Bridging the Gap
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Appellate Practice and Procedure

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Minor Wisdom, http://raymondpward.typepad.com
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Look for the entries dated October 27, 2006, or type "Bridging the Gap" in the Google search box on either site.

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Any authority cited in these materials may be outdated by the time you read this.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.

1. Appealable judgment – La. C.C.P. 2083.

    a. Final judgment – La. C.C.P. 1841, 1911, 2083.

        i. Judgment that determines the merits in whole.

        ii. Judgment that determines the merits in part.

            1. La. C.C.P. 1915(A) – no designation of finality necessary.

            2. La. C.C.P. 1915(B) – must have designation of finality.

                a. Designation of finality can occur when judgment is signed, or any time after judgment signed. *Fraternal Order of Police v. City of New Orleans*, 2002-1801 p. 4 (La. 11/8/02), 831 So.2d 897, 899.

        iii. Judgment must be written and signed. No appeal without a signed judgment. La. C.C.P. 1911.

        iv. Judgments on the pleadings and summary judgments are final judgments. La. C.C.P. Art. 968.

    b. Exceptions to final-judgment rule.

        i. Class actions. La. C.C.P. Art. 592 (as amended by Acts 2005, No. 205, effective 1/1/06).

        ii. 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).

        iii. A discovery order is generally not appealable. But an order compelling discovery from a non-party is final as to the non-party, and so can be appealed by the non-part. *R.J. Gallagher Co. v. Lent, Inc.*, 361 So.2d 1231, 1231 (La. App. 1 Cir. 1978).

    c. Other appealable judgments (a non-exclusive list):

        i. In executory proceedings, an order directing the issuance of a writ of seizure and sale (15-day deadline). La. C.C.P.

Art. 2642.

ii. Judgment granting or refusing an annulment of marriage or a divorce (30-day deadline). La. C.C.P. Art. 3942.

iii. Judgment awarding custody, visitation, or support (same deadline as Art. 3942). La. C.C.P. Art. 3943. "Support" includes alimony pendete lite. *Fuori v. Fuori*, 316 So.2d 802, 803 (La. App. 1 Cir. 1974).

iv. Any final judgment rendered under La. Children's Code. La. Ch. C. Art. 330. For procedure, see La. Ch. C. Arts. 331-338.

v. Expropriation: no suspensive appeal. La. R.S. 19:13. For expropriation by Dept. of Transp. & Devel., see La. R.S. 48:459.

vi. Default judgment: La. C.C.P. Art. 2083(A).

vii. Worker's compensation judgment. La. R.S. 23:1310.5(A)(2). (For deadlines, see La. R.S. 23:1310.5(B).

viii. Unemployment compensation: La. R.S. 23:1630 through 23:1635.

ix. 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.

x. 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.)

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

2. Time to appeal.

a. When does clock start?

i. If timely motion for new trial or JNOV filed: The date of mailing of notice of court's refusal to grant new trial or JNOV. La. C.C.P. Art. 2123(A)(2) (suspensive appeal); Art. 2087(A)(2) (devolutive appeal).

ii. If no timely motion for new trial or JNOV filed: On expiration of delay for applying for new trial or JNOV. La. C.C.P. Art. 2123(A)(1) (suspensive appeal); Art. 2087(A)(1) (devolutive appeal).

iii. If preliminary injunction, clock starts when judgment is rendered; motion for JNOV or new trial does not interrupt the delay. *See* La. C.C.P. Art. 3612(C).

iv. 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.

b. How long does clock tick?

i. Suspensive appeal: 30 days. La. C.C.P. 2123.

ii. Devolutive appeal: 60 days. La. C.C.P. 2087.

iii. Preliminary injunction (suspensive or devolutive): 15 days. La. C.C.P. Art. 3612(C).

3. Procedure for appealing: Motion or petition for appeal – La. C.C.P. 2121.

a. Which court of appeal? See Revised Statutes Title 13.

b. Suspensive appeal.

i. How differs from devolutive appeal: La. C.C.P. 2123(A).

ii. Security requirement.

1. Amount must be stated on order of appeal. La. C.C.P. 2121.

2. How to determine amount: La. C.C.P. 2124(B).

3. Procedure for contesting amount of security: La. C.C.P. 2124(C).

c. Devolutive appeal.

i. How differs from suspensive appeal – La. C.C.P. 2087.

ii. No security required – La. C.C.P. 2124(A)..

d. Return date.

i. What is a return date?

ii. When is the return date? La. C.C.P. 2125.

iii. Return date must be shown on order of appeal. La. C.C.P. 2121.

e. Content of record: If you don't need the entire record for appeal: La. C.C.P. 2128.

f. Payment of estimated costs: La. C.C.P. 2126.

i. Time to pay or contest.

ii. Procedure for contesting La. C.C.P. 2126(C).

