Chapter 7

Standards of Review

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I. Introduction

If Vince Lombardi had taught appellate advocacy instead of coaching football, he might have exhorted his students, "The standard of review isn't the only thing; it's everything." He would not have been exaggerating. The standard of review influences everything that an effective appellate lawyer does at every stage of an appeal.

What is a standard of review? It is a function of the allocation of judicial power between trial and appellate courts. Appellate courts, by definition, are courts of review, not courts of original jurisdiction. Thus, they "do not sculpt on virgin marble."[1] Instead, they review the trial court's rulings, and in doing so, they accord varying degrees of deference to those rulings. That degree of deference is the standard of review.[2] It can be viewed negatively, as a limit on the appellate court's power—Professors Childress and Davis compare it to "handcuffs."[3] Or it can be viewed positively, as the authority the appellate court has to review the trial court's ruling.[4]

"What is the standard of review?" is among the first questions that appellate judges ask, because disposition of the appeal necessarily revolves around the answer.[5] When you handle an appeal, you must answer this question, not only for the court, but also for yourself and your client. Only by identifying the proper standard of review can you know that the appellate court has the power to reach an issue.[6] When you know the standard of review, you can shape your argument to fit the standard.[7] The result will be a more effective argument and a better chance of winning.[8]

The opposite is also true: if you get the standard of review wrong, or ignore it completely, you undermine your argument. Judge Pratt flatly says, "[A]n argument on appeal based upon an incorrect standard of review must fail."[9] Judge Godbold once wrote that counsel unfamiliar with the standard of review "may find himself trying to run for a touchdown when basketball rules are in effect."[10] And losing the appeal may only begin the misery. Lawyers who have given the standard of review short shrift—or worse, ignored it completely—have been chastised by appellate courts. In one case, the court sanctioned counsel for pursuing a frivolous appeal.[11] In another, the court struck the appellant's brief and dismissed the appeal.[12] It's no surprise, then, that Judge Aldisert "elevate[s] the necessity of correctly stating the standard of review to a question of minimum professional conduct."[13]

What is surprising—even shocking—is how frequently lawyers fail to meet this minimum standard. According to a recent study by the U.S. Fifth Circuit clerk's office, the most common reason that office rejects briefs filed by lawyers is failure to state the standard of review.[14]

Our goals are to give you an overview of the terminology that courts most often use to describe standards of review and some tips for applying standards of review throughout the life of a case.

II. Terminology

The standard of review generally turns on the identity of the decision maker below and the nature of the question decided. Appellate courts accord the greatest deference to a jury's factual findings. At the other end of the spectrum are a trial judge's decisions on questions of law. Between those two extremes are a trial judge's factual findings and exercises of discretion.

A. Jury's Findings: Sufficiency of Evidence

In federal court, the Seventh Amendment forbids a fact found by a jury from being "re-examined in any Court of the United States, than according to the rules of the common law."[15] But the Seventh Amendment

does not wholly immunize jury-found facts from appellate review. A verdict that lacks evidentiary support is deemed an error of law;[16] but if the verdict is supported by substantial evidence, it must stand.[17]

To appeal a verdict on grounds of insufficient evidence, a party must have preserved the error by moving for judgment as a matter of law under F.R.C.P. 50.[18] In reviewing the verdict, the appellate court views all evidence and draws all reasonable inferences in the light most favorable to the verdict. If, in that light, a rational juror could reach the same decision as did the jury, then sufficient evidence exists to support the verdict.[19]

Not all verdicts are sacrosanct. If a verdict resulted from procedural or legal error, or from improper influence on the jury, an appellate court may reverse.[20]

B. Judge's Factual Findings: Clear Error

Federal Rule of Civil Procedure 52(a) sets the standard of review for judge-found facts. "[W]hether based on oral or documentary evidence," the trial judge's factual findings cannot 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."[21]

