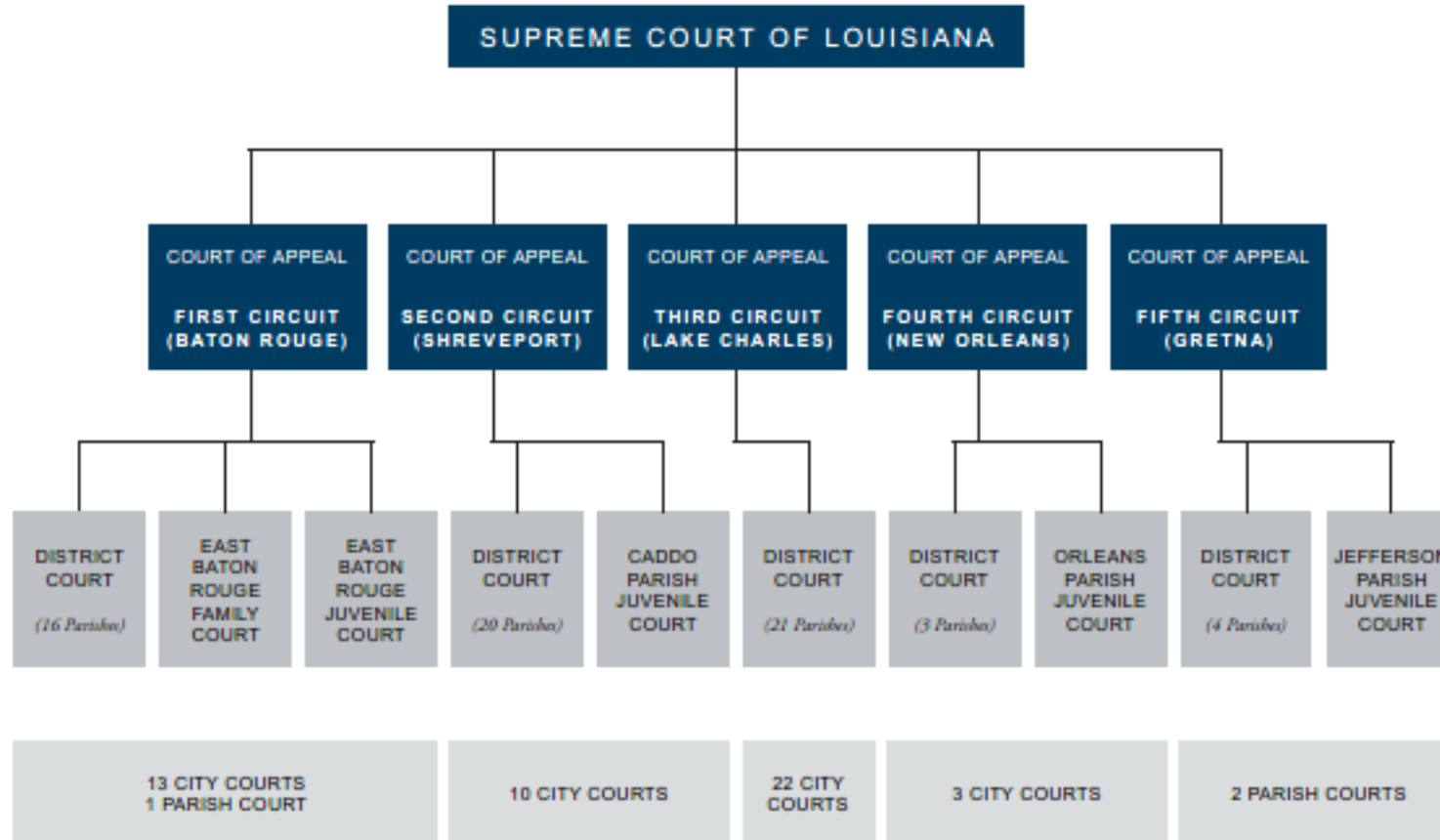


Appellate Practice: Writs and Appeals

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Source: La. Supreme Court 2021 Annual Report
See also La. Const. art. V §§ 5, 10, and 16.

