

Louisiana Appellate Practice

Presented by
Raymond P. Ward
Adams and Reese LLP
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Appeal or supervisory writ?

Let's say a trial court renders a judgment that's adverse and (to your mind at least) erroneous, and you want the court of appeal to review it. In Louisiana, we have two avenues for getting appellate review of a trial court's judgment: appeal and supervisory writ. Which one to use depends on whether the judgment is appealable. If it is, generally you take an appeal.¹ If it's not, your only avenue for appellate review is by supervisory writ.

What's the difference between an appeal and a supervisory writ? By definition, "[a]ppel is the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court." La. Code Civ. P. art. 2082. The key word is *right*. When a judgment is appealable, the aggrieved party has the right to have it reviewed by the court of appeal, and the court of appeal has the corresponding obligation to review the merits of the judgment. In contrast, review by supervisory writ is up to the appellate court's discretion—the court *may* grant a writ to review the merits, or may decide not to review the judgment at all until the case comes up on appeal after final judgment. As explained by the Louisiana Supreme Court, "A court of appeal has plenary power to exercise supervisory jurisdiction over district courts and may do so at any time, according to the discretion of the court."² Since review is mandatory in an appeal but discretionary on an application for supervisory writ, generally you should appeal if the adverse judgment can be appealed.

Quotable quote: "The distinction between supervisory and appellate jurisdiction [in the 1974 Constitution] is a continuation of existing terminology, 'supervisory' referring to the court's *discretionary jurisdiction* under which it has the power to select the cases it will hear, and 'appellate' contemplating cases *in which a party as a matter of right can demand that the court hear a case.*" *Unwired Telecom Corp. v. Parish of Calcasieu*, 03-0732, p. 8 n. 8 (La. 1/19/05), 903 So. 2d 392, 400 n. 8 (brackets and emphasis by the Court).

¹ *But see* Unif. R. La. Cts. App., Rule 4-3, Revision Comment: "In the interests of judicial efficiency and fairness to the parties, an appellate court in its discretion may review an interlocutory or final judgment pursuant to its supervisory jurisdiction, even though the judgment also could be reviewed pursuant to an appeal. See *Chambers v. LeBlanc*, 598 So.2d 337 (La. 1992); *Winston v. Martin*, 34,195 (La. App. 2 Cir. 7/6/00), 764 So. 2d 368; *Smith v. Louisiana Dept. of Public Safety*, 90-1029 (La. App. 3 Cir. 10/15/90), 571 So.2d 666; *Hamilton Medical Group v. Ochsner Health Plan*, 550 So.2d 290 (La. App 3 Cir. 1989). The 30-day period in Rule 4-3 in no way affects an appellate court's ability to utilize its supervisory jurisdiction in such instances."

² *Herlitz Constr. Co. v. Hotel Investors of New Iberia, Inc.*, 396 So. 2d 878 (La. 1981).

To figure out whether a judgment is appealable, the starting place is La. Code Civ. P. art. 2083. Article 2083(A) says, “A final judgment is appealable in all causes in which appeals are given by law” In contrast, “[a]n interlocutory judgment is appealable only when expressly provided by law.” La. Code Civ. P. art. 2083(B). Translation: if the judgment is final, you can appeal it; if it’s not final, you need a statute saying that this type of judgment is appealable.

Is this judgment final?

Unless you have a special statute making the adverse judgment appealable, the next step is to figure out whether the adverse judgment is a final judgment. That takes us to La. Code Civ. P. art. 1841, which defines judgments, final judgments, and interlocutory judgments. According to Article 1841, “A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final.” An interlocutory judgment is “[a] judgment that does not determine the merits but only preliminary matters in the course of the action” A final judgment is one “that determines the merits in whole or in part” Black’s Law Dictionary (10th ed.) defines *merits* as “[t]he elements or grounds of a claim or defense; the substantive consideration to be taken into account in deciding a case” Metaphorically, if the judgment decides which party wins the war, it’s final—the war is over. If the judgment just decides who wins one battle in the overall war, it’s interlocutory because the war continues.

That’s fine if the judgment on the merits disposes of the entire case. But what if the judgment decides only part of the merits—for instance, a judgment that decides only one of several claims, or a judgment that dismisses one of several defendants? To figure out whether that kind of judgment is appealable, we look to La. Code Civ. P. art. 1911(B), which in turn refers us to Article 1915(A) and (B). Article 1911(B) says that a partial final judgment under Article 1915(B) can be appealed only if designated as a partial final judgment under Article 1915(B). In contrast, says Article 1911(B), a partial final judgment under Article 1915(A) can be appealed without being designated as final.

To figure out what La. Code Civ. P. art. 1911(B) is talking about, we flip to La. Code Civ. P. art. 1915. Article 1915(A) lists six kinds of partial final judgments a trial court may render that “may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case” It’s an Article 1915(A) judgment if it does one of the following things:

- (1) Dismisses the suit as to less than all of the parties, defendants, third party plaintiffs, third party defendants, or intervenors.

(2) Grants a motion for judgment on the pleadings, as provided by Articles 965, 968, and 969.

(3) Grants a motion for summary judgment, as provided by Articles 966 through 969, but not including a summary judgment granted pursuant to Article 966(E).

(4) Signs a judgment on either the principal or incidental demand, when the two have been tried separately, as provided by Article 1038.

(5) Signs a judgment on the issue of liability when that issue has been tried separately by the court, or when, in a jury trial, the issue of liability has been tried before a jury and the issue of damages is to be tried before a different jury.

