



## Appellate Practice Corner

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### Putting the Standard of Review to Use

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Legal arguments are not all created equal. Certain arguments are more difficult than others to win on appeal when the reviewing court cares more about what the trial court decided. The difference is reflected in the concept of the standard of review, which dictates the deference that the reviewing court is to show to the decision of the lower court.

The standard of review is important enough that the rules governing appellate briefs in the state courts require the appellant to identify it in the opening brief. Ill. S. Ct. R. 341(h)(3) (eff. Jan. 1, 2016). Apart from that formal requirement, an understanding of the standard of review enables counsel to better understand the strengths and weaknesses of arguments on appeal, so as to make better use of the precedents cited to support or refute those arguments. This edition of the Appellate Practice Corner describes the distinctions between the major standards of review and suggests some ways in which to use those distinctions to one's advantage.

#### *De Novo* or Abuse of Discretion?

The standard of review dictates how much the trial court's decision should matter to the reviewing court. Another way of thinking about it is as a way of measuring the significance of the lower court's ruling itself as a factor in reviewing the correctness of that ruling.

When the standard of review is *de novo*, the reviewing court pays no deference to the trial court's decision. *Waters v. City of Chicago*, 2012 IL App (1st) 100759, ¶ 8. This standard applies to those matters that the reviewing court is equally well-suited to examine, typically issues that are purely legal in nature and can be resolved without any direct observation of how the evidence was presented or received. *People v. Brener*, 357 Ill. App. 3d 868, 870 (2d Dist. 2005). Questions of law are reviewed *de novo* because a ruling on the law, whether made by a trial court or by a reviewing court, does not depend upon the court's appraisal of the weight or the strength of the evidence. Such rulings are objectively either right or wrong, not matters of opinion, and are not properly influenced by subjective interpretations of the evidence. Because such determinations should not be influenced by such things, *de novo* review can take place on a clean slate.

When the standard of review is abuse of discretion, however, the ruling concerns a subject that often depends on direct observation of the events that prompted it—such as the demeanor of the witnesses and the strengths and weaknesses of the evidence the parties offered. *In re Marriage of Holder*, 137 Ill. App. 3d 596, 600 (3d Dist. 1985). Unlike when questions of law are in dispute, the trial court is expected to be influenced by these factors, so the reviewing court pays a great deal of deference to the trial court's decision. This standard recognizes that sometimes, in order to understand the reason for a ruling, “You had to be there.” For an issue that is reviewed for abuse of discretion, there may be no objectively correct or incorrect ruling, but rather a range of permissible rulings; as long as the ruling is within that range, the trial court has not abused its discretion. Such rulings include most evidentiary issues, such as motions *in limine* and objections

at trial, as well as the instruction to the jury and the verdict forms it is given. *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 505 (2002); *City of Naperville v. Watson*, 175 Ill. 2d 399, 409 (1997).

To an appellant, *de novo* review is preferable to review for abuse of discretion. To an appellee, the reverse is generally true. That does not mean, however, that *de novo* review favors the appellant over the appellee. While *de novo* review does not defer to the trial court or tend to favor the appellee, it gives the appellant no inherent advantage either; it is more accurate to say that *de novo* review does not favor either side. Appellants ordinarily prefer *de novo* review not because it tends to favor reversal, but because it does not tend to favor affirmance, as review for abuse of discretion does. When the standard of review is *de novo*, the opposing parties begin on an equal footing, with neither party receiving any advantage from the ruling of the trial court.

### Identifying the Standard of Review in the Case at Bar

Reflecting the importance of the standard of review, the rules that govern the content of appellate briefs require it to be identified in the appellant's initial brief. "The appellant must include a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument." Ill. S. Ct. R. 341(h)(3).

Such a statement is not required of the appellee. Rule 341(h) is specific to the appellant's opening brief, and the reference in subsection (3) to the standard of review underscores that limitation by stating that "[t]he *appellant* must include" a statement of the standard of review for each issue in the initial brief. *Id.* (emphasis added). Supreme Court Rule 341(i) expressly permits the appellee to omit certain matters that are required of the appellant, including those required by subsection (3). Ill. S. Ct. R. 341(i) (eff. Jan. 1, 2016). The rule suggests, however, that the appellee might nonetheless include those matters "to the extent that the presentation by the appellant is deemed unsatisfactory." *Id.*

When an appellant has represented the standard of review to be *de novo* and that representation is either incorrect or open to reasonable dispute, the appellee should deem the presentation unsatisfactory under Rule 341(i) and supply authority for an abuse-of-discretion standard. Not only will the reviewing court be more inclined to defer to the trial court's ruling and thus to affirm, but a demonstrated misunderstanding or misrepresentation on such a fundamental aspect of appellate procedure may be revealing in itself for purposes of appellate review.