4. What happens between this point and date record is lodged.

a. Clerk's duties: La. C.C.P. 2127, 2127.1.

b. Court reporter's duties: La. C.C.P. 2127.2.

5. Lodging of record: Effects.

a. Briefing schedule kicks in. Unif. R. 2-12.7.

b. 14-day period to request oral argument starts. Unif. R. 2-11.4.

i. What happens when one party requests oral argument: Usually everyone gets it.

ii. What happens when no one requests oral argument:

Usually no one gets it. Matter is submitted on briefs.

iii. If you want oral argument but miss the 14-day deadline, file a motion to reinstate oral argument.

c. Appellee has 15 days to answer the appeal. La. C.C.P. 2133.

6. Briefs.

a. Form, fonts, paper size, page limits: Unif. R. 2-12.2.

b. Cover: Unif. R. 2-12.3.

c. Content: Unif. R. 2-12.4 (appellant); Unif. R. 2-12.5 (appellee).

i. Jurisdiction of the Court.

ii. Concise statement of the Case.

iii. Action of the trial court.

iv. Specification or assignment of errors.

v. Issues presented for review.

vi. Argument.

vii. Conclusion, stating precise relief sought.

viii. 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.)

d. Attachments.

i. What to attach.

1. Complaining litigant: copy of judgment, order, or ruling complained of, trial court's written or transcribed oral reasons, or minute entry. Unif. R. 2-12.4.

2. Copies of non-Louisiana cases cited in brief. *Id.*

ii. What ***not*** to attach.

1. Anything else.

7. Oral argument.

    a. Time: Unif. R. 2-15.2.

        i. 40 minutes per case (30 minutes in La. 5 Cir.).

        ii. If 2 sides, 20 minutes per side (15 minutes per side in La. 5 Cir.).

    b. Do:

        i. Prepare, prepare, prepare.

        ii. Speak extemporaneously.

        iii. Answer questions immediately and directly.

        iv. Be courteous and professional.

    c. Don't:

        i. Read your argument (Unif. R. 2-15.3).

        ii. Interrupt the judge.

        iii. Fail to answer questions directly.

        iv. Be nasty.

        v. Argue as you would to a jury.

8. Decision by the court of appeal. Unif. R. 2-16.

    a. Full opinion: Unif. R. 2-16.1(A).

    b. Concise memorandum opinion: Unif. R. 2-16.1(B).

    c. Summary disposition: Unif. R. 2-16.2.

9. Publication of opinion.

    a. Criteria for publication. La. C.C.P. 2-16.3.

        i. Full opinion: published unless designated "not for

publication." Unif. R. 2-16.3(A).

ii. Concise memorandum opinion or summary disposition: not published unless panel designates it for publication. Unif. R. 2-16.3(B).

iii. Effect of non-publication: Unif. R. 2-16.3(C) *But see* Acts 2006, No. 644 (enacting La. C.C.P. Art. 2168). New Article 2168 does two things:

1. Requires Supreme Court and each court of appeal to publish all unpublished decisions on court's web site.

2. Authorizes citation of unpublished decisions posted on a court's web site as legal authority.

b. Court will reconsider its decision not to publish an opinion if asked by the trial judge or a party. Unif. R. 2-16.3(D).

10. Notice of judgment: Unif. R. 2-17.1.

11. Application for rehearing.

a. When will court consider a rehearing application? Unif. R. 2-18.7.

i. If your case fits Unif. R. 2-18.7, then timely filed application for rehearing interrupts for all parties the time to apply to La. Supreme Court for writs.

ii. If your case doesn't fit Unif. R. 2-18.7, you cannot apply for rehearing. Any rehearing application will be null and will not interrupt time to apply to La. Supreme Court for writs.

b. Time to file:

i. Criminal: 14 days after rendition of judgment. Unif. R. 2-18.2(a).

ii. Civil: 14 days after mailing of notice of judgment. La. C.C.P. 2166, Unif. R. 2-18.2(b).

iii. No extensions granted. Unif. R. 2-18.2(c).

1. Note: But you can get an extension on the supporting brief. Unif. R. 2-18.3.

c. Formal requirements.

i. File original plus 4 copies. Unif. R. 2-18.1.

1. Exception: 2nd Circuit requies original plus 6 copies. 2d Cir. Local Rule 3-1.

ii. Application must not exceed 10 pages.

iii. Supporting brief: file original plus 4 copies with the application for rehearing.

