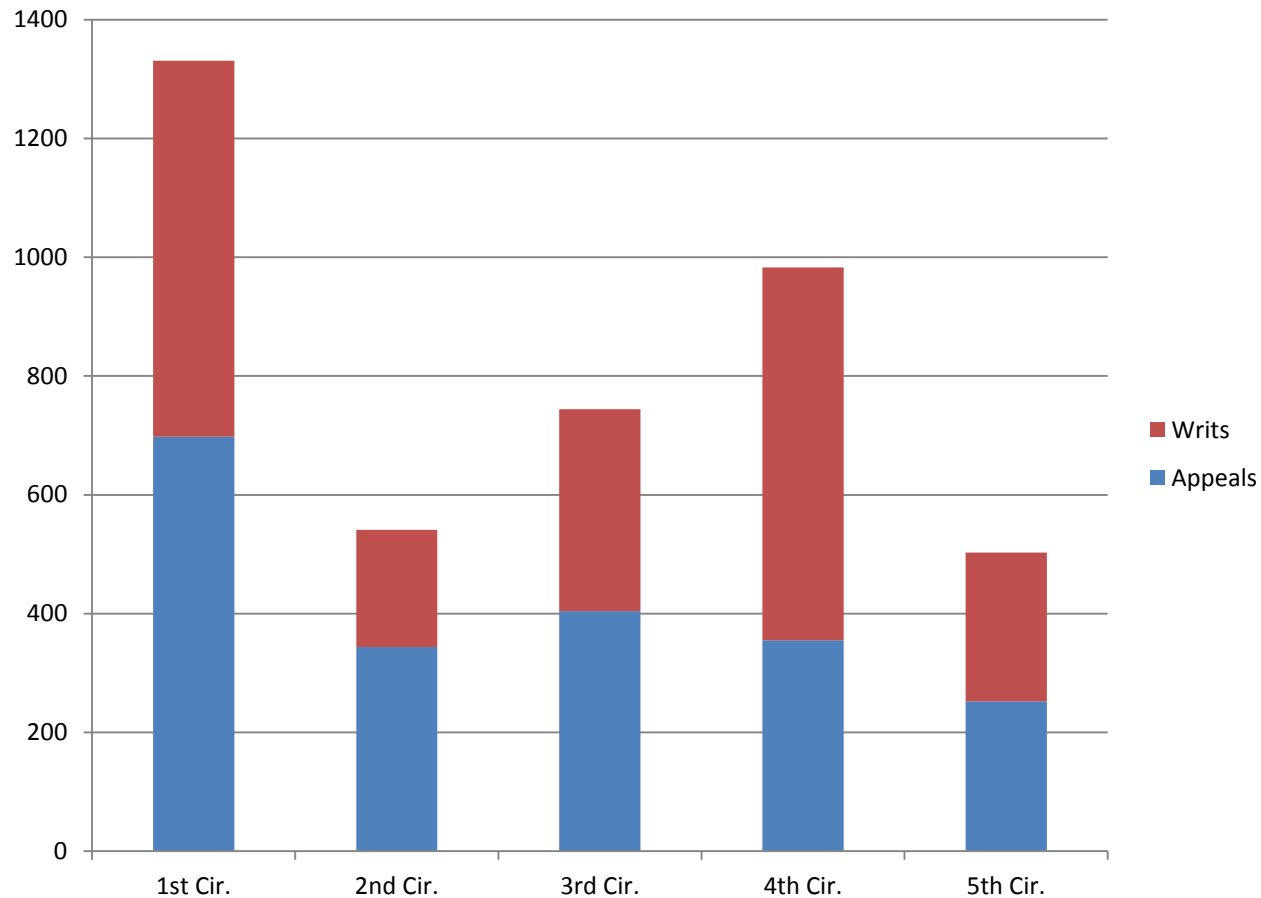


# Appellate Practice: Writs and Appeals

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## 2015 writs v. appeals in La. courts of appeal

Raw numbers taken from Annual Report 2015: Supreme Court of La.,  
excluding pro se writs.

