CONVERSATIONS WITH THE COURT:

A Theme for Preserving Error Under TEX. R. APP. P. 33.1

By

STEVEN K. HAYES
Law Office of Steven K. Hayes
500 Main Street
Suite 340
Fort Worth, Texas 76102

With many thanks to

TIFFANY SHROPSHIRE
Archivist, Supreme Court of Texas,
for her work in locating archived materials
Related to the Adoption of Rules 33.1 and 52(a)

State Bar of Texas
28th ANNUAL
ADVANCED CIVIL APPELLATE PRACTICE COURSE
Austin, Texas: September 4-5, 2014

CHAPTER

STEVEN K. HAYES

LAW OFFICE OF STEVEN K. HAYES
500 Main Street, Suite 340
Fort Worth, Texas 76102
Direct Phone: 817/371-8759
Facsimile: 817/394-4436
www.stevehayeslaw.com
E-mail: shayes@stevehayeslaw.com

Education:	Harvard Law School, J.D. in 1980. Austin College, B.A. in 1977, *summa cum laude*
	Briefing Attorney assigned to the Honorable Charles Barrow, Supreme Court of Texas, 1980-1981
	Assistant County Attorney, Bell County, Texas, 1984-1985
Practice:	Civil Appeals.
Admissions:	State Bar of Texas Supreme Court of the United States Fifth Circuit Court of Appeals United States District Courts (all Districts in Texas)
Memberships:	American Law Institute (2005-present) Appellate Law Section, State Bar of Texas (Treasurer, 2013-2014; Council, 2008-2011; Course Director, Advanced Civil Appellate Law Seminar, 2012). Appellate Law Section, Tarrant County Bar Association (Chair, 2007-8) Litigation Section, State Bar of Texas (Online CLE Committee, Co-Chair, 2013-Present; News for the Bar, Co-Chair, 2011-2013) Texas Association of Defense Counsel Tarrant County Bar Association, 1993-present (Director, 2005-2008, 2013-present) Eldon B. Mahon Inn of Court (Emeritus, 2010-present; President 2009-2010; Executive Committee, 2010-2013) Serjeant's Inn of North Texas (2012-present) Bell-Lampasas-Mills Counties Bar Association, 1984-1992

(former Director)
Bell-Lampasas-Mills Counties Young Lawyers Association
(former President, Vice-President, Secretary-Treasurer and Director)
Life Fellow, Texas Bar Foundation

Mentor of the Year, 2009-2010, Fort Worth-Tarrant County Young Lawyers' Association.

TABLE OF CONTENTS

CONVERSATIONS WITH THE COURT: A Theme for Preserving Error Under TEX. R. APP. P. 33.1.

In the fiscal year that ended August 31, 2012, when courts of appeals dealt with error preservation in civil cases, they held that error was ***not*** preserved in the trial court roughly 93% of the time. In approximately 85% of those error preservation decisions, the courts held that error was not preserved because either no objection was raised in the trial court, or the complaint was not made timely, or it was not made on the record, or because the trial court did not make either an express or implicit ruling on the objection. Roughly 15% of the cases in which courts of appeals issued opinions on the merits in that fiscal year involved error preservation issues. And it appears that FYE 2012 was not an aberration-an ongoing study of opinions in civil cases during the FYE August 31, 2014, indicates that roughly those same percentages will hold true for 2014, as well.

And if that was the end of the analysis, then this paper would be nothing more than an exercise in fear mongering. But the analysis does not end with the foregoing numbers. Because the numbers also show us the way to the things we have to do to preserve error-and the things we need to look for to see if error has been preserved. Because the numbers also show us that, over the last quarter century or so, courts of appeals have increasingly judged error preservation by expressly invoking the provisions of the general error preservation rules in Texas. And the last seventeen years, that Rule has been TEX. R. APP. P. 33.1. And it is in that Rule that we find the requirements of the conversation we need to have with the trial court in order to preserve error-and the requisites we need to argue to the courts of appeals have been met.

So let's look at the conversation which Rule 33.1 tells us we need to have with the trial court. But let's look at that conversation in the context of the trends and tendencies of the courts of appeals over a long period of time, and lots of cases, and in the context of the history behind Rule 33.1, and finish up with specific examples of error preservation problems which practitioners and courts have faced. And the process of error preservation will not seem quite so scary any more.

1. A Picture (or Graph) is Worth A Thousand Words: The Exponentially Increasing Invocation of the General Error Preservation Rule by the Courts of Appeals in Civil Cases, and What That Means for Error Preservation.

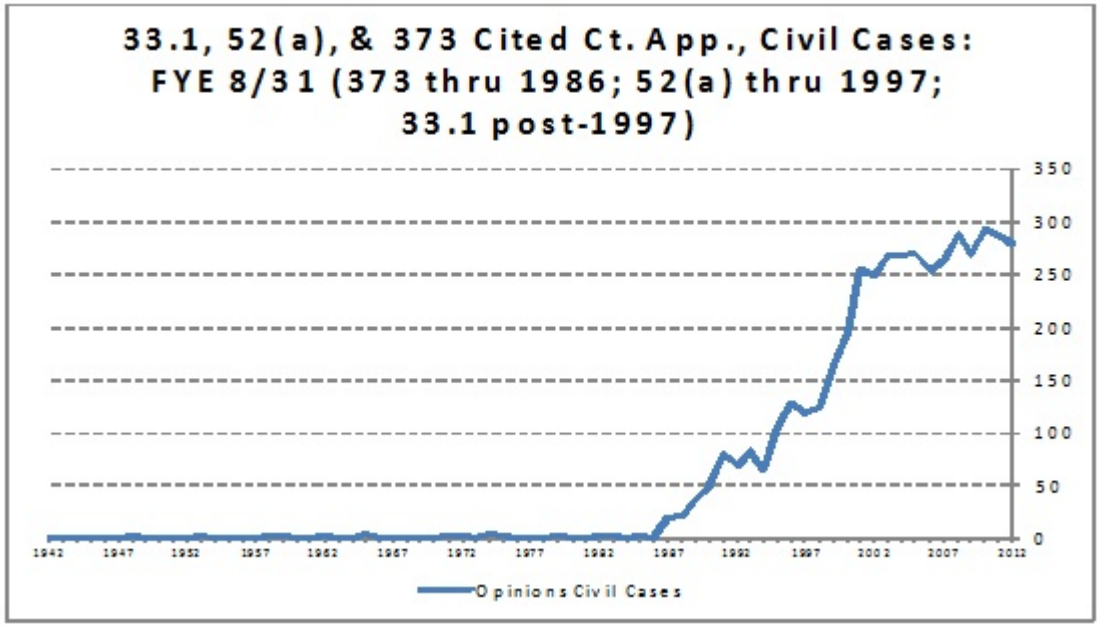
What follows in this section of the paper is not a statistical study. Other than a brief stint working with an expert witness in about 1999, I have not dealt with statistics since my junior year in college. The words "regression analysis" have not even been spoken in the same room with any of the following percentages and numbers. But I still think the following measurements bear giving some thought.

A. Courts of Appeals Are Increasingly Telling Us to Have the Conversation with the Trial Court which is envisioned by Rule 33.1.

People talk about "exponential growth" all the time, often doing so when the pertinent growth has not been exponential. But in looking at how often Texas courts have invoked the general error preservation rules in civil cases[1] over the 70-odd years such rules have existed, the growth has in fact been exponential.

Texas has had three general error preservation rules (the "general error preservation rules"): TEX. R. CIV. PRO. 373, which existed from September 1, 1941 through August 31, 1986 (45 years); TEX. R. APP. P. 52(a), which existed from September 1, 1986, through August 31, 1997 (11 years); and TEX. R. APP. P. 33.1, which became effective September 1, 1997 (in existence at the writing of this paper for nearly 16 years). *See* Vernon's Ann.Rules Civ. Proc., rule 373, Historical Note (Repealed by Order of April 10, 1986, eff. Sept. 1, 1986); TEX. R. APP. P. 52(a). *Emerson v. Fires Out, Inc.,* 735 S.W.2d 492, 493 (Tex. App.–Austin 1987, no writ); *Delhi Gas Pipeline Corp. v. Lamb*, 724 S.W.2d 97, 101 (Tex. App.–El Paso 1986, writ ref'd., n.r.e.); TEX. R. APP. P. 33.1, John Hill Cayce, Jr., Anne Gardner, and Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure.* 49 BAYLOR L. REV. 872 (1997).

The following chart shows the number of opinions issued by Texas courts of appeals in civil cases which relied on any of the foregoing rules in any given year:



[1] Unless otherwise stated, all observations and comments in this paper relate to civil cases, and do not include criminal cases.

The foregoing chart reflects that, in the roughly 45 years of Rule 373's existence, courts of civil appeals did not expressly address Rule 373 more than about 94 times[2]–barely more than twice per year, on average. But when Rule 52(a) came in effect September 1, 1986, the number of civil cases in which courts of appeals cited to the general error preservation rules exploded–courts eventually cited Rule 52(a) in civil cases nearly 75 times as frequently as they cited to its predecessor, Rule 373.[3] The advent of Rule 33.1 (the current general error preservation rule) on September 1, 1997, saw yet another vast increase in case cites–it was eventually cited nearly twice as much as its predecessor, Rule 52(a).

Furthermore, it appears that this exponential growth cannot be explained by burgeoning dockets–we see the same exponential growth reflected in the percentage of opinions in civil cases in each of these years which expressly addressed any of these general error preservation rules:

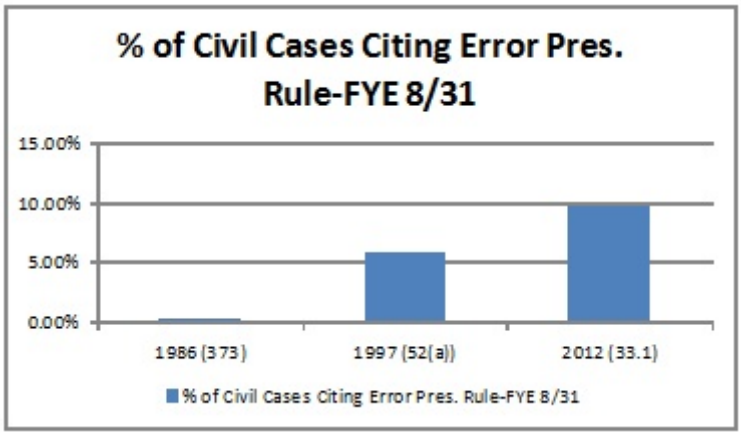
Rule	**FYE August 31**	**Total Opinions in Civil Cases Citing the Rule**	**Total Opinions in Civil Cases Decided On the Merits***	**% of Total Cases Decided on Merits Citing Rule**
33.1	2012	279	2902	9.6%
52(a)	1997	119	2040	5.8%
373	1986	1	2135	.05%

The geometrically increasing tendency of courts to invoke the general error preservation rule is emphasized by the depiction of the foregoing percentages on the following graph:

---

[2] This count of cases citing Rule 373 comes from a combination of online searches, and reviewing the Notes of Decision for Rule 373 found in 4 Vernon's Ann.Rules Civ.Pro., published in 1985, and the 1996 Cumulative Annual Pocket Part thereto.

[3] And on the criminal side of the docket, the courts of appeals–which handled no criminal appeals prior to the fiscal year ending 1987–went from citing Rule 373 in about 23 opinions during FYE 1987 to citing it in nearly 547 opinions in FYE 2012.



* The "Total Opinions in Civil Cases Decided on the Merits" for each year was drawn from the Texas Judicial System Annual Reports for the pertinent year. Those Annual Reports may be found at http://www.courts.state.tx.us/pubs/AR2012/toc.htm. For each Annual Report, look for "Courts of Appeals Activity, Activity Detail," or the like, for the three years in question. I considered "Total Opinons in Civil Cases Decided on the Merits" to consist of all dispositions of civil cases for the various courts of appeals reflected in the Activity Detail *except* for those "Cases otherwise disposed" (which include abatement, bankruptcy stays, decisions on original proceedings, and other dispositions), and "Cases dismissed." It did not seem likely that opinions in those two categories would involve or address the general error preservation rules.

You will see later in the paper that not all opinions which cite the general error preservation rule actually apply or interpret it. For example, in the fiscal year ending 2012, about 258 of the 279 cases (about 92%) which mentioned Rule 33.1 actually interpreted and applied it. But the percentage of cases in 2012 which cited Rule 33.1 and actually interpreted and applied it was so high that comparing the opinion count as I've done in the foregoing table and chart seems to be a legitimate comparison of opinions citing the three rules. Any way you look at it, the tendency of the courts of appeals to invoke the general error preservation rule has increased exponentially over the years-thus emphasizing that we should look to the general error preservation rule-now, Rule 33.1-to tell us what kind of conversation we need to have with the trial court in order to preserve error..

B. When the Courts of Appeals invoke the current general error preservation rule (Rule 33.1), they virtually always hold that error has not been preserved–for some reasons we should find

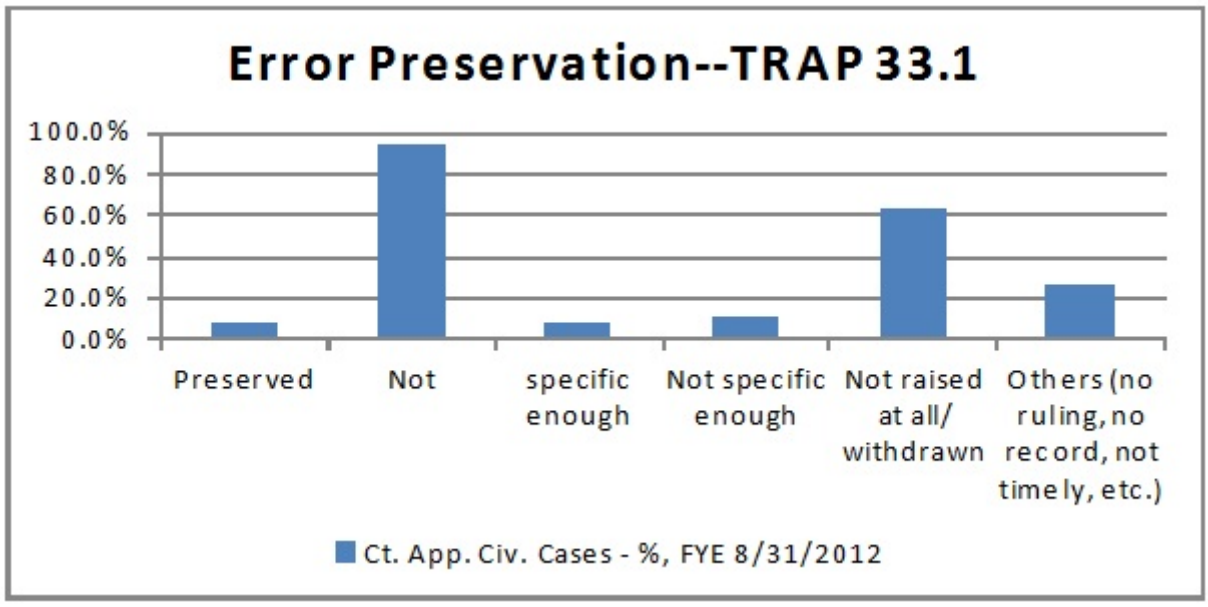
instructive.[4]

I have not yet tried to do a survey of cases decided under Rule 373 or Rule 52(a) to determine how often courts of appeals held that error was not preserved under either of those two rules. Nor, in that regard, have I done a multi-year survey of the cases decided under Rule 33.1. But as to cases decided under Rule 33.1 during the fiscal year ending September 1, 2012, the courts of appeals held that error was not preserved 93% of the time. That means they found error was preserved only 7% of the time.

	Error Preserved	Error Not Preserved	Objection Specific Enough	Objection Not Specific Enough	Objection Not Raised at All	Other (no ruling, no record, not timely, etc.)
Cases	18	240	18	27	150	63
%	7%	93%	7%	10.5%*	62.5%*	27%[5]

* These are the percentages of the cases as to which error was not preserved.

Graphically, the foregoing numbers look like this:



[4] All the numbers and percentages in this section of the paper come from opinions handed down by the courts of appeals in civil cases in the fiscal year ending August 31, 2012. That was the fiscal year which immediately preceded the first publishing of this paper.

[5] I rounded this number up by about .7% to account for one or two cases which were outliers and did not fit any category, thanks to such inventive lawyers as Chad Baruch. *See Basley v. Adoni Holdings, LLC*, 373 S.W.3d 577, 588 (Tex. App.–Texarkana 2012, no pet.)

I. When Courts of Appeals hold that error was not preserved under Rule 33.1, they do so about 90% of the time because an objection was not made at all, no record was made, no ruling obtained, or the objection was not timely.

The most interesting–and perhaps instructive–aspect of the foregoing numbers is how often the courts of appeals held that error was not preserved because of the failure of parties to comply with what I will call the "mechanical" aspects of Rule 33.1. When courts of appeals have held that error was not preserved, they so held: 62.5% of the time because of the failure to raise the objection at all; and 27% of the time because of the failure to get a ruling on the objection, or to bring forward a record of the objection or the ruling, or the failure to timely assert the objection. This latter category of failure is anything but mechanical, of course–e.g., pots of ink have been spilt and gigabytes of information have been encoded in discussing when an objection is timely, and when it is not. Still, these numbers underscore the importance of knowing when, and how often, one must assert a particular objection–and to ensure the record reflects that assertion and the trial court's ruling. And they emphasize the need to assert all grounds on which you intend to object to a ruling.

II. When courts of appeals rule on the specificity of an objection under Rule 33.1, they only find the objection sufficiently specific about 40% of the time.

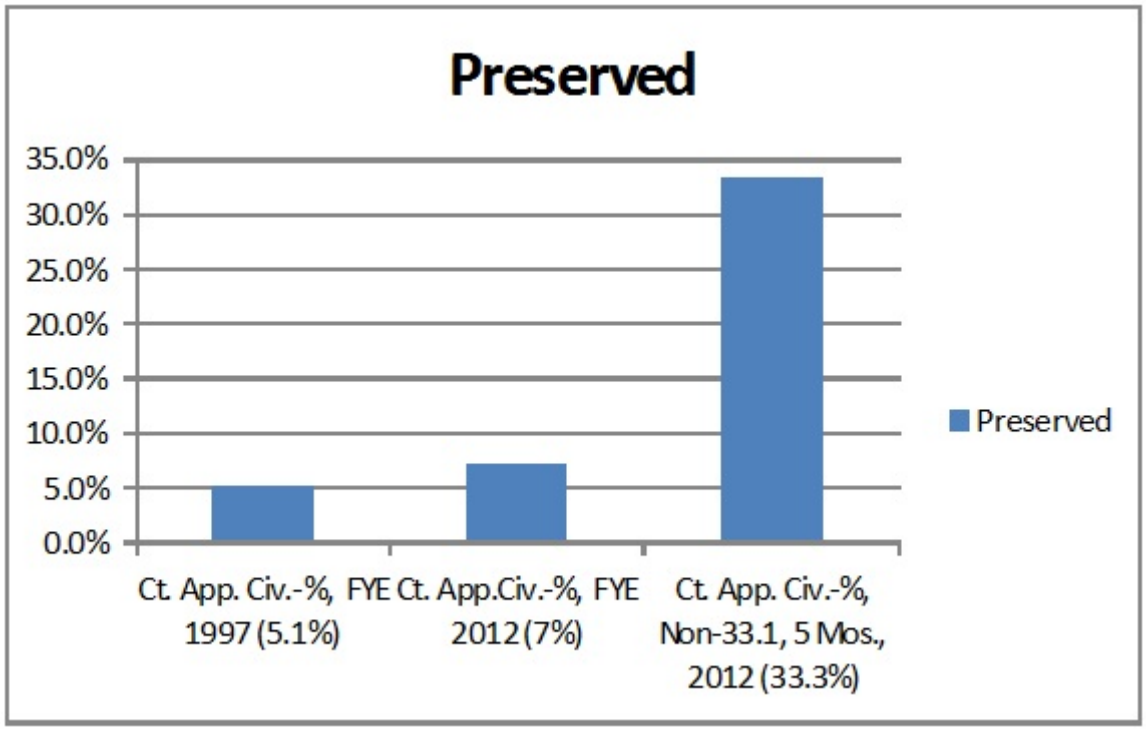
Interestingly enough, when the courts of appeals actually decided whether a complaint was specific enough to make the trial court aware of the complaint, about 40% of the time the courts found the complaint sufficient–and about 60% of the time they found the complaint not sufficiently specific. More on that later in the paper.

III. When courts of appeals rule on error preservation *without* invoking Rule 33.1, they find error preserved almost 5 times as often as when they invoke Rule 33.1. So if you intend to argue error was not preserved, cast that argument in the Rule 33.1 template.

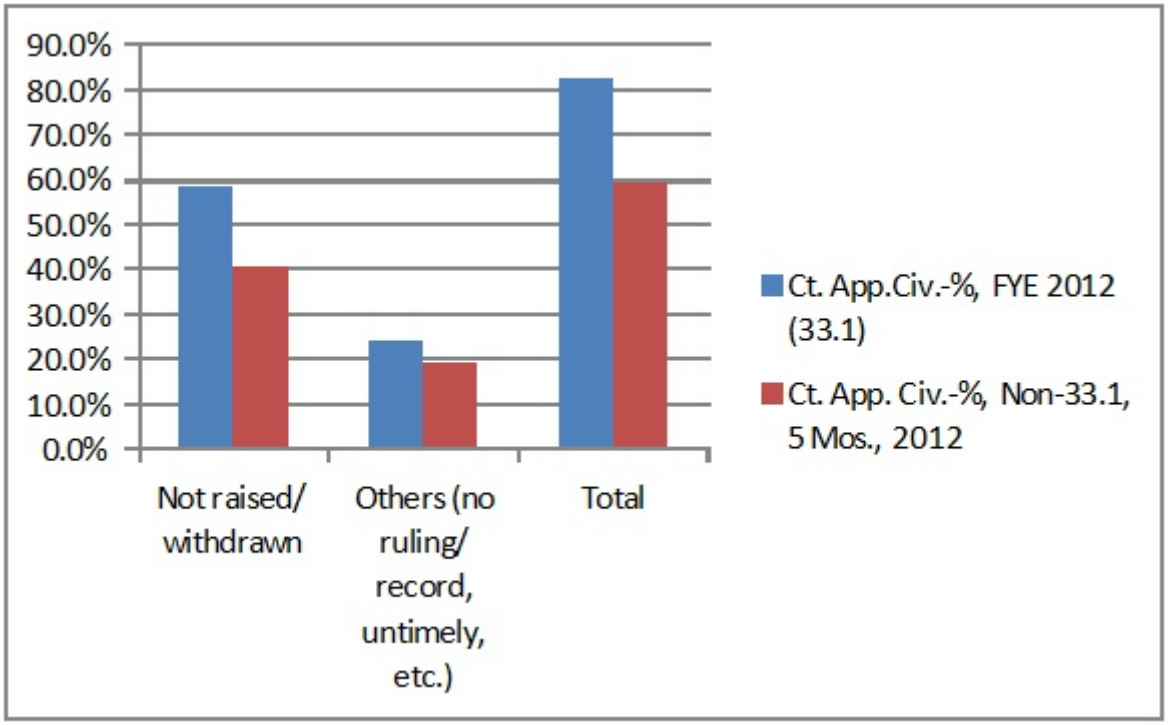
Over the decades, courts of appeals have ruled on error preservation in cases in which they did not cite to the existing error preservation rule. That was true for Rule 373 and Rule 52(a), and it remains true today. In fact, in the last five months of FYE 2012 (i.e., April-August, 2012), there were at least 41 cases in which the courts of appeals issued opinions dealing with error preservation, but in which they did not cite Rule 33.1. This was about 29% as often, during that time span, as they issued opinions which cited Rule 33.1 and resolved error preservation issues (139). Not an insignificant number.

But what is more significant about those non-Rule 33.1 error preservation opinions

is that the courts of appeals found error was preserved a little over 33% of the time-in other words, about five times as often as they did when they invoked Rule 33.1. Here is a graph showing that:



And, interestingly enough, in these non-33.1 error preservation cases, the courts of appeals were only about 3/4 as likely to find error waived as they were in cases in which they invoked Rule 33.1 in the error preservation analysis-59.% as compared to 82.5%:



I don't know how to explain that phenomena-maybe parties who did not think their error preservation challenge was all that strong did not invoke Rule 33.1 in their briefing. But I think that this phenomena does emphasize that, if you intend to argue the other side did not preserve error–even if there is a specific Rule of Civil Procedure or Evidence you claim was not complied with-set out your challenge in a Rule 33.1 framework.

C. The Supreme Court Has Also Exponentially Increased its Tendency to Cite the General Error Preservation Rules–But It Has Been Much More Likely to Find Error Preserved Than the Courts of Appeals.

I. The tendency of the Supreme Court to rely on the general error preservation rules has roughly tracked that of the courts of appeals–and reflected an exponential increase.

The Supreme Court expressly dealt with Rule 373 only seven times during the four and a half decade existence of the Rule–about once every six years. *Hurst v. Sears, Roebuck & Co.*, 647 S.W.2d 249, 252 (Tex. 1983); *TM Productions, Inc. v. Blue Mountain Broadcasting Co.*, 639 S.W.2d 450, 451 (Tex. 1982); *PGP Gas Products, Inc. .v. Fariss*, 620 S.W.2d 559, 560 (Tex. 1981); *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 921 (Tex. 1979); *State v. Wilemon*, 393 S.W.2d 816, 818 (Tex. 1965); *Plasky v. Gulf Ins. Co.*, 160 Tex. 612, 617, 335 S.W.2d 581, 584 (Tex. 1960); *Swanson v. Swanson*, 148 Tex. 600, 228 S.W.2d 156, (1950). In at least two cases, the Court dealt with error preservation without citing to Rule 373: *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (held, could not raise for the first time on appeal the failure of the defendant to join an indispensable third party, rejecting the argument that the absence of that third party was "fundamental error."); *Minus v. Doyle*, 141 Tex. 67, 170 S.W. 2d 220 (1943) (held, error not preserved).[6]

The Supreme Court expressly cited Rule 52(a) in about 25 opinions during the 11 years the Rule was on the books–on average, a little over two opinions a year, which was a rate about 14 times greater than the Court cited Rule 373 in that latter rule's 45 year run. *See* Appendices 2 and 3 for the list of cases and whether error was preserved.

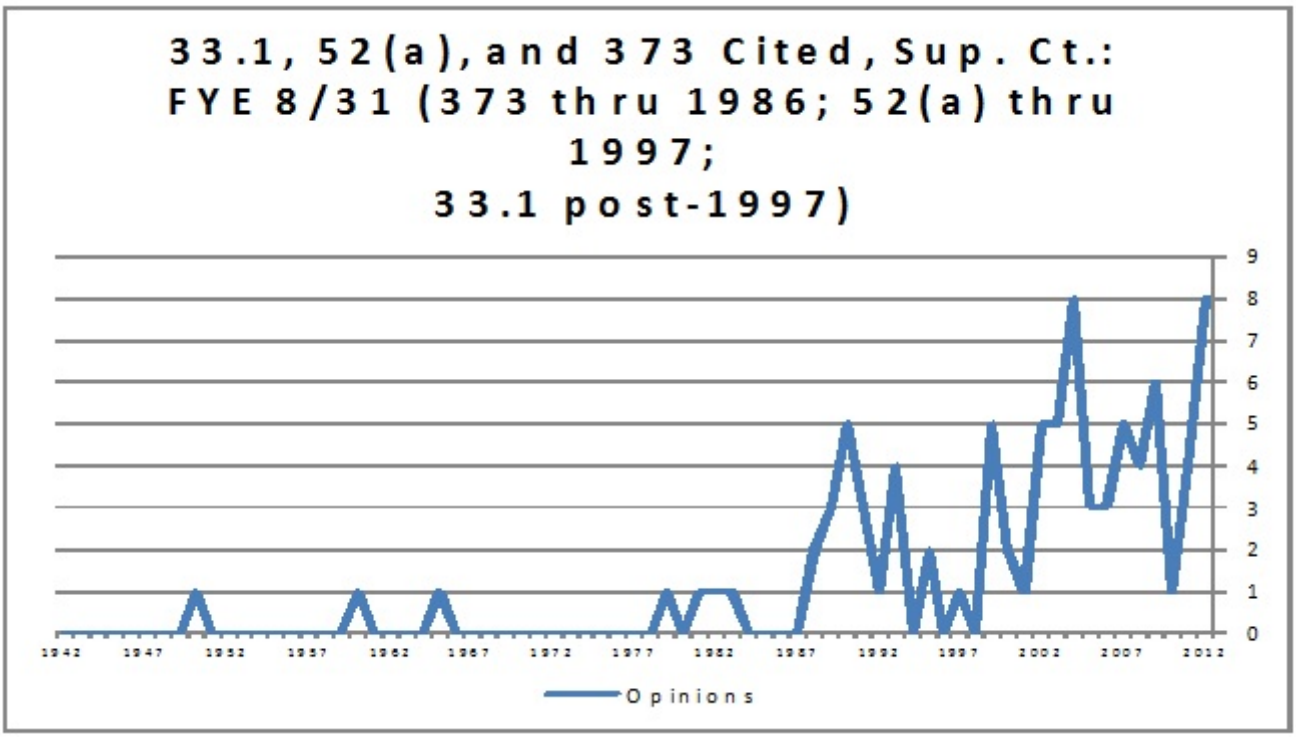
In the first 15 ½ years of the existence of Rule 33.1 (i.e., through the end of April, 2013), the Supreme Court had expressly cited that rule in 64 opinions. See Appendix 4. Though 6 of those cases actually involved the application of Rule 52(a), the rate at which

---

[6] In *Minus*, the lawsuit was filed before Rule 373 became effective, it is unclear whether it was tried before the effective date, and the Supreme Court did not cite Rule 373. This case was included in the Notes of Decision mentioned in the prior footnote.

the Court dealt with Rule 33.1 was 75% greater than its tendency to deal with cases involving Rule 52(a), and was almost 25 times greater than the rate at which it dealt with cases involving Rule 373.

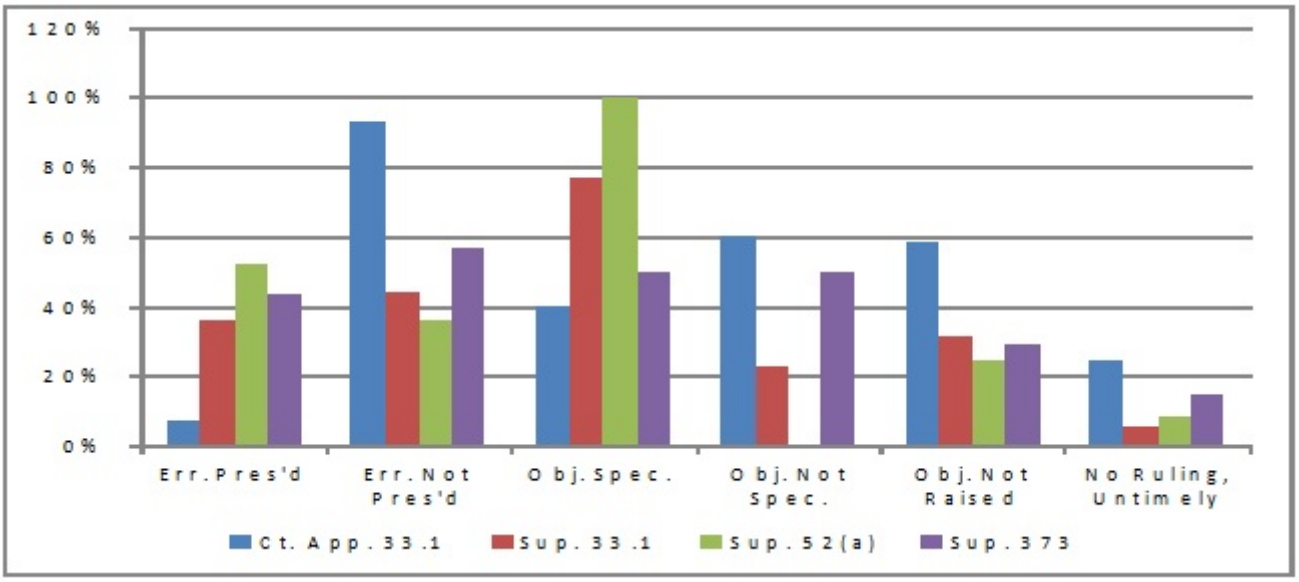
When charted, the Supreme Court's increased tendency to cite the general error preservation rules looks much like the tendency of the courts of appeals in that regard:



II. The Supreme Court has been much more likely to find that error was preserved, and more likely to find that a complaint was sufficiently specific, than the courts of appeals.

The Supreme Court held error was preserved in: 43% of its opinions which dealt with Rule 373; in 62% of the cases in which it dealt with whether error was preserved under Rule 52(a); and in 45% of the cases in which it dealt with whether error was preserved under Rule 33.1. See Appendices 1-4. The Supreme Court addressed whether an objection was specific enough in two of its Rule 373 cases–in one, it held the objection specific enough, in one it held the opposite. In 8 of the Rule 52(a) cases, the Court addressed whether a complaint was specific enough to preserve error–and in all 8 cases held that the complaint was specific enough (though in one case it held that both parties had also waived other issues). *See* Appendix 3. Interestingly, when the Court ruled on whether an objection was specific enough to satisfy Rule 33.1, it found the objection specific enough three times as often as it found the objection not specific enough. *See* Appendix 5.

