Chapter 6

The Appellate Brief: Preparing the Draft and Related Matters

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(Levy, Rel. #15, 11/14) 6–1
§ 6:1  

Introduction

The task of preparing the brief is fraught with pitfalls and opportunities. A good brief requires much work before pen is even set to paper, and a great deal thereafter. There are myriad techniques. Only by experimentation can you determine what best suits your work habits and your craftsmanship. However, one point is undebatable: Before a brief is drafted you should know your case thoroughly. This involves a study not merely of the briefs below but also of the record below.

§ 6:2  

Examination of Briefs and Records Below

§ 6:2.1  

Read the Briefs First

Reading the briefs before the record will give you a bird's-eye view of the issues and enable you to see more readily the relevant parts of the record. A drawback to such an approach is that you may see the case not with the fresh eyes of the appellate attorney, but with those of trial counsel (or of appellate counsel in the appellate court below, as the case may be). After some appellate experience, however, you will generally find it more useful to read the lower-court briefs first, underlining the points that seem particularly significant or essential, and making a list on a separate piece of paper of additional legal arguments that occur to you. Such points should be reduced to writing, whether or not there is any authority for them; development of authorities comes later. You will then be able to review the record to see if it fully supports the points developed in the briefs below and if those points were fully preserved. What seemed obvious at trial may not be supported by the record. Not only is recollection distorted by involvement in the trial, but frequently knowledge of off-the-record conferences becomes merged in trial counsel's mind with on-the-record matters. We also cannot reconstruct proceedings as accurately as the court reporter can.
You will see whether the record bears out the contentions in the brief, and will consider whether different arguments on facts not stressed in the briefs in the lower court might be more persuasive to an appellate court. Also, reading the record, especially if it is a lengthy one—without first seeing what argument was attempted below with it—may have a dizzying effect and will almost certainly necessitate a rereading of the record after reading briefs. Reading the record, the briefs, and the record again may be the most thorough approach, if time permits, but it rarely does. Moreover, for the development of skills to be used over a long period of time, the best training is to read the briefs first, making the necessary discountings for enthusiasm of trial counsel, and only then to turn to the record.

If record citations have been given to the court below—which usually occurs only if you are handling the case in a higher appellate court—it pays to reread the brief, checking the citations to see if they bear out the propositions for which they are cited. Frequently, they do not. Enthusiasm, and counsel’s own knowledge of the facts, which may not be reflected in the record, create distortions. Sometimes, too, the citations may be to the wrong pages of the record. Accurate record citation is exceedingly important. Effective appellate advocacy, particularly over the long term, as courts become familiar with appellate counsel and learn upon whom they can rely, requires that the record be cited accurately.

§ 6:2.2 **Review of the Record—Notations and Record Abstract**

The next step is to read the record. The temptation is to read it as swiftly as possible, merely underlining those parts that seem most relevant to appellate issues. Such an approach wastes valuable time. All too often, you will have to go back to the record to search out an elusive page. The best approach is to read the record at leisure, preferably at a time when you will not be bothered by phone calls. This is ideal work to be done at home. Read the record carefully, slowly, with a pad and a supply of pencils next to you. If you have an extra copy, underline those portions that seem most significant and note in the margins how you might be able to use them. First impressions frequently turn out to be valuable. If not recorded, they may escape you.

Make an abstract of the record. You have read the briefs and know what were thought to be the significant propositions of law in the lower court. Each time you find a page or a folio that might be relevant to one of those propositions, or to any other legal argument that the record suggests and that was not developed below, note the page or folio number and write a quick summary note about it.
As each new witness testifies, and his status appears, write out his name in capital letters, the page number where his testimony begins, whose witness he is, whether he is an expert witness, or eyewitness, and whether he is testifying on direct or cross. Page numbers are best noted in the margin on the pad, while the substance of the significant testimony is summarized in the body of the pad. This procedure will give you an excellent table of contents to the record. It may save you the trouble of thumbing through several hundred pages to locate some particular piece of testimony.

If you have a dictating machine, it may be easier to substitute the machine for the pad and pencil, dictating the material set forth above, after having given your secretary instructions along the lines of the above as to the form of the abstract. To dictate “live” rather than to a machine is unduly time consuming. It will make your secretary impatient to sit by for hours while you dictate for only a few minutes at a time. Use of the dictating machine obviates another problem—reading your own handwriting—and results in an abstract that is easier to work with than a handwritten one. Or, perhaps, you can put your notes on a computer, and, later, your abstract and index.

Leave the appropriate part of the record with your secretary. Your secretary, in typing the abstract, can check your dictation against the record and thus avoid misspellings of unfamiliar names and words.

An increasing tendency is to leave the preparation of the abstract of the record to a paralegal. While this does save time, the careful appellate attorney should then read the record in tandem with the paralegal’s abstract. No matter how excellent the paralegal might be, the experienced attorney will note some vital testimony not abstracted, different emphases and nuances, and, of course, errors. The attorney should correct and edit the paralegal’s work and prepare a supplemental abstract of what the paralegal missed.

§ 6:2.3 Making Reference to Your Abstract of Record Easier

After abstracting the record, you will have a rather disjointed group of summary statements addressed to a variety of points. By this time, however, you will have a general idea of the points that you will want to raise, and you can devise your own shorthand for the classification of the factual aspects of the case. Go back over your transcript and put shorthand symbols in the margins next to the page notations. For example, if you are working on a criminal case, and fingerprint and alibi evidence are relevant to the questions on appeal, put an “A” next to those parts of your abstract dealing with alibi evidence, and “F” next to those dealing with fingerprint evidence. Similar factual symbols will readily suggest themselves. If one item in the record can be keyed to
two questions, use both symbols. By going down the finished list of symbols you will be able easily to find all the significant parts of the record dealing with a particular aspect of the case.

This kind of an abstract will suffice for the relatively simple case where the record is not lengthy. But if your abstract itself becomes prolix, you will be able to work more easily if you have your secretary retype it according to the varying classifications. For example, your secretary can collect all your “F” notations under the heading “Fingerprint Evidence,” and can put next to each item a notation in parentheses as to the name of the witness testifying and his status. If your secretary isn’t capable of this, an hour or two of your own time invested in rewriting or redictating your abstract will save you many hours of work later. You will then in effect have an invaluable index of your record.¹

After completing your abstract and your index, integrate the notes you have made in the margins of the briefs and record.

§ 6:3 Techniques of Brief Preparation

What you do after you prepare the abstract depends largely upon your own preference for one of several techniques, as well as the structure of your law office. A large office, with a large staff available for research, will have one procedure; a single practitioner or an appeal specialist working alone may have another.

§ 6:3.1 Large Office Brief Preparation—The Research Staff Approach

An excellent illustration of the way a large office operates in an appellate briefing is to be found in Anthony Lewis’s *Gideon’s Trumpet*, a detailed study of the case of *Gideon v. Wainright,*² wherein a partner in a large Washington, D.C. law firm (who later became Mr. Justice Fortas of the U.S. Supreme Court) was appointed by the Court to brief and argue the case after it had granted review. Lewis relates how the attorney in charge, after having immersed himself in the record and briefs below, as well as the available legal literature, wrote a memo indicating the various points that, in his judgment, would be most important. Young lawyers in the firm thereafter researched different questions.

This method is excellent, especially when, as in *Gideon*, there is a clear-cut legal issue, and the attorney in charge remains in control, not merely to digest the various research memoranda but also to bring the final document into a coherent unit. However, often a case is fractured

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¹. As to computer manipulation of this data, see section 2:5.3, note 19, supra.
into too many compartments by this method, and the potential significance of seemingly unimportant facts, which might emerge only after research, may never be realized.

If such a method is used, each lawyer should be aware of the other problems being researched. The person researching one question, who stumbles across a precedent valuable to the researcher into another question, can share the information. Moreover, all members of the staff should exchange memoranda. Thus, a staff member may realize the relevancy of something he had found to another researcher’s problem. Even if he had been furnished with a list of all other questions being researched, he might have been unable to realize such relevancy if he had not received the other memoranda.

Such cross-checking will also help to avoid another error that plagues attorneys. A researcher of one question may furnish a citation which, while helpful on his question, is damaging to the position of the client on a different question. To avoid this, not only should all researchers be made aware of all the problems being researched and the results of all research, but the attorney in charge should read and analyze each of the cases cited in all the legal memoranda. This may also reveal further avenues of research.

The large law office may also wish to consider adopting the “stream of consciousness” approach described below using the rough-draft brief that results as the starting point for research, instead of merely dictating a memo listing the apparent questions.

§ 6:3.2 Solo Preparation Technique—“Stream of Consciousness” or “Free Association” Briefs

The approach of the appellate attorney who has no research staff, or only a small one, must necessarily be different. The attorney alone, or with a small staff, will have to research all questions or use a legal computer research organization, which will do research in accordance with the attorney’s instructions. The task is more arduous for this attorney than for the attorney with a large research team, but the brief will be more unified. While the large law office will generally begin research when the abstract of record is completed, or perhaps even before, the appellate attorney without the large staff might delay research until a first draft of the argument in the brief has been dictated. I urge this not only for the independent practitioner but for the large law office as well; for only after a brief has been drafted will you really see all the major and minor lines of argument. Even a thorough digestion of the briefs and records below will not serve as a substitute.

I do not recommend that, in a large law office, the dictation of the first draft of the brief be divided among several researchers. This
results in lack of uniformity in style. More importantly, the usefulness of the first draft comes from its dictation by one person who has read the entire record and briefs and has thoroughly immersed himself in all aspects of the case. The attorney in charge should dictate the first draft. The researchers should be invited at some later stage to dictate a draft themselves, which may be useful for later incorporation into the brief by the attorney in charge.

In dictating such a rough draft, let your imagination run riot. Do not dictate a rough draft of the facts; rough out only the legal argument. Do not, at this stage, be bothered by what the cases actually hold. Set forth every legal argument that occurs to you, even though you have no idea whether there is any support for it in the cases. Do not be concerned about the organization of your material at this point. Set forth your arguments in varying degrees, first without qualifications and then with such qualifications as might actually be found upon research. Where you would normally put citations, dictate “[blank] v. [blank], leave space for citation.” These can be filled in if and when you find support for your legal propositions.

Should you omit an argument if you cannot find supporting legal authorities? In general, no; in a “stream of consciousness,” rough-draft brief, definitely not. For an appellate court may be more influenced by a well-reasoned brief, where there is no authority for the arguments made, than by a brief filled with citations, many of which are probably inapplicable anyway. Also, one of your arguments that seems rather farfetched may turn out to be better than you thought and a useful line of reasoning. The time for choosing which arguments to use, for organizing them, and for putting them in polished, persuasive form will come later. Inventiveness should be the prime characteristic of your first work on the brief.

Some attorneys cannot operate this way. What works best for one attorney may be a dismal failure for another. The lawyer who has been trained to organize carefully before a word appears on a page may prefer to outline carefully—first in his mind, and then on paper—the exact order in which he wishes to bring up his arguments. [There are other attorneys, it is said, who can dictate a brief from beginning to end at one sitting in such polished form that no revisions are necessary.]

A technique of careful and exacting pre-organization is not to be disparaged; it works for many skilled attorneys. But by concentrating on the problem of organization at the outset, you may miss valid arguments that would not occur to you but for free association in preparing a rough draft.

If you cannot prepare a rough draft except by careful organization before beginning to write, try the “stream of consciousness” method in the next case when you have time to spare.
§ 6:4  Initial Preparation for Oral Argument—Ancillary Benefits to Briefing

When you have finished the first rough draft of your argument, begin to work toward your oral argument. Oral argument, even if it is several months off, is immensely helped by discussing a case at every opportunity with all who will listen. Discuss it not merely with lawyers in your own office, and lawyer friends, but also with laymen. This will facilitate your two major tasks on appeal: making the facts and the law comprehensible and persuading the court. One of the problems in presenting your case to friends will be to do it in a way that arouses their interest. What aspects of the case are most interesting to them will be a guide to how an appellate court may react. Similarly, in trying to make the case comprehensible to associates, you will find a way to make it comprehensible to an appellate court.

If your friends have difficulty understanding the case, analyze why. What facts or arguments did you omit? What parts of your presentation misled them? Your method of presentation of the case to friends will vary as you go along. As you continue the process, your approach to the oral argument—and perhaps to your brief—will emerge.

§ 6:5  Preparing the Draft Statement of Facts

The statement of facts, usually one of the first things to appear in the brief, is one of the last things to be prepared. Until you know the arguments you want to make, you will not know which facts to state or the best way to state them. Moreover, if you prepare a statement of facts first you risk including many that will be irrelevant to the arguments you will finally use. Perhaps, even more seriously, you risk omitting facts you thought irrelevant before formulating your arguments. Of course, you must always keep in mind the facts from which you can draw favorable legal conclusions.

§ 6:5.1  Formulating the Questions Involved

Some appellate courts require an appellant (and sometimes an appellee) to list the questions involved. You should comply with this requirement, although appellate courts may differ on the stringency with which they enforce it. Even if it would be improper in your jurisdiction to set forth the questions involved, much time should be spent in drafting them. It will sharpen your thinking and permit you to write a better organized brief, as well as aid you in oral argument, though no one may ever see your drafts. Once you clearly state what the issues are in the case, you will know which of the many facts involved in your case are really relevant to the issues presented. And how the issue is presented, how it is verbally
couched, may be important to the outcome of your case. If a case is worth appealing, you frequently can and should state each issue as a question to which there can be only one answer—the one favorable to you. In other words, the question should be so phrased that to ask it is to answer it.

This is far easier said than done. It is not always possible to so state the issue, particularly if it is a complex one turning upon interpretation of the evidence. But in any event, the issues should be phrased in terms of the facts of the case. The U.S. Supreme Court Rule is a wise one, and should be followed by appellate attorneys generally:

[The petition should contain:] The questions presented for review expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. . . . The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.3

In formulating your questions, keep them as short and simple as possible. A question that runs for half a page is likely to be more confusing than edifying. If it must be long, break it up into several components. If the question must have several components, break them up by introductory letters ([a], [b], etc.).4

Try to make the question build. If you think you can ask a question that will yield the answer you want even without certain facts in the picture, ask the question without including such facts, and add to it "especially when [here adding the facts that make your case an a fortiori one]." But be careful not to overstate your case in the questions presented. Stick to the crucial operative facts that are not in dispute. If facts are in dispute, and if they are crucial facts, don’t gloss over them.

An example of how not to formulate the questions presented may be found in a petition for certiorari filed some years ago in the Supreme Court. This was the list of questions presented:

(1) Whether the forum in which enforcement of a foreign judgment is sought must weigh due process considerations as a prerequisite for affording the aforesaid judgment full faith and credit, where the party against whom enforcement is sought raises that substantial constitutional issue.

3. SUP. CT. R. 14.1[a], dealing with questions presented in a petition for certiorari. Questions presented in a jurisdictional statement are subject to the same requirements. SUP. CT. R. 18.3.

