IADC COMMITTEE NEWSLETTER

APPELLATE PRACTICE

JUNE 2017

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No one lies awake at night thinking about the appellate standard of review. Robert A. Brundage reports on two new U.S. Supreme Court decisions that illustrate why maybe you should.

Standard of Review

ABOUT THE AUTHOR

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The standard of review on appeal is like plumbing. It's unsexy but it's mission-critical, and those on the wrong end of it may be in for a mess.

A pair of recent United States Supreme Court decisions provides an unusual window into how to turn the standard of review to your advantage. One case, *McLane Co. v. EEOC,* __ U.S. ___, 137 S. Ct. 1159 (2017) provides a roadmap of how to argue for your preferred standard of review. [Disclosure: The author's firm represented petitioner in *McLane*.] The other, *Cooper v. Harris,* ___ U.S. ___, 137 S. Ct. 1455 (2017), illustrates why the standard of review matters: a high-stakes Supreme Court appeal on constitutional law was decided by the standard of review.

First a reminder of Appellate Law 101. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood,* 487 U.S. 552, 558 (1988). *De novo* is the standard least deferential to the trial court and most prized by appellants. It means the appellate court re-decides the issue from scratch without deferring to the trial court. In contrast, review for clear error affords great deference to the trial court. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 400-01 (quoting *Anderson v. Bessemer City,* 470 U. S. 564, 573-574 (1985)). The third standard, also deferential to the trial court, is abuse of discretion. This standard applies to a range of issues from admission of evidence to case management. While there is no one-size-fits-all definition of abuse of discretion, it frequently means the trial court's decision will be reversed if the court's decision was unreasonable or infected by legal error or a clearly-erroneous factual decision.

McLane provides a rare look at how the courts decide what the standard of review should be, and how to argue for your preferred standard. The district court had quashed an Equal Employment Opportunity Commission subpoena, concluding that the information sought was irrelevant to the EEOC's investigation. As the Supreme Court recounted, the Court of Appeals had reviewed that decision *de novo* and reversed. But the Court of Appeals panel questioned why *de novo* review applied. It noted that other circuits reviewed enforcement of administrative subpoenas for abuse of discretion, *i.e.* with greater deference to the trial court. The Supreme Court granted certiorari to decide the standard of review. 137 S. Ct. at 1166. The Court ultimately held that a district court's decision whether to quash an EEOC subpoena should be reviewed on appeal for abuse of discretion, not *de novo*. More importantly for appellate practice, however, the opinion's reasoning provides a

template for arguments in other cases about what standard of review the court should apply.

McLane explained that "When considering whether a district court's decision should be subject to searching or deferential appellate review—at least absent 'explicit statutory command'—we traditionally look to two factors." *Id.* at 1166. First is whether the "history of appellate practice" provides an answer. *Id.* Second is the institutional competence of the trial and appellate courts: "at least where 'neither a clear statutory prescription nor a historical tradition exists,' we ask whether, 'as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.'" *Id.* at 1166-67 (quoting *Pierce v. Underwood*, 487 U.S. 552, 558-60 (1988)) (further citation omitted).

McLane illustrates how these factors apply. As to historical practice, the EEOC's statute gave the EEOC the same authority to issue subpoenas as the National Labor Relations Act gave to the National Labor Relations Board (NLRB). When Congress gave the EEOC that authority, it did so against a backdrop of uniform court of appeals opinions holding that the decision whether to enforce an NLRB subpoena was reviewed for abuse of discretion. 137 S. Ct. at 1167. Except the Ninth Circuit, the courts of appeals uniformly applied the same standard to EEOC subpoenas. *Id.*

As to trial and appellate courts' institutional competence, *McLane* held, trial courts have greater experience and intensive appellate review would be counterproductive. The "decision whether to enforce an EEOC subpoena is a case-specific one that turns not on 'a neat set of legal rules' [citation] but instead on the application of broad standards to 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Id.* at 1167 (citation omitted). In the "mine run of cases," whether to enforce the subpoena will turn either on whether the evidence is relevant to the specific charge or whether the subpoena is unduly burdensome in light of the circumstances. These inquiries, the Court explained, "are 'generally not amenable to broad per se rules,'" but are "the kind of 'fact-intensive, close calls' better suited to resolution by the district court than the court of appeals." *Id.* at 1168 (citations omitted). And while the district court's decision whether to enforce the subpoena turns partly on legal decisions – such as the correct standard of relevance – those legal decisions will be reviewed *de novo* in any event. *Id.* at 1168 n.3.

Last, the Court looked at other "functional considerations." *Id.* at 1168. It noted that that district courts have an institutional advantage given their experience in deciding relevance and evaluating reasonableness of subpoenas, while deferential review "streamline[s] the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts …." *Id.* (citations omitted).

In most appeals, settled law will dictate the standard of review. But when there is room

to argue, *McLane* reinforces the framework that courts use to decide what standard of review to apply, and therefore the framework that lawyers can use to seek the standard of review that benefits their clients.

But does the standard of review really matter? Yes. *Cooper* illustrates how the best legal arguments in the most important cases can still be trumped by a standard of review that defers to the trial court's decision.