What does "clearly erroneous" mean? In *United States v. United States Gypsum Co.*,[22] the Supreme Court gave this answer: "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."[23]

The clear-error standard, while deferential, is less so than the substantial-evidence standard applied to a jury's finding. It does not require the conclusion that no rational person could make the same finding as the trial judge did;[24] but the standard is still difficult to meet. If the trial court's finding is plausible, the appellate court cannot reverse. The trial court's choice between two permissible views of the evidence cannot be clearly erroneous.[25] Likewise, a trial court's decision to credit one witness's testimony over another's can almost never be clear error[26]—but the credibility determination must be reasonable. If the record reveals objective evidence contradicting the witness's story, or if the witness's story is internally inconsistent, then an appellate court may find clear error even in a finding purportedly based on a credibility determination.[27]

C. Questions of Law: *De Novo* Review

In contrast to a jury's or trial judge's factual finding, a trial judge's ruling on a question of law gets no deference on appeal. Rather, an appellate court reviews such a ruling *de novo*. *De novo* literally means "anew";[28] thus the appellate court reviews a decision on a question of law anew, without regard to the trial judge's ruling. Under this standard, an appellate court may substitute its own judgment for that of the trial court on a conclusion of law.[29]

Appellate courts are better suited than trial courts to decide questions of law. Unlike trial courts, appellate courts do not preside over fast-paced trials, nor do they spend time and energy listening to witnesses. By the time a case reaches the appellate court, the record is fixed. Thus, appellate judges have more time to ponder legal issues than do their trial-court colleagues. Most appellate courts hear cases in multijudge panels, thus allowing for "reflective dialogue and collective judgment."[30]

De novo review does not mean that the appellate court will retry the case. It means only that the appellate court claims the authority to reach a legal conclusion different from that reached by the trial court on the same record.[31]

D. Mixed Questions

Sometimes it's hard to tell whether an issue is a question of law or of fact. Rule 52(a) does not tell you how to distinguish one from the other, and there is no other "rule or principle that will unerringly distinguish a

factual finding from a legal conclusion."[32] As the Supreme Court has observed, "[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive."[33] Sometimes an appellate court allows itself to reach an issue by labeling it as a question of law.[34]

Issues like these are sometimes called mixed questions of law and fact. These are "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or put another way, whether the rule of law as applied to the established facts is or is not violated."[35]

Which review standard applies to issues like these? This question does not have a single, one-size-fits-all answer. The general rule is that such issues are reviewed *de novo*.[36] But this isn't always so. "[D]eferential review… is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question…."[37] The best advice we can give is to find binding authority dealing with the specific issue.[38]

E. Abuse of Discretion

Between the extremes of clear-error review and *de novo* review is review for abuse of discretion. Falling under this standard are decisions made by a trial judge that are neither findings of fact nor legal conclusions. This standard applies to a wide variety of issues, including abstention, awards of attorneys' fees and costs, class certification, discovery orders, and evidentiary rulings.[39] Such rulings are committed to the trial court's discretion—and undisturbed on appeal absent abuse of discretion—because of "the superiority of [the trial court's] nether position."[40] The trial court deals directly with the parties, their counsel, the evidence, and the jurors, while the appellate court has only the record. Thus, the trial court has a unique insight into the case that the appellate court cannot share. Aware of this fact, the appellate court defers to the trial court on discretionary matters.