So we see that the Supreme Court has found error preserved much more frequently under all of the three Rules than did the courts of appeals interpreting Rule 33.1 for FYE 2012–in fact, the Supreme Court found error preserved anywhere from about 4 to 6 times more often than did the courts of appeals. And for the cases it decided over the last quarter century or more under Rules 52(a) and 33.1, the Supreme Court has been nearly twice as likely to find that an objection was sufficiently specific than did the court of appeals interpreting Rule 33.1 for the FYE 2012. The following table shows those comparisons:



So what can we take from these figures? Here are some thoughts:

- The Supreme Court is a court of discretionary jurisdiction (or at least it has been such a court for cases on which judgments became final on or after June 20, 1987, meaning virtually the entire life span of Rule 52(a) and the entire life of Rule 33.1. V.T.C.A., Government Code §22.001, Historical and Statutory Notes). One would not expect the Court to burden itself with a case where error preservation was a thorny problem on a major issue–unless it really wanted to address error preservation, or the issue fraught with waiver was not the central issue in the case for the Court. Hence, one would not expect for the Court to write opinions in as high a percentage of cases with preservation issues as the courts of appeals.

    - Put another way, the Supreme Court may be also be focused more on the jurisprudential questions, rather than error preservation questions, and may place its thumb on the side of the former. For example, there are cases in which the Supreme Court has addressed certain issues over a dissent or concurrence which argued that error was not preserved. There are four such cases decided by the Court

under Rule 33.1, and one such case decided under Rule 52(a). As to Rule 33.1, *see Texas Mutual Insurance Company v. Ruttiger*, 381 S.W.3d 430, 464, n. 6 (Tex. 2012) (Jefferson, C.J., dissenting); *Tex. Comptroller of Pub. Accounts v. AG of Tex.*, 354 S.W.3d 336, 353 (Tex. 2013) (Wainwright, J., dissenting and concurring); *City of Dallas v. Abbott*, 304 S.W.3d 380, 396 (Tex. 2010)(Wainwright, J., dissenting); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 822 (Tex. 2009) (Medina, J., dissenting); and *Perry Homes v. Cull*, 258 S.W.3d 580, 611 (Tex. 2008) (Johnson, J., dissenting). As to Rule 52(a), *see State Dep't Highways & Public Transp. v. Payne,* 838 S.W.2d 235, 242 (1992) (Mauzy, J., dissenting).

- But the Court was not a court of discretionary jurisdiction when Rule 373 was in effect, it was an error correction court. And when it was an error correction court, it found error preserved under Rule 373 almost 5 times as often as did the courts of appeals under Rule 33.1 for the fiscal year ending in 2012 (see graph above).

- This means that we may still want to give some thought to whether there is a disconnect between how stringently the courts of appeals view and apply the requirements of Rule 33.1, and the manner in which the Supreme Court has applied Rules 373, 52(a) and Rule 33.1. The potential for such a disconnect at least suggests the invocation of Supreme Court authority by analogy or comparison to show that error was preserved in a given case, even if the particulars of the case differ from the Supreme Court authority (i.e., "if the Supreme Court held that the objection in *Dunn* preserved error as to whether the trial court allowed unequal jury strikes, then my client preserved error as to _____." *See*, *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 917, 921 (1979)."

- When faced with the question, the Supreme Court was most likely to find that error was preserved when deciding questions under Rule 52(a)–that is, the roughly 12 years from September 1986 through February 2000–while it was interpreting and applying Rule 52(a). This was right after the Court became a court of discretionary jurisdiction. As we will see later, the two 52(a) cases in which the Supreme Court dealt with specificity do not do much to shed light on when an objection is specific enough, and when it is not.

D. What Does This Track Record Tell Us?

I. What Does This Track Record Tell Us About the Courts?

First of all, it tells us that courts will overwhelming find waiver if the "mechanical

grounds" are not satisfied. So if you plan on relying on an objection as a basis for appeal, make sure you know when to make it, do so on the record, and get a timely ruling on the record. And if the mechanical grounds have not been satisfied, then do not think an appellate issue based on the objection will succeed.

But, much more important to us (both to us as trial lawyers and to us as appellate lawyers), the increasing tendency of the appellate courts to invoke Rule 33.1 in error preservation decisions, and the lopsided tendency of the appellate courts to find that error has not been preserved, causes us to focus on this fact: the courts of appeals are telling us, either expressly or implicitly, to have the conversation with the trial court which Rule 33.1 tells us to have.

II. What Does This Track Record Tell Us About . . . Us?

The "Us" being lawyers. I'm not sure. Without overstating it, I'm not aware of any other single rule that gets invoked more often in civil cases, to the detriment of points raised on appeal, than TRAP 33.1. The likelihood Rule 33.1 will be invoked seems to be increasing–it certainly has increased dramatically as compared to the invocation of the two prior general error preservation rules. And I suspect that the overwhelming majority of times a court of appeals discusses TRAP 33.1,it is prompted to do so by one party pointing out the other side had not preserve error. So I think that it means we have become increasingly more likely to challenge error preservation on appeal, if the basis exists for doing so-and that the courts of appeals have served as a receptive audience to our arguments in that regard.

But, mentioned before, the track record also tells us what to do, because it tells us that, more and more-geometrically more, in fact-courts of appeals are focusing on the requirements of the general error preservation rule-now Rule 33.1-when they decide error preservation issues. And that tells us to focus on Rule 33.1 in preserving error in the trial court, and to focus on Rule 33.1 in arguing on appeal whether error has been preserved or not. Rule 33.1 tell us the kind of conversation-the components of the conversation-which we have to have with the trial court in order to preserve error.

Finally, does the track record mean that an increasing number of trial lawyers do not know what they are doing? Not necessarily. There are legitimate reasons for not making an objection at trial sometimes–strategic, tactical, or practical (i.e., not wanting to irritate the judge on what seems a minor point, the upside not being worth the effort, etc.). But we do have to wonder if error preservation has taken a back seat at trial, or gotten lost in the trial lawyers' tool bag. Why would that be the case? If it was the case, is it because of the much discussed reduction in numbers of trials, especially jury trials, with an attendant rustiness in trial skills? Or does the track record result from the proliferation and increasing complexity of trial-related rules and rulings which a lawyer must satisfy to preserve error? Or can we blame the track record on some combination

of the foregoing and other dynamics? I don't know. But what I do know if this-trial lawyers have to be confident and assertive-like Crash Davis advised Luke LaLouche to approach the major leagues in *Bull Durham*. And trial lawyers cannot effectively try cases if they live in fear of screwing up or forgetting something. So I would encourage trial lawyers to embrace error preservation-and the guidelines of Rule 33.1-as addtional offensive tools to advance their cases. Rule 33.1 is not an impediment to trip over-it tells you how to tell your story yet one more time when addressing the many requirements that pop up in the trial court. It tells you what to do in order to turn a trap into a triumph.

But if a tactical, strategic, or practical reason explained not making the objection in the trial court, then it would also seem that the objection should not be raised on appeal, especially when the "mechanical grounds" render it unviable. So, at the very least, issues raised in an appeal should be evaluated carefully for error preservation–especially to confirm the "mechanical grounds" were met–before wasting the court's time and your own raising them in a brief. Make sure the conversation occurred.

2. A Brief History of Rule 33.1 and its two Predecessors–Rule of Civil Procedure 373, and TRAP 52(a) .

A. Before the Flood: Tex R. of Civ. P. 373, which was modeled after the still existing Federal Rule of Civil Procedure 46, became effective September 1, 1941.

I. "[T]he mid-August heat was broken by a Texas thundershower, but in the air-conditioned Texas Hotel at Fort Worth the discussion raged . . . constantly."

The discussion in the foregoing heading culminated seven months of work by an "advisory committee appointed by the Supreme Court to assist it in the task of preparing rules of procedure for civil actions, to become effective September 1, 1941." Roy W. McDonald, Reporter, Supreme Court Advisory Committee, *Completed Rules Urge Liberal Interpretation*, 3 TEX. BAR J. 404, 404. And in the air-conditioned comfort of the Texas Hotel, the committee "completed its study of appellate procedure and the rules which it will recommend to the Supreme Court." *Id.* In doing so, the committee recommended the adoption, in whole or in part, of 35 of the 86 Federal Rules. *Id.* One of those rules was TEX. R. CIV. P. 373, which was modeled after FED. R. CIV. P. 46. *Id.*, at 405; Vernon's Ann.Rules Civ. Proc., rule 373, Historical Note (Repealed by Order of April 10, 1986, eff. Sept. 1, 1986).

B. Rule 373, entitled "Exceptions Unnecessary," eliminated the need for a formal exception to a trial court ruling, but required that the party

"makes known to the court the action" desired of the court or the party's "objection . . . and . . . grounds therefor."

Rule 373 was noteworthy at the time because it "eliminates the necessity of formally noting an exception to the rulings of the trial court which are made over the objection of a party." *Id.* Rule 373 read, in parts pertinent to this paper, as follows:

> . . . it is sufficient that a party, at the time the ruling or order of the court is made or sought, *makes known to the court* the action which he desires the court to take or his objection at the action of the court and his grounds therefor; . . . .

Vernon's Ann.Rules Civ. Proc., rule 373 (Repealed by Order of April 10, 1986, eff. Sept. 1, 1986), *emphasis supplied.*

I. The Rules Advisory Committee recognized that the success of the new rules, including Rule 373, depended on courts liberally interpreting the same. In the ensuring four and a half decades, courts were not much prone to interpreting Rule 373 at all.

The committee realized that the "success of any reform in procedure rests . . . . upon the judiciary of Texas," and that "unless the rules . . . receive the liberal interpretation which has been presumed in suggesting them . . . the opportunity of reform will be lost." McDonald, at 406. In fact, the committee suggested interpreting all the proposed rules, including Rule 373, as follows:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable, and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the State as may be practical, *these rules shall be given a liberal interpretation.*

McDonald, at 406, citing to "Suggested Rule Number One." This exact language constitutes TEX. R. CIV. P. 1 to this day.

II. In the four and a half decades following the adoption of Rule 373, courts were not much prone to interpreting it at all.

As shown above, neither the Supreme Court nor the courts of civil appeals did not particularly give Rule 373 much of an interpretation at all, liberal or otherwise, though the first case which did cite Rule 373 noted that it was " the same as Federal Rule 46,"

and so relied on federal authority applying Federal Rule 46 in interpreting and applying Rule 373. *Davis v. Grogan Mfg. Co.*, 177 S.W.2d 213, 215 (Tex. Civ. App.– Texarkana 1943, writ ref'd.). The Supreme Court did not add much to the interpretation of Rule 373. It expressly dealt with Rule 373 only seven times during the four and a half decade existence of the Rule. *Hurst v. Sears, Roebuck & Co.*, 647 S.W.2d 249, 252 (Tex. 1983); *TM Productions, Inc. v. Blue Mountain Broadcasting Co.*, 639 S.W.2d 450, 451 (Tex. 1982); *PGP Gas Products, Inc. .v. Fariss*, 620 S.W.2d 559, 560 (Tex. 1981); *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 921 (Tex. 1979); *State v. Wilemon*, 393 S.W.2d 816, 818 (Tex. 1965); *Plasky v. Gulf Ins. Co.*, 160 Tex. 612, 617, 335 S.W.2d 581, 584 (Tex. 1960); *Swanson v. Swanson*, 148 Tex. 600, 228 S.W.2d 156, (1950).[7] *See* Appendix 1 for a synopsis of all such cases. In four of the seven opinions the Court said that error had not been preserved, and in three opinions it concluded that error had been preserved. You can find a table summarizing these Supreme Court cases in Appendix 2 to this paper.

There were also times the Supreme Court (and probably the courts of appeals) dealt with error preservation during the existence of Rule 373, but did not expressly mention the Rule. For example, the Supreme Court held that a plaintiff could not raise for the first time on appeal the failure of the defendant to join an indispensable third party, rejecting the argument that the absence of that third party was "fundamental error." *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982); *see also*, *Minus*, 170 S.W.2d at 224, cited above. That raises the question of whether some kind of common law error preservation concepts overlaid, or ran parallel to, Rule 373, and, if so, whether those concepts survived the creation of subsequent error preservation rules.

III. The Supreme Court says that Rule 373 requires a complaint to identify the objection "sufficiently" for the trial judge "to know the nature of the alleged error."

In applying Rule 373, the Supreme Court set out the following test for determining whether a party had sufficiently objected so as to preserve error for appellate review:

> [The Appellants] made general objections to the need for [the Appellee] to prove strict compliance with the procedures governing condemnation but did not specifically direct the trial court's

---

[7] In an eighth case, it is unclear whether the Supreme Court ruled pursuant to Rule 373–the case was filed before Rule 373 became effective, it is unclear whether it was tried before the effective date, and the Supreme Court did not cite Rule 373. *Minus v. Doyle*, 141 Tex. 67, 170 S.W. 2d 220 (1943). This case was included in the Notes of Decision mentioned in the prior footnote. The Supreme Court held that error was preserved in that case.

> attention to the commissioners' failure to take the oath or the failure to include the oath in the record.
>
> The complaint must identify the objectionable matter or event *sufficiently* for the *opposite party to cure any deficiency* and *for the trial judge to know* the *nature* of the alleged error.
>
> . . . .
>
> These objections [made in this case] were too general to apprise the trial court of the complaint. The effect of these objections was to conceal the objectionable matter with uncertain and overbroad language.

Fariss, 620 S.W.2d at 560 (Tex. 1981), *emphasis supplied.* The Court's focus on the trial court knowledge of the nature of the error is supported by the language of Rule 373. In fact, in a prior case, the Court had similarly pointed out that the policy underlying the rules is to "give the trial judge a chance to correct his errors." *Wilemon*, 393 S.W.2d at 818. But no express language in Rule 373 supported the *Farris* Court's concern about giving the opposing party an opportunity to cure a deficiency. Interestingly, one of the last courts of appeal to interpret Rule 373 held that the test articulated in *Fariss* was satisfied, even though the court was dealing with a reporter's record which left "much to be desired," and even though the objection of the attorney at the trial court had been "paradoxical." *Castillo v. Castillo*, 714 S.W.2d 440, 442 (Tex. App.–San Antonio 1986, no writ).

IV. One case which applied Rule 373 spoke in terms of making the trial court "aware of" the issue–and perhaps provided a foreshadowing of the test in Rule 33.1-- but provides no further help in helping determine when that "awareness" occurs, or whether "awareness" is judged by an objective or subjective standard.

In interpreting Rule 373, the Supreme Court did not expressly refer to making the trial court "aware" of the objection, as does the current Rule 33.1. But one court of appeals did hold that an issue was preserved for appeal when the trial court was "made aware of" the issue. *Bluebonnet Express, Inc. v. Employers Ins. of Wausau*, 651 S.W.2d 345, 353 (Tex. App.–Houston [14th Dist.] 1983, writ ref'd., n.r.e.), disapproved on other grounds by *Horrocks v. Texas Dep't of Transp.*, 852 S.W.2d 498, 499 n. 1 (Tex. 1993). But the *Bluebonnet* Court really does not help much in defining the fine line between when an objection is sufficient and when it is not. *Bluebonnet* issued the foregoing holding in the context of holding that, in a trial to the court, a motion for new trial was not necessary in order to assert "no evidence" points on appeal. *Id.* The *Bluebonnet* Court noted that "trial was to the court, and where lengthy and detailed objections to and delineation of the evidence occurred throughout the proceeding," no motion for new trial

was necessary to preserve a no evidence point. *Id.*, at 352. It also noted that "[b]ecause of the provisions of TEX. R. CIV. P. 373, and the notions of judicial economy and fairness," the requirement remained that "a party must make known his position, in some fashion, to the trial court in order to preserve his point on appeal." *Id.*, at 261. Clearly, the trial court in *Bluebonnet* had to have known of the objections made by the appellant, but whether the "awareness" mentioned by *Bluebonnet* is judged by what the trial court actually knew, or what it should have known, or exactly how "aware" the trial court had to be about the complaint, *Bluebonnet* does not say.

C. On September 1, 1986, Rule 52(a) replaced Rule 373. Rule 52(a) gets cited twenty times as often as Rule 373, and it "carried forward" the provisions of Rule 373–or did it?

Effective September 1, 1986, Rule 373 was repealed, and replaced by TEX. R. APP. P. 52(a). *Emerson v. Fires Out, Inc.,* 735 S.W.2d 492, 493 (Tex. App.–Austin 1987, no writ); *Delhi Gas Pipeline Corp. v. Lamb*, 724 S.W.2d 97, 101 (Tex. App.–El Paso 1986, writ ref'd., n.r.e.). Rule 52(a) read, in pertinent part, as follows:

> In order to preserve a complaint for appellate review, the party must have presented to the trial court a timely . . . objection . . . stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context.

Gill v. State, 1998 Tex. App. LEXIS 3461, *3 n. 3 (Tex. App.– Dallas June 10, 1998, no pet.).

I. The courts of appeals confirm Rule 52(a) "carried forward" Rule 373.

The Austin and El Paso courts of appeals fairly quickly held that Rule 52(a) "carried forward the provisions of Rule 373, and that the rationale of *Plasky* and other opinions decided under Rule 373 applied under Rule 52(a)." *Emerson*, 735 S.W.2d at 493, citing *Lamb*, 724 S.W.2d at 101. And there is no doubt you will find dozens, if not hundreds, of cases decided under TRAP 52(a) which cite, rely on, and apply cases decided under Rule 373.

II. One Supreme Court opinion and a couple of court of appeals opinions addressed preservation of error by looking to whether the trial court was "aware of" the complaint.

a. Without mentioning TRAP 52(a), the Supreme Court talked about "awareness" in jury charge cases.

There were numerous cases in which the Supreme Court addressed whether error was preserved under Rule 52(a). You can find a compilation of those cases, and a synopsis of the rulings, in Appendices 2 and 3.

During the Rule 52(a) era, but on cases in which the Supreme Court did not expressly invoke Rule 52(a), the Supreme Court also began describing its error preservation analysis in terms of whether the party's complaint or objection made the trial court "aware" of the complaint–i.e., using the language which eventually found its way into Rule 33.1. In holding that a defendant preserved error to a jury charge by objecting to a question as a comment on the weight of the evidence, and requesting an instruction for the charge, the Court issued the following holding in an opinion by Justice Hecht:

> There should be but one test for determining if a party has preserved error *in the jury charge*, and that is whether the party *made the trial court aware* of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.

State Dep't of Highways & Public Transp. v. Payne, 838 S.W.2d 235, 241 (Tex. 1992), *emphasis supplied.* In reaching this holding, the majority opinion in *Payne* did not expressly mention Rule 52(a), nor did it mention Rule 274, which (then as now) sets out the error preservation test for objecting to a jury charge–"a party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection." The dissenting opinion, on the other hand, did mention Rule 52(a). And the dissent also noted that Rule 52(a) required the objecting party to state "the specific grounds" for the objection. The dissent would have held the error was not preserved:

> Although the State objected to the charge, it did so on the basis that the instruction was a comment on the weight of the evidence, not on the ground that it misstated the State's legal duty to Payne. I would hold that this objection did not adequately state the "specific grounds for the ruling [the State] desired the court to make." Tex. R. App. P. 52(a); see *Davis v. Campbell*, 572 S.W.2d at 663 (holding that a "no evidence" objection did not amount to a complaint that a special issue was immaterial).

Payne, 838 S.W.2d at 242 (Mauzy, J., dissenting).

The Court issued other opinions in which it used the "awareness" test to address whether a party had preserved error as to a jury charge. In at least two of these opinions, the Court relied on *Payne*, did not mention Rule 52(a), but (as in *Payne*) held that error

was preserved. *Texas Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 638-39 (Tex. 1995) (party "did not request the instruction that should have been given," but its proposal of an instruction taken from a concurring opinion in another Supreme Court decision preserved error because " there was no other Texas law to guide [the party and] the request called the trial court's attention to the causation element missing in Question No. 2."); *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451 (Tex. 1995) (Court held that party preserved error by objecting to the omission of future lost profits as an element of damages, when it had submitted requested charge which contained question which included future lost profits, which question trial court included in the jury charge, except for references to future lost profits, which it redacted). The Supreme Court subsequently reversed a court of appeals' decision that the trial court was not aware of a defendant's request for a question about unreasonable risk of harm. *Dallas Mkt. Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 386, 387 (Tex. 1997), *overruled on other grounds by Torrington Co. v. Stutzman*, 46 S.W.3d 829, 840 (Tex. 2000). In doing so, the Court held that the trial court's admission that the question was submitted and ruled on, and was the subject of a lengthy discussion, "clearly preserved [the Defendant's] complaint that the case should have been submitted to the jury on a premises liability theory." *Id.* Once again, Rule 52(a) was not mentioned by the Court in *Liedeker*.

Between the decision in *Payne* and the decisions in *Hinds*, *Alaniz*, and *Liedeker*, the Court issued at least one jury charge opinion which did not mention rule 52(a), and did not mention the "awareness" test for an objection's specificity, but which did show what a battleground this area had become. That case was *Keetch v. Kroger*, in which the Court held that the party had not preserved error–even though the complaining party had requested exactly the jury question which the Supreme Court approved on a going forward basis. *Keetch v. Kroger Co.*, 845 S.W.2d 262, 267, 268 (Tex. 1992). In *Keetch*, the majority held that:

> we need not decide whether failure to submit in broad form was reversible error because [Plaintiff] did not provide the trial judge with any indication that her complaint was with the trial court's failure to submit in broad form. Error in the charge must be preserved by distinctly designating the error and the grounds for the objection.

Id., at 267. The concurrence in *Keetch* noted that:

> the objection the dissent refers to did not so much as hint that the trial court's granulated submission was improper or that the charge should have been in broad form. [Plaintiff] did request the same question the Court suggests today, but she requested no accompanying instructions. A party does not object to a failure to submit a jury charge in broad form by requesting questions

without the necessary instructions.

The dissent in *Keetch* stridently pointed out that:

> By almost any measure, Keetch did a better job of preserving error in the charge than the State did in Payne.
> . . . .
> The majority cites only one case in support of its holding that error was waived: *Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex. 1987). ___ S.W.2d at ___. Notably, this is the main case relied upon in the dissenting opinion in *Payne*. ___ S.W.2d at ___. Apparently, defendants alone are to enjoy the benefit of the liberal Payne standard for preservation of error; plaintiffs are still governed by the strict *Wilgus v. Bond* standard.

Id., at 272,273.

Obviously, properly parsing and invoking error preservation cases from this time frame will provide a challenge.

b. A couple of courts of appeals used the "awareness" test, in reliance on *Payne* and while citing TRAP 52(a).

Several of the courts of appeals began to adopt and cite the Supreme Court's articulation of the error preservation test in *Payne* as whether "the party made the trial court aware of the complaint," and did so while mentioning Rule 52(a). *Yazdi v. Republic Ins. Co.*, 935 S.W.2d 875, 878 (Tex. App.–San Antonio 1996, writ denied) (held, error not preserved by party who, when interrupted by the trial court, did not thereafter "articulate a clear objection that would sufficiently apprise the trial court of the specific complaint" to the effect that the charge "may have had the effect of allowing the jury to return a verdict for [Plaintiff] if it found that [Defendant] had made only a false statement of an immaterial fact."); *Apache Corp. v. Moore*, 891 S.W.2d 671, 685 (Tex. App.–Amarillo , writ denied), *vacated and remanded* by 517 U.S. 1217, 116 S. Ct. 1843 (1996) (held, complaint was not preserved because party failed "to point out to the trial court distinctly the objection raised on appeal," thus failing to make "the trial court aware of its complaint."). Both *Yondi* and *Moore* specifically mentioned Rule 52(a) and *Payne*. *Yondi* did not hold that *Payne* interpreted Rule 52(a), but *Moore* held that since the Appellant failed to make "the trial court aware of its complaint timely and plainly" as required by *Payne*, it had not "preserved its complaint for our review" under Rule 52(a). There are more court of appeals opinions which recite the "awareness" test, but we will not cite them here as they did not address that particular issue.

D. Rule 33.1 rewrites Rule 52(a), but does it relax the specificity

required to preserve error?

Rule 33.1 came into existence effective September 1, 1997, at the same time that a multitude of other TRAPS were amended or created. *See* John Hill Cayce, Jr., Anne Gardner, and Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*. 49 BAYLOR L. REV. 872 (1997). It might be of some merit to consider how the Rule came into being, and comments of the Supreme Court leading up to its existence.

I. Supreme Court commentary regarding the shortcomings of error preservation rules, including Rule 52(a).

While Rule 52(a) was still in effect, that the Supreme Court was openly discussing the problems it was having with error preservation rules. This paper has already mentioned the difficulties and disputes aired concerning preservation of error in the jury charge area. In addition to the holdings discussed above, the Court mentioned in *Payne* that the procedure governing when and how to preserve error concerning the jury charge "is becoming worse, not better," despite the best intentions behind the endorsement of the broad form submission of jury questions. *Payne*, 838 S.W.2d at 241. And that opinion also specifically mentioned that the "flaws" in jury charge procedures "stem partly from the rules governing those procedures and partly from caselaw applying those rules." *Id.* Two years earlier, in another opinion by Justice Hecht, the Court had specifically discussed the apparent disconnect between the new trial rule (Rule 324) and Rule 52(a), with Rule 324 stating "that no complaints other than those specified in the rule need be raised . . . as a prerequisite to appeal," while Rule 52(a) provided that "a complaint is not preserved for appellate review unless it is presented to the trial court and a ruling obtained." *Dunn*, 800 S.W.2d at 837, n. 9. The Court specifically noted that the "problems" about "[h]ow Rule 52(a) applies 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, is unclear," and that "[t]hese problems should be considered in future amendments to the rules." *Id.*

II. The drafting of Rule 33.1–while recommending the "awareness" test, the SCAC Subcommittee recommended language which "contained a standard similar to the proposed jury charge rules."

In its 1992 opinion in *Payne*, the Supreme Court mentioned that "[l]ast year we asked a special task force to recommend changes in the rules to simplify charge procedures, and amendments are under consideration." *Payne*, 838 S.W.2d at 241. In 1995, the Supreme Court Advisory Committee ("SCAC") was well into its work revising the Rules of Civil and Appellate Procedure. In response to a concern voiced about waiver of error in the trial court by Luke Soules, who was then Chair of the Committee, by

January 20, 1995 the Committee had already approved incorporating the following language for Rule 52(a):

> No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint.

Page 5296, Hearing of the Supreme Court Advisory Committee, January 20, 1995 (Morning Session), Archives of the Supreme Court of Texas (Appendix 6); *see also* Disposition Chart accompanying letter from Bill Dorsaneo to Luke Soules dated December 21, 1995, Archives of the Supreme Court of Texas (Appendix 7). The Committee's deliberations indicate that this language was "supposed to be the same standard as in the charge draft rules." *Id.*; Page 1, Rules Memorandum, TRAP 52, February 26, 1996, Archives of the Supreme Court of Texas (Appendix 8). Following the January 1995 discussions, the aforementioned Disposition Chart commented that this proposed language in rule 52(a) had in mind establishing that no waiver of error occurred in the trial court so long as "a request, objection, or motion is specific enough *to support the conclusion* that the trial court *was made fully aware* of the complaint." *Id.*, Disposition Chart, *emphasis supplied.*

A Rules Memorandum issued early in 1996 contained a draft of Rule 52(a) which contained the same specificity language cited above. Pages 1-6, Rules Memorandum, TRAP 52, February 26, 1996, Archives of the Supreme Court of Texas (Appendix 8). The author of this Memorandum is unknown, but the Memorandum contained at least some proposals from "LP," perhaps designating Lee Parsley, who was then the Rules Attorney for the Supreme Court of Texas. *Id.*, p. 6. Consistent with the aforementioned Disposition Chart, the Subcommittee recommended the foregoing language for Rule 52(a) "so that the rule contained a standard similar to the proposed jury charge rules." *Id.*, page 1.

In a subsequent memorandum about seven months later, Lee Parsley forwarded to several members of the Supreme Court Advisory Committee some changes to TRAP 52 suggested by Justice Hecht. Page 1, Memorandum re: TRAP 47 and 52, October 30, 1996, Archives of the Supreme Court of Texas (Appendix 9). Though still designated Rule 52(a), for the purposes of this paper that proposal looked remarkably like the current Rule 33.1. It conditioned the preservation of error on stating the grounds for the ruling "with sufficient specificity to make the trial court aware of the complaint," unless "the specific grounds were apparent from the context." *Id.*, Page 2. This language made its way into the rule designated as Rule 33.1, to be effective September 1, 1997. Page 2, Proposed form of certain Texas Rules of Appellate Procedure, January 1, 1997, Archives of the Supreme Court of Texas (Appendix 7).

III. Comparing Rule 33.1 and its predecessors indicate that Rule 33.1 may have intended to relax the specificity requirements

of Rule 52(a) and Rule 373.

Comparing the three general error preservation rules side by side, we see the following:

Rule 373 (1985 Rule)	Rule 52(a) (1987 rule)	Rule 33.1 (existing rule)
. . . it is sufficient that a party, at the time the ruling or order of the court is made or sought, *makes known to the court the action* which he desires the court to take or his objection at the action of the court *and his grounds therefor*; . . . ."	"In order to preserve a complaint for appellate review, the party must have presented to the trial court a timely . . . *objection . . . stating the specific grounds for the ruling he desired* the court to make *if the specific grounds were not apparent from the context*." *Gill v. State*, 1998 Tex. App. LEXIS 3461, *3 n. 3 (Tex. App.–Dallas June 10, 1998, no pet.)	"As a prerequisite to presenting a complaint for appellate review, the record must show that . . . the complaint was made to the trial court by a timely . . . *objection . . . that . . . stated the grounds for the ruling . . . sought . . . with sufficient specificity to make the trial court aware* of the complaint, *unless the specific grounds were apparent from the context*." *Emphasis supplied.*

For purposes of this paper, the foregoing comparison of Rules 373, 52(a) and 33.1 brings several questions and points to mind:

1) Rule 373 did not mention the possibility that *context* might provide the specificity necessary to preserve error. Both Rule 52(a) and Rule 33.1 did make that clear. So in looking at and invoking cases decided under Rule 373, keep in mind that Rule 33.1 would allow the context in which an objection or complaint was made to make the objection sufficiently specific, while Rule 373 would not seem to allow looking to that context. In other words, there may be some instances when cases decided under Rule 373 held that error was not preserved, while under Rule 33.1 context might lead to a different result.

2) Rule 373 did not mention specificity at all–it said error was preserved if the party "makes known to the court . . . the grounds therefor." Rule 52(a) seemed to elaborate and make that requirement stricter–it required that the objection state "the specific grounds for the ruling," if the "specific grounds were not apparent from the context." Rule 33.1 seemed to relax the requirement of Rule 52(a) in this regard–it required the grounds be stated "with sufficient specificity to make the trial court aware of the complaint,"

while still allowing the specificity to be provided "from the context." So, on its face, Rule 33.1 arguably relaxed the specificity standards of Rule 52(a)–meaning that just because an objection was not specific enough under Rule 52(a) does not mean that it would fail to pass muster under Rule 33.1.

IV. The Comment to Rule 33 says it "is former Rule 52," and that "33.1 is rewritten."

On reading the "Notes and Comments" to Rule 33, you find this comment:

> Comment to 1997 change: This is former Rule 52. Subdivision 33.1 is rewritten.

TEX. R. APP. P. 33. Though the comments mention that Rule 52(b) and 52(d) are omitted as unnecessary, the comments provide no further guidance as to whether, or to what extent, the specificity requirements of Rule 52(a) are carried forward to Rule 33.1.

V. The Appellate Section of the State Bar of Texas suggested that Rule 33.1 has a more relaxed standard of specificity for an objection–but no court or commentator has expressly addressed that suggestion.

About five months before Rule 33.1 took effect, the Appellate Section of the State Bar of Texas published its Project entitled THE GUIDE TO THE NEW TEXAS RULES OF APPELLATE PROCEDURE 1997 (State Bar of Texas Appellate Section) (See Appendix 11). In the GUIDE, the Appellate Section expressly said that "[t]he new rule *relaxes* the former requirement of specificity for an objection." GUIDE, p. 10. The GUIDE also pointed out that Rule 33.1 also contained a "new provision" which required "that the complaining party must comply with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Criminal Evidence." *Id.*

VI. Generally speaking, the 1997 TRAPS were intended to "refocus appellate procedure on the merits rather than technicalities."

In article which can still be found on the Supreme Court's website (as of the drafting of this paper), an by Justice Nathan Hecht and his former Staff Attorney Lee Parsley (which was updated by Justice Bob Pemberton when he was still Rules Attorney for the Supreme Court) had this to say about the 1997 revisions to the Rules of Appellate Procedure:

> In 1997, the Supreme Court promulgated an entirely new set of Rules of Appellate Procedure. The new rules were intended to make appellate practice more user-friendly, refocus appellate procedure

on the merits rather than technicalities, and reduce cost and delay.

Nathan L. Hecht & E. Lee Parsley, *Procedural Reform: Whence and Whither*, MATTHEW BENDER C.L.E., PRACTICING LAW UNDER THE NEW RULES OF APPELLATE PROCEDURE 1-12 at § 1.02(b) & (c); *see* http://www.supreme.courts.state.tx.us/rules/history.asp

About sixteen years later, Justice Hecht had this to say in a speech he gave at an appellate seminar:

> Of course, we rewrote the rules of appellate procedure in 1997 to simplify them and facilitate presentation of the merits, but I hope that one of the most lasting contributions of the court I have served on will make to appellate practice in Texas is what Judge Ray wrote and I joined in *Dodge* [*Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 643 (Tex. 1989)]:
>
> > "This court has labored long and hard to remove as many procedural traps from our rules as possible. Litigants are entitled to have their disputes resolved on the merits, not on unnecessary and arcane points that can sneak up on even the most diligent of attorneys."
>
> So we have tried to eliminate in [sic.] the Rules' gotchas, occasions for waiver of arguments and issues, we have tried to take a very liberal approach to the presentation of those issues and encourage all of the appellate courts to decide those issues on the merits rather than on procedure."

Justice Nathan Hecht, Where We Are From, Where We Are Headed-A Senior Justice's Perspective, Remarks to the 23rd Annual Conference on State and Federal Appeals sponsored by the University of Texas School of Law (June 13, 2013).

VI. Apparently, neither the commentators nor courts expressly addressed the differences regarding specificity between Rule 33.1 or its predecessors, nor the Appellate Section's suggestion that Rule 33.1 relaxed the specificity requirements for error preservation.

