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## Say What: Confusion in the Courts over What Is the Proper Standard of Review for Hearsay Rulings

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# SAY WHAT?? CONFUSION IN THE COURTS OVER WHAT IS THE PROPER STANDARD OF REVIEW FOR HEARSAY RULINGS

*Todd J. Bruno* \*

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## I. INTRODUCTION

“[I]t is not entirely clear whether construction of a hearsay rule is a matter of discretion or a legal issue subject to de novo review.”<sup>1</sup> “The circuits are also split (sometimes internally) on essentially the same issue in the context of . . . evidentiary rules.”<sup>2</sup> In 2012, judges from both the Sixth Circuit and Ninth Circuit Courts of Appeals recognized both intra-circuit confusion and an inter-circuit split on what standard of review should apply to a district court’s determination of whether evidence is admissible under the hearsay rules and exceptions.<sup>3</sup> Professor John Wigmore noted in 1904 that the hearsay rule dates back to the 1500’s and that it was essentially fully developed by the 1700’s.<sup>4</sup> Several hundred years after the creation and development of the hearsay rule, however, the appellate court still struggles with whether the resolution of a hearsay objection is a matter of law, a matter of fact, or something that is completely within the discretion of the trial court.

The discussions on the authority split noted in the Sixth and Ninth Circuit both occurred in 2-1 decisions at the federal appellate level—one on April 19, 2012 and one on November 16, 2012—with the dissenting opinion in each case emphasizing that an abuse of discretion standard should be the proper standard of review for an appellate court in all evidentiary rulings.<sup>5</sup> In recognizing the confusion, the majority opinion in

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<sup>1</sup> *Wagner v. Cnty. of Maricopa*, 701 F.3d 583, 587 (9th Cir. 2012).

<sup>2</sup> *United States v. Clay*, 677 F.3d 753, 755 (6th Cir. 2012) (Kethledge, J., dissenting) (noting circuit split on issue of what standard of review applies to hearsay rulings).

<sup>3</sup> *Id.* (discussing standard of review); *Wagner*, 701 F.3d at 591-92 (Smith, J., dissenting) (“This circuit’s case law is not entirely clear regarding whether we review de novo a district court’s decision that a statement is or is not hearsay.”).

<sup>4</sup> John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 437 (1904) (“The history of the Hearsay Rule, as a distinct and living idea, begins only in the 1500’s, and it does not gain a complete development and final precision until the early 1700’s.”).

<sup>5</sup> *Clay*, 677 F.3d at 755-56 (Kethledge, J., dissenting) (“So perhaps eventually the Supreme

*Wagner v. County of Maricopa*<sup>6</sup> agreed with the dissent on one key point and highlighted the confusion in the second line of the “Discussion” in its opinion by acknowledging the dissent and agreeing that there is a lack of clarity within the Ninth Circuit.<sup>7</sup> However, the court chose not to resolve the ambiguity and stated that the court’s “conclusions would be the same under either standard.”<sup>8</sup>

In *United States v. Clay*,<sup>9</sup> the primary issue on petition for rehearing en banc involved judicial review of a bad-acts evidence ruling under Federal Rule of Evidence 404(b).<sup>10</sup> In the dissent, which called for an abuse of discretion for all evidentiary decisions, Judge Raymond M. Kethledge noted his exhaustive research in articulating the split in authority on the same issue of what standard of review to apply in the hearsay context.<sup>11</sup> Judge Kethledge not only mentions competing standards of review from different circuits for hearsay rulings, he also demonstrates to the reader that the Sixth and Ninth Circuit have intra-circuit confusion on the rules by citing cases from within both of those circuits that use either a de novo standard or an abuse of discretion standard to review a hearsay issue.<sup>12</sup>

State appellate courts have also struggled in determining the proper standard to apply when reviewing district court hearsay rulings. Some states, such as Nebraska and Utah, have even created hearsay-specific standards of review “tests” because of the multiple layers of inquiry that go into each hearsay determination.<sup>13</sup> As recently as 2005, other states have even overruled past cases that used abuse of discretion to review hearsay rulings to create a new de novo review standard when reviewing hearsay rulings.<sup>14</sup>

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Court will remind us again that ‘abuse of discretion is the proper standard of review of a district court’s evidentiary rulings.’” (citing *Gen. Elec. Co. v. Joiner*, 555 U.S. 136, 141 (1997)); *Wagner*, 701 F.3d at 591 (Smith, J., dissenting) (“We review the district court’s remaining evidentiary rulings for abuse of discretion.” (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997))).

<sup>6</sup> 701 F.3d 587 (9th Cir. 2012).

<sup>7</sup> See *Wagner*, 701 F.3d at 587 (pointing out ambiguity in hearsay rule).

<sup>8</sup> *Id.*

<sup>9</sup> 677 F.3d 753 (6th Cir. 2012).

<sup>10</sup> *Id.* at 754-55 (Kethledge, J., dissenting).

<sup>11</sup> *Id.* at 755 (expressing complexity of hearsay standard of review).

<sup>12</sup> *Id.* (demonstrating confusion caused by competing standards).

<sup>13</sup> See *State v. Jacob*, 494 N.W.2d 109, 118 (Neb. 1993) (overruling cases using abuse of discretion standard to review hearsay rulings and creating two-part test); *Hansen v. Heath*, 852 P.2d 977, 978 n.3 (Utah 1993) (listing cases that used contradictory standards of review before creating a new three-tiered approach). See generally discussion *supra* Parts V.B.4-5.

<sup>14</sup> *Bernadyn v. State*, 887 A.2d 602, 606 (Md. 2005) (emphasis in original) (holding that “[w]hether evidence is hearsay is an issue of law reviewed *de novo*”).

Most notably, in *State v. Saucier*,<sup>15</sup> the Connecticut Supreme Court performed a state-by-state and circuit-by-circuit survey in 2007 in an attempt to “clarify” the standard of review that appellate courts in Connecticut should use with respect to district court hearsay rulings.<sup>16</sup> In that case, the majority concluded that there is no “categorical” or “bright line” rule approach to determining the standard of review applicable to evidentiary claims on appeal and held that courts should use a different standard depending on the context of the ruling.<sup>17</sup> In *Saucier*, three of the seven justices were part of a concurring-in-part opinion that was written separately only to disagree with the standard of review discussion in the majority opinion.<sup>18</sup> As noted within the concurring opinion, “[u]ntil the majority’s decision in this case, it had been ‘axiomatic [in Connecticut] that [t]he trial court’s ruling on the admissibility of evidence is entitled to great deference’” and that “[t]his deferential standard is [generally] applicable to evidentiary questions involving hearsay.”<sup>19</sup>

Consequently, many federal and state appellate courts end up in one of two positions. Courts are often either confused about what standard of review is proper for hearsay rulings or are reconsidering whether new tests should be created specifically for hearsay rulings, with many jurisdictions abandoning the traditional abuse of discretion review of evidentiary rulings. At the same time, however, many of these opinions are met with opposing viewpoints from other judges sitting on the same panel who are typically urging for a simple abuse of discretion review for hearsay and all other evidentiary rulings.<sup>20</sup>

This article will explore the unique nature of the hearsay rule and its exceptions that have created chaos among the various federal and state jurisdictions. The confusion oftentimes stems from the fact that trial courts have traditionally had broad discretion to make evidentiary decisions based on its understanding of the issues and evidence at trial, as well as its ability

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<sup>15</sup> 926 A.2d 633 (Conn. 2007).

<sup>16</sup> *State v. Saucier*, 926 A.2d 633, 638 (Conn. 2007) (clarifying standard of review through state-by-state and circuit-by-circuit survey); *see also* discussion *infra* Part V.B.6 (discussing standard in Supreme Court of Connecticut).

<sup>17</sup> *Saucier*, 926 A.2d at 640-41 (concluding that no rule determines standard of review applicable to evidentiary claims on appeal).

<sup>18</sup> *Id.* at 649-50 (Norcott, J., concurring) (disagreeing with majority’s standard of review).

<sup>19</sup> *Id.* at 651-52 (citing *State v. Calabrese*, 902 A.2d 1044, 1053 (Conn. 2006)).

