

Louisiana Appellate Practice

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Introduction

In this presentation, we hope to give you some of the information you will need to handle your first application for a supervisory writ, your first appeal, and your first application to the Louisiana Supreme Court for a writ of review.

To download a copy of these materials, the accompanying PowerPoint presentation, or other appellate-practice materials, please visit *Louisiana Civil Appeals* at <http://raymondward.typepad.com/>. Look for the entry dated October 28, 2014, or type “Bridging the Gap” in the Google search box.

These materials were prepared for a one-hour presentation to lawyers as an introduction to Louisiana appellate procedure. They are not intended to be a comprehensive review of Louisiana appellate law; nor are they a substitute for an experienced appellate attorney or for your own legal research.

Any authority cited in these materials may be outdated by the time you read this. Remember that laws and court rules may change.

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Supervisory writs – courts of appeal

Can this interlocutory judgment be reviewed by supervisory writ?

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). On the other hand, “If the decree of the appellate court can restore the parties, without the loss of any right under the pleadings, to the identical position which they respectively occupied before the rendering of the interlocutory decree or order complained of, the injury to either party is clearly not irreparable” *Farmers Supply Co. v. Williams*, 107 So. 2d 544, 547 (La. App. 2 Cir. 1958).

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 is a non-exclusive list of judgments deemed to cause irreparable injury:

1. Improper venue.
 - a. Cases holding that erroneous venue ruling causes irreparable injury: *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; *Scarborough v. J. Ray McDermott*, 2002, 1235 p. 5 (La. App. 4 Cir. 11/20/02), 833 So. 2d 436, 439-40.
 - b. Note: Failure to apply for writs following erroneous judgment on venue exception may be deemed a waiver of that issue. See *Hebert v. Mid South Controls & Servs.*, 96-378 (La. App. 3 Cir.

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10/9/96), 688 So. 2d 1171, 1176; *Mousa v. Kasem*, 1998-2320 p. 3 (La. App. 4 Cir. 3/31/99), 731 So. 2d 981, 983; *Jac,son v. St. Pierre*, 336 So. 2d 261, 262 (La. App. 1 Cir. 1976).

2. Trial by jury.
 - a. A party who fails to seek supervisory writs from the wrongful denial of a jury trial waives the issue on appeal. *La. Nat'l Bank v. Majella, Inc.*, 610 So. 2d 964, 965 (La. App. 1 Cir. 1992); *Eddy v. Litton*, 586 So. 2d 670, 673 (La. App. 2 Cir. 1991); *Cooks v. Cornin*, 560 So. 2d 994, 996 (La. App. 4 Cir. 1990); *Van Meter v. Kubelka*, 544 So. 2d 547, 550 (La. App. 5 Cir. 1989).
 - b. Similarly, a party who fails to seek supervisory writs from the wrongful denial of a motion to strike a demand for jury trial waives the issue on appeal. *Brown v. Gen. Motors Corp.*, 95-245 p. 8 (La. App. 5 Cir. 10/18/95), 662 So. 2d 531, 537; *Turner v. Regional Transit Auth.*, 498 So. 2d 777, 779 (La. App. 4 Cir. 1986); *Wyndham v. Sec. Ins. Co. of Hartford*, 337 So. 2d 577, 578–79 (La. App. 4 Cir. 1976).
3. An order that violates a privilege afforded by Chapter 5, La. Code of Evidence.
4. Arbitration.
 - a. Refusal to order arbitration causes irreparable injury. *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.
 - b. But 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.
 - c. Judgment denying motion to compel arbitration held no longer appealable under current version of La. Code Civ. P. art. 2083, but court converted appeal into application for supervisory writ. *Arkel Constructors, Inc. v. Duplantier & Meric, Architects, L.L.C.*, 2006 1950 pp. 4–7 (La. App. 1 Cir. 7/25/07), 965 So. 2d 455, 458–59.

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5. Order compelling a party to sign a compromise. *Volz v. Hertz Rent-A-Car*, 552 So. 2d 1311, 1313 (La. App. 5 Cir. 1989); *Rhodes v. Nalencz*, 545 So. 2d 638, 639 (La. App. 5 Cir. 1989).