An appellee who maintains that the standard of review is abuse of discretion should emphasize the high bar that the appellant must clear in order to obtain a reversal—and by extension, the relatively low bar for affirmance. In defending a favorable ruling on the admission of evidence or the instruction to the jury, for instance, the appellee need not convince the reviewing court that the trial court would have been wrong to rule in favor of the appellant's position. The appellee need only establish that what the trial court actually did was within its discretion. In most cases, the appellee should resist the temptation to argue that the trial court did not have the discretion to do what the appellant claims it should have done; such arguments not only go much further than necessary for affirmance under an abuse-of-discretion standard, but may also be incorrect. As the appellate court once described the abuse-of-discretion standard, "Perhaps another trial judge would have proceeded in a different fashion. We must focus on what the trial court did and whether that was an abuse of discretion." *Higgins v. House*, 288 Ill. App. 3d 543, 546 (4th Dist. 1997). Especially in close cases, where the trial court could have reasonably ruled in favor of either party, the appellee may wish to avoid describing the trial court's ruling as right, or an opposite ruling as wrong, in favor of the more measured position that the trial court's ruling was within its discretion.

Rulings that are reviewed for abuse of discretion ordinarily share two qualities that make them best suited to resolution at the trial level: they concern subjective matters on which reasonable people may differ, and they depend on the direct observation of the events that led to the ruling. *In re Marriage of Sykes*, 231 Ill. App. 3d 940, 946 (4th Dist. 1992). The trial court sees and hears the witnesses testify and has the opportunity to see how persuasive and effective they were before the jury. The reviewing courts, by contrast, typically must rely on written transcriptions of witness testimony. “The trial judge, as the trier of fact, is in a position superior to a court of review to observe the demeanor of witnesses while testifying, to judge their credibility and to determine the weight their testimony should receive.” *Flynn v. Cohn*, 154 Ill. 2d 160, 166 (1992) (quoting *In re Application of Cnty. Treasurer*, 131 Ill. 2d 541, 549 (1989)) (citations omitted). The deferential standard of review embodies the reluctance of reviewing courts to question rulings that are based on factors the reviewing courts are unable to view for themselves.

That is not to say, however, that rulings on discretionary matters are immune to reversal. Implicit in the abuse-of-discretion standard is the understanding that trial courts sometimes rule in ways that exceed or violate the broad discretion they enjoy. But this standard of review is a difficult one to satisfy, reflecting the fact that in many instances a trial judge has two or more contradictory options that are all within his or her discretion. In such circumstances, it is not sufficient to show that the trial court was permitted to rule in the way the appellant desired. “Although a trial court’s decision is always subject to review, a reviewing court should not overturn a trial court’s findings merely because it does not agree with the lower court or because it might have reached a different conclusion had it been the trier of fact.” *Flynn*, 154 Ill. 2d at 166 (quoting *County Treasurer*, 131 Ill. 2d at 549). When the standard of review is abuse of discretion, the appellant must show that the trial court was not permitted to do what it actually did—that is, that the challenged ruling was outside the trial court’s authority, and therefore an abuse of its discretion.

In some cases there is room for argument as to what standard governs the court’s review. This may be the case, for instance, when the ruling at issue is a summary judgment that resulted from the exclusion of evidence. There are too many cases to count in which the reviewing courts have observed that summary judgments are reviewed *de novo*, often an unremarkable and uncontested proposition. *See, e.g., Carney v. Union Pac. R.R. Co.*, 2016 IL 118984, ¶ 25 (citing *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 13). A plaintiff appealing a summary judgment might simply declare that the standard of review is *de novo*, citing one of the many decisions that apply that standard to summary judgments. Since that standard does not call for deference to the trial court, a plaintiff appealing a judgment for the defense might be content to suggest that the reviewing court should take up the question afresh, without regard for the trial court’s observations.

But depending on the basis for the summary judgment, an appellee might take issue with the appellant’s contention that a non-deferential standard should apply—even though the ruling being appealed may be a summary judgment, something ordinarily reviewed *de novo*. When summary judgment is entered because a crucial plaintiff’s witness was barred, for instance, the plaintiff’s appeal of that judgment is not necessarily reviewed *de novo*. If the plaintiff maintains that the expert was not essential to the *prima facie* case, then the issue is the sufficiency of the evidence, and thus reviewed *de novo*. *People v. Howard*, 2016 IL App (3d) 130959, ¶ 18. But if the plaintiff argues that the trial court should not have barred the witness, that argument concerns the trial court’s discretion in the admission of evidence—and that issue should be reviewed for abuse of discretion. *Ford v. City of Chicago*, 132 Ill. App. 3d 408, 413 (1st Dist. 1985).