<sup>20</sup> *See, e.g.*, *United States v. Clay*, 677 F.3d 753, 754 (6th Cir. 2012) (Kethledge, J., dissenting) (advocating for abuse of discretion standard due to lower court’s knowledge of case); *Wagner v. Cnty. of Maricopa*, 701 F.3d 583, 591 (9th Cir. 2012) (Smith, J., dissenting) (suggesting review of hearsay rulings using abuse of discretion standard); *Saucier*, 926 A.2d at 650 (Norcott, J., concurring) (stating hearsay issue should fall under abuse of discretion standard).

to hear and assess witness testimony at the trial level.<sup>21</sup> However, as will be seen in this article, courts are reconsidering this traditional deference in the context of hearsay rulings. In exploring the different levels of review used by federal and state appellate courts, at least six different “tests” are used to review a trial court’s hearsay ruling:

Abuse of discretion standard traditionally used for all evidentiary rulings;

De novo review as a general rule with several documented exceptions that require an abuse of discretion or clear error review;

Two-part test that asks appellate courts to (a) review de novo the question of whether a statement is hearsay and (b) review for abuse of discretion regarding whether the statement falls within a hearsay exception;

Two-part test that asks appellate courts to (a) review for clear error the factual findings underpinning a trial court’s hearsay ruling and (b) review de novo the court’s ultimate determination to admit evidence over a hearsay objection;

Three-part test that asks appellate court to (a) review legal questions for correctness or legal error under a de novo review, (b) review questions of fact for clear error, and (c) review the final ruling on admissibility for abuse of discretion; and

No bright line rule at all, but instructs appellate courts to apply a different standard of review depending on the context of each specific hearsay ruling.<sup>22</sup>

After reading the conflicting opinions on this issue and after learning that federal and state appellate courts have created at least six different standards to review hearsay rulings by the trial court, you might be left thinking “say what?” to express your surprise or astonishment that the courts have not figured this out, even though the hearsay rule has been around for centuries.<sup>23</sup>

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<sup>21</sup> See *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (“In deference to a district court’s familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court’s evidentiary rulings.”); see also *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (pointing out district court’s error in excluding expert testimony).

<sup>22</sup> See *infra* Part V.B.1-6 (analyzing standards and tests in different jurisdictions).

<sup>23</sup> Say What, [URBANDICTIONARY.COM](http://m.urbandictionary.com/#define?term=say%20what), <http://m.urbandictionary.com/#define?term=say%20what> (last visited February 1, 2013). Urbandictionary.com defines “Say what” as “[a] term used when a person wishes for a surprising or astonishing statement to be repeated, or simply to show their surprise at said statement.” *Id.* “To accurately model the timbre of the phrase, omit a high pitch during the last portion of the phrase in addition to stretching the “what” as long as deemed necessary by the user: Say (In high pitch) Whaaaaat?!!” *Id.*

The article, in Part II, will explain the various standards of review used by appellate courts and how those have been defined generally. In Part III, the article will explain why trial courts have traditionally been given deference in terms of its decisions on admissibility of evidence. The article will then briefly discuss, in Part IV, the hearsay rule and some of the exceptions that have been the subject of confusion for appellate courts. The article, in Part V, will attempt to explain how the various appellate courts have grappled with the issue of how much deference should be afforded to trial courts' decisions to admit or exclude evidence on hearsay grounds. Finally, in Part VI, the article will argue that this may just be a matter of semantics, and that it is possible that none of the courts are, in fact, in disagreement conceptually. Most importantly, the article suggests that appellate courts might be able to create a simpler, more coherent approach to reviewing hearsay rulings by the district courts.

## II. STANDARDS OF REVIEW

Standards of review are the metaphorical hinges on the door to the realm of appellate review; they determine just how much deference will be allowed through the door when a case is up for review. Understanding the purpose and application behind standards of review is a crucial courtroom skill. Standards of review not only define the framework for appeal by highlighting both the facts and the law of a given case, they also determine whether the appellate court will use a plenary or deferential approach when reviewing the trial court's decision.<sup>24</sup> Consequently, standards of review are, more often than not, outcome-determinative; they can "doom any number of appeals from the start . . . ."<sup>25</sup> It would seem obvious, then, that the precedent for a standard of review would be given great weight and significance by the reviewing court in its specified application.<sup>26</sup>

However, in actual practice, the standards of review are not often

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<sup>24</sup> STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 1.01, at 1-4 (3d ed. 1999) (detailing how facts and law are interpreted under standard of review); Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 531 (2004) (highlighting importance of standard of review).

<sup>25</sup> Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 241 (2009) (quoting MICHAEL D. ZIMMERMAN, *BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS* 45-46 (Robert L. Haig ed., 2nd ed. 2008)); Nicolas, *supra* note 24, at 531 (discussing purpose of standard of review).

<sup>26</sup> Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 64-65 (2000) (discussing significance of Chevron case to judicial review of statutory interpretation).

given great consideration.<sup>27</sup> Often this is because the application of a given standard of review is not always easily discernible.<sup>28</sup> As a result, standards of review “are sometimes ignored, manipulated, or misunderstood” and are frequently disregarded as a boilerplate insert in a court opinion.<sup>29</sup> Yet, for standards of review to function properly, they must be thoroughly understood, correctly applied, and used throughout an analysis by a reviewing court when making a judgment on the decision of a lower court.<sup>30</sup>

To understand and apply a standard of review properly, the appellate court must have knowledge of what the standards of review are and understand the standard of review’s designated purposes.<sup>31</sup> Standards of review are established through a court rule, a judicial decree, a state statute, or by constitution.<sup>32</sup> The concept behind standards of review is that an appellate court will use the standards for guidance in approaching both a trial court’s decision and the issues up for review.<sup>33</sup> More specifically, the standard of review applied is intended to indicate the amount of deference to be given to the lower court’s procedure and decision and to set forth the proper materials that the appellate court should look to during the review process.<sup>34</sup> Ultimately, a standard of review answers two similar, yet different, questions: (1) “‘How ‘wrong’ the lower court has to be before it will be reversed?’” and (2) What is necessary to overturn the [lower court’s] decision?<sup>35</sup> When an appellate court is faced with these questions, the most common standards of review used to supply an answer (or at least

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<sup>27</sup> See *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997). Appellate courts frequently reserve only a few lines to state the standard of review without providing any further analysis. *Id.* In *Old Chief*, a well-cited example, the standard of review for evidentiary issues was not addressed in the opinion of the case, but rather only in a footnote. *Id.*

<sup>28</sup> Davis, *supra* note 26, at 64-65 (describing difficulty of utilizing selected standard of review).

<sup>29</sup> See Peters, *supra* note 25, at 234, 257-58 (analyzing reasons for multiple standards of review).

<sup>30</sup> *Id.* at 234-36.

<sup>31</sup> *Id.*

<sup>32</sup> J. ERIC SMITHBURN, APPELLATE REVIEW OF TRIAL COURT DECISIONS 7-8 (2009) (discussing variety of ways that standards of review are created).

<sup>33</sup> CHILDRESS & DAVIS, *supra* note 24, § 1.01, at 1-1.

<sup>34</sup> Davis, *supra* note 26, at 47 (highlighting how standards of review indicate amount of deference given to trial court); see also SMITHBURN, *supra* note 32, at 7 (linking standard of review to level of deference); CHILDRESS & DAVIS, *supra* note 24, § 1.01, at 1-3 (detailing how facts and law are interpreted under standard of review).

<sup>35</sup> Peters, *supra* note 25, at 235 (quoting Mary Beth Beazley, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 12 (2d ed. 2006) (discussing threshold for reversing lower court’s ruling); SMITHBURN, *supra* note 32, at 7 (describing requirements for overturning lower court’s ruling).



a guideline) are de novo, clearly erroneous, and abuse of discretion.<sup>36</sup>

#### *A. De Novo*

The English translation of the Latin phrase de novo means “from the beginning” or “anew,” which lends to the understanding that the de novo standard of review does not provide any deference to the lower court’s procedure or decision.<sup>37</sup> When employing the de novo standard of review, the appellate court is placed in the same position as the lower court and is equally equipped with the materials needed to decide the issue.<sup>38</sup> The de novo standard of review, also referred to as “independent” or “plenary” review, is traditionally used for the review of questions of law, though this is not stated by any rule.<sup>39</sup> Questions of law are reviewed de novo on the theoretical basis that a reviewing court is afforded more time to research and consider such issues because they are not confronted with the fast-paced trials of the lower court.<sup>40</sup> Additionally, the reviewing court is considered to be at an advantage because it contains a multi-judge panel that is capable of greater amount of dialogue.<sup>41</sup>

Due to the appellate court’s equitable footing when a lower court’s decision is being reviewed de novo, the appellate court reviewing the issue is provided with substantial power to reverse the decision.<sup>42</sup> De novo review awards the appellate court with greater authority to reverse a decision without deference.<sup>43</sup> Thus, an individual bringing a case on appeal is expected to have his or her best chances staked here.<sup>44</sup> Accordingly, it may be most advantageous to frame an issue as a question of law.<sup>45</sup> However, de novo review is also occasionally applied to mixed questions, which are questions involving both those of law and fact.<sup>46</sup> Confusion and

<sup>36</sup> Peters, *supra* note 25, at 242 (offering standards of review for guidance).

<sup>37</sup> *Id.* at 246 (articulating meaning of de novo); DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 31:3, at 701 (5th ed. 2007) (discussing when and how to apply de novo standard); *see also* Peters, *supra* note 25, at 246 (analyzing de novo standard).

<sup>38</sup> Peters, *supra* note 25, at 246 (discussing appellate court’s decision in reviewing decisions de novo); *see also* SMITHBURN, *supra* note 32, at 9 (employing de novo standard places appellate court in same position as lower court).

<sup>39</sup> KNIBB, *supra* note 37, § 31:3, at 701 (addressing ways de novo is defined); *see* SMITHBURN, *supra* note 32, at 9 (explaining historic use of de novo standard of review).