4. For an example of this form of statement of questions, see Appendix C2, infra.
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(2) Whether a judgment rendered by the Superior Court of Puerto Rico against a citizen of New York which was fraudulently secured is entitled to full faith and credit.

(3) Whether the Puerto Rican tribunal had in personam jurisdiction over the petitioner sufficient to afford its judgment full faith and credit.

Such questions completely ignore the wise requirement that they be “expressed concisely in relation to the circumstances of the case.” They tell the court nothing except that a Puerto Rican judgment was enforced against a New Yorker. “Due process considerations” are mentioned. What are they? How did they arise? Why is that issue substantial? What was the “fraud” used in Puerto Rico? The questions merely give rise to other questions and fail to tell the court the legal issues involved. In addition, the reader cannot tell whether the judgment was for violation of a criminal law, for specific performance, for damages (based on what?), or to enforce gambling debts (it was indeed the last). The Supreme Court denied certiorari.

Nothing can be more disastrous to an appellate advocate than to write a brief addressed to issues that are not present in the case. One appellate judge has said that more than 75% of the briefs he read were not addressed to the issues, and thus were not at all helpful to the appellate courts.

Your questions presented should cover the major issue determinative of the case. Do not list every legal question you may discuss in your brief, or every legal theory. If you state the questions in terms of the facts of the case, the legal theories should flow inexorably therefrom. Subsidiary issues should not be stated; they are implicit in the major issues.

As you revise your brief, as the legal issues emerge more clearly, you will find yourself revising the questions presented. It is good practice to spend much time on the initial draft of the questions presented and then to leave their polishing for the last part of the brief preparation, to be revised in the light of the changes in the legal arguments. But it is essential to delineate the issues at the outset, so you know the problems to tackle in your brief and so you will be able to select the relevant facts for your statement of facts.

If practice in your jurisdiction does not permit you to list the questions involved, the appellate court will read the briefs without prior knowledge of the issues involved, unless your court hears oral argument before reading the briefs. It is therefore important to indicate what the legal issues are at the outset of, or prior to, the statement of facts. Otherwise, the statement of facts will have little significance to the court until the argument is read. Try to give the court, in one brief sentence, some idea of the basic issues involved. Generally, the
one-sentence statement of what the court held below will suffice. But, without distortion, state this in a way designed to show the correctness of your position if you represent the appellant, or the correctness of the decision below if you represent the appellee.

§ 6:5.2 Organizing the Statement of Facts

I cannot overstress the importance of the way the facts are stated and of the judicious selection of which facts to state. Occasionally, one sees how appellate judges muster the facts in such a way as to influence the sympathies of the reader.

An illustration of the different ways facts are stated by the majority and dissenters in an appellate court appears in *Schneider v. Rusk*.\(^5\) The sole issue was the constitutionality of a federal law that provided that a naturalized citizen, unlike a native-born citizen, loses nationality by having a continuous residence abroad for three years. Said the majority:

Appellant, a German national by birth, came to this country with her parents when a small child, acquired derivative American citizenship at the age of 16 through her mother, and, after graduating from Smith College, went abroad for postgraduate work. In 1956 while in France she became engaged to a German national, returned here briefly, and departed for Germany, where she married and where she has resided ever since. Since her marriage she has returned to this country on two occasions for visits. Her husband is a lawyer in Cologne where appellant has been living. Two of her four sons, born in Germany, are dual nationals, having acquired American citizenship under § 301(a)(7) of the 1952 Act. The American citizenship of the other two turns on this case. In 1959 the United States denied her a passport, the State Department certifying that she had lost her American citizenship under § 352(a)(1), quoted above. Appellant sued for a declaratory judgment that she still is an American citizen. The District Court held against her. . . .\(^6\)

Note the appealing nature of this formulation. She went abroad initially only for postgraduate work; she really grew up as an American. Obviously she lived in Germany because she married a German. She did return for visits. The American citizenship of two boys turns on the case. But how do the dissenters handle the statement of facts?

\(^{5}\) *Schneider v. Rusk*, 377 U.S. 163 (1964).

\(^{6}\) *Id.* at 164.
The appellant, a derivative citizen since 1950, has voluntarily absented herself from the United States for over a decade, living in her native Germany for the last eight years. In 1956 she married a German citizen there; she has since borne four (German national) sons there, and now says she has no intention to return to the United States.\footnote{Id. at 169.}

It is obvious from reading the dissent that this woman cares little about her American citizenship, and nothing about the United States. Sympathy for her is immediately lost. The dissent stressed her absence from the United States for over a decade, a fact not easily ascertainable from the majority opinion. Further, the dissent, assuming that the statute was constitutional, presumed that all four sons were German. The dissent mentioned that the woman had no intention to return to the United States [a fact missing from the majority statement], just as the dissent ignored the marital relationship as the reason for her remaining abroad. And note that none of these facts were relevant to the constitutionality of the statute on its face.

In another case where the facts were crucial, the same opinion writers again gave differently stressed versions. In \textit{Gallegos v. Colorado},\footnote{Gallegos v. Colorado, 370 U.S. 49 (1962).} pre-dating the \textit{Miranda} decision,\footnote{Miranda v. Arizona, 384 U.S. 436 (1966).} the only issue was whether the confession of Robert Gallegos, a fourteen-year-old, was obtained in violation of due process. The majority stated the facts this way:

Petitioner, a child of 14, and another juvenile followed an elderly man to a hotel, got into his room on a ruse, assaulted him, overpowered him, stole $13 from his pockets, and fled. All this happened on December 20, 1958. Petitioner was picked up by the police on January 1, 1959, and immediately admitted the assault and robbery. At that time, however, the victim of the robbery was still alive, though hospitalized. He died on January 26, 1959, and forthwith an information charging first degree murder was returned against petitioner. A jury found him guilty, the crucial evidence introduced at the trial being a formal confession which he signed on January 7, 1959, after he had been held for five days during which time he saw no lawyer, parent, or other friendly adult. The Supreme Court of Colorado affirmed the judgment of conviction. 145 Colo. 53, 358 P.2d. 1028. We granted the petition for certiorari, 368 U.S. 815.

After petitioner’s arrest on January 1, the following events took place. His mother tried to see him on Friday, January 2, but permission was denied, the reason given being that visiting hours

were from 7 P.M. to 8 P.M. on Monday and Thursday. From January 1 through January 7, petitioner was in Juvenile Hall, where he was kept in security, though he was allowed to eat with the other inmates. He was examined by the police in Juvenile Hall on January 2, and made a confession which an officer recorded in longhand. On January 3, 1959, a complaint was filed against him in the Juvenile Court by the investigating detectives.

The State in its brief calls this preliminary procedure in Juvenile Hall being “booked in.” As noted, petitioner signed a full and formal confession on January 7. The trial in the Juvenile Court took place January 16 on a petition dated January 13 containing a charge of “assault to injure.” He was committed to the State Industrial School for an indeterminate period. Thereafter, as noted above, the victim of the robbery died and the murder trial was held.

On reading this opinion, one is immediately outraged at what happened below. The mother was denied permission to see the boy for an obviously spurious reason. The boy was kept “in security.” The boy was fairly rushed to trial. He saw no friendly adult face during the five days preceding the formal confession. All the boy did was to commit an assault during a $13 robbery.

But the dissent gave a different version of the facts. Said the dissenters:

The record through the testimony of Officer Chism, a special juvenile officer, shows that on Thursday evening, January 1, he was investigating the assault on Mr. Smith, an 80-year-old man, when he noticed three boys who appeared to fit the description furnished him of the ones involved. The three, who were sitting on the curb outside of Dutchman’s Inn, were the Gallegos brothers: petitioner Robert (14), Charles (12), and Richard (8). The officer, who was alone and in street clothes, stopped his car across the street from the Inn. He approached the boys, told them he was a police officer, and asked them to come over and sit in his car. They did so and the officer asked them about the Smith assault. Richard orally confessed, and the petitioner “admitted he had a part in it.” Officer Chism then took the boys to Juvenile Hall where the petitioner again admitted his participation, as did his youngest brother, Richard. Both stated that the third brother, Charles, had nothing to do with the matter, but that their cousin, Eddie Martinez, had accompanied them. Charles, having been cleared of any involvement in the assault, was taken home that very evening by Officer Chism, who told Mrs. Gallegos that the petitioner and Richard were being held at Juvenile Hall and that visiting hours were on Monday and Thursday evenings. He also informed her of her sons’ right to counsel.
The next evening January 2, Officer Chism talked to the petitioner, Richard, and Martinez, who by this time was also at Juvenile Hall. As the officer took notes, petitioner again described his participation in the assault on Mr. Smith in the following manner as narrated by Officer Chism at the trial:

[After his participation in an assault on a Mr. Kruhd,] he proceeded down to 8th and Curtis Street where he was shining shoes. . . . [U]pon seeing an old man, who was later identified as Robert F. Smith, he followed him to a hotel on 18th street . . . . [H]e . . . . was with his younger brother Richard, and one Eddie Martinez . . . . They followed the old man to the hotel and Richard stayed downstairs and watched out for cops. He and Eddie went upstairs and they lost track of the old man; they asked several if they had seen his grandfather come in, that he had just come in and was drunk . . . [and] a man told . . . [them] he just went down the hallway, and upon knocking on the door a man opened the door and he told him he was looking for his grandfather, that he was drunk, and the man told him the old man next door had just come in. He said upon knocking on the other door someone told him to come in, that he opened the door and he seen it was the man he was looking for. . . . [A]t that time Eddie Martinez asked the old man for a drink of water and when the old man brought the water Eddie grabbed him and he, Robert, hit the old man about the head and face with a shoe brush; that when the old man fell to the floor he took a knife and held it to the old man's throat and took his billfold out of his back pocket. . . . [T]hey all left then and went to the Twenty-third Street Viaduct where he gave Eddie $3.00 and he kept $10.00 to split between him and Richard and then they went home. . . .

That same evening, January 2, at 11:30 p.m., Mrs. Gallegos attempted to visit her two sons at Juvenile Hall but was again informed that visiting hours were 7 p.m. to 8 p.m. on Mondays and Thursdays. At the trial she testified that she made no effort to see her sons on the next visiting day, which was Monday, but waited until Thursday, January 8.

The record shows that on January 3 the officer filed in the juvenile court a detailed report of the arrest and petitioner’s confessions together with a petition charging petitioner with juvenile delinquency. This was supplemented on the 5th by the report of the Kruhd assault and Kruhd’s identification of petitioner and the other boys. The officer followed, as he was obliged to do, the juvenile court law of Colorado which provides for commitment in Juvenile Hall, report to the juvenile judge who supervises the Hall and its inmates, and the filing of a delinquency petition.
For the first few days at Juvenile Hall petitioner was placed in "security," which meant that he did not participate in the school program. The uncontradicted testimony of the Hall Superintendent was that the decision to keep the petitioner out of the program was made by his unit supervisor in order to size up the boy, who had been charged with a serious crime, before placing him in the regular activities with the others. During this time he had all his meals with the other boys and conversed with his younger brother who was held in another ward. Although the petitioner did not testify at the trial in the presence of the jury, he admitted at a hearing held to determine the admissibility of the formal confession that he was only questioned three times between January 1 and January 7 and that no threats or physical coercion was used at any time.

On January 7 the police department sent a man over to formalize the earlier confessions. Officer Miller, who took the confession, testified that he told petitioner of the possibility of a murder charge, warned him that he did not have to make a statement, and told him that he could have his parents and an attorney present if he desired. Petitioner indicated that he did not so desire, and a formal confession was taken which was substantially identical to the statement given on January 2, as related by Officer Chism in his testimony. The confession was typed, and Officer Chism took it over to Juvenile Hall for petitioner to sign. He testified that petitioner read it aloud before signing it. Above his signature was the admission that the confession was made voluntarily and upon warning that it could be used against him.

On January 16 the three assailants were committed to the Industrial School by the juvenile court. Upon the death of Mr. Smith, petitioner on information was tried for murder. As noted above, the evidence included testimony of his admissions upon arrest and his confession on January 2, as well as the formal confession of January 7.

Note the different impression that this statement of the facts gives. The impartiality of the police in clearing other possible participants in the crime is shown. The dissent mentions that the police informed the mother of the boy’s right to counsel. The crime is narrated in ghastly detail. True, the mother was turned away from the jail. But this was only because she did not come during visiting hours; she made no further effort to see her boy. True, the boy was "in security," but all that this meant was that he did not participate in the school program, for good reason. He was not threatened or coerced at any time. He was adequately warned that he might face a murder charge and indicated that he did not want his parents or an attorney present. His confession was obviously voluntary, and the jury passed upon it, as well as the
trial judges. One is tempted to ask, what more could the police and court have done?

In writing your statement of facts, try to make any reasonable person conclude therefrom that there is only one result that can follow—the one you desire. What the opinion writers did in the cases above was not merely recite the facts, but recite them in such a way that they enlist the sympathies of the reader; not merely marshal the facts, but marshal them in such a way that they pointed inexorably to only one resolution of the legal problems, the one the writer desired.

One of New York’s most distinguished jurists referred to appellate work, only half-jocularly, as the art of “judicial seduction.” The very first instance of this “seduction” is in the statement of facts.

To some extent, the examples of the Supreme Court decisions listed above may be misleading. For while a judge can ignore all facts except those upon which he wishes to seize, the brief-writer cannot do this with any degree of safety. For if you leave out relevant facts that are unfavorable to you, the judge, upon seeing the adverse facts in your adversary’s brief, may believe that you are hiding material facts. And this you must never do.

How, then, to present the facts so that it appears from a mere reading thereof that your client must prevail? What follows is a discussion of the varying techniques of attaining this objective.

[A] The Impropriety of Argument in the Statement of Facts

The temptation to argue in your statement of facts is always great. Never succumb to it. Your statement of facts should be as dispassionate and objective as you can make it. If one word of argument creeps in, even a word such as “nevertheless,” delete it. The time to argue is in your argument. The art lies in letting the facts speak for themselves. To mix facts with argument at this stage makes the court wonder where fact leaves off and argument begins.

The only possible exception to the above rule is in the fortunately rare event where the lower court has made a fundamental error in its determination of facts, where the error is crystal clear and has materially skewed the result below. To state the facts as the lower court erroneously stated them would be a disservice to the appellate court; to state the facts correctly, without noting the clear conflict between the actual facts and those stated by the lower court, would run the risk of the appellate court being given a jaundiced view of your case, handicapping you at the very outset. The only way to resolve this dilemma is to note the factual conflict in as non-argumentative style as you can, making completely sure not to overstate your case in the least. An example of where this was done, by use of factual footnotes in the Statement of Facts, and the later recital of the correct facts in the
text itself, can be found in the brief that is reproduced in Appendix C4 hereto [“Lubitz v. Mehlman”]; see particularly, footnotes 2 and 5, where the lower court had relied upon a wrong exhibit and had also recited an assignment that never existed.

