Standards of Review in Eleventh Circuit Civil Appeals

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Abstract

Word has it that the United States Courts of Appeals are tough on summary judgments.

KEYWORDS: appeals, review, standards
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CONTENTS

I. Introduction .................................................. 260
II. Civil Appeals .................................................. 265
   A. Findings in A Bench Trial. .......................... 265
      1. Findings of Fact ............................ 265
         a. Development of the Clearly Erroneous Rule. 265
         b. Rule 52 and Applicability ............... 266
         c. Definition .............................. 267
            i. Gypsum: "Mistake" ................. 267
            ii. Sanders: "Truth and Right" .... 268
            iii. "Substantial Evidence"? ...... 269
         d. Practical Application of Rule 52(a) .... 270
         e. Demeanor and Documentary Evidence .... 271
         f. Verbatim Adoption ....................... 273
         g. No Findings and Faulty Findings .... 274
      2. Conclusions of Law ............................ 275
         a. Errors: Law or Fact? ............... 275

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b. State Law and Foreign Law .......................... 276

c. Findings Based on Faulty Law ....................... 277

d. Inferences and "Ultimate Facts" ...................... 277

e. Mixed Law-Fact Findings ............................. 279

f. Law, Fact, or Mixed? ................................ 280

  i. Patents and Trademarks ............................ 280

  ii. Contracts and Business Situations ............... 281

  iii. Discrimination and Intent Cases ................. 282

  iv. Tort and Admiralty ................................ 283

 v. Employee Status .................................... 283

 vi. Adequate Criminal Representation: Habeas Petitions ........ 285

B. Findings In A Jury Trial .............................. 286

  1. The Verdict ....................................... 286

     a. Requirement of Evidentiary Basis ............... 286

     b. Boeing: Rejection of "Scintilla" Rule ............ 287

     c. F.E.L.A. and Jones Act Cases ................... 288

     d. Applications: Inferences and Credibility ....... 289

     e. Law and Fact .................................... 290

  2. Fact Findings and Damages .......................... 292

     a. Findings by Jury ................................. 292

     b. Special Verdicts: Inconsistencies ............... 292

     c. Damages ......................................... 293

  3. Directed Verdict and J.N.O.V. ....................... 294

     a. Rule 50 and Review Principles ................... 294

     b. Directed Verdict as Prerequisite ................. 295

     c. Review After No Motion: "Plain Error" ......... 295

C. Trial Judge: Supervision and Discretion ........... 296

  1. Evidence and Trial ................................ 296

     a. Evidentiary Rulings: " Abuse of Discretion" ? .... 296

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b. Comment on the Evidence .......... 300

c. Supervision of Trial ............... 300

d. General Supervision and Discretion 302
   i. Supervisory Applications ....... 302
   ii. Attorneys' Fees and Costs .. 304
   iii. Forum Non and Choice of Law ... 304
   iv. Injunctions and Declaratory Actions 305
 v. Pendent Jurisdiction ....... 307
 vi. Leave to Amend ........... 307
 vii. "Discretion": A Final Note ...... 308

2. Jury Instructions .................. 310
   a. Form and Consent .............. 310
   b. The Test: Technical Errors ... 311
   c. "Plain Error"? ............. 311

3. Motions For Judgment or Relief .... 312
   a. Rule 12(b)(6) Dismissal ...... 312
   b. Summary Judgment ............ 313
      i. "Material Fact": Tests and Burdens ... 313
      ii. Trial Court Findings .... 316
      iii. Appropriateness in Specific Applications 316
   c. Rule 41(b) Dismissal ....... 317
   d. New Trial .................. 318
      i. Discretion and General Application ... 318
      ii. Weight of the Evidence ...... 319
      iii. Conditional New Trial and Damages 321
      iv. J.N.O.V. Compared .... 323
   e. Reopen Judgment .......... 323

D. Special Principles and Applications .... 324
I. Introduction

Word has it that the United States Courts of Appeals are tough on summary judgments. The district court's sign reflects the perception that, in practice, the reviewing court turns a strict eye on grants of summary judgment—perhaps more so in the former Fifth Circuit than in other circuits, though the verbal formulations are similar, tracking Federal Rule of Civil Procedure 56. It also suggests that standards of review—catch phrases meant to guide the appellate court in approaching both the issues and parties before it and the trial court's earlier procedure or result—really affect subsequent courts, trial and appellate, in doing their job.

The trial court's sardonic sign at least illustrates two tines of a fork that must be kept in mind when the concept of "standards of review" is approached. First, practice counts more than words. Standards are not self-actualizing; for example, what is a "material fact?" And the formulations do not say much until the appeals court, in discussion and practice, gives them life.

Second, words may control or frame the practice. The ubiquitous standard, either in basic form or as defined and refined, is presented as a meaningful guidepost to frame the arguments to the appellate court and that court's analytical response. Even if the catch phrases have no real internal meaning, in many cases it is clear that the issue-framing or assignment of power behind the words is the turning point of the decision. That many panels take the scope of review seriously is illus-

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1. Fed. R. Civ. P. 56. The courts must find that no material facts are left for trial resolution. See infra note 286.

2. See, e.g., text accompanying infra notes 143-45 (debate over "some evidence" rule).
trated by conclusions like the one tagged on a recent case: “This case does not present a model of proof of the statutory employer defense. Our review is, however, strictly circumscribed by the posture of this appeal. We cannot find plain error on this record.”

The importance of the review posture is also implicit in the number of cases in this article which had to be resolved by the full en banc court before the standard was settled. Additionally, the Supreme Court has seen fit recently to step into the picture to preserve the “buckler and shield” of the clearly erroneous rule against perceived evasion by the former en banc Fifth Circuit. Even that decision was not without strong disagreement.

Even where review authority controls, however, it is not clear how much of the structuring is really found inside the standard of review phrases. Sometimes the intricacies are nonsensical; how can a jury in a criminal case convict on insufficient evidence (the normal review) without doing a miscarriage of justice (the test where counsel had not moved for acquittal)? Of course the tests may turn out to be a practical fiction—shorthand which ultimately does not control the appellate decision-making process. Just when it is “obvious” that the standard determines outcome, the next panel may routinely recite the proper

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6. See Swint, 456 U.S. at 293 (Marshall, J., dissenting). The case also illustrates the confusion that at times exists in this area, the court noting that the former Fifth Circuit opinion spoke of the inapplicability of the clearly erroneous rule while simultaneously applying language associated with the test. See id. at 290.
7. See generally Levinson, Law as Literature, 60 TEX. L. REV. 373 (1982). For example, the “substantial evidence” test for review of facts in formal administrative actions has been likened to the core of a seedless grape. See also W. GELTHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW 269 (7th ed. 1979) and infra note 135.
8. Cf. infra note 187 and accompanying text (review of civil verdict absent directed verdict motion). Judge Anderson made a similar observation in United States v. Bell, 678 F.2d 547, 550 (5th Cir. 1982)(en banc)(concurring opinion), aff’d, 462 U.S. 356 (1983), noting: “To say that the evidence is sufficient if a ‘reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt’ is not substantively different from saying that the ‘evidence was inconsistent with every reasonable hypothesis of innocence.’” Id. (citations omitted). The majority nevertheless rejected the “hypothesis of innocence” formulation for ordinary review of criminal convictions. See id. at 548-49.
language but apparently decide the case in its own way.

The problem is of course not unusual in a common law system, where judges are always human in applying and interpreting legal rules. Yet while it is easy to say the "guideposts" are meaningless post-hoc rationalizations, most courts present them as restricting or freeing their reviewing scope at least in a general way. Similarly, witness our surprise when we realize that John Hinckley's jury actually followed its prescribed guiding formulation in finding that the government had not met its federal sanity burden.9

In addition to the problem of finding the true meaning and value of the standard of review notion, two further problems quickly appear. First, the courts in general, and the Eleventh Circuit at times, have not always been uniform in their recitation and application of the specific tests.10 Second, even with an established standard, the term of the standard usually defies definition. One senses the circular difficulties a court had in explaining "abuse of discretion": "In a legal sense, discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered."11

Further definition and discussion often adds nothing and is no more helpful than the term itself. "Clearly erroneous," for example, is probably clear enough (or as clear as such a non-mathematical concept allows) without the reams of garnishing and explanation courts have offered.12 Yet the bonus definition, as law, cannot be ignored by subsequent courts, practicing attorneys, or exploring scholars.

Perhaps all the standards and elaboration could be reduced to three or four such standards—no deference, some deference, high deference, scepticism. Or as Professor Rosenberg has classified, "[a]ll appellate Gaul, the trial judge would say, is divided into three parts: review of facts, review of law, and review of discretion."13 Despite the

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10. See, e.g., infra note 128 and accompanying text.
12. See infra notes 31-50 and accompanying text.
room for simplification in this area, however, it must be noted that the

tests also often define what materials the reviewing court looks to, in

addition to the scope of its review. In practice the standards appear to

have some real value: to guide the process, to tip the balance to one

side, to direct the court to common points of departure which are al-

ready deemed relevant. At least the standards are useful to organize an

argument or holding, or to give a common language of appellate scope.

Standards may even assign or reflect the power distribution between

reviewing and “lower” court.

Whatever the actual value or use of standards of review, most
cases on appeal set out the test appropriate for the particular issue. The
smart attorney and the careful court is likely to cite or discuss the stan-
dard and its application to the issues at hand. Standards, whatever
their substance, have strategic value in appellate practice because they
“indicate the decibel level at which the appellate advocate must play to
catch the judicial ear.” For example, counsel for appellant in a recent
case challenged the trial court’s finding as clearly erroneous—an ambi-
tious effort—apparently adopting that test in light of the Supreme
Court’s strict application in Pullman-Standard v. Swint. The attorney
need not have conceded that deferential standard, however, since a
strong argument was available that the finding at issue was a “mixed”
question of law and fact, possibly subject to stricter review even under
Swint. By sliding over the standard of review issue, counsel could
have lost the chance to have the appellate court stir more freely in the
trial court’s soup. Even a topic as routine as the proper standard, then,
may turn out to be a vital issue on appeal.

This article is offered as a guidebook to the standards used to re-
view various decisions based on particular situations at trial in civil and
habeas cases. The article reviews the several standards, their meanings,
their applications, and their differences. Although this guide empha-
sizes Eleventh Circuit and former Fifth Circuit cases and language,
many of the general tests and analyses are standard fare among all the
circuits. Former Fifth Circuit precedent is particularly telling for the
Eleventh Circuit, for which former Fifth Circuit precedent rules until

15. Id. at 873.
17. See infra notes 94-97 and accompanying text.
an Eleventh Circuit en banc court overrules.  

Lawyer or court may wish to follow the categories to find the proper tests—cases often involve several—or doctrinal debate. The cited standard may sound common but have a twist, in language or practice, which distinguishes it from a similar situation.  

This summary, then, may serve as a helpful reference: where the review issue is not crucial or complex, it can be addressed and passed; where it counts, this guidebook may present a first step and point to a meaningful direction.

This article, however, is meant to be more than a completed peg-and-hole set or a purely practical list. Cases are often conflicting, unclear, or skimpy on the rules and their bases. The historical development and intent of the standards is neglected. Other authorities are lacking, as substantive articles discuss and promote legal issues as if they were decided in an appellate vacuum, little attention given to the decision-making context of the issues or the assignment of power and roles among courts. These areas demand beginning analysis and questioning.

This guidebook, then, may also serve as a starting point for further inquiry, by court and commentator, into the propriety of various tests in theory and application. Courts may wish to shore up inconsistencies. Scholars may begin to ask what these standards mean and how they affect the judicial process on appeal or, in turn, at trial. Standards of review, like chemical catalysts, must act on something, and usually that something is more important in the final analysis. Nevertheless, the guideposts are useful in practice, and also raise substantial questions about the legal system in general. The article is presented to lawyer, court, and scholar alike as a helpful Eleventh Circuit guide and springboard.


19. Factors commonly affecting the appropriate standard include: objections and waivers, presumptions and burdens, appellant versus appellee, fact versus law, criminal versus civil, and judge versus jury. This article attempts to categorize along these and other lines.

Similarly, the article compares other circuits' tests and rules in some divergent or illustrative situations. Although the general principles often apply nationally, specific applications sometimes differ among and within the circuits, and conflicts exist beyond the general statements of the broadly applicable standard. See generally S. Childress & M. Davis, STANDARDS OF REVIEW (forthcoming 1986).
II. Civil Appeals

A. Findings in a Bench Trial

1. Findings of Fact

a. Development of the Clearly Erroneous Rule

Before the adoption of the Federal Rules of Civil Procedure, an uneasy dichotomy existed between the standard applied in reviewing equity findings and the one reserved for those actions based in law but for which, as permitted by Congress since 1865, a jury had been waived. In nonjury legal actions the judge was seen as both judge and jury, and his findings of fact were considered as conclusive as a jury verdict, which had long been strictly protected by the seventh amendment. Equity review, on the other hand, was traditionally broader—only a self-imposed restraint—though more restrictive than that used in admiralty. Equity in fact applied three tests, varying the strength of "presumptively correct" where the evidence to be reviewed was oral, undisputed documentary, or disputed documentary.\(^\text{20}\)

The merger of law and equity in 1934 further complicated this divergence. Although it was accepted that law and equity would then require the same standard, the profession hotly debated whether that test should be imported from former legal practice or from "the" standard used in equity practice. In the end the broader equity test prevailed in the Federal Rules of Civil Procedure, though a draft stating it explicitly—"the same effect as heretofore given to findings in suits in equity"\(^\text{21}\)—was rejected in an effort to avoid the uncertainty surrounding prior equity practice. In addition, the Advisory Committee attempted to bring uniformity to the equity test by stating that the new rule would be "applicable in all classes of findings," regardless of the documentary or testimonial nature of the fact found.\(^\text{22}\)


\(^{21}\) Note, supra note 20, at 72-75 & n.22. The Advisory Committee made clear, however, that the equity test was the chosen one. See Nangle, supra note 20, at 414-15. See also United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948).

\(^{22}\) Nangle, supra note 20, at 414-15.
b. Rule 52 and Applicability

The result was the now-famous clearly erroneous rule formulated for equity and law courts in Rule 52.23 Rule 52(a) requires the trial court to separate and spell out its fact findings and conclusions of law. "Findings of fact shall not be set aside unless clearly erroneous. . . ."24

This rule applies to review of standard civil cases and equity actions, as well as to admiralty cases,25 and to habeas corpus appeals.26 The rule on its face applies to findings made by a judge aided by an advisory jury as though there were no jury.27 "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."28 Similarly, fact findings of a bankruptcy judge, affirmed by the district court, are to be credited unless clearly erroneous.29 Rule 52(a) by its own terms does not require the district court to

23. FED. R. CIV. P. 52(a). One brief filed with the Fifth Circuit demonstrated sarcasm about, or ignorance of, the ubiquitous nature of the rule. It argued that the "findings below are, to coin a phrase, clearly erroneous."

24. Id.


26. See infra notes 124-26, 372-78, and accompanying text.

27. FED. R. CIV. P. 52(a). A 1946 amendment clarified the rule's applicability, as originally intended, to the advisory jury situation.

28. FED. R. CIV. P. 52(a). Cf. FED. R. CIV. P. 53(e)(2)(in nonjury actions the district court, before further hearing, shall accept master's findings unless clearly erroneous); Morgan v. Kerrigan, 523 F.2d 917, 921-22 (1st Cir. 1975)(distinguishing specific reference under Rule 53(c) from other Rule 53 situations). Review is less clear, however, for findings of a magistrate referred under 28 U.S.C. § 636(b). Findings under §§ 636(b)(1) and 636(b)(3) may be subject to "de novo determination." See United States v. Raddatz, 447 U.S. 667 (1980). But recently a court has declined such free review in a case referred under § 636(b)(2). See Miss. River Grain Elevator, Inc. v. Bartlett & Co., 659 F.2d 1314 (5th Cir. 1981). See also Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982)(Unit B)(en banc)(failure to file objections in a § 636(b)(1) proceeding does not waive right to appeal district court's conclusions of law, but there is no de novo review of an issue covered in the report, and adopted facts are not reversed absent plain error or manifest injustice).