How to succeed at appellate practice

1. Understand the court's jurisdiction (power) and function.
2. Know the standards of review.
3. Know the record.
4. Follow the rules. Be suspicious of forms.
5. Act like a professional writer.

1

Jurisdiction (Power) and Function

What the court can (and cannot) do

Jurisdiction defined

“Jurisdiction is the legal power and authority of a court to hear and determine an action or proceedings involving the legal relations of the parties, and to grant the relief to which they are entitled.”

— La. Code Civ. P. art. 1.

Jurisdiction and Function

District court	Original jurisdiction La. Const. art. V § 16(A).	Determine the facts. Render final judgment on the merits.
Court of appeal	Appellate and supervisory jurisdiction. La. Const. art. V § 10(A).	Correct errors by the district court.*
La. Supreme Court	Mostly supervisory jurisdiction. La. Const. art. V § 5(A) and (D).	Develop Louisiana jurisprudence.*

* See *Boudreaux v. State, DOTD*, 2001-1329, p. 3 n. 5 (La. 2/16/02), 815 So. 2d 7, 9 n. 5.

Quotable quotes about courts of appeal

“However persuasive the argument, the appellate court does not function as a choice-making court; the appellate court functions as an errors-correcting court.”

— *Hayes Fund for First United Methodist Church of Welsh, LLC v. Kerr-McGee Rocky Mountain, LLC*, 2014-2592, p. 2 (La. 12/8/15), 193 So. 3d 1110, 1112.

“The function of the Court of Appeal is to correct errors, not make choices it prefers over the District Court when there are two or more permissible views of the evidence.”

— *Id.*, p. 67, 193 So. 3d at 1150.

Quotable quotes about LASC

“A litigant is not entitled ... to two appeals; any further review after the first appeal should be provided only in the interest of the law and the legal system.”

—*Boudreaux v. State, DOTD*, 2001-1329, p. 3 n. 5 (La. 2/26/02), 815 So. 2d 7, 9 n. 5.

LASC has “institutional, law-developing role,” not “error-correcting” role.

—*Id.*

“[S]imple error below is usually not sufficient to warrant review by the [supreme] court.”

—I.H. Ryan and J.T. Benson, *Get That Writ: Civil Writ Practice before the La. Supreme Ct.*, 48 La. B.J. 120, 121 (Aug. 2000).

2

Standards of Review

An appeal is not a do-over.

“Standard of review” defined

“The phrase ‘standard of review’ refers to the degree of deference that an appellate court must accord to the decision of the lower court or administrative agency whose ruling is being reviewed.”

—*Booth v. State*, 251 P.3d 369, 372 (Alaska 2011).

Jurisdiction drives standards of review

“This state’s appellate review standard ... is constitutionally based and jurisprudentially driven ...”

—*Stobart v. State, DOTD*, 617 So. 2d 880, 882 n. 2 (La. 1993).

Jurisdiction drives standards of review

The manifest-error standard of review “is based not only upon the trial court’s better capacity to evaluate live witnesses (as compared with the appellate court’s access to only a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts.”

—*Canter v. Koehring Co.*, 283 So. 2d 716, 724 (La. 1973); *Stobart v. State, DOTD*, 617 So. 2d 880, 883 (La. 1993); *Marange v. Custom Metal Fabricators, Inc.*, 2011-2678, p. 8 (La. 7/2/12), 93 So. 3d 1253, 1258.

Standards of review, grossly oversimplified

Manifest error (a.k.a. “clearly wrong”)	Highly deferential. Applies to fact findings.
Abuse of discretion	Deferential. Applies to discretionary rulings (anything where court “may” do something).
De novo	No deference. Applies to rulings of law (e.g. summary judgments, exceptions not involving disputed facts).

You must brief the standard of review

Brief must contain for each issue, a concise statement of the standard of review.