On rare occasions, an attorney may perform the converse of inserting argument in the statement of facts—the attorney may omit all or many of the salient facts in the statement of facts, and not refer to them until the argument part of the brief. This runs the risk that the appellate judges read the argument part of the brief without knowing the full material facts. There is no advantage in so structuring an appellant’s brief. Of course, some of the relevant facts may appear in the argument (and indeed some of them must appear), but there is no conceivable benefit from omitting material facts from your statement of facts. On the contrary, it makes the brief seems disorganized and written in haste, without enough care.

[B] The Need for Accuracy in Stating the Case

Dictate the draft of your statement of facts from the abstract of record or index that you have prepared.\(^\text{10}\) Be careful; do not paraphrase, do not exaggerate the facts. Include appropriate citations to the record, even if not required in your jurisdiction, not merely to help the court find the record support for your statements, but also to help you check them later. Some distortions will sneak in, even quite unintentionally; you will have made a notation in your abstract of record, and you will probably (unconsciously or consciously) paraphrase this in your dictation, giving two opportunities for distortion.

But inaccuracies and distortions can only hurt you. Your adversary, if he is at all alert, will pounce on them. A judge or his clerk, in checking the brief against the record, will spot them. You will be embarrassed when they are raised at oral argument. And, worse still, you will quickly acquire a reputation as one whose statements of facts cannot be considered reliable. It is much better to build up a reputation for accuracy.

Rule 28(e) of the Federal Rules of Appellate Procedure requires page references to the appendix or parts of the record or transcript to support factual assertions. Counsel have been criticized for violating this rule, even by referring to hundreds of pages to support a single assertion. Such burying a needle in a haystack may amount to a violation, even though a court may elect, in the interest of justice, to search the record.\(^\text{11}\) And failure to include appropriate materials in the appendix may amount to sanctionable misconduct.\(^\text{12}\) Failure to

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10. See sections 6:2.2 and 6:2.3, supra.
12. Cruz v. Town of Cicero, Ill., 275 F.3d 579, 592 (7th Cir. 2001).
provide appendix citations means that any resulting uncertainty will be resolved against you.\footnote{13}{Alberty-Velez v. Corporacion de P.R., 361 F.3d 1 (1st Cir. 2004).} (But there is no need to cite to the record where no factual record exists.)\footnote{14}{Hunter v. Underwood, 362 F.3d 468 (8th Cir. 2004).}

An appellant’s failure to comply with the rules in one or more substantial respects deprives the appellate court of the basic tools it needs. The brief must provide the necessary case law and a reasoned analysis to support its theories, or the appeal may be dismissed with prejudice.\footnote{15}{Rodriguez-Machado v. Shinseki, 700 F.3d 48 (1st Cir. 2012).} Even a pro se appellant may be so dismissed when noncompliance is so fundamental that it prevents the court from engaging in meaningful review.\footnote{16}{Davison v. Huntington Ingalls, Inc., 712 F.3d 884 (5th Cir. 2013).}

\section*{[C] The Legal Posture}

One source of poor organization of the statement of facts is a failure to appreciate the appellate court’s scope of review. Thus, if you are in a court that has jurisdiction to review law but not facts, it is senseless to review the evidence pro and con (unless you can establish that there was no substantial evidence to support the factual findings, itself perhaps a legal issue). In such a situation, the facts are those as found by the triers of the facts; if a general jury verdict was rendered, the usual rule is that all facts were found in favor of the prevailing party. Yet many attorneys in such a situation make the mistake of reviewing the evidence pro and con, generally hoping to win sympathy. However, this wins nothing but the annoyance of appellate judges. Even if to do otherwise is to leave you with an unsympathetic factual picture, make the best of it. If it is too unsympathetic, settle the case or drop your appeal.

If you can make your case on the basis of uncontradicted testimony and/or unquestioned documentary proof, you can bypass the theory that all disputed facts were resolved against you. And when appellee opines that all factual issues were resolved against you, your reply can be that you are only relying on unquestioned and unquestionable items of evidence.

Do not accept at face value a concession on a matter of law by your adversary; but research and brief the issue nonetheless, for such a concession need not be accepted by the court, at least where it is likely to affect a number of cases in its jurisdiction.\footnote{17}{Deen v. Darosa, 414 F.3d 731 (7th Cir. 2005).}

The appellate attorney must consider, in addition to the jurisdictional limits upon the appellate court, the standard of review to be exercised in the particular case before it, sometimes to be found in the
relevant statute. Can the appellate court reverse only for a mistake of law? Will the determination below be upheld if there was substantial evidence to support it, even if it seems contrary to the evidence?\textsuperscript{18} May it be upheld if it was discretionary, so long as there was no abuse of discretion, and it was not arbitrary or capricious?\textsuperscript{19} Must the decision below be clearly erroneous to be reversible? Did the proof below have to be beyond a reasonable doubt, by a mere preponderance of the evidence, by clear and convincing evidence, or what? And, of course, you will usually have to show that the alleged error below was prejudicial to your client. Your local procedures may require that you set forth the appropriate standard of review, as in federal cases.

[D] Standards of Appellate Review

The 1998 Federal Rules of Appellate Procedure, by requiring that appellant’s briefs must contain, within the argument, for each issue, a concise statement of the applicable standard of review,\textsuperscript{20} precipitated a plethora of opinions on standards of review in different settings. While the same standard of review may be interpreted differently in different circuits, the tremendous range of different standards makes knowledge of the applicable standard an essential tool of advising a client on the viability of his appeal, as well as for formulating the argument to be presented to the appellate court. But a mere failure to recite the proper standard of review does not constitute waiver of a properly raised merits issue.\textsuperscript{21}

The area of federal constitutional law has evoked multiple standards of review for different situational contexts. A recent pronouncement by the Supreme Court on how to evaluate a law respecting the

\begin{itemize}
\item \textsuperscript{18} Such is the rule in New York when reviewing an agency decision; N.Y. C.P.L.R. 7803.
\item \textsuperscript{19} Another standard of review of agency decision in New York under N.Y. C.P.L.R. 7803. \textit{See also} section 4:3.3, \textit{supra}. The Supreme Court has recently held that the standard of review of an administrative agency action is whether it is arbitrary or capricious; the agency must examine the relevant data and articulate a satisfactory explanation for its action, even when an agency reverses course. FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).
\item \textsuperscript{20} \textsc{Fed. R. App. P.} 28(a)(9)(B) provides that this may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues.
\item \textsuperscript{21} Mejia v. Ashcroft, 298 F.3d 873 [9th Cir. 2002]. And the Ninth Circuit has also held that despite the government’s failure to brief the issue, the deferential standard of review under the Anti-Terrorism and Effective Death Penalty Act cannot be waived. Hernandez v. Holland, 750 F.3d 843 [9th Cir. 2014]. \textit{But cf.} Long v. Teachers’ Ret. Sys. of Ill., 585 F.3d 344 [7th Cir. 2009] (failure to identify the proper standard of review or legal standard involved, without appropriate citation to the record or making no statement as to what was error, is waiver of argument).
\end{itemize}
right to vote as against a facial attack is to be found in *Crawford v. Marion County Election Board*. The problems of the nascent field of appellate review of detained enemy combatants are just beginning to proliferate. The appellate attorney seeking review of an order or judgment of a specialized court must also consider whether the appellate court has jurisdiction to review the issue in question. Where a regulatory scheme neither implicates a fundamental right nor creates a suspect classification, rational basis review applies.

The Supreme Court has recently enunciated a standard of review for a motion to dismiss under Rule 12(b)(6). The complaint must state enough facts so that, if assumed to be true, the plaintiff plausibly, not just speculatively, has a claim for relief. Perhaps this may make it easier for the courts to deal with many sincere complaints that, while obviously frivolous or delusional, might otherwise be unassailable.

[D][1] **Categories for Determining Standard of Review; the Clear-Error Rule**

Traditionally, decisions by judges are divided into three categories: questions of law (reviewable de novo), questions of fact (reviewable for clear error), and discretionary matters (reviewable for abuse of discretion). But these distinctions have begun to blur, in practice, presenting

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23.1. See, e.g., *Middleton v. Shinseki*, 743 F.3d 1356 (Fed. Cir. 2013) [the reviewing court ruling that it lacked jurisdiction to review the Veterans Court application of the regulations to the facts]. For discussion of reviewability of issues in immigration cases, see *Ortega v. Holder*, 736 F.3d 637 (1st Cir. 2013); *Hernandez v. Holder*, 736 F.3d 234 (2d Cir. 2013); *Munis v. Holder*, 720 F.3d 1293 (10th Cir. 2013).


difficult choices to appellate courts, and frequently resulting in an amalgam of tests. Thus, a district court’s grant or denial of a habeas corpus petition will be reviewed de novo, but its underlying finding of facts will be reviewed for clear error, a test used as well in patent cases, contempt cases, and immigration cases, as well as when the appellant has invited the error complained of, and in cases involving the interpretation of a consent decree. Similarly, the appellate court may not review a conclusion that issues of fact are genuine, but can review the conclusion that an issue of fact is material. And a district court reviews a magistrate judge’s ruling denying a motion to stay litigation and compel arbitration under a clearly erroneous or contrary-to-law standard. The proper standard of review depends on the character of the ruling sought to be reviewed, and sometimes different standards, such as a review for clear error and for abuse of discretion, may be similar or even identical in the amount of leeway they

26. For a discussion of rationales to be employed in solving appellate dilemmas, see Harman v. Apfel, 211 F.3d 1172 (9th Cir. 2000).
27. Arreguin v. Prunty, 208 F.3d 835 (9th Cir. 2000); Seymour v. Walker, 224 F.3d 542 (6th Cir. 2000); Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009). But cf. Teleguz v. Pearson, 689 F.3d 322 (4th Cir. 2012) [district court’s denial of habeas reviewed de novo and its decision not to grant an evidentiary hearing for abuse of discretion, which includes basing the decision on an error of law].
30. Lim v. INS, 224 F.3d 929 (9th Cir. 2000). And there is no appellate jurisdiction to review an immigration judge’s factual findings under the Real ID Act. Ramadan v. Gonzales, 479 F.3d 646 (9th Cir. 2005). But the Third Circuit, in partial reliance on a Seventh Circuit ruling, has reviewed and remanded to the Board of Immigration Appeals because its opinion denying a motion to reopen a removal proceeding did not reflect meaningful consideration of much of the evidence submitted in support of the motion, the appellate court applying the standard of abuse of discretion, deferentially. Fei Yan Zhu v. Attorney Gen. U.S., 744 F.3d 268 (3d Cir. 2014). The Eighth Circuit achieved an opposite result while noting that while it cannot review the decision to grant cancellation of removal, it does have jurisdiction to review constitutional claims or questions of law, and then determining that there was no error. Zeah v. Holder, 744 F.3d 577 (8th Cir. 2014).
31. Ark. State Highway Comm’n v. Ark. River Co., 271 F.3d 753 (8th Cir. 2001). But when a party simply cross-examines a witness to counter evidence already admitted, the error is not invited. Elsayed Mukhtar v. Cal. State Univ., 299 F.3d 1053 (9th Cir. 2002). See also section 3:5, supra, note 86.
33. Reyes v. City of Richmond, Tex., 287 F.3d 346 (5th Cir. 2002).
34. PowerShare, Inc. v. Syntel, Inc., 597 F.3d 10 (1st Cir. 2010).
34.1. Meritage Homes of Nevada, Inc. v. FDIC, 753 F.3d 819 (9th Cir. 2014).
give the district judge.\textsuperscript{35} And while the Ninth Circuit has ruled that it reviews the district court’s decision on appeal from a bankruptcy court de novo, it is also stated that it reviews findings of fact for clear error, but reviews conclusions of law and mixed questions of fact and law de novo, as well as whether a claim is nondischargeable.\textsuperscript{36}

Clear error exists if, based on the whole record, the appellate court is left with a firm conviction that the district court has made a mistake.\textsuperscript{37} The district court’s determination of credibility is reviewed for clear error, which means that the district court’s findings must be implausible.\textsuperscript{38} In the Tenth Circuit, plain-error review was further made more difficult, because it was limited to errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings,\textsuperscript{39} a requirement recently approved by the Supreme Court.\textsuperscript{40} Yet the Tenth Circuit thereafter reversed a conviction after an FBI agent testified as an expert on the defendant’s credibility, in the light of the relative weakness of the government’s overall case, using this very limitation on which to base its ruling of plain error.\textsuperscript{40.1} On direct appeal in a federal court, the credibility findings of the trial court in a *Batson* inquiry (as to racial discrimination in a jury selection case) are reviewed for clear error, while state court factual findings are presumed correct, and the defendant has the burden of rebuttal by clear and convincing evidence.\textsuperscript{41} However, to the extent that an

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\item \textsuperscript{35} Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305 [7th Cir. 2002].
\item \textsuperscript{36} In re Hamada, 291 F.3d 645 [9th Cir. 2002].
\item \textsuperscript{38} Smith v. United States, 293 F.3d 984 [7th Cir. 2002].
\item \textsuperscript{39} Dilley v. Supervalu, Inc., 296 F.3d 958 [10th Cir. 2002].
\item \textsuperscript{40} Henderson v. United States, 133 S. Ct. 1121 [2013].
\item \textsuperscript{40.1} United States v. Hill, 749 F.3d 1250 [10th Cir. 2014].
\item \textsuperscript{41} Rice v. Collins, 546 U.S. 333 [2006].
\end{itemize}
evidentiary issue turns on the interpretation of a Federal Rule of Evidence, review is plenary.\textsuperscript{42} When appellants fail to preserve an issue as to incorrect jury instructions, they will only be reviewed for plain error,\textsuperscript{43} except when a solid wall of authority in that circuit would have rendered an objection futile.\textsuperscript{44} But four circuits preclude appellate review altogether if a party fails to move for a new trial or challenge a damage award at trial.\textsuperscript{45} The majority rule is that when a district court has not been asked to set aside a guilty plea, appellate review of the conviction is for plain error.\textsuperscript{46} Plain error is the standard of review for an unpreserved challenge to an appeal waiver.\textsuperscript{46.1}

There is confusion existing under the plain-error rule as applied to criminal cases, well manifested in the majority and minority encyclopedic opinions in a recent Supreme Court case.\textsuperscript{47} And there is disagreement in the circuits as to whether sentencing judges should be required to solicit objections after imposing sentence, and as to whether, if a proper objection is not made after sentence, review of the sentence will be only for plain error.\textsuperscript{48}

There is a conflict between the Sixth and Seventh Circuits as to the scope of review of sentences within the range recommended by the U.S. Sentencing Guidelines.\textsuperscript{49} The guiding principle is that the court of appeals must review all sentences under a deferential abuse of discretion standard to determine if the sentencing decision is reasonable, with the Guidelines being the starting point.\textsuperscript{50}

