

**PRESENTED AT**

29<sup>th</sup> Annual Conference on State and Federal Appeals

June 20-21, 2019

Austin, Texas

## **Anticipation and Prevention of Error Preservation Ambushes**

**Steven K. Hayes**

Speaker Contact Information::

Steven K. Hayes

Law Office of Steven K. Hayes

500 Main Street, Suite 340

Fort Worth, Texas 76102

[shayes@stevhayeslaw.com](mailto:shayes@stevhayeslaw.com)

512.555.5555



**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.stevhayeslaw.com](http://www.stevhayeslaw.com)

E-mail: [shayes@stevhayeslaw.com](mailto:shayes@stevhayeslaw.com)

- Education:
- Harvard Law School, J.D. in 1980
  - Austin College, B.A. in 1977, *summa cum laude*
- Public Service:
- 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
- Admitted:
- State Bar of Texas
  - Supreme Court of the United States
  - Fifth Circuit Court of Appeals
  - United States District Courts (all Districts in Texas)
- Member:
- American Law Institute (2005-present)
  - Bell-Lampasas-Mills Counties Bar Association (1984-1992; former Director) and Young Lawyers Association (former President, Director)
  - Eldon B. Mahon Inn of Court (Emeritus, 2010-present; President 2009-2010; Executive Committee, 2010-2013)
    - Serjeant's Inn of Court of North Texas (2012-present)
  - State Bar of Texas
    - Appellate Law Section (Chair, 2016-2017; Council, 2008-2011; Course Director, Advanced Civil Appellate Law Seminar, 2012).
    - Litigation Section Council (2011-2017); Co-Chair, Online CLE Committee (2013-2016) and News for the Bar (2011-2013)
    - Life Fellow, Texas Bar Foundation
  - Tarrant County Bar Association (1993-present; Director, 2005-2008, 2013-2015)
    - Appellate Law Section (Chair, 2007-2008)
    - Mentor of the Year, 2009-2010, Fort Worth-Tarrant County Young Lawyers' Association.
  - Texas Association of Defense Counsel

## TABLE OF CONTENTS

|  |    |
|--|----|
| 1. Error Preservation Ambushes: We have met the enemy, and they are us..   | 6  |
| 2. The Resources, and a word of thanks.....  | 6  |
| 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..  | 7  |
| 4. The Ambushes..  | 8  |
| A. Complaints you can raise for the first time on appeal..   | 8  |
| 1. A word about the federal rule concerning complaints which a party can first raise on appeal—in case you are desperate enough to suggest its adoption in state courts. ....  | 8  |
| 2. Fundamental error—a limited and discredited doctrine, except for subject matter jurisdiction, some juvenile matters, and a significant public interest.....   | 8  |
| a. Lack of subject matter jurisdiction—a concept which older cases may have “intemperate[ly]” used, but which (if applicable) may be raised for the first time on appeal..   | 9  |
| i. The many guises of lack of subject matter jurisdiction.....   | 10 |
| • Preemption. ....   | 10 |
| • Statutory prerequisites to suit—maybe.....   | 10 |
| • The damages in a claim exceed the trial court’s jurisdiction. ....   | 10 |
| • A state agency has exclusive original jurisdiction. ....   | 11 |
| • A case involving the political question doctrine.....  | 11 |
| • Sovereign immunity. ....   | 11 |
| • Action by the trial court on remand inconsistent with or beyond what is necessary to give full effect to the appellate court’s judgment and mandate (?). ....  | 11 |
| ii. Other components of subject matter jurisdiction. ....  | 11 |
| • Standing. ....   | 11 |
| • Ripeness. ....   | 12 |
| • Mootness.....  | 12 |
| • Defective service. ....  | 12 |
| iii. A temporary injunction order which does not comply with Rule 683. CONFLICT. ....  | 13 |
| b. An important public interest or public policy. ....   | 13 |
| c. Certain issues in juvenile cases. ....  | 14 |
| • the failure of the trial court “to commence a trial by jury unless and until both the juvenile and his attorney release the trial court from that duty. Tex. Fam. Code §§ 51.09, 54.03(c).” . . . .                    | 15 |
| • the “failure of a juvenile to object to the jury charge or to request an issue based on proof beyond a reasonable doubt rather than preponderance of the evidence. ....  | 15 |
| • the trial court’s failure to inquire as to the juvenile’s competence to stand trial. ....  | 15 |
| • the trial court’s failure to comply with the requirements of Family Code Section 51.09 and 54.03, in terms of obtaining a waiver of rights (like the right to a jury trial) from a juvenile. .                         | 15 |
| d. Certain issues in parental-right termination cases. ....  | 15 |
| • ineffective assistance of counsel, including in some contexts the right to be apprised of one’s right to court-appointed counsel. ....   | 16 |
| • the specificity of a court order establishing what a parent must do to receive child custody, when a parental-right termination under Family Code Section 161.001(b)(1)(O) is based on a violation of that order. .... | 16 |
| • a trial court's failure to appoint an attorney ad litem or amicus attorney for a child in a private termination case.....  | 16 |
| • that there was no evidence the parent consented to or gave his attorney authority to enter a Rule 11 agreement (unsigned by the parent) which does not comply with Family Code section 153.0071(d)(2).....             | 16 |
| 3. Other stuff..   | 16 |
| a. Ambiguity of contracts. ....  | 16 |
| b. Complaints about judges. ....   | 17 |

