ANTICIPATING AND PREVENTING ERROR PRESERVATION AMBUSHES

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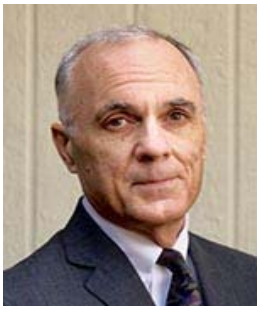
Elizabeth G. (Heidi) Bloch, Jennifer Buntz, *Unwaivable Error and Arguments That Still Work Even if You Think of Them for the First Time on Appeal*, SBOT 29th Annual Advanced Civil Appellate Practice Course (2015).



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ERROR PRESERVATION AMBUSH
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1. Error Preservation Ambushes: We have met the enemy, and they are us.

Any long-time fan of Walt Kelly's cartoon strip *Pogo* will recall that Walt's characters invoked a version of this maxim, with Wikipedia attributing the first version to Walt's foreword to *The Pogo Papers* in 1953, and a more succinct version to an Earth Day poster of Walt's in 1970. In any event, it symbolizes the realization that sometimes we are our own worst enemy.

So it is with trying to inflict, or avoid, error preservation ambushes, largely because the concept of "infliction" can include "self-infliction." In springing an error preservation ambush by waiting to complain until the other side cannot fix the problem, you need to avoid self-inflicting a timeliness wound on your complaint. To do that, you need to make sure that the pertinent court of appeals views the timeliness of your objection as you do. You also need to make sure that you accomplish something other than obtaining a remand back to the same trial judge who could have heard, and resolved, your complaint in the first trial. You might find that trial judge's discretionary rulings not going your way on the remand. Conversely, to avoid having an opponent ambush you with a righteous error preservation ambush, you need to anticipate the objections your opponent might assert, know how to foreclose those complaints, and know absolutely how long your opponent can wait to assert those objections. Otherwise, you have (at best) wasted a lot of time and expense; at worst, you may lose a case you should have won.

2. The Resources, and a word of thanks.

Usually, this comes at the end of a paper, but I owe too much to too many people to not put them up front. There are dozens of good papers dealing with error preservation, but here are some I want to really point out.

For starters, Heidi Bloch has written at least two papers which focus on complaints which one can first raise on appeal, and she inspired me to put this paper together. I thank her every chance I get. Her papers are:

- Elizabeth G. (Heidi) Bloch, *Preserving Error-Different Rules for Questions of Law?*, SBOT 32nd Annual Advanced Civil Appellate Practice Course (2018); and

- Elizabeth G. (Heidi) Bloch, Jennifer Buntz, *Unwaivable Error and Arguments That Still Work Even if You Think of Them for the First Time on Appeal*, SBOT 29th Annual Advanced Civil Appellate Practice Course (2015).

Next, when figuring out whether a complaint is timely or not, you absolutely need to know how preserving that complaint is viewed by the court of appeals to which your case will be appealed–because the courts of appeals do not always see eye to eye on these things. While it's not necessarily exhaustive on error preservation, here is at least one resource you should consult before considering your ambush work done:

- Yvonne Y. Ho, Walter A. Simons, paper originally written and updated by Hon. Kem Thompson Frost, Hon. Brett Busby, Yvonne Ho, Jeffrey L. Oldham, Cynthia Keely Timms, *Splits Among the State Appellate Courts*, SBOT 32nd Annual Advanced Civil Appellate Practice (2018)

As a matter of fact, you should visit that source before you consider *any* work done on your lawsuit. If the courts of appeals conflict, or if your court sees an issue differently than other courts of appeals, you need to know that.

If your issue involves summary judgment practice, then you absolutely need to consult the most recent versions of the following summary judgment practice guides:

- Timothy Patton, *Summary Judgment Practice in Texas*, LexisNexis; and

- Hon. David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 60 Hous. L. Rev. 1 (2019)

Finally, you might want to review the following paper I put together in 2017:

- Steven K. Hayes, *Selling Your Case at Trial, Selecting Appellate Issues to Pursue, and Other Implications of Error Preservation Rulings*, SBOT 31st Annual Advanced Civil Appellate Practice Course (2017)

3. The tension between timeliness, error preservation policy, and potential error-preservation ambushes shows

one thing–we all need to be aware of the ambushes which exist.

We all know the general error preservation rule in Texas state courts: TRAP 33.1. As a general proposition, it requires the complaining party to make the complaint to the trial court:

- in a timely fashion;
- with sufficient specificity to make the trial court aware of the complaint (unless the context makes the grounds apparent);
- in compliance with all pertinent rules.

TRAP 33.1 also requires the complaining party to obtain a ruling from the trial court on the complaint (or objecting to the trial court's failure to rule). A timeliness component was set out in 33.1's predecessors–Rule 52a's "timely" requirement (from 1986 through 2007), and Rule 373's requirement that one make the complaint "at the time the ruling or order . . . is made or sought" (from 1941 through 1986).

The Rules do not generically define what amounts to a "timely" complaint under TRAP 33.1 (though they sometimes set deadlines for specific complaints–e.g., Rule 324(d) requires raising a factual sufficiency complaint about a jury verdict in a motion for new trial, while TRAP33.1(d) allows a party to first raise on appeal a legal or factual insufficiency complaint in a civil nonjury case). But cases have talked about the policies behind the error preservation rules in terms that would seem to militate against error preservation ambushes:

> There are "important prudential considerations" behind our rules on preserving error. *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003). First, requiring that parties initially raise judicial resources by providing trial courts the opportunity to correct errors before appeal. *Id.* Second, judicial decision-making is more accurate when trial courts have the first opportunity to consider and rule on error. *Id.* ("Not only do the parties have the opportunity to develop and refine their arguments, but we have the benefit of other judicial review to focus and further analyze the questions at issue."). Third, a party "should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time." *Id.* (quoting *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam)).

Mansions in the Forest, L.P. v. Montgomery Cty., 365 S.W.3d 314, 317 (Tex. 2012). *Mansions* held that if an affidavit lacks a jurat, and no extrinsic evidence shows the affidavit was sworn to, "the opposing party must object [in the trial court] to this error, thereby giving the litigant a chance to correct the error." *Id.* The Court recently reaffirmed those principles:

> our law on preservation is built almost entirely around putting the trial court on notice so that it can cure any error. *See Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014) ("Preservation of error reflects important prudential considerations recognizing that the judicial process benefits greatly when trial courts have the opportunity to first consider and rule on error." (*citing In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003))). Affording trial courts [*14] an opportunity to correct errors conserves judicial resources and prevents an appeal by ambush or otherwise having to order a new trial. *Id.*

Rohrmoos Venture v. UTSW DVA Healthcare, LLP, No. 16-0006, 62 Tex. Sup. Ct. J. 808, 2019 WL 1873428, 2019 Tex. LEXIS 389, at *13-14 (Apr. 26, 2019). But the Court has not uniformly worshiped at this altar–it has also held that it will not "force the defendant to forfeit a winning hand" by objecting to a jury charge which the majority characterized as the submission of an immaterial jury question, but which the dissent characterized as "a defective submission [because omitting certain elements via instruction or question], not a complete omission," as to which a charge objection was necessary. *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 481, 482 (Tex. 2017); (Boyd, J., Dissenting, at 500).

Study *United Scaffolding* very, very carefully; several folks have written on it, and you can find what I said in *Selling Your Case at Trial*, supra, at pp. 68-70 (on my website). But juxtaposing *Mansions*, *Rohrmos*, and *United Scaffolding* is just one exercise which shows how drastically your fortunes can shift if you are on the wrong side of the ambush argument.

Error preservation ambushes can wreak all kinds of havoc–sometimes initiating a lengthy and unpredictable appellate trek, sometimes surprising the other side, sometimes dealing a case-ending blow, or sometimes doing nothing more than resulting in a remand to a trial court which will have to retry the case. In some respects, these ambushes–which the rules

and case law allow–seem to run counter to the policies which *Mansions* and *Rohrmos* say support the error preservation rules. About the only thing for sure about error preservation ambushes–each of us will inflict them on others, and have them inflicted on us. So we might as well try to be aware–and wary–of how they can be laid, and boomerang.

4. The Ambushes.

Error preservation ambushes take many forms, from those which you can first raise on appeal, to those which you can first raise after it is too late for your opponent to do anything about them. We will address them in that order.

A. Complaints you can raise for the first time on appeal.

For this topic, make sure you check out the latest incarnation of the *Unwaivable Error* paper of Heidi Bloch and Jennifer Buntz, *supra*.

1. A word about the federal rule concerning complaints which a party can first raise on appeal–in case you are desperate enough to suggest its adoption in state courts.

This paper will not address error preservation in federal court, but I did want to mention one federal concept. In the context of a legal malpractice lawsuit, I ran across the following:

> Federal appellate courts will generally not consider an issue or argument raised for the first time on appeal. *Atlantic Mut. Ins. Co. v. Truck Ins. Exch.*, 797 F.2d 1288, 1293 (5th Cir. 1986). An appellate court has discretion, however, to review an issue not preserved below. *See Singleton v. Wulff*, 428 U.S. 106, 120-21, 96 S. Ct. 2868, 2877, 49 L. Ed. 2d 826 (1976); *Texas v. United States*, 730 F.2d 339, 358 n. 35 (5th Cir. 1984). *The court may appropriately exercise its discretion to review such an issue if, for example, it involves a purely legal question, refusal to consider it would result in a miscarriage of justice, or its proper resolution is beyond doubt. See Singleton*, 428 U.S. at 121, 96 S. Ct. at 2877; *Texas v. United States*, 730 F.2d at 358 n. 35; *In re Johnson*, 724 F.2d 1138, 1140 (5th Cir. 1984).

Vitale v. Keim, No. 01-95-00401-CV, 1997 WL 549186, 1997 Tex. App. LEXIS 4719, at *21 (Tex. App.—Houston [1st Dist.] Aug. 29, 1997, pet. denied) (not designated for publication) (*emphasis supplied*).

I won't address these further. But as you read this paper, you might consider a couple of things: (1) whether, in any given case, you face a situation desperate enough that you might want to consider suggesting to a state court that the federal concepts should apply in state court; and (2) whether, without saying so, some of the rules you read below suggest Texas courts already follow this rul.

2. Fundamental error–a limited and discredited doctrine, except for subject matter jurisdiction, some juvenile matters, and a significant public interest.

Generally speaking, the Texas concept of first being able to raise a complaint on appeal probably harkens back to the concept of "fundamental error," (sometimes referred to in headnotes as "plain error"). Fundamental error is a common law notion that predates the adoption of the Rules of Civil Procedure in 1941. Now, the doctrine is of limited effect; as the Supreme Court has noted, "[i]n light of our strong policy considerations favoring preservation, we have called fundamental error 'a discredited doctrine'" employed in "rare instances" such as "when the record shows on its face that the court lacked jurisdiction" or "to review certain types of error in juvenile delinquency cases." *In the Interest of B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003), quoting *Cox v. Johnson*, 638 S.W.2d 867, 868, 25 Tex. Sup. Ct. J. 418 (Tex. 1982) (per curiam). Recently, the Supreme Court held that "the fatal conflict in the jury's verdict in this case does not constitute fundamental error, and as a result, we cannot consider that conflict unless the error was properly preserved." *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 515 (Tex. 2018). In doing so, the Court admonished us all that it had long ago "warned that cases 'discussing fundamental error decided before the adoption of the Rules of Civil Procedure in 1941 must be considered in the light of changes in the concept of fundamental error made by the adoption of the new rules.'" *Menchaca*, 545 S.W.3d at 513, quoting *Lewis v. Tex. Emp'rs' Ins. Ass'n*, 151 Tex. 95, 246 S.W.2d 599, 600 (Tex. 1952).

You can find a good discussion of the history of fundamental error in Justice Hankinson's lengthy dissent in *In the Interest of J.F.C.*, 96 S.W.3d 256, 285 (Tex. 2002) (Hankinson, J., dissenting). Justice Hankinson pointed to *Jones v. Black*, 1 Tex. 527 (1846), in which the Court observed that, "as a general rule, 'the record being silent as to any judicial

action either sought or had upon the issues of law, they will be considered waived.'" Hankinson, dissenting, quoting *Jones*, at 529. Justice Hankinson then also noted that *Jones* carved out an exception to the foregoing general waiver rule: "'if the foundation of the action has manifestly failed, we can not, without shocking the common sense of justice, allow a recovery to stand.'" *Id.* Justice Hankinson extensively traced the ebbs and flows in the development of the fundamental error doctrine, and then summed up the state of the "fundamental error" doctrine now, perhaps a little more extensively than did the Court in *B.L.D.*:

1) "First, and most commonly, we apply fundamental-error review when a jurisdictional defect exists in a case."
2) "Second, we apply fundamental-error review when an important public interest or public policy is at stake." This "public interest" basis is "rare, implicated only when our most significant public interests are at stake," i.e., a public interest "'declared in the statutes or Constitution of this state," such as something of "constitutional importance . . . to the public generally,'" though "it cannot be enough to allege that an error violates a party's constitutional rights. . . .[O]ur courts have categorically recognized only one other type of public interest so significant that fundamental-error review applies–the state's interest in the rights and welfare of minors. In particular, ... the failure to give statutory admonishments in a juvenile delinquency proceeding."

J.F.C., 96 S.W.3d at 291-292 (Hankinkson, J., Dissenting), quoting *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979, 983 (Tex. 1947) and *State v. Santana*, 444 S.W.2d 614, 615 (Tex. 1969).

So let's look at some of these components of "fundamental error" which might still allow for an ambush–recognizing that subject matter jurisdiction is the most fertile ground for raising a complaint not preserved in the trial court.

a. Lack of subject matter jurisdiction–a concept which older cases may have "intemperate[ly]" used, but which (if applicable) may be raised for the first time on appeal.

The Texas Supreme Court, "like the U.S. Supreme Court, ha[s] recognized that our sometimes intemperate use of the term 'jurisdictional' has caused problems." *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 306 (Tex. 2010) (footnote omitted). The Supreme Court of Texas has noted that "'[t]he classification of a matter as one of jurisdiction [**13] . . . opens the way to making judgments vulnerable to delayed attack for a variety of irregularities that perhaps better ought to be sealed in a judgment.'" *United Servs. Auto Ass'n.*, 370 S.W.3d at 306, quoting *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) which in turn quoted RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b. at 118 (1982). "Thus, 'the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.'" *Id.*, quoting RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e. at 113).

If a trial court does truly lack subject matter jurisdiction, then its judgment is void.

> "A judgment is void only when it is apparent that the court rendering judgment 'had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court.' Errors other than lack of jurisdiction render the judgment merely voidable . . . ." *Cook v. Cameron*, 733 S.W.2d 137, 140, 30 Tex. Sup. Ct. J. 550 (Tex. 1987) (quoting *Browning v. Placke*, 698 S.W.2d 362, 363, 29 Tex. Sup. Ct. J. 33 (Tex. 1985)).

Saudi v. Brieven, 176 S.W.3d 108, 113 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). A court's lack of subject matter jurisdiction "is never presumed and cannot be waived," can be raised for the first time on appeal, and can be raised by an appellate court on its own motion. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex. 1993).

i. The many guises of lack of subject matter jurisdiction.