29. In re Reed, 700 F.2d 986 (5th Cir. 1983). See Northern Pipe-line Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 55 n.5 (1982). The court's plan or provisions, however, have been reviewed under an "abuse of discretion" test. See In re Bradley, 705 F.2d 1409, 1411 (5th Cir. 1983). The bankruptcy referral situation is, of course, in a state of flux, both with the institution of a new system under the Bank-
Eleventh Circuit Standards of Review

state its findings and conclusions on decisions under Rules 12 or 56. But the court dismissing plaintiff's case on the merits under Rule 41(b) is subject to Rule 52(a).30

c. Definition

i. Gypsum: “Mistake”

Soon after Rule 52(a) was adopted, the Supreme Court in United States v. United States Gypsum Co. defined “clear error,” offering this formulation: “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.”31 The language of this definition has become standard fare in subsequent Supreme Court opinions.32 Most of the Eleventh Circuit precedent which defines “clearly erroneous” follows the Gypsum formula in applying Rule 52(a).33 And Gypsum’s “mistake” definition has itself been “defined”: “Where the evidence would support a conclusion either way, a choice by the trial judge between two permissible views of the weight of the evidence is not clearly erroneous . . . .”34 Review is made, at any rate, by considering the evidence as a whole.35

ruptecy Code and the adjustments made to maintain the constitutionality of the referrals in light of recent Supreme Court pronouncement.

30. FED. R. Civ. P. 41(b). Denial of a Rule 41(b) motion has the effect of carrying it with the case and entering judgment on the merits at the close of the evidence. See Rigel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784 (5th Cir. 1975). See also infra note 306.

31. 333 U.S. 364, 395 (1948). In Gypsum the Court, on direct appeal, rejected the trial court’s findings. Id. at 396.


33. E.g., Citibank, N.A. v. Citibank Group, Inc., 724 F.2d 1540 (11th Cir. 1984); United States ex rel. G.E. Supply Co. v. Wiring, Inc., 646 F.2d 1037, 1041 (5th Cir. 1981); Ferrero v. United States, 603 F.2d 510, 512 (5th Cir. 1979); Hague v. Liberty Mut. Ins. Co., 571 F.2d 262, 264 (5th Cir. 1978); Chaney v. City of Galveston, 368 F.2d 774 (5th Cir. 1966).

34. Chaney, 368 F.2d at 776.

35. Gypsum, 333 U.S. at 395 (“entire evidence”). Although the Supreme Court would appear to have settled this issue, the Seventh Circuit once erroneously indicated that the reviewing court looks to the evidence most favorable to the findings. See Uniroyal v. Mumford, 454 F.2d 1233, 1236 (7th Cir. 1972).
ii. Sanders v. Leech: "Truth and Right"

The standard, unfortunately, is not so clearly and consistently construed in many former Fifth Circuit opinions. One line of cases continues to use a pre-Gypsum three-pronged test, reversing where: (1) findings are unsupported by substantial evidence; (2) the court "misapprehended" effect of the evidence; or (3) although there is evidence which if credible would be substantial, the "force and effect of the testimony as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case." The circuit formulated this test prior to Gypsum in Sanders v. Leech, which held that the reviewing court may reverse in the three situations above, but warned that "it is not for the appellate court to substitute its judgment on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the finding." Of course the Sanders test, especially in its "truth and right" incarnation, is not wholly inconsistent with the Gypsum approach. (The warning to appellate courts not to substitute their own judgments is prevalent in both lines of cases, for example.) In fact, some cases cite both Gypsum and Sanders as precedent without discussing possible differences. Others seem to allow the appeals court a choice, as an "either/or."

Nevertheless, opinions which cite both tests tend to blur rather than reconcile. Some interpret Sanders' "truth and right" test as restating Gypsum's "mistake" test. One case says that Gypsum man-

36. Divergent definition is an observation or criticism separate from any inconsistency in applying the standard. See infra text accompanying notes 51, 100-132. Cf. Note, supra note 20, at 68 (controversy is not over whether findings are in fact clearly erroneous but over the language of the rule, especially where credibility is involved).

37. Western Cottonoil Co. v. Hodges, 218 F.2d 158, 161 (5th Cir. 1954)(citing Sanders v. Leech, 158 F.2d 486 (5th Cir. 1946)).

38. 158 F.2d 486, 487 (5th Cir. 1946).


41. See, e.g., Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 258 (5th Cir.)("in other words . . . truth and right"), cert. denied, 449 U.S. 899 (1980); Armstrong Cork Co. v. World Carpets, Inc., 597 F.2d 496, 501, 506 (5th Cir. 1979), cert.
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The merger of law and equity in 1934 further complicated this divergence. Although it was accepted that law and equity would then require the same standard, the profession hotly debated whether that test should be imported from former legal practice or from “the” standard used in equity practice. In the end the broader equity test prevailed in the Federal Rules of Civil Procedure, though a draft stating it explicitly—“the same effect as heretofore given to findings in suits in equity”21—was rejected in an effort to avoid the uncertainty surrounding prior equity practice. In addition, the Advisory Committee attempted to bring uniformity to the equity test by stating that the new rule would be “applicable in all classes of findings,” regardless of the documentary or testimonial nature of the fact found.22


21. Note, supra note 20, at 72-75 & n.22. The Advisory Committee made clear, however, that the equity test was the chosen one. See Nangle, supra note 20, at 414-15. See also United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948).

b. Rule 52 and Applicability

The result was the now-famous clearly erroneous rule formulated for equity and law courts in Rule 52. Rule 52(a) requires the trial court to separate and spell out its fact findings and conclusions of law. “Findings of fact shall not be set aside unless clearly erroneous. . . ."24

This rule applies to review of standard civil cases and equity actions, as well as to admiralty cases, and to habeas corpus appeals. The rule on its face applies to findings made by a judge aided by an advisory jury as though there were no jury. "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.”27 Similarly, fact findings of a bankruptcy judge, affirmed by the district court, are to be credited unless clearly erroneous.29 Rule 52(a) by its own terms does not require the district court to

23. FED. R. Civ. P. 52(a). One brief filed with the Fifth Circuit demonstrated sarcasm about, or ignorance of, the ubiquitous nature of the rule. It argued that the "findings below are, to coin a phrase, clearly erroneous.”

24. Id.


26. See infra notes 124-26, 372-78, and accompanying text.

27. FED. R. Civ. P. 52(a). A 1946 amendment clarified the rule’s applicability, as originally intended, to the advisory jury situation.

28. FED. R. Civ. P. 52(a). Cf. FED. R. Civ. P. 53(e)(2)(in nonjury actions the district court, before further hearing, shall accept master’s findings unless clearly erroneous); Morgan v. Kerrigan, 523 F.2d 917, 921-22 (1st Cir. 1975)(distinguishing specific reference under Rule 53(c) from other Rule 53 situations). Review is less clear, however, for findings of a magistrate referred under 28 U.S.C. § 636(b). Findings under §§ 636(b)(1) and 636(b)(3) may be subject to “de novo determination.” See United States v. Raddatz, 447 U.S. 667 (1980). But recently a court has declined such free review in a case referred under § 636(b)(2). See Miss. River Grain Elevator, Inc. v. Bartlett & Co., 659 F.2d 1314 (5th Cir. 1981). See also Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982)(Unit B)(en banc)(failure to file objections in a § 636(b)(1) proceeding does not waive right to appeal district court’s conclusions of law, but there is no de novo review of an issue covered in the report, and adopted facts are not reversed absent plain error or manifest injustice).

29. In re Reed, 700 F.2d 986 (5th Cir. 1983). See Northern Pipe-line Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 55 n.5 (1982). The court’s plan or provisions, however, have been reviewed under an “abuse of discretion” test. See In re Bradley, 705 F.2d 1409, 1411 (5th Cir. 1983). The bankruptcy referral situation is, of course, in a state of flux, both with the institution of a new system under the Bank-
ward expanded review—either in practical application or through manipulation of the test(s). Broader review of fact findings is criticized for increasing appeals, undermining confidence in the judicial system, and demoralizing district judges. This charged “circumvention” of Rule 52 is seen as especially marked where the issue of demeanor evidence or inferences is involved.

e. Demeanor and Documentary Evidence

The district judge is often recognized as having a superior position from which to judge the facts. Thus, “credibility choices and the resolution of conflicting testimony are within the province of the court sitting without a jury, subject only to the clearly erroneous rule of Rule 52(a).” The rule recognizes this deference: “Findings of fact 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.” The implication is that the appellate court must apply the standard especially carefully when reviewing demeanor testimony. This warning has been termed a stronger burden or a “special reluctance.”

Despite the original intent that the clearly erroneous rule be applied to all types of evidence and the plain language of the “due regard” caution, many courts have reversed the logic, allowing “clear error” to be more readily found for documentary evidence, undisputed testimony, and depositions. In those situations, early Fifth Circuit panels held that the rule did not apply at all or that “the burden is

51. See Nangle, supra note 20, at 409-11, 418, 426-29; Wright, The Doubtful Omniscience of Appellate Courts, 41 MINN. L. REV. 751, 779-81 (1957). But see Note, supra note 20, at 80-81, 84-85 (more recently trend is toward stricter and more uniform application, especially by Supreme Court and former Fifth Circuit). See also supra note 36 (inconsistency in applying Rule 52).


53. FED. R. CIV. P. 52(a).

54. See Gypsum, 333 U.S. at 394, 396.


56. FED. R. CIV. P. 52 advisory committee note of 1955, quoted in J. MOORE & J. LUCAS, supra note 25, ¶ 52.01[07] (unadopted amendment to Rule 52).

57. See supra notes 20-22 and accompanying text.

58. See Frazier v. Alabama Motor Club, Inc., 349 F.2d 456, 458 (5th Cir. 1965). Other cases at the same time strictly applied the rule. See, e.g., Welch, 345 F.2d at 943-44.
lighter, much lighter," to show clear error.59 Today the standard formula in the Eleventh and Fifth Circuits holds that, though the rule still applies where credibility is not involved, "the burden of establishing clear error is not so heavy, and the clearly erroneous rule is somewhat ameliorated . . . ."60

The policy behind somewhat freer review in such situations, echoing the three-part standard formerly used in equity, is clear: the appeals court considers itself to sit in a vantage point as good as the trial court's. While the Supreme Court over the years has in practice and definition applied Rule 52(a) across-the-board, it has occasionally used dicta which support those declining to give up the demeanor distinction of old equity, noting that the rationale behind the rule is of less moment where the evidence is mostly documentary.61 Additionally, recent Court dicta seem to endorse fully the Eleventh Circuit's intermediate approach.62

Extended review has, however, been strongly criticized for flip-flopping the intent of Rule 52(a) and usurping the trial court's function.63 The approaches taken among and within the circuits are not always consistent,64 and the Eighth Circuit has recently held that it is not

63. See, e.g., Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 VAND. L. REV. 493, 505-06 (1950)("by a process almost inveterate in legal thinking, a negative was soon deduced as the opposite of the affirmations; and now the definitely erroneous gloss is being stated in place of the rule itself"). See generally Wright, supra note 51; Note, Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence, 49 VA. L. REV. 506 (1963). Even where the reviewing court is as competent, its function may not be to reinterpret a "cold" record. Note, supra note 20, at 90.
64. See Note, supra note 20, at 79-85. Presently the Supreme Court and most circuits endorse application of the rule regardless of the class of evidence. Id. at 79-80 & n.56. See generally Anderson, — U.S. at —, 105 S. Ct. at 74.
bound at all by findings based on paper evidence. Nevertheless, Professors Wright and Miller have noted a "marked trend" toward strict application of the rule to all fact findings. The Eleventh and Fifth Circuit test has become relatively settled, allowing a middle-ground approach in which the class of evidence may be considered, but the clearly erroneous rule still applies.

f. Verbatim Adoption

A special problem is presented when the district court's findings are directly adopted from a brief or submission of one party, since the reviewing court cannot see the discerning factors or be assured that the trial court has faced the conflicts inherent in adjudication. While the former Fifth Circuit "has consistently expressed its disapproval of the practice," it nonetheless applies Rule 52(a) to such findings, with a qualification similar to that used for documentary evidence. The court "can take into account the District Court's lack of personal attention to factual findings in applying the clearly erroneous rule." Then the "appellate court can feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered . . . ."

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67. Note, supra note 20, at 84-85. The circuit's position has been repeatedly invoked despite the Supreme Court's generally broad reading of the clear error rule expressed recently in Swint, 456 U.S. 273 (1982). The flexible review given nondemeanor evidence, however, is put forth as a variation on, not an abrogation of, Rule 52, so that it is apparently distinguished from the discredited "ultimate facts" exception. See infra text accompanying notes 87-93. Pre-Swint cases do not always carefully distinguish the two situations, leaving it unclear whether the freer review was based on paper evidence or on inferences which the appellate court was entitled to draw. See, e.g., Galena Oaks, 218 F.2d at 219. Now, however, the court apparently sees its demeanor variation as permissible and separate from the prior review given inferences.
Other circuits, including the First and Ninth, turn an even more critical appellate eye. But the Supreme Court’s early observations are consistent with the present Eleventh Circuit approach: “The findings leave much to be desired in light of the function of the trial court. But they are nonetheless the findings of the District Court. And they must stand or fall depending on whether they are supported by evidence. We think they are.” The courts may be more willing to accept (or otherwise to reject) adopted findings in cases involving highly technical facts. On the other hand, future courts may be more reluctant to accept findings adopted by a special master; cases often emphasize the special burdens on district judges, adoption thwarts the purpose of a special reference, and the appellate court may flinch at facing two levels of verbatim adoption.

g. No Findings and Faulty Findings

Where the district court has failed to make Rule 52 findings, the Supreme Court has noted that

the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings. Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.

In the Eleventh Circuit a similar rule has been applied to inadequate or conclusory findings which do not reveal the trial court’s analytical process. In such a case, remand for more specific findings is routine, but “[t]his failure is merely a hindrance and not a fatal error,” since the appellate court can make the factual collation, in the interest

Apache Tribe, 616 F.2d 464 (10th Cir. 1980).

71. See, e.g., In re Las Colinas, Inc., 426 F.2d 1005, 1008-10 (1st Cir. 1970)(“maximum doubt”). Cf. Heterochemical Corp. v. United States Rubber Co., 368 F.2d 169 (7th Cir. 1966)(calling it a “practical and wise custom”).


73. See In re Las Colinas, Inc., 426 F.2d at 1009-10 (such as patent appeals).

of judicial economy, where the record fully establishes the pertinent facts. Chief Judge Godbold of the Eleventh Circuit has observed that “[c]ourts of appeals, at least those in the federal system, are properly capable of making findings of fact in a broad range of circumstances, and in practice they actually do so.” Nevertheless, the Supreme Court’s recent reminder that remand to the fact-finding body is the normally appropriate procedure may check the circuit’s use or development of fact-finding economies.

2. Conclusions of Law

a. Errors: Law or Fact?

Errors of law are not insulated by the clearly erroneous rule and are freely reviewable. Such a statement is not very helpful since the threshold question, whether the finding is factual or a legal conclusion, depends on the case law on that issue and, at times, the facts of the case. The cases offer little general guidance into the fact-law distinction beyond specific determinations in individual situations. Justice Brennan offers that fact questions are those for which resolution is “based ultimately on the application of the fact-finding tribunal’s expe-


77. E.g., Swint, 456 U.S. at 287; Gypsum, 333 U.S. at 394; United States v. Richberg, 398 F.2d 523, 529 (5th Cir. 1968). Appellate courts are foremost, of course, law courts. For example whether specific conduct is constitutionally protected is ultimately an issue of law. See generally Neil v. Biggers, 409 U.S. 188, 193 n.3 (1972).

For the principles underlying the “rule of law” controlling in any case, especially panel stare decisis, see infra notes 348-54 and accompanying text.

rience with the mainsprings of human conduct. . . ."9 Judge Friendly has observed, "what a court can determine better than a jury [is] perhaps about the only satisfactory criterion for distinguishing ‘law’ from ‘fact.’ ”80

b. State Law and Foreign Law

Federal courts defer, of course, to interpretations of state law by state courts, especially the state’s highest court. Where no controlling precedent exists, the court is to decide the case as it believes the state courts would.81 Although review of a district court’s construction of law is normally an unbounded job of the appellate court, some courts note their deference to an interpretation made by a district judge experienced in the law of the state in which he or she sits.82 Rule 44.1 provides for the use of foreign law in the district courts, allowing them to consider broad sources in determining it. “The court’s determination shall be treated as a ruling on a question of law.”83


The Supreme Court has approved certification for determination of state law where the state so provides. Lehman Bros. v. Schein, 416 U.S. 386, 389 (1974). The procedure “helps build a cooperative judicial federalism.” Id. at 391.

82. E.g., Freeman v. Continental Gin Co., 381 F.2d 459 (5th Cir. 1967). See also Rudd-Melikian, Inc. v. Merritt, 282 F.2d 924, 929 (6th Cir. 1960)(district court's “permissible” construction of state law in diversity cases is to be accepted even though the reviewing court disagrees). Cf. Gee v. Tenneco, Inc., 615 F.2d 857, 861 (9th Cir. 1980)(district judge not overruled on question of state law unless “clearly wrong”).

