

ROADMAP OF TEXAS AND FEDERAL STANDARDS OF REVIEW

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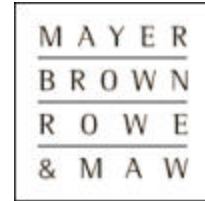
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I. INTRODUCTION

The “standard of review” is the level of deference that an appellate court gives to a decision by a lower court or administrative agency. There is not a single standard of review. Instead, different standards apply depending on the nature of the error being asserted. In some situations, Texas and federal courts will use different standards of review to determine whether similar types of error occurred.

This paper explores and compares Texas and federal standards of review, offering a framework for assigning a standard of review to a particular issue in each court. It begins with an overview of appellate procedure and a discussion of how to determine which standard of review applies. Next, it discusses each standard of review used by Texas and federal courts and briefly explores differences between them.

II. APPELLATE PROCEDURE – OVERVIEW

A fundamental principle of American jurisprudence is the right to a fair trial. U.S. CONST. amend. V. This does not mean that litigants are entitled to a perfect trial. See *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). The ideal, error-free trial is elusive in practice. Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 575 (2004). “Perfection is an aspiration, but the failure to achieve it in the judicial process, as elsewhere in life, does not, absent injury, require a repeat performance.” *Miles v. M/V Miss Queen*, 753 F.2d 1349, 1352 (5th Cir. 1985).

For these reasons, appellate courts will not correct every trial error. In general, a claim of error does not require reversal unless: (1) the complaining party preserved the claimed error for appellate review; (2) when the claim is evaluated under the correct standard of review, the trial court committed error; and (3) the error prejudiced a substantial right of the complaining party.

A. Preservation And Fundamental Error

An aggrieved party may ask an appellate court to review particular issues and decide whether the trial court erred. Before reaching that question, however, the appellate court must determine whether those issues were raised in the trial court and preserved for review. In general, “unpreserved complaint[s] cannot be reviewed on appeal, regardless of any [harmful] error which may be present.” W. Wendell Hall,

Standards of Review in Texas, 34 ST. MARY’S L.J. 1, 19-20 (2002).

Rule 33 of the Texas Rules of Appellate Procedure lists the requirements for preserving error: (1) the complaint must be made to the trial court by a timely request, objection, or motion that states the grounds for the ruling sought and complies with any applicable rules;¹ and (2) the trial court must either rule on the complaint (expressly or implicitly) or refuse to do so over the complaining party’s objection. TEX. R. APP. P. 33.1. In addition, to complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception. TEX. R. APP. P. 33.2.

Generally, federal appellate courts also refuse to consider complaints not passed upon by the trial court.² Unlike in Texas courts, however, “[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.”³ This more relaxed standard notwithstanding, federal appellate courts frequently are more willing than Texas courts to hold that a claim of error was not properly preserved.

Despite these preservation requirements, both Texas and federal appellate courts consider certain issues to be sufficiently important that a party can raise them for the first time on appeal. These issues include jurisdiction as well as “plain” or “fundamental” errors.⁴

¹ For example, Rules 272-74 and 276-79 of the Texas Rules of Civil Procedure provide more specific rules governing the preservation of charge error.

² *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); see FED. R. CIV. P. 46 (party should make court aware of desired action or objection and the grounds for it); FED. R. EVID. 103(a) (complaining party preserves error when (1) as to admission of evidence, a timely objection or motion to strike appears in the record that identifies the specific ground of objection, or (2) as to exclusion of evidence, the substance of the evidence was adequately proffered to the court).

³ *Singleton*, 428 U.S. at 121.

⁴ See FED. R. EVID. 103(d) (court may take notice of plain errors affecting substantial rights although they were not brought to the attention of the court); see also *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998) (jurisdiction can be raised by party for first time on appeal or by court *sua sponte*); *United States v. Atkinson*, 297 U.S. 157, 160 (1936) (appellate courts may consider unpreserved error if it is obvious or seriously affects the fairness or integrity of judicial proceedings); *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982) (per curiam) (jurisdiction may

These latter types of error are rare. Federal courts define plain error as “error so obvious and substantial that failure to notice it would affect the fairness, integrity, or public reputation of the judicial proceedings and would result in manifest injustice.” *United States v. Restivo*, 8 F.3d 274, 279 (5th Cir. 1993). Texas courts define fundamental error as error that directly and adversely affects the public interest “as that interest is declared in the statutes or Constitution of Texas.” *Cent. Educ. Agency v. Burke*, 711 S.W.2d 7, 8 (Tex. 1986) (per curiam).

B. Determining Error Under The Proper Standard

If a claim of error has been preserved or falls within one of the exceptions discussed above, the appellate court will next consider whether the lower court erred. To make this determination, the appellate court uses a “standard of review” to frame the relevant issues, define the depth of review, assign power among various judicial actors, and determine the proper scope of materials to review. Hall, *Standards of Review*, 34 ST. MARY’S L.J. at 8.

