Appellate Standards of Review and Reversal: Why They Matter

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Appellate Standards of Review and Reversal: Why They Matter
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AGENDA

9:00 am: **Introduction to Standards of Review and Standards of Error**
This presentation will address the importance of issue preservation, standards of review and standards of error: what they are, why they matter, and how courts and practitioners use them.
*Presented by **Katayoun "Katy" Donnelly, Esq.**, Azizpour Donnelly LLC, and **Blain Myhre, Esq.**, Blain Myhre LLC*

10:00 am: **Specific Standards of Review/Error in Civil and Criminal Appeals, Part I**
We will address specific standards of review, nuances, exceptions, and how to use them as advocates to improve your clients' chances on appeal.
*Presented by **Katayoun "Katy" Donnelly, Esq.**, Azizpour Donnelly LLC, and **Blain Myhre, Esq.**, Blain Myhre LLC*

11:00 am: **Break**

11:10 am: **Specific Standards of Review/Error in Civil and Criminal Appeals, Part II**
(See Part I)
*Presented by **Katayoun "Katy" Donnelly, Esq.**, Azizpour Donnelly LLC, and **Blain Myhre, Esq.**, Blain Myhre LLC*

12:10 pm: **Adjourn**

BIOGRAPHICAL INFORMATION

PROGRAM PLANNERS AND FACULTY

Katayoun "Katy" Donnelly, Esq., is an appellate and trial lawyer who has handled civil and criminal trials and appeals for clients ranging from indigents to Fortune-200 companies. Ms. Donnelly served as a law clerk to the Honorable Edward W. Nottingham, Chief Judge of the U.S. District Court for the District of Colorado, and to the Honorable Stephanie K. Seymour of the U.S. Court of Appeals for the Tenth Circuit. Prior to that, she worked in the Appeals Section of the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia in The Hague. In 2010, the American Inns of Court selected Ms. Donnelly as one of four Temple Bar Scholars to represent the law clerks of the United States Circuit Courts and the United States Supreme Court in the United Kingdom. As an active member of the William E. Doyle Inn of Court and the Colorado legal community, she has served on several boards and committees, including the Chief Justice's Commission on the Legal Profession, the Board of Trustees of the Colorado Supreme Court's Attorneys' Fund for Client Protection, and the Board of Trustees of the American Inns of Court. She co-chairs the pro bono Subcommittee of the American Bar Association's Appellate Practice Committee.

Blain Myhre, Esq., is an appellate practitioner at Blain Myhre LLC, where he specializes in civil and criminal appeals and select post-conviction matters. He is currently on the Criminal Justice Act Panel for the Tenth Circuit and is a contract appeals attorney for the Office of Alternate Defense Counsel and the Office of Respondent Parents' Counsel. He was formerly a law clerk to Hon. William J. Holloway, Jr., Senior Circuit Judge of the U.S. Court of Appeals for the Tenth Circuit, and chaired the Appellate Practice Group at Isaacson Rosenbaum PC. He writes and lectures frequently on appellate topics, and formerly published a weblog on the Colorado state appellate courts, www.Colorado-appealsblog.com. He served for many years as the appellate editor for Trial Talk and on the CBA Appellate Pro Bono Program screening committee. When he's not writing briefs and arguing appeals, he can often be found on the golf course, though not necessarily in the fairway. And if you want to ruin a good happy hour, ask him about his record collection, which he will happily describe in nauseating detail.

NOTES:

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STANDARDS OF REVIEW—WHAT THEY ARE AND WHY THEY MATTER

Both the Colorado Appellate Rules and the Federal Rules of Appellate Procedure require opening briefs to set forth the applicable standards of review for each issue and specify where an issue was raised and ruled on. *See* CAR 28(a)(7)(A) and FRAP 28(a)(8). These rules serve a fundamental purpose for appellate courts and practitioners. Yet many attorneys treat these requirements as simply an annoying box to check, like the certificate of service or certificate of compliance. Far from it. The preservation of issues and the applicable standards of review frame the appellate court's analysis. The standard of review is the lens through which an appellate court views an issue. Good appellate advocacy thus requires understanding this framework and using the standards of review to demonstrate lower court error or lack of error in your case.

ISSUE PRESERVATION

A discussion of the standards of review must start with issue preservation. A good appeal starts in the trial court, where issues are raised and preserved, or where they are not raised and thus likely waived. Preserving issues in the trial court is key to taking advantage of the most favorable standard of review on appeal. For example, a constitutional error in a criminal case that counsel preserves receives the favorable "harmless beyond a reasonable doubt" standard of review, whereas the unpreserved constitutional error is reviewed under the difficult-to-prove "plain error" standard. Failure to preserve an issue in civil cases almost always waives the ability to raise that issue on appeal. Issue preservation is thus central to successful appellate advocacy.

There is nothing more frustrating as an appellate advocate than seeing a great appellate issue unpreserved in the trial court.

Preserving issues and creating a good appellate record require counsel to consider what appellate judges do and how they do it. An appellate judge will receive a "stack" of briefs—these days often on an iPad—in which the parties in a number of appeals have set forth their arguments for why the trial court got it right or why it got it wrong. The judges will review the briefs—just how judges do that varies greatly from judge to judge—to get a sense of what arguments they must wrestle with and the issues they must decide.

The appellate judge will be reviewing the work of a trial court (or agency), in essence, "grading the papers" of the trial judge. So that means that the "papers" to be graded must make it into the record on appeal. It's like packing to move. With few exceptions, everything you need on appeal must be "put in the box" for the move from the trial court to the appellate court. If it doesn't get in the box, it won't be available to you on appeal. That means preserving issues in the trial court so that you can raise them on appeal.

Properly preserving issues requires the trial lawyer to make clear what the issue is, the party's position on it and the basis for it, including specific evidence, testimony, case law, statutes, or other authority. Trial counsel must at all times consider how the record will appear after trial. Will the pleadings, the exhibits, and transcripts reflect the position of counsel and the factual and legal bases for it, and will they provide the appellate court the necessary context in which the ruling was made? What seems clear in the trial court can appear uncertain or confusing in the cold transcript or record

documents. Trial counsel's goal therefore must be to create a record that shows the court of appeals, not just the trial judge, counsel's position and the basis for it.

In his seminal book *Winning on Appeal*, the late great Third Circuit Judge Ruggero Aldisert listed three elements to meet in order to preserve an issue for appellate review:

1. A specific ruling, act, or omission by the trial tribunal constituting trial error;
2. which follows an objection by counsel or the grant or denial of an oral or written motion or submission;
3. accompanied by a proper and appropriate course of action recommended by the appellant that was rejected by the tribunal.

Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* at 55 (NITA 2d ed. 2003). If you can satisfy each of these elements, an issue should be preserved. How you satisfy these three requirements will depend on the nature of the issue.

