Alaska Court of Appeals Off The Record

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Standards of Review

by David Mannheimer

1. A "standard of review" is the rule that governs how much or how little deference an appellate court must give to a lower court's decision on a particular matter. Or, in plain English, the standard of review defines the extent to which an appellate court is authorized to second-guess the lower court's decision and declare it to be wrong.

2. Our court often receives briefs which contain statements such as:

> "The standard for reviewing a constitutional error is whether the error is harmless beyond a reasonable doubt."

This is *not* a standard of review.

a. As explained above, a "standard of review" is the rule that specifies how much weight an appellate court must give to a trial judge's conclusions or choices when the appellate court decides *whether error has been committed*.

b. The "harmless beyond a reasonable doubt" test, on the other hand, comes into play only *after* the appellate court (using the proper standard of review) has concluded that error was indeed committed. At that point, if the error is of constitutional dimension, the appellate court will apply the "harmless beyond a reasonable doubt" to decide whether this error requires reversal of the lower court's decision. *See Nelson v. State*, 68 P.3d 402, 405-06 (Alaska App. 2003).

3. Attorneys are not the only ones who misdescribe the standard of review. *Appellate courts* often make misleading — or even nonsensical — statements about the standard of review. Attorneys will then quote and rely on these misleading or nonsensical statements.

a. For example, the Alaska Court of Appeals has repeatedly stated that a judge's decision to grant or deny post-conviction relief is reviewed under the "abuse of discretion" standard. [1] This is simply false. If a defendant has proved entitlement to post-conviction relief, a judge has no discretion to deny relief. Conversely, if the defendant has failed to prove entitlement to post-conviction relief, a judge has no discretion to grant relief.

b. Similarly, the Alaska appellate courts are fond of saying that the "abuse of discretion" standard of review governs an appellate court's review of a trial judge's rulings concerning the admission or exclusion of evidence. [2] This is a misleading half-truth.

(1) The "abuse of discretion" standard of review applies to situations where the law does not specify a particular answer, but merely provides the criteria for the decision, and reasonable judges (applying these proper criteria) could reach different conclusions.

(2) Thus, it is true that *some* of a trial judge's evidentiary rulings are reviewed for abuse of discretion. For example, the judge's decision to exclude evidence under Rule 403 (balancing of probative value versus potential for unfair prejudice), or the judge's decision to

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[1] *See, e.g., Tucker v. State*, 892 P.2d 832, 834 (Alaska App. 1995); *Brown v. State*, 803 P.2d 887, 888 (Alaska App. 1990).

[2] *See, e.g., Jeffries v. State*, 169 P.3d 913, 924 (Alaska 2007); *City of Bethel v. Peters*, 97 P.3d 822, 825 (Alaska 2004); *John's Heating Service v. Lamb*, 46 P.3d 1024, 1030 (Alaska 2002).

allow a witness to give an additional explanation of a previous answer, are reviewed for abuse of discretion.

(3) On the other hand, the question of whether particular evidence is hearsay, or the question of whether a witness's proposed answer is protected by the attorney-client privilege, are *not* entrusted to the trial judge's discretion. These are questions of law. Thus, a trial judge's decision as to whether evidence is (or is not) hearsay will be reviewed under the *de novo* or "independent" standard of review.

(4) Moreover, some evidentiary issues turn on questions of historical fact. For instance, before an out-of-court statement can be admitted as an excited utterance, the trial judge must decide whether the person who made the out-of-court statement was still so much under the emotional influence of the prior startling or distressing event that the person's capacity for conscious reflection was temporarily abated, leading to "utterances free of conscious fabrication". [3] This is a question of fact — and, therefore, an appellate court will use the "clearly erroneous" test to review the trial judge's ruling on this issue. [4]

c. Another example of appellate courts making misleading statements about the standard of review: Alaska appellate decisions often declare that a trial judge's decision to give (or not give) a requested jury instruction is reviewed for "abuse of discretion". [5] Again, this is a half-truth.

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[3] *Davis v. State*, 133 P.3d 719, 727-28 (Alaska App. 2006) (quoting the Commentary to Alaska Evidence Rule 803(2)).

