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Using the Standard of Review to Advance Your Arguments on Appeal

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It is late at night, and your brief is due tomorrow. You have completed the factual and procedural history and drafted your legal argument. Now you are putting the finishing touches on the brief and checking to ensure you have complied with the technical requirements set forth in Rule 28 of the Federal Rules of Appellate Procedure—table of contents, table of authorities, corporate disclosure statement, jurisdictional statement. Suddenly, you remember that Rule 28(a)(9)(B) requires a statement regarding the appropriate standard of review. You scramble to add a heading entitled "Standard of Review" at the start of your brief, toss in a two-line quote from a case, and then move on to the next technical requirement.

By adding the "Standard of Review" heading and throwing in the two-line quote, you have complied with Rule 28(a)(9)(B) because it provides that the standard of review may be set forth "under a separate heading placed before the discussion of the issues." You have also done the same thing as countless other attorneys. But in treating the standard of review as just another technical briefing requirement akin to the table of authorities, you may have missed a critical opportunity to advance your legal arguments. The standard of review—particularly when it favors your side of the case—can be a useful tool in persuading appellate court judges.

"Although many advocates ignore the standard after (or even instead of) articulating it, the appellate standard of review is really the context within which the entire argument rests." Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 13 (Aspen 2002). In other words, the standard of review actually matters. The phrases "abuse of discretion," "de novo," and "clear error" are not just empty words that take up space in briefs and court opinions; rather, those phrases represent the very framework within which appellate courts operate because "[t]he question of whether a trial court clearly erred or abused its discretion is not the same determination as whether the court was simply wrong." Michael R. Bosse, "Standards of Review: The Meaning of Words," 49 *Me. L. Rev.* 367, 369 (1997). The standard of review sets the boundaries within which the appellate courts operate when deciding a case. Thus, it just might make the difference between whether you win or lose your appeal. It only makes sense, therefore, to treat the standard of review as a central part of your brief instead of a mere technical requirement that is easily satisfied and forgotten.

To make effective use of the standard of review, you should identify the applicable standard early on in the brief writing process. If you are the appellant, start thinking of the standard of review when deciding what issues to even raise on appeal. Regardless of whether you are the appellant or appellee, it is advisable to consider the standard of review when deciding how to organize your brief. As advocates have heard time and again, appellate judges are the most focused when they first pick up your brief, and their attention wanes as they make their way through the brief. Thus, as an appellant, you should consider leading with any issues that receive de novo review. Conversely, if you are the appellee, you should consider leading with any issues that receive some form of deferential review. To do that, however, you must resist falling into the common trap of allowing the appellant's organizational structure to dictate the organizational structure of your brief. The organizational structure of a brief is an important persuasive tool, and appellees too often miss an opportunity to persuade by mimicking the appellant's organizational structure—a structure that the appellant presumably has chosen in order to maximize the persuasiveness of his or her brief.

Another way to enhance the persuasiveness of your brief is to incorporate the standard of review into the statement of issues. Again, this is especially important when the standard of review is favorable to your side of the case. Appellate court judges pay close attention to the statement of issues, and weaving the standard of review into the statement of issues is an excellent way to start persuading the judges from the minute they open your brief. Consider the difference between the following examples:

> Did the trial court **err** by finding that the probative value of the autopsy photographs was not substantially outweighed by the danger of unfair prejudice under Federal Rule of Evidence 403?
>
> or

> Did the trial court **abuse its broad discretion** by finding that the probative value of the autopsy photographs was not substantially outweighed by the danger of unfair prejudice under Federal Rule of Evidence 403?
>
> Did the trial court **incorrectly** hold the defendant responsible for orchestrating a fraudulent scheme that caused $1,000,000 in loss under U.S.S.G. § 2B1.1?
>
> or
>
> Did the trial court **commit clear error** by holding the defendant responsible for orchestrating a fraudulent scheme that caused $1,000,000 in loss under U.S.S.G. § 2B1.1?