Examples of pre-trial preservation

Issue preservation takes place throughout trial court proceedings. Satisfying the three elements listed above is the common theme. On pre-trial matters, knowing the applicable statutes, rules, and case law is essential to properly preserving issues because procedure often dictates what must be done to properly raise, and thus preserve, an issue.

When dealing with motions in limine to exclude your evidence, create a record that shows (1) what the evidence is; (2) how the evidence will be offered at trial; and (3) your argument for admissibility of the evidence, with specific citations to the rules, statutes, and case law. If there are multiple bases on which you rely, make sure to make a

full record for each basis. A record that fully explains only one basis for admission will likely preclude you from raising the alternate grounds on appeal. For experts challenged under *Shreck* or otherwise, be sure that the expert's opinion, deposition testimony, and other documents get put before the trial court before the court renders its decision. An offer of proof may be necessary as well, to ensure that the appellate court will have the excluded testimony before it. If an expert is excluded before trial, consider re-raising the issue at trial and making a renewed offer of proof at the appropriate point in the trial. By giving the trial court a second opportunity to admit the testimony, you demonstrate that you gave the trial court a clear chance to allow the evidence. The court of appeals will look favorably on your efforts and will likely be more amenable to your argument that you did all you could to get the evidence in below.

If you want to disqualify a judge, you need to follow the procedure set forth in C.R.C.P. 97, including the requirement of submitting a supporting affidavit setting forth the factual basis for disqualification. You must also be aware of case law holding that a motion to disqualify can be waived if not timely filed. *See, e.g., Estate of Binford*, 839 P.2d 508-510-11 (Colo. App. 1992).

Summary judgment motions can be of particular concern for plaintiffs' lawyers. Obvious things to be aware of are the plaintiff's burden to come forward with evidence sufficient to demonstrate existence of a genuine issue of material fact that precludes summary judgment on a claim. But the requirement goes beyond that. Evidence submitted in response to a summary judgment motion must be in an admissible form. If it's not admissible evidence, it cannot be used to create a genuine issue of material fact. Thus, inadmissible hearsay statements contained in affidavits or deposition testimony

cannot defeat summary judgment. *See, e.g., Terrones v. Tapia*, 967 P.2d 216, 219 (Colo. App. 1998) (hearsay statements in plaintiff's deposition testimony were insufficient to create a material issue of fact on issue of loss). Simply attaching affidavits or deposition testimony to a summary judgment response is not good enough if the statements relied upon in those materials are not themselves admissible.

If additional discovery is needed to produce the evidence necessary to create an issue of fact, a motion under C.R.C.P. 56(f) is useful so long as the proper procedure is followed. The rule provides: "Should it appear from the affidavits of a party opposing the motion that the opposing party cannot for reasons stated present by affidavit facts essential to justify its opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." In order to obtain relief under 56(f), a party must demonstrate the proposed discovery that is necessary to produce facts that would preclude summary judgment. If a party fails to make that showing, a trial court will not abuse its discretion in denying the 56(f) request. *See Henisse v. First Transit, Inc.*, 220 P.3d 980 (Colo. App. 2009). To preserve the issue, identify with specificity the additional depositions or other discovery and why those are likely to assist in providing affidavits or evidence to counter the summary judgment motion.

At bottom, when faced with responding to a summary judgment motion, make sure you've got the evidence to support your claim and to show that a genuine issue of material fact exists. Be certain that the evidence is in an admissible form and that the evidence gets before the trial court in your summary judgment response. If the court

grants summary judgment, at least you will have gotten the issue into the box, with the evidence that the court of appeals will need to review the trial court's ruling.

Examples of preservation during trial

At trial, the issues to be preserved run the gamut, but again you simply need to be prepared to satisfy the three issue preservation elements regardless of the nature of the issue.

Evidentiary rulings need to be preserved carefully. Moreso than most other issues, evidentiary issues at trial can seem crystal clear in the courtroom, yet will appear muddled and confused in the trial transcript. Properly preserving evidentiary issues for appeal can require putting more on the record than the trial court may need (or want) to make its evidentiary ruling, in order to give a full explanation and necessary context to the court of appeals. Excepting plain error review, a challenge to the admission of evidence generally requires a timely objection or motion to strike that states "the specific ground of the objection, if the specific ground was not apparent from the context." CRE 103(a)(1). You must consider whether the grounds for objection will be readily apparent to the appellate judge reading the transcript, recognizing that the context will appear different when viewed by the court of appeals through that transcript than by the trial judge who has the benefit of seeing and hearing the evidence and the exchanges between counsel within the context of the case at hand.

A challenge to the exclusion of evidence will require an offer of proof unless the substance of the evidence is apparent from the context within which the questions were asked. Failure to make the offer of proof can be fatal to preserving the issue. Without an

offer of proof, the appellate court will have no idea from the record what the excluded evidence was. Thus, in a criminal case where a defendant failed to make an offer of proof as to what an expert witness would say relevant to the defendant's actions, the lack of an offer of proof precluded defendant from raising the exclusion of the expert's testimony as an issue on appeal, even for plain error review. *See People v. Washington*, 179 P.3d 153, 165-66 (Colo. App. 2007), *aff'd on other grounds*, 186 P.3d 594 (Colo. 2008) The court of appeals concluded that "a clear indication" of what the expert would have said was essential to analyzing any claim of error. Thus, when in doubt, make an offer of proof, even in writing if necessary.

A challenge to the admission of evidence requires a timely objection that states the legal bases for the objection. It is necessary to state every basis for objection in order to preserve each basis. *See, e.g., People v. Moore*, 117 P.3d 1, 4-5 (Colo. App. 2004) (hearsay objection was preserved, but confrontation objection was not, so the confrontation issue was reviewed for plain error only). It is also important to ensure that the court rules on each basis. It is not uncommon for trial court's to make a specific ruling on one basis without ruling on another basis. That can create uncertainty on whether counsel has waived her objection on the other basis, which the court did not address.

Jury instruction issues are especially important to preserve because of their great potential for creating strong issues on appeal. Objections to jury instructions must be specific enough to indicate how the instruction varies from a correct statement of the law. *Silva v. Wilcox*, 223 P.3d 127, 134 (Colo. App. 2009). Specific objections are necessary to enable trial judges to clarify or correct misleading or erroneous instructions before they

are given to juries, in order to prevent retrials necessitated by obvious prejudicial error. *See id.* Thus, an objection to a jury instruction that says only that the instruction doesn't properly state the law may not be sufficient without an explanation of how the law is misstated. To preserve the issue, explain on the record how the instruction does not state the law and provide a proper alternative instruction with citations. Submitting proposed written instructions is a must, but making sure oral objections get into the record is also necessary. Judge Aldisert emphasized, "Preserve the issue at all costs. Do not be content with 'informal' rulings made at sidebar or in chambers with no court reporters present. Always request that the trial court's ruling and your objection be entered on the record." *Winning on Appeal*, at 55.

