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 (in your opinion) 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]ppeal 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 judgment's merits. 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(C). 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 La. Code Civ. P. art. 1915. 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 Article 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 order[4]) 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]

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[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 *Messinger*, 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 of appealable interlocutory judgments 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(B).
- An order confirming, modifying, correcting, or vacating an arbitration award. La. R.S. 9:4215.
- 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 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.

Special rule for discovery involving non-parties

A judgment on a discovery dispute can be final and appealable if it involves discovery from a non-party. The rationale is that such a judgment is final as far as the non-party is concerned.[6]

[6] Examples: *Hughes v. Capital City Press*, 2023-0059 (La. App. 1 Cir. 6/2/23), 369 So.3d 441; *R.J. Gallagher Co. v. Lent, Inc.*, 361 So.2d 1231 (La. App. 1 Cir. 1978); *Berard v. Am. Employers Ins. Co.*, 246 So.2d 686 (La. App. 1 Cir. 1970); *Larriviere v. Howard*, 00-186 (La. App. 3 Cir. 10/11/00), 771 So.2d 747; *Green v. Canal Ins. Co.*, 2022-0384 (La. App. 4 Cir. 11/14/22), 352 So.3d 99; *Channelside Servs., LLC v. Chrysochoos Group, Inc.*, 2015-0064 (La. App. 4 Cir. 5/13/16), 194 So.3d 751; *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 2014-0286 (La. App. 4 Cir. 8/27/14), 147 So.3d 1266; *Gariepy v. Evans Indus., Inc.*, 06-106 (La. App. 5 Cir. 9/25/07), 968 So.2d 753.

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 intervened 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(A).

Generally, the delay to perfect a suspensive appeal is 30 days, and the delay to perfect a devolutive appeal is 60 days.[7] *See* La. Code Civ. P. art. 2123(A) (suspensive appeal); La. Code Civ. P. 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).[8] If a timely motion for new trial or JNOV is filed, the clock starts ticking when the clerk sends notice of the

[7] Some appeals have shorter delays; for example, 15 days to appeal a preliminary injunction (La. Code Civ. P. art. 3612(C)), and 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.

[8] The time to file a motion for new trial is governed by La. Code Civ. P. art. 1974, and the time to file a motion for JNOV is governed by La. Code Civ. P. art. 1811(A)(1). Both delays are seven days, excluding legal holidays, after the clerk has mailed or the sheriff has served notice of judgment.

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.

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).[9] To perfect a suspensive appeal, you have to obtain the order of appeal *and* furnish the required security within the 30-day period. *See* La. Code Civ. P. art. 2123(A). 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.)

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 needs only 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 your time and 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.

[9] La. Code Civ. P. art. 2121 (appeal taken by obtaining an order of appeal); *id.* art. 2087(A) (60 days to take a devolutive appeal).

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).

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 timely 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(B)(1). 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.[10]

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.

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[10] *See*, *e.g.*, Unif. R. 2-12.1 (number of copies), Unif. R. 2-13 (rules for timely filing by mail).

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 to apply 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). La. Code Crim. P. art. 922(A); La. Code Civ. P. art. 2166(A); 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(C). 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. Unif. R. 2-18.1. In the 3rd Circuit, the supporting brief likewise must not exceed 10 pages. 3d Cir. R. 21. 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.[11] Theoretically,

[11] *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).

any interlocutory judgment can be the subject of a writ application. But in reality, a 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 … 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 the 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.[12]
- Denial of a stay pending arbitration.[13]
- In a medical-malpractice case, denial of a medical review panel.[14]

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[12] *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. 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.

[13] *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 irreparably 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.

[14] *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").

- Denial of a summary judgment or a peremptory exception asserting a First Amendment defense.[15]
- Denial of a jury trial.[16]

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 dictate[ ] 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 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. The most frequent exception is when the court orders the judgment to be reduced to writing. ***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.

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[15] *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. Collin*, 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).

[16] *Row v. New Orleans Public Belt R.R.*, 539 So. 2d 907, 908–09 (La. App. 4 Cir. 1989).

Unlike appeals, a motion for new trial or reconsideration will not interrupt or suspend the 30-day period to apply for a supervisory writ.[17]

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.[18]

The trial court or court of appeal may grant an extension of the return date, but only if the motion for extension 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.[19]

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.[20]

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).

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[17] *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.

[18] *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; *Levert 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.

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

[20] *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.

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(C), 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 (*see* Unif. R. 4-5(A)).

The big difference between a writ application and an appeal brief is the attachments. An appeal brief has no attachments except for copies of the trial court's judgment and reasons for judgment. 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(C) 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, or the applicant's statement that no written opposition was filed.
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 follow; 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, namely certification of 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.

