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APPELLATE PRACTICE

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RECENT DEVELOPMENTS
BY THE JUDICIARY

APPELLATE LAW PRESENTATION

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BRIEF WRITING
A PRACTITIONER'S APPROACH - PART II
WRIT APPLICATIONS

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I. **WHEN IS IT A WRIT AND WHEN IS IT AN APPEAL?**:

A. La. Code Civ. Proc. art. 2201: Supervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction.

B. La. Code Civ. Proc. art. 2083: Judgments Appealable: 2083 A. A final judgment is appealable in all causes in which appeals are given by law, whether rendered after hearing, by default, or by reformation under Article 1814...C. An interlocutory judgment is appealable only when expressly provided by law.

C. La. Code Civ. Proc. art. 1841: A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final. A judgment that does not determine the merits but only the preliminary matters in the course of the action is an interlocutory judgment. A judgment that determines the merits in whole or in part is a final judgment.

D. La. Code Civ. Proc. art. 1914: A interlocutory judgment rendered in open court constitutes notice to all parties. Except...if the judgment is to be reduced to writing or a party asks that it be reduced to writing within 10 days of rendition or if the court took the matter under advisement. Then notice is when it is mailed by the clerk. Also, if the interlocutory judgment refuses to grant a new trial or JNOV notice is from when the clerk mails notice of the denial.

E. Much confusion exists as to whether a judgment is "interlocutory" or whether it is a partial final judgment under 1915 of the Code of Civil Procedure. If a partial final judgment, the judgment may be designated as immediately appealable, but absent the declaration, then the partial final judgment is not appealable either. A partial final judgment resolves on the merits some but not all claims or some but not all of the parties are dismissed.

F. Appealable Interlocutory Judgments. Interlocutory judgments that cause "irreparable harm" are said to be appealable. *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So. 2d 1234 (La. 1993).

See also, *Herlitz Const. Co., Inc. v. Hotel Investors of New Iberia, Inc.*, 396 So. 2d 878 (La. 1981). In that case the trial court had overruled an exception of no cause of action. The defendant took a writ to the court of appeal, which was denied, as follows:

> "Writs denied. This Court will not exercise its supervisory jurisdiction save in cases where there is palpable error in the ruling complained of, and then only if irreparable injury will ensue. No such showing being made, the application is denied."

The Supreme Court wrote a per curium opinion saying, "A court of appeal has plenary power to exercise supervisory jurisdiction over district courts and may do so at any time, according to the discretion of the court. In cases in which peremptory exceptions are overruled, appellate courts generally do not exercise supervisory jurisdiction, since the exceptor may win on the merits or may reurge the exception on appeal."

"This general policy, however, should not be applied mechanically. 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."

Thus, *Herlitz* stands for the proposition that "irreparable harm" is not a necessary ingredient to the appellate court exercising its "supervisory" jurisdiction, as an interlocutory order which causes irreparable harm would be appealable. Thus, supervisory jurisdiction applies to interlocutory orders that do not cause irreparable harm, as appellate jurisdiction extends to interlocutory orders that do cause irreparable harm.

An example given of an interlocutory judgment that would cause "irreparable injury" is the overruling an exception of improper venue. See footnote 1, *Herlitz*. The *Herlitz* court finds that "irreparable injury" occurs if any error in the ruling cannot be corrected on appeal.

II. **PREPARING TO FILE THE WRIT TIMELY**:

A. TIME IS OF THE ESSENCE! It's a great idea to have a template made for the writ application and the documents necessary to successfully file a writ application on time in the court of appeal.

1. REVIEW THE RULES OF COURT - RULE 4. REVIEW THEM EVERY SINGLE TIME YOU HAVE TO FILE A WRIT.

a. RULE 4-1. You know in advance that you will file an original and 3 copies of the writ application **AND** everything you attach to it. Pick out the attachments and have the copies ready to go when the time comes to put it together. DO NOT wait until the last minute.