The Fifth Circuit has recently noted that it reviews properly preserved objections to conditions of supervised release for abuse of discretion, but uses the plain error standard of review when a party fails to raise a claim of error with sufficient specifically in the court

\begin{footnotesize}
\begin{enumerate}
\item[42.] Forrest v. Beloit Corp., 424 F.3d 344 (3d Cir. 2005).
\item[43.] Cozzo v. Tangipahoa Parish Council, 279 F.3d 273, 293 (5th Cir. 2002); Kight v. Auto Zone, Inc., 494 F.3d 727 (8th Cir. 2007) (further limiting reversal to avoiding a miscarriage of justice).
\item[44.] Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002).
\item[45.] Crowley v. CCAIR, Inc., 98 F. App’x 930 (4th Cir. 2004).
\item[46.] United States v. Driver, 242 F.3d 767 (7th Cir. 2001).
\item[46.1.] United States v. Cook, 722 F.3d 477 (2d Cir. 2013).
\item[47.] United States v. Marcus, 560 U.S. 258 (2010), dealing with the standard of review of unpreserved error.
\item[48.] United States v. Steele, 603 F.3d 803 (10th Cir. 2010).
\item[49.] United States v. Gammiechia, 498 F.3d 467 (7th Cir. 2007); United States v. Thomas, 2007 WL 1224032 (6th Cir. Apr. 25, 2007); United States v. Smith, 549 F.3d 355 (6th Cir. 2008).
\item[50.] Gall v. United States, 552 U.S. 38 (2007); United States v. Greenough, 669 F.3d 567 (5th Cir. 2012).
\end{enumerate}
\end{footnotesize}
below, unless the party made its position clear below and to have objected would have been futile.\footnote{50.1}

The Sixth Circuit, after what a dissenter termed its “tangled case law” on sentencing,\footnote{51} reversed a district court sentence “on the admittedly unfair ground of insufficient clairvoyance” in not having foreseen a Supreme Court decision that the district court had the authority to vary categorically from the crack-cocaine guidelines in choosing the sentence, when the substance of this idea was conveyed to the district court. This problem was laid to rest when the Supreme Court ruled that an error is plain so long as it was plain at the time of appellate review.\footnote{52}

There is a conflict in the circuits over the proper standard for evaluating harmless error in reviewing a capital habeas corpus case when the state courts did not perform harmless-error analysis.\footnote{53} There is also a conflict in the circuits as to the proper standard of review in ERISA cases.\footnote{54} Obviously, if an error was harmless, there is no basis for appeal because of such error. A litigant, to have standing to appeal, must demonstrate injury caused by the judgment below rather then by

\footnote{50.1. United States v. Salazar, 743 F.3d 445 (5th Cir. 2014).

51. United States v. Priester, 646 F.3d 950 (6th Cir. 2011). For other relevant Sixth Circuit cases regarding sentencing, see United States v. McFalls, 675 F.3d 599 (6th Cir. 2012); United States v. Corp, 668 F.3d 379 (6th Cir. 2012); United States v. Walker, 649 F.3d 511 (6th Cir. 2011). For a thorough discussion of the Fifth Circuit approach to review of sentencing issues, see United States v. Teel, 691 F.3d 578 (5th Cir. 2012).


53. Allen v. Woodford, 366 F.3d 823 (9th Cir. 2004).

54. See section 1:8.3, supra, and the briefs reproduced in Appendix C8. The Second Circuit adhered to its rigid standard of review, that even when an insurance company is the adjudicator of its own liability, the courts should grant deference to its determination, upholding it unless an abuse of discretion—defined as being arbitrary and unreasonable—is shown. Flanagan v. First Unum Life Ins., 170 F. App’x 182 (2d Cir. 2006). In an attempt to clarify this problem, the Supreme Court has recently set a standard that is likely to provoke even more litigation in this area, ruling that, when an insurance company is both the decider and the payor, this creates a conflict of interest that a reviewing court should consider as a factor in determining whether the plan administrator had abused its discretion in denying benefits, and that the significance of this factor will depend upon the circumstances of the particular case. Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008). But cf. Menz v. Procter & Gamble Health Care Plan, 520 F.3d 865 (8th Cir. 2008) [when administrator has discretion, a less [unspecified] deferential standard of review may be warranted if the insured shows that a serious procedural irregularity existed that caused a serious breach of the plan trustee’s fiduciary duty]. The Eighth Circuit, using a substantial evidence test, adheres to this standard, as long as the procedural irregularities had no connection to the substantive decision reached. Wade v. Aetna Life Ins. Co., 684 F.3d 1360 (8th Cir. 2012).}
the underlying facts. The determination of what error is harmless can be complex, as in cases of evidentiary rulings and so-called *Blakely* errors. Harmless error analysis does not apply to a *Batson* challenge, nor to found judicial bias, where reversal is automatic. The Supreme Court has characterized as structural errors a very limited class of errors that trigger automatic reversal not requiring a showing of prejudice, because they undermine the fairness of a criminal proceeding as a whole, including denial of counsel of choice, of self-representation, or of a failure to convey to a jury that guilt must be proved beyond a reasonable doubt, but not a violation of the rule providing that the court must not participate in plea discussions. A non-constitutional legal error will be deemed harmless if it is highly probable that the error did not affect the judgment. Error in jury instructions does not require reversal of judgment if it was more probably than not harmless.

In a case of first impression, the government used information revealed at a proffer session when plea negotiations failed, despite its prior promise not to. Finding that the government had not shown that such error was harmless beyond a reasonable doubt, the appellate court reversed the conviction. In sentencing cases, the burden is on the government to convincingly demonstrate that the district court would have imposed the same sentence absent the purported error, and for the same reasons.

A split in the circuits as to when the error must have been plain was resolved by the Supreme Court, holding that an error is plain so long as it was plain at the time of appellate review. But the high Court, in the same opinion, also ruled that the error must have affected the appellant’s substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings.

55. *Tachione v. United States*, 386 F.3d 205 (2d Cir. 2004).
56. For an analysis of harmless evidentiary error, see *Beck v. Haik*, 377 F.3d 624 (6th Cir. 2004).
60. *FED. R. CRIM. P. 11*.
63. *Head v. Glacier Nw., Inc.*, 413 F.3d 1053 (9th Cir. 2005).
64. *United States v. Martinez-Flores*, 720 F.3d 293 (5th Cir. 2013).
The Ninth Circuit has ruled that the proper standard of review of the district court’s findings of fact on a nationality claim is for clear error.\textsuperscript{66}

[D][2] De Novo

The broadest standard of review is a de novo review, applying the same standards that the district court was obliged to follow. This standard of review is used in employment discrimination cases determined on summary judgment motions,\textsuperscript{67} in decisions on qualified immunity,\textsuperscript{68} and sovereign immunity,\textsuperscript{69} in reviewing district court determinations of questions of law in interpreting an underlying statute,\textsuperscript{70} in reviewing the text of an ERISA plan including whether the plan’s terms are ambiguous,\textsuperscript{71} in determining whether a district court correctly applied the appellate court’s mandate,\textsuperscript{72} in reviewing issues of standing,\textsuperscript{73} or ripeness,\textsuperscript{74} and an agency’s construction of a statute that the agency administers,\textsuperscript{75} or the dismissal of a complaint because of failure to exhaust administrative remedies,\textsuperscript{76} in reviewing orders denying or compelling arbitration,\textsuperscript{77} in reviewing the trial court’s application of the doctrine of issue preclusion,\textsuperscript{78} and in determining whether the

\begin{itemize}
\item \textsuperscript{66} Mondaca-Vega \textit{v.} Holder, 718 F.3d 1075 (9th Cir. 2013).
\item \textsuperscript{67} Carlton \textit{v.} Mystic Transp., Inc., 202 F.3d 129, 133 (2d Cir. 2000); Figueroa \textit{v.} Blackburn, 208 F.3d 435 (3d Cir. 2000); Munoz \textit{v.} St. Mary-Corwin Hosp., 221 F.3d 1160 (10th Cir. 2000).
\item \textsuperscript{68} Fancher \textit{v.} Barrientes, 723 F.3d 1191 (10th Cir. 2013); Holloway \textit{v.} Reeves, 277 F.3d 1035 (8th Cir. 2002); Hamilton \textit{v.} Myers, 281 F.3d 520, 530 (6th Cir. 2002); Poe \textit{v.} Leonard, 282 F.3d 123 (2d Cir. 2002); Keenan \textit{v.} Tejede, 290 F.3d 252 (5th Cir. 2002). Qualified immunity questions must be resolved at the earliest possible stage. Saucier \textit{v.} Katz, 533 U.S. 194 (2001).
\item \textsuperscript{69} Bistrop Paiute Tribe \textit{v.} Cnty. of Inyo, 275 F.3d 893 (9th Cir. 2002).
\item \textsuperscript{70} Walton \textit{v.} Nalco Chem. Co., 272 F.3d 13 (1st Cir. 2001); Rural Water Dist. No. 1 \textit{v.} City of Wilson, Kan., 243 F.3d 1263 (10th Cir. 2001).
\item \textsuperscript{71} Blankenship \textit{v.} Liberty Life Assurance Co. of Bos., 486 F.3d 620 (9th Cir. 2007).
\item \textsuperscript{72} Greenberg \textit{v.} Nat’l Geographic Soc’y, 488 F.3d 1331 (11th Cir. 2007).
\item \textsuperscript{73} Houston Chronicle Publ’g Co. \textit{v.} City of League City, Tex., 488 F.3d 613 (5th Cir. 2007).
\item \textsuperscript{74} Roark & Hardee LP \textit{v.} City of Austin, 522 F.3d 533 (5th Cir. 2008).
\item \textsuperscript{75} Griffiths \textit{v.} IMS, 243 F.3d 45 (1st Cir. 2001). But this review is tempered by established principles of deference to the agency. \textit{Id.} On the other hand, the District of Columbia Circuit, when reviewing an agency’s interpretation of its regulations, applies the arbitrary and capricious test, deferring to the agency’s interpretation, and determines whether substantial evidence supports its interpretation. Honeywell Int’l, Inc. \textit{v.} EPA, 372 F.3d 441 (D.C. Cir. 2013).
\item \textsuperscript{76} McCormick \textit{v.} Waukegan Sch. Dist. No. 60, 374 F.3d 564 (7th Cir. 2004).
\item \textsuperscript{77} Ipcon Collections LLC \textit{v.} Costco Wholesale Corp., 698 F.3d 58 (2d Cir. 2012); Paper, Allied-Indus. Chem. & Energy Workers Int’l Union \textit{v.} Exxon Mobil Corp., 657 F.3d 272 (5th Cir. 2011).
\item \textsuperscript{78} Laguna Hermosa Corp. \textit{v.} United States, 671 F.3d 1284 (Fed. Cir. 2012).
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court or jury decides an issue.\textsuperscript{79} Errors of law in a jury charge may be reviewed de novo,\textsuperscript{80} but are reversed only when the charge as a whole leaves the court with substantial and ineradicable doubt as to whether the jury has been properly guided in its deliberations,\textsuperscript{81} or that, taken as a whole, they did not correctly and completely inform the jury of the applicable law.\textsuperscript{82} Query, however, whether this is different from another rule of reviewability for abuse of discretion, considering whether the instructions—taken as a whole and viewed in context of the entire trial—were misleading or confusing, inadequately guided the jury’s deliberations, or improperly intruded on the fact finding process.\textsuperscript{83} The district court’s conclusions of law in patent cases are reviewed de novo.\textsuperscript{84}

A pure issue of law is to be reviewed de novo.\textsuperscript{85} In Social Security cases, a district court’s decision to affirm, reverse or modify a

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\item \textsuperscript{79} Bristol v. Bd. of Cnty. Comm’rs of Clear Creek, 281 F.3d 1148 (10th Cir. 2002).
\item \textsuperscript{80} Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002); Jin v. Metro. Life Ins. Co., 295 F.3d 335 (2d Cir. 2002). But the Sixth Circuit would reverse a jury verdict only in situations where the instruction, viewed as a whole, is confusing, misleading and prejudicial. Argentine v. United Steelworkers, Am., AFL-CIO, 287 F.3d 476 (6th Cir. 2002). The Fifth Circuit, even if the challenger proves the instructions misguided the jury, would reverse only if the erroneous instruction affected the outcome of the case. Thomas v. Tex. Dep’t of Criminal Justice, 297 F.3d 361 (5th Cir. 2002).
\item \textsuperscript{81} Rodriguez v. Riddell Sports, Inc., 242 F.3d 567 (5th Cir. 2001); Hudson v. N.Y. City, 271 F.3d 62 (2d Cir. 2001); Sanchez-Lopez v. Fuentes-Pujols, 375 F.3d 121 (1st Cir. 2004). The First Circuit also examines the verdict forms, along with the instructions, to determine whether the issues were fairly presented to the jury. Walden v. City of Providence, R.I., 596 F.3d 38 (1st Cir. 2010).
\item \textsuperscript{82} Huff v. Sheahan, 493 F.3d 893 (7th Cir. 2007).
\item \textsuperscript{83} Gracie v. Gracie, 217 F.3d 1060 (9th Cir. 2000). The Tenth Circuit combines a de novo standard with an abuse of discretion standard—whether or not to give a particular instruction is reviewed for abuse of discretion, but the instructions themselves are given a de novo review to determine whether, as a whole, they correctly stated the governing law and provided the jury with ample understanding of the issues and applicable standards. Hynes v. Energy W., Inc., 211 F.3d 1193 (10th Cir. 2000). But the Tenth Circuit will also reverse if a jury instruction was legally erroneous and the jury might have based its verdict on the erroneous instructions. Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232 (10th Cir. 2002).
\item \textsuperscript{85} Davis v. N.Y. Hous. Auth., 278 F.3d 64, 79 (2d Cir. 2002); Walton v. Nalco Chem. Co., 272 F.3d 13 (1st Cir. 2001); Underwood Cotton v. Hyndai Merch. Marine, 288 F.3d 405, 407 (9th Cir. 2002). Thus, whether a statute of limitations justifies a dismissal is reviewed de novo by a court of appeals. Orr v. Bank of Am., NT & SA, 285 F.3d 764 (9th Cir. 2002); Michals v. Baxter Healthcare Corp., 289 F.3d 402 (6th Cir. 2002). But a district court’s ruling on equitable tolling is reviewed for abuse of discretion (Chao v.
determination of the Social Security Administration, or to remand a case to the commissioner, is reviewed de novo;\footnote{Harman v. Apfel, 211 F.3d 1172 (9th Cir. 2000).} but what is determined in the Ninth Circuit is whether the administrative decision should be reversed on the ground that it is arbitrary, capricious, an abuse of discretion, or contrary to law;\footnote{Id.} or—in the Sixth Circuit—whether it is supported by substantial evidence and was made pursuant to proper legal standards.\footnote{Cole v. Astrue, 661 F.3d 931 (6th Cir. 2011).}

A similar standard of review is used in cases involving the U.S. Department of Veterans Affairs, including its treatment of its employees—whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;\footnote{Ford-Clifton v. Dep’t of Veterans Affairs, 661 F.3d 655 (Fed. Cir. 2011).} obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence.\footnote{Ford-Clifton v. Dep’t of Veterans Affairs, 661 F.3d 655 (Fed. Cir. 2011).} The substantial evidence rule is also used to review factual decisions of the National Labor Relations Board\footnote{Nat’l Labor Relations Bd. v. Galicks, Inc., 671 F.3d 602 (6th Cir. 2012).} and the Board of Patent Appeals under the Administrative Procedure Act.\footnote{In re Baxter Int’l, Inc., 678 F.3d 1357 [Fed. Cir. 2012].}

A grant of a habeas corpus petition is reviewed for its legal conclusions de novo,\footnote{Arreguin v. Prunty, 208 F.3d 835 [9th Cir. 2000]; Seymour v. Walker, 224 F.3d 542 [6th Cir. 2000]; Cleveland v. Bradshaw, 693 F.3d 626 [6th Cir. 2012].} but when the government has the burden of proving that there was a basis in fact for denial of the application, review is the narrowest known to law.\footnote{The court searches the record for some affirmative evidence to support the government’s overt or implicit finding, that is, some proof incompatible with the applicant’s claims. Alhassan v. Hagee, 424 F.3d 518 [7th Cir. 2005].} In a federal collateral attack on a state conviction, an issue not addressed by the state courts will be reviewed de novo.\footnote{Harris v. Thompson, 698 F.3d 609 [7th Cir. 2012].} In reviewing a state habeas corpus proceeding, the federal appellate court will presume that the factual findings of the state courts are correct unless the petitioner presents clear and convincing evidence to the
contrary. A denial of a writ of coram nobis is reviewed de novo, but the factual findings below are upheld unless clearly erroneous.