(6) Imposes sanctions or disciplinary action pursuant to Article 191, 863, or 864 or Code of Evidence Article 510(G).³

If the partial final judgment does not do one of these six things, then under Article 1915(B)(1), it is not a final judgment “unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.” This provision gives the trial court the authority to decide whether a partial judgment on the merits is final and immediately appealable. To do so, the trial court must say (in the judgment itself or a separate order⁴) *that* there is no just reason to delay entry of a final judgment, and *should* give reasons why there is no just reason for delay.⁵

³ La. Code Civ. P. art. 1915(A).

⁴ The Article 1915(B) designation of finality can be made in the judgment itself, or can be made later by a separate order, which can occur any time before entry of the final judgment in the case. *Fraternal Order of Police v. City of New Orleans*, 2002-1801, p. 4 (La. 11/8/02), 831 So. 2d 897, 899.

⁵ “In order to assist the appellate court in its review of designated final judgments, the trial court should give explicit reasons, either oral or written, for its determination that there is no just reason for delay. However, if the trial court fails to do so, we find the appellate court cannot summarily dismiss the appeal.” *R.J. Messinger, Inc. v. Rosenblum*, 2004-1664 (La. 3/2/05), 894 So. 2d 1113, 1122. In that case, the Louisiana Supreme Court gave a non-exclusive list of factors that trial court’s may use when considering whether a partial judgment should be designated as final under La. Code Civ. P. art. 1915(B):

- 1) The relationship between the adjudicated and unadjudicated claims;
- 2) The possibility that the need for review might or might not be mooted by future developments in the trial court;
- 3) The possibility that the reviewing court might be obliged to consider the same issue a second time; and
- 4) Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

If this judgment is not final, can it still be appealed?

As we saw above, under La. Code Civ. P. art. 2083(C), “An interlocutory judgment is appealable only when expressly provided by law.” Examples include the following:

- An order certifying or refusing to certify a case as a class action. La. Code Civ. P. art. 592(A)(3)(c).
- A preliminary injunction (deadline 15 days from rendition). La. Code Civ. P. art. 3612.
- In antitrust cases, interlocutory judgments on exceptions (deadline 5 days from rendition). La. R.S. 51:134. Other interlocutory judgments in antitrust cases are also appealable “except those rendered during the progress of the trial” La. R.S. 51:135.

As these examples show, if there’s a statute making the judgment appealable, you’ll usually find it in the same neighborhood as the statute authorizing the judgment itself. Thus, the provision for appealing class-certification orders is in the same code article governing class certification; the provision for appealing a preliminary injunction is in the code chapter on injunctions, and the provisions for interlocutory appeals in antitrust cases are in the Revised Statutes governing those types of cases. If the case has a special set of provisions in the Code of Civil Procedure, that same section of the code may say something about appeals in that type of case.

Appeals

Procedure in the trial court

Under La. Code Civ. P. art. 2121, an appeal is taken by obtaining an order for appeal with the applicable deadline. You can get the order of appeal by oral motion in open court, but that is rarely done. The normal way to get the order of appeal is to file a written motion or petition for an order of appeal.

Motion or petition for appeal? There are historical reasons why Article 2121 allows either a motion or petition for appeal. Today, the distinction is obsolete. But if you’re looking for a reason to choose one or the other, here’s a suggestion: Louisiana law allows a non-party who could have appealed to appeal an adverse judgment. *See* La. Code Civ. P. art. 2086. And a non-party wishing to intervene does so by filing a petition. *See* La. Code Civ. P. art. 1032. So if you represent a non-party wishing to take an appeal under Article 2086, file a petition for appeal. But if you represent someone already a party to the case who wants to appeal, file a motion for appeal.

Deadlines. Louisiana law provides for two kinds of appeals—suspensive and devolutive—each with its own deadline. A suspensive appeal is one that “suspends the effect or the execution of an appealable order or judgment” La. Code Civ. P. art. 2123(A). A devolutive appeal is one “which does not suspend the effect or the execution of an appealable order or judgment” La. Code Civ. P. art. 2087(A). A suspensive appeal requires security, usually in the form of a surety bond. A devolutive appeal does not require any security. *See* La. Code Civ. P. art. 2124.

Generally, the delay to perfect a suspensive appeal is 30 days, and the delay to perfect a devolutive appeal is 60 days.⁶ *See* La. Code Civ. P. art. 2123(A) (suspensive appeal); *id.* art. 2087(A) (devolutive appeal). The time that the 30- or 60-day clock starts ticking depends on whether any party filed a timely motion for new trial or judgment notwithstanding the verdict (JNOV). If a timely motion for new trial or JNOV is filed, the clock starts ticking when the clerk sends notice of the judgment denying new trial or JNOV. If no timely motion for new trial or JNOV is filed, the clock starts ticking when the delay to move for new trial or JNOV expires. That delay is 7 working days after the clerk sends notice of the judgment to be appealed.

To perfect a devolutive appeal, you have to obtain an order of appeal within the 60-day period provided by La. Code Civ. P. art. 2087(A).⁷ To perfect a suspensive appeal, you have to obtain the order of appeal *and* furnish the required security within the 30-day period. To determine the amount of security, see La. Code Civ. P. art. 2124(B).

Costs. Generally, the appellant must advance the cost of having the record prepared and lodged in the court of appeal. Within a few days after the order of appeal has been signed, the clerk of court will send the appellant a bill for estimated costs of the appeal. The appellant then has 20 days to either pay the bill or file a motion for reduction in the trial court. Once the trial court has ruled on that motion, the appellant then has 20 days from the ruling to pay the costs. *See* La. Code Civ. P. art. 2126. (Note: Whoever ultimately loses the appeal will probably be ordered to pay the appeal costs. So if the appellant wins, the appellant may be reimbursed by the appellee for the costs advanced on the front end.)