Lack of subject matter jurisdiction can take many guises, and we will not discuss them exhaustively here by any means. But consider these few examples:

- **Preemption.** "A preemption argument that affects the choice of forum rather than the choice of law is not waivable and can be raised for the first time on appeal." *Gorman v. Life Ins. Co.*, 811 S.W.2d 542, 545, 546 (Tex. 1991) (held, "where ERISA's preemptive effect would result only in a change of the applicable law, preemption is an affirmative defense which must be set forth in the defendant's answer or it is waived."). For example, "'[t]he Copyright Act expressly preempts all causes of action falling within its scope, with few

exceptions.' *Daboub v. Gibbons*, 42 F.3d 285, 288 (5th Cir. 1995)." *Mometrix Media, LLC v. LCR Publ'g, LLC*, No. 03-17-00570-CV, 2018 WL 6072357, 2018 Tex. App. LEXIS 9499, at *5 (Tex. App.—Austin Nov. 21, 2018, no pet. hist.). However, because the United States' Office of Personnel Management "performs no adjudicatory functions" but instead "'performs purely ministerial actions' in following the trial court's instructions" as to retirement benefits, an argument that a trial court's subject matter jurisdiction is pre-empted by the OPM's involvement in retirement benefit allocation is not an argument that can first be raised on appeal. *Brauer v. Brauer*, No. 02-11-00109-CV, 2012 WL 4121120, 2012 Tex. App. LEXIS 7991, at *6 (Tex. App.—Fort Worth Sep. 20, 2012, no pet.) (memo. op.). Furthermore, a complaint that maritime law governs case is a pre-emption argument, but only one that affects the choice of law, and hence cannot be first raised on appeal. *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 919 (Tex. 1993). Having said that, at least two courts have held that a complaint alleging a failure to follow the Indian Child Welfare Act is a complaint which *can* first be raised on appeal. *In the Interest of M.T.R.*, No. 14-18-01058-CV, 2109 Tex. App. Lexis 3993 (Tex App.–Houston [14th Dist.] May 16, 2019) (no pet. history); *In re J.J.C.*, 302 S.W.3d 896, 898-99 (Tex. App.—Waco 2009) (mem. op. and abatement order), *disp. on merits*, Nos. 10-09-00269-CV, 10-09-00270-CV, 2010 Tex. App. LEXIS 2513, 2010 WL 1380123 (Tex. App.—Waco Apr. 7, 2010, no pet.) (mem. op.);

- **Statutory prerequisites to suit–maybe**. "Statutory prerequisites to a suit, including the provision of notice, are *jurisdictional* requirements in all suits against a government entity." Tex. Gov't. Code §311.034, *emphasis supplied*. As the Supreme Court has recently noted, "[n]early a century ago, we held that where a cause of action is derived from a statute, . . . 'strict compliance with all statutory prerequisites is necessary to vest a trial court with jurisdiction.' *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 510 (Tex. 2012) (citing *Mingus v. Wadley*, 285 S.W. 1084, 1087 (Tex. 1926))." *Tex. Mut. Ins. Co. v. Chicas*, No. 17-0501, ___ WL___, 2019 Tex. LEXIS 353, at *4 (Apr. 5, 2019). However:

  > "just because a statutory requirement is mandatory does not mean that compliance with it is jurisdictional." [*City of DeSoto v. White*, 288 S.W.3d 389 (Tex. 2009)] at 395 (quoting *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999)).

  Id.. And that launches you into the voluminous body of case law that differentiates between when a statutory prerequisite is, and is not, jurisdictional. For example, included in the kinds of notice that are statutorily required are the notices to the Department of Public Safety when seeking an expunction–which is a civil proceeding. *Ex parte Butler*, No. 06-18-00110-CV, 2019 WL 1996525, 2019 Tex. App. LEXIS 3618, at *1-3 (Tex. App.—Texarkana May 7, 2019) (applying TEX. CODE. CRIM. PROC. ANN. art. 55.02, §2(c)(1)-(2);
- **The damages in a claim exceed the trial court's jurisdiction**. *See United Servs. Auto. Ass'n v. Brite*, 215 S.W.3d 400, 401 (Tex. 2007). And remember–if you file suit in a court without jurisdiction, and so with "intentional disregard of proper jurisdiction," you are not protected from the running of limitations by the tolling provisions set out in Tex. Civ. Prac. & Rem. Code §16.064. *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 304 (Tex. 2010). And when the damages in a potential claim exceed the trial court's jurisdiction, that would also obviate that court's jurisdiction to entertain **a Rule 202 pre-suit discovery petition** as to the potential claim. *In re City of Dallas*, 501 S.W.3d 71, 74 (Tex. 2016);
- **A state agency has exclusive original jurisdiction**. "A state agency 'has exclusive jurisdiction when the Legislature has granted that agency the sole authority to make an initial determination in a dispute.' *In re Entergy Corp.*, 142 S.W.3d 316, 321 (Tex. 2004)." *Oncor Elec. Delivery Co. LLC v. Chaparral Energy, LLC*, 546 S.W.3d 133, 138 (Tex. 2018) (held, "PUC has exclusive jurisdiction over all matters involving an electric utility's rates, operations, and services," including a "breach-of-contract claim . . . [which] complains" about whether a utility timely established electric service); *see also Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 223 (Tex. 2002) (Texas Motor Vehicle Board has exclusive jurisdiction over Texas Motor Vehicle Code-related issues and claims, such as alleged: (1) Code violations which serve as the basis for claims under the DTPA; (2) alleging the breach of a duty of good faith and fair dealing; or (3) alleging a breach of oral contract). Within this general area is a **worker's compensation claim** over which the claimant has not exhausted his administrative remedies. *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013);
- **A case involving the political question doctrine**, which involves "justiciability, a jurisdictional matter." *Am. K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 260 (Tex. 2018) (the claim alleged negligent training and handling by private contractors led to a dog bite by a war zone dog trained to sniff out IEDs);
- **Sovereign immunity**. Sovereign immunity implicates subject matter jurisdiction to the extent that a claim of sovereign immunity can first be raised on appeal–but it does not so completely implicate it that it can be raised "to reopen a final judgment that would otherwise operate as claim preclusion." *Engelman Irrigation Dist. v. Shields Bros.*, 514 S.W.3d 746, 751-52, 753 (Tex. 2017); and
- **Action by the trial court on remand inconsistent with or beyond what is necessary to give full effect to the appellate court's judgment and mandate (?)**. At least one court of appeals has implied that a party can first

complain on appeal that, on remand, the trial court took an action that is inconsistent with or beyond what is necessary to give full effect to the appellate court's judgment and mandate. *Scott Pelley P.C. v. Wynne*, No. 05-18-00550-CV, 2019 Tex. App. LEXIS 4943, at *5 (Tex. App.—Dallas June 13, 2019). It is unclear whether the *Pelley* Court actually held such a complaint could first be raised on the appeal after remand–in *Pelley*, the appellants "contend[ed] the trial court's award . . . exceeded this Court's mandate," the appellees "argue[d] the [appellants] failed to preserve the issued for appeal," and the Court held that "[w]hen [as here] a trial court exceeds its authority under a mandate, the resulting judgment is erroneous," without addressing whether appellants had preserved the complaint in the trial court. *Scott Pelley P.C. v. Wynne*, No. 05-18-00550-CV, __WL__, 2019 Tex. App. LEXIS 4943, at *4-5, 6 (Tex. App.—Dallas June 13, 2019, no pet. hist.) (Opinion). I would not rely on this case as the basis for *not* complaining in the trial court that the trial court has exceeded the court of appeals mandate–too many courts, including the Supreme Court, have held " we do not agree with the court of appeals that, to the extent the trial court exceeded its authority, it acted 'beyond its jurisdiction'" *Phillips v. Bramlett*, 407 S.W.3d 229, 234 (Tex. 2013).

- **The failure to join an indispensable party.** I have not exhaustively researched this example, to say the least. But a couple of recent cases have held that . Just remember, if you sue to establish liability against a decedent, or sue on behalf of a decedent's estate, make sure the estate's representative is named as a party–or that personal representative at least "participates" in the case. *Miller v. Estate of Self*, 113 S.W.3d 554, 557 (Tex. App.–Texarkana 2003, no pet.); *Sorrell v. Estate of Carlton*, 504 S.W.3d 379, 382 n. 1 (Tex. App.–Houston [14th Dist.] 2016, pet. denied); *In re Coats*, No. 06-19-00040-CV, 2019 Tex. App. LEXIS 5347, at *8 (Tex. App.—Texarkana June 27, 2019) ("'[t]he failure to join a jurisdictionally indispensable party constitutes fundamental error, which an appellate court is bound to notice if the error is apparent from the face of the record.' *Dueitt v. Dueitt*, 802 S.W.2d 859, 861 (Tex. App.—Houston [1st Dist.] 1991, no writ).").

The list goes on. Keep in mind, a successful challenge to subject matter jurisdiction on appeal does not necessarily earn you a dismissal, or rendition. For example, if a governmental entity fails to show that the plaintiff could not have shown jurisdiction, or that the plaintiff was given a "full and fair opportunity" to show the existence of jurisdiction, "the appellate court should remand the case to the trial court for further proceedings." *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 96 (Tex. 2012). Which means that waiting until appeal to raise a subject matter complaint might place you in the unenviable position of explaining to a trial court why it is having to deal with this case again.

ii. Other components of subject matter jurisdiction.

Before moving on from lack of subject matter jurisdiction, let's consider some other complaints which courts have held can be raised for the first time on appeal, basing their decisions on how these complaints invoke jurisdictional concepts.

- **Standing**. "Standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a justiciable interest in the outcome, whereas capacity is a procedural issue addressing the personal qualifications of a party to litigate." *Zermeño v. Garcia*, No. 14-17-00843-CV, 2019 Tex. App. LEXIS 3766, at *9 (Tex. App.—Houston [14th Dist.] May 9, 2019, no pet. hist.) (memo. Op.), citing *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). "Because . . . standing is a component of subject matter jurisdiction, it cannot be waived and may be raised for the first time on appeal." *Tex. Ass'n of Bus.*, 852 S.W.2d at 445; *see also In re Fort Worth Star-Telegram*, 441 S.W.3d 847, 850 (Tex. App.—Fort Worth 2014) (orig. proceeding); *see also Watson v. City of Southlake, et al*, No. 02-18-00143-CV, ___ WL ___, ___ Tex. App. LEXIS ___ (Tex. App.–Fort Worth, Sept. 19, 2019, no pet. hist.), citing *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018). *Schwartzott v. Etheridge Property Management*, 403 S.W.3d 488, 498 n.4 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Trojacek v. Estate of Kveton*, No. 14-07-00911-CV, 2009 Tex. App. LEXIS 2258, 2009 WL 909591, at *3 (Tex. App.—Houston [14th Dist.] Apr. 7, 2009, no pet.) (mem. op.). Once again, appellate courts can raise lack of standing on their own motion. *Tex. Ass'n of Bus*., 852 S.W.2d at 446; *In re Fort Worth Star-Telegram*, 441 S.W.3d at 850; *Trojacek*, 2009 WL 909591, at *3. But keep in mind that, to preserve a complaint about capacity, you must file a verified denial under Rule 93.
- **Ripeness.** "[R]ipeness and standing components of subject matter jurisdiction cannot be waived." *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000. "Under the ripeness doctrine, we consider whether, at the time a lawsuit is filed, the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote.'" *Gibson*, 22 S.W.3d at 851-52, quoting *Patterson v. Planned Parenthood*, 971 S.W.2d 439, 442 (Tex. 1998).
- **Mootness**. As used here, I refer to a case that was moot at the trial court level, as opposed to a case where the

issue became moot after the trial court lost jurisdiction–in other words, this section deals with mootness arguments that a party could have raised in the trial court, but did not.

- "Appellate courts are prohibited from deciding moot controversies. *See Camarena v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988). This prohibition is rooted in the separation of powers doctrine in the Texas and United States Constitutions that prohibits courts from rendering advisory opinions. See TEX. CONST. art. II, § 1*; see also Texas Ass'n of Bus. v. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968)." *NCAA v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). In turn, "[u]nder our constitution, courts simply have no jurisdiction to render advisory opinions. TEX. CONST. art. II, § 1." *Speer v. Presbyterian Children's Home*, 847 S.W.2d 227, 229 (Tex. 1993).
- This line of reasoning has led courts to observe (in what appears to be dicta) or imply that a challenge to mootness can first be raised on appeal. *State v. KNA Partners, A JV*, No. 01-14-00723-CV, 2015 WL 46033, 2015 Tex. App. LEXIS 7957, at *4 (Tex. App.—Houston [1st Dist.]July 30, 2015, no pet.) (memo. op.); *see also Poston v. Wachovia Mortg. Corp.*, No. 14-11-00485-CV, 2012 WL 1606340, 2012 Tex. App. LEXIS 3608, at *7 (Tex. App.—Houston [14th Dist.]May 8, 2012, pet. denied) (memo. op.); *Yost v. Jered Custom Homes*, 399 S.W.3d 653, 658 (Tex. App.—Dallas 2013, no pet.) (held, mootness obviates a party's standing to assert a claim, and standing may first be raised on appeal); *Compton v. Port Arthur Indep. Sch. Dist.*, No. 09-15-00321-CV, 2017 WL 3081092, 2017 Tex. App. LEXIS 6717, at *15 (Tex. App.—Beaumont July 20, 2017, no pet.) (memo. op.)). And a couple of courts have actually held that mootness can first be raised on appeal. *In re H&R Block Fin. Advisors, Inc.*, 262 S.W.3d 896, 899 n.2 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding); *City of El Paso v. Waterblasting Techs., Inc*., 491 S.W.3d 890, 904 (Tex. App.—El Paso 2016, no pet.

While it appears you can raise mootness for the first time on appeal, no reason comes to mind as to why you would not raise mootness as an issue in the trial court, so I would suggest you consider doing so, unless you can think of a reason not to.

- **Defective service**. Prior to the adoption of TRAP 33.1, the Supreme Court held that a trial court's "jurisdiction is dependent upon citation issued and served in a manner provided for by law," and that since Rule 324 did not list defective service as one of the items which could only be preserved through a motion for new trial, a party could first complain about defective service on appeal. *Wilson v. Dunn*, 800 S.W.2d 833, 837 (Tex. 1990). *Wilson* had some language that indicated that there might be some conflict between the precursor to TRAP 33.1 (i.e., Rule 52(a)), which required complaining in the trial court, and Rule 324, which set out certain issues which could only be preserved in a motion for new trial; *Wilson* suggested that as to "complaints which cannot be raised prior to judgment but are not specifically required by Rule 324 to be raised in a motion for new trial" those conflicts "should be considered in future amendments to the rules." *Wilson*, 800 S.W.2d at 837, n. 9. Those conflicts were not addressed by the 1997 rules.