But beware: though the term "abuse of discretion" applies to many areas, the actual level of deference varies according to the particular issue. To say that a decision lies within the trial court's discretion "means merely that the decision is uncontrolled by fixed principles or rules of law,"[41] and says nothing about the factors that the court must consider in exercising its discretion.[42] Though the law commits a variety of decisions to the trial court's discretion, the justifications for doing so are not uniform, but vary according to the issue.[43] In his book, *Winning on Appeal*, Judge Aldisert identifies fives levels of discretion given the trial judge; and hence five levels of deference accorded those decisions under the abuse-of-discretion standard.[44]

Judge Aldisert also gives us good advice for dealing with an issue under abuse-of-discretion review: The trial judge's discretion on any given issue has limits. Learn what those limits are, articulate them for the appellate court, and demonstrate how the trial judge either stayed within or stepped outside those limits.[45]

III. Review Standards Matter at Every Stage

A. Before the Appeal

Good strategists think ahead. To be a good trial lawyer, you must think ahead to the possible appeal; you should "plan, organize, lay the foundation, and anticipate how judges all along the litigation pipeline tend to view and handle certain issues."[46] When you do that, think about the standard of review: how much deference the appellate court will give to each trial-court decision. Keep in mind how much convincing you'll need to do in the appellate court if things don't go your way in the trial court, and build the record that will best enable you to do that.

Knowing your standards of review should motivate you to try harder to win battles in the trial court. For most issues, appeal is not a second chance to win a battle lost below. Most trial-court decisions—those sub-

ject to clear-error or abuse-of-discretion review—"are set in a quick-hardening jurisprudential cement and will be subject to an extremely limited scope of appellate review."[47]

When you get to trial, realize that because of deferential review standards, you face a "momentous event,"[48] your one chance to persuade the trier of fact. The appellate court will not readily second-guess the jury's verdict or the trial judge's factual findings.

Standards of review come into play during posttrial motions, because the trial judge will play a quasi-appellate role. When ruling on a motion for judgment as a matter of law under F.R.C.P. 50(b), the trial judge considers the evidence in the light most favorable to the nonmoving party, draws all reasonable inferences in the nonmoving party's favor, and decides whether the verdict is reasonable—the same task that the appellate court performs.[49] When a party moves for new trial on grounds that the verdict is contrary to the great weight of evidence, the trial judge applies the same weight-of-evidence test that the appellate court would apply.[50]

Your client, if disappointed at the result of the trial, will look to you for a recommendation whether to appeal. You cannot competently advise your client on this question until you have figured out the standard of review that applies (or arguably might apply) to each issue that you might raise on appeal. Only then can you give your client reasonably accurate advice on the chances of success.

B. During the Appeal

If you represent the appellant, then before you begin writing your brief, you must select the issues to urge on appeal. In deciding which issues give you the best chance of winning, you must consider the standard of review. We do not mean that you automatically jettison any issue to which a deferential standard applies. Sometimes your strongest, most credible issue will be one subject to clear-error review. We simply mean that because the standard of review bears directly on whether a particular issue is winnable, you must consider the standard of review along with all other relevant factors in deciding whether to urge that issue on appeal.

When you write the brief, you must include in your argument a statement of the standard of review that applies to each issue. Federal Rule of Appellate Procedure 28(a)(9)(B) requires this.[51] Even if you are in a state appellate court without a rule like this one, you should tell the court what the standard of review is.[52] The only exception is when you represent the appellee and you are satisfied with the appellant's statement of the review standard.

Many lawyers view the standard-of-review requirement as nothing more than a base to be touched before getting to the "real" argument. These lawyers write standards-of-review sections that look like this:

> The standard of review for Issue No. 1 is abuse of discretion. The standard of review for Issue No. 2 is *de novo*. The standard of review for Issue No. 3 is manifest error. The standard of review for Issue No. 4….

Statements like these may help you avoid having your brief rejected by the clerk, but otherwise they are useless: they neither help the court decide the case nor help you win the appeal.