83. Fed. R. Civ. P. 44.1. The Advisory Notes specifically recognize that the final sentence makes inapplicable the clearly erroneous rule.
c. Findings Based on Faulty Law

Findings of fact based on an erroneous view of the law or an incorrect legal standard are not binding on the appellate court. 84 Although this rule has been standard in the circuit, it was not always clear whether the courts were "freely reviewing" such findings or whether the findings were, because of the mistake of law, "clearly erroneous." An early case implied the latter—that the rule is another facet of Rule 52. 85 But most cases, especially recently, find that in such a situation Rule 52 insulation no longer applies. 86

d. Inferences and "Ultimate Facts"

Although the cases were by no means uniform, the former Fifth Circuit traditionally considered itself as free to reject findings of "ultimate fact" or inference as where the error was one of law. 87 Where the district court's error goes to the heart of the legal issue, it was argued, the finding, though ostensibly one of fact, should not be protecteu. This doctrine was first adopted and defined by the court in Galena Oaks Corporation v. Scofield: "Insofar . . . as the so-called 'ultimate fact' is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary [or 'subsidiary'] facts, it is 'subject to review free of the restraining impact of the so-called 'clearly erroneous' rule." 88 One court has observed that the

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84. See, e.g., Swint, 456 U.S. at 287; Franks, 414 F.2d at 684; United States v. Richberg, 398 F.2d 523, 529 (5th Cir. 1968). Remand is the usual course for further fact-finding under the corrected legal test. Swint, 456 U.S. at 291-93. See supra notes 74-76 and accompanying text.

85. See Chaney v. City of Galveston, 368 F.2d 774, 776 (5th Cir. 1966).

86. See, e.g., Lincoln, 697 F.2d at 939-40 (if taints findings); Manning v. M/V Sea Road, 417 F.2d 603, 607 (5th Cir. 1969). See also Johnson v. Uncle Ben's, Inc., 628 F.2d 419, 422 (5th Cir. 1980) ("no deference"), vacated on other grounds, 451 U.S. 902 (1981).


88. 218 F.2d 217, 219 (5th Cir. 1954)(quoting Lehmann v. Acheson, 206 F.2d 592, 594 (3d Cir. 1953)). Broad factual inferences were regarded as "ultimate facts" and thus treated as a question of law. Inferences were also often involved in the less stringent review given documentary evidence but were more likely to be analyzed, espe-
The doctrine is "abortive" because "[t]he Supreme Court has levelled it."\(^91\) In *Pullman-Standard v. Swint*, the Court, noting that Rule 52 "does not divide facts into categories,"\(^92\) rejected the former Fifth Circuit doctrine and its distinction between subsidiary and ultimate facts. Today the doctrine is no longer viable, though its concepts and result may continue to affect or survive in related areas.\(^93\)

American Telephone & Telegraph Co. v. Delta Communications Corp., 590 F.2d 100, 102 (5th Cir. 1979).

89. Byram v. United States, 705 F.2d 1418, 1423 (5th Cir. 1983)(footnote omitted)(tracing the doctrine from *Galena Oaks* through *Swint*). It may also be noted that over the years the doctrine has often been invoked in discrimination cases. See *Lincoln*, 697 F.2d at 940.


91. Byram, 705 F.2d at 1422.

92. 456 U.S. at 287. *Swint* held that the trial court's finding of no discriminatory intent in a section 703(h) case was a fact reversible only if clearly erroneous. See generally Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases*, 58 TUL. L. REV. 403 (1983).

93. See supra note 88. It is not clear after *Swint*, for example, whether some inferences will be distinguished from ultimate fact and treated as issues of law. The debate may, for now, be subsumed under the "mixed question" issue, especially since some cases characterized inferences as mixed questions. But a recent Fifth Circuit opinion, citing *Swint*, found "neither the facts found by the district court nor the inferences drawn by it to be clearly erroneous." *Cormier v. P.P.G. Industries, Inc.*, 702 F.2d
e. Mixed Law-Fact Findings

The *Swint* Court reserved the question whether its ruling affected "mixed" questions of law and fact "of the kind that in some cases may allow an appellate court to review the facts to see if these facts satisfy some legal concept of discriminatory intent."94 It may be argued, of course, that a trial court has committed *legal error* if its findings do not satisfy a legal standard. In the Eleventh Circuit, review of mixed questions generally is broad, "allowing us to substitute our own judgment for that of the lower court."95 Mixed questions of fact and law are not, as a general matter, reviewable under the clearly erroneous standard."96 Some courts have held, however, that while Rule 52 is normally not applicable to mixed questions, it would be applied in the pre-

567, 568 (5th Cir. 1983). Where the disputed finding is a purely legal conclusion drawn from the facts, however, the issue is one of law and is freely reviewed, even under *Swint*. See infra note 96.

94. 456 U.S. at 289. The Court added:

We need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact—i.e., questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. There is substantial authority in the circuits on both sides of this question. *Id.* at 289 n.19. See Gypsum, 333 U.S. at 396. See also infra text accompanying note 125.

It is not always so easy to distinguish between mixed questions and ultimate facts, and many cases applied them interchangeably. See Washington v. Watkins, 655 F.2d 1346, 1352 n.4 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also *Swint*, 456 U.S. at 286 n.16. *Swint* limited its notion of "ultimate fact" to those *decisive* to a trial issue, unmixed with law. The definitions *Swint* provides may help subsequent courts make the distinction, however, and it is likely that the cases equating them will not be used. But even the courts recognizing a line may find drawing it to be a troublesome task. See *Junior* v. Texaco, Inc., 688 F.2d 377, 279 (5th Cir. 1982)("Serbonian bog").


sent case since fact questions predominated.97

f. Law, Fact, or Mixed?

Whether the substantive issue in a particular case is termed a question of fact, law, or a mixture of fact and law is often a difficult but linchpin issue under Rule 52(a). That initial determination seems to be in the hands of the appellate court, since it will often ignore the characterization used by the trial court.98 At times, however, the circuit has expressed its willingness to consider the trial court's classification of its findings as one factor—though not a determinative one—to use in the appellate court's initial characterization task.99 The Supreme Court in Swint recognized the "vexing nature of the distinction[s]"100 and noted that Rule 52 does not draw the line between law and fact. In some areas, however, the circuit has fixed the line, and often in the process has joined or created a conflict among the circuits.101 In others, reference to comparable situations—or the compelling facts of the case at hand—may offer guidance for future decisions.

i. Trademarks and Patents

In trademark law, the issue of likelihood of confusion is a question of fact, subject to Rule 52(a).102 Likewise, the classification of a trademark term (as generic, descriptive, etc.) is a fact.103 A recent court held that a district court's finding of no profits in the area of trademark infringement was not clearly erroneous.104 Patent validity is a question of law, as is the test of obviousness, but the factual underpinnings of

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97. See Connally v. Transcon Lines, 583 F.2d 199 (5th Cir. 1978); Backar v. Western States Producing Co., 547 F.2d 876, 884 (5th Cir. 1977).
99. E.g., Lewis v. S.S. Baune, 534 F.2d 1115, 1119 (5th Cir. 1976).
100. 456 U.S. at 288. See supra notes 77-80, 89 and accompanying text.
101. The "fixed" lines may, of course, be adjusted as Swint makes its impact, though many tests cited below were decided or reaffirmed after Swint.
102. Amstar Corp. v. Domino's Pizza, Inc. 615 F.2d 252, 258 (5th Cir.), cert. denied, 449 U.S. 899 (1980). It is characterized as law, fact, and mixed in other circuits. See id. at 257-58.
103. Vision Center v. Opticks, Inc., 596 F.2d 111, 113 (5th Cir. 1979).
such findings are entitled to clear error review. Although infringement and equivalence are facts, construction of a patent is a legal issue. Few patent appeals remain for the regular circuits, but the doctrine may be useful for illustration and related application.

ii. Contracts and Business Situations

A recent case applied Rule 52 to a finding regarding what the contracting parties did not intend. Contract interpretation, on the other hand, is a question of law, as is the preliminary question of whether an ambiguity exists. Treated as fact questions are agency status, bailment relationship, and breach of warranty.
iii. Discrimination and Intent Cases

Swint made clear that in that case discriminatory purpose under Title VII is a pure question of fact. Indeed, "[t]reating issues of intent as factual matters for the trier of fact is commonplace." The Court noted that it has treated as fact purposeful school segregation, gift motive (and ultimately whether a gift was made) under the tax code, and intent in antitrust. Additionally, a finding of "no retaliation" is likewise a "final fact." In the Eleventh Circuit, even a finding that the plaintiff has not made out his prima facie case of discrimination is reviewed only for clear error.

The doctrine of constructive discharge, used in discrimination and labor cases, poses a more difficult inquiry. Pre-Swint Title VII cases treated the issue inconsistently. One court "appl[ied] the facts as found by the district court to the law of constructive discharge" in holding that "[a]s a matter of law the facts involved here do not constitute constructive discharge." Another case, however, applied the clear error rule.

Since Swint, the Fifth Circuit has noted the standard-of-review inconsistency and discussed the applicability of Rule 52. It may be argued, of course, that constructive discharge fits into the Supreme Court's reserved definition of "mixed" questions. In Junior v. Texaco, Inc., the new Fifth Circuit found it unnecessary in that case to resolve the issue and expressly reserved the inquiry. It is now probable, how-

114. 456 U.S. at 286-89. See also Fowler v. Blue Bell, Inc., 737 F.2d 1007, 1012 (11th Cir. 1984); Hill v. K-Mart Corp., 699 F.2d 776 (5th Cir. 1983).

115. 456 U.S. at 288.

116. See id. Following these observations, the new Fifth Circuit has ruled that the holding purpose of a taxpayer is a fact, and the issue is not less so simply because the taxpayer's state of mind is not controlling. Byram, 705 F.2d at 1418.


119. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 64 (5th Cir. 1980). Framed in this way, the inquiry sounds much like the definition of mixed questions the Swint Court used to distinguish ultimate fact. See supra notes 92-93. See also Calcote v. Texas Educ. Found., 578 F.2d 95, 97, 98 (5th Cir. 1978)("conclusion of law").

120. See Meyer v. Brown & Root Const. Co., 661 F.2d 369, 372 (5th Cir. 1981). Although categorization of the issue has varied, the substantive legal definition of "constructive discharge" in the Eleventh Circuit is consistently stated. E.g., Bourque, 617 F.2d at 65.

121. 688 F.2d 377, 379-80 (5th Cir. 1982). The new Fifth Circuit concluded that the finding of no discharge was neither legal error nor clear error. Accord Shawgo, 701
ever, that constructive discharge is either a fact or fact-law.

iv. Tort and Admiralty

Findings of negligence vel non have been categorized as fact questions in cases involving admiralty\(^{122}\) and federal\(^{123}\) law. Likewise, the court's apportionment of fault is subject to the clearly erroneous standard.\(^{124}\) Causation, even including the "legal" concept of proximate cause, is treated as fact.\(^{124.1}\)

v. Employee Status

The final conclusion that one is an "employee" (or "employer") under the Fair Labor Standards Act (F.L.S.A.) is a legal determination. One court's statement of this characterization may shed light on the newer definitions of "mixed" questions and reveal how the circuit will generally analyze ultimate "legal" determinations under \textit{Swint}:

We review the district court's determination as being one of mixed law and fact. As to the trial court's underlying factual findings and factual inferences deduced therefrom, we are bound by the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. However, as to the legal conclusion reached by the district court based upon this factual data, i.e., here that these welders are employees rather than independent contractors, we may review this as an issue of law.\(^{125}\)

F.2d at 470.


124. Harbor Tug and Barge \textit{v.} Belcher Towing, 733 F.2d 823 (11th Cir. 1984). \textit{Cf.} \textit{Verrett}, 705 F.2d at 1443 (citing Reyes \textit{v.} Vantage S.S. Co., 672 F.2d 556 (5th Cir. 1982)).

124.1 Proximate cause in admiralty law is generally treated as fact, Consolidated Grain \textit{v.} Barge Co. \textit{v.} Marcona Conveyor Corp., 716 F.2d 1077, 1082 (5th Cir. 1983); Cheek \textit{v.} Williams-McWilliams Co., 697 F.2d 649 (5th Cir. 1983), as is seaman status under the Jones Act, at least in the summary judgment context. \textit{See} Holland \textit{v.} Allied Structural Steel Co., 539 F.2d 476 (5th Cir. 1976), \textit{cert. denied}, 429 U.S. 1105 (1977).

125. Robicheaux \textit{v.} Radcliff Material Inc., 697 F.2d 662, 666 (5th Cir. 1983)(ci-
Judge Higginbotham has expressed his concern with this approach:

Our efforts to justify appellate review by attempting to separate intertwined subsidiary facts and ultimate legal conclusions inevitably cast surrealistic shadows. The exercise can, and occasionally does, do little more than serve as a covering cape for the exercise of the trial court function by an appellate court.\(^\text{128}\)

Although the F.L.S.A. "employee" or "employer" determinations are often held to be ultimately a legal issue (following an analysis mixing law and fact), some cases rule to the contrary, holding the statutory "employer" issue to be one of fact, and, therefore, subject to Rule 52.\(^\text{127}\) A more recent panel, however, has noted the circuit's inconsistent treatment and determined that the most precise labeling makes the "employer" conclusion legal while basing it on underlying findings of fact, such as indicia of control.\(^\text{128}\) This court follows "the substantial line of authority" in terming it ultimately a legal question.\(^\text{129}\) It may be argued, however, that the apparently smaller line of precedent (holding the question to be fact) is more consistent with the spirit of *Swint*.


126. *Castillo*, 704 F.2d at 199 (Higgenbotham, J., concurring). It may be argued, however, that most legal issues are shaded by case facts, leaving the appellate court with little reviewing authority if legal conclusions are practically finalized at trial. Moreover, the analysis of "mixed" questions offered by the *Castillo* majority seems at least compatible with the Supreme Court's definition of a mixed question as one in which "the issue is whether the [established historical] facts satisfy the statutory standard." *Swint*, 456 U.S. at 289 n.19.


128. *Castillo*, 704 F.2d at 187 n.12. This panel writes that the confusion originated from the Supreme Court's characterization of the issue as "essentially a question of fact" in another context, but reconciles that language with Castillo's mixed fact-law analysis. See supra text accompanying note 125.

129. *Id.* It may be noted, however, that while *Castillo* cites several cases characterizing the employer issue as one of law excluded from Rule 52 and discusses three contrary cases, in *Castillo* itself the issue does not arise in the Rule 52 context. See infra note 163.
vi. Adequate Criminal Representation: Habeas

The adequacy of representation issue over the years has not been consistently classified in habeas appeals to the former Fifth Circuit, the cases finding the question to be fact, law, and fact-law. In Washington v. Watkins, the Fifth Circuit discussed the various interpretations and concluded that the issue is a mixed question, allowing the appeals court an independent determination of the final legal conclusion of effectiveness.130 The specific finding that a lawyer's choice was or was not strategic, on the other hand, is a fact to be accepted unless clearly erroneous.131 The substantive test of constitutional adequacy of counsel has also consistently been in controversy.132


Also in the criminal context, some cases apply a clearly erroneous rule to fact findings in criminal hearings. E.g., United States v. Medel, 592 F.2d 1305, 1317 (5th Cir. 1979)(whether writing is "statement" under Jencks Act); United States v. Watson, 591 F.2d 1058, 1061 (5th Cir. 1979)(voluntariness of confession). These cases are not clear as to how this standard found its way into the criminal law. E.g., United States v. Vasilios, 598 F.2d 387, 392 (5th Cir. 1979)(credibility calls at suppression hearing subject to "normal" clear error standard). Cf. United States v. Hayes, 589 F.2d 811, 822-23 (5th Cir.)(citing both "clearly arbitrary" and "clear error" tests for competence), cert. denied, 444 U.S. 847 (1979).

131. Washington v. Strickland, 693 F.2d 1243, 1257 n. 24 (5th Cir. 1982)(en banc)(Unit B), rev'd on other grounds, ___ U.S. ___, 104 S. Ct. 2052 (1984). The reasonableness of that strategic choice, as based on certain assumptions, is also a fact question. Id. at 1256 n.23. See also Washington v. Watkins, 655 F.2d at 135 ("basic" or "historical" facts underlying conclusion of effectiveness are subject to Rule 52).

132. Within the Eleventh Circuit, the issue of effectiveness—and such subissues as the duty to investigate and the prejudice determination—have more than once warranted en banc consideration. See generally Comment, A Coherent Approach to Ineffective Assistance of Counsel Claims, 71 CALIF. L. REV. 1516 (1983).
B. Findings in a Jury Trial

1. The Verdict

a. Requirement of Evidentiary Basis: General Review Principles

Although the Founding Fathers granted the Supreme Court "appellate jurisdiction, both as to Law and Fact," that power was checked by the seventh amendment: "[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Jury facts are, in reality, re-examined. A jury verdict cannot stand without an evidentiary basis. Whether that basis is adequate to support the verdict has historically been determined by a "substantial evidence" measure. In the Eleventh Circuit, the requirement of substantial evidence is in turn tested by a "reasonable conflict" or "reasonable juror" standard.