[4] *See Sipary v. State*, 91 P.3d 296, 305-06 (Alaska App. 2004).

[5] *See Hilbish v. State*, 891 P.2d 841, 852 (Alaska App. 1995).

(1) The statement is accurate if the issue is merely the judge's choice of wording versus an attorney's preferred wording, or if a cautionary instruction needs to be given concerning a particular aspect of the evidence, or concerning an occurrence that took place in the jury's presence during the trial.

(2) But if the question is whether a party was entitled to *some* jury instruction on an issue (for instance, a self-defense instruction), then the standard of review is *de novo* — because it is a question of law whether the defendant was entitled to argue self-defense under the particular evidence presented at trial. Similarly, an appellate court always applies its independent judgment when deciding whether a challenged jury instruction or a refused jury instruction correctly stated the law. [6]

4. As you might infer from these examples, probably the worst thing that appellate courts do to mislead the bar is that appellate courts repeatedly — and mistakenly — declare that there is one particular standard of review that applies to a whole *type of decision* — for example, any decision concerning the admissibility of evidence, or any decision concerning jury instructions. When an appellate court declares that there is a single standard of review that governs a whole category of legal rulings, the appellate court will usually be wrong.

a. The truth of the matter is this: The standard of review does not hinge on the category of decision that the appellate court is reviewing. Rather, the applicable standard of review hinges on what the appellate court perceives to be the *underlying issue to be resolved.*

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[6] *Alaska Dept. of Transportation and Public Facilities v. Miller*, 145 P.3d 521, 528 (Alaska 2006).

b. For instance, *Veco Alaska, Inc. v. Alaska Department of Labor*, 189 P.3d 983 (Alaska 2008), involved an appeal from the decision of an administrative agency (the Workers' Compensation Board). The supreme court was not able to agree on the applicable standard of review: the majority believed that the applicable standard of review was *de novo* or "independent" review, while the dissent believed that the "substantial evidence" standard of review applied.

(1) This disagreement concerning the correct standard of review stemmed directly from a disagreement about the correct categorization of the underlying issue in the case.

(2) The majority of the court believed that this underlying issue was a question of statutory interpretation (one that did not rest on agency expertise). Thus, the majority concluded that the applicable standard of review was "de novo". 189 P.3d at 987.

(3) The dissent, on the other hand, believed that the Workers' Compensation Board's decision did not turn on an issue of statutory interpretation, but instead rested on a finding of fact made by the Board. Because of this, the dissent argued that the proper standard of review was the "substantial evidence" test. 189 P.2d 992-93.

c. The supreme court's decision in *Veco Alaska* is a prime illustration of the true rule concerning standards of review: Before you can identify the proper standard of review, you must identify the true underlying issue to be decided.

d. Once you have identified that true underlying issue, the proper standard of review will almost always be obvious — because there are only six standards of review, and because they apply to distinct types of issues.

5. Here are the six standards of review recognized by Alaska law:

a. *de novo* or independent review. This is the standard of review that appellate courts use when the issue to be decided is purely one of law:

(1) what does a statute mean?
(2) what common-law rule should be adopted or followed?
(3) what is the proper legal characterization of given facts?

This standard of review is called "*de novo*" or "independent" because an appellate court owes *no deference* to a lower court's ruling about what the law is, or what the law requires, allows, or forbids under given facts.

b. *deferential* independent review — "reasonable basis". This is the standard of review that an appellate court employs when (1) the question presented on appeal is how to interpret a statute or administrative regulation, (2) the decision being appealed is an administrative agency's interpretation of the statute or regulation, and (3) the administrative agency relied on its expertise within its field, or on fundamental policies within its field, when the agency decided how to interpret the statute or regulation.

(1) For instance, to resolve an ambiguity in an administrative regulation, the Board of Fish might rely on its knowledge of the commercial fishing industry and fishing practices, or the Public Utilities Commission might rely on its knowledge of how electric utilities operate. In such instances, an appellate court will defer to the agency's interpretation of the regulation if the agency's decision appears to be a reasonable interpretation of the disputed law — even though the appellate court might have reached a different conclusion.