Cooper was a politically-charged appeal from a district-court decision holding two North Carolina congressional districts unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The Supreme Court explained that when a voter claims that a district is racially gerrymandered, the court's decision proceeds in two steps. First, plaintiff must prove that race was "the predominant factor" motivating the legislature's decision to place a significant number of voters within or without a particular district. 137 S. Ct. at 1463. Second, if racial considerations did predominate, the state must prove that the district's design serves a compelling interest and is narrowly tailored to that interest. *Id.* at 1464. The district court had found that race was the predominant factor motivating the design of both districts. *Id.* at 1466. As to one congressional district, the district court had rejected on the facts the state's attempt to satisfy strict scrutiny, and as to the other congressional district the state did not even try to satisfy strict scrutiny. *Id.* Because the appeal was from a special three-judge district court, the appeal went directly to the Supreme Court.

The Supreme Court majority emphasized that its decision was driven by the facts found by the district court and the deferential standard of review: "We of course retain full power to correct a court's errors of law, at either stage of the analysis. But the court's findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error. [Citations] Under that standard, we may not reverse just because we 'would have decided the [matter] differently.' [Citation] A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Id.* at 1464-65.

Most arguments advanced by the appellant (North Carolina) or the dissent foundered on this clear-error standard. For example, the state argued that its victory in a similar state-court lawsuit should control the outcome in federal court. But, the *Cooper* majority explained, the state's argument rested on a factual premise rejected by the district court: that the federal-court plaintiffs were affiliated with the state-court plaintiffs. The district court's "conclusion defeats North Carolina's attempt to argue for claim or issue preclusion here. We have no basis for assessing the factual assertions underlying the State's argument any differently than the District Court did…. We need not decide whether the [federal-court plaintiffs'] alleged memberships [in the state-court plaintiff groups] would have supported preclusion if they had been proved. It is enough that the

District Court reasonably thought they had not." *Id.* at 1468.

The same fate awaited the state's argument that the state court's findings favoring the state should lead to "searching" review of the federal district court's contrary findings. "The rule that we review a trial court's factual findings for clear error contains no exception for findings that diverge from those made in another court…. Whatever findings are under review receive the benefit of deference, without regard to whether a court in a separate suit has seen the matter differently." *Id.* at 1468. "[T]he very premise of clear error review is that there are often 'two permissible'—because two 'plausible'—'views of the evidence.' [Citation] Even assuming the state court's findings capture one such view, the District Court's assessment may yet represent another. And the permissibility of the District Court's account is the only question before us." *Id.*

And so it continued. The state "denied that racial considerations accounted for (or, indeed, played the slightest role in) District 12's redesign." *Id.* at 1473. The majority explained that while "getting to the bottom of a dispute like this poses special challenges for a trial court," "[o]ur job is different – and generally easier. As described earlier, we review a district court's finding as to racial predominance only for clear error, except when the court made a legal mistake. [Citation] Under that standard of review, we affirm the court's finding so long as it is 'plausible'; we reverse only when 'left with the definite and firm conviction that a mistake has been committed.' [Citation] And in deciding which side of that line to come down on, we give singular deference to a trial court's judgments about the credibility of witnesses." *Id.* at 1473-74. After reviewing the evidence, the majority upheld the district court's decision based on the standard of review. "The District Court's assessment that all this evidence proved racial predominance clears the bar of clear error review…. We cannot disrespect such credibility judgments. [Citation] And more generally, we will not take it upon ourselves to weigh the trial evidence as if we were the first to hear it. [Citation] No doubt other interpretations of that evidence were permissible. Maybe we would have evaluated the testimony differently had we presided over the trial; or then again, maybe we would not have. Either way—and it is only *this* which matters—we are far from having a 'definite and firm conviction' that the District Court made a mistake in concluding from the record before it that racial considerations predominated in District 12's design." *Id.* at 1478.

The majority also wielded the standard of review to answer many of the dissent's arguments. As to District 12, the dissent agreed with the state that the legislature had permissibly gerrymandered based on politics, not race. The majority responded that "we simply take the State's account for what it is: one side of a thoroughly two-sided case (and, as we will discuss, the side the District Court rejected, primarily on factual grounds)." *Id.* at 1473 n.6. The majority concluded that the dissent "undertakes to refind the facts" and "repeatedly flips the appropriate standard of

review—arguing, for example, that the District Court's is not 'the only plausible interpretation' of one piece of contested evidence …." *Id.* at 1474 n.8. The majority argued that "Underlying that approach to the District Court's factfinding is an elemental error: The dissent mistakes the rule that a legislature's good faith should be presumed … for a kind of super-charged, pro-State presumption on appeal, trumping clear-error review." *Id.*

Justice Thomas, providing the crucial fifth vote for the majority, wrote a brief concurrence that also rested heavily on the standard of review. "I write briefly to explain the additional grounds on which I would affirm the three-judge District Court and to note my agreement, in particular, with the Court's clear-error analysis." *Id.* at 1485 (Thomas, J., concurring). Referring to a case distinguished by the majority, Justice Thomas wrote that the prior case reached its conclusion by "misapplying our deferential standard for reviewing factual findings" and that the majority's decision "represents a welcome course correction to this Court's application of the clear-error standard." *Id.* at 1486

Obviously plenty of law entered into the Supreme Court's opinion. But aside from one defense based on the Voting Rights Act, nearly every argument raised by the appellant or the dissent was reduced to a fact question resolved for the appellees by the deferential standard of reviewing the district court's decision.

The morals of the story are well-known to appellate practitioners but worth repeating. If you represent the appellant, keep the standard of review top of mind when deciding which issues to raise on appeal. When there is room to debate the standard of review, argue for the least deference possible to the district court's decision. If you represent the appellee, explain how the appellant's arguments boil down to issues on which the appellate court must defer to the trial court. Either way, use the standard of review to your best advantage to avoid a mess.

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