In the 2nd Circuit, an application seeking expedited review must be filed "as soon as possible after the trial court's ruling, and in no event later than fifteen days from the applicable Time to File provision of [Unif. R.] 4-3 …." La. 2nd Cir. R. 17. Failure to comply with this rule is grounds for denial of expedited review. *Id*. The 2nd Circuit's rational for this rule applies to all Louisiana courts of appeal:

> This Court's ability to address issues raised in writ applications requesting expedited review can be significantly impaired when applicants elect to wait until the last day of the thirty-day period for

> seeking review to request expedited consideration. Such late-filed requests often create unnecessary emergent circumstances which place a significant burden on this Court.
> [*Id.*, Comment.]

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.

In the 4th Circuit, you should file, within 10 days after filing of the writ application, either (a) the opposition, or (b) a motion to extend the time to file the opposition. Otherwise, the court will presume "that a response will not be forthcoming." 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. 16.

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 the Louisiana Supreme Court's review of a court of appeal's judgment does so by filing an application for a supervisory writ or a writ of certiorari or review. 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 2023 statistics:

	2023 Total	**2023 Civil**	**2023 Criminal**
Applications filed (except prisoner pro se)	961	661	300
Prisoner pro se writs	578	7	571
Granted	139	90	49
To be argued	36	27	9
With orders & transferred	103	63	40
Dismissed	34	23	11
Not considered	272	26	246
Denied	1,506	557	949
Opinions rendered	37	30	7

Source: *Annual Report 2023: 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, 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).

The writ application must raise every issue that you want the Court to consider. 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. 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.

Time to file is governed by Rule X § 5 and 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).

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 valuable 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.

The rules on the 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 ¾ in. and 1¼ in. at the left, right, and bottom.
- Top margin between 1½ 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 at https://www.lasc.org/SupremeCourtRules. See also Appendix C to Rules of Supreme Court of Louisiana.

b. Note that the writ-application filing sheet fulfills two functions:

   i. The verification required by Rule X § 2(d) 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 https://www.lasc.org/SupremeCourtRules.

   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 X § 5(b), a copy of the trial judge's order fixing the time for filing application in Supreme Court, and any extensions of the deadline. If a copy is unavailable, an affidavit of the applicant or counsel indicating the contents of the order and explaining why it's unavailable.

Rule X § 4.6.

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 30 days after filing of the writ application. (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. For the applicant, two jurisprudential rules apply:

1. 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.

Oral argument: Rule VIII.

Rehearings: Rule IX.

Appendix A: 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.

Appendix B: Quotable quotes about ethos

Bryan A. Garner, *The Winning Brief* 696–97 (3d ed. 2014).

> The success or failure of an advocate comes down at last to this: What manner of man is it who is speaking? …. An advocate might obey every rule that Aristotle and Cicero have laid down, but if he is not sincere in what he says, he will not achieve persuasion.
> —Lloyd Paul Stryker, *The Art of Advocacy* 147 (1954).

> If your readers dislike you, they will dislike what you say. Indeed, such is human nature [that], unless they like you, they will mostly deny you even justice.
> —F.L. Lucas, *Style* 49 (1955).

> Almost everybody develops a habit of sizing up each person he has occasion to deal with: Is he honest? Is he intelligent? Has he been willing to do the necessary work on the matter in hand? Judges, consciously or unconsciously, form similar conclusions as they read each brief.
> —Robert N. Miller, "Judges and Briefs" (1955), in *Classical Essays on Legal Advocacy* 413, 419 (George Rossman ed., 2010).

> As Aristotle pointed out years ago, most people do not have the patience or intelligence to follow a logical argument very closely. Most people will be persuaded neither by reason nor by emotion, but by the *ethos*—the character—of the author.
> —James C. Raymond, *Writing (Is an Unnatural Act)* 60 (1980).

> You want readers to buy two things: your ideas and you, their source. That is, you want them to view your ideas as sound and interesting, and to view you as smart, informed, direct, and companionable…. If you don't persuade them to accept you, it's doubtful that you'll persuade them to buy the ideas you're proffering. We buy from people we like and trust—it's human nature.
> —John R. Trimble, *Writing with Style* 5 (3d ed. 2011).

Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges (2008).

> Whatever the outcome of the case, the quality of your performance will have advanced or hindered your career. If you appear before the court in question with any frequency, the judges will remember you as fair-minded, reliable,

and trustworthy—or the opposite. If the former, they will be more likely to grant discretionary review in a case that you assert to be worth considering; and when you appear to argue, the credibility you have developed will give you a leg up. If your argument has been uninformative and misleading, you may well begin your next case at a disadvantage. [*Id.* at 205–06.]

Persuasive briefing induces the court to draw favorable conclusions from accurate descriptions of your authorities. It never distorts cases to fit the facts. The impression you want to make on the court—that you're knowledgeable and even expert—will be compromised by any misdescription that opposing counsel brings to the court's attention. [*Id.* at 123.]

Linda L. Berger & Kathryn M. Stanchi, Legal Persuasion: A Rhetorical Approach to the Science 5 (2018).

As a mode of invention, *ethos* suggests that the advocate consider arguments based on the knowledge, experience, credibility, integrity, or trustworthiness of the speaker. Ethos may emerge from the character of the advocate herself, from the character of another actor within the argument, or from the sources used in the argument.