The standard of review has been described as the single most important concept of appellate review. Jacques L. Wiener, Jr., *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 TUL. L. REV. 187, 189 (1995). Standards of review are the “cornerstone of an appeal, and these standards must be woven into the discussion of the facts and the substantive law in a manner which persuades the appellate court that the trial court erred.” Hall, *Standards of Review*, 34 ST. MARY’S L.J. at 9. Under the Federal Rules of Appellate Procedure and a local rule of the Fifth Circuit, briefs must identify the standard of review for each argument. FED. R. APP. P. 28(a)(9)(B); 5TH CIR. LOC. R. 28.2.6. Texas does not have an analogue to these rules, but the Texas Supreme Court has stated that standard of review is an important procedural issue. *In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000).

The standard of review “is to the appellate court what the burden of proof is to the trial court.” Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U.L. REV. 11, 12 (1994). Although the burden of proof can always be defined in

terms of quantum, or how much evidence is necessary to establish a fact, there is no similar measure that is common to all standards of review. *Id.* at 14. Standards range from quantum (“substantial evidence” or “legal and factual sufficiency”), to point of view (“de novo”), to impression (“abuse of discretion”). *See id.* at 14 (discussing the range of standards of review).

There are four major standards of review used by appellate courts. Federal courts use the de novo, abuse of discretion, clearly erroneous, and substantial evidence standards of review. Texas courts also use the first two standards but substitute legal and factual sufficiency standards of review for the latter two.

In most cases, identifying the appropriate standard of review is not very difficult. The law “prescribing the standard of review applicable to a particular ruling is complex but relatively well settled.” Nathan L. Hecht, *Introduction to W. Wendell Hall, Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY’S L.J. 1041, 1041 (1993). Generally, appellate courts place the claim of error into a particular category and then apply the standard indicated by that category. Jeffrey C. Alexander, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 TEX. L. REV. 157, 173 (1985). Courts often rely on prior appellate decisions or statutory provisions for guidance in choosing the correct category and standard.⁵ *See Pierce v. Underwood*, 487 U.S. 552, 558-62 (1988).

Errors can be divided into three main categories: 1) fact-finding, 2) legal, and 3) discretionary. *E.g., id.* at 558; Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 645-46 (1971); *see* Part III, *infra*. Federal courts use a “substantial evidence” standard of review for fact-findings made by a jury. *See* Part IV.A.1, *infra*. Fact-findings made by a judge are reviewed under a “clearly erroneous” standard. *See* Part IV.A.2, *infra*. Texas courts review fact-findings made by the judge or jury for “legal and factual sufficiency.” *See* Part IV.B, *infra*. In both federal and Texas courts, legal conclusions are reviewed independently under a “de novo” standard of review with no deference to the lower court’s decision. *See* Part V, *infra*. Judicial rulings on discretionary matters such as trial

(... cont’d)

be raised for first time on appeal); *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam) (fundamental error may be raised for the first time on appeal).

⁵ For a comprehensive discussion of the many different types of trial court rulings and the standard of review applicable to each, see Steven Alan Childress & Martha S. Davis, FEDERAL STANDARDS OF REVIEW (3d ed. 1999), and W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY’S L.J. 1 (2002).

management are reviewed under an “abuse of discretion” standard. *See* Part VI, *infra*.

C. Reversible Error

If the appellate court determines that there is error, it will then examine whether the error is “harmful” or “reversible.” In order to obtain reversal, the complaining party must show (in Texas court) that the error probably caused the rendition of an improper judgment or (in federal court) that the error affected its substantial rights. *See* 28 U.S.C. § 2111 (1994); FED. R. CIV. P. 61; FED. R. CRIM. P. 52(a); FED. R. EVID. 103(a); TEX. R. APP. P. 44.1. One type of error that typically meets this standard is error that precludes fact-finding, such as error in granting a dismissal, summary judgment, or directed verdict, or error in refusing to submit a ground of recovery or defense.

Errors that do not meet this standard are considered harmless and cannot provide a basis for reversal. For example, when certain evidence is merely cumulative of other unchallenged evidence on a particular subject, error in the admission or exclusion of that evidence is often found harmless. This harmless error rule “serves administrative policies by moving cases through the system. It also mitigates expense . . . by precluding reversal of cases for technical errors that in reality did not affect the outcome.” Hall, *Standards of Review*, 34 ST. MARY’S L.J. at 21.

In deciding whether an error is harmful, an appellate court often must consider whether alternative non-erroneous grounds support the trial court’s challenged action. The procedures for handling alternative grounds differ widely depending on the forum. In federal appeals, the court can affirm on any ground supported by the record even if the appellate briefs and district court did not discuss alternative grounds, though usually the grounds must at least have been raised below. *J.E. Riley Inv. Co. v. Comm’r*, 311 U.S. 55, 59 (1940); *In re Williams*, 298 F.3d 458, 462 (5th Cir. 2002); *cf. FDIC v. Lee*, 130 F.3d 1139, 1142 (5th Cir. 1997) (discussing treatment of grounds not raised below). In Texas appeals, however, the appellee generally must raise an alternative ground by cross-appeal or by cross-point in its brief in order for the court to consider it. TEX. R. APP. P. 26.1(d), 38.2(b), 53.3(c)(2)-(3); *Lamar County Appraisal Dist. v. Campbell Soup Co.*, 93 S.W.3d 642, 649-50 (Tex. App.—Texarkana 2002, no pet.). Some exceptional areas in which Texas appellate courts will consider alternative grounds without a cross-point include evidentiary complaints, summary judgments, and other

trial court decisions where findings of fact and conclusions of law were neither requested nor filed.⁶

III. CATEGORIES OF ERROR: FACT-FINDING, LEGAL, AND DISCRETIONARY

As discussed above, in order to determine which standard of review applies, claims of error can be divided into three main categories: (1) fact-finding, (2) legal, and (3) discretionary. A “finding of fact” may be defined as a conclusion by way of reasonable inference from the evidence. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 164 (1988) (citing BLACK’S LAW DICTIONARY 569 (5th ed. 1979)). Courts generally do not provide an abstract definition of what constitutes a legal conclusion, preferring instead to rely on precedent and analogy to decide whether a particular issue is one of law.