⁶ Some appeals have shorter delays; for example, 15 days to appeal a preliminary injunction (La. Code Civ. P. art. 3612(C)); 5 days to appeal an interlocutory judgment in an antitrust case (La. R.S. 51:134 and 51:135). So before you rely on the general rule, do some research to make sure your appeal isn't subject to a shorter time period.

⁷ La. Code Civ. P. art. 2121; *id.* art. 2087(A).

The cost of the appeal is a function of the size of the trial court record: the more pages in the record, the higher the cost. When the record is bulky, the cost of preparing the record for appeal can be substantial, often in the five-figure range. One way to manage costs is to designate the record on appeal under La. Code Civ. P. art. 2128.

Article 2128 is made for situations where the appellate court only needs part of the record to decide the appeal—for example, a case decided on exceptions or a motion for summary judgment. In cases like that, you can save a lot of time and a lot of your client’s money by designating only certain items from the trial-court record to constitute the record on appeal. But the time to do this is short—you have only 3 days after taking the appeal (excluding holidays) to file your designation. See La. Code Civ. P. art. 2128. And if you do this, you must file with your designation a concise statement of points on which you intend to rely, and the appeal will be limited to those points. La. Code Civ. P. art. 2129.

When an appellant has made a designation under art. 2128, the appellee has 5 days (excluding holidays) to designate any additional items to be included in the record. La. Code Civ. P. art. 2128.

Once the estimated costs have been paid, there is nothing for the parties to do until the record is lodged in the court of appeal. It is the clerk’s job to prepare the record and file it in the court of appeal, and it is the court reporter’s job to prepare any transcript to be included in the record. *See* La. Code Civ. P. arts. 2127 – 2127.3.

Procedure in the court of appeal

“Lodging of the record” occurs when the appellate-court clerk receives the record from the trial-court clerk. The lodging of the record in the court of appeal is a major event because it triggers several deadlines:

- The appellee’s 15-day deadline to answer the appeal. La. Code Civ. P. art. 2133(A).
- The briefing schedule—usually 25 days from lodging for the appellant, and 45 days from lodging for the appellee. La. Ct. App. Unif. R. 2-12.7.
- The parties’ 30-day deadline to request oral argument. Unif. R. 2-11.4.

Answer to the appeal. An appellee need not file an answer to the appeal unless the appellee wants to have the judgment modified or reversed, or unless the appellee wants damages from the appellant for a frivolous appeal. The answer to the appeal is equivalent to a cross-appeal from any portion of the judgment rendered against the appellee in favor of the appellant. La. Code Civ. P. art. 2133(A).

Note: The answer to the appeal is not equivalent to a cross-appeal against anyone who is not an appellant. An appellee who wants relief against someone other than the appellant must take his or her own appeal. See S. Mark Tatum, *Questions About Answers: Problems With Answers to Appeals and Protective Cross-Appeals Under Louisiana Procedure*, 57 La. B. J. 306 (Feb./Mar. 2010) ([link here](#)).

Request for oral argument. Within 30 days after lodging, any party may file a request for oral argument, which may be in the form of a letter to the clerk of court. If one party makes a timely request for oral argument, all parties will be allowed oral argument (unless a party forfeits oral argument for some reason, such as failing to file a brief). If no one makes a timely request for oral argument, the appeal will be decided on the briefs. See Unif. R. 2-11.4.

Briefs. Everything you need to know about the form and content of a brief is in the Uniform Rules for Louisiana Courts of Appeal:

- Form, fonts, page size, page limits: Unif. R. 2-12.2.
- Cover: Unif. R. 2-12.3.
- Content: Unif. R. 2-12.4 (appellant); Unif. R. 2-12.5 (appellee).
- Certificate of service: Unif. R. 2-14.2.

Unlike trial-court memos, a brief in a Louisiana court of appeal should have few (if any) attachments. The only attachments to the appellant's brief should be the trial court's judgment and its reasons for judgment (if any), whether contained in written reasons or transcribed oral reasons. Unif. R. 2-12.4. The appellee's brief usually has no attachments; the same goes for the appellant's reply brief. Any pleadings, evidence (exhibits or testimony), judgments, or orders referred to in the brief must be included in the record, and your brief must refer to these materials by record page number.

Filing the brief is easy. All five Louisiana courts of appeal now allow e-filing. If you have a computer and an Internet connection, register as an e-filer with the court of appeal and file everything electronically. Do that, and you won't have to worry about the rules for filing on paper.⁸

⁸ See, e.g., Unif. R. 2-12.1 (number of copies), Unif. R. 2-13 (rules for timely filing by mail). Paper filers also have to check the court's local rules supplementing or overriding the Uniform Rules.

Oral argument. If any party files a timely request for oral argument, all parties who file timely briefs get to argue.

The general amount of time for oral argument is 40 minutes per case, or 20 minutes per side. The court has the discretion to shorten this time. The 1st and 5th Circuits usually allow 30 minutes per case, or 15 minutes per side. See Unif. R. 2-15.2; La. 5th Cir. R. 5.

If you represent the appellant, you have the right to open and close oral argument. Unif. R. 2-15.1. But to reserve time for rebuttal, you should inform the court or the clerk either before or at the start of oral argument.

Be prepared to speak extemporaneously. “Argument should not be read from a prepared text. Counsel shall not be permitted to read from briefs, except matters, such as quotations, which are customarily read.” Unif. R. 2-15.3. Answer questions immediately and directly. Be professional.

You are not required to use all of your time. *See* Unif. R. 2-15.2. If you run out of things to say before your time is up, ask if there are any questions. If there are none, reserve the rest of your time for rebuttal (if you represent the appellant) or yield the rest of your time (if you represent the appellee).