(2) However, the appellate court retains the ultimate authority to decide whether to extend this kind of deference to the agency's decision. If the appellate court concludes that the agency has not given a reasonable interpretation to the statute or regulation, *or* if the appellate court concludes that the question of interpretation does not really involve a matter of agency expertise, then the appellate court will extend no deference to the agency's interpretation.

c. "substantial evidence". This is the standard of review that an appellate court employs when deciding whether a judge's verdict in a judge-tried case (or an administrative agency's decision following an evidentiary hearing) is adequately supported by the evidence. Under this standard of review, the test for upholding the verdict is: "Given the evidence presented in the case, and viewing that evidence in the light most favorable to the lower court's verdict, could a reasonable person have concluded that this was the proper verdict?"

Note: This is exactly the same test that an appellate court applies when it evaluates whether the evidence presented at a civil or criminal trial is sufficient to support a *jury's* verdict. This is on purpose. The idea behind the "substantial evidence" standard of review is to make sure that the verdicts in judge-tried cases are just as insulated from appellate court second-guessing as the verdicts in jury-tried cases.

d. "clearly erroneous". This is the standard of review that an appellate court employs when deciding whether the evidence supports a *finding of historical fact* that a lower court judge has made in non-final-verdict contexts — contexts such as deciding a motion to suppress, or ruling on the admissibility of evidence, or deciding whether a party should be granted a delay of trial.

(1) Findings of "historical fact" are findings regarding what happened, or what did a particular person do, or what was a particular person thinking, etc.

(2) Under the "clearly erroneous" standard of review, an appellate court is obliged to uphold a lower court judge's findings of historical fact unless the appellate court is left with a "definite and firm conviction that a mistake has been made".

(3) This standard of review is *less* deferential than the "substantial evidence" standard that applies when an appellate court is reviewing the *verdict* issued by a judge in a judge-tried case — because, under the "clearly erroneous" standard of review, an appellate court is authorized to overturn a judge's finding of fact even though there is some evidence that arguably supports the judge's finding.

e. "abuse of discretion". This is the standard of review that an appellate court employs when reviewing a lower court judge's decision on a matter entrusted to the judge's discretion — that is, a decision in a situation where (1) the law does not specify a particular proper response to the situation, but instead only provides the factors or criteria that a judge should consider, and where (2) reasonable judges applying the correct criteria might reach differing conclusions about how to deal with the problem.

(1) Under the "abuse of discretion" standard, an appellate court must uphold the trial judge's decision unless, under the circumstances, the judge's decision falls outside the range of reasonable responses to the problem — or, as some Alaska cases have put it, unless the judge's decision is "clearly untenable or unreasonable".

(2) *Note*: You will find many Alaska appellate decisions that use the term "abuse of discretion" to describe a lower court judge's decision when the appellate court really means that the judge has committed an error of law. For instance, *Julsen v. Julsen*, 741 P.2d 642, 649 (Alaska 1987), our supreme court declared, "An abuse of discretion may be found where the trial court considered improper factors [or] failed to consider statutorily mandated factors [when making its decision]."

(3) Although one could reasonably say that judges who fail to follow the law have "abused their discretion", the use of this phrase in this context is misleading and may ultimately create legal difficulties — because the appellate court is *not* applying the "abuse of discretion" standard of review. The question of what factors a judge is forbidden to consider when making a decision, and the question of what factors the judge is required to consider, are *questions of law* — and, thus, an appellate court employs *de novo* or "independent" review when it decides whether a lower court judge has committed this type of error.

f. "clearly mistaken". This is the standard of review that an appellate court employs when reviewing the sentencing decision in a criminal case. It is similar to — in fact, almost indistinguishable from — the "abuse of discretion" standard of review. Under the "clearly mistaken" standard of review, a sentence will be upheld if, given the facts of the case (including the defendant's background and criminal history), the defendant's sentence is within the range of reasonable sentences.

6. *In conclusion*: Do not try to identify the applicable standard of review until you have identified the underlying issue to be resolved. Once you have identified that underlying issue, you will know which one of the standards of review applies to that issue.

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