Courtroom mechanics—make sure it gets recorded

With the unfortunate loss of court reporters in most civil cases, counsel have to be especially vigilant to ensure that what happens in the courtroom actually makes it onto the transcript. I handled a civil appeal once where the trial was recorded by digital recorder. The trial transcript generally turned out well, with one glaring exception. No bench conferences were recorded because the microphones did not pick them up. Trial counsel failed to make any audible record of the bench conferences. Thus, any potential appellate issues that may have arisen in the bench conferences were lost.

If you can afford it, hire a court reporter. If not, make sure that the record will contain bench conferences, discussions in chambers, and the like. This is particularly important in preserving the record on jury instructions where informal conferences often go unrecorded.

It may seem obvious, but you must also ensure that the trial court actually makes a definitive ruling on the record on an issue to be preserved. Without a definitive ruling on the record, the court of appeals may conclude that counsel abandoned the issue at trial. For evidentiary issues, there is an added benefit of explicit issue preservation: "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." CRE 103(a)(2). Of course, any time the trial court's ruling is not clear, counsel must request clarification so that the ruling, good or bad, will appear definitive in the transcript and can be easily understood by the appellate judge. When in doubt, make an additional record.

Preserving issues does not require magic. But it does require constant focus and an ever-present sense of what the record on an issue will look like in a transcript. If you are unsure whether you've preserved the issue, make an additional record until you are satisfied that (1) you've raised the issue and explained your reasoning on the record; (2) the trial court has ruled on the issue definitively and on the record; and (3) you have made any offers of proof, additional explanations, or provided any other information necessary for the court of appeal to understand the issue, the ruling, and your position.

STANDARDS OF REVIEW

Appellate courts exercise three basic types of review: (1) review of factual findings; (2) review of the exercise of discretion by trial course; and (3) review of the choice, interpretation, and application of controlling legal standards. At a basic level, appellate courts review findings of fact for clear error, the trial court's exercise of discretion for abuse of discretion, and questions of law de novo (*i.e.*, plenary review).

These basic standards, however, have nuances and variations that can affect how the court reviews a particular appeal issue and therefore how the appellate advocate should frame and argue it. In addition, criminal cases present additional governing standards flowing from the constitutional rights involved in criminal cases that permit review of purported trial court errors in circumstances where such review is precluded in civil cases. These materials address many of these governing standards. But working with standards of review requires research and analysis of the governing standards in each case, as each issue may present a variety of standards, with possible nuance, complexity, and sometimes unusual twists.

The Clearly Erroneous Standard: Reviewing Factual Findings

Appellate courts generally review factual findings under the "clearly erroneous" standard. Clear error occurs when the record contains no evidence to support the findings of fact, *Wright v. Horse Creek Ranches*, 697 P.2d 384, 390 (Colo. 1985), or "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 made.'" *St. James v.*

People, 948 P.2d 1028, 1031 n.8 (Colo. 1997), quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 375 (1948). The clearly erroneous standard does not permit a reviewing court to reverse a factual finding simply because it would have decided the case differently: "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Thus, where evidence in the record supports a factual finding, that factual finding is virtually certain to stand up on appellate review.

The deference of the clearly erroneous standard stems largely from the role of the trial judge in viewing and judging the credibility of witnesses. Only the trier of fact "can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575. Another justification for deference is the trial judge's experience and expertise in determining facts. *Id.* "The sanctity of trial court findings is derived from the recognition that the trial judge's presence during the presentation of testimonial evidence provides an unparalleled opportunity to determine the credibility of the witnesses and the weight to be afforded the evidence which is before the court." *Page v. Clark*, 592 P.2d 792, 796 (Colo. 1979).

Whatever the justification, the clearly erroneous standard places a large obstacle in the path of the advocate who seeks to overcome adverse factual findings. There are certain circumstances, however, that present counsel the opportunity to undermine the deference ordinarily afforded to findings of fact. Though appellate courts defer to trial courts' factual findings, the record on appeal must contain adequate findings to permit meaningful appellate review. Without sufficient factual findings on the key contested issues, the appellate court cannot engage in proper appellate review of either the trial

court's findings of fact or its conclusions of law. *See People v. D.F.*, 933 P.2d 9, 14 (Colo. 1997); *see also People v. McIntyre*, 789 P.2d 1108, 1110 (Colo. 1990) (trial court must place its findings in the record, otherwise appellate review may be impossible). The appellate advocate therefore must analyze whether the trial court has made sufficient findings to permit meaningful appellate review. If not, a remand may be possible.

In addition, the "clearly erroneous" standard does not apply where the trial court has applied an incorrect legal standard in making its findings of fact. Instead, appellate courts review de novo the issue of whether the trial court applied the correct legal standard. *People in the Interest of J.R.T.*, 55 P.3d 217, 219 (Colo. App. 2002), *aff'd*, 70 P.3d 474 (Colo. 2003). If the trial court applied the wrong standard, the appellate court may order a remand and instruct the trial court to make new findings based on the correct legal standard.

One common misconception about findings of fact is that uncontroverted evidence must be accepted as true. That is not the case. The trial court as the trier of fact is not bound to accept the testimony of a witness as establishing the truth of facts to which such testimony is directed even though the testimony is not contradicted by other evidence. *West Denver Feed Co. v. Ireland*, 551 P.2d 1091, 1094 (Colo. App. 1976). The trier of fact may reject the uncontroverted evidence, and the fact that evidence is uncontroverted does nothing in and of itself to overcome the deference of the clearly erroneous standard. In the ordinary case, findings of fact, though not necessarily set in stone, are unlikely to be reversed on appeal. But for the advocate who must attempt to overcome adverse findings of fact, nuances and variations in the clearly erroneous standard can provide the opportunity to undercut and sometimes to avoid that standard.

For example, a critical difference exists between review of findings of fact in federal court and Colorado state court. Under the federal rules, "[f]indings of fact, *whether based on oral or other evidence*, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6) (emphasis added). Under the state rules, "[f]indings of fact 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." C.R.C.P. 52. The difference between the federal and state rules matters where an appellate court reviews findings of fact based on documentary evidence (*e.g.*, written documents, video recordings, and audio recordings).

The omission from the Colorado rule of the language "whether based on oral or documentary evidence" allows independent appellate review of documentary evidence in certain circumstances. Thus, Colorado appellate courts do not defer to a trial court's factual findings where judgment is entered on the basis of stipulations or documentary evidence alone. Rather, in such cases, "an appellate court is as competent as the trial court to review the sufficiency of the evidence and apply the law thereto." *Colorado River Water Conservation Dist. v. Municipal Subdistrict, Northern Colorado Water Conservancy Dist.*, 610 P.2d 81, 83 (Colo. 1979). *See also Fox v. Alfini*, 2018 CO 94, ¶ 55 (Samour, J., dissenting) ("Here, the factual findings deserve no deference because we are in the same position to do what the district court did. The district court did not observe, much less evaluate, the demeanor or the body language of any live witnesses—indeed, there were no live witnesses. By electing to make credibility assessments, resolve conflicts in the exhibits, and reach factual determinations on a cold record, the

district court nullified its unique position to make factual findings and placed itself in the disadvantaged shoes of a reviewing court. The district court then proceeded to do precisely what a reviewing court abstains from doing because of the real danger of engaging in fact-finding on a cold record"). But this independent review does not apply where the factual findings are not based solely on the documentary evidence or stipulations. *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1383 (Colo. 1994).

