IDENTIFYING AND UNDERSTANDING STANDARDS OF REVIEW*

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You’ve read the case. You’re familiar with the fact pattern, the holding, and the reasoning set forth in the opinion. But are you familiar with the standard of review? What is a “standard of review”? Why is it important? And how do you identify the standard of review for a particular issue? This concept is frequently glossed over in first-year courses, and with good reason—standards of review are complex, often difficult to understand, and frequently confusing even to experienced attorneys. Yet, because the standard of review plays a significant role in deciding appeals, it is important to become familiar with the concept. Being able to recognize and understand the standard of review will help you to understand more fully the reasoning of appellate court decisions. To that end, this paper provides a basic definition of standard of review, discusses the most common standards, and describes how to determine the applicable standard of review.

WHAT IS A STANDARD OF REVIEW?

A standard of review is the measure of deference an appellate court gives to the rulings of a lower court. A legal case is decided at the trial level, and the losing party appeals the judgment. The appellate court must then decide how far to go in reconsidering the lower court’s decision. Should the appellate court start again from the beginning and consider the issue as if the trial court had not ruled at all? Or should the appellate court take a more deferential stance, allowing the decision of the trial court to stand in all but the most extraordinary circumstances? The scope of an appellate court’s reconsideration is determined by the applicable standard of review.

Consequently, appellate litigators are particularly concerned with standards of review. For instance, if a trial court rules against your client, and you know that the appellate court will reverse only if the trial court was plainly wrong, you can inform your client that the chances of success on an appeal are slim. If, however, the appellate court will consider the dispute anew, your chances of success on appeal will be greater. In effect, therefore, the standard of review (in combination with other factors) will decide whether your client should appeal or not.

Standards of review also influence trial litigators. An attorney who knows that an appeal will consider only certain issues, based on the standard of review, can take pains to ensure that the record reflects those helpful issues. In other words, a trial attorney can craft the record to help the client in the event of a later appeal. By building a strong record, a trial attorney strengthens the client’s case and weakens the opponent’s chances on appeal.

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As noted, the amount of deference that an appellate court accords to a trial court is measured by the standard of review. The most common standards of review – clear error, de novo, and abuse of discretion – are discussed in the next section.

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

The common standards of review include “clear error,” “de novo,” and “abuse of discretion.”

- **Clear error**, a highly deferential standard, is used when reviewing trial courts' findings of fact, such as whether a witness's story was true.
- **De novo**, a non-deferential standard, is used when reviewing questions of law, such as the meaning of a statute.
- **Abuse of discretion**, a deferential standard, is employed when reviewing decisions that are left to the discretion of trial courts, such as the decision to sanction a party for actions taken during the discovery (i.e. evidence-gathering) phase of litigation.

**CLEAR ERROR & FACTS**

Findings of fact are reviewed under the “clearly erroneous” standard. “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). This standard is highly deferential, meaning that in most cases the appellate court will accept the trial court's findings of fact.

Why are appellate courts so deferential when reviewing a trial court’s findings of fact? Trial courts, unlike appellate courts, have fact-finding power. Because the trial court can see and hear witnesses, it is uniquely positioned to determine that one witness is more credible than another or that one story is more likely to be true than another. See United States Gypsum, 333 U.S. at 395 (“The practice in equity … was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court.”). Because of the unique institutional role of trial courts in resolving factual disputes, “due regard [is] given to the opportunity of the trial court to judge of the credibility of the witnesses.” Fed. R. Civ. P. 52(a).

**DE NOVO & LAW**

Issues of law are reviewed de novo. Under this standard, appellate courts consider legal issues anew, and decide how to interpret and apply the law. Although a trial court’s reasoning on a legal issue may provide a point of comparison for an appellate court, the trial court is not
given any deference. The appellate court can, and frequently does, decide the legal issue differently from the trial court.

But why, if appellate courts give so much deference to trial courts on findings of fact, do appellate courts give no deference on issues of law? The Supreme Court explains it this way:

... District judges preside alone over fast-paced trials: Of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence. Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs. Thus, trial judges often must resolve complicated legal questions without benefit of extended reflection or extensive information. …

Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. Salve Regina College v. Russell, 499 U.S. 225, 231-32 (1991) (internal quotation marks deleted).

In other words, just as the trial court has a unique institutional role in resolving factual disputes, an appellate court has the institutional role of resolving legal questions. Because of these different roles, an appellate court will review a trial court’s interpretation of the law de novo.

ABUSE OF DISCRETION & DISCRETION

Discretionary decisions are reviewed under the “abuse of discretion” standard. Under this standard, the question is not whether the appellate court “would as an original matter have [acted as the trial court did]; it is whether the [trial court] abused its discretion in so doing.” Nat’l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 642 (1976).

