ERROR PRESERVATION:
USING THE MOST COMMON PROBLEMS TO SELL YOUR CASE

By

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(If you find mistakes, it's because Steve ignored Hannah's advice)

To Accompany Panel Discussions on Error Preservation
featuring the following current and former Justices and Judges:

San Antonio	Dallas	Houston
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1. Preserve Error, and Sell Your Case.

Preserving error provides you with an exciting, but often lost, opportunity to sell your case. Every time your opponent objects to what you do, or tries to put the bum's rush on you, or does something which they should not do, they give you the opportunity to show the trial court–and perhaps the jury–not only that it is wrong, but that it is improperly trying to avoid the justness of your cause.

When a civil appeal occurs, parties overwhelmingly agree as to the issues which were properly teed up in the trial court. Only about five percent of the time in civil appeals does one party or the other contend that a particular complaint was not raised in the trial court. And when error preservation is an issue, we do best at preserving error as to those parts of the case about which we are passionate–like jury argument, or contesting the legal sufficiency of the evidence to support an adverse jury verdict. In those two categories, we successfully preserve error anywhere from half to two-thirds of the time. But as to other aspects of our cases, we fail to anticipate, and therefore, to take advantage of, situations which allow us to both preserve error and sell our cases.

Why do I say that? From looking at what happens in that five percent of the civil appeals where there is disagreement as to whether error was preserved. In those cases, courts of appeals hold that error was not preserved over 80% of the time. Over half the time, they hold that error was not preserved because it was not raised at all in the trial court. About another twenty-five to thirty percent of the time, courts of appeals hold that error is not preserved because of a failure to obtain a ruling, a lack of timeliness in an objection, the lack of a record, the lack of specificity in the objection, or the failure of the objection to comply with the pertinent evidentiary or substantive rule or statute. All of these are deficiencies that a clairvoyant would anticipate, prepare for, and address at trial.

No one can anticipate everything that will happen in a trial, or as a case winds through the trial courts. Your opponents will do things you cannot possibly predict and prepare for. But perhaps by looking at specific error preservation situations, we can identify those which will give us additional opportunities to sell our cases, and inspire us to take advantage of them.

This paper facilitates a panel discussion involving trial court judges and court of appeals justices who will discuss error preservation opportunities they commonly see. Accordingly, this paper focuses on the most common error preservation opportunities as revealed by opinions of the courts of appeals for the fiscal year ending August 31, 2014, spiced up with a few opinions of the Supreme Court and courts of appeals handed down outside that fiscal year. But before turning to those cases, let's look 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 you carte blanche to do so in a way that sells your case to your 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 in one fiscal year, to wit, 2014. First, we will look at the universe of error preservation decisions in civil appeals for that year, 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 Year Ending 2014.

According to my interpretation of the annual reports from the Office of Court Administration, in fiscal year 2014, the courts of appeals issued 2,330 opinions on the merits in civil cases.[1] In that same fiscal year, I found 398 opinions from courts of appeals which dealt with error preservation issues in civil cases. Collectively, those opinions contained 467 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 year 2014. But I'm pretty sure I caught almost all, if not all, the opinions which cited TEX. R. APP. P. 33.1 (297 cases). I also know I caught a lot of opinions in that fiscal year which ruled on error preservation issues without citing Rule 33.1 (101 cases).

B. Overwhelmingly, we took advantage of the 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 overwhelmingly agree as to what the case was about. Why do I say that? Well, assume with me for a moment that, on average, civil appellate cases decided on the merits by courts of appeals during fiscal year 2014 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 2,330 opinions on the merits had 4 issues each (on average), that means the cases decided by those opinions raised about 9,380 issues. I only found 467 issues (more or less) on which error preservation was challenged–i.e., only about 5% of the issues dealt with by the courts of appeals on civil cases in fiscal year 2014. 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. "The Unpreserved Average:" When parties disagree as to whether an issue was preserved, courts almost always hold 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 a little over 81% of the time. A little over half the time–in fact, in 52% of all error preservation decisions–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.

[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.

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.