The issue usually is presented on an appeal as review of the district judge's decision on a motion for judgment n.o.v., or of the granting of a directed verdict where the issue is not submitted to the jury. In the directed verdict situation, review is judged as well by the test of reasonableness, in this case framed in terms of a requirement that a fact issue be submitted if reasonable men could differ on the conclu-

134. U.S. CONST. amend. VII. Juries were seen as the citizen's protection from an autocratic and centralized chancery court. See Clark & Stone, Review of Findings of Fact, 4 U. Chi. L. Rev. 190, 192 (1937).
135. See, e.g., Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891)(jury fact-finding to be accepted unless no substantial evidence supports); Comfort Trane Air Conditioning v. Trane Co., 592 F.2d 1373, 1383 (5th Cir. 1979).

A "substantial evidence" standard is also used to review most jury verdicts in criminal cases. United States v. Malatesta, 590 F.2d 1379, 1382 (5th Cir.)(en banc), cert. denied, 440 U.S. 913 (1968). The court appears to frame the reasonableness test as an application of the substantial evidence requirement, and no suggestion is made that two different tests are actually involved.

136. E.g., Helene Curtis Indus. v. Pruitt, 385 F.2d 841, 850 (5th Cir. 1967)(judge erred in not directing verdict or granting j.n.o.v.), cert. denied, 391 U.S. 913 (1968). The court appears to frame the reasonableness test as an application of the substantial evidence requirement, and no suggestion is made that two different tests are actually involved.

137. See infra note 180 and accompanying text. Thus the same standard used to review the verdict is applied to certain decisions by the trial judge concerning the reasonableness of the verdict or a potential verdict, despite the procedural techniques used.
sions to be reached from the evidence presented. A frequently-quoted passage from *Liberty Mutual Insurance Company v. Falgoust* summarizes the court's general approach to a verdict:

We have said that if there were no evidentiary basis for the jury's verdict, it cannot be permitted to stand, and that the standard for reviewing a jury verdict is whether the state of the proof 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 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.

The verdict is affirmed "where there is reasonable basis in the record" such that the "conclusion could, with reason, be reached on the evidence."

b. Boeing: Rejection of "Scintilla" Rule

A verdict requires an evidentiary basis. But is the converse true? Must the verdict stand if there is some basis, and how much evidence is "substantial"? A conflict developed within the circuit over whether, in applying the substantial evidence test, the reviewing court is to accept a verdict if some evidence supports it. The conflict is alternatively framed by the question whether the appellate court looks to one side of the facts only. On this question the circuits have disagreed, and the Supreme Court has not said "yes" or "no" recently on the issue. But in 1969 the en banc Fifth Circuit, in *Boeing Company v. Shipman*, rejected the "complete absence of probative facts" standard formerly applied to general civil appeals. The court articulated the proper test:

138. See, e.g., *Helene Curtis*, 385 F.2d at 850.
139. 386 F.2d 248 (5th Cir. 1967)(affirming judge's denial of a directed verdict, j.n.o.v., and new trial).
140. Id. at 253 (citations omitted).
141. Id. Some cases add that the test means whether reasonable jurors could, under any theory submitted to them, have resolved the dispute as they did.
142. 411 F.2d 365 (5th Cir. 1969)(en banc). The decision affirmed the trial court's denial of directed verdict and j.n.o.v.
[T]he Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions [for d.v. or j.n.o.v.] is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.144

The court summed up, "[t]here must be a conflict in substantial evidence to create a jury question."145

In determining the sufficiency of the evidence on the entire record, the trial court considers the record intact and must take the record as presented to the jury.146 The court may not grant a directed verdict of j.n.o.v. by ignoring admitted evidence and then gauging the jury's performance under the fiction that the erroneous evidence was not before it, or by entering judgment on a record altered by the elimination of incompetent evidence.147

c. The F.E.L.A. and Jones Act Cases

Although the Boeing standard of considering all evidence applies

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144. Boeing, 411 F.2d at 374 (footnote omitted). This means that the appeal "should not be decided by which side has the better of the case" or by the "complete absence" standard. Id. at 374-75.

The Boeing sufficiency test, though federal and arguably substantive, is to be applied in diversity cases. Id. at 368 (noting split in circuits).

145. Id. at 375. Constitutional and institutional arguments in favor of the rejected "some evidence" test may be found in Planters and Judge Rives' dissent in Boeing.


147. See Sumitomo Bank, 717 F.2d at 218. This methodology may, however, be acceptable when applied to a new trial motion. See id. (citing Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940)). See also infra note 343 and accompanying text.
to most claims, the old "complete-absence" rule is still used to review Federal Employees Liability Act\(^\text{148}\) and Jones Act\(^\text{149}\) verdicts. Less evidence is necessary to support a finding in such cases, it is explained, since a less demanding proof-of-causation standard, requiring only "slight negligence," is applied.\(^\text{150}\) Findings on an unseaworthiness claim, on the other hand, are reviewed under the Boeing standard.\(^\text{151}\)

In Jones Act cases, the stricter review standard imported from F.E.L.A. cases is usually applied where the defendant employer has asked for a directed verdict.\(^\text{152}\) It is uncertain, however, whether the underlying policies equally support the strict test where the seaman has moved for a directed verdict, and the "reasonable man" litmus may provide the appropriate standard for reviewing evidence sufficiency in the latter case.\(^\text{153}\) The court has noted this reciprocity problem but normally has found it unnecessary to resolve this conflict and policy dilemma.\(^\text{154}\)

d. Applications Since Boeing: Inferences and Credibility

Many cases cite both Boeing and Liberty Mutual in setting forth the proper test. Apparently Boeing does not supersede the guiding language in Liberty Mutual, so long as the latter's general rules are read in light of the appellate discretion allowed in Boeing.\(^\text{155}\) It is clear in


\(^{151}\) Id. at 1025-26 (noting the difficulty of mixing Jones Act and unseaworthiness claims). See Allen, 623 F.2d at 359-60.

\(^{152}\) See Allen, 623 F.2d at 360. But see Campbell v. Seacoast Prods., Inc., 581 F.2d 98, 99 (5th Cir. 1978).

\(^{153}\) See, e.g., Robin v. Wilson Bros. Drilling, 719 F.2d 96, 98 (5th Cir. 1983). But the court has consistently used the F.E.L.A. test when reviewing the evidence supporting a finding of the seaman's contributory negligence. See id. at 98 n.2.

\(^{154}\) See, e.g., id. at 98 & n.2; Allen, 623 F.2d at 360.

\(^{155}\) Cases also cite similar general language in Blount Brothers Corp. v. Reliance Ins. Co., 370 F.2d 733 (5th Cir.)(trial court erred in directing verdict), cert. denied, 387 U.S. 907 (1967), though that case allowed no appellate reweighing of the entire record. See id. at 739.

For application of the sufficiency test in combination with burden of proof and
application, however, that the Boeing rule is firmly accepted in the circuit. In applying the Boeing standard, some courts have indicated that the type of evidence pointing to the questioned conclusion may be considered in determining whether the evidence is "substantial." "Unsupported, self-serving testimony is not substantial evidence sufficient to create a jury question."\textsuperscript{157}

This application must be read in light of Boeing's caution that "it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."\textsuperscript{158} The jury's authority has been interpreted to mean that inferences and ultimate facts are for the jury, subject to reversal if the evidence is insufficient to sustain the resulting findings.\textsuperscript{159} Nevertheless, "[i]t is, of course, axiomatic that inferences . . . cannot stand in the face of uncontradicted and substantial evidence to the contrary."\textsuperscript{160}

e. Law and Fact

In the sufficiency situation, as in a bench trial, facts are submitted to the fact-finder, but law is freely reviewed.\textsuperscript{161} Inferences a jury draws are reviewed within the standard sufficiency test and not judged under a separate set of review rules. More basically, the law between "law"
and "fact" is of a different character than that found in the Rule 52(a) context. When a judge's finding is reviewed, initial characterization of the finding as one of fact or law is in essence mere shorthand for the general standards-of-review inquiry: Does the clear error rule apply? When the proper standard is chosen, the case must still be analyzed—through the standard-of-review prism—and the evaluative decision follows.

In the jury situation, on the other hand, "law or fact?" is the decision and not really a standard-of-review set-up. Procedurally, review deals with the relation between judge and jury: Did the judge properly take the issue away from the jury? The answer to this question is substantive, since the judge has committed legal error if he or she was wrong in not submitting it. In determining whether the judge so erred, the substantive law, rather than general standards-of-review language, controls. Thus, unlike in the usual standard-of-review situation, "law or fact?" is more a substantive inquiry, and no follow-up application is necessary. Whether the court legally erred in taking an issue from the jury is often phrased in evidentiary terms: Does the evidence establish a certain issue "as a matter of law"? And that question is in turn answered by reference to the substantive law and the facts of the case sub judice.

162. The judge may, of course, be challenged for wrongly deciding to submit an issue to a jury, though some courts seem less willing to consider it reversible error. See Control Components, Inv. v. Valtek, Inc., 609 F.2d 763, 770 (5th Cir.), cert. denied, 449 U.S. 1022 (1980). See also Continental Conveyors & Equipment Co. v. Prather Sheet Metal Works, Inc., 709 F.2d 403 (5th Cir. 1983)(although patent construction normally a legal question, court properly allowed jury to consider claim's meaning in judging infringement); Tights, Inc. v. Acme-McCrary Corp., 541 F.2d 1047, 1060 (4th Cir.)("if an issue presents a mixed question of fact and law, it may be submitted if the jury is instructed as to the legal standard to be applied"), cert. denied, 429 U.S. 980 (1976). Cf. Baumstimmer v. Rankin, 677 F.2d 1061 (5th Cir. 1982) (criticizing the court for directly submitting validity issue to jury).

163. See Continental Conveyor, 709 F.2d at 405 (distinguishing Rule 52 review of a bench trial from submission-to-jury issue); United States ex rel. Weyerhaeuser Co. v. Bucon Constr. Co., 430 F.2d 420, 423 (5th Cir. 1970)(directed verdict review is "a pure question of law"). The fact-law dilemma thus may appear in two forms in jury situations. First, is the issue properly one of fact which the jury should have considered? Second, are fact-findings incorrect as a matter of law? The inquiry depends on the substantive law and facts, as framed by the directed verdict or j.n.o.v. context, and the various law/fact characterizations established in the substantive law are beyond the scope of a standards-of-review article.

Some cases indicate that the classifications made under Rule 52 may be used in the parallel inquiry under j.n.o.v. review. E.g., Castillo, 704 F.2d 181 (5th Cir. 1983)
2. Fact Findings and Damages

a. Findings by Jury

The Boeing standard also applies to specific jury findings, such as those made on written interrogatories under Rule 59. One court, for example, applied both Boeing and Liberty Mutual in upholding jury findings of fair market value.

b. Special Verdicts: Inconsistencies

The court may, under Rule 49(a), submit the case to the jury in the form of specific fact questions accompanied by appropriate legal instructions. A fact issue not submitted is, absent request or objection, considered submitted to the judge. The jury's written findings are protected by constitutional and procedural guidons. Where the findings are apparently inconsistent, "[t]he Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the [trial] court must adopt that view and enter judgment accordingly."
c. Damages

Whether evidence supports a jury's assessment of damages—as well as the figure chosen—should also be reviewed by a test of reasonableness. The upper limit has been defined as the "maximum which the jury could reasonably find." Other guiding phrases abound and either coexist with or interpret a reasonableness test. A recent case stated that the appeals court "will not reverse the jury's verdict unless the award is so large that it shows passion or prejudice or shocks the judicial conscience." Especially where subjective evaluations are made, the award must be "grossly excessive."

A damages award may be challenged as erroneous as a matter of law (for example, the award was based on faulty legal apportionment principles, or on damages legally unavailable). But the damages challenge usually arises in the context of reviewing the trial judge's initial discretionary response to the jury's finding. The cases have not, however, clearly separated the legal sufficiency question from this new trial (or conditional new trial) situation.

However the test is framed, it is apparent that the jury's choice in practice is given real deference. "[E]xamination of the Fifth Circuit cases in this field reveals only rare instances in which the court felt

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168. See Bonura v. Sea Land Serv., 512 F.2d 671, 672 (5th Cir. 1974) (Goldberg, J., dissenting from denial of rehearing en banc). Accord Bonura v. Sea Land Serv., 505 F.2d 665, 669 (5th Cir. 1974). Cf. Perricone v. Kansas City Southern Ry. Co., 704 F.2d 1376, 1382 (5th Cir. 1983) ("when approved by the trial judge, such awards will be overturned only when contrary to right reason or for a clear abuse of discretion."). See generally Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975).


170. See id. at 206-07 (judge did not abuse discretion since the verdict was not gross excess). Pope adds that the verdict is taken as is—before trebling—in determining its excessiveness vel non. Id.

171. See, e.g., id. at 203-04.

172. See generally infra notes 331-40 and accompanying text. The cases do not clearly separate the various procedural paths in which the damages issue arises (except perhaps where the court reviews a judge's reduction of the jury award, infra note 323) or the precedent and catch phrases called on to set up the appellate determination. Thus, the principles outlined in this section may be found in the new trial context. E.g., supra note 170. But they may also inform generally the reasonableness review for excessiveness. Perhaps the Eleventh Circuit could clarify these distinctions, or at least settle on an ungarnished reasonableness test, avoiding the proliferation of further definition and the bleeding of theoretically different review situations.
bound to set aside a jury award for its exessiveness."\textsuperscript{173} A point of departure from this general observation may occur when the trial judge has, within his discretion, reduced an award.\textsuperscript{174} The appeals court, despite seventh amendment concerns, has given the judge leeway, finding abuse "only when it appears that the jury's original verdict was clearly within the universe of possible awards which are supported by the evidence."\textsuperscript{175} But the jury's award, at any rate, "is not to be disturbed unless it is entirely disproportionate to the injury sustained."\textsuperscript{176}

3. Directed Verdict and J.N.O.V.

a. Rule 50 and Review Principles

Rule 50 sets forth the procedural rules governing motions for directed verdicts and judgment non obstante veredicto.\textsuperscript{177} Although the rule does not on its face require the judge, as does Rule 52, to make findings, the motion must state its grounds,\textsuperscript{178} and the court must, in making the conditional decision on new trial included in Rule 50, specify the decisional reasons.\textsuperscript{179} The trial court uses the same standard in passing on a motion for directed verdict or j.n.o.v. as does the appellate court in reviewing the judge's decision on the motion.\textsuperscript{180} This standard

\begin{itemize}
  \item \textsuperscript{173} Perricone, 630 F.2d at 319 (reversing damages).
  \item \textsuperscript{174} See \textit{infra} note 340 and accompanying text.
  \item \textsuperscript{175} Bonura, 505 F.2d at 670 (emphasis in original).
  \item \textsuperscript{176} Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 784 (5th Cir. 1983).
  \item \textsuperscript{177} \textit{Fed. R. Civ. P. 50(a)(d.v.)}, and \textit{50(b)(j.n.o.v.)}.
  \item \textsuperscript{178} \textit{Fed. R. Civ. P. 50(a).} See \textit{generally} O'Brien v. Westinghouse Elec. Co., 293 F.2d 1, 5-10 (3d Cir. 1961). This requirement, settling an early conflict in the cases, may in practice inform the appellate court, even where a judge does not spell out his or her grounds in an opinion or judgment.
  \item \textsuperscript{179} \textit{Fed. R. Civ. P. 50(c).}
  \item \textsuperscript{180} \textit{E.g.}, Sulmeyer v. Coca-Cola Co., 515 F.2d 835 (5th Cir. 1975), \textit{cert. denied}, 424 U.S. 934 (1976). See Hayes v. Solomon, 597 F.2d 958, 972 (5th Cir. 1979). The same standard applies whether the motion is for directed verdict or j.n.o.v., and whether the judge grants or denies the motion. \textit{See, e.g.}, United States \textit{ex rel.} Weyerhaeuser Co. v. Bucon Const. Co., 430 F.2d 420, 423 (5th Cir. 1970). It may be argued that application of the directed verdict test may be slightly different when defendant brings the motion at the close of all evidence rather than plaintiff's case, since the moving party once the evidence is in, having the burden of proof, should show that her opponent's proof is insufficient as a matter of law \textit{and} that her own evidence suffices and cannot be discarded by the jury. \textit{See generally} Grey v. First Nat'l Bank in Dallas, 393 F.2d 371, 380 (5th Cir.)(discussing sufficiency and burden of proof), \textit{cert. denied}, 393 U.S. 961 (1968).
\end{itemize}
is, of course, the general test for sufficiency of a jury's verdict and findings outlined in *Boeing Company v. Shipman.*

**b. Directed Verdict as Prerequisite**

A motion for j.n.o.v. cannot be made unless an earlier proper directed verdict motion was made (and renewed, if necessary). The earlier motion "is a prerequisite, virtually jurisdictional." Although this rule is followed strictly, the courts at times will stretch the notion of what constitutes a motion under the rule. Occasionally the trial court will grant j.n.o.v. even though no directed verdict motion has been made. In such a situation the Fifth Circuit has recently indicated it will review the case as where the sufficiency is challenged on appeal after no j.n.o.v. motion at all had been filed, *i.e.*, asking whether "any" evidence supports, or plain error taints, the jury's finding. The Eleventh Circuit, applying former Fifth authority, may follow suit.