<sup>40</sup> SMITHBURN, *supra* note 32, at 8 (elucidating reasons for de novo review).

<sup>41</sup> *Id.* (explaining rationales for exercising different standards of review).

<sup>42</sup> Peters, *supra* note 25, at 266 (warning of judicial manipulation of standards of review).

<sup>43</sup> *Id.* at 246 (explaining that appellate court has power to reverse trial court’s decision).

<sup>44</sup> *Id.* at 274 (discussing difficulty in discerning standards used by appellate court).

<sup>45</sup> *Id.* at 275 (providing remedial measures).

<sup>46</sup> SMITHBURN, *supra* note 32, at 9 (offering that some circuits hold that standard of review

misuse have a higher chance of occurring when questions of fact are reviewed alongside questions of law under the de novo standard of review because questions of fact are reviewed with deference under the clearly erroneous standard.<sup>47</sup>

An appellate court is not equipped with the same materials as the lower court in making factual findings.<sup>48</sup> Reviewing mixed questions of law and fact under a “blanket de novo standard” creates the dangerous possibility that an appellate court could improperly reverse factual findings.<sup>49</sup> Because this could change the outcome of a case entirely, it may be wiser for reviewing courts to provide a deeper case-by-case analysis of which standard should apply to mixed questions of law and fact.<sup>50</sup>

### *B. Clearly Erroneous*

When an appellate court reviews a lower court’s decision for clear error, it allows a handsome amount of deference to the lower court’s determinations in reaching a decision.<sup>51</sup> Such deference is accorded under the clearly erroneous standard of review because the trial court is considered to act as the principal fact-finder in a case.<sup>52</sup> Once the factual findings have been made, the trial court will apply those facts to the law to produce its ultimate determinations.<sup>53</sup>

The trial court is given the role of the fact-finder because the trial court is considered to be in a better position than a reviewing court to determine the facts; the trial court possesses more experience in uncovering the facts and observing witness testimony.<sup>54</sup> Additionally, independent

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for mixed questions is de novo); *see, e.g.*, *Malone v. Clark*, 536 F.3d 54, 62 (1st Cir. 2008) (determining factual findings are reviewed for clear error, while mixed questions are reviewed de novo); *Rizzo v. Smith*, 528 F.3d 501, 505 (7th Cir. 2008) (finding legal questions and mixed questions of law and fact are reviewed de novo); *Matthews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004) (finding mixed question of law and fact are reviewed de novo).

<sup>47</sup> SMITHBURN, *supra* note 32, at 10 (warning of confusion when questions of fact and questions of law are reviewed de novo).

<sup>48</sup> *Id.* (distinguishing appellate court from lower court regarding de novo standard of review).

<sup>49</sup> *Id.*

<sup>50</sup> *See In re Excide Technologies*, 607 F.3d 957, 962 (3d Cir. 2010) (finding mixed standard for mixed questions and clearly erroneous standard for integral facts). The interpretation and application of those facts to a legal standard are under plenary review. *Id.* Some reviewing courts have stated the use of a multi-standard strategy for mixed questions. *Id.*

<sup>51</sup> SMITHBURN, *supra* note 32, at 10 (explaining crux of clear error review); *see also* Peters, *supra* note 25, at 245 (showing mechanics of clear error review).

<sup>52</sup> *See* SMITHBURN, *supra* note 32, at 10 (explaining purpose of clearly erroneous standard).

<sup>53</sup> Peters, *supra* note 25, at 245 (discussing appellate review process).

<sup>54</sup> SMITHBURN, *supra* note 32, at 8-9 (giving trial court deference because it possesses more

review of the facts of every case by a reviewing court that was not present for witness testimony or equipped with the same materials as the trial court could lead to a greater chance of mistake.<sup>55</sup> Also, this would be a waste of valuable resources.<sup>56</sup> The trial court is naturally in a better position to view the facts; therefore, the appellate court provides deference to the trial judge's factual findings and only reviews questions of fact for clear error.<sup>57</sup>

A reviewing court will find a trial court's decisions as clearly erroneous when, after considering the evidence as a whole, the lower court has been found, with certainty, to have made a clear mistake.<sup>58</sup> An appellate court cannot make a clearly erroneous finding if it would have had a different interpretation of the facts or if it does not agree with the decisions reached by the lower court.<sup>59</sup> On appeal, however, if the appellate court does deem a factual finding as clearly erroneous, it may not reverse the lower court's decisions and make its own findings of fact.<sup>60</sup> When reviewing for clear error, the appellate court is equipped only with the authority to remand the case to the lower court "for a further attempt at proper findings."<sup>61</sup> As a result of the considerable amount of deference given to the lower court, it is not common for an appellate court to find a trial court's decision to be clearly erroneous.<sup>62</sup>

### *C. Abuse of Discretion*

When a district court's decision entails the exercise of a judge's

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experience with facts and testimony).

<sup>55</sup> *Id.* at 8-10 (stating reasons for trial court as fact-finder).

<sup>56</sup> *Id.* at 8-9 ("[A]void the waste of resources that would accompany plenary review of facts at the appellate level.").

<sup>57</sup> *Id.* at 10 (highlighting appellate court's function compared to trial court); see FED. R. CIV. PRO. 52(a)(6) (granting appellate court power to set aside trial court findings).

<sup>58</sup> See FED. R. CIV. PRO. 52(a)(6) (stating requirements for appellate court to set aside findings of lower court); *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (determining when finding is "clearly erroneous"). 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 made. *U.S. Gypsum Co.*, 333 U.S. at 395.

<sup>59</sup> Peters, *supra* note 25, at 244-45 ("[C]learly erroneous review is still very respectful of the trial court's factual determinations."); see *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (finding clearly erroneous standard of review to be deferential). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse even if convinced that it would have weighed the evidence differently. *Zant*, 486 U.S. at 223.

<sup>60</sup> SMITHBURN, *supra* note 32, at 10-11 (stating trial court is given deference for findings of fact when reviewed on appeal); see also Peters, *supra* note 25, at 245 (same).

<sup>61</sup> SMITHBURN, *supra* note 32, at 10-11 (explaining that appellate court is equipped only with authority to remand under clear error review).

<sup>62</sup> *Id.*

discretion, an appellate court will review those decisions for an abuse of discretion.<sup>63</sup> The abuse of discretion standard of review does not (and perhaps cannot) have a singular definition; applying the abuse of discretion standard is greatly dictated by the surrounding circumstances and, as such, the application of the standard allows for flexibility accordingly.<sup>64</sup> While the abuse of discretion standard provides the greatest deference to the lower court's decision, the amount of deference given will always vary because the reasons are numerous for allowing a trial judge to exercise discretion.<sup>65</sup> Theoretically, as long as the lower court's discretion has provided a decision that falls within a range of acceptable choices, it will be allowed to stand and the appellate court will not typically find an abuse of discretion.<sup>66</sup> Thus, the abuse of discretion standard, at best, is a "useful generic term . . . [that] more accurately describes a *range* of appellate responses."<sup>67</sup>

The situations in which an abuse of discretion occurs are often broad and overwhelming because there is no one definition for abuse of discretion.<sup>68</sup> Thus, in general, a reviewing court will find an abuse of discretion to exist in many different situations. The court will use an abuse of discretion standard when a judge fails to consider necessary factors, considers the wrong factors, applies incorrect or erroneous conclusions of law, applies incorrect or erroneous assessments of evidence to form a

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<sup>63</sup> *Id.* at 11-12 (detailing where abuse of discretion review is appropriate); see also KNIBB, *supra* note 37, § 31:4, at 702 (stating that when district court exercises discretion then appellate court reviews with abuse of discretion).

<sup>64</sup> See Peters, *supra* note 25, at 244 (explaining how abuse of discretion standard is defined in numerous ways); see also SMITHBURN, *supra* note 32, at 12 (determining when abuse of discretion occurs); KNIBB, *supra* note 37, § 31:4, at 702-04 (describing when abuse of discretion occurs); Davis, *supra* note 26, at 54-55, 57-58 (describing abuse of discretion when incorrect factors are considered, or exercise of decision is arbitrary). The appellate court will find an abuse of discretion when decision-maker considers incorrect factors or when exercises discretion arbitrarily. SMITHBURN, *supra* note 32, at 12. Abuse of discretion takes place when the district court considers wrong factors, uses incorrect law, or makes a finding based on clearly erroneous material fact. KNIBB, *supra* note 37, § 31:4, at 702-04.

<sup>65</sup> SMITHBURN, *supra* note 32, at 11-12 (explaining discretionary amount varies due to numerous reasons for judge to exercise discretion).

<sup>66</sup> KNIBB, *supra* note 37, § 31:4, at 703 (explaining possibilities of how lower court ruling under abuse of discretion standard).

<sup>67</sup> Davis, *supra* note 26, at 77 (defining abuse of discretion standard as one describing variety of appellate responses).