—Fed. R. App. P. 28(a)(8)(B).

—La. Ct. App. Unif. R. 2-12.4(A)(9)(b).

“The ability to correctly state the standard of review is a question of minimum professional competence.”

—Tessa L. Dysart, Leslie H. Southwick, and Ruggero J. Aldisert, *Winning on Appeal* § 5.2 at 52 (3d ed. 2017)..

3

Know the Record

“If it’s not in the record, it doesn’t exist.”
—Hon. Max Tobias

What is this “record”?

- All pleadings, orders, judgments, and other papers filed with the clerk of the trial court
- Transcripts of trial-court proceedings
- Exhibits admitted into evidence or proffered in the trial court
 - In La. state court, *see* La. Ct. App. Unif. R. 2-1.5 – 2.1.9.
 - In federal court, *see* Fed. R. App. P. 10.

Jurisdiction and the record

“This court cannot receive evidence, therefore we cannot render a judgment based on consent of the parties not evidenced in the record on appeal.”

—*Hester v. Hester*, 501 So. 2d 910, 911 (La. App. 5 Cir. 1987).

Importance of the record

“The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal.”

—La. Code Civ. P. art. 2164.

“Under La. C.C.P. art. 2164, the scope of review on appeal is limited to the contents of the record as lodged in the appellate court.”

—*Ballard v. Lambert*, 624 So. 2d 8, 10 (La. App. 5 Cir. 1993).

You must master the record

“At the appellate stage, knowing your case means, first and foremost, knowing the record. You never know until it is too late what damage a gap in your knowledge of the record can do—not only at oral argument ..., but even in your brief.”

—Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* § 3 at 8 (2008).

Your brief must be based on the record

Every assertion in a brief must be supported by a citation to a specific page in the record.

- In state court, La. Ct. App. Unif. R. 2-12.4(A)(9)(a).
- In the U.S. Fifth Circuit, 5th Cir. R. 28.2.2.

How to cite the record

By volume, abbreviation, and page (like So. 3d and F.3d):

5 R. 1249 (vol. 5 p. 1249)

In the U.S. 5th Circuit (mandatory):

ROA.[page]

4

Follow the Rules

Beware of forms.

Hazards of forms

- **Obsolescence**
 - Rules change. Forms do not.
- **Preserve bad legal writing**
 - “Now into court,” blah blah blah
 - “Wherefore, premises considered”

Louisiana rules and where to find them

La. Code Civ. P. arts. 2081 – 2201	La. Legislature web site http://www.legis.la.gov/legis/LawSearch.aspx
La. Code Crim. P. arts. 911 – 923	La. Legislature web site http://www.legis.la.gov/legis/LawSearch.aspx
Uniform Rules of La. Courts of Appeal	Court's web site
Local Rules	Court's web site
La. Supreme Court rules	Court's web site

See also the Green Books, La. Rules of Court pamphlet, Westlaw, Lexis

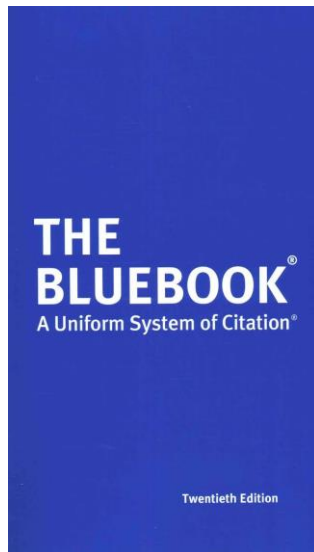
U.S. Fifth Circuit rules and where to find them

Federal Rules of Appellate Procedure	Court's web site
5th Circuit Rules	Court's web site
5th Circuit Internal Operating Procedures	Court's web site
5th Circuit Practitioner's Guide	Court's web site

Speaking of rules, how to cite La. cases

Wrong

- *Boudreaux v. State*, 815 So. 2d 7 (La. 2002).