**c. Review After No Motion: "Plain Error"**

Failure to move for directed verdict, or to renew the motion by moving for j.n.o.v., is said to preclude review of a jury verdict. "It is well settled that in the absence of a motion . . . made at trial this Court cannot examine the evidence for sufficiency." Nevertheless, the language of "plain error" has slipped into the case law. Thus,

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181. See generally *supra* notes 142-80 and accompanying text. The trial court must consider the record as presented to the jury. See *supra* notes 146-47 and accompanying text. See *infra* notes 324-325 for comparison of these motions with the new trial on appeal.


183. See, e.g., Roberts v. Price, 398 F.2d 954 (5th Cir. 1968). See also Fed. R. Civ. P. 46 (general rule that formal exceptions are unnecessary).

184. See *Perricone*, 704 F.2d at 1380.


186. See, e.g., Dunn, 639 F.2d at 1175; Urti v. Transport Comm'l Corp., 479
although "we may not question the sufficiency of whatever evidence we do find," the court may reverse if "plain error has been committed which, if not noticed, would result in a manifest miscarriage of justice."\textsuperscript{187}

Applications of the plain error exception is an inquiry standing in contrast to the normal \textit{Boeing} standard: the court affirms if there is "\textit{any} evidence supporting the jury's finding."\textsuperscript{188} One court, for example, reversed on a determination of "no evidence" in reviewing a directed verdict motion not renewed by j.n.o.v. motion.\textsuperscript{189}

C. Trial Judge: Supervision and Discretion

1. Evidence and Trial

a. Evidentiary Rulings: "Abuse of Discretion"?

Evidentiary matters are said to be committed to the "discretion" of the trial court. On appeal in the various circuits this means that evidentiary calls, in general, are reviewed only for "abuse of discretion." As one recent court observed, sounding almost tired: "Time and again we have stated that the admission of evidence is within the sound discretion of the district court. Absent proof of abuse an appellate court will not disturb a district court's evidentiary rulings."\textsuperscript{190}


\textsuperscript{188} See also Hall v. Crown Zellerbach Corp., 715 F.2d 983, 986-87 (5th Cir. 1983). The cases are not always clear whether the "any evidence" rule is the application of a "plain error" exception, or "plain error" is an alternative ground for relief, even where some evidence exists. But the cases do not indicate a conflict in interpretation, much less an outcome-determinative one, possibly because the rule echoes the pre-\textit{Boeing} "scintilla" test.


\textsuperscript{190} Jon-T Chems., Inc. v. Freeport Chem. Co., 704 F.2d 1412, 1417 (5th Cir. 1983)(citations omitted). See \textit{Noel Shows, Inc. v. United States}, 721 F.2d 327 (11th Cir. 1983). See also infra note 197 and accompanying text (applicability of evidence rules in bench trials). Sometimes the test for evidence is phrased as "clear abuse" or "manifest error." See Perkins v. Volkswagen of America, Inc., 596 F.2d 681, 682 (5th Cir. 1979). One case stated that rulings must be affirmed unless they affect a substantial right of the complaining party, though the language is probably an application of harmless error doctrine rather than evidentiary scope of review. See Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979); \textit{Fed. R. Evid.} 103(a). See also infra note 197. The cases do not, at any rate, appear in practice to distinguish "abuse" from...
The cases do not go on to define such "abuse" though obviously substantial deference is involved. As Professor Rosenberg observes, discretion is a pervasive yet elusive concept. The standard is, at any rate, broadly applied in many evidence situations. The notion of "discretion" in reality has two dimensions: the broad manner with which a judge can deal with the matter below, and the limited review afforded such decisions. Many evidentiary rulings involve both sides of this coin, so that tethered review follows from situations where the trial judge was in the position to exercise discretion. Many cases set out the standard-of-review in this format, first noting that the judge has discretion, then adding that review is thus limited.

In the evidentiary context, however, the "abuse" test is often used even where the judge has not specifically used true discretion. Although the "abuse of discretion" standard is, on its face, the appropriate test by which to review a judge's application of an evidence rule to trial facts, it does not necessarily follow that all evidence rulings should be given "abuse" deference, especially where the challenged ruling is simply the legal analysis of the applicability or construction of a given rule. The latter decisions are, analytically, conclusions of law rather than exercises of discretion. Nevertheless, many cases state the "abuse" test as one of general review of evidentiary calls. Conversely, many

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"clear abuse," though the latter might be said to apply to those rulings which necessarily involve true discretion at trial. See infra notes 193, 261 and accompanying text.

In criminal cases, too, determinations on admissibility are said to reside generally within the district court's discretion. E.g., United States v. Cohen, 544 F.2d 781, 786 (5th Cir.), cert. denied, 431 U.S. 914 (1977); United States v. Linetsky, 533 F.2d 192, 204 (5th Cir. 1976). More generally, the criminal area is usually not presented as having a separate set of evidence rules. Cf. Chambers v. Mississippi, 410 U.S. 284 (1973); infra note 199. Administrative law, on the other hand, may in practice follow its own star. See E. Cleary, McCormick on Evidence § 348, at 997-1000 (3d ed. 1984) [hereinafter cited as McCormick on Evidence]. However, in some contexts the agency must follow the federal rules. E.g., NLRB v. Gulf States United Tel. Co., 694 F.2d 92 (5th Cir. 1982)(Board bound "so far as practicable" by regulation).

191. Rosenberg, supra note 13. "What are the standards or factors that lead to a finding that there has been an abuse of discretion? The decided cases are not especially informative." Id. at 180.


193. See Rosenberg, supra note 13, at 175.

194. E.g., Jon-T Chems., 704 F.2d at 1417. This approach may be used because of the difficulty, in close cases, of determining where discretion ends and legal analysis
cases do not rely on the "abuse" test or refer to the judge's discretion, but—apparently following the principle that errors of law are freely corrected—simply decide whether or not the evidence was admissible; if not, and prejudice resulted, the reviewing court will reverse.195

Applicability of the "abuse" standard is especially clear—and perhaps deference is stronger—where the evidentiary ruling is based on a rule explicitly giving discretion to the court or where an evidentiary call is intimately bound with the trial facts. A prejudice determination under Federal Rule of Evidence 403, for example, necessarily involves true discretion. "This is a question of legal relevance, a matter on which the trial judge has wide discretion, and which the appellate court will not reverse unless the trial judge has clearly abused his discretion."196 Nevertheless, the courts do not state that the "abuse" standard should be limited to such situations.

Whether an evidentiary call is challenged as abuse or simple error, the appellate court must, under Federal Rule of Evidence 103(a), further inquire whether "a substantial right of the party is affected," since nonprejudicial, "harmless" errors are not reversed.197 On the other begins, though the cases do not reveal a conscious choice.

195. See, e.g., Central Freight Lines, Inc. v. NLRB, 653 F.2d 1023, 1026 (5th Cir. 1981) ("matter of law" that hearsay admitted erroneously); Reyes v. Missouri Pac. R. Co., 589 F.2d 791, 794-95 (5th Cir. 1979). See generally 10 J. MOORE & J. LUCAS, supra note 25, §§ 609.13, 609.14. It may be, of course, that no practical difference results, since erroneously admitted evidence is likely to constitute an abuse. Nevertheless, traditionally a lax abuse standard defines how hard the appeals court looks for error, and in the final analysis, legal error may be more easily excused under review only for abuse.

196. Wright v. Hartford Accident & Indem. Co., 580 F.2d 809, 810 (5th Cir. 1978). See Consolidated Grain & Barge Co. v. Marcona Conveyor Corp., 716 F.2d 1077, 1082 (5th Cir. 1983). But the discretion is not unbounded; further, a distinction may be made for the appellate court in deciding whether Rule 403 is legally applicable or the legal requirements of any such application. See United States v. Beechum, 582 F.2d 898 (5th Cir. 1978)(en banc)(Rule 404(b)), cert. denied, 440 U.S. 920 (1979); Bailey, 455 F.2d at 392 (Rule 407).

197. FED. R. EVID. 103(a) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected" and the error is properly preserved. Any such harmless error must be distinguished from the same-named analysis used to review constitutional error. See generally R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970). Cf. Haddad v. Lockheed Cal. Corp., 720 F.2d 1454, 1457-59 (9th Cir. 1983)(distinction drawn on criminal/civil lines more appropriate than "constitutional"/"nonconstitutional" dichotomy); infra notes 367-68 and accompanying text.

Although the evidence rules apply to trial by jury or judge, their application may
hand, alleged errors not properly preserved by timely objection or offer of proor may be tested for “plain error” under Rule 103(d).

A safe summary, then, concludes that “abuse of discretion” is the general standard to be applied on review of most evidentiary decisions, except perhaps those evidence rules which do not appear to commit to the trial court’s discretion. Next, reference to a case which applies the test to the specific rule in question would be helpful, as would the facts which might establish such abuse. Finally, the reviewing court must examine an otherwise reversible decision for “prejudice to a substantial right of the party contesting the admission, coupled with timely objection.”

Although the cases do not clearly distinguish between evidence rulings which are generally affirmed absent abuse and those situations be relaxed somewhat in a bench trial. This view is said to have its strongest impact where appellate courts review for prejudice. See McCormick on Evidence, supra note 190, § 60, at 153-54. See also C. Wright, Federal Courts § 96, at 645 (4th ed. 1983); Builders Steel Co. v. Commissioner, 179 F.2d 377, 379 (8th Cir. 1950).


199. Fed. R. Evid. 103(d) provides: “Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.” See United States v. Garcia, 530 F.2d 650 (5th Cir. 1976). The Advisory Committee’s Notes observe that in practice plain error is more likely to arise where evidence is admitted than excluded.

Since Rule 103(d) neither proscribes nor prescribes “plain error” review, resort to the case law is necessary to establish such a rule in the circuit. Although the exception is often applied in criminal cases, such as United States v. Abravaya, 616 F.2d 250, 251-52 (5th Cir. 1980), and is patterned after Fed. R. Crim. P. 52(d), it is less clear how—and how much—the rule will be applied in civil actions. McCormick on Evidence states that the plain error rule is “much less common in civil cases than in criminal cases, perhaps in part because liberty and life are not involved as a motive to apply the doctrine. . . .” McCormick on Evidence, supra note 190, § 52, at 134 (footnote omitted), though the Notes of the Advisory Committee are to the contrary. See generally Wangerin, “Plain Error” and “Fundamental Fairness,” 29 De Paul L. Rev. 753 (1980).

200. See Fed. R. Evid. 609(a)(language of “shall”) and 803(24) (discretionary federal hearsay exception, implying that other exceptions are not discretionary).

201. The appellate lawyer might, of course, wish to argue (and find cases to support) that a certain evidentiary call is in effect a question of law, for example, how “regular practice” in the business records rule, Fed. R. Evid. 803(6), should be interpreted. See United States v. Robinson, 700 F.2d 705, 210 (5th Cir. 1983).

where it is more appropriate, at least tacitly, to review admissibility vel non as a matter of law, it might be argued that a distinction should be drawn where the ruling "is based on facts or circumstances that are critical to decision and that the record imperfectly conveys." The line might be called true discretion. The circuit may, of course, find the line undesirable and prefer an "either/or" course where, as presently, it appears that an unspoken line is drawn from intuition or appellate facts. Nevertheless, "[t]o tame the concept [of discretion] requires no less than to force ourselves to say why it is accorded or withheld, and to say so in a manner that provides assurance for today's case and some guidance for tomorrow's."  

b. Comment on the Evidence

Despite the traditional concept of the judge as a passive umpire, the modern trial judge has maintained the common-law power of summary and assessment of the evidence. This authority is, of course, subject to the limitations forced by the jury's function and the requirement of impartiality. Judge's comments which have the effect of preventing the jury from resolving an issue of fact are error unless the court could have directed a verdict on that issue.  

c. Supervision of Trial

Most of the district court's decisions by which the trial is supervised and conducted, including timing, control, and oversight of arguments, are said to be within the court's discretion. Affirmance is

203. Rosenberg, supra note 13, at 183 (emphasis omitted).
204. Id. at 185 (emphasis in original).
205. See Quercia v. United States, 289 U.S. 466, 470 (1933). The judge may not, for example, state which view of conflicting evidence is more credible. Many states do not permit the practice of commenting on the evidence. See C. Wright, supra note 197, § 94, at 629. See also id. § 97, at 651.
207. See generally Herring v. New York, 422 U.S. 853, 862 (1975)("broad supervisory discretion"). For review of jury argument which was not objected to, see Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 286 (5th Cir. 1975). Of course the circuit may impose requirements on how the discretion is exercised, as by requiring on-
mandate absent abuse. The standard is broadly applied, for example, to sequestration of witnesses, 208 qualifying experts, 209 application of the pretrial order, 210 and even the use of offensive collateral estoppel. 211 Also discretionary are dispositions on motions for mistrial 212 and intervention, 213 as well as voir dire matters. 214 Because of the realities of the trial situation, the judge's supervisory power is often, in practice, inevitably broad. As one appellate judge has observed:

The trial judge is a potent figure indeed. . . . He can communicate his attitude in a thousand ways from a cocked eyebrow to a sideways glance. Those will not be of record. They are not reviewable. Trial judges are disciplined ultimately only by their good faith and integrity and by an occasional reminder from their appellate brethren to be constantly vigilant of their power. 215

the-record determinations or other factors the trial court "must" consider.


210. Emmons v. Southern Pac. Transp. Co., 701 F.2d 1112 (5th Cir. 1983) (citing Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980)). The Emmons court noted that if "the parties actually litigate without objection issues not raised in the order, there is little reason to enforce pretrial elimination of the issues." Id. at 1118 (quoting Perfection-Cobey Co. v. City Tank Corp., 597 F.2d 419, 420 (4th Cir. 1979)). See also Flannery v. Carroll, 676 F.2d 126 (5th Cir. 1982). But introduction of evidence on an issue already in the case does not necessarily show consent to trying a new issue. See International Harvester Credit Corp. v. East Coast Truck, 547 F.2d 888, 890 (5th Cir. 1977). In something of a twist of analysis, Emmons states that it is not abuse to admit evidence not in the pretrial order where the opposing party does not object. 701 F.2d at 1118-19.


212. See Nevels v. Ford Motor Co., 439 F.2d 251, 258 (5th Cir. 1971) (mistrial on basis of improper argument).

213. See Lelsz v. Kavanagh, 710 F.2d 1040, 1043 (5th Cir. 1983) (denial under Rule 24(a)(2) reversed as abuse).

214. Stokes v. Delcambre, 710 F.2d 1120, 1128 (5th Cir. 1983) ("wide discretion").

215. Perricone, 704 F.2d at 1378-79. Professor Wright once noted that the "federal judge is a very puissant figure," and adds that "it is wise to leave many details of procedure to the informed discretion of the judge." C. WRIGHT, supra note 197, § 97, at 651-52. See also infra text accompanying note 315.
Nevertheless, the court does not hesitate to reverse if the requisite abuse is found.216

d. General Supervision and Discretion

District judges are more than just trial judges; their function involves supervision of litigation in the broader sense and other duties of control and direction over the docket, the district, and parties before the court. The broad rule of district judges, like the judgments of immediate trial control, are often considered discretionary.

i. Supervisory Applications

The Eleventh Circuit has applied the "abuse of discretion" test to a wide assortment of supervisory situations, including transfer of an action217 and determination of "excusable neglect" for untimely appellate filings.218 The test is also applied to the court's decision on class certification,219 as well as its approval of a proposed class settlement220 or consent decree.221 The severance of trials under Rule 42(b) is re-

216. See United States v. Welliver, 601 F.2d 203, 208 n.12 (5th Cir. 1979).
217. See Abshire v. Seacoast Products, Inc., 668 F.2d 832 (5th Cir. 1982). When the successor court reconsidered an order or judgment picked up from the transfer, its decision is within its discretion though, for reasons of comity, the court ought not overrule the prior judge. Id. See also Gallimore v. Mo. Pac. RR, 635 F.2d 1165 (5th Cir. 1981).
220. Bennett v. Behring Corp., 737 F.2d 982 (11th Cir. 1984). See Reed v. General Motors Corp., 703 F.2d 170 (5th Cir. 1983). Reed surveys the cases and lists the factors for reviewing the exercise of discretion in this area. See also In re Corrugated Container Antitrust Litig., 643 F.2d 195 (5th Cir. 1981).
221. See Williams v. City of New Orleans, 694 F.2d 987 (5th Cir. 1982)(finding abuse in denial of approval), rev'd en banc, 729 F.2d 1554 (5th Cir. 1983); United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981)(en banc). The panel opinion in Williams also notes that the fact-findings on which the judge's decision is based are
viewed for abuse, as is the consolidation of actions and continuances. Often in a particular area the judge is given discretion, subject to review for abuse, but the cases tack on some additional cautions. Rule 41(b), for example, empowers the court to dismiss an action involuntarily for failure to prosecute or comply. The discretion, however, is to be exercised only in extreme cases. Likewise, although the court has broad discretion in controlling discovery, it must "adhere to the liberal spirit of the Rules," and "[t]he imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases."

accepted unless clearly erroneous.