At the ends of the fact-law spectrum, distinctions between fact findings (Ms. X was/was not in Austin yesterday) and legal conclusions (the Fourth Amendment does/does not apply to the States) are easy to draw. A court’s findings of fact and conclusions of law often can be treated as such. Similarly, in a jury trial, the court’s jury instructions frequently can be categorized as legal issues and the jury’s answers as fact findings. Sometimes, however, the distinction between a finding of fact and a conclusion of law merges into what has been called “application of law to fact” or a “mixed question of law and fact.” Kunsch, *Standard of Review*, 18 SEATTLE U. L. REV. at 22. For example, the U.S. Supreme Court has recognized that in First Amendment cases, the “ultimate conclusions of law are virtually inseparable from findings of fact.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

Texas and federal appellate courts frequently address mixed questions of law and fact by applying a fact-based standard of review to underlying fact findings and inferences therefrom while reviewing the lower court’s conclusions based on those findings and inferences as questions of law. *E.g., Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 666 (5th Cir. 1983); *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 820 (Tex. App.—San Antonio 1996, no writ) (per curiam) (confusingly labeling this hybrid

⁶ *E.g., Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625-26 (Tex. 1996) (summary judgment); *Kipp v. State*, 876 S.W.2d 330, 337 (Tex. Crim. App. 1994) (evidence); *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989) (summary judgment); *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987) (per curiam) (no findings/conclusions).

standard “abuse of discretion”). In addition, Texas courts have partially avoided the need to draw a rigid fact-law distinction by conducting both legal and factual sufficiency review of fact questions at the court of appeals level. The Texas Supreme Court must draw this distinction, however, because it lacks jurisdiction over questions of fact. TEX. GOV'T CODE ANN. §§ 22.001(a), 22.225(a) (Vernon 2004).

The debate on what constitutes an issue of fact and what constitutes an issue of law goes as far back as the Magna Carta. *Sparf v. United States*, 156 U.S. 51, 114 (1895) (Gray, J., dissenting). Hundreds of years later, the U.S. Supreme Court noted that it did not yet know of any rule or principle that would “*unerringly distinguish* a factual finding from a legal conclusion.” *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (emphasis added). Some courts look to the historical appellate classification of a particular claim of error for guidance, and if no such classification exists, where courts perceive the inquiry as empirical – revolving around actual events, past or future – the inquiry is labeled a question of fact. Alexander, *The Law-Fact Distinction*, 64 TEX. L. REV. at 179. See Part IV, *infra*, for a discussion of the standard of review for claims of factual error. If a court concludes that the substantive issue on appeal involves large-scale policy issues relating to values society wishes to promote, then the claim of error will be characterized as a legal conclusion. Alexander, *supra*. See Part V, *infra*, for a discussion of the standard of review for claims of legal error.

In addition to addressing matters of fact and law, trial courts make a number of discretionary decisions relating to procedural and trial management matters that appellate courts evaluate under an abuse of discretion standard of review. Part VI, *infra*, discusses this standard in detail. An abuse of discretion standard generally applies when flexibility is necessary or when the trial court is in a better position than the appellate court to decide the question. It is important to note that this standard is not entirely distinct from the factual and legal standards discussed above, which an appellate court often uses to aid its inquiry into whether the trial court abused its discretion. *E.g.*, *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 790 (5th Cir. 1999) (court abuses discretion when it makes error of law, relies on clearly erroneous factual determination, or misapplies law to facts); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (failure to analyze or apply law correctly is abuse of discretion). Thus, while the three-category model is a useful first-cut analysis for assigning the proper standard of review, attorneys should keep in

mind that a court applying one standard may draw on other standards as well.

IV. FACT-FINDING ERROR: SUFFICIENCY OF EVIDENCE STANDARDS

This section discusses the standards of review for claims of error involving fact-finding. In applying these standards, the reviewing court should not itself engage in fact-finding, nor should it reweigh or reclassify the evidence. In fact, the Seventh Amendment prohibits courts from re-examining facts found by a jury except as permitted by the common law. U.S. CONST. amend. VII. Instead, the reviewing court uses these legal standards to determine whether jury or trial court fact-findings are supported by sufficient evidence.

A. Federal Standard

The standard of review for fact-finding errors is sometimes governed by court rule and other times by common law. Kunsch, *Standard of Review*, 18 SEATTLE U.L. REV. at 24. An administrative agency or jury's findings of fact are reviewed under a “substantial evidence” standard, while a trial judge's findings are reviewed under the “clearly erroneous” standard codified in Federal Rule of Civil Procedure 52(a). See *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999).

