parties which unsuccessfully claim error was preserved, and which unsuccessfully challenge whether error was preserved, as compared to the average success rate on the merits found by Lynne and Kent in their study. The following table excludes error preservation decisions in Pro Se cases, cases involving the commitment of Sexually Violent Predators, and cases involving the termination of parental rights. Here is a table which compares the remainder of the error preservation docket for FYE 2016 with Lynne and Kent's study:

Table 4. Correlating Success on Error Preservation With Success on the Merits.

Category	**Complaining party's winning % (on the merits) on appeal.**
Overall Average, Liberato/Rutter, 2012	36%
Preservation cases in which error was not preserved, FYE 2016	23.6%
All error preservation cases, FYE 2016	36.6%
Preservation cases in which error was preserved, FYE 2016	62.3%
Preservation cases in which error did not have to be preserved FYE 2016	68%

See Appendix 3.B.

Folks, the foregoing is significant. Lynne and Kent found that an appeal nets a significant reversal 36% of the time. In FY 2015- 2016, when a party pursues an issue on which it failed to preserve error, it only wins significant relief on the appeal as a whole about 24% of the time–i.e., one third less frequently than the success rate found in Lynne and Kent's study. And when a party *unsuccessfully* contends that error was *not* preserved (either because error was preserved or because it did not have to be raised at trial), the likelihood its opponent will significantly prevail on the merits of the appeal skyrockets to 60-70%–nearly twice the reversal rate found in the study done by Lynne and Kent. So unsuccessfully challenging error preservation correlates with nearly doubling the success rate of your opponent.

What does that tell us about cases involving error preservation in the courts of

appeals? That both pursuing an issue which has not been preserved below, or challenging an issue as to which error has been preserved, correlates to losing on the merits at a much higher rate than normal.

I do not know if being on the wrong side of an error preservation issue disposes the courts against us, or whether it indicates that we have grasped at straws in a desperate situation. But I do know the above-mentioned correlations exist. And I think that correlation behooves us to carefully evaluate whether to pursue an issue where error preservation is an issue–or whether to challenge preservation on an issue which has probably been preserved. Or, perhaps, when we find ourselves in either of those situations, perhaps we should carefully, and candidly, evaluate the strength of our position on appeal, and talk to the client about the strengths and weaknesses of the case, and what options the client might have.

In ruthlessly evaluating whether to assert an issue as to which there is a preservation problem, or to challenge an issue which is probably preserved or did not have to be, consider the following observations from the patterns I've seen in the last two to three years.

1. Do not unwittingly succumb to that most frequent and perhaps unfulfilling of error preservation sirens, to wit, complaints about Evidence.

The most common error preservation topic is Evidence. Evidence accounts for about ten percent of the error preservation docket. Evidentiary complaints survive a preservation challenge on appeal only about 10% of the time, for all the reasons you would expect in what is usually a situation necessitating immediate reaction and constant diligence:

- thirty percent of the time, the complaint was untimely, did not comply with other rules, was not ruled on or on the record–nearly double the rate of the Unpreserved Average;
- nearly forty percent of the time, the complaint was not raised at all.

Keep in mind, too, that an evidentiary complaint will only succeed on appeal if we show an abuse of discretion, and show that the incorrect evidentiary ruling resulted in an erroneous judgment. *See* Sec. 5.E, *infra*. That does not happen terribly often–when an evidentiary complaint was challenged on error preservation grounds, the party claiming the evidentiary complaint was preserved obtained a favorable judgment from the court of appeals less than 20% of the time.

In a world where the courts of appeals tell us to limit the number of our issues to no more than six, and preferably as few as three, and with a huge hill to climb in order to prevail on this most frequently pursued, and overwhelmingly unsuccessful, error preservation issue, it makes sense to at least make sure that the complaint passes the mechanical requirements of TRAP 33.1. If your complaint about an Evidence ruling is questionable in any respect, you might be well off to place it at the top of your list to cull from your brief.

2. Complaints about factual sufficiency as to a jury verdict which have error preservation problems are as unfulfilling as complaints about evidence.

In a non-jury trial, factual sufficiency complaints can be raise for the first time on appeal. Not so in jury trials–in a jury trial, you *must* raise a factual sufficiency complaint in a motion for new trial, or it is not preserved. Tex. R. Civ. Pro. 324(b)(2).

The error preservation rate for a factual sufficiency complaint averages about 6.3%, and roughly 90% of the time the party claiming it preserved error as to a factual sufficiency complaint failed to obtain a judgment on appeal that was favorable in any respect.

3. A complaint about a continuance which has error preservation problems is not often associated with a favorable judgement for the party asserting the complaint.

Only about 20% of the time did the preservation-challenged party complaining about the granting or denying of a continuance obtain a judgment which was favorable in any respect. Nearly half of the preservation-challenged complaints about continuances failed because they did not satisfy the mechanical requirements of TRAP 33.1–that is, the complaint was not timely, did not comply with other rules, or the party did not get a ruling or make a record. Given the really poor success rate on appeal for preservation-challenged parties asserting a complaint about continuances, it really looks like appeals involving a preservation-challenged complaint about continuances are a bit desperate. Keep that in mind.

4. Similarly, if you have a preservation problem concerning a constitutional complaint, ruthlessly evaluate whether to raise that complaint on appeal.

In terms of decisions involving error preservation, 90-100% of the time Constitutionality and Due Process issues fail because they are not raised at all in the trial court, and (as you would expect) their error preservation rate is abysmal (3% or less, overall). Furthermore, the parties asserting a preservation-challenged complaint concerning a constitutional issue other than due process never got a completely favorable judgment on appeal, got a partially favorable judgment no more than about 18% of the time, and the due process complainers *never* obtained a favorable judgment on appeal.

But all of these complaints share one other common characteristic which lead to the desperation label: when error preservation was involved as to these complaints, the parties which asserted these complaints virtually never got a favorable judgment from the court of appeals (parties asserting Constitutionality and Due Process complaints never got a favorable judgment on appeal, and parties asserting an Evidentiary complaint got a favorable judgment on appeal less than 20% of the time).

B. None of the most common

error preservation issues see courts ruling that error was preserved more than about 1/3 of the time–and most of those issues find error preserved a tenth of the time or less.

If you look at the first column in Appendix 1, you will notice some pretty wild swings in error preservation rates between 2014 and 2015 on some issues. For example, error was preserved on legal sufficiency challenges 40% of the time in 2014, and not at all in 2015. But you will also notice that, for the three most common categories (the "Big Three"–Evidence, Jury Charge, and Summary Judgment) the error preservation rates were pretty consistent between 2014 and 2015. It could be that, unless you have 30-40 error preservation decisions a year (such as you have with the Big Three), you get swings like we see from year to year (if you only look at a group of 15 decisions, for example, one decision can swing the numbers by 6%).

But the point is, *none* of these categories do well, from an error preservation standpoint. Even the most promising issue–Jury Argument–saw error preserved only about 30% of the time. All the remainder of the most common error preservation issues saw error preserved 20% of the time or less, and most were at 10% or less. There are no common error preservation issues where the courts have indicated a tendency toward leniency.

C. Except for legal (and factual) sufficiency in a bench trial, none of the issues which can be raised for the first time on appeal are among the most common error preservation issues.

In addition to legal and factual sufficiency in a bench trial, there are other issues which can be raised for the first time on appeal (jurisdiction, etc.), and we will mention them later. But note that none of these other issues are really among the most commonly raised error preservation issues. Perhaps everyone understands they can be raised for the first time on appeal, and we should be surprised if they were more commonly involved in error preservation decisions.

D. Two of the six most frequent error preservation issues on appeal–Summary Judgment and Attorney's Fees–most often fail because the complaints were not raised at trial. This may be explained by the time constraints in Summary Judgment practice, and a failure to treat a claim for attorney's fees as a significant cause of action.

Summary Judgment and Attorney's Fees are the third and fourth most common error preservation issues on appeal, respectively, counting for nearly 11% of the error preservation docket. And yet, despite the frequency with which they appear on the error preservation docket, most of the time these complaints fail because they were not raised at trial (50% of the time Summary Judgment complaints fail because they are not raised at trial; that is true 80% of the time as to Attorney's Fees complaints).

As to Summary Judgments, I think a large part of the problem comes from the time constraints we face in summary judgment practice. Many times, we have three

weeks–often in the middle of an otherwise busy practice and in a case which is coming down to the trial or to other trial-related deadlines–to respond to a motion for summary judgment, and fully object to that motion and the evidence supporting it. And, despite the protections which discovery and special exceptions practice affords us, summary judgment practice may be the moment when our opponents' position first completely comes into focus for us. Three weeks in the middle of a hectic schedule is not necessarily the best time to think of everything which can thwart your opponents' arguments and tactics.

As to Attorney's Fees, I think we often do not fully embrace, or address, the fact that attorney's fees can comprise a really significant part of an adverse judgment. We need to approach, from the very beginning, the claim for attorney's fees as a separate, distinct, element-driven cause of action, and that it deserves as much of our attention as the other causes of action in the case. If we intend to thwart–or prosecute, depending on which side we are on–a claim for fees, we cannot treat that claim as an afterthought if we intend to preserve error for appeal.

The "failure to raise in the trial court" aspect of both of these error preservation categories reinforce the argument that we should periodically review and reflect on the issues in our cases, and think about what we will need on appeal as to each cause of action should the case go wrong in the trial court.

E. You have to make a record of your complaint and get a ruling on it. We see the failure to do so most frequently regarding complaints about affidavits, continuances, summary judgments, and jury arguments. Draft an order for, and use the order during, the hearing on the same.

With the exception of jury argument, these issues probably demonstrate more than any other areas the need to have a well-drafted order before your hearing, and to make sure the judge uses it at the hearing. Judges will tell you such an order is an invaluable road map for them, and an essential checklist for you. Not only does a signed confirm the judge has ruled, it helps remind you of all the things you need to cover, and should remind you to create a record of the same, as well.

Complaints about jury arguments are more difficult, heat of the moment, perceive-and-react-affairs. And this might indicate a need to have a template in your trial notebook, in bullet point or schematic format, which outlines the essentials for a complaint about an improper jury argument. This paper covers jury argument later. Make sure you make a record of the jury argument–and make sure the judge rules, on the record, in response to your complaint.

5. The most frequent error preservation categories: specific examples of additional opportunities to sell our cases.

The three categories with the most frequent error preservation holdings-evidence, jury, charge, and summary judgment-account for nearly one fourth of the total error preservation decisions in fiscal years 2014-2015. If we throw in the error preservation decisions involving affidavits, that rises to a little over 27% of those error preservation

decisions. The ten categories with the most frequent error preservation holdings account for nearly half of the error preservation decisions in fiscal years 2014-2015. The twenty most frequent categories account for nearly 60% of those fiscal years' error preservation decisions. So the remainder of this paper will deal substantively with those categories of error preservation which see the most activity. You may be surprised about the opportunities which exist to sell your case in these categories.

A. Affidavits.

Error preservation decisions concerning affidavits come up most frequently in the context of summary judgment practice. But since the use of affidavits also occurs in other settings, this paper addresses them as a standalone category.

Before discussing the affidavit cases for fiscal years 2014-2015, we really need to mention two great resources on affidavits, both of which address the same in the context of summary judgment practice. Those two resources are: David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 46 Hous. L. Rev. 1379 (2010) (this is the most recent iteration of this work), and Timothy Patton, *Summary Judgment Practice in Texas*, LexisNexis.

Now for the cases. In an error preservation context, lawyers are more likely to raise a complaint about an affidavit than they are any of the other most common error preservation categories, but they are less likely to make a record for that complaint or get a ruling on it. So remember, as to your complaints about affidavits:

- Prepare an Order;
- Make a record of the hearing; and
- Get the judge to sign the Order.

Don't be reluctant to get a hearing on your objections. If the other side's evidence is improper, then why should the judge allow that improper evidence to tarnish the justness of your cause? Perhaps an objection to an affidavit is accompanied by a "we'll sort it out later" attitude driven by time-constraints. Just remember–the time for sorting it out is at the hearing where the affidavit is used, if not before. And if you do not feel strong enough about the complaint to bring it to the trial judge's attention and get a ruling, then don't bring it up on appeal.

But there is a (perhaps) unexpected warning coming out of this area for the lawyer who submits an affidavit to the trial court: not all objections as to an affidavit have to be made in the trial court, and you might get to the court of appeals with a defective affidavit that requires a reversal of your judgment. In that regard, here is a summary of the substantive law concerning preserving error as to affidavits:

> Texas law divides defects in summary judgment affidavits into two categories: (1) defects in form and (2) defects in structure. For the first category, defects in form, the complaining party must make an objection in the trial court and obtain a ruling at or before the summary judgment hearing . . . . For the second category, defects in substance, the complaining party may raise the issue

for the first time on appeal.

Coward v. H.E.B., Inc., 2014 WL 3512800, 2014 Tex. App. LEXIS 7637, 5-6 (Tex. App.-- Houston [1st Dist.] July 15, 2014, no pet.).

Defects in form–as to which complaints must be made and ruled on in the trial court– include:

(1) a failure to affirm that assertions in the affidavit are true and correct. *Parker v. Hunegnaw*, 2014 WL 800998, 2014 Tex. App. LEXIS 2257, 15-17 (Tex. App.- Houston [14th Dist.] Feb. 27, 2014, no pet.);

(2) a failure to state that the affidavit is made on personal knowledge. *Fjell Tech. Group v. Unitech Int'l, Inc.*, 2015 Tex. App. LEXIS 966, 11-13 (Tex. App.–Houston [14th Dist.] Feb. 3, 2015); *CMC Steel Fabricators v. Red Bay Constructors*, 2014 WL 953351, 2014 Tex. App. LEXIS 2693, 15-17 (Tex. App.-Houston [14th Dist.] Mar. 11 2014, no pet.);

(3) the affidavit contains hearsay. *Cedillo v. Immobiliere Jeuness Establissement*, 2015 Tex. App. LEXIS 9017, *10-11 (Tex. App.– Houston [14th Dist.] Aug. 27, 2015); *Fjell*, 2015 Tex. App. LEXIS 966, at *11-13; *Clef Constr. v. CCV Holdings*, 2014 Tex. App. LEXIS 9534 (Tex. App.–Houston [14th Dist.] July 17, 2014, pet. filed);

(4) inconsistencies caused by errors made in affidavits. *Wakefield v. Wells Fargo Bank, N.A.*, 2013 WL 6047031, 2013 Tex. App. LEXIS 14018 (Tex. App.-Houston [14th Dist.] Nov. 14 2013, no pet.);

(5) the fact that the affiant is an interested witness, and her testimony is not clear, positive and direct, and free from contradictions and inconsistencies, thus failing to satisfy the requirement of Rule 166a(c) as to the type of affidavit on which a trial court could grant summary judgment. *Parkway Dental Assocs., P.A. v. Ho & Huang Props., L.P.*, 391 S.W.3d 596, 604 (Tex. App.—Houston [14th Dist.] 2012, no pet.); and

(6) a complaint that the affidavit is a "sham" in that it contradicted the affiant's deposition testimony. *Bowser v. Craig Ranch Emergency Hosp., L.L.C.*, 2015 Tex. App. LEXIS 6631, *5-6 (Tex. App.–Dallas June 29, 2015); *Am. Idol, Gen., LP v. Pither Plumbing Co.*, 2015 Tex. App. LEXIS 4431, 7 (Tex. App.–Tyler Apr. 30, 2015).

