Effective Communication and Legal Writing - The Goal of Persuasion

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Alaska Bar Association Webinar

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Webinar

The underlying purpose of any legal writing is effective communication. And when lawyers write briefs, pleadings, or letters in their role as advocates, the goal of effective communication usually translates as the goal of persuasion.

In this hour-long presentation, retired Judge David Mannheimer will discuss the principles of effective writing — principles that will help you produce writing that is clear, concise, free of ambiguity, and persuasive. Among the topics to be covered will be:

- Identifying the "deep issue" — formulating a concise statement of the main question to be answered, or the main point you are trying to make
- Composing section headings and transition sentences that will help your readers follow your argument
- Word choice: Using plain English when you can, and carefully explaining your terms when you can't
- Structuring your sentences and your paragraphs to take advantage of the human tendency to pay closest attention to what comes first and what comes last
- Transforming long and cumbersome sentences into smaller, more digestible sentences
- The importance of proofreading (and proofreading again)
- The crucial advantage of finding and using a good editor

Judge David Mannheimer,
Alaska Court of Appeals (ret.)

Judge David Mannheimer came to Alaska after graduating from law school in 1974. Four years later, in 1978, he joined the Office of Criminal Appeals in Anchorage. As an appellate advocate, Judge Mannheimer briefed and argued over 150 cases in the Alaska Supreme Court and the Alaska Court of Appeals. In addition, during his 5½ years as chief of the criminal appeals office (1985–1990), Judge Mannheimer reviewed and edited hundreds of briefs written by the attorneys in that office.

Judge Mannheimer began serving on the Alaska Court of Appeals in late 1990. He retired from the Court in February 2019, but he later returned to work part-time for the Court as a *pro tem* judge. During his three decades of judicial service, Judge Mannheimer has written more than two thousand judicial opinions. He has also served as a faculty member at several appellate advocacy and legal writing seminars.

Program will be available for purchase on the Video-On-Demand catalogue in approximately 10 days after live event.

Presentation on the Art of Legal Writing
for the Alaska Bar Association
June 6, 2023

The underlying goal of any legal writing is to communicate effectively with other people. If you want to achieve this goal, your writing must be accurate, it must be unambiguous, and it must be readily understandable — not only to you and the other people working with you, but to the people you are writing to.

In today's presentation, I am going to discuss the general principles you should follow, as well as some habits you can cultivate and some techniques you can use to improve the effectiveness of your writing.

General Principles

Whether writing comes easily to you, or whether putting words on paper is a struggle for you, the same thing holds true: Good writing is a skill that you can learn, but which you must practice and cultivate.

Everybody's brain works differently. Some people can easily write pages and pages, but find it hard to organize and structure their writing. In this digital age, when you can easily copy and paste text from online court decisions and from your own earlier pleadings, this can be a particular problem.

On the other hand, some people find it difficult to write anything at all until they have formulated an outline — either written or mental — of all the topics they will discuss, and the order in which they will discuss them.

Most people fall somewhere in between these two poles. For example, I tend to be an mental-outline-first type of writer, but there are times when I simply have to begin writing before I have thought my way through the whole case — because, in the writing process, I finally figure out what I really want to say.

The important thing is to know yourself, and then adopt the strategies and habits that will allow you to produce good writing.

You can group legal writing into three main categories.

The first category is the kind of writing where a lawyer's purpose is to accurately and unambiguously memorialize other people's intentions and decisions. This category includes documents such as wills, contracts, and offers of settlement.

The second category is the kind of writing where a lawyer's purpose is to prepare someone else — a colleague or a client — to make an informed decision. The chief example of this category of writing is a legal memo in which you lay out the facts and the law that the other person must be aware of, and must understand, before they make a decision and take action.

The third category of legal writing — the category that I am going to focus on in this presentation — is the writing which lawyers do in their roles as advocates. The main examples of written advocacy are briefs, motions and oppositions, and some types of letters to opposing counsel. Here, a lawyer's underlying goal is almost always persuading someone — usually a court or an administrative agency — to do something that will help their client.

Whenever you are engaged in written advocacy — that is, where the goal of your writing is persuasion — you must convincingly communicate three things: (1) *what* you want the other person to do, (2) the *reasons* they should do it, and (3) how the law either *requires* or at least *allows* them to do it.

In order to write well, you must keep in mind that legal advocacy is a type of story-telling. It may have a few more formal rules than other types of story-telling, but the basic principles remain the same.

The key to any good story-telling is to present only the relevant facts, and to present those facts in a concise and easily understandable sequence, organized so that your listeners are carried forward willingly and effortlessly to your conclusion.

This leads me to one of the primary rules for effective writing: You must not make your readers struggle with your prose to extract your meaning.

As you know from your own experience, some people are bad at telling stories. Instead of leading you quickly to the point, they tell you a bunch of irrelevant information, or they lard their narrative with meaningless detail, or they repeatedly have to backtrack because they forgot to mention something important, or they utterly fail to provide you with one or more key facts.