Commentators did not underscore or comment on the GUIDE's observation that Rule 33.1 "relaxed" the specificity requirement of Rule 52(a). In her article for the 1988 Advanced Civil Appellate Course, Helen Cassidy mentioned that the GUIDE "covers the significant changes in the rules," and that "John Hill Cayce, Jr., Anne Gardner, and Felicia Harris Kyle have a comprehensive article on the rule changes, Civil Appeals in

Texas: Practicing Under the New Rules of Appellate Procedure. 49 BAYLOR L. REV. 872 (1997)." Helen Cassidy, *One Year Under the New TRAP*, p. 1, State Bar of Texas 12th Annual Advanced Civil Appellate Practice Course (1998). (Author's note: I could not find Helen's entire article–if anyone has it, and it addresses 33.1, I would love to see it). This latter article mentioned that the "new Rule 33.1(a)(1) echoes former Rule 52(a), carrying forward the basic requirement of appellate practice--that to complain of any error on appeal, the record must reflect that the complaint was timely and properly made by request, objection, or motion, and ruled on by the trial court." *Id.*

The GUIDE was cited by a couple of the courts of appeals, in the context of whether a trial court had to expressly rule on objections to summary judgment evidence. *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 498 (Tex. App.–Fort Worth 2002, no pet.); *Taylor-Made Hose v. Wilkerson*, 21 S.W.3d 484, 493 (Tex. App.–San Antonio 2000, pet. denied); *Frazier v. Khai Loong Yu*, 987 S.W.2d 607, 610 (Tex. App.–Fort Worth 1999, pet. denied); *Blum v. Julian*, 977 S.W.2d 819, 823 (Tex. App.–Fort Worth 1998, no pet.). But courts did not expressly refer to the guidance provided by the GUIDE about whether Rule 33.1 "relaxed" the specificity required of an objection in order to preserve appellate review.

The first courts of appeals which recited the specificity language found in Rule 33.1 equated that rule with Rule 52(a), without addressing the linguistic differences between the two rules:

> The purpose of the requirement that a specific objection be lodged in the trial court is to ensure that the trial court has the opportunity to rule on the issue. New TEX.R.APP.P. 33.1, like its predecessor Rule 52(a), requires that to preserve a complaint for appellate review, the record must show that the complaint was made to the trial court in a fashion that states the grounds for the ruling sought with sufficient specificity to make the trial court aware of the complaint, unless the grounds were apparent from the context.

In the Interest of Shaw, 966 S.W.2d 174, 182 (Tex. App.–El Paso 1998, no pet.). *See also United Air Conditioning Co. v. Westpark Invs.*, 1998 Tex. App. LEXIS 4823, 89 n. 2 (Tex. App.–Houston [14th Dist.] August 6, 1998, pet. dism'd.) ("the substance of Rule 52(a) became part of Rule 33.1 of the Rules of Appellate Procedure."). I have not yet found a court of appeal decision which analyzed the differences between Rule 52(a) and Rule 33.1 concerning specificity. But courts of appeals pretty routinely began invoking specificity holdings from cases applying Rule 52(a) to decide cases under Rule 33.1 without expressly comparing the specificity language in the two rules. Interestingly, some courts did note that Rule 33.1 differed from Rule 52(a), in that Rule 33.1 "relaxes the former requirement of an express ruling [under Rule 52(a)] and codifies case law that recognized implied rulings." *Frazier v. Khai Loong Yu*, 987 S.W.2d 607, 610 (Tex. App.–Fort Worth

1999, pet. denied).

The Supreme Court also did not specifically address the question of whether Rule 33 relaxed the specificity requirements of Rule 52(a). It did comment that Rule 33.1 was "formerly" Rule 52(a). *Operation Rescue-National v. Planned Parenthood*, 975 S.W.2d 546, 569 n. 73 (Tex. 1998). In a Rule 52(a) case, the Supreme Court commented that "[i]n 1997, Rule 52(a) was rewritten as Rule 33.1"–and then the Court proceeded to hold that error had been preserved, because even though "the statements in the pleading [answer] and motion [for directed verdict] were not paragons of specificity," they "nevertheless identified for the trial court the issue to be ruled on and provided the trial court the opportunity to rule." *Osterberg v. Peca*, 12 S.W.3d 31, 40 n. 7 (Tex. 2000). *Peca* involved a First Amendment argument of some sort, and the Court noted that its holding that error was not waived under Rule 52(a) was also supported by a "[c]oncern for protecting First Amendment rights . . . [because] the Supreme Court will find waiver only in circumstances that are 'clear and compelling.'" *Id.* In another Rule 52(a) case, "the Court said that Rule 33.1 "supersedes former Rule 52(a)" and "is substantially unchanged" from the old rule. *In the Matter of C.O.S.* 988 S.W.2d 760, 764 (Tex. 1999). But *C.O.S.* did not involve whether an objection had been made with sufficient specificity–instead, it held 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." *C.O.S.*, 988 S.W.2d at 768. So it cannot be said that *C.O.S.* was ruling on specificity at all, much less issuing a binding holding on whether the specificity requirements of Rule 33 equated with those of Rule 52(a). In several Rule 52(a) cases, in which the Court held that objections were sufficiently specific, the Supreme Court parenthetically noted that the "current version" of Rule 52(a) was "at . . . [Rule] 33.1," without comparing the specificity requirements of either rule. *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999); *Holland v. Wal-Mart Stores*, 1 S.W.3d 91, 94 (Tex. 1999).

You will find that courts of appeal still invoke authority decided under Rule 52(a) to decide whether an objection met the specificity test of Rule 33.1. Perhaps it is too late to urge that the specificity requirements of the two Rules differ, based on their respective wording and on the commentary by the State Bar Appellate Section. But it is an argument to keep in mind–especially if a case decided under Rule 52(a) holds that the objection you made was not specific enough.

3. The Conversation With the Court Which Rule 33.1 Tells Us to Have.

A. But First, Some Really Helpful Reference Materials for Trial Practitioners.

Having looked at historical trends and the pedigree of Rule 33.1, let's now look at the wording of the Rule and how it has been applied by courts over the course of a year.

But before launching into that exercise, I want to commend to all the trial lawyers several really helpful reference materials.

First, on an ongoing basis, I have a blog where every couple of weeks I try to post a synopsis of error preservation decisions in Texas civil cases. Steven K. Hayes, *Error Preservation in Texas Civil Cases* (2013 et seq), http://shayessite.wordpress.com/error-preservation-in-texas-civil-cases. I try to announce that on LinkedIn, as well.

Second, the really excellent, succinct, paper by Andrew Sommerman, in which he addresses what is required to preserve error on number of topics, which he lays out in chronological fashion as one proceeds through a lawsuit. *See* Andrew Sommerman, *Preserving Error and How to Appeal*, State Bar of Texas 27th Annual Advanced Civil Appellate Practice Course (2013). For a quick and ready reference on things which routinely raise their heads, it is an excellent resource. In fact, you should put it in your trial notebook. If possible, you should also watch the presentation made by his partner, Tex Quesada, on that paper at the 2013 Annual Advanced Civil Appellate Practice Course.

Third, for another trial notebook type reference material, consider the paper I did and Dabney Bassel updated, concerning post-trial preservation of error. Steven K. Hayes, updated by Dabney Bassel, *Error Preservation Post-Trial: How to Avoid that Sinking Feeling*, SBOT Civil Appellate Practice 101 (2012). The paper is on my website. In addition to referencing a plethora of other really excellent papers on post-trial preservation of error, we've arranged the paper chronologically as you proceed through the post-trial time frame-including what to do if the jury comes back with conflicting answers.

For Summary Judgment practice, you should always have access to the following two works, both of which have been cited in over 100 published opinions: David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 46 Hous. L. Rev. 1379 (2010) (this is the most recent iteration of this work), and Timothy Patton, *Summary Judgment Practice in Texas*, LexisNexis, which I can tell you is on the shelf of the library of at least one court of appeals.

B. The Requisites of Rule 33.1.

Rule 33.1(a)(1) provides, for purposes of this paper, that:

- "[a]s a **prerequisite** to presenting a complaint for appellate review"
- "the **record** must show" that
- "the **complaint** was made"
- "**to the trial court**"

- "by a **timely** request, objection, or motion" that
- "stated the **grounds** for the ruling that the complaining party sought from the trial court" with
- "**sufficient specificity to make the trial court aware** of the complaint, unless the specific grounds were apparent from the context."

Whether docket management goals or other dynamics are involved, when we examine the cases applying Rule 33.1, we find that the courts of appeals take its rather draconian directives to heart. So this paper will delve into the requirement of Rule 33.1 that the grounds for the complaint be made with "sufficient specificity to make the trial court aware of the complaint."

C. In analyzing error preservation rulings for use in your case, make sure you are not comparing your apples to their oranges.

I. Make sure you do not forget to distinguish, where appropriate, authority decided under Rule 52(a).

I have already mentioned the possibility that Rule 33.1 may have relaxed the specificity requirements of Rule 52(a). THE GUIDE TO THE NEW TEXAS RULES OF APPELLATE PROCEDURE 1997 (State Bar of Texas Appellate Section) (See Appendix 8); *see*, as to the need for an express ruling, *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 498 (Tex. App.–Fort Worth 2002, no pet.); *Taylor-Made Hose v. Wilkerson*, 21 S.W.3d 484, 493 (Tex. App.–San Antonio 2000, pet. denied); *Frazier v. Khai Loong Yu*, 987 S.W.2d 607, 610 (Tex. App.–Fort Worth 1999, pet. denied); *Blum v. Julian*, 977 S.W.2d 819, 823 (Tex. App.–Fort Worth 1998, no pet.). Without rehashing that material, if you find yourself arguing that error was preserved in your case, you will find that many, if not most, of the authority adverse to your position trace their lineage to authority decided under Rule 52(a). They will almost invariably do so, without bothering to discuss how the two rules might differ. Of course, if authority decided under Rule 52(a) militates in favor of your error having been preserved, use it.

If you find yourself arguing error was not preserved, relying on Rule 52(a) based authority, you can always point out cases which imply the two rules are the same, by saying that Rule 33.1 was "formerly" Rule 52(a), or that the latter was "rewritten" by the former, or that the current version of the latter can be found in the former. *Operation Rescue-National v. Planned Parenthood*, 975 S.W.2d 546, 569 n. 73 (Tex. 1998); *Osterberg v. Peca*, 12 S.W.3d 31, 40 n. 7 (Tex. 2000); *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999); *Holland v. Wal-Mart Stores*, 1 S.W.3d 91, 94 (Tex. 1999); *see also In the Interest of Shaw*, 966 S.W.2d 174, 182 (Tex. App.–El Paso 1998); *United Air Conditioning Co. v. Westpark Invs.*, 1998 Tex. App. LEXIS 4823, 89 n. 2 (Tex. App.–Houston [14th Dist.] August 6, 1998, pet. dism'd.); John Hill Cayce, Jr., Anne Gardner, and Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules*

of Appellate Procedure. 49 BAYLOR L. REV. 872 (1997).

II. Be careful when relying on cases involving preservation of constitutional rights, due process or fundamental error–in which error either does not have to be preserved, or the specificity test is vastly relaxed.

In selecting authority to rely on, you need to make sure to not rely on authority involving due process or amount to fundamental error, unless your case involves such an issue. *See*, *e.g.*, *In the Interest of B.L.D.*, 113 S.W.3d 340, 349, 351, 354 (Tex. 2003). Additionally, you may want to consider whether other dynamics–such as protections afforded by the U.S. Constitution–might place a thumb on the scales in favor of whether your clients have preserved error under Rule 33.1.[8] And, in the pertinent kind of case, you might want to take note of the fact that the Supreme Court has held that Rule 33.1 "applies to criminal as well as civil cases, as did [its] predecessor, Rule 52(a)." *In the Matter of C.O.S.* 988 S.W.2d 760, 765 (Tex. 1999) (in which the Court looked to error preservation rules followed by the Court of Criminal Appeals when deciding error preservation issues in juvenile proceedings). But in invoking the "fundamental error" doctrine, you might keep in mind how narrow a window of opportunity that doctrine provides:

> *In B.L.D.,* the Court recognized that, despite the fact that the fundamental-error doctrine has been labeled "'discredited,'" *id.* at 350 (quoting *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982) (per curiam)), the doctrine has been employed in "rare instances" to review "certain types" of unpreserved or unassigned error in civil cases. *Id.* For example, the doctrine has been invoked to review unpreserved [*9] issues regarding: (1) whether the record shows on its face that the trial court

---

[8] *Osterberg v. Peca*, 12 S.W.3d 31, 40 (Tex. 2000), *cert. denied* 2000 U.S. 4195 ("In their answer and their motion for directed verdict, the Osterbergs identified the constitutional rights at issue and the statutory provisions that, when applied, allegedly violate them. Although the statements in the pleading and motion were not paragons of specificity, they nevertheless identified for the trial court the issue to be ruled on and provided the trial court the opportunity to rule. We hold that the Osterbergs did not waive their First Amendment defenses to the application of Chapter 253. Concern for protecting First Amendment rights also supports this holding. When freedom of speech is at issue, the Supreme Court will find waiver only in circumstances that are "clear and compelling." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). This case does not provide 'clear and compelling' circumstances to justify finding that the Osterbergs' First Amendment arguments are waived.")

lacked jurisdiction, id. (citing *McCauley v. Consol. Underwriters*, 157 Tex. 475, 304 S.W.2d 265, 266 (1957) (per curiam)); (2) the failure to give mandatory statutory admonishments in a juvenile delinquency proceeding, id. (citing *In re C.O.S.*, 988 S.W.2d 760, 767 (Tex. 1999)); and (3) the constitutionality of the burden of proof instruction in a juvenile delinquency proceeding, id. (citing *State v. Santana*, 444 S.W.2d 614, 615 (Tex. 1969)). The Court noted that its application of the fundamental-error doctrine in the latter two cases rested on the "quasi-criminal" nature of juvenile delinquency cases. *Id.* (citing *C.O.S.*, 988 S.W.2d at 765; Santana, 444 S.W.2d at 615). In *B.L.D.*, the supreme court declined to extend the fundamental-error doctrine to jury charge error in parental termination cases. See *id.* at 351.

Free v. Lewis, 2012 Tex. App. LEXIS 6639, *9-10 (Tex. App.–Corpus Christi-Edinburg Aug. 9, 2012, no pet.).

D. The tests courts have used to determine that the complaint was made "with sufficient specificity to make the trial court aware of the complaint."

By and large, the cases which deal with the specificity of a particular complaint or objection seem to do so on an ad hoc basis, without citing any general rules about interpreting or applying the specificity test of Rule 33.1. But before looking at ad hoc cases, and trying to glean guidance they provide, those cases which try to devise or apply general rules of interpretation bear examining.

I. General Rules in interpreting and applying Rule 33.1.

In Appendix5, you will find a compilation of a year's worth of cases in with the Supreme Court and the courts of appeals addressed the specificity requirements of TRAP 33.1, organized by whether or not error was preserved, and then organized by topic. That compilation might give you an overview of the kinds of cases in which courts address objection specificity, and how they deal with the same.

a. Substance takes precedence over form.

Generally speaking, substance takes precedence over form in determining specificity, and specificity is intended to promote judicial efficiency by giving the trial court an opportunity to correct error. But are their any helpful guidelines to determine specificity?

In applying Rule 33.1, the Supreme Court noted that "[W]e have long favored a common sense application of our procedural rules that serves the purpose of the rules, rather than a technical application that rigidly promotes form over substance." *Tex.*

Comm'n on Human Rights v. Morrison, 381 S.W.3d 533, 536-37 (Tex. 2012), citing *Thota v. Young*, 366 S.W.3d 678, 690, 691 (Tex. 2012) (held, a party "did not have to cite or reference *Casteel* specifically to preserve the right" to object to a jury question's overbreadth). And one court of appeals also seemed to reflect the "substance over form" approach to applying Rule 33.1 when it noted that it would allow a "fair reading of the record in context" to show that a ruling was obtained and error was preserved as to the denial of a motion for continuance--even though "[c]ounsel's objection could have been clearer." *In the Interest of R.R.*, 2011 Tex. App. LEXIS 8394, *6-7 (Tex. App.–Houston [1st Dist.] Oct. 20, 2011, pet. denied)

b. The purpose behind general error preservation rules is to conserve judicial resources and to enhance the accuracy of trial court decision making.

The Supreme Court has recently reaffirmed the purpose behind the general error preservation rules:

> 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 complaints in the trial court conserves 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)). For these reasons, to preserve this issue for appeal, the County needed to present its complaint to the trial court.

Mansions in the Forest, L.P. v. Montgomery County, 365 S.W.3d 314, 317 (Tex. 2012).

With regard to preventing "surprise" to an opponent, sometimes referred to as ensuring that the opposing party "is not blind-sided with a new complaint for the first time on appeal," be cautious about relying on your own surprise as a grounds to argue that the other side waived error. *Basic Energy Serv. v. D-S-B Props.*, 367 S.W.3d 254, 265 (Tex. App.–Tyler 2011, no pet.) (opinion withdrawn by agreement, appeal dismissed). That concept is without a doubt relied on in cases decided under Rule 33.1 and in cases decided under Rule 52(a), and dates back at least to Rule 373, even though none of those

rules mentions or alludes to preventing surprise to the non-objecting party. Undoubtedly, the net effect of complying with Rule 33 should be that the party urging waiver is not surprised by a point on appeal. But whether or not opposing counsel is or should have been aware of the complaint is not part of the test set out in Rule 33.1–and if it looks like the objection was sufficiently specific to make the trial court aware, then protestations of surprise by an advocate probably won't be real persuasive. This might be especially true if you had tools available at trial to protect yourself, in response to whatever the party asserting error did. Sometimes, courts will not necessarily have any pity on you if you do not avail yourself of tools available to you. *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 279-280 (Tex. 1999) (in a case decided under Rule 52(a), held, when a plaintiff could have amended his pleadings post-trial to assert a federal cause of action, the failure of the defendant "to resolve the legal issue [i.e., that the state cause of action asserted by plaintiff only allowed equitable relief] before the trial court submitted the case to the jury" did not deprive the plaintiff of the ability to amend his pleadings; "[t]hus, [plaintiff's] claim that the timing of [defendant's] objection left him without recourse to cure any pleading defect is without merit.").

c. Is it enough that your objection on appeal comports with or is related to the objection you make at trial–or do the two have to be the "same," and the objection at trial had to enable the trial court to understand the "precise" nature or the alleged error?

This leads us to consider whether there are any tests which courts have suggested to assist in interpreting and applying the requirement of Rule 33.1 that the party "stated the grounds . . . with sufficient specificity to make the trial court aware of the complaint." Rule 33.1(a)(1)(A).

From time to time, the Supreme Court will weigh in-but it is not unusual for the Court to do so without specifically invoking Rule 33.1, leaving us to wonder whether that omission means anything:

- "But post-trial objections will rarely be as detailed as an appellate brief . . .time is short, the record may not be ready, and the trial court is already familiar with the case. In that context, an objection is not necessarily inadequate because it does not specify every reason the evidence was insufficient." *Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 388 (Tex. 2008)(held, motion for new trial which said evidence was legally insufficient to support damage award preserved error. Trial court ordered a remittitur) (emphasis supplied).

Other courts have used various tests in applying Rule 33.1, indicating that if an argument on appeal "comports with," "relate[s] to," is "sufficiently similar to," or

"principally argues" what was done in the trial court, error was preserved:

- whether the objection made at trial "comport[s] with" the complaint on appeal. *Cajun Constructors, Inc. v. Velasco Drainage Dist.*, 380 S.W.3d 819, 827 (Tex. App.–Houston [14th Dist.] 2012, pet. denied), (citing *See Lundy v. Masson*, 260 S.W.3d 482, 507 (Tex. App.—Houston [14th Dist.] 2008, pet. denied), which in turn cited *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992); *Basic Energy*, 367 S.W.3d at 264. "Comport with" seems to have a fairly expansive meaning: " accord with; agree with," despite the fact that *Cajun Constructors* and *Basic Energy* found error was not preserved.
http://oxforddictionaries.com/us/definition/american_english/comport

- whether the parties' discussions with the court on the record "relate[d] to" the issue on appeal. *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 312, n. 5 (Tex. App.– Houston [1st Dist.] 2011, no pet.) (dicta). Despite the fact that *Pitts & Collard* invoked the "relate to" test to indicate in dicta that an objection was not sufficiently specific, "related to" is a phrase "very broad in its ordinary usage," and "means to 'have reference to,' 'concern,' 'pertaining to,' 'associated with' or 'connected with.'" *Tex. Dep't of Pub. Safety v. Abbott*, 310 S.W.3d 670, 674-75 n. 2 (Tex. App.–Austin 2010, no pet.); *Crimson Exploration, Inc. v. Intermarket Mgmt., LLC*, 341 S.W.3d 432, 443 (Tex. App.–Houston [1st Dist.] 2010, no pet.).

- "Appellant directs us to, and we can locate, no point in the record where defense counsel requested a mistrial. Accordingly, the issue of whether the trial court should have granted a mistrial has not been preserved for review. See Tex. R. App. P. 33.1(a). However, defense counsel did lodge an objection to the allegedly improper jury argument, and appellant principally argues on appeal that the trial court erred [*39] in denying that objection. Accordingly, that issue has been preserved for our review, and we will address it." *Howard v. State*, 2014 Tex. App. LEXIS 3051, 38-39 (Tex. App. Corpus Christi Mar. 20, 2014, no pet.)

Several other tests for sufficiency have been invoked by the courts, based in whole or in part on authority decided under Rule 52(a), the precursor to Rule 33.1. Those tests are:

- whether the party "adequately apprise[d] the trial court of the alleged deficiencies [as to legal and factual sufficiency] in such a way that its objection can be clearly identified and understood." *Basic Energy*, 367 S.W.3d at 263-264. However, it appears this formulation conflated the requirements

of Rule 33.1, holdings of courts interpreting Rule 52(a), and the specific language found in the rules governing motions for new trial and motions to modify judgments. *Id.* So this formulation may not be useful in a 33.1 analysis outside the confluence of legal and factual sufficiency challenges and motions for new trial or to modify. And it is subject to any criticism attendant to relying on Rule 52(a).

- whether the objection was specific enough "to enable [the] trial court to under stand [the] precise nature of the error alleged." *Basic Energy*, 367 S.W.3d at 263, citing *Lake v. Premier Transp.*, 246 S.W.3d 167, 174 (Tex. App.—Tyler 2007, no pet.)–which adopted and solely relied on, without discussion, authority decided under Rule 52(a).

- whether the objection on appeal was "the same as" that asserted in the trial court. *Basic Energy*, 367 S.W.3d at 265. However, while this test (which was supported solely with authority decided under Rule 52(a)) may confirm that objections have to be the "same" on appeal and at trial, but it does not provide much illumination as to how we determine whether a trial objection had "sufficient specificity to make the trial court aware of the complaint." Rule 33.1(a)(1)(A).

Finally, there are literally dozens of cases each year recently which framed the issue as being whether the argument made on appeal was made below or not. *E.g.*, "[T]he fact that the post-verdict motions use the words 'immaterial' and 'not controlling' do not preserve objections as to those grounds ['have not been proven [and] there is no evidence they should apply'], because 'those expressions do not accurately capture their argument.'" Kamat v. Prakash, 2014 Tex. App. LEXIS 881, *35-36 (Tex. App.- Houston [14th Dist.] Jan. 28, 2014, no pet.)

It may be there is no real helpful test for deciding the specificity issue, other than the plain language of the rule. There are a multitude of situations in which courts have held that specific objections were, or were not, sufficiently specific; we will look at some of those later in the paper. In the meantime, advocates may want to consider the following tools to ensure that the trial court was made aware of their complaint–keeping in mind that the purpose of the rule is "'to ensure that the trial court has had the opportunity to rule on matters for which parties later seek appellate review.'" *In re Smith*, 366 S.W.3d at 286-7; *Richard*, 2013 Tex. App. LEXIS 4813, at *55.

II. Is it arguments that we have to preserve, or issues?

In one case which commented that Rule 33.1 was "formerly" Rule 52(a), the Supreme Court held that because the petitioners conceded "they did not make this argument to the trial court . . .their complaint has not been preserved." *Operation*

Rescue-National v. Planned Parenthood, 975 S.W.2d 546, 569 n. 73 (Tex. 1998). But it does not appear the Court was using the word "argument" to signify one of several lines of reasoning that would support a single objection–it appears the Court was using the word "argument" to refer to an objection. The "argument" which the petitioners did not make at the trial court was that "punitive damages cannot be assessed for conspiracy absent a finding of actual damages for conspiracy." *Id.*

III. Things to keep in mind in order to preserve error in the trial court.

You cannot beat a brief which fully covers all the nuances of a point, and which was argued at length to the court, to provide "sufficient specificity to make the trial court aware of the complaint." But there are some things you can incorporate into your general routine at trial which might help provide the specificity necessary to preserve appeal.

a. Encourage conversations *on the record.*

i. Get the trial court to talk–and rule– *on the record*–and keep in mind that sometimes an exasperated judge will say the darnedest things.

What better way to show that the trial court was aware of your complaint than to have her or him say at the hearing on the motion for new trial that "I remember" an objection you previously made about excluding certain evidence? *Johnson v. Luchin*, 2012 Tex. App. LEXIS 8055, **15, 16 (Tex. App.– Houston [14th Dist.] Sept. 25, 2012). And isn't it great when the court of appeals specifically notes that "the dialogue in which the attorneys and the trial judge engaged, the record shows that the request by Jason's attorney for further instructions was apparent from the context, and the trial court implicitly denied the request." *Watts v. Watts*, No. 04-11-00777-CV, 2012 Tex. App. LEXIS 8978, *3, n. 1 (Tex. App.–San Antonio Oct 31, 2012). And it undoubtedly helps your error preservation argument when the record reflects that, in a hearing outside the presence of the jury, the trial court's comment that "Well, I understand your objection [that the other side's witness had injected insurance into the case], I overrule that objection. I overruled that at the time you made it"–that's the kind of thing that will lead the court of appeals to conclude that "the trial court clearly understood the basis of [the] general objection" which "has been preserved for our review." *Nguyen v. Myers*, 2013 Tex. App. LEXIS 2085, *13, 14 (Tex. App.–Dallas Feb. 14, 2013); *see also K.P. v. State*, 373 S.W.3d 198, *13 (Tex. App.–Beaumont 2012) (orig. proceeding) ("in light of the trial court's suggestion that it would conduct further proceedings, K.P.'s efforts were also sufficient to deem the trial court to be aware that K.P. objected to the trial court's failure to rule on his motions."). When the trial judge says "let the record show that this matter's already been ruled on twice, that this request that's made is carefully considered by this court and denied," that's at least one indicia that the trial court was aware of the

objection. *Babcock v. Northwest Memorial Hospital*, 767 S.W.2d 705, 707-708 (Tex. 1989). Finally, when the court tells you to go do it yourself without giving you the relief you want, "the trial court clearly understood [the] request and just as clearly refused to grant it." *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 661-62 (Tex. 2009) (held, trial court telling party to conduct its own investigation as to outside influence in the drafting of a note from the jury preserved error as to request to conduct discovery on jury misconduct).

1. Get on the record *who the trial judge is*–let the trial judge's experience and insight shine through, thus enhancing your ability to argue on appeal that they understood what you were talking about.

If your trial judge took 75 jury verdicts in private practice, has sat on the bench for a decade, is board certified in two areas, has been reversed or affirmed (as a judge or as a lawyer) on a topic, or has spoken or published about an issue, etc.–well, the trial judge's abilities, intelligence, experience, and competence should have something to do with whether they were of a particular issue. So, through the process of the trial, start lining the record (perhaps outside the jury's presence) with the trial judge's experience and accomplishments, especially as they relate to the issues of most interest to you.

2. If the trial judge asks you to clarify your position–then clarify it. If you don't, there might be an implication the trial court was not made aware of your complaint.

This is sort of the express flip side of the prior section–no matter how tuned in the trial court is, if the judge asks you to "clarify" your objection, for goodness sake, don't just reiterate your "general statement that the argument was 'improper'"–that will pretty much lead the court of appeals to conclude that your objection "preserved nothing." *Gardner Oil, Inc. v. Chavez*, 2012 Tex. App. LEXIS 3655, *28 (Tex. App.– Tyler May 9, 2012, no pet.). And take notice that sometimes a judge's comments will show they did not understand the thrust of your objection; when that happens, take the opportunity to diplomatically try to get the point across to the judge. *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009) (held, objection that *argument* about other verdicts in the county not preserved when judge responded "'This is his argument, and it is not testimony.'").

A. Which brings to mind-do we judge the trial court's "awareness" using a subjective standard-i.e., whether this particular trial judge was aware-or an objective standard-i.e., whether this trial

judge should have been aware.

The last case mentioned above brings to mind a question that, so far as I have found, has not been directly addressed by any court: as to the trial court's "awareness," do we apply an objective standard, or a subjective standard. In *Phillips*, here is what happened:

> Jury argument: "[Jury's] verdicts [in "this very conservative community"] didn't send much of a message [to doctors] at all."
> Objection: "I object to any testimony about the propriety of other trials and the verdicts . . . ."
> Ruling: "This is his argument, and it is not testimony."

Phillips v. Bramlett, 258 S.W.3d 158, 170 (Tex. App.-Amarillo 2007, rev'd, remanded on other grounds by 288 S.W.3d 876) Subsequently, the argument was repeated without objection, and there was no express ruling. The Court of Appeals recited the foregoing, and then held:

> "From the language . . . the trial court did not perceive the objection to be directed toward improper jury argument;"
> "[T]he court simply clarified that the statement was not evidentiary;" and
> Context does not provide the specificity, and there was no ruling.

Id. So the Court of Appeals held that error was not preserved.

When the Supreme Court addressed this matter, it mentioned that the argument was repeated without objection, and then held that:

> "The court of appeals here concluded that the . . . trial court's response indicated that it did not understand the objection . . . ."
> "We agree that this objection, without more, did not preserve error in this case."

Phillips, 288 S.W.3d at 883.

It is possible that the Supreme Court's holding that "without more, [this objection] did not preserve error in this case" could mean that error was waived by the failure to object to the later repetition of the argument, or the lack of a trial court ruling, or to imply there was a failure to satisfy all the requisites of for preserving error concerning improper jury argument. But set those aside for the moment, and accept the Supreme Court's statement that "the trial court's response indicated that it did not understand the objection." While it is clear the trial court distinguished between "testimony" and "argument" in responding to the objection, if that indicates the trial court did not understand the objection, doesn't the objection and response merit a discussion as to

whether we should use an objective or subjective standard, and whether a "reasonable" trial court should have understood the objection to be directed toward improper argument?

I have not found a case which expressly addressed whether an objective standard should ever be applied in deciding whether a trial court should have been aware of the objection, but perhaps the Supreme Court and Courts of Appeals should look for opportunities to specifically address that question.

3. Do not overlook the implication which comes from getting a ruling on the record, or the trial court's comment about a ruling.

While this paper will not deal with the requirement of Rule 33.1 that you obtain a ruling from the court, do not overlook the fact that eliciting a ruling from the court can serve as a springboard for arguing that, when taken in context, the court's ruling shows it was aware of the objection you were making. *Braglia v. Middleton*, 2012 Tex. App. LEXIS 1647, *9-10 (Tex. App.–Corpus Christi-Edinburg Mar. 1, 2012, no pet.) (denial of an oral request for continuance of trial on the heels of the last-minute withdrawal of nonsuit preserved error, especially when counsel argued that the withdrawal of the nonsuit was a "'180-degree' turnaround of which [counsel] had little or no notice."); *see also Scott's Marina at Lake Grapevine Ltd. v. Brown*, 365 S.W.3d 146, 154 n. 3 (Tex. App.–Amarillo 2012 pet. denied) (overruling of objection which counsel said was "based on the hearing that we've had outside the presence of the jury with regard to *Daubert* and those matters.")

ii. Get opposing counsel to talk *on the record.*

And it is not just comments of the trial court that might preserve error. For example, when an "objection sparked a discussion spanning roughly the next twenty-five pages of reporter's record," it makes it fairly easy for the court of appeals to "conclude that the judge implicitly overruled [the objection as to the jury instruction] by failing to change the jury charge at the conclusion of the charge conference." *State v. Colonia Tepeyac, Ltd.*, 2012 Tex. App. LEXIS 6407, *5-6 (Tex. App.–Dallas Aug. 2, 2012, no pet.).

iii. Have the jurors talk *on the record.*

At least during voir dire–their answers may show that your objections about bias, prejudice, the need for further questioning, etc., are valid. *In re Commitment of Hill*, 334 S.W.3d 226, 229 (Tex. 2011).

iv. Make sure you talk *on the record.*

Finally, take note of the obvious–your comments on the record can preserve error. For example, even though a "motion for new trial is [not] a model of clarity with respect to his first issue on appeal," when the record supplements the motion by showing that counsel "raised the issue of whether an agreement between the parties existed at the hearing on his motion for new trial," that will preserve error. *In re Marriage of Western*, 2012 Tex. App. LEXIS 6432, *5-7 (Tex. App.–Waco Aug. 2, 2012, no pet.). Even doing no more than objecting to testimony "based on the hearing that we've had outside the presence of the jury with regard to *Daubert* and those matters" can preserve error. *Scott's Marina at Lake Grapevine Ltd. v. Brown*, 365 S.W.3d 146, 154 n. 3 (Tex. App.–Amarillo 2012 pet. denied).

1. But, while talking, don't take a position which undermines the relief you actually want.

For example, if you contend that you have the unilateral right to appoint an arbitrator under an arbitration agreement, then don't request that the trial court "appoint an arbitrator," and don't just argue that the trial court should "enforce the Rule 11 Agreement . . . [which] broadly addressed the validity and enforceability of the arbitration agreement and did not reference [your] right under the arbitration agreement to [unilaterally] select an arbitrator." *In re Directory Assistants, Inc.*, 2012 Tex. App. LEXIS 1662, *22-23 (Tex. App.–Corpus Christi-Edinburg, Feb. 29, 2012) (orig. proceeding).

b. Context can eliminate the need for stating the grounds for a ruling with specificity–but do not let context lull you into complacency.