Worse, mere recitation of standards of review, without any attempt to apply those standards in the argument, can lead to dire consequences. In one Fifth Circuit case, the appellant recited boilerplate language governing summary judgment without making any effort to argue why the granting of summary judgment violated those standards. The court deemed the issue waived, treating it "the same as if he had not appealed that judgment."[53] In a Seventh Circuit case, where the appellant gave "short shrift" to the standards of review without developing a legal argument applying those standards, the court sanctioned counsel for bringing a frivolous appeal.[54]

Don't just tell the court which term (clear error, abuse of discretion, or *de novo*) applies to the standard. Explain the standard, using your explanation as an opportunity to persuade the court. If you represent the appel-

lant, explain the standard in a way that makes it sound surmountable. If you represent the appellee, explain it in a way that makes it sound formidable. In either event, build your credibility by making your explanation fair and accurate, and supporting it with binding authorities.

Often the standard of review will itself be a disputed issue. For example, an appellant may characterize an issue as one of law, subject to *de novo* review, while the appellee characterizes the same issue as one of fact, subject to clear-error review. If you find yourself in such a case, you must argue the standard of review as thoroughly as you would argue any other contested issue in the case. For if you win the standard-of-review battle, you greatly increase your chances of winning the appeal war.

At the end of this chapter are two examples of standard-of-review sections from briefs written by the authors of this chapter—Example 1 from the brief of an appellant, Example 2 from the brief of an appellee.

In Example 1, the brief writer faced the difficult task of persuading the appellate court that the trial court's factual findings were clearly wrong. He began the argument by acknowledging the difficult standard that he faced; then he explained the standard in a way that made his task seem achievable.

Example 2 is from a marine-collision case; the substantive issue was whether the trial judge erred by finding the appellee's vessel to be without fault. The parties disputed the standard of review—the appellant advocating *de novo* review, the appellee advocating clear-error review. For the appellee, winning the standard-of-review battle would result in winning the appeal. So the appellee spent as much time and effort—and nearly as many words—on the standard of review as on any other issue in the case.

You may find yourself in a case where the standard of review isn't clear cut. Such issues do exist. In recent years, the Supreme Court has frequently granted *certiorari* to decide a previously unsettled standard of review.[55] If you are involved in such a case, then you should advocate the least deferential standard that you can credibly argue (if you represent the appellant) or most deferential standard (if you represent the appellee).

At oral argument, don't try to hide from the standard of review, because you won't succeed. Since the court will already know the standard of review or (if the standard is unsettled) will be keenly interested in it, you may as well tackle it head-on. If you represent the appellant faced with a deferential standard, you can expect questions about the review standard at oral argument. Be prepared to answer those questions directly, and segue into explaining why the decision below is clearly wrong or an abuse of discretion. If you represent the appellee and the standard of review hasn't yet been mentioned when you begin your oral argument, make that the first subject you talk about, and be prepared to tell the court about the evidence or reasons supporting the decision below.

C. After the Appeal

The briefing is finished; the oral argument is concluded; the appellate court has rendered its decision. *Now* you can stop thinking about the standard of review, right? Wrong. If the court misapplied the standard, or applied the wrong one, you may have grounds to apply for rehearing. A different review standard on rehearing may lead to a different result.[56] If the standard of review was contested in the intermediate appellate court, you may have an issue that would interest the U.S. Supreme Court. As mentioned above, in recent years the Supreme Court has granted *certiorari* many times to decide an unsettled standard of review.[57]

IV. Conclusion

If the Supreme Court thinks that the standard of review is important enough to repeatedly grant *certiorari* on the issue, then you, too, must consider it vital in any appeal. If you give the standard of review only bare-bones treatment, or if you fail to apply the standard in your argument, you are not functioning as an effective

appellate advocate. If you keep the standard of review in the forefront of your mind during all stages of appeal—indeed during all stages of litigation—then you are well on your way to success.