|      |  |    |
|------|--|----|
| i.   | The art. V, §11 constitutional disqualification of judge based on the judge's interest, the judge's connection with the parties, or when the judge was counsel in the case.. . . . .   | 17 |
| ii.  | Actions beyond the scope of the judge's assignment. . . . .  | 17 |
| iii. | Challenge to a trial judge's qualifications. . . . .   | 18 |
| iv.  | A trial judge may not testify as a witness at trial. . . . .   | 18 |
| v.   | A trial judge's bias or prejudice shown on the face of the record. . . . .   | 18 |
| c.   | Inadequate notice of a hearing (so long as you don't show up for the hearing in question). CONFLICT. . . . .   | 18 |
| d.   | Change in applicable law. CONFLICT. . . . .  | 19 |
| e.   | Complaints about legal and factual sufficiency in a bench trial. . . . .   | 20 |
| f.   | Certain complaints about affidavits in, and other aspects of, summary judgment practice. . . . .   | 20 |
| i.   | Complaints can first be raised on appeal about the following substantive defects in affidavits. . . . .  | 20 |
| •    | a conclusory statement. . . . .  | 21 |
| •    | a subjective belief. . . . .   | 21 |
| •    | an unsubstantiated opinion. . . . .  | 21 |
| •    | a lack of relevance. . . . .   | 21 |
| •    | the parol evidence rule. . . . .   | 21 |
| •    | that a party's own interrogatory responses may not be used in its favor in a no evidence challenge, . . . . .  | 21 |
| •    | an unsigned affidavit. . . . .   | 21 |
| ii.  | A complaint that an affidavit shows it is not based on personal knowledge concerns a substantive defect, and can first be raised on appeal ... . . . . .   | 22 |
| •    | Most courts of appeals hold that a complaint that an affidavit that merely <i>fails to show</i> the affiant's personal knowledge is an objection as to form which must be raised in the trial court. CONFLICT. . . . .   | 22 |
| •    | In any event, in a couple of courts of appeals you <i>may</i> be able to complain that the absence of a showing of personal knowledge is a complaint that can first be raised on appeal. CONFLICT . . . . .  | 23 |
| iii. | Some courts of appeals hold that a failure to attach sworn or certified copies of documents referenced in a summary judgment affidavit is a substantive defect making the affidavit incompetent (and can first be raised on appeal). CONFLICT. . . . .   | 24 |
| g.   | That the no-evidence motion for summary judgment is not sufficiently specific. CONFLICT. . . . .   | 24 |
| h.   | That the traditional summary judgment motion fails to prove the entitlement of the movant to judgment as a matter of law. . . . .  | 25 |
| i.   | If you don't object to the trial court sustaining the other side's objections to your summary judgment evidence, you may <i>not</i> be able to complain about the trial court's rulings on appeal. . . . .   | 25 |
| j.   | Certain complaints about affidavits used outside summary judgment practice—at least consider all the summary judgment affidavit complaints. . . . .  | 25 |
| B.   | Complaints which can be raised when it's too late to fix them. . . . .   | 25 |
| 1.   | A losing party has more time (i.e., until appeal) to raise legal and factual sufficiency complaints in a civil non-jury trial, as compared to a jury trial. . . . .  | 26 |
| 2.   | Legal and factual sufficiency complaints—how creative can you be?. . . . .   | 26 |
| a.   | A complaint that expert testimony is speculative or conclusory on its face can first be raised after the evidence is offered—but you should preserve that complaint as you would a complaint about legal sufficiency. CONFLICT. . . . .  | 26 |
| b.   | One court of appeals, and a concurrence in another court, say that complaining about a party's failure to segregate its attorney's fees in a bench trial is a legal/factual sufficiency complaint—but most courts don't, and the disagree about the deadline for such a complaint. CONFLICT. . . . . | 28 |
| c.   | A complaint that legally insufficient evidence supports the jury's answer to a question the complaining party submitted. TEX. R. CIV. P. 279. . . . .  | 29 |
| d.   | At least one court of appeals has held that a legal insufficiency complaint as to damages can be made in a post-trial motion. . . . .  | 29 |
| 3.   | Immaterial jury findings, or jury findings regarding a "purely legal issue." . . . .   | 29 |
| a.   | What makes a jury finding immaterial? . . . . .  | 29 |
| ☞    | the question asks the jury about damages on an irrelevant date. . . . .  | 30 |
| ☞    | the question asks the jury to find whether there was negligence in a case pled as a premises liability claim. . . . .  | 30 |