Herlitz. If a judgment does not cause irreparable injury, it is still 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 [sic] 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.”

How do I apply for a supervisory writ?

Preliminary steps in the trial court.

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 by which the writ application must be filed 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. **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.

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.

The trial court or court of appeal may grant an extension of return date, but only if the motion is filed within the original or previously extended return date. Unif. R. 4-3. Thus, as a practical matter, you must always file your notice of intent within the 30-day window, and you must get the trial court’s signature on the return-date order within that 30-day window.

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 treats

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the order as the implied grant of a motion to extend the return date. *Barnard v. Barnard*, 96-0859 (La. 6/24/96), 675 So. 2d 734.

Conversely, if the notice of intent is not filed until after the 30 days has run, the writ application will be deemed untimely. 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.

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

If the judge refuses to give you a return date, file the writ application anyway, but do so within the 30-day window or, if you need expedited consideration, as soon as possible. Include in the writ application an explanation for the absence of a return-date order. “When a relator makes a timely and genuine attempt to obtain the judge’s signature on the order for which review is sought, the writ should not be refused. See *City of New Orleans v. Benson*, 95-2436 (La. App. 4 Cir. 12/14/95), 665 So. 2d 1202.” *In re Gramercy Plant Explosion at Kaiser*, 06-555 (La. App. 5 Cir. 7/31/06).

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) (available at <http://www.adamsandrees.com/a-writ-in-time-02-01-2004/>).

Mechanics for preparing and filing the writ application.

The application must be filed within the return date, as originally set or as extended by trial court or court of appeal. Unif. R. 4-3.

You must file an original and 3 copies of the writ application in the court of appeal. Unif. R. 4-1. The 4th Circuit has a local rule requiring that you need file only the original plus 1 copy. See La. 4 Cir. R. 22. But in my recent experience in that court, the clerk’s office has always asked for 2 additional copies. So play it safe and be prepared to file the original plus 3 copies in that court.

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The writ application itself resembles an appellate brief with several attachments. The following rules govern the form and content of the writ application:

1. Cover: see briefing rule Unif. R. 2-12.3. (Rules governing appeals fill gaps in rules governing writ applications. See Unif. R. 4-8.)
2. Form: see briefing rule Unif. R.2-12.2 (see Unif. R. 4-8). The pages of application and attached documents must be consecutively numbered. Unif. R. 4-5.
3. Contents (Unif. R. 4-5):
 - a. Index of all items contained in application. Unif. R. 4-5(a).
 - b. Affidavit of verification and service. Unif. R. 4-5.
 - c. Concise statement of grounds for invoking court's jurisdiction Unif. R. 4-5(b).
 - d. Concise statement of the case. Unif. R. 4-5(c).
 - e. Issues or questions of law presented for determination by the court. Unif. R. 4-5(d).
 - f. Assignments or specifications of error. Unif. R. 4-5(e).
 - g. Memorandum of law, complying with briefing rules Unif. R. 2-12.2 and Unif. R. 2-12.10.
 - h. Prayer for relief. Unif. R. 4-5(e).

The attachments to the writ application must include the following items:

1. A copy of judgment, order, or ruling complained of (if in writing). Unif. R. 4-5(f).
2. A copy of judge's reasons for judgment, order, or ruling (if written). Unif. R. 4-5(g).
 - a. Note: If judge gives oral reasons, contact the court reporter, order the transcript, and attach a transcript of reasons to writ application.
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.

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4. A copy of pertinent court minutes. Unif. R. 4-5(i).
5. The notice of intent and order setting return date, including any order extending the return date. Unif. R. 4-5(j).
6. Any other document that the court *must have* to properly rule on the writ application. This usually includes any document that served as the basis for the motion or exception below, the opposition to the motion or exception, or the trial court's ruling.

The 4th Circuit also requires a Writ Application Intake Form, which you can download from the 4th Circuit's web site. Visit <http://www.la4th.org/>. Put the intake form up front, immediately behind the cover page.