Rule 33.1 expressly excuses a party from stating the grounds for the ruling if "the specific grounds were apparent from the context." Several cases discussed above, and some which will be discussed below, have rightfully relied on the context of the objection or complaint to find that error was preserved. But relying on context is dangerous. In any case which plays out over an extended period of time, and especially in multi-party, class action, or mass tort type litigation, the lawyers (and sometimes, judges) start speaking in a shorthand or code that they may understand, but that a newcomer to the case–like a court of appeals–may neither understand nor appreciate. For example, merely because counsel said "'[b]ut I'm the—I'm the plaintiff in that [other] cause'" and that "'I'd like my objection noted for the record'" does not preserve an objection that a consolidation of the two cases would deprive her clients "of the opportunity to present evidence or argument in support of their claims." *Tate v. Andrews*, 372 S.W.3d 751, 754 (Tex. App.–Dallas 2012, no pet.).

And do not overlook the temporal component of context, or that context can work against you if you are not specific in the grounds you state. While "counsel originally

objected to the letter's admission into evidence on both statute of frauds and best evidence grounds," but after taking the witness on voir dire " reiterated his objection [only] on statute of frauds grounds, but he did not reiterate his best evidence objection," one court of appeals held that "[w]e are not convinced that Vela's counsel either made the trial court sufficiently aware of his best evidence objection or that he pursued that objection to an adverse ruling by the trial court." *Vela v. Colina*, 2011 Tex. App. LEXIS 8168, *7 (Tex. App.–Corpus Christi-Edinburg Oct. 13, 2011, no pet.).

c. You do not have to mention specific cases or statutes by name or number–but if you choose to do so, make sure you get them right.

You don't have to mention the seminal case or statute by name or number to preserve error–but if you choose to cite a statute make sure you get the particular subsections correct, because otherwise you would have been better off making a general reference to the statute. *Thota v. Young*, 366 S.W.3d 678 (Tex. 2012) (held, do not have to cite *Casteel* to preserve presumed harm analysis); *Russell v. Russell*, 2012 Tex. App. LEXIS 6925, *9 (Tex. App.–Houston [14th Dist.] Aug. 21, 2012, pet. denied) (Despite not specifically arguing the application of section 157.167, the party preserved error because "in her petition, [she] specifically requested that the trial court award attorney's fees. Also, in her motion for new trial, she presented evidence regarding the reasonable and necessary fees incurred."); *see also Congleton v. Shoemaker*, 2012 Tex. App. LEXIS 2880, *3-4 (Tex. App.–Beaumont Apr. 12, 2012, pet. denied) (held, an objection that "section 31.002(b) of the Civil Practice and Remedies Code did not authorize the powers listed in the proposed order" was sufficiently specific to advise the trial court of the basis for a complaint "that the trial court erred in granting the receiver the authority of a master in chancery."). *Compare with Wilson v. Dallas Indep. Sch. Dist.*, 376 S.W.3d 319 , 327-28 (Tex. App.–Dallas 2012, no pet.) (citing the a different subsection or statute at trial did not preserve error as to an objection concerning a different subsection or statute).

d. When objecting to experts, use the buzzwords.

An objection that damage estimates of expert "are not based upon any factual foundation" and are just hypothetical estimates will preserve error that "testimony is 'unreliable, incompetent and inadmissable' and there is no evidence 'to support an award of damages or to support the amount of damages awarded.'" *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 252-53 (Tex. 2004). And you can preserve error as the to lack of an expert's reliability by objecting that "the failure of this witness's methodology to meet the reliability standards as articulated by the Supreme Court in Gammill versus Jack William[s] Chevrolet as applying to all expert testimony." *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002).

e. Do More Than You Have to Do–Don't Just File Something

in Passing and Walk Away.

Or at least consider doing more than you think you have to. A perfect example is in the area of the jury charge, which I said earlier in this paper I would not delve into, and will not, except for these examples. The jury charge rules (Rules 271-279, and especially 274) have very specific and extensive requirements for error preservation. When discussing error preservation related to the jury charge, courts often conflate, without distinction, the requirements of Rule 33.1 and the requirements of the jury charge rules. *See Basic Energy*, 367 S.W.3d at 263-264; *Dallas County v. Crestview Corners Car Wash*, 370 S.W.3d 52, 53-54 (Tex. App.–Dallas 2012, no pet.). That is not a criticism of those cases–it is merely to point out that the analysis used in those cases might not always be helpful in addressing whether error has been preserved in a case not involving a jury charge. And sometimes it is difficult to know exactly who has the burden to obtain a finding on a particular issue, which merely emphasizes the need to carefully identify the elements and burdens of causes of action, defenses, and exceptions to defenses to make sure you do not overlook obtaining a finding you need to obtain. *Dynegy v. Yates*, 2013 Tex. LEXIS 679, *10 (Tex. Aug. 30, 2013) (in a non-Rule 33.1 case, the Court held that "the burden was on [the plaintiff] to secure favorable findings on the main purpose doctrine [which was an exception to the statute of frauds defense pled by the defendant]. [The plaintiff's] failure to do so constituted a waiver of the issue under Rule 279 of the Texas Rules of Civil Procedure.").

But the jury charge area is instructive in pointing out that it may be provident to do more than you think you have to when trying to preserve error:

> Despite not having the burden to tender a correct question, TCHR submitted a proposed question that would only allow a finding of liability based on Morrison's termination—again indicating to the Court the over-broad nature of the question. We conclude the trial court was sufficiently put on notice and aware of TCHR's objection [so as to preserve the *Casteel* complaint].

Tex. Comm'n on Human Rights v. Morrison, 381 S.W.3d 533, 536-37 (Tex. 2012); *see also Thota v. Young*, 366 S.W.3d 678, 691 (Tex. 2012) (error preserved when party "made a specific and timely no-evidence objection to the charge question on Ronnie's contributory negligence and also specifically objected to the disputed instruction on new and independent cause. . . . [*And*] submitted a proposed charge to the trial court, which omitted any inclusion of Ronnie's contributory negligence and the new and independent cause instruction and presented the charge according to Young's theory of the case.").

This same concept applies outside the jury charge context. For example, if you want to trial court to rely on federal law instead of state law, give the trial court that federal authority. *In the Interest of B.A.L.*, 2012 Tex. App. LEXIS 1502, *8-10 (Tex.

App.–Amarillo Feb. 27, 2012, no pet.).

f. Merely throwing paper at the trial court may not preserve error.

Emphasizing the need to do more than you have to–and, at least as to the jury charge, not just filing something and not bringing it to the trial court's attention in a hearing–is the following Supreme Court's holding, the importance of which is highlighted by juxtaposing it against the holdings in *Morrison* and *Young*, *supra*:

> Filing a pretrial charge that includes a question containing that subpart, when no other part of the record reflects a discussion of the issue or objection to the question ultimately submitted, does not sufficiently alert the trial court to the issue. A charge filed before trial begins rarely accounts fully for the inevitable developments during trial. . . . we have held that a party may rely on a pretrial charge as long as the record shows that the trial court knew of the written request and refused to submit it. *Alaniz*, 907 S.W.2d at 451-52. Thus, error was preserved where a party filed a pretrial charge, and the trial court used the very page from that charge that contained the requested question but redacted one of the subparts and answer blanks, and the party objected to the omission. *Id.* ***Again, trial court awareness is the key.*** Although trial courts must prepare and deliver the charge, we cannot expect them to comb through the parties' pretrial filings to ensure that the resulting document comports precisely with their requests—that is the parties' responsibility. It is impossible to determine, on this record, whether the trial court refused to submit the question, or whether the omission was merely an oversight. *Cf. Payne*, 838 S.W.2d at 239. As the court of appeals concluded, "[t]he trial court's overruling of [Protech's] objection does not show that it was refusing to submit a jury question or blank regarding attorney's fees incurred for preparation and trial," 323 S.W.3d at 585, and the record does not otherwise reflect a refusal to submit the question. We conclude the issue was not preserved for appellate review.

Cruz v. Andrews Restoration, Inc., 364 S.W.3d 817, 831 (Tex. 2012) (***emphasis supplied***).

In applying *Cruz*, it is important to note that, in the context of objections to the jury charge, Rule 273 specifically requires that "requests [for written questions, definitions, and instructions to be given to the jury] shall be prepared and presented to the court . . .within a reasonable time *after* the charge is given to the parties or their attorneys for

examination." TEX. R. CIV. P. 273 (*emphasis supplied*). In other words, one of the rules governing jury charge specifically addresses the timing of when a requested question, definition, or instruction must be presented to the trial court. *Alaniz*, mentioned in *Cruz*, recognizes an exception to that Rule-based requirement when "the record shows that the trial court knew of the written request and refused to submit it." *Cruz*, 364 S.W.3d at 831, referring to *Alaniz*, 907 S.W.2d at 451-52.

But even outside the jury charge context, it has been held that merely including a section in a verified answer about a lease's consequential damages section, without thereafter mentioning it in the trial court, "does nothing to make the trial court aware that [the party] believed the moving expenses qualified as consequential damages." *Breof BNK Tex., L.P. v. D.H. Hill Advisors, Inc.,* 370 S.W.3d 58, 68 (Tex. App.–Houston [14th Dist.] 2012, no pet.). "'With literally hundreds and perhaps thousands of cases on their docket, it is only reasonable that we require litigants to affirmatively direct the judge's attention to their complaints so the court can make a deliberate decision.' *Cecil v. Smith*, 804 S.W.2d 509, 515 (Tex. 1991) (Cornyn, J., dissenting)." *Id. see also In re Smith*, 366 S.W.3d 282, 286-287 (Tex. App.– Dallas 2012) (orig. proceeding) (the "bare assertion [that Defendants had not carried their burden to plead sufficient facts as to potentially responsible third party's liability], buried in a footnote, was not sufficient to satisfy Lewis's burden under section 33.004(g)(1) to establish that relators failed to meet their pleading burden.").

To the extent non-jury charge cases rely (directly or indirectly) on reasoning in jury charge cases and, hence, the specific timing requirements of Rule 273 (which only applies in the jury charge context), they might be subject to attack. But they do remind us that the test is whether the trial court was aware of the objection, and the need to make sure the record reflects that awareness.

g. Get those informal, off-the-record discussions *on the record.*

The foregoing all underscore the need to have all hearings recorded by the court reporter–a need that often understandably goes unsatisfied in jury trials, which invariably involve hearings outside the presence of the jury, in chambers, in passing, and, with the end of trial drawing near, the inclination of everyone to just get the case to the jury. But if you will make it a practice of starting every discourse with the court by looking at the court reporter and asking her or him to respond to "Are you ready?", or "Can you hear us alright?," you will find that bit of polite courtesy also reminds you to make sure you are preserving error.

If the judge insists on informal discussions in chambers without the presence of the court reporter–an admittedly valuable tool for moving things along–then make it a point when back in the court room, immediately before the jury is brought back, to ask the

judge if you can take one minute to make a record of the discussions in chambers–and then take no more than one minute to do so. Doing something like that may also help you show that the trial court made a ruling. Remember the counsel who preserved error who got the judge to overrule his objection which the counsel said "based on the hearing that we've had outside the presence of the jury with regard to *Daubert* and those matters." *Scott's Marina at Lake Grapevine Ltd. v. Brown*, 365 S.W.3d 146, 154 n. 3 (Tex. App.–Amarillo 2012 pet. denied). If the trial court denied your motion for continuance in an informal, off-the-record exchange, say so on the record. *In the Interest of R.R.*, 2011 Tex. App. LEXIS 8394, *6-7 (Tex. App.–Houston [1st Dist.] Oct. 20, 2011, pet. denied) (defense counsel said "[b]efore we get started, I wanted to renew my objection to the motion for continuance, which was previously denied."

And you might, from an error preservation standpoint, hope that opposing counsel rises to the bait and insists on rearguing things, thus making it even more likely that your complaint will be fleshed out.

IV. Some things to keep in mind if you argue on appeal that error was preserved.

First of all, keep in mind those types of objections and complaints which can be raised for the first time on appeal. We will not go into them now, but a short synopsis of the same can be found at Martin Seigel, *How to Beat Waiver Arguments*, 28 TEXAS LAWYER 12, June 18, 2012, at 22. Seigel reminded us of other ways around a situation if your issue really was not brought to the attention of the trial court: the waiver-proof issues (lack of subject matter jurisdiction, which can be first raised on appeal or *sua sponte* by the appellate court-*see City of Houston v. Rhule*, 2013 Tex. LEXIS 951, *3-4 (Tex. Nov. 22, 2013); standing; mootness; most versions of sovereign immunity (*Rusk State Hospital v. Black*, 392 S.W.3d 88 (Tex. 2012)); the law of the case doctrine; attacks on void orders; defects in the substance of affidavits and questions about the judge's authority to hear the case, etc.); a new rule of law announced after the trial court's decision; plain error; miscarriage of justice; fundamental error; and, finally, when the other side just doesn't notice that you have argued something your party did not argue below (the waiver of waiver). *Id.*

But when you have to face a TRAP 33.1 analysis, here are a few things to keep in mind in deciding how to approach your problem.

a. The objection does not have to be perfect, as specific as it could have been, and it can be inartfully worded–so long as it indicates to the trial court the trial court's error.

Just because the objection was not as specific as it could have been does not mean

it has been waived. *In re D.I.B.,* 988 S.W.2d 753, 760 (Tex. 1999) (held, questioning "whether the trial court's statement of the law regarding probation [i.e., that 'only a jury, not the court, could grant probation'] was accurate" were "sufficient to call the issue to the trial court's attention" even though the "objections were not as specific as they might have been."). And just because it "could have been clearer," error will be preserved if "a fair reading of the record in context shows that counsel presented specific grounds for his motion for continuance and secured a ruling on it." *In the Interest of R.R.*, 2011 Tex. App. LEXIS 8394, *6-7 (Tex. App.–Houston [1st Dist.] Oct. 20, 2011, pet. denied) (defense counsel said "[b]efore we get started, I wanted to renew my objection to the motion for continuance, which was previously denied.") If the court rules that one of only two options is correct, and the party objects that the ruling is not accurate, error is preserved. *Id.* Similarly, in a case decided under Rule 52(a), even though an objection as to the trial court allowing a previously undisclosed witness to testify was "inartfully worded," it still preserved error. *McKinney v. Nat'l. Union Fire Ins. Co.*, 772 S.W.2d 72, 74 n. 3 (Tex. 1989) (party objected that "we have had no previous notice that they intended to call this man to testify as allowed under the Rules of Civil Procedure, that his testimony should not be allowed as he was not identified." The Court held that a "specific objection is one which enables the trial court to understand the precise grounds so as to make an informed ruling, affording the offering party an opportunity to remedy the defect, if possible." *Id.*). One case has held that error was preserved because of the objection or action of counsel "indicating to the trial court" the overbroad nature of the trial court's ruling. *Texas Commision on Human Rights v. Morrison*, 381 S.W.3d 533 (Tex. 2012) (jury charge).

b. Exhaustively mine the record.

As the following suggestions will show, your pitch for error preservation may not end with just looking at the two or three lines–or even pages–where something was discussed and ruled on. Other comments, filings, draftings, or rulings by the court, by the other party, by your trial lawyer, may show that, at least in context, the objection made by your trial lawyer was sufficiently specific to make the trial court aware of the complaint.

c. Make sure the record supports your position.

Just make sure that "the records excerpts relied on" by you show that the "context of the [subject matter of the]. . . discussion" made the trial court aware of the point you raise on appeal–because otherwise, the discussions show you did not preserve error. *Pitts & Collard*, 369 S.W.3d at 312, n. 5. For example, just because your trial counsel and opposing counsel discuss something on the record ad nauseum, and the trial court says something like "the way to resolve this is that this is a suit brought by [the plaintiff partnership] for 100 percent and then . . . however much the jury awards, we cut it in half," that does not mean that the court has ruled on, or been made aware of, an objection

about the segregation of the defendant's claim for fees against the non-settling partner in the partnership. *Pitts & Collard*, 369 S.W.3d at 312, n. 5. Or if you intend to argue, for example, that the trial court misinterpreted federal law in calculating child support, then make sure you provide the trial court with that federal law–otherwise, the court of appeals will conclude that "the trial court was not presented with the relevant federal law and the relevant evidence to have arrived at a conclusion regarding the precise impact child support payments would have on SSI benefits. . . . Because the proper application of federal law was not presented to the trial court as such, we will not conclude that the trial court abused its discretion by misinterpreting or misapplying federal law. . . Indeed, it appears that the trial court fully understood that child support payments would negatively impact SSI benefits and then applied Texas family law principles to the facts of the case." *In the Interest of B.A.L.*, 2012 Tex. App. LEXIS 1502, *8-10 (Tex. App.–Amarillo Feb. 27, 2012, no pet.).

d. Even in a case not involving jury charge error, look over the Supreme Court's rulings on jury charge cases to see if they support preservation in your case by analogy.

As pointed out earlier, many Supreme Court cases which deal with error preservation in the jury charge context find that error was preserved–even under the arguably stricter specificity requirements of Rule 274. So it might bear keeping in mind the various factors which supported a holding of error preservation in those cases, like:

- the submission of an objection to a jury question that it did not "accurately reflect the law," and submitted in writing a proposed question with the correct definition, and cases on which you rely, that will preserve error as to a jury question. *Ford Motor Company v. Ledesma*, 242 S.W.3d 32, 43-44 (Tex. 2007);

- A party does not have to state it wants two apportionment jury questions instead of one to preserve error, when it objects that the damage question could include recovery on a "legally non-viable theory." *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 228-229 (Tex. 2005). The party also objected to the malicious credentialing question; if the trial court had sustained that objection there would have been no problem with the apportionment question. *Id.*

- In a case decided under Rule 52(a), a defendant preserved its complaint that the trial court refused to ask the jury about the plaintiff's knowledge of the culvert, based in some part because the following things showed that the trial court was "aware that the [plaintiff's knowledge of the culvert was disputed]": (1) the trial court's failure to submit the plaintiff's premise

liability theory, which "could hardly have been an oversight;" (2) "very fact that [the trial court] included instructions concerning special defects in the charge [which] indicates that the trial court decided that the culvert was a special defect and not a premise defect;" and (3) "the trial court [allowing] the parties to present evidence and argument concerning [the plaintiff's] knowledge, which would have been irrelevant if the culvert was a special defect." *State v. Payne*, 838 S.W.2d 235, 239 (Tex. 1992).

- In *Payne*, the jury question requested by the Defendant also preserved error by asking the jury whether the plaintiff "had actual knowledge that the culvert was at the location in question." *Id.* Even though it was a specific question, instead of the broad form submission called for by TEX. R. CIV. P. 277, it "clearly called the trial court's attention to the State's complaint because it was the sole element of premise defect liability missing from the charge." *Id.*, at 239-240.

e. Look to other things that happened in the trial court.

This gets back to fully mining the record. The other things that you should look at include:

- juror's responses to voir dire questions. *In re Commitment of Hill*, 334 S.W.3d 226, 229 (Tex. 2011) (a juror's response to a voir dire question, for example, which might help "establish the propriety of the question and the trial court's abuse in denying . . . the right to ask it [of other jurors]."));

- admissions or contentions in the other side's pleadings. *Phillips v. Phillips*, 820 S.W.2d 785, 790 (Tex. 1991) (In a case decided under Rule 52(a), when the plaintiff pleaded "that she was 'entitled to damages . . . in the amount of ten (10) times all losses suffered,'" her "own pleading establishes that the contractual provision she relies upon is an unenforceable penalty under our decisions . . . as a matter of law," and the defendant "was not required to plead penalty as an affirmative defense.").

I. Look at the rulings and statements of the trial court, and do not limit yourself to looking only at ruling you complain of.

So as not to rehash the material set out above about the importance of trial counsel getting the trial court to talk and rule on the record, please refer back to the suggestions made there. But do not limit your review of the record to the specific line, lines, or pages in the record which contain the ruling you complain of. For example, in a case decided under Rule 52(a), a defendant preserved its complaint that the trial court refused to ask

the jury about the plaintiff's knowledge of the culvert, based in some part because the following things showed that the trial court was "aware that the [plaintiff's knowledge of the culvert was disputed]": (1) the trial court's failure to submit the plaintiff's premise liability theory, which "could hardly have been an oversight;" (2) "very fact that [the trial court] included instructions concerning special defects in the charge [which] indicates that the trial court decided that the culvert was a special defect and not a premise defect;" and (3) "the trial court [allowing] the parties to present evidence and argument concerning [the plaintiff's] knowledge, which would have been irrelevant if the culvert was a special defect." *State v. Payne*, 838 S.W.2d 235, 239 (Tex. 1992).

ii. Argue that the objection made, and relief requested, at trial are consistent with and imply the objection made on appeal.

To some extent, this is a corollary of the fact that the objection does not have to be perfect nor even as specific as it should have been. *Wheeler v. Green*, 157 S.W.3d 439, 441-42 (Tex. 2005) (held, asserting that "requests should not have been deemed admitted, the summary judgment should be set aside, and that Sandra would pay Darrin's costs if it was" was "sufficient to give the trial court notice of her request to withdraw deemed admissions and file a late response to the" summary judgment motion.). Other examples which fall in this category are:

- "At the hearing on Shoemaker's post-judgment application for turnover relief, Congleton argued that section 31.002(b) of the Civil Practice and Remedies Code did not authorize the powers listed in the proposed order. Congleton's objection was sufficiently specific to advise the trial court of the basis for his complaint [that the trial court erred in granting the receiver the authority of a master in chancery]." *Congleton v. Shoemaker*, 2012 Tex. App. LEXIS 2880, *3-4 (Tex. App.–Beaumont Apr. 12, 2012, pet. denied).

- Objecting that "that there was no evidence the sanctions were warranted and that the trial court failed to specify the reasons for imposing sanctions" was sufficiently specific "to make the trial court aware of the complaint [to appeal sanctions for allegedly filing a frivolous motion]." *Loya v. Loya*, 2011 Tex. App. LEXIS 8870, *9-10 (Tex. App.– Houston [14th Dist.] Nov. 8, 2011, no pet.).

- Asking to sever termination cases before trial against parents "because of potential conflicts between them," and after trial"because evidence showed actual conflict existed, and if he had only represented mother he would have pointed the finger at terminating only the father" was held to preserve "the argument concerning conflict of interest." *In the*

Interest of B.L.D., 113 S.W.3d 340, 345 (Tex. 2003);

- A motion to disregard a jury finding on modification, or alternatively, to render an order specifying a fixed geographical area for the children's residence was held to have preserved a legal sufficiency challenge to the modification finding as to the joint managing conservatorship. *Lenz v. Lenz*, 79 S.W.3d 10, 13-14 (Tex. 2002);

- In a case under Rule 52(a), an objection to the improper dismissal of a juror was preserved because the trial court stated that "pursuant to the provisions of Rule 292, the Court on its own motion has decided to go ahead and proceed with 11 jurors," and the attorney objected, suggesting "the proper remedy was not disqualification, but a further recess to allow the juror to return" after the inclement weather passed. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 252 (Tex. 1994).

f. Keep in mind that a successful motion for j.n.o.v. preserves a whole host of stuff.

This might not have anything to do with specificity, but if you have prevailed on a motion j.n.o.v., you may also present issues on any ground that would vitiate the verdict or preclude reinstating the verdict, including grounds not raised in the j.n.o.v. *Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009).

V. Some things to keep in mind if you are arguing on appeal that error was <u>not</u> preserved.

First of all, remember that the overwhelming majority of cases on the books hold that error was not preserved. Never overlook the opportunity to argue that "it is not clear from the record [even in context] what [the party's] objection was, whether he argued that the question was prejudicial, or whether he objected on some other grounds." *Parsons v. Greenberg*, 2012 Tex. App. LEXIS 888, *17-18 (Tex. App.–Fort Worth Feb. 2, 2012, pet. denied).

But not all your error preservation fights will be that clean, and it is sometimes difficult to ferret out cases that expressly hold that an objection or complaint was not specific enough is sometimes difficult. But here are some concepts and examples to keep in mind:

a. Your initial point should be that the insufficiently specific objection deprive you of the ability to cure the alleged deficiency at issue at a time when you had the ability to do so.

Keep in mind that courts have said that a party should not be able "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." *Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 317 (Tex. 2012), citing *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003) and *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam). While Rule 33.1 does not say anything about protecting the non-objecting party, and the foregoing holding is based on authority decided under Rule 373, you should invoke this policy consideration *especially* if you can show things you could have done in the trial court in response to a sufficiently specific objection. But anticipate, and be ready to answer a question about, why you did not do those things anyway.

b. Merely requesting relief without saying why one is entitled to it may not preserve error.

For example, a party which said he wanted to "call 'a rebuttal witness' without identifying the witness or its proposed line of questioning" did not preserve error as to a complaint that the party "needed more time to call Allice as a rebuttal witness to point out inconsistencies with his testimony and his discovery responses." *1.9 Little York, Ltd. v. Allice Trading Inc.*, 2012 Tex. App. LEXIS 2112, *22-23 (Tex. App.–Houston [1st Dist.] Mar. 15, 2012, pet. denied).

c. An objection buried in a filing does not make the trial court aware of anything.

Failing to bring to the trial court's attention an objection made in a filing, at least when that filing is not thereafter brought to the trial court's attention. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 829-831 (Tex. 2012) (held, error not preserved as to jury charge by an appropriately worded proposed jury question which was not thereafter brought to the trial court's attention or rule on by the trial court). Outside the jury charge context, it has been held that merely including a section in a verified answer about a lease's consequential damages section, without thereafter mentioning it in the trial court, "does nothing to make the trial court aware that [the party] believed the moving expenses qualified as consequential damages." *Breof BNK Tex., L.P. v. D.H. Hill Advisors, Inc.,* 370 S.W.3d 58, 68 (Tex. App.–Houston [14th Dist.] 2012, no pet.). "'With literally hundreds and perhaps thousands of cases on their docket, it is only reasonable that we require litigants to affirmatively direct the judge's attention to their complaints so the court can make a deliberate decision.' *Cecil v. Smith*, 804 S.W.2d 509, 515 (Tex. 1991) (Cornyn, J., dissenting)." *Id. see also In re Smith*, 366 S.W.3d 282, 286-287 (Tex. App.– Dallas 2012) (orig. proceeding) (the "bare assertion [that Defendants had not carried their burden to plead sufficient facts as to potentially responsible third party's liability], buried in a footnote, was not sufficient to satisfy Lewis's burden under section 33.004(g)(1) to establish that relators failed to meet their pleading burden.").

Sticking with the theme that a nuance buried in a mound of material will not preserve error, a request for "revisions to [the] proposed modification order . . . [which] 'included the deletion of pages of items—such as conservatorship and travel—which were not part of the [Mediated Settlement Agreement]'" did not preserve error as to a complaint that "the inclusion of two specific items [e.g., a school zone issue] in those pages effectively changes the operation of provisions that were not modified by the parties' MSA." *Brantley v. Brantley*, 2012 Tex. App. LEXIS 1741, *7-9 (Tex. App.–Houston [14th Dist.] Mar. 6, 2012, no pet.).

d. An objection as to one aspect of a claim, or evidentiary requirement, does not preserve error as to another aspect or requirement.

This particular line of attack indicates there is a continuum of sorts which ranges from an objection which is specific enough to a scenario where the objection in question was not made at all. Somewhere in the middle of that continuum are cases like the one which held that objecting that "that the statements . . . were statements of opinion" did not preserve error that those "statements were not material." *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 369, n. 8 (Tex. App.–Houston [1st Dist.] 2012, pet. granted, remanded by, settled *by Devon Energy Holdings v. Allen*, 2013 Tex. LEXIS 20 (Tex., Jan. 11, 2013)).And if you argue that an objection was not preserved, you want to argue that the specific objection involved in the appeal was not made at all. So you would want to invoke the following cases:

- Held, error was waived because the party "did not frame additional inquiries or convey to the trial court that the thrust of any remaining [voir dire] questions would be different from the single one presented for a ruling." *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 760 (Tex. 2006);

- A contention that a party "had properly obtained student approval" did not raise, nor preserve error, as to the contention that "it was exempt from the approval requirement altogether." *Dallas County Cmty. College Dist. v. Bolton*, 185 S.W.3d 868, 876 (Tex. 2005) ("In the trial court, the District contended only that it). Similarly, an objection on appeal that a jury charge included "an invalid legal theory" was not preserved by an objection that party "lacked standing to maintain a claim under article 21.21 for unfair settlement practices." *Rocor Int'l v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 273 (Tex. 2002);

- arguments "which were plainly challenges to the validity of the contract as a whole, not the arbitration clause, specifically" did not preserve error as to an argument that "the Board never approved the arbitration clause and [the] Superintendent . . . thus had no authority to sign a contract containing an

arbitration clause." *Aetna Life Ins. Co. v. Weslaco Indep. Sch. Dist.*, 2012 Tex. App. LEXIS 4379, *16-17 (Tex. App.–Corpus Christi-Edinburg May 31, 2012, no pet.);

- An objection that an expert's opinions were "unreliable" does not preserve error as to whether he was qualified. *Nissan Motor Co. v. Armstong*, 145 S.W.3d 131, 143-44 (Tex. 2004). Similarly, a challenge to "Parkhill's qualifications to read and interpret the medical records generally" was not preserved by an objection which was "'partly a challenge to Parkhill's lack of expertise in pediatric matters or in matters related to the effects of drugs on unborn or newly born children and partly his potential interest and bias." *In the Interest of I.H.R.*, 2012 Tex. App. LEXIS 2001, *5-6 (Tex. App.–Texarkana Mar. 9, 2012, no pet.).

- "[A]n oral objection [to producing tax returns] based on relevance [does not preserve an objection based on] . . . the Fifth Amendment." *Valdez v. Progressive County Mut. Ins. Co.*, 2011 Tex. App. LEXIS 9773, *13 (Tex. App.–San Antonio Dec. 14, 2011, no pet.);

- Merely asserting "that the trial court was without authority to require her to reimburse Alvarez because the settlement agreement contained no such remedy" did not preserve error as to an argument that "the trial court erred in issuing a money judgment favoring Alvarez because (1) such judgment would only be proper if Garcia's conduct caused Alvarez to suffer damages and (2) Family Code section 9.010 does not support issuance of a money judgment under these circumstances" *Garcia v. Alvarez*, 367 S.W.3d 784, 788 (Tex. App.–Houston [14th Dist.] 2012, no pet.);

e. An objection to factual sufficiency, which sought only a new trial, does not preserve a legal sufficiency point.

"[A] challenge to the factual sufficiency of the evidence [to support the jury verdict" when "appellants did not request rendition of judgment in their favor . . . [but] sought only a new trial" did not preserve "a legal-sufficiency challenge in the trial court." *K.J. v. USA Water Polo, Inc.*, 383 S.W.3d 593, 599-600 (Tex. App.– Houston [14th Dist.] 2012, pet. filed). Similarly, asking "the trial court to vacate its order [granting a new trial] and reopen the case for additional evidence" was "not sufficiently specific to preserve the complaint" that the landlord "failed to establish that she provided a demand to vacate before filing suit and that, consequently, the trial court lacked good cause to grant a new trial." *Bovey v. Coffey*, 2012 Tex. App. LEXIS 3247, *4-5 (Tex. App.– Beaumont Apr. 26, 2012, no pet.).

3. Conclusion.

The tendency of courts to invoke the general error preservation rule-now Rule 33.1-in ruling on error preservation issues has boomed over the last quarter century-and that points us to the elements of the conversation that trial lawyers must have with the trial courts in order to preserve error. Courts of appeals have shown a tendency to hold error was not preserved an overwhelming majority of the time–mostly because the "mechanical" requirements of Rule 33.1 were not met: an objection was either not made, was not timely, was not ruled on, or the ruling or the objection is not on the record. Courts have been more likely to find that an objection was specific enough to make the trial court aware of it, but the odds are still against error preservation on specificity grounds. There appear to be unexplored arguments supporting the proposition that 33.1 has a more relaxed standard for specificity than did either Rule 52(a) or Rule 373: the "awareness" language of Rule 33.1, the comments of the State Bar of Texas Appellate Section, and the comments of the Supreme Court and its advisory committee in the cases and work leading up to the adoption of Rule 33.1. For appellate lawyers, the overwhelming tendency of courts to find that error was not preserved merely reinforces the need to create, and mine, the record in your case to show that the trial court was aware of the objection at issue.

APPENDIX

(All Appendix items may be found online at:
http://www.stevehayeslaw.com/resume.html)

1. Table of Supreme Court Cases Expressly Addressing Rule 373

2. Table of Supreme Court Cases Expressly Addressing Specificity of the Objection under Rule 52(a)

3. List of Supreme Court Cases Citing Rule 52(a)

4. Cases in which Supreme Court has cited Rule 33.1 (through 8/15/2013).

5. Cases in which error was preserved in the Supreme Court and Courts of Appeals, or in which error was not preserved in courts of appeals because of a lack of specificity (9/1/2011-8/31/2012).

6. Page 5296, Hearing of the Supreme Court Advisory Committee, January 20, 1995 (Morning Session), Archives of the Supreme Court of Texas.

7. Disposition Chart accompanying letter from Bill Dorsaneo to Luke Soules dated December 21, 1995, Archives of the Supreme Court of Texas.

8. Pages 1-6, Rules Memorandum, TRAP 52, February 26, 1996, Archives of the Supreme Court of Texas.

9. Page 1, Memorandum re: TRAP 47 and 52, from Lee Parsley, October 30, 1996, Archives of the Supreme Court of Texas.

10. Pages 1-2, Proposed form of certain Texas Rules of Appellate Procedure, January 1, 1997, Archives of the Supreme Court of Texas.

