



# Louisiana Appellate Practice and Procedure:

*The appellate process begins in the trial court. Whether the appeal is from a final judgment or supervisory writs are taken during an ongoing proceeding, appellate practitioners should do certain things to ensure success. These materials were written from the perspective of an appellate practitioner and former Louisiana Supreme Court law clerk. They are intended to provide a brief overview of Louisiana appellate practice and procedure and to serve as a thumbnail reference guide for attorneys practicing in Louisiana state courts.*

## An Overview for Legal Practitioners

By Jonathan C. Augustine

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### Appellate Preparation Begins Before and During the Trial Proceeding: Be Sure to Make a Record

#### Applying for Supervisory Writs with the Court of Appeal

Under applicable law, “[s]upervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction.”

La. C.C.P. art. 2201; *see also* La. Const. art. V, § 10, ¶(A) (delegating supervisory appellate jurisdiction to the respective courts of appeal on matters arising within their circuits).

Supervisory writs are typically taken during the course of a trial court proceeding and before a final judgment is issued. For example, pursuant to La. C.C.P. art. 2201, litigants may petition a circuit court of appeal to review and/or reverse a ruling on an exception. A supervisory writ application to the respective courts of appeal must be in conformity with the Uniform Rules Courts of Appeal (hereinafter URCA) 4-1, *et seq.*<sup>1</sup> More importantly, however, because the trial court litigation will be ongoing, a party seeking supervisory writs should strongly consider moving the trial court to stay the proceedings contingent on the appellate court’s review. Specifically, URCA 4-4 provides:

[w]hen an application for writs is sought, further proceedings may be stayed at the trial court's discretion. Any request for a stay of proceedings should be presented first to the trial court. The filing of, or the granting of, a writ application does not stay further proceedings unless the trial court or appellate court expressly orders otherwise.

The Louisiana 3rd Circuit interpreted URCA 4-4 in *Bankston v. Alexandria Neurosurgical Clinic*.<sup>2</sup> In *Bankston*, the plaintiff filed an application for supervisory writs from a district court judgment. The plaintiff did not, however, receive an order staying proceedings in the district court pending the supervisory application. The district court proceeded under its previously issued scheduling order. Because the *pro se* plaintiff did not appear for trial, the district court dismissed her claim. On appeal, the 3rd Circuit emphasized the district court's discretion as to whether a stay should be issued in any litigation where a party has filed an application for supervisory writs.<sup>3</sup> The 3rd Circuit also ruled the district court did not abuse its discretion in dismissing the suit because there was no stay order in place.<sup>4</sup> As therefore evident by the foregoing, a stay of trial court proceedings pending a writ application to a court of appeal is far from automatic.

### Appealing a Final Judgment

Appellate courts can consider only matters that are in the record.<sup>5</sup> Accordingly, a practitioner's pretrial preparation should include plans to develop an advantageous record to ensure success on appeal. Such preparations must include planning objections and possibly applying for supervisory writs when necessary.

Instances are arguably extremely rare where an appellate court may consider matters when no objection was raised at trial.<sup>6</sup> Moreover, in considering a trial court objection, appellate courts usually consider only the grounds for the objection as raised.<sup>7</sup> Louisiana law

clearly provides that a party must make a timely objection to evidence which he considers to be inadmissible and must state the specific ground for the objection.<sup>8</sup> Practitioners should, therefore, constantly keep the appellate record in mind during the course of their trial court proceedings.

## Post-trial Procedure to Perfect the Appeal

### Post-Judgment Practice

Generally speaking, an "[a]ppel is the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court." La. C.C.P. art. 2082. For a party to seek an appeal, the trial court's judgment must first be signed and filed into the record. La. C.C.P. art. 1911 provides that "every final judgment shall be signed by the judge. For the purpose of an appeal . . . no appeal may be taken from a final judgment until the requirement of this Article has been fulfilled." Regardless, however, even if an appeal is made before the trial judge signs the court's final judgment, the defect can be cured and the appeal properly maintained.<sup>9</sup>

Furthermore, the Code of Civil Procedure specifically details matters that may be appealed in Louisiana state courts.<sup>10</sup> After the trial court has issued its signed judgment, the party adversely affected has up to seven days, exclusive of legal holidays, to move the court for a new trial.<sup>11</sup> The delays for taking an appeal do not begin to run until the seven-day expiration of time to apply for a new trial.<sup>12</sup> Regardless, however, the untimely application for a new trial does not interrupt or extend the delay for taking a timely appeal.<sup>13</sup>