Edward P.J. Corbett & Robert J. Connors, *Classical Rhetoric for the Modern Student* (4th ed. 1999).

A third mode of persuasion was the ethical appeal. This appeal stemmed from the character of the speaker, especially as that character was evinced in the speech itself. A person ingratiated himself or herself with an audience—and thereby gained their trust and admiration—if he or she managed to create the impression that he or she was a person of intelligence, benevolence, and probity. Aristotle recognized that the ethical appeal could be the most potent of the three modes of persuasion. All of an orator's skill in convincing the intellect and moving the will of an audience could prove futile if the audience did not esteem, could not trust, the speaker. [*Id.* at 19.]

The ethical appeal can be the most effective kind of appeal; even the cleverest and soundest appeal to the reason could fall on deaf ears if the audience reacted unfavorably to the speaker's character. The ethical appeal is especially important in rhetorical discourse, because here we deal with matters about which absolute certainty is impossible and opinions are divided. [*Id.* at 72.]

The ethical appeal is exerted, according to Aristotle, when the speech itself impresses the audience that the speaker is a person of sound sense …, high moral character …, and benevolence …. Notice that it is *the speech itself* that must create this impression. Thus a person wholly unknown to an audience … could by his or her words alone inspire this kind of confidence. Some people, of course, already have a reputation familiar to an audience, and this reputation, if it is a good one, will favorably dispose an audience toward them, even before they utter a word. In the last analysis, however, it is the discourse itself that must establish or maintain the ethical appeal, for what a person says in any particular discourse could weaken or destroy any previously established reputation. [*Id.* at 72.]

If a discourse is to exhibit a person's good sense, it must show that the speaker or writer has an adequate, if not a professionally erudite, grasp of the subject being talked about, that the speaker or writer knows and observes the principles of valid reasoning, is capable of viewing a situation in the proper perspective, has read widely, and has good taste and discriminating judgment. If a discourse is to reflect a person's moral character, it must display an abhorrence of unscrupulous tactics and specious reasoning, a respect for the commonly acknowledged virtues, and an adamant integrity. If the discourse is to manifest a person's good will, it must display a person's sincere interest in the welfare of the audience and a readiness to sacrifice any self-aggrandizement that conflicts with the benefit of others. [*Id.* at 72–73.]

The *whole* discourse must maintain the "image" that the speaker or writer seeks to establish. The ethical appeal, in other words, must be pervasive throughout the discourse. The effect of the ethical appeal might very well be destroyed by a single lapse from good sense, good will, or moral integrity. A note of peevishness, a touch of malevolence, a flash of bad taste, a sudden display of inaccuracy or illogic could jeopardize a person's whole persuasive effort. [*Id.* at 73.]

The ethical appeal must pervade all parts of the discourse, but it is nowhere more important than in this part where we are seeking to prove our case or refute the opposition. So important is the ethical appeal in effecting persuasion that Aristotle said "it is more fitting for a good man to display himself an honest fellow than as a subtle reasoner" (*Rhetoric*, III, 17). Sometimes when our case is weak, the ethical appeal, exerted either by the

image of the writer or by the tone of the discourse will carry the day. [*Id.* at 280.]

Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing (2d ed. 2008).

The third process of persuasion—ethos—involves efforts on the part of a persuader to establish credibility in the eyes of the audience. Classical rhetoricians have long recognized that an audience's perception[ ] of a speaker's or writer's credibility plays a significant role in how that audience will respond to the message presented. The more credibility the speaker or writer has, the more receptive the audience will be. [*Id.* at 13.]

Although the word *credibility* is frequently used as a general term for those traits of an advocate that inspire confidence and trust in an audience, classical rhetoricians have long recognized three separate components to credibility[:] … *intelligence*, *character*, and *good will*. [*Id.* at 125.]

There are several traits or characteristics that legal writers should project through their writing to demonstrate that they are of good moral character. These traits include:
Truthfulness
Candor
Zeal
Respect
Professionalism
[*Id.* at 125–26.]

Good will in the context of persuasion refers to how an advocate feels or is disposed toward others involved in the matter under discussion. According to classical rhetoricians, a decision-maker will doubt the veracity of what an advocate has to say if the advocate does not appear to be well-disposed toward the decision-maker or toward another party that may be affected by the decision…. The concept of good will is based largely on folk psychology and common sense: We tend to doubt a person's word if that person has ill-will toward us or toward another person who will be affected by the course of action we are being persuaded to take. [*Id.* at 143.]

An advocate is deemed intelligent when he or she possesses a number of important character traits that, taken together, indicate that the advocate is a trustworthy source of information in terms of *ability* (as opposed to being a

trustworthy source of information in terms of *moral character* …) ….
An intelligent legal writer is perceived as:

1. Informed
2. Adept at legal research
3. Organized
4. Analytical
5. Deliberate
6. Empathetic toward the reader
7. Practical
8. Articulate
9. Eloquent
10. Detail oriented
11. Innovative

[*Id.* at 148.]