11. THE GUIDE TO THE NEW TEXAS RULES OF APPELLATE PROCEDURE 1997 (STATE BAR OF TEXAS APPELLATE SECTION).

APPENDIX 1

Appendix 1. Table of Supreme Court Cases Expressly Addressing Rule 373

Case	Winner at			Error Preserved	Error Not Preserved
	Trial Ct.	Ct. App.	S. Ct.		
Hurst, 1983	P	D	P Re-mand	Motion for judgment praying for fees and trial brief arguing for fees preserved claim for fees. At 252	
Blue Mntn., 1982	D	D	D		Expressly saying party "does not urge that the . . . contract confers jurisdiction in Texas" waives jurisdiction under that clause. At 451
Farris, 1981	D	P	D		Objections "were too general to apprise the trial court of the complaint." At 560.
Dunn, 1979	D	P	P	Party complained that Defendants received more strikes than he did, which he repeated in his motion and amended motion for new trial. At 921	
Wile-mon, 1965	D	P	D		"Note our exception" to a trial court's ruling on another party's objection to testimony does not preserve error about the trial court's comment on the weight of the evidence. At 818
Plasky 1960	P	D	D*		P did not object at all in trial court to the judgment's failure to award him interest on certain amounts until the judgment was paid. At 616-17.

Swan-son, 1950	P	D	D*	Held, court of appeals did not err in considering points of error which asserted that the evidence was insufficient to support the decree of divorce (based on a finding of cruelty and excesses by the defendant toward the plaintiff), even in the absence of an objection to the judgment, an objection to the findings of fact or conclusions of law, or the filing of a motion for new trial. At 602-3	
Minus, 1943**				Defendant preserved error by excepting in open court to the trial court's sustaining a special exception that the defendant's cross action for an accounting should be dismissed as a misjoinder of causes of action in a suit brought for partition. At 224.	

*D won on preservation point.
** It is not clear that *Minus* was decided under Rule 373.

APPENDIX 2

Appendix 2. Table of Supreme Court Cases Expressly Addressing Specificity of the Objection under Rule 52(a) (or addressed argument in dissent raising issue of specificity under Rule 52(a)*).

Case	Trial Ct.	Ct. App.	S. Ct.	Error Preserved	Error Not Preserved
Osterberg v. Peca (2000)	P Won	P Won on some, D Won on some	P Won on some, D Won on some	D preserved objection in answer and motion for directed verdict as to freedom of speech and association issues, and did not waive constitutional objection as to court's definition of campaign contributions.	D waived error as to whether they substantially complied with statute, and P waived claim for attorney's fees.
Wal-Mart v. McKenzie (1999)	P Won	P Won	D Won (Remand)	D preserved objection by saying in its motion jnov and in written response to P's motion for judgment that statute did not allow for recovery of certain damages.	
Holland v. Wal-Mart (1999)	P Won	P Won	D Won	In motion for jnov, D preserved error about attorney's fees non-recoverability under existing Worker's Comp statute.	

McDaniel v. Yarbrough (1994)	D Won	D Won	P Won (Remand)	Objection to improper dismissal of juror was apparent from record, and atty. objected that proper remedy was not disqualification, but recess to allow juror to return.	
State Highway Dep't v. Payne (1992)*	P Won	P Won	D Won	D preserved complaint that jury charge failed to inquire about P's knowledge of special defect, by objecting that charge was comment on weight of evidence, etc., and also preserved by asking for question whether P "had actual knowledge" of the culvert. Other rulings by trial court showed it was aware that P's knowledge was disputed.	
Phillips v. Phillips (1991)	D Won	D Won	D Won	Even though the defense of penalty is an affirmative defense which a defendant must normally affirmatively plead, that defense is not waived by failing to plead it "if it is apparent on the face of the petition and established as a matter of law."	

Wilson v. Dunn (1990)	P Won	D Won	D Won	D preserved complaint about defect in service, even though he apparently did not mention same in his motion for new trial, or otherwise.	
McKinney v. National Union (1989)	D Won	D Won	D Won (though P pre-served error)	P's objection, though "inartfully worded," enabled the trial court to understand that the P was objecting to a witness because that witness had not been i.d.'ed as a fact witness in response to an interrogatory.	
Babcock v. Northwest Memorial (1989)	D Won	D Won	P Won (re-mand)	P's preserved complaint about request to question entire jury panel about lawsuit crisis by twice asking to do so and opposing motion in limine against same, and being denied request to put specific question it would have asked in the record.	

APPENDIX 3

Appendix 3. List of Supreme Court Cases Citing Rule 52(a).

Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000)
Walmart v. McKenzie, 997 S.W.2d 278 (Tex. 1999)
Holland v. Wal-Mart Stores, 1 S.W.2d 91 (Tex. 1999)
In re C.O.S., 988 S.W.2d 760 (1999)
Salinas v. Rafati, 948 S.W.2d 286 (1997)
McDaniel v. Yarbrough, 898 S.W.2d 251 (1995)
Kassen v. Hatley, 887 S.W.2d 4 (1994)
Estate of Pollack v. McMurrey, 858 S.W.2d 388 (1993)
McConnell v. Southside Independent School District, 858 S.W.2d 337 (1993)
Diamond Shamrock Refining & Marketing Co. v. Mendez, 844 S.W.2d 198 (1992)
State Dep't Highways & Public Transp. v. Payne, 838 S.W.2d 235 (1992)
Phillips v. Phillips, 820 S.W.2d 785 (1991)
Cecil v. Smith, 804 S.W.2d 509 (1991)
Bushell v. Dean, 803 S.W.2d 711 (1991)
Wilson v. Dunn, 800 S.W.2d 833 (1990)
Emerson v. Tunnell, 793 S.W.2d 947 (1990)
Lee v. Braeburn Valley West Civic Ass'n, 786 S.W.2d 262 (1990)
Vawter v. Garvey, 786 S.W.2d 263 (1990)
Ramos v. Frito-Lay, Inc., 784 S.W.2d 667 (1990)
San Jacinto River Authority v. Duke, 783 S.W.2d 209 (1990)
McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72 (1989)
Clark v. Trailways, Inc., 774 S.W.2d 644 (5/31/1989)
Babcock v. Northwest Memorial Hospital, 767 S.W.2d 705 (1989)
Jacobs v. Danny Darby Real Estate,Inc., 750 S.W.2d 174 (1988)
Lemons v. EMW Mfg. Co., 747 S.W.2d 372 (1988)

A “1" in the following table indicates that characteristic was present in the case.

Style	Cite	Date	Count	Rule 52(a) case	Pre-served	Not	Not De-cided/ Not at issue	Specific enough	Not specific enough	Spe-cifici-ty Not an Issue	Not raised at all/ with drawn	Others (no ruling, record, un timely, etc.)
Osterberg v. Peca	12 S.W.3d 31	2/3/2000	1	1	1	1		1			1	
Walmart v. McKenzie	997 S.W.2d 278	8/6/1999	1	1	1			1				

Style	Cite	Date	Count	Rule 52(a) case	Pre-served	Not	Not De-cided/ Not at issue	Specific enough	Not specific enough	Spe-cifici-ty Not an Issue	Not raised at all/ with drawn	Others (no ruling, record, un timely, etc.)
Holland v. Wal-Mart Stores	1 S.W.2d 91	7/1/1999	1	1	1			1				
In re C.O.S.	988 S.W.2d 760	4/1/1999	1	1			1					
Salinas v. Rafati	948 S.W.2d 286	6/27/1997	1	1	1					1		
McDaniel v. Yarbrough	898 S.W.2d 251	3/2/1995	1	1	1			1				
Kassen v. Hatley	887 S.W.2d 4	11/10/1994	1	1		1					1	

Style	Cite	Date	Count	Rule 52(a) case	Pre-served	Not	Not De-cided/ Not at issue	Specific enough	Not specific enough	Spe-cifici-ty Not an Issue	Not raised at all/ with drawn	Others (no ruling, record, un timely, etc.)
Estate of Pollack v. McMurrey	858 S.W.2d 388	6/30/1993	1	1		1					1	
McConnell v. Southside Independent School District	858 S.W.2d 337	4/21/1993	1	1			1					
Diamond Shamrock Refining & Marketing Co. v. Mendez	844 S.W.2d 198	10/7/1992	1	1			1					

Style	Cite	Date	Count	Rule 52(a) case	Pre-served	Not	Not De-cided/ Not at issue	Specific enough	Not specific enough	Spe-cifici-ty Not an Issue	Not raised at all/ with drawn	Others (no ruling, record, un timely, etc.)
State Dep't Highways & Public Transp. v. Payne	838 S.W.2d 235	9/23/1992	1	1	1			1				
Phillips v. Phillips	820 S.W.2d 785	12/11/1991	1	1	1			1				

Style	Cite	Date	Count	Rule 52(a) case	Preserved	Not	Not Decided/ Not at issue	Specific enough	Not specific enough	Specificity Not an Issue	Not raised at all/ with drawn	Others (no ruling, record, untimely, etc.)
Cecil v. Smith	804 S.W.2d 509	2/27/1991	1	1	1					1		
Bushell v. Dean	803 S.W.2d 711	2/13/1991	1	1		1						1
Wilson v. Dunn	800 S.W.2d 833	10/24/1990	1	1	1							
Emerson v. Tunnell	793 S.W.2d 947	5/2/1990	1	1	1					1		

Style	Cite	Date	Count	Rule 52(a) case	Pre-served	Not	Not De-cided/ Not at issue	Specific enough	Not specific enough	Spe-cifici-ty Not an Issue	Not raised at all/ with drawn	Others (no ruling, record, un timely, etc.)
Lee v. Braeburn Valley West Civic Ass'n	786 S.W.2d 262	3/7/1990	1	1	1					1		
Vawter v. Garvey	786 S.W.2d 263	3/7/1990	1	1		1					1	
Ramos v. Frito-Lay, Inc.	784 S.W.2d 667	1/31/1990	1	1		1					1	
San Jacinto River Authority v. Duke	783 S.W.2d 209	1/13/1990	1	1		1						
McKinney v. National Union Fire Ins. Co.	772 S.W.2d 72	6/7/1989	1	1	1			1				
Clark v. Trailways, Inc.	774 S.W.2d 644	5/31/1989	1	1		1						1
Babcock v. Northwest Memorial Hospital	767 S.W.2d 705	3/29/1989	1	1	1			1				

Style	Cite	Date	Count	Rule 52(a) case	Pre-served	Not	Not De-cided/ Not at issue	Specific enough	Not specific enough	Spe-cifici-ty Not an Issue	Not raised at all/ with drawn	Others (no ruling, record, un timely, etc.)
Jacobs v. Danny Darby Real Estate, Inc.	750 S.W.2d 174	5/18/1988	1	1			1					
Lemons v. EMW Mfg. Co.	747 S.W.2d 372	2/17/1988	1	1		1					1	
			25	25	13	9	4	8	0	4	6	2
% of total				100%	52%	36%	16%	32%	0%	16%	24%	8%
% of Preserved or Not/Specific or Not					59%	41%		100%	0%			

APPENDIX 4

Appendix 4. Cases in which Supreme Court has cited Rule 33.1 (through 4/30/2013). (A "1" indicates the characteristic for the column was present in the case).

Style	Cite	Date	Count	Rule 52(a) case	33.1 Pre-served	33.1 Not Pre-served	33.1 Not Decided / Not at issue	33.1 Speci-ficity Not an Issue	33.1 Speci-fic enough	33.1 Not speci-fic enough	33.1 Not raised at all/ with-drawn	33.1 Others (no ruling, record, un-timely, etc.)
In re Toyota Motor, U.S.A.	2013 Tex. LEXIS 673	9/20/2013	1			1						1
Tex. DOT & Edinburg v. A.P.I. Pipe & Supply, LLC,	397 S.W.3d 162	4/5/2013	1			1					1	
Ford Motor Co. v. Stewart, Cox and Hatcher, P.C.	390 S.W.3d 294	1/25/2013	1		1				1			
Texas Commision on Human Rights v. Morrison	381 S.W.3d 533	8/31/2012	1		1				1			
Texas Mutual Insurance Company v. Ruttiger	381 S.W.3d 430	6/22/2012	1				1					
Office of the Attorney General v. Burton	369 S.W.3d 173	6/8/2012	1		1			1				

Style	Cite	Date	Count	Rule 52(a) case	33.1 Pre-served	33.1 Not Pre-served	33.1 Not Decided / Not at issue	33.1 Speci-ficity Not an Issue	33.1 Speci-fic enough	33.1 Not speci-fic enough	33.1 Not raised at all/ with-drawn	33.1 Others (no ruling, record, un-timely, etc.)
Thota v. Young	366 S.W.3d 678	5/11/2012	1		1				1			
Cruz v. Andrews Restoration, Inc.	364 S.W.3d 817	4/20/2012	1			1		1				1
Mansions in the Forest, L.P. v. Montgomery County	365 S.W.3d 314	4/20/2012	1			1					1	
Comm'n for Lawyer Discipline v. Schaefer	346 S.W.3d 831	4/20/2012	1			1					1	
City of Dallas v. Abbott	304 S.W.3d 380	2/19/2012	1				1					
Service Corp. Int'l v. Guerra	348 S.W.3d 221	6/17/2011	1		1		1					

Style	Cite	Date	Count	Rule 52(a) case	33.1 Pre-served	33.1 Not Pre-served	33.1 Not Decided / Not at issue	33.1 Speci-ficity Not an Issue	33.1 Speci-fic enough	33.1 Not speci-fic enough	33.1 Not raised at all/ with-drawn	33.1 Others (no ruling, record, un-timely, etc.)
Roccaforte v. Jefferson County	341 S.W.3d 919	4/29/2011	1			1					1	
In re Commitment of Hill	334 S.W.3d 226	3/11/2011	1		1				1			
Tex. Comptroller of Pub. Acccounts v. Atty Gen'l. of Texas	354 S.W.3d 336	12/3/2010	1				1					
In re Ensco Offshore Int'l Co.	311 S.W.3d 921	5/7/2010	1			1					1	
Ingram v. Deere	288 S.W.3d 996	7/3/2009	1				1					

Style	Cite	Date	Count	Rule 52(a) case	33.1 Pre-served	33.1 Not Pre-served	33.1 Not Decided / Not at issue	33.1 Speci-ficity Not an Issue	33.1 Speci-fic enough	33.1 Not speci-fic enough	33.1 Not raised at all/ with-drawn	33.1 Others (no ruling, record, un-timely, etc.)
City of San Antonio v. Pollock	284 S.W.3d 809	5/1/2009	1				1					
Ford Motor Co. v. Castillo	279 S.W.3d 656	4/3/2009	1		1				1			
Phillips v. Bramlett	288 S.W.3d 876	3/6/2009	1			1				1		
In re Dep't of Family Protective Servs.	273 S.W.3d 637	1/1/2009	1				1					
Perry v. Cohen	272 S.W.3d 585	11/14/2008	1				1					

Style	Cite	Date	Count	Rule 52(a) case	33.1 Preserved	33.1 Not Preserved	33.1 Not Decided / Not at issue	33.1 Specificity Not an Issue	33.1 Specific enough	33.1 Not specific enough	33.1 Not raised at all/ withdrawn	33.1 Others (no ruling, record, untimely, etc.)
Ulico Cas. Co. v. Allied Pilots Ass'n.	262 S.W.3d 773	8/29/2008	1			1					1	
Perry Homes v. Cull	258 S.W.3d 580	5/2/2008	1				1					
Villifani v. Trejo	251 S.W.3d 466	4/18/2008	1		1			1				
Ford Motor Company v. Ledesma	242 S.W.3d 32	12/21/2007	1		1				1			
Bay Area Healthcare Group, Ltd. v. McShane	239 S.W.3d 231	6/8/2007	1			1					1	
Tellez v. City of Soccoro	226 S.W.3d 413	6/1/2007	1			1					1	
Low v. Henry	221 S.W.3d 609	4/20/2007	1			1					1	
Zipp v. Wuemling	218 S.W.3d 71	3/9/2007	1				1					

Style	Cite	Date	Count	Rule 52(a) case	33.1 Pre-served	33.1 Not Pre-served	33.1 Not Decided / Not at issue	33.1 Speci-ficity Not an Issue	33.1 Speci-fic enough	33.1 Not speci-fic enough	33.1 Not raised at all/ with-drawn	33.1 Others (no ruling, record, un-timely, etc.)
Parker v. Barefield	206 S.W.3d 119	10/27/2006	1		1			1				
Thomas v. Long	207 S.W.3d 334	4/21/2006	1		1			1				
Hyundai Motor Co. v. Vasquez	189 S.W.3d 743	3/10/2006	1			1				1		
Dallas County Cmty. College Dist. v. Bolton	185 S.W.3d 868	12/2/2005	1			1					1	
Romero v. KPH Consol., Inc.	166 S.W.3d 212	5/27/2005	1		1				1			
Wheeler v. Green	157 S.W.3d 439	2/11/2005	1		1				1			
Volkswagen of Am., Inc. v. Ramirez	159 S.W.3d 897	12/31/2004	1		1				1			

Style	Cite	Date	Count	Rule 52(a) case	33.1 Pre-served	33.1 Not Pre-served	33.1 Not Decided / Not at issue	33.1 Speci-ficity Not an Issue	33.1 Speci-fic enough	33.1 Not speci-fic enough	33.1 Not raised at all/ with-drawn	33.1 Others (no ruling, record, un-timely, etc.)
County of Bexar v. Santikos	144 S.W.3d 455	8/27/2004	1									
Nissan Motor Co. v. Armstong	145 S.W.3d 131	8/27/2004	1			1				1		
Brooks v. Northglen Ass'n	141 S.W.3d 158	6/25/2004	1			1					1	
Garza v. Garcia	137 S.W.3d 36	5/14/2004	1			1						1
Cire v. Cummings	134 S.W.3d 835	4/23/2004	1			1						1
Kerr-McGee Corp v. Helton	133 S.W.3d 245	1/30/2004	1		1				1			
In the Interest of Z.L.T.	124 S.W.3d 163	11/21/2003	1		1				1			
In the Interest of L.M.I.	119 S.W.3d 707	9/18/2003	1			1					1	
In the Interest of B.L.D.	113 S.W.3d 340	7/3/2003	1		1	1			1		1	

Style	Cite	Date	Count	Rule 52(a) case	33.1 Pre-served	33.1 Not Pre-served	33.1 Not Decided / Not at issue	33.1 Speci-ficity Not an Issue	33.1 Speci-fic enough	33.1 Not speci-fic enough	33.1 Not raised at all/ with-drawn	33.1 Others (no ruling, record, un-timely, etc.)
In the Interest of M.S.	115 S.W.3d 534	7/3/2003	1				1					
City of San Benito v. Rio Grande Valley Gas Co.	109 S.W.3d 750	6/26/2003	1				1					
Walker v. Gutierrez	111 S.W.3d 56	6/19/2003	1				1					
In the Interest of J.F.C.	96 S.W.3d 256	12/31/2002	1			1					1	
Campbell v. State	85 S.W.3d 176	8/29/2002	1			1					1	
Lenz v. Lenz	79 S.W.3d 10	6/6/2002	1		1				1			
Rocor Int'l v. Nat'l Union Fire Ins. Co.	77 S.W.3d 253	5/23/2002	1			1				1		

Style	Cite	Date	Count	Rule 52(a) case	33.1 Preserved	33.1 Not Preserved	33.1 Not Decided / Not at issue	33.1 Specificity Not an Issue	33.1 Specific enough	33.1 Not specific enough	33.1 Not raised at all/ withdrawn	33.1 Others (no ruling, record, untimely, etc.)
Guadalupe-Blanco River Auth. v. Kraft	77 S.W.3d 805	5/9/2002	1		1				1			
In the Interest of A.D.	73 S.W.3d 244	4/11/2002	1			1				1		
Fortune Prod. Co. v. Conoco, Inc.	52 S.W.3d 671	11/30/2000	1			1					1	
City of Fort Worth v. Zimlich	29 S.W.3d 62	6/29/2000	1			1					1	
Osterberg v. Peca	12 S.W.3d 31	2/3/2000	1	1								
Wal-Mart Stores, Inc. v. McKenzie	997 S.W.2d 278	8/26/1999	1	1								
Motor Vehicle Bd. of the Tex. DOT v. El Paso Indep. Auto. Dealers	1 S.W.3d 108	8/26/1999	1		1				1			

Style	Cite	Date	Count	Rule 52(a) case	33.1 Preserved	33.1 Not Preserved	33.1 Not Decided / Not at issue	33.1 Specificity Not an Issue	33.1 Specific enough	33.1 Not specific enough	33.1 Not raised at all/ withdrawn	33.1 Others (no ruling, record, untimely, etc.)
Holland v. Wal-Mart Stores	1 S.W.3d 91	7/1/1999	1	1								
Northern Natural Gas Co. v. Conoco, Inc.	986 S.W.2d 603	4/1/1999	1			1					1	
In re C.O.S.	988 S.W.2d 760	4/1/1999	1	1								
In re D.I.B.	988 S.W.2d 753	4/1/1999	1		1				1			
Operation Rescue-National v. Planned Parenthood	975 S.W.2d 546	7/3/1998	1	1								
			64	5	21	26	13	5	16	5	18	3
% of total				8%	36%	44%	22%	8%	27%	8%	31%	5%
% of Opinions Determining if Error Preserved/If Obj. Specific Enough					45%	55%			77%	23%		

APPENDIX 5

Appendix 5. Cases in which error was preserved in the Supreme Court and Courts of Appeals, or in which error was not preserved in courts of appeals because of a lack of specificity (9/1/2011-8/31/2012).

Error was preserved (Supreme Court and Courts of Appeals)

"Despite not having the burden to tender a correct question, TCHR submitted a proposed question that would only allow a finding of liability based on Morrison's termination—again indicating to the Court the over-broad nature of the question. We conclude the trial court was sufficiently put on notice and aware of TCHR's objection [so as to preserve the *Casteel* complaint]. See Tex. R. App. P. 33.1(a)(1)(A); Thota, 366 S.W.3d at 690 ("[W]e have long favored a common sense application of our procedural rules [*537] that serves the purpose of the rules, rather than a technical application that rigidly promotes form over substance.")." *Tex. Comm'n on Human Rights v. Morrison*, 381 S.W.3d 533, 536-37 (Tex. 2012).

"In contrast to *A.V.* and *B.L.D.*, Young made a specific and timely no-evidence objection to the charge question on Ronnie's contributory negligence and also specifically objected to the disputed instruction on new and independent cause. In addition to Young's timely and specific objections at the charge conference, Young submitted a proposed charge to the trial court, which omitted any inclusion of Ronnie's contributory negligence and the new and independent cause instruction and presented the charge according to Young's theory of the case. This was sufficient to place the trial court on notice that Young believed the evidence did not support an inclusion of Ronnie's contributory negligence or instruction on new and independent cause, and our procedural rules require nothing more. By making timely and specific objections that there was no evidence to support the disputed items submitted in the broad-form charge and raising these issues for the court of appeals to consider, Young properly preserved these issues for appellate review; Young did not have to cite or reference Casteel specifically to preserve the right for the appellate court to apply the presumed harm analysis, if applicable, to the disputed charge issues." *Thota v. Young*, 366 S.W.3d 678, 691 (Tex. 2012).

"Thus, Texas Rule of Appellate Procedure 33.1(d) provides that '[i]n a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence . . . may be made for the first time on appeal in the complaining party's brief.' The Attorney General complained in the court of appeals that no evidence supported the trial court's finding of a zero arrearage. This legal sufficiency complaint is clearly within the ambit of the above rules, whether the standard of review is for abuse of discretion or not. The court of appeals accordingly erred in holding that a post-judgment motion or other objection was needed to preserve the complaint for appellate review." *Office of the AG of Tex. v. Burton*, 369 S.W.3d 173, 175 (Tex. 2012).

"Even in the absence of an explicit denial of a jurisdictional challenge, however, if a trial court rules on the merits of an issue without explicitly rejecting an asserted jurisdictional attack, it has implicitly denied the jurisdictional challenge. *Thomas,* 207 S.W.3d at 339-40. This implicit denial satisfies section 51.014(a)(8) and gives the court of appeals jurisdiction to consider an otherwise impermissible interlocutory appeal." City of Houston v. ATSER, L.P., 2012 Tex. App. LEXIS 7661, *8 (Tex. App.–Houston [14th Dist.] Aug. 30, 2012) *on rehearing, Opinion withdrawn by, substituted opinion at, appeal dismissed by City of Houston v. ATSER, L.P.*, 2013 Tex. App. LEXIS 880 (Tex. App. Houston 1st Dist. Jan. 31, 2013).

"Tara did not secure a ruling on her objections to The Spot's summary-judgment evidence. Thus only her objections that assert a defect of substance are preserved. See Vice, 318 S.W.3d at 11. The

only such objection was her contention that Gray's affidavit was conclusory." *Williams v. BAD-DAB, Inc.*, 2012 Tex. App. LEXIS 7725, *17 (Tex. App.–Houston [1st Dist.] Aug. 30, 2012, no pet.).

"Chris contends Janna did not preserve error for recovery of attorney's fees pursuant to the statute because she did not specifically argue the application of section 157.167 in the trial court. See Tex. R. App. P. 33.1. However, in her petition, Janna specifically requested that the trial court award attorney's fees. Also, in her motion for new trial, she presented evidence regarding the reasonable and necessary fees incurred. Accordingly we conclude that error was properly preserved on this issue." *Russell v. Russell*, 2012 Tex. App. LEXIS 6925, *9 (Tex. App.–Houston [14th Dist.] Aug. 21, 2012, pet. denied).

"On appeal, the State challenges the second quoted paragraph above. The State argues that if the exception set forth in that paragraph exists, the italicized subpart (b) of the paragraph is wrong because it refers to "the Landowner's tract" instead of to the tract being used by the State for its project. We first consider error preservation. During the charge conference, the State objected to the italicized portion of the jury instructions, arguing that it misstated the law, commented on the evidence, and would be confusing to the jury. In explaining its objection, the State argued that the italicized words "the Landowner's tract" were incorrect, and that under the law the instruction should refer to the land being used by the State for the entire project rather than the landowner's land. The objection sparked a discussion spanning roughly the next twenty-five pages of reporter's record. The trial judge did not expressly overrule the State's objection, but we conclude that the judge implicitly overruled it by failing to change the jury charge at the conclusion of the charge conference, after a lengthy discussion of the State's objection. See Tex. R. App. P. 33.1(a)(2)(A) (providing that an objection is preserved by an implicit ruling by the trial judge); *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 830 (Tex. 2012) (stating that existence of implicit ruling on jury-charge issue depends on whether aggrieved party can "show that the trial court was aware of the party's request and denied it"). The State preserved its argument concerning subpart (b) of the second paragraph of jury instructions." *State v. Colonia Tepeyac, Ltd.*, 2012 Tex. App. LEXIS 6407, *5-6 (Tex. App.–Dallas Aug. 2, 2012, no pet.).

"The record reflects that Eldon did not object to Valerie's testimony about the details of the purported agreement. In fact, Eldon's trial counsel questioned him about the details of the agreement at the final hearing, and Eldon agreed to the terms. But, after obtaining new counsel, Eldon filed motion for new trial, which stated the following, in its entirety:

> 1. This motion is presented within the time allowed by law on motions for new trial. The Final Decree of Divorce in this case having been rendered on December 2, 2011.
>
> 2. The judgment rendered on December 2, 2011, in this case should be set aside because it is manifestly unfair and unjust. The order is not a fair and equitable division of the parties' estate. There is not sufficient evidence provided at the time of trial to support the judgment.

At no point prior to the trial court's signing of the final divorce decree did Eldon argue that he and Valerie did not have an agreement to divide the community estate. Instead, Eldon waited until the hearing on his motion for new trial to raise this argument. Nevertheless, at the hearing on Eldon's motion for new trial, Valerie's counsel objected to Eldon's motion as being too general. The trial court overruled Valerie's objection, and, after hearing arguments and testimony, denied Eldon's motion for new trial. A point on appeal premised on a trial court's ruling on a motion, request, or objection must be supported by a showing in the record that the motion, request, or objection was presented to and acted upon by the trial court. Tex. R. App. P. 33.1(a); see *Guyot v. Guyot*, 3

S.W.3d 243, 246 (Tex. App.—Fort Worth 1999, no pet.); see also *Hadeler v. Hadeler*, No. 04-06-00459-CV, 2007 Tex. App. LEXIS 4969, at *4(Tex. App.—San Antonio June 27, 2007, no pet.) (mem. op.). "It is the appellant's responsibility to preserve error for appeal by taking affirmative steps to ensure that all matters he may wish to appeal are timely and properly entered into the trial court record." *Guyot*, 3 S.W.3d at 248. While we do not believe that Eldon's motion for new trial is a model of clarity with respect to his first issue on appeal, see Tex. R. Civ. P. 321, 322, the record reflects that Eldon's counsel raised the issue of whether an agreement between the parties existed at the hearing on his motion for new trial. Thus, we cannot say that Eldon failed to preserve error in this issue by not making the complaint in the trial court." In re Marriage of Western, 2012 Tex. App. LEXIS 6432, *5-7 (Tex. App.–Waco Aug. 2, 2012, no pet.).

" Congleton argues that the trial court abused its discretion by vesting the receiver with powers that are not supported by Texas law. He argues that the trial court erred in granting the receiver the authority of a master in chancery. Shoemaker contends that Congleton's complaint is not preserved for our review. At the hearing on Shoemaker's post-judgment application for turnover relief, Congleton argued that section 31.002(b) of the Civil Practice and Remedies Code did not authorize the powers listed in the proposed order. Congleton's objection was sufficiently specific to advise the trial court of the basis for his complaint. See Tex. R. App. P. 33.1(a). Additionally, we construe Congleton's complaint as a challenge to the sufficiency of the evidence to support the trial court's order, which is a relevant factor in assessing whether the trial court abused its discretion." *Congleton v. Shoemaker*, 2012 Tex. App. LEXIS 2880, *3-4 (Tex. App.–Beaumont Apr. 12, 2012, pet. denied).

"Appellant did object in the trial court 'to Coppell's legal arguments that a condition precedent was not performed by Mira Mar.' That objection concerned appellant's request for roadway and water and sewer 'impact' fees under chapter 395 of the Local Government Code. Appellant argues the City did not plead or disclose in discovery appellant's failure to perform a condition precedent. The City asserted appellant did not timely contest the impact fees under chapter 395 of the Local Government Code. See Tex. Loc. Gov't Code Ann. § 212.904(f); id. § 395.077(a), (b) (West 2005). The City also moved for summary judgment and opposed appellant's motion for summary judgment on alternate grounds discussed below. We resolve the issue of the impact fees on those alternate grounds." *Mira Mar Dev. Corp. v. City of Coppell*, 364 S.W.3d 366, 376 (Tex. App.–Dallas 2012, pet. filed).

" In this case, the record shows that Middleton filed his nonsuit six days prior to the trial setting, was allowed to reinstate his claims hours before trial, and presented evidence later that day. This chain of events satisfies Braglia's burden to show that he lacked proper notice to defend against Middleton's lawsuit. . . . Middleton asserts that despite the lack-of-notice error, Braglia nonetheless waived his complaint on appeal for not specifically objecting [*10] to the trial court's decision to move forward. Our reading of the record shows Braglia expressed with enough specificity to the trial court that he was unprepared to defend against Middleton's lawsuit, sought an oral continuance or reset, which was denied, and at one point remarked to the trial court that the last-minute withdrawal of nonsuit was a "180-degree" turnaround of which he had little or no notice. We conclude that Braglia sufficiently preserved error on appeal." *Braglia v. Middleton*, 2012 Tex. App. LEXIS 1647, *9-10 (Tex. App.–Corpus Christi-Edinburg Mar. 1, 2012, no pet.)

"We acknowledge that Brown contends that appellants waived their issue regarding the reliability of Brook's expert testimony. However, when the [**15] video of Brook's deposition testimony was offered at trial, the appellants timely objected to this evidence "based on the hearing that we've had outside the presence of the jury with regard to Daubert and those matters." The trial court overruled the objection and the videotaped deposition was shown to the jury. As such, appellants' objection to

the admission of Brook's testimony at trial simply re-urged their objections made pretrial, and were sufficient to preserve error. See Tex. R. App. P. 33.1. Further, appellants can challenge the sufficiency of the evidence supporting the reliability of Brook's testimony so long as they objected to the reliability of the evidence before trial or when it is offered at trial. See Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998). Appellants, in the present case, objected to the reliability of Brook's testimony both before trial and when offered at trial." *Scott's Marina at Lake Grapevine Ltd. v. Brown*, 365 S.W.3d 146, 154 n. 3 (Tex. App.–Amarillo 2012 pet. denied).

"In his fourth issue, Rad contends that the trial court erred in awarding punitive damages in the absence of an award of actual damages.8 8 The Calbecks contend that Rad has not complained of the judgment but only of the jury's findings or impliedly of the jury charge and has waived this argument. However, we construe Rad's pleadings liberally, see Tex. R. App. P. 38.9; Anderson, 897 S.W.2d at 784, and conclude that Rad's complaint in his motion for new trial was sufficiently specific to preserve error, see Tex. R. App. P. 33.1(a); Bushell v. Dean, 803 S.W.2d 711, 712 (Tex. 1991) (per curiam op. on reh'g), and gave the trial court the opportunity to correct its legal error." *Rad v. Calbeck*, 2011 Tex. App. LEXIS 10240, *14, n. 8 (Tex. App.– Austin Dec. 30, 2011, no pet.).

"Schechter contends that the issue of legal sufficiency of the evidence was not preserved. To preserve a complaint for appellate review, a party must first demonstrate that the complaint was made to the trial court by a timely request, objection, or motion. Tex. R. App. P. 33.1. A "no-evidence" issue is raised in the trial court and preserved for appellate review in one of five ways: (1) a motion for instructed verdict, (2) a motion for judgment n.o.v., (3) an objection to the submission of the issue to the jury, [**12] (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); Cecil v. Smith, 804 S.W.2d 509, 510-11 (Tex. 1991); El-Khoury v. Kheir, 241 S.W.3d 82, 86 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Pitts filed five motions for judgment n.o.v., in which he argued that there was no evidence or jury finding that he breached the nine letter agreements, that there was no evidence that the alleged breach was material, and that Schechter waived the excuse of prior repudiation by not promptly suing Pitts and instead waiting for Pitts's performance under the contract. In addition, Pitts argued at length in his initial motion for judgment n.o.v. that the nine letter agreements were an integrated contract and were not ambiguous, therefore the jury should not have been permitted to consider parol evidence in determining whether Pitts breached the contract and whether his breach preceded Schechter's contractual breach. Pitts also filed a motion for new trial, in which he argued, among other things, that the evidence was legally and factually insufficient to support the jury's answers [**13] on these issues. Pitts's motions for judgment n.o.v. and his motion for new trial were sufficient to inform the trial court of the complaints he now raises on appeal, i.e., that there was no evidence to support Schechter's affirmative defenses and that he did not breach the nine letter agreements because they unambiguously do not require him to share the work. Thus, we conclude that these issues are preserved for our review." *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 312, n. 2 (Tex. App.– Houston [1st Dist.] 2011, no pet.).

