

**ETHICAL CONDUCT ON APPEAL:
IT'S WHAT'S EXPECTED**

**Kevin Dubose
HOGAN DUBOSE & TOWNSEND, L.L.P.
700 Louisiana, Suite 4200
Houston, Texas
Telephone: 713.222.8800
Fax: 713.222.88.10
e-mail: kdubose@hdtlaw.com**

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ETHICAL CONDUCT ON APPEAL: IT'S WHAT'S EXPECTED

I. INTRODUCTION

Trial lawyers who venture forth into the appellate arena often notice that practicing in the appellate courts is like entering a different world. It's not just the increased emphasis on written briefs, the more formal interactions with the judges, and a whole new set of procedural rules that can be demanding and unforgiving. Those differences are often expected. What is less likely to be expected is a sometimes subtle, but often extremely important, difference in the way that appellate advocates are expected to treat each other and the court.

If trial litigation is at times comparable to hand-to-hand-combat, appellate practice is more like diplomatic negotiations. The outcome of a trial often depends on a jury making credibility determinations to resolve disputed facts. One of the best ways to persuade the jury that the other side's case is not credible is to attack the credibility of the person presenting that case: opposing counsel. On appeal, the credibility determinations made by the fact-finder in the trial court are given great deference, and the primary emphasis is on applying the law, given the facts found by the jury or trial judge. Appellate courts universally consider this process a more dignified and academic exercise, in which the advocates' function is more to assist the court than to attack opposing counsel. Attorneys who do not appreciate this feature of the appellate culture are likely to stick out like a sore thumb, and their clients' interests suffer in the process.

As a reflection to the Appellate Bar's heightened sensitivity to ethics and professionalism, the Texas Supreme Court and the Texas Court of Criminal Appeals jointly promulgated the Standards for Appellate Conduct in 1999. The adoption of these standards made Texas the first jurisdiction in the country to endorse ethical standards specifically applicable to appellate courts. More importantly, the appellate judiciary in Texas has made it clear that these are not meant to be lofty aspirational goals that can be printed on a nice brochure to gather dust in reception areas.¹ Rather, they are intended to provide guidance to attorneys practicing in appellate courts about what conduct is expected. The drafters of the Standards also hoped that these standards

would provide a reflection of the conduct that actually takes place in those courts. For the most part, they do.

II. SUGGESTIONS FOR ETHICAL CONDUCT ON APPEAL

These suggestions were originally conceived as a column for a local bar section newsletter in 1991, and were generated off the top of my head. I later discovered that each of them found support in the "Texas Lawyer's Creed—A Mandate for Professionalism," which had been promulgated in 1989, but, unfortunately, is largely ignored by many attorneys today. They now have support in the "Standards for Appellate Conduct." Accordingly, I have reproduced excerpts from both the Standards and the Creed following each suggestion.

Some of the problems addressed in these suggestions are more serious than others. Some fall under the category of clearly unethical, and are prohibited by the Texas Disciplinary Rules of Professional Conduct. Others are a matter of professionalism, and strongly discouraged by the "Standards for Appellate Conduct" and "Texas Lawyer's Creed—A Mandate for Professionalism." Still others are merely unnecessary, aggravating, and ill-advised.

Some of these rules may have exceptions in extraordinary circumstances. Nevertheless, a lawyer who attempts to follow these suggestions in the appellate courts will not be perceived as inappropriate.

A. Do Not Make Personal Attacks On Opposing Counsel.

Joining issue with the arguments that are made is appropriate and advisable. However, attacking the integrity, intelligence, sanity or character of the person who made the argument is always a bad idea. Appeals are about legal issues, not personalities.

Standards for Appellate Conduct

Lawyers' Duties to Lawyers (No. 1). Counsel will treat each other and all parties with respect.

Lawyers' Duties to Lawyers (No. 5). Counsel will not make personal attacks on opposing counsel or parties.