222. United States v. 499.472 Acres of Land, 701 F.2d 545 (5th Cir. 1983)(noting relevant factors). Professor Wright analyzes the problems and factors where issues are submitted to separate juries. C. WRIGHT, supra note 197, § 97, at 651-52. The Fifth Circuit recently expressed similar concern over a bifurcation decision:

While we do not doubt the power of a trial court to order a separate trial on its own motion or, in its discretion, to separately try the damage issues in a case such as this, the present record nevertheless illustrates the unfortunate confusion which can occur when the above-quoted admonition . . . is not fully heeded.

Pryor v. Gulf Oil Corp., 704 F.2d 1364, 1370 (5th Cir. 1983)(citing Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976)).

223. See 9 C. WRIGHT & A. MILLER, supra note 66, §§ 2382-2386 (1971). FED. R. Civ. P. 42(a) permits the judge to order joint trial of separate actions. In both situations discretion is limited too by the requirement that the actions involve a common issue of law or fact. See C. WRIGHT, supra note 197, § 97, at 652-53. Professor Wright also discusses the factors and tests for a judge's joinder of parties (noting federal discretion), acceptance of voluntary dismissal (broad common law power restricted somewhat by Rule 41(a)), referral to a master (rule discretionary but requires certain circumstances, especially in nonjury cases), and disqualification (must be and seem impartial). See id. at 651-55.


225. See Mann v. Merrill Lynch, 488 F.2d 75 (5th Cir. 1973). But involuntary dismissal for inadequate proof is reviewed on legal grounds. See supra text accompanying notes 306-10.


ii. Attorneys' Fees and Costs

Much like the review of discovery orders, an award of attorney's fees is within the judge's discretion, 229 but should be awarded in civil rights cases "unless special circumstances would render such an award unjust." 230 Similar rules govern costs under Rule 54(d). 231 "[W]hile an award of costs to a prevailing party is usual, the inclusion of various items within that award is within the discretion of the trial judge."

iii. Forum Non Conveniens and Choice of Law

Choice of law determinations are not reviewed under the abuse test, 232 but are subject to de novo appellate review. 233 Conversely, the appeals court "may reverse a district court's decision on a motion to


Some statutes, such as the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E)(1982 & Supp.), are more neutral grants of discretion, requiring no special presumption of an award. See Blue v. Bureau of Prisons, 570 F.2d 529 (5th Cir. 1978)(listing relevant factors). It appears that diversity cases are similarly neutral on the attorneys' fee issue, depending of course on state law. See Atlantic Richfield, 702 F.2d at 87.


dismiss based on forum non conveniens only if its action constitutes a clear abuse of discretion.”

iv. Injunctions and Declaratory Actions

The trial court usually has broad discretion in granting or denying a preliminary injunction, subject to review for abuse. (Stays pending appeal are subject to a similar analysis.) Because the application for relief is in equity, fact findings by which the judge supports his decision are subject to Rule 52(a). Although the abuse standard is generally employed among the circuits, the Second Circuit has developed a line of broad de novo review when the judge’s decision rests on documentary evidence.

The equity court, even when fashioning more permanent relief, is generally acting in a discretionary capacity, subject of course to the


The courts, both trial and appellate, consider four factors: likelihood of success on the merits, irreparable injury, no substantial harm to other parties, and the public interest. E.g., State of Tex. v. Seatrain Int’l, 518 F.2d 175 (5th Cir. 1975). Findings on these four factors are mixed fact-law questions. Buchanan v. United States Postal Serv., 508 F.2d 259 (5th Cir. 1975). See also Va. Petroleum Jobbers Ass’n v. F.P.C., 259 F.2d 921, 925 (D.C. Cir. 1958)(establishing the now-popular four-part formula). Cf. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983)(the Ninth Circuit organizes these factors into a “continuum” analysis).

The district court is required to make findings of fact and law. Canal Auth. v. Callaway, 489 F.2d 567 (5th Cir. 1974).

237. See Lopez, 713 F.2d at 1435. Although the judge’s decision is said to be reviewable only for abuse, courts will grant a stay of an injunction pending appeal only sparingly and regard it as “an extraordinary form of reprieve.” Reed v. Rhodes, 472 F. Supp. 604, 605 (N.D. Ohio 1979). The stay is a disfavored remedy because it interrupts the ordinary process of judicial review and postpones relief for the prevailing party who has been found entitled to an equitable remedy. United States v. State of Tex., 523 F. Supp. 703, 729 (E.D. Tex. 1981).

238. See American Rice, Inc. v. Ark. Rice Growers Co-op Ass’n, 701 F.2d 408, 411 n.2 (5th Cir. 1983). Cf. supra note 236 (four factors as mixed questions).

peculiar requirements of equity jurisdiction. The Supreme Court has stated that "the scope of a district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." The "abuse" deference is often given, for example, to the judge's remedy in desegregation cases. The district court apparently has similar authority when applying its equitable remedy. In reviewing a trial judge's decision that one party had not violated his injunction, the courts have stated: "We see no basis for substituting our judgment for that of the district judge in interpreting his own order.

The Federal Declaratory Judgment Act permits the district court to declare the rights of the parties before it. In the Eleventh Circuit, the decision to take a case under the Act is discretionary to the court, though it may not decline by whim. Other circuits permit broader review, citing the liberal purpose of the statute as circumscribing the trial court's discretion. Declaratory jurisdiction may, at any rate, be

240. These requirements, including inadequacy of legal remedy, property interest, and lack of equitable defenses, seem subject to legal definition by the reviewing court, though the district judge, in weighing the facts and fashioning a remedy, is exercising discretion. Cf. Firefighters Local Union No. 1784 v. Stotts, ___U.S.____, 104 S. Ct. 2576, 2585 n.8 (1984) (implying review more circumscribed for preliminary injunctions than with permanent relief).


In criminal contempt cases, review of the sentencing decision is by the abuse test. United States v. Leyva, 513 F.2d 774, 779 (5th Cir. 1975). 244. 28 U.S.C. § 2201 (1982).

245. Hollis v. Itawamba County Loans, 657 F.2d 746, 750 (1981). Accord Duggins v. Hunt, 323 F.2d 746 (10th Cir. 1963). A distinction should be made, of course, between the decision to decide and the decision on the merits of the action. Similarly, general abstention decisions are also subject to abuse review. See Midkoff v. Tom, 702 F.2d 788, 789 n.1, 799 (9th Cir. 1983). But once jurisdiction is found proper, the court normally should not abstain absent exceptional circumstances. Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1046 (11th Cir. 1982).

246. E.g., Alsager v. District Court of Polk County, 518 F.2d 1160 (8th Cir.
inappropriate where the issues are speculative or one party is attempting a game of "procedural fencing." 247

v. Pendent Jurisdiction

The exercise of pendent jurisdiction over state law claims combines both mandatory (jurisdictional minimum) and discretionary (appropriateness of keeping state claims) elements. 248 Even when the district judge is acting within her "discretion," however, she ordinarily "should" dismiss pendent state claims if the federal claims are dismissed before trial. 249

vi. Leave to Amend

Permission to amend pleadings under Rule 15 presents a subtle quirk in the judge's usual discretion. Where a party is not entitled to amendment as of right, he may apply to the court for leave, "and leave shall be freely given when justice so requires." 250 But the court's decision—either granting or denying leave—is committed to its discretion, 251 reversible only where abuse is found. 252 Factors justifying denial include prejudice to the opponent, undue delay and dilatory motive, bad faith, repeated failure to cure deficiencies, and the futility of amendment. 253 Denial is also more likely affirmed if denial is made after summary judgment, although not necessarily affirmed if other re-

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250. FED. R. CIV. P. 15(a).
251. E.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971). This discretion is said to be similar to that for supplemental pleadings. See Lewis v. Knutson, 699 F.2d 230 (5th Cir. 1983). Rule 15(d), governing the latter, makes no particular requirement of liberal amendment.
lief motions have been granted. Normally, however, leave should be granted, for although review is limited to determining whether the trial court’s decision is an abuse of discretion, the policy of liberal amendment directs that “unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial.” The quirk is that liberal amendment clashes with court discretion, at least when the judge denies amendment. While the “abuse” test is said to apply in either case, in practice the test is applied differently. Where amendment is allowed, affirmance is routine; a denial also is often affirmed, but the appellate court nearly always applies and analyzes the relevant factors itself in determining whether denial was abuse. Some courts, then, find the factors wanting and reverse the district court.

Moreover, it is likely that the judge’s discretion will be checked more in future cases. Application of the abuse standard was developed under case law which gave no preclusive effect to the judge’s discretionary call. The new Fifth Circuit, sitting en banc, has recently ruled, however, that res judicata principles may be applied to claims for which amendment was denied. While the direct impact of this decision remains to be felt, reviewing courts may be much more reluctant to affirm, as a matter of course, the judge’s discretion where the denied amendment, in theory freely given, extinguishes a claim forever.

vii. “Discretion”: A Final Note

The tension inherent in the leave to amend cases—where discre-
tion is the standard but review is often probing, employing established guidelines—also reveals itself in other discretionary situations, including discovery and involuntary dismissal. The court gives a theoretically free hand to the district judge but immediately creates impediments and establishes qualifications for exercising the discretion. On appeal the result is often something of a hybrid “abuse” test where abuse is more commonly found and less pejoratively implied.\textsuperscript{260} It must be asked, then, whether the circuit in fact employs at least two “abuse of discretion” standards. Though “the” test is the same, there seems to be a real distinction, in common sense and review standard, between a judge’s approval of amendment—blessed by Rule 15(a)—and the denial of leave. The court appears to have responded, at least implicitly, to a perceived difference in these twins and other situations.

Of course, the addition of factors to be considered in exercising discretion is not necessarily freer review, and the courts often frame the factors not as the rationale for broader review of abuse but as elements pointing to an abuse where incorrectly considered. In some situations, however, the appeals court may be doing more, resulting in a freer appellate hand. If the court makes a tacit distinction between two or more “abuse” standards, the dividing line might be seen as “true” discretion, where real trial authority translates into effectively restricted review.\textsuperscript{261} Such a line might underlie the oft-quoted but unexplained juxtaposition of review for “abuse” and review for “clear abuse”\textsuperscript{262} (if there is a difference), though the court does not appear to be consciously pursuing a distinction. In application, for example, the courts do not indicate that abuse is present but not clear.

In the final analysis, however, the concept of discretion quite naturally fights uniformity, so it should not be surprising that review of

\textsuperscript{260} The courts state, however, that a finding of abuse of discretion is not a pejorative label upon the trial judge. \textit{E.g.}, Sam’s Style Shop v. Cosmos Broadcasting Corp., 694 F.2d 998 (5th Cir. 1982). Nevertheless, an ironic consequence of the way review standards are often phrased is the number of jurors who are labeled “unreasonable” and the relative frequency with which district judges, whose power is solemnly granted, are said to have “abused” it.

\textsuperscript{261} See supra notes 180-83. See generally Rosenberg, \textit{supra} note 189. Professor Rosenberg discerns at least four levels of discretion in action. \textit{See also} Chris-Craft Indus., Inc., v. Piper Aircraft Corp., 480 F.2d 341, 389 (2d Cir.) (in comparing “the” abuse test for grants versus denials of SEC injunction, judge notes “scope of review would appear to be different,” but urges abuse to be found “whatever abuse of discretion standard be applied”), \textit{cert. denied}, 414 U.S. 910 (1973).

\textsuperscript{262} See \textit{supra} note 189.
discretion is not always consistently applied or even theorized. Nevertheless, the circuit has broadly set out one abuse of discretion inquiry as the standard for reviewing district courts' trial and supervisory roles.

2. Jury Instructions

a. Form and Content

The form of jury instruction and the method of objection are considered procedural points. The federal courts look to federal law in framing instructions at trial and in reviewing charge form on appeal. Where state law defines the contested right or action, however, state law of course governs the substance of the charge. The actual content of jury instructions presents, then, a question of substantive law rather than standard of review, and legal errors are freely reversed if prejudicial. In reviewing the manner of instruction, the federal courts are not always picky about language and format. As long as the jury is not misled, prejudiced, or confused, "[a] party is not entitled to have the jury instructed in the particular language of its choice." The reviewing court considers "the charge as a whole, viewing it in light of the allegations of the complaint, the evidence, and the arguments of counsel." These principles have also been applied where the appellant complained of the timing of portions of the charge. Similarly, the court's choice to submit the case in the form of a special verdict is said to be within its discretion.

263. Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir.), cert. denied, 419 U.S. 1096 (1974). One reflection of the differing federal approach is the power to comment on the evidence. See supra note 205 and accompanying text.


266. Smith v. Borg-Warner Corp., 626 F.2d 384, 396 (5th Cir. 1980). "If, viewed in that light, the jury instructions are comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury, the charge will be deemed adequate." Scheib v. Williams-McWilliams Co., 628 F.2d 509, 511 (5th Cir. 1980).


268. See C. WRIGHT, supra note 197, § 94, at 630-31. See also supra note 165.
b. The Test: Technical Errors and the Jury’s Function

The circuit has indicated that review of jury instructions is not a search for utopia or an exercise in technicalities. As one court summarized the standard:

A technical imperfection does not occasion reversal when it is part of a charge that otherwise adequately instructs the jury on the applicable law. We must determine 'not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.' If the charge as a whole 'leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations' it cannot stand. 269

In sum, then, “[i]nstructions are considered adequate if the jury is given an appropriate understanding of the controlling law and of its role in the decision-making process...” 270 Even where language and form is placed in the hands of the trial judge, the Eleventh Circuit will reverse where the charge fails these principles. 271


c. “Plain Error”?

Rule 51 provides: “No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.” 272 Since no “plain error” exception is supplied, as is specifically the case in criminal cases under

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McCullough, quoting Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1100 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), states one aspect of the test as requiring that the jury not be misled in any way. Id. at 759. Other courts ask whether the charge is likely to mislead. See Scheib, 628 F.2d at 511. The possible variation in the language, however, is not presented as inconsistent in theory or application. See also Johnson v. Bryant, 671 F.2d 1276, 1280 (11th Cir. 1982)(“ineradicable doubt”).

270. Farmhand, 693 F.2d at 1142.

271. See, e.g., Williams v. Bennett, 689 F.2d 1370, 1387-88 (11th Cir. 1982). See also Pryor v. Gulf Oil Corp., 704 F.2d 1364, 1374-75 (5th Cir. 1983)(instructions insufficient, misleading, and confusing); McCullough, 587 F.2d at 759 (contradictory charge and summation constituted erroneous directed verdict).

the federal rules, the civil rule literally means no review. Some circuits, including the Ninth, openly apply Rule 51 strictly. Some old Fifth Circuit panels appeared to find themselves precluded from review without suggesting a plain error exception. Many former Fifth Circuit cases, however, have indicated such an exception. Most of these offer the exception in dicta, finding that if there were error it would not be "plain." Other courts, especially recently, have found that plain error was present and reversed accordingly. The circuit also appears willing to consider an objection adequate under a lenient objection rule, at least where it brings the trial court's attention to the defect. Moreover, requested instructions are not necessary to preserve error in failing to instruct on the controlling issues or in giving erroneous or misleading instructions.