3. If you need a stay or expedited consideration

Usually it takes about 4 to 6 weeks for the court of appeal to rule on a writ application. If you can't wait that long, or if you want a stay of trial-court proceedings, read on.

Stay. The trial court has discretion to stay or not stay proceedings while writ application is pending. The filing or granting of a writ application, in itself, does not stay proceedings unless trial or appellate court orders otherwise. Unif. R. 4-4(A). Any request for stay must first be presented to trial court. Unif. R. 4-4(A).

Expedited consideration. If you need expedited consideration, you have to tell the court. The cover must contain a statement **in bold print** that expedited consideration is requested. And the writ application must contain a separate additional page, titled "REQUEST FOR EXPEDITED CONSIDERATION." This page must be properly noted in the index. The page itself must state the justification for the request and a specific time within which action by the appellate court is sought. Unif. R. 4-4(B), Unif. R. 4-5(C)(12).

The writ application must also include an affidavit certifying the following:

1. That the trial court, all counsel, and all unrepresented parties have been notified by telephone or equally prompt means of communication that the writ application has been or is about to be filed.
2. That the trial court, all counsel, and all unrepresented parties have been served with a copy of the writ application by means equal to the means used to file in court of appeal.

Unif. R. 4-4(C). In short: make sure that these people receive the writ application as soon as the court of appeal receives it.

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How much time do I have to respond to a writ application?

The Uniform Rules do not provide a deadline for responding to a writ application.

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.

In the 4th Circuit, you have 10 days after the filing of a non-emergency writ application to file either a response or a motion for an extension of time to file a response. If neither is filed within 10 days, the court will presume "that a response will not be forthcoming." *See* 4th Cir. R. 16.

The 1st, 2nd, 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 and 2nd Circuits, it's probably not a bad idea to telephone the clerk's office to inform them that you wish to file a response. Sometimes I've filed a motion asking the court to set a reasonable deadline (usually around 20 days after filing of the writ application). The motion informs the court that a response is on the way, and any action by the court on the motion will at least give you a definite deadline for filing your response.

Warning: The court of appeal may act peremptorily on the writ application, with or without a response. Unif. R. 4-7.

Civil appeals

Can I appeal this judgment?

In civil cases, the final judgment in the case can be appealed. La. Code Civ. P. art. 2083. A final judgment is a judgment that determines the merits of the case. La. Code Civ. P. art. 1841. A judgment that does not determine the merits but only preliminary matters is an interlocutory judgment. *Id.* An interlocutory judgment cannot be appealed unless legislation expressly makes it appealable. La. Code Civ. P. art. 2083.

Every final judgment must be signed by the trial judge. No appeal can be taken until the judgment is signed. La. Code Civ. P. art. 1911.

A judgment that determines the merits in whole is a final judgment and is immediately appealable. A judgment that determines the merits in part is a partial final judgment. La. Code Civ. P. arts. 1841, 1911. To determine whether a partial final judgment can be immediately appealed, consult art. 1915.

Article 1915(A) specifies six kinds of partial final judgments that are automatically appealable. If the judgment does not fit any of the art. 1915(A) categories, then it is *not* appealable unless the trial court designates it as final and makes “an express determination that there is no just reason for delay.” La. Code Civ. P. art. 1915(B).

The art. 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.

Article 2083(C) allows an appeal from an interlocutory judgment “only when expressly provided by law.” The following is a list of interlocutory judgments that can be appealed:

1. Class actions – order certifying or refusing to certify. La. C.C.P. Art. 592(A)(3)(b).
2. Preliminary injunctions – 15 days from rendition. La. C.C.P. Art. 3612(B) and (C). But no appeal from a T.R.O. La. C.C.P. Art. 3612(A).
3. Although a discovery order is generally not appealable, an order compelling discovery from a non-party is final as to the non-party, and so can be appealed by the non-party. *Garipey v. Evans Indus.*, 06-106 pp. 3–4 (La. App. 5 Cir. 9/25/07), 968 So. 2d 753, 754–55; *Larriviere v. Howard*, 2000-186 p. 3 (La. App. 3 Cir. 10/11/00), 771 So. 2d 747, 749–50, *writ granted in part on other grounds*, 2000-3087 (La. 1/26/01), 781 So. 2d 567; *R.J. Gallagher Co. v. Lent, Inc.*, 361 So. 2d 1231, 1231 (La.

