

# Pulling Oxen From Ditches: Complaints You Can First Raise Post-Trial or On Appeal

*With Thanks to Heidi Bloch at Greenberg Traurig*

Steven K. Hayes

Law Office of Steven K. Hayes

777 Main Street

Suite 600

Fort Worth, Texas 76102

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[www.stevhayeslaw.com](http://www.stevhayeslaw.com); [shayes@stevhayeslaw.com](mailto:shayes@stevhayeslaw.com); 817/371-8759

# Pulling Oxen From Ditches

This Presentation Comes in Four Sections:

- 1) Some suggestions about Research References courts use, and which you might find handy.
- 2) Suggestions about complaining about Zoom trials-with Research References.
- 3) Complaints you can first raise on appeal.
- 4) Complaints you can first raise in the post-trial time frame.

# Resources

- Bloch, *Preserving Error-Different Rules for Questions of Law?*, SBOT 32<sup>nd</sup> Annual Advanced Civil Appellate Practice Course (2018)
- Bloch/Buntz, *Unwaivable Error and Arguments That Still Work Even if You Think of Them —But Have to Raise—on Appeal*, SBOT 29th Annual Advanced Civil Appellate Practice Course (2015)
- Hayes, *Selling Your Case at Trial, Selecting Appellate Issues to Pursue, and Other Implications of Error Preservation Rulings*, p. 55 et seq, ([www.stevhayeslaw.com/ErrorPreservation14.pdf](http://www.stevhayeslaw.com/ErrorPreservation14.pdf), 2018)
- Ho, Simons, Frost, Busby, Oldham, Timms, *Splits Among the State Appellate Courts*, SBOT 32<sup>nd</sup> Annual Advanced Civil Appellate Practice (2018)
- Summary Judgment Practice (both cited 100+ times, in libraries of various courts of appeals):
  - Patton, *Summary Judgment Practice in Texas*, LexisNexis;
  - Hittner & Liberato, *Summary Judgments in Texas*, 60 S. Tex. L. Rev. 1 (2019)

# A Suggestion: Raise Covid-Related Zoom Complaints Before Trial

→If you have complaints regarding:

- Zoom hearings
- Zoom jury voir dire/trials (i.e., the lack of in person versions of the same).

Raise them specifically before hearing/trial; don't assume you can raise them thereafter.

*J.C.N.*, No. 05-21-01163-CV, Dallas Apr. 29, 2022; *D.B.S.*, no. 05-20-00959-CV Dallas April 26, 2021

→A Constitutional Complaint does not necessarily equal fundamental error. For example, have to complain about lack of jury trial when case called in:

- parental right terminations. *A.Ja.T.*, 2018 Tex. App. LEXIS 9358, 2018 WL 5993905 (Dallas 11/15/18, no pet.)],
- juvenile trials. *J.O.E.*, 2016 Tex. App. LEXIS 11094 (Amarillo 10/13/16, no pet.)
- Typically have to timely raise even constitutional complaints in PRT and Sexually Violent Predator Commitments, and (with certain exceptions) in Juvenile cases

# Resources: Potential Zoom Complaints

*See Miskel, Hon. Emily, Appellate Concerns About Zoom Trials, Computer and Technology Section Circuits (March 2021)*

Remember: “As a prerequisite . . .the record must show” the complaint. TRAP 33.1

The record will not show:

- Inaudible audio (fix by agreement or by hearing. TRAP 34.6(e))
- Corrupted Electronic Exhibits (ditto, TRAP 34.6(f))
- Exhibits Displayed but not admitted in evidence (same problem in live trials);
- Physical Evidence (pre-submit?)

# Resources: Potential Zoom Complaints

## Other problems:

- Do you want to get the trial court to order that video or audio recordings of trial are accessible to the parties and part of the record? (TRAP 34.1, Tex. R. Jud. Admin. 12);
- Sensitive Data and Trade Secrets (Live-streaming probs.; TRCP 21c(b), Redact, Sealing-see *HouseCanary*, SCOTX No. 19-0673, April 30, 2021);
- Disconnection (stop proceedings to allow rejoining)
- Obtain/comply with Standing Orders re: Zoom hearings.

# Pulling Oxen From Ditches: Use the Checklist

The Table of Contents for this paper is a checklist to help identify ambushes regarding complaints which can first be raised on appeal, or after it's too late to fix them.