In about another 5% of the error preservation decisions, the courts of appeals hold that error was not preserved because the issue raised on appeal was different than the complaint preserved at trial. Finally, in about 6% of the error preservation decisions the courts of appeals hold that the complaint made at trial was not sufficiently specific to make the trial court aware of the complaint.

Here is a table which compiles these numbers:

Error was Preserved	Error Not Preserved	Obj. specific enough	Obj. not specific enough	Obj. not raised at all	Other (no ruling or record, untimely, d/n follow rules)	Issue on appeal diff. than at trial	D/n have to raise issue at trial
13.3%	81.3%	13.3%	5.8%	51.7%	18.9%	4.9%	5.4%

In the rest of this paper, I will refer to the foregoing numbers as "The Unpreserved Average." First, we will talk about what that "Unpreserved Average" tells us about lost opportunities to sell our case. 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.

4. Lessons from "The Unpreserved Average:" 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 15-20% 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, nearly 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. Here are those categories, listed in descending order (i.e., ranked in order of the most to the fewest error preservation holdings):

Evidence	47
Summary Judgment	37
Jury Charge (incl. Jury Instructions)	27
Expert Witness	18
Legal Sufficiency	16
Affidavits	15
Continuance	16
Attorney's Fees	14
Due Process	14
Family Law	14*
Constitutional Challenges*	8**
Pleadings	8
Factual Sufficiency	7
Judgment	7
Jury Argument	7
Testimony	7
Contract	6
Voir Dire	6
Notice	5
Witnesses	5
Arbitration	4
Findings of Fact and Conclusions of Law	4
Fraud	4
Limitations	4
New Trial	4
Pre-Judgment Interest	4
Res Judicata	4
Trial Court's Comments	4***

* 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.

** Not including Due Process claims

*** Categories with fewer than 4 holdings were not listed

At least half of the ten most frequent error preservation categories relate to things it would seem lawyers have the time to prepare for (e.g., Summary Judgment, Jury Charge, Affidavits, Continuance, Due Process challenges). That same thing can also be said about at least half of the next six most frequent categories (Constitutional Challenges, Pleadings, and Judgments). Maybe this indicates that it would not hurt for all of us to occasionally spend some quiet time reflecting about our cases from time to time, 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.

But a more compelling thought comes from looking at the most frequent error preservation categories, and taking a lesson in motivation from those at which we do best. Here is a table which ranks the 14 most frequent error preservation categories, starting with the ones at which we do best in preserving error:

	Number of Preserved Decisions	Not Preserved	Specific Enough	Not Specific	Not Raised	No ruling, etc.	Issue Different	D/n have to raise
Jury Argument	7	42.9%	42.9%	42.9%	0.0%	28.6%	14.3%	0.0%	14.3%
Legal Sufficiency	15	40.0%	26.7%	40.0%	0.0%	26.7%	0.0%	0.0%	33.3%
Continuances	16	25.0%	75.0%	25.0%	0.0%	31.3%	25.0%	18.8%	0.0%
Jury Charge	27	22.2%	74.1%	25.9%	11.1%	33.3%	14.8%	11.1%	3.7%
Factual Sufficiency	7	14.3%	85.7%	14.3%	0.0%	85.7%	0.0%	0.0%	0.0%
Judgment	7	14.3%	85.7%	14.3%	0.0%	57.1%	14.3%	14.3%	0.0%
AA-The Unpreserved Average	467	13.3%	81.3%	13.3%	5.8%	51.7%	18.9%	4.9%	5.4%
Evidence	47	12.8%	87.2%	12.8%	19.1%	31.9%	29.8%	6.4%	0.0%
Pleadings	8	12.5%	87.5%	12.5%	12.5%	37.5%	25.0%	12.5%	0.0%
Expert Witness	18	11.1%	77.8%	11.1%	0.0%	55.6%	16.7%	5.6%	11.1%
Summary Judgment	38	7.9%	84.2%	7.9%	0.0%	55.3%	28.9%	0.0%	7.9%
Attorney's Fees	14	7.1%	92.9%	7.1%	7.1%	85.7%	0.0%	0.0%	0.0%
Affidavits	15	6.7%	80.0%	6.7%	6.7%	40.0%	33.3%	0.0%	13.3%
Constitutionality	22	0.0%	100.0%	0.0%	0.0%	100.0%	0.0%	0.0%	0.0%
Testimony	7	0.0%	100.0%	0.0%	14.3%	28.6%	57.1%	0.0%	0.0%