But since the adoption of TRAP 33.1 in 1997, a relatively quick search reveals that the following courts of appeals have confirmed that service which does not comply with Tex. R. Civ. Pro. 106 and 107 can be raised for the first time on appeal: Second/Fort Worth (*All Commer. Floors v. Barton & Rasor*, 97 S.W.3d 723, 726 (Tex. App.—Fort Worth 2003, no pet.)); Third/Austin (*Lee Hoffpauir, Inc. v. Kretz*, 431 S.W.3d 776, 781 (Tex. App.—Austin 2014, no pet.)); Fourth/San Antonio (*Benefit Planners, L.L.P. v. RenCare, Ltd.*, 81 S.W.3d 855, 858 (Tex. App.—San Antonio 2002, pet. denied) (held, "When the attempted service of process is invalid, the trial court acquires no in personam jurisdiction over the defendant, and the trial court's judgment is void."); Fifth/Dallas (*Garduza v. Castillo*, No. 05-13-00377-CV, ___WL___, 2014 Tex. App. LEXIS 6903, at *9 (Tex. App.—Dallas June 25, 2014, no pet.) (memo. op.)); Sixth/Texarkana (*In re C.T.F.*, 336 S.W.3d 385, 387-88 (Tex. App.—Texarkana 2011, no pet.)); Eighth/El Paso (*Robb v. Horizon Cmtys. Improvement Ass'n, Inc.*, 417 S.W.3d 585, 590 (Tex. App.—El Paso 2013, no pet.) (held, invalid service "cannot establish the trial court's jurisdiction over a party.")); Thirteenth/Corpus Christi-Edinburg (*Alamo Home Fin., Inc. v. Duran*, No. 13-14-00462-CV, 2015 WL 4381091, 2015 Tex. App. LEXIS 7292, at *6 (Tex. App.—Corpus Christi July 16, 2015, no pet.) (memo op.)). Other courts may have also weighed in on this issue, but I'll leave it to you to determine where your particular court of appeals stands on this issue.

But keep this in mind: *Wilson* did reaffirm the rule that a party can "waive[] his complaint of defective service by conceding the issue." *Wilson*, 800 S.W.2d at 837. However, the Court made clear that this meant the party had to concede that she had been *served*, not just that she had "received" process. *Id.*

iii. A temporary injunction order which does not comply with Rule 683. CONFLICT.

" If a temporary injunction order fails to comply with the mandatory requirements of rule of civil procedure 683, it is void. *El Tacaso, Inc.*, 356 S.W.3d [740] at 745 [(Tex. App.–Dallas 2011, no pet.)] (collecting cases). 'An appellate court can declare a temporary injunction void even if the issue has not been raised by the parties.' *Id.* at 745 n.4 (quoting *City of Sherman v. Eiras*, 157 S.W.3d 931, 931 (Tex. App.—Dallas 2005, no pet.))." *Freedom LHV, LLC v. IFC White Rock, Inc.*, No. 05-15-01528-CV, 2016 WL 3548012, 2016 Tex. App. LEXIS 6837, at *5 (Tex. App.—Dallas June 28, 2016, pet. dismissed on motion of petitioner following agreement of parties on underlying dispute). This is the majority rule in Texas, though some courts disagree, as set out in the following observation in a concurring opinion by Chief Justice Frost of the Fourteenth Court, in which she provides a critique of this rule:

> Of the fourteen intermediate courts of appeals, the Eleventh is the only one that has not addressed the Rule 683 error-preservation issue. Like this court, the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Twelfth, and Thirteenth hold that a party need not preserve error on a complaint that a temporary-injunction order does not comply with Rule 683. The other two, the Third and the Seventh, though representing the [*125] minority view, hold the sounder position — that a party must preserve error in the trial court to raise a Rule 683 defect on appeal.

Hoist Liftruck Mfg. v. Carruth-Doggett, Inc., 485 S.W.3d 120, 124-25 (Tex. App.—Houston 2016, no pet.) (Frost, CJ, concurring), authorities omitted. Be aware–the Supreme Court asked for a response to the petition for review in *Freedom LHV* before the petitioner filed a motion to dismiss, telling the court that the parties had reached an agreement on the underlying dispute in a way which the petitioner felt mooted the petition. So the Supreme Court may have this particular rule on its radar screen, and it may be best to raise this complaint in the trial court–or decide that not doing so is worth running the risk of being the test case at the Supreme Court.

b. An important public interest or public policy

Almost nothing makes the grade on this component of fundamental error. A little over seventy years ago, the Supreme Court held that "[w]e shall not undertake to give an all-inclusive definition of fundamental error; but, to the purpose of this case, we do hold that an error which directly and adversely affects the interest of the public generally, as that interest is declared in the statutes or Constitution of this state, is a fundamental error," and that "[a]s to errors that are truly fundamental," appellate courts have the authority to consider the same, even though such errors were not preserved in the trial court. *Ramsey v. Dunlop*, 146 Tex. 196, 202, 205 S.W.2d 979, 983 (1947). The complaint is *Ramsey*, which the Court held was fundamental, was whether a candidate who did not get a majority of the vote was entitled to hold office–even though the parties, who were the only two candidates for the race, had agreed that the only issues were whether the candidate who got the most votes lived in the precinct. *Id.* To give you a flavor of what amounts to "the interest of the public generally," here is how the *Ramsey* Court reasoned:

> Since the faith of our people stand [sic] inalienably pledged to the preservation of a republic form of government (Art. I, Sec. 2, Constitution of Texas), a fundamental idea of which is that no one can be declared elected to public office unless he receives a majority or a plurality of the legal votes cast (29 C.J.S., p. 353, Sec. 242), Art. 3032, R.S. 1925, must be regarded as declaratory of fundamental public policy in prescribing that the certificate of a candidate's right to take an office must show that he received the highest number of votes polled for any candidate therefor. Yet, . . . Ramsey and Dunlop agreed in the trial court that the only issues for decision were their respective residences, the true location of a precinct line and the validity of a commissioners' court order. . . .We cannot sanction that proposition. If our courts, in whom is imposed the judicial power of this state, cannot act of their own motion in such [***17] a situation, only because litigants whose personal interests are adverse to that public policy have waived the error, then the government of this state is indeed impotent.

Id. Subsequently, the Supreme Court held that a complaint was not "the type of error 'which directly and adversely affects the interest of the public generally.'" *Deer Park v. State*, 154 Tex. 174, 188, 275 S.W.2d 77, 85 (1954). The complaint was about a property's detachment from a city, and its use, which allegedly adversely impacted the ability of a city to annex it. *Id.*

As of the writing of this paper, there are only about 30 cases (according to Lexis) which supposedly cite *Ramsey* on the issue of public interest or policy excusing preserving a complaint in the trial court. We'll not spend any more time here on this particular aspect of fundamental error. I don't discourage you from pursuing this aspect of fundamental error if you think you have a complaint that "directly and adversely affects the interest of the public generally, as that interest is declared in the statutes of Constitution of this state." If you find some cases that support your position, forward the briefing to me, and I'll include it in future versions of this paper with attribution to you.

c. Certain issues in juvenile cases.

As mentioned above, appellate courts sometimes invoke fundamental error to review, for the first time on appeal, "certain types of error in juvenile delinquency cases." *In the Interest of B.L.D.*, 113 S.W.3d at 350, quoting *Cox*, 638 S.W.2d at 868. As the Texarkana Court recently held:

> Thus, both the Court of Criminal Appeals and the Legislature have recognized that, in a criminal proceeding, the procedural safeguards necessary to guard the defendant's right not to be tried when she is incompetent to stand trial must include a requirement that the trial court, on its own motion, make an inquiry into the defendant's competency to stand trial when sufficient evidence comes to its attention. Because the failure to observe adequate procedures to protect this right deprives the defendant of her due process right to a fair trial, we find that a complaint asserting the failure of a trial court on its own motion to make inquiry into the defendant's competency to stand trial is included among the waivable-only rights that may be asserted for the first time on appeal. *See Pate v. Robinson*, 383 U.S. 375, 384, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Therefore, we find that H.C. did not have to preserve her complaint in the juvenile court.

In re H.C., 562 S.W.3d 30, 41 (Tex. App.—Texarkana 2018, no pet.)

In terms of identifying complaints, in the civil context, unique to juvenile delinquency appeals which can first be raised on appeal, you might consider taking advantage of the materials provided by the various courts of appeals to assist court-appointed counsel in preparing *Anders* briefs. Without putting too fine a point on it, an *Anders* brief informs the court that counsel has diligently reviewed the entire record and have concluded that there is no reversible error. See *Anders v. California*, 386 U.S. 738, 744 (1967); *High v. State*, 573 S.W.2d 807, 813 (Tex. Crim. App. [Panel Op.] 1978). The following courts of appeals have provided materials, in the form of checklists, that counsel should review to ensure there is no error in the record; while not all of these complaints can first be raised on appeal, they are worth considering in handling the juvenile appeal:

- the Houston First Court. http://www.txcourts.gov/1stcoa/practice-before-the-court/anders-guidelines-forms/
- the El Paso Court. http://www.txcourts.gov/media/816679/anders-requirements-tab-for-website-revised-1-20-15.pdf
- the Corpus Christi/Edinburg Court. http://www.txcourts.gov/13thcoa/practice-before-the-court/anders-guidelines/
- the Houston Fourteenth Court. http://www.txcourts.gov/14thcoa/practice-before-the-court/anders-guidelines-forms/

You also might keep an eye on the other courts' websites, in case they decide to do something similar.

Perhaps the richest vein to mine for complaints which can first be raised on appeal in a juvenile proceeding emanates from the Texas Supreme Court holding that "when a statute directs a juvenile court to take certain action, the failure of the juvenile court to do so may be raised for the first time on appeal unless the juvenile defendant expressly waived the statutory requirement." *In re C. O. S.*, 988 S.W.2d 760, 767 (Tex. 1999); *In re R.R.*, 373 S.W.3d 730, 735 (Tex. App.—Houston [14th Dist.] 2012) (pet. denied). But you have to be careful here–because what a statute giveth, a statute also can taketh away:

> In order to preserve for appellate or collateral review the failure of the court to provide the child the explanation required by Subsection (b) [which *C.O.S.* applied], the attorney for the child must comply with Rule 33.1, Texas Rules of Appellate Procedure, before testimony begins or, if the adjudication is uncontested, before the child pleads to the petition or agrees to a stipulation of evidence.

Tex. Fam. Code § 54.03(i), which was not in existence at the time of *C.O.S.*

Without going too deeply into the courts' various reasonings, or their failures to discuss fundamental error, some complaints unique to juvenile cases which can first be raised on appeal include:

- the failure of the trial court "to commence a trial by jury unless and until both the juvenile and his attorney release the trial court from that duty. Tex. Fam. Code §§ 51.09, 54.03(c)." *In re R.R.*, 373 S.W.3d 730, 735 (Tex. App.—Houston [14th Dist.] 2012)

- the "failure of a juvenile to object to the jury charge or to request an issue based on proof beyond a reasonable doubt rather than preponderance of the evidence was fundamental error and could be raised for the first time in a motion for new trial in view of the constitutional importance of the case to the public generally." *In re C. O. S.*, 988 S.W.2d 760, 767 n.48 (Tex. 1999), *citing State v. Santana*, 444 S.W.2d 614, 615 (Tex. 1969), vacated 397 U.S. 596, 90 S. Ct. 1350, 25 L. Ed. 2d 594 (1970) (directing reconsideration in light of *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), which held that the due process clause of the Fourteenth Amendment required proof beyond a reasonable doubt in a juvenile cases).
- the trial court's failure to inquire as to the juvenile's competence to stand trial. *In re H.C.*, supra.;
- the trial court's failure to comply with the requirements of Family Code Section 51.09 and 54.03, in terms of obtaining a waiver of rights (like the right to a jury trial) from a juvenile. *In re S.L.*, No. 07-14-00190-CV, 2016 WL 638017, 2016 Tex. App. LEXIS 1142, at *3 (Tex. App.—Amarillo Feb. 3, 2016) (no pet.) (mem. op.); *see also In re R.R.*, 373 S.W.3d at 735.
- the "charge erroneously allowed the jury to convict M.S. [the juvenile] of capital murder and aggravated robbery under an improper legal-duty theory." *In re M.S.*, No. 02-18-00099-CV, 2019 Tex. App. LEXIS 6980, at *5-6 (Tex. App.—Fort Worth Aug. 8, 2019, no. pet. hist.).

There are doubtless a bunch of others, and I encourage those who practice in this area to let me know when they run across the same.

d. Certain issues in parental-right termination cases.

As is true with juvenile cases, *Anders* briefs sometimes get filed in parental right termination cases, as well, so reviewing the *Anders* materials discussed for juvenile cases, above, might give you some ideas about complaints which can first be raised on appeal in parental-right termination cases.

But bear in mind that, as true for complaints raised by juveniles in delinquency cases, courts of appeals routinely reject complaints made by parents whose parental rights have been terminated because those complaints were not preserved in the trial court. However, there are some unique complaints in termination proceedings which a parent can raise for the first time on appeal. The following are a few examples of the same, though in making use of this sub-list make sure that you understand whether each of these issues can be first raised on appeal only in non-private termination proceedings:

- ineffective assistance of counsel, including in some contexts the right to be apprised of one's right to court-appointed counsel. *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009).

  > Because some courts have recognized that in certain contexts termination suits are quasi-criminal, we determine that the right of assistance of counsel cannot be waived. *In the Interest of B.L.D.*, 56 S.W.3d 203, 211-12 (Tex. App.—Waco 2001) (rev'd on other grounds, 113 S.W.3d 340, 342-43 (Tex. 2003)) (noting that statutory right to counsel in termination proceedings includes a due process right that counsel be effective); *In re J.M.S.*, 43 S.W.3d 60, 63 n. 1 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (arguing by analogy in termination case that certain other family law proceedings are quasi-criminal in nature); *In the Matter of the Marriage of Hill*, 893 S.W.2d 753, 755-56 (Tex. App.—Amarillo 1995, writ denied) (likening the procedural issues in parental termination cases to those of criminal cases as both implicate constitutional concerns); see also *Edwards v. Texas Dep't of Protective and Regulatory Servs.*, 946 S.W.2d 130, 135 (Tex. App.—El Paso 1997, no writ) (quoting approvingly of *Hill*). Thus, J.B.J., Jr. did not waive his right to assistance of counsel."

  In the Interest of A. J., 559 S.W.3d 713, 718 (Tex. App.—Tyler 2018, no pet.).
- the specificity of a court order establishing what a parent must do to receive child custody, when a parental-right termination under Family Code Section 161.001(b)(1)(O) is based on a violation of that order. *In the Interest of N.G.*, No. 18-0508, 62 Tex. Sup. Ct. J. 1069, 2019 WL 2147263, 2019 Tex. LEXIS 465, at *13-19 (May 17, 2019).
- a trial court's failure to appoint an attorney ad litem or amicus attorney for a child in a private termination case. *In re D.M.O.*, No. 04-17-00290-CV, 2018 WL 1402030, at *3, 2018 Tex. App. LEXIS 1992, at *4-5 (App.—San Antonio Mar. 21, 2018) (mem. op.) (held, " a complaining party may raise a trial court's failure to appoint an attorney ad litem or amicus attorney when required by Section 107.021(a-1) for the first time on appeal"), citing *In re K.M.M.*, 326 S.W.3d 714, 715 (Tex. App.—Amarillo 2010, no pet.); *Turner v. Lutz*, 654 S.W.2d 57, 58 (Tex. App.—Austin 1983, no pet.); *Arnold v. Caillier*, 628 S.W.2d 468, 469 (Tex. App.—Beaumont 1981, no pet.); *In re D.W.*, No. 04-05-00927-CV, 2006 Tex. App. LEXIS 7005, 2006 WL 2263907, at *1 (Tex. App.—San

Antonio Aug. 9, 2006, no pet.) (Lopez, C.J., dissenting) (dissenting on other grounds, but recognizing that failure to appoint an ad litem for a child may be raised for the first time on appeal);

- that there was no evidence the parent consented to or gave his attorney authority to enter a Rule 11 agreement (unsigned by the parent) which does not comply with Family Code section 153.0071(d)(2). *In the Interest of J.S.*, No. 05-18-01328-CV, 2019 WL 1417142, 2019 Tex. App. LEXIS 2549, at *6 (Tex. App.—Dallas Mar. 29, 2019, no pet. hist.) (mem. op.).
- that the trial court failed to comply with the statutory dismissal deadline deprived the court of jurisdiction (and that deadline is not extended by DFPS filing a SAPCR for termination in a paternity SAPCR filed by the AG). *In re A.F.*, No. 02-19-00117-CV, 2019 WL 4635150, 2019 Tex. App. LEXIS 8563, at *15 (Tex. App.—Fort Worth Sep. 24, 2019, no pet. hist.)

