Appellate Practice: Writs and Appeals

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*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.”

## Jurisdiction and Function

<table>
<thead>
<tr>
<th>Court</th>
<th>Jurisdiction</th>
<th>Function</th>
</tr>
</thead>
<tbody>
<tr>
<td>District court</td>
<td>Original jurisdiction &lt;br&gt;La. Const. art. V § 16(A).</td>
<td>Determine the facts. &lt;br&gt;Render final judgment on the merits.</td>
</tr>
<tr>
<td>Court of appeal</td>
<td>Appellate and supervisory jurisdiction. &lt;br&gt;La. Const. art. V § 10(A).</td>
<td>Correct errors by the district court.*</td>
</tr>
<tr>
<td>La. Supreme Court</td>
<td>Mostly supervisory jurisdiction. &lt;br&gt;La. Const. art. V § 5(A) and (D).</td>
<td>Develop Louisiana jurisprudence.*</td>
</tr>
</tbody>
</table>

* See *Boudreaux v. State, DOTD*, 2001-1329, p. 3 n. 5 (La. 2/16/02), 815 So. 2d 7, 9 n. 5.
“However persuasive the argument, the appellate court does not function as a choice-making court; the appellate court functions as an errors-correcting court.”

“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.”
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.”

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.”

## Standards of review, grossly oversimplified

<table>
<thead>
<tr>
<th>Manifest error (a.k.a. “clearly wrong”)</th>
<th>Highly deferential. Applies to fact findings.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abuse of discretion</td>
<td>Deferential. Applies to discretionary rulings (anything where court “may” do something).</td>
</tr>
<tr>
<td>De novo</td>
<td>No deference. Applies to rulings of law (e.g. summary judgments, exceptions not involving disputed facts).</td>
</tr>
</tbody>
</table>
You must brief the standard of review

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


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

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 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.”

Importance of the record

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

“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.”

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 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

<table>
<thead>
<tr>
<th>Rule Description</th>
<th>Source Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uniform Rules of La. Courts of Appeal</td>
<td>Court’s web site</td>
</tr>
<tr>
<td>Local Rules</td>
<td>Court’s web site</td>
</tr>
<tr>
<td>La. Supreme Court rules</td>
<td>Court’s web site</td>
</tr>
</tbody>
</table>

*See also* the Green Books, La. Rules of Court pamphlet, Westlaw, Lexis
# U.S. Fifth Circuit rules and where to find them

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<th>Rule Description</th>
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<tr>
<td>Federal Rules of Appellate Procedure</td>
<td>Court’s web site</td>
</tr>
<tr>
<td>5th Circuit Rules</td>
<td>Court’s web site</td>
</tr>
<tr>
<td>5th Circuit Internal Operating Procedures</td>
<td>Court’s web site</td>
</tr>
<tr>
<td>5th Circuit Practitioner’s Guide</td>
<td>Court’s web site</td>
</tr>
</tbody>
</table>
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.)
Act like a professional writer

Because you *are* a professional writer
“[A] supermajority of lawyers—even law professors—grossly overestimate their writing skills, and underestimate the importance of those skills.”

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., …

In the U.S. 5th Circuit, percentage of briefs that are “well-written” and “genuinely helpful”: 5% to 10% —Judge Thomas M. Reavley

Fun brief-writing fact

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

3%  
—Judge Frank Easterbrook

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

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

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*