Texas Lawyer's Creed

II. 4. *I will advise my client that civility and courtesy are expected and are not a sign of weakness.*

II. 6. *I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.*

III. 1. *I will be courteous [and] civil, in oral and written communications.*

II. 9. *I can disagree without being disagreeable . . . effective representation does not require antagonistic or obnoxious behavior.*

III.10. *I will avoid disparaging personal remarks or acrimony towards opposing counsel. . . . I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.*

B. Do Not Accuse Opponents Of Lying, Unless:

1. You can prove the lie beyond a reasonable doubt.

Accusing an attorney of dishonesty is a serious charge that should never be made without rock solid proof. Making the charge in error can tarnish the reputation of the accuser. An attorney is not lying simply because he makes an argument that is supported by the record, just because you can find support in the record for a contrary position. Conflicting evidence does not constitute lying. Conflicting interpretations of the same evidence is not lying. A typographical error may be a good faith mistake that should not be grounds for an accusation of a deliberate attempt to deceive.

2. It is a matter of substance and significance.

If you are going to risk accusing someone of lying, the lie should pertain to a matter that goes to the substance of an argument that the case may turn on. It should not be about a trivial matter that is not likely to affect the outcome of the case.

Standards for Appellate Conduct

Lawyers Duties to Lawyers (No. 6). Counsel will not attribute bad motives or improper conduct to other counsel without good cause, or make unfounded accusations of impropriety.

Texas Lawyer's Creed

III.10. *I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety.*

C. Do Not Oppose Motions For Extension Of Time, Motions For Leave To Exceed Page Limit, Motions For Leave To File Post-Submission Briefs, Etc.

These are matters between the court and the party seeking a discretionary favor. Although the adversary of the party seeking a favor is not a wholly uninterested third party, there is little to be gained by turning these pleas for mercy into a cat fight. Parties that ask for more time, more pages, and more briefs are often shooting themselves in the foot anyway, because appellate judges who are pressed for time and bogged down with paper do not want to read more pages and additional briefs. If your adversary wants to hang herself in that way, you should gladly give her enough rope. If you believe that the granting of mercy in these situations will unfairly disadvantage your client, wait until mercy has been granted to the other side, and then request the same treatment for your client, and the court will almost always grant it.

Standards for Appellate Conduct

Lawyers' Duties to Lawyers (No. 2). Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel.

Lawyers' Duties to Clients (No. 10). Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.

Texas Lawyer's Creed

II. 7. *I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.*

II. 10. *. . . I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives.*

III. 6. *I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.*

Texas Disciplinary Rules of Professional Conduct

Rule 3.02. In the course of litigation, a lawyer shall not take a position that unreasonably increases the cost or other burdens of the case or that unreasonably delays resolution of the matter.

D. Agree To The Substitution Of Copies When Original Documents Or Exhibits Have Been Lost.

Most rules for repairing a broken appellate record provide two ways to supply the missing pieces: an easy way, based on the agreement of the parties, and a more difficult way necessitated by the failure of the parties to agree. See TEX. R. APP. P. 34.5(e) (regarding clerk's record, copies substituted if parties agree, court must resolve disputes and substitute copies if parties cannot agree). But see TEX. R. APP. P. 34.6(f) (if a "significant exhibit" or a "significant portion of the court reporter's notes and records" is lost or destroyed, and the lost or destroyed portion of the reporter's record is "necessary to the appeal's resolution," if the parties cannot agree on substitution the appellant is entitled

to a new trial). Parties who are victimized by deficiencies in the record can usually achieve what they want eventually, it is just a matter of whether that will be done the hard way or the easy way. Try to choose the easy way. It will save time and money, and building some good will by being agreeable will not hurt either. You may need a favor yourself some day.

Standards for Appellate Conduct

Lawyers' Duties to Clients (No. 10). Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.

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III. 6. *I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.*

Texas Disciplinary Rules of Professional Conduct

Rule 3.02. In the course of litigation, a lawyer shall not take a position that unreasonably increases the cost or other burdens of the case or that unreasonably delays resolution of the matter.

E. In Briefs, Do Not Fail To Provide Record References To Statements About What Transpired At Trial.

Allegations without record references mean that opposing counsel must search the entire appellate record to find the passage so it can be addressed.

Unfortunately, appellate judges and briefing attorneys have to do the same thing, and they are not favorably disposed toward lawyers who create more work for them. Thus, this breach is not only discourteous to opposing counsel, it is also counter-productive with the appellate court. Finally, assertions without record references invariably raise doubt about whether the statement is true, which undermines the credibility of the appellate advocate.

Standards for Appellate Conduct

Lawyers' Duties to the Court (No. 3). Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.