As a question of law, a district court’s compliance with the mandate of an appellate court is reviewed de novo. A district court’s decision to grant judgment as a matter of law is reviewable de novo, as are questions of law in reviewing determinations of the Board of Immigration Appeals, of a federal district court reviewing the decision of a bankruptcy court, and dismissals based on res judicata, or collateral estoppel. Similarly, courts of appeal review de novo state law determinations of district courts, and choice of law determinations, as well as such a court’s determination that it had subject matter jurisdiction, and on whether the complaint states a claim.

94.1 Frost v. Pryor, 749 F.3d 1212 (10th Cir. 2014).
95. Pilla v. United States, 668 F.3d 368 (6th Cir. 2012).
96. United States v. Kellington, 217 F.3d 1084 (9th Cir. 2000).
97. While the Fifth Circuit subscribes to a de novo standard of review of denial of a motion for judgment as a matter of law, it will reverse only if the facts and inferences therefrom point “so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary.” Advocare Int’l LP v. Horizon Labs., Inc., 524 F.3d 679 [5th Cir. 2008] (quoting Cousin v. Trans Union Corp., 246 F.3d 359, 366 [5th Cir. 2001]). Query whether this transforms a de novo standard into an abuse of discretion standard for juries.
98. Shen v. Leo A. Daly Co., 222 F.3d 472 [8th Cir. 2000]; C&F Packing Co., Inc. v. IBP, Inc., 224 F.3d 1296 [Fed. Cir. 2000]; Lim v. INS, 224 F.3d 929 [9th Cir. 2000]. But under the relevant regulation, the BIA may review an immigration judge’s factual findings for clear error only, and it is error for the BIA to make its own de novo factual findings. Zhou Hua Zhu v. U.S. Attorney Gen., 703 F.3d 1303 [11th Cir. 2013]. There is a conflict in the circuits as to whether the BIA ruling should be accorded deference. Patel v. Napolitano, 706 F.3d 370 [4th Cir. 2013].
99. Mixed questions of law and fact are also reviewed de novo in such a review. In re ASARCO, L.L.C., 650 F.3d 593 [5th Cir. 2011].
103. Hoiles v. Alioto, 461 F.3d 1224 [10th Cir. 2006].
or granting summary judgment, or transferring a case to the Court of Federal Claims, or dismissing a complaint under the Rooker-Feldman doctrine, or determining whether there are nonfrivolous issues requiring appointment of counsel in a criminal appeal. Allegations of constitutional error are reviewed de novo. So, too, the constitutionality of punitive damage awards. And so is a ruling on mootness. Forfeiture cases are examined de novo, as is the proper measure of damages. A district court’s decision on appeal from a bankruptcy court is reviewed de novo. Whether a crime qualifies as a crime of violence is reviewable de novo. In a criminal case, a determination that the government has an important interest in trying the defendant to render him competent to stand trial through involuntary medication is reviewed de novo, though the relevant factual findings are reviewed for clear error. The review of a district court’s ruling on the sufficiency of a search warrant is de novo, but great deference is paid to the probable cause determination of the judge who issued the warrant. Denial of a motion for acquittal based on the sufficiency of evidence is reviewed de novo. Denial of intervention as of right is reviewable de novo, though denial of permissive intervention is reviewed

Cellular Partners, 412 F.3d 1247 [11th Cir. 2005] [review of decision on motion to dismiss without an evidentiary hearing is for abuse of discretion].


107. Fisherman’s Harvest, Inc. v. PBS&J, 490 F.3d 1371 [Fed. Cir. 2007].

108. Green v. Mattlin, 585 F.3d 97 [2d Cir. 2009].


110. Spretitzer v. Schomig, 219 F.3d 639 [7th Cir. 2000]. Indeed, when First Amendment rights are at issue, the appellate court has the constitutional duty to conduct an independent examination of the record as a whole. Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514 [3d Cir. 2004]. Cf. Mega Life & Health Ins. Co. v. Pieniozek, 585 F.3d 1399 [11th Cir. 2009] [denial of jury trial is reviewed with the most exacting scrutiny, indulging every reasonable presumption against waiver].

111. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424 [2001].


113. United States v. Wagoner Cnty. Real Estate, 278 F.3d 1091 [10th Cir. 2002].


115. In re Hamada, 291 F.3d 645 [9th Cir. 2002].

116. United States v. Winn, 364 F.3d 7 [1st Cir. 2004].

117. United States v. Evans, 404 F.3d 227 [4th Cir. 2005].

118. Poolaw v. Marcantel, 565 F.3d 721 [10th Cir. 2009].

119. United States v. Aciern, 579 F.3d 694 [6th Cir. 2009].
for abuse of discretion.120 The circuits are split on whether a decision of an NLRB regional director not to hold a hearing is subject to de novo or a more limited review.121 A determination that a jury returned a general verdict inconsistent with its answers to special interrogatories is a mixed question of law and fact, and, as such, is subject to plenary review.122

Though rare, an appellate court may make findings of fact when the record permits only one resolution of the factual issue.123

In a public figure libel case, the reviewing court must independently determine whether there is clear and convincing proof of actual malice.124

While review of denial of a Rule 50(b) motion based on sufficiency of the evidence normally is de novo, in a diversity case the court of appeals applies the standard of review of the state whose substantive law governs the matter.125

Overruling its past holdings that denial of attorneys fees is reviewable for abuse of discretion, the Ninth Circuit has ruled that, when such denial is because of failure to state a claim or where it altered the legal relationship of the parties, review is de novo.126 And it has also applied the de novo standard of review in affirming the decision of the Tax Court granting innocent spouse relief after the Tax Court reviewed new evidence outside the administrative record.127 And the Third Circuit will exercise plenary review of the application of legal standards on reviewing an award of legal fees.128

The U.S. Court of Appeals for the Federal Circuit recently reconsidered and upheld its standard of appellate review of district court decisions concerning the meaning and scope of patent claims (called claim construction) to be de novo—that is, review for correctness as a matter of law.128.1

In some instances, a de novo review may turn out to be extremely narrow. Thus, in de novo review of Vaccine Act cases, the appellate court applies the same standard as used by the court below in its

120. United States v. Michigan, 424 F.3d 438 (6th Cir. 2005); Haspel & Davis Milling & Planting Co. v. Bd. of Levee Comm’rs, 493 F.3d 570 (5th Cir. 2007).
121. NLRB v. City Wide Insulation of Madison, Inc., 370 F.3d 654 (7th Cir. 2004).
126. Parent V.S. v. Los Gatos-Saratoga Joint Union High Sch. Dist., 484 F.3d 1230 (9th Cir. 2007).
127. Wilson v. Comm’r, 705 F.3d 980 (9th Cir. 2013).
review—whether the original rulings were arbitrary, capricious, an
abuse of discretion, or otherwise not in accordance with law—and
being uniquely deferential, upholding the original ruling if it was based
on evidence that was not wholly implausible. 129

[D][3] Abuse of Discretion

We have already noted an intriguing amalgam of de novo and abuse
of discretion review in regard to review of jury instructions. 130 The
decision of a district court to admit or exclude expert testimony is
reviewable under an abuse of discretion standard, 131 as is a district
court’s exercise of discretion in determining whether to entertain a
declaratory judgment action under the Declaratory Judgment Act, 132
or to enter a default judgment, 133 or reducing damages, 134 or refusing
to apply equitable estoppel, 135 or in denying a motion to disqualify
counsel, 136 or allowing counsel to withdraw, 137 or to recuse a judge, 138

129. Hibbard v. Sec’y of Health & Human Servs., 698 F.3d 1355 (Fed. Cir.
2012).
130. See section 6:5.2[D][2], supra.
[1st Cir. 2001]; Pipitone v. Biomatrix, Inc., 288 F.3d 239 [5th Cir.
2002]; Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 [6th Cir. 2002];
Neb. Plastics, Inc. v. Holland Colors Ams., Inc., 408 F.3d 410 [8th Cir.
2005]; United States v. Bender, 290 F.3d 1279 [11th Cir. 2002]. But the
Ninth Circuit has ruled that it cannot reverse the exclusion of lay witness
opinion testimony unless it has a definite and firm conviction that the
district court committed a prejudicial clear error of judgment. Head v.
Glacier Nw., Inc., 413 F.3d 1053 [9th Cir. 2005].
132. Scottsdale Ins. Co. v. Roumph, 211 F.3d 964 [6th Cir. 2000]; Declaratory
Judgment Act, 28 U.S.C. § 2201[a]; Orix Credit Alliance, Inc. v. Wolfe, 212
F.3d 891 [5th Cir. 2000]; Hartford Fire Ins. v. R.I. Pub. Transit Auth., 233
F.3d 127 [1st Cir. 2000]; United States v. City of Las Cruces, 289 F.3d 1170
[10th Cir. 2002].
133. Speiser, Krause & Mandole P.C. v. Ortiz, 271 F.3d 884 [9th Cir. 2001].
134. Callantine v. Staff Builders, Inc., 271 F.3d 1124 [8th Cir. 2001]; cf. Peyton
v. Dimario, 287 F.3d 1121 [D.C. Cir. 2002]. The appellate court reviews as
award of damages under FMLA for abuse of direction, though the factual
findings related to it are reviewed for clear error. Traxler v. Multnomah
Cnty., 596 F.3d 1007 [7th Cir. 2010]. The Eighth Circuit considers a non-
jury award of damages as a finding of fact and therefore applies the “clearly
erroneous” standard—but recognizes an “enormous’ range of discretion
in evaluating damages for pain and suffering. Gonzalez v. United States,
681 F.3d 949, 953 [8th Cir. 2012].
135. Spaulding v. United Transp. Union, 279 F.3d 901 [10th Cir. 2002].
137. Allen v. United States, 590 F.3d 541 [8th Cir. 2009].
138. Dixon v. Clem, 492 F.3d 665 [6th Cir. 2007]; Thomas v. Tenneco
or to file a surrebuttal brief, or joinder questions or denying a motion for a new trial, or deciding whether to apply the equitable doctrine of laches, or denying a motion for continuance, or for an extension of time to file a response to a summary judgment motion, or to file a notice of appeal, or for costs and more time to file a reargument motion below.

Another amalgam of standards occurs when an appellate court reviews a district court’s decision on whether prejudice occurred by a jury’s exposure to written or oral statements not in evidence—though such a decision in reviewed for abuse of discretion, a reversal will occur only when the decision was arbitrary, capricious, whimsical, or manifestly unreasonable. Abuse of discretion has been also defined as including a decision based on an erroneous construction of the law, or clearly erroneous factual findings, or when the appellate court is firmly convinced that the decision lies beyond

139. Vittoria N. Am. v. Euro-Asia Imps., 278 F.3d 1076 (10th Cir. 2001).
140. Jonesfilm v. Lion Gate Int’l, 299 F.3d 134 (2d Cir. 2002); Acevedo v. Allsup’s Convenience Stores, Inc., 600 F.3d 516 (5th Cir. 2010); Jiminez v. Rodriguez-Pagan, 597 F.3d 18 (1st Cir. 2010). But if the trial court lacked jurisdiction, in rare cases the appellate court may order joinder of a necessary party at the appellate level. AsymmetRx, Inc. v. Biocare Med., LLC, 582 F.3d 1314 (Fed. Cir. 2009).
141. Industrias Magromer Cueros v. La. Bayou Furs, 293 F.3d 912 (5th Cir. 2002); Ball v. Rodgers, 492 F.3d 1094 (9th Cir. 2007). Cf. Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484 (4th Cir. 2007) [reviewable for clear abuse of discretion]. See also note 165, infra. But this may belie the standard actually used. Butcher v. United States, 368 F.3d 1290 (11th Cir. 2004). And if the district court committed legal error in instructing the jury, the denial of a new trial was itself an abuse of discretion. Huff v. Sheahan, 493 F.3d 893 (7th Cir. 2007).
143. Shields v. Twiss, 389 F.3d 142 (5th Cir. 2004).
144. Soliman v. Johanns, 412 F.3d 920 (8th Cir. 2005).
147. Smith v. Ingersoll-Rand Co., 214 F.3d 1235 (10th Cir. 2000).
148. Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc., 134 S. Ct. 1051 (2014); Hughes Commc’ns Galaxy, Inc. v. United States, 271 F.3d 1060 (Fed. Cir. 2001); Jonesfilm, 299 F.3d at 134; United States v. Campbell, 291 F.3d 1169 (9th Cir. 2002); Van v. Barnhart, 483 F.3d 600 (9th Cir. 2007). A variant on the definition of abuse of discretion is used in the Sixth Circuit: It occurs when the district court’s decision is based on erroneous legal conclusions, its findings are clearly erroneous, or the decision is clearly unreasonable, arbitrary, or fanciful. Other factors to be considered include prejudice resulting from discovery abuse, whether the noncooperating party was warned that violations would result in sanctions, and whether the court considered less drastic sanctions.] Tisdale v. Fed. Express Corp., 415 F.3d 516 (6th Cir. 2005).
the pale of reasonable justification under the circumstances, or to be found when the appellate court concludes that the trial court committed a clear error of judgment. An administrative agency acts arbitrarily and capriciously, and thus abuses discretion, by adopting two inconsistent interpretations of the same statutory language.

But when an agency incorrectly states the date by which a petition for review must be filed, an aggrieved party’s filing by that later but incorrect date is dismissed.

