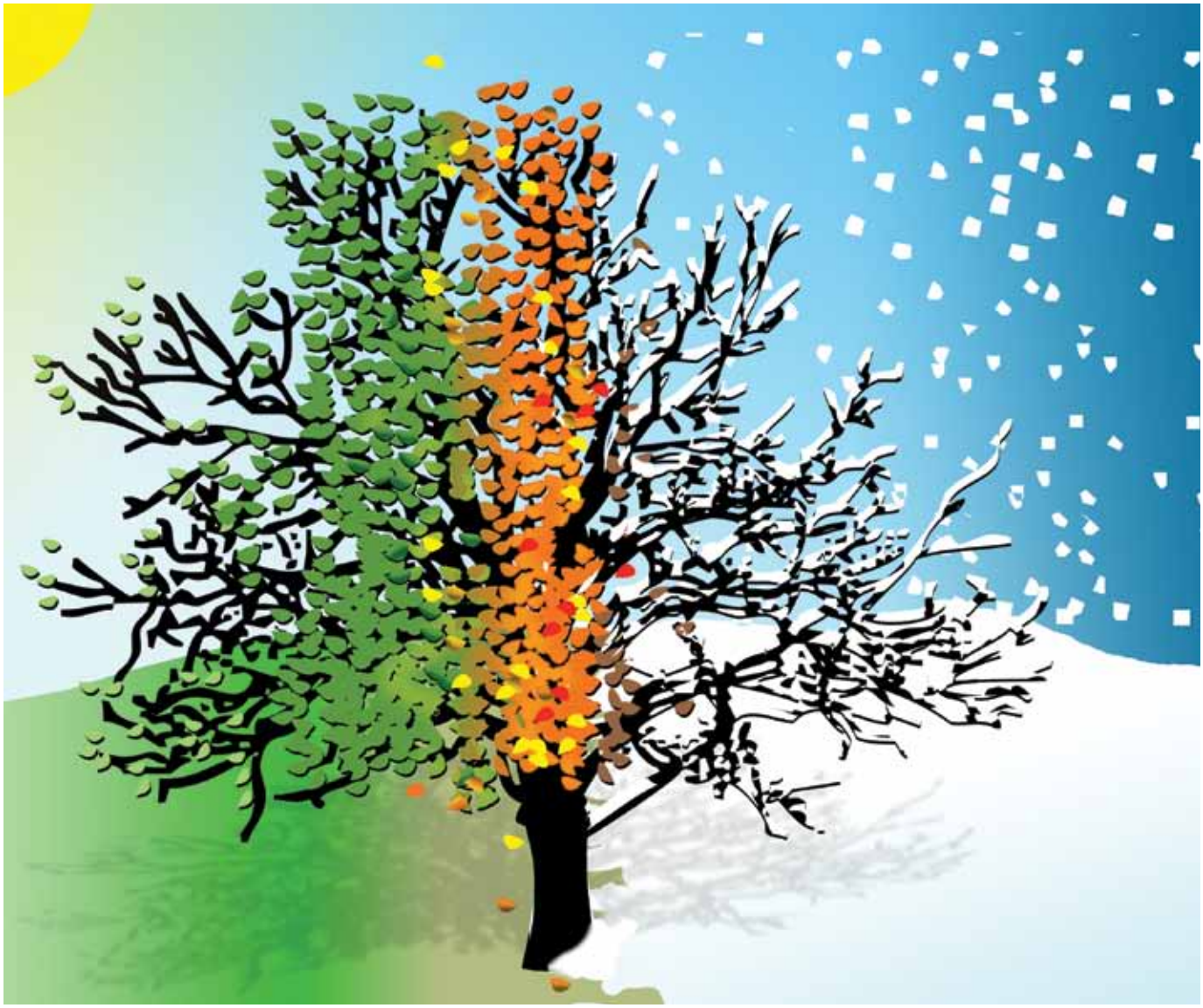

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15. Appellate Advocacy in Civil Cases

Civil Appellate Advocacy: Effective Use of the Standards of Review

Hillary J. Massey, Esq.[1]

One of the first cases I handled as a law clerk for a state supreme court justice involved one of those tricky issues that is neither factual nor legal, but mixed. After reviewing the briefs and observing oral argument, I eagerly met with my boss, the Chief Justice, hoping to impress her with my analysis of the issues and my recommendations for the decision. My ego was quickly deflated, however, when the Chief stumped me with her first question about an issue in the case: what is the standard of review? I blankly stared at her as I realized for the first time that the parties had not set forth the standard in their briefs or argument. The Chief promptly ordered me back to my office to figure it out, explaining with great patience that the standard of review decides every issue in every case. Having left a bit of my pride on the route between the Chief's desk and mine, I will never forget that lesson. This article emphasizes the importance of the standards of review to the entire appellate process, from advising a client about whether to take an appeal, to structuring the briefs and preparing for oral argument.