<sup>68</sup> See Peters, *supra* note 25, at 243 (indicating abuse of discretion as most deferential standard of review); see also SMITHBURN, *supra* note 32, at 12 (determining abuse occurs when decision-maker considers incorrect factors or when discretion is arbitrary); KNIBB, *supra* note 37, § 31:4, at 703-04 (stating abuse occurs when court considers wrong factors, uses incorrect law, or makes erroneous findings); Davis, *supra* note 26, at 54-55 (asserting abuse when incorrect factors are considered, or when discretion is contrary to evidence).

decision, or makes a completely arbitrary decision.<sup>69</sup>

The appellate court's attention in reviewing for an abuse of discretion is theoretically supposed to be concentrated on the *process* used by a lower court in making their decision, as opposed to reviewing the decision itself.<sup>70</sup> After finding an abuse of discretion, whether actually found in the trial court's process or not, the appellate court has the authority only to reverse and remand the decision.<sup>71</sup> As with the clearly erroneous standard of review, the decision made was based on the trial court's discretionary power; the reviewing court was not present when the discretionary decision was made and cannot replace that discretionary decision with one the reviewing court would have made.<sup>72</sup>

However, the "ideal" application of the abuse of discretion standard to the issues under review does not always play out in practice as it would in theory.<sup>73</sup> The abuse of discretion standard has no concrete definition or application to guide the reviewing court effectively. Thus, the circumstances in which this standard applies has broadened from examining the process used in making discretionary decisions to include even the merits of a decision.<sup>74</sup>

A prime example of where this occurs is within the main focus of this paper: hearsay rulings. Several states have defined the abuse of discretion standard to apply to both the interpretation of a hearsay rule, which is a matter of law, as well as to the admissibility of the hearsay, which is a matter of discretion.<sup>75</sup> Using the abuse of discretion standard in this all-encompassing manner forces the appellate court to review questions of law with deference, thereby placing great decision-making authority in the hands of the trial court when the appellate court is equally able, if not

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<sup>69</sup> KNIBB, *supra* note 37, § 31:4, at 703-04 (explaining ways abuse of discretion standard is used to overturn lower court's ruling); *see also* SMITHBURN, *supra* note 32, at 12 (same).

<sup>70</sup> Davis, *supra* note 26, at 59 (emphasis added) (explaining that ideal abuse of discretion analyzes merits of decision by lower court itself).

<sup>71</sup> SMITHBURN, *supra* note 32, at 12 (describing authority of appellate court).

<sup>72</sup> Peters, *supra* note 25, at 245 (likening clearly erroneous standard to abuse of discretion standard).

<sup>73</sup> *Id.* at 249 (stating how reviewing court should apply abuse of discretion standard).

<sup>74</sup> Davis, *supra* note 26, at 49 ("[D]iscretion review has come to be applied with a very broad brush . . .").

<sup>75</sup> *See* *People v. Hammonds*, 957 N.E.2d 386, 400 (Ill. App. Ct. 2011) (finding trial court has discretion in deciding whether statements were hearsay); *see also* *State v. Flood*, 219 S.W.3d 307, 313 (Tenn. 2007) (determining trial court's sound discretion will not be reversed unless there is abuse of discretion). Once statements were determined to be hearsay, the trial court then decided if the statements were still admissible under an exception to the hearsay rule. *Hammonds*, 957 N.E.2d at 400.

more able, to make legal determinations.<sup>76</sup>

#### *D. Problems with Defining and Applying Standards of Review*

For the standards of review to function as they were intended to, they must be understood, correctly analyzed, and applied by the reviewing courts throughout the review process.<sup>77</sup> The ability of the appellate court to do so has been impeded by the difficulty in concretely defining all of the standards of review, the lack of a clear line between determining issues of fact and issues of law, and the indecision over which standard is proper to apply in instances of mixed questions.<sup>78</sup> In light of the confusion created by these obstacles, most courts have resigned themselves to inserting boilerplate statements in their opinions by stating briefly which standard of review will be used before delving into the courts' analysis.<sup>79</sup> In some court systems, the confusion has created intra- and inter-circuit splits.<sup>80</sup> Consequently, the theory behind standards of review does not translate into practice.<sup>81</sup> To obtain an understanding of the uses and applications of standards of review, it is important to comprehend where the confusion is stemming from.

##### 1. Analyzing the Definitions

Though standards of review have been in existence since the beginning of American jurisprudence, the standards, as we use them today, are "modern creatures."<sup>82</sup> The appearance of standards of review in court opinions is still a relatively new concept when compared to how long the standards of review have actually been used.<sup>83</sup> Defining standards and their

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<sup>76</sup> Peters, *supra* note 25, at 243.

<sup>77</sup> *Id.* at 236-37.

<sup>78</sup> *Id.* at 247-74 (emphasizing difficulties wrought by standards of review).

<sup>79</sup> *Id.* at 255 (explaining boilerplate resolution).

<sup>80</sup> See generally *United States v. Clay*, 677 F.3d 753, 755 (6th Cir. 2012) (Kethledge, J., dissenting) (discussing both intra- and inter-circuit split over standard of review for evidentiary rulings).

<sup>81</sup> Peters, *supra* note 25, at 247.

<sup>82</sup> Davis, *supra* note 26, at 47 (describing use of standards to guide appellate review as existing since onset of judicial review).

<sup>83</sup> See *id.* (providing historical context between use and statement of standard of review); Peters, *supra* note 25, at 237-38 (describing how standards were formulated and later discussed); see also *Illinois Cent. R.R. Co. v. Norfolk & W. R. Co.*, 385 U.S. 57, 65-66 (1966) (providing one of earliest appearances of our modern standards of review in Supreme Court opinion). The modern use of standards of review in court opinions did not occur throughout the United States until the late 1950's and 1960's and only regularly in the 1980's. See Peters, *supra* note 25, at

specific applications, in this early stage, has been a difficult task, which has been complicated by the vague language and boundaries used in all attempts to do so.<sup>84</sup> As a result, standards of review, at best, provide only a guideline of how much deference a reviewing court should grant a lower court, rather than a definitive measure.<sup>85</sup> A clear explanation of exactly *when* each standard should apply is lacking.<sup>86</sup>

Many courts have attempted to clarify some of the vagueness on their own by creating new definitions, qualifications, or by expanding on their explanations.<sup>87</sup> Despite the good faith behind these attempts, most result in creating a definition that resembles more of a labyrinth than a clear path.<sup>88</sup> A major problem arising from this labyrinth lies in its inability to determine what an appellate court's limitations are in applying a scope of review to a particular issue.<sup>89</sup> The lack of solid, material definitions and application procedures for the standards of review necessarily convolutes the process for determining the appropriate amount of authority the appellate court *should* wield when reviewing a lower court's decision.<sup>90</sup> This is already occurring in the review of evidentiary matters and mixed questions of law and fact. The courts are now being faced with situations where one standard of review is applied to all of the issues presented, which allows deference where none should be given or, in the alternative, provides no deference when deference should be recognized.

## 2. The Law-Fact Distinction

Analyzing the definitions of each standard of review has not been a simple task and further analysis into the application of the standards of review highlights some of the difficult questions the courts have been facing.<sup>91</sup> Most notably among these questions is whether an issue under review is one of law, one of fact, or a mixed question of law and fact.<sup>92</sup>

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237-38.

<sup>84</sup> Peters, *supra* note 25, at 248 (explaining difficulty in defining standards of review).

<sup>85</sup> CHILDRESS & DAVIS, *supra* note 24, § 1.01, at 1-2.

<sup>86</sup> *See id.* (suggesting that clear explanation of when each standard should apply is lacking).

<sup>87</sup> Peters, *supra* note 25, at 248 (explaining abuse of discretion standard).

<sup>88</sup> *See id.* (suggesting that attempts to explain when to use standards have been confusing).

<sup>89</sup> *Id.* at 276 (elaborating on appellate court's misuse and lack of understanding when utilizing standards of review); *see also* CHILDRESS & DAVIS, *supra* note 24, § 1.01, at 1-4 (describing appellate court's scope of review when analyzing particular issues).

<sup>90</sup> Peters, *supra* note 25, at 248-49 (noting ambiguous language creates significant problem).

<sup>91</sup> Davis, *supra* note 26, at 49.

<sup>92</sup> *Id.* (explaining that question of whether issue is law, fact, or mixed is challenging).

The law-fact distinction is the “broad basis of review differences.”<sup>93</sup> It is important to recognize that the standard of review for issues of law versus issues of fact allow varying levels of deference to the lower court.<sup>94</sup> Thus, understanding the law-fact distinction is especially critical when an issue can be labeled as either law or fact because the chosen standard of review will be based upon that label and will often be outcome-determinative on appeal.<sup>95</sup>

Deciding whether an issue is one of fact or one of law is not always a simple decision; it is one that is highly circumstantial.<sup>96</sup> When an issue could potentially be classified as either law or fact, the decision will usually rest on the wording or on the scope of the decisions made by the lower court.<sup>97</sup> Once a reviewing court determines whether an issue is one of law or fact, this decision dictates which standard of review the appellate court will apply.<sup>98</sup> If an issue is deemed to be one of law, the appellate court should review the issue *de novo*, without any deference to the lower court, by asking whether the decision made below was correct.<sup>99</sup> If an issue is deemed to be one of fact, the appellate court should review the lower court’s decision for clear error, which provides the lower court with a great amount of deference by asking whether the decision-making process of the lower court was reasonable.<sup>100</sup> If an issue is neither one of law or fact and turns on the exercise of the trial judge’s discretion, then the issue should be reviewed for abuse of discretion, providing the lower court with the greatest amount of deference, though, ideally, the appellate courts will put aside the fact-law distinction and their corresponding standards of review.<sup>101</sup>

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<sup>93</sup> See CHILDRESS & DAVIS, *supra* note 24, § 7.05, at 7-32.