Rehearing. If you lose the appeal, or if you don’t win everything you wanted to win, you have the option of applying for rehearing. The deadline to do so is 14 days after rendition of judgment (in criminal cases) or 14 days after transmission of the notice of judgment (in civil cases). Unif. R. 2-18.2.

One advantage of applying for rehearing is that a timely application for rehearing interrupts the time to apply to the Louisiana Supreme Court for a writ of review. *See* La. Code Civ. P. art. 2166. Note, though, that this applies only in cases where rehearing is available. And under Unif. R. 2-18.7, rehearing is available in only three instances:

- When the court has granted a writ application on the merits;
- When the court has dismissed an appeal; or
- When the court has ruled on the merits of an appeal.

In other cases (most often, denial of a supervisory writ), rehearing is not available, and an attempt to apply for rehearing will not interrupt the time to apply to the Louisiana Supreme Court for a writ.

The rehearing application must not exceed 10 pages. In the 3rd Circuit, the supporting brief likewise must not exceed 10 pages. Unif. R. 2 18.1, 2-18.3; 3d Cir. R. 25. Practitioners often file one 10-page pleading styled as a rehearing application and incorporated supporting brief.

Writ applications in the court of appeal

Deciding whether to apply for a supervisory writ.

A court of appeal has plenary power to exercise supervisory jurisdiction over district courts and may do so at any time, according to its discretion.⁹ Theoretically, any interlocutory judgment can be subject of writ application. But in reality, writ application will be seriously considered only for certain classes of judgments.

Irreparable injury. If a judgment causes irreparable injury, it is a good candidate for review by supervisory writ. “Irreparable injury” is a term of art, meaning that any error in the judgment cannot, as a practical matter, be corrected on appeal following final judgment. *In re Depland*, 2003-0385 p. 2 (La. App. 4 Cir. 8/6/03), 854 So. 2d 438, 440; *White Oak, Inc. v. Katz & Simone*, 515 So. 2d 476, 476-77 (La. App. 1 Cir. 1987); 1 La. Civ. L. Treatise, Civil Procedure § 14:17(1) (2d ed. Nov. 2021 Update). In deciding whether to grant supervisory review, the court of appeal is “especially influenced by a relator’s showing that the interlocutory ruling complained of should be immediately corrected either because the ruling likely would cause ‘irreparable harm’” *Blow v. OneBeacon Am. Ins. Co.*, 2016-0301, p. 3 (La. App. 4 Cir. 4/20/16), 193 So. 3d 244, 247.

Under pre-2006 version of La. Code Civ. P. art. 2083, an interlocutory judgment causing irreparable injury was immediately appealable. Under the current version of art. 2083, “[a]n interlocutory judgment is appealable only when expressly provided by law.” But “irreparable injury continues to be an important (but not exclusive) ingredient in an application for supervisory writs.” La. Code Civ. P. art. 2083, Comments—2005, comment (b). So older cases defining “irreparable injury” for purposes of appealability, while obsolete for that purpose, remain pertinent for persuading an appellate court to exercise its supervisory jurisdiction. The following are some examples of judgments deemed to cause irreparable injury:

- Ruling on a venue exception.¹⁰

⁹ *E.g.*, *Cole v. Whitfield*, 556 So. 2d 96, 98 (La. App. 4 Cir. 1989); *Casnave v. Dixie Bldg. Material Co.*, 490 So. 2d 381, 382 (La. App. 4 Cir. 1986); *Greater Tangipahoa Utility Co. v. Hammond*, 247 So. 2d 410, 411 (La. App. 1 Cir. 1971).

¹⁰ *White Oak, Inc. v. Katz & Simone*, 515 So. 2d 476, 477 (La. App. 1 Cir. 1987); *Winninger v. State ex rel. Dep’t of Social Servs.*, 32,086 p. 1 n. 1 (La. App. 2 Cir. 8/18/99), 740 So. 2d 236, 237 n. 1; *Starks v.*

- Refusal to grant a stay pending arbitration.¹¹
- In a medical-malpractice case, denial of a medical review panel.¹²
- Denial of a summary judgment or a peremptory exception asserting a First Amendment defense.¹³

Herlitz. If a judgment does not cause irreparable injury, it may still be a good candidate for supervisory review if it meets the criteria of *Herlitz Const. Co., Inc. v. Hotel Investors of New Iberia, Inc.*, 396 So. 2d 878 (La. 1981): “When the overruling of the exception is arguably incorrect, when a reversal will terminate the litigation, and when there is no dispute of fact to be resolved, judicial efficiency and fundamental fairness to the litigants dictates that the merits of the application for supervisory writs should be decided in an attempt to avoid the waste of time and expense of a possibly useless future trial on the merits.” *Id.* Although *Herlitz’s* context was denial of an exception of no cause of action, the *Herlitz* test should apply to a court of appeal’s review of any interlocutory ruling. 1 La. Civ. L. Treatise, Civil Procedure § 14:17 (2d ed. Nov. 2021 Update).

Procedure in the trial court

Before filing a writ application in a court of appeal, the applicant must first file in the trial court a notice of intent to seek a supervisory writ and obtain the trial court’s signature on an order setting a return date, i.e., a deadline to file the writ application in the court of appeal. *See* Unif. R. 4-2 and 4-3.

In civil cases, the return date must not be more than 30 days from notice of judgment under La. Code Civ. P. art. 1914. Under art. 1914, the general rule is that rendition of an interlocutory judgment in open court constitutes notice of judgment

American Bank N.A., 2004-1219 p. 2 (La. App. 3 Cir. 5/4/05), 901 So. 2d 1243, 1244; *Blow v. OneBeacon Am. Ins. Co.*, 2016-0301, p. 4 (La. App. 4 Cir. 4/20/16), 193 So. 3d 244, 247–48; *Scarbrough v. J. Ray McDermott*, 2002-1235 p. 5 (La. App. 4 Cir. 11/20/02), 833 So. 2d 436, 439-40.

