

RULES OF THE GAME & NUGGETS OF
WISDOM: STANDARDS OF PROOF,
REVIEW AND HIDDEN STATUTORY
TREASURES

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Standard of Review

VS.

Scope of Review

The standard of review focuses on the deference an appellate court affords to the decisions of a District Court, jury or agency.

The scope of review describes that portion of the appellate record a reviewing court may examine to determine whether the trial court erred. It asks: "Does the appellate court review the entire record or only some portion of the record to determine error?"

Descriptions of the Standard of Review

- "The anvil on which the recitation of facts and the argument are both to be forged, and it as much as anything else determines their cast."
- "The difference between an issue on appeal case that is governed by a de novo standard ... as opposed to an issue governed by a clearly erroneous standard ... is the difference between an appeal that may have a decent chance and one that may have a snowball's chance in hell."
- "The bread and butter of appellate advocacy is the standard of review."
- "The standard of review that governs a particular issue on appeal has been characterized as the pivot on which judicial decisions turn."
- D.C. Circuit Judge Patricia Wald once wrote that the standard of review in a case "more often than not determines the outcome" of that appeal, and Tenth Circuit Judge Deanelle Tacha wrote that "to the [appellate] judge, [the standard of review] is everything."
- The standard effectively calibrates an "index point" for the likelihood of reversal, as determined by a level of appellate court confidence in the validity of the ruling below.
- Ronald R. Hofer, describing standards of review as the "height of the hurdles over which an appellant must leap"); Alvin B. Rubin, stating that standards of review "indicate the decibel level at which the appellate advocate must play to catch the judicial ear."

Most Common Standards of Review

While commentators have noted up to thirty different standards of review, many of these are just variations of the four most common standards of review, which are:

1. **abuse of discretion,**
2. **clearly erroneous,**
3. **substantial evidence,**
4. **de novo**

CHART RE B/P and S/R

BURDENS OF PROOF

Quantity of Proof Necessary
to Prevail on Issue or Claim

Typical Burdens of Persuasion

CIVIL

Preponderance of Evidence

ADMINISTRATIVE

Substantial Evidence
“Some Evidence”

CRIMINAL

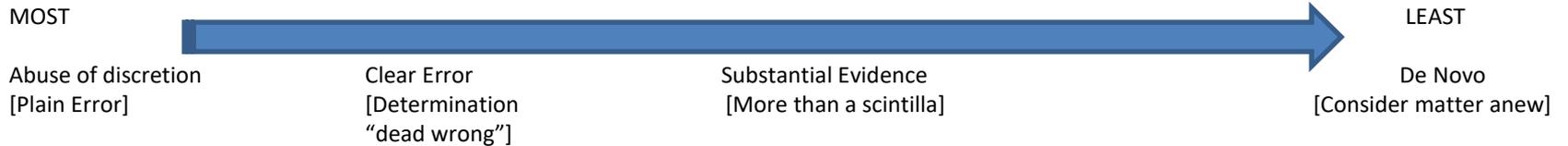
Beyond a Reasonable Doubt

Other Burdens of Proof

Beyond a Moral Certainty
Clear and Convincing
Chevron (Agency deference)

STANDARDS OF REVIEW

Degree of Deference to Trial Court



Abuse of Discretion

Abuse of Discretion:

- A plain error,
- Discretion exercised to an end not justified by the evidence,
- A judgment that is clearly against the logic and effect of the facts.
- Other jurisdictions state that a judge abuses her discretion when she acts outside the scope of the applicable law. For example, it does not apply the correct law or relies upon an erroneous finding of a material fact (e.g. wrong date), irrational ruling; error of law

Clearly Erroneous

- A trial court's determinations, which are based upon its findings of fact, are often reviewed under the clearly erroneous or clear error standard of review (e.g. findings of fact made on the basis of evidentiary hearings; credibility determinations).
- The Seventh Circuit Court of Appeals once stated that in order for a trial court's decision to warrant reversal under this standard, the determination must be "dead wrong," so wrong that it must be "more than just maybe or probably wrong; it must ... strike us as wrong with the force of a five-week-old, unrefrigerated dead fish."
- Definite and firm conviction that an error has been committed.

Substantial Evidence

Substantial Evidence:

- Means more than a mere scintilla;
- It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion even if it is possible to draw a contrary conclusion from the evidence." *Consolidated Edison Co. v. NLRB* , 305 U.S. 197, 229 (1938)(Chief Justice Hughes)

De Novo

De Novo:

- The court views the case from the same position as the district court.
- The appellate court must consider the matter anew, as if no decision previously had been rendered
- Generally reserved for the review of legal issues
- Courts using de novo review examine the trial court's application of the law without affording the lower court discretion
- To contrast the difference between de novo review, which is the least deferential standard, and abuse of discretion, which is the most deferential, one commentator suggested that under de novo review, the lower court's determination is protected by "a gossamer film" whereas under abuse of discretion, the trial court's decision "is safeguarded by a Kevlar shield."