F. Do Not File Last Minute Briefs.

Before September of 1997, the Texas Rules of Appellate Procedure only had time limits for initial briefs by each party, but did not address the time for filing reply briefs. This often led to the filing of reply briefs a day or two before oral argument. The current rules remedied the immediate problem by requiring an appellant's reply brief to be filed 20 days after the appellee's brief is filed. See TEX. R. APP. P. 38.6. Moreover, since rule 38.6 provides deadlines for appellant's brief, appellee's brief, and a reply brief, but makes no mention of any other brief, many practitioners have assumed that no other briefs would be permitted. However, other practitioners have argued that the rule does not expressly prohibit the filing of other briefs, so that additional briefing is permitted, without time limits.

Assuming *arguendo* that additional briefing is permitted, a brief should never be handed to opposing counsel for the first time at oral argument. When unavoidable circumstances require the filing of last minute briefs, the party making the last minute filing should call opposing counsel to advise her to expect it, and should either fax the brief or deliver it by messenger as soon as possible, rather than sending it by fourth class mail and hoping that it will not arrive until after oral argument.

Standards for Appellate Conduct

Lawyers' Duties to Lawyers (No. 11). Counsel will not serve briefs or other communications in a manner or at a time that unfairly limits another party's opportunity to respond.

Texas Lawyer's Creed

III. 7. *I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.*

G. Do Not Go Beyond The Record In Briefs Or In Oral Argument.

Most appellate lawyers know better than to go beyond the record in briefs, though it still sometimes happens. The more common problem occurs in face-to-face conversation with the court during oral argument, when it is sometimes tempting to say, "Well, Your Honor, you see what really happened was that . . ." If it is not in the appellate record, it should be treated as if it did not happen, and should not be discussed.

Standards for Appellate Conduct

Lawyers' Duties to the Court (No. 3). Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.

The Court's Relationship with Counsel (No. 2). The court will take special care not to reward departures from the record.

Texas Lawyer's Creed

IV. 2. *I will conduct myself in court in a professional manner and demonstrate my respect for the Court and the law.*

IV. 6. *I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.*

H. Avoid Arguing Frivolous Positions In Briefs Or In Oral Argument.

Never make an argument that you are fairly sure you cannot win. You waste your time in making it, opposing counsel's time in responding to it, and the court's time in reading it, hearing it, and writing about it. Moreover, the credibility that you lose in making weak arguments can diminish the effectiveness of your strong arguments. It is better to make no argument at all than to make a weak argument. Or, as the old saying goes, "It is better to

keep your mouth closed and be thought a fool than to open it and remove all doubt."

Standards for Appellate Conduct

Lawyers' Duties to the Court (No. 1). An appellate remedy should not be pursued unless counsel believes in good faith that error has been committed, that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

Lawyers' Duties to the Court (No. 2). An appellate remedy should not be pursued primarily for purposes of delay or harassment.

Lawyers' Duties to the Court (No. 4). Counsel will advise the Court of controlling legal authorities, including those adverse to their position, and should not cite authority that has been reversed, overruled, or restricted without informing the court of those limitations.

Texas Lawyer's Creed

- II. 9. . . . we will not pursue any course of action which is without merit.
- IV. 8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

Texas Disciplinary Rules of Professional Conduct

- 3.01. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.
- 3.03. (a) A lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a tribunal;
 - (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

- (5) offer or use evidence that the lawyer knows to be false.

I. During Oral Argument, Do Not Distract The Court During Your Opponent's Argument.

Some advocates feel that they have a duty to let the court know how they are reacting to opposing counsel's argument. The most common types of telegraphed responses are looks of disbelief and disagreement. This kind of grandstanding is not only rude, but it is likely to be counterproductive with appellate judges who see through it and do not like it. Keep a poker face and avoid distracting movements.

Standards for Appellate Conduct

Lawyers' Duties to Lawyers (No. 1). Counsel will treat each other and all parties with respect.

Lawyers' Duties to the Court (No. 7). Counsel will conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process.

Lawyers' Duties to the Court (No. 10). Counsel will not permit a client's or their own ill feelings toward the opposing party, opposing counsel, trial judges or members of the appellate court to influence their conduct or demeanor in dealings with the judges, staff, other counsel, and parties.

Texas Lawyer's Creed

- IV. 1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
- IV. 2. I will conduct myself in court in a professional manner and demonstrate my respect for the Court and the law.
- IV.5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

Texas Disciplinary Rules of Professional Conduct

- 3.04. A lawyer shall not:

(5) *engage in conduct intended to disrupt the proceedings.*

anyone or indulge in any offensive conduct.