Stop and think about it–objections as to all these issues give you a chance to talk about evidence that is so weak that your opponent won't even properly prove it up. You can rail about this, in the context of talking about the justness of your case.

As to these objections about defects in form, don't just say the affidavit is defective. Since you must state the specific defect (e.g., that the affidavit lacked personal knowledge or contained hearsay) really stand up and shout about it. *Clef Constr.*, 2014 Tex. App. LEXIS 9534 at ___. And while it is true that Rule 33.1 "relaxe[d] the requirement of an express ruling and codifie[d] caselaw that recognized implied rulings," don't rely on such an implied ruling. Get the trial judge to rule expressly on this objection about evidence which is worthless. *Capitol Wireless, LP v. XTO Energy, Inc.*, 2014 WL 3696084, 2014 Tex. App. LEXIS 8028, 14-15 (Tex. App.–Fort Worth July 24, 2014, no pet.). In addition to the opportunity to get the trial judge engaged in your endeavor by

ruling, there is another practical reason you should not count on an implied ruling. Not only do informal reports from former staff attorneys reflect that courts of appeals are very reticent to find such implied rulings, none of the 2014 cases found such an implied ruling. "Merely granting or denying the summary judgment is, in and of itself, insufficient" to provide a ruling on an objection to a summary judgment affidavit. *Id.* Get. An. Express. Ruling. On. Your. Objection. If the trial court fails to rule, ask it to rule, file a motion requesting it to rule, and file a written objection to its failure to rule. *CMC*, 2014 Tex. App. LEXIS 2727, at *16-17; Rule 33.1(a)(2)(B).

Defects in substance–as to which complaints may be raised for the first time on appeal–include:

(1) that statements in an affidavit are conclusory. *Lenoir v. Marino*, 2014 Tex. App. LEXIS 12703 (Tex. App.–Houston [1st Dist.] July 2, 2015); *Coward*, at 5-6. This conclusory nature can be shown by the contents of an exhibit controverting the averments in an affidavit. *Akins v. FIA Card Servs., N.A.*, 2015 Tex. App. LEXIS 1729, 7-8 (Tex. App.–Amarillo Feb. 23, 2015, no pet.); *County Real Estate Venture v. Farmers & Merchants Bank*, 2015 Tex. App. LEXIS 1409, 3 (Tex. App.– Houston [1st Dist.] Feb. 12, 2015, no pet.); and

(2) that the evidence in the affidavit is legally insufficient. *Bastida v. Aznaran*, 444 S.W.3d 98, 105 (Tex. App.–Dallas 2014, no pet.);

(3) that the affidavit is unsworn, and hence amounts to no evidence. *Kolb v. Scarbrough*, No. 01-14-00671-CV, 2015 Tex. App. LEXIS 2943, 9-11 (Tex. App.–Houston [1st Dist.] Mar. 26, 2015, no pet. h.).

So, just because an affidavit you filed does not draw an objection in the trial court, don't think you are out of the woods. You may find out on appeal that the affidavit was impermissibly conclusory, or contained legally insufficient evidence. This means you have to be doubly sure that your affidavit passes muster.

B. Attorney's Fees.

About 80% of the failures of parties to preserve error about complaints regarding attorney's fees came from failing to make any objection at all about the same in the trial court. I wonder if this reflects some innate reluctance to challenge the testimony of another lawyer. Examples of objections concerning attorney's fees which you will fail to preserve if you do not present them to the trial court include the following:

(1) a failure to segregate fees between claims on which fees are recoverable and those on which they are not. *Garcia v. Baumgarten*, No. 02-14-00267-CV, 2015 WL 4603866, 2015 Tex. App. LEXIS 7878, *19-20 (Tex. App.-Austin July 30, 2015, no pet.); *Parham Family L.P. v. Morgan*, 434 S.W.3d 774, 791 (Tex. App.- Houston [14th Dist.] no pet.);

(2) a party's failure to comply with the applicable attorney's fee statute. *Enzo Invs., LP v. White*, 468 S.W.3d 635, 651 (Tex. App.-Houston [14th Dist.] 2015, pet. denied) (this includes a claim that fees cannot be recovered under TCPRC 38.001 against a partnership); *Coffin v. Bank of Okla.*, 2014 WL 198410, 2014 Tex. App. LEXIS 578, *2 (Tex. App.-Dallas Jan. 16, 2014, no pet.).

This would include a complaint that a party failed to present the claim as required by the attorney's fees statute. *Cannon v. Castillo*, 2014 WL 3882190, 2014 Tex. App. LEXIS 8656, 7-8 (Tex. App.–Eastland Aug. 7, 2014, no pet.). It would also include a complaint that a party failed to serve a copy of an attorney's fee affidavit under TCPR Sec. 18.001(d). *Jamshed v. McLane Express Inc.*, 449 S.W.3d 871, 884 (Tex. App.-El Paso 2014, no pet.);

(3) a complaint that the party did not incur fees, or that fees were excessive. *Tom Bennett & James B. Bonham Corp. v. Grant*, 2015 Tex. App. LEXIS 2639, 85 (Tex. App.–Austin Mar. 20, 2015); *Davis v. Chaparro*, 431 S.W.3d 717, 727 (Tex. App.-El Paso 2014, pet. denied); and

(4) that the copies of time records supporting the fees were redacted. *Bosch v. Frost Nat'l Bank*, 2015 Tex. App. LEXIS 7481, *18 (Tex. App.–Houston [1st Dist.} July 21, 2015);

(5) that the jury, and not the judge, should make the finding about reasonable and necessary attorney's fees. *Jefferson County v. Ha Penny Nguyen*, 2015 Tex. App. LEXIS 8052, *74-75 (Tex. App.–Beaumont July 31, 2015); and

(6) the method for calculating fees. *Dias v. Dias*, 2014 Tex. App. LEXIS 12676, 30-31 (Tex. App.–Corpus Christi Nov. 25, 2014).

Also, if you are an attorney ad litem and want your fees, ask for them in the trial court; otherwise, you will not have preserved an objection as to the trial court's failure to award you fees. *In re Estate of Velvin*, 2013 WL 5459946, 2013 Tex. App. LEXIS 12267 (Tex. App.–Texarkana Oct. 1, 2013, no pet.).

C. Constitutional Challenges (and see Due Process, below).

An argument that a client's constitutional rights have been violated must be raised in the trial court or it is not preserved. In one respect, error preservation decisions involving constitutional issues are similar to decisions involving attorney's fees: of the more than 30 error preservation decisions in fiscal years 2014-2015 which involved a party complaining of a constitutional rights violation, all but two of those decisions held that error was not preserved because the party had failed to raise the complaint in the trial court.

If the constitutions of this nation or state protect your client, make sure you say so in the trial court. Those constitutions are the basis of our legal system(s), and if your case involves such complaints, you should never pass up an opportunity to say so.

Having said that, in the criminal sphere–and perhaps carrying over in the related civil area of forfeiture, and beyond–is the concept that the "constitutional prohibition of ex post facto laws has been held to be a *Marin* category-one, 'absolute requirement' that is not subject to forfeiture by the failure to object. *See Ieppert v. State*, 908 S.W.2d 217 (Tex. Crim. App. 1995). *See also Sanchez v. State*, 120 S.W.3d 359, 365-66 (Tex. Crim. App. 2003). On the other hand, an 'as applied' constitutional challenge to a statute's retroactivity is subject to a preservation requirement and therefore must be objected to at the trial court in order to preserve error. *Reynolds v. State*, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014)." *Tafel v. State*,No.

10-14-00384-CV, No. 10-14-00385-CV, ___ WL ____, 2016 Tex. App. LEXIS 9713, *103 (Tex. App. Waco Aug. 31, 2016) (Grey, C.J., dissent)

D. Continuance.

In fiscal years 2014-2015, parties were more effective at preserving error about continuances (or, more accurately, the lack thereof) than they were on all but two other issues, in part because they were more likely to raise a complaint about a continuance in the trial court as they were to raise a complaint about any other issue.

However, it does appear that parties may have let the circumstances surrounding the need for a continuance panic them a little bit in terms of dotting the i's and crossing the t's. For example, parties were more likely to fail to comply with the mechanical requirements of TRAP 33.1 (no ruling, no record, untimely complaint, fail to comply with other rules) concerning a complaint about continuances than they were as to any other error preservation category. So, with that in mind:

- make sure you comply with the requirements of Rule 251–i.e., file a written motion, and support it by an affidavit, or make sure the other party agrees to the continuance or the operation of law mandates the same. *Gonzalez v. Reyna*, 2015 Tex. App. LEXIS 6764, *4 (Tex. App.–Corpus Christi July 2, 2015); *Wakefield v. Wells Fargo Bank, N.A.*, 2013 WL 6047031, 2013 Tex. App. LEXIS 14018 (Tex. App.-Houston [14th Dist.] Nov. 14 2013, no pet.);
- make sure you make a record of the hearing on the continuance. *Gonzales*, 2015 Tex. App. LEXIS, *4; *Lane-Jones v. Estate of Jones*, 2014 WL 3587377, 2014 Tex. App. LEXIS 7900, 6-7 (Tex. App.–Houston [14th Dist.] July 22, 2014, no pet.); and
- make sure you get a ruling from the trial court. *Gonzales*, 2015 Tex. App. LEXIS, *4; *Brown v. Bank of Am., N.A.*, 2013 WL 6196295, 2013 Tex. App. LEXIS 14494 (Tex. App.–Dallas Nov. 25, 2013, pet. denied). This is always the safe bet, even though courts of appeals do seem to be inclined to find that a trial court implicitly denied a motion for continuance by proceeding with the hearing in which a continuance was sought. *Roper v. Citimortgage, Inc.*, 2013 WL 6465637, 2013 Tex. App. LEXIS 14518 (Tex. App.–Austin Nov. 27, 2013, pet. denied).

And keep in mind–not opposing another party's motion for continuance is *not* the same thing as joining in the motion and asking for the relief, and will not preserve a complaint that the trial court erred by not granting the continuance. *Heat Shrink Innovations v. Medical Extrusion Technologies*, 2014 Tex. App. LEXIS 11494, 25-26 (Tex. App.–Fort Worth Oct. 16 2014).

There was one other indication that parties may have let a sense of panic adversely affect their continuance motions: as compared to "The Unpreserved Average," parties complaining on appeal about a continuance ruling were more likely to pursue a different issue on appeal than was true on all but one other error preservation category (i.e.,

the Jury Charge).

So, for purposes of pursuing a continuance, the lesson here might be to take a moment, make sure you're thinking about all the reasons a continuance should (or should not be) granted, make sure you have complied with Rule 251, and then make sure you make a record and get a ruling from the trial court. And let the trial court know why the justness of your case will not see the full light of day unless you have a little more time.

E. Discovery.

We do a little worse preserving complaints about discovery than we do with the Unpreserved Average, largely because we don't raise the complaint in the trial court, or fail to do so in a timely fashion and in keeping with specific pertinent rules. So remember, object to the discovery request before the discovery becomes due. *In re Lowery*, No. 05-14-01509-CV, 2014 Tex. App. LEXIS 13633, 7-8 (Tex. App.–Dallas Dec. 18, 2014, no pet.). If you have not gotten something in discovery which you requested, file and have the motion to compel heard and ruled on prior to the pertinent trial or hearing on the motion for summary judgment. *Lewis v. Ally Fin. Inc.*, No. 11-12-00290-CV, 2014 Tex. App. LEXIS 13004, 11-12 (Tex. App.–Eastland Dec. 4, 2014, no pet.). If deadlines in rules, statutes, or scheduling order make discovery impossible to comply with, ask for a continuance or to reset deadlines, where possible–otherwise, you will waive your complaint about those deadlines interfering with discovery. *St. Germain v. St. Germain*, No. 14-14-00341-CV, 2015 WL 4930588, 2015 Tex. App. LEXIS 8633, *13-15 (Tex. App.–Houston [14th Dist.] Aug. 18, 2015, no pet.). If you failed to timely disclose discovery or identify witnesses, ask the court to find that there was good cause to timely supplement the discovery or that the failure would not unfairly surprise or prejudice the other parties–and remember that you have the burden to make that showing. *In the Interest of T.K.D-H*, 439 S.W.3d 473, 478 (Tex. App.–San Antonio 2014, no pet.), Tex. R. Civ. P. 193.6(a), (b).

F. Due Process.

In the two years covered by this study, when error preservation was at issue, no due process complaint was preserved. The reason they were not preserved is because none of them were raised at trial. No party asserting a challenged due process complaint got any kind of a favorable judgment on appeal. That makes due process complaints on appeal look, collectively, somewhat desperate. If you have a due process complaint, raise it in the trial court.

G. Evidence.

As mentioned earlier, evidentiary issues are the single biggest category of error preservation decisions. In addition to the error preservation decisions which involved affidavits (none of which are examined in this section), over ten percent of the error preservation decisions in FYE 2014-2015 involved evidentiary rulings (including decisions regarding affidavits raises that number to over 20%). There are at least 109 error preservation decisions in the two years covered by this study that involve evidentiary complaints. Studying those decisions is probably a paper in and of itself. We cannot cover all those decisions here.

But we can fairly say that the dynamics of how we fare on appeal regarding these issues should further incentivize us to try to anticipate, and prepare for, evidentiary problems. Such preparation can help us do two things better:

> 1) decide whether the evidentiary fight on appeal is worth the powder;
> 2) improve our chances at making an evidentiary objection which passes muster on appeal.

Let's take these in order.

Is the fight worth the powder? Now, no one can dispute that both objecting to improper evidence, and defeating an improper objection to your evidence, are important. Not only does such evidence impede, or enable (as the case may be), the telling of your story, error preservation practice allows you the opportunity to expound on the justness of your cause. But if we do not anticipate the particular evidentiary fight, then it is forced on us unexpectedly, and we have to react on instinct and fight back. This means that we don't have the time to analyze whether the fight is really worth it in the greater scheme of things. And that go-no go decision on the evidentiary fight is a very important part of the error preservation picture. Because, as Justice Michael Massengale pointed out in a presentation he and I made at the Advanced Civil Appellate Seminar of the State Bar in 2014, error on appeal "may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." TEX R. EVID. 103(a)(1), entitled "Rulings on Evidence." Not only that, appellate courts:

> (1) review a trial court's ruling on evidentiary matters on an abuse of discretion standard;
> (2) must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling; and
> (3) will not reverse a judgment based on a claimed error in admitting or excluding evidence absent a showing that the error probably resulted in an improper judgment.

Willie v. Comm'n for Lawyer Discipline, 2015 Tex. App. LEXIS 2466, 27 (Tex. App–. Houston [14th Dist.] Mar. 17, 2015). That is a very high threshold to cross. It does not mean you should not fight about evidentiary matters in the trial court. It does mean that, to the extent reasonably possible, you should pick the fights you really want to push, and avoid the ones that are not worth it.