Upon expiration of the seven-day period, the adversely affected party must divest the trial court of jurisdiction by moving the court for an appeal within the delays allowed by law. La. C.C.P. art. 2088 provides that the "jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the granting of the order of appeal and

the timely filing of the appeal bond . . ." Article 2121 also notes that an order for appeal may be granted on oral or written motion but must show the return day for the appeal in the appellate court and the requisite security to be furnished for the appeal. After the order accompanying the motion for appeal is granted, the applicable court of appeal asserts jurisdiction and the trial court is divested of the same.<sup>14</sup>

### Appealing a Final Judgment

As a general rule, there are two types of appeals in Louisiana state courts: devolutive and suspensive. A devolutive appeal under article 2087 does not suspend the effect or execution of the trial court's final judgment. Under the Code of Civil Procedure, such an appeal may be taken within 60 days of either the expiration of time to apply for a new trial or the date the clerk's office mailed the notice of the trial court's refusal to grant a timely application for a new trial. A suspensive



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appeal under article 2123 literally has the effect of suspending the effect or execution of the trial court's judgment. Under the Code of Civil Procedure, "[e]xcept as otherwise provided by law, *an appeal that suspends the effect or the execution of an appealable order or judgment may be taken*, and the security therefor furnished, *only within thirty days* [of the expiration of time to apply for a new trial or the clerk's mailing the notice of a refusal to grant a timely filed application for new trial." Regardless of which type of appeal is sought, the trial court shall fix a return date that is "thirty days from the date estimated costs are paid if there is no testimony to be transcribed and lodged with the record and 45 days from the date such costs are paid if there is testimony to be transcribed . . ."<sup>15</sup> Furthermore, the clerk of the trial court is required to prepare the record for appeal and lodge it with the appellate court on or before the return day or any extension thereof.<sup>16</sup>

Under La. C.C.P. art. 2133, an **appellee** also may seek to modify or reverse a judgment on appeal. In order to do so, however, the appellee must timely file an answer with the court of appeal. In relevant part, article 2133 provides as follows:

An appellee may not be obliged to answer the appeal unless he desires to have the judgment modified, revised, or reversed in part or unless he demands damages against the appellant. In such cases, he must file an answer to the appeal, stating the relief demanded, not later than fifteen days after the return day or the lodging of the record whichever is later. *The answer filed by the appellee shall be equivalent to an appeal on his part from any portion of the judgment rendered against him in favor of the appellant and of which he complains in his answer.* (Emphasis added.)

More importantly, when a party does not answer an appeal or file a cross-appeal, the appellate court is precluded from

awarding that party any relief subsequently requested.<sup>17</sup>

Oral arguments must be requested at the court of appeal. Under URCA 2-11.4, if a party wants oral arguments, it must specifically request so within 14 days of the filing of the record in the court. Moreover, under URCA 2-12.12, decisions shall be reached on the parties' briefs and oral argument shall be forfeited if either party's brief is not timely filed.

The appellate court may consider only that which is in the record. As such, it is imperative that if an aggrieved party — appellant or appellee — intends to win on appeal, the party must ensure the record contains the correct and accurate information upon which it shall rely. La. C.C.P. art. 2132 allows a party to correct a record containing errors:

*A record on appeal which is incorrect or contains misstatements, irregularities or informalities, or which omits a material part of the trial record, may be corrected even after the record is transmitted to the appellate court, by the parties by stipulation, by the trial court or by order of the appellate court. All other questions as to the content and form of the record shall be presented to the appellate court.* (Emphasis added.)