<sup>94</sup> See KNIBB, *supra* note 37, § 31:3, at 702 (distinguishing standard of review for issues of law and issues of fact).

<sup>95</sup> See SMITHBURN, *supra* note 32, at 8; *see also* CHILDRESS & DAVIS, *supra* note 24, § 7.05, at 7-32.

<sup>96</sup> See KNIBB, *supra* note 37, § 31:3, at 702 (concluding that determining whether issue is law or fact is difficult).

<sup>97</sup> CHILDRESS & DAVIS, *supra* note 24, § 7.05, at 7-32.

<sup>98</sup> See Davis, *supra* note 26, at 48.

<sup>99</sup> SMITHBURN, *supra* note 32, at 8 (acknowledging use of *de novo* review for legal questions); CHILDRESS & DAVIS, *supra* note 24, § 7.05, at 7-32 (explaining that appellate courts should review issues of law *de novo*).

<sup>100</sup> SMITHBURN, *supra* note 32, at 8 (recognizing clear error review for factual inquiries in appellate courts); CHILDRESS & DAVIS, *supra* note 24, § 7.05, at 7-32 (explaining standard of review used when dealing with factual questions).

<sup>101</sup> SMITHBURN, *supra* note 32, at 8, 11 (stating standard of review should analyze procedural and evidentiary issues).



### 3. Questions of Mixed Law and Fact

Correctly interpreting the law-fact distinction is often outcome-determinative because the distinction determines which standard of review should be applied and how much deference should be accorded. However, because the standards of review for issues of law and fact are very different, there is considerable difficulty involved in dictating which standard of review should apply to questions of mixed law and fact.<sup>102</sup> A question of mixed law and fact asks, “[w]hether the rule of law applied to the established fact is or is not violated.”<sup>103</sup>

The confusion over which standard of review should be employed for issues of mixed law and fact arises because there is no uniform test applied to determine the proper standard of review in these instances.<sup>104</sup> Many circuits apply a de novo standard of review to mixed questions, whereas other circuits treat mixed questions with varying levels of deference.<sup>105</sup> Additionally, some circuits determine the standard of review on a case-by-case basis, while other circuits reveal no pattern in determining which standard to apply.<sup>106</sup> Thus, the courts have provided little guidance in applying the proper standard of review when faced with a question of mixed law and fact.<sup>107</sup>

### 4. Standards of Review as Boilerplates

Due to the lack of guidance in deciphering both the law-fact

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<sup>102</sup> *Id.* at 9-10 (differentiating standards of review for law and fact).

<sup>103</sup> *Id.* at 9 (offering example of mixed law and fact question).

<sup>104</sup> *Id.* at 10 (describing lack of precedent in defining hybrid category).

<sup>105</sup> See *Malone v. Clark*, 536 F.3d 54, 62 (1st Cir. 2008) (determining factual findings are reviewed for clear error, while mixed questions are reviewed de novo); *Rizzo v. Smith*, 528 F.3d 501, 505 (7th Cir. 2008) (finding legal questions and mixed questions of law and fact are reviewed de novo); *Matthews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004) (finding mixed question of law and fact are reviewed de novo); SMITHBURN, *supra* note 32, at 9-10 (stating how mixed questions are reviewed); see also *United States v. Green*, 383 Fed.Appx. 301, 303 (4th Cir. 2010) (determining that court applies due deference standard to mixed questions); *In re Nortel Networks, Inc.*, 669 F.3d 128, 137 (3rd Cir. 2011) (engaging in mixed standard of review for mixed questions). Integral facts are reviewed for clear error and plenary review for the interpretation and application of facts to legal precepts. *In re Nortel Networks, Inc.*, 669 F.3d at 137.

<sup>106</sup> SMITHBURN, *supra* note 32, at 9 (citing Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 240, 249 (1991)) (describing how some circuits differ from others when determining standard of review).

<sup>107</sup> SMITHBURN, *supra* note 32, at 9-10 (neglecting to offer judicial explanation over proper standard of review application for law or fact).

distinction and mixed questions of law and fact, as well as the confusion in finding proper standards of review, many courts have turned to using standards of review as merely a postscript, if at all.<sup>108</sup> Standards of review have become a “cut and paste” option for court opinions and offer little analysis regarding why a specific standard has been chosen in reviewing a particular case.<sup>109</sup> Yet this is no more helpful than ignoring the standards of review altogether.<sup>110</sup> Using standards of review as boilerplates allows the reviewing courts to present them as self-defining and, sometimes, self-applying.<sup>111</sup> If the previous discussion has shown anything, it shows that the standards of review are anything but self-defining and self-applying.<sup>112</sup> Thus, viewing standards of review as boilerplate statements propagates judicial confusion.<sup>113</sup>

Furthermore, a lack of proper articulation of analyzing the standard of review chosen increases the likelihood for judges to find loopholes for employing judicial discretion.<sup>114</sup> Standards of review are complex and rely heavily on circumstance. For there to be any real chance of clearing up the confusion surrounding standards of review, the appellate court must engage in the task of comprehensibly explaining when a standard of review applies, why it is proper, and *how* it is to be applied throughout their opinions when making a decision.<sup>115</sup>

Standards of review often sound deceptively simple. The truth is that all of the standards have “twists, in language or in practice” that distinguish them from one another and from the similar situations in which they can apply.<sup>116</sup> These twists reveal the complex process behind properly applying standards of review and just how tangled that process has become.<sup>117</sup> Nowhere has this point been made clearer than in reviewing evidence where the boilerplate standard used by the courts no longer fits

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<sup>108</sup> Peters, *supra* note 25, at 255 (exposing problems in standard of review applications).

<sup>109</sup> *Id.* (discussing issues with application of standard of review); see Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 752 (2008) (acknowledging that judges have cut and paste string-cite boilerplates when stating standard of review).

<sup>110</sup> Peters, *supra* note 25, at 256 (discussing how practitioners treat standards of review as boilerplate).

<sup>111</sup> CHILDRESS & DAVIS, *supra* note 24, § 1.01, at 1-4 (describing effect of courts using standard of review as boilerplate).

<sup>112</sup> Peters, *supra* note 25, at 256-57 (elucidating difficulties in standards of review).

<sup>113</sup> *Id.* at 257 (noting three standards without articulating which standard utilized by court).

<sup>114</sup> *Id.* (indicating that lack of definition allows for too much judge discretion).

<sup>115</sup> *Id.*

<sup>116</sup> CHILDRESS & DAVIS, *supra* note 24, § 1.01, at 1-4 (distinguishing standards of review based on language or practice).

<sup>117</sup> CHILDRESS & DAVIS, *supra* note 24, § 1.01, at 1-4.

the practice.<sup>118</sup>

### III. EVIDENTIARY RULINGS AND STANDARDS OF REVIEW

The appellate court states that evidentiary rulings made by the lower court are within the discretion of the lower court and, as such, are generally to be reviewed for an abuse of discretion.<sup>119</sup> In fact, each Federal Circuit Court and the Supreme Court has stated that evidentiary rulings are typically reviewed for an abuse of discretion.<sup>120</sup> Abuse of discretion has been the go-to standard of review for evidentiary rulings because our frame of reference for the appropriate use of judicial discretion is “the trial forum, where a solitary judge rules on the admission of evidence.”<sup>121</sup> This discretion suggests that, in evidentiary matters, among other areas of law, the trial judge is not bound by any law to give a decision on an issue one way versus another.<sup>122</sup> Evidence rules allow the trial court to exercise discretion when the trial court is in a better position to make an evidentiary ruling than an appellate court.<sup>123</sup> The trial court is allotted further discretion regarding evidentiary questions.<sup>124</sup>

The appellate court must review these decisions with great deference because it better enables the trial judge to manage his or her

<sup>118</sup> Peters, *supra* note 25, at 255-56.

<sup>119</sup> CHILDRESS & DAVIS, *supra* note 24, § 11.02, at 11-5 (discussing appellate review of admissibility decisions); see PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 6.13, at 87 (3d ed. 2009) (same).