Conversely, an appellant should not overlook the possibility of urging a reviewing court not to defer to the trial court on an issue that might initially seem to fall under the abuse-of-discretion standard. Where a trial court’s exercise of discretion relies on an erroneous conclusion of law, for instance, the reviewing court applies a *de novo* standard. *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680–81 (1st Dist. 2001) (citing *People v. Williams*, 188 Ill. 2d 365, 369 (1999)). Though

the issue in *Beehn* concerned an *in limine* ruling, which ordinarily would be reviewed for abuse of discretion, the appellant argued that it should be reviewed *de novo* because it relied upon a conclusion of law. *Beehn*, 321 Ill. App. 3d at 680. The appellate court agreed, and went on to hold that the trial court had erred in granting the motion *in limine*. *Id.* at 681.

### Using the Standard of Review to Select and Distinguish Legal Authority

As important as it is to appreciate the standard of review in evaluating the strengths and weaknesses of the case being litigated and the chances of success on appeal, it can be just as important to evaluating and selecting the precedents to cite in support of one's position. Likewise, a full understanding of the standard of review can be a powerful basis for distinguishing an opponent's precedents on procedural grounds.

For an appellant claiming error in a trial court's discretionary ruling, there is often small precedential value in cases in which the reviewing courts have affirmed trial courts in the exercise of discretion—especially when the decision cites the deferential standard of review and emphasizes the discretion the trial court enjoys. As a rule, the decisions with the greatest precedential value to an appellant are those that reverse trial-court rulings. If the issue was one for the trial court's discretion, there is little to be gained from a case holding that the trial court was permitted to do something else. The cases that matter are those in which the reviewing courts reversed—and found that other trial courts abused their discretion doing the same thing to which the appellant objects in the case at bar.

There are exceptions, of course; a decision affirming a discretionary ruling may be useful to an appellant, for instance, if it not only holds that the ruling at issue was within the trial court's discretion but also suggests that the trial court would have abused its discretion had it ruled differently. While such a suggestion might be dismissed as *dictum*, it may nonetheless cast doubt on the ruling being challenged in the case at bar. Still, the precedential reversal of a trial court's ruling as an abuse of discretion is generally the best authority for finding a similar ruling, in similar circumstances, to be an abuse of discretion as well.

The appellate court applied this principle in *Bangaly v. Baggiani*, 2014 IL App (1st) 123760, citing the standard of review as the basis for distinguishing one of the decisions the appellant had cited in support of her argument for reversal. Claiming that the trial court had erred in permitting a defense expert to testify, the plaintiff relied upon *Stehlik v. Village of Orland Park*, 2012 IL App (1st) 091278, in which the appellate court had affirmed a trial court's ruling that barred an expert. *Bangaly*, 2014 IL App (1st) 123760, ¶ 162 (citing *Stehlik*, 2012 IL App (1st) 091278, ¶ 29). But the *Bangaly* court rejected *Stehlik* as authority for reversing the judgment. While its ruling was partly based on the better qualifications of the expert in *Bangaly*, the court also recognized that the *Stehlik* court's affirmance of a discretionary evidentiary ruling had little precedential value for *Bangaly*, and did not suggest an abuse of discretion in the admission of similar expert testimony:

We also note that the *Stehlik* court was presented the issue of expert testimony from the opposite viewpoint as in this case: there, the court was asked to determine whether the trial court abused its discretion in refusing an expert opinion while, here, we are asked to determine whether the trial court abused its discretion in permitting the expert opinion. *Given the deferential standard of review, such a distinction is significant.*

*Id.* (emphasis added).



That distinction is less significant to an appellee’s choice of authority in defense of a discretionary ruling. A precedent that affirms a discretionary ruling, and holds that the ruling was within a previous trial court’s discretion, is useful authority for the argument that a similar ruling in the case at bar was within that trial court’s discretion as well.

### Conclusion

Apart from the rule requiring a statement of the standard of review, there might seem to be little reason for it; presumably the appellate court doesn’t need to be told, for instance, that its review of a summary judgment in a contract interpretation case is *de novo*, or that evidentiary rulings are reviewed for abuse of discretion. The real value of citing the standard of review is to the attorney who writes the brief, focusing attention on what must be proved—how much or how little—and setting the tone for the appeal.

### About the Author

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