# Pulling Oxen From Ditches: Remember The Checklist

## 2. Checklist of complaints which can first be raised on appeal, or after it is too late to fix the problem

### A. Complaints which can be raised for the first time on appeal... . . . . .

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

##### 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... . .

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

- An order signed after the expiration of plenary power . . . . .
- Preemption. . . . .
- Statutory prerequisites to suit—maybe. . . . .
- The damages in a claim exceed the trial court’s jurisdiction. . . . .
- A state agency has exclusive original jurisdiction. . . . .
- A case involving the political question doctrine. . . . .
- Sovereign immunity. . . . .
- 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 (?). . . . .
- The failure to join an indispensable party. . .



# Pulling Oxen From Ditches: Use the Checklist

Compare the Table of Contents Checklist to your lawsuit

If doing so reveals a potential, previously unraised complaint—  
Figure out whether it's worth pursuing and how to pursue it.

# Complaints You Can First Raise on Appeal

## New Arguments in Support of Complaints Which Your Trial Counsel Raised

“parties are free to construct new arguments in support of issues properly before the Court,” *N. E. ISD v. Riou*, 598 /// 243, 252 n.36 (Tex. 2020)

“parties on appeal need not always ‘rely on precisely the same case law or statutory subpart’ on which they relied below.” *Li v. Pemberton*, 631 S.W.3d 701, 704 (Tex. 2021), quoting *Adams v. Starside*, 547 /// 890, 896 (Tex. 2018)

Don’t lose sight of framing a new argument as just that.

# Complaints You Can First Raise on Appeal

## Fundamental error

Now a “discredited doctrine . . .” *Tamez* (2006); *B.L.D.*(2013)

### Only applies:

- Lack of subject matter jurisdiction (but not in mandamus).  
*Coppola*, 535 ///506, 510 (Tex. 2017); *Ron*, 14-18-00711-CV (14<sup>th</sup>, 2018)
- Some juvenile delinquency cases, and some issues in parental right termination cases.
- When error directly, adversely affects public generally, as declared by statute or constitution. *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982)

# Complaints You Can First Raise on Appeal

## The Double-Edged Sword: Lack of Subject Matter Jurisdiction

Improper Severance Order [CONFLICT]	
Order signed after plenary power ends	Lack of Standing (real controversy)
Lack of Ripeness	Defective Service
Lack of indispensable party	Damages exceed trial court jurisdiction
Pre-emption re: choice of forum (not law)	Sovereign Immunity (some SCOTX Justices disagree)
Statutory prerequisites to suit-maybe	State agency has exclusive original jurisdiction
Mootness	A case involving the political question doctrine
Internal management of a voluntary association	Ecclesiastical Abstention Doctrine

# Complaints You Can First Raise on Appeal

Some other specific complaints you can first raise on appeal:

<input type="checkbox"/> Ambiguity of contract	<input type="checkbox"/> Legal/Factual Suff. civil bench trial
<input type="checkbox"/> Constitutional disqualification of judge (interest; connection w/parties; prior counsel in case. art. V, §11)	<input type="checkbox"/> New rule of law announced after trial court decision. <b>CONFLICT</b>
<input type="checkbox"/> Actions beyond scope of trial judge's assignment.	<input type="checkbox"/> Temp. injunc. order d/n comply with Rule 683. <b>CONFLICT* <i>Enlist a Second Set of Eyes</i></b>
<input type="checkbox"/> Challenge to trial judge's qualifications.	<input type="checkbox"/> Inadequate notice of trial (shown on face of record). <b>CONFLICT</b>
<input type="checkbox"/> The trial judge who testifies at trial.	<input type="checkbox"/> Vexatious Litigation Statute. <i>Reeves</i> , 14 <sup>th</sup> COA, 2/5/21
<input type="checkbox"/> Trial judge's bias/prejudice shown on face of record.	<input type="checkbox"/> Some summary judgment stuff

\*Can first be raised on appeal: Dallas, Corpus, Beaumont, Tyler, Fort Worth, Texarkana, El Paso, Waco, Dallas, San Antonio, both Houston. Must raise in trial court: Amarillo, Austin. Great discussion: Concur, CJ Frost, *Hoist Liftruck*, 485 S.W.3d 120.

# Error Preservation Issues About Summary Judgments/Affidavits

Some summary judgment/affidavit complaints can first be raised on appeal.

Conversely, some such complaints must be raised in the trial court.

# Complaints You Can First Raise on Appeal: Summary Judgment Stuff

## No Evidence MSJ:

- Rule 166a(i)'s lack of specificity requirement (i.e., d/n i.d. the specific elements as to which no evidence). **CONFLICT**
  - Can first raise on appeal: Dallas, Tyler, Texarkana, El Paso, 14th, San Antonio.
  - Must be raised in trial court: Amarillo, Waco

## Traditional:

- Grounds not expressly presented in msj. *Energen v. Wallace*, (Tex. 3/11/22).
- Failure to prove as a matter of law that movant wins.