V. Suggestions for Further Reading

Much more could be written—indeed has been written—on appellate review standards. We highly recommend each of the following:

- Ruggero J. Aldisert, *Winning on Appeal*, chapter 5 (3d ed. 2003).
- Steven Alan Childress, *A Standards of Review Primer: Federal Civil Appeal*, 125 F.R.D. 319 (1989). Professor Childress describes numerous review standards applicable to a great variety of issues that might arise in the course of a civil case, with citations to caselaw from several circuits. If you are researching standards of review, this is an excellent place to start.
- Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* (3d ed. 1999). This is a two-volume treatise on the subject, with one volume devoted to civil cases, the other to criminal cases.
- R. Christopher Lawson, *Seeing the Appellate Horizon: Civil Trial Strategy and Standards of Review in the Eighth Circuit*, 4 J. App. Prac. & Process 561 (Fall 2002). If you practice before the Eighth Circuit, this article will give you a good start on your review-standards research.
- George C. Pratt, *Standards of Review*, 19 James Wm. Moore *et al.*, *Moore's Federal Practice* §206 (3d ed. 2004). Judge Pratt gives the subject a good, thorough treatment. At the end of his chapter is a list of issues, arranged alphabetically from "Abstention" to "Summary Judgment," with the standard of review applicable to each, supported by citations to case law from all circuits, or from as many circuits as Judge Pratt could find case law.

Example 1

This example comes from the brief of appellants. It was originally written by Raymond P. Ward; later it was lightly edited by Bryan A. Garner for inclusion in his book, *The Winning Brief*.

> Appellants have the difficult burden of proving that the trial court's factual findings were clearly wrong. But they can carry this burden. The manifest-error standard of appellate review does not require the court of appeal to rubberstamp the trial court's factual findings and credibility determinations. Rather, the court of appeal has a constitutional duty to review facts[58] despite the deference accorded to the factfinder. *Ambrose v. New Orleans Police Dep't Ambulance Serv.*, 639 So.2d 216, 221 (La. 1994). The appellate review of facts is not completed by reading so much of the record as will reveal a reasonable factual basis for the finding in the trial court. The court must go further by determining that the record shows the finding to be neither clearly wrong nor manifestly erroneous. *Id.* at 220. A trial court's factual findings are not immune from appellate review simply because they appear to be based on the relative credibility of witnesses. Where documents or objective evidence so contradicts the witness's story—or the story itself is so internally inconsistent or implausible on its face—that a reasonable factfinder would not credit the witness's story, the court of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. *Rosell v. ESCO*, 549 So.2d 840, 844–45 (La. 1989).

Example 2

This is an excerpt from the brief of an appellee in a marine-collision case. It gives an example of a full-blown argument on standard of review, in a case where the parties disputed the applicable standard.

> Judge Clement's finding that the Cane River was not at fault is subject to the clear-error standard of appellate review. The United States Supreme Court has held that F.R.C.P. 52(a) applies to admiralty cases. *See McAllister v. United States*, 348 U.S. 19, 20 (1954). This means that the trial judge's fact findings may not be set aside unless they are clearly erroneous. This Court has repeatedly held that in marine-collision cases, the clear-error standard of review applies to the trial court's allocation of fault. This Court has also made it clear that in such cases, its job is not to retry the case:
>
> > In maritime actions, questions of fault are "factual issues which cannot be disturbed on appeal unless the resolutions are clearly erroneous." … "If the district court's findings are plausible in light of the record viewed in its entirety, we may not reverse even if we would have weighed the evidence differently and arrived at a contrary conclusion."
>
> *Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 502 (5th Cir. 1994).
>
> Appellants, realizing that they cannot win under a clear-error standard, argue for *de novo* review. The Texaco employees, for example, argue that the clear-error standard does not apply "to decisions made by district court judges when they apply legal principles to essentially undisputed facts." Their thesis is this: The Cane River committed statutory violations. Therefore, under the *Pennsylvania* rule, Judge Clement should have presumed that the Cane River was negligent. *See The Pennsylvania*, 86 U.S. (19 Wall.) 125, 136 (1873).
>
> While appellant's pitch for *de novo* review is understandable, it is wrong, because their premise is flawed. The *Pennsylvania* rule does not apply to the Cane River unless the Cane River violated a statute. Judge Clement made detailed, specific, and credibility-based factual findings that the Cane River did not violate any statute. To reach any *Pennsylvania* question, the Court would first have to find clear error in Judge Clement's factual findings—error that does not exist.
>
> In *Acacia Vera Navigation Co. v. Kezia, Ltd.*, 78 F.3d 211 (5th Cir. 1996), this Court rejected an argument similar to that made by appellants here. The case involved a collision between the Blue Cloud (or "BC") and the Omina. The trial judge found the BC solely at fault. On appeal, the BC, angling for *de novo* review, argued that the district court "erred as a matter of law" by failing to address the Omina's alleged violations of certain navigational rules, and by failing to apply the *Pennsylvania* rule. This Court perceived the flaw in BC's argument: It depended on an assumed fact contrary to the trial judge's factual findings:
>
> > There is a problem with this argument. BC's statutory allegations assume that the ships were on a *reciprocal (collision) course*, an assumption contrary to the court's finding. Since the lower court's finding that the ships were not on reciprocal courses is supported by the record, BC's allegations are without merit.
>
> *Id.* at 216.
>
> In *Brunet v. United Gas Pipeline Co.*, 15 F.3d 500 (5th Cir. 1994), the appellant made the same argument, and got the same answer. *Brunet* arose from an allision between a push-boat's tow and a natural-gas pipeline. The trial court imposed 100 percent liability on the