¹¹ *Williams v. Litton*, 2003-805 p. 2 (La. App. 3 Cir. 12/23/03), 865 So. 2d 838, 842; *Grote v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 96-551 (La. App. 3 Cir. 11/6/96), 682 So. 2d 926, 927-28. But an order compelling arbitration has been held to not cause irreparable injury. *Collins v. Prudential Ins. Co. of Am.*, 1999-1423 p. 6 (La. 1/19/00), 752 So. 2d 825, 829; *Flatland Real Estate Co. v. Dugas Constr., Inc.*, 00-1794 p. 4 (La. App. 3 Cir. 5/9/01), 784 So. 2d 867, 870.

¹² *Derouen v. Kolb*, 397 So. 2d 791, 793 (La. 1981); *see also* *Everett v. Goldman*, 359 So. 2d 1256, 1260 n. 1 (La. 1978) (referring to “the irreparable harm to be caused to Dr. Goldman (if the ruling below is not correct) in not having plaintiff’s claim first reviewed by the statutory medical review panel”).

¹³ *Roppolo v. Moore*, 93-2361, pp. 2–3 (La. App. 4 Cir. 7/27/94), 644 So. 2d 206, 208; *Batson v. Time, Inc.*, 298 So. 2d 100, 106 (La. App. 1 Cir. 1974). (Note: Denial of summary judgment on other issues may be suitable for supervisory review under *Herlitz*, as described below.); *see also* *Mashburn v. Collins*, 355 So. 2d 879, 890–91 (La. 1977) (explaining why, “[i]n cases affecting the exercise of First Amendment liberties, proper summary judgment practice is essential).

starting the 30 days. But art. 1914 provides several exceptions to this general rule, under which the clerk's mailing of notice of written judgment is "notice of judgment" starting the 30 days. **Practice tip:** If the judge ruled in open court, assume that the 30-day clock started ticking at that moment unless you're sure that one of the exceptions in art. 1914 applies.

Unlike appeals, a motion for new trial or reconsideration will not interrupt or suspend the 30-day period.¹⁴

In criminal cases, the return date must not be more than 30 days from the ruling at issue, unless the trial judge orders the ruling to be reduced to writing, in which case the return date must be not more than 30 days from the date the ruling is signed. Unif. R. 4-3.

If the notice of intent is not filed until after the 30-day time has run, the writ application will be deemed untimely.¹⁵

The trial court or court of appeal may grant an extension of the return date, but only if the motion is filed within the original or previously extended return date. Unif. R. 4-3. **Beware:** Although the court reporter may request an extension of the return date for an appeal, the court reporter has no authority to request an extension of the return date for a writ application. If you rely on a court reporter's motion to extend the return date for a writ application, your application may be dismissed for untimeliness.¹⁶

If the order setting the return date is signed within the 30-day window, but the return date set is beyond the 30-day window, the court of appeal may treat the order as the implied grant of a motion to extend the return date.¹⁷

¹⁴ *Clement v. Am. Motorists Ins. Co.*, 1998-504 pp. 3-4 (La. App. 3 Cir. 2/3/99), 735 So. 2d 670, 672; *Carter v. Rhea*, 2001 0234 pp. 4-6 (La. App. 4 Cir. 4/25/01), 785 So. 2d 1022, 1024-25.

¹⁵ See *Watts v. Dorignac*, 95-2285 p. 2 (La. App. 1 Cir. 4/22/96), 681 So. 2d 955, 956; *Spangler v. Chiasson*, 95-2113 p. 2 (La. App. 1 Cir. 4/22/96), 681 So. 2d 956, 957; *Lever v. St. Bernard Parish Sch. Bd.*, 2000-2216 pp. 1-2 (La. App. 4 Cir. 10/20/00), 772 So. 2d 236, 236-37; *Lawyer v. Succession of Kountz*, 97-2320 (La. App. 4 Cir. 12/10/97), 703 So. 2d 233, 234-35; *Ross v. City of New Orleans*, 96-1853 (La. App. 4 Cir. 9/13/96), 694 So. 2d 973, 974; *Ware v. Mumford*, 04-118 p. 4 (La. App. 5 Cir. 5/26/04), 875 So. 2d 885, 887.

¹⁶ See *Lafferty v. Allstate Ins. Co.*, 36,119 (La. App. 2 Cir. 2/28/02), 806 So. 2d 1000.

¹⁷ *Barnard v. Barnard*, 96-0859 (La. 6/24/96), 675 So. 2d 734; *Crummey v. Morgan*, 2007 0087 p. 5 n. 1 (La. App. 1 Cir. 8/8/07), 965 So. 2d 497, 500.

For an excruciatingly detailed discussion about timeliness of writ applications and notices of intent, see Raymond P. Ward, *A Writ in Time*, 51 La. B.J. 338 (Feb.-Mar. 2004) ([link here](#)).

Procedure in the court of appeal

As noted above, the writ application must be filed in the court of appeal within the return date, either as originally set by the trial court or as timely extended by the trial court or court of appeal. Unif. R. 4-3.

The writ application is like an appeal brief in some ways and unlike an appeal brief in other ways. The form and content of a writ application are similar (though not identical) to that of a brief. Under Unif. R. 4-5, the writ application must include the following elements:

1. An index (table of contents) of everything contained in the writ application, with page numbers.
2. A jurisdictional statement, stating the grounds for invoking the court's jurisdiction.
3. A statement of the case, including the status in the trial court and any pending trial or hearing dates.
4. The issues and questions of law presented.
5. Assignments or specifications of error.
6. A brief in support of the application.
7. An affidavit verifying the allegations of the writ application and service of the writ application on the trial judge, opposing counsel, and any unrepresented parties.