Other Standards of Review

Others:

1. Arbitrary and Capricious – Agency reviews; narrow standard
2. “Some Evidence” – Examining an administrative record developed after an adversarial proceeding (*Superintendent v. Hill*) [a standard of review; not burden of proof]

Burden of Persuasion/Proof

The concept of a burden of persuasion ordinarily applies to questions of fact, and ordinarily is expressed in one of three ways:

(1) a preponderance of the evidence - The factfinder must believe that the existence of a fact is more probable than its nonexistence (civil disputes);

(2) clear and convincing evidence - a party must persuade the jury that the proposition is highly probable (constitutional and policy considerations);
and

(3) proof beyond a reasonable doubt - proof that leaves you firmly convinced of the defendant's guilt.

Required Standards of Review

Civil Rule 52(a) requires facts found by the court to be reviewed under a "clearly erroneous" standard; facts found by a jury are reviewed with the common law "substantial evidence" test. The sanctity of the Constitutional right to jury trial is the justification given for this enhanced deference.

U.S. Const. Amend. VII ("No fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."); 5 U.S.C. § 706 (2015) (defining scope of review); Fed. R. Civ. P. 52(a)(6) (noting judicial findings of fact "must not be set aside unless clearly erroneous").

Requirements to Set Forth Standard of Review

Federal Rule of Appellate Procedure 28(a)(8)(B)

(8) the argument, which must contain:

...

(B) or each issue, ***a concise statement of the applicable standard of review*** (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

NRAP 28(10)(B)

(10) the argument, which must contain:

...

(B) for each issue, ***a concise statement of the applicable standard of review*** (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

Typical Arguments for S/R Extremes

Abuse of discretion

1. The court misunderstood the facts or there was insufficient evidence to support the facts it relied upon
2. The court misunderstood the law
3. The court misunderstood the scope of its discretion
4. The court failed to follow the proper procedure for exercising its discretion
5. The record shows the court was unaware of its discretion
6. The court failed to exercise its discretion

Typical Arguments for S/R Extremes (con't)

De Novo

1. Interpretation of Evidence Code (but evidentiary rulings normally reviewed for abuse of discretion).
2. Facts presented in documentary evidence (e.g. removal of potential juror normally reviewed for abuse of discretion but de novo is used when the decision was based solely on questionnaires).
3. Was a confession voluntary where tape recorded?
4. Counsel had conflict of interest - no facts in dispute.
5. Evidentiary or prosecutorial misconduct errors at trial. If attorney or witness blurts out inadmissible/prejudicial comments the appellate challenge should be that an error of law occurred when the comment was made (witness let slip that defendant was on parole).

Statutory Pearls of Wisdom (NRS)

1.030. Application of common law in courts.

The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state.

Annotations for 1.030

This section includes the English statutes in force at the time of the American Declaration of Independence. *West Indies, Inc. v. First Nat'l Bank*, 67 Nev. 13, 214 P.2d 144, 1950 Nev. LEXIS 43 (Nev. 1950).

The common law is the rule of decision in state courts, unless in conflict with the state or federal constitution or statutory law. *In re Bailey's Estate*, 31 Nev. 377, 103 P. 232, 1909 Nev. LEXIS 33 (Nev. 1909); *Edward J. Achrem, Chtd. v. Expressway Plaza Ltd. Pshp.*, 112 Nev. 737, 917 P.2d 447, 112 Nev. Adv. Rep. 94, 1996 Nev. LEXIS 82 (Nev. 1996).

The term "common law of England" was employed in the sense in which it is generally understood in this country, and the intention of the Legislature was to adopt only so much of it as was applicable to the conditions of the state. *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 21 P. 317, 1889 Nev. LEXIS 4 (Nev. 1889).

Statutes (con't)

0.025. Use of “may,” “must,” “shall” and “is entitled”; explanation of flush lines.

1. Except as otherwise expressly provided in a particular statute or required by the context:

- (a) “May” confers a right, privilege or power. The term “is entitled” confers a private right.
- (b) “May not” or “no *** may” abridges or removes a right, privilege or power.
- (c) “Must” expresses a requirement when:
 - (1) The subject is a thing, whether the verb is active or passive.
 - (2) The subject is a natural person and:
 - (I) The verb is in the passive voice; or
 - (II) Only a condition precedent and not a duty is imposed.
- (d) “Shall” imposes a duty to act.
- (e) “Shall be deemed” or “shall be considered” creates a legal fiction.
- (f) “Shall not” imposes a prohibition against acting.