1. Can ask for extension, but don't count on getting it. Unif. R. 2-18.4.

2. Note: Many lawyers incorporate the brief into the application itself.

12. At the end of the appeal, aggrieved party has 30 days to apply to La. Supreme Court for writ of certiorari or review.

a. If no timely rehearing application filed in court of appeal, 30 days begins at notice of judgment. La. C.C.P. 2166(A).

b. If timely rehearing application filed, 30 days begins when court of appeal disposes of last rehearing application. La. C.C.P. 2166(B), (C).

1. 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.

    a. Irreparable injury.

        i. "The test for determining whether an interlocutory judgment may cause irreparable injury is whether any error in the judgment may be corrected as a practical matter on appeal following the determination of the merits." *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).

        ii. 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, and therefore the right to appeal does not exist." *Farmers Supply Co. v. Williams*, 107 So.2d 544, 547 (La. App. 2 Cir. 1958).

        iii. A non-exclusive list of examples:

            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; *Scarbrough 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. 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.

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. *Turner v. Regional Transit Auth.*, 498 So.2d 777, 779 (La. App. 4 Cir. 1986).

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.

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).

b. *Herlitz Const. Co., Inc. v. Hotel Investors of New Iberia, Inc.*, 396 So.2d 878 (La. 1981) holds, "When the overruling of the exception is arguably incorrect, when a reversal will terminate the litigation, and when there is no dispute of fact to be resolved, judicial efficiency and fundamental fairness to the litigants dictates that the merits of the application for supervisory writs should be decided in an attempt to avoid the waste of time and expense of a possibly useless future trial on the merits."

c. If you don't fit one of these categories, the likely response to your writ application will be: "Denied. Adequate remedy on appeal."

2. Procedure in trial court.

   a. Give notice of intent to seek supervisory writ. Unif. R. 4-2.

   b. Obtain return date. Unif. R. 4-3.

   c. When must you accomplish steps (a) and (b)?

      i. 30 days from notice of judgment under La. C.C.P. 1914. Unif. R. 4-3.

      ii. But when is "notice of judgment"? See La. C.C.P. 1914.

         1. General rule: If judge rules from the bench in parties' presence, that is when you have notice of judgment. La. C.C.P. 1914(A).

         2. Exceptions to general rule: La. C.C.P. 1914(B): clerk of court's mailing of notice of judgment is notice of judgment, if

            a. Judge takes case under advisement. La. C.C.P. 1914(B).

            b. Judge orders the judgment to be reduced to writing. La. C.C.P. 1914(B).

            c. Within 10 days after rendition in open court, a party requests that the judgment be reduced to writing. La. C.C.P. 1914(B).

d. The interlocutory judgment is one refusing to grant a new trial or JNOV. La. C.C.P. 1914(C).

d. Deadline for the return date.

i. Rule says return date must not exceed 30 days from date of ruling at issue. Unif. R. 4-3.

ii. Trial court or court of appeal may grant extension of return date, but only if the motion is filed within the original or previously extended return date. Unif. R. 4-3.

iii. In practice, if notice of intent is filed and the order setting the return date is issued within the 30 days, court of appeal treats 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.

iv. The safe practice is: File your notice of intent, get your return date, and file your application for supervisory writ within 30 days of notice of judgment under La. C.C.P. 1914.

e. If the judge refuses to give you a return date: "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).

3. The writ application itself:

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

b. Must file original plus 3 copies. Unif. R. 4-1.

c. Cover: see briefing rule Unif. R. 2-12.3 (see Unif. R. 4-8).

d. Form: see briefing rule Unif. R.2-12.2 (see Unif. R. 4-8). Pages of application must and attached documents must be consecutively

numbered. Unif. R. 4-5.

e. Contents (Unif. R. 4-5):

   i. Index of all items contained in application. Unif. R. 4-5(a).

   ii. Affidavit of verification and service. Unif. R. 4-5.

   iii. Concise statement of grounds for invoking court's jurisdiction Unif. R. 4-5(b).

   iv. Concise statement of the case. Unif. R. 4-5(c).

   v. Issues or questions of law presented for determination by the court. Unif. R. 4-5(d).

   vi. Assignments or specifications of error. Unif. R. 4-5(e).

   vii. Memorandum of law, complying with briefing rules Unif. R. 2-12.2 and Unif. R. 2-12.10.

   viii. Prayer for relief. Unif. R. 4-5(e).

   ix. Copy of judgment, order, or ruling complained of (if in writing). Unif. R. 4-5(f).

   x. Copy of judge's reasons for judgment, order, or ruling (if written). Unif. R. 4-5(g).

      1. Note: If judge gives oral reasons, contact court reporter, order transcript, and attach transcript of reasons to writ application.

   xi. Copy of each pleading on which the judgment, order, or ruling was founded.