By incorporating the standard of review into the statement of issues, you can be certain the judges are cognizant of the scope of their review from the outset. On the other hand, if you simply present the issue without mentioning the standard of review, there is a chance the judges will assume de novo review applies. As a result, they will begin reviewing your brief through a different (and more critical) lens. By mentioning the standard of review in the statement of issues, you prevent the judges from "slid[ing] into the assumption that you and your adversary are on a level playing field when in fact the standard of review favors you." Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 11 (2008).

After alerting the court to the standard of review in the statement of issues, you should incorporate it into the argument section of your brief. When crafting your argument headings and topic sentences, look for ways to mention the standard of review. In addition, you would be well advised to devote a portion of your argument to explaining what the standard requires and why it has or has not been satisfied. Consider the following example of an issue that is reviewed for abuse of discretion:

> The trial court did not abuse its discretion by finding that the probative value of the autopsy photographs was not substantially outweighed by the danger of unfair prejudice under Federal Rule of Evidence 403. A trial court has "very broad discretion" when making Rule 403 determinations. *United States v. Mack*, 258 F.3d 548, 555 (6th Cir. 2001). An abuse of that "very broad discretion" can only be found if this Court is "left with the definite and firm conviction that the trial court committed a clear error of judgment." *United States v. Dixon*, 413 F.3d 540, 544 (6th Cir. 2005). That high standard cannot be satisfied here because the trial court fully articulated its reasons for admitting the autopsy photographs, it issued a proper limiting instruction, and its decision finds support in prior decisions of this Court.

The advantage of the suggested approach is that it ensures the judges are aware of not only the applicable standard but also of what the standard actually requires. Compare the effectiveness of the paragraph above with the all-too-common situation in which the standard of review is only mentioned in a two-sentence quote at the start of the brief. Both approaches comply with the Rules of Appellate Procedure, but the approach taken above constitutes advocacy as opposed to mere compliance with the rules.

Presumably, the reason why appellate advocates often devote little attention to the standard of review is because they believe appellate judges already know the applicable standard for every conceivable issue; thus, the advocates believe it would be a waste of time and words to address the standard. That presumption is not supported by reality—appellate judges (and their law clerks) are incredibly busy, they read numerous briefs per day, and they confront vastly different legal issues on a regular basis. As at least one appellate judge has candidly admitted, if the standard of review is not "fully addressed in briefing . . . it is easy for both the lawyers and the judges to overlook the applicable standard." Raymond T. Elligett, Jr. & Hon. John M. Scheb, "Appellate Standards of Review—How Important Are They?," 70*Fla. Bar J.* 33 (Feb. 1996). Because the standard of review may affect the ultimate outcome, you want to be certain that the judges reading your brief could not possibly "overlook" the standard.

If you have a favorable standard of review, you should not only mention it in the statement of issues and at the start of your argument section, but also you should "keep it before the court throughout" your brief. Scalia & Garner, *supra*, at 11. One way to do that is through your discussion of the cases that support your position. When discussing a helpful case, make it a point to highlight the standard of review the court applied. And when

applying that helpful case to the facts of your particular situation, consider mentioning the standard of review once again. For example:

Just as the trial court in *Smith* did not abuse its discretion by admitting the coroner's graphic testimony regarding the cause of death, the trial court here did not abuse its discretion by admitting photographs from the victim's autopsy.

Now you have not only drawn a comparison between your case and a helpful decision, but also you have reminded the judges that the question is whether the trial court abused its discretion and not whether the appellate judges would have admitted the evidence had they been in the trial court's shoes.

Finally, you should think about referring to the standard of review at the end of your argument regarding a particular issue. Rather than concluding with "Accordingly, the trial court should be affirmed," consider saying "Accordingly, the trial court did not abuse its broad discretion and should be affirmed." Such a conclusion reinforces once again the nature of the lens through which the appellate judges should be viewing the issue.

It goes without saying that the approach suggested in this article may not be appropriate in every circumstance. But in many cases, you may greatly improve the quality of your brief by thinking of the standard of review early in the process and treating it as an important advocacy tool instead of a mere technical requirement. Doing so will ensure that the judges considering your appeal will know full well what the standard of review is, and they will know why you believe that standard helps your side of the case. The same cannot be said for simply relegating the standard of review to a two-sentence quote at the start of your brief that is likely to be overlooked or forgotten.

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