Think about it–everyone is passionate about jury argument, and about arguing why the evidence is not legally sufficient to support the jury's verdict. That may have something to do with why, on both those categories of cases, we preserve error 50-60% of the time. Maybe if we applied that same passion to the other areas of error preservation, we would anticipate and take advantage of opportunities to sell our cases there as well as we do in jury argument and as to legal sufficiency. But this is also just a thought.

5. Comparing "The Unpreserved Average" to 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, summary judgment, and jury charge-account for nearly 22% of the total error preservation decisions in fiscal year 2014. If we throw in the error preservation decisions involving affidavits, that rises to 25% 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 year 2014. The fourteen most frequent categories account for nearly 60% of fiscal year 2014's 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 year 2014, 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. As compared to "The Unpreserved Average," several things stand out about missed opportunities to sell our cases when it comes to affidavits:

- Lawyers are about half as likely to preserve error as to affidavits as they are for "The Unpreserved Average," mostly because they are more likely to fail to get a ruling from the trial court as to their objections. In fact, almost half of the 2014 error preservation rulings involving affidavits held that a complaint as to a defect in the form of an affidavit was not preserved because of the party's failure to obtain a ruling on the objection in the trial court.
- Interestingly, lawyers are about a third more likely than "The Unpreserved Average" to make an objection in the trial court about an affidavit.

If the other side's evidence is improper, then why should the judge allow that improper evidence to tarnish the justness of your cause? Maybe the lesson here is this: be as diligent about recognizing objections on all areas as you are as to affidavits, and when you object to an affidavit, be as avid about getting a ruling as you are to other objections.

On the other hand, maybe the converse is true. Maybe trial lawyers ought to be as diligent in objecting to affidavits as they are in other areas. It is often the case that 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. Make the objection, bring it to the trial court's attention, and get a ruling.

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 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. *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. *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.).

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 on it, 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, askit 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. *Coward*, at 5-6; 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.); and

(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 90% 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. That's nearly 60% higher than we see in "the Unpreserved Average." 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. *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. *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.); and

(3) a complaint that the party did not incur fees, or that fees were excessive. *Davis v. Chaparro*, 2014 WL 3882190, 2014 Tex. App. LEXIS 4025, 26-27 (Tex. App.- El Paso Apr. 11, 2014, no pet.).

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 (including Due Process complaints).

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 20 error preservation decisions in fiscal year 2014 which involved a party complaining of a constitutional rights violation, every one 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.

D. Continuance.

In fiscal year 2014, parties were twice as effective at preserving error about continuances (or, more accurately, the lack thereof) as they were on other issues, and they were less than half as likely to fail to raise a complaint about continuance rulings as they were about other issues.

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 about a third more likely than "The Unpreserved Average" to fail to comply with the rules governing continuances, making a record, and getting a ruling. In that regard:

- 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. *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. *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. *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).

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 five times as likely to pursue a different issue on appeal than they asserted in the trial court.

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. Evidence.

As you probably suspected, evidentiary issues are the single biggest category of error preservation decisions, at least for fiscal year 2014. In addition to the error preservation decisions which involved affidavits (none of which are examined in this section), ten percent of the error preservation decisions in 2014 involved evidentiary rulings (including decisions regarding affidavits raises that number to over 13%).

The magnitude of error preservation decisions, and the dynamics of how we fare on appeal regarding these issues, should further exhort 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 is worth the powder;

2) improve your 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, TEX R. EVID. 103(a)(1), entitled "Rulings on Evidence," error on appeal "may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." 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) we do a 60% better job of making at least some objection than we are for "The Unpreserved Average;" yet
> (2) as compared to "The Unpreserved Average," we are three times as likely to not make a specific enough objection, and about 50% more likely to either not get a ruling, not object in a timely fashion, or not comply with the pertinent evidentiary rules.