The Colorado Supreme Court has applied independent review of documentary evidence in criminal cases as well. For example, in *People v. Al- Yousif*, 49 P.3d 1165, 1171-72 (Colo. 2002), the court reversed a suppression order relying on its own review of videotape statements made by the defendant to conclude that the defendant's *Miranda* waiver was knowing and intelligent. The dissent in *Al-Yousif* criticized the majority for making "its own findings of fact based solely on its viewing of the videotape and in disregard of the other evidence presented." 49 P.3d at 1176 (Bender, J., dissenting). The dissent stressed that "[t]he video must be considered in combination with the other evidence presented at trial . . . ." *Id.* at 1177. But *Al-Yousif* indicates that Colorado appellate courts will engage in independent appellate review of documentary evidence in videorecorded police encounters, interrogations, and confessions.

In the typical case, findings of fact are unlikely to be reversed on appeal if there is evidence in the record to support them. Knowing this, the appellate advocate is generally better off looking for legal error in the trial court's application of the law or its exercise of discretion.

The Abuse of Discretion Standard: Review of Discretionary Decisions

You've probably all heard the rote recitation of the abuse of discretion standard of review, whether by courts or in briefs: a trial court abuses it discretion where its decision is "manifestly arbitrary, unreasonable, or unfair." Too many briefs set forth the standard of review by simply saying "the court reviews this issue for an abuse of discretion," without telling the appellate court how the trial court's discretion was, or was not, abused on the specific issue.

The abuse of discretion standard is really several standards in one. That is, an abuse of discretion can occur in more than one way. An abuse of discretion occurs where "the court's decision was manifestly arbitrary, unreasonable, or unfair." *People v. Arellano,* 2020 CO 84, ¶ 21. But a trial court also abuses its discretion when it misapplies the law. *Id.* ("a misapplication of the law necessarily constitutes an abuse of discretion"*)*. And the trial court abuses its discretion when it fails to exercise its discretion. *See DeBella v. People*, 233 P.3d 664, 668 (Colo. 2010) (trial court abused its discretion by failing to exercise its discretion to assess the potential for undue prejudice with respect to jury's access to a forensic interview videotape).

"In its abstract sense, judicial discretion implies the absence of any settled legal standard that controls the controversy at hand." *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112, 1115 (Colo. 1986). Where the trial court has discretion, it is not bound by an issue one way or another, but has the power to choose between two or more courses of action, each of which is a permissible resolution of the issue. *Id.* Only when a trial court "abuses" its discretion is the exercise of discretion subject to reversal by an appellate court.

Trial courts possess discretion in countless day-to-day decisions. Whether to admit evidence, to grant a continuance, to accept a witness as an expert, or to give a particular jury instruction are just a few examples. Appellate review of the exercise of trial court discretion is generally deferential though not as deferential as the clearly erroneous standard. And because the exercise of discretion requires the application of some legal rule, the abuse of discretion standard presents opportunities for an appellate advocate to challenge the trial court's application of the law, which in turn gives a more favorable standard of review.

In exercising its discretion, a trial court may decide an issue one way but be perfectly justified in deciding the same issue the other way. Thus, in a particular circumstance, a decision to exclude evidence may not be an abuse of discretion and a decision to admit that same evidence also may not be an abuse of discretion. For the appellate court, review for abuse of discretion "requires an ad hoc evaluation of the facts and circumstances of each case." *People v. Metcalf*, 926 P.2d 133, 135 (Colo. App. 1996). If that evaluation convinces the appellate court that the trial court's decision was "manifestly arbitrary, unreasonable or unfair" an abuse of discretion will be found. *Id.* Demonstrating that a trial court was "manifestly arbitrary, unreasonable or unfair" is difficult. Judge Aldisert wrote, "One who blindly challenges on appeal the exercise of discretion might do better to take a leisurely stroll through an uncharted minefield." Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral § 5.7 at 66 (NITA 2d ed. 2003). But knowing and using the nuances in the abuse of discretion standard can give the appellate advocate tools to persuade the appellate court that an abuse of discretion has occurred. A decision does not have to be "manifestly arbitrary" to be an abuse of

discretion where the trial court commits legal error in its exercise of discretion.

The first thing an appellate advocate should do when faced with a discretionary decision is to examine the breadth of the discretion the trial court had to make that decision. When a controlling legal standard exists, a trial court may not disregard that standard, but must exercise its discretion within the framework of the controlling legal norm. *Buckmiller*, 727 P.2d at 1115-16. Thus, if the controlling law affords narrow discretion, it is much easier to obtain a reversal than if the court's discretion is broad. For example, whether a trial court requires a party to pay attorney fees as a sanction or enters a default judgment, the standard of appellate review is abuse of discretion. The scope of the trial court's discretion, however, is considerably narrower where dismissal is the sanction, and therefore it is easier to show an abuse of discretion in that instance than if the sanction had only been an award of fees.

Appellate advocates also fare better when the issue under review concerns only legal as opposed to factual questions. For pure legal questions, the lower court's judgment is subject to independent review on appeal. *Evans v. Romer*, 854 P.2d 1270, 1274 (Colo.), *cert. denied*, 510 U.S. 959 (1993). Thus, while the grant or denial of a preliminary injunction lies within the discretion of the trial court, if the issue on appeal from the grant or denial is a pure legal question, the court's review is de novo. *Id.* To the extent possible, therefore, the effective appellate advocate will frame discretionary issues as pure issues of law in order to obtain essentially de novo review. Colorado case law is full of cases reminding advocates that misapplication of the law is an abuse of discretion.

If the trial court misapplies the appropriate legal standard in exercising its discretion, it abuses its discretion. *See DeBella v. People*, 233 P.3d 664, 667 (Colo.

2010). For example, review of a court's award of attorney fees is for abuse of discretion, but the appellate court reviews de novo the trial court's legal basis for the award. *Fail v. Community Hosp.*, 946 P.2d 573, 583 (Colo. App. 1997), *aff'd*, 969 P.2d 667 (Colo. 1998). Thus, if no legal basis exists for an award of fees, then the trial court's award cannot stand.

In addition, the failure to exercise discretion when required to do so is itself an abuse of discretion. *DeBella v. People*, 233 P.3d at 668. Thus, where a district court denied a motion to dismiss brought under Fed. R. Civ. P. 41(a)(2), but the denial rested solely on the movant's "contumacious conduct," the court failed to exercise its discretion. On review, the appellate court said, "Whether a motion to dismiss under Rule 41(a)(2) may be granted is a matter initially left to the district court's discretion, but such discretion does not excuse a court's failure to exercise any discretion, nor does it save an unpermitted exercise of discretion from reversal." *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997).