3. Motions for Judgment or Relief

a. Rule 12(b)(6) Dismissal

A district court considering a Rule 12(b)(6) motion is told that "a motion to dismiss for failure to state a claim should not be granted

274. See Bock v. United States, 375 F.2d 479 (9th Cir. 1967). The Third Circuit, on the other hand, has increasingly reversed for plain error.
275. E.g., Landry v. Two R. Drilling Co., 511 F.2d 138, 141 (5th Cir. 1975). Such cases simply fail to mention a possible exception to the no-review rule.
277. See, e.g., Jamison Co., Inc. v. Westvaco Corp., 526 F.2d 922, 932-33, reh'g denied, 530 F.2d 34 (5th Cir. 1976); Industrial Dev. Bd. v. Fuqua Industries, Inc., 523 F.2d 1226, 1237-40 (5th Cir. 1975). Most of these cases also call the error "fundamental" or a "miscarriage." See also cases cited in Rodrigue v. Dixilyn Corp., 620 F.2d 537, 540-41 (5th Cir. 1980)(setting out the standard).
279. See 9 C. Wright & A. Miller, supra note 66, § 2556 (1971)("[t]he court must instruct the jury properly on the controlling issues of the case even though there has been no request for an instruction or the instruction requested is defective."). See generally Pryor, 704 F.2d at 1375-76. Cf. Herman v. Hess Oil, 524 F.2d 767, 771 (3d Cir. 1975)(invited error).
unless it appears to a certainty that the plaintiff would not be allowed to recover under any state of facts which could be proved in support of his claim." The appellate court reviews under the same standard. The federal courts generally read the plaintiff's allegations liberally: "The form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim." The liberalization of complaint construction and procedures has led Professor Miller to note the decline of Rule 12(b)(6), remarking that it was last used "during the McKinley Administration."

Rule 12(b)(6) applies where one party challenges the legal claim presented in a pleading; after pleadings are closed either party may move for judgment on the pleadings under Rule 12(c). In either case, where matters outside the pleadings are considered, the court must use the standard and procedures for summary judgment under Rule 56, though as a practical matter the legal inquiry may be similar since facts are not material if they carry no legal import.

b. Summary Judgment

i. "Material Fact": Test and Burdens

Summary judgment is appropriate if the full record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." On review the


282. Dussouy, 660 F.2d at 604. Cf. Daves, 661 F.2d 1022 (5th Cir. 1981); Fed. R. Civ. P. 9(b). The court in evaluating the motion takes the factual allegations as true and in the light most favorable to plaintiffs. E.g., Scheuer, 416 U.S. at 235-37. An even less stringent pleading standard is applied to pro se complaints, for example in § 1983 actions. See Watts v. Graves, 720 F.2d 1416, 1419 (5th Cir. 1983).


284. See Fed. R. Civ. P. 12(b)(6) and 12(c). See generally infra note 286.

285. See infra note 289. Generally, however, the Rule 12(b)(6) focus in on law while Rule 56 is on "material" facts; moreover, different procedures and materials are used. For the requirement of written findings and conclusions, see infra note 296.

286. Fed. R. Civ. P. 56(c). Everything in the record, including depositions and affidavits, is considered, unlike in the pre-trial dismissal situation. See also Underwood.
appellate court applies the same test as the district courts.287

The court may not weigh the evidence or its probative value, nor may the court resolve any factual issues discerned in the record,288 but a factual dispute without legal significance is not "material."289 Material facts are those which may affect the outcome of litigation.289 The moving party carries the burden, an "exacting" one, of demonstrating absence of fact and entitlement to judgment, so that the evidence, and all inferences therefrom, must be viewed in the light most favorable to the opponent and all reasonable doubts resolved in his favor.291 Thus, even where all facts are known or stipulated, summary judgment may nonetheless be inappropriate:

v. Hunter, 604 F.2d 367, 369 (5th Cir. 1979)(judge may sua sponte convert motion to dismiss into summary judgment motion but must then comply strictly with Rule 56).

The plaintiff or the defendant may move for summary judgment as to all or part of a claim or defense. The motion may be granted in equity. Even where the mechanism is appropriate, the court may in its discretion deny the motion. C. WRIGHT, supra note 197, § 99, at 663-65, 667, 669. See generally Bruce v. Travelers Ins. Co., 266 F.2d 781, 786 (5th Cir. 1959); Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 YALE L.J. 745 (1974).

In diversity cases, the federal Rule 56 standard still controls. Nunez v. Superior Oil Co., 472 F.2d 1119, 1123 n.5 (5th Cir. 1978). But the legal issues underlying the action are of course creatures of state law.

287. See, e.g., Thrasher v. State Farm Fire and Casualty Ins. Co., 734 F.2d 637 (11th Cir. 1984); United States Steel Corp. v. Darby, 516 F.2d 961 (5th Cir. 1975).


289. See Union Planters Nat'l Leasing Co. v. Woods, 687 F.2d 117, 119 (5th Cir. 1982)("contested fact must have some legal significance to be material to the resolution of a case"). Thus the court has stated, in language similar to the test for Rule 12(b)(6) motions, that summary judgment normally is granted "only when the moving party has established his right to judgment with such clarity that the nonmoving party cannot recover . . . under any discernible circumstance." Everhart v. Drake Mgmt., Inc., 627 F.2d 686, 690 (5th Cir. 1980). See infra note 292.

290. See Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980).

There is no litmus that infallibly distinguishes those issues that are "factual" from those that are "legal" or "mixed." When all those material facts susceptible of objective determination are known, there may be inferences or conclusions to be drawn from them. Many observations that may appear superficially to be factual are the result of inference, viewpoint, and judgment. At ends of the spectrum, it may be relatively easy to separate fact and law, but as we approach the point where facts and the application of legal rule to them blend, appraising evidentiary facts in terms of their legal consequences and "applying" law to fact become inseparable processes. In some instances where facts may assume infinitive variety, legal rules are deliberately stated in a fashion calling for the application of judgment.292

Although the moving party maintains the burden under Rule 56, when a motion is made and properly supported,

an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.293

The non-moving party, then, "is required to bring forward 'significant provocative evidence' demonstrating the existence of a triable issue of fact."294 Additionally, the nonmover cannot present one view of the purported factual dispute (or legal theory of its materiality) to the trial

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292. Nunez v. Superior Oil Co., 572 F.2d 1119, 1123 (5th Cir. 1978). Nunez cites jury sufficiency cases, including Boeing and Liberty Mutual, in reversing summary judgment, and notes that inferences and ultimate facts are for the jury, subject to reversal if the evidence is insufficient to sustain the resultant findings. Nunez, 572 F.2d at 1124 & n.6. In theory, however, the summary judgment inquiry is different from the j.n.o.v. situation since inferences under Rule 56 are not really left to the jury but are decided, against the movant, in determining the propriety of summary judgment. See First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289-90 (1968)(summary judgment vehicle typically appropriate where only issue is the legal significance to be ascribed to undisputed record facts).

Rule 56(c) also provides for procedural protections different from those under Rule 12, including ten day notice before hearing. See infra note 296.

293. Fed. R. Civ. P. 56(e). Thus, "[d]efense of a proper summary judgment motion requires more than a mere denial." Union Planters, 687 F.2d at 119.

court—only to raise a new tack on appeal.295

ii. Trial Court Findings and Appellate Record Review

In addition to the Rule 56 duties imposed on the parties, the district court is often said to have its own responsibility to delineate its basis for granting summary judgment:

"Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 and 56," [and] their absence here is not, of itself, fatal. Even so, "the parties are entitled to know the reasons upon which [summary] judgment[s] . . . are based," if for no other reason than to secure meaningful appellate review. Although our prior admonitions have been precatory in character, we have in practice insisted that district courts record—however informally—their reasons for entering summary judgment, at least where their underlying holdings would otherwise be ambiguous or inascertainable.296

In a similar vein, a recent court has noted a conflict in the case law on the question of whether the appellate court is to make an independent review of the record to find a factual dispute which the appellant has not pointed out. "Judges are not ferrets!," the court complained, but searched the record anyway and reversed.297

iii. Appropriateness in Specific Applications

"Summary judgment is, of course, Damoclean and lethal. It can serve as a quick sword untangling the Gordian knot of litigation."298

295. See, e.g., DeBardeleben v. Cummings, 453 F.2d 320, 324 (5th Cir. 1972). The cases do not consistently require such care from the parties. Cf. infra note 279 and accompanying text. But a party's failure to properly bring facts or legal theories to the trial court's attention may constitute actual abandonment of the issues. See generally infra notes 355-62 and accompanying text.


A recent Fifth Circuit case emphasized that these findings must be evaluated under Rule 56(e), not the clear error rule of Rule 52(a). New York Life Ins. Co. v. Baum, 707 F.2d 870, 871 (5th Cir. 1983)(on rehearing).


298. Id. at 844. See also Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940).
The mechanism is not to be used unless manifestly inappropriate. The court has indicated that summary judgment is particularly inappropriate as a general matter in certain classes of cases. For example, "ordinarily, summary disposition of Title VII cases is not favored, especially on a 'potentially inadequate factual presentation.'" Summary judgment is normally—but not always—inappropriate when the issues involve negligence or a determination of the reasonableness of the parties' acts under the circumstances.

The Supreme Court has similarly stated: "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Nevertheless, lower courts have expressed their willingness to affirm summary judgments in appropriate antitrust cases, especially where tangible and objective issues are involved, though the procedure is generally to be avoided. Other cases indicate that summary judgment may not be proper in securities actions prior to completion of discovery, and the procedure may be cautiously applied where the issue is novel or the case is complex. Critics blame this hesitance in complex cases, as with liberality in other procedural vehicles, for clogging the federal courts.

c. Rule 41(b) Dismissal

In bench trials after the plaintiff concludes his case, the defendant may move for dismissal of the action, arguing "that upon the facts and


302. See Ferguson, 584 F.2d at 114. See also Sponsler, Fifth Circuit Symposium: Antitrust Law, 28 Loy. L. Rev. 775, 785 (1982).


305. See Carter, supra note 283, at 2.
the law the plaintiff has shown no right to relief." The court may defer the motion until the close of the case or, finding the evidence insufficient, render judgment on the merits and make Rule 52(a) findings. The trial court is said to weigh the evidence, even on a motion made only after plaintiff has offered evidence.

The substantive Rule 41(b) motion is roughly analogous to the directed verdict motion offered at the same time in jury trials. But the judge passing on a directed verdict or j.n.o.v. motion, to preserve the jury function, must view the evidence in the light favoring the nonmover. In nonjury cases under Rule 41(b), however, the judge is said to be not so limited and may resolve credibility and evidentiary conflicts. As one recent court clarified: "Although the court disposed of the [limitations] issue through the vehicle of a motion for directed verdict, the issue was actually tried to the court as fact finder, and it made, in effect, findings of fact and conclusions of law thereon. The Boeing standard was therefore inapplicable.""310

d. New Trial

i. Discretion and General Applications

Rule 59 permits a trial court to grant a new trial, after motion or on its own initiative, on any or all issues in a jury or bench trial. Common grounds on which such a motion is based include legal error (e.g., in instructions or evidentiary calls), improper conduct (of judge, attorney, or juror), new evidence, and verdict contrary to evidence. The trial court's decision generally is committed to its discretion. For ex-

306. Fed. R. Civ. P. 41(b). Defendant can so move at the close of the case, though then the court must render judgment anyway. See supra note 225 for dismissal under Rule 41 on grounds other than insufficient evidence.
307. See supra note 30 and accompanying text.
308. See Weissinger v. United States, 423 F.2d 795 (5th Cir. 1970)(en banc).
309. C. Wright, supra note 197, § 96, at 645.
312. See generally Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940);
ample, a motion for new trial based on inflammatory argument or other improper remarks is a matter committed to the sound discretion of the trial judge,\textsuperscript{313} reversible only for abuse.\textsuperscript{314} Justification for this deference echoes that which is given to other exercises of discretion:

The district judge . . . was best able to measure the impact of improper argument, the effect of the conduct on the jury, and the results of his effort to control it. Our review is not only hindsight, but is based on a written record with no ability to assess the impact of the statement on the jury or to sense the atmosphere of the courtroom.\textsuperscript{315}

The courts may find that the earlier "failure to move for a mistrial is also significant" in reviewing the propriety of the ultimate new trial motion, since the party "[b]y doing so, and by acquiescing in the court's corrective charge, . . . got a chance to see the verdict and then to seek to overturn it"\textsuperscript{316}—an advantage apparently viewed as unfair.

ii. Weight of the Evidence

Where an appeal is made from an order denying or granting a new trial (the latter reviewed after a second trial) on the basis of legal error, the appellate court may simply review for such error. The more


The Supreme Court has recently defined the proper factors and procedures the trial court is to consider in determining a new trial motion for juror bias in civil cases. \textit{See} McDonough Power Equip., Inc. v. Greenwood, \textit{---} U.S. \textit{---}, 104 S. Ct. 815 (1984). The Court in \textit{McDonough Power} stated that a party seeking a new trial based on juror prejudice or bias must demonstrate that the juror in question failed to answer honestly a material question posed on voir dire. In addition, the party must show that a honest answer would have provided a valid basis for a challenge for cause. \textit{See id.} at 849-50.

\textsuperscript{314} Meyers v. Moody, 693 F.2d 1196 (5th Cir. 1982). \textit{See} Rosenberg, \textit{supra} note 13, at 178.

\textsuperscript{315} Caldadera v. Eastern Airlines, Inc., 705 F.2d 778 (5th Cir. 1983).

\textsuperscript{316} \textit{Id.} at 782 (footnote omitted). The courts also appear influenced by a judge's quick or thorough limiting of prejudice by corrective instruction. \textit{See id.} at 781-82. Review generally may narrow to the question whether "the damage done by this inflammatory argument was irreparable. . .," with the trial judge in the superior position from which to evaluate prejudice. \textit{Id.} at 781.
difficult cases, however, involve evidence-weighing, necessarily involving factual inquiry. The trial court’s decision on a new trial motion for lack of evidentiary support again is subject to review only for an abuse of discretion. In exercising this discretion in granting the motion, however, the trial court is warned not to merely substitute its view or doubts about the evidence for those of the jury, though it is said that the trial court on a new trial motion has the discretion to consider both the weight of the evidence and the credibility of witnesses. The standard by which the appellate court checks for abuse is the same as the one guiding its exercise by the trial court: the trial court may not grant a new trial unless the verdict is “against the great weight of the evidence,” and the reviewing court will not affirm such a decision unless the “great weight” line is broken. Reversals have thus been ordered where there is “no great weight of the evidence in any direction.”

Although “[t]he ‘great weight of the evidence’ standard is not easily met,” or for that matter easily defined, it is clear that the verdict is not as safe under this test as where the verdict is challenged as a matter of law under a j.n.o.v. motion; “the court has a wide discretion in setting aside a verdict and granting a new trial even if the verdict is supported by substantial evidence.” This discretion is allowed, even in the face of the seventh amendment, possibly, because the verdict is not flatly reversed—the parties instead just get a new jury. The circuit has even, rarely, reversed trial court findings that a verdict is not against the weight of the evidence. Nevertheless, the jury’s verdict is

317. See, e.g., Saunders v. Chatham County Bd. of Comm’rs, 728 F.2d 1367 (11th Cir. 1984); Spurlin v. General Motors Corp., 528 F.2d 612 (5th Cir. 1976). See also McGuire v. Davis, 437 F.2d 570, 576 (5th Cir. 1971)(“manifest abuse”); Weyerhaeuser, 430 F.2d at 423 (“clear abuse”).


319. See Robin v. Wilson Brothers Drilling, 719 F.2d 96, 98 (5th Cir. 1983).

320. E.g., Taylor v. Fletcher Properties, Inc., 592 F.2d 244, 247 (5th Cir. 1979).

321. E.g., Narcisse v. Ill. Cent. Gulf RR Co., 620 F.2d 544 (5th Cir. 1980). See also Weyerhaeuser, 430 F.2d at 423 (against “clear weight” or a miscarriage of justice). Some cases apply the “great weight” test without first setting it up as the standard by which the judge’s discretion is directed and checked for abuse. E.g., Perricone, 704 F.2d at 1376.