# What's the difference?

## **Supervisory writs**

- Interlocutory judgment
- Discretionary review
- No record (so lots of attachments)
- No oral argument (usually)

## **Appeals**

- Final judgment
- Right to appeal
- Record (so few to no attachments)
- Oral argument (if you ask)

# Supervisory Writ

- What to writ
- How to writ
- When to writ
- Oppositions and replies

# What to writ

- Irreparable injury
- Herlitz

# What to writ

- **Irreparable injury**
  - Error cannot, as a practical matter, be corrected on appeal after final judgment
  - Examples:
    - Venue
    - Judge v. jury trial
    - Denial of arbitration

See written materials pp. 2–4

# What to writ

- **Herlitz**

- Trial court's judgment is arguably incorrect
- No factual dispute to resolve
- Reversal would terminate the litigation

- *Herlitz Constr. Co. v. Hotel Investors of New Iberia*, 396 So. 2d 878 (La. 1981)

See written materials p. 4.

# How to writ

- File (in the trial court) a notice of intent to seek a supervisory writ.
- Obtain trial-court order setting a return date.
- File the writ application in the court of appeal before the return date passes.

See written materials pp. 4–5

# How to writ

- Writ application: a brief with a bunch of attachments
- Form and content: See Unif. R. 4-5
- In 2d, 4th, and 5th Circuits, include court's intake form (see courts' web sites)

See written materials pp. 6–7

# When to writ?

- 30 days (?) from ....
  - Civil cases: notice of judgment under La. C.C.P. art. 1914
  - Criminal cases: date of ruling
- *See R. Ward, A Writ in Time*, 51 La. B.J. 338 (Feb.-Mar. 2004).

# Oppositions and replies

- No Uniform Rule
- Check court's local rules
- If in doubt, file a motion to set a deadline

# Appeals: The nuts and bolts

- File (in trial court) motion for appeal
- If a suspensive appeal, post a bond
- Pay estimated appeal costs
- When record is lodged, request oral argument
- File brief
- Oral argument
- Rehearing? LASC writ?

# How to succeed at appellate practice

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

1

**Rules, not forms**

# Rules, not forms

- Forms, the vampires of legal writing



- “The world changes; we do not.”
  - Anne Rice, *Interview with a Vampire*.
- Conform (maybe) to obsolete, outdated rules
- Preserve bad legal writing

# Louisiana rules

- La. Code Civ. P. arts. 2081–2201
- La. Code Crim. P. arts. 911–923
- Uniform Rules
- Local Rules
- La. Supreme Court rules

# U.S. 5th Circuit rules

- Federal Rules of Appellate Procedure
- 5th Circuit Rules
- 5th Circuit Internal Operating Procedures
- 5th Circuit Practitioner's Guide

# Where to find the rules

- Green books
- La. Rules of Court (Thomson Reuters)
- Courts' web sites

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**Know the record**

# Know the record

“Arguing about the law in the abstract is interesting and fun, but what wins cases is the lawyer’s ability to marshal the facts littered over an extensive trial court record in a way that's consistent with favorable controlling authority... In real-life appellate advocacy, the record plays a key role, and a lawyer’s mastery of the record—or lack thereof—often makes the difference between winning and losing.” —Judge Alex Kozinski, *In Praise of Moot Court—Not!*, 97 Colum. L. Rev. 178, 189 (1997).

# Know the record

“Before you start writing the brief, it is absolutely essential that you review the trial record, including all documents and exhibits. You must study the record carefully and not just mechanically flick through the pages. You also must read the entire record, not just the portions that favor you....

# Know the record

“You should do this even if you were trial counsel. If you were not trial counsel, you have no choice. You simply must become familiar with every page of the record. I elevate this requirement to a standard of professional responsibility.”

—Judge Ruggero J. Aldisert, *Winning on Appeal* § 7.2 (Rev. 1<sup>st</sup> ed. 1996).

