Appellate Practice: Writs and Appeals

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2017 writs v. appeal in La.

What’s the difference?

Supervisory writs
• Interlocutory judgment
• Discretionary review
• No record (so lots of attachments)
• No oral argument (usually)

Appeals
• Final judgment
• Right to appeal
• Record (so few to no attachments)
• Oral argument (if you ask)
How to succeed at appellate practice

1. Know the standards of review
2. Follow the rules, not a form
3. Know the record
4. Be a professional writer
5. Oral argument: prepare, prepare, prepare, prepare
Standards of review
“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.”

Standards of review, grossly oversimplified

Manifest error (a.k.a. “clearly wrong”)  
Highly deferential.  
Applies to fact findings.

Abuse of discretion  
Highly deferential.  
Applies to discretionary rulings.

De novo  
No deference.  
Applies to rulings of law.
| (A) SCOPE, STANDARDS, AND EXTENT, IN GENERAL, k836-k867 |
| (B) INTERLOCUTORY, COLLATERAL, AND SUPPLEMENTARY PROCEEDINGS AND QUESTIONS, k868-k876 |
| (C) PARTIES ENTITLED TO ALLEGE ERROR, k877-k884 |
| (D) AMENDMENTS, k885-k890 |
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| (F) TRIAL DE NOVO, k892-k899 |
| (G) PRESUMPTIONS, k900-k939 |
| (H) DISCRETION OF LOWER COURT, k940-k986 |
| (I) QUESTIONS OF FACT, VERDICTS, AND FINDINGS, k987-k1024.6 |
| (J) HARMLESS ERROR, k1025-k1074 |
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Quotable quote on standards of review

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

Ruggero J. Aldisert et al., Winning on Appeal § 5.2 at 52 (3d ed. 2017).
Quotable quote on the abuse-of-discretion standard of review

“To try to beguile the appellate court to review discretionary actions *de novo* is simply a waste of the lawyer’s abilities, the client’s money, and the court’s time.”

Briefing the standard of review

In the U.S. Fifth Circuit briefs, the appellant’s argument must contain, “for each issue, a concise statement of the standard of review ....”

Briefing the standard of review

In briefs for Louisiana appellate courts, the appellant’s argument must contain, “for each assignment of error and issue for review a concise statement of the applicable standard of review ....”

Briefing the standard of review

“[E]ven if you’re not required to state the standard [of review], you’re wise to do so. If the standard happens to be a tough one, you’ll enhance your credibility by your unflinching approach.”

For writ applications, additional standards of review

• Irreparable injury

• Herlitz
For writ applications, additional standards of review

- **Irreparable injury**
  - Error cannot, as a practical matter, be corrected on appeal after final judgment

  - Examples:
    - Venue
    - Judge v. jury trial
    - Denial of arbitration

See written materials pp. 2–4
For writ applications, additional standards of review

• Herlitz
  – Trial court’s judgment is arguably incorrect
  – No factual dispute to resolve
  – Reversal would terminate the litigation


See written materials p. 4.
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Rules, not forms
Rules, not forms

• Forms, the vampires of legal writing

• “The world changes; we do not.”
  – Anne Rice, *Interview with a Vampire*.

• Conform (maybe) to obsolete, outdated rules

• Preserve bad legal writing
Louisiana rules

• La. Code Civ. P. arts. 2081–2201
• La. Code Crim. P. arts. 911–923
• Uniform Rules
• Local Rules
• La. Supreme Court rules
U.S. 5th Circuit rules

• Federal Rules of Appellate Procedure
• 5th Circuit Rules
• 5th Circuit Internal Operating Procedures
• 5th Circuit Practitioner’s Guide
Where to find the rules

- Green books
- La. Rules of Court (Thomson Reuters)
- Westlaw, LEXIS
- Courts’ web sites
Know the record
Content of the record (La.)

- Extract of pertinent trial-court minutes
- All pleadings and motions (including attachments)
- Court orders
- Documentary evidence and other evidence
- Judgment and reasons for judgment
- Transcript of testimony
  — See Unif. R. 2-1.5 – 2-1.9.
Content of the record (U.S. 5th Cir.)

• Original papers and exhibits filed in the district court
• Transcript of proceedings, if any
• Certified copy of the docket entries prepared by the district clerk
  — See Fed. R. App. P. 10
Form of the record

- Electronic
  - U.S. Fifth Circuit
- Paper, but available in PDF
  - La. 1st, 3rd, and 5th Circuits
- Paper
  - La. 2nd and 4th Circuits
Know 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.”

Know the record

“The brief ... shall contain ... [the party’s] contentions, with reference to the specific page numbers of the record and citation to the authorities on which [the party] relies ....”

Know the record

“Every assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record, whether in paper or electronic form, where the matter is found ....”

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)

• And sometimes by line (like the Bible)
  — 6 R. 1307:5-12 (vol. 6 p. 1307 lines 5-12)

• In the U.S. 5th Circuit: ROA.[page]
Be a professional writer
Too much brief-writing
Fun brief-writing fact

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

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

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

—Judge Thomas M. Reavley

Fun briefwriting fact

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

In the U.S. 7th Circuit, percentage of briefs that are “of a high professional caliber”: 3%

—Judge Frank Easterbrook

What’s wrong with briefs (according to the 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., ...

—Ruggero Aldisert et al., *Winning on Appeal* § 2.3.1, at 20-21 (3d ed. 2017)
More fun facts about legal writing

• Legal writing is the most important subject taught in law school.*

• 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.

* But not necessarily treated so.
Citing cases La. style

Wrong

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

Right

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

- In La. courts of appeal, give parallel citations to U.S. Supreme Court decisions. (Unif. R. 2-12.4.)
The importance of typography

The other day, I ran into an entire paragraph written in all capital letters. To make matters worse, the entire thing was in bold text. And I thought to myself, “Geez, trying to read this is hurting both my eyes and my brain. It’s like the writer is shouting at me, which hurts my ears and makes me wish that he would just shut up, just to stop the pain.”
Help with typography

- Matthew Butterick, *Typography for Lawyers*


- U.S. 7th Cir., *Requirements and Advice for Typography in Briefs and Other Papers*
Oral argument: prepare, prepare, prepare
YOU'RE PRESENTING AN ORAL ARGUMENT IN APPELLATE COURT?

THAT'S RUFF
I'm fine
“You must prepare. You must know and—what is important—you must believe that you know more about the case than anyone else in the courtroom, including the judges.... [I]f you have this feeling, then you will have no apprehension about having hypotheticals thrown to you at oral argument. You will have the attitude that you are ready for anything.”

Differences between moot court and real-world oral argument

• Record and precedents are important; “policy” not so important.
• A conversation, not a rhetorical display, not a debate.
• You’re not required to use all your time.
• Splitting the argument with co-counsel is usually a bad idea.
Preparing for oral argument

• Review the record. Know it cold.
• Re-read the briefs.
• Re-read the important cases cited in the briefs.
• Update your research.
• Prepare 1 to 3 points to make.
• Anticipate questions.
• Moot court (maybe)
For supplemental materials:

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