In applying the abuse of discretion standard, appellate courts must defer to the trial court's exercise of its discretion. But the scope and nature of that discretion can vary greatly, and the effective appellate advocate will exploit those variations to undercut the deference otherwise afforded the trial court.

The De Novo Standard: Review of Legal Questions

The final basic standard of review is the de novo standard. De novo review encompasses the trial court's decisions regarding the choice of law, the interpretation of the law, and the application of the law. *See* Winning on Appeal § 5.10. In conducting

a de novo review, "no form of appellate deference is acceptable." *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991). Instead, the appellate court views the legal issue anew and renders its decision based on its own independent analysis. De novo review affords the practitioner a fresh opportunity to argue the legal issues, free from deference to the trial court. It therefore affords the advocate the most favorable standard of review.

The three basic standards of review largely define the constraints on an appellate court in a given case. But through careful research of the law and the record on appeal, the appellate advocate can sometimes uncover circumstances where the ordinary standards are relaxed or even inapplicable. For each appeal issue, practitioners should spend the time and energy necessary to understand fully the applicable standards and their possible nuances. Advocates who can reduce or eliminate the appellate court's deference to the trial court gain ground towards success on appeal.

Mixed Questions of Fact and Law, Ultimate "Facts," and Independent Review

Mixed questions of law and fact involve determinations that are neither completely factual nor purely legal. Instead, they involve application of law to evidentiary facts. *See Atlantic Richfield Co. v. Whiting Oil & Gas Corp.*, 2014 CO 16, ¶ 22 (mixed question "involves the application of a legal standard to a particular set of evidentiary facts in resolving a legal issue"); *People in the Interest of S.N.*, 2014 CO 64, ¶ 21 (whether a child is dependent and neglected is a mixed question involving application of the dependency and neglect statute to the evidentiary facts).

No single standard of review governs appellate review of all mixed questions, and thus advocates must carefully and thoroughly research the standard applicable to a

specific mixed question. Some cases simply state that when reviewing mixed questions of law and fact, courts "give deference to the trial court's factual findings, but [] subject its conclusions of law to de novo review." *People v. Taylor*, 131 P.3d 1158, 1163 (Colo. App. 2005) (reviewing a ruling on a motion to suppress); *People v. DeGreat*, 2015 COA 101, ¶ 51 (same). In practice, though, separating out the facts from the application of law is not always clear cut or easy, and the standard of review is not self-evident. Other cases recognize that appellate courts may take a number of different approaches to addressing mixed questions, including (1) treating the ultimate conclusion as one of fact and applying the clear error standard, (2) treating it as one that demands de novo review, or (3) treating it as one where the findings of fact are reviewed for clear error but the ultimate conclusion is reviewed de novo. *E-470 Public Highway Authority v. 455 Co.*, 3 P.3d 18, 22 (Colo. 2000).

The courts muddy the waters in some cases by referring to "ultimate facts" or "ultimate findings." But an "ultimate fact" is not a pure fact at all but instead is a determination that includes a conclusion of law, such as the ultimate legal determination of "reasonableness" under the Fourth Amendment. The courts recognize that the line between ultimate facts and evidentiary (historical) facts is sometimes blurry. The Colorado Supreme Court has attempted to draw a distinction between ultimate "facts" and evidentiary facts by noting that an ultimate finding "settles the rights and liabilities of the parties." *Ritzert v. Board of Education,* 2015 CO 66, ¶ 30, quoting *State Board of Medical Examiners v. McCroskey,* 880 P.2d 1188, 1193 (Colo. 1994). Evidentiary facts by contrast, "detail factual and historical findings on which an ultimate fact rests." *Id.* When controlling (i.e., evidentiary) facts are undisputed, the legal effect of those facts

constitutes a question of law. *Turbyne v. People*, 151 P.3d 563, 572 (Colo. 2007).

"Ultimate facts" can arise in agency proceedings, where a board, such as the Medical Board, reviews the determinations made by a hearing officer. Whether something is an ultimate "fact" or evidentiary fact can affect how the agency reviews a hearing officer's determinations. In the medical board context, for example, an evidentiary fact cannot be set aside by the medical board unless the finding is contrary to the weight of the evidence. But the Board can substitute its judgment for that of the ALJ on an ultimate conclusion of "fact." *McCroskey*, at 1193.

When mixed questions implicate constitutional rights appellate courts exercise independent review. For example, the question whether jurors were exposed to extraneous information is a mixed question subject to independent appellate review. *See People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004). In *Wadle*, the supreme court noted, as "distinguished from the trial court's historical factfinding concerning the circumstances and nature of an extraneous communication with the jury, the determination of a 'reasonable possibility' of influence is [] properly characterized as a mixed question of law and fact." And because the question implicated constitutional rights, the court noted it must be treated as a question of law requiring independent consideration by reviewing courts. *Id.*

Areas where the courts exercise independent review of mixed questions of law and fact include probable cause and reasonable suspicion determinations, reasonableness of searches or seizures, whether Miranda rights have been honored by the police, whether a suspect has waived his Miranda rights, whether a confession is voluntary, and whether officers have engaged in interrogation through their words or conduct. *See People v.*

Matheny, 46 P.3d 453, 461-62 (Colo. 2002).

In First Amendment cases, Colorado courts have long applied de novo or plenary review. *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 318 (Colo. 1981) (evaluation of First Amendment questions of "constitutional fact" require de novo review); *In re Marriage of Newell*, 192 P.3d 529, 535 (Colo. App. 2008) (independent review of the record is required to ensure lower court's judgment does not intrude free speech rights). The United States Supreme Court, in *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 510-14 (1984), held that the clearly erroneous standard of Fed. R. Civ. P. 52(a) does not prescribe the scope of appellate review of a finding of actual malice in defamation cases; instead, courts must exercise independent judgment to determine whether the record establishes actual malice. The "constitutional fact doctrine" recognizes that independent appellate review is necessary to ensure the judiciary adequately protects constitutional rights. Rote application of traditional standards of review risks violating fundamental constitutional rights through lack of appropriately heightened appellate review. *See* Katayoun A. Donnelly, *Mixed Questions of Fact and Law: Deferential or Plenary Review?*, ABA Appellate Practice Journal (Spring 2020 ed.).

For advocates, the message is to do the research and homework necessary to thoroughly understand the applicable standard of review for the mixed question at hand. To the extent possible, distinguish between what are in essence the pure legal conclusions, involving application of law, from the underlying historical or evidentiary facts, which are pure facts (the light was red, the dog was brown, the car was stopped) to which the law is applied. It would help if the appellate courts would stop using terms like

"ultimate fact" entirely, but given the judiciary's glacial ability to change, advocates need to ensure careful research and review of such issues to determine the applicable review. There's no magic to it, just thoughtful and thorough analysis.