As is true concerning juvenile cases, I'm sure the foregoing is not an exhaustive list, and I hope those of you who find others will let me know about them.

3. Other stuff.

There are other complaints which can be first raised on appeal, and in some instances can be raised by appeals courts *sua sponte*. Those complaints include the following:

a. Ambiguity of contracts

You can find several cases which hold that appellate courts "may determine ambiguity as a matter of law for the first time on appeal." *Royal Maccabees Life Ins. Co. v. James*, 146 S.W.3d 340, 347 (Tex. App.—Dallas 2004, pet. denied), citing *Sage Street Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 444-46, (Tex. 1993); *see also Holmes v. Newman*, No. 01-16-00311-CV, 2017 WL 2871786, 2017 Tex. App. LEXIS 6177, at *6 (Tex. App.—Houston [1st Dist.] July 6, 2017, no pet.) (memo. op.) ("A court may conclude a contract is ambiguous even in the absence of a claim of ambiguity by the parties. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 231 (Tex. 2003) ('[The dissent] implies that, because the parties do not contend the agreement is ambiguous, we may not hold that it is. This is contrary to Texas law.')."); *KSWO TV Co. v. KFDA Operating Co., LLC*, 442 S.W.3d 695, 704 (Tex. App.—Dallas 2014, no pet.), citing *Arredondo v. City of Dallas*, 79 S.W.3d 657, 666-67 (Tex. App.—Dallas 2002, pet. denied); *Derwen Res., LLC v. Carrizo Oil & Gas, Inc.*, No. 09-07-00597-CV, 2008 WL 6141597, 2009 Tex. App. LEXIS 3661, at *10 (Tex. App.—Beaumont May 21, 2009, pet. denied) (memo. op.); *Beckham Res., Inc. v. Mantle Res., L.L.C.*, No. 13-09-00083-CV,2010 WL 672880, 2010 Tex. App. LEXIS 1323, at *55 (Tex. App.—Corpus Christi Feb. 25, 2010, pet. denied) (memo. op.); *see also Altech Controls Corp. v. Malone*, No. 14-17-00737-CV, 2019 WL 3562633, 2019 Tex. App. LEXIS 6719, at *12 (Tex. App.—Houston [14th Dist.] Aug. 6, 2019, no pet. hist.). These cases usually proceed from the premise, or rely on cases which proceeded from the premise, that "[d]eciding whether a contract is ambiguous is a question of law for the court." *Sage St.*, 863 S.W.2d at 445. This is true though both parties claim, in their summary judgment filings, that the contract is unambiguous (*Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983)) or that a will was unambiguous. *White v. Moore*, 760 S.W.2d 242, 243 (Tex. 1988).

Interestingly, when you look at a lot of these cases, or the cases they rely on, they at least indicate that the parties *impliedly* submitted the ambiguity question to the trial court for decision (perhaps by virtue of the conflicting claims of contractual unambiguity), or that the parties tried the issue of ambiguity by consent. For example, in *Sage St.*, the Court dealt with a jury trial, and actually held that the issue of whether or not the contract was ambiguous was tried by consent, by virtue of the evidence in that case and the question posed to the jury. *Sage St.*, 863 S.W.2d at 445, 446. But whether it is because that competing claims of ambiguity necessarily involve the possibility of ambiguity, or because the determination of contractual ambiguity lies squarely and indelibly in the purview of appellate courts, contractual ambiguity seems to be an issue which can first be raised on appeal. But if the latter justification cements the non-waivability of a claim of contractual ambiguity, it does raise the question: why doesn't that same justification mean that every other question of law can first be raised on appeal?

b. Complaints about judges.

We are all happy with our trial judges, and concerned about how the judge will react to a complaint about her/him. Unless, of course, things have gone so haywire that we don't care any more. A few situations allow parties to first complain on appeal about whether a trial judge can preside over a case, though one presents a tactical challenge–i.e., it seems to require consciously laying groundwork in the trial court in order to later challenge the judge on appeal.

i. The art. V, §11 constitutional disqualification of judge based on the judge's interest, the judge's connection with the parties, or when the judge was counsel in the case.

> Section 11 of Article V of the Constitution provides that: "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, [***16] within such a degree as may be prescribed by law, or when he shall have been counsel in the case. * * *"
> . . . .
> The rules announced in the Constitution and Statutes upon this subject are expressed in unconditional language, and are regarded as mandatory and to be rigidly enforced. It has long been the settled rule in this State that any order or judgment entered by a trial judge in any case in which he is disqualified is absolutely void. . . . Furthermore, the disqualification of a judge can not be waived in order to give validity [***17] to his actions.

Fry v. Tucker, 146 Tex. 18, 25-26, 202 S.W.2d 218, 221 (1947).

The rule excusing preservation does not extend to objections to an assigned (sometimes called "visiting") judge under Tex. Gov't. Code §74.053. *In re Approximately $ 17,239.00*, 129 S.W.3d 167, 168-69 (Tex. App.–Houston [14th Dist.] 2003, pet. denied); *Chandler v. Chandler*, 991 S.W.2d 367, 383 (Tex. App.–El Paso 1999, pet. denied); *Tex. Emp't Comm'n v. Alvarez*, 915 S.W.2d 161, 164 (Tex. App.–Corpus Christi 1996, no writ). If not preserved in the trial court, those objections are waived. *Id.*

ii. Actions beyond the scope of the judge's assignment.

At least one court has held that a party may first raise on appeal an objection to the actions of a visiting judge which exceed the scope of his or her assignment, because the judge's extra-assignment actions were void. *In the Interest of B.F.B.*, 241 S.W.3d 643, 647 (Tex. App.—Texarkana 2007) (orig. proceeding)..

iii. Challenge to a trial judge's qualifications

Some authority suggests that a challenge to a trial judge's qualifications–e.g., the failure to take the oath of office–can first be raised on appeal. *Sparkman v. Phillips*, No. 12-13-00272-CV, ___WL___, 2015 Tex. App. LEXIS 2512, at *4 (Tex. App.—Tyler Mar. 18, 2015, no pet.) (memo. op.). However, that same authority held that "in the absence of any evidence [the judge] did not take his oath, and pursuant to the requirement that we indulge every presumption in favor of the regularity of proceedings, we presume [the judge] took the required oath." *Id.* How one can provide proof that the trial court did not take the oath, or otherwise is unqualified, without raising that issue in the trial court is a little bit of a mystery to me, but maybe you will find a situation where those two dynamics happily co-exist.

Furthermore, you need to be aware that other authority holds that complaints about a trial judge's defective oath may ***not*** be raised for the first time on appeal. *Johnson v. Mohammed*, No. 03-10-00763-CV, 2013 WL 1955862, 2013 Tex. App. LEXIS 5808, at *4 (Tex. App.—Austin May 10, 2013, pet. dism'd, w.o.j.) (memo. op.)

iv. A trial judge may not testify as a witness at trial.

Tex. R. Evidence 605 provides that "[t]he presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue." As to a prior version of the rule which had slightly different wording, the Court of Criminal Appeals held as follows:

> [Rule 605] means that the judge who is presiding over a proceeding may not "step down from the bench" and become a witness in the very same proceeding over which he is currently presiding. Rule 605 addresses only that specific situation; the rule does not encompass any future proceedings in which the judge is participating but not over which the judge is presiding. Moreover, this narrow interpretation of Rule 605 accomplishes the objective of this rule.

Hensarling v. State, 829 S.W.2d 168, 170-71 (Tex. Crim. App. 1992)

v. A trial judge's bias or prejudice shown on the face of the record.

> Although not framing the issue in terms of fundamental or structural error, the Texas Supreme Court has recognized that claims of judicial bias would not be waived by a failure to object in the court below if "the conduct or comment

cannot be rendered harmless by proper instruction." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (*citing State v. Wilemon*, 393 S.W.2d 816, 818 (Tex. 1965)). In short, if a trial judge's conduct or comments are incurable, the failure to object may be excused. See *id.* This "limited," "narrow," and "rare" exception to the preservation-of-error requirements in civil cases essentially requires a harm analysis—the error "probably caused the rendition of an improper judgment"—to determine if the error was incurable and, therefore, not subject to waiver. Tex. R. App. P. 44.1(a)(1); *B.L.D.*, 113 S.W.3d at 350-51; see *In re K.R.*, 63 S.W.3d 796, 799-800 (Tex. 2001); *Dow Chem.*, 46 S.W.3d at 241. . . .We conclude, under the singular facts of this case, that the trial judge's course of conduct throughout the entire proceeding showed a deep-seated antagonism for Father that violated Father's constitutional right to a fair trial, resulting in a judgment that neither this court nor the public generally could be confident was not improper.

In the Interest of L.S., No. 02-17-00132-CV, __WL__, 2017 Tex. App. LEXIS 8963, at *48-49 (App.—Fort Worth Sep. 21, 2017, no pet.) (mem. op.).

c. Inadequate notice of a hearing (so long as you don't show up for the hearing in question). CONFLICT.

This is at best a murky area, with the cases heavily fact specific, and often seemingly hinging on whether or not the party appeared at the hearing, whether or not the party's own lack of diligence contributed to its failure to receive notice, and the egregiousness of the outcome. I'm not sure I would defer raising this complaint until appeal without exhaustively researching the cases and critically examining whether your situation has all the dynamics of the case(s) on which you plan to rely. Here is why I say that:

[A] party who complains of inadequate notice of a hearing and does not appear at the hearing may raise the complaint for the first time following the hearing. *See Prade v. Helm*, 725 S.W.2d 525, 527 n.3 (Tex. App.—Dallas 1987, no writ) (citing with approval *Martinez v. Gen. Motors Corp.*, 686 S.W.2d 349, 350-51 (Tex. App.—San Antonio 1985, no writ), which addressed inadequate notice of hearing complaint raised for the first time on appeal where appellant did not appear at complained-of hearing).

In re B.T.G., No. 05-17-00521-CV, 2017 WL 2334243, 2017 Tex. App. LEXIS 4911, at *3-4 (Tex. App.—Dallas May 30, 2017, no pet.) (memo. op.); *see also Fifteen-Thousand One-Hundred Ninety-Six Dollars & Forty-One Cents in United States Currency v. State*, No. 03-16-00015-CV, 2016 WL6833102, 2016 Tex. App. LEXIS 12294, at *3-8 (Tex. App.—Austin Nov. 18, 2016, no pet.) (memo. op.).

Having said that, the Fourteenth Court has held (admittedly in a situation where the party complaining about insufficient notice appeared at the hearing) that an "allegation that a party received less notice than required by statute does not present a jurisdictional question and may not be raised for the first time on appeal." *Graves v. Miller*, NO. 14-96-00236-CV, 1997 WL 197883, 1997 Tex. App. LEXIS 2122, at *6 (Tex. App.—Houston Apr. 24, 1997, pet. denied) (memo. op.); *see also Templeton Mortgage Corporation v. Poenisch*, No. 04-15-00041-CV, 2015 Tex. App. LEXIS 11813, 2015 WL 7271216 (Tex. App.—San Antonio Nov. 18, 2015, no pet.) (mem. op.).

d. Change in applicable law. CONFLICT.

Generally, however, a supreme court decision operates retroactively unless the court exercises its discretion to provide otherwise. *Bowen v. Aetna Cas. & Sur. Co.*, 837 S.W.2d 99, 100 (Tex. 1992) (per curiam). Thus, when the applicable law changes during the pendency of an appeal, we must render our decision in light of the change in the law. *Blair v. Fletcher*, 849 S.W.2d 344, 345 (Tex. 1993) (per curiam).

Cont'l Cas. Co. v. Baker, 355 S.W.3d 375, 386 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (op'n. on rehearing); *see also Kubala Pub. Adjusters, Inc. v. Unauthorized Practice of Law Comm.*, 133 S.W.3d 790, 796 (Tex. App.—Texarkana 2004, no pet.); *Phifer v. Nacogdoches Cty. Cent. Appraisal Dist.*, 45 S.W.3d 159, 166 (Tex. App.—Tyler 2000, pet. denied); *Sec. Fin. Corp. v. Blakely*, No. 09-96-295 CV, 1998 WL 473311, 1998 Tex. App. LEXIS 5061, at *15 n.2 (Tex. App.—Beaumont Aug. 13, 1998 __ pet. __); *Lubbock Cty. v. Strube*, 953 S.W.2d 847, 858 (Tex. App.—Austin 1997, pet. denied). This rule would seem to allow a party to raise a complaint for the first time on appeal, though I could not find a case exactly so holding–i.e., a case in which an issue was not raised in the trial court, the law as to the issue changed on appeal, and a party raised the issue as to which the law changed for the first time on appeal. At least one case seems to say the issue must have at least been addressed, at least if it involves summary judgment practice. *Baty v.*

ProTech Ins. Agency, 63 S.W.3d 841, 863 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). And one case has pointed out that a new post-trial decision will not represent a change in the law when it did not "represent[] such a sudden shift in the law as to require a new trial in the interests of fairness." *Bay Area Healthcare Grp., Ltd. v. Rayburn*, No. 13-99-275-CV, 2000 WL 35729513, 2000 Tex. App. LEXIS 8649, at *41-42 (Tex. App.—Corpus Christi Dec. 28, 2000, no pet.) (op. on rehearing) (not designated for publication).

Obviously, if the law changed as to an issue which was raised in the trial court, that change in the law could be mentioned on appeal–how else could courts fulfill their obligation to apply the changed law? And, if the law changes on appeal, that might relax the specificity requirements of Rule 33.1, in terms of courts of appeals evaluating the complaint you lodged in the trial court:

> Considering that the parties lacked the benefit of the supreme court's decision in *Crump* at the time of trial, we hold that Continental's objection to the definition of producing cause adequately preserved error. *See Lubbock Cnty. v. Strube*, 953 S.W.2d 847, 858 (Tex. App.—Austin 1997, pet. denied) (holding general objection to submission of question asking jury to determine attorney's fees as percentage of recovery sufficient to preserve error when *Arthur Andersen v. Perry Equipment Corp*., prohibiting juries from determining attorney's fees by awarding percentage of recovery, was decided during pendency of appeal).

Baker, 355 S.W.3d at 386; *see also Strube*, 953 S.W.2d at 858.

e. Complaints about legal and factual sufficiency in a bench trial.

Sometimes, the rules allow a party to first raise a complaint on appeal, as with legal and factual sufficiency in a bench trial:

> (d) *Sufficiency of Evidence Complaints in Civil Nonjury Cases*. In a civil nonjury case, a complaint regarding the legal or factual insufficiency of the evidence - including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a complaint that the trial court erred in refusing to amend a fact finding or to make an additional finding of fact - may be made for the first time on appeal in the complaining party's brief.

Tex. R. App. P. Rule 33(s).