      1. What is a pleading? See La. C.C.P. 852:

         a. Petition (including incidental demand)

         b. Exception

         c. Written motion

d. Answer

2. What is ***not*** a pleading?

a. Anything not listed in La. C.C.P. 852, especially trial-court briefs or memos.

b. Translation: Attach copy of the pertinent pleading. Do not attach copy of memo or brief in support of the pleading.

i. Practice hint: When you file an exhibit in support of a motion or exception, attach it to *the motion or exception*, not to the supporting memorandum. At the hearing, formally offer the exhibit into evidence.

xii. Copy of pertinent court minutes. Unif. R. 4-5(i).

xiii. The notice of intent and order setting return date, including any order extending the return date. Unif. R. 4-5(j).

xiv. 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.

4. Additional requirements if stay or expedited consideration requested.

a. Stay.

i. Trial court has discretion to stay or not stay proceedings while writ application is pending. Filing or granting of writ application, in itself, does not stay proceedings unless trial or appellate court orders otherwise. Unif. R. 4-4(A).

ii. Any request for stay must first be presented to trial court. Unif. R. 4-4(A).

b. Expedited Consideration.

i. Cover must contain statement **in bold print** that expedited consideration is requested.

ii. Writ application itself must contain 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(k).

iii. Writ application must include affidavit certifying that:

1. 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. 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).

a. Example: If you file in court of appeal by overnight mail, must complete service by overnight mail.

b. Example: If writ application is hand-delivered to court of appeal, it must be served on trial court and opposing counsel "by an equally prompt means."

5. Response to writ application.

a. Warning: Court of appeal may act peremptorily on the writ application, with or without a response. Unif. R. 4-7. Or court may order response to be filed by a certain date, or may order the trial court to file a per curiam.

b. Otherwise, time for opposition is governed by local rule.

i. 1st, 2nd, and 5th Circuits: no rule governing.

Recommendation:

1. If expedited consideration has been requested, file ASAP.

2. If expedited consideration has not been requested, file within 20 days. See Unif. R. 4-8 (appeal rules fill gaps in writ rules), Unif. R. 2-17.7 (appellee's brief generally due 20 days after appellant's brief). Or file motion to set/extend time for response (this will notify the court that a response is on the way), and obtain an order setting a date certain for the response.

ii. 3rd Cir: See Internal Rule 19: Party opposing writ application "must contact the court immediately after receiving the application. The court will then set the time in which an opposition/reply brief may be filed."

iii. 4th Cir.: Local Rule 16: "When an application for supervisory writs has been filed, a party has the right to respond. However, the court may adjudicate the application at any time after receipt, with or without the benefit of a response. If within ten days after [filing of a writ application], a response or motion for an extension of time in which to file a response has not been filed, it shall be presumed that a response will not be forthcoming."

6. Rehearing: same rules as for appeals. See Unif. R. 4-9 and 2-18.1 through 2-18.7.

1. Jurisdiction of the Louisiana Supreme Court.

    a. Original jurisdiction.

        i. Disciplinary proceedings against a lawyer. La. Const. Art. 5 § 5(B).

        ii. Disciplinary proceedings against a judge. La. Const. Art. 5 § 25(C).

    b. Appellate jurisdiction.

        i. Death penalty. La. Const. Art. 5 § 5(D).

        ii. Louisiana statute declared unconstitutional by a lower court. *Id.*

        iii. Trial court judgment following appeal to trial court from La. Public Service Commission. La. Const. Art. 4 § 21(E).

    c. Discretionary jurisdiction: by writ (supervisory, certiorari, review) La. Const. Art. 5 §§ 2 and 5(A).

    d. Scope of jurisdiction:

        i. Civil cases: Law and facts. (But see manifest-error standard of review.) La. Const. Art. 5 § 5(C). "Subject to the provisions in Paragraph (C), the supreme court has appellate jurisdiction over all issues involved in a civil action properly before it." *Id*. Art. 5(F).

        ii. Criminal cases: Only to questions of law. La. Const. Art. 5 § 5(C).

    e. Certified questions.

        i. From a Louisiana court of appeal. La. Const. Art. 5 § 11; La. R.S. 13:4449; LSC Rule 11.

        ii. From the Supreme Court of the United States or any federal court of appeals. La. Const. Art. 5 § 11; La. R.S. 13:72.1; LSC Rule 12.

