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REVISITING STANDARDS OF REVIEW IN CIVIL APPEALS

FOREWORD

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"I have all the answers," more than one wag has said. "It's the questions that give me trouble." Asking the right question is the starting point in reviewing the merits of a case on appeal. A ruling may be error, but not reversible error, and certainly not an abuse of discretion. Which standard applies? There may be more than a scintilla of evidence on a point, but it is less than clear and convincing and so little in relation to the entire record that the factfinder cannot be said to have reached a rational result. Which is the proper test? Are uncertainties to be resolved in favor of the judgment or against it? The answers to such questions—the choice of the proper standard of review—may well determine the result.

The law prescribing the standard of review applicable to a particular ruling is complex but relatively well settled. One of the virtues of Wendell Hall's new article on this subject is that it catalogues dozens of rulings subject to review and specifies the standard applicable to each. The article is an invaluable reference work for the appellate lawyer, as well as the appellate judge. When the applicable standard of review is certain, as is most often the case, the effective lawyer will set it firmly in mind before the first word of the brief is written. It is the anvil on which the recitation of facts and the argument are both to be forged, and it as much as anything else determines their cast. Each word should be aimed at proving that the ruling on appeal either does or does not meet the standard by which it is to be judged. The difference between such a brief and one which has lost sight of the goal, as it were, is always apparent.

The brief should advise the appellate court of the standard of review at the outset of the argument and add such reminders as are necessary throughout. It is usually a waste of words, however, and

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even a distraction to recite much authority for the standard. Most appellate judges know the standard applicable to a summary judgment, or the legal or factual sufficiency of the evidence. That the existence of a genuine issue of material fact will defeat most summary judgments needs no string cite for support; it is virtually axiomatic. When the standard of review is not in dispute, and its parameters are well settled as applied to the case at hand, there is no need to support it with authority.

It is far more important in most cases, when the proper choice of a standard of review is well settled, to demonstrate its application with some analytical care. Here the law cannot be well settled, as each situation is unique. One must look to the caselaw for analogies. Wendell Hall's article is again invaluable in citing cases that serve as paradigms for analytical constructs. These cases show by example what does and does not comport with a particular standard of review. The law governing standards of appellate review has some lasting uncertainties—like the metaphysical difference between an abuse of discretion and a *clear* abuse of discretion—and some new developments. Mr. Hall's article sheds new light on both.

There are two pitfalls to avoid in analyzing the applicability of a standard of review. One is the tendency to invoke the label by which the standard is referenced as a talisman to validate or invalidate a ruling. The label—abuse of discretion, for example—does not define the standard any more than a person's name defines the person. It is simply, in the vernacular, the "handle" by which the concepts that comprise the standard are easily referenced. The dictionary meanings of "abuse" and "discretion" provide little insight into the meaning of the standard. The meanings are revealed only by identifying and applying the purposes and principles of the standard. By way of illustration, clear abuse of discretion is part of the dual standard of review used to determine whether to issue the extraordinary writ of mandamus. The reasons the writ is extraordinary dictate that it should not often issue. Thus, abuse of discretion includes the idea, not apparent from the words in the label itself, that it is to be found only rarely. The standard of review consists of principles, not merely words.

The second pitfall to avoid in applying a standard of review is the tendency to substitute conclusory assertions for real explanations. It is not enough to insist that a verdict was against the great weight and preponderance of the evidence. One must show why: because no rational person could have considered the evidence beyond serious dis-

pute and still have reached a contradictory conclusion. Too many briefs lay out the circumstances and then conclude that the proper application of the standard of review is "clear." I have learned in more than a decade of judging that what is claimed to be clear seldom is. If the assessment of a ruling on appeal is really so clear, it should not be hard to say why; and if it is not so clear, it is all the more important to say why.

Knowledge of proper standards of review is important not only to appellate lawyers, but to appellate judges, and never to be forgotten, appellate law clerks (or parajudicials, as they much prefer to be called). Some of my colleagues have directed their law clerks to Wendell Hall's previous article for guidance on standards of review, *Standards of Review in Civil Appeals*.[1] His new article represents an advance from his prior work. I suspect it will be used every bit as much. No human system of adjudicating disputes is perfect. How imperfect it is allowed to be and yet do justice is determined in part by the standards of appellate review. The subject is very important, and Mr. Hall is to be commended for the study he has given it.

1. W. Wendell Hall, *Standards of Review in Civil Appeals*, 21 ST. MARY'S L.J. 865 (1990).