Anticipating evidentiary problems helps you make sure you do what you should to win on appeal. Error preservation decisions emphasize two really interesting aspects of the "bang-bang" nature of evidentiary objections:

> (1) there are only three error preservation categories in which lawyers do a better job in raising some complaint in the trial court than they do concerning evidentiary complaints. This is not surprising–lawyers have an informed instinct that something is wrong about an evidentiary issue, and immediately react to the same, because they have to. However,
> (2) evidentiary complaints at trial are the least likely of any of the error preservation categories to be specific enough, and lawyers are less likely on

> evidentiary complaints to comply with the mechanical rules of TRAP 33.1 (no ruling, no record, untimely, noncompliant with other rules) than they are on all but one other error preservation category (to wit, continuances).

So the message seems to be this: our initial reaction to evidentiary problems is pretty good, but we need to brush up on the individual evidentiary rules, and we need to follow through on getting a ruling. As Justice Massengale pointed out in the aforementioned presentation, Rule 33.1 requires that our complaints in the trial court satisfy the specific pertinent rules and statutes, and Rule 103(a)(1) specifically requires a *timely* objection, "stating the *specific* ground of objection, if the specific ground was not apparent from the context."

In terms of making a specific enough objection, be aware that "'a general objection to an insufficient predicate'" or the fact that you "did not 'think the entire predicate ha[d] been laid'" does not preserve an objection. *In the Interest of A.A.*, 2013 WL 6569922, 2013 Tex. App. LEXIS 14997 (Tex. App.-Houston [1st Dist.] Dec. 12, 2013, pet. denied); see also *Schreiber v. Cole*, 2015 Tex. App. LEXIS 5098, *15 (Tex. App.–Amarillo May 19, 2015).

So, anticipating potential evidentiary problems and challenges will not only help us decide whether the fight will really help our situation, but it will assist in making sure that, at least on appeal (and perhaps at trial), we win the fights we pick.

Once we decide the fight is worth having, what other problems do we face, in addition to not making our evidentiary objections specific enough? Well:

- **If your evidence is excluded, make an offer of proof.** Not only does Rule 103 require you to make such an offer, it requires you to make that offer "as soon as practicable, but before the court's charge is read to the jury." Remember, making that offer gives you a free shot at selling your case. Roughly 20% of the error preservation decisions relating to evidence saw the party fail to make an offer of proof. "Error may be predicated on a ruling that excludes a party's evidence only if the substance of the evidence was made known to the court by the offer, or was apparent from the context within which questions were asked. Tex. R. Evid. 103(a)(2); Tex. R. App. P. 33.1(a)(1)." *In re Commitment Lovings*, 2013 WL 5658426, 2013 Tex. App. LEXIS 12927, *2-3 (Tex. App.–Beaumont Oct. 17, 2013, no pet.); see also *Qui Phuoc Ho v. MacArthur Ranch, LLC*, 2015 Tex. App. LEXIS 9175, *15-17 (Tex. App.–Dallas Aug. 28, 2015). "'To preserve error concerning the exclusion of evidence, the complaining party must actually offer the evidence and secure an adverse ruling from the court.' *Perez v. Lopez*, 74 S.W.3d 60, 66 (Tex. App.—El Paso 2002, no pet.)." *City of San Antonio v. Kopplow Dev., Inc.*, 441 S.W.3d 436, 440-441 (Tex. App.- San Antonio 2014, pet. denied).

- **Get a ruling on your objection.** In

> roughly twelve percent of the error preservation decisions related to evidence, the party failed to obtain a ruling as to its objection. "An instruction to 'move along' is not a ruling." *Nguyen v. Zhang*, 2014 Tex. App. LEXIS 9311 (Tex. App. Houston 1st Dist. Aug. 21, 2014, no pet.); see also *Qui Phuoc Ho*, 2015 Tex. App. LEXIS 9175, *15-17. Get the judge involved and interactive–the court's ruling on your offer may give you insight into how to structure the rest of your case.

Finally, keep in mind that a "ruling on a motion in limine preserves nothing for review." *Blommaert v. Borger Country Club*, 2014 WL 1356707, 2014 Tex. App. LEXIS 3682, 6-7 (Tex. App.-Amarillo 2014, pet. denied); see also *Rivera v. 786 Transp., LLC*, 2015 Tex. App. LEXIS 6676, *10-11 (Tex. App.– Houston [1st Dist.] June 30, 2015). You must make a timely and specific objection when the offending evidence is offered at trial. *Id.*

H. Expert Witness.

Where courts of appeals have held that error as to expert witnesses was not preserved, both the reasoning and the frequency of those decisions pretty much track "The Unpreserved Average," with one exception. And that is something that should put fear in the heart of each of us who offers the testimony of an expert witness: an objection that an expert's testimony is "wholly conclusory [and] is essentially a no-evidence claim . . . may [be] raise[d] for the first time in his appeal." *In re Dodson*, 434 S.W.3d 742, 750 (Tex. App.-Beaumont 2014, pet. filed). In other words, as is true with affidavit testimony, you may not realize you have a problem with the conclusory testimony you offer until it is too late to do anything about it.

Contrast the objection about the conclusory nature of the expert's testimony with the objection that the expert's opinion is unreliable (at least one subset of which is that the expert's methodology is improper). These latter objections must be asserted, and a ruling obtained on them, before trial or when the testimony is offered. *Vega v. Fulcrum Energy, LLC*, 415 S.W.3d 481, 490-491 (Tex. App.–Houston [1st Dist.] 2013, pet. denied); *Transcon. Realty Investors, Inc. v. Wicks*, 442 S.W.3d 676, 681-682 (Tex. App.–Dallas Aug. 5, 2014, pet. denied). Similarly, you must also object at or before the time evidence is admitted, and obtain a ruling on your objection, if your complaint is that revealing the facts or data underlying the expert's opinion would violate Tex. R. Evid. 403 (the probative value of said facts is substantially outweighed by the danger of unfair prejudice, etc.) or 705 (said facts and data are unfairly prejudicial). *In re Commitment of Brooks*, 2014 WL 989700, 2014 Tex. App. LEXIS 2802, *1 (Tex. App.- Beaumont Mar. 13, 2014, pet. dismissed w.o.j.). For an example of how to preserve a complaint about the reliability of an expert, see *Acadia Healthcare Co. v. Horizon Health Corp.*, 2015 Tex. App. LEXIS 7683, *20-22 (Tex. App.–Fort Worth July 23, 2015).

I'll admit the whole conclusory/ reliability spectrum causes my head to hurt. Justice Harvey Brown and Melissa Davis made a presentation at the 2015 Advanced Civil Appellate Seminar, complete with paper, concerning issues related to Expert Witnesses.

I would encourage you to get that paper. Hon. Harvey Brown, Melissa Davis, *Eight Gates for Expert Witnesses: 15 Years Later*, SBOT 29th Annual Advanced Civil Appellate Practice (2015). Justice Brown also has an earlier paper on the subject. Justice Harvey Brown, *Expert Witness 201 Update*, SBOT 28th Annual Advanced Personal Injury Course (2012). Additionally, you should consider referencing the following materials: Carlos Edward Cardenas, James W. Christian, Michael Emmert, Rebecca Simmons, *How to Effectively Use Expert Witnesses Expert Witness 2014 Update*, SBOT 31st Annual Litigation Update Institute (2015).

I. Factual Sufficiency.

In a bench trial, you do not need to raise a factual sufficiency complaint in the trial court *at all*–that is, you can raise it for the first time on appeal. But you have to raise the complaint in the trial court in a jury trial, and there is only one way to preserve a factual insufficiency point in a jury trial–you *have* to raise it in a *motion for new trial*. *L.C. v. Tex. Dep't of Family & Protective Servs.*, 2015 Tex. App. LEXIS 5770, *3-4 (Tex. App.–Austin June 8, 2015); *W. B. v. Tex. Dep't of Family & Protective Servs.*, 2014 Tex. App. LEXIS 9173, 1-2 (Tex. App.–Austin Aug. 20, 2014, no pet.); TEX. R. CIV. PRO. 324(b)(3). And that may explain why, 87% of the time parties fail to preserve a factual sufficiency complaint because they fail: (1) to raise the complaint at all; or (2) to comply with the pertinent rule, i.e., Rule 324.

There are also other complaints that can only be preserved through a motion for new trial: that a jury finding is against the overwhelming weight of the evidence; the inadequacy or excessiveness of the damages found by the jury; incurable jury argument (see below); or any complaint on which evidence must be heard, such as jury misconduct, newly discovered evidence, or failure to set aside a judgment by default. Rule 324(b). We will talk about jury argument in a minute. The other bases which require a new trial motion to preserve error do not come up often enough to be included here.

A lot of times, the last thing you want at the end of the trial is another trial. You've told your story, and you are physically and mentally exhausted. But if the jury got it wrong, you are entitled to another go. In a jury trial, if you think the evidence is factually insufficient to support the verdict, file a motion for new trial saying so. Once again, this gives you the opportunity to rail about the justness of your case, and how wrong the jury was. Take advantage of that fact.

J. Judgment.

There are not many cases dealing with error preservation as to Judgments–it barely made the top seventeen category of error preservation categories, with ten decisions in two years. That may have something to do with the fact that, when Judgment formation time comes around, everyone's focus has really sharpened. The trial or summary judgment hearing has happened and–absent getting the bum's rush–we have had time to think about what to do to wrap it up for the appellate trip. Nonetheless, the fact that error preservation cases about judgments rank in the top seventeen show that we ought to take note of some of the lessons these cases offer.

Especially at this stage of the game,

think through fully what you will argue on appeal about why the Judgment is insufficient or incorrect–for example, the judgment gives more relief than was asked for. As a rule, those arguments must be made in the trial court to preserve them. *Teri Rd. Partners, Ltd. v. 4800 Freidrich Lane L.L.C.*, 2014 WL 2568488, 2014 Tex. App. LEXIS 5957, 18-19 (Tex. App.–Austin June 4, 2014, pet. denied). In fact, if the judgment is merely "voidable" (i.e., is contrary to a statute, or constitutional provision or rule) as opposed to "void" (i.e., the trial court has no jurisdiction), the challenge to the judgment must be raised in the trial court to be preserved. *In the Interest of M.L.G.J.*, 2015 Tex. App. LEXIS 2750, 8 (Tex. App.–Houston [14th Dist.] Mar. 24, 2015). And if you want something in the judgment–like an attorney's fee award–you have to ask for it in the trial court, or you will have waived the same. *Kelley/Witherspoon, LLP v. Armstrong Int'l Servs.*, 2015 Tex. App. LEXIS 7720, *14-15 (Tex. App.–Dallas July 27, 2015).

Furthermore, if you are the losing party, always make sure that you never sign a judgment in such a way that waives your right to appeal–I have a friend who will never even approve a judgment as to form only. Having said that, such a limitation on your signature probably preserves your appeal, especially if you make it clear you are objecting to the judgment. *Seeberger v. BNSF Ry. Co.*, 2013 WL 5434141, 2013 Tex. App. LEXIS 12108, *5, 13 (Tex. App.–Houston [1st Dist.] Sept. 26, 2013, pet. denied). Be especially careful about signing a document, like an Agreed Order, which consents to an Agreed Judgment. Doing so without reservation, and doing so without withdrawing your prior consent to the Agreed Judgment may waive any right you have to challenge the sufficiency (legal or factual) of the evidence supporting the Judgment. *Gonzalez v. Wells Fargo Bank, N.A.*, 441 S.W.3d 709, 713-714 (Tex. App.–El Paso 2014, no pet.).

There are some really good papers, as well some good things to think about regarding judgment formation. You should get and review those every time you begin creating or reviewing a draft of a judgment. On a pretty routine basis, either the SBOT Advanced Civil Appellate Seminar or the Appellate Law 101 Seminar include such papers. *See* Justice Brett Busby, Anne Johnson, *Trial Judgment Traps*, SBOT 27th Annual Advanced Civil Appellate Seminar (2013); Anne Johnson, *Translating a Jury Verdict into a Judgment*, SBOT 26th Annual Advanced Civil Appellate Seminar (2012).

K. Jury Argument.

Interestingly, there are also not many cases involving error preservation issues about jury argument. That may reflect the much-discussed decline in jury trials. But the following dynamics may indicate that (most of the time) we have given a lot of thought to, and react pretty well to, what should or should not come up in jury arguments:

- the relatively few error preservation decisions about jury arguments–it is the second least common category among the top seventeen, having only 13 decisions in two years; and
- the fact that courts hold that objections about jury arguments were preserved far more often than any of the other most frequent error preservation categories–which, at a

> 30% error preservation rate, may be like bragging that one is the least ugly man, but it is still something.

If the jury argument to which you object is curable, you have to assert the objection at the time the argument is made, and ask for an instruction that the jury disregard the argument, or you will waive it. *In re Tesson*, 413 S.W.3d 514, 524 (Tex. App.–Beaumont 2013, pet. denied). If the jury argument at issue is incurable, then you must raise that complaint no later than your motion for new trial, or you will waive it. TEX. R. CIV. P. 324(b)(5); *In re Lopez*, 2015 Tex. App. LEXIS 3506, 14-15 (Tex. App.–Beaumont Apr. 9, 2015); *Cowboys Concert Hall-Arlington v. Jones*, 2014 WL 1713472, 2014 Tex. App. LEXIS 4745, *62 (Tex. App. Fort Worth May 1, 2014, pet. denied). And if you invite the argument of the other side, then you really won't have a complaint on appeal. *In re Dodson*, 434 S.W.3d 742, (Tex. App.- Beaumont 2014, pet. filed). You can open the door on opening statement, by the way. *Pojar v. Cifre*, 199 S.W.3d 317, 338 (Tex. App.–Corpus Christi 2006, pet. denied).

In terms of what are improper (though perhaps not necessarily incurable) jury arguments, consider re-reading the comment to TEX. R. CIV. P. 269 (which lists at least 24 improper jury arguments). Where is the dividing line between curable and incurable jury arguments? That discussion is really beyond the scope of this paper. But, generally speaking, incurable jury argument is argument which: (a) by its nature, degree and extent, constitutes such error that an instruction from the court, or retraction, could not remove its effect; and (b) probably caused rendition of an improper verdict. Bradley M. Whalen, *Opening Statement and Closing Argument*, 4th Annual Advanced Civil Trial Strategies (2015), citing *Living Centers of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 680 (Tex. 2008) (*per curiam*). One court has said an argument was not incurable if "the argument was not so extreme that a 'juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that to which he would have agreed but for such argument.'" *In re Pilgrim*, 2015 Tex. App. LEXIS 6476, *10-11 (Tex. App.–Beaumont June 25, 2015). Here are some examples of incurable jury argument, listed by *Penalver* and reported by Mr. Whalen:

a) likening opposing counsel's arguments concerning limiting damages to a Nazi Germany program under which the elderly were used for medical experiments and murdered;

b) appealing to racial prejudice;

c) unsupported, extreme and personal attacks on opposing counsel and witnesses;

d) accusing opposing counsel of manipulating witnesses in the absence of evidence of witness tampering; and

e) comments which impugn the court's impartiality, equality and fairness.