2. Writ practice before the Louisiana Supreme Court: Rule 10, Rules of

Supreme Court of Louisiana.

a. The odds are always against the Court's granting a writ. Consider these 2005 statistics:

    i. All cases

        1. Applications filed (excluding prisoner pro se): 1,520

        2. Prisoner pro se applications: 866

        3. Writs granted: 163 (10.7% of non-prisoner pro se total)

    ii. Civil cases

        1. Applications filed (excluding prisoner pro se): 1,157

        2. Prisoner pro se applications: 34

        3. Writs granted: 73 (15.84% of non-prisoner pro se total)

    iii. Criminal cases

        1. Applications filed (excluding prisoner pro se): 363

        2. Prisoner pro se applications: 832

        3. Writs granted: 90 (24.8% of non-prisoner pro se total)

b. Writ-grant considerations: 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 by present in order for an application to be granted:

    i. **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.

    ii. **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.

iii. **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.

iv. **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.

v. **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.

c. Time to file: Rule 10 § 5.

i. Generally, 30 days after mailing of notice of court of appeal's original judgment. Rule 10 § 5(a).

ii. But if a party timely applies for rehearing in the court of appeal in case where rehearing is allowed, then 30 days runs from denial of rehearing or judgment on rehearing. *Id.*; see also La. C.C.P. Art. 2166(B).

1. Note: Time for rehearing is generally 14 days after court of appeal's judgment (criminal) or mailing of judgment (civil). See La. C.C.P. Art. 2166(A); Ct. App. Unif. Rule 2-18.2.

2. For cases where rehearing is allowed in court of appeal, see Unif. R. 2-18.7.

iii. Special rule for cases that bypass court of appeal (e.g. death penalty): see Rule 10 § 5(b).

iv. Special rule for objection to candidacy or election contests: 48 hours. Rule 10 § 5(c).

v. You can file by mail. "An application properly mailed shall be deemed timely filed if mailed on or before the last day of the delay for filing." Rule 10 § 5(d). But beware:

1. "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." *Id.*

2. "[T]he 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." *Id.* In other words, a postage-meter date isn't good enough. Permissible proof of date of mailing includes any of the following if received from the postal clerk at time of mailing (*id.*, Revision Note—1978):

a. A certificate of mailing.

b. A receipt for certified mail.

c. A receipt for registered mail.

d. File original plus 8 copies. Rule 10 § 2(a).

e. Form of writ application (Rule 10 § 2(b)):

i. White, legal-size paper (8½ x 14 in.).

ii. Double spaced type.

iii. Margins between ¾ in. and 1¼ in. at left, right, and bottom.

iv. Margin between 1½ and 2 inches at top.

v. Bind in at least two places at top margin. Staples or

ACCO-type metal fasteners preferred.

vi. Typeface between 11 and 12 point.

f. Content of writ application:

i. Must contain:

1. A front cover. See Rule 7 § 3 for guidelines.

2. Behind the front cover, a writ-application filing sheet.

a. You can download this from the La. Supreme Court's web site. www.lasc.org. Go to http://www.lasc.org/rules/supreme.asp.

b. See also Appendix C to Rules of Supreme Court of Louisiana.

c. 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.

a. You can download these from the Court's web site; go to http://www.lasc.org/rules/supreme.asp.

b. See also Appendices D and E to Rules of Supreme Court of Louisiana.

c. 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.

a. *See also* Rule 10 § 1(b): "The application for writs shall address, in concise fashion, why the case is appropriate for review under the considerations stated in [§ 1(a)] above …."

b. [I]n concise fashion" means generally no longer than two pages.

6. A memorandum in support of the application, 25-pages or less (50-page limit for capital post-conviction case), containing:

a. A concise statement of the case summarizing the nature of the case and prior proceedings;

b. An assignment of errors in the opinion, judgment, ruling or order complained of;

c. 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.

d. 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).

ii. Attachments: Civil case (Rule 10 § 3.5):

1. Trial court judgment, order, or ruling; and trial court's reasons for judgment, if reasons were written or transcribed. Rule 10 § 3.5(a).

2. Court of appeal's order and opinion, if any.

3. Court of appeal's ruling and opinion on rehearing, if any.

4. Must not attach (Rule 10 § 3.5(b)):

    a. Briefs filed in court of appeal.

    b. Other pleadings or documents, unless their inclusion is essential to demonstrate why the application should be granted.

iii. Attachments: Criminal case (Rule 10 § 4):

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 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.

7. The Court discourages other attachments, except for transcripts of relevant proceedings.

g. Opposition to writ application (Rule 10 § 6).

i. "Oppositions serve an important purpose in assisting the

court in the exercise of its discretionary jurisdiction. As such, the court encourages the filing of oppositions." *Id.*

ii. Time to file: 15 days after filing of writ application, unless time for filing is extended.

1. Exception: if writ application requests emergency action or stay order, then opposition must be filed "immediately upon receipt of a copy of the application." *Id.*

2. "[S]hould be as brief as possible, and must not exceed 25 pages in length." *Id.*

h. What happens if the Court grants the writ application?

i. The Court may order peremptory relief. Rule 10 § 7(b).

ii. But usually the Court will order that the record be lodged with the clerk of the LSC. The case will then be placed on the calendar for oral argument, and the briefing schedule will kick in.