The record is something you will build for yourself. So, start putting together a plan of what all you will need to support the writ application. Look at Rule 4-5 so that you will know what you have to attach.

b. RULE 4-2: NOTICE OF INTENT AND ORDER SETTING THE RETURN DATE FOR THE WRIT. Develop a form that can be quickly and easily adapted. Have one for writs in which no stay order nor expedited treatment will be sought and one where a stay is sought and expedited treatment sought pursuant to RULE 4-4.

c. KNOW YOUR TIME DELAYS...RULE 4-3 "It's a Trap!"

i. Civil Cases: As a general rule, the return date cannot be more than 30 days from the date of notice as provided in La. Code Civ. Proc. art. 1914. Extensions are allowed if requested within the initial delay or a valid extension of the delay. HERE'S THE TRAP...1914 A. "An interlocutory ruling in open court constitutes notice to all parties." 1914 B. A court may order the ruling reduced to writing or a party may request that the ruling be reduced to writing within 10 days of the ruling or the court may take the ruling under advisement, then the delay for filing writs runs from the date the clerk mails notice of the ruling.

ii. Criminal Cases: The return date cannot be more than 30 days from the date of ruling unless the court orders the ruling at issue be reduced to writing, then the delay is 30 days from the date the ruling is signed.

iii. Note: You MUST attach the order setting the return date to the writ application or else it won't be considered, dead on arrival. NOT GOOD!

d. RULE 4-4, Stays and Expedited Consideration. You need to make this decision before you file your notice of intent. You must get either the trial court or the appellate court to issue a stay or the matter from which the writ is taken is NOT stayed and may proceed while the writ is pending.

i. If you desire expedited consideration you must put it on the Application itself.

ii. You must give reasons in the writ why expedited consideration should be granted.

iii. You must set forth the reasons in a separate section that is designated in the table of contents.

iv. You must give notice to the parties and trial court in the same manner that you filed the writ such that they have notice at or before the time you are filing the expedited writ application. See the **special certificate** required by Rule 4-4 C.

e. BUILD A WRIT APPLICATION TEMPLATE:

i. Rule 4-5 sets forth the things needed in a writ application: Rule 4-5 A. requires the application to be signed AND contain an affidavit verifying the allegations of the application and certifying that copy has been delivered or mailed to the respondent judge and opposing parties. The affidavit shall list all parties and all counsel and list the addresses and telephone numbers (if available) of the respondent judge, opposing counsel and any opposing party not represented.

ii. 4-5 B. Requires that all pages of the application and attachments be consecutively numbered. The application should be bound at the top and the sections of the application should be no more than 250 pages each. Don't use tabs outside the boundaries of the paper and don't staple documents within the binding.

iii. 4-5 C. The application shall contain...

An index of all items contained therein.

Jurisdiction Statement

Statement of the Case

Statement of Issues

Assignments of Error

A memorandum in support of the Application in accordance with 2-12.2 - 2-12.10 and a “prayer for relief.”

Copy of the Ruling, Order or Judgment at issue

Copy of the Judge’s Reasons/Ruling if written

Copy of any pleadings upon which the judgment was based

Copy of any opposition and attachments thereto or a statement that no opp was filed

Copy of pertinent court minutes

Notice of Intent and Order Setting Return Day

Separate page entitled “Request for Expedited Consideration” if such is sought

III. **"OTHER WRITS"**

A. La. Const. Art. 5, § 2 states: A judge may issue writs of habeas corpus and all other needful writs, orders and process **in aid of the jurisdiction** of his court. Exercise of this authority by a judge of the supreme court or of a court of appeal is subject to review by the whole court. The power to punish for contempt of court shall be limited by law.

B. Mandamus: What if the trial judge refuses to sign your order granting you an appeal of his/her order or Judgment? You may want to consider the writ of mandamus as a method to require the trial court to sign your motion and order of appeal. Don't forget to get an order setting the return date of the writ. The Second Circuit may require that a return date be set even for writs of mandamus, habeas corpus, etc.

IV. **WRITS TO LOUISIANA SUPREME COURT**

A. RULE X of the Louisiana Rules of Court, Supreme Court, sets forth the procedures for filing a writ with the Louisiana Supreme Court.