I. Overview of the Standards of Review

There is no shortage of authorities describing the various standards of review. *See, e.g.,* David M. Axelrad, *Appellate Practice in Federal and State Courts* (Law Journal Press 2011); Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* (4th ed. 2010).[2] One must-have source for any appellate practitioner in Maine is *Maine Appellate Practice,* authored by Justice Donald G. Alexander of the Maine Supreme Judicial Court. Hon. Donald G. Alexander, *Maine Appellate Practice* (Tower 2008). This article will provide only a brief overview of the most common standards of review: *de novo*, abuse of discretion and clear error.

Appellate standards establish the degree of deference that an appellate court (in Maine, the Supreme Judicial Court sitting as the Law Court) affords a trial court's decisions and rulings. At one extreme is the *de novo* ("anew") standard. When the Law Court reviews an issue *de novo*, it does not give any deference to the determinations made by the lower court. Instead the Court takes a fresh look at the issue, standing in the shoes of the trial court, and decides the issue without any regard for the decision below. This standard applies to legal issues including the

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[1] Hillary J. Massey is an Associate with Libby, O'Brien, Kingsley & Champion, LLC in Kennebunk, Maine. Hillary attended Boston College Law School and then clerked for Chief Justice Margaret H. Marshall at the Massachusetts Supreme Judicial Court and Judge William G. Young in the U.S. District Court for the District of Massachusetts. Hillary's practice focuses on civil litigation, including appeals.

[2] There are also materials addressing effective advocacy from a style and strategic perspective, which is not within the scope of this article. *See* Hon. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (Thomson/West 2008); Jane R. Roth & Mani S. Walia, *Words to the Wise Advocate: Persuading Quickly: Tips for Writing an Effective Appellate Brief*, 11 J. App. Prac. & Process 443 (2010); Sylvia Walbolt, *Twenty Tips from a Battered and Bruised Oral-Advocate Veteran*, ABA Litigation (Winter 2011).

interpretation of statutes and ordinances; interpretation of contracts and other legal documents; application of the law to the facts; and review of summary judgment orders.[3] Deference to the trial court is not required because the appellate court is equally or more capable to decide these issues.

On the other extreme is the clear error standard. Clear error exists when there is not competent evidence in the record to support a lower court's finding. *State v. Price-Rite Fuel, Inc*., 2011 ME 76, ¶ 18, 24 A.2d 81, 86. The most frequent application of this standard is to judicial fact finding, but it also applies to other issues, including determinations of sufficient foundation for admission of evidence. The lower court is entitled to deference on these issues because it is in a superior position to make the pertinent findings. For example, a trial court's determinations concerning credibility are entitled to great deference because the trial judge had the opportunity to observe witnesses at trial, as opposed to the appellate court's cold and distant review of a transcript.

Somewhere in the middle of the deference spectrum is the abuse of discretion standard. As discussed in more detail below, the overarching question for the Law Court in applying this standard is whether the trial court's ruling or order was within the range of permissible alternatives. In other words, there are boundaries to the trial court's decision-making authority in certain areas, and this standard determines whether the court has exceeded those boundaries. The abuse of discretion standard applies to procedural matters such as motions for continuances, extensions of time and discovery disputes, as well as to most evidentiary rulings and decisions on sanctions and remedies.

The abuse of discretion standard requires more explanation than the *de novo* or clear error standards because, as Justice Andrew M. Mead explained in a law review article before he was appointed to the Supreme Judicial Court, "abuse of discretion is a highly flexible and malleable term that is applied to widely differing circumstances with equally differing results." Hon. Andrew M. Mead, *Abuse of Discretion: Maine's Application of a Malleable Appellate Standard*, 57 Me. L. Rev. 519, 520 (2005). In general, the Law Court must consider three questions in determining whether a lower court has abused its discretion: "(1) are factual findings, if any, supported by the record according to the clear error standard; (2) did the court understand the law applicable to its exercise of discretion; and (3) given all the facts and applying the appropriate law, was the court's weighing of the applicable facts and choices within the bounds of reasonableness." *Pettinelli v. Yost*, 2007 ME 121, ¶ 11, 930 A.2d 1074, 1077-78. Keeping those questions in mind, the Law Court recently has explained that a trial court exceeds the bounds of its discretionary decision-making when it:

[3] Administrative decisions receive a more nuanced type of review. *See* Hon. Donald G. Alexander, *Maine Appellate Practice* ch. 4, section III (Tower 2008).