3. Briefs on the merits: See Rule 7.

a. Time to file: Unless Court orders otherwise when it grants writs, briefs are due as follows (Rule 7 § 8(a)):

i. For appeals:

1. Appellant: 30 days after record is lodged in Supreme Court.

2. Appellee: 60 days after record is lodged.

ii. For writs of certiorari or review:

1. Applicant: 25 days after writ is granted. "In lieu of filing a brief, the applicant may, within the time prescribed by Rule VII, Section 8(a), file 15 additional copies of the [writ] application (with or without the supporting exhibits) and any memorandum or brief filed in support of the application. [Rule 10 § 7(b)]"

2. Respondent: 45 days after writ is granted.

b. Form and content of brief: See Rule 7 §§ 2–7.

4. Oral argument: See Rule 8.

5. Rehearing: See Rule 9.

a. Time to file: 14 days after mailing of notice of judgment. No extensions. La. R.S. 13:4446(A); LSC Rule 9 § 1. (But you can get an extension on the supporting brief: See LSC Rule 9 § 3.)

b. You can file by mail. Same precautions as writs filed by mail. Rule 9 § 2.

c. You cannot apply for rehearing if any of the following applies:

i. The Court has merely granted or denied a writ application (i.e. the Court has not ruled on the merits of the application). Rule 9 § 5.

ii. The case has been decided on rehearing [id.], unless:

1. You have not previously applied for and been granted rehearing.

2. The Court, in deciding the case on rehearing, specifically reserves to the unsuccessful party or parties the right to apply for another rehearing.

Regular Session, 2006

ACT No. 644

ENROLLED

SENATE BILL NO. 49

BY SENATOR MARIONNEAUX

AN ACT

To enact Code of Civil Procedure Article 2168, relative to courts, appellate procedure and opinions; to provide for posting unpublished opinions of the court on Internet websites; to provide that such opinions may be cited; to provide for the form of such citation; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Code of Civil Procedure Article 2168 is hereby enacted to read as follows:

Art. 2168. Posting of unpublished opinions; citation

A. The unpublished opinions of the supreme court and the courts of appeal shall be posted by such courts on the Internet websites of such courts.

B. Opinions posted as required in this Article may be cited as authority and, if cited, shall be cited by use of the case name and number assigned by the posting court.

_____

PRESIDENT OF THE SENATE

_____

SPEAKER OF THE HOUSE OF REPRESENTATIVES

_____

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____

SUPREME COURT OF LOUISIANA

No. 2001-C-1329

Jean Boudreaux, *et al*.
v.
The State of Louisiana, Department of Transportation & Development

February 26, 2002

[6] The opinion of the court was delivered by: Per Curiam[1]

[7] ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FIRST CIRCUIT, PARISH OF TANGIPAHOA

[8] This per curiam addresses whether relator, the State of Louisiana Department of Transportation and Development (DOTD), abandoned its claims of alleged errors originally advanced in its writ application to this Court, when it urges different errors in its brief, after we granted a writ of certiorari. Finding all but one of the errors alleged in the writ application not briefed, we find those errors abandoned because they were not argued in brief for oral argument. We further find that in order to reach the merits urged in relator's brief after certiorari was granted, we would have to address questions that were neither presented in the application for certiorari nor fairly included in the questions that were presented. Accordingly, we dismiss our writ of certiorari.

[9] In its writ application to this Court on May 4, 2001, DOTD urged three writ grant considerations: (1) the claims of the class members were prescribed pursuant to LA. REV. STAT. ANN. § 9:5624; (2) the trial court erred when it refused to allow DOTD to present certain evidence and the appellate court erroneously found that DOTD failed to proffer evidence on this issue; and (3) the trial and appellate courts erred when they failed to retroactively apply LA. CIV. CODE ANN. art. 667, as amended in 1996.

[10] Now DOTD makes numerous other arguments before this Court, and only argues one of the previously urged writ grant contentions, namely the lower courts' failure to retroactively apply LA. CIV. CODE ANN. art. 667, as amended in 1996.[2] In addition, for the first time DOTD filed in this Court the

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[1] Retired Judge Robert L. Lobrano, assigned as Associate Justice Pro Tempore, participating in the decision.

[2] See infra for our summary disposition of this question.

declinatory exception of lack of subject matter jurisdiction over the non-inverse expropriation claims.[3]

[11] Except for the declinatory exception of lack of subject matter jurisdiction and the peremptory exceptions, two of which, prescription and res judicata, must be specially pleaded,[4] 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. *Krauss Co. v. Develle*, 110 So. 2d 104, 105-06 (La. 1959); *Weingart v. Delgado*, 16 So. 2d 254, 256 (La. 1943); *Gaines v. Crichton*, 174 So. 666, 668 (La. 1937); *Succession of Quinn*, 164 So. 781 (La. 1935).