IS IT REVERSIBLE ERROR?

Demonstrating trial court error to an appellate court is only half the battle, and sometimes less than that. To obtain relief on appeal, the trial court's error had to matter to the outcome of the proceeding. To demonstrate reversible error, advocates have to overcome the hurdle of harmless error—error that in an appellate court's view does not require reversal. The standards for demonstrating reversible error vary based on the nature of the error and whether the error was preserved or not.

Harmless error

An error is meaningless to an appellant if that error is deemed harmless. Yet, too many lawyers fail to show appellate courts that an error made a difference and therefore that their clients are entitled to relief. In most trial transcripts, I can find an evidentiary ruling by the trial court that was erroneous. For example, courts get hearsay rulings wrong frequently, but those errors usually are irrelevant to the outcome of the case. But good appellate advocacy is about finding *reversible* errors, not just errors.

Harmless Error Standards in Criminal Cases

Though Crim. P. 52(a) provides that any "error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded," the rule does not define the range of error standards applied in criminal appeals. Rather, as defined through case law, both state and federal, there are five basic standards employed in criminal cases to determine whether an error requires reversal of a judgment of conviction. The five standards differ by the degree to which they require that the error impair the reliability of

the judgment. *Hagos v. People*, 2012 CO 63, ¶ 9.

Structural Errors

Structural errors are errors in the fundamental structure of the trial court proceedings that are so significant that they require automatic reversal without an analysis of how the error actually impaired the reliability of the conviction. *Hagos*, ¶ 10. They are errors lying at the core of fair trial rights and include a biased judge, complete denial of the right to counsel, denial of the right to a public trial, and denial of the right to self-representation. *Id.*, citing *Neder v. United States*, 527 U.S. 1 (1999). Structural errors are "a limited class of errors described by the Court as including errors concerning rights protecting some interest other than the defendant's interest in not being erroneously convicted; errors the effects of which are too hard to measure, in the sense of being necessarily unquantifiable and indeterminate; and errors that can be said to always result in unfairness." *James v. People*, 2018 CO 72, ¶ 15. If an appellant can demonstrate that a structural error occurred, then reversal is automatic.

But it is important to preserve structural errors in the trial court. Federal courts review unpreserved structural errors only for plain error. *See People v. Kadell*, 2017 COA 124, n. 10 (Jones, J., dissenting), citing *Johnson v. United States*, 520 U.S. 461 (1997) and collecting federal cases. Whether unpreserved structural errors are subject to plain error analysis in Colorado state appellate courts is arguably unclear and in flux. In *Kadell*, Judge Jones acknowledged that *Bogdanov v. People*, 941 P.2d 247, 253 (Colo. 1997), held that structural errors aren't amenable to plain error review, but questioned *Bogdanov's* continued viability. *Kadell*, n. 10. The supreme court has backed away from *Bogdanov* some, *see, e.g., People v. Childress*, 2015 CO65M, and it would not be

surprising for Colorado to adopt the federal view that unpreserved structural errors are reviewed for plain error. So the safest course of action is to preserve structural error issues in the trial court.

Constitutional Trial Errors

The next most favorable harmless error standard is for preserved trial errors of a constitutional dimension. Such preserved constitutional errors require reversal unless the reviewing court determines that the error was harmless beyond a reasonable doubt, meaning that there is a "reasonable possibility" that the error might have contributed to the conviction. *Hagos*, ¶ 11. The State bears the burden of proving the error was harmless beyond a reasonable doubt. *Id.* Such errors are harmless beyond a reasonable doubt in circumstances where the evidence of guilt is overwhelming. *See Key v. People*, 865 P.2d 822, 827 (Colo. 1994). By contrast, if there is a reasonable probability from a review of the entire record that the defendant could have been prejudiced, the error cannot be harmless. *Id.*

Examples of constitutional trial errors are numerous, and include violation of confrontation rights, *see Merritt v. People*, 842 P.2d 162 (Colo. 1992), failure to notify defense counsel before responding to a jury's inquiry, *People v. Trujillo*, 114 P.3d 27 (Colo. App. 2004), and exclusion of evidence material, favorable defense evidence, *People v. Bell*, 809 P.2d 1026 (Colo. App. 1990). Because of the favorability of the constitutional error standard, counsel should try to "constitutionalize" issues in the trial court, i.e., make a record to demonstrate that the issue and alleged error is a matter of constitutional dimension and not simply a non-constitutional trial error. The more favorable standard of error is an advantage on appeal that counsel should try to obtain if

at all possible.

Nonconstitutional trial errors

Unlike preserved constitutional errors, nonconstitutional trial errors that are preserved are reviewed under a more difficult standard for defendants, where harmlessness will be found more readily than under the constitutional harmless error standard. *Hagos*, ¶ 12. Under the nonconstitutional standard, reversal is required only where "the error affects the substantial rights of the parties," meaning that the error "substantially influenced the verdict or affected the fairness of the trial proceedings," a more difficult hurdle for defendants than the harmless-beyond-a-reasonable-doubt standard. *Id.*

The types of errors that are nonconstitutional run the gamut. Some examples are the admission of certain expert testimony, *Ruibal v. People*, 2018 CO 93, improper bolstering of victim's testimony by other witnesses, *Venalonzo v. People*, 2017 CO 9, exclusion of evidence that did not deprive defendant of the ability to present a complete defense, *Krutsinger v. People*, 219 P.3d 1054 (Colo. 2009), and admission of other acts or res gestae evidence, *People v. Trujillo*, 2018 COA 12. When faced with a possible trial court error that was preserved but for which existing precedent does not definitively classify as constitutional or nonconstitutional error, counsel should argue that the constitutional error standard should apply but should also be prepared to demonstrate that the error was not harmless under the stricter nonconstitutional error standard.

Plain Error: review of unpreserved errors

Crim. P. 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error

review is reserved for unpreserved errors, whether constitutional or nonconstitutional (and structural, at least in federal court). *See Reyna-Abarca v. People*, 2017 CO 15, ¶ 37 (noting that Crim. P. 52(b) does not distinguish between constitutional and nonconstitutional errors). Plain error review is a more onerous burden for defendants than the other error standards. To prevail on plain error review, a defendant must show a an "obvious and substantial" error that "so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of the conviction." *Hagos*, ¶ 14. Because the plain error standard "was formulated to permit an appellate court to correct 'particularly egregious errors,' *Wilson v. People*, 743 P.2d 415, 420 (Colo. 1987), the error must impair the reliability of the judgment of conviction to a greater degree than under harmless error to warrant reversal." *Id.* Thus, while defendants are better off arguing a preserved error issue on appeal, plain error review does give defendants a safety valve on appeal where trial counsel fails to preserve an issue. But the hurdle is a high one, and all appellate advocates prefer preserved to unpreserved issues.