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App. 1 Cir. 1978); *Union Planters Bank Natl. Assn. v. Salih*, 369 F.3d 457, 460 (5th Cir. 2004) (applying La. law).

4. In executory proceedings, an order directing the issuance of a writ of seizure and sale (15-day deadline). La. C.C.P. Art. 2642.
5. Judgment granting or refusing an annulment of marriage or a divorce (30-day deadline). La. C.C.P. Art. 3942.
6. Judgment awarding custody, visitation, or support (same deadline as Art. 3942). La. C.C.P. Art. 3943. “Support” includes alimony pendente lite. *Fuori v. Fuori*, 316 So. 2d 802, 803 (La. App. 1 Cir. 1974).
7. Any final judgment rendered under La. Children’s Code. La. Ch. C. Art. 330. For procedure, see La. Ch. C. Arts. 331-338.
8. Expropriation: no suspensive appeal. La. R.S. 19:13. For expropriation by Dept. of Transp. & Devel., see La. R.S. 48:459.
9. Default judgment: La. C.C.P. Art. 2083(A).
10. Worker’s compensation judgment. La. R.S. 23:1310.5(A)(2). (For deadlines, see La. R.S. 23:1310.5(B).
11. Unemployment compensation: La. R.S. 23:1630 through 23:1635.
12. Judgment of interdiction, judgment appointing or removing a curator or undercurator, judgment modifying or terminating interdiction (30-day deadline, no suspensive appeal). La. C.C.P. Art. 4555.
13. Judicial commitment: La. R.S. 28:56(D) (no suspensive appeal, but appeal “shall be heard in a summary manner, taking preference over all other cases except similar matters.” *Id.*)

If you don’t have a final, appealable judgment, but you need immediate appellate review, consider applying for supervisory writ.

What is the deadline for taking an appeal?

The time limit is 30 days for a suspensive appeal and 60 days for a devolutive appeal. La. Code Civ. P. arts. 2123, 2087. The time that the 30- or 60-day clock starts ticking depends on whether a timely motion for new trial (art. 1971 et seq.) or judgment notwithstanding the verdict (art. 1811) has been filed. If one of these motions was timely filed, the 30- or 60-day clock starts ticking when the clerk mails notice of the trial court’s denial of the motion. If neither of these motions was timely filed, then the 30- or 60-day clock starts

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ticking when the time to apply for new trial or judgment notwithstanding the verdict has expired.

The time to file a motion for new trial or judgment notwithstanding the verdict is 7 days, excluding holidays, after the clerk has mailed or the sheriff has served notice of the final judgment. La. Code Civ. P. arts. 1811, 1974.

If, sometime after partial final judgment is rendered under La. C.C.P. Art. 1915(B), the judgment is designated as final for immediate appeal, then clock starts when the clerk mails notice of order designating judgment as final. *Fraternal Order of Police v. City of New Orleans*, 2002-1801 p. 4 (La. 11/8/02), 831 So. 2d 897, 900.

Special rule for preliminary injunctions. The deadline to appeal the grant or denial of a preliminary injunction is 15 days from the date of the order or judgment. La. C.C.P. Art. 3612(C). A motion for new trial does not interrupt or suspend the 15-day time limit.

How do I take an appeal?

File a motion or petition for an appeal and obtain the trial court's signature on an order granting the appeal. La. Code Civ. P. art. 2121. Do this within the 30-day suspensive-appeal deadline or the 60-day devolutive-appeal deadline.

The order granting the appeal should specify the court of appeal to which the appeal is being taken. To determine which appellate court that is, see La. R.S. 13:312.

If you are taking a suspensive appeal (an appeal that will suspend the effect or execution of the judgment), you must also furnish security, usually in the form of a surety bond. La. Code Civ. P. art. 2123. The order granting the appeal must state the amount of security required. La. Code Civ. P. art. 2121. To determine the amount, see La. Code Civ. P. art. 2124(B). If you're unhappy with the amount of security set by the trial court, you can apply for a supervisory writ. *See* La. Code Civ. P. art. 2124(C).