[12] The Louisiana Supreme Court has general supervisory jurisdiction over all other courts. LA. CONST. ART. V, § 5(A).[5] The grant or denial of an application for supervisory writs rests within the sound judicial discretion of this Court. LA. SUP. CT. R. X, § (1)(a).[6]. Although this Court has broad authority to exercise

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[3] As provided in LA. CIV. CODE ANN. art. 925(C), "All objections which may be raised through the declinatory exception, except the court's lack of jurisdiction over the subject matter of the action, are waived unless pleaded therein." (Emphasis added).

[4] As provided in LA. CODE CIV. PROC. ANN. art. 927(B), "[t]he court cannot supply the objections of prescription and res judicata, which must be specially pleaded. The non-joinder of a party, or the failure to disclose a cause of action or a right or interest in the plaintiff to institute the suit, may be noticed by either the trial or appellate court of its own motion."

[5] Contrary to the state's current constitution, in 1812, the first Louisiana constitution limited the state supreme court to appellate jurisdiction. LA. CONST. OF 1812, art. 4, § 2. It was not until the constitution of 1879 that this Court was granted supervisory jurisdiction. See Jerry A. Brown, *Supervisory Powers of the Supreme Court of Louisiana over Inferior Courts*, 36 TUL. L. REV. 165, 168 (1960). At that time, LA. CONST. OF 1879, art. 90 was added, providing that: The Supreme Court shall have control and general supervision over all inferior courts. They shall have power to issue writs of certiorari, prohibition, mandamus, quo warrantor, and other remedial writs. Subsequent state constitutions have contained similar provisions.

[6] "The simplest scheme [as to how the state's appellate work is to be routed] is to provide that all appeals from the trial courts go to the intermediate court, with the supreme court receiving no appeals directly from the trial level. The supreme court's jurisdiction is limited to reviewing the intermediate court's decisions on a discretionary basis. . . The theory of this arrangement is that every litigant is entitled to one appellate review of a trial court's judgment on the merits, and that review is to be provided by the intermediate court. But, so the theory goes, a litigant is not entitled as a matter of right to two appeals; any further review after the first appeal should be provided only in the interest of the law and the legal system. Thus the supreme court is given discretion to determine what cases, among the large number in which petitions are filed, deserve its attention in its

its general supervisory jurisdiction, we carefully screen writ applications under the criteria detailed in LA. SUP. CT. R. X, § 1(a).[7] As directed in LA. SUP. CT. R. X, § 1(b), "[t]he application for writs shall address, in concise fashion, why the case is appropriate for review under the considerations stated in subsection (a) above." (Emphasis added). As further provided in civil cases, LA. SUP. CT. R. X, § 3(3) requires the applicant to submit assignments of error and "[a]n argument of each assignment of error on the facts and law, addressing particularly why the case is appropriate for review under the considerations stated in Section 1(a) of this rule." (Emphasis added). This procedure provides a standard to aid us in the exercise of our discretionary authority.[8] In the present case, DOTD, with the exception of its argument about the retroactive application of LA. CIV. CODE ANN. art. 667, chose not to argue in it its brief filed in anticipation of oral argument the two other issues it addressed in its memorandum in support of its writ application.

[13] Even if LA. CIV. CODE ANN. art. 667 is applicable (the trial court relied upon LA. CIV. CODE ANN. arts. 655 and 656, the codal articles relevant to the servitude of drain, and DOTD did not raise Article 667 as an issue on appeal), all of the appellate courts that have addressed the 1996 amendments to LA. CIV. CODE ANN. art. 667 have concluded that the changes were substantive and subject to prospective application only. *Carr v. Oake Tree Apartments*, 34,539 (La. App. 2 Cir. 5/9/01), 786 So. 2d 230; *Hunter v. Town of Sibley*, 32,075 (La. App. 2 Cir. 10/29/99), 745 So. 2d 820, *writ denied*, 99-3351 (La. 2/18/00), 754 So. 2d 965; *Mossy Motors, Inc. v. Sewerage & Water Bd. of the City of New Orleans*, 98-0495 (La. App. 4 Cir. 5/12/99), 753 So. 2d 269, *writ denied*, 99-2102 (La. 10.29/99), 749 So. 2d 638; *Jackson v. Beasley*, 30,359

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institutional law-developing role, leaving the bulk of appeals to the error-correcting function of the intermediate court." DANIEL JOHN MEADOR, AMERICAN COURTS 15-16 (1991).