<sup>120</sup> See, e.g., *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997) (declaring standard of review applicable to evidentiary rulings of district courts is abuse of discretion); *United States v. Diaz*, 670 F.3d 332, 344 (1st Cir. 2012) (same); *United States v. Pruett*, 681 F.3d 232, 243 (5th Cir. 2012) (same); *United States v. Reese*, 666 F.3d 1007, 1018 (7th Cir. 2012) (same); *Wagner v. Cnty. of Maricopa*, 701 F.3d 583, 587 (9th Cir. 2012) (same); *Chism v. CNH Am. LLC*, 638 F.3d 637, 640 (8th Cir. 2011) (same); *Brown v. Norris*, 819 F.Supp.2d 1249, 1250 (11th Cir. 2011) (same); *Witkowski v. Int’l Bhd. of Boilermakers*, 404 Fed.Appx. 674, 677 (3d Cir. 2010) (same); *United States v. Mercado*, 573 F.3d 138, 141 (2d Cir. 2009) (same); *United States v. Basham*, 561 F.3d 302, 325 (4th Cir. 2009) (same); *Nolan v. Memphis City Schools*, 589 F.3d 257, 264 (6th Cir. 2009) (same); *Perkins v. Silver Mountain Sports Club & Spa, LLC*, 557 F.3d 1141, 1146 (10th Cir. 2009) (same).

<sup>121</sup> Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1100 (1984) (explaining circumstances of judicial discretion).

<sup>122</sup> *Id.* at 1101 (indicating latitude at trial court level).

<sup>123</sup> See RODGER C. PARK ET AL., EVIDENCE LAW 613 (3d ed. 2011); see also *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (“In deference to a district court’s familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court’s evidentiary rulings.”).

<sup>124</sup> *Mendelsohn*, 552 U.S. at 384.

courtroom and produce decisions that have finality.<sup>125</sup> Having the appellate court review evidentiary issues for an abuse of discretion enables the trial court to make decisions with necessary leeway so that the ultimate goal of “truth-determination” may be achieved.<sup>126</sup> Due to the great amount of deference conferred upon trial courts in evidentiary matters, the trial court is “granted a virtual shield” from reversal.<sup>127</sup> Generally, as long as a decision falls within an acceptable range of *possible* decisions, the appellate court will not overturn this decision, even if an error existed in the application of discretionary rules.<sup>128</sup>

However, the idea that not all evidentiary rulings should be reviewed under the unitary standard of abuse of discretion is fundamental and crucial to proper appellate review.<sup>129</sup> While the appellate court generally applies a generic “abuse of discretion” rubber stamp to evidentiary issues on review, the trial court’s appraisal in forming a decision can be “highly variable” and sometimes requires a different, more applicable review approach.<sup>130</sup> A trial court’s evidentiary decision as to an admissibility determination, at times, can hinge on both legal and discretionary questions.<sup>131</sup> When issues of interpretation and admissibility are both present in an evidentiary ruling, it is necessary for the reviewing court to distinguish whether a *de novo* standard, an abuse of discretion standard, or both is proper.<sup>132</sup> Alternatively, if the appellate court finds that an evidentiary issue within a rule did not confer any discretion to the trial judge, the appellate court should give less deference and apply a *de novo* standard of review.<sup>133</sup>

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<sup>125</sup> PARK, *supra* note 123, at 613 (explaining that appellate courts must review trial court decisions with great deference).

<sup>126</sup> *Id.* at 612 (explaining underlying policy’s purpose when allowing trial judge some deference).

<sup>127</sup> *Id.* at 613 (describing trial courts as practically protected from reversal).

<sup>128</sup> *Id.* at 614.; *see also* Waltz, *supra* note 121, at 1101.

<sup>129</sup> David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1155, 1188 (1992) (“That not all evidentiary rulings should be reviewed according to the same standard is a fundamental proposition.”).

<sup>130</sup> CHILDRESS & DAVIS, *supra* note 24, § 11.02, at 11-5 to -6.

<sup>131</sup> *Id.* § 11.02, at 11-6; *see, e.g.*, State v. Alvarez-Abrego, 225 P.3d 396, 361-62 (Wash. Ct. App. 2010) (reviewing evidentiary rules interpretation *de novo* and evidence admissibility interpretation for abuse of discretion); Citizens Fin. Grp. Inc. v. Citizens Nat’l Bank of Evans City, 383 F.3d 110, 132-33 (3rd Cir. 2004) (reviewing Federal Rules of Evidence interpretation *plenary* while reviewing decision to admit evidence for abuse); United States v. Alvarez, 358 F.3d 1194, 1214 (9th Cir. 2004) (determining hearsay rule construction *de novo* and decision to admit non-hearsay for abuse of discretion).

<sup>132</sup> Leonard, *supra* note 129, at 1188 (“[N]ot all evidentiary rulings should be reviewed according to the same standard . . .”).

<sup>133</sup> PARK, *supra* note 123, at 614 (suggesting when appellate court should use *de novo*

Although there is a great need for this type of in-depth reasoning and analysis for determining a proper standard of review for an evidentiary ruling, many courts still apply the “abuse of discretion” rubber stamp and ignore the different standards that may be more appropriate.<sup>134</sup> In fact, most courts are divided on which standard is the “appropriate” standard when reviewing evidentiary rulings.<sup>135</sup> While there may not be one correct answer in finding an appropriate standard in these instances, the reviewing court can help achieve some clarification “by explicitly pointing to the issue to be decided.”<sup>136</sup> This can be achieved by first determining whether an evidentiary issue involves a trial judge’s discretion, a factual decision, or a question of law to help illuminate the proper standard.<sup>137</sup>

When evidentiary issues are reviewed for an abuse of discretion, it would be a mistake to assume that the application of that standard has the same meaning in all cases.<sup>138</sup> Clarification on *how* the abuse of discretion standard is applied to evidentiary matters is still needed.<sup>139</sup> Clarification is also required on *whether* the abuse of discretion is applied or should be applied to all evidentiary rulings; in particular, the evidence rule that has created the most confusion for students, lawyers, professors, and judges for centuries: hearsay.<sup>140</sup> As already noted and as will be explored more below, courts reconsidering this question often create new tests or use de novo review for issues of hearsay. Before considering how courts have struggled with this issue, a brief introduction to hearsay is helpful for context.

#### IV. THE HEARSAY RULE AND THE MULTIPLE LAYERS OF ANALYSIS

“It is almost universally acknowledged that hearsay is less valuable than other forms of information.”<sup>141</sup> Three primary reasons have

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standard of review).

<sup>134</sup> Leonard, *supra* note 129, at 1188.

<sup>135</sup> JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE 103-46 (Joseph P. McLaughlin ed., 2d ed. 2006) (describing courts as divided when determining which standard to use for evidentiary rulings).

<sup>136</sup> CHILDRESS & DAVIS, *supra* note 24, § 11.02, at 11-8.

<sup>137</sup> *Id.* § 11.02, at 11-8 (suggesting that clarification can be achieved by first defining type of issue).

<sup>138</sup> Leonard, *supra* note 129, at 1193.

<sup>139</sup> See Leonard, *supra* note 129, at 1193 (urging for clarification of abuse of discretion standard).

<sup>140</sup> *Id.* at 1164 (stating de novo standard used when threshold rule is not satisfied).

<sup>141</sup> CHRISTOPHER W. BEHAN, EVIDENCE AND THE ADVOCATE: A CONTEXTUAL APPROACH TO LEARNING EVIDENCE 349 (2012) (suggesting that hearsay is less valuable than other

traditionally been given for this. The reasons are that the statement was not given under oath, the statement was not given in the presence of the fact-finder so there is no opportunity to judge the demeanor of the person making the statement, and there was no opportunity for cross-examination to test such indicators like the perception, memory, narration, and sincerity of the person who made the statement.<sup>142</sup>

Figuring out if a statement is admissible over a hearsay objection involves multiple layers of inquiry.<sup>143</sup> Without going into a full and exhaustive description of the hearsay rule and its exceptions, which typically takes 200 pages of an Evidence textbook or might require a 250-page supplemental study aid just to understand that one article in the Federal Rules of Evidence, the inquiry can be broken down to two simple steps: (1) is the statement hearsay by definition; and, (2) if so, does it meet any exceptions?<sup>144</sup> First, the trial court must determine if a statement fits the definition of hearsay. To do this, the court determines: (1) is it a statement, (2) is it a statement other than one made by the declarant while testifying at trial or hearing, and (3) is it being offered for the “truth of the matter asserted?”<sup>145</sup> The trial court examines many potential legal and factual issues with the help of these three questions.<sup>146</sup> For example, the decision of whether the statement was made out of court would seem to be a fairly straightforward fact inquiry, yet, it is not always clear if the statement “being offered for the truth of the matter asserted” is a factual decision requiring deference by an appellate court or a purely legal decision.<sup>147</sup>

On the one hand, the trial court is in the best position to listen to the witness explain what he or she thought the original statement meant when he or she heard it. The trial court is also capable of reviewing all of the circumstances that gave context to the statement, which calls for a clear

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evidence).

<sup>142</sup> FED. R. EVID. art. VIII advisory committee’s note (listing factors considered in evaluating testimony of witnesses).

<sup>143</sup> *Id.* (describing determination of whether statement is admissible as involving layers of inquiry).

<sup>144</sup> See, e.g., *United States v. Dwyer*, No. 05-3140, 2012 WL 2948189, at \*3-5 (3d Cir. July 20, 2012) (applying process to review hearsay rulings); BEHAN, *supra* note 141, at 349-542 (discussing length of chapter entitled “Introduction to Hearsay”); CLIFFORD S. FISHMAN, A STUDENT’S GUIDE TO HEARSAY 250 (3d ed. 2007) (focusing on length of supplemental study aid for hearsay).