1. Substantial Evidence

The common-law “substantial evidence” standard of review for jury findings has been described as more deferential than the “clearly erroneous” standard of review for judicial fact-findings, discussed below. Edward H. Cooper, *Civil Rule 50(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 650 (1988). The sanctity of the Seventh Amendment right to jury trial is the justification given for this enhanced deference. Kunsch, *Standard of Review*, 18 SEATTLE U.L. REV. at 24.

Under the substantial evidence standard, a reviewing court considers whether there was a “legally sufficient evidentiary basis for a reasonable jury to find for [the other] party on [the challenged] issue.” FED. R. CIV. P. 50(a)(1). The essence of this inquiry is whether reasonable minds could reach different conclusions based on the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). In applying this standard, the court considers all evidence in the record, not merely the evidence supporting the

challenged findings. *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

The Fifth Circuit has explained the substantial evidence standard as follows:

We have said that if there is no evidentiary basis for the jury's verdict, it cannot be permitted to stand, and that the standard [of review] is whether the [evidence] is such that reasonable and impartial minds could reach the conclusion the jury expressed in its verdict. The jury is, of course, the traditional finder of the facts, and its verdict must stand unless appellant can show that there is no substantial evidence to support it, considering the evidence in the light most favorable to appellees, and clothing it with all reasonable inferences to be deduced therefrom.

Liberty Mut. Ins. Co. v. Falgoust, 386 F.2d 248, 253 (5th Cir. 1967) (citations and footnotes omitted). Thus, “[s]ubstantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established.” *N.L.R.B. v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). Moreover, “substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion *even if* it is possible to draw two inconsistent conclusions from the evidence.” *Poppell v. City of San Diego*, 149 F.3d 951, 962 (9th Cir. 1998) (emphasis added).

The appellate court may not reweigh evidence or reassess the credibility of witnesses. *Cousin v. Trans Union Corp.*, 246 F.3d 359, 366 (5th Cir. 2001). Instead, the appellate court defers to the jury on these fact-finding functions because the jury was in a position to observe the witnesses and develop a feel for the trial. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (rationale for deferring to original finder of fact not limited to questions concerning credibility). The trial on the merits should be “the ‘main event’ . . . rather than a ‘tryout on the road.’” *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

2. Clearly Erroneous

A judge's findings of fact are reviewed under the “clearly erroneous” standard of Rule 52(a). That rule provides that “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.” FED. R. CIV. P. 52(a). This

standard does not mean that a reviewing court may reverse the judge's findings simply because it is convinced that it would have decided the case differently. *Anderson*, 470 U.S. at 574. An appellate court exceeds its authority under Rule 52(a) if it undertakes to duplicate the role of the lower court by deciding fact issues independently. *Id.* at 573.

Although the meaning of “clearly erroneous” is not apparent from the rule itself, the Supreme Court has held that a finding is “clearly erroneous” when, “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Yet “when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.” *Anderson*, 470 U.S. at 575. Likewise, “[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.” *Id.* at 574. Even evidence that, if credited, would support a contrary inference does not mean that the inferences drawn by the court were clearly erroneous. *Healey v. Chelsea Resources, Ltd.*, 947 F.2d 611, 619 (2d Cir. 1991).

The “clearly erroneous” standard focuses on mistake. *See U.S. Gypsum*, 333 U.S. at 395. The trial judge has committed a mistake if, based on all the evidence, the factual finding seems “so improbable” that it defies belief. *Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 842 (2d Cir. 1993) (higher billable hours after complex litigation resolved than during litigation too improbable to believe). A mistake also occurs when the judge's findings are “incredible on the admitted facts.”⁷ Finally, when a finding is internally inconsistent, the appellate court will hold that a mistake has been made. *See, e.g. Todd v. Corporate Life Ins. Co.*, 945 F.2d 204, 208 (7th Cir. 1991) (finding that prohibits and permits unilateral modification of employment contract is internally inconsistent and represents a mistake).

⁷ *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1011 (7th Cir. 1994) (court had trouble imagining situation in which male factory workers sexually harass a lone female employee in self-defense); *see also United States v. Fid. Capital Corp.*, 920 F.2d 827, 840 (11th Cir. 1991) (inconceivable that company would release debt for nothing and district court could not force it to do so).

The rationale for deference to the trial judge's findings of fact is similar to the one discussed above regarding juries: the trial judge is in a better position than an appellate court to determine credibility and weigh evidence. See Part IV.A.1, *supra*. Yet this deference is not limited to the trial judge's superior position for making credibility determinations. *Anderson*, 470 U.S. at 574. The trial judge also has developed expertise in making determinations of fact. *Id.* Duplicating the trial judge's efforts at the court of appeals level "would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Id.* at 575. In addition, the parties to a case on appeal have already been forced to "concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Id.*

B. Texas Standard

Unlike federal appellate courts, Texas appellate courts do not use different standards of review for findings of fact depending on whether the fact finder is a judge or a jury. "The trial court's findings of fact carry the same force and dignity as a jury's verdict. *M.D. Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). Thus, we review the trial court's fact findings the same way we review the legal and factual sufficiency of the evidence supporting a jury's verdict. *Id.*" *McLaughlin, Inc. v. Northstar Drilling Techs., Inc.*, 138 S.W.3d 24, 27 (Tex. App.—San Antonio 2004, no pet.); see also *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).