It is therefore imperative that the appellant performs due diligence to ensure the record lodged with the court of appeal is accurate and/or contains the information upon which he intends to rely on appeal. If a record is deficient, the court of appeal will assume the trial court's ruling was correct.<sup>18</sup>

## The Standard of Review

The Louisiana Constitution of 1974 details state appellate courts jurisdiction. "Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts." La. Const. art. V, § 10(B). In interpreting

this provision, the Supreme Court expressly outlined a two-part test for reviewing factual issues on appeal in *Arceneaux v. Domingue*.<sup>19</sup> Under *Arceneaux*, appellate courts may not disturb a factfinder's factual determinations if the appellate court finds in the record there is: (1) a reasonable factual basis for the trial court's findings; and (2) the trial court was not clearly wrong/manifestly erroneous.<sup>20</sup>

## Manifest Error or Clearly Wrong

When a trial court's factual findings are based on witness credibility, appellate courts must give great deference to the factfinder's determinations.<sup>21</sup> The Supreme Court has held that "[t]he reason for this well settled principle of review is based not only on the trial court's better capacity to evaluate live witnesses (as opposed to the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts."<sup>22</sup> Accordingly, "where two permissible views of evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong."<sup>23</sup>

Although appellate courts must give great deference to witness credibility, such evaluations may be clearly wrong when documents and other objective evidence so contradict with witness's testimony that no reasonable factfinder could credit the witness's story.<sup>24</sup> Courts of appeal must also give the same deference to trial court decisions based on deposition testimony as to decisions based on "live" testimony.<sup>25</sup> Nevertheless, "the reviewing court must always keep in mind that 'if the trial court or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'"<sup>26</sup>

## De Novo

When the appellate court reviews the trial court's findings of fact as if it were the trier of fact, the review is *de novo*.

The classic and most common example of *de novo* review is when appellate courts review a grant of summary judgment.<sup>27</sup>

Furthermore, when a case is bifurcated and the judge and jury render inconsistent verdicts, the court of appeal must review the issues *de novo*.<sup>28</sup> More importantly, when an appellate court has all the facts before it, it may not remand but must decide the case on the merits.<sup>29</sup>

## Practice Before the Louisiana Supreme Court

The Louisiana Supreme Court has both original and appellate jurisdiction over certain litigious matters. For example, under La. Const. art. V, § 5, ¶ (B), “[t]he supreme court has exclusive original jurisdiction of disciplinary proceedings against a member of the bar.” Similarly, the court has appellate jurisdiction over litigation “if (1) a law or ordinance has been declared unconstitutional, or (2) the defendant has been convicted of a capital offense and a penalty of death actually has been imposed.” Art. V, § 5, ¶ (D). Equally as important, the court has appellate jurisdiction over certain matters from the Louisiana Public Service Commission. “Appeal may be taken in the manner provided by law by any aggrieved party or intervenor to the district court of the domicile of the commission. A right of direct appeal from any judgment of the district court shall be allowed to the supreme court.” Art. IV, § 21, ¶ (E). With regard to adjudicating the foregoing, the Supreme Court does not have discretion because of the constitutional mandates.

However, unlike appeals to Louisiana’s five circuit courts, the Louisiana Supreme Court is much like the United States Supreme Court because it does have a great deal of discretion over general adjudication. In 2003, the court received 1,929 general writ applications and 1,381 prisoner *pro se* applications. Of all the aggregate writ applications filed, the court only granted 294 of the applications. Of the 294 writ applications the court granted, only 93

cases were docketed for oral arguments while 201 were transferred with order.<sup>30</sup>

Louisiana Supreme Court Rule X, § 1, details the court’s wide discretion on writ grant considerations. If an applicant is to successfully apply for writs of certiorari on a litigious matter falling outside the express constitutional provisions previously detailed, the application must meet one or more of the court’s Rule X consideration. Because of the criteria’s obvious importance, the five factors are listed below.

In outlining the criteria to be evaluated when determining whether a writ application should be granted, Rule X provides the following:

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

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

Analysis of the foregoing clearly shows odds are stacked against a writ application being granted. Moreover, although the criteria are not “ranked,”

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they arguably appear in order of importance. The author argues successful writ applications will be direct, concise, and focus the reader on why the issue presented is critical to more than his or her client, but important to Louisiana jurisprudence in general.

## General Tips and Advice from a Former Law Clerk

From the prospective of a former Louisiana Supreme Court law clerk, the author candidly believes “less is always more.” More often than not, applications for writs of certiorari are almost a verbatim regurgitation of the briefs and/or application filed at the circuit court of appeal. Louisiana Supreme Court Rule X is a road map for Supreme Court writ applications. The URCA serve as a roadmap for circuit court applications. At the risk of mimicking a cliché, “driving with the wrong map can only get you lost.”