322. Conway, 610 F.2d at 367.

323. Shows v. Jamison Bedding, Inc., 671 F.2d 927, 931 (5th Cir. 1982).


326. United States v. Simmons, 346 F.2d 213 (5th Cir. 1965); Georgia-Pacific
given deference, especially where the issues are simple, the facts not strongly disputed, and trial conduct not pernicious. 327

Although denial of a new trial motion is likewise said to be subject to "abuse of discretion" review, it is clear that more deference in practice is given to the district judge when she agrees with the jury. Where the "judge denies the motion and leaves undisturbed the jury's determination, all factors press in the direction of leaving the trial judge's ruling undisturbed . . . ." 328 Comity, common sense, and the seventh amendment, of course, support this extra reluctance, though the distinction is at odds with the notion that the abuse test is a single or uniform standard. 329 Similarly, the like judgments of two successive juries is especially guarded; "courts rarely grant a new trial after two verdicts upon the facts in favor of the same party." 330

iii. Conditional New Trial and Damages

The conditional grant of a new trial motion is governed by similar language. In such a case the district court or even appellate court indicates that it will order a new trial for damages unless the nonmoving party will consent to a judicial reduction of damages. 331 In the federal courts the issue is one of excessive damages—remedied by the conditional remittitur vehicle—since additur, for inadequate damages, is held to violate the seventh amendment. 332 The trial judge applying remittitur must actually offer the plaintiff a choice between reduction or

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327. Perricone, 704 F.2d at 1381.
329. See generally supra notes 258-61 and accompanying text.
332. See Dimick v. Schiedt, 293 U.S. 474 (1935); Bonura v. Sea Land Serv., 505 F.2d 665 (5th Cir. 1974). Although the circuits once split on the question whether a party accepting remittitur may challenge the order on appeal, the Supreme Court now holds that the order is not subject to appellate review when consented to, even if the complaining party had given consent under protest. Donovan v. Penn Shipping Co., 429 U.S. 648, 649 (1977).
new trial; otherwise the appeals court must remand for that selection. 333 Use of remittitur is, not surprisingly, reviewed under an “abuse of discretion” standard. 334 The jury's determination, of course, is afforded deference, especially where the trial judge approves it. 335 “The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained.” 336

The courts are not clear, in setting forth these principles, how the judge's discretion accords with the traditional deference given jury verdicts. It is, again, likely that “abuse” is found more rarely—or even reviewed differently (if such is a real analytical distinction)—where the judge agrees with the jury. 337 Similarly, other courts 338 do not clearly distinguish among the language accompanying flat orders of new trial, remittitur, and reversal of a jury's findings on damages. 339 Perhaps all these situations could be summarized, beyond “abuse” language, as requiring that all courts defer to the reasonable jury and the appellate court in turn defer to the trial judge, especially where the judge's review affirms the jury's determination. 340


Nevertheless, the trial judge may not reduce the award below the maximum reasonable amount. Bonura, 505 F.2d at 669.

335. See Caldarera, 705 F.2d at 783-84 & n.15.

336. See id. at 784. Excessiveness of the verdict is judged from the base award, e.g., before trebling. See Pope, 703 F.2d 197 (5th Cir. 1983). New trial on damages may not be ordered unless the verdict is against the great weight of the evidence. Narcisse, 620 F.2d at 547.

337. See supra notes 328, 334-35 and accompanying text.

338. See, e.g., Pope, 703 F.2d at 208.

339. See supra note 172.

340. Whether the issue of damages is reviewed on its own terms or after initial trial judge review, it is said that “an examination of the [former] Fifth Circuit cases in this field reveals only rare instances in which the Court felt bound to set aside a jury award for its excessiveness.” Perricone, 630 F.2d at 319. But where the trial judge exercises his discretion to reduce an award, abuse is found “only when it appears that the jury's original verdict was clearly within the universe of possible awards which are supported by the evidence.” Bonura, 505 F.2d at 670 (emphasis in original).
iv. Discretion versus Law: J.N.O.V. Compared

Despite the blending in some damages cases, the court has distin-
guished generally between the new trial situation and the j.n.o.v. mo-
tion, which often accompanies a new trial motion. As one Fifth Circuit
case summarized, in rejecting the argument that failure to move for a
directed verdict precludes granting a new trial on evidence:

In passing a motion for a directed verdict, or for a judgment n.o.v.,
the court does not exercise discretion, but decides a pure question
of law, that is, whether the evidence, considered in the light most
favorable to the party against whom the motion is directed, affords
substantial support for a verdict in his favor . . . . In passing on a
motion for a new trial, the court may and should exercise a sound
discretion, and its ruling thereon will not be reviewed in an appel-
late court in the absence of a clear abuse of discretion. 341

This distinction, the court added, “was firmly embedded in the common
law” and recognized by the former Fifth and other circuits. 342

Some courts also distinguish between j.n.o.v. and new trial in the
context of evidence considered, noting that the trial court in passing on
a new trial motion may retroactively strike erroneously admitted evi-
dence and then gauge the jury’s performance as if the evidence were
not before it. This procedure is not allowed in the directed verdict or
j.n.o.v. context. 343

e. Reopen Judgment

Under Rule 60(b) the district court may, on motion, order relief
from a judgment or order on grounds ranging from mistake or excusa-

341. Weyerhaeuser, 430 F.2d at 423 (footnotes omitted). The trial judge may
grant a new trial if in her opinion the verdict is against the clear weight of the evidence
or will cause an injustice, even though substantial evidence prevents granting a j.n.o.v.
Id.

342. Id. at 424 (footnote omitted). For another comparison of new trial motion
with other motions, including directed verdict, involuntary dismissal, and summary
judgment, see 5A J. MOORE & J. LUCAS, supra note 25, ¶ 50.03. Two cases which, like
many appeals, also involve multiple trial motions are Comfort Trane, 592 F.2d 1373
(5th Cir. 1979), and Spurlin v. General Motors Corp., 528 F.2d 612 (5th Cir. 1976).
1983). See also notes 146-47 and accompanying text.
ble neglect to fraud or general fairness.\textsuperscript{344} When a legal error is alleged the judge acts within his discretion.\textsuperscript{345} The circuit has also allowed discretion under Rule 60(b) to consider new evidence\textsuperscript{346} or to reinstate a dismissed complaint.\textsuperscript{347}

D. Special Principles and Applications

1. Panel Stare Decisis

One application of the general rule of stare decisis, in which prior decisional law provides the governing "rule of law" in subsequent appeals,\textsuperscript{348} is the Eleventh Circuit principle of "panel stare decisis." Under this rule, each three-judge panel in the circuit is said to be "without power to overrule a decision of another panel. That task falls solely to the full Court sitting \textit{en banc}."\textsuperscript{349} But subsequent panels can also reject precedent, even \textit{en banc} precedent, under a superseding Supreme Court ruling or statutory change.\textsuperscript{350}

A sticky dilemma is presented by conflicting panel cases, cases which theoretically should not develop if the panel stare decisis principle is maintained. In such a situation, later courts are caught in a jam:

\begin{itemize}
\item 344. \textit{Fed. R. Civ. P.} 60(b). Rule 60(a) governs clerical errors, Rule 59(e) provides for alteration or amendment of judgment within ten days, and Rule 52(b) allows amendment of findings, as is discussed in the Advisory Committee Notes, 1946 Amendment, to Rule 60(b).
\item 345. \textit{See} Fackelman v. Bell, 564 F.2d 734, 736 (5th Cir. 1977).
\item 346. Steelcase, Inc. v. Delwood Furniture Co., 578 F.2d 74, 77 (5th Cir.), \textit{cert. denied}, 440 U.S. 960 (1978). The court left the motion to the trial judge's discretion but reviewed the implicit finding of due diligence supporting it for clear error. \textit{Id.}
\item 347. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981) (abuse of discretion).
\item 348. \textit{Cf.} Edwards v. Sea-Land Serv., Inc., 720 F.2d 857, 859 (5th Cir. 1983) (discussing general rule that appellate court must apply decisional law in effect at the time it renders its subsequent opinion, plus exceptions that allow retroactive legal application).
\item A similar principle, the "law of the case" doctrine, makes controlling prior decisions in earlier appeals of the same line of litigation.
\item 349. Ford v. United States, 618 F.2d 357, 361 (5th Cir. 1980). \textit{ Accord} Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981) (\textit{en banc}); Hernandez v. City of Lafayette, 643 F.2d 1188, 1192-93 (5th Cir. 1981), \textit{cert. denied}, 455 U.S. 907 (1982); Davis v. Estelle, 529 F.2d 437, 441 (5th Cir. 1976) (controls even where later panel perceives error in the precedent). This rule controls in the circuit, of course, until the \textit{en banc} court rejects it.
\item 350. \textit{See, e.g.}, Davis, 529 F.2d at 441.
\end{itemize}
"[W]e cannot pay heed to one line of precedent without disregarding the other, and we lack the authority to overrule one line at the other's expense."\footnote{351} In response, some judges will choose the "longer established and more extensive line of precedent,"\footnote{352} while others follow a relatively lonely case "because it is the first of our cases to consider the problem before us, has never been specifically overruled, and is in our view better-reasoned. . . ."\footnote{353}

In the final analysis, the latter factor—which precedent is right—probably controls over such apparently—malleable rules of thumb as "first case" or "latest case."\footnote{354} Such conflicts are, of course, appropriate fodder for the en banc court, though panels seem to avoid that drastic course where one line of precedent is overwhelmingly applied or "correct," such that a conflict is in effect merely a couple of aberrational cases.

2. Review of Issues Not Raised

The courts have developed the general rule that appellants may not assert facts or theories on appeal which were not urged before the district court. In some cases the rule is applied strictly, since "[t]he time for sorting out theories begins long before the filing of a notice of appeal."\footnote{355} The trial court "is not to be trapped" by the appellant's earlier tactical decision or abandonment.\footnote{356} The rule may have its strictest application where the assertion first raised on appeal is factual or reflects a conscious waiver.\footnote{357} In some cases, "additional facts would have been developed in the trial court had the new theory been presented there; in that case, judicial economy is served and prejudice

352. Id. at 1354 (footnote omitted).
354. See also Castillo, 704 F.2d at 187 n.12 (citing "substantial line of authority" but also independently analyzing value of each position).
357. See id. at 324-26. See also Compass Insurance Co. v. Vanguard Insurance Co., 649 F.2d 331 (5th Cir. 1981).}
is avoided by binding the parties to the facts presented and the theories argued below."\textsuperscript{358}

Despite the strict warnings, however, many cases eventually go on to decide the new issue. The general rule is not jurisdictional but is “one left primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual cases.”\textsuperscript{359} A common exception is usually made where the newly raised issue concerns a pure question of law and a refusal to consider it would result in a miscarriage of justice.\textsuperscript{360} Other factors which make courts more willing to consider virgin issues include consent by the other party\textsuperscript{361} and matters for which the proper resolution is beyond real doubt.\textsuperscript{362}

Similar rules apply in other “waiver” situations. For example, it is said to be impermissible to raise an issue for the first time in a reply brief since the appellee then gets no chance to respond.\textsuperscript{363} The appellate court need not address issues which should have been raised by cross-appeal.\textsuperscript{364} Of course, it is likely that these “waivers” will themselves be waived by an appeals court finding it necessary to address an issue critical to the litigation or the decisional law. The appeals court generally has a “duty to apply the correct law.”\textsuperscript{365}

\begin{itemize}
  \item \textsuperscript{358} Higginbotham v. Ford Motor Co., 540 F.2d 762, 768 n.10 (5th Cir. 1976).
  \item \textsuperscript{360} The language and situation is, of course, reminiscent of “plain error” principles applied in other settings. See supra text accompanying notes 187, 199, 277. But here an “injustice” justifies review at all rather than providing the “standard of review,” level of deference, or amount of error that need be shown.
  \item \textsuperscript{361} Nilsen, 674 F.2d at 387 n.13 (“absence of a strong argument from the appellee”). Another important factor is the full opportunity of each party to address the issue. Id.
  \item \textsuperscript{362} See Singleton, 428 U.S. at 121.
  \item \textsuperscript{364} It is often said that no cross-appeal is necessary to urge alternative theories in support of the lower court’s judgment. See French v. Estelle, 692 F.2d 1021, 1024 n. 5 (5th Cir. 1982).
  \item \textsuperscript{365} Empire Life Ins. Co. v. Valdak Corp., 468 F.2d 330, 334 (5th Cir. 1972)(emphasis in original).
\end{itemize}
3. Harmless Error

Even where the district court or jury has made an error of law or fact in the situations discussed throughout this article, the Eleventh Circuit does not automatically reverse the lower decision. Rule 61 provides the general principle of “harmless error” applicable in civil actions:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. 366

The circuit has framed this test for prejudice as a basic question: “We must determine whether, assuming the action under review to have been erroneous, was it really harmful to the complaining party?”367 The courts add as a corollary that if the result below is correct it must be affirmed, even though the district court relied on a wrong ground or gave a wrong reason.368 In applying these principles, then, every “standards of review” issue may also involve the question, either preliminary or ultimate, of whether any potential error would effect a substantial unfairness upon the parties.369

4. Habeas Appeals

Habeas corpus cases on appeal, though involving elements and is-

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369. Some errors are per se reversible, especially where constitutional issues or judicial prophylactic measures are concerned. E.g., Rovinsky v. McKasle, 722 F.2d 197, 201-02 (5th Cir. 1984)(denial of right to public trial warrants reversal even without prejudice). See generally Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980)(en banc).
sues of the criminal law, are of course structured as civil appeals, and
the federal district judge acts as a fact finder or hearing-master as he
would in the usual civil proceeding. The court’s findings of fact, for
example, are subject to the clear error test of Rule 52(a). The
habeas case in the lower court also often involves referral to a magis-
trate for preliminary consideration.

Habeas appeals from district court review of state court convictions
necessarily involve two levels of federal appellate review. In such
cases the federal circuit court generally gives state court decisions and
written findings a “presumption of correctness.” But the two levels
may clash when the federal district court’s fact findings are contrary to
state court findings. Presumably appellate review giving a “presump-
tion of correctness” is about equal to review for “clear error,” so that
where district court differs from state court the tug of appellate pre-
sumptions is from opposite, but equally strong, directions. If the first
level of deference—to state courts—is to have meaning, it appears that
the “clear error” deference given the district court may have to give
way some. That rationale may, of course, underlie the “glosses” on the
clearly erroneous rule the former Fifth Circuit developed for cases built
on documentary evidence, since habeas cases often run through the
federal courts on paper.

The Supreme Court set out in *Jackson v. Virginia* the habeas
standard for sufficiency of evidence. Allowing all reasonable inferences
to be drawn in the government’s favor, the appeals court must affirm
if “any rational trier of fact could have found the essential elements of

See supra notes 23, 24, 31-44 and accompanying text. *See generally Watts*, 655 F.2d at 1353 n.9 (discussing fact findings and characterizations for such situations as adequate representation, sufficiency of evidence, identification procedures, and multiple representation), cert. denied, 456 U.S. 949 (1982).

See supra note 28 and accompanying text.


See supra notes 55-70 and accompanying text.


*See Glasser v. United States*, 315 U.S. 60, 80 (1942).
the crime beyond a reasonable doubt.\textsuperscript{377} It could be argued that Jackson intended even less review discretion to the federal courts in state habeas cases than with the sufficiency test for direct appeals, or at least that even more deference should be given the states. But the appeals courts do not generally perceive such a distinction, often applying Jackson on direct appeals.\textsuperscript{378}

\section*{III. Conclusion}

Appellate courts seldom do their magic from an empty hat. The work of the lower courts—sometimes including state courts—or administrative agency frequently defines how the appeals judges look at the litigation and how far they can go in making law. What one court recently admonished is often true: "We take this occasion to repeat: we do not sit to hear cases de novo."\textsuperscript{379}

But in the final analysis the appeals court’s duty is to make a correct decision. In frequent situations the judges are ultimately given “plain error” review, which means that at a minimum they can reverse for a manifest miscarriage of justice. Thus, the Eleventh Circuit judge, regardless of the first-level standard of review, need not preside over a substantial injustice. In the long run, then, standards of review can be powerful case-defining and power-assigning tools, but they should not serve as a Dickens-like limit to the judges’ sense of fairness. It has worked out that in practice the avoidance of a rank injustice is indeed a legitimate ultimate standard of review. At the same time, regardless of the substantive standard of review or the transparent nature of the lower court’s error, the appellate court may not reverse unless the appellant's substantial rights are abridged.\textsuperscript{380} Judge Frank once noted the irony of the deference levels in the standards-of-review notion:

A wag might say that a verdict is entitled to high respect because the jurors are inexperienced in finding facts, an administrative finding is given high respect because the administrative officers are specialists (guided by experts) in finding a particular class of facts, but, paradoxically, a trial judge's finding has far less respect because he is blessed neither with jurors' inexperience nor adminis-

\textsuperscript{377} Jackson, 443 U.S. at 319.
\textsuperscript{378} See, e.g., United States v. Shaw, 701 F.2d 367 (5th Cir. 1983).
\textsuperscript{379} Commercial Standard, 703 F.2d at 908.
Of course, the courts have added to this straightforward observation with plenty of defining texts and minute categorization of special situations. But even at a high level, at any rate, it is a wise “wag,” as practicing attorney, who keeps the various standards straight and uses them—along with any ambiguities and inconsistencies—to frame the issues in the client’s best light. The wise court, too, will sort out the checkpoints and follow them, keeping in mind the final test in either direction for substantial fairness. Meanwhile, the profession as a whole, joined by legal commentators, may remember the ubiquitous nature of the standards of review and further the inquiry into their value and fairness, not just in each case, but upon the legal system as a whole.