It is a real mental effort to listen to a badly told story — and often, when the person reaches the end of their story, you are left scratching your head and wondering why they thought that what they just told you was important.

Legal stories should be *inherently* interesting — because almost all legal stories are about fairness: they either involve a claim that someone is being mistreated and is seeking justice, or a claim that someone is trying to obtain something that they are not entitled to. But bad writing can make the story confusing, uninteresting, or even vexing to the reader.

When I write, I try to imagine *speaking* my words to a friend or colleague. I pretend that I am explaining the issues in the case to them, and I try to ask myself, as I go along, if my listener would be able to follow my analysis and understand the reasons behind my proposed resolution of the case.

Bryan Garner, who is a celebrated teacher of legal writing, says, "Your readers have limited time, and they are impatient to get the goods." So you must identify the point you are trying to make in your writing, you must get to your point as quickly as possible, and you must structure your narrative so that all portions of it are relevant to your point.

For example, take a look at Attachment A, which is an abridged version of a magazine article written by Bryan Garner. As Garner explains in this article, you should never begin a motion with the kind of meaningless boilerplate language described in this article. Instead, you should quickly get to the point of your motion.

(See Attachment A.)

The same thing hold true for appellate pleadings. I recently read a petition addressed to the Alaska Supreme Court, asking that court to review and reverse a decision of the Court of Appeals. The petitioner argued that the Court of Appeals had misunderstood or misapplied one aspect of the law governing the case. The petition was 15 pages long — but the petitioner did not identify the Court of Appeals' purported mistake of law until page 13. The first twelve pages of the petition contained a lengthy recitation of the underlying facts and procedural history of the case. This recitation was accurate — but three quarters of it was not relevant to the issue of law that the petitioner was raising.

Bryan Garner's "deep issue" approach to legal writing.

One of Bryan Garner's precepts is that, when a person writes a brief, a motion, a law clerk memo, or a judicial opinion, the writer must identify the "deep issue" in the case if that brief, motion, memo, or judicial opinion is to be accurate, focused, and convincing.

Although Garner uses the phrase "deep issue", he is not referring to "deep" philosophical thinking. Rather, Garner is referring to the *ultimate* factual or legal question that must be answered by the court. The question is "ultimate" in the sense that the answer to this question will not hinge on the answer to some other question. Instead, the answer to this underlying question will determine the resolution of the claim or defense you have raised in your pleading. You have already seen an example of this "deep issue" approach in Garner's article on how to begin a motion.

Here's an example of how you identify the deep issue. Let's assume that you are an appellate judge, and you are reading the "Issues Presented on Appeal" section of a defendant's brief. You might find the defense attorney asserting that the issue to be decided is, "Did the trial judge commit error by denying the defendant's motion to suppress evidence?" But think about that. A question like "Should the trial judge have granted the suppression motion?" cannot be the deep issue — because a court should only grant a suppression motion if the police obtained the evidence illegally. So, at the very least, we must ask the question, "Did the police obtain the evidence against the defendant illegally?"

But even this formulation of the issue has a major flaw: it is so generic that it describes *all* suppression issues. It doesn't identify — nor does it help the court resolve — the underlying issue raised in this particular case.

So let's assume that the police obtained their evidence by searching the defendant's car during a traffic stop. As you read the defendant's brief in more detail, you may discover that the defendant's suppression motion was based on the assertion that the police lacked probable cause to justify the traffic stop.

Now, the existence of probable cause might *appear* to be the underlying issue in the case. But you should be asking, "*Why* does the defendant claim that the police lacked probable cause for the stop?"

Does the defendant contend that the facts known to the police did not satisfy the legal test for "probable cause"? If that is the defendant's contention, then *why* does the defendant contend that there was no probable cause? Is it because, even considering all the facts known to the police, their information was not sufficient to justify a reasonable and prudent person in believing that a crime had occurred? Or is it because some of the police information came from a "criminal informant" whose reliability was not sufficiently established? Or does the defendant argue that no reasonable judge could have believed the police officer's testimony at the evidentiary hearing — and that the judge's findings of fact regarding the circumstances of the traffic stop are therefore clearly erroneous?

Each step of the way, these questions get closer to the "deep" or underlying issue. In every case, by asking yourself these questions, you will be able to distill your each of your legal claims or defenses down to one or two specific questions of fact or law on which everything else hinges. Those are your "deep" issues.

Identifying the deep issue takes work — sometimes, really hard work. There have been many times when I thought that I had identified the deep issue, only to discover the true deep issue during the writing process, when I was forced to confront my thoughts on paper (or on a computer screen). And there have been times when I did not identify

the true deep issue until I circulated a draft opinion to my judicial colleagues and my draft failed to convince them.

Because the "deep issue" is the central point of the story you are telling in your brief or other pleading, your statement of facts must focus on this issue, and the argument portion of your pleading must likewise focus on the law relating to this issue. Don't fill your brief or pleading with facts that aren't related to this underlying issue, and don't fill your brief or pleading with recitations of law that have no bearing on how the court should resolve this issue.