"We determine Leticia objected with sufficient specificity to make the trial court aware of the complaint. See Tex. R. App. P. 33.1(a). Among other complaints, Leticia objected on the grounds that there was no evidence the sanctions were warranted and that the trial court failed to specify the reasons for imposing sanctions. To receive sanctions, the requesting party must show that the motion was presented for an [*10] improper purpose, including harassment, delay, or improper increase of attorney's fees. Tex. Civ. Prac. & Rem. Code Ann. § 10.001. Thus, we conclude Leticia did not waive her rights to appeal the sanctions granted under Section 10.001. Id. at § 10.001." *Loya v. Loya*, 2011 Tex. App. LEXIS 8870, *9-10 (Tex. App.– Houston [14th Dist.] Nov. 8, 2011,

no pet.).

"The mother maintains that the court erred in denying her motion for continuance. The Department claims that the mother waived this complaint by failing to obtain a ruling. We disagree. Defense counsel filed a handwritten motion for continuance along with a proposed order. In the motion, counsel represented that the mother was confused about the judicial process and had not prepared a defense, and that he had been retained the day before and needed additional time to prepare the case. Although the trial court did not sign a written order denying the motion, defense counsel stated on the record, "Before we get started, I wanted to renew my objection to the motion for continuance, which was previously denied." Before the trial court could rule, the Department requested that the trial court take notice of documents in its [*7] own file showing when the mother received notice of the trial setting, and the trial court proceeded with trial.

Counsel's objection could have been clearer, but a fair reading of the record in context shows that counsel presented specific grounds for his motion for continuance and secured a ruling on it. See Tex. R. App. P. 33.1(a)(2)(A) (declaring that appellant presenting complaint for appellate review preserved same where record shows that specific grounds for motion apparent from the context, appellant complied with pertinent rule of civil procedure, and record shows that trial court ruled on motion "either expressly or implicitly")." *In the Interest of R.R.*, 2011 Tex. App. LEXIS 8394, *6-7 (Tex. App.–Houston [1st Dist.] Oct. 20, 2011, pet. denied).

The Supreme Court held that error was not preserved

"The trial court initially granted the Kings' motion in limine to preclude Officer Coon's deposition testimony regarding King's seat belt usage at the time of the crash. But a protective limine order alone does not preserve error. . . . Furthermore, where, as here, the party that requested the limine order itself introduces the evidence into the record, and then fails to immediately object, ask [*33] for a curative or limiting instruction or, alternatively, move for mistrial, the party waives any subsequent alleged error on the point." *In re Toyota Motor, U.S.A., Inc.*, 2013 Tex. LEXIS 673, *32-33 (Tex. Aug. 30, 2013).

"Here, the parties had ample time to review the draft charge and point out discrepancies to the trial court. The charge that was ultimately submitted to the jury was forty pages long and contained thirty-two questions, most of which had multiple subparts. Protech can complain on appeal only if it made the trial court aware, timely and plainly, of the purported problem and obtained a ruling. *Payne*, 838 S.W.2d at 241. Filing a pretrial charge that includes a question containing that subpart, when no other part of the record reflects a discussion of the issue or objection to the question ultimately submitted, does not sufficiently alert the trial court to the issue. A charge filed before trial begins rarely accounts fully for the inevitable developments during trial. For these reasons, our procedural rules require that requests be prepared and presented to the court "within a reasonable time *after* the charge is given to the parties or their attorneys for examination." Tex. R. Civ. P. 273 (emphasis added). Notwithstanding our rules, we have held that a party may rely on a pretrial charge as long as the record shows that the trial court knew of the written request and refused to submit it. *Alaniz*, 907 S.W.2d at 451-52. Thus, error was preserved where a party filed a pretrial charge, and the trial court used the very page from that charge that contained the requested question but redacted one of the subparts and answer blanks, and the party objected to the omission. Id. Again, trial court awareness is the key. Although trial courts must prepare and deliver the charge, we cannot expect them to comb through the parties' pretrial filings to ensure that the resulting document comports precisely with their requests—that is the parties' responsibility. It is impossible to determine, on this record, whether the trial court refused to submit the question, or whether the omission was merely an oversight. *Cf. Payne*, 838 S.W.2d at 239. As the court of appeals concluded, "[t]he trial court's

overruling of [Protech's] objection does not show that it was refusing to submit a jury question or blank regarding attorney's fees incurred for preparation and trial," 323 S.W.3d at 585, and the record does not otherwise reflect a refusal to submit the question. We conclude the issue was not preserved for appellate review." Cruz v. Andrews Restoration, Inc., 364 S.W.3d 817, 831 (Tex. 2012).

"When 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. The County did not complain that Hiles's purported affidavit was unsworn until its responsive brief in the court of appeals. Accordingly, the County waived this issue at the trial court, and it cannot be considered on appeal." *Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 317 (Tex. 2012).

"The Grievance Committee should timely advise respondent attorneys of the composition of the evidentiary panel from which the quorum was drawn to hear the case. But generally speaking, reasonable diligence by the attorney requires more than occurred here. Faced with an incomplete evidentiary panel, the respondent attorney must inquire as to panel composition and object if the composition requirements are not satisfied. Should an attorney fail to appear at an evidentiary hearing, she makes her task more difficult and should obtain the hearing report and preserve error through a timely post-judgment motion." *Comm'n for Lawyer Discipline v. Schaefer*, 364 S.W.3d 831, 837 (Tex. 2012).

"Here, appellant moved to extend the [**4] dismissal deadline of the underlying termination suit for 108 days because he was still incarcerated in the Parker County jail and would not be released until shortly before the scheduled trial date of February 9, 2011. See Tex. Fam. Code. Ann. § 263.401. He specifically asked that the case be reset to October 7, 2011 so that after his release he could attend the trial and also complete the parenting class and other services required by his service plan. First, we note that appellant preserved this issue for appeal by bringing his request to the trial court's attention by written motion dated January 11, 2011." *In the Interest of A.J.M.*, 375 S.W.3d 599, 604 (Tex. App.–2012, pet. denied).

"The record shows that after the trial court granted The Examiner relief, K.P. again attempted to obtain a ruling by urging his motion [challenging the newspaper's right to participate in the proceedings], but the trial court told K.P. to "[u]rge it later." Although the trial court stated that it would reset the matter for thirty days, no party has suggested that the trial court has done so. Under the circumstances, we hold that K.P.'s efforts to obtain a ruling on his motion were sufficient to bring his complaint to the trial court's attention, and, in light of the trial court's suggestion that it would conduct further proceedings, K.P.'s efforts were also sufficient to deem the trial court to be aware that K.P. objected to the trial court's failure to rule on his motions." *K.P. v. State*, 373 S.W.3d 198, (Tex. App.–Beaumont 2012) (orig. proceeding)

The following cases deal with situations in which error was preserved, or in which the court held error was not preserved at least arguably because it was not made with sufficient specificity.

Affidavit

"When 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. The County did not complain that Hiles's purported affidavit was unsworn until its responsive brief in the court of appeals. Accordingly, the

County waived this issue at the trial court, and it cannot be considered on appeal." *Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 317 (Tex. 2012).

"Tara did not secure a ruling on her objections to The Spot's summary-judgment evidence. Thus only her objections that assert a defect of substance are preserved. See Vice, 318 S.W.3d at 11. The only such objection was her contention that Gray's affidavit was conclusory." *Williams v. BAD-DAB, Inc.*, 2012 Tex. App. LEXIS 7725, *17 (Tex. App.–Houston [1st Dist.] Aug. 30, 2012, no pet.).

Arbitration

"WISD's only substantive challenge to the arbitration clause is made for the first time in its appellate brief, wherein it argues that the Board never approved the arbitration clause and Superintendent Rivera thus had no authority to sign a contract containing an arbitration clause. This argument differs markedly from the arguments made before the trial court, which were plainly challenges to the validity of the contract as a whole, not the arbitration clause, specifically." *Aetna Life Ins. Co. v. Weslaco Indep. Sch. Dist.*, 2012 Tex. App. LEXIS 4379, *16-17 (Tex. App.–Corpus Christi-Edinburg May 31, 2012, no pet.).

"Although Directory Assistants requested the trial court to enforce the Rule 11 Agreement, the Rule 11 Agreement broadly addressed the validity and enforceability of the arbitration agreement and did not reference Directory Assistants' right under the arbitration agreement to select an arbitrator. In short, Directory Assistants never informed the trial court that it was invoking its contractual right to unilaterally select an arbitrator and it never requested the trial court to enforce that right. Instead, and inconsistently, Directory Assistants requested the trial court to appoint an arbitrator. The trial court was not presented with Directory Assistants' contention that it had the unilateral right to select the arbitrator and the trial court thus had no opportunity to address it. " *In re Directory Assistants, Inc.*, 2012 Tex. App. LEXIS 1662, *22-23 (Tex. App.–Corpus Christi-Edinburg, Feb. 29, 2012) (orig. proceeding)

Attorney's fees

"Chris contends Janna did not preserve error for recovery of attorney's fees pursuant to the statute because she did not specifically argue the application of section 157.167 in the trial court. See Tex. R. App. P. 33.1. However, in her petition, Janna specifically requested that the trial court award attorney's fees. Also, in her motion for new trial, she presented evidence regarding the reasonable and necessary fees incurred. Accordingly we conclude that error was properly preserved on this issue." *Russell v. Russell*, 2012 Tex. App. LEXIS 6925, *9 (Tex. App.–Houston [14th Dist.] Aug. 21, 2012, pet. denied).

"In Cajun's fourth and fifth issues, it challenges the award of attorney's fees to Velasco. Specifically, in its fourth issue, it asserts that the jury should not have been given a question on the award of attorney's fees at all because Velasco did not recover damages; rather, Velasco retained the liquidated damages authorized by the contract by not paying Cajun the full contract price. However, Cajun did not challenge the award of attorney's fees on this basis in the trial court. It neither contended in its summary-judgment response that Velasco was not entitled to attorney's fees, nor challenged attorney's fees on this basis in the jury trial on fees. The only challenge it made to the submission of the attorney's fee question to the jury was that Velasco had not submitted legally or factually sufficient evidence to support the submission:

> We would object to the submission of the issue of attorneys' fees because while the admitted

> failure to segregate attorneys' fees on the part of the Plaintiff, they have not submitted legally sufficient or factually sufficient evidence to support this submission. So we will object to the submission of Question 1 on that basis and further move for an instructed verdict of a take nothing recovery on attorney fees at this time.

This objection does not comport with its complaint on appeal. *See Lundy v. Masson*, 260 S.W.3d 482, 507 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (citing *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992)). Accordingly, this issue has not been preserved for our review, and it is overruled. *See id.*; Tex. R. App. P. 33.1(a)." *Cajun Constructors, Inc. v. Velasco Drainage Dist.*, 380 S.W.3d 819, 827 (Tex. App.–Houston [14th Dist.] 2012, pet. denied).

"At the charge conference, Pitts did not object to the failure to segregate attorney's fees or request an instruction thereon. Pitts opposed Schechter's motion to enter judgment after the jury rendered its verdict, asserting that "one-half of the attorney fees were settled by Ed Collard," but this objection did not account for the fact that none of the post-settlement fees incurred by Schechter were attributable to pursuing a claim against Collard. Pitts first raised his objection to the failure to segregate attorney's fees in his motion for new trial and in his fourth supplemental motion for judgment n.o.v. These two motions were filed nearly a full month after the trial court rendered judgment. Because Pitts's objection to the failure to segregate attorney's [**43] fees was not raised before the trial court rendered judgment, Pitts has waived this objection on appeal. See Tex. R. App. P. 33.1(a), Donihoo, 2010 Tex. App. LEXIS 2343, 2010 WL 1240970, at *14. We overrule Pitts's issues relating to the award of attorney's fees.5 FOOTNOTES 5 In the sole issue addressed by Pitts's motion for rehearing, Pitts contends that the parties agreed and stipulated before trial that any recovery by Schechter, including any recovery for attorney's fees, would be reduced by half to account for Schechter's settlement with Collard. We have reviewed the record excerpts relied upon by Pitts, and it is apparent that the context of the relevant stipulation was a discussion of Pitts's motion in limine and Pitts's damages claims against Schechter. Although the parties did agree to refrain from mentioning the Collard settlement, they only discussed reducing any jury award on Pitts's claims for damages, and in particular there was no discussion about the effect on a jury award on Schechter's claims for attorney's fees. The discussion culminated with the trial court stating: "the way to resolve this is that this is a suit brought by Pitts & Collard for 100 percent and then with the agreement of everybody that [**44] at the end of the day, however much the jury awards, we cut it in half." Counsel for both Pitts and Schechter indicated their agreement on the record. The stipulation thus did not relate to the Collard settlement's effect on any claim asserted by Schechter." *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 312, n. 2 (Tex. App.– Houston [1st Dist.] 2011, no pet.)

Child Support

"In its first issue, the OAG contends that the trial court abused its discretion by misinterpreting federal law governing the modification of SSI benefits. The OAG maintains that the trial court misunderstood or miscalculated the impact of child support payments on B.A.L's SSI benefits because, otherwise, the trial court would understand that the reduced SSI payment plus the court-ordered child support payment equals more overall financial support for B.A.L. . . . Initially, however, we observe that the issue of the precise impact child support payments would have on B.A.L.'s SSI benefits was not directly presented to the trial court. That is, the trial court was not presented with the relevant federal law and the relevant evidence to have arrived at a conclusion regarding the precise impact child support payments would have on SSI benefits. . . . Because the proper application of federal law was not presented to the trial court as such, we will not conclude that the trial court abused its discretion by misinterpreting or misapplying federal law relating to

calculation of SSI benefits. Further, contrary to the OAG's contention, the record provides no indication that the trial court failed to understand that, as a more general proposition, child support payments would reduce SSI benefits. Indeed, it appears that the trial court fully understood that child support payments would negatively impact SSI benefits and then applied Texas family law principles to the facts of the case to ultimately conclude that court-ordered child support and reduced SSI payments would not yield an overall higher amount of resources for B.A.L.'s support." *In the Interest of B.A.L.*, 2012 Tex. App. LEXIS 1502, *8-10 (Tex. App.–Amarillo Feb. 27, 2012, no pet.).

Condition Precedent

"Appellant did object in the trial court 'to Coppell's legal arguments that a condition precedent was not performed by Mira Mar.' That objection concerned appellant's request for roadway and water and sewer 'impact' fees under chapter 395 of the Local Government Code. Appellant argues the City did not plead or disclose in discovery appellant's failure to perform a condition precedent. The City asserted appellant did not timely contest the impact fees under chapter 395 of the Local Government Code. See Tex. Loc. Gov't Code Ann. § 212.904(f); id. § 395.077(a), (b) (West 2005). The City also moved for summary judgment and opposed appellant's motion for summary judgment on alternate grounds discussed below. We resolve the issue of the impact fees on those alternate grounds." *Mira Mar Dev. Corp. v. City of Coppell*, 364 S.W.3d 366, 376 (Tex. App.–Dallas 2012, pet. filed).

Consolidation

"At the conclusion of trial, when the trial court announced its decision to grant the motion to consolidate the tort lawsuit, Tate stated, "But I'm the—I'm the plaintiff in that cause." She also stated, "I'd like my objection noted for the record, Your Honor." Appellants did not argue, either before or after the trial court granted the motion to consolidate, that the consolidation deprived them of the opportunity to present evidence or argument in support of their claims. As a result, we conclude that appellants' second issue was not preserved for appellate review. See, e.g. [*Knapp v. Wilson N. Jones Mem'l Hosp.*, 281 S.W.3d 163, 171 (Tex. App.—Dallas 2009, no pet.)] ("We conclude [appellant] failed to preserve the issue for appellate review because his issue on appeal does not comport with his objections made at trial.")." *Tate v. Andrews*, 372 S.W.3d 751, 754 (Tex. App.–Dallas 2012, no pet.).

Continuance

"The mother maintains that the court erred in denying her motion for continuance. The Department claims that the mother waived this complaint by failing to obtain a ruling. We disagree. Defense counsel filed a handwritten motion for continuance along with a proposed order. In the motion, counsel represented that the mother was confused about the judicial process and had not prepared a defense, and that he had been retained the day before and needed additional time to prepare the case. Although the trial court did not sign a written order denying the motion, defense counsel stated on the record, "Before we get started, I wanted to renew my objection to the motion for continuance, which was previously denied." Before the trial court could rule, the Department requested that the trial court take notice of documents in its [*7] own file showing when the mother received notice of the trial setting, and the trial court proceeded with trial.

Counsel's objection could have been clearer, but a fair reading of the record in context shows that counsel presented specific grounds for his motion for continuance and secured a ruling on it. See Tex. R. App. P. 33.1(a)(2)(A) (declaring that appellant presenting complaint for appellate review

preserved same where record shows that specific grounds for motion apparent from the context, appellant complied with pertinent rule of civil procedure, and record shows that trial court ruled on motion "either expressly or implicitly")." *In the Interest of R.R.*, 2011 Tex. App. LEXIS 8394, *6-7 (Tex. App.–Houston [1st Dist.] Oct. 20, 2011, pet. denied).

Contract

"Before this appeal, Breof mentioned article 15.4 only once—in its answer to Advisors' counterclaims. The section of the answer mentioning 15.4, entitled "Verified Defense," provides in its entirety: "Additionally and or alternatively, without waiver of any of the above and foregoing, pursuant to Tex. R. Civ. P. 93, [Breof] alleges that the [l]ease prohibits [Advisors] from suing [Breof] for certain consequential damages including lost profits or lost economic opportunities as set out in paragraph 15.4 of the [l]ease." But this general language does nothing to make the trial court aware that Breof believed the moving expenses qualified as consequential damages. See Tex. R. App. P. 33.1. Moreover, Breof made no effort to bring the argument to the trial court's attention. It did not mention paragraph 15.4 in the trial on the merits, in its motion for new trial, or at the hearing on its motion for new trial. "With literally hundreds and perhaps thousands of cases on their docket, it is only reasonable that we require litigants to affirmatively direct the judge's attention to their complaints so the court can make a deliberate decision." Cecil v. Smith, 804 S.W.2d 509, 515 (Tex. 1991) (Cornyn, J., dissenting)." *Breof BNK Tex., L.P. v. D.H. Hill Advisors, Inc.,* 370 S.W.3d 58, 68 (Tex. App.–Houston [14th Dist.] 2012, no pet.).

Damages

In response, DSB argues that Basic failed to preserve error because Basic's objections at trial do not comport with the argument underlying its second issue. Accordingly, we first consider DSB's contention that Basic failed to preserve error.3

FOOTNOTES

3 See Tex. R. App. P. 33.1(a) (preservation of error a prerequisite to presenting complaint for appellate review); In re M.S., 115 S.W.3d 534, 547 (Tex. 2003) (error preservation is threshold to appellate review).

A legal sufficiency challenge may be preserved by (1) a motion for directed verdict, (2) a motion for judgment notwithstanding the verdict, (3) an objection to submitting an issue to the jury, (4) a motion to disregard a jury finding on an issue, or (5) a motion for new trial. See Cecil v. Smith, 804 S.W.2d 509, 511 (Tex. 1991); C.M. Asfahl Agency v. Tensor, Inc., 135 S.W.3d 768, 786 (Tex. App.—Houston [1st Dist.] 2004, no pet.). [**14] On the other hand, there is only one way to preserve a factual sufficiency challenge: include the complaint in a motion for new trial. See In re C.E.M., 64 S.W.3d 425, 428 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

In its motion for instructed verdict, Basic argued, in pertinent part, as follows:

[T]he testimony of Plaintiff's expert offered no credible testimony regarding [*263] damages. In fact, as with his other testimony, this testimony was conflicting. On direct examination, he testified to damages totaling approximately $1.7 million based upon various factors set forth in his report produced in 2008. However, on cross-examination, he acknowledged a substantial differential in those factors, primarily due to changes in market

forces. He did not, however, recalculate his damages evaluation based upon these admitted cost changes. Consequently, his damages evaluation is unreliable and cannot form the basis of a verdict in Plaintiff's favor.

In its reply brief, Basic asserts that it preserved its second issue by its written objections to the trial court's findings of fact and conclusions of law and motion to modify, correct, or reform the trial court's judgment. There, Basic argued, in [**15] pertinent part, as follows:

> The evidence is legally insufficient to support any finding that: [t]he reasonable cash market value of the BM-Moseley #1 well immediately before its destruction, less any salvage value, was $3,661,000.00. The reasonable cost to reproduce the well is $1,118,250.00. Because of the substantial risk of the failure involved in attempting to reproduce this Paluxy sand well, a risk adjustment of $366,100.00 is appropriate. The total cost to abandon and restore the well site and accompanying salt water disposal well, less equipment salvage, is $105,000.00. Upon cross-examination, Plaintiff's economics expert conceded that his financial evaluation of damages was incorrect and not based upon valid economic conditions. He acknowledged that the recent downturn in the oil and gas industry had caused a significant reduction in costs associated with oil well operations. As such, the opinions he provided and that the Court relied on cannot justify an award of damages.

Finally, Basic filed a motion for new trial in which it made an identical contention to the aforementioned argument made in its objections to the trial court's findings of fact and conclusions of law, save [**16] that the contention in its motion for new trial was directed at the issue of factual sufficiency.

To preserve issues of legal and factual insufficiency, an appellant is required to adequately apprise the trial court of the alleged deficiencies in such a way that its objection can be clearly identified and understood. See Tex. R. App. P. 33.1(a); Wal-Mart Stores, Inc. v. McKenzie, 997 S.W.2d 278, 280 (Tex. 1999); Cecil, 804 S.W.2d at 510-11; Arroyo Shrimp Farm, Inc. v. Hung Shrimp Farm, Inc., 927 S.W.2d 146, 150-51 (Tex. App.—Corpus Christi 1996, no writ); see also Lake v. Premier Transp., 246 S.W.3d 167, 174 (Tex. App.—Tyler 2007, no pet.) (objection must be specific enough to enable trial court to understand precise nature of error alleged); Samedan Oil Corp. v. Intrastate Gas Gathering, Inc., 78 S.W.3d 425, 449-51 (Tex. App.—Tyler 2001, pet. granted, judgment vacated w.r.m.); City of Houston v. Precast Structures, Inc., 60 S.W.3d 331, 335-36 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (argument to trial court on legal sufficiency did not adequately apprise it of argument subsequently made on appeal concerning probative value of expert witnesses' testimony on issue of damages); [**17] In re C.E.M., 64 S.W.3d at 427-28 (general objection does not preserve sufficiency issue; objection at trial must comport with objection on appeal). Further, "a motion for directed verdict shall state the specific grounds therefor." Tex. R. Civ. P. 268; see also Tex. R. Civ. P. 321 (each point relied upon in motion for new trial shall refer to complained of error "in such a way that the objection can be clearly identified and understood by the court"); Tex. R. Civ. P. 329b(g) (motion to modify, correct, or [*264] reform judgment "shall specify" respects in which judgment should be modified, corrected, or reformed).

Moreover, the objection to the trial court must comport with the argument made on appeal. See Lake, 246 S.W.3d at 174; In re C.E.M., 64 S.W.3d at 428; Precast Structures, 60 S.W.3d at 337-38. An objection on appeal that is not the same as that urged at trial presents nothing for review. See Religious of the Sacred Heart of Tex. v. City of Houston, 836 S.W.2d 606, 614 (Tex. 1992); see also Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Tex., Inc., 937 S.W.2d 60, 70 (Tex. App.—Houston [14th Dist.] 1996), aff'd as modified, 975

S.W.2d 546 (Tex. 1998) (party cannot enlarge [**18] on appeal objection made to trial court).

The crux of Basic's argument on appeal is that there is only one correct time frame to determine the cost to reproduce the well—the September 2007 date of the injury to the old well. Nowhere in its arguments to the trial court does Basic specifically reference this point of law so critical to its argument on appeal. To the contrary, Basic made only general assertions to the trial court that Ungerecht's evaluation of damages was not based upon "valid economic conditions" or that the downturn in the oil and gas industry had caused a significant reduction in costs associated with oil well operations. During trial, particularly during cross examination, the parties elicited testimony from Ungerecht concerning his 2008 damages calculations and the rationale of discounting those figures by 10% to account for the change in the oil producing market between the date of his calculations and the September 2009 date of trial. Faced with this testimony and given DSB's failure to specifically reference in its objection what it now contends is the appropriate time frame to determine the cost to reproduce the well, it was reasonable for the trial court to conclude [**19] that Basic was arguing that Ungerecht's 10% discount factor between his June 2008 damage calculations and the 2009 trial date was the basis of its objection.

Preservation of error is the most fundamental step in the appellate process. Catherine Stone, Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence Foreword, 30 St. Mary's L.J. 993, 994 (1999). It is designed to allow the judicial system to function efficiently by eliminating error that could have been corrected at the trial court had the error been pointed out in time. See Polly Jessica Estes, Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence, 30 St. Mary's L.J. 997, 1092 (1999). At the same time, preservation of error ensures, in the interest of fairness, that a party is not blind-sided with a new complaint for the first time on appeal. Id.

In considering this issue, we have reviewed the entirety of the record and have carefully compared Basic's aforementioned arguments to the trial court with the argument it now raises on appeal. As a result, we conclude that Basic's argument to the trial court was not sufficiently specific to make the trial court aware of the argument it [**20] now makes on appeal. Therefore, we hold that Basic has waived the issue." *Basic Energy Serv. v. D-S-B Props.*, 367 S.W.3d 254, 262-265 (Tex. App.– Tyler 2011, no pet.).

Discovery Responses

"Progressive first sought production of Valdez' tax returns in March 2010. Valdez offered no objection and asserted no privilege to this request for production. Only when Progressive sought to compel production and set the matter for hearing on July 1, 2010, did Valdez assert any objection. At that time, he raised only an oral objection based on relevance. Valdez did not propose a constitutional privacy argument until he filed a motion to reconsider on July 16, and failed to raise the Fifth Amendment issue until October 2010. The record indicates Valdez was not deprived of an opportunity to raise either objection. Accordingly, having filed no timely written objections to Progressive's request for production of the tax returns, we hold Valdez waived his right to contest production. Id." *Valdez v. Progressive County Mut. Ins. Co.*, 2011 Tex. App. LEXIS 9773, *13 (Tex. App.–San Antonio Dec. 14, 2011, no pet.)

Exclusion of Evidence

"Appellant did not state a basis for his objection to the trial court's refusal to allow the testimony of either Weaver or Appellee. Appellant also did not make an offer of proof or make a bill of exception

as to either of the potential witnesses. He did not make the substance of the evidence he hoped to elicit known to the trial court. He merely made known the topics of his proposed questions for Appellee. Appellant stated that he wished to ask Appellee about his efforts to search for assets, his personal knowledge of the inventory, and his knowledge of oil and gas interests in general and also whether he considered an alleged error in Appellant's father's estate (administered in the 1970s) to be "significant" in the administration of this estate. When the trial court asked Appellant several times to testify about those topics himself, he declined. As for Weaver, Appellant said only that he would like to take her testimony. Appellant has not preserved error for either of his first two issues, and they are overruled." In re Estate of Denton, 2012 Tex. App. LEXIS 6212, *9-10 (Tex. App.–Eastland July 26, 2012, no pet.).

" In this case, neither Denbury nor the court referenced the [*9] dispensation of a running objection. Moreover, while it may be clear that Denbury objected to the unaccepted offers during Longron's testimony, there is no indication in the record that Denbury made the court aware of the various sources of the objectionable testimony or the ways this testimony would be before the jury. Denbury argues in its brief that Archibald's "entire testimony was based upon the objectionable evidence" and that the "documentary evidence" introduced during his testimony "was simply a summary of the unaccepted-offer testimony." There is no indication in the record before us that Denbury made the trial court aware of the extent to which the objectionable evidence would be placed before the jury when it made the single objection during Longron's testimony." *Denbury Green Pipeline-Tex., LLC v. Star-L Land Co.*, 2012 Tex. App. LEXIS 1346, *8-9 (Tex. App.–Beaumont Feb. 23, 2012, no pet.).

"We note first that it is not clear that Vela has preserved this issue for our review. Vela's counsel originally objected to the letter's admission into evidence on both statute of frauds and best evidence grounds. At that point, without ruling on the objection, the trial court permitted Vela's counsel to examine Colina on voir dire. When Vela's counsel concluded his questioning, he reiterated his objection on statute of frauds grounds, but he did not reiterate his best evidence objection. The trial court then ruled that the letter was admitted, thereby implicitly overruling any objections. We are not convinced that Vela's counsel either made the trial court sufficiently aware of his best evidence objection or that he pursued that objection to an adverse ruling by the trial court. See Tex. R. App. P. 33.1(a)(1)(A), (a)(2)(A)." *Vela v. Colina*, 2011 Tex. App. LEXIS 8168, *7 (Tex. App.–Corpus Christi-Edinburg Oct. 13, 2011,

Expunction

"The record shows that after the trial court granted The Examiner relief, K.P. again attempted to obtain a ruling by urging his motion [challenging the newspaper's right to participate in the proceedings], but the trial court told K.P. to "[u]rge it later." Although the trial court stated that it would reset the matter for thirty days, no party has suggested that the trial court has done so. Under the circumstances, we hold that K.P.'s efforts to obtain a ruling on his motion were sufficient to bring his complaint to the trial court's attention, and, in light of the trial court's suggestion that it would conduct further proceedings, K.P.'s efforts were also sufficient to deem the trial court to be aware that K.P. objected to the trial court's failure to rule on his motions." *K.P. v. State*, 373 S.W.3d 198, (Tex. App.–Beaumont 2012) (orig. proceeding)

Family Law

"The record reflects that Eldon did not object to Valerie's testimony about the details of the purported agreement. In fact, Eldon's trial counsel questioned him about the details of the agreement at the final hearing, and Eldon agreed to the terms. But, after obtaining new counsel, Eldon filed

motion for new trial, which stated the following, in its entirety:

> 1. This motion is presented within the time allowed by law on motions for new trial. The Final Decree of Divorce in this case having been rendered on December 2, 2011.
>
> 2. The judgment rendered on December 2, 2011, in this case should be set aside because it is manifestly unfair and unjust. The order is not a fair and equitable division of the parties' estate. There is not sufficient evidence provided at the time of trial to support the judgment.

At no point prior to the trial court's signing of the final divorce decree did Eldon argue that he and Valerie did not have an agreement to divide the community estate. Instead, Eldon waited until the hearing on his motion for new trial to raise this argument. Nevertheless, at the hearing on Eldon's motion for new trial, Valerie's counsel objected to Eldon's motion as being too general. The trial court overruled Valerie's objection, and, after hearing arguments and testimony, denied Eldon's motion for new trial. A point on appeal premised on a trial court's ruling on a motion, request, or objection must be supported by a showing in the record that the motion, request, or objection was presented to and acted upon by the trial court. Tex. R. App. P. 33.1(a); see *Guyot v. Guyot*, 3 S.W.3d 243, 246 (Tex. App.—Fort Worth 1999, no pet.); see also *Hadeler v. Hadeler*, No. 04-06-00459-CV, 2007 Tex. App. LEXIS 4969, at *4(Tex. App.—San Antonio June 27, 2007, no pet.) (mem. op.). "It is the appellant's responsibility to preserve error for appeal by taking affirmative steps to ensure that all matters he may wish to appeal are timely and properly entered into the trial court record." *Guyot*, 3 S.W.3d at 248. While we do not believe that Eldon's motion for new trial is a model of clarity with respect to his first issue on appeal, see Tex. R. Civ. P. 321, 322, the record reflects that Eldon's counsel raised the issue of whether an agreement between the parties existed at the hearing on his motion for new trial. Thus, we cannot say that Eldon failed to preserve error in this issue by not making the complaint in the trial court." *In re Marriage of Western*, 2012 Tex. App. LEXIS 6432, *5-7 (Tex. App.–Waco Aug. 2, 2012, no pet.).

"While Q.C. included a complaint in her motion for new trial that the trial [*24] court erred by enjoining the parties from communicating, she did not complain that the order was unconstitutional. Therefore, Q.C. has waived her complaint that the trial court's order for the parties to refrain from communicating with each other violates her right to free speech." *In the Interest of K.L.D.*, 2012 Tex. App. LEXIS 4655, *23-24 (Tex. App.–Tyler June 13, 2012, no pet.).

"Garcia additionally argues that the trial court erred in issuing a money judgment favoring Alvarez because (1) such judgment would only be proper if Garcia's conduct caused Alvarez to suffer damages and (2) Family Code section 9.010 does not support issuance of a money judgment under these circumstances. . . . Garcia asserted below only that the trial court was without authority to require her to reimburse Alvarez because the settlement agreement contained no such remedy. At no point did Garcia specifically object, complain, or argue that a money judgment was an improper remedy under the circumstances of this case. Specifically, she did not raise objection when the trial court announced at the conclusion of the enforcement hearing that this would be the form of the judgment and she did not file any post-judgment motions seeking amendment or modification of the judgment. Consequently, Garcia failed to preserve her money judgment arguments for appellate review. See Tex. R. App. P. 33.1(a)." *Garcia v. Alvarez*, 367 S.W.3d 784, 788 (Tex. App.–Houston [14th Dist.] 2012, no pet.)

Grievances

"The Grievance Committee should timely advise respondent attorneys of the composition of the evidentiary panel from which the quorum was drawn to hear the case. But generally speaking,

reasonable diligence by the attorney requires more than occurred here. Faced with an incomplete evidentiary panel, the respondent attorney must inquire as to panel composition and object if the composition requirements are not satisfied. Should an attorney fail to appear at an evidentiary hearing, she makes her task more difficult and should obtain the hearing report and preserve error through a timely post-judgment motion." *Comm'n for Lawyer Discipline v. Schaefer*, 364 S.W.3d 831, 837 (Tex. 2012).

