



IDENTIFYING AND UNDERSTANDING STANDARDS OF REVIEW¹

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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. For many 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 the most beneficial for your position.

When determining the standard of review applicable to your appeal, the key is to research how courts of appeals in your jurisdiction review your type of appeal. This handout presents the typical approach to standards of review, but it is critical to remember that courts vary widely, so you must do your own research of the case law specific to your issue. Further, standards of review are best understood as a continuum and lack clear boundaries, so research can help determine how your court will approach this continuum.

This handout will help you understand why there are different standards of review, what the differences with each standard are, the issues of mixed questions of law and fact, and some of the ways you can write about the standard of review in a brief.

WHY DO DIFFERENT STANDARDS OF REVIEW EXIST?

Standards of review are drawn from the limited role of the appellate court in a multi-tiered judicial system. Trial court judges generally resolve relevant factual disputes and make credibility determinations regarding the witnesses' testimony because they see and hear the witnesses testify. Whereas, appellate judges primarily correct legal errors made by lower courts, develop the law, and set forth precedent that will guide future cases. 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. Structurally, it 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

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reviewed. These varying levels of deference are known as standards of review. Besides providing the justification for standards of review, these theories of institutional competence can also be used persuasively in a brief to argue for a certain standard of review or for the standard to be applied a certain way.

WHAT ARE THE DIFFERENT STANDARDS OF REVIEW?²

There are six basic standards of review which span a continuum of no deference to the lower court (de novo) to complete deference to the lower court (no review). The standard of review applied will generally be based on the type of ruling up on appeal and the decisionmaker below. The table below summarizes where the main standards of review fall on the deference continuum, and some of the areas where each standard of review may apply.³ The sections that follow provide an overview of each standard.

Deference Continuum	No Deference	Minimal Deference	Some Deference	More Deference	More Deference	Complete Deference
Standard of Review	De novo	Clearly erroneous	Reasonableness/ Substantial Evidence	Arbitrary and capricious	Abuse of discretion	No review
When it Applies	Question of law	Question of fact	Jury decision Formal agency decision	Informal agency decision	Discretionary decision	Some agency actions Decision to not prosecute

I. De novo

Questions of law are reviewed de novo. Because 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, a question of constitutional interpretation or the meaning of particular terms in a statute is a question of law. 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 lessen the disadvantage of losing below.

Note that in some situations both law and fact findings from an administrative proceeding can be reviewed de novo, so it is important to check the statute providing for the review of that proceeding.

² Unless otherwise cited, the concepts in this section were adapted from Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469 (1988).

³ This table is a simplified to present a general roadmap of the types of standard of review. For a more detailed version that breaks down the type of decision and decision maker, see Davis, *supra* note 2, at 468.

II. Clearly Erroneous

Questions of fact are reviewed under the clearly erroneous standard. This standard is based on the proposition that the trial judge has presided over the trial, heard the testimony, and has the best understanding of the evidence. Thus, lower courts receive “substantial, but not total, deference.”⁴ The Supreme Court defined the standard as: “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.”⁵ But, if there are two permissible outcomes, the trial judge’s choice is not clear error, even if the reviewing court may have come to a different conclusion.

It is very difficult to overturn a trial court’s factual determination, so if your appeal rests solely on a challenge to a finding of fact, the likelihood of success will be low unless the circumstances are egregious. In practice, you may have more success persuading a court of appeals to overturn a finding based on documentary evidence, such as a question of contract interpretation, 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 still a difficult argument to make because the trial court’s traditional role as fact-finder is sufficient basis alone for deferring to the trial court on findings from documents.

Note that the clearly erroneous standard is only applied to fact finding by judges, masters, and sometimes magistrates. Fact finding by a jury or administrative agency is reviewed under the reasonableness or substantial evidence standard.

III. Reasonableness/Substantial Evidence

The two main types of proceedings subject to a reasonableness or substantial evidence standard are jury and agency decisions.

A. Jury decisions

The Seventh Amendment places great constraints on a court’s authority to overturn factual findings made by a jury. Thus, jury fact findings and other decisions are given great deference by reviewing courts. The reasonableness standard of a jury verdict is generally for the verdict to stand unless no substantial evidence supports the decision. An appellate court must reverse a conviction if, after viewing the evidence in the light most favorable to the verdict, it finds no “rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁶

⁴ Davis, *supra* note 2, at 476.

⁵ United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

⁶ Jackson v. Virginia, 443 U.S. 307, 319 (1979).

B. Agency decisions

The Administrative Procedures Act (APA) provides substantial evidence review for formal agency actions. The application of a reasonableness or substantial evidence standard to administrative proceedings varies in how much deference is afforded. For example, if an agency is seen as performing functions like a court then the standard will operate similar to clearly erroneous review. But if an agency is seen as operating not like a court and rather as using its particular expertise, then reasonableness review will look more like the review of jury decisions.

Note that when reviewing agency statutory interpretation or policymaking, courts may describe the review as “rational basis review” or “hard look review,” which are just kinds of substantial evidence review.

IV. Arbitrary and Capricious

Under the APA, informal agency actions are reviewed under the arbitrary and capricious standard. Initially this was a very deferential standard because agency fact finding or policy decisions did not require much of a record. However, as courts began requiring a more substantial record, the arbitrary and capricious review became less deferential. The major difference in arbitrary and capricious and reasonableness/substantial evidence standards is what the appeals court reviews:

In substantial evidence review, the review encompasses the agency's assessment of the evidence in the record and its application of that evidence in reaching a decision. In arbitrary and capricious review, the focus is on the agency's explanation or justification of its decision and whether that decision can be reasoned from the body of evidence.⁷

Note that the “clear error judgment” test is a subset of arbitrary and capricious review that is not related to the clearly erroneous standard. Courts sometimes mix these two standards by referring to a “clear error of judgment” test when reviewing trial court discretionary or fact finding decisions.