Id. The following, while objectionable, have been held to not constitute incurable jury argument:

a) referring to an opposing party as a "liar, a cheat, a thief, and a fraud" where there are allegations and some evidence of deceit. *Business Staffing, Inc. v. Viesca*, 394 S.W.3d 733, 749 (Tex. App.–San Antonio 2012, no pet.);

b) violating an order in limine not to

mention a party's absence from the court house (harmless because a party's absence is obvious). *Id.* at 750;

c) violating an order in limine concerning mention of financial hardship should the jury fail to award damages. Id. at 750; and

d) violating an order in limine concerning settlements among parties. *Columbia Med. Center of Las Colinas v. Bush*, 122 S.W.3d 835, 862 (Tex. App.–Fort Worth 2003, pet. denied);

e) arguments that "'inferred that [client] and his attorney . . . were engaged in [] criminal activity' that involved 'funneling payments on the aircraft back to [the attorney's] criminal client." *Tanguy v. Laux*, 2015 Tex. App. LEXIS 6495, *12-17 (Tex. App.–Houston [1st Dist.] June 25, 2015).

See, Whalen, *Opening Statement and Closing Argument*, supra.

L. Jury Charge (including instructions).

The second largest category of error preservation decisions involves the jury charge, including instructions. We actually do nearly twice as well in preserving error in this category (as compared to "The Unpreserved Average") though that still means that nearly 80% of the time courts hold that attorneys do not preserve error as to the charge. Why? Surprisingly, our jury charge objections are nearly twice as likely, as compared to "The Unpreserved Average," to not be specific enough, and we are nearly three times as likely (as compared to "The Unpreserved Average") to think of a complaint on appeal which is different than the complaint we made at trial.

How can these seemingly incongruous patterns go hand in hand? First, not many jury charge objections can be raised for the first time on appeal–you either raise it at trial, or you lose it. Second, we do tend to focus to the charge. But mostly, I suspect most error preservation problems regarding the charge arise from the difficult nature of the charge itself, combined with the fact that-most of the time-the charge is put together very shortly after the evidence closes. The Supreme Court once said that "the process of telling the jury the applicable law and inquiring of them their verdict is a risky gambit in which counsel has less reason to know that he or she has protected a client's rights than at any other time in the trial." *State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992). *Payne* was an error preservation case under the former TEX. R. APP. P. 52(a), and I believe it was probably the seed bed of the language in Rule 33 which requires our complaints be specific enough to make the trial court "aware" of them. *Id.*, at 241.

What is the answer to preventing these problems with the charge? Goodness knows, we want to avoid these problems. After all, the charge is the place where we get the jury to tell us the facts that confirm the story we have tried to tell. Perhaps, on the difficult or unusual cases, we should schedule the charge conference–or conferences–such that they begin in earnest weeks before the trial starts. Parties hold the ability to make this happen by virtue of scheduling orders they can request from the trial courts. Doing so would address the daunting challenge faced by trial counsel which the Supreme Court noted in *Payne* over twenty years ago:

The preparation of the jury charge,

> coming as it ordinarily does at that very difficult point of the trial between the close of the evidence and summation, ought to be simpler. To complicate this process with complex, intricate, sometimes contradictory, unpredictable rules, just when counsel is contemplating the last words he or she will say to the jury, hardly subserves the fair and just presentation of the case. Yet that is our procedure. To preserve a complaint about the charge a party must sometimes request the inclusion of specific, substantially correct language in writing, which frequently requires that even well prepared counsel scribble it out in long-hand sitting in the courtroom.

Id., at 240.

Scheduling your jury charge conferences in advance of the trial will also give you the opportunity to discover what the trial court is inclined to do with your proposed charge, thereby potentially helping you preserve error. In that regard, consider the following example of some pre-trial rulings about spoliation instructions by the Supreme Court:

> In light of Wackenhut's specific reasons in its pretrial briefing for opposing a spoliation instruction and the trial court's recognition that it submitted the instruction over Wackenhut's objection, there is no doubt that Wackenhut timely made the trial court aware of its complaint and obtained a ruling. Under the circumstances presented here, application of Rules 272 and 274 in the manner Gutierrez proposes would defeat their underlying principle. *See Payne*, 838 S.W.2d at 241. Therefore, we conclude that Wackenhut preserved error.

Wackenhut Corp. v. Gutierrez, 58 Tex. Sup. J. 289, 2015 Tex. LEXIS 112, 7 (Tex. Feb. 6, 2015).

If you put an accelerated charge conference schedule in place, however, be ever vigilant as to any indication that the trial court has accelerated the deadline by which you must make your final objections to the charge. In fact, you might want to build a defined deadline for making such final objections into the scheduling order. Rule 272 allows those objections to be made "before the charge is made to the jury." But if the trial court says something like "tomorrow when we come in, I'm not going to mess with this [charge] any further," you may be shut out of making further objections to the charge before the case goes to the jury the next morning. *King Fisher Marine Serv., L.P. v. Tamez*, 443 S.W.3d 838, 842 (Tex. 2014).

There really is no replacement for periodically reviewing the rules governing jury charges (i.e., Rules 271-279). In a very brief and certainly not exhaustive nutshell, they set at least the following error preservation bars you must clear:

> Rule 272–if you don't make an objection to the charge, it is waived;
> Rule 274–you must point out distinctly the objectionable matter in the charge and the grounds of your objection. Any complaint is waived unless specifically included in the

objection.

Rule 276–submit written instructions, questions, and definitions. Get the trial court to refuse or modify them in writing, which fundamentally preserves your objection, etc.

Rule 278–you cannot complain about a failure to submit a question unless you submit one in substantially correct wording, and the same is true for the failure to submit instructions or definitions.

In addition to the foregoing thumbnail sketch of this area on which pots of ink have been spilled, here are some examples from Fiscal Year 2014 for you to consider in terms of making your objection sufficiently specific and timely:

- if a broad form question involves valid and invalid theories, make a *Casteel* objection as to form, either by citing *Casteel* (*Acadia Healthcare Co. v. Horizon Health Corp.*, 472 S.W.3d 74, 99 (Tex. App.–Fort Worth 2015, pet. filed)) or *Casteel's* test *(Benge v. Williams*, 472 S.W.3d 684, 709 (Tex. App.–Houston [1st Dist.] 2015, pet. filed)). *Burbage v. Burbage*, 2014 Tex. LEXIS 753, *18 (Tex. Aug. 29, 2014).
- if answering one question should be conditioned on the answer to another question, say so, and object if that is not done. *Trinity Materials, Inc. v. Sansom*, No. 03-11-00483-CV, 2014 WL 7464023, 2014 Tex. App. LEXIS 13884, *43 (Tex. App.–Austin Dec. 31, 2014, pet. filed); *Bishop v. Miller*, 412 S.W.3d 758, 782 (Tex. App.–Houston 2013, no pet.).
- if the other side improperly failed to segregate the evidence between recoverable and non-recoverable fees, object as to the jury question, and request an instruction as to the same. *Aon Risk Servs. Southwest v. C.L. Thomas*, 2014 Tex. App. LEXIS 13652, 26-27 (Tex. App.–Corpus Christi Dec. 19, 2014, no pet.); *Metroplex Mailing Servs. v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 901 (Tex. App.–Dallas 2013, no pet.).
- while *Wackenhut* may give you some protection, you might want to wear belt and suspenders just to be sure. For example, just because the trial court overruled your pre-trial objection to an instruction, don't stop objecting to it. Object to it every time the judge asks if you have objections, and don't submit proposed instructions on the subject without reservation or condition. *A & L Indus. Servs. v. Oatis*, 2013 Tex. App. LEXIS 13765, *30-31 (Tex. App.–Houston 2013, no pet.).
- if the damage question includes a period of time that was barred in part by the statute of limitations, you must object to the question in that regard. *Kamat v. Prakash*, 420 S.W.3d 890, 909-910 (Tex. App.- Houston [14th Dist.] 2014, no pet.).
- you have to submit a written instruction which you contend should be in the charge (*Lerma v. Border Demolition & Envtl., Inc.*, 459 S.W.3d 695, 700 (Tex. App.–El Paso 2015, pet. denied)) and object as to the failure to include the instruction (*Internacional Realty, Inc. v. 2005 RP*

West, Ltd., 449 S.W.3d 512, 532 (Tex. App. Houston 1st Dist. 2014, pet. denied)). That objection will not be preserved by you submitting a proposed question containing the instruction if the record does not demonstrate that the trial court ruled on the proposed question *Irika Shipping S.A. v. Henderson*, No. 09-13-00237-CV, 2014 Tex. App. LEXIS 13550, *22 (Tex. App.–Beaumont Dec. 18, 2014, no pet.). This is especially true if the trial court indicates it is not taking the time to read through objections which were filed. *Shamoun & Norman, LLP v. Hill*, 2016 Tex. App. LEXIS 744, *54-55 (Tex. App.-Dallas Jan. 26, 2016, no pet. history).

- if you feel a contract did not exist, then object on that basis to the court submitting *any question at all* which asks the jury to find whether a contract was breached. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, 2014 WL 3107507, 2014 Tex. App. LEXIS 5691, 11-17 (Tex. App.-Corpus Christi May 29, 2014), reversed at 482 S.W.3d 559, 571 (Tex. 2016); see also *Martin v. Beitler*, No. 03-13-00605-CV, 2015 WL 4197042 2015 Tex. App. LEXIS 6894, *20 (Tex. App.–Austin July 7, 2015, no pet.).

With regard to *Gulf Energy*, mentioned above, the Supreme Court reversed the court of appeals on a couple of error preservation issues. As to the holding mentioned above, the Court held that when the objection at trial ws "similar in substance" to the issue on appeal and therefore was preserved. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, 482 S.W.3d 559, 572 (Tex. 2016). On another issue, the Court held that error was not waived "by [the defendant] failing to request a definition of good faith in conjunction with the question" which the defendant had submitted on its good faith defense. *R.R. Comm. v. Gulf Energy Exploration*, 482 S.W.3d 559, 571 (Tex. 2016). The requested question "generally tracked the pertinent statutory language" of the good faith defense set out in Tex. Nat. Res. Code §89.045, as the case law required, but the defendant did not "request an accompanying extra-statutory definition" of good faith. *Id.* The Court held that it was "particularly loath to find waiver for failing to propose a definition of a statutory term when no case law provided explicit guidance on what the proper definition of that term should be." *Id.*

Finally, take advantage of the "Preservation of Charge Error (Comment)" which you can find in the PJC. COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES: GENERAL NEGLIGENCE, INTENTIONAL PERSONAL TORTS, WORKERS' COMPENSATION PJC 32.1 (2014 ed.).

M. Legal Sufficiency.

One does not need to object as to legal sufficiency in a *bench trial* in order to preserve a complaint to that effect on appeal. Rule 33.1(d). Therefore, it should come as no surprise that a lot of the error preservation rulings recognize that fact. Just remember, if you are the party with the burden of proof in a non-jury trial, your opponent does not have to object to the lack of evidence, and thus you

may not have a chance to fix this problem until the appeal, when it is too late to do so.

But, when we focus on jury trials, we see we do no better on preserving error on legal sufficiency claims than the Unpreserved Average. There are numerous ways to preserve a legal sufficiency challenge to a jury verdict, though you have to take advantage of at least one of them:

> To preserve a challenge to the legal sufficiency of evidence in a jury trial, a party must either (1) file a motion for instructed verdict, (2) file a motion for judgment notwithstanding the verdict, (3) object to the submission of the issue to the jury, (4) file a motion to disregard the jury's answer to a vital fact issue, or (5) file a motion for new trial.

W. B. v. Tex. Dep't of Family & Protective Servs., 2014 Tex. App. LEXIS 9173, 1-2 (Tex. App.–Austin Aug. 20, 2014, no pet.); see also *In re A.L.P.*, No. 11-15-00011-CV, 2015 WL 5192066, 2015 Tex. App. LEXIS 8817, *11 (Tex. App.–Eastland Aug. 21, 2015, pet. denied). But remember–if you file a motion for directed verdict claiming there is legally insufficient evidence, and the trial court denies the same, and then you (or any other party) proceeds to elicit more evidence–you have to renew your legal sufficiency complaint by one of the mechanisms recognized in Rule 324, or you will waive your objection. *In the Interest of A.R.M.*, 2014 Tex. App. LEXIS 3744, *13-14 (Tex. App. Houston [14th Dist.] Apr. 8, 2014, no pet.).

N. Notice.

We tend to not raise a complaint about notice, or not raise it in a timely fashion or in compliance with specific rules, more than is true with the Unpreserved Average. "To preserve a complaint of untimely notice under rule 21a, the complaining party must object under that rule, request additional time to prepare for the hearing, and obtain a ruling by the court on each objection or request." *Holland v. Friedman & Feiger*, No. 05-12-01714-CV, 2014 WL 6778394, 2014 Tex. App. LEXIS 12892, 16-17 (Tex. App.–Dallas Dec. 2, 2014, pet. denied). If you participate in a hearing without objecting as to the notice of the same, you will have waived any complaint as to the notice. One can preserve the lack of any notice at all (such as notice of submission of a summary judgment motion) by a motion for new trial after the hearing. *Ready v. Alpha Bldg. Corp*., 467 S.W.3d 580, 584 (Tex. App.–Houston [1st Dist.] 2015, no pet.).

O. Pleadings.

TEX. R. CIV. P. 90 provides that you will waive every omission, defect, or fault in a pleading which you do not specifically point out in writing and bring to the attention of the trial court before the instruction or charge to the jury, or (in a non-jury case) before the judgment is signed. If you have a problem with the other side's pleadings–including their insufficiency, or the failure to allege all conditions precedent to a claim or defense or required notice of the same–then object, except, and get a hearing and ruling on the issue. This would include a complaint about the timeliness of the filing of your opponent's pleading. *Lombardo v. Bhattacharyya*, 437 S.W.3d 658, 663 (Tex. App.--Dallas July 30, 2014, pet. denied). And then, when the trial

occurs, object to evidence, claims, and defenses which are not supported by the pleadings. Otherwise, complaining on appeal about the pleadings will not bear much fruit. If you file a motion to strike a late filed pleading, get a ruling on the motion–or, just as if you failed to file such a motion or object, you will not preserve your complaint. *Drew v. Elumenus Lighting Corp.*, 2015 Tex. App. LEXIS 4694, 13-14 (Tex. App.–Dallas May 7, 2015, pet. filed).