Abuse of discretion is the litmus paper test in reviewing the grant or denial of injunctive relief, automatically found if the trial court misinterpreted applicable law. Denial of a motion to amend a petition a second time or to alter or amend a judgment is reviewable for abuse of discretion; as are rulings re discovery, on

149. Mayes v. Massanari, 276 F.3d 453 [9th Cir. 2001]; cf. Gonzales v. Free Speech Coalition, 408 F.3d 613 [9th Cir. Cal. 2005] [limited to assuring that decision below has a basis in reason]; Jonesfilm, 299 F.3d at 134.


153. Breyer v. Meissner, 214 F.3d 416 [3d Cir. 2000] [petition]; Matthew v. Unum Life Ins. Co. of Am., 639 F.3d 857 [8th Cir. 2011] [judgment] [the abuse must be clear]. But if based on a legal interpretation, review is de novo. Littlejohn v. Artuz, 271 F.3d 360 [2d Cir. 2001]. But the Seventh Circuit will overturn a district court’s denial of a motion to amend only if it has abused its discretion by not providing a justifying reason for the decision. Crest Hill Land Dev. v. Joliet, 396 F.3d 801 [7th Cir. 2005]. If a motion to amend a pleading is denied on the ground that the amendment will be futile, there must be a de novo review of the legal basis for the finding of futility. Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch., 565 F.3d 1232 [10th Cir. 2009]; In re 2007 Novastar Fin., Inc., Sec. Litig., 579 F.3d 878 [8th Cir. 2009].

154. Diaz v. Paul J. Kennedy Law Firm, 289 F.3d 671 [10th Cir. 2002]; Tax Analysts v. IRS, 410 F.3d 715 [D.C. Cir. 2005]. Such decisions will only be reversed upon a clear showing of manifest injustice, that is, where the discovery order was plainly wrong and resulted in substantial prejudice. Bogan v. City of Boston, 489 F.3d 417 [1st Cir. 2007]; Serra-Lugo v. Consortium-LAS Macias, 271 F.3d 5 [1st Cir. 2001]; Hallett v. Morgan, 296 F.3d 732 [9th Cir. 2002]. Cf. Patterson v. Avery Dennison Corp., 281 F.3d 676, 679 [7th Cir. 2002]; Sallis v. Univ. of Minn., 408 F.3d 470 [8th Cir. 2005] [must be gross abuse of discretion and fundamental unfairness]; Cardinal v. Metrish, 564 F.3d 794 [6th Cir. 2009],

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requests for costs,\footnote{155} on preliminary injunctions,\footnote{156} or permanent injunction,\footnote{157} on Rule 60(b) motions,\footnote{158} orders granting or denying a new trial,\footnote{159} denial of counsel to an indigent civil litigant,\footnote{160} dismissals on the ground of forum non conveniens,\footnote{161} on closing reviewing for abuse of discretion a district court’s decision to enter summary judgment without permitting discovery; Patent Rights Prot. Grp. LLC v. Video Gaming Techs., Inc., 603 F.3d 1364 (Fed. Cir. 2010) [abuse of discretion to deny jurisdictional discovery resulting in actual and substantial prejudice]. For an encyclopedic discussion of appealability of issues surrounding grand jury subpoenas directed at third parties, see United States v. Punn, 737 F.3d 1 (2d Cir. 2013). The Fifth Circuit has ruled that it lacks jurisdiction in qualified immunity cases to order discovery, except when the district court fails to find that the complaint overcomes a qualified immunity defense, refuses to rule on a qualified immunity defense, or when the discovery order exceeds the requisite narrowly tailored scope [to uncover only those facts needed to rule in the immunity claims]. Zapata v. Nelson, 750 F.3d 481 [5th Cir. 2014].

\footnote{155}Munoz v. St. Mary-Corwin Hosp., 221 F.3d 1160 [10th Cir. 2000].

\footnote{157}Parks v. City of Columbus, 395 F.3d 643 [6th Cir. 2005]. But if the decision rests on conclusions of law, the record is reviewed de novo. \textit{Id.}

\footnote{158}United States v. Kayser-Roth Corp., 272 F.3d 89 [1st Cir. 2001]; Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1225 [10th Cir. 2002]. But the Tenth Circuit would reverse a denial of a 60(b)(6) or 62(c) motion only if it found a complete absence of a reasonable basis and was certain that the decision is wrong. \textit{Id.} Denial of a motion to vacate a default judgment is limited to abuse of discretion [Old Republic Ins. v. Pac. Fin. Servs., 301 F.3d 54 [2d Cir. 2002]], as is denial of relief because of newly discovered evidence. Gonzalez-Pina v. Guillermo Rodriguez, 407 F.3d 425 [1st Cir. 2005].

\footnote{159}Farrior v. Waterford Bd. of Educ., 277 F.3d 633 [2d Cir. 2002]; Medforms, Inc. v. Healthcare Mgmt., 290 F.3d 98 [2d Cir. 2002]; see also infra section 6:5.2[D][5]; \textit{In re Air Crash at Little Rock, Ark.}, 291 F.3d 503 [8th Cir. 2002].

\footnote{160}Montgomery v. Pinchak, 294 F.3d 492 [3d Cir. 2002].

arguments,\textsuperscript{162} denial of a continuance,\textsuperscript{163} district court damage awards,\textsuperscript{164} including front-pay awards,\textsuperscript{165} decisions to abstain,\textsuperscript{166} on protective orders,\textsuperscript{167} on certifications of judgment as final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,\textsuperscript{168} a decision to enforce or approve a settlement agreement,\textsuperscript{169} a decision not to exercise jurisdiction,\textsuperscript{170} a decision to dismiss for failure to comply

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\item \textsuperscript{162} Billingsley v. City of Omaha, 277 F.3d 990 (8th Cir. 2002). Similarly, a sua sponte dismissal of a complaint for failure to serve under Rule 4(m) is reviewed for abuse of discretion. Richardson v. Johnson, 598 F.3d 734 (11th Cir. 2010).
\item \textsuperscript{163} Research Sys. Corp. v. Ipsos Publicite, 276 F.3d 914 (7th Cir. 2002). Similarly, a sua sponte dismissal of a complaint for failure to serve under Rule 4(m) is reviewed for abuse of discretion. Richardson v. Johnson, 598 F.3d 734 (11th Cir. 2010).
\item \textsuperscript{164} Shen v. Leo A. Daly Co., 222 F.3d 472 (8th Cir. 2000); Am. Airlines, Inc. v. Allied Pilots Ass'n, 228 F.3d 574 (5th Cir. 2000); Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639 (4th Cir. 2002); Akouri v. State of Fla. Dep't of Transp., 408 F.3d 1338 (11th Cir. 2005). The Sixth Circuit's standard of review of compensatory damages: whether the award is monstrously excessive, whether there is no rational connection between the award and the evidence, and whether it is roughly comparable to awards made in similar cases. Deloughery v. City of Chicago, 422 F.3d 611 (7th Cir. 2005). As to the bases for overturning a jury's damage award, see Wackman v. Rubsamens, 602 F.3d 391 (5th Cir. 2010).
\item \textsuperscript{165} Bourdais v. New Orleans City, 485 F.3d 294 (5th Cir. 2007).
\item \textsuperscript{166} Cedar Rapids Cellular Tel., L.P. v. Miller, 280 F.3d 874 (8th Cir. 2002); Addiction Specialists, Inc. v. Twp. of Hampton, 411 F.3d 399 (3d Cir. 2005) (abstention under Younger doctrine); Laurel Sand & Gravel, Inc. v. Wilson, 519 F.3d 156 (4th Cir. 2008) (same); Chase Brexton Health Servs., Inc. v. Maryland, 411 F.3d 457 (4th Cir. 2005). The Second Circuit, however, while ruling that decisions to abstain on the basis of international comity are reviewed for abuse of discretion, has evolved an interesting amalgam of standards: In other abstention cases involving the “act of state” doctrine and some forms of domestic federal-state abstention, the court applies a somewhat more rigorous standard of review that approaches de novo review, and in evaluating the district court's exercise of discretion, it reviews the conclusions of law de novo. JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418 (2d Cir. 2005).
\item \textsuperscript{167} Hotard v. State Farm Fire & Cas. Co., 286 F.3d 814 (5th Cir. 2002); Williams v. Prof'l Transp., Inc., 294 F.3d 607 (4th Cir. 2002).
\item \textsuperscript{168} Hakim v. Payco-Gen. Am. Credits, Inc., 272 F.3d 932 (7th Cir. 2001); Robidoux v. Rosengren, 638 F.3d 1177 (9th Cir. 2011).
\item \textsuperscript{169} Robert N. Clemens Trust v. Morgan Stanley DW, Inc., 485 F.3d 840 (6th Cir. 2007) (exercise of supplemental jurisdiction); Nielander v. Bd. of Cnty. Comm'r's of Cnty. of Republic, Kan., 582 F.3d 1155 (10th Cir. 2009) (same); Hollandro N. Am., Inc. v. Wärtsilä N. Am., Inc., 485 F.3d 450 (9th Cir. 2007); Bank One, N.A. v. Boyd, 288 F.3d 181 (5th Cir. 2002).
\end{itemize}
with a scheduling order, a judicial estoppel ruling, an order denying a motion to amend the complaint conform the pleading to the proof, a refusal to unseal court documents, an order to an outgoing attorney to produce a file, a decision vacating a maritime attachment order, evidentiary rulings, an order denying a motion to proceed.
and an order involving a local rule. The granting of a motion for rehearing is entirely discretionary, except when the underlying ruling involves the grant of summary judgment. Where a grant of attorneys fees is available, the district court’s discretionary award will be reversed only if no reasonable district court would have granted fees under such circumstances, or the decision was based on an inaccurate view of the law or a clearly erroneous finding. A grant of decision rests on an error of law or a clearly erroneous factual finding, or that its decision cannot be located within the range of permissible decisions. United States v. White, 692 F.3d 235 [2d Cir. 2012]. The First Circuit used the classic abuse-of-discretion standard. Milward v. Acuity Specialty Prods. Grp., Inc., 639 F.3d 11 [1st Cir. 2011]. The Sixth Circuit will not reverse on a challenge to exclusion of evidence unless necessary to do substantial justice. Greene v. B.F. Goodrich Avionic Sys., Inc., 409 F.3d 784 [6th Cir. 2005]. The Seventh Circuit will disturb evidentiary rulings only on an abuse-of-discretion standard, defined as meaning that no reasonable person could take the view of the trial court. Marcus & Millichap Inv. Servs. of Chi., Inc. v. Sekulovski, 639 F.3d 301 [3d Cir. 2010]. The Eighth Circuit will review a denial of a motion to compel production of evidence for gross abuse of discretion, but in criminal cases will use the ordinary abuse of discretion standard to review the district court’s refusal to require the disclosure of a confidential informant’s identity. Elnashar v. Speedway SuperAmerica, LLC, 484 F.3d 1046 [8th Cir. 2007]. The Ninth Circuit begins with a presumption of prejudice from an erroneous evidentiary ruling in a civil case, and that erroneous exclusion of evidence is not harmless when it cannot be said that it is more probable than not that the jury was unaffected by the exclusion. Obrey v. Johnson, 400 F.3d 691 [9th Cir. 2005]. And it applies the abuse of discretion test to rulings re evidence in the context of summary judgment motions. Wong v. Regents of Univ. of Cal., 410 F.3d 1052 [9th Cir. 2005]. The Tenth Circuit’s review is even more deferential when the issue is the admissibility of what is claimed to be hearsay evidence. United States v. Ramirez, 479 F.3d 1229 [10th Cir. 2007].

\begin{enumerate}
\item[178.] Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate, 596 F.3d 1036 [9th Cir. 2010].
\item[179.] Carreras v. Sajo, Garcia & Partners, 596 F.3d 25 [1st Cir. 2010].
\item[180.] Clark v. Johnson, 227 F.3d 273 [5th Cir. 2000]. Cf. Zamani v. Carnes, 491 F.3d 990 [9th Cir. 2007] [denial of motion for reconsideration reviewed for abuse of discretion].
\item[181.] Indah v. U.S. SEC, 661 F.3d 914 [6th Cir. 2011].
\item[182.] Jannotta v. Subway Sandwich Shops, Inc., 225 F.3d 815 [7th Cir. 2000]. Accord Gold, Weems, Bruser, Sues & Rundell v. Metal Sales, 236 F.3d 214 [5th Cir. 2000]. Cf. Rossello-Gonzalez v. Acevedo-Vila, 483 F.3d 1 [1st Cir. 2007] [review of award for manifest abuse of discretion, customarily deferring to trial judge, upheld absent a mistake of law or a clear error in judgment]; French v. Corporate Receivables, Inc., 489 F.3d 402 [1st Cir. 2007].
\end{enumerate}
fees under the Lanham Act, however, will be reversed only for clear error. 184 Where it is impossible to discern the correctness of the lower court’s denial of fees, the issue will be remanded for determination. 185 Both the granting 186 and denial 187 of attorney fees are reviewable for abuse of discretion, as well as the amount awarded, if any. 188 Rulings on the granting or denial of a motion for class certification 189 or denying or imposing sanctions 190 will also give deference to the district court’s decision. But the district court’s findings granting sanctions must be detailed. 191 An award of punitive damages is subject to an abuse of

184. Cent. Mfg., Inc. v. Brett, 492 F.3d 876 (7th Cir. 2007).
188. 605 Park Garage Assocs., LLC v. 605 Apartment Corp., 412 F.3d 304 (2d Cir. 2005). Accord Wolfe v. Perry, 412 F.3d 707 (6th Cir. 2005). The Second Circuit has a “highly deferential” review of attorney fee awards; that issue will be rejected if there was a failure adequately to advance it below. Barbour v. City of White Plains, 700 F.3d 631 (2d Cir. 2012).
189. In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001); Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001); Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004). But the Second Circuit has also announced that it is considerably less deferential when the district court has denied rather than certified a class. While noting various meanings of “abuse of discretion,” the court has noted that it reviews de novo the district court’s conclusions of law. In re Nassau County, Strip Search Cases, 461 F.3d 219 (2d Cir. 2006).
190. Tower Ventures, Inc. v. City of Westfield, 296 F.3d 43 (1st Cir. 2002); Hunter v. Earthgrains Co. Bakery, 281 F.3d 144 (4th Cir. 2002); Greyhound Lines, Inc. v. Wade, 485 F.3d 1032 (8th Cir. 2007); Christian v. Mattel, Inc., 286 F.3d 1118 (9th Cir. 2002); Tollett v. City of Kemah, 285 F.3d 357 (5th Cir. 2002); Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130 (2d Cir. 2007). Nyer v. Winterthur Int’l, 290 F.3d 456 (1st Cir. 2002); Lasalle Nat’l Bank v. First Conn. Holding, 287 F.3d 279 (3d Cir. 2002); Thomas v. Tenneco Packaging Co., 293 F.3d 1306 (11th Cir. 2002); Anderson v. Smithfield Foods, Inc., 353 F.3d 912 (11th Cir. 2003). See also supra note 171. But deferential review does not mean abject review: CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721 (7th Cir. 2011).
191. Procter & Gamble Co. v. Amway Corp., 280 F.3d 519 (5th Cir. 2002); Pan Am. Grain v. P.R. Ports Auth., 295 F.3d 108 (1st Cir. 2002). And the power to sanction must be used with great circumspection and restraint, employed only in compelling situations. Dubois v. U.S. Dep’t of Agric., 270 F.3d 77 (1st Cir. 2001). Rule 11 sanctions are reviewed for abuse of discretion as to both violation and the sanction, but a mistake of law and a clearly erroneous finding of fact constitute abuse. Young v. City of Providence ex rel. Napolitano, 404 F.3d 33 (1st Cir. 2005). If sanctions, or costs, incurred in an earlier proceeding, or in prior actions involving the same parties in the same or similar subject matter, remain unpaid, the appeal will be dismissed. Maxwell v. Snow, 409 F.3d 354 (D.C. Cir. 2005).
discretion standard of review,\textsuperscript{192} though its constitutionality is reviewable under a de novo standard,\textsuperscript{193} as is a decision to exclude or admit evidence,\textsuperscript{194} or determinations of excusable neglect to extend time to file a notice of appeal.\textsuperscript{195} Dismissal for failure to prosecute is reviewed under an abuse of discretion standard, not for being arbitrary and unreasonable, but by examination of a number of factors. And there need not be blind deference to the court below when the appellate record contains all the materials on which the district court decision hinged.\textsuperscript{196}