# Know the record

“At the appellate stage, knowing your case means, first and foremost, knowing the record. You never know until it is too late what damage a gap in your knowledge of the record can do—not only at oral argument ..., but even in your brief.”

—Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* § 3 at 8 (2008).

# Know the record

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

Unif. R. 2-12.4(A)(9)(a).

# Know the record

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

5th Cir. R. 28.2.2.

# How to cite the record

- By volume, abbreviation, and page (like So. 3d and F.3d).  
— **5 R. 1249** (vol. 5 p. 1249)
- And sometimes by line (like the Bible)  
— **6 R. 1307:5-12** (vol. 6 p. 1307 lines 5-12)
- In the U.S. 5th Circuit: **ROA.[page]**

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**Know the standards of review**

# “Standard of review” defined

“The phrase ‘standard of review’ refers to the degree of deference that an appellate court must accord to the decision of the lower court or administrative agency whose ruling is being reviewed.”

*Booth v. State*, 251 P.3d 369, 372 (Alaska 2011).

# Standards of review, grossly oversimplified

Manifest error (a.k.a. “clearly wrong”)

Highly deferential.  
Applies to fact findings.

Abuse of discretion

Highly deferential.  
Applies to discretionary rulings.

De novo

No deference.  
Applies to rulings of law.

☐ Select all content No items selected [Clear Selection](#) ☒ Specify Content to Search

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> ☐ (B) INTERLOCUTORY, COLLATERAL, AND SUPPLEMENTARY PROCEEDINGS AND QUESTIONS, k868-k876

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**Title Search**

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Roger A. Stetter, *La. Civil Practice Series: La. Civil Appellate Procedure*  
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§ 10:156	Review of grant of lis pendens
<b>Scope</b>	
This chapter discusses the authority underlying the power of review and limitations on its exercise. Both the preservation of issues for review as well as the question of when an issue must first be raised is addressed. The effect of orders deciding post-trial motions on the scope of an appeal is also treated. This chapter also discusses the various standards of review and the particular instances when they are used.	

## Table of Contents – Standards of Review

Roger A. Stetter, *La. Civil Practice Series: La. Civil Appellate Procedure*  
436–37 (2012–13 ed.)

## Quotable quote on standards of review

“I elevate the necessity of correctly stating the review standard to a question of minimum professional conduct.”

Ruggero J. Aldisert, *Winning on Appeal* § 5.2 at 58 (Rev. 1st ed. 1999).



“One who blindly challenges on appeal the exercise of discretion might do better to take a leisurely stroll through an uncharted minefield. If the issue implicates lower tribunal discretion, the appellate lawyer who fails to recognize this, in my charitable and understated view, misses by light years the minimum standards of competence.”

—Ruggero J. Aldisert, *Winning on Appeal* § 5.10 (Rev. 1st ed. 1999).

# Briefing the standard of review

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

Fed. R. App. P. 28(a)(8)(B).

# Briefing the standard of review

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

Unif. R. 2-12.4(A)(9)(b).

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**Be a professional writer**

# Too much briefwriting



## Fun briefwriting fact

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

—Bryan A. Garner, *Garner on Language and Writing* xxxv (2009).

# Fun briefwriting fact

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

# Fun briefwriting fact

In the U.S. 5<sup>th</sup> Circuit,  
percentage of briefs that  
are “well-written” and  
“genuinely helpful”:

5% to 10%

—*Judge Thomas M. Reavley*

Bryan A. Garner, *Garner on  
Language and Writing* xxxiii (2009).

# Fun briefwriting fact

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

# Fun briefwriting fact

In the U.S. 7<sup>th</sup> Circuit,  
percentage of briefs that  
are “of a high professional  
caliber”:

3%

—*Judge Frank Easterbrook*

Bryan A. Garner, *Garner on Language and Writing* xxxiv (2009).