pushboat. On appeal, the pushboat owner argued that the *Pennsylvania* rule applied to the pipeline, because its owner failed to cover it properly and failed to adequately inspect it, thus violating various permits and regulations. This Court rejected the argument, because the trial court had found that the pipeline was in fact properly covered. Since both sides had presented substantial evidence on that issue, this Court held that the trial court's finding "cannot be clearly erroneous." *Id.* at 504. Since the Court found no statutory violation by the pipeline, the *Pennsylvania* rule did not apply to it. *Id.*

Here, the statutory allegations against the Cane River are excessive speed and improper lookout, including improper use of radar. But Judge Clement made detailed and specific factual findings that the Cane River kept both safe speed and proper lookout, and made proper use of radar. These findings, as shown below, are supported by the record and are not clearly wrong. Since Judge Clement made factual findings that the Cane River did not violate any statutes, the *Pennsylvania* rule does not apply to the Cane River.

Finally, as this Court reconfirmed last year, findings based on a trial judge's assessment of witness credibility demand even greater deference. *Tokio Marine & Fire Ins. Co. v. Flora MV*, 235 F.3d 963, 970 (5th Cir. 2001). Rule 52(a) requires an appellate court to give "due regard… to the opportunity of the trial court to judge… the credibility of witnesses." Thus, as here, when a trial court's finding is based on its decision to credit one witness's testimony over another's, that finding, if not internally inconsistent, "can virtually never be clear error." *Burma Navigation Corp. v. Reliant Seahorse MV*, 99 F.3d 652, 657 (5th Cir. 1996).

Endnotes

[1] Steven Alan Childress, *A Standards of Review Primer: Federal Civil Appeals*, 125 F.R.D. 319, 321 (1989).

[2] 1 Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* §1.01, at 1–2 (3d ed. 1999).

[3] *Id.* §1.03, at 1–17.

[4] *Id.* §1.01, at 1–2.

[5] *See* Henry A. Politz (former chief judge of U.S. 5th Circuit Court of Appeals), *Foreword* to Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* vii (3d ed. 1999).

[6] George C. Pratt, *Standard of Review*, 19 James Wm. Moore *et al.*, Moore's Federal Practice §206.01 (3d ed. 2003). Judge Pratt retired from the Second Circuit Court of Appeals in 1995.

[7] *Id.*; *see also* Fed. R. App. P. 28 Advisory Committee Notes, 1993 Amendments ("Experience… indicates that requiring a statement of the standard of review generally results in arguments that are properly shaped in light of the standard.").