After administrative processing, the justices’ law clerks provide the first comprehensive writ-application review. Although clerks work only for one justice, they work and socialize with all the other justices’ law clerks. From the author’s recollection, the uniform sentiment among all clerks was “less is always more.” An application that focuses on one or two Rule X criterion is always better than a shotgun approach attempting to hit as many points as possible with a wide aim. The shotgun approach arguably lacks discipline and credibility.

Equally important as a focused approach, accurate citations — preferably pinpoint citations referencing the exact page from which relevant language was extracted — are more helpful than simply citing a case with no other foundation. Law clerks actually look up and review key cases upon which the practitioner relies. As such, specific page references are always helpful and allow the law clerk easier focus.

Some practitioners will nevertheless feel more comfortable using a citation without a specific page. If such is the case, he or she should consider following the citation with a short parenthetical to

further explain the citation’s significance. For example, “*See Reynolds v. Select Properties, Ltd.*, 93-1480 (La. 4/11/94), 634 So.2d 1180 (noting that appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate).” The foregoing clearly explains the citation’s significance without mentioning the exact page on which the relevant language is found. As a practical rule, the easier it is for the law clerk to follow a concise argument, focused on one or two Rule X criterion, the easier it is for the law clerk to recommend to the justices the writ application should be granted.

## Conclusion

The foregoing is obviously only one practitioner’s perspective. Hopefully, it will serve as a rough guide for practitioners who are infrequently required to engage in appellate litigation. As made evident herein, the governing rules are much different from those of a trial court. Accordingly, a practitioner taking a matter on appeal should live by the rules of the craft.

## FOOTNOTES

1. One of the URCA’s key provisions requires the party seeking writs from the court of appeal to first file a notice of intention with the trial court, serve opposing counsel with the same, provide a copy to the trial judge and request a return date not to exceed 30 days from the date the adverse ruling was signed. *See* URCA 4-2 & 4-3.

2. 94-0693 (La. App. 3 Cir. 12/7/94), 659 So.2d 507.

3. *Id.* at 510.

4. *Id.*

5. *See, e.g.*, *White v. West Carroll Hosp.*, 613 So.2d 150 (La. 1992); *see also Earles v. Ahlstedt*, 591 So.2d 741 (La. App. 1 Cir. 1991).

6. *See, e.g.*, *State v. McCutcheon*, 93-0488 (La. App. 1 Cir. 3/11/94), 633 So.2d 1338, *writ denied*, 94-0834 (La. 6/17/94), 638 So.2d 1093 (providing that a party must make timely objections on evidentiary rulings during trial to preserve grounds for appeal); *Davis v. Kreuter*, 93-1498 (La. App. 4 Cir. 2/25/94), 633 So.2d 796, *writ denied*, 94-0733 (La. 5/6/94), 637 So.2d 1050; *see also* La. C.E. art. 103.

7. Applicable statutory law also provides that “[a]ll objections to the manner of selecting or drawing the jury or to any defect or irregularity that can be pleaded against any array or venire must be entered before entering on the trial of the case; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.” La. R.S. 13:3052.

8. *Tartar v. Hymes*, 94-0758 (La. App. 5 Cir. 5/30/95), 656 So.2d 756, 760, *writ denied*, 95-1640 (La. 10/6/95), 661 So.2d 475.

9. *See Camaille v. Shell Oil Co.*, 562 So.2d 28, 30 (La. App. 5 Cir. 1990), *writ denied*, 565 So.2d 944 (La. 1990) (citing *Overmier v. Traylor*, 475 So.2d 1094 (La. 1985), in support of the position that although the appellant’s appeal was technically premature, because the trial court did eventually sign a final judgment, the defect was considered cured).

10. *See, generally*, La. C.C.P. art. 2083.

11. La. C.C.P. art. 1974.

12. *See Johnson v. E. Carroll Detention Ctr.*, 27,075 (La. App. 2 Cir. 6/21/95), 658 So.2d 724.

13. *See Womer v. Womer*, 95-0833 (La. App. 5 Cir. 1/8/96), 666 So.2d 1232.

14. If however a party only appeals a portion of the trial court’s judgment, the court of appeal only has jurisdiction over the matters before it on appeal and the trial court retains jurisdiction on the other matter(s). *See, generally* La. C.C.P. art. 1915.