1. Sec. 3 sets forth the requirements of Civil Applications and requires:

    i. An index of all items contained therein;

    ii. A statement of the considerations set forth in Sec. 1 (a);

    iii. A memo 25 pages or less that has...
        a. Statement of the case
        b. Assignment of errors
        c. Summary of the Argument
        d. Argument

    iv. Verification as set forth in 2 (d);

    v. Appendix that contains...
        a. judgment from trial court
        b. reasons for judgment
        c. court of appeal opinion

    vi. Other pleadings or documents are FORBIDDEN, unless necessary to show why the application should be granted. Then they cannot exceed 25 pages.

    vii. Clerk of Court is forbidden to accept for filing any documents over the 25 page limit. They are serious about that rule!

    viii. Do Not Attach Appeal Court briefs.

    ix. Can refer to documents on previously filed applications.

2. Sec. 4 sets forth the requirements for a criminal writ and provides:

    i. An index of items contained therein;

ii. Statement of considerations set forth in Section 1(a) of this rule is present in the case;

iii. Memo (25 pages or less) capital case (50 pages or less)
   a. Statement of the Case
   b. Assignment of Errors
   c. Summary of Argument
   d. Argument

iv. Verification, See Rule 2(d)

v. Copy of ruling, order, opinion of Ct. of Appeal

vi. Appendix that contains:
   a. copy of the charging document
   b. copy of the minutes of the trial court
   c. copy of all briefs from appeal
   d. copy of the ruling and reasons (trial court) - pleadings supporting the ruling
   e. copy of the order fixing the time to file the writ 5(b)
   f. other documents discouraged except transcripts
   g. may refer to other documents attached to other apps.

3. Rule 5 Relates to the time to file the writ application.

i. NO EXTENSION OF TIME ALLOWED! General rule 30 days from the date notice of ruling from the court of appeal is mailed. If a rehearing is filed 30 days from date notice of the denial of rehearing or from ruling on rehearing is mailed.

ii. 5(b) relates to cases in which the court of appeal does not have supervisory jurisdiction. In that case have to attach an order from the trial court setting the delay to file, which is designated as a "reasonable" time.

iii. 5c. relates to candidate/election cases which are rare. 48 hours after ruling is the general rule.

iv. 5(d) Relates to mailing and timely filing. If received day after due date, presumed timely. Otherwise have to have official post mark or mark from commercial carrier, can't use your office postage meter as proof.

v. Louisiana Supreme Court has electronic filing now. I ALWAYS electronic file.

B. OPPOSITIONS (DO THEM) Section 6

1. Time to file is 15 days from filing of application unless extended
2. No format required. Rule says memo not exceeding 25 pages.
3. Sets forth reasons why writ should not be granted.
4. Attachments are discouraged. If have any, separate binding 25 pgs.
5. If emergency writ...notice intent to oppose immediately
6. Oppositions are encouraged

C. REPLY MEMOS (DISCOURAGED) Sec. 7

1. 10 days after opposition filed is due date.
2. Can't be more than 7 pages inclusive of attachments.

V. MY WRIT WRITING PROCESS

A. DO THE EASY/ROUTINE THINGS FIRST! There is nothing more annoying than to be facing a filing deadline, but have double check or correct minute details or engage in clerical minutia. So, by any means necessary... DO AHEAD OF TIME...

1. Create a Notice of Intent and Order Templates:

2. Create Writ Templates both Court of Appeal and Supreme Court

   a. Rule 4-5 Court's of Appeal

   b. The Louisiana Supreme Court templates are found in Rule X, Sect. 3 and Sect. 4 FOLLOW THEM!

   c. Certificates. MAKE SURE YOU REVIEW the rules on what you must certify on your writ. Fill out your certificate of service in the template so you won't be worried if it's right at the deadline. You don't want your writ rejected because you failed to follow a rule.

3. Copy what you can early: For all items that you know or plan to attach to your brief, i.e. Judgment, Reasons for Judgment, etc. make the requisite number of copies RIGHT AWAY. Copy machines jam and run slow at filing time. TRUST ME!

4. Calendar all delays immediately: This means all delays, date to file notice of intent, return date, date opposition is due, delay to file extensions of time.

I recommend you do the mundane easy things first and get them right so that when you are worrying over substance, and you will worry over substance, you won't be overlooking the mundane.