2. Except as otherwise required by the context, text of a statute that:

- (a) Follows subsections, paragraphs, subparagraphs or sub-subparagraphs that are introduced by a colon;
 - (b) Is not designated as a separate subsection, paragraph, subparagraph or sub-subparagraph; and
 - (c) Begins flush to the left margin rather than immediately following the material at the end of the final subsection, paragraph, subparagraph or sub-subparagraph,
- applies to the section as a whole, in the case of subsections, or to the subdivision preceding the colon as a whole rather than solely to the subdivision that the text follows. The symbol “→” in bills and in Nevada Revised Statutes indicates the beginning of such text.

Statutes (con't)

205.4611. "Artificial person" defined.

"Artificial person" means any corporation, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation or any comparable entity which is created and existing under the laws of this State, any other state, territory or foreign government, or the Government of the United States and which is doing business in this State.

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205.4613. "Document" defined.

"Document" includes, without limitation, a photocopy print, photostat and other replica of a document.

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205.4615. "Older person" defined.

"Older person" means a person who is 60 years of age or older.

Statutes (con't)

205.4617. "Personal identifying information" defined.

1. Except as otherwise provided in subsection 2, "personal identifying information" means ***any information designed, commonly used or capable of being used, alone or in conjunction with any other information, to identify a living or deceased person*** or to identify the actions taken, communications made or received by, or other activities or transactions of a living or deceased person, including, without limitation:
 - (a) The current or former name, driver's license number, identification card number, social security number, checking account number, savings account number, credit card number, ***debit card number***, financial services account number, date of birth, place of employment and maiden name of the mother of a person.
 - (b) The unique ***biometric data of a person***, including, without limitation, the fingerprints, facial scan identifiers, voiceprint, retina image and iris image of a person.
 - (c) The ***electronic signature***, unique electronic identification number, address or routing code, telecommunication identifying information or access device of a person.
 - (d) ***The personal identification number or password of a person.***
 - (e) ***The alien registration number, government passport number, employer identification number, taxpayer identification number, Medicaid account number, food stamp account number, medical identification number or health insurance identification number of a person.***
 - (f) The number of any professional, occupational, recreational or ***governmental license, certificate, permit or membership of a person.***
 - (g) The number, code or other identifying information of a person who receives medical treatment as part of a confidential clinical trial or study, who participates in a confidential clinical trial or study involving the use of prescription drugs or who participates in any other confidential medical, psychological or behavioral experiment, study or trial.
 - (h) ***The utility account number*** of a person.
2. To the extent that any information listed in subsection 1 is designed, commonly used or capable of being used, alone or in conjunction with any other information, to identify an artificial person, ***"personal identifying information" includes information pertaining to an artificial person.***

Statutes (con't)

603A.040. "Personal information" defined (Title 52; Ch. 603A)

1. "Personal information" means a natural person's ***first name or first initial and last name*** in combination ***with any one or more of the following data elements***, when the name and data elements are not encrypted:
 - (a) Social security number.
 - (b) Driver's license number , driver authorization card number or identification card number.
 - (c) Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account.
 - (d) A medical identification number or a health insurance identification number.
 - (e) A user name, unique identifier or electronic mail address in combination with a password, access code or security question and answer that would permit access to an online account.
2. The term does not include the last four digits of a social security number, the last four digits of a driver's license number, the last four digits of a driver authorization card number or the last four digits of an identification card number or publicly available information that is lawfully made available to the general public from federal, state or local governmental records.

Statutes (Con't)

205.4611. “Artificial person” defined.

“Artificial person” means any corporation, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation or any comparable entity which is created and existing under the laws of this State, any other state, territory or foreign government, or the Government of the United States and which is doing business in this State.

Statutes (con't)

205.463. Obtaining and using personal identifying information of another person to harm or impersonate person, to obtain certain nonpublic records or for other unlawful purpose; penalties; rebuttable inference that possessor of personal identifying information intended to unlawfully use such information.

...

- 3. A person who violates:
 - (a) Subsection 1 or 2 by obtaining and using the personal identifying information of an older person or a vulnerable person;
 - (b) Subsection 1 or 2 by obtaining and using the personal identifying information of five or more persons;
 - (c) Subsection 1 or 2 by causing another person to suffer a financial loss or injury of \$3,000 or more as a result of the violation; or
 - (d) Subsection 2 to avoid or delay being prosecuted for an unlawful act that is punishable as a category A felony or category B felony,
- is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 3 years and a maximum term of not more than 20 years, and may be further punished by a fine of not more than \$100,000.