The big difference between a writ application and an appeal brief is the attachments. Except for copies of the trial court's judgment and reasons for judgment, an appeal brief has no attachments. That's because everything the court of appeal may look at in deciding the appeal should be in the record. For supervisory writs, the court of appeal has no record because there has been no appeal. So the writ application itself must serve as the record. This means that everything the court of appeal needs to rule on the writ application must be attached to the writ application or contained in an accompanying appendix. Thus, Unif. R. 4-5 requires that the following materials be attached to the writ application:

1. A copy of the judgment, order, or ruling complained of.
2. A copy of the judge's reasons for the judgment, order, or ruling (if in writing).

3. A copy of each pleading on which the judgment, order, or ruling was founded, including the petition in civil cases and the indictment or bill of information in criminal cases.
4. A copy of any opposition, including attachments.
5. A copy of any pertinent court minutes.
6. The notice of intent to seek a supervisory writ and the signed order setting the return date.

The 2nd, 4th, and 5th Circuits also require a writ-application intake form, which you can download from the court's web site. (When e-filing a writ application in the 4th Circuit, you input the information on the writ application filing sheet during the e-filing process, so it's a good idea to download the form and fill it out before beginning e-filing just to have all the information readily available.)

If you need a stay or expedited consideration, there are some additional steps you have to comply with; these are spelled out in Unif. R. 4-4. To begin with, you must alert the court and the clerk that you need a stay or expedited consideration. You do that by putting on the cover, in bold print and all caps, "REQUEST FOR EXPEDITED CONSIDERATION." Inside the writ application, you need a separate page with the heading, "Request for Expedited Consideration," setting forth justification for the request and a specific time within which you need a ruling by the court of appeal. Finally, the affidavit of verification and service needs some additional information: the affidavit must certify two things:

1. that the trial judge, opposing counsel, and any unrepresented parties have been notified by phone, email, or equally prompt means that the writ application has been or is about to be filed; and
2. that the writ application itself has been served "forthwith" on the trial court, opposing counsel, and any unrepresented parties by means equal to the means used to file in the court of appeal. (In other words, they get the writ application as quickly as the court of appeal gets it.)

Practice tip: If you need expedited consideration, don't jam the court. Don't take 30 days to file it and expect the court of appeal to drop what they're doing to give you an instant ruling. File the application as soon as you can to give the court of appeal as much time as you're able to give them to consider the writ application.

Oppositions. The Uniform Rules do not provide a deadline for responding to a writ application. Uniform Rule 4-7 warns that the court of appeal may rule on an application at any time, with or without an opposition. But in practice, the courts

allow a reasonable time for an opposition, especially for non-expedited writ applications.

In the 2nd Circuit, you should respond to a non-expedited writ application within 15 days; otherwise the court will “presume[] that a response will not be forthcoming. No extensions of time to file a response will be granted.” 2nd Cir. R. 16. The Fourth Circuit has a similar rule, except the default time period is 10 days. See 4th Cir. R. 16.

In the 3rd Circuit, a party wishing to respond to a writ application must telephone the clerk’s office immediately, and the court will then give that party a deadline for the response. See 3d Cir. R. 19.

The 1st and 5th Circuits do not have a local rule governing when to file an opposition. But my recent experience in the 5th Circuit indicates that they follow the same procedure as the 3rd Circuit: telephone the clerk’s office to get a deadline. In the 1st Circuit, parties often file a letter informing the court of their intent to file an opposition by a date certain unless the court orders the opposition to be filed sooner.

Writ applications in the Louisiana Supreme Court

The Louisiana Supreme Court has appellate jurisdiction in two situations: (1) a criminal case where the death penalty has been imposed; and (2) any case where a law has been declared unconstitutional. La. Const. art. V § 5(D). In all other cases, the Court has discretionary supervisory jurisdiction. This means that the Court decides which cases it wants to adjudicate.

A party seeking review by the Louisiana Supreme Court of a court of appeal’s judgment does so by filing an application for a writ. If the Court grants the application, the Court sometimes orders peremptory relief. Other times, the Court issues a writ of certiorari, ordering the court of appeal to send up the record, and schedules briefing on the merits and oral argument.

The applicant for a writ always has an uphill battle, as the vast majority of writ applications are denied. Consider these 2020 statistics:

	2021 Total	2021 Civil	2021 Criminal
Applications filed (except prisoner pro se)	1,208	691	517
Prisoner pro se writs	613	30	583
Granted	139	91	48

To be argued	43	37	6
With orders & transferred	96	54	42
Dismissed	73	60	13
Not considered	159	12	147
Denied	1,164	554	610
Opinions rendered	29	21	8

Source: *Annual Report 2021: Supreme Court of Louisiana*.

Everything (almost) you need to know about applying to the Louisiana Supreme Court for a writ—form, content, time to file—is contained in Rule X, Rules of the Supreme Court of Louisiana.

While the granting of a writ is purely discretionary with the Court, the Court has guidelines for exercising its discretion. These guidelines are listed in Rule X § 1:

(a) The grant or denial of an application for writs rests within the sound judicial discretion of this court. The following, while neither controlling nor fully measuring the court’s discretion, indicate the character of the reasons that will be considered, one or more of which must ordinarily be present in order for an application to be granted:

1. Conflicting Decisions. The decision of the court of appeal conflicts with a decision of another court of appeal, this court, or the Supreme Court of the United States, on the same legal issue.