Later in this paper, we will explore more fully the ramifications of having the ability to raise a legal or factual sufficiency complaint after it is too late for the other party to do anything about it. But for the present time, consider this question, and let it sink in–is there *any* complaint that an inventive lawyer cannot structure as either a legal or factual sufficiency complaint? The answer is "yes," of course–but the malleability of legal and factual sufficiency complaints provide a whole host of problems for the trial lawyer, in terms of anticipating and obviating complaints which may be raised. And, for present purposes, the fact that a party can first raise legal and factual sufficiency complaints on appeal in a civil nonjury trial should give every trial lawyer reason to carefully evaluate whether a case–or any component of it–should be tried to the court.

f. Certain complaints about affidavits in, and other aspects of, summary judgment practice.

Before launching into this discussion, let me remind you to always consult the following two resources to determine if affidavits in a case (either yours, or the other side's) have defects which can first be complained about on appeal: Timothy Patton, *Summary Judgment Practice in Texas*, LexisNexis; and Hon. David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 60 Hous. L. Rev. 1 (2019). And always check the most recent version of the paper by Yvonne Ho, et al, concerning conflicts among the various courts of appeals on these issues. Yvonne Y. Ho, Walter A. Simons, paper originally written and updated by Hon. Kem Thompson Frost, Hon. Brett Busby, Yvonne Ho, Jeffrey L. Oldham, Cynthia Keely Timms, *Splits Among the State Appellate Courts*, SBOT 32nd Annual Advanced Civil Appellate Practice (2018)

Rule 166a(f), entitled "Form of Affidavits; Further Testimony," has several pertinent things to say about affidavits used in summary judgment practice:

(1) they "shall be made on personal knowledge;"
(2) they "shall set forth such facts as would be admissible in evidence;"

(3) they "shall show affirmatively that the affiant is competent to testify to the matters stated therein;"
(4) "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith;" and
(5) "[d]efects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend."

I have not completely run it to ground, but it appears the first three provisions existed from the inception of the rule (effective March 1, 1950); the last provision was added, effective January 1, 1978. *Life Ins. Co. v. Gar-Dal, Inc.*, 570 S.W.2d 378, 380 n.1 (Tex. 1978).

i. Complaints can first be raised on appeal about the following substantive defects in affidavits.

[F]or purposes of preservation of error, "an appellate court treats a party's objections to defects in the 'form' and the 'substance' of an affidavit differently." *Stone v. Midland Multifamily Equity REIT*, 334 S.W.3d 371, 374 (Tex. App.—Dallas 2011, no pet.). Defects in substance are those that leave the evidence legally insufficient and may be raised for the first time on appeal despite the trial court's failure to rule on the objections. *Id.* A defect in form of an affidavit must be objected to in the trial court, and the failure to obtain a ruling waives the objection. Id.

City of Dall. v. Papierski, No. 05-17-00157-CV,2017 WL 4349174, 2017 Tex. App. LEXIS 9267, at *4-5 (Tex. App.—Dallas Oct. 2, 2017, no pet.) (mem. op.). You can find a bit of a historical discussion about defects in form and substance in *Mathis v. Bocell*, 982 S.W.2d 52, 59 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Examples of defects in form, which you must preserve in the trial court, include "[o]bjections to hearsay, best evidence, self-serving statements, and unsubstantiated opinions are considered defects in form." *Id.* You can raise complaints about the following defects in substance for the first raise on appeal:

- **a conclusory statement. CONFLICT.** "Objections that statements in an affidavit are conclusory assert defects in substance, which can be raised for the first time on appeal. *S & I Mgmt., Inc.*, 331 S.W.3d at 855. A conclusory statement is one that does not provide the underlying facts to support the conclusion. *Id.* It may be either legal or factual in nature. *Id.*" *McKinney Ave. Props. No. 2, Ltd. v. Branch Bank & Tr. Co.*, No. 05-14-00206-CV, 2015 Tex. App. LEXIS 5763, at *25 (Tex. App.—Dallas June 5, 2015, no pet.) (mem. op.). 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.*, ___WL___, 2015 Tex. App. LEXIS 1729, at *7-8 (Tex. App.–Amarillo Feb. 23, 2015, no pet.) (mem. op.); *County Real Estate Venture v. Farmers & Merchants Bank*, 2015 WL 591646, 2015 Tex. App. LEXIS 1409, at * 3 (Tex. App.– Houston [1st Dist.] Feb. 12, 2015, no pet.) (mem. op.). Be aware that the El Paso Court, without opinion, held that a complaint that an expert's affidavit "was conclusory" had not been preserved because "the record contains no ruling on the objections. See Tex.R.App.P. 33.1." *Acosta v. Falvey*, No. 08-16-00295-CV, 2019 Tex. App. LEXIS 5188, at *6 n.2 (Tex. App.—El Paso June 21, 2019, no pet. hist.). Sometimes, the failure to attach documents referenced in the affidavit makes the affidavit conclusory, and thus subject to a complaint in that regard which you can first raise on appeal. *Brown v. Brown*, 145 S.W.3d 745, 752 (Tex. App.—Dallas 2004, pet. denied);
- **a subjective belief** is a sort of subset of a conclusory statement, and you may raise a complaint about the same for the first time on appeal. *Hayes v. Vista Host, Inc.*, No. 03-08-00053-CV, 2009 WL 722288, 2009 Tex. App. LEXIS 1921, at *13 (Tex. App.—Austin Mar. 20, 2009, no pet.) (mem. op.), citing *Rizkallah v. Conner*, 952 S.W.2d 580, 586 (Tex. App.—Houston [1st Dist.] 1997, no writ), which in turn cited *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex.1996) and *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994) ("I believe I was terminated because" did not raise a fact issue in response to a motion for summary judgment).
- **an unsubstantiated opinion**, which is another subset of a conclusory statement, is an objection which that the affidavit "contained conclusions not supported by facts," and thus you can first make that complaint on appeal as well–and keep in mind that this complaint may help you avoid the conflicts among the courts of appeals as to whether one must preserve a complaint about the failure to show the affiant's personal knowledge. *Fernandez v. Peters*, No. 03-09-00687-CV, 2010 Tex. App. LEXIS 8473, at *12 (Tex. App.—Austin Oct. 19, 2010, no pet.) (mem. op.);
- **a lack of relevance**. *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003pet. denied); *Hartranft v. UT Health Sci. Ctr.-Houston*, No. 01-16-01014-CV, 2018 Tex. App. LEXIS 4679, at *23 (Tex. App.—Houston [1st Dist.] June 26, 2018, no pet.) (mem. op.);
- **the parol evidence rule** is an objection which at least one court has held can be raised for the first time on

appeal, because "[e]vidence that violates the rule is incompetent and without probative force, and cannot be given legal effect." *Lissiak v. SW Loan OO, L.P.*, 499 S.W.3d 481, 496 (Tex. App.—Tyler 2016, no pet.);

- **that a party's own interrogatory responses may not be used in its favor in a no evidence challenge, even when opposing counsel fails to object**. *ANA, Inc. v. Lowry*, 31 S.W.3d 765, 770 n.2 (Tex. App.—Houston [1st Dist.] 2000, no pet.);
- **an unsigned affidavit** "does not constitute an affidavit, does not authenticate the documents affixed thereto, and will not support a summary judgment, even though it is unchallenged." *Gonzalez v. Grimm*, 353 S.W.3d 270, 274 (Tex. App.—El Paso 2011, no pet.) (overruled in part, *Mansions in the Forest, L.P. v. Montgomery Cty.*, 365 S.W.3d 314, 317 (Tex. 2012)) , and cases cited therein. However, "[w]hen a purported affidavit lacks a jurat and a litigant fails to provide extrinsic evidence to show that it was sworn to before an authorized officer, the opposing party must object to this error, thereby giving the litigant a chance to correct the error." *Mansions*, 365 S.W.3d at 317. Apparently, the same is true for a complaint that the jurat is not signed by the notary public. *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 166 (Tex. 2018).

See Patton, *Summary Judgments in Texas*, §§6.10[1][c], and cases and cross-references found therein.

Having said that, a few other complaints present sometimes nuanced preservation problems and conflicts among the various courts of appeals. Let's look at a few of those now.

ii. A complaint that an affidavit shows it is not based on personal knowledge concerns a substantive defect, and can first be raised on appeal .

This can be a confusing area. Generally speaking, if the affidavit affirmatively shows that it is not based on the affiant's personal knowledge, that complaint can first be raised on appeal. *Stone v. Midland Multifamily Equity Reit*, 334 S.W.3d 371, 374 (Tex. App.—Dallas 2011, no pet.) ("Substantive defects are those that leave the evidence legally insufficient. *See Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 666 (Tex. 2010) (plurality op.) (affidavit not based on personal knowledge is legally insufficient); *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) (per curiam) (affidavit showing no basis for personal knowledge is legally insufficient).").

And so, welcome to the world of trying to discern what provides sufficient personal knowledge to support an affidavit. In this world, various courts' decisions "conflict on whether lack of personal knowledge is a form objection that must be preserved or a substance objection that may be raised on appeal without a trial court ruling." *Kyani*, 2018 Tex. App. LEXIS 5610, at *9 n.2, contrasting *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.) with *Stone*, 334 S.W.3d at 375. And the dividing line between a showing of sufficient personal knowledge, and not making that showing, is sometimes nuanced: for example, the fact that the affiant is General Counsel for the party and "attests to [his] job duties and responsibilities" does "give him personal knowledge of the facts," while the affidavit of "an officer for a company described as the exclusive advisor to the plaintiff" does not. *Kyäni, Inc. v. HD Walz II Enters.*, No. 05-17-00486-CV, 2018 WL 3545072, 2018 Tex. App. LEXIS 5610, at *9 (Tex. App.—Dallas July 24, 2018, no pet.) (mem. op.), distinguishing *Stone v. Midland Multifamily Equity REIT*, 334 S.W.3d 371 (Tex. App.—Dallas 2011, no pet.).

- **Most courts of appeals hold that a complaint that an affidavit that merely *fails to show* the affiant's personal knowledge is an objection as to form which must be raised in the trial court. CONFLICT.**

And that brings us to the question of whether one must object in the trial court "to preserve a complaint for appeal that an affidavit fails to reveal the basis of the affiant's personal knowledge of the stated facts." *Wash. DC Party Shuttle, LLC v. IGuide Tours, LLC*, 406 S.W.3d 723, 726 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). It seems safest to object in the trial court to an affidavit that fails to show the basis for the personal knowledge of the affiant. Justice Christopher extensively discusses the state of the law on that issue in *IGuide*, pointing out that the Supreme Court has left the area somewhat muddled:

> The court has stated on numerous occasions that an affidavit showing a lack of personal knowledge is incompetent or legally insufficient. *See, e.g., Laidlaw Waste Sys., (Dall.), Inc., v. City of Wilmer*, 904 S.W.2d 656, 661 (Tex. 1995); *Humphreys v. Caldwell*, 888 S.W.2d 469, 470 [*732] (Tex. 1994) (per curiam) (orig. proceeding); *Radio Station KSCS v. Jennings*, 750 S.W.2d 760, 761-62 (Tex. 1988) (per curiam); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *Burke v. Satterfield*, 525 S.W.2d 950, 954-55 (Tex. 1975). But the court also has concluded

that a party must object to an affiant's lack of personal knowledge and obtain a ruling on the objection to preserve error. *See Grand Prairie Indep. Sch. Dist. v. Vaughan*, 792 S.W.2d 944, 945 (Tex. 1990).

IGuide, 406 S.W.3d at 731-32 (*footnotes omitted*). *Iguide* also pointed out that most courts of appeals-- "[t]he Second, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Courts of Appeals"–have held that this complaint must be raised in the trial court, while noting that "[t]he Third and Eighth Courts of Appeals also have discussed the split of authority, but have resolved the conflict in favor of treating an objection based on the lack of personal knowledge as a defect in substance" which can first be raised on appeal. *Iguide*, 406 S.W.3d at 735 (citations omitted).

- **In any event, in a couple of courts of appeals you *may* be able to complain that the absence of a showing of personal knowledge is a complaint that can first be raised on appeal. CONFLICT**

I took a stab at trying to run to ground the current state of the conflicts among the courts of appeals on this issue, using the paper by Yvonne Ho, et al, as a starting point. Ho, Simons, et al, p. 18. After an afternoon or two, I got frustrated enough that I gave up, though I'll give you the benefit of some the research I did, below. But let me give you this advice, based on what I've seen:

- When you draft an affidavit, specifically say that your affiant has personal knowledge of the facts stated, and then have that affiant show how that personal knowledge exists. In other words–just eliminate the problem;
- If you think your opponent's affidavit fails to show an affiant's personal knowledge, make that objection in a timely fashion and get a ruling on it in the trial court;
- If you are brought into a case after a ruling adverse to your client, carefully evaluate whether the potential end result from raising a previously unasserted challenge based on an affiant's failure to show personal knowledge justifies the time, expense, and effort of making that challenge. For starters, you should:
  - Read *Wash. DC Party Shuttle, LLC v. iGuide Tours*, 406 S.W.3d 723, 731-36 & nn.16-24 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (en banc) (which holds that the failure of an affidavit to show the affiant's personal knowledge is a defect of form which must be preserved in the trial court, and extensively examines the competing authorities and what the Supreme Court has said on this issue, including a discussion parsing the potentially conflicting holdings of the Supreme Court in *Grand Prairie ISD v. Vaughan*, 792 S.W.2d 944, 945 (Tex. 1990) and *City of Wilmer v. Laidlaw Waste Systems, Inc.*, 890 S.W.2d 459 (Tex. App.--Dallas 1994), aff'd, 904 S.W.2d 656 (Tex.1995));
  - If you think you have found a case from your court of appeals holding that you can first raise on appeal a complaint that an affidavit fails to show the personal knowledge of the affiant, you will need to:
    - ensure the language you have found is a holding, and not just dicta–for example, the court of appeals held that the affidavit should have been stricken for some other reason, such as its conclusory nature;
    - ensure the affidavit in the case you found:
      - not only fails to show personal knowledge, but also fails to have a boilerplate assertion that all the facts are "within the affiant's personal knowledge," or something similar;
      - does not actively prove that the affiant lacked such personal knowledge;
      - is not distinguishable in some other way; and
    - ensure that your court of appeals has not issued an opinion in another case holding that the failure of an affidavit to show personal knowledge is a defect of form which must be preserved in the trial court.