In other words, your "statement of facts" should *not* include all the underlying facts of the case, nor should it include a recitation of all the witnesses and testimony presented in the case. In fact, you should not even think of this section of your pleading as a statement of the "case". Instead, think of it as a statement of the *problem* — and focus it accordingly.

Similarly, the argument portion of your pleading should not recite *all* the law that broadly applies to your claim — not all the general principles of contract law, not all the rules that a court must follow when making a child custody determination, not all the rules and restrictions governing searches and seizures, and not all the law that pertains to ineffective assistance of counsel claims. Instead, your pleading should identify and explain the particular portions of the law which apply to the specific issue in your case.

Your ultimate goal is to provide the court with the information it will need to understand what the underlying problem is — and why your client will suffer injustice if the court does not rule in your favor on the issue presented in your pleading.

A note on structuring your brief or pleading: Ideally, you want the judge to move immediately from your description of the underlying facts of the problem to your discussion of why this problem should be resolved in your client's favor. If your brief

only addresses one issue, that shouldn't be hard. But if your brief addresses several different claims, and each of those claims arises from different facts — in other words, if you are telling several different stories — then don't try to write a single statement of facts that covers all of those claims. Instead, write a short statement of facts that merely introduces the case in general terms, and then tell the judge that the facts pertinent to each separate issue will be presented in the separate sections of your brief dealing with those issues.

Writing clearly, intelligibly, and convincingly: **specific techniques**

Bryan Garner urges legal writers to remember this precept: "Good writing makes readers feel smart, while bad writing makes readers feel stupid — and people do not like to feel stupid."

What Garner means is that a good writer will actively find ways to ease their readers' passage through the text, while a mediocre writer will not pay attention to the difficulties posed by their writing.

Your briefs and your other pleadings should be worded so clearly and intelligibly that any literate and intelligent person — including non-lawyers — can easily understand the underlying issue to be resolved, and why you believe that, under the applicable law, this issue should be resolved in your client's favor.

Garner says, "If people can't understand the issue, that's your fault." He's right. Don't place unnecessary obstacles in the path of your readers. Even when the facts of your case are fairly complex, or you are discussing an area of the law that is fairly technical, there are things you can do — techniques you should practice — to make your writing more accessible:

Garner is also fond of saying, "Readers are eager to get the goods," In other words, get to the point early in your writing, and stick to the point.

Here are some habits and techniques that you can cultivate to make your writing better — *i.e.*, clearer and more intelligible, less ambiguous, and easier to follow on first reading.

1. If your brief or pleading is important, *give yourself sufficient time to write it*.

2. If your brief or pleading is important, *use an editor*. You will often be too close to your own writing to see the problems in it.

    a. But pick your editor wisely. It must be someone who (a) knows about good writing, (b) cares about the success of *your* writing, and (c) has the time to carefully study what you have written.

    b. And give your editor sufficient time to do a good job.

3. If your document is more than a few pages long, divide your discussion into sections. And write informative section headings that tell your readers what they will find in each section.

4. Here is a related technique to help your readers follow your argument: When you are approaching the end of a section, write a paragraph that summarizes what you have said in that section, and then write another transition sentence or a transition paragraph that introduces the next section. Alternatively, you can just write a paragraph that summarizes the section you have completed — and then, at the beginning of the *next* section, insert a paragraph that introduces the topic you will discuss in that new section.

5. Your "statement of the case" should be the *last* portion of your brief or pleading that you finalize — because you can't be sure which facts are important until you have completed your argument section and you are sure that you have correctly identified the deep issues in the case.

    a. As a practical matter, most people (including me) write their "Statement of the Case" first. But if you do write the facts first, this means that you

must carefully review and edit those facts before you file your brief or pleading — because (again) you won't be able to identify which facts are significant until you know what the deep issues are.

6. Work to make sure that your readers quickly understand the topic of each of your sentences and the main idea of each of your paragraphs.

   a. The two natural points of emphasis, both in sentences and in paragraphs, are the beginning and the end. So train yourself to structure your sentences and your paragraphs so that you use these natural points of emphasis.

   b. When organizing your sentences into paragraphs, begin with sentences that convey information that is already familiar to your reader. You can then end the paragraph with less familiar information, or you can end the paragraph by announcing the conclusion your reader should reach based on the information you have already described.

   c. This kind of paragraph structuring may mean that you end up repeating yourself to some extent. For example, you'll end up writing sentences that begin, "As I have already explained, ... " or "As I noted earlier, ... ". That's okay. The aim of legal writing is not to test your readers' memory. Nor is it to force your readers to exercise their utmost attention when they read your text. The aim of legal writing is communication. (See, I've repeated myself.)

7. When you are trying to communicate a complex thought, don't use complex, convoluted sentences. Instead, break your complex thought into short, readable sentences. That way, your reader can move slowly through your thought process, one step at a time. Not only will this help your readers

understand what you are saying, but it often helps *you* reach a better understanding of what you are saying.