2. Significant Unresolved Issues of Law. A court of appeal has decided, or sanctioned a lower court’s decision of, a significant issue of law which has not been, but should be, resolved by this court.

3. Overruling or Modification of Controlling Precedents. Although the decision of the court of appeal is in accord with the controlling precedents of this court, the controlling precedents should be overruled or substantially modified.

4. Erroneous Interpretation or Application of Constitution or Laws. A court of appeal has erroneously interpreted or applied the constitution or a law of this state or the United States and the decision will cause material injustice or significantly affect the public interest.

5. Gross Departure from Proper Judicial Proceedings. The court of appeal has so far departed from proper judicial proceedings or so abused its powers, or sanctioned such a departure or abuse by a lower court, as to call for an exercise of this court’s supervisory authority.

(b) The application for writs shall address, in concise fashion, why the case is appropriate for review under the considerations stated in subsection (a) above

Any issue you raise in the Louisiana Supreme Court must have been raised in the court of appeal and trial court. “We cannot consider contentions raised for the first time in this court which were not pleaded in the court below and which the district court has not addressed.” *Johnson v. State*, 2002-2382 (La. 5/20/03), 851 So. 2d 918, 921; *see also Dean v. Southmark Constr.*, 2003-1051, p. 6 (La. 7/6/04), 879 So. 2d 112, 116 (similar).

Time to file is governed by Rule X § 5 and Be La. Code Civ. P. art. 2166. The general rule is as follows:

- 30 days after transmission of the court of appeal’s judgment, if no one applies for rehearing or if rehearing is unavailable.
- 30 days after denial of rehearing, if rehearing is available and a party has applied timely to the court of appeal for rehearing.

Exception to the general 30-day rule: If you’re seeking expedited consideration, you must file your writ application “as soon as possible after the court of appeal’s disposition and in no event more than ten days after mailing of the notice of judgment by the court of appeal.” Rule X § 5(a)(2) (eff. Sept. 1, 2022).

Rule X § 5 also includes special rules for death-penalty cases, election contests, and cases where the court of appeal has supervisory jurisdiction but the applicant files a writ application in the Louisiana Supreme Court (either simultaneously with or in lieu of an application in the court of appeal).

For some invaluable tips on writing a writ application to the Louisiana Supreme Court, read *Get That Writ: Civil Writ Practice Before the Louisiana Supreme Court*, 48 La. B.J. 120 (Aug. 2000), by Isaac H. Ryan and J. Todd Benson ([link here](#)).

The rules on form of a writ application to the Louisiana Supreme Court, contained in Rule X § 2(b), are as follows:

- White, legal-size pages
- Double-spaced type (except for block quotes)
- Margins between $\frac{3}{4}$ in. and $1\frac{1}{4}$ in. at the left, right, and bottom.
- Top margin between $1\frac{1}{2}$ and 2 in.

The content of the writ application in both civil and criminal cases includes the following:

1. A front cover. See Rule VII § 3 for guidelines.
2. Behind the front cover, a writ-application filing sheet.
 - a. You can download this from the La. Supreme Court's web site. www.lasc.org. See also Appendix C to Rules of Supreme Court of Louisiana.
 - b. Note that the writ-app. cover sheet fulfills two functions:
 - i. The verification required by Rule 10 § 2(c) and § 3.4.
 - ii. The certificate of service.
3. If the application requires expedited consideration, a Civil Priority Filing Sheet or Criminal Priority Filing Sheet.
 - c. You can download these forms from the Court's web site; go to <http://www.lasc.org/>.
 - d. See also Appendices D and E to Rules of Supreme Court of Louisiana.
 - e. For additional obligations when requesting priority consideration, see Rule X § 2(e). And mind the 10-day deadline to file. *See* Rule X § 5(a)(2).
4. Index (i.e. table of contents).
5. Statement of the considerations in Rule X § 1(a) that are present in the case. (Note: This statement must be concise—no more than a page or two.)
6. A memorandum in support of the application, 25 pages or less (50-page limit for capital post-conviction case), containing:
 - f. A concise statement of the case summarizing the nature of the case and prior proceedings;
 - g. An assignment of errors in the opinion, judgment, ruling or order complained of;
 - h. A summary of the argument, which should be a succinct but accurate and clear condensation of the argument actually made in the body of

the memorandum. It should not be a mere repetition of the argument's headings.

- i. An argument of each assignment of error on the facts and law, addressing why the case is appropriate for review under the considerations stated in Rule X § 1(a).

Attachments—civil cases. Attach a copy of the trial court's judgment, trial court's written or transcribed oral reasons for judgment (if any), and the court of appeal's order and opinion (if any), including any rulings and opinions on rehearing or applications for rehearing. *Do not attach anything else.* "Other pleadings or documents shall not be filed, unless their inclusion is essential to demonstrate why the application should be granted. Other pleadings or documents shall be bound separately from the writ application and shall not exceed 25 pages." Rule X § 3.6.

Attachments—criminal cases. Attach a copy of the trial court's judgment, trial court's written or transcribed oral reasons for judgment (if any), and the court of appeal's order and opinion (if any), including any rulings and opinions on rehearing or applications for rehearing. Rule X § 4.5. You must also file a separately bound appendix that includes the following:

1. Copy of the charging document, if specifically relevant to the writ application.
2. Copy of minutes of proceedings in trial court, if specifically relevant to the judgment or order under review.
3. Copy of judgment, order, or ruling and opinion or reasons for judgment, if any, of the court of appeal, including rulings and opinions on rehearing or application for rehearing.
4. Copies of briefs of all parties filed in court of appeal relevant to issues raised by the application.
5. Where relevant to the writ application, copy of the judgment, order, or ruling of the trial court, and reasons for same, if written or transcribed, and a copy of the pleadings on which the order or ruling is founded.
6. If required by Rule 10 § 5(b), copy of order of trial judge fixing time for filing application in Supreme Court, and any extensions of the deadline. If copy unavailable, an affidavit of the applicant or counsel indicating the contents of the order and explaining why it's unavailable.