[8] Ruggero J. Aldisert, *Winning on Appeal* §5.13, at 76 (Rev. 1st ed. 1996) ("I am convinced that briefs and oral argument would be more effective… if counsel would identify the standard of review for each point.").

[9] Pratt, *supra* note 6, §206.01.

[10] John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 811 (1976), *quoted by* Childress, *supra* note 1, 125 F.R.D. at 321.

[11] *Tyson v. Jones & Laughlin Steel Corp.*, 958 F.2d 756, 762 (7th Cir. 1992). Though counsel committed other sins, the one cited first by the court and discussed at greatest length was giving "short shrift to the standards of review." *Id.*

[12] *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997). As in *Tyson*, counsel committed other violations, but the first on the court's list was failure to address the standard of review.

[13] Aldisert, *supra* note 8, §5.2, at 58; see also *id.* §5.10, at 66–67.

[14] Luther T. Munford, *The Most Common Mistakes in the Form of Fifth Circuit Briefs*, 14 Fifth Cir. Rptr. 227 (West Mar. 1997), *cited in* Childress & Davis, *supra* note 2, at 3 (2002 cumulative supplement).

[15] U.S. Const. amend. VII.

[16] Childress, *supra* note 1, 125 F.R.D. at 330.

[17] Pratt, *supra* note 6, §206.02[1], at 206–05.

[18] *Id.*; *see also* Childress, *supra* note 1, 125 F.R.D. at 333.

[19] Pratt, *supra* note 6, §206.02[1], at 206.

[20] *Id.* at 206–07.

[21] Fed. R. Civ. P. 52(a).

[22] 333 U.S. 364 (1948).

[23] *Id.* at 395.

[24] Pratt, *supra* note 6, §206.03[7], at 206–21.

[25] Pratt, *supra* note 6, §206.03[4], at 206–16.

[26] *Id.* §206.03[5], at 206–17.

[27] *Id.* at 206–18.

[28] *Black's Law Dictionary* 447 (7th ed. 1999).

[29] Pratt, *supra* note 6, §206.04[1], at 206–23.

[30] *Salve Regina College v. Russell*, 499 U.S. 225, 231–32 (1991).

[31] Childress, *supra* note 1, 125 F.R.D. at 325.

[32] *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982).

[33] *Miller v. Fenton*, 474 U.S. 104, 113 (1985).

[34] See *Baumgartner v. United States*, 322 U.S. 665, 671 (1944) ("Deference properly due to the findings of a lower court does not preclude the review here of such judgments. This recognized scope of appellate review is usually differentiated from review of ordinary questions of fact by being called review of a question of law…."); *Miller v. Fenton*, 474 U.S. at 113–14 ("[T]he decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis."); *see also* Childress, *supra* note 1, 125 F.R.D. at 328.

[35] *Pullman-Standard v. Swint*, 456 U.S. at 289 note 19.

[36] Pratt, *supra* note 6, §206.04[3][b], at 206–27.

[37] *Salve Regina College v. Russell*, 499 U.S. at 233.

[38] *See* Childress, *supra* note 1, 125 F.R.D. at 328.

[39] Pratt, *supra* note 6, §206.08, at 206-39 to 206-43.

[40] *United States v. Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (quoting Maurice Rosenberg, *Judicial Discretion Viewed from Above*, 22 Syracuse L. Rev. 635, 663 (1971)).

[41] *United States v. Criden*, 648 F.2d 814, 817 (3d Cir. 1981).

[42] See *United States v. Sablan*, 114 F.3d 913, 916 (9th Cir. 1997) ("To say that departure decisions must be reviewed for an abuse of discretion… says nothing about what factors a district court should take into consideration when confronted with the question of whether or not to depart in a particular case.").

[43] *Criden*, 648 F.2d at 817.