J. Communicate with Opposing Counsel Throughout the Appellate Process.

Sad—but not uncommon—is the case in which appellate counsel speak to each other for the first time at oral argument. Counsel should call each other as soon as they have been identified, introduce themselves if necessary, and try to establish an air of mutual cordiality. Do not assume that opposing counsel will oppose everything that you want to do, or that you should oppose everything that they want to do. Try to agree to everything you can that will not jeopardize the interest of your client. These agreements are most likely to happen if appellate counsel are in regular communication with each other.

Standards for Appellate Conduct

Lawyers' Duties to Clients (No. 9). Counsel will advise their clients of proper behavior, including that civility and courtesy are expected.

Lawyers' Duties to Clients (No. 10). Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.

Lawyers' Duties to Lawyers (No. 1). Counsel will treat each other and all parties with respect.

Lawyers' Duties to Lawyers (No. 2). Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel.

Texas Lawyer's Creed

II. 4. *I will advise my client that civility and courtesy are expected and are not a sign of weakness.*

II. 6. *I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse*

II. 9. *. . . we will not pursue any course of action which is without merit.*

IV. 3. *I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.*

III. REASONS TO FOLLOW THESE SUGGESTIONS

A. Because It Is The Right Thing To Do.

As Faye Dunaway's Mrs. Pendrake told Dustin Hoffman's Jack Crabbe while she was bathing him in one of the early scenes of the movie *Little Big Man*, "Virtue is its own reward." Treating other appellate lawyers in a more civilized and accommodating manner should make you feel better about yourself. It will certainly make them feel better about you when they have to deal with you in other cases, or when considering people for appellate referrals. It will undoubtedly make the appellate court personnel feel better if they perceive that they are engaged in the dignified task of resolving disputes and meting out justice rather than refereeing a cock fight. As the preamble to the *Texas Lawyer's Creed* states "Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right."

B. It Will Enhance Your Client's Chance Of Achieving A Favorable Result.

Uniformly, judges find the conduct cautioned against in these suggestions to be offensive. Although those judges decide cases based on the law and the facts rather than on the personalities of the advocates, they are also human beings whose perception of the message cannot avoid being influenced by their feelings about the messenger. Credibility plays a role in decision-making, and human beings do not tend to place much credibility in those persons they consider to be offensive. Moreover, the judges may conclude, consciously or unconsciously, that persons who resort to unprofessional tactics are doing so in order to gain an unfair advantage because they lack the conviction in their

substantive arguments to prevail if they play the game fairly.

In an opinion by the Fourteenth Court of Appeals last year, Justice Kem Frost eloquently expressed the court's frustration with unethical conduct and the adverse impact it can have on the client's case: "When counsel misrepresent the facts on which their legal arguments are based, they not only delay the entire process by unnecessarily adding to the court's workload, but also render a tremendous disservice to their clients. It is also a very poor strategy to misrepresent the record because any material misstatements and/or omissions will almost certainly be detected by opposing counsel, the appellate panel, and/or the court's alert and able staff." *Schlafly v. Schafly*, 33 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Thus, even if you are cynical enough to not be motivated to do the right thing simply because it is right, you should at least do the right thing because it is calculated to improve your client's chances of winning.

C. Unconvincing Reasons To Disregard These Suggestions.

Appellate advocates may chose to disregard these suggestions for a variety of reasons. The most common explanations, and the reasons that they are unconvincing are as follows:

1. "My clients expect me to play hardball with their despised enemies."

Clients who are uneducated about the appellate process and the ethical standards of the profession may sincerely believe that their position is best served by an aggressive, combative, uncooperative posture in all aspects of the appeal. However, just as lawyers have a duty to educate their clients about the substantive law, they also have a duty to educate their clients about the way that the game is, or should be, played. The Standards for Appellate Conduct, the Texas Lawyer's Creed, and the Texas Rules of Disciplinary Conduct all recognize this problem of clients who want to vent their spleen through the conduct of their lawyer, and place the burden on the attorney to educate the client about the inappropriateness of these expectations.