When a trial court does not issue findings of fact, "all facts necessary to support the judgment and supported by the evidence are implied." *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). If clerk's and reporter's records are filed, "these implied findings are not conclusive and may be challenged for legal and factual sufficiency in the appropriate appellate court." *Id.*

1. Legal Sufficiency

A legal sufficiency challenge asserts that there is a complete lack of evidence to support a finding. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied). If successful, the proper remedy for legal insufficiency of evidence generally is rendition of judgment in favor of the complaining party. *Vista Chevrolet, Inc. v. Lewis*, 709 S.W.2d 176 (Tex. 1986)

(per curiam). In deciding a legal sufficiency challenge, the court "view[s] the evidence in a light that tends to support the disputed finding and disregard[s] evidence and inferences to the contrary." *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex. 2003) (per curiam). The legal sufficiency standard is classified as either "no evidence" or "matter of law," depending on whether the complaining party had the burden of proof. *Raw Hide*, 766 S.W.2d at 275.

a. "No Evidence" Issue

If the party complaining on appeal did not bear the burden of proof at trial, then the court reviews a legal insufficiency challenge under the "no evidence" standard. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). Unlike in federal court, a state appellate court conducting a "no evidence" review considers only the evidence and reasonable inferences that tend to support challenged findings and disregards evidence and inferences to the contrary. *Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 274 (Tex. 2002); *Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001). "An inference may be drawn from a fact proved, but an inference may not be drawn from another inference." *Tex. & N.O. R.R. v. Burden*, 203 S.W.2d 522, 531 (Tex. 1947). Inferences that are equally consistent with two different propositions require the appellate court to find that there is "no evidence" to support the finding of fact. *Fifty-Six Thousand Seven Hundred Dollars v. State*, 730 S.W.2d 659, 662 (Tex. 1987).

An appellate court will sustain a "no evidence" issue when (a) the record discloses a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact.⁸ Anything more than a scintilla of evidence is legally sufficient to support the finding and a "no evidence" challenge cannot be sustained. *Stafford v. Stafford*, 726 S.W.2d 14, 16 (Tex. 1987); *Catalina*, 881 S.W.2d at 297.

⁸ *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003) (per curiam); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997); Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEX. L. REV. 361, 362-63 (1960).

More than a scintilla of evidence exists when the evidence supporting the finding “rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.”⁹ The evidence is no more than a scintilla if the evidence offered to prove a vital fact is so weak that it does nothing more than create a mere surmise or suspicion of its existence. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995); *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). In addition, when weak circumstantial evidence gives rise to inferences that are equally consistent with two different propositions, no more than a scintilla of evidence exists. *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996). The legal effect of a “no more than a scintilla” holding is that no evidence supports the finding. *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995); *Kindred*, 650 S.W.2d at 63.

b. “Matter of Law” Issue

If the complaining party on appeal did bear the burden of proof at trial, then the court reviews the legal insufficiency challenge under the “matter of law” standard. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). If a party mistakenly asserts a “no evidence” issue when it bore the burden of proof at trial, or vice versa, the Texas Supreme Court has endorsed the liberal construction of issues in order to obtain a just, fair and equitable adjudication of the rights of the litigants. *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982). In *Sterner*, for example, the Texas Supreme Court found that the court of appeals *should have* reviewed Marathon’s issue under the “matter of law” standard instead of the “no evidence” standard because Marathon had the burden of proof at trial. *Sterner*, 767 S.W.2d at 690. The court found that the “no evidence” standard could not be the “basis for establishing an issue as a matter of law.” *Id.*

A “matter of law” challenge will be sustained if the evidence conclusively establishes all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). In general, the jury may not disregard undisputed evidence and decide issues in accordance with its wishes. *Burden*, 203 S.W.2d at 530; *but see Thomas v. McNair*, 882 S.W.2d 870, 884 (Tex. App.—Corpus Christi 1994, no writ) (undisputed testimony did not establish fact as a matter of law since the fact finder is free to accept or reject any or all of such testimony).

⁹ *Havner*, 953 S.W.2d at 711; *see Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994).

In conducting a matter of law review, the appellate court must first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. *Sterner*, 767 S.W.2d at 690; *Burden*, 203 S.W.2d at 530. If there is no evidence to support the finding, the court will then examine the entire record to determine if the contrary proposition is established as a matter of law. *Id.* The issue should be sustained only if the contrary proposition is conclusively established. *Dow Chem.*, 46 S.W.3d at 241; *Croucher*, 660 S.W.2d at 58.

2. Factual Sufficiency

Factual sufficiency challenges may only be reviewed by the court of appeals. *See In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000).¹⁰ Nevertheless, the Texas Supreme Court continues to review whether the court of appeals has applied the correct standard of review for determining the factual insufficiency of the evidence. *See, e.g., Pool v. Ford Motor Co.*, 715 S.W.2d 629, 633 (Tex. 1986) (court allowed to review appellate court’s *application* of correct legal standard to facts); *Dyson v. Olin Corp.*, 692 S.W.2d 456, 457 (Tex. 1985) (court has jurisdiction to review whether appellate court used the *correct rules* of law in reaching its conclusion).