Rule X§ 4.6. The Court discourages other attachments, except for transcripts of relevant proceedings. Rule X § 4.7.

How to file. The Court allows all papers, including writ applications and oppositions, to be e-filed. If you have a computer and an Internet connection, you should e-file. Otherwise, you have to know and comply with additional rules for copying, binding, and timely filing of the physical paper. *See* Rule X §§ 2 and 5(d).

Oppositions to writ applications. Oppositions are governed by Rule X § 6. The Court encourages the filing of oppositions. The time to file is 15 days after filing of the writ application, unless the opponent moves for and is granted an extension. (Exception: If the writ application requests emergency action or a stay order, file the opposition as soon as possible.) The opposition must not exceed 25 pages.

Reply in support of the application: Optional. If you file one, it must be filed within 10 days after filing of the opposition and must not exceed 7 pages. Rule X § 7.

If the Court grants a writ, it may order peremptory relief. Or the Court may issue a writ of certiorari, ordering the court of appeal to file the record in the Louisiana Supreme Court, and ordering the parties to file briefs on the merits. If you make it this far, consult the following rules:

Briefs on the merits: Rule VII, which includes rules governing the form, content, deadlines, and filing requirements for briefs. In addition, the following jurisprudential rules govern the applicant’s brief:

1. You must brief each issue raised in the writ application. Failure to brief an issue constitutes waiver of that issue.
2. Do not brief any issue not raised in the writ application. Issues not included in the writ application are not properly before the Court and will not be considered.

See Boudreaux v. State, DOTD, 2001-1329 (La. 2/26/02), 815 So. 2d 7. Note that, to be preserved, the issue must be genuinely raised and argued in the writ application. Attempting to “reserve” an issue in a writ-application footnote does not preserve it for consideration on the merits. *See Bonnette v. Conoco, Inc., 2001-2767 pp. 8-10 (La. 1/28/03), 837 So. 2d 1219, 1225-27.*

Oral argument: Rule VIII.

Rehearings: Rule IX.

Appendix: Citing Louisiana Cases in Louisiana Courts: La. Supreme Court General Administrative Rules, Part G, § 8

A. The following rules of citation of Louisiana appellate court decisions shall apply:

(1) Opinions and actions issued by the Supreme Court of Louisiana and the Louisiana Courts of Appeal following December 31, 1993 shall be cited according to a uniform public domain citation form with a parallel citation to West's Southern Reporter:

(a) The uniform public domain citation form shall consist of the case name, docket number excluding letters, court abbreviation, and month, day and year of issue, and be followed by a parallel citation to West's Southern Reporter, e.g.:

Smith v. Jones, 93-2345 (La. 7/15/94); 650 So.2d 500, or

Smith v. Jones, 93-2345 (La. App. 1 Cir. 7/15/94); 660 So.2d 400

(b) If a pinpoint public domain citation is needed, the page number designated by the court shall follow the docket number and be set off with a comma and the abbreviation "p.", and may be followed by a parallel pinpoint citation to West's Southern Reporter, e.g.:

Smith v. Jones, 94-2345, p. 7 (La. 7/15/94); 650 So.2d 500, 504

(2) Opinions issued by the Supreme Court of Louisiana for the period between December 31, 1972 and January 1, 1994, and all opinions issued by the Courts of Appeal from the beginning of their inclusion in West's Southern Reporter in 1928 until January 1, 1994, shall be cited according to the form in West's Southern Reporter:

(a) The citation will consist of the case name, Southern Reporter volume number, title abbreviation, page number, court designation, and year, e.g.:

Smith v. Jones, 645 So.2d 321 (La. 1990)

(b) A parallel public domain citation following the same format as that for post-January 1, 1994 opinions may be added after the Southern Reporter citation, but is not required.

(3) Opinions issued by the Supreme Court of Louisiana prior to the discontinuation of the official Louisiana Reports in 1972 and opinions issued by

the Courts of Appeal prior to their inclusion in the Southern Reporter in 1928 shall be cited in accordance with pre-1994 practice, as follows:

(a) Cite to Louisiana Reports, Louisiana Annual Reports, Robinson, Martin, Reports of the Louisiana Courts of Appeal, Peltier, Teisser, or McGloin if therein, and to the Southern Reporter or Southern 2d if therein.

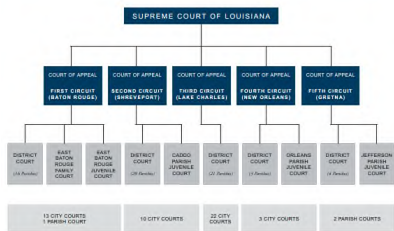
(b) A parallel public domain citation following the same format as that for post-January 1, 1994 opinions may be added, but is not required.

B. These rules shall apply to all published actions of the Supreme Court of Louisiana and the Louisiana Courts of Appeal issued after December 31, 1993. Citation under these rules in court documents shall become mandatory for all documents filed after July 1, 1994.

Appellate Practice: Writs and Appeals

Raymond P. Ward
Adams and Reese LLP
<https://raymondward.typepad.com>
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LOUISIANA COURT STRUCTURE JANUARY 1, 2021



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*, DQFD, 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.”

— *Lt. 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 less intelligent, less credible.</p>

Sources: Daniel M. Oppenheimer, *Consequences of Erudite Vernacular Utilized Irrespectively 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*