The Standards for Appellate Conduct approach this problem in two ways: 1.) By specifying what an appellate attorney must advise their clients regarding professionalism, and 2.) By limiting what clients have a right to expect from their attorney. Attorneys must "*advise their clients of the contents of the Standards of Conduct when undertaking representation.*" St. App. Cond, Lawyers' Duties to Clients at 1. They must advise their clients "*of proper behavior, including that civility and courtesy are expected,*" *id.* at 9, and that the attorney "*reserves the right to grant accommodations to opposing counsel in matters that do not affect the client's lawful objectives.*" *Id.* at 10. The client has no right to "*instruct a lawyer to refuse reasonable requests made by other counsel,*" *id.*, or to "*demand that counsel abuse anyone or engage in any offensive conduct.*" *Id.* at 11.

From the outset, the Texas Lawyer's Creed states, "*I am obligated to educate my clients . . . regarding the spirit and letter of this Creed.*" *Texas Lawyer's Creed* at I. 4. This obligation begins from the inception on the relationship. "*I will advise my clients of the contents of this Creed when undertaking representation.*" *Id.* at II. 1. The Creed requires the attorney to advise the client "*that civility and courtesy are expected and are not a sign of weakness,*" *id.* at II. 4., and that the "*client has no right to demand that I abuse anyone or indulge in any offense conduct,*" *id.* at II. 6. Specifically, the Creed requires the attorney to advise the client that he will not "*pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party,*" *id.* at II. 7.; "*pursue tactics which are intended primarily for delay,*" *id.* at II. 8.; and "*will not pursue any course of action which is without merit,*" *id.* at II. 9. Finally, the Creed requires the attorney to advise the client that he "*reserve[s] the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives.*" *Id.* at II. 10.

The Texas Rules of Disciplinary Conduct also recognize this potential tension between the client's desires and the attorney's duty to behave professionally. Although the Rules state that "*a lawyer shall abide by a client's decisions concerning the objectives and general methods of representation,*" Texas Rule of Disciplinary Conduct 1.02(b) states that "*a lawyer may limit the scope,*

objectives and general methods of the representation if the client consents after consultation." Id. at 1.02 (b). Moreover, "When a lawyer knows that a client expects representation not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct." Id. at 1.02 (f). Despite the client's originally expressed intentions, when "representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Id. at 2.01. Moreover, despite what the client wants, "A lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." Texas Rules of Disciplinary Conduct 3.01. The comment to Rule 3.01 explains, "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." Id. at comment 1. Moreover, "a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter." Id. at 3.02.

Thus, although the lawyer owes the client a duty to abide by the client's wishes, that duty does not override the concurrent duty to behave in a professional manner. If the client demands unprofessional conduct, and the attorney is unable to persuade the client otherwise, withdrawal may be the only alternative. *See id.* at 1.02, comment 8.

2. "They did it first."

I often hear this justification for misconduct when fighting breaks out between my two adolescent sons. It is considerably more disappointing to hear a similar argument from grown professionals. The lawyer's version of this whine usually goes something like, "I can be pretty easy to get along with as long as the other attorney plays fair with me, but if they mess with me I have the right to get them back." As an initial emotional response to unprofessional conduct this is understandable. However, the temptation to respond in kind should be resisted. Wait a couple of days to cool off before firing off an angry response. Go ahead and dictate the venomous retort, but throw it away or edit it severely when cooler reason prevails. When one party to a dispute stoops to unprofessional conduct, but the other party adheres

strictly to the high standards that should be expected of the professional, the contrast is vividly apparent to the appellate court personnel, which will be more impressed by the attorney who takes the high road. Two wrongs do not make a right. When it comes to professionalism, "turn the other cheek" is a better rule than "an eye for an eye, and a tooth for a tooth."

IV. CONCLUSION

Appellate courts really do expect a higher level of professionalism and ethical conduct than what is often seen in the trial courts. Any lawyer who comes into the appellate courts and behaves in a manner that is perceived as overly adversarial, non-cooperative, or less than completely candid is likely to be noticed and remembered, to the detriment of the client. Ethical conduct in the appellate courts is not only a good idea, it is undeniably expected by the appellate courts.

1. In the short time that the Standards have been in effect they already have been cited in several appellate opinions. See *In re Goldblatt*, 38 S.W.3d 802, 805 (Tex. App.—Fort Worth 2001, no pet.); *Schlafly v. Schlafly*, 33 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Ex parte Lafon*, 977 S.W.2d 865, 868 (Tex. App.—Dallas 1988, no pet).