|   |    |
|---|----|
| the question asks the jury to find reasonable attorney’s fees when recovery of fees is sought under Chapter 38 against an LLC. . . . .  | 30 |
| i. A case study in the difficulties and disagreements regarding immateriality and preserving charge error– <i>United Scaffolding</i> .. . . .   | 30 |
| b. What constitutes a purely legal issue? . . . . .   | 31 |
| i. exemplary damages are capped. . . . .  | 31 |
| ii. a party is not jointly and severably responsible for exemplary damages. . . . .   | 31 |
| iii. contractual damages are independent of statutory damages. . . . .  | 32 |
| 4. Incurable jury argument. TEX. R. CIV. P. 324(b)(5). . . . .  | 32 |
| 5. You may be able to complain about irreconcilably conflicting jury answers after the trial court dismisses the jury—but I would not advise counting on it. . . . .                      | 32 |
| C. Strategies, counter strategies, and considerations for error preservation am bushes. . . . .   | 33 |
| 1. Realize that a jury trial compresses the losing party’s opportunities to specify legal and factual sufficiency complaints, while bench trials give them months to be creative. . . . . | 33 |
| 2. Thank Heidi Bloch and Jennifer Buntz, not me—if you’ve lost in a jury trial, file post-trial motions with catch-all legal insufficiency and immateriality arguments. . . . .           | 33 |
| 3. Thank Heidi and Jennifer, again—counter strategies for the amorphous (or, in a non-jury trial, unstated) legal insufficiency or immateriality argument. . . . .                        | 34 |
| 4. In setting the ambush, consider: do you really want to have a new trial in front of a trial judge who you did not alert to a problem he/she could have addressed? . . . . .            | 34 |
| Conclusion. . . . .   | 34 |

## 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 31<sup>st</sup> 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*

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: Anticipation and Prevention of Error Preservation Ambushes

Also available as part of the eCourse

[2019 eConference on State and Federal Appeals](#)

First appeared as part of the conference materials for the 29<sup>th</sup> Annual Conference on State and Federal Appeals session "Error Preservation Ambushes: Infliction and Prevention"