Jury Argument

"Improper jury argument must ordinarily be preserved by timely objection and request for an instruction that the jury disregard the improper remark. Tex. R. App. P. 33.1; *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009). Error is not preserved when the trial court's response indicates that it did not understand the objection, and counsel makes no further attempt to clarify the court's understanding or obtain a ruling on his objection. *Phillips*, 288 S.W.3d at 883. In rare instances, no objection is required because the comment's prejudice could not have been cured by retraction of the argument and instruction. *Id.* . . . . In its brief, Gardner Oil contends that Chavez's jury argument, in effect, asked the "jury to put themselves into [Chavez's] shoes and to give [Chavez] what they would want if they were injured. . . ." Yet the objection Gardner Oil made to the trial court does not comport with this argument. Rather, Gardner Oil made only one objection near the outset of Chavez's jury argument—that the argument was improper. The trial court asked Gardner Oil to clarify its objection. But Gardner Oil simply iterated its general statement that the argument was "improper." Accordingly, we hold that Gardner Oil's objection preserved nothing. See id. And Chavez's allegedly improper argument is not the type of argument that "strikes at the very core of the judicial process" so that any error is preserved without objection. See id." *Gardner Oil, Inc. v. Chavez*, 2012 Tex. App. LEXIS 3655, *24, 25-26, 28 (Tex. App.– Tyler May 9, 2012, no pet.) (Held, the following did not preserve error: "[Gardner Oil's Counsel]: Your Honor, I object to this argument as being improper. The Court: What grounds? [Gardner Oil's Counsel]: It's improper argument. The Court: Overrule.")

Jury Charge

"Despite not having the burden to tender a correct question, TCHR submitted a proposed question that would only allow a finding of liability based on Morrison's termination—again indicating to the Court the over-broad nature of the question. We conclude the trial court was sufficiently put on notice and aware of TCHR's objection [so as to preserve the *Casteel* complaint]. See Tex. R. App. P. 33.1(a)(1)(A); Thota, 366 S.W.3d at 690 ("[W]e have long favored a common sense application of our procedural rules [*537] that serves the purpose of the rules, rather than a technical application that rigidly promotes form over substance.")." *Tex. Comm'n on Human Rights v. Morrison*, 381 S.W.3d 533, 536-37 (Tex. 2012).

"In contrast to *A.V.* and *B.L.D.*, Young made a specific and timely no-evidence objection to the charge question on Ronnie's contributory negligence and also specifically objected to the disputed instruction on new and independent cause. In addition to Young's timely and specific objections at the charge conference, Young submitted a proposed charge to the trial court, which omitted any inclusion of Ronnie's contributory negligence and the new and independent cause instruction and presented the charge according to Young's theory of the case. This was sufficient to place the trial court on notice that Young believed the evidence did not support an inclusion of Ronnie's contributory negligence or instruction on new and independent cause, and our procedural rules require nothing more. By making timely and specific objections that there was no evidence to support the disputed items submitted in the broad-form charge and raising these issues for the court of appeals to consider, Young properly preserved these issues for appellate review; Young did not

have to cite or reference Casteel specifically to preserve the right for the appellate court to apply the presumed harm analysis, if applicable, to the disputed charge issues." *Thota v. Young*, 366 S.W.3d 678, 691 (Tex. 2012).

"Here, the parties had ample time to review the draft charge and point out discrepancies to the trial court. The charge that was ultimately submitted to the jury was forty pages long and contained thirty-two questions, most of which had multiple subparts. Protech can complain on appeal only if it made the trial court aware, timely and plainly, of the purported problem and obtained a ruling. *Payne*, 838 S.W.2d at 241. Filing a pretrial charge that includes a question containing that subpart, when no other part of the record reflects a discussion of the issue or objection to the question ultimately submitted, does not sufficiently alert the trial court to the issue. A charge filed before trial begins rarely accounts fully for the inevitable developments during trial. For these reasons, our procedural rules require that requests be prepared and presented to the court "within a reasonable time *after* the charge is given to the parties or their attorneys for examination." Tex. R. Civ. P. 273 (emphasis added). Notwithstanding our rules, we have held that a party may rely on a pretrial charge as long as the record shows that the trial court knew of the written request and refused to submit it. *Alaniz*, 907 S.W.2d at 451-52. Thus, error was preserved where a party filed a pretrial charge, and the trial court used the very page from that charge that contained the requested question but redacted one of the subparts and answer blanks, and the party objected to the omission. Id. Again, trial court awareness is the key. Although trial courts must prepare and deliver the charge, we cannot expect them to comb through the parties' pretrial filings to ensure that the resulting document comports precisely with their requests—that is the parties' responsibility. It is impossible to determine, on this record, whether the trial court refused to submit the question, or whether the omission was merely an oversight. *Cf. Payne*, 838 S.W.2d at 239. As the court of appeals concluded, "[t]he trial court's overruling of [Protech's] objection does not show that it was refusing to submit a jury question or blank regarding attorney's fees incurred for preparation and trial," 323 S.W.3d at 585, and the record does not otherwise reflect a refusal to submit the question. We conclude the issue was not preserved for appellate review." Cruz v. Andrews Restoration, Inc., 364 S.W.3d 817, 831 (Tex. 2012).

"On appeal, the State challenges the second quoted paragraph above. The State argues that if the exception set forth in that paragraph exists, the italicized subpart (b) of the paragraph is wrong because it refers to "the Landowner's tract" instead of to the tract being used by the State for its project. We first consider error preservation. During the charge conference, the State objected to the italicized portion of the jury instructions, arguing that it misstated the law, commented on the evidence, and would be confusing to the jury. In explaining its objection, the State argued that the italicized words "the Landowner's tract" were incorrect, and that under the law the instruction should refer to the land being used by the State for the entire project rather than the landowner's land. The objection sparked a discussion spanning roughly the next twenty-five pages of reporter's record. The trial judge did not expressly overrule the State's objection, but we conclude that the judge implicitly overruled it by failing to change the jury charge at the conclusion of the charge conference, after a lengthy discussion of the State's objection. See Tex. R. App. P. 33.1(a)(2)(A) (providing that an objection is preserved by an implicit ruling by the trial judge); *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 830 (Tex. 2012) (stating that existence of implicit ruling on jury-charge issue depends on whether aggrieved party can "show that the trial court was aware of the party's request and denied it"). The State preserved its argument concerning subpart (b) of the second paragraph of jury instructions." *State v. Colonia Tepeyac, Ltd.*, 2012 Tex. App. LEXIS 6407, *5-6 (Tex. App.–Dallas Aug. 2, 2012, no pet.).

"TYC asserts that even though the trial court eventually dismissed the section 64.102 claim, its failure to do so before trial was error that adversely affected TYC because, by including the section 64.102 claim in the jury charge, the trial court "lowered the causation standard of proof" for the

whistleblower claim. . . .At the charge conference, TYC only objected to the jury question relating to Koustoubardis' section 64.102 claim on the ground that "it includes a question on section 64.102. And it is the defendant's position that that is not a separate cause of action." . . . Nothing about TYC's objection would have made the trial court aware that TYC was concerned the question regarding the section 64.102 claim would "lower the causation standard of proof" on the whistleblower claim. Therefore, TYC failed to preserve this complaint for appeal." *Tex. Youth Comm'n v. Koustoubardis*, 378 S.W.3d 497, 500-501 (Tex. App.–Dallas 2012, no pet.).

"A party objecting to the jury charge must "point out distinctly the objectionable matter and the grounds of the objection." Tex. R. Civ. P. 274. When the complaining party's objection is, "in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable." *Id.* Reviewing the reporter's record of the charge conference, we cannot determine the County's exact complaint to the trial court concerning "cost to cure" except that it constituted a comment on the weight of the evidence. The trial court addressed that complaint by modifying the statement of the definition. The other language—a brief, vague comment and not an objection—to which the County directs our attention in the motion for rehearing and on which it relies as preserving error, does not distinctly explain why the phrase "cost to cure" should have been omitted from the charge, or why the definition of the phrase being used was improper. . . . We conclude this statement during the charge conference preserved nothing for appellate review. *See* Tex. R. App. P. 33.1(a); Tex. R. Civ. P. 274. FOOTNOTES 3 The County also contends it preserved error by requesting two jury questions asking the jury to find the fair market value of the remainder (1) immediately before and (2) immediately after the condemnation, without any instruction or definition of cost to cure. The trial court did not expressly rule on these requested questions; it submitted a broad form damage question measured by the difference in value rather than separate questions for before and after values. . . . . We do not see how by requesting these questions the County distinctly and clearly made known to the trial court that the cost to cure definition was an allegedly incorrect statement of Texas law. *See* Tex. R. App. P. 33.1, Tex. R. Civ. P. 274." *Dallas County v. Crestview Corners Car Wash*, 370 S.W.3d 52, 53-54 (Tex. App.–Dallas 2012, no pet.).

"Appellants argue that the trial court erred by submitting a spoliation instruction because there was no evidence to support it.20

> FOOTNOTES
>
> 20 To the extent Appellants argue that the spoliation instruction was an incorrect statement of law, they did not present that contention to the trial court by objecting to the jury charge. Appellants therefore failed to preserve that argument for appellate review. See Tex. R. App. P. 33.1(a); Tex. R. Civ. P. 272; see also Wackenhut Corp. v. Gutierrez, No. 04-10-00661-CV, 358 S.W.3d 722, 2011 Tex. App. LEXIS 7308, 2011 WL 3915630, at *2 (Tex. App.—San Antonio Sept. 7, 2011, no pet. h.) (mem. op.) (holding spoliation complaint not preserved due to failure to object to charge instruction)." *Matlock Place Apts., L.P. v. Druce*, 369 S.W.3d 355, 379 n. 20 (Tex. App.–Fort Worth 2012 pet. filed).

"In the charge conference, Roustan's attorney objected to the damages question, stating that

> the measure of damages stated here is not one of the measures of damages for fraud recognized by Texas law. It just says the economic losses. And the proper definitions for fraud would be benefit of the bargain or out-of-pocket or one of the other recognized measures, and this is not one of them. [Emphasis added.]

This objection was not sufficient to advise the trial court of Roustan's objection that the charge was defective for [*28] failing to instruct the jury how to calculate benefit-of-the-bargain damages and out-of-pocket damages. Roustan argued only that economic losses were not a proper measure of fraud damages. Thus, to the extent that Roustan argues that the trial court should have instructed the jury on how to calculate the damages, he has not preserved the complaint." *Roustan v. Sanderson*, 2011 Tex. App. LEXIS 7827, *27-28 (Tex. App.–Fort Worth 2011, pet. denied).

Legal Sufficiency

"Thus, Texas Rule of Appellate Procedure 33.1(d) provides that '[i]n a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence . . . may be made for the first time on appeal in the complaining party's brief.' The Attorney General complained in the court of appeals that no evidence supported the trial court's finding of a zero arrearage. This legal sufficiency complaint is clearly within the ambit of the above rules, whether the standard of review is for abuse of discretion or not. The court of appeals accordingly erred in holding that a post-judgment motion or other objection was needed to preserve the complaint for appellate review." *Office of the AG of Tex. v. Burton*, 369 S.W.3d 173, 175 (Tex. 2012).

"In their third issue, appellants contend the uncontroverted evidence established that an assault took place, and the jury was not free to disregard it. Appellants ask us to reverse and render judgment that there was an assault and remand for new trial on all other issues. . . .To preserve a complaint of legal insufficiency of the evidence after a jury trial, a party must (1) move for an instructed verdict, (2) move for a judgment notwithstanding the verdict, (3) object to the submission of the jury question, (4) move to disregard the jury finding, or (5) move for a new trial. . . . Appellants contend they presented the issue in a motion for new trial, but the motion for new trial recited only that the jury's verdict was "against the great weight and preponderance of the evidence and is manifestly unjust"—a challenge to the factual sufficiency of the evidence. Moreover, appellants did not request rendition of judgment in their favor; they sought only a new trial. Therefore, we conclude that appellants did not raise a legal-sufficiency challenge in the trial court and thus have not preserved the issue for review." *K.J. v. USA Water Polo, Inc.*, 383 S.W.3d 593, 599-600 (Tex. App.– Houston [14th Dist.] 2012, pet. filed).

"Schechter contends that the issue of legal sufficiency of the evidence was not preserved. To preserve a complaint for appellate review, a party must first demonstrate that the complaint was made to the trial court by a timely request, objection, or motion. Tex. R. App. P. 33.1. A "no-evidence" issue is raised in the trial court and preserved for appellate review in one of five ways: (1) a motion for instructed verdict, (2) a motion for judgment n.o.v., (3) an objection to the submission of the issue to the jury, [**12] (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); Cecil v. Smith, 804 S.W.2d 509, 510-11 (Tex. 1991); El-Khoury v. Kheir, 241 S.W.3d 82, 86 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Pitts filed five motions for judgment n.o.v., in which he argued that there was no evidence or jury finding that he breached the nine letter agreements, that there was no evidence that the alleged breach was material, and that Schechter waived the excuse of prior repudiation by not promptly suing Pitts and instead waiting for Pitts's performance under the contract. In addition, Pitts argued at length in his initial motion for judgment n.o.v. that the nine letter agreements were an integrated contract and were not ambiguous, therefore the jury should not have been permitted to consider parol evidence in determining whether Pitts breached the contract and whether his breach preceded Schechter's contractual breach. Pitts also filed a motion for new trial, in which he argued, among other things, that the evidence was legally and factually insufficient to support the jury's answers [**13] on these issues. Pitts's motions for judgment n.o.v. and his motion for new trial were sufficient to inform the trial court of the

complaints he now raises on appeal, i.e., that there was no evidence to support Schechter's affirmative defenses and that he did not breach the nine letter agreements because they unambiguously do not require him to share the work. Thus, we conclude that these issues are preserved for our review." *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 312, n. 2 (Tex. App.– Houston [1st Dist.] 2011, no pet.)

New Trial

"In issue one, Bovey challenges the trial court's decision to sua sponte order a new trial "in the interest of justice." Bovey contends that Coffey failed to establish that she provided a demand to vacate before filing suit and that, consequently, the trial court lacked good cause to grant a new trial. See Tex. Prop. Code Ann. § 24.005 (West Supp. 2011) (Requiring a notice to vacate before suit). Coffey responds that Bovey failed to preserve her complaint for appeal. The record does not indicate that Bovey objected to the trial court's order granting a new trial. At the beginning of trial, Bovey's counsel asked the trial court to [*5] vacate its order and reopen the case for additional evidence. This objection was not sufficiently specific to preserve the complaint Bovey now raises on appeal." *Bovey v. Coffey*, 2012 Tex. App. LEXIS 3247, *5 (Tex. App.– Beaumont Apr. 26, 2012, no pet.)

Parent Child Relationship

"Here, appellant moved to extend the [**4] dismissal deadline of the underlying termination suit for 108 days because he was still incarcerated in the Parker County jail and would not be released until shortly before the scheduled trial date of February 9, 2011. See Tex. Fam. Code. Ann. § 263.401. He specifically asked that the case be reset to October 7, 2011 so that after his release he could attend the trial and also complete the parenting class and other services required by his service plan. First, we note that appellant preserved this issue for appeal by bringing his request to the trial court's attention by written motion dated January 11, 2011." *In the Interest of A.J.M.*, 375 S.W.3d 599, 604 (Tex. App.–2012, pet. denied).

"We have rejected that argument. Assuming that Father's issue about substantive due process may be construed to relate to something other than evidentiary sufficiency, because Father did not assert a violation of substantive due process at trial, he waived that issue for appeal." *In the Interest of M.A.P.*, 2012 Tex. App. LEXIS 4496, *57 (Tex. App.–Fort Worth June 7, 2012, no pet.).

"In Janene's "Motion for Enforcement [*8] of Mediated Settlement Agreement and Entry of [Janene's] Order in Suit to Modify Parent-Child Relationship," she states that she unsuccessfully requested revisions to Matthew's proposed modification order, and that these requested revisions "included the deletion of pages of items—such as conservatorship and travel—which were not part of the MSA." Janene did not complain more specifically in her motion, as she does on appeal, that the inclusion of two specific items in those pages effectively changes the operation of provisions that were not modified by the parties' MSA. [The Court noted in a footnote that "The record contains no transcript from any hearing concerning either Janene's or Matthew's proposed orders."]. We conclude that Janene's complaint regarding the erroneous inclusion of "pages of items" was not sufficient to alert the trial court to Janine's specific complaint regarding the "current school zone" issue. . . . . Such a complaint was not apparent from the context because a recitation of other provisions of the February 27, 2009 divorce decree that are not dependent on the date of the trial court's signature arguably would not change the operation of those provisions. See Tex. R. App. P. 33.1(a)(1)(A). Janene did not otherwise object or apprise the trial court of her complaint in a post-trial motion. See Hachar, 153 S.W.3d at 145 (citing Willis, 826 S.W.2d at 702)). Because she did not preserve her complaint for our review, we overrule Janene's issues on appeal." *Brantley v.*

Brantley, 2012 Tex. App. LEXIS 1741, *7-9 (Tex. App.–Houston [14th Dist.] Mar. 6, 2012, no pet.)

Parties

"The H. Carlos Smith family urges that Sand Point Ranch failed to preserve this issue [that the Bauers were not properly parties in the case] for our review. We disagree. Before the jury trial, Sand Point Ranch filed a motion to strike the Bauers from the case, contending that they had no standing to participate at trial absent a timely rule 771 objection. The trial court denied the motion to strike. Next, immediately prior to voir dire, Sand Point Ranch again objected to the Bauers' participation at trial. In particular, the following exchange occurred:

> [Sand Point Ranch]: ... I just wanted to make [an objection] for purposes of the record and that at this point there are no pleadings by Mr. Bauer in this case on behalf of his family objecting to the award.
>
> [The Court]: Okay.
>
> [Sand Point Ranch]: And if the Court, as you said, is denying that, my motion to reconsider [the motion to strike], for purposes of the record, would object to the presence of Mr. [Bauer] and his clients — the Bauer family in participating in this lawsuit from the very —
>
> ....
>
> [The Court]: [Counsel for Sand Point Ranch], I said earlier that I was going [**9] to cut you off.
>
> ....
>
> [Sand Point Ranch]: I just — Your Honor, I'm not going to delay. So, I don't need to stand up and object every time Mr. [Bauer] participates in this lawsuit, I just wanted to make the objections from the beginning —
>
> [The Court]: Right.

To preserve a complaint for appellate review, "the record must show ... a complaint was made to the trial court by a timely request, objection, or motion that ... stated the grounds for the [sought] ruling ... with sufficient specificity to make the trial court aware of the complaint" and the trial court ruled on the objection. Tex. R. App. P. 33.1(a). Here, Sand Point Ranch twice objected to the Bauers' participation at trial-first, in its motion to strike, and second, immediately prior to trial. The substance of Sand Point Ranch's complaint was made known to the trial court, and the trial court twice denied the objection. Moreover, the trial court confirmed that Sand Point Ranch was not required to object at every instance during trial that the Bauers' participated. In short, Sand Point Ranch clearly preserved this issue for our review. We are not persuaded by the H. Carlos Smith family's assertions to the contrary." *Sand Point Ranch, Ltd. v. Smith*, 363 S.W.3d 268, 272 n. 10 (Tex. App.–Corpus Christi-Edinburg 2012, no pet.).

Punitive Damages

"In his fourth issue, Rad contends that the trial court erred in awarding punitive damages in the absence of an award of actual damages.8 8 The Calbecks contend that Rad has not complained of

the judgment but only of the jury's findings or impliedly of the jury charge and has waived this argument. However, we construe Rad's pleadings liberally, see Tex. R. App. P. 38.9; Anderson, 897 S.W.2d at 784, and conclude that Rad's complaint in his motion for new trial was sufficiently specific to preserve error, see Tex. R. App. P. 33.1(a); Bushell v. Dean, 803 S.W.2d 711, 712 (Tex. 1991) (per curiam op. on reh'g), and gave the trial court the opportunity to correct its legal error." *Rad v. Calbeck*, 2011 Tex. App. LEXIS 10240, *14, n. 8 (Tex. App.– Austin Dec. 30, 2011, no pet.)

Receivership

"Congleton argues that the trial court abused its discretion by vesting the receiver with powers that are not supported by Texas law. He argues that the trial court erred in granting the receiver the authority of a master in chancery. Shoemaker contends that Congleton's complaint is not preserved for our review. At the hearing on Shoemaker's post-judgment application for turnover relief, Congleton argued that section 31.002(b) of the Civil Practice and Remedies Code did not authorize the powers listed in the proposed order. Congleton's objection was sufficiently specific to advise the trial court of the basis for his complaint. See Tex. R. App. P. 33.1(a). Additionally, we construe Congleton's complaint as a challenge to the sufficiency of the evidence to support the trial court's order, which is a relevant factor in assessing whether the trial court abused its discretion." *Congleton v. Shoemaker*, 2012 Tex. App. LEXIS 2880, *3-4 (Tex. App.–Beaumont Apr. 12, 2012, pet. denied).

Reinstatement

" In this case, the record shows that Middleton filed his nonsuit six days prior to the trial setting, was allowed to reinstate his claims hours before trial, and presented evidence later that day. This chain of events satisfies Braglia's burden to show that he lacked proper notice to defend against Middleton's lawsuit. . . . Middleton asserts that despite the lack-of-notice error, Braglia nonetheless waived his complaint on appeal for not specifically objecting [*10] to the trial court's decision to move forward. Our reading of the record shows Braglia expressed with enough specificity to the trial court that he was unprepared to defend against Middleton's lawsuit, sought an oral continuance or reset, which was denied, and at one point remarked to the trial court that the last-minute withdrawal of nonsuit was a "180-degree" turnaround of which he had little or no notice. We conclude that Braglia sufficiently preserved error on appeal." *Braglia v. Middleton*, 2012 Tex. App. LEXIS 1647, *9-10 (Tex. App.–Corpus Christi-Edinburg Mar. 1, 2012, no pet.)

Responsible Third Parties

"We also reject Lewis's argument that relators waived the right to replead. . . . In the text of Lewis's written response to relators' motion for leave to designate [responsible third parties], he asserted three principal arguments: (1) that Chapter 33 did not apply at all, (2) that Edith Winfrey was not a proper responsible third party because the damages Lewis sought from relators were different from his auto-accident damages, and (3) that relators could not use Chapter 33 to avoid their own responsibility by reviving limitations against Edith Winfrey. None of these arguments addressed the sufficiency of relators' pleadings. Rather, Lewis referred to the pleading standard of section 33.004(g) only in a footnote in his response, in which he stated:

> Defendants cannot merely "contend" that Edith Winfrey caused or contributed to "Plaintiff's alleged injuries and damages." They must plead specific facts concerning her alleged responsibility. TRCP [sic] § 33.004(g). Defendants have failed to meet this burden because they have failed to plead any specific facts explaining how Edith Winfrey could have committed legal malpractice upon Lewis.

This bare assertion, buried in a footnote, was not sufficient to satisfy Lewis's burden under section 33.004(g)(1) to establish that relators failed to meet their pleading burden. See Tex. R. App. P. 33.1(a)(1)(A) (stating that party must state the grounds for the ruling it sought from the trial court "with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context"); *Odom v. Clark*, 215 S.W.3d 571, 574 (Tex. App.—Tyler 2007, pet. denied) (stating that purpose of Rule 33.1(a) is "to ensure that the trial court has had the opportunity to rule on matters for which parties later seek appellate review"); see also *Lincoln v. Clark Freight Lines, Inc.*, 285 S.W.3d 79, 84-85 n.4 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (argument raised only by bare assertion in footnote in appellate brief was waived); cf. *Bever Props., L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878, 888 (Tex. App.—Dallas 2011, no pet.) (if no-evidence motion for summary judgment fails to identify and challenge specific elements, it is fundamentally defective and cannot support a judgment). Because Lewis's response and objection to the motion for leave to designate was insufficient under section 33.004(g), the response could not and did not shift any burden to relators to request leave to replead. *In re Smith*, 366 S.W.3d 282, 286-287 (Tex. App.– Dallas 2012) (orig. proceeding).

Sanctions

"We determine Leticia objected with sufficient specificity to make the trial court aware of the complaint. See Tex. R. App. P. 33.1(a). Among other complaints, Leticia objected on the grounds that there was no evidence the sanctions were warranted and that the trial court failed to specify the reasons for imposing sanctions. To receive sanctions, the requesting party must show that the motion was presented for an [*10] improper purpose, including harassment, delay, or improper increase of attorney's fees. Tex. Civ. Prac. & Rem. Code Ann. § 10.001. Thus, we conclude Leticia did not waive her rights to appeal the sanctions granted under Section 10.001. Id. at § 10.001." *Loya v. Loya*, 2011 Tex. App. LEXIS 8870, *9-10 (Tex. App.– Houston [14th Dist.] Nov. 8, 2011, no pet.)

Summary Judgment

"Similarly, we do not address Chief's contentions that Rees-Jones's statements were not material because, essentially, only information relating to Chief's value at the time of redemption could be material to Allen's decision to redeem his interest. This was not a ground on which Chief requested summary judgment. Chief's summary judgment argument was that the statements were not statements of fact—they were statements of opinion; Chief's contention was not that any statements of fact were nevertheless not actionable because they were immaterial. Nor did Chief offer summary judgment evidence establishing that a 'reasonable person' would not 'attach importance to' and 'be induced to act on' information regarding Chief's future prospects 'in determining his choice of actions in the transaction in question.' *Italian Cowboy*, 341 S.W.3d at 338. We limit our opinion to the grounds for summary judgment presented to the trial court on which a party has raised a point of error. See Tex. R. Civ. P. 166a(c) ('The motion for summary judgment shall state the specific grounds therefor.'); Tex. R. App. P. 33.1, 47.1." *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 369, n. 8 (Tex. App.–Houston [1st Dist.] 2012, pet. granted, remanded by, settled by *Devon Energy Holdings v. Allen*, 2013 Tex. LEXIS 20 (Tex., Jan. 11, 2013)).

Visitation

"It is not apparent from the record why the court restricted Moreno's access and possession to Harris County. We cannot conclude that doing so was an abuse of discretion, however, because we can find no reference at trial to Moreno's living in any particular county, and Moreno did not complain about this geographical limitation in her motion for new trial. Moreno lived in Harris County when

the original divorce decree being modified was entered, and the first reference we find to her residence in another county, i.e., Brazoria, was her testimony at the indigency hearing that she lives in Lake Jackson. Without any indication that Moreno asked the [**31] trial court to permit visitation and access in a county other than Harris County, her post-judgment testimony about her residence would not fairly put the trial court on notice about Moreno's complaint here that restricting access to Harris County is not supported by the evidence." *Moreno v. Perez*, 363 S.W.3d 725, 739 (Tex. App.– Houston [1st Dist.] 2011, no pet.)

Voir Dire

"Parsons argues that Blue's line of questioning during voir dire was prejudicial. Normally, to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion. Tex. R. App. P. 33.1(a); see also Tex. R. Evid. 103(a)(1). If a party fails to do this, error is not preserved, and the complaint is waived. *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (op. on reh'g). Parsons argues that he preserved his complaint because the grounds for his objection were apparent from the context. See Tex. R. Evid. 103(a)(1). However, it is not clear from the record what Parsons's objection was, whether he argued that [*18] the question was prejudicial, or whether he objected on some other grounds. The questions to which Parsons objected did not include any references to conspiracy theories, and later when Blue did mention Parsons's belief in a conspiracy, Parsons did not object. The same information also came in at trial when Motsenbocker questioned Parsons regarding conspiracy theories and George H.W. Bush. Parsons objected but stated no basis for his objection, and it was overruled." *Parsons v. Greenberg*, 2012 Tex. App. LEXIS 888, *17-18 (Tex. App.–Fort Worth Feb. 2, 2012, pet. denied).

Whistleblower Cases

"In this [Whistleblower] case, DISD asked appellant in an interrogatory to identify what "specific state or federal statute, ordinance, or rule adopted under a statute or ordinance you claimed had been violated." Appellant's answer set forth many of the facts of the case, but he did not identify in his answer to the interrogatory the law or laws he asserted were violated. However, in his responses to DISD's plea to the jurisdiction [**21] and motion for summary judgment, [*328] appellant identified the laws he believed were violated—section 33.081(c) of the Education Code and section 37.10(c)(2) of the Penal Code. Appellant did not assert in the trial court that the conduct described in his reports violated section 37.10(a) of the Penal Code or section 28.0214 of the Education Code. Accordingly, appellant has not preserved for appeal his arguments that the conduct he reported violated those statutes.

Appellant's pleadings failed to allege a violation of law of section 33.081(c) of the Education Code or section 37.10(c)(2) of the Penal Code, and the evidence presented to the trial court failed to create a fact question whether appellant reported a violation of those statutes. Accordingly, we conclude the trial court did not err in determining it lacked jurisdiction over appellant's Whistleblower action and dismissing the cause because appellant did not report a violation of law." *Wilson v. Dallas Indep. Sch. Dist.*, 376 S.W.3d 319 , 327-28 (Tex. App.–Dallas 2012, no pet.).

Witnesses

"Although Little York now asserts that it needed more time to call Allice as a rebuttal witness to point out inconsistencies with his testimony and his discovery responses, at trial it requested only that it call "a rebuttal witness" without identifying the witness or its proposed line of questioning.

Under these circumstances, we hold that Little York did not make the substance of its proposed rebuttal testimony known with sufficient specificity and it has not preserved this issue for our review. See Tex. R. App. P. 33.1(a)." *1.9 Little York, Ltd. v. Allice Trading Inc.*, 2012 Tex. App. LEXIS 2112, *22-23 (Tex. App.–Houston [1st Dist.] Mar. 15, 2012, pet. denied).

"'To preserve error as to the admission of evidence, a party must make a timely objection and state the specific grounds for the desired ruling, if the grounds are not apparent from the context.' *Moon v. Spring Creek Apartments*, 11 S.W.3d 427, 432 (Tex. App.—Texarkana 2000, no pet.); see Tex. R. App. P. 33.1. "If a party fails to make a timely and specific objection, error is not preserved and the complaint is waived." Id. (citing *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (op. on reh'g)). From this record, it appears that counsel's objection was mixed: partly a challenge to Parkhill's lack of expertise in pediatric matters or in matters related to the effects of drugs on unborn or newly born children and partly his potential interest and bias.5 We do not read Amanda's challenge as an attack on Parkhill's qualifications to read and interpret the medical records generally." *In the Interest of I.H.R.*, 2012 Tex. App. LEXIS 2001, *5-6 (Tex. App.–Texarkana Mar. 9, 2012, no pet.).

"We acknowledge that Brown contends that appellants waived their issue regarding the reliability of Brook's expert testimony. However, when the [**15] video of Brook's deposition testimony was offered at trial, the appellants timely objected to this evidence "based on the hearing that we've had outside the presence of the jury with regard to Daubert and those matters." The trial court overruled the objection and the videotaped deposition was shown to the jury. As such, appellants' objection to the admission of Brook's testimony at trial simply re-urged their objections made pretrial, and were sufficient to preserve error. See Tex. R. App. P. 33.1. Further, appellants can challenge the sufficiency of the evidence supporting the reliability of Brook's testimony so long as they objected to the reliability of the evidence before trial or when it is offered at trial. See Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998). Appellants, in the present case, objected to the reliability of Brook's testimony both before trial and when offered at trial." *Scott's Marina at Lake Grapevine Ltd. v. Brown*, 365 S.W.3d 146, 154 n. 3 (Tex. App.–Amarillo 2012 pet. denied).

Error Has to Have Been Committed Before An Objection to it Has Been Waived

"The trial court did not award attorney's fees to Whitt. Whitt is requesting that this Court award attorney's fees or remand to the trial court with instructions to award attorney's fees to Whitt. Although Adoni and Dodeka previously invited similar error in the trial court, the error in dispute (i.e., an award to Whitt) is not existing trial court error. Dodeka and Adoni did not fail to preserve error, because the error did not occur in the trial court. The award of attorney's fees to Whitt has yet to occur. . . .Whitt has not directed our attention to a legally correct basis for an award of attorney's fees to her. Dodeka and Adoni do not contest that their award of attorney's fees should be reversed. We conclude neither party is entitled to an award of attorney's fees." *Basley v. Adoni Holdings, LLC*, 373 S.W.3d 577, 588 (Tex. App.–Texarkana 2012, no pet.).

APPENDIX 6

* * * * * * * * * * * * * * * * * *

HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 20, 1995

(MORNING SESSION)

* * * * * * * * * * * * * * * * * *

Taken before D'Lois Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 20th day of January, A.D., 1995, between the hours of 8:35 o'clock a.m. and 12:20 p.m. at the Texas Law Center, 1414 Colorado, Room 101 and 102, Austin, Texas 78701.

JANUARY 20, 1995 MEETING

MEMBERS PRESENT:

Luther H. Soules III
Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Ann Tyrrell Cochran
Prof. William V. Dorsaneo III
Sarah B. Duncan
Honorable Clarence A. Guittard
Charles F. Herring Jr.
Donald M. Hunt
David E. Keltner
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Anthony J. Sadberry
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

David J. Beck
Michael Gallagher
Anne Gardner
Mike Hatchell
Tommy Jacks
Franklin Jones, Jr.
Thomas Leatherbury
Harriett Miers
Paula Sweeney

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht
Hon Sam Houston Clinton
Hon William Cornelius
Paul N. Gold
David B. Jackson
Hon. Doris Lange
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

Kenneth Law
Doyle Curry
Thomas Riney

Also present:

Lee Parsley
Holly Duderstadt

the term ends. Right, Judge?

HONORABLE C. A. GUITTARD: That's right.

MR. MCMAINS: I'm just wondering have we checked to make sure that we don't have to do something to a statute?

PROFESSOR DORSANEO: Well, we can check again.

MR. MCMAINS: In regards to term. That was my only concern.

PROFESSOR DORSANEO: We can check again. All of those -- subject to checking the statutes all of those in favor?