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).

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 a 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.). "'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.). 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). You must make a timely and specific objection when the offending evidence is offered at trial. *Id.*

F. 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 offering the testimony of an expert witness: an objection that an expert's testimony is "wholly conclusory [and] 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). In other words, as is true with affidavit testimony, you may not realize you have a problem with the 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.).

I'll admit the whole conclusory/ reliability spectrum causes my head to hurt. Justice Harvey Brown is slated to make a presentation at the 2015 Advanced Civil Appellate Seminar, complete with paper, concerning issues related to Expert Witnesses, and I would encourage you to get that paper and watch his presentation. He has an earlier paper which I know is available as I write this. 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).

G. 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. Having said that, parties in jury trials fail to raise factual sufficiency complaints, and thereby fail to preserve error on the same, about 60% more often than "The Unpreserved Average." And that one dynamic puts in perspective the fact that 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*. *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). The same can also be said for a complaint that a jury finding is against the overwhelming weight of the evidence; as to 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).

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.

H. Judgment.

There are not many cases dealing with error preservation as to Judgments, and 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 sixteen 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).

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).

I. 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;
- the fact that courts hold that objections about jury arguments were preserved half the time (nearly four times greater than "The Unpreserved Average"); and
- the virtual absence of holdings that no objection was made about an objectionable jury argument.

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); *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). But 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 that: (a) by its nature, degree and extent, constituted 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*). 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).

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

J. Jury Charge (including instructions).

The third largest category of error preservation decisions involves the jury charge, including instructions. We actually do 50% better in preserving error in this category (as compared to "The Unpreserved Average") though that still means that 75% of the time courts hold that attorneys do not preserve error as to the charge. Why? Surprisingly, our jury charge objections are nearly three times as likely, as compared to "The Unpreserved Average," to not be specific enough, and we are more than twice 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? I suspect it is 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. *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. *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, request an instruction as to the same. *Metroplex Mailing Servs. v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 901 (Tex. App.–Dallas 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.).
- 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, no pet.).

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.).

K. 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 what is really interesting here is that we are three times more likely than "The Unpreserved Average" to preserve error as to a legal sufficiency complaint, and to make a specific enough objection to the same in a jury trial setting. Even at this heightened performance level, though, we are still letting about a third of the opportunities for selling our case, in the form of preserving error as to legal sufficiency, slip away from us.

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.). 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.).

L. Pleadings.

There are not many cases dealing with error preservation concerning pleadings, so comparing this category to "The Unpreserved Average" probably does not gain us much.

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.

M. 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 year 2014, 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 over 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 over 11% of the error preservation decisions studied here.

There are some objections concerning summary judgment practice which do not have to be raised in the trial court to be raised on appeal. Thank goodness for that, because we do 50% worse at preserving error as to summary judgment complaints than we do with "The Unpreserved Average." With regard to summary judgment practice, we also do fifty percent worse than "The Unpreserved Average" in terms of getting rulings on objections and making those objections in a timely manner. And, like "The Unpreserved Average," more than half the time error preservation is an issue, we fail to raise our objection at all in the trial court. 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 last 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). Then there are the examples of complaints which you do have to raise in the trial court in order to preserve them for appeal. Take a look at these and think about how each one would give you the opportunity to sell your case. In addition to preserving error for appeal:

- 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 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); *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). 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. *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. And remember, rendition can come before the summary judgment is signed. 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. *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 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).

- as 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.). 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.).

N. Testimony.

There are not many error preservation decision related to the testimony of witnesses (not already covered above), and that's probably a good thing–none of the decisions concerning testimony in Fiscal Year 2014 held that error was preserved. Over half of them found error was not preserved because we either did not make a timely objection, get a ruling, or comply with the pertinent rule. So make your objection the first time a witness offers a particular piece of testimony, and get a ruling on it. After all, if the witness should not be allowed to impugn the justness of your claim or defense, say so.

6. 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 Appellate Seminar or Appellate Law 101 Seminar conducted by the State Bar of Texas, or like materials for any State and Federal Appeals 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).

7. 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!