Similarly, a finding of contempt cannot be reversed unless it is an abuse of discretion,\textsuperscript{197} such as improperly placing the burden of proof on the complaining party to show the contemnor’s ability to pay.\textsuperscript{198} Dismissal on the ground of forum non conveniens is reviewable only for clear abuse,\textsuperscript{199} while denial of a motion to change venue is reviewed for abuse of discretion.\textsuperscript{200}

Orders on motions in limine are reviewable for abuse of discretion.\textsuperscript{201} Determination of a stay motion is reviewed for abuse of

Where the district court is the accuser, fact finder, and sentencing judge in imposing sentences, appellate review is more exacting than under ordinary abuse of discretion standards. Wolters Kluwer Fin. Servs., Inc. v. Scivantage, 564 F.3d 110 [2d Cir. 2009].

\textsuperscript{192} Schaud v. VonWald, 638 F.3d 905 [8th Cir. 2011]; Fair Hous. of Marin v. Combs, 285 F.3d 899 [9th Cir. 2002].

\textsuperscript{193} Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424 [2001].


\textsuperscript{195} Pincay v. Andrews, 367 F.3d 1087 [9th Cir. 2004].


\textsuperscript{197} United States v. Hoover, 240 F.3d 593 [7th Cir. 2001].

\textsuperscript{198} Chi. Truck Drivers v. Bd. Labor Leasing, 207 F.3d 500 [8th Cir. 2000]; \textit{In re} Grand Jury Subpoena Dated April 8, 2003, 383 F.3d 905 [9th Cir. 2004]. Similarly, a denial of a motion to quash the subpoena is reviewable for abuse of discretion. \textit{Id.}; Shields v. Twiss, 389 F.3d 142 [5th Cir. 2004] [deposition subpoenas].


\textsuperscript{200} N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc., 599 F.3d 102 [2d Cir. 2010]. \textit{Cf.} Dugboe v. Holder, 644 F.3d 462 [6th Cir. 2011], noting a conflict in the circuits over whether they have jurisdiction to decide if an Immigration Judge’s denial of a venue transfer motion was an abuse of discretion.

\textsuperscript{201} Countrywide Servs. Corp. v. SIA Ins. Co., 235 F.3d 390 [8th Cir. 2000]. Such motions in limine preserve evidentiary issues for appeal—if the district court makes a final and unconditional ruling on the motion, no further steps are necessary. Fed. Ins. Co. v. HPSC, Inc., 480 F.3d 26 [1st Cir. 2007].
discretion. There must be extraordinary cause to justify the Supreme Court intervening to vacate a stay in advance of the expeditious determination of the merits towards which the court of appeals is swiftly proceeding. A grant of a stay of execution in a federal criminal case is reviewed for abuse of discretion.

Denial of a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure is reviewed for abuse of discretion.

When the district court reviewed the acts of one who had discretion, the appellate court will review under an arbitrary and capricious standard. When a law gives discretion to the district court in assessing statutory damages, the standard of review is abuse of discretion. In a review of a district court’s treatment of a magistrate judge’s report and recommendation, the standard is abuse of discretion. A district court’s action in responding to questions from the jury is reviewed for abuse of discretion, as are: its exercise of authority to require parties to participate in mandatory settlement conferences and its decision whether and to what extent to enforce a subpoena, after reviewing the factual findings for clear error and its legal conclusions de novo and orders purportedly issued pursuant to the court’s inherent authority to enforce its own unappealed orders.

When an agency interprets its own regulation, the court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation.

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204. Adams v. Thaler, 679 F.3d 312 [5th Cir. 2012].

205. United States v. Wilson, 469 F. App’x 439 [6th Cir. 2012].


207. Lester E. Cox Med. Ctr. v. Huntsman, 408 F.3d 989 [8th Cir. 2005].

208. Williams v. McNeil, 557 F.3d 1287 [11th Cir. 2009]. A district court abuses its discretion when it reverses a magistrate’s pro-government credibility determinations made after reviewing live testimony, without viewing key demeanor evidence, unless the district judge rules that judgment should issue as a matter of law for the defendant. United States v. Thom, 684 F.3d 893 [9th Cir. 2012].

209. Hutton Contracting Co. v. City of Coffeyville, 487 F.3d 772 [10th Cir. 2007]. A judge’s comments during a jury trial will result in a reversal only if they projected to the jury an appearance of advocacy or partiality. In re Hanford Nuclear Reservation Litig., 521 F.3d 1028 [9th Cir. 2008].

210. EEOC v. Randstad, 685 F.3d 433 [4th Cir. 2012].


211.1. Griffin v. Gomez, 741 F.3d 10 [9th Cir. 2014].

When a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, a “doubly deferential” standard is used by the court that gives both the state court and the defense attorney the benefit of the doubt. Failure to credit a state court’s reasonable finding and assuming that counsel was ineffective where the record was silent is not permissible.\footnote{211.3}

There may even be shadings in terms of review for abuse of discretion. Thus, the Fourth Circuit has ruled that it will review denial of a new trial for clear abuse of discretion.\footnote{212} The Eighth Circuit has ruled that it will review the grant of liquidated damages pursuant to FMLA as well as a district court preclusion of a proposed affirmative defense based on equitable estoppel principles, for an abuse of discretion—but that it will review the exclusion of evidence for a clear and prejudicial abuse of discretion, while it reviews the denial of a remittitur of damages for clear abuse of discretion, and will grant a remittitur only in cases where the jury’s award is so grossly excessive at to shock the court’s conscience.\footnote{213} And the Eleventh Circuit has held that the legal question of whether the doctrine of collateral estoppel is considered de novo, and the decision to apply it, is reviewed for abuse of discretion.\footnote{214} And more recently, when ruling that it may overturn a district court’s decision granting judicial assistance to a foreign country only for abuse of discretion, it noted that such review was extremely limited and highly deferential, though it would be de novo to the extent that the lower court’s decision was based on an interpretation of law.\footnote{215}

\textbf{[D][4] Review of Arbitrator’s Decisions}

The narrow grounds for reviewing, judicially, the decisions of arbitrators have been narrowed even more by the Supreme Court’s decision in \textit{Major League Baseball Players Association v. Garvey}.\footnote{216}
where the Supreme Court held that even if the arbitrator’s factual finding is not supportable on the record before him, or even bordering on the irrational, the arbitrator’s decision must be upheld by the courts so long as the powers allocated to the arbitrator covered the arbitrator’s decision, even though the decision be improvident, or silly. The high Court has also recently ruled that even when the document containing an arbitration argument is a treaty, the usual presumption—that the interpretation and application of the provision for arbitration are primarily for the arbitrators—applies, and that courts must review their decisions with considerable deference.\(^{216.1}\) An arbitrator may even decide whether the parties affirmatively agreed to authorize class arbitration.\(^{216.2}\)

And a federal appellate court backs jurisdiction over arbitrators’ decisions regarding the removal of an employee of a federal non-appropriated fund instrumentality.\(^{216.3}\) The most common tool for attacking arbitration awards—that the award was made in manifest disregard of the law (since it is a form of imperfectly exercising arbitral powers)—was further recently narrowed, under a Seventh Circuit ruling that if the decision of the arbitrator does not violate any law, it must be upheld, that the decision is in manifest disregard only where it would have been illegal for the parties to have settled their dispute on the terms chosen by the arbitrators.\(^{217}\) This is in contrast to the prevailing law in most circuits that a court may overturn an arbitration award based on manifest disregard of the law if the legal principle in question is explicit and clear, the arbitrator clearly knew about it, and he ignored it or refused to apply it.\(^{218}\) Recently, the Second Circuit has held that manifest disregards of the law remains a ground for vacating arbitration awards,\(^{219}\) and the Fifth Circuit has ruled that manifest disregard is no longer an independent ground for such vacatur,\(^{220}\) both courts relying on the same cases.\(^{221}\)

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216.2. S. Commc’ns Servs., Inc. v. Thomas, 720 F.3d 1352 [11th Cir. 2013].
216.3. Deleon v. Dep’t of Army, ___ F.3d ___ (Fed. Cir. Feb. 24, 2014) [No. 2013-3129].
218. E.g., Bowen v. Amoco Pipeline Co., 254 F.3d 925 [10th Cir. 2001].
220. Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349 [5th Cir. 2009].
Eleventh Circuit, noting this conflict, has recently queried whether the manifest disregard standard is judicial shorthand for an arbitrator exceeding or imperfectly exercising his powers.\textsuperscript{222} Possibly, this conflict between circuits may be resolved by a Supreme Court grant of certiorari in the future.

An area that needed clarification is the extent to which the parties to an arbitration agreement may contract for expanded judicial review, an issue in dispute between the circuits,\textsuperscript{223} or for elimination of judicial review.\textsuperscript{224} But the Supreme Court has recently held that the statutory grounds under the Federal Arbitration Act for expedited judicial review to confirm, vacate, or modify arbitration awards are exclusive and may not be supplemented by contract.\textsuperscript{225}

Though there is a statutory right to an interlocutory appeal on the issue of arbitrability, the courts of appeals are also in conflict on whether a stay pending appeal should be issued.\textsuperscript{226} They are also in conflict whether, when the party appealing is not a signatory to the arbitration agreement, an interlocutory appeal may be taken from the denial of a motion to compel arbitration, the Second Circuit allowing such an appeal,\textsuperscript{227} while the Sixth Circuit forbids it.\textsuperscript{228} The rights of a non-signatory under an arbitration agreement may depend on applicable state law principles of agency or contract.\textsuperscript{228.1}

A district court’s action in responding to questions from the jury are reviewed for abuse of discretion.\textsuperscript{229}

\begin{itemize}
\item \textsuperscript{222} Frazier v. CitiFinancial Corp., LLC, 604 F.3d 1313 (11th Cir. 2010).
\item \textsuperscript{223} See id. The First Circuit has ruled that the standard of judicial review can be varied only if the intent of the parties is stated in clear, explicit contractual language. P.R. Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21 (1st Cir. 2005).
\item \textsuperscript{224} The Second Circuit has held that this cannot be done. Hoeft v. MVL Grp., Inc., 343 F.3d 57 (2d Cir. 2003).
\item \textsuperscript{225} Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008). The Ninth Circuit has ruled that a district court has the authority to decide whether an arbitration clause contained in an attorney retainer agreement is unconscionable. Smith v. Jem Grp., Inc., 737 F.3d 636 (9th Cir. 2013).
\item \textsuperscript{226} For an exhaustive survey of the law re judicial relief in ongoing arbitration, see Savers Prop. & Cas. Ins. Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa., 748 F.3d 708 (6th Cir. 2014).
\item \textsuperscript{227} Weingarten Realty Investors v. Miller, 495 F. App’x 418 (5th Cir. 2012).
\item \textsuperscript{228} McCauley v. Halliburton Energy Servs., Inc., 413 F.3d 1158 (10th Cir. 2005).
\item \textsuperscript{228.1} Grand Wireless, Inc. v. Verizon Wireless, Inc., 748 F.3d 1 (1st Cir. 2014).
\item \textsuperscript{229} Hutton Contracting Co. v. City of Coffeyville, 487 F.3d 772 (10th Cir. 2007). A judge’s comments during a jury trial will result in a reversal only if they projected to the jury an appearance of advocacy or partiality. In re Hanford Nuclear Reservation Litig., 521 F.3d 1028 (9th Cir. 2008).
\end{itemize}
A challenge of the enforceability of an arbitration agreement as a whole is for the arbitrator to decide, but a court may hear the issue only if the precise agreement to arbitrate enforceability is addressed.\textsuperscript{230} And to invoke appellate jurisdiction, the movant must either explicitly move to stay litigation and/or compel arbitration, or it must be unmistakably clear from the four corners of the motion that the movant seek relief provided for in the Federal Arbitration Act.\textsuperscript{230.1}

A word of warning: the Eleventh Circuit has pronounced itself fed up with baseless appeals of arbitration awards, and warned such appellants that they are inviting sanctions.\textsuperscript{231}

\textbf{[D][5] Review of Jury Verdict}

The inquiry on appeal is narrow: whether there was any evidence to support the jury verdict, and, in a criminal case, whether a jury must have had a reasonable doubt concerning one of the elements of the crime.\textsuperscript{232} The Third Circuit has recently narrowed its approval in criminal cases, ruling that unless the jury’s conclusion is irrational, it must be upheld. The test is whether the jury’s verdict falls below the threshold of bare rationality.\textsuperscript{232.1} Not all circuits agree.

There is some confusion as to whether an assessment of damages by a jury may be reversed only if it is clearly erroneous, or whether the court will consider whether the specific facts and circumstances are sufficient to support the jury’s award.\textsuperscript{233}

\textbf{[D][6] Habeas Corpus Cases}

The current standard of review is prescribed by statute.\textsuperscript{234} But since that statute morphed into the Antiterrorism and Effective Death Penalty Act (AEDPA), with DNA testing revealing a host of unjust criminal

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\textsuperscript{230.1.} Grosvenor v. Qwest Corp., 733 F.3d 990 [10th Cir. 2013].

\textsuperscript{231.} B.L. Harbert Int'l LLC v. Hercules Steel Co., 441 F.3d 905 [11th Cir. 2006].


\textsuperscript{232.1.} United States v. Caraballo-Rodriguez, 726 F.3d 418 [3d Cir. 2013].

\textsuperscript{233.} Miss. Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359 [5th Cir. 2002].