# Complaints You Can First Raise on Appeal: Summary Judgment Stuff

## Affidavit's Defect in Substance

Conclusory ( <b>CONFLICT</b> )	Parol Evidence
Subjective Belief	Unsigned Affidavit (but not absence of or failure to complete jurat)
Unsubstantiated Opinion	When Affidavit (or attachment) <i>shows</i> lack of personal knowledge ( <b>CONFLICT</b> )
Irrelevance	<b>NOTE: Mere failure to show personal knowledge must be raised in trial court. CONFLICT</b>

- Failure to attach documents to affidavits/unverified copies of same making affidavit inadmissible, perhaps as conclusory(**CONFLICT**)



# Complaints You Can First Raise on Appeal: Summary Judgment Stuff

## Failure to Attach/Failure to Authenticate Documents

- Failure to attach documents to affidavits/unverified copies of same makes affidavit incompetent as to those documents, and this complaint can first be raised on appeal (**CONFLICT**)
- ***BUT*** the failure to authenticate a document in motion practice is a complaint which must be raised in the trial court.

# Complaints You Can First Raise on Appeal: A Warning to All

But mostly remember this—if your new complaint works, but only gets you a remand:

You Are Back in Front of

*The Trial Judge Who*

*Did Not Want to See This Case Again*

# The Clock Is Ticking: Post-trial Complaints

## Irreconcilably conflicting jury answers (Rule 295)

The “absence of . . . an objection [to conflicting jury answers before the trial court dismisses the jury] . . . should not prohibit [an appellate court] from reaching the issue of irreconcilable conflicts in jury findings.”  
*Menchaca*, 545 III 479, 526 (Green, plurality, joined by Hecht, Guzman, and Brown); *see also In re Auto.*, No. 08-18-00149-CV, (El Paso Dec. 30, 2020) (post-verdict motion timely).

### **BUT, FROM SCOTX AFTER MENCHACA:**

“[A] party who claims that jury answers fatally conflict must raise that objection with the trial court before the court discharges the jury.” *Los Compadres*, 622 III 771, citing TRCP 295 and *Menchaca*.

# Sources of Post-Trial Complaints

- Opinions
- Rules—for example:
  - legal/factual sufficiency in a *civil* bench trial (TRAP 33.1(d)).
  - Legal/factual sufficiency in post-verdict motion practice in jury trial (Rule 279, Rule 324)
  - Incurable jury argument (Rule 324(b)(5))
  - Other Rule 324(b) matters (jury misconduct, newly discovered evidence, overwhelming weight, damages)

# The Clock Is Ticking: Post-trial Complaints

## Post-Verdict is Timely to Complain About:

- Immaterial Finding
- “Purely Legal Issue”
- Legal Insufficiency

These can be raised in a motion: to disregard; for judgment; for jnov; or new trial. *Musallam* (2018); *Red Deer* (2017); *Menchaca* (2018); *United Scaffolding* (2017).

# The Clock Is Ticking: Post-trial Complaints

## Post-Verdict Complaint is Timely re: Immaterial Finding

Examples of immaterial finding (*do the rationales apply to your case?*):

- P requesting question re: existence of K may say in JNOV no evidence supports same. *Musallam* (P wins @ SCOTX, remand: was quest. immaterial/no evid.).
- Wrong theory (negligence) submitted/correct theory (premises liability) omitted. *United Scaffolding*. (Rendition for Defendant)
- Using irrelevant date in asking if capable of production in paying quantities. *Red Deer* (rendition for D).
- Damages, when jury found that D violated insurance code but failed to find that D breached policy. *Menchaca*, (D wins at SCOTX, remand).
- Finding re reasonable fees under Chapter 38 when D was an LLC. *CBIF Limited* (Dallas 2017)

# The Clock Is Ticking: Post-trial Complaints

Jury Charge: “when . . . the wrong theory was submitted and the correct theory was omitted entirely, [D] has no obligation to object . . . . [otherwise] we would effectively force the [D] to forfeit a winning hand.” *United Scaffolding*, at 481 (Tex. 2017).

Wrong theory-Negligence? No Charge Objection Needed  
Right theory, no instruction-Premises? Needs Charge Obj.

Study majority and dissent in *United Scaffolding*. Also study *Innovative Block v. Valley Builders*: a jury finding on a defamation claim was immaterial when the cause of action actually sounded in business disparagement. 603 S.W.3d 409, 413.