“Factual sufficiency [challenges] concede conflicting evidence on an issue, yet maintain that the evidence against the jury’s finding is so great as to make the finding erroneous.” *Raw Hide*, 766 S.W.2d at 275. In conducting a factual sufficiency review, the appellate court considers all evidence in the record, including any evidence contrary to the judgment. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). The court of appeals will set aside the verdict only if the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam). “It is not within the province of [the reviewing] court to interfere with the jury’s resolution of conflicts in the evidence, or to pass on the weight or credibility of the witnesses’ testimony.” *Edmunds v. Sanders*, 2 S.W.3d 697, 703 (Tex. App.—El Paso 1999, pet. denied). Where there is conflicting evidence, the jury’s verdict on the matter is generally regarded as conclusive. *Id.* The reasoning behind this rule is that the trier of fact is in a better position than

¹⁰ See Hall, *Standards of Review*, 34 ST. MARY’S L.J. at 175-81, for a discussion of the constitutional conflict between the right to a jury trial and courts of appeals’ conclusive jurisdiction over issues of fact.

the appellate judge to make credibility determinations. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000).

If the court of appeals does sustain a factual insufficiency challenge, it must detail “all of the relevant evidence, . . . clearly state why the evidence supporting the jury's finding was insufficient, and . . . state in what regard the contrary evidence greatly outweighs the evidence supporting the jury’s verdict.” *Lofton v. Tex. Brine Corp.*, 777 S.W.2d 384, 385 (Tex. 1989); *see also Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). The purpose of these requirements is to facilitate supreme court review. The proper remedy for factual insufficiency of evidence is a new trial. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 413 (Tex. 1998).

a. “*Insufficient Evidence*” Issue

Like legal sufficiency, analysis of factual sufficiency issues depends on who had the burden of proof at trial. *Gooch v. Am. Sling Co.*, 902 S.W.2d 181, 184 (Tex. App.–Fort Worth 1995, no writ). If the challenging party did not have the burden of proof, then the issue will be classified as an insufficient evidence challenge. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *Gooch*, 902 S.W.2d at 184; *Raw Hide*, 766 S.W.2d at 275. An assertion that the evidence is “insufficient” to support a finding of fact means that the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the answer should be set aside and a new trial ordered. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

b. “*Great Weight and Preponderance of Evidence*” Issue

If the challenging party does have the burden of proof, then the issue will be classified as a “great weight and preponderance of the evidence” challenge. *Croucher*, 660 S.W.2d at 58; *Raw Hide*, 766 S.W.2d at 275. In reviewing “great weight and preponderance of the evidence” issues, the court examines the entire record to determine whether the finding is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Dow Chem.*, 46 S.W.3d at 241. A court can hold that a finding is against the great weight of the evidence even if the record contains some evidence of probative force to support it. *In re King’s Estate*, 244 S.W.2d 660, 661 (Tex. 1951) (per curiam).

V. LEGAL ERROR: DE NOVO STANDARD

Appeals challenging legal conclusions are reviewed under a “de novo” standard of review. *See Adams v. Unione Mediterranea di Sicurta*, 364 F.3d 646, 654 (5th Cir. 2004); *Aguero v. Ramirez*, 70 S.W.3d 372, 373 (Tex. App.–Corpus Christi 2002, pet. denied). For example, dismissals on the pleadings, summary judgment, subject-matter jurisdiction, statutory interpretation, construction of unambiguous contracts, and constitutional review of punitive damages are all governed by a “de novo” standard of review.¹¹

Under the de novo standard, the appellate court accords no deference to the lower court’s conclusions of law, but instead independently analyzes the relevant facts to arrive at its own legal conclusion. *See* Steven Alan Childress & Martha S. Davis, *FEDERAL STANDARDS OF REVIEW* § 2.14, at 2-80 (3d ed. 1999) (de novo review is not appellate fact-finding; court reviews relevant portions of the record to arrive at legal conclusion). Thus, the appellate court may substitute its own judgment regarding a conclusion of law made by the trial court. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1990).

The rationale for independently reviewing questions of law is found in the structure of the appellate system itself:

[A]ppellate courts have several advantages over trial courts in deciding questions of law. First, appellate judges are freer to concentrate on legal questions because they are not encumbered, as are trial judges, by the vital, but time-consuming, process of hearing evidence. Second, the judgment of at least three members of an appellate panel is brought to bear on every case. It stands to reason that the collaborative, deliberative process of

¹¹ *E.g.*, *Shepherd v. Int’l Paper Co.*, 372 F.3d 326, 329 (5th Cir. 2004) (subject-matter jurisdiction); *Shocklee v. Mass. Mut. Life Ins. Co.*, 369 F.3d 437, 439 (5th Cir. 2004) (per curiam) (summary judgment); *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 643-44 (5th Cir. 2004) (dismissal and statutory interpretation); *Lincoln v. Case*, 340 F.3d 283, 290 (5th Cir. 2003) (punitive damages); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215-16 (Tex. 2003) (summary judgment); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998) (subject-matter jurisdiction); *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989) (per curiam) (statutory interpretation); *Coker v. Coker*, 650 S.W.2d 391, 393-94 (Tex. 1983) (contract).

appellate courts reduces the risk of judicial error on questions of law. Thus, de novo review of questions of law, like clearly erroneous review of questions of fact, serves to minimize judicial error by assigning to the court best positioned to decide the issue the primary responsibility for doing so.

In re McLinn, 739 F.2d 1395, 1398 (9th Cir. 1984).