V. Abuse of discretion

In each stage 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. Typically, the judge who presides during the trial is in the best position to evaluate the relevant factors. Thus, when reviewing discretionary decisions, the courts of appeals give great deference to the result reached by the trial judge under the abuse of discretion standard. It will be

⁷ Davis, *supra* note 2, at 480.

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 a legal error in exercising her discretion. If the trial judge fails to consider the various options available, 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.⁸ The appellate court may also remand if the record does not adequately establish the reasoning employed by the judge to reach a discretionary decision.

Note that courts of appeals may use similar language when reviewing discretionary decisions of trial courts and agencies, but in practice the review of agency discretion is more deferential. This greater deference may occur because the appeals court has little understanding of the agency subject matter or action, so it cannot easily assess the agency's use of discretion.

VI. No Review

Complete deference to the decisionmaker below occurs when there is no review. This is rare; however, some statutes do not allow review of certain agency actions. There are also court created nonreviewable decisions, including the decision not to prosecute and the decision of an agency not to act.

THE PROBLEM OF 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. 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.”⁹ Despite their difficulty, these issues provide a terrific opportunity for lawyers to characterize the claim in such a way as to obtain the most favorable standard of review.

In general, mixed questions of law and fact are reviewed under the abuse of discretion standard, clearly erroneous standard, or the de novo standard. While the Circuits use a variety of approaches,¹⁰ the Supreme Court has described the general principle that “the standard of review

⁸ *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.”).

⁹ *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982); *see also Ornelas v. United States*, 517 U.S. 690 (1996).

¹⁰ *See, e.g., Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 193 (2d Cir. 2003) (stating that mixed questions are reviewed de novo); *United States v. McConney*, 728 F.2d 1195 (9th Cir.

for mixed questions all depends – on whether answering it entails primarily legal or factual work.”¹¹ So when the decision “involves developing auxiliary legal principles of use in other cases,” de novo review should typically be used.¹² But, if the issues are more fact specific, like weighing evidence or making credibility decisions, the decision should be reviewed with deference.¹³

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.”¹⁴ 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.

HOW DO I WRITE ABOUT THE STANDARD OF REVIEW?

As illustrated by the discussion above, the applicable standard of review can inform how you argue your case. The standard of review can then be explicitly discussed in your brief in a number of ways. The Federal Rule of Appellate Procedure 28(a)(9)(B) requires a concise statement of the standard of review for each issue. This statement may appear in the argument section or under a separate, short “Standard of Review” section prior to the argument section. When the standard of review is not in dispute, this can be as simple as a sentence identifying the standard and a supporting citation. For example:

Denials of motions to dismiss indictments are reviewed de novo, *see Scott*, 394 F.3d at 116, as are “question[s] of statutory interpretation.” *United States v. Shim*, 584 F.3d 394, 395 (2d Cir. 2009).¹⁵

Even when the standard is not in dispute, you should still cite to a case that is helpful to your side because you always want to be furthering your argument.

With the less deferential standards of review, the language of the standard can be used to label decisions by the lower court as either a clear error/abuse of discretion or not. An example of a point heading:

It Was Clear Error For The District Court To Refuse To Grant Valdin's Application For Discovery In Aid To The Motion To Enforce.¹⁶

1984) (proposing an inquiry to determine whether de novo or clearly erroneous review is appropriate).

¹¹ U.S. Bank Nat. Ass’n v. Village at Lakeridge, LLC, 138 S.Ct. 960, 967 (2018).

¹² *Id.*

¹³ *Id.*

¹⁴ *McConney*, 728 F.2d at 1204.

¹⁵ Brief for appellant at 22, *United States v. Thompson*, 896 F.3d 155 (2d Cir. 2017) (No. 16-2986), 2017 WL 512550, 22.

¹⁶ Brief for appellant at 17, *Valdin Investments Corp. v. Oxbridge Capital Mgmt.*, 651 Fed. App’x 5 (2d Cir. 2016) (No. 15–2032–cv), 2016 WL 293367, 17.

An example of a topic sentence:

In addition to changes in controlling law, the Second Circuit must intervene to vacate the order on the motion for reconsideration because the Immigration Judge committed clear errors in rendering an adverse credibility finding.¹⁷

In other cases when the standard of review is not clear, a major part of your argument may be advocating for a particular standard. Here, you will likely have to engage with the justifications for the different levels of deference and explain how your issue fits in the continuum of standards. When there is a mixed law and fact question, you may frame the issue in different ways depending on what standard will best help your side. For example, if you want a more deferential standard, you may first argue that the issue is a question of fact, and in the alternative, that the issue is a mixed question where deference should be applied.

Thus, depending on the nature of the issues on appeal, the standard of review could only be discussed in a brief statement or be your primary argument. Either way it is important to ground your discussion in case law and think critically about the underlying justifications for standards of review.

¹⁷ Brief for petitioner at 11, *Chen v. Bd. of Immigration Appeals*, 131 Fed. App'x 764 (2d Cir. 2005) (No. 03-4508), 2004 WL 3757415, 11.