# The Clock Is Ticking: Post-trial Complaints

## Post-Verdict Complaint is Timely for a “Purely Legal Issue”

Examples of Purely Legal Issues (*do the rationales apply to your case?*):

- Applicability of Chapter 95 (liability of property owner to Ind. K’or).
- Capping of exemplary damages (MNT preserves. *Zorrilla* 469///143, 157)
- Party is not jointly and severally responsible for exemplary damages. (Mot. For Judgment. *Horizon v. Acadia*, 520 /// 848, 881)
- That contractual damages are independent of statutory damages. (Mo. For Judgment preserves. *Menchaca*, 545 /// 487, n. 8)



# The Clock Is Ticking: Post-trial Complaints

## Legal and Factual Sufficiency Complaints

Jury Trial: can first raise in post-trial motions—even if the moving party submitted the question (Rule 279).

[Civil Bench Trial: can first raise on appeal (TRAP 33.1(d))]

# The Clock Is Ticking: Post-trial Complaints

## Legal Sufficiency Complaints—Examples:

→ no evidence of control over perpetrators is *not* a complaint of misidentification requiring a verified denial. *Ross Stores v. Miller*, 14-18-01032-CV [14<sup>th</sup> coa, 11/3/20).

no evidence supports K's existence. *Musallam*

→ Expert testimony is facially conclusory/speculative. *Emerson Elec. v. Johnson*, (SCOTX 4/16/21) (even though “wrong test” complaint was waived).

→ Failure to Segregate Fees. CONFLICT

→ The amount of damages

→ “no evidence to support the disputed items submitted in the broad-form charge” preserves *Casteel*—but does that mean it can be first asserted post-verdict? *Thota*, 366 /// 678, 691 (Tex. 2012)

→ ***Can't recover fees under Chapter 38 from an LLC!*** *CBIF Limited* (Dallas 2017)

# The Clock Is Ticking: Post-Trial Complaints (thanks to Heidi)

- Utilize the checklists, above.
- If your issue involves a statute or rule, invoke it:
  - did a no evidence complaint preserve a statutory interpretation question?
  - Does a question of law argument exist which renders findings (jury/bench/implied) immaterial?
- **In addition to specific legal/factual insufficiency complaints, assert a broadly worded legal/factual insufficiency complaint.**  
***BUT*** “stock objections may not ...preserve error”- “cardinal rule...objection must be clear enough to give the trial court an opportunity to correct it.” *Arkoma v. FMF*, 249///380, 387 (Tex. 2008); *Ski Team* (14<sup>th</sup> 3/3/22); *Foster* (Austin 3/4/22).

# Question

Is there any complaint that cannot be couched as:

A legal insufficiency complaint;

An immateriality complaint—which can be couched as a legal insufficiency complaint;

A complaint involving a question of law?

# How About the Failure to Segregate Fees?

What about the claim which is sometimes the largest dollar value component of the lawsuit—the claim for attorney's fees, and the failure to segregate those fees?

# How About the Failure to Segregate Fees?

The failure to segregate attorney's fees:

- Jury Trial: can be preserved by objection to charge (can it be preserved as **legal/factual suff.** point in post trial motion?).
- Civil Bench Trial: **CONFLICT**
  - Must be raised when evidence offered: 1<sup>st</sup>, 4<sup>th</sup>, 13<sup>th</sup>(?), 14<sup>th</sup>
  - In response to msj. 14<sup>th</sup> (?)
  - Before trial court rules. 2<sup>nd</sup>
  - After trial court rules, but before signing judgment: 5<sup>th</sup>
  - Motion new trial too late. 3<sup>rd</sup>
  - Post-judgment motion. 14<sup>th</sup>
  - As **legal/factual suff. point** on appeal. 13<sup>th</sup>, 5<sup>th</sup> concurrence

# Pulling Oxen From Ditches: The Checklist Is Just the First Step

- Use the Checklist to identify potential complaints

*PLUS*

- Carefully evaluate the viability of the complaint:
  - Sometimes only one court-or a few-hold a complaint can first be raised on appeal
    - Has your court of appeals ruled, and is it on your side?
    - What will your court of appeals-or the Supreme Court-hold?
  - the many **CONFLICTS** among the courts of appeals.
    - *See also* Ho, Busby, et al, paper re: conflicts among courts of appeals.
  - *Lots* of turnover in courts of appeals in the last general election:
    - Partisan shifts in Austin, Dallas, Houston, and San Antonio Courts
    - *Plus*, other courts have seen transitions due to retirements (Fort Worth)
- *A new idea does not necessarily mean a viable idea.*