MR. MCMAINS: I don't mind changing the statutes. We just need to identify it.

PROFESSOR DORSANEO: All of those in favor? Opposed?

All right. The next one -- and we don't really have that many more, and I think none that we haven't given pretty substantial consideration that involve any complexity. It is Rule 52, which if you are looking on the short handout is on page 8, and it's on page 29 of the January 19th cumulative report.

Now, the paragraph (a) is what has not been voted on under this number in the form that it appears here completely. I think we actually at the last meeting voted on the language, but it wasn't assembled altogether in one package. This paragraph tries to accomplish at least four different things. The first, which actually is stated most clearly in the second sentence, is based on a recommendation by our chairman, Luke Soules, that there be a statement in here concerning nonwaiver, and he recommended at the last meeting that we use this language or a comparable language.

"No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint." The idea is that that is supposed to be the same standard as in the charge draft rules, and I believe that it is, if not verbatim, the same idea. And we have actually already voted on that, and it's incorporated into this. We can reconsider it if you want.

The second point is the Cecil Vs. Smith point that's really most embodied in the third

APPENDIX 7

SOUTHERN METHODIST UNIVERSITY

4543.001
LHS
Hd

re all SCAC members

December 21, 1995

Luther H. Soules, III
Soules & Wallace
Frost Bank Tower
100 West Houston St.
Suite 1500
San Antonio, TX 78205-1457

Re: Disposition Table for the Texas Rules of Appellate Procedure

Dear Luke,

Here is the disposition table that I promised to send to you by the end of 1995.

Best regards,

Bill

William V. Dorsaneo, III
Chief Justice John and Lena Hickman
Distinguished Faculty Fellow and
Professor of Law

WVD:kg
Enclosure

School of Law
PO Box 750116 Dallas TX 75275-0116
214-768-3249 Fax 214-768-4330

		DISPOSITION CHART	TEXAS RULES OF APPELLATE PROCEDURE	
RULE NO.	PAGE NO.	CHANGE SUGGESTED BY	RECOMMENDED ACTION	REASON
TRAP 52(a)	1052	Luke Soules is concerned about waiver of errors on the trial court level.	SCAC adopted proposal that when either a timely request, objection, or motion is specific enough to support the conclusion that the trial court was made fully aware of the complaint, no waiver will occur in the trial court.	Proposed Rule 52(a) provides: "As a prerequisite to the presentation of a complaint for appellate review, a timely request, objection, or motion must appear of record, stating the specific grounds for the ruling that the complaining party desired the trial court to make if the specific grounds were not apparent from the context. No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint. The judge's ruling upon the complaining party's request, objection, or motion must also appear of record provided that in civil cases the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion unless the taking of evidence is necessary for proper presentation of the complaint in the trial court. A ruling may be shown in the judgment, in a signed separate order, in the statement of facts, or in a formal bill of exceptions. If the trial judge refuses to rule, an objection to the judge's refusal to rule is sufficient to preserve the complaint. Formal exceptions to ruling or orders of the trial court are not required." Cum. Rep. 3/21/95, p. 83
TRAP 53(k) & 54(c)	1059-1060	Murry Cohen suggests that the court reporter should file the statement of facts in the Court of Appeals and the court reporter should also obtain extensions of time for late filing.	Proposed rules adopt the suggestion that the court reporter should have the duty to file the statement of facts, if needed.	See Cum. Rep. 3/21/95 at TRAP 53 pp.90-94.

APPENDIX 8

RULES MEMORANDUM	TRAP 52
	February 26, 1996

General comments.

The SCAC has recommended duplicating all of Rule 52 in the Rules of Civil Procedure. In my opinion, this can only create problems. All of it is trial procedure and, in my opinion, belongs in the TRCP; but the inclusion only in the TRCP would eliminate a rule for criminal cases. Ultimately, we could limit TRAP 52 to criminal cases, I suppose; but only after the revisions to the post-judgment rules are promulgated.

Paragraph (a).

Currently, Rule 52(a) reads:

> (a) **General Rule.** In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. If the trial judge refuses to rule, an objection to the court's refusal to rule is sufficient to preserve the complaint. It is not necessary to formally except to rulings or orders of the trial court.

The Subcommittee made several non-substantive changes and four substantive recommendations. First, they added a sentence providing "No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint." The reason given was so that this rule contained a standard similar to the proposed jury charge rules.

The second substantive recommendation was to add the clause "provided that in civil cases the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion unless the taking of evidence is necessary for proper presentation of the complaint in the trial court." The reason given for this change was to codify the holding of *Cecil v. Smith*, 804 S.W.2d 509, 512 (1991).

The third substantive recommendation was to provide that the ruling of the judge could be recited in the judgment, in a separate signed order, in the statement of facts, "or otherwise made to appear of record." The reason given for this revision was to overrule the cases that hold that a separate order is necessary for certain types of motion, such as a motion for directed verdict.

The fourth substantive recommendation was to add a sentence regarding waiver of objections, as follows: "A party properly notified but absent from the trial court waives all objections and complaints that the party would be required to raise at trial unless the party's absence was wrongfully induced by another party." The reason given for this amendment was to prevent an absent party from receiving more favorable treatment than a party who attended the trial. Specifically, it was asserted that this sentence fixed the "problem" presented in *Wilson v. Dunn*, 800 S.W.2d 833, 837 n.9 (Tex. 1990).

In addition, although not mentioned as substantive, the requirement that the request, objection or motion, and the ruling of the judge on the request, objection or motion, "must appear of record" was added in the first and third sentences. The current rule provided only that a timely request, objection or motion was required and the party had to obtain a ruling.

The final product of the subcommittee looked like this:

> (a) General Preservation Rule. ~~In order to preserve~~ As a prerequisite to the presentation of a complaint for appellate review, ~~a party must have presented to the trial court~~ a timely request, objection, or motion must appear of record, stating the specific grounds for the ruling ~~he~~ that the complaining party desired the trial court to make if the specific grounds were not apparent from the context. No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint. ~~It is also necessary for the complaining party to obtain~~ a The judge's ruling upon the complaining party's request, objection, or motion must also appear of record provided that in civil cases the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion unless the taking of evidence is necessary for proper presentation of the complaint in the trial court. An order may be recited in the judgment, entered as a separate signed order, shown in the statement of facts, or otherwise made to appear in the record. If the trial judge refuses to rule, an objection to the judge's ~~court's~~ refusal to rule is sufficient to preserve the complaint. ~~It is not necessary to formally except~~ Formal exceptions to rulings or orders of the trial court are not required. A party properly notified but absent from the trial court waives all objections and complaints that the party would be required to raise at trial unless the party's absence was wrongfully induced by another party.

The SCAC accepted the first two substantive recommendations without comment. It rejected the recommendation that the ruling could be "otherwise made to appear of record" and inserted a reference to the formal bill of exceptions instead. The SCAC also rejected the sentence regarding an absent party waiving objections. The final product of the

SCAC is as follows:

> **(a) General ~~Preservation~~ Rule.** ~~In order to preserve~~ As a prerequisite to the presentation of a complaint for appellate review, ~~a party must have presented to the trial court~~ a timely request, objection, or motion must appear of record, stating the specific grounds for the ruling ~~he~~ that the complaining party desired the trial court to make if the specific grounds were not apparent from the context. No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint. ~~It is also necessary for the complaining party to obtain a~~ The judge's ruling upon the complaining party's request, objection, or motion must also appear of record provided that in civil cases the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion unless the taking of evidence is necessary for proper presentation of the complaint in the trial court. A ruling may be shown in the judgment, in a signed separate order, in the statement of facts, or in a formal bill of exceptions. If the trial judge refuses to rule, an objection to the judge's ~~court's~~ refusal to rule is sufficient to preserve the complaint. ~~It is not necessary to formally except~~ Formal exceptions to rulings or orders of the trial court are not required.

A clean copy is as follows:

> **(a) General Preservation Rule.** As a prerequisite to the presentation of a complaint for appellate review,[1] a timely request, objection, or motion must appear of record,[2] stating the specific grounds for the ruling that the complaining party desired the trial court to make if the specific grounds were not apparent from the context.[3] No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint.[4] The judge's ruling upon the complaining party's request, objection, or motion must also appear of record[5] provided that in civil cases the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion unless the taking of evidence is necessary for proper presentation of the complaint in the trial court.[6] A ruling may be shown in the judgment, in a signed separate order, in the statement of facts, or in a formal bill of exceptions.[7] If the trial judge refuses to rule, an objection to the judge's refusal to rule is sufficient to preserve the complaint.[8] Formal exceptions to rulings or orders of the trial court are not required.[9]

When I examine the work of the committee closely, I am not sure the rule is much improved.

[1] The beginning of the first sentence is too complicated. Rather than "As a prerequisite to the presentation of a complaint for appellate review . . ." I suggest "To preserve a complaint for appellate review . . .."

[2] The requirement of the first sentence that the request, objection or motion "appear of record" is unnecessarily obscure to me. It seems to me that what we want is (1) a timely request, objection or motion that (2) appears in the appellate record as defined by Rule 50.

Thus, I suggest the following first sentence:

> To preserve a complaint for appellate review, a timely request, objection or motion must be made in the trial court and included in the record on appeal.

[3] I would split the first sentence into two sentences and revise the new second sentence to take out the adjective "specific" in both places. I would take out "specific" because the new sentence regarding waiver defines how specific the request, objection or motion must be.

[4] Something is just not right about the new sentence regarding waiver of complaints (and if I had paid attention in English 101, I would probably know what the problem is). Whatever, I would reword that sentence slightly.

Thus, I suggest the following second and third sentences:

> The request, objection or motion must state the grounds for the ruling the party desired the trial court to make, unless the grounds were apparent from the context. No complaint is waived if the grounds for the desired ruling were stated with sufficient specificity to make the judge aware of the complaint.

[5] & [7] The SCAC rejected the notion that the ruling could be "otherwise made to appear of record" (formerly in [7]) but they failed to note that the preceding sentence provided that the ruling should "appear of record." (*See* [5]) Indeed, clauses [5] and [7] speak to exactly the same issue, but suggest different requirements.

Clause [5] provides that the ruling may "appear of record," but clause [7] provides that the ruling can only appear in a limited number of documents. I think these should be reconciled.

In addition, the current rule places a duty on the complaining party to get a ruling. Clause [5] omits that duty. It requires that the judge's ruling appear of record, but it does not require the complaining party to secure a ruling.

Again, it seems to me that all we are trying to say is (1) get a ruling and (2) make sure it appears in the appellate record. Thus, I would revise [5] as follows:

> The complaining party should obtain a ruling upon the party's request, objection or motion, and the ruling must be included in the record on appeal . . .

I would delete [7] as unnecessary and not helpful. It is unnecessary if we provide that the ruling should appear in the record on appeal. In addition, it does not specifically address the cases holding that a motion for directed verdict requires a separate order, although the comment says that it is intended to overrule those cases.

[6] does appear to correctly codify *Cecil v. Smith* and I don't suggest any change.

[8] No changes.

[9] could be deleted.

Finally, as I stated above, the subcommittee recommended a concluding sentence providing that an absent party waived all objections the party would have been required to present if in attendance. The SCAC initially modified that suggestion to limit it to "objections to the admission and exclusion of evidence" but decided that all the ramifications were unknown and it should be omitted altogether.

The subcommittee had suggested that the sentence cured the problem of *Wilson v. Dunn* but it really did not. In *Wilson*, the plaintiff had failed to verify the motion for substituted service. A default judgment was rendered against the defendant. The defendant attacked the judgment on appeal. The Court held that service was defective - even though it is undisputed that the defendant had actual knowledge of the suit - because the plaintiff did not follow the service rule precisely.

The "problem" noted in *Wilson* arose because the defendant did not raise the defective service problem at the trial court, but raised it for the first time on appeal. The Court noted that TRCP 324 did not require the allegation of defective service to be raised by motion for new trial to preserve error, but TRAP 52(a) requires all matters to be presented to the trial court first. This "problem" the Court suggested "should be considered in future amendments to the rules." *Wilson v. Dunn*, 800 S.W.2d 833, 837 n.9 (Tex. 1990).

The sentence suggested by the subcommittee does not solve the *Wilson* problem, although it may have other virtues. The proper solution to *Wilson* is to amend Rule 324 to provide that a defect in service should be raised in a motion for new trial (or it can be raised in a writ of error).

Thus, I don't really have an opinion about the necessity of the proposed sentence.

Why shouldn't we merge paragraph (d) with (a)?

LP draft:

> (a) **General Preservation Rule.** To preserve a complaint for appellate review, a timely request, objection or motion must be made in the trial court and included in the record on appeal. The request, objection or motion must state the grounds for the ruling the party desired the trial court to make, unless the grounds were apparent from the context. No complaint is waived if the grounds for the desired ruling were stated with sufficient specificity to make the judge aware of the complaint. The complaining party should obtain a ruling upon the party's request, objection or motion, and the ruling must be included in the record on appeal, except that in civil cases the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion, unless the taking of evidence is necessary for proper presentation of the complaint in the trial court. If the trial judge refuses to rule, an objection to the judge's refusal to rule is sufficient to preserve the complaint for appellate review. Formal exceptions to rulings or orders of the trial court are not required. [A party properly notified but absent from the trial court waives all objections to the admission or exclusion of evidence that the party would be required to raise at trial unless the party's absence was wrongfully induced by another party.]

Paragraph (b).

Regards paragraph (b), it appears that it is redundant of Texas Rule of Civil Evidence 103 and might be deleted altogether. At the very least, the title of the paragraph should be "Offers of Proof."

This is the SCAC version with a couple of minor changes:

> (b) ~~**Informal Bills of Exception and**~~ **Offers of Proof.** When evidence is excluded, the offering party shall as soon as practicable, but before the charge is read to the jury or before the judgment is signed in a nonjury case, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The judge may, or at the request of a party shall, direct the making of the offer in question and answer form. A transcription of the reporter's notes or ~~of~~ the electronic tape recording showing the offer, whether by concise statement or question and answer, showing the objections made, and showing the ruling, when included in the statement of facts certified by the reporter or recorder, shall establish the nature of the

APPENDIX 9

MEMORANDUM

TO:	Pamela Stanton Baron	512-479-8070
	Prof. William V. Dorsaneo III	214-768-4330
	Hon. Clarence A. Guittard	214-692-7897
	Michael A. Hatchell	903-597-2413
	Bryan A. Garner	214-691-9294
CC:	Hon. Nathan L. Hecht	
FROM:	Lee Parsley	
DATE:	October 30, 1996	
RE:	TRAP 47 and 52	

Judge Hecht made some changes to Rules 47 and 52 and asked that I send it to you for comment.

Bryan, he especially wants to know if the structure of 52(a) passes the Garner test.

RULE 52. PRESERVATION OF APPELLATE COMPLAINTS

(a) Preservation; How Shown.

(1) *In general.* As a prerequisite to presenting a complaint for appellate review, except for a complaint of fundamental error, the record must show that:

(A) the complaint was made to the trial court by a timely request, objection, or motion that:

(i) stated ~~stating~~ the ~~specific~~ grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, ~~must appear in the record,~~ unless the specific grounds were apparent from the context. ~~A complaint is not waived if the ground stated was sufficiently specific to make the trial court aware of the complaint.~~; and

(ii) complied with the requirements of any applicable rule of evidence or procedure; and

(B) the trial court:

(i) ruled on the request, objection, or motion; or

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

(2) ~~*Court's r*~~*Ruling by operation of law*.

~~(A) The trial court's ruling on the complaining party's request, objection, or motion must appear in the record. But i~~In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.

~~(B) A ruling may be shown in the judgment, in a signed separate order, in the statement of facts, or in a formal bill of exceptions.~~

~~(C) If the trial court refuses to rule, the complaining party's objection to that refusal preserves the complaint.~~

(~~D~~3) A formal exception to a trial court ruling or order is not required to preserve a

complaint for appeal.

~~(b) Informal Bills of Exception and Offers of Proof.~~

~~(1) *Time to make; form.* When the trial court excludes evidence, the court must — as soon as practicable but before the court reads the charge to the jury or, in a nonjury case, signs the judgment — allow the offering party to make an offer of proof in the form of a concise statement. In a jury trial, this offer must be made outside the jury's presence. The court may — or at a party's request must — direct that the offer be made in question-and-answer form.~~

~~(2) *How established; effect.* When included in the statement of facts, a transcription of the reporter's notes or of the electronic tape recording showing the offer, the objections made, and the ruling establishes the nature of the evidence, the objections, and the ruling. The trial court may add a statement showing the character of the evidence, the form in which it was offered, the objection made, and the ruling. No further offer need be made. A formal bill of exception is not needed to authorize appellate review of exclusion of evidence.~~

~~(3) *When evidence admitted over objection.* When the trial court hears an objection to offered evidence outside the jury's presence and rules that the evidence be admitted, the objection need not be repeated when the evidence is admitted before the jury.~~

(c) **Formal Bills of Exception.** To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exceptions. ~~The following paragraphs govern preparing and filing a formal bill of exception.~~

(1) *Form.* No particular form of words is required in a bill of exception. But the objection to the court's ruling or action, and the ruling complained of, must be sufficiently stated — as briefly as possible — in order to explain the objection ~~or~~ and ruling.

(2) *Evidence.* When the statement of facts contains the evidence needed to explain a bill of exception, the bill itself need not repeat the evidence, and a party may simply refer to the statement of facts.

~~(3) *Jury instructions.* Unless a party objects timely and properly, that party will be considered to have approved the trial court's ruling in giving or qualifying the jury's instructions.~~

(~~4~~3) *Procedure.*

(A) The complaining party must first present a formal bill of exception to the trial court ~~for its allowance and signature~~.

(B) ~~Before signing, the court must submit the bill to the adverse party or that party's counsel, if present, and if the adverse party finds it to be correct, the court must immediately sign the bill and file it with the clerk.~~ If the parties agree on the contents of the bill of exception, the judge must sign the bill and file it with the clerk. If the parties do not agree on the contents of the bill, a hearing must be set — and notice of the hearing given — in accordance with local rules or practice.

(C) After hearing, the trial judge must do one of the following things: ~~If the court finds a bill to be incorrect, the court must suggest to the parties or their counsel whatever corrections the court considers necessary. If those corrections are agreed to, the court must make them, sign the bill, and file it with the clerk.~~

~~(D) If the parties do not agree to the court's suggested corrections, the court must return the bill to the complaining party with the court's refusal endorsed on it, and must prepare, sign, and file with the clerk a bill of exception that will, in the court's opinion, present the court's actual ruling.~~

(i) sign the bill of exception and file it with the clerk if the judge finds that it is correct;

(ii) suggest to the filing party those corrections to the bill that the judge believes are necessary to make it accurately reflect the proceedings in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the clerk; or

(iii) if the filing party will not agree to the corrections suggested by the judge, return the bill the filing party with the judge's refusal written on it, and prepare, sign and file with the clerk such bill as will, in the judge's opinion, accurately reflect the proceedings in the trial court.

(~~E~~D) ~~If the complaining party is dissatisfied with the bill filed by the court, that party may have the bill as originally presented filed as part of the record by having three respectable bystanders who are Texas citizens attest, by their signatures, to the original bill's correctness. The bill's truth may be controverted or supported by up to five affidavits submitted by each side and filed with the papers of the case within ten days after the original bill's filing. The appellate court will decide, based on the affidavits, which bill of exception is accurate.~~ If the filing party is dissatisfied with the bill of exception filed by the judge under (C)(iii), the party may file the bill that was rejected by the judge. That party must also file the affidavits of at least three people who observed the matter to which the bill of exception is addressed. The affidavits must attest to the correctness of the bill as

presented by the party. The matters contained in that bill of exception may be controverted and maintained by additional affidavits filed by any party within ten days after the filing of that bill. The truth of the bill of exception will be determined by the appellate court.

(~~5~~4) *Conflict.* If a formal bill of exception conflicts with the statement of facts, the bill controls.

~~(6) *Matters that may be included in statement of facts.* Anything occurring in open court or in chambers that is reported or recorded and so certified by the court reporter or recorder may be included in the statement of facts rather than in a formal bill of exception. In a civil case, a party requesting that any part of the jury arguments or voir dire examination be included in the statement of facts must pay the cost of those requested portions. That cost must be listed separately in the certified bill of costs. The appellate court may tax that cost wholly or partly against any party to the appeal.~~

(~~7~~5) *Time to file.*

(A) *Civil cases.* In a civil case, a formal bill of exception must be filed no later than 30 days after the notice of appeal is filed.~~:~~

~~(i) no later than 60 days after the judgment is signed; or~~

~~(ii) no later than 90 days after the judgment is signed if any party timely files a motion for new trial, a motion to modify the judgment, a motion to reinstate under Texas Rule of Civil Procedure 165a, or a request for findings of fact.~~

(B) *Criminal cases.* In a criminal case, a formal bill of exception must be filed:

(i) no later than 60 days after the trial court pronounces or suspends sentence in open court; or

(ii) if a motion for new trial has been timely filed, no later than 90 days after the trial court pronounces or suspends sentence in open court.

(~~8~~6) *Inclusion in transcript.* When filed, a formal bill of exception may be included in the transcript or in a supplemental transcript.

APPENDIX 10

TEXAS RULES OF APPELLATE PROCEDURE

to be effective September 1, 1997

SECTION ONE: GENERAL PROVISIONS

RULE 1. SCOPE OF RULES; LOCAL RULES OF COURTS OF APPEALS

1.1 Scope. These rules govern procedure in appellate courts and before appellate judges and post-trial procedure in trial courts in criminal cases.

1.2 Local Rules.

(a) ***Promulgation.*** A court of appeals may promulgate rules governing its practice that are not inconsistent with these rules. Local rules governing civil cases must first be approved by the Supreme Court. Local rules governing criminal cases must first be approved by the Court of Criminal Appeals.

(b) ***Copies.*** The clerk must provide a copy of the court's local rules to anyone who requests it.

(c) ***Party's noncompliance.*** A court must not dismiss an appeal for noncompliance with a local rule without giving the noncomplying party notice and a reasonable opportunity to cure the noncompliance.

Notes and Comments

Comment to 1997 change: Subdivision 1.1 is simplified without substantive change. Subdivision 1.2 is amended to make clear that any person is entitled to a copy of local rules. Paragraph 1.2(c), restricting dismissal of a case for noncompliance with a local rule, is added.

RULE 2. SUSPENSION OF RULES

On a party's motion or on its own initiative an appellate court may — to expedite a decision or for other good cause — suspend a rule's operation in a particular case and order a different procedure; but a court must not construe this rule to suspend any provision in the Code of Criminal Procedure or to alter the time for perfecting an appeal in a civil case.

Notes and Comments

Comment to 1997 change: Former subdivision (a) regarding appellate court jurisdiction is deleted. The power to suspend rules is extended to civil cases. Other nonsubstantive changes are made.

RULE 3. DEFINITIONS; UNIFORM TERMINOLOGY

3.1 Definitions.

(a) *Appellant* means a party taking an appeal to an appellate court.

(b) *Appellate court* means the courts of appeals, the Court of Criminal Appeals, and the Supreme Court.

(c) *Appellee* means a party adverse to an appellant.

(d) *Applicant* means a person seeking relief by a habeas corpus in a criminal case.

(e) *Petitioner* means a party petitioning the Supreme Court or the Court of Criminal Appeals for review.

(f) *Relator* means a person seeking relief in an original proceeding in an appellate court other than by habeas corpus in a criminal case.

(g) *Reporter* or *court reporter* means the court reporter or court recorder.

(h) *Respondent* means:

(1) a party adverse to a petitioner in the Supreme Court or the Court of Criminal Appeals; or

(2) a party against whom relief is sought in an original proceeding in an appellate court.

3.2 Uniform Terminology in Criminal Cases. In documents filed in criminal appeals, the parties are the *State* and the *appellant*. But if the State has appealed under Article 44.01 of the Code of Criminal Procedure, the defendant is the *appellee*. Otherwise, papers should use real names for parties, and such labels as *appellee, petitioner,*

(2) if the appellant is not represented by an attorney, that party's name, address, telephone number, and fax number, if any;

(b) the date the notice of appeal was filed in the trial court and, if mailed to the trial court clerk, the date of mailing;

(c) the trial court's name and county, and the name of the judge who tried the case;

(d) the date the trial court imposed or suspended sentence in open court, or the date the judgment or order appealed from was signed;

(e) the date of filing any motion for new trial, motion in arrest of judgment, or any other filing that affects the time for perfecting the appeal;

(f) the offense charged and the date of the offense;

(g) the defendant's plea;

(h) whether the trial was jury or nonjury;

(i) the punishment assessed;

(j) whether the appeal is from a pretrial order;

(k) whether the appeal involves the validity of a statute, ordinance, or rule;

(l) whether a reporter's record has been or will be requested, and whether the trial was electronically recorded;

(m) the name of the court reporter;

(n) (1) the dates of filing of any motion and affidavit of indigence;

(2) the date of any hearing;

(3) the date of any order; and

(4) whether the motion was granted or denied; and

(o) any other information the appellate court requires.

32.3 Supplemental Statements. Any party may file a statement supplementing or correcting the docketing statement.

32.4 Purpose of Statement. The docketing statement is for administrative purposes and does not affect the appellate court's jurisdiction.

Notes and Comments

Comment to 1997 change: The rule is new.

RULE 33. PRESERVATION OF APPELLATE COMPLAINTS

33.1 Preservation; How Shown.

(a) ***In general.*** As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

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

(b) ***Ruling by operation of law.*** In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.

(c) ***Formal exception and separate order not required.*** Neither a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal.

33.2 Formal Bills of Exception. To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception.

(a) ***Form.*** No particular form of words is required in a bill of exception. But the objection to the court's ruling or action, and the ruling complained of, must be stated with sufficient specificity to make the trial court aware of the complaint.

(b) ***Evidence.*** When the appellate record contains the evidence needed to explain a bill of exception, the bill itself need not repeat the evidence, and a party may attach and incorporate a transcription of the evidence certified by the court reporter.

(c) ***Procedure.***

(1) The complaining party must first present a formal bill of exception to the trial court.

(2) If the parties agree on the contents of the bill of exception, the judge must sign the bill and file it with the trial court clerk. If the parties do not agree on the contents of the bill, the trial judge must — after notice and hearing — do one of the following things:

(A) sign the bill of exception and file it with the trial court clerk if the judge finds that it is correct;

(B) suggest to the complaining party those corrections to the bill that the judge believes are necessary to make it accurately reflect the proceedings in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the trial court clerk; or

(C) if the complaining party will not agree to the corrections suggested by the judge, return the bill to the complaining party with the judge's refusal written on it, and prepare, sign, and file with the trial court clerk such bill as will, in the judge's opinion, accurately reflect the proceedings in the trial court.

(3) If the complaining party is dissatisfied with the bill of exception filed by the judge under (2)(C), the party may file with the trial court clerk the bill that was rejected by the judge. That party must also file the affidavits of at least three people who observed the matter to which the bill of exception is addressed. The affidavits must attest to the correctness of the bill as presented by the party. The matters contained in that bill of exception may be controverted and maintained by additional affidavits filed by any party within ten days after the filing of that bill. The truth of the bill of exception will be determined by the appellate court.

(d) ***Conflict.*** If a formal bill of exception conflicts with the reporter's record, the bill controls.

(e) ***Time to file.***

(1) *Civil cases.* In a civil case, a formal bill of exception must be filed no later than 30 days after the filing party's notice of appeal is filed.

(2) *Criminal cases.* In a criminal case, a formal bill of exception must be filed:

(A) no later than 60 days after the trial court pronounces or suspends sentence in open court; or

(B) if a motion for new trial has been timely filed, no later than 90 days after the trial court pronounces or suspends sentence in open court.

(3) *Extension of time.* The appellate court may extend the time to file a formal bill of exception if, within 15 days after the deadline for filing the bill, the party files in the appellate court a motion complying with Rule 10.5(b).

(f) ***Inclusion in clerk's record.*** When filed, a formal bill of exception should be included in the appellate record.

Notes and Comments

Comment to 1997 change: This is former Rule 52. Subdivision 33.1 is rewritten. Former Rule 52(b), regarding offers of proof, is omitted as unnecessary. *See* TEX. R. CIV. EVID. 103; TEX. R. CRIM. EVID. 103. Subdivision 33.2 is also rewritten and the procedure is more definitely stated. Former Rule 52(d), regarding motions for new trial, is omitted as unnecessary. *See* TEX. R. CIV. P. 324(a) & (b).

APPENDIX 11

GUIDE TO THE NEW

TEXAS RULES OF

APPELLATE PROCEDURE

As Promulgated by orders of

The Supreme Court of Texas and

The Texas Court of Criminal Appeals

March 20, 1997

A Project of the
State Bar of Texas
Appellate Section

Austin 1997

error as the method by which Supreme Court review is sought. TRAP 53.1.

- **Motion for rehearing not required:** A motion for rehearing is not a prerequisite for filing the petition. TRAP 49.9. The former practice required a motion for rehearing.

- **Where to file:** The petition is filed with the Supreme Court clerk. TRAP 53.7(a). The former practice required filing in the courts of appeals.

- **When to file:** The petition is filed within 45 days after the date of the court of appeals' judgment or, if any motion for rehearing has been timely filed, the date of the court of appeals' last ruling on such motion. TRAP 53.7(a)(1), (2).

- **Length:** The petition is limited to 15 pages, exclusive of specific sections. TRAP 53.6.

- **Contents of petition:** The petition must contain, among other things, a detailed statement of the case, issues or points presented, statement of facts, summary of the argument, and appendix. TRAP 53.2.

- **Issues presented:** The petition must state either points of error or issues presented for review. TRAP 53.2(f). In the argument, the petitioner need not address all issues or points presented; those not addressed may be covered in the brief on the merits, if one is requested by the Court. TRAP 53.2(i). The former practice required that all points in the application be supported by argument and authority.

- **Response to petition:** The response is also limited to 15 pages and must be filed within 30 days after the petition is filed. TRAP 53.3; 53.6; 53.7(d).

- **Reply:** The petitioner's reply is limited to 8 pages and must be filed within 15 days after the response is filed. TRAP 53.5; 53.6; 53.7(e).

- **No grant unless response requested or filed:** The Court may consider the petition without a response if no response has been timely filed, but will not grant a petition before a response has been filed or requested. TRAP 53.3. Thus, the respondent can waive the filing of a response to hasten Supreme Court action.

- **The record:** The record is not sent to the Supreme Court unless requested by the Court. TRAP 54.1; 54.2. Under the old rules, the record was automatically sent to the Court with the application for writ of error.

- **Appendix:** The petition must contain an appendix, which functions as a substitute for the record. TRAP 53.2(k).

- **Brief on the merits:** With or without granting the petition, the Court may request additional briefing in the form of a brief on the merits. TRAP 55.1.

- **Length:** The brief on the merits and the brief in response are limited to 50 pages; the reply brief is limited to 25 pages. TRAP 55.6.

- **Time for filing:** In the absence of a briefing schedule, petitioner's brief is filed within 30 days of the request, the response brief is filed within 20 days of receipt of petitioner's brief, and the reply is filed within 15 days of receipt of the response. TRAP 55.7.

- **Issues or points not considered in court of appeals:** A party may raise any issue or point briefed in the courts of appeals, but not considered by that court, in the petition, the response, the reply, any brief, or a motion for rehearing. TRAP 53.4.

Preservation of Error

- **Objection:** An objection is sufficiently specific if it "make[s] the trial court aware of the complaint, unless the specific grounds were apparent from the context."

TRAP 33.1(a)(1). The new rule relaxes the former requirement of specificity for an objection. However, a new provision specifies that the complaining party must comply with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure. TRAP 33.1(a)(1)(B).

- **Ruling:** The record must show that the trial court ruled on the request, objection, or motion, "either expressly or implicitly." TRAP 33.1(a)(2). The new rule relaxes the former requirement of an express ruling. A signed, separate order is not required, as long as the record otherwise shows that the ruling was made. TRAP 33.1(c).

- **Motion for new trial:** In a civil case, complaints in a motion for new trial or a motion to modify the judgment are specifically preserved for appellate review, unless taking evidence was necessary. TRAP 33.1(b).

- **Offers of proof:** TRAP 33 deletes any discussion of offers of proof. Texas Rule of Evidence 103 will govern offers of proof. TRAP 33 comment.

- **Formal bills of exception:** The complaining party may attach to the bill and incorporate a transcription of the evidence certified by the court reporter. TRAP 33.2(b). In civil cases, a formal bill must be filed no later than 30 days after the notice of appeal; in criminal cases, no later than 60 days after the trial court pronounces or suspends sentence in open court or 90 days if a motion for new trial has been timely filed. TRAP 33.2(e)(1), (2). An extension of time may be obtained. TRAP 33.2(e)(3).

MISCELLANEOUS SMALL BUT IMPORTANT CHANGES

Bankruptcy

- **Procedure:** The rules establish a uniform procedure when a bankruptcy affects appellate proceedings. TRAP 8. A notice of bankruptcy is required, along with proof of the date the bankruptcy petition was filed. TRAP 8.1. The rule also provides for motions to sever and to reinstate. TRAP 8.3.

- **Effect:** The effect of filing bankruptcy is clarified. A document filed while an appeal is suspended by bankruptcy is not void, but is considered a prematurely filed document. TRAP 8.2. In addition, a time period suspended by bankruptcy begins over after the debtor is severed or the appellate proceeding is reinstated.

Amicus Curiae Briefs

- **Disclosure required:** The amicus rule now requires disclosure of the identity of the person or entity on whose behalf the amicus brief is filed and the source of any fee. TRAP 11.

Publication of Opinions

- **Unpublished opinions:** Prohibition against citing unpublished opinions as authority is retained. TRAP 47.7.

- **Settlement:** When dismissing an appeal, a court of appeals may determine whether to withdraw an opinion it has already issued. TRAP 42.1. An agreement or motion for dismissal may not be conditioned on withdrawal of the court of appeals' opinion. TRAP 42.1. The Supreme Court may render a judgment or abate a case to effectuate a settlement agreement. TRAP 56.3. The Supreme Court now has discretion to vacate a court