8. Use plain English whenever you can — words that any intelligent reader can understand, even if they don't have law training.

    a. If you must use technical terms — *e.g.*, legal terms, or medical or scientific terms, or any other non-standard words or phrases — carefully explain what you mean by those terms.

    b. This is especially important when you are using professional jargon — situations where a profession uses words or phrases differently from how those words are used in everyday English words.

    c. Defining your terms will greatly help your readers. And by forcing yourself to explicitly define these terms for your readers, you may often improve your own analysis.

9. Don't use abbreviations and acronyms unless you are sure that your readers are already familiar with them. Everyone recognizes the acronym "FBI", but most of your readers will not be familiar with "NHTSA" (the National Highway Traffic Safety Administration). And no one will have ever seen the acronym "AWSN" that you, yourself, just invented as a shorthand for the Association of Western State Numismatists. So don't use these acronyms.

    a. Legal writers traditionally have taken the approach that *any* acronym is okay so long as they insert an explanatory parenthetical into their pleading when they first refer to the acronym — for example, "National Highway Traffic Safety Administration (NHTSA)". This is *not* okay. The problem is that, even though you have told your readers what the

acronym means, they will *still* mentally stumble over this acronym every time it appears in your brief. (You know this from your own experience.) So pick a shorter, plain-English version of the name — for example, the "Traffic Safety Administration", or the "Highway Administration".

b. This same rule applies to statutes. Yes, lawyers are expected to understand that "AS 11.61.110(a)(5)" refers to a provision of Alaska's disorderly conduct statute — but that doesn't make this long combination of letters and numbers any easier to read. So give the full citation once, and then use a shortened plain-English version. Depending on why you are citing this statutory provision, you might refer to it as "the statute", or "the disorderly conduct statute", or "the unlawful fighting statute", or "section (a)(5)".

c. Federal Circuit Judge Frank Easterbrook uses this approach: when a case raises an issue regarding the interpretation or application of a statute, he cites the statute once, and thereafter he refers to it as "the Act".

d. I apply this same rule to the legal citations in my writing. Yes, the Harvard Blue Book has pages of citation abbreviations that cover all sorts of non-standard and antiquated law reports, as well as all the statutory compilations and levels of court from every state and every country of the world. But many of these abbreviations are incomprehensible to anyone who is not already familiar with the source. The purpose of a citation is to inform your readers of where they can find the support for your assertion about the law. It achieves this purpose only if it is comprehensible to your readers. So don't use a Blue Book abbreviation if it is incomprehensible or ambiguous; instead, write out the name in full.

10. Footnotes: *Don't write substantive footnotes*. A reader should be able to fully understand your arguments without reading a single footnote of your document. Do not discuss important factual or legal issues in footnotes.

    a. There are two reasons for this approach. You will understand the first reason when your eyes are fifty years old. The second reason is that the use of substantive footnotes is bad writing. If a fact or a legal authority is important to your argument, don't bury it in a footnote where it may escape your reader's notice. Put it in the main text.

    b. When I write, I try to make sure that my footnotes are limited to (1) legal citations and (2) matters that are truly collateral to my argument — matters that are not necessary for an understanding of the issues I am discussing in the main text.

11. Every time you insert a precise name, a precise date, or a precise number into a sentence, it is a flag for readers to pay attention. They naturally assume that you are being precise because your analysis of the case requires this precision. So don't waste your readers' time and mental energy by filling your sentences with names, dates, numbers, and other precise details that don't matter.

    a. For example, don't write "August 22, 2022" when "mid-August" or "late summer" will do — or when you really mean "eight days later".

    b. Similarly, if all your readers need to know is that the plaintiff filed a series of pleadings raising the same argument, don't write "The plaintiff filed a series of nine pleadings in late 2021 and early 2022, pleadings in which he argued ...".

c. I often have to go back and edit my own writing to correct this fault — because, when I engage in my initial drafting, my head is filled with all the details of the case, and it is only when I'm done that I realize that my analysis doesn't require all that detail.

Attachment A

A Bryan Garner article on legal writing

It's extraordinary how lawyers are wedded to their old forms and templates — pleadings which typically get off to a glacial start. Consider this beauty:

TO THE HONORABLE UNITED STATES DISTRICT COURT:

NOW COME Eau Claire Independent School District (the "District") and Sgt. William "Bull" Ballard ("Ballard"), Defendants in the above-entitled and numbered cause, by and through their attorneys of record, Karr & Stilton, 3300 First City Centre, Suite 1700, Real City, Real State, Real ZIP (with four extra digits), and files this, the DEFENDANT EAU CLAIRE INDEPENDENT SCHOOL DISTRICT'S AND SGT. WILLIAM "BULL" BALLARD'S MOTION TO DISMISS, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, together with their memorandum in support thereof, and would respectfully show unto the Court the following ...

In these first 100 words, how much have you learned about this case?