Having given you that advice, let me then give you this big picture overview:

- It seems pretty clear, as set out in the conflicts paper by Ho, et al, that you can find opinions from most of the courts of appeals which hold the lack of personal knowledge is a defect in form, requiring preservation in the trial court. *See* Ho, et al, p. 18, ascribing such holdings to the 1st, 14th, Corpus Christi, Dallas, Fort Worth, San Antonio and Waco Courts of Appeals. *See* the following cases, mentioned in the paper by Ho, et al: *Wash. DC Party Shuttle*, 406 S.W.3d at 731-36 & nn.16-24; *Wolfe v. Devon Energy Prod. Co.*, 382 S.W.3d 434, 452 (Tex. App.— Waco 2012, pet. denied); *McFarland v. Citibank (S.D.), N.A.*, 293 S.W.3d 759, 762 (Tex. App.—Waco 2009, no pet.); *Thompson v. Curtis*, 127 S.W.3d 446, 450 (Tex. App.—Dallas 2004, no pet.); *Rizkallah v. Connor*, 952 S.W.2d 580, 585 (Tex. App.—Houston [1st Dist.] 1997, no writ); *Bauer v. Jasso*, 946 S.W.2d 552, 557 (Tex. App.—Corpus Christi 1997, no writ.); *Garcia v. John Hancock Variable Life Ins. Co.*, 859 S.W.2d 427, 433 (Tex. App.—San Antonio 1993, writ denied); *Albright v. Good Samaritan Soc'y - Denton Village*, No. 02-16-00090-CV, 2017 Tex. App. LEXIS 3536, 2017 WL 1428724, at *3 (Tex. App.—Fort Worth Apr. 20, 2017, no pet.) (mem. op.);

- It appears that the Amarillo, Beaumont, Eastland, and Texarkana Courts have also issued similar holdings. *Wynne v. Citibank (South Dakota) N.A.*, No. 07-06-0162-CV, 2008 WL 1848286, 2008 Tex. App. LEXIS 3037, at *4 n.3 (Tex. App.—Amarillo Apr. 25, 2008, pet. denied) (mem. op.); *Lewis v. Lamb*, No. 09-06-201 CV, 2007 WL 2002901, 2007 Tex. App. LEXIS 5414, at *10 (Tex. App.—Beaumont July 12, 2007, no pet.) (mem. op.)*; Boone v. Citibank (S.D.) N.A.*, No. 09-05-00135 CV, 2006 WL 3742802, 2006 Tex. App. LEXIS 10865, at *4 (Tex. App.—Beaumont Dec. 21, 2006, no writ) (mem. op.); *Athey v. Mortg. Elec. Registration Sys., Inc.*, 314 S.W.3d 161, 165-66 (Tex. App.—Eastland 2010, pet. denied); *Sundance Res., Inc. v. Dialog Wireline Servs., L.L.C.*, No. 06-08-00137-CV, 2009 Tex. App. LEXIS 2345, 2009 WL 928276, at *5 (Tex. App.—Texarkana Apr. 8, 2009, no pet.) (mem. op.); *Youngblood v. U.S. Silica Co.*, 130 S.W.3d 461, 468 (Tex. App.—Texarkana 2004, pet. denied); *Allen v. St. Paul Fire & Marine Ins. Co.*, 960 S.W.2d 909, 913-14 (Tex. App.—Texarkana 1998, no pet.);
    - But heed this forewarning: you can find cases issued by some, if not most or all of the foregoing courts, holding that the failure of an affidavit to show personal knowledge is a complaint which can be raised for the first time on appeal. Before I gave up trying to compile a list of such holdings, I found that, both after and prior to the *Thompson* case, *supra*, the Dallas Court had also held that "to be competent summary judgment evidence, an affidavit must set forth the basis on which the affiant had personal knowledge of the facts asserted," and that the failure to show such personal knowledge was a substantive defect which could first be raised on appeal. *City of Wilmer v. Laidlaw Waste Sys.*, 890 S.W.2d 459, 467 (Tex. App.-Dallas 1994), *aff'd*, 904 S.W.2d 656 (Tex. 1995). And recently, without citing *Bauer*, the Corpus Christi Court relied on *Laidlaw*'s holding that a failure to show how the affiant had personal knowledge was a defect in substance which could first be raised on appeal. *Ochoa v. City of Palmview*, No. 13-14-00021-CV, 2014 WL 7404594, at *7, 2014 Tex. App. LEXIS 6577, at *5 n.3 (Tex. App.—Corpus Christi June 19, 2014, no pet.) (mem. op.).
- I could not find a case from the Tyler Court (or, more accurately, gave up before finding one);
- It appears that the Austin and El Paso Courts have held to the contrary, and allow a complaint about the lack of personal knowledge to be raised for the first time on appeal. *Fernandez v. Peters*, No. 03-09-00687-CV, 2010 WL 4137491, at *4 (Tex. App.—Austin Oct. 19, 2010, no pet.) (mem. op.) (lack of personal knowledge renders the affidavit testimony incompetent); *Dailey v. Albertson's, Inc.*, 83 S.W.3d 222, 227 (Tex. App.—El Paso 2002, no pet.).

Finally, keep in mind that it might be possible to avoid these conflicts by couching your complaint as one that the affidavit "contained conclusions not supported by facts," thus providing you with a complaint you can first raise on appeal. *Fernandez v. Peters*, No. 03-09-00687-CV, 2010 Tex. App. LEXIS 8473, at *12 (Tex. App.—Austin Oct. 19, 2010, no pet.) (mem. op.). But, all in all, this issue is an error preservation quagmire, and it's probably best to stay away from it.

iii. Some courts of appeals hold that a failure to attach sworn or certified copies of documents referenced in a summary judgment affidavit is a substantive defect making the affidavit incompetent (and can first be raised on appeal). CONFLICT.

Once again, check the most current issue of the paper on *Splits Among the State Appellate Courts*, which at this writing confirms that the Texarkana, Fort Worth, Amarillo, El Paso, and Dallas courts of appeals hold that a failure to attach sworn or certified copies of documents referenced in a summary judgment affidavit is, at least in some circumstances, a substantive defect making the affidavit incompetent, thus making the complaint about this failure a complaint which first can be raised on appeal; the Beaumont, Houston First and Fourteenth, Corpus Christi, and San Antonio courts hold that the omission of underlying documents is not a substantive defect. Ho, Simons, et al, p. 18-19, and cases cited therein. "In *In re Estate of Guerrero*, this court, sitting en banc, determined that under precedent from the Supreme Court of Texas and from this court, a document submitted as evidence in a summary-judgment or a motion-to-compel-arbitration context has a substantive defect and is incompetent if there was a complete failure to authenticate the document. *See* 465 S.W.3d 693, 705, 706-08 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (en banc)." *Maree v. Zuniga*, No. 14-17-00210-CV, 2019 WL 2000464, 2019 Tex. App. LEXIS 3651, at *15-16 (Tex. App.—Houston [14th Dist.] May 7, 2019, no pet. hist.).

g. That the no-evidence motion for summary judgment is not sufficiently specific. CONFLICT.

As set out in *Splits Among the State Appellate Courts*, seven of the courts of appeals (Dallas, Tyler, Texarkana, El Paso, Houston First and Fourteenth, and San Antonio) hold that a non-movant may challenge a no-evidence summary judgment as being too conclusory or too general for the first time on appeal. *Jose Fuentes Co. v. Alfaro*, 418 S.W.3d 280, 287 (Tex. App.—Dallas 2013, pet. denied) (collecting authorities endorsing this approach); *Keathley v. Baker*, No.

12-07-00477-CV, 2009 WL 1871706, at *3, 2009 Tex. App. LEXIS 4957, at *8-9 (Tex. App.—Tyler July 30, 2009, pet. denied) (mem. op.); *Helm Cos. v. Shady Creek Housing Partners, Ltd.*, No. 01-05-00743, 2007 Tex. App. LEXIS 5902, 2007 WL 2130186, at *6 n.7 (Tex. App.--Houston [1st Dist.] July 26, 2007, pet. denied) (mem. op.); *Garcia v. State Farm Lloyds*, 287 S.W.3d 809, 818 (Tex. App.—Corpus Christi 2009, pet. denied); *Bean v. Reynolds Realty Grp., Inc.*, 192 S.W.3d 856, 860 (Tex. App.—Texarkana 2006, no pet.); *Cimarron Hydrocarbons Corp. v. Carpenter*, 143 S.W.3d 560, (Tex. App.--Dallas 2004, pet. denied); *In re Estate of Swanson*, 130 S.W.3d 144, 147 (Tex. App.—El Paso 2003, no pet.) (abrogating *Walton v. City of Midland*, 24 S.W.3d 853, 857 (Tex. App.—El Paso 2000, no pet.), and *Walton v. Phillips Petroleum Co.*, 65 S.W.3d 262, 268 (Tex. App.—El Paso 2001, pet. denied)); *Cuyler v. Minns*, 60 S.W.3d 209, 212-14 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 3 (Tex. App.—San Antonio 2000, pet. denied).

On the other hand, Austin, Waco and Amarillo hold that a complaint about a no-evidence motion's lack of specificity must be raised in the trial court. *Barnes v. Sulak*, No. 03-01-00159-CV, 2002 Tex. App. LEXIS 5727, at *26 n.4 (Tex. App.--Austin Aug. 8, 2002, pet. denied) (not designated for publication), cited, in recognizing split of authorities, by *Leifester v. Dodge Country, Ltd.*, No. 03-06-00044-CV, 2007 WL 283019, 2007 Tex. App. LEXIS 790, at *9 n.3 (Tex. App.—Austin Feb. 1, 2007, no pet.) (mem. op.); *Williams v. Bank One, Tex., N.A.*, 15 S.W.3d 110,117 (Tex. App.—Waco 1999, no pet.); *Roth v. FFP Operating Partners, L.P.*, 994 S.W.2d 190, 194-95 (Tex. App.—Amarillo 1999, pet. denied). Ho, Simons, *Splits Among the State Appellate Courts*, p. 19.

h. That the traditional summary judgment motion fails to prove the entitlement of the movant to judgment as a matter of law.

When the "complaint [is] that [movant's] summary-judgment evidence does not prove as a matter of law [movant's] entitlement to summary judgment on a traditional ground," that complaint does not have to be raised in response to the motion for summary judgment. *Carter v. ZB, Nat'l Ass'n*, No. 14-17-00900-CV, 2019 Tex. App. LEXIS 3645, at *13-14 (Tex. App.—Houston [14th Dist.] May 7, 2019, no pet. hist.) (memo. op.), *citing M.D. Anderson Hosp. & Tumor Institute v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).

i. If you don't object to the trial court sustaining the other side's objections to your summary judgment evidence, you may *not* be able to complain about the trial court's rulings on appeal.

I don't know this amounts to an ambush, but it certainly falls in the category of meeting the enemy and finding out it is you. 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 WL 4536614, 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).

j. Certain complaints about affidavits used outside summary judgment practice–at least consider all the summary judgment affidavit complaints.

Like the personal knowledge requirement of Rule 166a(f), TEX. R. EVID. 602 provides that a non-expert "witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Courts have invoked summary judgment case law in the non-summary judgment context to hold that affidavits not based on personal knowledge are "legally insufficient." *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 666 (Tex. 2010), citing *Kerlin*, 274 S.W.3d at 668. So that means that, if you are called on to try to reverse an adverse decision below which is based on an affidavit, you might consider all the bases set out above for challenging summary judgment affidavits for the first time on appeal. But if you are trying to decide whether to hide behind the log and not raise a complaint about an affidavit in the trial court, you better be very, very sure that authority in your court of appeals district applies the rule you rely on outside the summary judgment context.

B. Complaints which can be raised when it's too late to fix them.

Creativity plays such a large part in devising complaints at a time when it's too late for the other party to fix them that there is probably no paper that can cover them all. In fact, you could probably argue that *almost every* complaint is made when it's too late to do anything about it. But let's look at some such complaints which might surprise you.

1. A losing party has more time (i.e., until appeal) to raise legal and factual sufficiency complaints in a civil non-jury trial, as compared to a jury trial

As we know, complaints about legal and factual sufficiency can be raised after the evidentiary phase of the trial:

- as to a **"civil non-jury case"**, a "complaint regarding the legal or factual insufficiency of the evidence–including a complaint that the damages found by the court are excessive or inadequate–may be made for the first time on appeal in the complaining party's brief." TRAP 33.1(d).
- as to a **jury trial**:
  ○ a "claim that the evidence was legally or factually insufficient to warrant the submission of any question [to the jury] may be made for the first time after verdict." TRCP 279. One can assert a legal insufficiency complaint post-verdict if the complaining party owed no duty as to which the jury was asked to make a finding. *Shell Oil Co. v. Humphrey*, 880 S.W.2d 170, 174 (Tex. App.—Houston [14th Dist.] 1994, writ denied);
  ○"a complaint of factual insufficiency of the evidence to support a jury finding" can *only* be preserved for appeal in a motion for new trial. TRCP 324(b)(2); and
  ○ generally speaking, "[a] no evidence point is preserved through one of the following: (1) a motion for instructed verdict; (2) a motion for judgment notwithstanding the verdict; (3) an objection to the submission of the issue to the jury; (4) a motion to disregard the jury's answer to a vital fact issue; or (5) a motion for new trial." *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 220 (Tex. 1992.

We'll talk a little later about the tactical advantage this may give a losing party in a bench trial–and how this tactical advantage might affect your bench trial/jury trial election.

2. Legal and factual sufficiency complaints–how creative can you be?

It may surprise you to know some of the complaints which courts have characterized as legal sufficiency complaints (which, as we noted above, can first be raised post-trial).

a. A complaint that expert testimony is speculative or conclusory on its face can first be raised after the evidence is offered–but you should preserve that complaint as you would a complaint about legal sufficiency. CONFLICT.

When the challenge to an expert's testimony "is restricted to the face of the record -- for example, when expert testimony is speculative or conclusory on its face – then a party may challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility." *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004). The speculative/conclusory complaint contrasts to "a reliability challenge [which] requires the court to evaluate the underlying methodology, technique, or foundational data used by an expert, the challenging party must have timely objected at trial to raise the complaint on appeal." *Id.* An objection as to the underlying methodology, technique, or foundational data used by the expert must be made "before trial or when the evidence is offered. *See Robinson*, 923 S.W.2d at 557; *see also Havner*, 953 S.W.2d at 713." *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998).

Keep in mind that while facially speculative or conclusory expert testimony does not require an objection at the time the testimony is offered, any complaint about such testimony is still subject to the rules of error preservation. For bench trials, it seems this is the kind of no evidence objection which one could first raise on appeal. TRAP 33.1(d). *See In the Interest of Z.S.*, No. 02-18-00335-CV, __WL__, 2019 Tex. App. LEXIS 3147, at *10 (Tex. App.—Fort Worth Apr. 18, 2019, no pet. hist.) (mem. Op.). As to jury trials, at least two courts have held that one must use one of the four traditional post-trial preservation motions to preserve a complaint that the conclusory/speculative opinion provides no evidence to support the jury verdict. *S.E.A. Leasing, Inc. v. Steele*, No. 01-05-00189-CV, ___ WL ___, 2007 Tex. App. LEXIS 1337, at *15 (Tex. App.—Houston [1st Dist.] Feb. 22, 2007, pet. denied) (memo. Op.) ("Generally, there are five recognized methods of preserving a legal-sufficiency complaint in a jury trial: (1) a motion for directed verdict; (2) an objection to the submission of a jury question; (3) a motion for judgment notwithstanding the verdict; (4) a motion to disregard the jury's answer to a vital fact issue; or (5) a motion for new trial."); *City of Dall. v. Redbird Dev. Corp.*, 143 S.W.3d 375, 385 (Tex. App.—Dallas 2004, no pet.). Having said that, one court of appeals has held that *no* objection is necessary in the trial court to preserve such a complaint, and that a party can first raise a conclusory/speculative objection concerning expert testimony for the first time on appeal. *de Damian v. Bell Helicopter Textron, Inc.*, 352

S.W.3d 124, 155 (Tex. App.—Fort Worth 2011, pet. denied) ("Bell argues that Ross's testimony is conclusory and speculative on its face. No objection was required to preserve the no evidence issue for appellate review," citing *Coastal*); *see also S.E.A. Leasing, Inc. v. Steele*, 264 S.W.3d 71, 78 (Tex. App.—Houston [1st Dist.] 2007) (Keyes, J., dissenting on rehearing en banc) ("[I]n *City of Keller v. Wilson*, [the Texas Supreme Court stated] that 'incompetent evidence is legally insufficient to support a judgment, even if admitted without objection.' 168 S.W.3d 802, 812 (Tex. 2005). It explained, 'This exception frequently applies to expert testimony. . . . And if an expert's opinion is based on certain assumptions about the facts, we cannot disregard evidence showing those assumptions were unfounded.' *Id.* at 812-13. Thus, under *City of Keller*, evidence showing that supporting evidence is incompetent cannot be disregarded when conducting a legal-sufficiency review. *See id.*").

