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Anticipation and Prevention of Error Preservation Ambushes

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

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

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

2. The Resources, and a word of thanks.

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

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

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

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

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

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

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

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

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

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

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

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

3. The tension between timeliness, error preservation policy, and potential error-preservation ambushes shows one thing–we all need to be aware of the ambushes which exist.

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

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

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

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

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

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

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

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

Study *United Scaffolding* very, very carefully; several folks have written on it, and you can find what I said in *Selling Your Case at Trial*, supra, at pp. 68-70 (on my website). But juxtaposing *Mansions*, *Rohrmos*, and *United*

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