P. Sanctions.

I suspect it is difficult to stay focused when one is accused of sanctionable conduct, but you must do so to preserve error on the various issues involved in a sanctions situation. "A sanctions order is required to state the particulars of good cause supporting sanctions. Tex. R. Civ. P. 13. Failing to object to the form of the sanctions order, however, waives any error." *Grotewold v. Meyer*, 457 S.W.3d 531, 536 (Tex. App.–Houston [1st Dist.] 2015, no pet.), citing *Robson v. Gilbreath*, 267 S.W.3d 401, 407 (Tex. App.—Austin 2008, pet. denied). There is at least some authority for the proposition that a "motion for new trial [which] generally alleged that the trial court erred in assessing sanctions but did not detail or address any evidence which [plaintiff] believed supported his claims" was not sufficient to preserve error about the lack of the particulars of good cause in the sanctions order. *John Kleas Co. v. Prokop*, No. 13-13-00401-CV, 2015 Tex. App. LEXIS 3162, *34 (Tex. App.–Corpus Christi Apr. 2, 2015, no pet.). But remember–even if you complain about the lack of particularity in the order, just in case you lose on that point, you still must complain about the excessiveness of the fees or their lack of relation to the alleged sanctionable conduct to raise those points on appeal. *Shops at Legacy Inland v. Fine Autographs & Memorabilia Retail Stores*, No. 05-14-00889-CV, 2015 Tex. App. LEXIS 4724, 6-7 (Tex. App.–Dallas May 8, 2015, pet. denied). When you complain about that excessiveness, you do preserve that complaint. *Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 365 (Tex. 2014).

A party did preserve error when he "objected to the evidence submitted . . . in support of [the] sanctions request, specifically arguing that fees incurred before the misstatements were not related to her conduct." *Zuehl Land Dev., LLC v. Zuehl Airport Flying Cmty. Owners Ass'n*, 2015 Tex. App. LEXIS 3979, 29 (Tex. App.–Houston [1st Dist.] Apr. 21, 2015, no pet.). And at least one court has pointed out that a complaint "that there was no evidence to support the imposition of sanctions . . . . may be raised for the first time on appeal." *Wells v. May*, No. 05-12-01100-CV, | 2014 WL 1018135, 2014 Tex. App. LEXIS 1610, *1 (Tex. App.–Dallas Feb. 12, 2014, no pet.). Perhaps the same thing is true for a factual sufficiency complaint in a sanctions proceeding which was entirely a bench trial. Rule 33.1(d).

Q. Summary Judgment.

Here we are at the third of the big three categories of error preservation problems–Summary Judgments. And before launching in to the revelations of fiscal years 2014-2015, let me once again recommend to you the previously mentioned resources on summary judgment practice which you ought to consult: David Hittner & Lynne Liberato,

Summary Judgments in Texas, 46 Hous. L. Rev. 1379 (2010) (this is the most recent iteration of this work), and Timothy Patton, *Summary Judgment Practice in Texas*, LexisNexis.

Summary Judgment decisions comprise nearly 7% of all error preservation decisions covered by this paper. If combined with the Affidavit category–which this paper addressed on its own, above–Summary Judgments would account for about 10% of the error preservation decisions studied here.

With regard to summary judgment practice, we are twice as likely to fail to get rulings on objections or make a record than the "Unpreserved Average," and our objections are more likely than the Average to be untimely or fail to comply with specific rules. With potentially the entire lawsuit riding on the procedure, coming at a point when everyone has had time to figure out what the lawsuit is about, and with at least some period of time to sit and reflect on what we are doing, why do we do so poorly on these aspects of error preservation in summary judgment practice?

In the first place, the general summary judgment rule–which Rule 33.1 requires that we satisfy–in itself requires an express presentation of complaints to the trial court:

> The motion for summary judgment shall state the specific grounds therefore. . . . Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.

TEX. R. CIV. P. 166a(c). There are a myriad of issues you have to raise in the trial court on summary judgment to preserve them for appeal. Consider the following–and think about how each one would give you the opportunity to sell your case:

- if you contend that you have not had an adequate opportunity for discovery before a summary judgment hearing, you "must file either an affidavit explaining the need for further discovery or a verified motion for continuance." *Kaldis v. Aurora Loan Servs.*, 424 S.W.3d 729, 736 (Tex. App.- Houston [14th Dist.] 2014, no pet.); *Morgan v. BAC Home Loans Servicing, LP*, 2014 WL, 2507661, 2014 Tex. App. LEXIS 5931 (Tex. App.- Houston [1st Dist.] June 3, 2014, no pet.); *Correa v. CitiMortgage Inc*., 2014 WL 3696101, 2014 Tex. App. LEXIS 8029, 3-4 (Tex. App.–Fort Worth July 24, 2014, no pet.)

- if the motion for summary judgment was unclear or ambiguous, challenge them through special exceptions (*Coleman v. Prospere*, 2014 Tex. App. LEXIS 10546, 28-29 (Tex. App.–Dallas Sept. 22, 2014, no pet.)) and if the motion for summary judgment was filed outside the time limits in the scheduling order (Wilson v. Colonial County Mut. Ins. Co., 2015 Tex. App. LEXIS 4261, 9-10 (Tex. App.–Dallas Apr. 27, 2015, no pet.)).

- if the other side moves for summary judgment on one of your claims which the trial court has already dismissed, you have to raise the prior dismissal as an objection in the trial court to the propriety of the summary judgment in order to complain about the same on appeal. *O'Carolan v. Hopper*, 414 S.W.3d 288, 310-311 (Tex. App.–Austin 2013, no

pet.).

● to argue on appeal that a document in the summary judgment evidence was irrelevant and inadmissible, you have to make that objection in the trial court. *Brown v. Bank of Am., N.A.*, 2013 WL 6196295, 2013 Tex. App. LEXIS 14494, *8 (Tex. App. –Dallas Nov. 25, 2013, pet. denied); *Hernandez v. Gallardo*, 458 S.W.3d 544, 547 (Tex. App.–El Paso 2014, pet. denied) (same, hearsay); *Weeks v. Bank of Am., N.A.*, 2014 WL 345633, 2014 Tex. App. LEXIS 1093, *13 (Tex. App. Fort Worth Jan. 30, 2014, no pet.) (same, hearsay objection); *Johnson v. McDaniel*, 2014 Tex. App. LEXIS 5705 (Tex. App.- Amarillo May 28, 2014, no pet.) (same, lack of authentication). You also have to get a ruling on your objection. *Hernandez v. Gallardo*, 458 S.W.3d 544, 547 (Tex. App.–El Paso 2014, pet. denied). Generally speaking, as pointed out with regard to affidavits, defects in substance may be pointed out for the first time on appeal, but defects as to form must be raised in the trial court or they are waived. *Id.*; *Seaprints, Inc. v. Cadleway Props.*, 446 S.W.3d 434, 441 (Tex. App.–Houston [1st Dist.] 2014, no pet.).

● remember to refer to what this paper said, above, about affidavits, as your summary judgment practice will undoubtedly include affidavits, and the objections thereto.

● if a witness statement is not sworn to, you have to object to it on that grounds to preserve the complaint for appeal. *Gonzalez v. S. Tex. Veterinary Assocs.*, 2013 WL 6729873, 2013 Tex. App. LEXIS 15215, *9-10 (Tex. App. Corpus Christi Dec. 19, 2013, pet. Dism'd w.o.j.)

● get a ruling on your objections to summary judgment evidence *prior* to the rendition of summary judgment. *Johnson v. Bank of Am., N.A.*, 2014 Tex. App. LEXIS 11900, *9 (Tex. App.–Beaumont Oct. 30 2014, no pet.) And remember, rendition can come before the summary judgment is signed. Additionally, this ruling should come "at, before, or very near the time the trial court rules on the motion for summary judgment." *Marhaba Partners Ltd. P'ship v. Kindron Holdings, LLC*, 457 S.W.3d 208, 217 (Tex. App. Houston 14th Dist. 2015, pet. denied). Do not assume the court of appeals will presume that the granting or denial of a motion for summary judgment implies a ruling on your objections. *See* Patton, *Summary Judgments in Texas*, §6.10[4][e]. Some courts will presume such a ruling (Fort Worth); some will not (Austin, Beaumont, El Paso, Houston [14th] Dallas, Tyler); and some have gone both ways (Houston [1st and 14th], Waco, Texarkana, Corpus Christi). *Id.* None of the courts want to have to deal with you leaving this situation undone, and at best it will not inure to your benefit to do so. Get a ruling.

● if the trial court sustains the other side's objections to your summary judgment evidence, make sure that you have either responded to the other side's objection, or that you object to that ruling on the record and get a ruling on your objection–and it certainly wouldn't hurt to do both. *McMordie v. McMordie*, No. 07-14-00393-CV, 2015 Tex. App. LEXIS 7702, *10 (Tex. App.–Amarillo July 24, 2015, pet. denied); *Cunningham v. Bobby Anglin*, 2014 WL 3778907, 2014 Tex. App. LEXIS 8416, 7-9 (Tex. App.–Dallas July 31, 2014, pet. denied); *Montenegro v. Ocwen Loan Servicing, LLC*, 419 S.W.3d 561,

568-569 (Tex. App.-Amarillo 2013, pet. denied).

● if the trial court sustains the other side's motion to strike your response as late filed, object to that ruling and have the court rule on your objection. *Dotson v. Tpc Group*, 2015 Tex. App. LEXIS 2385, 9 (Tex. App.–Houston [1st Dist.] Mar. 12, 2015, no pet.);

● if you move for leave to file an affidavit late, get the motion heard and ruled on, but don't set it for hearing after the summary judgment hearing, and then cancel the hearing on your motion for leave after the MSJ is granted. *Bailey v. Respironics, Inc.*, 2014 WL 3698828, 2014 Tex. App. LEXIS 8003, 22-23 (Tex. App.–Dallas July 23, 2014, no pet.).

● if you fail to get an order from the trial court granting or denying your no-evidence motion for summary judgment, you will fail to have preserved error as to the trial court failing to grant the same. *Cantu v. Frye & Assocs., PLLC*, 2014 WL 2626439, 2014 Tex. App. LEXIS 6384, 36-37 (Tex. App.-Dallas June 12, 2014, no pet.).

● if the summary judgment granted by the trial court exceeds the scope of the motion to which it is directed, you have to raise that complaint in the trial court. *Haubold v. Medical Carbon Research Inst.*, 2014 WL 1018008, 2014 Tex. App. LEXIS 2863, *7 (Tex. App.-Austin Mar. 14, 2014, no pet.). The same is true if the other side files a motion to modify asking for the summary judgment order to grant more relief than requested in the summary judgment motion. *Vanderpool v. Vanderpool*, 442 S.W.3d 756 (Tex. App.–Tyler 2014, no pet.).

While we have to raise all the foregoing complaints in the trial court to preserve them, we know that there are some kinds of complaints which do not have be raised in the trial court in order to preserve them for appeal. Such complaints are few in number, but let's look at some examples of them. These complaints show us the kinds of things movants must do correctly, and their opponents can lay behind the log until the appeal, when it is too late for the movant to correct the deficiency:

● if you file a no-evidence motion for summary judgment, you must specify the element or elements of the claim or defense as to which you claim there is no evidence. A no-evidence motion which fails to do so "is insufficient as a matter of law and does not require an objection." *Jose Fuentes Co. v. Alfaro*, 2013 WL 6174488, 2013 Tex. App. LEXIS 14567, *18 (Tex. App. Dallas Nov. 26, 2013, pet. denied); see also *Corral-Lerma v. Border Demolition & Envtl. Inc.*, 467 S.W.3d 109, 120 (Tex. App. El Paso 2015, pet. filed).

● as traditional summary judgment movant, you have to make sure that your summary judgment evidence "prove[s] [your] entitlement to judgment as a matter of law on a traditional summary-judgment ground." *Thu Binh Si Ho v. Saigon Nat'l Bank*, 438 S.W.3d 871, 872-873 (Tex. App.–Houston [14th Dist.] July 22, 2014, no pet.); see also *Auz v. Cisneros*, 477 S.W.3d 355, 359 (Tex. App. Houston 14th Dist. 2015, no pet.). This is a different question than whether a particular piece of evidence should not have been admitted because it did not prove the

elements necessary to recover on the cause of action. *Id.* Put another way, the respondent can challenge "the legal sufficiency of the evidence supporting summary judgment" for the first time on appeal. *Murray v. Pinnacle Health Facilities XV*, 2014 WL 3512773, 2014 Tex. App. LEXIS 7642, 6-8, n. 4 (Tex. App.– Houston [1st Dist.] July 15, 2014, pet. denied).

● as movant, file all your evidence on time, or obtain leave of court to file evidence late. Failing to do one of those two things leaves you vulnerable on appeal to a complaint that your evidence should not have been considered. *Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150, 154-155 (Tex. App.- Houston [14th Dist.] 2014, no pet.).

A complete absence of authentication of evidence is a defect of substance which may be raised for the first time on appeal. *Hernandez v. Gallardo*, 458 S.W.3d 544, 547 (Tex. App.–El Paso 2014, pet. denied).

6. Some Unusual Error Preservation Situations You Will Never See–Until You Do.

Having dealt with the most common error preservation problems, we will wrap up by dealing with a few unusual error preservation situations, the kind of thing that you might practice your entire career and not see. Which means these things have no importance to you at all–until you do see them.

If you need to disqualify opposing counsel on a conflicts basis, file the motion to do so as soon as the conflict becomes apparent to you. This same thing can probably be said, no matter what your grounds for disqualification. As soon as the grounds "became apparent" to you–always a fact specific situation–move for disqualification. *In re Trujillo*, 2015 Tex. App. LEXIS 11394, *4-5 (Tex. App.-El Paso Nov. 4, 2015, no pet. h.). Cases indicate that waiting even 4 to 8 months will waive the disqualification. *Id.*, citing "*Buck v. Palmer*, 381 S.W.3d 525, 528 (Tex. 2012) (unexplained delay of seven months amounted to waiver); *Vaughan v. Walther*, 875 S.W.2d 690, 691 (Tex. 1994) (delay of six and a half months constituted waiver); *Enstar Petroleum Company v. Mancias*, 773 S.W.2d 662, 664 (Tex.App.–San Antonio 1989, orig. proceeding)(finding waiver where party waited four months to file motion to disqualify)." Waiting three and a half months may not be too long to wait to file the motion to disqualify-if the rest of the facts surrounding the delay are in your favor-but why run the risk. *See In re Kahn*, No. 14-15-00615-CV, 2015 Tex. App. LEXIS 12199, *6-7 (Tex. App. Houston 14th Dist. Dec. 1, 2015) (orig. proceeding).

If you intend to challenge the granting of a motion for new trial, file your petition for mandamus as soon as possible. Waiting seventeen months is too long–laches will bar your petition–and there are even cases which have held that delays of four to six months result in laches barring the mandamus. *In re Timberlake*, No. 14-15-00109-CV, 2015 Tex. App. LEXIS 12279, *6 (Tex. App.-Houston [14th Dist.] Dec. 3, 2015) (orig. proceeding).

If your opponent files an affidavit before trial asserting the reasonableness and necessity of their attorney's fees, don't

thank them for the free discovery. Challenge it in compliance with TEX. CIV. PRAC. & R. CODE §18.001. Otherwise, you may not get to cross-examine the other side's lawyer about the reasonableness and necessity of their fees. One court has even held that said affidavit can prove up the reasonableness and necessity of fees on appeal. *Hunsucker v. Fustok*, 238 S.W.3d 421, 432 (Tex. App.–Houston [1st Dist.] 2007, no pet.). If your opponent fails to timely serve an attorney's fee affidavit, you must raise that complaint in the trial court or you will waive it. *Jamshed v. McLane Express Inc.*, 449 S.W.3d 871, 884 (Tex. App.–El Paso 2014, no pet.).