[7] The ABA STANDARDS RELATING TO APPELLATE COURTS state that "review by a supreme court should be available only after review has been had before an intermediate appellate court, and then only if the supreme court determines that such review is warranted in a specific case. . . An essential task for the highest court in a multi-level appellate system is the proper apportionment of its limited time and energy among cases that are eligible for its consideration. . . The question involved in considering a petition for review is not whether a case is meritorious, or even whether it arguably might have been decided the other way, but whether it is more important for decision than other cases competing for the attention of the court." ABA STANDARDS RELATING TO APPELLATE COURTS § 3.10, 16-18 (1976).

[8] As further evidence of the importance of honing the argument, our Court rules encourage the filing of oppositions to writ applications. "Oppositions serve an important purpose in assisting the court in the exercise of its discretionary jurisdiction." LA. SUP. CT. R. X, § 6. See also Issac H. Ryan and J. Todd Benson, *Get That Writ, Civil Writ Practice before the Louisiana Supreme Court*, 48 LA. B. J. 83, 120-26 (2000).

(La. App. 2 Cir. 4/8/98), 712 So. 2d 162; *Small v. Baloise Ins. Co.*, 96-2484 (La. App. 4 Cir. 3/18/98), 753 So. 2d 234. Even in its brief now before us, DOTD fails to cite any Louisiana cases that have sanctioned the retroactive application of LA. CIV. CODE ANN. art. 667. Accordingly, we find no merit to DOTD's contention in this regard.

[14] Even though this Court does not have a specific court rule to address abandonment of an assignment of error as do the appellate courts of this state,[9] we find it within our authority to effect the same result. It is axiomatic that our rules are fashioned to assist us in the exercise of our discretionary jurisdiction. It is for that reason that we promulgated rules that mandate assignments of error in the application for writs and a memorandum which addresses with particularity the reasons why we should exercise our discretionary jurisdiction. This procedure allows for the best use of our judicial function in developing Louisiana jurisprudence. Correlatively, if this Court is to sharpen the focus on those issues most worthy of consideration and hasten the decisional process, it is imperative that we not be blind sided after we grant a writ application[10] with questions which did not appear in the application for a writ of certiorari.[11] Accordingly, we find that DOTD has

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[9] UNIFORM RULES - LA. CT. OF APP. R. 2-12.4 provides, in pertinent part: All specifications or assignments of error must be briefed. The court may consider as abandoned any specification or assignment of error which has not been briefed.

[10] To exemplify the importance of this point, we call attention to LA. SUP. CT. R. X, § 7(a). In Rule 7(a), we specifically provide that when a writ has been granted, "[i]n lieu of filing a brief, the applicant may, within the time prescribed by Rule VII, Section 8(a), file additional copies of the application (with or without the supporting exhibits) and any memorandum or brief filed in support of the application." Thus, it is evident that we anticipate that the issues considered by us in deciding to exercise our discretion are those that were urged in the writ application and that these will form the basis for our consideration at oral argument.

[11] Notably, the rules of the United States Supreme Court recognize this policy. U.S. SUP. CT. R. 24.1(a) provides, in pertinent part: The questions [presented for review under Rule14.1] shall be set out on the first page . . . The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide. Commenting on this rule, in *Kaisha v. U. S. Phillips Corp.*, 510 U.S. 27 (1993), the Court stated: Even before the first version of Rule14.1(a) was adopted, we indicated our unwillingness to decide issues not presented in petitions for certiorari. As we stated in *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 179 (1938): "One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue." And as Justice Jackson stated . . . in *Irvine v. California*, 347 U.S. 128, 123-130 (1954): "We disapprove the practice of smuggling additional

abandoned the prescription argument and its argument as to the lower courts' erroneous evidentiary rulings it made in its application for writ of certiorari because it chose not to brief these issues for oral argument. Furthermore, we find the additional questions briefed for oral argument, but not contained in the original writ application, are not properly before us. Therefore, we dismiss our writ of certiorari.

[*Discussion of declinatory exception omitted.*]

[20] DECREE

[21] For the foregoing reasons, we dismiss our writ of certiorari and deny DOTD's declinatory exception of lack of subject matter jurisdiction. This matter is remanded to the trial court for determination of damages.

[22] WRIT OF CERTIORARI DISMISSED. DECLINATORY EXCEPTION DENIED. CASE REMANDED TO THE DISTRICT COURT FOR THE DETERMINATION OF DAMAGES.

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questions into a case after we grant certiorari. The issues here are fixed by the petition unless we limit the grant, as frequently we do to avoid settled, frivolous or state law questions." *Kaisha*, 510 U.S. n.6 at 32.