(1) considers a factor prohibited by law, *see Pettinelli v. Yost*, 2007 ME 121, ¶ 11, 930 A.2d 1074, 1077-78; *Osier v. Osier*, 410 A.2d 1027, 1029-31 (Me. 1980); (2) declines to consider a legally proper factor under a mistaken belief that the factor cannot be considered, *see State v. Svay*, 2003 ME 93, ¶ 11, 828 A.2d 790, 794; (3) acts or declines to act based on a mistaken view of the law, *see Shaw v. Packard*, 2005 ME 122, ¶¶ 11-12, 886 A.2d 1287, 1290; *State v. Mason*, 408 A.2d 1269, 1272-73 (Me. 1979); or (4) expressly or implicitly finds facts not supported by the record according to the clear error standard of review, *Pettinelli*, 2007 ME 121, ¶ 11, 930 A.2d at 1077-78.

Smith v. Rideout, 2010 ME 69, ¶ 13, 1 A.3d 441, 444.

For example, in *Osier v. Osier*, the Law Court concluded that a trial court abused its discretion in giving undue weight to the religious preference of a parent when determining the custody of a child, and remanded the matter for a new hearing. 410 A.2d at 1029-31. In *State v. Svay*, the Law Court concluded that it was an abuse of discretion for a trial court to refuse to consider the consequences of deportation as a mitigating factor in sentencing, but the Court affirmed the judgment because the error did not affect the sentence. 2003 ME 93, ¶¶ 13-17, 828 A.2d at 794. In *Shaw v. Packard*, 2005 ME 122, ¶¶ 11-12, 886 A.2d 1287, 1290, the Court ruled it was an abuse of discretion for a trial court to deny a continuance based on its incorrect determination that the governing statute did not allow it, and concluded the error was not harmless.[4]

A recent decision highlights the difficulty in applying this standard. In *Corcoran v. Marie*, 2011 ME 14, ¶ 17, 12 A.3d 71, 75, the Law Court concluded that the District Court "exceeded its authority" in construing an ambiguous divorce judgment. The dissent (Jabar, J.) disagreed, opining that the majority had failed to accord the District Court "an appropriate measure of deference" pursuant to the abuse of discretion standard. *Id.* ¶ 28, 12 A.3d at 78. *See also Nixon v. Nixon*, 2008 ME 157, ¶ 18, 957 A.2d 101, 105 (Alexander, J., dissenting) (noting that abuse of discretion review is narrow and deferential). It may be that the *Corcoran* Court afforded the trial court a low level of deference in its construction of the divorce judgment because the Law Court typically reviews the interpretation of contracts and other legal documents *de novo*, and is certainly equipped to handle the task. This is particularly true where, as in *Corcoran*, the clarification judge in the lower court was not the issuing judge.

Several commentators have emphasized that, within the abuse of discretion standard, varying levels of deference apply. Hon. Andrew M. Mead, *Abuse of Discretion: Maine's*

[4] These cases demonstrate that, regardless of the applicable standard of review, the harmless error test determines the outcome of most appeals: the Law Court will vacate a judgment in the trial court only if the error resulted in substantial injustice or affected substantial rights. Hon. Donald G. Alexander, *Maine Appellate Practice* § 405 (a) (Tower 2008). This standard does not apply to a small subset of constitutional errors. *Id.*

Application of a Malleable Appellate Standard, 57 Me. L. Rev. 519, 535-39 (2005); David M. Axelrad, *Appellate Practice in Federal and State Courts* § 3.04 (Law Journal Press 2011); Richard H. W. Maloy, *"Standards of Review" - Just a Tip of the Icicle*, 77 U. Det. Mercy L. Rev. 603, 634 (Summer 2000). Further analysis of this issue is beyond the scope of this article, but it's important to keep in mind the varying levels of discretion when deciding whether to take an appeal, and when presenting arguments during the appellate process, as discussed below.