7. How Error Preservation Plays Out in the Various Courts of Appeals.

Our various courts of appeals have no discretion as to which cases they decide and which they do not–they are not courts of discretionary jurisdiction. So it may be that this section would be more appropriately entitled "Decisions We Force On the Various Courts of Appeals." But let's take a look at these dynamics, and see what guidance they may offer in terms of how we raise or defend against error preservation arguments.

A. Error Preservation Land–a dark and foreboding place.

If you look at Appendix 2, you will see a table which compares and contrasts the error preservation practices of the various courts of appeals for FYE 2014. Appendix 3 does the same thing for the combined FYE 2014-2015. So comparing Appendix 3 to Appendix 2 gives you a feel for which way the trend went in 2015.

If you study the two tables, you also become aware of the danger which accompanies a trip to Error Preservation Land in any court. Even the brightest spots are dismally foreboding, and the darkest are places from which almost no one returns.

1. Avoid Error Preservation Land, as it is an unforgiving place. Very, very, very few safely pass through it in any court.

Corpus Christi, Fort Worth, and San Antonio are the most likely courts to find error was preserved, or that a complaint did not have to be raised in the trial court to raise it on appeal. But they do so only 25% of the time. Three other courts–the Houston First Court, Austin, and Amarillo–do so about 20% of the time. None of the remaining 9 courts do so more than 16%. Tyler and Eastland only did so 8% of the time, or less. Waco never did, though it did find a complaint did not have to be raised at trial in order to preserve error about 4% of the time.

Those are poor chances of success. This just underscores the need to evaluate whether you have preserved error–or had to–before raising an issue on appeal. If at least 75% of the time even the most lenient courts will find your complaint cannot be considered, Error Preservation Land is not a forgiving or promising place to visit.

2. Parties in one court seem to find themselves in Error Preservation Land far more often than parties in other courts.

Error Preservation: What Have You Got To Lose?

Nearly a third of the civil cases decided on the merits in the Fourteenth Court in Houston involve error preservation issues. That's at least fifty percent more than any other court of appeals, and nearly double that of its sister Houston First Court right across the hall. I don't know why that is, or what you can do about it–other than to be especially careful to vet your appeal for preservation issues before filing an appeal that might end up in that court.

At first glance, it appears that a Beaumont sees a greater percentage of its decisions on the merits involve error preservation than any court of appeals. However, if you eliminate the cases involving the commitment of sexually violent predators, the percentage of its decisions which involved error preservation would be about 13.86%, only about 2/3 the average of all the courts of appeals. I think it's legitimate to eliminate those cases from any analysis involving the Beaumont Court (except, of course, for cases involving the commitment of a sexually violent predator). Why? Because in FYE 2015, Beaumont handed down all but one of such decisions coming out of the courts of appeals, and in none of those decisions did Beaumont hold that error was preserved.

Three of the courts–El Paso, Dallas, and Fort Worth–deal with error preservation in about 20% of their civil decisions on the merits. With two exceptions, the remainder of the courts do so on about every 14-17% of civil cases decided on the merits. The exceptions are Eastland and San Antonio, in which only about 8-11% of the civil cases involve error preservation.

3. For all but two of the courts, TRAP 33.1 will guide your journey through Error Preservation Land at least two-thirds of the time–but the increasing number of error preservation decisions may be causing a downward trend in that tendency.

All but two of the courts expressly invoke and follow the light of TRAP 33.1 in at least two-thirds of their trips through Error Preservation Land. Even those two exceptions–San Antonio and the Houston 14th–expressly invoke TRAP 33.1 more than 50% of the time.

A court's failure to expressly invoke Rule 33.1 in addressing an error preservation question does not necessarily make its decision wrong. For example, if the particular objection in question did not comply with the requisites of another pertinent rule, like Rules 272, *et seq*, for a jury charge matter or Rule 166a for a summary judgment question, and it was on that basis that the court resolved the matter, then there was probably no harm in failing to mention Rule 33.1. And it is possible that the court addressed a general error preservation question without mentioning Rule 33.1, but it was clear the court followed the directives of the Rule.

Having said that, it does bear considering whether to distinguish authority cited by your opponent which does not rely on Rule 33.1. I won't go into the bases for that argument here, but you can see some of observations I have for that point in a prior paper on the subject. *See* Steven K. Hayes, *Conversations With the Court: A Theme for Preserving Error Under TEX. R. APP. P. 33.1*,

SBOT 28th Annual Advanced Civil Appellate Practice Course (2014), pp. 30-36.

And having said that, I will also say this: if you decide to challenge whether the other side has preserved error on a particular issue, it behooves you to tether your challenge to Rule 33.1, for two reasons: (1) it's legally correct to do so; and–at least as important, if not more so–(2) courts have shown that they are nearly *two and a half times as likely to find error was preserved if they do not invoke Rule 33.1 in their error preservation analysis*. *See* Appendix 3.A (Error Preserved 19.5% of the time when Rule 33.1 is not invoked, as compared to 8.6% of the time when it was).

Now, I have to admit that, in FYE 2015, the courts were only about twice as likely to hold error was preserved in a non-33.1 opinion than in an opinion relying on 33.1, which was decidedly different than in FYE 2014 (when the ratio was nearly three to one). And I also have to admit I have no explanation for the shift between the two years. The total error preservation decisions increased by about 20% in 2015 over 2014, the total decisions in which error was preserved actually decreased from 2014 to 2015, and virtually all the increase from 2014 through 2015 in holdings that error was not preserved occurred in cases not citing Rule 33.1. But I would still say that, if you intend to challenge error preservation, invoke Rule 33.1 in your argument.

4. There are some complaints you do not have to raise at the trial court in order to pursue them on appeal.

Courts found that about one in twenty issues which involve error preservation did not have to be raised below to be pursued on appeal. As you evaluate your appeal and the issues you will pursue, if you think you have hit upon something that is particularly strong that was arguable not raised below, screen it through the following filters before discarding it:

- lack of jurisdiction., one component of which can be standing. *Legarreta v. Fia Card Servs., N.A.*, 412 S.W.3d 121, 124 (Tex. App.–El Paso 2013, no pet.);
- mootness;
- most versions of sovereign immunity *Rusk State Hospital v. Black*, 392 S.W.3d 88 (Tex. 2012);
- the law of the case doctrine;
- attacks on void orders;
- defects in the substance of affidavits. As discussed earlier, these defects include:

(1) That statements in an affidavit are conclusory. *Coward*, at 5-6; and

(2) That the evidence in the affidavit is legally insufficient. *Bastida*, 444 S.W.3d at 105; and

(3) That the affidavit is unsworn, and hence amounts to no evidence. *Kolb*, at 9-11.

- questions about the judge's authority to hear the case, etc. *Sparkman v. Phillips*, 2015 Tex. App. LEXIS 2512, 4-5 (Tex. App.-Tyler Mar. 18, 2015);
- in a bench trial, legal and factual sufficiency points may be made for the first time on appeal. Rule 33.1(d);
- a complaint that an expert's testimony is "wholly conclusory, is essentially a no-evidence claim; consequently, it is the type of claim that an appellant may raise for the first time in his appeal." *In re Dodson*, 434 S.W.3d 742, 750 (Tex. App.-Beaumont 2014, pet. filed);

●a new rule of law announced after the trial court's decision;

●plain error;

●miscarriage of justice;

●fundamental error. However, if you intend to pursue a fundamental error argument, be aware of the following:

> In light of the strong policy considerations favoring the preservation-of-error requirement, the Supreme Court of Texas has called the fundamental-error doctrine 'a discredited doctrine." *See id.* [*20] At most, the doctrine applies when (1) the record shows on its face that the court rendering the judgment lacked jurisdiction, (2) the alleged error occurred in a juvenile delinquency case and falls within a category of error on which preservation of error is not required, or (3) when the error directly and adversely affects the interest of the public generally, as that interest is declared by a Texas statute or the Texas Constitution. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006); *In the Interest of B.L.D.*, 113 S.W.3d at 350-51.

In the Interest of M.M.M., 428 S.W.3d 389, 398 (Tex. App.–Houston [14th Dist.] 2014, pet. filed); see also *Cisneros v. Cisneros*, No. 14-14-00616-CV, 2015 Tex. App. LEXIS 2352, 4-6 (Tex. App.–Houston [14th Dist.] Mar. 12, 2015) or

●when the other side just doesn't notice that you have argued something your party did not argue below (the waiver of waiver). I would not count on this last one happening very often.

See Martin Seigel, *How to Beat Waiver Arguments*, 28 TEXAS LAWYER 12, June 18, 2012, at 22.

5. Your complaint at trial must be sufficiently specific–but what exactly does that mean?

Rule 33.1 provides that the complaint at trial must be "sufficiently specific to make the trial court aware of the complaint." Begging the question of when a complaint is "sufficiently specific."

I've got another paper that addresses this topic in far greater detail. Steven K. Hayes, *Conversations With the Court: A Theme for Preserving Error Under TEX. R. APP. P. 33.1*, SBOT 28th Annual Advanced Civil Appellate Practice Course (2014), pp. 42-44. But there are several tests used by the courts in determining whether a complaint was–or was not–sufficiently specific. The Supreme Court, for example, has indicated that when the objection at trial is "similar in substance" to the issue on appeal it will be sufficient. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, 2016 Tex. LEXIS 98, *29-30 (Tex. 2016). The Court has also held that a complaint was sufficient even though "it does not specify every reason" to support it. *Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 388 (Tex. 2008)(held, motion for new trial which said evidence was legally insufficient to support damage award preserved error. Trial court ordered a remittitur).

The courts of appeals have invoked some of the following tests, almost universally to hold that the complaint was *not*

sufficiently specific:

- whether the argument on appeal "comports with" the argument at trial. *L.H. v. N.H.*, NO. 02-15-00116-CV, 2015 WL 7820489, 2015 Tex. App. LEXIS 12319, *8 (Tex. App.–Fort Worth Dec.3, 2015).
- whether a complaint "relate[s] to" what was raised in the trial court. *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 312, n. 5 (Tex. App.– Houston [1st Dist.] 2011, no pet.) (dicta);
- whether the issues on appeal were "sufficiently similar" to the complaint at trial in order to be preserved. *Wilson v. Deutsche Bank Trust Co. Americas*, No. 01-12-00284-CV, 2014 Tex. App. LEXIS 9463, 8-9 (Tex. App.- Houston [1st Dist.] Aug. 26, 2014, no pet.).
- whether "those expressions [used at trial] do not accurately capture their argument" made on appeal. *Kamat v. Prakash*, 2014 Tex. App. LEXIS 881, *35-36 (Tex. App.- Houston [14th Dist.] Jan. 28, 2014, no pet.); or
- whether the party "principally argues" on appeal what it did in the trial court. *Howard v. State*, 2014 Tex. App. LEXIS 3051, 38-39 (Tex. App.–Corpus Christi Mar. 20, 2014, no pet.) (Held, error preserved).

However, one court held that a party could pursue a complaint on appeal even though the party did "not articulate the complaint in the same way [in the trial court] as they do on appeal." *SCC Partners, Inc. v. Ince*, 2016 Tex. App. LEXIS 5918, *14-15 (Tex. App. Fort Worth June 2, 2016).

Courts usually do not base the error a ruling that error was not preserved on the specificity question–the other elements of error preservation draw far more attention than specificity. But it is maddening to find a specificity holding when you need one. You might check out my other paper (mentioned above) as a starting point, or search for the foregoing standards (and cases that cite the foregoing authority) to see what pops up.

B. There may be something about a given court's docket that we have to allow for in analyzing its tendencies.

We've already talked about some characteristics of various courts of appeals in the foregoing sections. I will not necessarily repeat those comments here, but I will try to make a few observations about each court, below. Remember, none are very forgiving on error preservation, a couple seem to deal with error preservation much more than the others, and all of them invoke Rule 33.1 on the majority of their error preservation decisions–with all but a couple invoking Rule 33.1 in the vast majority of their decisions. So consider the following sections of the paper against that background.

Furthermore, to the extent there are variations between the courts of appeals, we may need to ask if there is some docket-driven explanation for those variations. For example: the Sexually Violent Predator component of the Beaumont Court's docket, discussed above. To get a more accurate picture of the Beaumont court for most civil cases, we need to eliminate the SVP component of the Beaumont court's docket.

Additionally, we might need to try to adjust for the effect, if any, on the analysis of a court's tendencies from cases transferred pursuant to docket equalization. I've run out of steam to try to identify, and adjust the analysis for, cases the Supreme Court transferred from one court to another for docket equalization purposes. But, for FY 2015, I looked at certain types of cases which are not subject to transfer for docket equalization purposes–i.e., arbitration cases, cases seeking dismissals in healthcare liability claims related to expert reports, Citizen Participation Act cases, and parental right termination cases. It appears that TRAP 33.1 is not invoked as frequently in error preservation decisions in those kinds of non-transferable cases as it is in all error preservation decisions (52.9% v. 67.5%). Appendix 3.D. That might explain why the analysis in this paper would show that a transferor court invoked TRAP 33.1 less frequently than a transferee court, but it would not explain why a court was less inclined to invoke TRAP 33.1 in non-transferrable cases. In error preservation decisions in the aforementioned non-transferable cases, courts also held that error was preserved only about half as often as in all error preservation decisions (5.7% to 10.4%). *Id.* Once again, that might explain why the analysis here showed a transferor court was less likely to find error preserved than a transferee court, but it does not answer why that tendency exists.

But the transferor/transferee message here is a little muddled–if we look at the tendencies of courts of appeals related to error preservation, we find (with a couple of minor exceptions) that both transferor and transferee courts are above and below the average, for any given tendency, in proportion to the percentage of all courts above and below average, and as in proportion to the relative numbers of transferor and transferee courts. See Appendix 3.C.

So I'm not sure what to say about the transfer docket factor, other than to speculate that it might signal parties are a little less adept than normal at preserving error in cases leading to interlocutory appeals.

If anyone has a suggestion as to reasons why the tendencies vary between courts of appeals, let me know and I'll see if I can drill down on it. But, otherwise, the search for the needle in fourteen haystacks will await some future epiphany.

C. Specific tendencies which may affect how you brief error preservation issues in the various courts of appeals.

Keeping in mind the foregoing observations that no courts hold error is preserved very often, and that the status of the court as a transferor or transferee court may have affected what the numbers reflect about its tendencies, here are the tendencies reflected by the error preservation decisions of the various courts for fiscal years 2014 and 2015.

1. First Court–Houston.

The First Court was a transferee court during 2014 and 2015. For that reason, it is not surprising that, as compared to the average for all courts of appeals (the "Unpreserved Average"), the First Court was about 1/4 more

likely to find that error was preserved than the average for all courts average–though at a 14.75% preservation rate, that's still not much comfort. The First Court came closest to the average on more categories than any other court. So, with regard to the 1st Court, your odds at error preservation are a little higher than average–though probably not enough to give you much comfort–especially given the transfer docket factor.