Imagine the difference if the lawyer had immediately informed the court of the underlying issues the lawyer was going to address. The defendants' motion to dismiss actually presented two underlying issues. To formulate these two issues, I had to spend nearly an hour studying all 15 pages of the lawyer's original motion — and, assumably, the judge who was assigned to the motion had to spend a comparable amount of time to gain a firm understanding of the gist of the motion. But by clearly stating these issues at the outset, the pleading is off to a much faster start. Here is my revised motion:

Defendants' Motion to Dismiss

This motion to dismiss presents the Court with two straightforward issues:

1. Qualified Immunity. Under applicable law, a law enforcement officer loses their qualified immunity for making an arrest only if there was "no arguable basis for probable cause to arrest." Here, the crime lab report conclusively determined that Bianca Trevino signed a forged high school grade-change request that is the basis of the complaint against her. Relying on that report, Officer Ballard instituted an arrest, and Trevino has sued him for malicious prosecution and alleged Section 1983 violations. Is Officer Ballard entitled to qualified immunity?

2. Vicarious Liability. Under state and federal law, a school district is liable for damages under Section 1983 only if the plaintiff proves (1) a school district policy-maker (2) formulated an official policy and (3) a violation of constitutional rights ensued whose moving force was that policy. Here, Bianca Trevino has alleged no such official policy or policy-maker, even though she has twice been granted leave to amend her complaint. Now that the final deadline for repleading has passed, should this Court dismiss her Section 1983 claims against the school district?

This first issue is described in 84 words; the second issue is described in 90 words.

The bottom of the first page of a pleading is the most valuable space you have in that pleading. Can you see how much more effectively we're now using this invaluable real estate? Why would you want to waste it on a regurgitation of meaningless form-book verbiage? Yet countless lawyers do it. I urge you not to be one of them.

My comments on Garner's article:

Garner is so right: The attorney's original opening paragraph contains only useless verbiage. The parties are already listed in the caption of the pleading — and it is obvious that when the defendants' attorney refers to "the District" and "Ballard" later in his pleading, these will be references to his clients. Moreover, the name and address of the attorney's law firm are already printed on the firm's pleading paper, and the title of the motion is already recited at the top of the first page.

When you write a motion, you should not waste your time — and, more importantly, your readers' time — with this kind of useless recitation. Instead, follow Garner's advice and move directly to a clear statement of the underlying issue(s) to be resolved. After all, what is a motion? It is a request for a court to resolve a specific problem by entering a specific order. Whatever the problem is, don't make your readers — the judge and your opposing counsel — wait until the middle of your pleading (or worse, the very end of your pleading) to find out what you think the problem is, and what resolution you are seeking.

Note that Garner's two issues are *not* written like West headnotes. West's editors adhere to the rule, "Describe every holding in a single convoluted sentence." But Garner uses several sentences to describe each of his underlying issues— presenting each issue in a form that is much easier to read and understand.

Standards of Review

When you file an appellate brief, Alaska Appellate Rule 212(c) requires you to discuss the "standard of review" that applies to each issue raised in your brief.[1] There are four crucial things that you must understand before you perform this task.

1. Even though the phrase "standard of review" *looks like* it is written in normal English, it is not. The phrase "standard of review" is technical jargon. The same thing is true of the various individual standards of review that are discussed in this handout: the "clearly erroneous" standard, the "abuse of discretion" standard, the "clearly mistaken" standard, the "substantial evidence" standard, and the "reasonable basis" standard. *None of these phrases are being used in their normal English sense*. They are all being used in a special lawyerly sense.

2. The phrase "standard of review" does *not* refer to the legal rules that the appellate court will employ when resolving the merits of an appeal. "Standard of review" does not refer to the rules of contract formation, or to the rules of statutory interpretation, or to the case law interpreting the First Amendment. Nor does the phrase "standard of review" refer to the test for deciding whether a particular error was harmless or (instead) requires reversal of the lower court's judgement. *None of these* are "standards of review".

Rather, the "standard of review" is the *degree of deference that an appellate court must show* to the decision of the lower court or administrative agency. 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.

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[1] See subsection (c)(1)(H) (requirements for the appellant's brief) and subsection (c)(2) (requirements for the appellee's brief).

3. The third crucial thing you must understand is that the published decisions of the Alaska Supreme Court and the Alaska Court of Appeals are brimming with statements about "standards of review" that are either flatly wrong or, at best, grossly misleading.

Many Alaska appellate decisions purport to identify a single standard of review that governs *all* cases involving a particular type of lower court decision — for instance, a single standard of review that applies to all rulings on the admissibility of evidence, or all rulings on jury instructions, or all child custody rulings. These cases are simply wrong.

There is no single standard of review that applies to all evidentiary rulings, or to all jury instruction rulings, or to all child custody rulings.

4. To identify the proper standard of review, you must identify the *underlying issue* to be resolved. See the discussion of this point in *Booth v. State*, 251 P.3d 369, 372–73 (Alaska App. 2011) (found in the Appendix to this handout). .