II. Use of the Standards of Review in Appellate Advocacy

Understanding the standards of review is central to an appellate advocate's task because the applicable standard of review determines the likelihood of success on any issue on appeal. Logic dictates that the more deference an appellate court affords to the trial court, the more likely it will uphold the trial court decision. A review of the decisions of the Law Court in the spring of 2004 and 2011 supports this assumption. From January 1, 2004 through May 15, 2004, the Law Court decided 123 cases, affirming the judgment in 102, or 83%, of them. For example, the Court affirmed 82% of divorce decisions, and 97% of criminal decisions. Of the 21 decisions that the Court vacated, 86% involved a legal error, to which the *de novo* standard applied. The Law Court vacated only four decisions based on an abuse of discretion, and did not identify clear error in any case. [5]

From January 1, 2011 through May 15, 2011, the Law Court decided 133 cases, including 76 memoranda of decision and 57 published opinions.[6] The Court affirmed 105, or 79%, of them, and dismissed six. The Court vacated at least a portion of the decision in twenty cases: three Rule 80B/C cases; three family (19-A) cases; eleven general civil cases; and three criminal cases. Of the decisions that were vacated, two were vacated for insufficient fact finding, and one was vacated for an abuse of discretion (*Corcoran v. Marie*, discussed above). The other seventeen decisions were vacated based on legal error, as follows: one for insufficient evidence[7]; eight for incorrect application of law to facts[8]; three for incorrect statutory/contract interpretation[9]; three for improper rulings on summary judgment[10]; one for obvious error[11]

[5] This analysis was prepared by Justice Jon D. Levy of the Maine Supreme Judicial Court, and is used with his permission.

[6] I conducted the following analysis of the decisions from January through May, 2011.

[7] *Dupuis v. Soucy*, 2011 ME 2, 11 A.3d 318.

[8] *Harvey v. Dow*, 2011 ME 4, 11 A.3d 303; *Britton v. Donnell*, 2011 ME 16, 12 A.3d 39; *Turner v. Sec'y of State*, 2011 ME 22, 12 A.3d 1188; *Flaherty v. Muther*, 2011 ME 32, 17 A.3d 640; *State v. Kent*, 2011 ME 42, 15 A.3d 1286; *Bonney v. Stephens Mem. Hosp*., 2011 ME 46, 17 A.3d 123; *State v. Dodge*, 2011 ME 47, 17 A.3d 128; *Muther v. Broad Cove Shore Ass'n*, Mem 11-53 (Me. Mar. 22, 2011).

[9] *Tenants Harbor General Store, LLC v. DEP*, 2011 ME 6, 10 A.3d 722; *Blue Yonder*, *LLC v. State Tax Assessor*, 2011 ME 49, 17 A.3d 667; *Jacobi v. MMG Ins. Co*., 2011 ME 56, 17 A.3d 1229.

[10] *McCormick v. LaChance*, 2011 ME 44; *Stewart-Dore v. Webber Hosp. Ass'n*, 2011 ME 26, 13 A.3d 773; *Hutz v. Alden*, 2011 ME 27, 12 A.3d 1174.

(involving the opportunity to cross-examine); and one for preemption by federal law.[12] Two other cases were vacated only because they were related to a decision that was vacated.

The lesson for the appellate practitioner is that the standard of review must remain central to our decision-making at every stage of every case. When we advise clients about whether to take an appeal, we must evaluate and explain the potential issues for appeal, the standards that apply, and the likelihood of success. If the majority of issues in the case will be reviewed under the clear error or discretionary standards, we have a responsibility to advise our clients about the risks/benefits of bringing an appeal. The standards of review must govern our decision-making after an appeal is brought as well, by informing the issues we highlight in our arguments, and determining the extent to which we praise or challenge the reasoning of the trial court.

III. Conclusion

Rule 9(a)(4) of the Maine Rules of Appellate Procedure requires the appellant in every case to set forth the standard of review for every issue on appeal. Thankfully, therefore, Maine law clerks will never experience the moment of absolute panic that I felt as a law clerk when the Chief asked that very simple question. However, as advocates, we must do more than merely provide the Court with the applicable standard. Rather, effective appellate advocacy requires that we truly understand the standards of review and use them to encourage the Court to reach the decision we seek.

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[11] *Jusseaume v. Ducatt*, 2011 ME 43, 15 A.3d 714.

[12] *In re Guardianship of Smith*, 2011 ME 51, 17 A.3d 136.