2. Second Court–Fort Worth.

The Second Court was a transferor court during 2014 and 2015, meaning it is a little surprising to find that it was the second most likely court to find that error was preserved, almost 60% higher than the Unpreserved Average–though at an 18% preservation rate, perhaps still not high enough to give you much comfort. What is interesting is that, in 2014, it almost *never* held that the objection at the trial court was not specific enough. The Second Court was the most likely court to hold that the complaint raised at trial was different than the issue raised on appeal–a tendency which might inform your error preservation challenge.

3. Third Court–Austin.

Like the Second Court, the Waterloo Court was also a transferor court during 2014-2015. It was the court most likely to hold that a complaint was not specific enough and the court most likely to hold that error was not preserved because there was no record or no ruling.

4. Fourth Court–San Antonio.

In the languid River City, the San Antonio Court sometimes transferred case to equalize its docket, and sometimes received transfer cases. It issues more opinions on the merits per Justice than any other Court (though the Third Court was very, very close, and several others were not far off). Yet it has the smallest percentage of error preservation issues of any court–only about 2% of the issues it faces. It ranks third to only the Corpus and Fort Worth Courts in terms of its tendency to hold that error was preserved (though, at a 17% preservation rate, that's not much comfort).

5. Fifth Court–Dallas.

The Dallas Court was a transferor court in 2014-2015. It almost never holds the complaint at trial was not sufficiently specific, but it is the court most likely to hold that a party failed to preserve error because it failed to satisfy one of the mechanical elements of Rule 33.1 (no ruling, no record, untimely, not compliant with other rules). If I had to guess, I would guess this latter dynamic suggests the Dallas Court may get more than its fair share of summary judgment proceedings–but that is just a guess.

6. Sixth Court–Texarkana.

Texarkana was a transferee court during 2014-2015. Given that fact, it is surprising that Texarkana was, other than the Waco Court, the court least likely to find error preserved. It is the second most likely court to find that error did not have to be raised in the trial court, and it very, very, very seldom holds that the mechanical elements of Rule 33.1 were not met.

7. Seventh Court–Amarillo.

Just to the northwest of Palo Duro Canyon, where the descendants of Charlie Goodnight's buffalo herd roam, the Amarillo Court is a transferee court which only sees error preservation issues in about one-seventh of its cases. While it is kind of average in terms of whether error was preserved or not, It is a court which finds itself on the far ends of the spectrum in terms of the reasons for those holdings:

- It leads the courts in holding that the complaint in the trial court was not specific enough, and in holding that the mechanical elements of Rule 33.1 were not met.
- It is the second least likely court to hold that the complaint was not raised at all in the trial court.
- It is the third least likely court to hold that the issue on appeal is different than that raised at trial.
- It is the most likely court to hold that the error did not have to be raised in the trial court to be pursued on appeal.

So, if you find yourself on the Llano Estacado, you might want to realize that the Amarillo Court is no stranger to Rule 33.1 or the elements of error preservation, nor is it a stranger to the concept that some complaints do not have to be raised in the trial court.

8. Eighth Court–El Paso.

From a different time zone than the rest of the State, the El Paso Court is a transferee court. It really didn't find itself at the extreme on any block in the error preservation grid, except it is the third least likely court to hold a party failed to preserve error because of a failure to satisfy the mechanical elements of Rule 33.1.

9. Ninth Court–Beaumont.

Beaumont is a transferor court–in fact, one of only two such courts on the border of Texas (if you consider the coast a border; Tyler is the other such court). As mentioned above, if you eliminate the cases involving the commitment of sexually violent predators, the percentage of the Beaumont court's decisions which involved error preservation would be about 13.86%. Making this same adjustment (at least for 2015) would also see Beaumont finding error preserved at a rate similar to the Unpreserved Average, finding that a complaint could be raised for the first time on appeal at about three times the Unpreserved Average, and finding error not preserved about 70% of the time–about ten percent below the Average. I did not keep the data for FYE 2014 as to which cases involved the commitment of sexually violent predators, so I cannot run the numbers for that year.

10. Tenth Court–Waco.

On the banks of the Brazos, Waco was also a transferor court. This makes it a little easier to understand that the Waco Court held the distinction of being the only court which never held that error was preserved in either year. It leads the pack in its tendency to invoke Rule 33.1, it never held the complaint in the trial court was not specific enough, and in 2015 never held error was not preserved because of the lack of a record or ruling. The Waco Court was second only to the Eastland Court in deciding cases in which a complaint asserted on appeal was not raised at all in the

trial court–it resolved nearly 70% of its error preservation cases on this basis.

11. Eleventh Court–Eastland.

Here in the home and (perhaps) final resting place of Old Rip, the Eastland Court is a transferee court. It had the second fewest number of cases involving error preservation issues, the third highest rate of invoking Rule 33.1, the third highest rate of finding error not preserved, the highest rate of finding error was not raised below, the lowest rate of finding error was not preserved because of a failure to satisfy the mechanical elements of Rule 33.1, and it never held error was not preserved because the issue raised on appeal differed from that raised at trial.

12. Twelfth Court–Tyler.

Tyler was like San Antonio–sometimes during 2014-2015 it was a transferor court, sometimes a transferee court. In Fiscal 2014, the Tyler Court was the second most likely court to invoke Rule 33.1, and the court second least likely to find error preserved.

13. Thirteenth Court–Corpus Christi/Edinburg.

Down by Copano Bay, the Thirteenth Court, as a transferee court, was the court most likely to find error preserved, though at 20%, that's not much comfort. It was also the court least likely to find that a complaint was not made in the trial court.

14. Fourteenth Court–Houston.

The Fourteenth Court, likes is sister First Court, was also a transferee court. But in nearly 30% of its opinions on the merits in civil cases, the Fourteenth Court deals with involve error preservation, making it nearly 80% more likely to see issues involving error preservation questions than its sister court in Houston, the First Court of Appeals. The Fourteenth Court is also the Court least likely to invoke Rule 33.1, though it does so in more than half its error preservation decisions. It is the court second most likely to hold that the issue raised on appeal was different than that raised at trial.

15. The Houston Parallel Universes.

I hate to make too much of a comparison between the two Houston Courts, but when two courts seemingly pull their dockets from the same counties, fill their benches with justices from the same part of the world, and sit across the hall from each other, it is intriguing to note when they seem to do things differently. Having said that, keep in mind that everything you are about to read may amount to nothing more than coincidence, how two years' dockets worked out, or the disparate nature of transfer cases.

As mentioned above, as compared to the First Court, the Fourteenth Court:

- was about 80% more likely to write on error preservation than the First Court;
- was only about 80% as likely to invoke Rule 33.1;
- was only about 2/3 as likely to find error was preserved;
- was five times more likely to hold that the issue raised on

appeal was different than that raised in the trial court.

So, for the years in question, did the Fourteenth Court have a higher bar on error preservation, or was it more inclined to look for error preservation problems than the First Court? I don't know that you can draw that conclusion–for example, the Fourteenth Court was more likely than the First Court to hold that a complaint was one that could be raised for the first time on appeal. But one other study does indicate that the Fourteenth Court may more strictly monitor its gates concerning permissive interlocutory appeals than the First Court, indicating that perhaps it views the various appellate thresholds as being higher than does the First Court. Rich Phillips and Justice Jane Bland pointed out that, at least through the first five years or so of permissive interlocutory appeals, the First Court was about three times as likely to accept a permissive appeal as was the Fourteenth Court. *See* Phillips, Richard B., Jr., and Bland, Justice Jane, *Strategies for Certified Interlocutory Appeals in State Court*, The University of Texas School of Law 26th Annual Conference on State and Federal Appeals (2015), pp. 6-7. The First Court allowed permissive interlocutory appeals 27% of the time (4 out of 15), while the Fourteenth Court only accepted such appeals about 10% of the time (1 out of 21).

As Cliff Robertson said in playing Cole Younger in *The Great Northfield Minnesota Raid*, it is a wonderment.

8. Other Error Preservation Resources.

This paper does not purport to be a dispositive error preservation discussion. There are volumes of good error preservation papers. They populate the tables of contents of the seminar materials for any Advanced Civil Litigation Seminar, Advanced Civil Appellate Seminar, or Appellate Law 101 Seminar conducted by the State Bar of Texas, or like materials for any State and Federal Appeals Seminar or Civil Litigation Seminar conducted by the University of Texas. Three in particular which you might want to make part of your trial notebook are these: Christian Crozier and Polly Graham, *Preservation of Error at Trial*, State Bar of Texas Advanced Trial Strategies (2015); Andrew Sommerman, *Preserving Error and How to Appeal*, State Bar of Texas 27th Annual Advanced Civil Appellate Practice Course (2013); and Steven K. Hayes, updated by Dabney Bassel, *Error Preservation Post-Trial: How to Avoid that Sinking Feeling*, SBOT Civil Appellate Practice 101 (2012). The Crozier/Graham and Hayes/Bassel papers are arranged chronologically, and might make suitable trial notebook materials. And, as I mentioned earlier, if you do summary judgment work, you really ought to obtain and use David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 46 Hous. L. Rev. 1379 (2010) (this is the most recent iteration of this work), and Timothy Patton, *Summary Judgment Practice in Texas*, LexisNexis.

If you have a discrete topic you would like to research for error preservation decisions, let me suggest this search matrix, which is what I use:

Take whatever error preservation subject you have, and (using your favorite legal search engine) add that to the following search phrases:

- 33.1 and –cv (and, to find decisions of the Texas Supreme Court, instead of –cv, use COURT (Supreme)); &
- "did not waive" or preserv! or waive! w/s error or object! or challenge! or "do not address" or "by consent" or "first time on appeal" or "not presented" or present! or "does not argue' or "argues only" or analogous or "comport with" and -cv and not 33.1 and –cv [and, instead of –cv, use COURT (Supreme) for decisions of the Texas Supreme Court).

If you are interested in criminal cases, you can replace the "-cv" with "-cr," and "COURT (Supreme)" with "COURT (Criminal)."

Finally, I want to mention one more resource, an error preservation blog I post every couple of weeks, which I call "Update on Error Preservation in Texas Civil Cases." In it, I compile the error preservation decisions I found in Texas civil cases for the prior couple of weeks, and I have them sorted by category and correlated to the various elements of Rule 33.1. There are usually 20-30 new error preservation decisions which you and your trial lawyers can scan relatively quickly, to see if anything has popped up which applies to things you find yourself doing. I always share it on my LinkedIn page (if you follow me there, you should get it), and there is a link to it on the resume page on my website.

9. Conclusion.

Hopefully, this paper will have given you some examples of things that will help you hone your error preservation skills. More than that, I hope it has helped you think about using error preservation not just as a way to keep your case alive on appeal, but to sell your case effectively at the trial court level. Good luck to you all!

APPENDIX

1. Preservation Rates for the Most Common Error Preservation Problems (2014-2015).

2. Comparing Individual Courts of Appeals to the Unpreserved Average (FYE 2014).

3. Comparing Individual Courts of Appeals to the Unpreserved Average (2014-2015).

3.A. Rates of Error Preservation, and Reasons Error Was Not Preserved, Correlated by Citing of Rule 33.1, for Fiscal Years 2014-2015.

3.B. The Correlation Between the Result on an Error Preservation Decision and the Result on the Merits (FY 2016, Non Pro Se, Non Sexually Violent Predator, Non Parent Child Relationship).

3.C. Correlating the Tendencies of Transferor Courts, Transferree Courts, and All Courts (2014-2015).

3.D. 2015: Comparing Averages on All Cases to Certain Non-transfer Cases (Arbitration, Healthcare Liability, Citizens Participation Act, Parent Child Relationship).

Appendix 1. Preservation Rates for the Most Common Error Preservation Issues in 2014-2015 (unless otherwise stated)													Sept. 1, 2015-May 18, 2016:			
Preservation Rate Range: 2014{}2015	**Rank**	**2014-2015 Category**	**Number of Decisions**	**Preserved**	**Not Preserved**	**Specific Enough**	**Not Specific Enough**	**Not Raised At All**	**Not timely, d/n comply with other rules***	**No ruling, no record***	**Issue Different Than at Trial**	**D/n have to raise at trial**	**Party Claiming Error Preserved Won on the Merits**	**Party Claiming Error Preserved Lost on the Merits**	**Party Claiming Error Preserved Won Sig. Part on Merits**	**Win + Win on Sig. Part**
13.3{}10.4%	0	AA-The Unpreserved Avg.	1023	11.7%	81.6%	11.8%	4.5%	52.8%	8.4%	8.8%	6.4%	6.6%	12.3%	69.7%	18.0%	30.3%
12.8{}12.9%	1	***Evidence***	***109***	***12.8%***	***85.3%***	***12.8%***	***11.0%***	***37.6%***	***17.7%***	***12.9%***	***6.4%***	***1.8%***	***13.2%***	***76.5%***	***8.8%***	***22.0%***
22.9{}19.0%	2	***Jury Charge***	***69***	***20.3%***	***78.3%***	***21.7%***	***8.7%***	***39.1%***	***7.1%***	***2.4%***	***17.4%***	***1.4%***	***12.3%***	***64.5%***	***22.6%***	***34.9%***
7.9{}10.7%	3	Summary Judgment	66	9.1%	81.8%	9.1%	3.0%	50.0%	10.7%	17.9%	0.0%	9.1%	11.1%	77.8%	11.1%	22.2%
7.1{}0.0%	4	Attorney's Fees	44	2.3%	93.2%	2.3%	6.8%	75.0%	0.0%	13.3%	2.3%	4.5%	0.0%	52.2%	39.1%	39.1%
40.0{}0.0%	5	***Legal Sufficiency***	***42***	***14.3%***	***38.1%***	***14.3%***	***0.0%***	***35.7%***	***0.0%***	***3.7%***	***0.0%***	***47.6%***	***25.0%***	***50.0%***	***12.5%***	***37.5%***
6.7{}10.0%	6	Affidavits	35	8.6%	71.4%	8.6%	5.7%	31.4%	10.0%	20.0%	2.9%	14.3%	8.3%	66.7%	16.7%	25.0%
11.1{}17.6%	7	***Expert Witness***	***35***	***14.3%***	***77.1%***	***14.3%***	***2.9%***	***57.1%***	***0.0%***	***0.0%***	***8.6%***	***8.6%***	***0.0%***	***83.3%***	***0.0%***	***0.0%***
25.0{}9.1%	8	***Continuances***	***27***	***18.5%***	***70.4%***	***18.5%***	***0.0%***	***25.9%***	***27.3%***	***18.2%***	***14.8%***	***0.0%***	***0.0%***	***85.7%***	***14.3%***	***14.3%***
10.0{}8.7%	9	Discovery	23	8.7%	87.0%	8.7%	0.0%	60.9%	17.4%	8.7%	0.0%	4.3%	0.0%	100%	0.0%	0.0%
12.5{}14.3%	10	***Pleading***	***22***	***13.6%***	***86.4%***	***13.6%***	***4.5%***	***63.6%***	***0.0%***	***7.1%***	***4.5%***	***0.0%***	***40.0%***	***60.0%***	***0.0%***	***40.0%***
0.0{}13.3%	11	Notice	19	10.5%	84.2%	10.5%	0.0%	63.2%	15.8%	0.0%	5.3%	5.3%	0.0%	100%	0.0%	0.0%
0.0{}9.1%	12	Constitution-ality	33	3.0%	97.0%	3.0%	0.0%	93.9%	9.1%	0.0%	0.0%	0.0%	0.0%	100%	0.0%	0.0%
0.0%{}0.0%	13	Due Process	16	0.0%	100.0%	0.0%	0.0%	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	0.0%	0.0%
14.3{}0.0%	14	Factual Sufficiency	16	6.3%	93.8%	6.3%	0.0%	75.0%	22.2%	0.0%	6.3%	0.0%	25.0%	75.0%	0.0%	0.0%
42.9{}16.7%	15	***Jury Argument***	***13***	***30.8%***	***61.5%***	***30.8%***	***0.0%***	***38.5%***	***0.0%***	***16.7%***	***7.7%***	***7.7%***	***0.0%***	***100.0%***	***0.0%***	***0.0%***
14.3{}0.0%	16	Judgment	11	9.1%	90.9%	9.1%	0.0%	72.7%	0.0%	0.0%	9.1%	0.0%	14.3%	42.9%	28.6%	42.9%

Entries in ***bold italics*** indicate a category which saw a higher error preservation rate than The Unpreserved Average.

