

## Two Error Preservation Checklists

Steven K. Hayes  
Law Office of Steven K. Hayes  
500 Main Street, Suite 340  
Fort Worth, Texas 76102  
[www.stevhayeslaw.com](http://www.stevhayeslaw.com)  
[shayes@stevhayeslaw.com](mailto:shayes@stevhayeslaw.com); 817/371-8759

### 1. The most frequent error preservation categories

- A. Affidavits...
- B. Attorney's Fees...
- C. Constitutional Challenges (including Due Process complaints)...
- D. Continuance...
- E. Discovery...
- F. Due Process...
- G. Evidence..
- H. Expert Witness..
- I. Factual Sufficiency..
- J. Judgment..
- K. Jury Argument..
- L. Jury Charge (including instructions)..
- M. Legal Sufficiency..
- N. Notice..
- O. Pleadings..
- P. Sanctions..
- Q. Summary Judgment...

### 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. . .
- ii. Other components of subject matter jurisdiction. . .
- Standing. . . . .
- Ripeness. . . . .
- Mootness. . . . .
- Defective service. . . . .
- iii. A temporary injunction order which does not comply with Rule 683. **CONFLICT**. . . . .
- b. An important public interest or public policy. . . . .
- c. Certain issues in juvenile cases. . . . .
- 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).” . . . . .
- 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. . . . .
- the trial court’s failure to inquire as to the juvenile’s competence to stand trial. . . . .
- 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. . . . .
- d. Certain issues in parental-right termination cases. . . . . 
  - ineffective assistance of counsel, including in some contexts the right to be apprised of one's right to court-appointed counsel. . . . .
  - 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. . . . .
  - a trial court's failure to appoint an attorney ad litem or amicus attorney for a child in a private termination case . . . . .
  - 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).
  - that the trial court failed to comply with the statutory dismissal deadline deprived the court of jurisdiction . . . . .
- 2. Other stuff. . . . . 
  - a. Ambiguity of contracts. . . . .
  - b. Complaints about judges. . . . . 
    - 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.. . . .
    - ii. Actions beyond the scope of the judge's assignment. . . . .
    - iii. Challenge to a trial judge's qualifications. . . . .
    - iv. A trial judge may not testify as a witness at trial. . .
    - v. A trial judge's bias or prejudice shown on the face of the record. . . . .
  - c. Inadequate notice of a hearing (so long as you don't show up for the hearing in question). **CONFLICT**. . . .
  - d. Change in applicable law. **CONFLICT**. . . . .
  - e. Complaints about legal and factual sufficiency in a bench

- trial .....
- f. Certain complaints about affidavits in, and other aspects of, summary judgment practice. .... 
  - i. Complaints can first be raised on appeal about the following substantive defects in affidavits. .... 
    - a conclusory statement. **CONFLICT**. ....
    - a subjective belief. ....
    - an unsubstantiated opinion. ....
    - a lack of relevance.. ....
    - the parol evidence rule. ....
    - that a party’s own interrogatory responses may not be used in its favor in a no evidence challenge,.. . .
    - an unsigned affidavit. ....
  - 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 .. .... 
    - Most courts of appeals hold that a complaint that an affidavit that merely fails to show the affiant’s personal knowledge is an objection as to form which must be raised in the trial court. **CONFLICT**. ....
    - In any event, in a couple of courts of appeals you may be able to complain that the absence of a showing of personal knowledge is a complaint that can first be raised on appeal. **CONFLICT**.. ....
  - 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**. ....
  - iv. The failure to authenticate a document in motion practice is a complaint which can first be raised on appeal.. ....
- g. That the no-evidence motion for summary judgment is not sufficiently specific. **CONFLICT**. ....
- h. That the traditional summary judgment motion fails to prove the entitlement of the movant to judgment as a matter of law. ....

- i. If you don't object to the trial court sustaining the other side's objections to your summary judgment evidence, you may not be able to complain about the trial court's rulings on appeal. . . . .
      - j. Certain complaints about affidavits used outside summary judgment practice—at least consider all the summary judgment affidavit complaints. . . . .
- B. Complaints which can be raised when it's too late to fix them.. . . . 
  - 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. . . . .
  - 2. Legal and factual sufficiency complaints—how creative can you be?. . . . . 
    - 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**. . . . .
    - 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**. . . . .
    - c. A complaint that legally insufficient evidence supports the jury's answer to a question the complaining party submitted. Tex. R. Civ. P. 279... . . . .
    - 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... . . . .
  - 3. Immaterial jury findings, or jury findings regarding a "purely legal issue." . . . . 
    - a. What makes a jury finding immaterial?. . . . . 
      - ☞the question asks the jury about damages on an irrelevant date . . . . .
      - ☞the question asks the jury to find whether there was negligence in a case pled as a premises liability claim. . . . .

- ☛the question asks the jury to find reasonable attorney’s fees when such fees are unrecoverable (including when recovery of fees is sought under Chapter 38 against an LLC). . . . .
- i. A case study in the difficulties and disagreements regarding immateriality and preserving charge error–United Scaffolding. . . . .
- b. What constitutes a purely legal issue?. . . . . 
  - i. that Chapter 95 applies. . . . .
  - ii. exemplary damages are capped. . . . .
  - iii. a party is not jointly and severably responsible for exemplary damages. . . . .
  - iv. contractual damages are independent of statutory damages. . . . .
- 4. Incurable jury argument. Tex. R. Civ. P. 324(b)(5). . . . .
- 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. . . . .