A perfect example of this principle — that the applicable standard of review hinges on identifying the precise issue to be resolved — was presented in *Veco Alaska, Inc. v. Division of Workers' Compensation*, 189 P.3d 983 (Alaska 2008),

The majority of the supreme court in *Veco* declared that the decision of the Workers' Compensation Board should be reviewed under the "*de novo*" or "independent judgement" standard of review, *id.* at 987, while the dissenting member of the court declared that the Board's decision should be reviewed under the "substantial evidence" standard of review, *id.* at 992-93. But this disagreement about the applicable standard of review stemmed from the fact the majority and the dissent held differing ideas about *the underlying issue to be decided*.

The *Veco* majority thought that the underlying issue was whether the Workers' Compensation Board had interpreted the governing statute correctly. Because the interpretation of a statute is a question of law, the majority concluded that the Board's ruling should be reviewed *de novo* (because appellate courts generally do not give any deference to a lower court's or agency's views about the law). (More about this later.)

The dissent, on the other hand, believed that the underlying issue was whether the evidence presented to the Workers' Compensation Board was sufficient to support the Board's factual conclusion that Veco (the employer) had prior knowledge of their employee's disability. And because the dissent believed that the ultimate issue was the sufficiency of the evidence to support the Board's decision, the dissent declared that the proper standard of review was the "substantial evidence" standard — the standard that applies when an appellate court reviews a verdict rendered by a lower court or agency (when there is no jury, and the court or the agency is sitting as the trier of fact).

Thus, the supreme court's decision in *Veco Alaska* is a prime illustration of the two principles that govern questions regarding the standard of review:

> *First: Before you can make a meaningful statement about the standard of review, you must identify the true underlying issue to be decided.*
>
> *Second: Once you have identified the underlying issue, the appropriate standard of review will usually be self-evident.*

The Six Standards of Review Defined by Alaska Law

1. *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 — issues such as "what does this statute mean?", or "what common-law rule should be adopted or followed?", or "what is the proper legal characterization of a given set of facts?'

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

2. Deferential independent review — what the Alaska Supreme Court has called the "reasonable basis" standard of review. This is the standard of review that an appellate court employs in *administrative* appeals when the question presented on appeal is how to interpret a statute or regulation, and 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.

   a. 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 under the normal rules of statutory interpretation.

   b. 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's interpretation of the statute or regulation is clearly unreasonable, *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.

3. "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 final decision after 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 fact-finder's verdict, could a reasonable person have concluded that this was the proper verdict?"

   Note: The "substantial evidence" standard of review 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.

4. "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 (apart from a final verdict). The "clearly erroneous" standard applies to a lower court's findings of fact when it decides a motion to suppress, or rules on the admissibility of evidence, or decides whether a party should be granted a delay of trial — any finding regarding what happened, or what a particular person did or did not do, or what a particular person was thinking, etc.

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

b. This standard of review is *less* deferential than the "substantial evidence" standard that applies when an appellate court is reviewing a *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.

5. "Abuse of discretion". This is the standard of review that an appellate court employs when it reviews a lower court's decision on a matter entrusted to the judge's discretion — that is,a decision made in a situation where (a) the law does not prescribe a particular "right" answer or response to the situation, but instead only provides the factors or criteria that a judge should consider, and (b) reasonable judges, given the same facts and applying the correct criteria, might come to differing conclusions about how to deal with the problem.

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".

6. "Clearly mistaken". This is the standard of review that an appellate court employs when reviewing a 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.

Why You Cannot Trust the Case Law

In dozens of child custody cases, the Alaska Supreme Court has quoted the following language (or close variants of it): "In [child] custody cases, we will overturn the lower court's custody determination only when there is an abuse of discretion or there are clearly erroneous findings of fact. An abuse of discretion may be found where the trial court considered improper factors, failed to consider statutorily mandated factors, or improperly weighed certain factors in making its determination." *Howlett v. Howlett*, 890 P.2d 1125, 1126 (Alaska 1995) (*per curiam*).

For purposes of identifying the proper standard of review, this statement is a jumbled mess.

If the lower court's child custody decision hinged on questions of fact, then it is true that the lower court's decision about those facts is reviewed under the "clearly erroneous" standard — because "clearly erroneous" is the standard of review that applies when an appellate court reviews a lower court's resolution of issues of fact.

But if the problem with the lower court's ruling is that the lower court actively relied on improper factors, or failed to consider statutorily mandated factors, the standard of review is *not* "abuse of discretion". A judge who does something that the law forbids, or who fails to do something that the law requires, commits *an error of law* — and the standard of review that applies to questions of law is *de novo* or independent review.

Admittedly, a normal English speaker, when describing the illegal action of the lower court, might say that the lower court "abused its discretion". Alternatively, an English speaker might say that the lower court "exceeded its authority", or that the lower court was "clearly mistaken" or was "clearly erroneous" when it considered an improper factor, or when it failed to consider a required factor.

But remember: the phrases that describe the standards of review are *not English*! They are legalese. Put those words aside for a moment, and remember that the phrase "standard of review" refers to the *degree of deference that an appellate court must show to the lower court's decision*.