* I did not separate these categories in 2014, so the numbers in these columns here are solely for FYE 2015; therefore, the individual reasons error was not preserved will not add up to the "Not Preserved" column for any given category.

	A	B	C	D	E	F	G	H	I	J	K	L	M
41	**Appendix 2. Error Preservation Tendencies (FYE 2014)**				**As a % of Error Preservation Decisions**								
42	Court Number	Court Name	% of Total Cases Which Are Error Preservation Cases	Error Preservation Rulings as a % of total issues*	Which Are Based on Rule 33.1**	In Which Error is Preserved	In Which Error is Not Preserved	In Which Objection is Specific Enough	In Which Objection is Not Specific Enough	In Which Complaint Was Not Raised at All	Others (no ruling, no record, not timely, d/n comply with other rules,etc.)	Issue raised at trial different than asserted on appeal	D/n have to raise
43	1	Houston 1st	15.0%	4.3%	73.6%	17.0%	79.2%	17.0%	3.8%	49.1%	22.6%	3.8%	3.8%
44	2	Fort Worth	17.4%	5.5%	78.6%	21.4%	73.8%	21.4%	0.0%	40.5%	23.8%	9.5%	4.8%
45	3	Austin	13.8%	3.8%	81.8%	21.2%	72.7%	21.2%	9.1%	54.5%	3.0%	6.1%	6.1%
46	4	San Antonio	8.0%	2.2%	79.2%	20.8%	79.2%	20.8%	0.0%	58.3%	16.7%	4.2%	0.0%
47	5	Dallas	16.7%	5.0%	78.8%	6.1%	84.8%	6.1%	3.0%	53.0%	24.2%	4.5%	9.1%
48	6	Texarkana	13.3%	3.8%	77.8%	11.1%	88.9%	11.1%	0.0%	88.9%	0.0%	0.0%	0.0%
49	7	Amarillo	16.8%	5.0%	85.0%	15.0%	75.0%	15.0%	10.0%	40.0%	25.0%	0.0%	10.0%
50	8	El Paso	17.4%	4.7%	68.8%	6.3%	81.3%	6.3%	6.3%	68.8%	6.3%	0.0%	12.5%
51	9	Beaumont	36.2%	11.0%	90.2%	9.8%	88.2%	9.8%	9.8%	56.9%	19.6%	2.0%	2.0%
52	10	Waco	13.3%	4.6%	81.8%	0.0%	100.0%	0.0%	9.1%	81.8%	9.1%	0.0%	0.0%
53	11	Eastland	14.1%	3.5%	84.6%	7.7%	84.6%	7.7%	0.0%	76.9%	7.7%	0.0%	7.7%
54	12	Tyler	9.5%	2.7%	75.0%	12.5%	87.5%	12.5%	12.5%	50.0%	25.0%	0.0%	0.0%
55	13	Corpus	18.9%	6.0%	89.5%	18.4%	73.7%	18.4%	7.9%	39.5%	21.1%	5.3%	7.9%
56	14	Houston 14th	27.4%	7.9%	53.0%	12.0%	83.1%	12.0%	8.4%	44.6%	20.5%	9.6%	4.8%
57		The Unpreserved Average	17.1%	5.0%	76.0%	13.5%	81.2%	13.5%	5.8%	51.6%	18.8%	4.9%	5.4%
58													
59	Greater Than the Overall %	Smaller Than the Overall %	None										

Appendix 3. Comparing Individual Courts of Appeals to Unpreserved Average: How and Why the Courts Ruled (FYE 2014-2015)

Ct. No	ID as 'Or or 'EE	Court Name	% of Total Cases Which Are Error Preservation Cases	% of Total Rulings Which Are Error Preservation Rulings*	% of Error Preservation Rulings In Which: TRAP 33.1 invoked	Error Was Preserved	Error Was Not Preserved	Complaint Was Specific enough	Complaint Was Not Specific Enough	Complaint Was Not Raised at All/Was Withdrawn	Others (no ruling, no record for 2014, not timely, d/n comply with other rules,etc., for 2014/2015)	No record, no ruling (only for 2015)	Issue raised at trial different than asserted on appeal	D/n have to raise compl'nt at trial
1	3	Houston 1st	16.72%	5.05%	72.13%	14.75%	79.51%	14.75%	2.46%	55.74%	14.75%	8.70%	1.64%	5.74%
2	1	Fort Worth	19.80%	6.60%	73.08%	18.27%	75.00%	18.27%	0.96%	46.15%	13.46%	8.06%	9.62%	6.73%
3	1	Austin	16.14%	4.26%	75.00%	13.16%	82.89%	13.16%	7.89%	59.21%	3.95%	13.95%	3.95%	3.95%
4	2	San Antonio	8.54%	2.23%	59.57%	17.02%	74.47%	17.02%	4.26%	46.81%	12.77%	8.70%	6.38%	8.51%
5	1	Dallas	20.24%	5.74%	69.74%	9.21%	82.24%	9.87%	1.32%	48.68%	17.76%	11.63%	7.89%	8.55%
6	3	Texarkana	14.50%	3.82%	75.00%	5.00%	85.00%	5.00%	5.00%	70.00%	5.00%	0.00%	5.00%	10.00%
7	3	Amarillo	13.78%	4.00%	72.22%	8.33%	80.56%	8.33%	11.11%	44.44%	16.67%	12.50%	2.78%	11.11%
8	3	El Paso	21.20%	7.07%	65.38%	9.62%	84.62%	9.62%	7.69%	59.62%	5.77%	8.33%	5.77%	5.77%
9	1	Beaumont, non-SVP^	13.86%	4.74%	84.16%	11.54%	69.23%	11.54%	7.69%	42.31%	7.69%	7.69%	3.85%	19.23%
9	1	Beaumont	30.83%	9.78%	76.77%	10.10%	83.84%	10.10%	7.07%	52.53%	13.13%	8.33%	7.07%	6.06%
10	1	Waco	16.24%	5.34%	88.00%	0.00%	96.00%	0.00%	4.00%	72.00%	16.00%	0.00%	4.00%	4.00%
11	3	Eastland	11.54%	3.43%	80.00%	8.00%	88.00%	8.00%	4.00%	80.00%	4.00%	0.00%	0.00%	4.00%
12	2	Tyler	16.38%	4.96%	82.61%	4.35%	91.30%	4.35%	4.35%	60.87%	8.70%	13.33%	8.70%	4.35%
13	3	Corpus/ Edinburg	15.46%	4.65%	79.66%	20.34%	74.58%	20.34%	6.78%	37.29%	23.73%	0.00%	6.78%	5.08%
14	3	Houston 14th	29.70%	8.55%	56.04%	9.89%	82.97%	9.89%	4.95%	52.20%	12.09%	9.09%	8.79%	7.14%
		Average	18.40%	5.45%	70.06%	11.84%	81.51%	11.94%	4.50%	52.74%	13.11%	8.83%	6.36%	6.65%

*Assumes 4 issues per case

> Unpreserved Avg.

< Unpreserved Avg.

None

Within 5% of Avg.

^ Decisions involving Sexually Violent Predators are eliminated from the figures on this row. Figures are only for FYE 2015.

Docket Equaliz'n Transferor Court

Docket Equaliz'n Transferee Court

Docket Equaliz'n Mixed Court

	A	B	C	D	E	F	G	H	I	J	K
1	**Appendix 3.A. Rates of Error Preservation in Courts of Appeals, Correlated by Citing of Rule 33.1**										
2	**Fiscal Years 2014 and 2015**										
3	**2014-2015, for Courts of Appeals**	**Total Decisions**	**Preserved**	**Not**	**Specific enough**	**Not specific enough**	**Not raised at all/ withdrawn**	**Others (no ruling, no record, not timely, d/n comply with other rules,etc.)***	**No record, no ruling (numbers only for 2015)**	**Issue raised at trial different than asserted on appeal**	**D/n have to raise to preserve**
4	**All Rulings, Cts. App.**										
5	**2014**	466	62	379	62	27	241	88		23	25
6	**2015**	557	58	456	59	19	299	47	49	42	43
7	**Totals**	1023	120	835	121	46	540	135	49	65	68
8			11.7%	81.6%	11.8%	4.5%	52.8%	13.2%	4.8%	6.4%	6.6%
9											
10	**33.1, Cts. App.**										
11	**2014**	355	33	308	33	25	206	57		20	14
12	**2015**	376	30	324	31	10	212	26	40	36	22
13	**Totals**	731	63	632	64	35	418	83	40	56	36
14			8.6%	86.5%	8.8%	4.8%	57.2%	11.4%	5.5%	7.7%	4.9%
15											
16	**Non-33.1, Cts. App.**										
17	**2014**	111	29	71	29	2	35	31		3	11
18	**2015**	181	28	132	28	9	87	21	9	6	21
19	**Totals**	292	57	203	57	11	122	52	9	9	32
20			19.5%	69.5%	19.5%	3.8%	41.8%	17.8%	3.1%	3.1%	11.0%
21											
22		***Includes no record, no ruling only for 2104; remainder of criteria for both years.**									

	A	B	C	D	E	F	G	H
17	**Appendix 3.B: Correlating the Result on Error Preservation with the Result on the Merits of the Appeal (Non Pro Se, Non SVP, Non Parent Child, FYE 2016)**							
18			**Total**	**Party Claiming Error Preserved Won on the Merits**	**Party Claiming Error Preserved Lost on the Merits**	**Party Claiming Error Preserved Won Part, Lost Part on the Merits**	**Party Claiming Error Preserved Won in Significant Part of the Merits**	**Party Claiming Error Preserved Won+Won in Significant Part on Merits**
19	**For All Error Preservation Cases/ Decisions**		257/287	17.6%	59.2%	22.1%	19.0%	36.6%
20	**For All Error Preservation Decisions in Which Error Was Not Preserved**		195	4.6%	71.8%	23.1%	19.0%	23.6%
21	**For All Error Preservation Decisions in Which Error Was Preserved**		63	44.9%	36.2%	17.4%	17.4%	62.3%
22	**For All Error Preservation Decisions in Which Error Did Not Have to be Raised in the Trial Court**		25	44.0%	32.0%	28.0%	24.0%	68.0%

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
22	**Appendix 3.C. Correlating The Tendencies of Transferor and Transferee Courts With the Tendencies of All Courts.**														
23	**Type of Court**			**% of Total Cases Which Are Error Preserva-tion Cases**	**% of Total Rulings Which Are Error Preserva-tion Rulings***	**TRAP 33.1 used**	**Error Was Pre-served**	**Error Was Not Pre-served**	**Com-plaint Was Specific enough**	**Com-plaint Was Not Specific Enough**	**Com-plaint Was Not Raised at All/Was With-drawn**	**Others (no ruling, no record for 2014, not timely, d/n comply with other rules, etc., for 2014/ 2015)**	**No record, no ruling (only for 2015)**	**Issue raised at trial differ from issues on appeal**	**D/n have to raise com-plaint at trial**
24	% of All Cts. Below Avg.			71.4%	71.4%	28.6%	64.3%	42.9%	64.3%	50.0%	50.0%	51.1%	64.3%	57.1%	57.1%
25	% of Transferor Courts Below Avg.			60.0%	60.0%	20.0%	60.0%	40.0%	60.0%	60.0%	60.0%	40.0%	60.0%	60.0%	40.0%
26	% of Transferee Courts Below Avg.			71.4%	71.4%	28.7%	71.4%	42.9%	71.4%	28.7%	42.9%	57.1%	71.4%	71.4%	57.1%
27	% of Mixed Courts Below Avg.			100.0%	100.0%	50.0%	50.0%	50.0%	50.0%	100.0%	50.0%	100.0%	50.0%	0.0%	50.0%
28	% of Courts Below Avg. Which Are Transferor Courts			30.0%	30.0%	25.0%	33.3%	33.3%	33.3%	42.9%	42.9%	25.0%	33.3%	37.5%	28.6%
29	% of Courts Below Avg. Which Are Transferee Courts			50.0%	50.0%	50.0%	55.6%	50.0%	55.6%	28.7%	42.9%	50.0%	55.6%	63.5%	57.1%
30	% of Courts Below Avg. Which Are Mixed Courts			20.0%	20.0%	25.0%	11.1%	16.7%	11.1%	28.7%	14.2%	25.0%	11.1%	0.0%	14.3%
31	According to the Miscellaneous Orders of the Supreme Court affecting 2014-2015 which effected Docket Equalization Transfers: 36% of Courts are Transferor Courts (Austin,														
32	Beaumont, Dallas, Fort Worth, Waco); 50% of Courts are Transferee Courts (Amarillo, Corpus Christi/Edinburg, Eastland, El Paso, Houston 1st, Houston 14th, Texarkana); 14% of Courts are both Transferor and Transferee Courts (San Antonio, Tyler)														

	P	Q	R	S	T	U	V	W	X	Y	Z	AA	AB
33	**Appendix 3.D. 2015: Comparing Averages on All Cases to Certain Non-transfer Cases (Arbitration, Healthcare Liability, Citizens Participation Action, Parent Child Relationship)**												
34		Number of Cases	Rule 33.1 invoked, % of Preser-vation Decisions	Error Preser-vation Decisions	Error Was Preserved	Error Was Not Preserved	Complaint Was Specific enough	Complaint Was Not Specific Enough	Complaint Was Not Raised at All/Was Withdrawn	Others (no ruling, no record for 2014, not timely, d/n comply with other rules,etc., for 2014/ 2015)	No record, no ruling (only for 2015)	Issue raised at trial different than asserted on appeal	D/n have to raise complaint at trial
35	2015 Non-transfer type Cases	75	46	87	5	74	4	0	49	13	5	8	8
36			52.9%		5.7%	85.1%	4.6%	0.0%	56.3%	14.9%	5.7%	9.2%	9.2%
37	All 2015 Cases	456	376	557	58	456	59	19	299	47	49	42	43
38			67.5%		10.4%	81.9%	10.6%	3.4%	53.7%	8.4%	8.8%	7.5%	7.7%