[44] Aldisert, *supra* note 8, §5.10, at 70–71 (citing Rosenberg, *Appellate Review of Trial Court Discretion*, Federal Judicial Center publication FJC-ETS-77-3 (1975)).

[45] Aldisert, *supra* note 8, §5.10, at 72.

[46] Childress & Davis, *supra* note 2, §1.04, at 1–25.

[47] Aldisert, *supra* note 8, §5.2, at 58.

[48] R. Christopher Lawson, *Seeing the Appellate Horizon: Civil Trial Strategy and Standards of Review in the Eighth Circuit*, 4 J. App. Prac. & Process 561, 576 (Fall 2002); Childress & Davis, *supra* note 2, §1.04, at 1–25.

[49] *See* Childress, *supra* note 1, 125 F.R.D. at 331, 344.

[50] *Id.* at 345; but the trial judge has greater freedom to grant a new trial, and the appellate court reviews the trial judge's decision for abuse of discretion. *Id.*

[51] Fed. R. App. P. 28(a)(9)(B).

[52] *See*, *e.g.*, Bryan A. Garner, *The Winning Brief* 372 (1999).

[53] *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

[54] *Tyson v. Jones & Laughlin Steel Corp.*, 958 F.2d 756, 762 (7th Cir. 1992).

[55] *E.g.*, *Cooper Indus. v. Leatherman Tool Group, Inc.*, 531 U.S. 923 (2000) (constitutionality of punitive damage award); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997) (*Daubert* ruling); *Koon v. United States*, 518 U.S. 81 (1996) (departure from Sentencing Guidelines); *Ornelas v. United States*, 517 U.S. 690 (1996) (reasonable suspicion to stop and probable cause to search); *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) (stay of declaratory judgment proceeding); *Salve Regina College v. Russell*, 499 U.S. 225 (1991) (determination of state law); *Hernandez v. New York,* 498 U.S. 894 (1990) (where defendant challenged prosecutor's use of peremptory challenges under *Batson* and trial court accepted prosecutor's race-neutral explanation, standard of review of trial court's ruling); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (judicial review of ERISA benefit determination); *Pierce v. Underwood*, 487 U.S. 552 (1988) (whether government's position was substantially justified); *Immigration & Naturalization Serv. v. Abudu*, 485 U.S. 94 (1988) (judicial review of Board of Immigration Appeals' denial of motion to reopen deportation proceeding); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986) (seaman status). *See also* the following cases, where a Justice dissented from denial of F.R.C.P. because of an unresolved standard of review: *Don's Porta Signs, Inc. v. City of Clearwater, Fla.*, 485 U.S. 981 (1988) (White, J., would grant *cert.* to decide standard of review for fact findings in case where First Amendment was violated); *Elby's Big Boy of Steubenville, Inc. v. Frisch's Restaurants, Inc.*, 457 U.S. 916 (1982) (White, J., would grant *cert.* to address standard of review of finding of likelihood of confusion under Lanham Act); *White v. Estelle*, 459 U.S. 1118

(1983) (Marshall, J., would grant *cert*. to determine whether petitioner's constitutional claim should be reconsidered under a less deferential review standard).

[56] See *United States v. Randle*, 304 F.3d 373 (5th Cir. 2002); *United States v. Bruscino*, 687 F.2d 938 (7th Cir. 1982); and *Guam v. Yang*, 850 F.2d 507 (9th Cir. 1988). See also *In re McGlinn,* 739 F.2d 1395 (9th Cir. 1984), where the *en banc* court took the case, at the request of the panel, to change circuit law on the review standard applicable to the district court's determination of state law. The panel had unanimously found that the outcome of the case would depend on the standard of review. *Id.* at 1397.

[57] *Supra* note 55.

[58] This "constitutional duty to review facts" is unique to Louisiana's appellate courts. *See* Aldisert, *supra* note 8, §5.9 (discussing appellate review of facts in civil law jurisdictions, including Louisiana).