VI. DISCRETIONARY ERROR: ABUSE OF DISCRETION STANDARD

Trial judges make a number of discretionary decisions relating to procedural and trial management matters. Examples of such decisions include: discovery and evidentiary rulings, injunctions, class certifications, sanctions, and matters of trial administration.¹² The trial judge's choices in these areas must be guided by sound legal principles and are not "unfettered by meaningful standards or shielded from appellate review." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). Thus, an aggrieved party may appeal the trial judge's discretionary decisions. The appellate court, however, reviews these decisions using a deferential "abuse of discretion" standard.

"Abuse of discretion" is an amorphous concept and it is "often easier for a reviewing court to state what is not an abuse of discretion than to determine what is an abuse of discretion." Hall, *Standards of Review*, 34 ST. MARY'S L.J. at 12. Like the sufficiency of evidence standards discussed in Part IV, *supra*, "abuse of discretion" is a less exacting standard of review than de novo. Commentators have been quick to point out that not all discretionary decisions are created equal, however; different degrees of discretion may be accorded depending on the issue. See Steven Alan Childress & Martha S. Davis,

¹² E.g., *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152-53 (1999) (evidentiary ruling); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (sanctions); *United States v. Dale*, 374 F.3d 321, 326 (5th Cir. 2004) (discovery ruling); *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003) (injunction); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471-72 (5th Cir. 1986) (class certification); *Cire v. Cummings*, 134 S.W.3d 835, 844 (Tex. 2004) (discovery ruling); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 691 (Tex. 2002) (modified abuse of discretion standard for class certification); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001) (sanctions); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 906 (Tex. 2000) (evidentiary ruling).

FEDERAL STANDARDS OF REVIEW §§ 4.10, 4.21 (3d ed. 1999).

A. Federal Standard

To determine whether an abuse of discretion standard should apply, the U.S. Supreme Court examines factors such as: the language and structure of the governing statute (if any), the consequences of an erroneous decision, whether the district or appellate court is better positioned to decide the issue correctly and efficiently, and whether the issue can be decided by application of a general rule or is "a multifarious and novel question, little susceptible . . . of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop." *Pierce*, 487 U.S. at 559-63. These factors also can be useful in deciding how much deference should be given to the district court. Childress & Davis, *supra*, § 4.01(C), at 4-12 & n.57.

In areas where this standard applies, federal courts will find an abuse of discretion if the district court (1) relied on clearly erroneous factual findings, (2) made an error of law, or (3) misapplied the law to the facts. *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 790 (5th Cir. 1999). More broadly, the district court may overreach the limits of its discretion when it considers factors outside the scope of its discretionary powers or fails to consider required factors, as well as when its exercise of discretion within its authority "is so bad on its own terms that the appellate court feels compelled to reject the actual choice." Childress & Davis, *supra*, § 4.01(A).

As discussed in Part III, *supra*, the abuse of discretion standard can blend together with legal and/or factual standards. For example, the U.S. Supreme Court has held that although a determination of sanctions under Federal Rule of Civil Procedure 11(c) involves both factual and legal issues, all aspects of the Rule 11 determination are reviewed for an abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The court noted that "[w]hen an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous." *Id.* at 401.

Federal courts apply a more strict version of the abuse of discretion standard to issues raised in a mandamus petition rather than on appeal. Mandamus will be granted only if the district court committed a

“clear abuse of discretion” or engaged in “conduct amounting to the usurpation of power.” *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 309 (1989); *Apache Bohai Corp. v. Texaco China, B.V.*, 330 F.3d 307, 310 (5th Cir. 2003). In federal court, mandamus is a drastic remedy reserved only for truly extraordinary situations. *Will v. United States*, 389 U.S. 90, 106 (1967).

B. Texas Standard

The abuse of discretion standard is the most common standard of review in Texas. Hall, *Standards of Review*, 34 ST. MARY’S L.J. at 13. In Texas state courts, the abuse of discretion standard applies when a trial court has discretion to either grant or deny relief based on its factual determinations. See *Bocquet v. Herring*, 972 S.W.2d 19, 20-21 (Tex. 1998). Applying the abuse of discretion standard is especially appropriate when the trial court must weigh competing policy considerations and balance interests in determining whether to grant relief. See *Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 526 (Tex. 1998).

In determining whether the trial court has abused its discretion, an appellate court reviews the record in the light most favorable to the trial court’s action and indulges every legal presumption in favor of its decision. *Holley v. Holley*, 864 S.W.2d 703, 706 (Tex. App.–Houston [1st Dist.] 1993, writ denied). As the Texas Supreme Court has explained:

The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court’s action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. Another way of stating the test is whether the act was arbitrary or unreasonable.

Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985) (internal citations omitted). As interpreted by later courts, the *Downer* test for abuse of discretion is whether the discretionary rulings were (1) arbitrary or unreasonable or (2) without reference to any guiding rules and principles. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995). Thus, even if the trial court refers to the proper guiding rules and principles, an unreasonable or arbitrary discretionary ruling is an abuse of discretion. *Id.* At least one court has incorrectly summarized the *Downer* test by combining the two separate formulations to form a single test. *Walker v. Guitierrez*, 111 S.W.3d 56, 62 (Tex. 2003) (the “trial court abuses

its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles.”). In a more recent case, however, the Texas Supreme Court correctly stated the *Downer* test. See *Cire v. Cummings*, 134 S.W.3d 835, 839 (Tex. 2004).