In trying to decide whether you may be able to spring an ambush in this area, or the extent to which you need to watch out for the same, keep in mind that it is sometimes difficult to distinguish between a complaint which "requires the court to evaluate the underlying methodology, technique, or foundational data used by an expert" (requiring a contemporaneous objection to the evidence), and a complaint that the "testimony is speculative or conclusory on its face,"which does not require such a contemporaneous objection. Sometimes, members of the Supreme Court have disagreed on the line between these two complaints:

> The opinions and testimony of the engineer and doctor here are far removed from the "bare conclusions" we rejected as conclusory in *Coastal*. *See Coastal Transp. Co.*, 136 S.W.3d at 232 (witnesses qualifications and bare opinion not enough). Neither expert asked the jury to trust their opinion merely on the basis of their expertise. They instead purported to analyze the underlying data that they (and apparently the City also) considered relevant before rendering their respective opinions.
>
> The City's present complaints about analytical gaps is nothing more than an unpreserved reliability challenge. Analytical gaps are not complaints about naked opinions, lacking any basis in the record, but rather are assertions that specific errors or omissions in an expert's analysis render his or her opinion unreliable. *See, e.g., Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 38-39 (Tex. 2007); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006); *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006); *Kerr-McGee Corp.*, 133 S.W.3d at 254; *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002). . . . The Court's opinion today unfortunately blurs the distinction between expert testimony that purports to have a basis in science (unreliable expert testimony) and expert testimony that lacks any apparent support apart from the expert's claim to superior knowledge (conclusory expert testimony).[6] The [*829] Court's decision today is not only wrong, it is also unfair and may encourage gamesmanship in the future. Why have a pretrial Robinson hearing or make a reliability objection during trial and run the risk that the proffering party may fix the problem, when the expert's opinion can be picked apart for analytical gaps on appeal? *See Robinson*, 923 S.W.2d at 552; *see also Ellis*, 971 S.W.2d at 411.
>
> [6] The Court's indiscriminate mixing of unreliable and conclusory expert opinions is most apparent in its reliance on *Exxon Corp. v. Makofski*, 116 S.W.3d 176 (Tex. App.--Houston [14th Dist]. 2003, pet. denied), a court of appeals' opinion written by a current member of this Court, and *Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706 (Tex. 1997). In both cases, timely objections were made to the reliability of the respective experts. . . .This Court . . . concludes that "[f]or the same reasons [as set out in *Makofski* and *Havner*], we reach the same conclusion here." S.W.3d at . But this case is not *Makofski* or *Havner* as the City conceded during oral argument, stating: "We cannot go into the statistical significant part of *Havner* because we did not object to the scientific reliability, we didn't make a *Daubert* objection and we have not tried to do that." Thus, the Court's conclusion is based on an authority the City has expressly conceded does not apply.

City of San Antonio v. Pollock, 284 S.W.3d 809, 828 n.6 (Tex. 2009) (Medina, J., dissenting). Good luck on correctly characterizing your complaint, or the type of complaint your opponent springs on you.

b. One court of appeals, and a concurrence in another court, say that complaining about a party's failure to segregate its attorney's fees in a bench trial is a legal/factual sufficiency complaint–but most courts don't, and the disagree about the deadline for such a complaint. CONFLICT.

Ah, yes. Attorney's fees, and the need to segregate fees concerning claims on which you can recover such fees. Can you spell "inextricably intertwined?" Does the nature of "inextricably intertwined" depend on the eye of the ~~beholder~~ biller?

But we will not go into all that, because all that concerns us here is when one can timely make a complaint about the failure to segregate fees. And that presents a quagmire. As the Dallas Court of Appeals noted:

> One of our sister courts has noted that "there is as yet no consistent rule about when an objection to the failure to segregate attorneys' fees must be raised in a case tried without a jury," *Home Comfortable Supplies, Inc. v. Cooper*, 544 S.W.3d 899, 908 (Tex. App.—Houston [14th Dist.] 2018, no pet.), and some courts have ruled that an objection to failure to segregate must be made "before the trial court issues its ruling." *Huey-You v. Huey-You*, No. 02-16-00332-CV, 2017 Tex. App. LEXIS 8750, 2017 WL 4053943, at *2 (Tex. App.—Fort Worth Sept. 14, 2017, no pet.) (mem. op.); *see also Cooper*, 544 S.W.3d at 908-09 (collecting cases).

Anderton v. Green, 555 S.W.3d 361, 372 n.4 (Tex. App.—Dallas 2018, no pet.).

In a jury trial, one case has held that "[i]t is well-established that in a case tried to a jury, an objection to the failure to segregate is preserved if raised in an objection to the charge. *See Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991), modified on other grounds by *Chapa*, 212 S.W.3d at 313-14." *Cooper*, 544 S.W.3d at 908.

In bench trials, the deadline is muddled. The Corpus Court, and a concurrence from the Dallas Court, say that this complaint can first be raised on appeal if it is asserted as a legal or factual sufficiency complaint. *Bos v. Smith*, 492 S.W.3d 361, 385 (Tex. App.—Corpus Christi 2016) (the court held that a party's objection to lack of segregation raised in request for additional findings of fact and conclusions of law did not preserve error, but then the court applied Tex. R. App. P. 33.1(d) to reverse the fee award as factually insufficient, based on a lack of segregation), aff'd in part, rev'd in part on other grounds, No. 16-0341, 2018 WL 2749714 (Tex. June 8, 2018); *Anderton v. Green*, 555 S.W.3d 361, 375-376 (Tex. App.–Dallas 2018, no pet.) (Whitehill, J., concurring, citing Tex. R. App. P. 33.1(d)). The remaining courts–and, maybe even the Corpus Court–are less forgiving on the deadline for making such a complaint–though some seem to allow an objection after the evidence has closed. Here are deadlines adopted by various courts, concerning objecting to the failure to segregate fees in bench trials:

- when the fee testimony and billing records are offered as evidence. Houston First, San Antonio, perhaps Corpus. *See Cooper*, 544 S.W.3d at 908, citing *Lost Creek Ventures, LLC v. Pilgrim*, No. 01-15-00375-CV, 2016 Tex. App. LEXIS 6974, 2016 WL 3569756, at *10 n.1 (Tex. App.—Houston [1st Dist.] June 30, 2016, no pet.) (mem. op.) and *In re M.G.N.*, 491 S.W.3d 386, 409 (Tex. App.—San Antonio 2016, pet. denied) (op. on reh'g); *Bos v. Smith*, 492 S.W.3d 361, 385 (Tex. App.—Corpus Christi 2016) (holding party's objection to lack of segregation raised in request for additional findings of fact and conclusions of law did not preserve error, but applying Tex. R. App. P. 33.1(d) to reverse award as factually insufficient based on a lack of segregation), aff'd in part, rev'd in part on other grounds, No. 16-0341, 2018 WL 2749714 (Tex. June 8, 2018).
- in response to the summary judgment motion. Sometimes, the Houston Fourteenth. *Red Rock Props. 2005 v. Chase Home Fin., L.L.C.*, No. 14-08-00352-CV, 2009 WL 1795037, at *7 (Tex. App.—Houston [14th Dist.] June 25, 2009, no pet.) (mem. op.); compare to *Clearview*, below.
- before the trial court rules. Fort Worth. *Huey-You v. Huey-You*, No. 02-16-00332-CV, 2017 Tex. App. LEXIS 8750, 2017 WL 4053943, at *2 (Tex. App.—Fort Worth Sept. 14, 2017, no pet.) (mem. op.);
- after the trial court announces its ruling, but before it signs a judgment. Dallas. *Anderton v. Green*, 555 S.W.3d 361, 372 n.4 (Tex. App.–Dallas 2018, no pet.) (Lang-Miers, J., joined by Wright, C.J.)
- a post-judgment motion. Sometimes, the Houston 14th. *Clearview Props., L.P. v. Prop. Tex. SC One Corp.*, 287 S.W.3d 132, 143 n.4 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); compare to *Red Rock*, above; and, finally (at least for this paper);
- raising the complaint in a motion for new trial is too late. Austin. *see also Horvath v. Hagey*, No.03-09-00056-CV, 2011 WL 1744969, at *6 (Tex. App.—Austin May 6, 2011, no pet.) (mem. op.) (failure to raise objection at bench trial);

No doubt about it–I sure want to take a chance on how late I can wait to make my complaint about a failure to segregate attorney's fees, especially since the courts of appeals are in such agreement on the issue. *See* Yvonne Y. Ho, Walter A. Simons, paper originally written and updated by Hon. Kem Thompson Frost, Hon. Brett Busby, Yvonne Ho, Jeffrey L. Oldham, Cynthia Keely Timms, *Splits Among the State Appellate Courts*, SBOT 32nd Annual Advanced Civil Appellate Practice (2018), p. 15.

c. A complaint that legally insufficient evidence supports the jury's answer to a question the complaining party submitted. TEX. R. CIV. P. 279.

In *Musallam v. Ali*, the plaintiff in a declaratory judgment action requested a jury question asking whether he and the defendant had agreed to the sale of a business by plaintiff to defendant. *Musallam v. Ali*, 560 S.W.3d 636, 638 (Tex. 2018). The defendant objected to the question, arguing that the evidence was unequivocal that the parties did enter into such an agreement; the submitting plaintiff argued that the agreement omitted material terms, and was just an unenforceable agreement to agree. *Id.* The trial court submitted the question. After the jury found that the two parties had agreed to the sale, the plaintiff argued in a motion for judgment notwithstanding the verdict that the answer was not supported by legally sufficient evidence. The Supreme Court held noted that "Texas Rule of Civil Procedure 279 provides that '[a] claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was made by the complainant.'" *Musallam*, 560 S.W.3d at 639. The Court then held that "a motion for judgment notwithstanding the verdict or motion to disregard the jury's answer will . . . preserve error," and that "by requesting Question 1 Musallam did not forfeit the right to later challenge the legal sufficiency of the evidence to support it." *Id.*

d. At least one court of appeals has held that a legal insufficiency complaint as to damages can be made in a post-trial motion.

That's right. *O.C.T.G., L.L.P. v. Laguna Tubular Prods. Corp.*, No. 14-16-00210-CV, 2018 WL 2439574, 2018 Tex. App. LEXIS 3840, at *12 (Tex. App.—Houston [14th Dist.] May 31, 2018, vacated pursuant to settlement).

3. Immaterial jury findings, or jury findings regarding a "purely legal issue."

In 2017 and 2018 the Supreme Court issued several decisions where it reminded us that a "purely legal issue," or a complaint about an immaterial finding, can first be raised in the post-verdict time frame, as opposed to being waived if not asserted as to the charge before the jury retired to deliberate. More recently, the Supreme Court has reminded us that "a complaint that a jury's answer is immaterial is *not* a jury charge complaint." *Musallam v. Ali*, 560 S.W.3d 636, 640 (Tex. 2018). Specifically, the Supreme Court has held that:

- a complaint about the immateriality of a jury finding can first be raised:
  - in a motion for jnov. *BP Am. Prod. Co. v. Red Deer Res., LLC* 526 S.W.3d 389, 402 (Tex. 2017); *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 482 (Tex. 2017); or
  - in a motion to disregard or for new trial. *Red Deer*, 526 S.W.3d at 402; and
- a purely legal issue can first be raised in a motion for judgment. *Menchaca*, at 487, n. 8.

a. What makes a jury finding immaterial?

Well, the following, for starters:

☞the question asks the jury about damages on an irrelevant date (i.e., different than set out in the shut-in clause). *Red Deer*, 526 S.W.3d at 402.
☞the question asks the jury to find whether there was negligence in a case pled as a premises liability claim. *United Scaffolding*, 537 S.W.3d at 482 (the Supreme Court has recently characterized *United Scaffolding* as "holding that the preservation requirement was satisfied because the defendant raised the issue of an improper theory of recovery that could not support the judgment in a motion for judgment notwithstanding the verdict." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, No. 16-0006, 62 Tex. Sup. J. 808, 2019 WL 1873428, 2019 Tex. LEXIS 389, at *10-11, 13-14 (Apr. 26, 2019)).
☞the question asks the jury to find reasonable attorney's fees when recovery of fees is sought under Chapter 38 against an LLC, because as a matter of law a party cannot recover such fees against an LLC. *CBIF, Ltd. P'ship v. TGI Friday's Inc.*, No. 05-15-00157-CV, 2017 WL 1455407, 2017 Tex. App. LEXIS 3605, at *68 (Tex. App.—Dallas Apr. 21, 2017, pet. denied).

i. A case study in the difficulties and disagreements regarding immateriality and preserving charge error–*United Scaffolding*.

United Scaffolding's 6-3 decision, holding that a charge error complaint was preserved by a post-verdict motion, emphasizes the difficulties which still remain in dealing with charge error–especially concerning those cases which involve an injury which arguably invokes the murky law at the confluence of negligence and premises liability. It also emphasizes the importance of distinguishing between the following:

- those situations in which a theory of recovery or defense is defectively submitted–which requires an objection to preserve error; and
- those situations in which the correct theory is entirely omitted, when no objection is necessary.

United Scaffolding involved the second trial of what the Supreme Court characterized as a "slip-and-fall case." 537 S.W.3d 463, 467 (Tex. 2017). The workman alleged he slipped on a piece of plywood that had not been nailed down, causing him to fall up to his arms through a hole in the scaffold. *Id.* Come charge time, the Plaintiff requested "only a general-negligence theory of recovery, without the elements of premises liability as instructions or definitions." 537 S.W.3d at 480-481. In fact, "the court in the second trial simply used the same question [the Defendant] had proposed in the first trial." Boyd, J., Dissent, 537 S.W.3d at 501.

Post-verdict and on appeal, the Defendant argued that the general negligence submission was incorrect and would not support a judgment for Plaintiff. Plaintiff "argues that even if his claim should have been submitted under a premises liability theory of recovery, [Defendant] either waived the argument because it did not object to the jury charge or invited the error by requesting a general-negligence submission in the first trial." 537 S.W.3d at 481. The Court rejected both arguments, based on the concept that a premises liability claim is a theory of recovery distinct from a general negligence claim. The Court said "[c]onsidering Levine's pleadings, the nature of the case, the evidence presented at trial, and the jury charge in its entirety, we hold that Levine's claim is properly characterized as one for premises liability," as opposed to a claim for negligence. 537 S.W.3d at 480. The Dissent vigorously disagreed with this conclusion:

> [The Majority] holds that Rule 279 is irrelevant here because 'the correct theory of recovery was omitted entirely.' . . . I disagree. Although a premises-liability claim is independent from an ordinary-negligence claim, it is still rooted in negligence principles.

Boyd, J., Dissent, 537 S.W.3d at 500.