Who pays for all this?

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

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appellant may be reimbursed by the appellee for the costs advanced on the front end.)

Once the estimated costs have been paid, it becomes the clerk's job to prepare the record and lodge it in the court of appeal. La. Code Civ. P. art. 2127. The clerk's deadline for doing this is referred to as the "return date." The return date is 30 days after estimated costs are paid if there is no testimony to be transcribed, or 45 days if there is testimony to be transcribed. The person responsible for preparing the transcript is the court reporter. La. Code Civ. P. art. 2127.2. The trial court may grant one extension of the return date for no more than 30 days. Any further extension of the return date may be granted by the appellate court. *See* La. Code Civ. P. art. 2125.

What if I don't need the entire trial-court record for the appeal?

Sometimes you don't need the entire trial-court record for an appeal. For example, if a case was decided on exceptions or a motion for summary judgment, the trial-court record may include voluminous pleadings that are unnecessary for the appeal. In cases like this, 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.

What happens next?

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 then 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.

The lodging of the record in the court of appeal is a major event, because it triggers several deadlines:

1. The appellee's 15-day deadline to answer the appeal. La. Code Civ. P. art. 2133(A).
2. The briefing schedule (25 days after lodging for the appellant, 45 days after lodging for the appellee).

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3. The parties' 30-day deadline to request oral argument.

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).

The briefing schedule. The appellant's brief will be due 25 days after the record is lodged, and the appellee's brief will be due 45 days after the record is lodged. Unif. R. 2-12.7. These deadlines can be extended by motion, but the appellate courts are not generous in granting extensions. See Unif. R. 2-12.8.

Request for oral argument. The lodging of the record also triggers another deadline: the deadline to request oral argument. Within 30 days after lodging, either party may file a request for oral argument, which may be in the form of a letter to the clerk of court. If any 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.

If you miss the deadline to file a request for oral argument but still want oral argument, file a motion to reinstate oral argument.

How do I write a brief?

Everything you need to know about the form and content of a brief is in the Uniform Rules:

1. Form, fonts, paper size, page limits: Unif. R. 2-12.2.
2. Cover: Unif. R. 2-12.3.
3. Content: Unif. R. 2-12.4 (appellant); Unif. R. 2-12.5 (appellee).

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4. Certificate of Service: must list all parties and all counsel, indicating party each counsel represents, and showing how and when service was accomplished. (Unif. R. 2-14.2.)

Attachments. Unlike an application for a supervisory writ, an appellate brief does not require many attachments. The reason is that all the material that the brief may refer to should be included in the record.

Attached to the appellant's brief should be a copy of the judgment, order, or ruling complained of, and the trial court's reasons for judgment (if any), which may take the form of written reasons, transcribed oral reasons, or a minute entry. Unif. R. 2-12.4.

Do not attach anything else to your brief.

Number of copies. The general rule is to file the original plus 7 copies. Unif. R. 2-12.1. Exceptions: In the 3rd Circuit, file the original plus 4 copies. (No local rule for this; these are the instructions on the court's web site.) In the 4th Circuit, file the original plus 4 copies in civil cases, and the original plus 2 copies in criminal case. 4th Cir. R. 2.

Will I get oral argument?

Yes, as long as any party has filed a request for oral argument within 30 days after lodging of the record.

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 5th Circuit (and recently, the 1st) have allowed 30 minutes per case, or 15 minutes per side. *See* Unif. R. 2-15.2; 5th Cir. R. 5.

The appellant has the right to open and close oral argument. Unif. R. 2-15.1. But if you want to reserve time for rebuttal, you need to 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.

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).

Civil appeals

I lost the appeal; now what do I do?

Usually within 4 to 6 weeks after oral argument, the court will render its judgment. If you lost, or if you didn'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 delivery or mailing of notice of judgment (in civil cases). Unif. R. 2-18.2.