The mere fact that a trial court decided a matter within its discretionary authority in a different manner than an appellate judge might have in a similar circumstance does not demonstrate that an abuse of discretion occurred. *Downer*, 701 S.W.2d at 242. A mere error in judgment is not an abuse of discretion. *Loftin v. Martin*, 776 S.W.2d 145, 146 (Tex. 1989) (orig. proceeding). Furthermore, a trial court does not abuse its discretion if it reaches the right result for the wrong reason. *In re ExxonMobil Corp.*, 97 S.W.3d 353, 358 n.5 (Tex. App.–Houston [14th Dist.] 2003, orig. proceeding).

A court abuses its discretion if it: (1) purports to exercise a power not committed to its discretion by law; (2) fails to recognize that it has discretion or fails to exercise it when circumstances so require; (3) lacks sufficient information in the record upon which to exercise its discretion; or (4) errs in its exercise of discretion. Examples of this final type of discretionary error include violating or misapplying guiding legal rules and principles (e.g., by failing to consider a relevant factor or relying upon an improper factor), as well as making an unreasonable choice within those guiding principles (e.g., by unreasonably exaggerating a relevant factor).¹³

In certain instances where the trial court must weigh facts in order to make a discretionary ruling, the sufficiency of evidence standard overlaps the abuse of discretion standard and the result is “similar, although not identical, to the federal standard of ‘clearly erroneous.’” *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997). In such circumstances, the appellate court conducts a two-prong inquiry: (1) whether the trial court had sufficient information upon which to exercise its discretion and, if so, (2) whether the trial court erred in its application of discretion. *Sandone v. Miller-*

¹³ *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 937-40 (Tex. App.–Austin 1987, no writ); *Johnson v. United States*, 398 A.2d 354, 363-66 (D.C. 1979); see also Hall, *Standards of Review*, 34 ST. MARY’S L.J. at 13-16; Roger Townsend et al., *Standards of Review and Reversible Error: State and Federal Court* 12-13, in *TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT* (Univ. of Tex. June 1991).

Sandone, 116 S.W.3d 204, 206 (Tex. App.–El Paso 2003, no pet.).

Like federal courts, Texas courts also apply a more strict abuse of discretion standard to petitions for a writ of mandamus. Although Texas courts issue mandamus much more freely than federal courts, they do so only to correct a “clear” abuse of discretion when there is no adequate remedy at law. *Johnson v. Fourth Ct. of App.*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding). A trial court clearly abuses its discretion when it “reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.” *Id.* This definition applies differently to factual and legal issues. Regarding facts and other matters committed to the trial court’s discretion, “the reviewing court may not substitute its judgment for that of the trial court.” *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). Thus, “[t]he relator must establish that the trial court could reasonably have reached only one decision.” *Id.* at 840. As to legal issues, review is “much less deferential,” and “a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion” *Id.*

VII. CONCLUSION

Only about 33 percent of appellate matters terminated on the merits in state court are reversed, and the figure is less than 10 percent in federal court. *See Lynne Liberato & Kent Rutter, Reasons for Reversal in the Texas Courts of Appeals*, 44 S. TEX. L. REV. 431, 434 (2003); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2003 JUDICIAL BUSINESS ANNUAL REPORT 94, available at <http://www.uscourts.gov/judbus2003/appendices/b5.pdf> (last visited Aug. 9, 2004). Moreover, federal appellate courts terminate most cases based on the briefs, without hearing oral argument. *See id.* at 34, available at <http://www.uscourts.gov/judbus2003/tables/s1.pdf> (last visited Aug. 9, 2004) (68% of federal appeals nationwide and 80% in the Fifth Circuit terminated without oral hearing).

The standard of review can positively affect both of these statistics. First, less deferential standards of review such as de novo are likely to have higher reversal rates than abuse of discretion and sufficiency of evidence standards of review. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 689 (2002); Liberato & Rutter, 44 S. TEX. L. REV. at 435. Second, the standard of review can be an effective and powerful outline for framing issues on appeal. Appellate courts

certainly seem to think so: many of their opinions begin with a discussion on the standard of review. Given the significance of the standard of review, thorough research to identify and define the appropriate standard is essential to any appeal. By identifying the standard applicable to each possible appellate issue and considering whether each is preserved and caused harm, advocates can focus their briefs on the issues most likely to yield success and provide the court with important guidance on how to make its decision.

It is also important for advocates who practice in both Texas and federal courts to be aware that these two systems sometimes apply different standards of review to similar issues. There are many similarities between the federal and Texas standards, especially regarding the definition and application of the de novo and abuse of discretion standards of review. The main difference concerns the standard used to judge challenges to factual matters. Texas reviews fact-finding errors under legal and factual sufficiency standards, regardless of whether the trier of fact is a judge or jury. Federal courts, in contrast, review findings of fact made by the jury for substantial evidence and those made by the judge under a clearly erroneous standard. Texas and federal courts also have somewhat different rules for determining which standard of review applies, as well as for preserving error and demonstrating harmful error.

In order to increase the likelihood of a successful appeal, it is essential to understand which standard applies and to use that understanding persuasively in the brief.