Right

Boudreaux v. State, 2001-1329 (La. 2/26/02), 815 So. 2d 7.

- Rules of La. S. Ct. Part G § 8
(See end of written materials)
- In La. courts of appeal, give parallel citations to U.S. Supreme Court decisions. (Unif. R. 2-12.4.)

5

Act like a professional writer

Because you *are* a professional writer

Fun brief-writing fact

“[A] supermajority of lawyers—even law professors—grossly overestimate their writing skills, and underestimate the importance of those skills.”

—Bryan A. Garner, *Garner on Language and Writing* xxxv (2009).

What's wrong with most briefs (according to judges)?

- Too long. Too long. Too long.
- Too many issues or points
- Rudderless; no central theme(s).
- Lack of focus.
- Absence of organization.
- Excessive citations and verbiage.
- Uninteresting and irrelevant fact statements.
- Misrepresented facts and case holdings
- Failure to mention or properly cite contrary authorities
- Failure to state proper jurisdiction
- Failure to set forth the proper standard of review
- Failure to apply the standard of review properly.
- Failure to prepare an accurate table of contents.
- Failure to prepare an accurate table of authorities with page references to the brief
- Failure to set forth a summary of the argument
- Unclear, incomprehensible, irrelevant statements of reasons.
- Misrepresenting or exaggerating the adversary's arguments
- Inaccurate or incomplete citations.
- Citing cases that have been overruled.
- Discussing unnecessary details of precedents and compared cases.
- Failure to cite the record.
- Failure to state the relief requested
- Typing, misspellings and grammatical mistakes.
- Failure to observe the court's appellate rules.
- Etc., etc., etc., ...

— Tessa L. Dysart, Leslie H. Southwick, and Ruggero Aldisert, *Winning on Appeal* § 2.3.1, at 20-21 (3d ed. 2017)

Fun brief-writing fact

In the U.S. 5th Circuit,
percentage of briefs that
are “well-written” and
“genuinely helpful”:

5% to 10%

—*Judge Thomas M. Reavley*

Bryan A. Garner, Garner on Language and Writing
xxxiii (2009).

Fun brief-writing fact

In the U.S. 7th Circuit,
percentage of briefs that
are “of a high professional
caliber”:

3%

—*Judge Frank Easterbrook*

Bryan A. Garner, *Garner on Language and Writing*
xxxiv (2009).

How you can be in the top 3% to 10%

Excel at writing.

- Excellent writing = career success.
- Excellence in writing is a life-long pursuit.
- About 70% to 80% of appeals are won or lost on the briefs.

Two ways to make your brief more persuasive

Write in plain English	Use good typography
<p>Reader impressions:</p> <p>Plain language = writer is more intelligent, more credible.</p> <p>Complicated language, big words, legalese = writer is less intelligent, less credible</p>	<p>Easy-to-read typeface has the same effect as plain language—writer perceived as being more intelligent, more credible.</p> <p>Hard-to-read typeface has the same effect as complicated language—writer perceived as being is less intelligent, less credible.</p>

Sources: Daniel M. Oppenheimer, *Consequences of Erudite Vernacular Utilized Irrespective of Necessity: Problems with Using Long Words Needlessly*, 20 *Applied Cognitive Psychology* 139 (2006); Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Legal Writing*, 20 *Loy. L.A. L. Rev.* 301 (1987); Rolf Reber & Norbert Schwarz, *Effects of Perceptual Fluency on Judgments of Truth*, 8 *Consciousness and Cognition* 338–42 (1999); Rolf Reber, Piotr Winkielman & Norbert Schwarz, *Effects of Perceptual Fluency on Affective Judgments*, 9 *Psychological Science* No. 1, at 45 (1998).

Help with typography

- Matthew Butterick, *Typography for Lawyers*
- Ruth Anne Robbins, *Painting With Print*, 2 J. ALWD 108 (Fall 2004)
- U.S. 7th Cir., *Requirements and Advice for Typography in Briefs and Other Papers*