IDENTIFYING AND UNDERSTANDING STANDARDS OF REVIEW\textsuperscript{1}

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When you begin researching to determine whether you have a viable issue to appeal, one of the first issues you must consider is the applicable standard of review. Identifying the applicable standard of review is essential because it may determine whether an issue is likely to be successful – or even arguable.\textsuperscript{2} For certain types of issues, the standard of review is clearly defined by case law or by statute. In other situations, however, the appropriate standard may be undecided. When working on appellate matters, you should seize any opportunity to persuade the court of appeals to apply a standard of review that is most beneficial for your position.

**WHY DO DIFFERENT STANDARDS OF REVIEW EXIST?**

Standards of review are drawn from and, to some extent reflect, the limited role of the appellate court in a multi-tiered judicial system. As a general rule, appellate judges are concerned primarily with correcting legal errors made by lower courts, developing the law and setting forth precedent that will guide future cases. Trial court judges, in contrast, are entrusted with the role of resolving relevant factual disputes and making credibility determinations regarding the witnesses’ testimony because they see and hear the witnesses testify. Appellate courts also sit in panels on the theory that three or more judges, acting as a unit, are less likely to make an error in judgment than one judge sitting alone. In other words, three judges may properly “judge” the legal decisions of one judge. Structurally, it also means that it takes at least two court of appeals judges to overturn a decision of a lower court, signifying that a single court of appeals judge does not have the power to reverse a single trial court judge. Because of these differences in the trial and appellate functions, appellate courts accord varying degrees of deference to trial judges’ rulings depending on the type of ruling that is being reviewed. These varying levels of deference are known as standards of review.

**WHAT ARE THE DIFFERENT STANDARDS OF REVIEW?**

Although many different variations of standards of review exist, they generally fall into three main categories—de novo, abuse of discretion, or clear error. Under “de novo” review, the appellate court gives no deference to the trial court’s ruling and considers the issue without any

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\textsuperscript{2} Also, Federal Rule of Appellate Procedure 28(a)(9)(B) requires you to include a concise statement of the standard of review for each issue. This statement may appear in the argument section or under a separate heading. Most practitioners fulfill this requirement by including a short “Standard of Review” section.
regard for the decision below as if it were considering the issue for the first time. Second, an
appellate court can review a trial court’s decision for abuse of discretion, meaning that it will
affirm the ruling below unless it is clearly unreasonable. Finally, the appellate court can review
a decision for clear error. This form of review is typically applied to a trial court’s factual
findings, because the trial court is considered to be in the best position to make factual
determinations. However, clear and distinct standards have become muddled by subtle
variations that have crept into the jurisprudence. Other labels are also applied, such as
reasonable, substantially justified, and presumptively correct. The standard of review applied
will be based on the type of ruling up on appeal. This document will focus on the four broadest
types of rulings that dictate the appropriate standard of review: questions of law, questions of
fact, discretionary rulings, and mixed questions of law and fact.

1. **Questions of Law**

   Questions of law are reviewed de novo. Because the courts of appeals are primarily
   concerned with enunciating the law, they give no deference to the trial court’s assessment of
   purely legal questions. For example, questions of constitutional interpretation or the meaning of
   particular terms as used in a statute is a question of law. Grants of summary judgment and
   motions to dismiss are also reviewed de novo.

   As an appellant, if there is any opportunity to do so, you should try to characterize the
   lower court ruling as a mistake of law because you can then start with a “clean slate” and not be
   at a disadvantage because you lost below.

2. **Questions of Fact**

   Questions of fact are reviewed under the clearly erroneous standard. Rule 52(a) of the
   Federal Rules of Civil Procedure specifically provides that “[f]indings of fact, whether based on
   oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard
   shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”

   **A. Factual Findings Made by a Judge**

   A trial judge’s factual findings are accorded great deference because the judge has
   presided over the trial, heard the testimony, and has the best understanding of the evidence. The
   same is true when a trial judge considers evidence with regard to a pre-trial motion, such as a
   motion to compel arbitration or to suppress evidence. Under the clearly erroneous standard, it is
   not enough to show that the factual determination was questionable. An appellate court will
   affirm the trial court’s fact determinations unless, based on a review of the entire record, it is
   “left with the definite and firm conviction that a mistake has been committed.” *Pullman-
court’s factual determination, so if your appeal rests solely on a challenge to a finding of fact,
you can anticipate that the likelihood of success will be low, unless the circumstances are
egregious.

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3 While there is no comparable provision in the criminal rules, the clearly erroneous rule is also applied to factual
While this rule applies to findings based on either testimony or documentary evidence, you might be able to persuade a court of appeals to overturn a finding based on documentary evidence, such as a question of contract interpretation, more easily than a finding based on testimony, because the appellate judge is in just as good a position to review the document as the trial judge. Nevertheless, this is a difficult argument to make, because even though the trial court holds no “eyewitness advantage” with regard to reviewing documents, the trial court’s traditional role as fact-finder is sufficient basis alone for deferring to the trial court on findings from documents.