# What's wrong with briefs (according to the judges)?

- Too long. Too long. Too long.
- Too many issues or points
- Rudderless; no central theme(s).
- Lack of focus.
- Absence of organization.
- Excessive citations and verbiage.
- Uninteresting and irrelevant fact statements.
- Misrepresented facts and case holdings
- Failure to mention or properly cite contrary authorities
- Failure to state proper jurisdiction
- Failure to set forth the proper standard of review
- Failure to apply the standard of review properly.
- Failure to prepare an accurate table of contents.
- Failure to prepare an accurate table of authorities with page references to the brief.
- Failure to set forth a summary of the argument
- Unclear, incomprehensible, irrelevant statements of reasons.
- Misrepresenting or exaggerating the adversary's arguments
- Inaccurate or incomplete citations.
- Citing cases that have been overruled.
- Discussing unnecessary details of precedents and compared cases.
- Failure to cite the record.
- Failure to state the relief requested
- Typing, misspellings and grammatical mistakes.
- Failure to observe the court's appellate rules.
- Etc., etc., etc., ...

—Ruggero Aldisert, *Winning on Appeal* § 2.4, at 23-24 (Rev. 1st ed. 1999)

# More fun facts about legal writing

- Legal writing is the most important subject taught in law school.\*
- Excellent writing = career success.
- Excellence in writing is a life-long pursuit.
- About 70% to 80% of appeals are won or lost on the briefs.

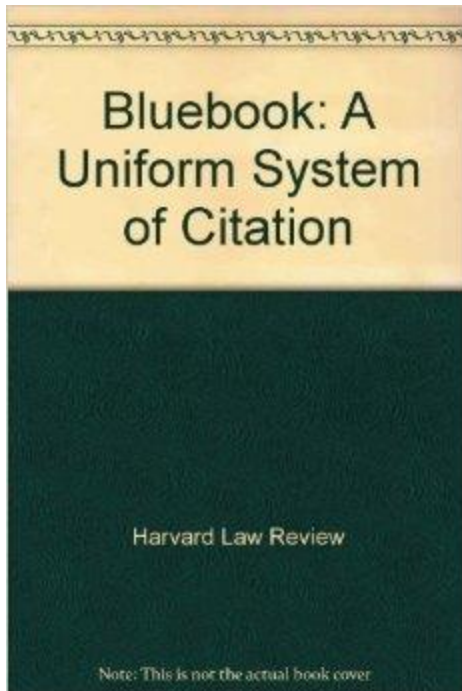
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\* But not necessarily treated so.

# Citing cases La. style

## Wrong

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



## Right

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

- In La. courts of appeal, give parallel citations to U.S. Supreme Court decisions. (Unif. R. 2-12.4.)
- See materials pp. 22–23

# The importance of typography

**THE OTHER DAY, I RAN INTO AN ENTIRE PARAGRAPH WRITTEN IN ALL CAPITAL LETTERS. TO MAKE MATTERS WORSE, THE ENTIRE THING WAS IN BOLD TEXT. AND I THOUGHT TO MYSELF, "GEEZ, TRYING TO READ THIS IS HURTING BOTH MY EYES AND MY BRAIN. IT'S LIKE THE WRITER IS SHOUTING AT ME, WHICH HURTS MY EARS AND MAKE ME WISH THAT HE WOULD JUST SHUT UP, JUST TO STOP THE PAIN."**

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

5

**Oral argument: prepare, prepare,  
prepare**

**YOU'RE PRESENTING AN ORAL ARGUMENT IN  
APPELLATE COURT?**



**THAT'S RUFF**

memegenerator.net

**I'm fine**



# Differences between moot court and real-world oral argument

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

# Preparing for oral argument

- Review the record. Know it cold.
- Re-read the briefs.
- Re-read the important cases cited in the briefs.
- Prepare 1 to 3 points to make.
- Anticipate questions.
- Be ready to talk about whatever the panel wants to talk about.
- Answer questions directly; then explain.

For supplemental materials:

[raymondward.typepad.com](http://raymondward.typepad.com)