B. Gather the materials you will rely upon in the writ application.

C. SUPPLEMENT YOUR RESEARCH ON THE LAW. Do use Shepard's Citations, especially for important cases to your argument. Nothing is more embarrassing than getting the law wrong because your case was overruled. Read the other side's citations; you would be surprised at the frequency at which cases do not stand for the cited premise or have been overruled or modified. For matters of common citation which are used frequently such as jurisdictional statements, standards of review, summary judgment standards, etc. have a really good database of go-to citations. As you come across quotations that you like and can be used at appropriate times make a database of them.

D. WRITING THE WRIT. I write my writs on the computer. I find that when I am putting together a writ, I have to clear my desk, clear my calendar and hold calls until such time as I can bang that puppy out. Since most writs involve interlocutory judgments they typically revolve around legal questions. Thus, you probably have a good idea of where the trial court went wrong.

1. Things to consider before you hit the keys:

    a. Do review or refresh a style of writing book such as: Strunk and White's, Elements of Style; Zinsser's, On Writing Well; or the Chicago Manual of Style. I clerked two years for the late Louisiana Supreme Court Justice, Pike Hall, Jr. The first day I walked in the office, he handed me a brand new copy of the Elements of Style that I still have to this day. He kept one in the upper right hand drawer of his desk. He said, the book is "our friend." He also said, "Read this, write like this, and we will get along just fine."

    b. Consider the system of citation you plan to use, use it and stay to the standard of your system throughout the brief. I prefer The Bluebook, A Uniform System of Citation. Consider whether you are going to include the citations within the text of the brief or use footnotes. Do one or the other. I prefer to include the citations in the text, unless I have some coincidental observation to make about the citation then I make it in a footnote.

2. Banging the Keys, as I like to call it:

    a. **Create a table of contents and table of authorities.** I am a Word Perfect guy and those tables are easily created on that platform. I hear

they are as easy to create on Word. If you do not know how to create them and use them, LEARN IT, OR INSIST THAT YOUR SECRETARY DOES. I create headings for each of the sections of the brief, but I also include especially under the Argument section, topic headings stated as a basis for the argument. That way, if anyone is reading my table of contents, they are reading arguments from the very beginning.

b. **Statement of Jurisdiction.** The bases for SUPERVISORY jurisdiction are set forth in the Louisiana Constitution. The appellate jurisdiction of courts of appeal is set forth in La. Const. Art. 5 § 2, i.e. courts may issue writs in aid of their jurisdiction; Art. 5 § 5 Supreme Court; and Art. 5 § 10 Courts of Appeal. Article 5 § 5 sets forth that the Louisiana Supreme Court has supervisory jurisdiction over all of the courts in the state. See also La. Code Civ. Proc. art. 2201, procedure for supervisory review.

Note: Rule 2-12.4 (3) requires the jurisdictional statement to include: the dates of the judgment appealed and of the motion and order for appeal to establish the timeliness of the appeal and the following, as applicable:(a) an assertion that the appeal is from a final appealable judgment and, if the appealability is dependent upon a designation by the trial court, a reference to the specific page numbers of the record where the designation and reasons for the designation are to be found, or (b) an assertion that the appeal is from an interlocutory judgment or order which is appealable as expressly provided by law, or (c) an assertion of information establishing the court of appeal's jurisdiction on some other basis.

c. **Statement of the Case.** I like to start my Statement of the Case with a concise paragraph setting forth why the case is before the court of appeal and the reason why the writ should be granted. IT IS VERY, VERY, VERY IMPORTANT TO HIT QUICK, HIT HARD AND BE RIGHT FOR WRITS. You should be able to sum up why the trial court was wrong and why it has to be corrected in two sentences or less.

d. **Assignments of Error.** I find that my best assignments of error are stated such that the reader is directed to a conclusion that my client wins and gives the basis by which the assignment of error is reviewed. Direct

statements such as, “The trial court committed legal error by...”; or “The district judge abused her discretion when she...” or “The determination of the district judge is manifestly erroneous because...”. These type of statements quickly establish why the ruling below is wrong and the standard by which the determination should be reviewed.

e. **Issues.** The best presentation I have seen on this topic was presented by Professor Marlene Krousel at the 2017 5th Circuit Court of Appeal Appellate Advocacy Seminar. Some of the information used here with her express permission is obtained from her power point presentation.