One advantage of applying for rehearing is that it interrupts the time to apply to the Louisiana Supreme Court for a writ of review. Note, though, that this applies only in cases where rehearing is available. And rehearing is available in only three instances:

1. When the court has granted a writ application on the merits;
2. When the court has dismissed an appeal; and
3. When the court has ruled on the merits of an appeal.

Unif. R. 2-18.7. In other cases (e.g. 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 general filing requirements are simple: File an original plus 4 copies of the rehearing application and the supporting brief. Exception: in the 2d Circuit, file the original plus 6 copies. 2d Cir. R. 3-1. (In the 2d Circuit, all rehearing applications go to a 5-judge panel.)

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.

Louisiana Supreme Court writ practice

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 jurisdiction. 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 order peremptory relief. But more often, the Court will issue a writ of certiorari, ordering the court of appeal to send up the record, and will schedule 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 2013 statistics:

	2013 Total	2013 Civil	2013 Criminal
Applications filed (except prisoner pro se	1,517	893	624
Prisoner pro se writs	1,271	41	1,230
Granted	195	96	99
To be argued	51	36	15
With orders & transferred	144	60	84
Dismissed	0	0	0
Not considered	35	26	9
Denied	2,064	737	1327
Opinions rendered	43	33	10

Source: *Annual Report 2012: 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 10, Rules of the Supreme Court of Louisiana.

While the granting of a writ is purely discretionary with the Court, the Court has guidelines for the exercise of that discretion. These guidelines are listed in Rule 10 § 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:

Louisiana Supreme Court writ practice

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

Time to file is governed by Rule 10 § 5. The general rule is as follows:

30 days after mailing 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.

Rule 10 § 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).

Louisiana Supreme Court writ practice

You can file by mail, but you need documentation from the U.S. Postal Service to prove timely mailing. Rule 10 § 5(d):

An application properly mailed shall be deemed timely filed if mailed on or before the last day of the delay for filing. If the application is received by mail on the first legal day following the expiration of the delay, there shall be a rebuttable presumption that it was timely filed. In all other cases where the presumption does not apply, the timeliness of the mailing shall be shown only by an official United States postmark or by official receipt or certificate from the United States Postal Service made at the time of mailing which indicates the date thereof. For the purpose of this rule, the term “by mail” applies only to the United States Postal Service.

Applications forwarded by private delivery or courier service shall be deemed timely filed only if received by the clerk on or before the last day of the delay for filing.

A postage-meter date is *not* considered adequate proof of timely mailing. Neither is a U.S. Postal Service receipt for postage. *See Darden v. Daniel*, 2009-1097 (La. 9/4/09), 16 So. 3d 1162.

File the original plus 8 copies of the application. Rule 10 § 2(a). The following are the formal requirements (Rule 10 § 2(b)):

1. White, legal-size paper (8½ x 14 in.).
2. Double spaced type.
3. Margins between ¾ in. and 1¼ in. at left, right, and bottom.
4. Margin between 1½ and 2 inches at top.
5. Bind in at least two places at top margin. Staples or ACCO-type metal fasteners preferred.
6. Typeface between 11 and 12 point.

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

1. A front cover. See Rule 7 § 3 for guidelines.
2. Behind the front cover, a writ-application filing sheet.

Louisiana Supreme Court writ practice

- 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 10 § 2(e).
4. Index (i.e. table of contents).
5. Statement of the considerations in Rule 10 § 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 10 § 1(a).

Louisiana Supreme Court writ practice

Attachments—civil cases. Attach a copy of the trial court’s judgment, trial court’s written or transcribed oral reasons for judgment (if any), 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 10 § 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), the court of appeal’s order and opinion (if any), including any rulings and opinions on rehearing or applications for rehearing. Rule 10 § 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 10 § 4.6. The Court discourages other attachments, except for transcripts of relevant proceedings. Rule 10 § 4.7.

Oppositions to writ applications. Oppositions are governed by Rule 10 § 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

Louisiana Supreme Court writ practice

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 10 § 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 7, 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 8.

Rehearings: Rule 9.

Rule for citing Louisiana cases

Rules of the Supreme Court of Louisiana, Part G: General Administrative Rules, § 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

Rule for citing Louisiana cases

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.