The takeaway for appellate counsel in criminal cases is simple—carefully and thoroughly research the standards of review and applicable reversal standard for any issue. Try to constitutionalize the issue if possible and try to take advantage of the most favorable standards, while being prepared to demonstrate reversal is required even under the less favorable standards.

Harmless error in Civil Cases

Plain error review is ordinarily unavailable in civil cases

Civil cases present a different challenge because there are far fewer constitutional dimensions to civil cases. There is no civil analog to Crim. P. 52(b), which permits plain error review in criminal cases. Therefore, plain error review in civil cases is generally unavailable and unpreserved errors in civil cases ordinarily cannot be raised on appeal.

Plain error review in civil cases is available only in "rare civil cases, involving unusual or special circumstances—and even then, only when necessary to avert unequivocal and manifest injustice." *People in the Interest of M.B.*, 2020 COA 13, ¶ 19 (internal quotation marks omitted), quoting *Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1195 (Colo. App. 2009). *M.B.* declined to address unpreserved due process and equal protection claims in a case involving termination of parental rights.

Besides the lack of a civil rules analog to Crim. P. 52(b), in civil cases "liberty is not at stake and there is no constitutional right to effective counsel." *Wycoff v. Grace Community Church*, 251 P.3d 1260, 1269 (Colo. App. 2010) (declining to review unpreserved challenge to plaintiff's closing argument). While the plain error doctrine has been employed in a few civil cases involving instructional error, circumstances justifying its application are rare. "This is so because C.R.C.P. 51 warns counsel to raise objections to instructions; issues involving jury instructions, unlike some objections to evidence, do not arise without warning; a timely objection allows the court to correct errors that can be easily corrected; restricting the scope of plain error review in civil cases promotes orderliness and the finality of decisions; and trials, not appeals, are the core of the judicial system. Thus, plain error review of instructional issues is restricted to unusual or special

cases, and, even then, reversal occurs only when necessary to avert unequivocal and manifest injustice." *Harris Group*, 209 P.3d at 1195; *see also Robinson v. City and County of Denver*, 30 P.3d 677, 684-85 (Colo. App. 2000) (plain error review "must be confined to the most compelling cases" and "deserves more stringent application to civil jury instructions" because C.R.C.P. 51 explicitly warns counsel of the need to raise objections to instructions). Counsel in civil appeals should assume that plain error review will not be available, but should be aware of the possibility of raising it an extraordinary case.

Harmless Error Standard in Civil Cases

C.R.C.P. 61 sets forth the harmless error standard applicable in civil cases: "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The importance of C.R.C.P. 61 is evident from the supreme court's recent decision in *Johnson v. Schonlaw*, 2018 CO 73. *Schonlaw* was a personal injury case involving a challenge to a trial court's decision to allow the alternate juror to participate in deliberations and the verdict over the defendant's objection. The court of appeals had reversed the trial court, concluding that participation of the alternate raised a presumption of prejudice that required reversal unless the plaintiff successfully rebutted the

presumption, which the court concluded the plaintiff failed to do.

The supreme court reversed, relying on C.R.C.P. 61: "As civil trial error governed by C.R.C.P. 61, the unauthorized participation of an alternate in civil jury deliberations must be disregarded as harmless if it does not affect the substantial rights of the parties." 2018 CO 73, ¶ 11. An error affects substantial rights only if it can be said with fair assurance that the error substantially influenced the outcome of the case or impaired the basic fairness of the trial itself. *Id.* The majority concluded that the error did not substantially influence the outcome nor impair the fairness of the trial, and therefore reversed the court of appeals.

Unlike criminal cases, structural error has not been applied in civil cases, and *Johnson v. Schonlaw* indicates it likely never will be in Colorado. *See also People v. R.D.*, 2012 COA 35, ¶¶ 30-31 (declining to apply structural error in parental termination proceeding because neither the Colorado nor United States Supreme Courts have recognized the concept of structural error in civil cases). So advocates in civil appeals must ensure that they can demonstrate that any trial court errors substantially influenced the outcome of the case or impaired the basic fairness of the trial. In other words, counsel has to show that the error mattered to the outcome below. Absent that showing, the appellate court is going to find an error harmless and affirm.

CONCLUSION

There is no magic to issue preservation, standards of review, or standards of reversal. To properly preserve issues requires making a record that sufficiently sets for the issue on the record, the legal basis for it, the trial court's ruling and the basis for it, and the context of the issue for the appellate court. Using the standards of review

appropriately requires nothing less than careful and thorough research and analysis to frame the argument for the appellate court to conclude the lower court erred. And finally, obtaining relief for your client requires demonstrating that the trial court's error mattered to the outcome of the case, under the applicable error standards.

Standards of Review

What they are and why they matter

Friday, May 14, 2021

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Introduction

Both the federal and state appellate rules require appellants to include in Opening Briefs the applicable standards of review for each issue and a specification of where the issue was preserved in the record.

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The standards of review and error are the lens through which appellate courts review the work of trial courts.

They frame the court's review and the level of deference, if any, the appellate court gives to the trial court's ruling.

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Issue preservation and standards of review go hand-in-hand, especially in criminal appeals.

Preserving issues in the trial court is essential to ensure that they will actually be considered by the appellate court.

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What we intend to cover

1. Issue Preservation—how to pack your suitcase for the appellate trip
2. Standards of Review—how to help the appellate courts pick the lenses of review
3. Standards of Error—enough to take everyone on a trip back to the district court?

ISSUE PRESERVATION
(or how to get it into the "box")

Preserving an issue on appeal is like packing for a move. Anything you want to take to the court of appeals when you move from the trial court needs to get packed into a "box," that is, make it into the record.

Issue preservation requires

1. Trial counsel raising on the record an objection or an issue on which the court must rule.
2. An explanation of counsel's position, with as much factual and legal detail as necessary to make the issue clear for the *appellate* court.
3. A ruling by the trial court on the issue.

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Trial counsel has to think about how the record will look, removed from its context.

Counsel needs to give necessary context for the court of appeals.

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Create a clear record that demonstrates

1. the issue being raised
2. the factual basis and *all* legal bases for your position
3. the trial court's ruling on the issue

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Questions/Comments??

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STANDARDS OF REVIEW

1. The Clearly Erroneous Standard: review of historical facts
2. The Abuse of Discretion Standard: review of trial court discretionary decisions (obvious example—evidentiary rulings)
3. The De Novo Standard: review of legal questions, law application, undisputed facts, documentary records, and constitutional facts.

11

The Clearly Erroneous Standard

Standard of Review: Appellate courts generally review historical facts only for "clear error."

Standard of Error: Clear error occurs where the record contains no evidence to support a finding, or when the reviewing court is left with the definite and firm conviction that a mistake has been made.

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The clearly erroneous standard is extremely deferential to the trial judge.

That deference stems from the role of the trial judge in assessing the credibility of witnesses.