B. FACTUAL FINDINGS MADE BY A JURY

The Seventh Amendment places great constraints on a court’s authority to overturn factual findings made by a jury. Jury verdicts, however, are not unreviewable. A court will overturn a jury verdict if it is unsupported by substantial evidence. In criminal cases, the due process clauses of the Fifth and Fourteenth Amendments have been interpreted to require that criminal convictions be based on sufficient evidence presented by the prosecution. Thus, an appellate court must reverse a conviction if, after viewing the evidence in the light most favorable to the prosecution, it finds no “rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979).

3. DISCRETIONARY DETERMINATIONS

Throughout the various stages of litigation, the judge is faced with a number of decisions that require an exercise of discretion. In making these decisions, the judge must consider many different factors, and often it is not clear how heavily any of these factors should be weighed in the balancing process. Indeed, a hallmark of these types of discretionary decisions is that it is impossible to develop any general rule to determine the correctness of the decision because each determination is a “judgment call” that rests on numerous factors unique to that particular case. Typically, the judge who presides during the trial is in the best position to evaluate the relevant factors. For example, when one party wants to introduce evidence at trial and the other party objects on the grounds of prejudice, the judge must balance the evidence’s probative value against its potential for prejudice. The trial judge is aware of the entire context of the trial and can consider the likely effects of the evidence upon the jury, having observed the jury’s reaction to other events at trial.

When reviewing discretionary decisions, the courts of appeals give great deference to the result reached by the trial judge because the appellate judges were not present at trial and are not in as good a position as the trial judge to evaluate the relevant factors. It will be a rare case where the court of appeals will reverse a discretionary ruling and direct the court below to reach a different result.

It is a far different situation if the claim on appeal is that the trial judge committed legal error in exercising her discretion. If the trial judge fails to consider the various options available or fails to consider relevant factors or considers irrelevant factors, the court of appeals will
reverse the decision and remand for a new determination. The failure to apply the law correctly in reaching a decision is always an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996) (“A district court by definition abuses its discretion when it makes an error of law.”). In some situations, the appellate court will remand if the record does not adequately establish the reasoning employed by the judge to reach a discretionary decision. In each of these situations the standard of review remains abuse of discretion but the court is essentially reviewing for legal error under a de novo standard. At the same time, the relief it will give you if it agrees that there has been legal error, is usually limited to a remand to the court below, before the same judge, for a redetermination of the issue.

4. **Mixed Questions of Law and Fact**

Unfortunately, many issues are not easily labeled as questions of law, fact, or discretionary rulings. Courts and advocates alike have struggled over the years with defining the appropriate standard of review for issues that present mixed questions of law and fact. Despite their difficulty, these issues provide a terrific opportunity for lawyers to seize the initiative and characterize the claim in such a way as to obtain the most favorable standard of review.

The Supreme Court has defined mixed questions as those in which “the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.” *Pullman-Standard*, 456 U.S. at 289 n.19; see also *Ornelas v. United States*, 517 U.S. 690 (1996). When a court must decide a mixed question of law and fact, it must progress through three distinct steps: 1) it must establish the basic, primary, or historical facts; 2) it must select the applicable rule of law; and 3) it must apply the law to the facts. The third step is the most troublesome for standard of review purposes. The facts are reviewed under the clearly erroneous standard, the rule of law is reviewed de novo, but under what standard is the application of the facts to the law reviewed? There is no easy answer to this question.

In general, mixed questions of law and fact are either reviewed under the abuse of discretion standard or the de novo standard. If you are faced with an issue for which there is no set standard of review, or if the circuits are split on the issue, then it is time to be creative. In a thoughtful and thorough opinion addressing the issue of the appropriate standard of review regarding the mixed question of exigent circumstances, the Ninth Circuit set forth a functional inquiry for determining whether de novo or clearly erroneous review was appropriate. *United States v. McConney*, 728 F2d 1195 (9th Cir. 1984). The court proposed that if application of the rule of law to the facts requires an inquiry that is “essentially factual,” then it should be reviewed under the clearly erroneous standard. If, on the other hand, the question requires the court to consider legal concepts and to exercise judgment about the “values that animate legal principles,” then the question should be reviewed de novo. *Id.* at 1202. When the mixed question implicates constitutional rights, the question most likely will be reviewed de novo, according to the Ninth Circuit.

Not all mixed questions will be reviewed de novo. In *Pierce v. Underwood*, 487 U.S. 552 (1998), the Court held that whether the position that the government took in litigation was
“substantially justified” for purposes of the Equal Access to Justice Act – should be reviewed under the abuse of discretion standard. The Court reached this conclusion because: 1) some of the relevant factors indicating whether the government’s position was substantially justified might be known only to the trial judge; 2) the appellate courts would be required to invest substantial time in reviewing the entire record to understand the factual setting; and 3) the circumstances of each case are so different that it would be difficult to develop a general rule that the courts could apply to determine whether the government’s position was substantially justified.

In sum, when dealing with mixed questions of law and fact, any approach used “is not precise … and does not offer any litmus test by which all mixed questions can be neatly categorized.” McConney, 728 F.2d at 1204. As an advocate, you must use any ambiguity to your advantage, and try to persuade the court to adopt the standard that best suits your client’s needs.