A lower court judge has no discretion to omit consideration of a factor that the law requires the judge to consider, nor does a lower court judge have the discretion to actively consider a factor that the law forbids. No appellate court will treat these matters as discretionary decisions, nor will any appellate court say, "Judges might reasonably differ on these matters, so we are willing to uphold different rulings from different judges." On the contrary: these are errors of law.

The appellate court will show *no deference* to the lower court's decision as to whether it is proper or improper to consider a particular factor in a child custody determination. The standard of review on such legal issues is "*de novo*" or "independent".

The situation is different, however, in cases where the claimed error is that the lower court "assigned disproportionate weight to some factors" when making its custody determination. Here (at last) is an issue that *is* governed by the "abuse of discretion" standard of review. Reasonable judges, applying the correct legal criteria to the facts of a particular child custody case, might reasonably differ as to how to weigh these various factors when making their custody decision. There is no "right" answer. And because of this, the proper standard of review is "abuse of discretion".

The Comforting Conclusion

The good news is that, once you have identified the true nature of the underlying issue to be decided in your case, the applicable standard of review will almost always be self-evident.

An appellate court will employ" *de novo*" or "independent" review if the underlying issue is one of law. In situations where the underlying issue is whether the lower court correctly decided a question of historical fact, an appellate court will employ the "clearly erroneous" standard. And in situations where the lower court correctly understood the law and the facts, and the underlying issue is whether the lower court reasonably exercised its judicial discretion — *i.e.*, situations where the law did not prescribe a "right" answer, and where reasonable judges might differ as to the proper response to the situation or the proper weighing of competing considerations — the proper standard of review is the "abuse of discretion" standard.

So — Do not try to identify the applicable standard of review until you have analyzed the claim raised on appeal and have identified the *true underlying issue* to be resolved. Once you have identified that underlying issue, you will *know* which standard of review applies to that issue.

Extra Credit: Find the Standard of Review

Here is an excerpt from a real brief. This was a civil case in which the trial court granted summary judgement to the defendant — *i.e.*, the trial judge ruled that the plaintiff's case was so inadequate that there was no point in holding a jury trial, and that judgement should immediately be entered in the defendant's favor. On appeal, the plaintiff challenged the trial judge's decision to award summary judgement to the defendant. Here is the plaintiff's discussion of the standard of review. Your task is to identify the portion(s) of the following paragraph that actually describe the standard of review:

Standard of Review

Summary judgment should be granted only if there is no disputed genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. [2] The party seeking summary judgment has the burden of showing that there is no genuine issue of material fact — meaning that the evidence in the record, taken as a whole, shows that a reasonable fact-finder, applying the governing law, could not return a verdict for the non-moving party. [3] The court views the evidence in the light most favorable to the non-moving party, [4] and determines whether there are any genuine factual issues which can only be resolved at trial. If there are, then the court must deny the motion for summary judgment. [5]

(For the answer, see the last page of the Appendix to this handout.)

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[2] Alaska Civil Rule 56(c).

[3] *Shade v. Anglo Alaska Service Corp.*, 901 P.2d 434, 437 (Alaska 1995).

[4] *Bradshaw v. Division of Motor Vehicles*, 224 P.3d 118, 121-22 (Alaska 2010).

[5] *Egner v. Talbot's, Inc.*, 214 P.3d 272, 279 (Alaska 2009).

APPENDIX

Two Appellate Decisions that Explain "Standard of Review"

Booth v. State, 251 P.3d 369, 372–73 (Alaska App. 2011) (footnotes omitted):

> *The standard of review that applies to this Court's review of the district court's decision*
>
> Before we reach the merits of the [pre-trial discovery] issue raised on appeal, we must identify the standard of review that governs our decision. The phrase "standard of review" refers to the degree of deference that an appellate court must accord to the decision of the lower court or administrative agency whose ruling is being reviewed.
>
> The State asserts that "abuse of discretion" is the standard of review that governs an appellate court's consideration of a trial court's ruling on a motion to compel discovery. If, indeed, this is the proper standard of review, then this Court would be obliged to affirm the district court's ruling in Booth's case unless we were convinced that the district court's decision was "clearly untenable or unreasonable", or unless we were "left with a definite and firm conviction that the [trial] court erred."
>
> As the State notes in its brief, the Alaska appellate courts have repeatedly declared that "abuse of discretion" is the standard that governs appellate review of a trial court's decision on a motion to compel pre-trial discovery. But this is not true as a general proposition of law. There is no single standard of review that governs all trial court decisions involving pre-trial discovery — no more than there is a single standard of review that governs all evidentiary rulings or all decisions involving jury instructions.
>
> To identify the proper standard of review, one must identify the underlying issue to be resolved by the appellate court. Broad categories such as "pre-trial discovery", "admission or exclusion of evidence", or "jury instructions" merely identify

the context in which that issue arose. Within these broad categories, trial judges make many kinds of decisions — rulings of law, findings of fact, and exercises of discretion.