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In Colorado, where the appellate court reviews *documentary* evidence (contract, videotaped statements, etc.), the court can engage in independent appellate review of that documentary evidence.

This is so because the appellate court is in the same position to review the evidence as the trial court, and therefore the reasons for deference are absent.

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The Abuse of Discretion Standard

The abuse of discretion standard is actually several standards addressing review of a trial court's discretionary decisions.

The often-recited language you're probably familiar with is "a trial court abuses its discretion where its decision is manifestly arbitrary, unreasonable, or unfair."

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But a trial court also abuses its discretion in ways that are often easier to show on appeal:

1. When the trial court misapplies the law.

2. When the trial court fails to exercise its discretion when required to do so.

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KD1

When faced with an abuse of discretion standard, good appellate advocates look for legal error in the trial court's discretionary decision such as misapplication of the governing legal standard, application of the wrong legal standard, incorrect application of the law to the facts, or failure to apply a governing legal standard.

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Counsel should also determine the scope of the trial court's discretion. If the discretion is narrow, it is easier for the trial court to abuse that discretion.

For example, a trial court has narrower discretion to dismiss a civil case for a discovery violation than it has to enter a less drastic sanction.

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Slide 17

KD1 This falls under de novo standard for legal questions and standards

Katayoun Donnelly, 5/13/2021

The De Novo Standard

Under this standard, the reviewing court does not defer to the trial court or its reasoning.

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De novo review includes review of

1. The trial court's decision regarding legal questions
2. The trial court's application of the law to the facts
3. Documentary record, undisputed facts, and constitutional facts

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Questions/Comments??

Mixed Questions of Fact and Law

The term “mixed question of fact and law” creates a lot of confusion in the case law and in practice.

Simply put, a mixed question is one that is neither completely factual nor completely legal. But this “definition” is incredibly unhelpful.

Review of facts in mixed questions of fact and law: deferential or plenary?

https://drive.google.com/file/d/1_J0nDbXYP6ginbk5ZeJZK0RkQ3T5CKYz/view

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Appellate courts will strive to separate the historical (evidentiary) facts—reviewed for clear error—from the legal conclusions, which they review de novo.

But doing so is not always easy or self-evident.

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The courts muddy the waters by referring to "ultimate facts" or "ultimate findings."

An "ultimate finding" is not a pure fact at all, but instead is a determination that includes a conclusion of law, such as the ultimate legal determination of "reasonableness" under the Fourth Amendment.

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The key for practitioners faced with a mixed question is to attempt to separate the actual evidentiary facts (the light was red, the dog was growling) from the application of law to those evidentiary facts, e.g., finding of probable cause. The application of law is a legal conclusion for which deference is not owed to the trial court.

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In the Fourth Amendment context, for example, the determination that a search was “reasonable” under the Fourth Amendment, though sometimes called an “ultimate finding” in some case law, is nothing more than a legal determination applying Fourth Amendment law to the historical facts as found by the trial court.

But what if the factual finding that the light had just turned red is based on a videotape admitted into evidence?

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In First Amendment cases, courts will apply de novo or plenary review.

In *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), the Supreme Court held that the clearly erroneous standard of Federal Rule of Civil Procedure 52(a) does not prescribe the scope of appellate review of a finding of actual malice in defamation cases, and as a matter of “federal constitutional law” appellate courts “must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.”

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This “constitutional fact doctrine” recognizes that independent appellate review is necessary to ensure that the judiciary adequately protects constitutional rights.

The rationale for conducting an independent review of constitutional facts in civil and criminal cases involving constitutional and statutory rights is the importance of the rights implicated or the need for the appellate courts to maintain control over law declaration and norm elaboration.

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The Standards of Review Takeaway

Do the homework necessary to thoroughly understand the applicable standards of review, their nuances, and their grey areas, and use that knowledge to frame an argument that leads the court to the conclusion you want it to reach.

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Questions/Comments??

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Is it Reversible Error?

Demonstrating trial court error is often less than half the battle. Trial courts make errors all the time. But for the appellate advocate, only reversible errors result in remand.

Thus, appellate advocates need to establish that the trial court's error requires reversal.

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Criminal appeal reversal standards

1. Structural Error
2. Constitutional Trial Error
3. Nonconstitutional Trial Error
4. Plain Error

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Structural errors are errors in the fundamental structure of the trial court proceedings so significant that reversal is automatic without an analysis of how the error impaired the reliability of the judgment.

They include a biased judge, a biased jury, complete denial of right to counsel, denial of the right to a public trial, and denial of the right to self-representation.

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The importance of issue preservation is illustrated in the structural error context. Federal courts review unpreserved structural errors for plain error only. Reversal is not automatic for unpreserved structural error.

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The United States Supreme Court has not addressed the issue of structural errors in civil cases involving fundamental constitutional rights.

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Criminal Appeals

Constitutional trial errors are preserved errors of a constitutional dimension. They don't cause automatic reversal but present a more favorable standard for criminal defendants.

If a constitutional trial error occurs, reversal is required unless the government proves beyond a reasonable doubt that the error was harmless, i.e., that there was no "reasonable possibility" that the error might have contributed to the conviction.

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Examples of constitutional trial error

1. Violation of the right to confront
2. Failure to notify defense counsel before responding to a jury question
3. Exclusion of *Brady* material, favorable defense evidence

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Questions/Comments??

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Nonconstitutional trial errors are preserved errors that are not of a constitutional dimension. The reversal standard is less favorable than for constitutional errors.

Reversal is required only if the error was harmless, i.e., it "substantially influenced the verdict or affected the fairness of the trial proceedings."

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Examples of nonconstitutional trial errors

1. Admission of certain expert testimony
2. Improper bolstering of other witnesses' testimony
3. Admission of other acts or *res gestae* evidence
4. Exclusion of evidence that did not deprive defendant of an ability to present a complete defense

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Because of the more favorable standard for constitutional trial errors versus nonconstitutional ones, trial counsel should try to be specific in their objections and include both constitutional and non-constitutional grounds during the trial court proceedings, e.g., argue that the trial court's course of action will violate a constitutional right of the defendant both because it is hearsay and because it violates the Confrontation Clause.

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Plain Errors

Plain errors are unpreserved errors that are "obvious and substantial" and "so undermine the fundamental fairness of the trial itself as to case serious doubt on the reliability of the judgment of conviction."

Plain Error in Civil Cases

In rare civil cases, the court has permitted plain error review when necessary to avert unequivocal and manifest injustice, or when fundamental constitutional rights are at stake, such as termination of parental rights.

C.R.C.P. 61 and Fed.R.Civ.P. 61 set forth the harmless error standards for civil cases:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

In order to demonstrate an error was not harmless in a civil case, the appellate advocate must show that the error "substantially influenced the outcome of the case or impaired the basic fairness of the trial itself."

Thus, counsel must show that the error mattered to the outcome of the trial court proceedings.

Questions/Comments??

CONCLUSION

Thanks for listening to us drone on!