Statutes (con't)

205.4655. Exempt persons.

The provisions of NRS 205.461 to 205.4657, inclusive, do not apply to any person who, without the intent to defraud or commit an unlawful act, possesses or uses any personal identifying information of another person:

1. In the ordinary course of his or her business or employment; or
2. Pursuant to a financial transaction entered into with an authorized user of a payment card.

Statutes (con't)

205.46513. Establishing or possessing financial forgery laboratory unlawful; penalty; expert testimony.

...

4. As used in this section:

- (a) "Computer" has the meaning ascribed to it in NRS 205.4735.
- (b) "Financial forgery laboratory" means any computer, system, program or other electronic or mechanical device, or any combination thereof, that is specifically configured for the purpose of unlawfully:
 - (1) Obtaining personal identifying information of another person to commit an unlawful act; or
 - (2) Manufacturing any forged or fraudulent financial instrument, document or item, including, without limitation, any negotiable instrument, check, draft, bond, credit card, debit card, stock certificate, annuity, bank bill or note, draft, bill of exchange, contract, promissory note, traveler's check or money order.
- (c) "Personal identifying information" has the meaning ascribed to it in NRS 205.4617.
- (d) "Program" has the meaning ascribed to it in NRS 205.475.
- (e) "System" has the meaning ascribed to it in NRS 205.476.

Statutes (con't)

205.46517. Court records.

In any case in which a person is convicted of violating any provision of NRS 205.461 to 205.4657, inclusive, the court records must clearly reflect that the violation was committed by the person convicted of the violation and not by the person whose personal identifying information forms a part of the violation.

Statutes (con't)

205.4653. Prosecution regardless of whether person whose personal identifying information was stolen is living or deceased, is artificial person or suffers financial loss or injury.

A person who violates any provision of NRS 205.461 to 205.4657, inclusive, may be prosecuted for the violation whether or not the person whose personal identifying information forms a part of the violation:

1. Is living or deceased during the course of the violation or the prosecution.
2. Is an artificial person.
3. Suffers financial loss or injury as the result of the violation.

Statutes (con't)

6.010. Persons qualified to act as jurors.

Except as otherwise provided in this section, every qualified elector of the State, whether registered or not, who has sufficient knowledge of the English language, and who has not been convicted of treason, a felony, or other infamous crime, and who is not rendered incapable by reason of physical or mental infirmity, is a qualified juror of the county in which the person resides. **A person who has been convicted of a felony is not a qualified juror of the county in which the person resides until the person's civil right to serve as a juror has been restored pursuant to NRS 176A.850, 179.285, 213.090, 213.155 or 213.157.**

Statutes (con't)

6.030. Grounds for excusing jurors. *[Effective January 1, 2018]*

1. The court may at any time temporarily excuse any juror on account of:
 - (a) Sickness or physical disability.
 - (b) Serious illness or death of a member of the juror's immediate family.
 - (c) Undue hardship or extreme inconvenience.
 - (d) Public necessity.
2. In addition to the reasons set forth in subsection 1, the court may at any time temporarily excuse a person who provides proof that the person is the primary caregiver of another person who has a documented medical condition which requires the assistance of another person at all times.
3. A person temporarily excused shall appear for jury service as the court may direct.
4. The court shall permanently excuse any person from service as a juror if the person is incapable, by reason of a permanent physical or mental disability, of rendering satisfactory service as a juror. The court may require the prospective juror to submit a certificate completed by a physician or an advanced practice registered nurse licensed pursuant to NRS 632.237 concerning the nature and extent of the disability and the certifying physician or advanced practice registered nurse may be required to testify concerning the disability when the court so directs.

Statutes (con't)

205.4629. "Vulnerable person" defined.

"Vulnerable person" means a person who:

1. Suffers from a condition of physical or mental incapacitation because of a developmental disability, organic brain damage or mental illness; or
2. Has one or more physical or mental limitations that restrict the ability of the person to perform the normal activities of daily living.

Statutes (con't)

616C.120. Employee may elect treatment through prayer in lieu of medical treatment.

Any provision of this chapter or chapter 616A, 616B, 616D or 617 of NRS must not prevent an employee from providing for treatment for the employee's injuries or disease through prayer or other spiritual means in accordance with the tenets and practices of a recognized church, which treatment is recognized in this State in lieu of medical treatment.