There are several recognized methods for making great issue statements. In many cases I have used the “Whether method” but I have moved away from this method as noted writer Michael Fontham has indicated that the method’s effectiveness is “questionable.” Michael R. Fontham, Written and Oral Advocacy 65 (1985), citing Wiener, Essentials of an Effective Appellate Brief, 17 Geo. Wash. L. Rev. 143, 161 (1949). And, Professor Krousel inspired me to consider these other methods for effective brief writing.

If used, the “Whether” method begins the question with the word “Whether” and ends with a period. It is fairly self explanatory in how to execute it.

Another method is the “Under-does-when” format. Pursuant to this method, the question begins with “under” or a derivative, then references the law; then “does” or a derivative is used to ask a precise legal question; then comes “when” with the key facts of the case. It is completed in a single sentence and ends with a question mark.

Finally, is the “Deep Issue” format formulated by Bryan Garner. By this method the question mirrors a legal syllogism. It is more than one sentence, unless the major premise is obvious or the issue simple, the “deep issue” is gaining popularity as the way to formulate the issue.

To state the issue using the “Deep Issue” format: In the first sentence the major premise is stated (states favorable rule(s) or principal(s). In the next sentence, a minor premise is related using favorable facts to the legal rule or principle stated in the major premise. The last sentence

leads the reader to a favorable conclusion.

Examples of the use of the "Deep Issue" format. These examples use the same issue from opposite sides of the same case:

For Former Husband: Under Louisiana law, a husband who is not the father of his wife's child is not obliged to pay child support for that child. Blood tests have conclusively revealed that the former husband is not the father of the child. Is the former husband entitled to reimbursement for the child support that he paid under the false belief that he was the father?

For the Former Wife: Under Louisiana law, a husband is presumed to be the father of a child born during the marriage and must pay child support unless he denies paternity within one year of the child's birth. The husband did not deny paternity until five years after the child's birth. Was the husband obliged to support the child until he proved that he was not the father? Marlene Krousel, Statement of Issues Presented for Review and Point Headings, 2017 Appellate Advocacy Seminar, 5th Circuit Court of Appeal.

f. **Summary of the Argument.** This section should be exactly what it says, a summary. If it is more than ½ a page, consider whether you should shorten it. Consider whether your argument should be short enough to eliminate this one for a writ.

g. **Argument.** The argument should be divided into topic headings to match the assignments of error. Remember if you fail to brief an assignment of error it will be considered abandoned. For writs your assignment of error is likely going to be a single error and issue presented for review. If it's more than that...your writ may be in trouble.

h. **Conclusion.** I write my conclusions last. I treat it much like the summary of argument where I briefly review all assignments of error and end with a precise statement on the relief I expect from the court of appeal. For instance, "For all of these reasons, the judgment of the trial court should be reversed and the plaintiff's claims dismissed. Or, "Because the trial court did not abuse her discretion in finding ... the judgment must be affirmed." This way, from the beginning, I have

informed the appellate court why we are here, why we should win and what we want them to do. Those themes are repeated in the conclusion.

E. TIPS

1. Keep in simple, keep it short, be direct, say what you mean to say, say it quick and get done.

2. Finish a draft of your writ at least a day (1) prior to the deadline, if at all possible. Print out the writ and read it on paper. Give the writ to someone who is adept at research and have them double check all of your cites for accuracy, relevancy and that they are good law. Give the writ to someone else that does not know anything about the case and let them read it. DO THEY UNDERSTAND YOU?

3. **IF I THINK THE TRIAL COURT MIGHT RULE AGAINST ME ON AN IMPORTANT ISSUE**...I write the writ before I go and argue the motion. I bring the notice of intent with me to court. When the judge rules, I hand him/her the notice of intent. When he asks me how long I need I tell him 24 hours. I have never had a writ denied when it was filed within a few hours of the trial judge's ruling. You need to be very, very sure you are right on the law when you go this route.

4. Write in an active voice. Use short sentences and short paragraphs.

5. Avoid string citations. Use the best authority for the statement you want to reference or the one that has the best language for your argument.

6. Review the Rules of Court prior to writing so that you make sure you are on time, in compliance and not embarrassed.