The Majority "recognize[d]. . . that a defendant must preserve error by objecting when an independent theory of recovery is submitted defectively. See Tex. R. Civ. P. 279." 537 S.W.3d at 481. That "includes when an element of that theory of recovery is omitted. *See id.*" *Id.* But, despite the Dissent's objections, the Majority stuck fast to the negligence/premises distinction, and held that "when, as in this case, the wrong theory of recovery was submitted and the correct theory of recovery was omitted entirely, the defendant has no obligation to object." 537 S.W.3d at 481. The Majority noted that to hold otherwise "would effectively force the defendant to forfeit a winning hand." 537 S.W.3d at 481. The Dissent also disagreed with that holding:

> We have held, and the Court specifically notes, . . . that a plaintiff may submit a premises-liability claim by submitting a question on control and 'a broad-form negligence question,' as long as 'instructions that incorporate the . . . premises defect elements . . . accompany the questions.' *Olivo*, 952 S.W.2d at 529. The jury charge here included a broad-form negligence question but lacked a question on control and instructions on the premises-liability elements. According to the Court's own rule, this is merely a defective submission, not a complete omission. . . . I agree with Levine that USI waived its complaint by failing to object to the omitted elements. See Tex. R. Civ. P. 279 (explaining when 'omitted element or elements shall be deemed found by the court in such manner as to support the judgment').

Boyd, J., Dissent, 537 S.W.3d at 500.

The Majority also held that the defendant did not waive, or invite error, by requesting the general negligence submission in the first trial. "[O]nce the trial court ordered a new trial, [Defendant] could invite error only in the second trial. *See Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005)." 537 S.W.3d at 482. The Dissent disagreed with the foregoing, as well:

> I agree with [Plaintiff] that [Defendant] invited the trial court to err by proposing the ordinary-negligence question. Since the record reflects that the court in the second trial simply used the same question [Defendant] had proposed in the first trial, and it does not reflect that [Defendant] ever withdrew the question it had proposed in the very same case, [Defendant] invited the error of which it now complains.

537 S.W.3d at 501.

Finally, the Court held that the Defendant "preserved its submission argument by raising it in a motion for judgment notwithstanding the verdict." 537 S.W.3d at 482. "[Defendant] cited *Olivo* in support of its request for a take-nothing judgment. This gave the trial court notice of USI's complaint that the verdict was based on an immaterial theory of recovery that could not support [Plaintiff's] recovery on a premises liability claim." 537 S.W.3d at 482.

The foregoing discussions by the *United Scaffolding* Majority and Dissent show how difficult this is. When the Justices disagree about whether a premises liability claim is a subset of negligence or not–and whether that means that a negligence question, without premises instructions, is defective (and thus needing an objection to preserve error) or amounts to an immaterial question not needing a pre-verdict objection–we realize the daunting task we face on the charge, and the peril of a self-inflicted wound intrinsic to an error preservation ambush based on the immateriality of a jury question. Guess wrong in your ambush decision–which you may not know until you get a head count in the Supreme Court–and you have waived your complaint. And if you represent the party with the burden on a claim or an affirmative defense, make very, very sure you know exactly what kind of claim or defense you have, and request the charge accordingly.

b. What constitutes a purely legal issue?

Examples include the following:

i. **that Chapter 95 applies.** Whether chapter 95 applied to appellants' claims against defendant could be raised at any time, including after trial. Gorman v. Ngo H. Meng, 335 S.W.3d 797, 803 (Tex. App.-Dallas 2011, no pet.). But make sure that you don't fail to get jury findings you need, if any, to support the affirmative defense.

ii. **exemplary damages are capped.** A motion for new trial will timely preserve a claim that exemplary damages are capped, as provided in Tex. Civ. Prac. & Rem. Code §41.008(c)–at least in "the absence of a plea and proof of cap-busting conduct." *Zorrilla v. Aypco Constr. II*, 469 S.W.3d 143, 157 (Tex. 2015).

iii. **a party is not jointly and severably responsible for exemplary damages**. Responding to an amended motion for entry of judgment, and specifically adopting the response of other defendants that any given defendant cannot be held jointly and severally liable for exemplary damages assessed against other parties, will preserve that complaint by the adopting defendant. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 881 (Tex. 2017).

iv. **contractual damages are independent of statutory damages.** A motion for judgment will preserve a complaint that "contractual damages are independent from statutory damages and must be based on a finding that [the defendant] breached the policy [of insurance]." *Menchaca*, at 487, n. 8.

4. Incurable jury argument. TEX. R. CIV. P. 324(b)(5)

No question that incurable jury argument can be preserved post-trial–in fact, Rule 324(b)(5) *requires* a motion for new trial as a "prerequisite" to complaining about such argument on appeal, if the trial court has not otherwise ruled on the complaint. But this clear rule of preservation begs the question: what amounts to incurable jury argument? As the Texas Supreme Court has said:

> ...in rare instances the probable harm or prejudice cannot be cured. In such instances the argument is incurable and complaint about the argument may be made even though objection was not timely made. See TEX. R. CIV. P. 324(b)(5); *Haywood*, 266 S.W.2d at 858. To prevail on a claim that improper argument was incurable, the complaining party generally must show that the argument by its nature, degree, and extent constituted such error that an instruction from the court or retraction of the argument could not remove its effects. *See Haywood*, 266 S.W.2d at 858. The test is the amount of harm from the argument: whether the argument, considered in its proper setting, was reasonably calculated to cause such prejudice to the opposing litigant that a withdrawal by counsel or an instruction by the court, or both, could not eliminate the probability that it resulted in an improper verdict. *Id.* But jury argument that strikes at the appearance of and the actual impartiality, equality, and fairness of justice rendered by courts is incurably harmful not only because of its harm to the litigants involved, but also because of its capacity to damage the judicial system. Such argument is not subject to the general harmless error analysis.
>
> In *Reese*, this Court discussed different types of jury argument that constitute incurable error. For

> example, appeals to racial prejudice adversely affect the fairness and equality of justice rendered by courts because they improperly induce consideration of a party's race to be used as a factor in the jury's decision. *See Reese*, 584 S.W.2d at 840 (citing *Haywood*, 266 S.W.2d at 858); *see also Moss v. Sanger*, 75 Tex. 321, 12 S.W. 619, 620 (Tex. 1889). Unsupported, extreme, and personal attacks on opposing parties and witnesses can similarly compromise the basic premise that a trial provides impartial, equal justice. *See Reese*, 584 S.W.2d at 840 (citing *Howsley & Jacobs v. Kendall*, 376 S.W.2d 562 (Tex. 1964) and *Sw. Greyhound Lines, Inc. v. Dickson*, 149 Tex. 599, 236 S.W.2d 115 (Tex. 1951)). Further, accusing the opposing party of manipulating a witness, without evidence of witness tampering, can be incurable, harmful argument. *See Howsley & Jacobs*, 376 S.W.2d at 565-66.

Living Ctrs. of Texas, Inc. v. Penalver, 256 S.W.3d 678, 680 (Tex. 2008)

Other examples of incurable jury arguments can be found at p. 15 of Jeffrey L. Oldham *Preservation of Error Post-Trial*, STATE BAR OF TEX. PROF. DEV. PROGRAM, APPELLATE NUTS AND BOLTS SEMINAR (2009)), updated and presented from the paper by JoAnn Storey. They include comparing defendant's business, and defense counsel's trial conduct, to Germany's World War II T-4 Project, which used the elderly and impaired for experiments. *Penalver*, 256 S.W.3d at 680; conversely, the Supreme Court has held that one counsel's plea to send a message to the doctors was not of this same class of impropriety. *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009). The party which complains about the incurable jury argument has the burden of showing that its nature, degree, and extent amounted to reversible harmful error. Oldham, at p. 15, updating Storey, and citing *Reliance Steel v. Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 871 (Tex. 2008), and giving a more full explanation of the manner of analyzing whether reversible error has occurred.

5. You may be able to complain about irreconcilably conflicting jury answers after the trial court dismisses the jury–but I would not advise counting on it.

There is some uncertainty as to whether a party can wait until after the jury is discharged to raise a complaint about irreconcilably conflicting jury answers under TEX. R. CIV. P. 295. Until April 2018, I would have said you had to raise that complaint before the trial court excused the jury. I still advise you to do so. Having said that, in *USAA Lloyd's Co. v. Menchaca*, a decision in which only seven of the Supreme Court's nine justices participated, four of those justices said that while "[g]enerally, a party should object to conflicting answers before the trial court dismisses the jury," the "absence of such an objection, however, should not prohibit us from reaching the issue of irreconcilable conflicts in jury findings." *USAA Lloyd's Co. v. Menchaca*, 545 S.W.3d 479, 526 (2018) (Green, J., dissenting, joined by Chief Justice Hecht, Justices Guzman and Brown). In so stating, the dissent noted that Rule 295 only says that if a purported verdict "is defective, the court *may* direct it to be reformed." *Id.*, at 527 (emphasis in dissent). The dissent said that holding that "the Rule 295 verdict-reformation process is the *only* remedy for conflicting jury answers . . . misconstrues Rule 295, misapplies our precedent, and ignores trial realities, as this case demonstrates." *Id.*, at 527. In discussing various cases in which post-judgment motions challenged allegedly conflicting jury answers, the four justice dissent said that they "do not believe our preservation requirements prevent us from ruling in USAA's favor or even from considering the issue of conflicting jury issues in this case." *Id.*, at 530.

The other three justices participating in the *Menchaca* decision held that "we have long held that a judgment will not be reversed 'unless the party who would benefit from answers to the issues objects to the incomplete verdict before the jury is discharged, making it clear that he desires that the jury redeliberate on the issues or that the trial court grant a mistrial," and applied that same rule to conflicting answers. *Menchaca*, at 519. Having said that, this three justice majority opinion held that, because "of the parties' obvious and understandable confusion over our relevant precedent and the effect of that confusion on their arguments in this case," a "remand is necessary here in the interest of justice," even though error was not preserved and the fatal conflict in the jury answers was not fundamental error which avoided the need to preserve error. *Menchaca*, at 521.

Keep in mind, too: *Menchaca* dealt with "irreconcilable conflicts" in jury answers, not with incomplete jury answers or unresponsive jury answers. In all, I would not advise knowingly failing to object to irreconcilably conflicting jury answers until after the trial court dismisses the jury. You may have three Supreme Court justices on your side (one of the four dissenting justices, Justice Brown, may have moved to the Federal district bench by the time this paper comes out), but that strikes me as short of a winning hand.

C. Strategies, counter strategies, and considerations for error preservation ambushes

1. **Realize that a jury trial compresses the losing party's opportunities to specify legal and factual sufficiency complaints, while bench trials give them months to be creative**.

Obviously, both jury trials and bench trials allow the losing party the opportunity to lodge legal/factual sufficiency objections after it's too late for the winning party to cure the problem–as mentioned above, the losing party can make such complaints in jury trials via a number of post-trial motions, and TRAP 33.1(d) allows the losing party to make such complaints in a civil non-jury trial for the first time on appeal. But, in making the decision between a jury trial and a bench trial, do not underestimate the (sometimes huge) error preservation advantage a bench trial gives the losing party, as compared to a jury trial. In a bench trial, legal/factual sufficiency complaints can first be raised in the appellant's brief, usually months after the trial, the ensuing judgment, and several briefing extensions. This gives the losing party–and, perhaps, its new appellate counsel–plenty of time to study the clerk's and reporter's records, fully research the law, and figure out which arguments work best and why. In a jury trial, depending on how quickly the winner can force the verdict to a judgment, the losing party will also have some time (probably at least a month) to draft and file its post-trial motions–but in the grand scheme of things, that time frame sometimes becomes agonizingly short for the losing party which has to face hiring new appellate counsel, perhaps running the supersedeas gauntlet, and having new appellate counsel become familiar with the (sometimes lengthy) trial transcript.

Just saying. For example, if only your opponent has the burden of proof, and really has the winning hand (for example, on a claim for attorney's fees), the error preservation advantage a bench trial would give you might affect your decision on the type of trial you want.

2. **Thank Heidi Bloch and Jennifer Buntz, not me–if you've lost in a jury trial, file post-trial motions with catch-all legal insufficiency and immateriality arguments**.

I have mentioned the really excellent paper which Heidi Bloch and Jennifer Buntz put together on unwaivable error and arguments. Elizabeth G. (Heidi) Bloch, Jennifer Buntz, *Unwaivable Error and Arguments That Still Work Even if You Think of Them for the First Time on Appeal*, SBOT 29th Annual Advanced Civil Appellate Practice Course (2015). Heidi and Jennifer had suggested that the losing party include in an appropriate post-trial motion a broadly stated catch-all legal insufficiency argument attacking the jury verdict, and a broadly stated catch-all argument about the immateriality of the verdict. Why? Because sometimes such a broadly worded sufficiency argument can morph on appeal into an argument that a challenge to legal sufficiency can preserve a complaint that attorney's fees are not recoverable from limited partnerships or limited liability companies under chapter 38 of the civil practices and remedies code (*CBIF, Ltd. P'ship v. TGI Friday's Inc.*, No. 05-15-00157-CV, 2017 WL 1455407, 2017 Tex. App. LEXIS 3605, at *68 (Tex. App.—Dallas Apr. 21, 2017, pet. denied)), or perhaps (depending on which court of appeals hears your case) a complaint about the other side not segregating their attorney's fees.

3. **Thank Heidi and Jennifer, again–counter strategies for the amorphous (or, in a non-jury trial, unstated) legal insufficiency or immateriality argument.**

Heidi and Jennifer also had some ideas about how to counter the amorphous legal insufficiency/immateriality post trial motion, and some of those ideas apply in both non-jury and jury trial scenarios:

1) Know your case, and plan for your opponent's moves. Think of *every* cause of action or affirmative defense you have, *request* jury questions on them all (so as to avoid a *United Scaffolding* problem), ruthlessly vet your fee statements for fees which need segregation, etc.–in other words, anticipate and plan for the unexpected;
2) In summary judgment practice, have someone ruthlessly vet your motion/response and evidence–*especially* your affidavits. Sometimes, it is difficult to see the deficiencies in your own work.
3) Force your opponent to narrow their legal insufficiency/immateriality arguments. Force hearings on your opponents' post-trial motions, and have those hearings on the record. At those hearings, challenge your opponents to comply with TRAP 33.1's requirement that they "state[] the grounds for the ruling ...with sufficient specificity to make the trial court aware of the complaint." Invite the trial court to both put your opponent on the spot to set out the details of their complaint, and then to delineate *on the record* the limited, specific number of things the trial court understands your opponents' complaint to entail;
4) Show the complaint made at trial does not satisfy TRAP 33.1's specificity requirement. If the complaint is first made on appeal, point out that it violates TRAP 33.1's requirement of sufficient specificity.

4. **In setting the ambush, consider: do you really want to have a new trial in front of a trial judge who**

you did not alert to a problem he/she could have addressed?

Trial judges make many discretionary calls during the course of a trial. And for a variety of reasons–including but not limited to not having the time to retry a case–if you have hidden the ball from a trial court judge on an error preservation ambush, based on a complaint the judge could have fixed,and then end up back in front of that judge on a new trial-don't say I didn't warn you.

Conclusion

Knowing the kinds of complaints which can first be raised after it is too late to do anything about them is a good thing. That knowledge helps you anticipate and prevent someone from asserting those complaints against you. Knowing those complaints can also help you identify complaints you can assert against your opponent. But before you postpone asserting such complaints until your opponent cannot fix them, be very, very sure that you are on solid ground. Otherwise, you might end up being the test case on the timeliness of such a complaint, and the losing party.