When trial judges make discretionary decisions, they are basically making a judgment call. Therefore, trial judges consider numerous and varied circumstances. Some are well-defined, and some are hazy. Some are significant (but not decisive), and some barely enter the equation. Because the trial judge sees more in the courtroom than any appellate court could by looking at the trial record, the trial judge’s balancing act is given great deference by the appellate court. The appellate court cannot disturb a discretionary decision just because it appears wrong. In order to disturb a discretionary decision, that decision must have resulted from an abuse of power by the trial court.

For instance, a trial court’s decision to sanction a party for failing to answer interrogatories during discovery by dismissing their action, while extreme, has been held not to be an abuse of discretion. See id. at 643. As the Supreme Court has explained, “[t]here is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order … [but] the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases.” Id. at 642-43.
HOW DO YOU DETERMINE THE STANDARD OF REVIEW?

Case precedent and strategy will help you to determine the standard of review. Case precedent is important because the judge is most likely to apply the standard of review that has been used before in similar cases of that jurisdiction. Strategy also plays a role because, when the standard of review is not clearly defined by precedent, you may be able to persuade the court to develop or adopt a standard in your favor.

CASE PRECEDENT: RECOGNIZING STANDARDS OF REVIEW IN CASES

Law students writing their first briefs or preparing cases for class discussion are most likely to be concerned with recognizing the standard of review in written opinions. As previously stated, this is not always an easy task, even for experienced litigators, and a number of factors must be considered. When searching for the standard of review in a written opinion, you must consider not only the language of the opinion but also what the court actually did.

The first and most obvious way to determine the standard of review is to look to the explicit language of the opinion. If the opinion contains a statement such as “The court traditionally reviews this type of issue de novo,” then that is a good indication that de novo is the correct standard. However, you must make sure that the opinion on which you rely is a current majority opinion that is binding precedent for your jurisdiction. If the opinion containing the standard of review is a minority or plurality opinion, or is not binding, then the judge deciding your case is free to apply a different standard of review. It is also important to check very recent cases, as standards tend to evolve and change over time. Ideally, you should check several cases on the same or similar legal matter to get a feel for the general standard in your jurisdiction and ensure that you are not relying upon one unusual case.

Once you have obtained a general standard of review, you should then examine the entire opinion to make sure the court applied the standard that it stated. In some cases, the court states that it will apply a particular standard, such as clear error, and then proceeds to apply a very different standard, such as de novo. Do the court’s actions agree with the stated standard of review? What standards were applied in similar cases, especially in your jurisdiction? If the court seems confused about which standard of review applies, this is your cue to argue for clearer application of the standard most favorable to your client.
Once you have learned to recognize the different standards of review, you can start mastering the next step: persuading the court to adopt the standard of review most favorable to your client. In general, the appellant (the party filing the appeal) prefers a broad *de novo* standard because it gives the appellate court the most leeway to overrule the lower court’s unfavorable decision. The appellee (the party defending against the appeal) prefers the narrow clear error standard in order to constrain the ability of the appellate court to overturn the lower court’s favorable judgment. Although strategy is a difficult art learned only through much practice in writing briefs and arguing cases, it is important to be realistic, to consider how different standards will change your argument, and to redefine the issue to change the standard of review.

**First, be realistic.** If case precedent for your jurisdiction steadily emphasizes a particular standard of review, you probably will not have much room to argue the standard, even if it does not favor your client. Judges are unlikely to overturn large bodies of case precedent by making a major change in a standard of review.

**Second, consider how different standards of review will change your argument.** Even if you have a strong case for a particular standard of review, the judge may disagree, or case precedent may lock you into a different standard before you have filed your brief. Therefore, if there is doubt as to the exact standard, plan an alternative argument around the less favorable standard of review so you will not be caught unprepared.

**Last, consider redefining the issue to change the standard of review.** The standard of review might change drastically if you can get the court to see your case in a different light. Framing an issue in terms of constitutional law (e.g., does the method of imposing a high bail requirement violate the Eighth Amendment?) will usually earn a less deferential standard of review. In contrast, framing the same issue as factual or case-specific (e.g., was the judge wrong to set a high bail in my client’s case?) may earn a more deferential standard.

**CONCLUSION**

Familiarity with the concept of standard of review – the degree of deference accorded to a trial court by an appellate court – is necessary for understanding appellate court opinions and litigation strategy in general. To sum up, appellate courts will generally defer to trial courts on issues of fact (a clear error standard) or discretion (an abuse of discretion standard). But appellate courts will not defer at all to trial courts on issues of law (*a de novo* standard). Although there are many variations of these basic standards, knowing the basics will enable you to better understand how appellate courts reason, and better shape your arguments at trial and appeal.