If the underlying problem confronting the appellate court is to ascertain the law or the legal test that applies to a given situation, then the appellate court will apply the "independent judgement" or " *de novo*" standard of review. Under this standard of [*373*] review, the appellate court will not defer to the lower court's decision.

If the lower court's ruling hinges on a finding of historical fact, then the appellate court will apply the "clearly erroneous" standard of review. Under this standard of review, the appellate court must affirm the lower court's finding of fact unless, after reviewing the entire record, the appellate court is left "with a definite and firm conviction ... that a mistake has been made, although there may be evidence to support the [lower court's] finding."

The "abuse of discretion" standard applies to situations where (a) the law does not specify a particular "right" answer or response to the situation, but instead only specifies the factors or criteria that a judge should consider, and (b) reasonable judges, given the same facts and applying the correct criteria, might come to differing conclusions about how to deal with the problem. In other words, the "abuse of discretion" standard of review applies to situations where the law allows or requires the judge to exercise discretion — to reach a decision by considering and weighing various factors, and then doing what seems most fair under the circumstances.

In matters involving pre-trial discovery, trial judges often make decisions that involve the exercise of discretion — decisions such as setting or amending deadlines for the completion of discovery, or restricting discovery requests that appear to be needlessly burdensome or cumulative.

But the underlying issue in Booth's case is an issue of law: we are asked to determine the threshold showing that a defendant must make in order to obtain pre-trial disclosure of a police officer's personnel file, or at least in camera review of that

file by the trial judge for the purpose of determining whether the file should be disclosed in whole or in part.

Even though this issue arose in the context of a judicial decision regarding pre-trial discovery, the applicable standard of review is the "independent judgement" or "*de novo*" standard. This case does not raise the question of whether the trial judge made a reasonable decision in a matter entrusted to the judge's discretion. Rather, the question we must decide is whether the trial judge used the correct legal test when he denied Booth's discovery request.

As we explained earlier, the term "standard of review" refers to the degree of deference that an appellate court must show to the decision of the lower court. When the underlying issue on appeal is to identify the law or the legal test that governed the proceeding in the lower court, we do not defer to the trial judge's decision.

Prior appellate decisions on this topic, when read carefully, acknowledge that there is no single standard of review that applies to all pre-trial discovery rulings — and that the applicable standard of review hinges on the underlying legal problem to be resolved. For example, even though the supreme court declared in *Lee v. State* that "discovery orders [are reviewed] under the deferential abuse of discretion standard", the court immediately qualified this statement by adding that it would apply the "independent judgement" standard of review if "the [underlying] legal question [is] whether the [trial] court weighed the appropriate factors in issuing [the] discovery order."

For these reasons, we reject the State's contention that our review of the district court's ruling is governed by the "abuse of discretion" standard of review, and that we should therefore defer to the district court's ruling unless that ruling is shown to be clearly untenable or unreasonable. Instead, we will decide this legal issue *de novo*.

Wilkerson v. State, 271 P.3d 471, 476 (Alaska App. 2012):

Over Wilkerson's objection, the trial judge allowed the State to introduce evidence of Wilkerson's character for violence through the testimony of the lead investigator in Wilkerson's case, John Foraker. As Wilkerson noted when he objected to this testimony, Detective Foraker had no personal acquaintance with Wilkerson, nor did he purport to know Wilkerson's reputation in the community. Rather, the detective based his opinion on the hearsay information he gleaned by reviewing Wilkerson's criminal record — in particular, Wilkerson's six prior convictions for assault.

The underlying issue here is whether a witness's opinion of another person's character must be based on the witness's personal knowledge. Because this underlying issue is a question of law, the State is incorrect when it asserts that we must review the trial judge's decision under the "abuse of discretion" standard. Instead, we exercise our own independent judgement as to what the law requires.

True, many Alaska appellate decisions declare that all of a trial judge's decisions regarding the admission and exclusion of evidence are reviewed for abuse of discretion. But that is wrong: there is no single standard of review that applies to all evidentiary rulings. Rather, the applicable standard of review hinges on what the underlying issue is. Here, the question is whether, under Alaska law, a witness offering an opinion about another person's character must speak from personal knowledge. We are not required to defer to the trial judge's view of this matter; rather, we decide this question *de novo*.

Answer to the Extra Credit Question:

Nothing in the appellant's discussion of the "standard of review" actually identifies a standard of review.

The correct standard of review here is "de novo" — because, when a lower court grants summary judgement to a defendant in a civil case, the court is saying that, even if the fact-finder were to view the available evidence in the light most favorable to the plaintiff, the law would still require the court to enter judgement in the defendant's favor under those facts.

As explained on page 4 of this handout, an appellate court owes no deference to a lower court's decision about what the law requires (or forbids) under a given set of facts. Thus, the "de novo" or independent standard of review governs the supreme court's review of the trial court's decision to grant summary judgement.

See, *e.g.*, *State Farm Mutual Automobile Insurance Co. v. Houle*, 269 P.3d 654, 657 (Alaska 2011).

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