<sup>145</sup> FED. R. EVID. 801(c) (defining hearsay).

<sup>146</sup> *Dwyer*, 2012 WL 2948189, at \*3-5.

<sup>147</sup> See, e.g., *id.* at \*3-5 (applying process to review hearsay rulings); BEHAN, *supra* note 141, at 349-542 (discussing length of “Introduction to Hearsay” chapter); Fishman, *supra* note 144, at 250 (focusing on length of supplemental study aid for hearsay).

error or abuse of discretion review.<sup>148</sup> Yet, on the other hand, the appellate court will often consider whether a statement fits the definition of hearsay as a legal question and will consequently perform a de novo standard of review.<sup>149</sup>

The rationale behind the de novo review is best explained in *State v. Saucier*,<sup>150</sup> whereby a Connecticut case embarked on the challenging state-by-state and circuit-by-circuit survey into the various standards of review used in the hearsay context:

[W]hether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no “judgment call” by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility.<sup>151</sup>

In other words, many courts have decided that, because the definition of hearsay is a legal definition, the courts simply have to make legal determinations. However, as noted above and as will be seen in the cases discussed below, this oversimplifies the various levels of inquiry that go into figuring out merely if a statement even qualifies as hearsay.<sup>152</sup>

Second, if a statement does qualify as hearsay, the trial court must consider whether an exception applies to the hearsay statement.<sup>153</sup> These legal rules contain legal definitions that seem to call for legal determinations.<sup>154</sup> Yet most appellate courts recognize that there are certain concepts in the hearsay exceptions that require deference because of the call for the trial court’s expertise, experience, and unique position to perceive witness testimony.<sup>155</sup> Examples of these hearsay exceptions from case law are detailed below, but one can simply look to the Federal Rules of Evidence for commonsense examples that might call for fact-finding,

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<sup>148</sup> *State v. Saucier*, 926 A.2d 633, 641-42 (Conn. 2007).

<sup>149</sup> *See id.* (distinguishing appellate courts from trial courts in determining whether statement is hearsay).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 641 (explaining rationale of de novo review).

<sup>152</sup> *See Wagner v. Cnty. of Maricopa*, 701 F.3d 583, 587 (9th Cir. 2012).

<sup>153</sup> *See discussion infra* Part V.B.2.

<sup>154</sup> *See discussion infra* Part V.B.2.

<sup>155</sup> *See generally discussion infra* Part V.B.2. Even appellate courts that customarily perform a de novo review for all hearsay rulings agree that trial courts require deference in some situations. *See discussion infra* Part V.B.2.

credibility determinations, and a trial judge's quick decision-making.<sup>156</sup>

Rule 803(2) of the Federal Rules of Evidence requires the judge to decide whether a statement was related to "a startling event or condition" and whether the declarant was under the stress and excitement caused by the event or condition.<sup>157</sup> Rule 803(3) asks whether the statement communicates the declarant's "then existing mental, emotional, or physical condition" and oftentimes requires a decision on whether the statement was one that shows "intent, plan, (or) motive."<sup>158</sup> Both of these exceptions seem to require basic fact-finding and judgment calls that would traditionally be left to a trial judge.

In addition, some hearsay exceptions specifically call for a determination of credibility or "trustworthiness" such as Federal Rules of Evidence 803(6), 803(8), and 807.<sup>159</sup> It would be difficult to imagine how an appellate court could say that it would be in a similar or better position to make this determination of "trustworthiness" than the trial court. In these situations, deference should be owed to the decision of the court below.<sup>160</sup>

Therefore, if a trial court is determining whether a statement meets the definition of hearsay or whether a statement meets an exception to hearsay, the language of the rules does not provide any neat formula for whether a trial court ruling on the ultimate admissibility of the statement would involve purely factual determinations or purely legal determinations.<sup>161</sup> Traditionally deference is owed to a trial court on evidentiary rulings and the basic legal and factual inquiries that go into a trial court's hearsay ruling. Additionally, the approaches of the various courts regarding appellate review of hearsay rulings should be reviewed.

## V. STANDARDS OF REVIEW IN HEARSAY RULINGS

Before attempting to illustrate how various jurisdictions approach the standard of review in relation to hearsay, it must be emphasized that many of the state and federal appellate court judges are not entirely sure

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<sup>156</sup> See FED. R. EVID. 803(2)–(3), (6)–(7).

<sup>157</sup> FED. R. EVID. 803(2) (explaining excited utterances).

<sup>158</sup> FED. R. EVID. 803(3) ("A statement of declarant's then-existing state of mind . . . or emotional, sensory, or physical condition . . .").

<sup>159</sup> See FED. R. EVID. 803(6)(E), ("[N]either the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness."); FED. R. EVID. 803(8) (discussing public records exception to hearsay); FED. R. EVID. 807(a)(1) ("[H]as equivalent circumstantial guarantees of trustworthiness.").

<sup>160</sup> See generally discussion *infra* Part V.B.2.

<sup>161</sup> See CHILDRESS & DAVIS, *supra* note 24, § 1.02, at 11-18.



what standard is being used within their jurisdiction.<sup>162</sup> This point has been most recently and emphatically noted in two 2012 cases.<sup>163</sup> These cases from the Sixth and Ninth Circuit, *United States v. Clay* and *Wagner v. County of Maricopa*, respectively document a split in the circuits and the confusion and conflict in their own jurisdictions.<sup>164</sup>

#### *A. Confusion in the Sixth and Ninth Circuits*

At issue in *Wagner* was the question of whether a statement was properly excluded under the state of mind exception found in Rule 803(3) of the Federal Rules of Evidence.<sup>165</sup> Although the majority and dissenting opinions disagreed on whether the exception was met, the judges agreed on one thing: there was no clear rule on what standard of review applies to a hearsay ruling.<sup>166</sup> In his dissent, Judge N. Randy Smith begins his “Standard of Review” section by stating, “[t]his circuit’s case law is not entirely clear regarding whether we review de novo a district court’s decision that a statement is or is not hearsay.”<sup>167</sup> In response, Judge John T. Noonan, writing for the majority, agreed and stated in the majority opinion: “[a]s Judge Smith points out, it is not entirely clear whether construction of a hearsay rule is a matter of discretion or a legal issue subject to de novo review.”<sup>168</sup> The majority and dissenting opinions in *Wagner* together cited eight different cases from the Ninth Circuit between 1994 and 2011 that use different standards of review for this issue.<sup>169</sup>

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<sup>162</sup> See *Wagner v. Cnty. of Maricopa*, 701 F.3d 583, 587-89 (9th Cir. 2012).

<sup>163</sup> *United States v. Clay*, 677 F.3d 753, 755 (6th Cir. 2012) (Kethledge, J., dissenting); *Wagner*, 701 F.3d at 587-89.

<sup>164</sup> *Clay*, 677 F.3d at 755 (Kethledge, J., dissenting) (discussing intra-circuit conflict); *Wagner*, 701 F.3d at 592 (Smith, J., dissenting) (describing how majority and dissent disagree on appropriate standard of review).

<sup>165</sup> *Wagner*, 701 F.3d at 587 (pointing out central issue in case).

<sup>166</sup> *Id.* (discussing lack of clarity in defining which type of abuse of discretion should be used).

<sup>167</sup> *Id.* at 591 (Smith, J., dissenting) (pointing out that de novo standard should be applied).

<sup>168</sup> *Id.* at 587 (majority opinion).

<sup>169</sup> Compare *United States v. Stinson*, 647 F.3d 1196, 1210-11 (9th Cir. 2011) (using abuse of discretion standard for hearsay ruling), with *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000) (using de novo standard for hearsay ruling); compare *United States v. Stinson*, 647 F.3d 1196, 1210 (9th Cir. 2011) (“We review a district court’s evidentiary rulings for abuse of discretion.”), and *United States v. Tran*, 568 F.3d 1156, 1162 (9th Cir. 2009) (applying abuse of discretion standard in determining whether statement is hearsay under Rule 801), with *Mahone v. Lehman*, 347 F.3d 1170, 1173-74 (9th Cir. 2003) (“We review the district court’s construction of the hearsay rule de novo . . . .” (quoting *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 778 (9th Cir. 2002))); and *United States v. Collicott*, 92 F.3d 973, 978-82 (9th Cir. 1996) (reviewing statements were hearsay and not admissible de novo without mentioning abused of discretion), with *United States v. Warren*, 25 F.3d 890, 894-95 (9th Cir. 1994) (holding that statements were

Notably, the Ninth Circuit recognizes the uncertainty in this area, even though it chose not to resolve this uncertainty for future cases.<sup>170</sup>

The Sixth Circuit recently declared a broader uncertainty among the circuits regarding the various standards used by federal appellate courts to review hearsay rulings.<sup>171</sup> Judge Kethledge, in his dissent that urged appellate courts to use an abuse of discretion standard for all evidentiary rulings, noted several cases from the First, Second, Fifth, Sixth, and Ninth Circuits, which explain that either a de novo or abuse of discretion standard of review is used for hearsay rulings.<sup>172</sup> Not only is it significant that a federal appellate judge has pointed out that the circuits are in disagreement on this, but throughout his note and accompanying string cite, he also discloses that the Sixth and the Ninth Circuit have actually disagreed with itself on the issue.<sup>173</sup>

In the last two lines of the dissent, Judge Kethledge sums up the major problem by asserting the fact that there is no consensus on the proper standard of review: “[b]ut again the relevant point is that we have one panel after another disagreeing with each other as to which of these tests controls. The practical result should be intolerable. In our circuit even the most

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admissible without mentioning abuse of discretion). All the cases listed above were cited in the dissenting opinion in *Wagner*. *Wagner*, 701 F.3d at 591.