\textsuperscript{234.} 28 U.S.C. § 2254(d); (e); Cannon v. Gibson, 259 F.3d 1253 [10th Cir. 2001]. The Supreme Court has now ruled, as to the standard of review in
convictions in many applications to the courts for relief, collateral attacks upon such convictions became almost commonplace—not only on DNA grounds—with an increasing degree of success, until two decisions of the Supreme Court in the October Term 2011 of the Court.

Reversing the grants of habeas corpus by the Ninth and Third Circuits, without briefing on the merits and without oral argument, the Supreme Court ruled that a reviewing court may set aside a jury’s verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury, and only if the state court decision was “objectively unreasonable.”235 On the other hand, the dissenters in one of those cases236 urged that, in the light of later scientific studies, it was unlikely that the prosecution’s experts would testify to guilt as adamantly as they had at trial, since recent scientific opinion undermined this testimony, a factor worthy of weight in determining whether to review the case.237

[D][7] Review of Standard of Review

Rare are the cases in which a major issue is which standard of review is to be used. But it may become complex—thus, if a district court has reviewed a so-called administrative decision in a summary judgment motion, the appellate court is to review the district court’s determination de novo238—including a determination of which standard of review the district court should itself have used.

An interesting case recently before the Second Circuit239 evolved from a Supreme Court decision involving the administration of employer-administered ERISA plans.240 While providing for plenary de novo review in reliance upon trust law, it added in obiter dictum that if the plan gave discretion to administrators operating under a

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237. For the author’s much earlier study of the use of subsequent development or newly discovered evidence to obtain a new criminal trial, see Levy, Justice—After Trial, 11 N.Y. L. Forum Nos. 2 and 3 [1965].
239. Flanagan v. First Unum Life Ins., 170 F. App’x 182 [2d Cir. 2006]. The briefs in the case are set forth infra in Appendix C8.
conflict of interest, that conflict must be weighed in determining whether there has been an abuse of discretion. Insurance companies issuing disability policies as part of an ERISA plan invested themselves with discretion as plan administrators—and then claimed that judicial review of their decisions should be deferential, reversible only if their decisions were arbitrary and unreasonable. Not surprisingly, the courts have struggled with the resultant problem of a review of an insurance company’s determination of its own liability.\(^\text{241}\)

Where the district court has conducted a bench trial in an ERISA case, the appellate court will review the fact-finding for clear error and the legal conclusions de novo.\(^\text{242}\)

**[E] The Atmospheric Fact**

Should you include only facts strictly relevant to the later legal arguments, or should you include facts that are in your record but are clearly irrelevant?

Find an in-between point, based upon persuasiveness. Background is always legitimate and may perhaps illuminate the legal issues. When it sheds light on your side of the case, use it. Do not use facts that shed no light on the issues unless they show the justice of your position. The courts themselves do this, as evidenced by the cases.\(^\text{243}\) “Flavoring” facts gives elasticity to the judicial process, permitting a court to distinguish a case if it wishes, enabling it not to do so if it wishes.

\(^{241}\) See, e.g., Doyle v. Liberty Life Ins. Co. of Bos., 542 F.3d 1352 (11th Cir. 2008), relying on Metro. Life Ins. Co. v. Glenn, 554 U.S. 105 (2008), ruling that the burden was still on the plaintiffs and that the conflict was merely a factor to be considered. More recently, the Sixth Circuit, reciting that it reviews the district court’s choice of remedy in an ERISA action for abuse of discretion, ruled that even under de novo review, remand is the appropriate remedial measure where further fact finding is necessary to further develop the record, not merely out of deference to the plan administrator. Javery v. Lucent Techs., Inc. Long Term Disability Plan for Mgmt. or LBA Emps., 741 F.3d 686 (6th Cir. 2014). Additionally, at least six other circuits have ruled that the traditional language in insurance plans—giving the administrator of the plan (in fact, the insurance company itself) the right to require proof of continuing disability satisfactorily to the insurance company itself—does not unambiguously confer discretionary authority, and that therefore the denial is subject to de novo judicial review. Cosey v. Prudential Ins. Co. of Am., 735 F.3d 161 (4th Cir. 2013). The District of Columbia Circuit has recently ruled that the correct standard of review is abuse of discretion, James v. Int’l Painters & Allied Trades Indus. Pension Plan, 738 F.3d 282 (D.C. Cir. 2013), while the Second Circuit has ruled that it is an open question whether a claimed violation of ERISA’s notice requirement is subject to review under a de novo or abuse of discretion standard. Frommert v. Conkright, 738 F.3d 522 (2d Cir. 2013).

\(^{242}\) Koons v. Aventis Pharm., Inc., 367 F.3d 768 (8th Cir. 2004).

\(^{243}\) See section 6:5.2, supra.
As an illustration, *Walker v. Hutchinson*\(^ {244} \) involved the question of the constitutionality of a Kansas law that enabled the government to give notice of condemnation proceedings by one publication in the local official city paper. The statement of facts mentioned that the person whose property had been condemned [and who had received no actual notice] was an eighty-year-old Negro, with a sixth-grade education. Obviously, this was not strictly relevant to the question of the constitutionality of the statute on its face, or even as construed and applied. However, it was relevant background, as it illustrated the defect of the statute in being unlikely to bring actual notice to property owners.

Use of atmospheric facts that are not strictly relevant must be limited to matters that will likely persuade the court that an injustice has been done or may result. Otherwise, the legal issues will be lost in the irrelevancies. The initial reaction of appellate judges is to right a wrong, and their conclusion will frequently first be reached emotionally. Only after that will come the legal thought processes evolving in the ultimate rationalization of the judicial opinion.\(^ {245} \) If you have a bad case from a legal point of view, your efforts to enlist the sympathies of the court may be in vain. Nonetheless, the judicious use of atmospheric facts poses an initial setting favorable to your cause.

**[F] Comprehensibility**

If your statement of facts is to be persuasive, it must be comprehensible. The case with which you have become familiar is as yet a totally new one for the appellate court. Your task is to organize the facts well in as few pages as possible so that the court will be able to absorb them as it goes along. It is not disproportionate to devote more than one-third of your brief-writing time to drafting and redrafting the statement of facts.

**[G] Methods of Organizing Facts**

There are several methods of organizing facts. To a large extent, the method to use depends upon the type of case. Obviously, to use two extremes, your treatment will be different in a case involving one clear-cut legal issue than in one involving complex facts. If a case lies in between the various categories discussed below, you may wish to adopt

\(^{244}\) Walker v. Hutchinson, 352 U.S. 112 (1956).

\(^{245}\) Cf. William O. Douglas, *The Court Years* (Random House 1980). Chief Justice "Hughes made a statement to me which at the time was shattering but which over the years turned out to be true: 'Justice Douglas, you must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.'" Id. at 8.
some combination of approaches. Sometimes a case that logically should be organized along the lines indicated below may still lack comprehensibility or persuasiveness. In such cases, another mode of organization should be tried.


With but one exception, your statement of facts should never merely narrate what happened at the trial or hearing by stating that witness A testified to such and such, that witness B testified to such and such, etc. This approach confuses the court and indicates laziness. It adds nothing to what the court can achieve on its own, more accurately, by reading the testimony.

When you have one clear-cut legal issue, the best way to present your facts is to tell the story chronologically. In the course of this chronological tale, you will eventually reach a point where you will have to narrate what happened in court. Thus, if the pleadings are relevant, at some point you will discuss these; if the case involves the charge to the jury, you will reach this point in its proper chronological order.

[G][2] Several Legal Issues or One Clear-Cut Single Issue—Classification Method

When there are several legal issues, or when there is only one legal issue but either it or the facts relevant thereto are complex, the chronological approach suggested above usually will not suffice.

In such situations, while you should preserve the chronological approach as much as you reasonably can, organize your facts by headings. If the proposition of law that you wish to put forward is based on the existence of five elements (for example, the five fingers of fraud), the facts should be stated so that each element of the factual picture necessary to that legal conclusion emerges clearly under a separate heading.

In line with earlier warnings that argument has no place in a statement of facts, the headings should not be argumentative. Continuing with the fraud example, if you wish to show first a false representation, the heading should not be “The False Representation,” but should be “The Representation by Defendant as to [stating the subject matter].” Its falsity can be demonstrated without arguing it, either by stating the true facts under the same heading or by using another heading, such as “The Facts of the Matter Represented.”

246. Discussed at section 6:5.2[G][4], infra.
The use of headings will, besides promoting clarity, permit the
court to refer more readily to your statement of facts while reading the
argument of your brief, and will also break up otherwise monotonous
pages of type.

Organize your facts, to the greatest extent possible, to subsume
under the same heading all of the facts pertinent to a particular legal
question later developed. Where it is possible, break down your factual
statements under subheadings, with the material under each subhead-
ing distinctly relevant only to the particular subportion of your legal
argument. By so breaking down the facts, your discussion of the law
will seem all the more persuasive, for you will have given the factual
statements in such a way that they will most easily serve as the
premise for your legal syllogism.247

Indeed, this is the main thrust and purpose of the statement of
facts: to set forth the minor premises of fact in such a way that they are
tailor-made to fit the major premises of law in your later legal
argument, so as to point inevitably to the conclusion that you wish
to reach. Since a legal argument generally involves not one but several
syllogisms, the use of separate cubbyholes for each minor premise of
fact aids the court in deciphering the syllogism.

The needs of a particular case may call for a different approach.
Thus, you may have a case with an exceedingly complex factual and
legal picture wherein your client is complaining of a long series of
related events. In such a case, though a classification approach
might initially seem indicated, it may present a seeming jungle of
unrelated facts. In that event, go back to the chronological approach
but break up your narration by headings that indicate a particular
event complained of.


If your case involves only questions of fact, where the weight of the
evidence or its substantial nature is the only or the main question
before the court, I suggest a different presentation. Where the major
question is whether there was substantial evidence to support the
findings, and the case depends upon testimony of various individuals
as to various alleged incidents, one effective method is to break down
each person’s testimony, in tabular form, so as to permit the court to
quickly but thoroughly analyze the particular evidence in support of
each finding. From this, you may develop the argument under each
subhead as to each witness to show that there was no substantial

247. For an illustration of this subject matter breakdown of the facts, see the
Statement of the Case in the Schweare brief, Appendix C6, infra.
evidence to support the findings. A several-hundred-page record, without such an analysis, would be a most difficult thing for the court to handle. A tabular approach can be most useful, as long as there is no statute or rule against it. In case of doubt, check with the clerk of the appellate court.

Another situation where the tabular approach may be effective is when the facts are complex, but are almost identical to the facts in an important precedent, or when they perhaps present an a fortiori case. In the course of your legal argument, not in your statement of facts, use the tabular approach to demonstrate this.248

In both situations described above, the tabular approach is not used in the statement of facts proper; it is, rather, used in the course of a restatement of the facts, or a more thorough explication thereof, in the argument portion of the brief. This is because the tabular form is used to compare one column in the table with another; and this, smacking of argument, should be in the argument portion of the brief. But the preparation of this table will be invaluable to you in preparing the statement of facts, for it will help you determine which facts you need in your statement.

The tabular approach is not universally beloved. The late Judge Medina of the Second Circuit characterized this approach as a "stunt."249 Perhaps it is in disfavor because it has been used in the statement of facts proper, or because its proper use is found most infrequently.250

[G][4] Proper Use of Narrative Statement of Trial

A simple narrative statement of facts of the hearing or trial—showing who testified as to what, proceeding in the order of the witnesses’ testimony—is usually most ineffective. Yet, on rare occasions, this form of presentation of the facts may be advisable or even necessary.

In one case, the major question was whether there is a constitutional right to appointed counsel in a judicial discharge proceeding on a writ of habeas corpus brought by an indigent inmate of a mental institution.251 The naked constitutional question was all-important, but there was an ancillary facet: a psychiatrist had used the way in which the prisoner had conducted his own hearing as evidence of insanity. The only way to counter this evidence was to show, step-by-step, the rational manner in which the prisoner had proceeded during

248. For an illustration of this approach, see Appendix C3, infra.
250. I have used the tabular approach only in the brief excerpted in Appendix C3, infra, and in another matter.
the hearing. Therefore, it was necessary to give a narrative statement of what took place at the hearing.  


In fortunately rare situations, the appellate attorney—who must make his judgement as to which factual and legal issues to raise on the appeal—may be confronted with a judicial opinion replete with so many material and serious errors of fact and law that the usual rules about selecting only the strongest points would seem to waste opportunities for securing a favorable outcome. I am not writing about the relatively average situation wherein the appellate attorney’s first brush with the case causes him to bristle with all sorts of perceived injustices. I am talking about an extreme case, wherein the trial court confuses dates, exhibits, testimony, and law. The best way to effectively handle such a situation is by categorizing the factual errors, as well as the legal arguments, so that rather than have an infinite number of apparent errors, they seem boiled down to a relative few, while you yet take advantage of each of the errors.

In the usual case, it pays to remember the recent pithy comment of the Sixth Circuit: “When a party comes to us with nine grounds for reversing the district court, that usually means there are none.”

[G][6] The Esoteric Issue

If an issue is complicated, or not readily understandable by an appellate judge, the responsible advocate should carefully explicate it to the court. Failure to do so may be responsible for the appellate court’s deference to the court below.

[H] The Unfavorable Fact

Unfavorable facts should be ignored only if you have no answer to them, either factual or legal. But this should almost never be done, for

252. This device also enabled me to show that appointed counsel was necessary to avoid unfounded adverse inferences from self-representation.

253. For an example of how this was handled, in a case known as Lubitz v. Mehlman, see Appendix C4, infra. The decision of the Appellate Division reversing the trial court—on the law and on the facts—may be found at 591 N.Y.S.2d 839 (App. Div. 1st Dep’t 1993), leave to appeal denied, 619 N.E.2d 662 (N.Y. 1993).


255. As noted by the Seventh Circuit, “This is a recurrent problem: specialized lawyers’ failing to appreciate generalist judges’ often limited understanding of esoteric financial instruments.” Johnson v. Meriter Health Servs. Emp. Ret. Plan, 702 F.3d 364, 366 (7th Cir. 2012).
your adversary will deal with them even if you do not. It is, therefore, wise to recite the unfavorable facts, minimizing them as much as possible—usually by submerging them in the favorable facts—and then to deal with them in your legal argument.²⁵⁶

§ 6:6 Statement of Facts for Appellee

Most court rules give the appellee the option of either not restating the facts already stated by the appellant, or of restating them. Do not decide what to do on the basis of whether your adversary has fairly stated the facts: Make your decision on the basis of whether you can state them more effectively and persuasively for your client. Rare will be the case where the facts cannot be persuasively stated for both sides. In fact, you will probably never come across a case in which a counter-statement of facts has not been made. This is the reason that the device of submitting a case upon an agreed statement of facts is so rarely used, for no advocate wishes to yield the opportunity to present his facts persuasively.

²⁵⁶. See, e.g., Error Brief (Plaintiff-Appellant’s Reply Brief) in Appendix C5, infra.