15. La. C.C.P. art. 2125.

16. La. C.C.P. art. 2127; *see also* URCA 2-1.

17. *McMorris v. McMorris*, 94-0590 (La. App. 1 Cir. 4/10/95), 654 So.2d 742; *see also W. Handien Marine v. Gulf States Marine*, 624 So.2d 907 (La. App. 5 Cir. 1993), *writ denied*, 93-2851 (La. 1/13/94), 631 So.2d 1166.

18. *See, e.g.*, *Porche v. Waldrip*, 597 So.2d 536, 537 (La. App. 1 Cir. 1992), *writ denied*, 599 So.2d 316 (La. 1992) (“It is the appellant’s responsibility to ensure the appellate record is complete. Since the appellant failed to do so, we must presume the trial court’s ruling on this issue is correct.”); *Cf. LeBlanc v. Cajun Painting, Inc.*, 94-1609 (La. App. 1 Cir. 4/7/95), 654 So.2d 800, 806, *writs denied*, 95-1655 (La. 10/27/95), 661 So.2d 1349 & 95-1706 (La. 10/27/95), 661 So.2d 1350 (discussing the plaintiff’s attempt to “supplement” the record on appeal by taking a deposition and moving the appellate court to accept the same in support of his assignment of error while noting said motion was inappropriate because the applicable provisions of the Code of Civil Procedure envisioned only correcting a record, not adding things to it once the trial court is divested of jurisdiction).

19. 365 So.2d 1330 (La. 1978).



20. See also Steven Guillory v. Ins. Co. of N. Am., 96-1084 (La. 4/8/97), 692 So.2d 1029; Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987).

21. See, e.g., Theriot v. Lasseigne, 93-2611 (La. 7/5/94), 640 So.2d 1305; Stobart v. State Dept. of Transp. & Dev., 617 So.2d 880, 882 (La. 1993) (“[F]actual findings . . . should not be reversed on appeal absent manifest error.”); see also Rosell v. ESCO, 549 So.2d 840, 844 (La. 1989).

22. Stobart, 617 So.2d at 883 (citing Canter v. Koehring Co., 283 So.2d 716 (La. 1973)).

23. *Id.* “This state’s appellate review standard, which is constitutionally based and jurisprudentially driven, is that a court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding which is manifestly erroneous or clearly wrong.” Stobart, 617 So.2d 882 n. 2.

24. Rosell, 549 So.2d 844-45.

25. See, generally, Shepard v. Scheeler, 96-1720 (La. 10/21/97), 701 So.2d 1008; see also Bruno v. Harbert Int’l, Inc., 593 So.2d 357 (La. 1992).

26. Stobart, 617 So.2d 883 (citing Housley v. Cerise, 579 So.2d 973 (La. 1991)).

27. See, e.g., Reynolds v. Select Properties,

Ltd., 93-1480 (La. 4/11/94), 634 So.2d 1180, 1182 (noting that appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate); Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181 (La. 2/29/00), 755 So.2d 226 (citing Schroeder v. Board of Supervisors, 591 So.2d 342, 345 (La. 1991), for the position that review of a grant of a motion for summary judgment is *de novo*); see also Carter v. State, 03-0634 (La. App. 4 Cir. 3/24/04), 871 So.2d 450, 452.

28. See, generally, Mayo v. Audubon Indem. Ins. Co., 26,767 (La. App. 2 Cir. 1/24/96), 666 So.2d 1290, writ denied, 96-0457 (La. 4/1/96), 671 So.2d 325; Moore v. Safeway, Inc., 95-1552 (La. App. 1 Cir. 11/22/96), 700 So.2d 831, writs denied, 97-2921 & 97-3000 (La. 2/6/98); see also Gremillion v. Derks, 96-0412 (La. App. 4 Cir. 11/18/96), 684 So.2d 492.

29. See Gonzales v. Xerox Corp., 320 So.2d 163 (La. 1975); see also Myers v. American Seating Co., 93-1350 (La. App. 1 Cir. 5/20/94), 637 So.2d 771, 779, writ denied, 94-1569 (La. 10/7/94), 644 So.2d 631.

30. The Supreme Court of Louisiana Annual Report (2003), pg. 33.

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