<sup>170</sup> See, e.g., *United States v. Stinson*, 647 F.3d 1196, 1210 (9th Cir. 2011) (reviewing trial court ruling for abuse of discretion); *Mahone v. Lehman*, 347 F.3d 1170, 1173-74 (9th Cir. 2003) (reviewing trial court’s construction of the hearsay de novo); *United States v. Collicott*, 92 F.3d 973, 978-82 (9th Cir. 1996) (reviewing statements were hearsay and not admissible de novo without mentioning abused of discretion).

<sup>171</sup> *United States v. Clay*, 677 F.3d 753, 755 (6th Cir. 2012) (Kethledge, J., dissenting) (highlighting Sixth Circuit’s note of broader uncertainty among circuits regarding hearsay ruling standards).

<sup>172</sup> *Id.* at 755-56 (“So perhaps eventually the Supreme Court will remind us again that ‘abuse of discretion is the proper standard of review of a district court’s evidentiary rulings.’” (citing *U.S. Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997))). Compare *United States v. Tatum*, 462 F.App’x 602, 605-06 (6th Cir. 2012) (emphasis in original) (“[W]e review *de novo* the court’s ultimate legal conclusion that the statements may be received as non-hearsay”), and *United States v. Ferguson*, 676 F.3d 260, 285 (2d Cir. 2011) (applying de novo review to the question whether evidence is hearsay), and *Mahone v. Lehman*, 347 F.3d 1170, 1171 (9th Cir. 2003) (citation omitted) (applying de novo review to “construction of the hearsay rule”), with *United States v. Brown*, 669 F.3d 10, 22 (1st Cir. 2012) (reviewing admission of purported hearsay for abuse of discretion), and *United States v. Tran*, 568 F.3d 1156, 1162 (9th Cir. 2009) (reviewing decision for abuse of discretion that statement is admissible hearsay) and *United States v. Lopez-Garcia*, No. 98-2252, 1999 WL 707783, at \*2 (10th Cir. Aug. 18, 1999) (applying abuse-of-discretion review to decision whether evidence is hearsay), and *Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 716-17 (6th Cir. 1999) (rejecting de novo review of district court’s decision whether evidence is inadmissible hearsay). *Clay*, 677 F.3d at 755 (Kethledge, J., dissenting) (citing listed cases).

<sup>173</sup> *Clay*, 677 F.3d at 754 (Kethledge, J., dissenting) (nothing disagreement between Sixth and Ninth Circuit).

conscientious district-court judge cannot tell what the law is on this important issue.”<sup>174</sup>

### *B. Six Different Standards and Tests in Various Jurisdictions*

When reviewing the federal and state courts to figure out what standard is used by appellate courts to review hearsay rulings made by trial courts, confusion is the norm. As noted earlier, often the appellate courts in the circuit or at the state level will disagree with earlier holdings and have trouble determining the standard of review for their own jurisdictions.<sup>175</sup> In addition, many jurisdictions self-identify as having one standard of review but will break from that particular standard when it is convenient for a particular case.<sup>176</sup> Consequently, accurately identifying all of the various standards is challenging, even when judges and their clerks attempt to take a survey of the federal and state courts.<sup>177</sup> At least six different standards of review are used by various courts when analyzing trial court rulings on hearsay: (1) traditional abuse of discretion used for all evidentiary rulings; (2) de novo review as general rule, but breaking from that rule for review of fact and credibility determinations; (3) two-part test where court first reviews whether statement fits definition of hearsay de novo and second reviews for abuse of discretion whether statement falls within hearsay exception; (4) two-part test where court reviews first for clear error the factual findings underpinning a trial court’s hearsay ruling and second reviews de novo the ultimate determination to admit the evidence; (5) three-part test that uses a mix of de novo, clear error, and abuse of discretion; and (6) no bright line rule at all that uses a standard of review depending on the issues raised by the particular hearsay objection.<sup>178</sup>

#### 1. Abuse of Discretion

As detailed in Part III, trial courts are traditionally afforded great deference in all evidentiary rulings primarily because the trial court is in the best position to hear and assess the witnesses’ testimony in the context

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<sup>174</sup> *Id.* at 756 (summarizing major problem with circuit split).

<sup>175</sup> See discussion *supra* Part I (highlighting complexities of applying appropriate standard of review and lack of consistency).

<sup>176</sup> See discussion *infra* Part V.B.2 (analyzing hearsay rulings de novo and factual or credibility determinations by clear error or abuse).

<sup>177</sup> See discussion *infra* Part V.B (describing different standards of review).

<sup>178</sup> See discussion *supra* Part III (detailing standards of review).

of the entire trial, and the trial judge has customarily been given leeway to manage his or her courtroom and put forth decisions that have finality.<sup>179</sup> Most jurisdictions use the abuse of discretion standard of review for hearsay rulings as well.<sup>180</sup> In explaining the rationale behind this level of deference, the Tenth Circuit explained that, “Given the fact- and case-specific nature of hearsay determinations, ‘our review of those decisions is especially deferential.’”<sup>181</sup>

In spite of the fact that courts using this standard emphasize the “fact- and case-specific” determinations, a few of the appellate courts

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<sup>179</sup> See discussion *supra* Part II (outlining standards of review and problems with defining and applying them).

<sup>180</sup> See *United States v. Brown*, 669 F.3d 10, 22 (1st Cir. 2012) (finding hearsay rulings reviewed for abuse of discretion); *United States v. Blechman*, 657 F.3d 1052, 1063 (10th Cir. 2011) (same); *United States v. Nickson*, 628 F.3d 368, 373 (7th Cir. 2010) (same); *United States v. Wright*, 540 F.3d 833, 843 (8th Cir. 2008) (same); *United States v. Williams*, 506 F.3d 151, 155 (2d Cir. 2007) (same); *United States v. Brown*, 441 F.3d 1330, 1359 (11th Cir. 2006) (same), *cert. denied*, 549 U.S. 1182 (2007); *United States v. Alexander*, 331 F.3d 116, 121–22 (D.C. Cir. 2003) (same); *United States v. Ware*, 29 Fed.Appx. 118, 119 (4th Cir. 2002) (same); *United States v. Aguilar-Tamayo*, 300 F.3d 562, 564 (5th Cir. 2002) (same); *Kolmes v. World Fibers Corp.*, 107 F.3d 1534, 1542 (Fed. Cir. 1997) (same); *Queen v. Belcher*, 888 So.2d 472, 477 (Ala. 2003) (same); *Wyatt v. State*, 981 P.2d 109, 112 (Alaska 1999) (same); *State v. Tucker*, 68 P.3d 110, 118 (Ariz. 2003) (same); *Miller v. State*, 362 S.W.3d 264, 282 (Ark. 2010) (same); *People v. Zambrano*, 163 P.3d 4, 48–49 (Cal. 2007) (same); *In re Water Rights of Central Colorado Water Conservancy Dist. v. Greeley*, 147 P.3d 9, 17 n.7 (Colo. 2006) (same); *Pressey v. State*, 25 A.3d 756, 758 (Del. 2011) (same); *Butler v. State*, 721 S.E.2d 889, 892 (Ga. 2012) (same); *State v. Chacon*, 186 P.3d 670, 672 (Idaho 2008) (same); *People v. Caffey*, 792 N.E.2d 1163, 1188 (Ill. 2001) (same); *Stephenson v. State*, 742 N.E.2d 463, 473 (Ind. 2001) (same); *State v. Miller*, 163 P.3d 267, 288 (Kan. 2007) (same); *Martin v. Commonwealth*, 170 S.W.3d 374, 382 (Ky. 2005) (same); *Menard v. Holland*, 919 So.2d 810, 815 (La. Ct. App. 2005) (same); *State v. Guyette*, 36 A.3d 916, 919 (Me. 2012) (same); *Commonwealth v. Lampron*, 806 N.E.2d 72, 74 (Mass. 2004) (same); *People v. Stamper*, 742 N.W.2d 607, 609 (Mich. 2007) (same); *State v. Burrell*, 772 N.W.2d 459, 469 (Minn. 2009) (same); *White v. State*, 48 So.3d 454, 456 (Miss. 2010) (same); *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. 2009) (same); *State v. Cameron*, 106 P.3d 1189, 1197 (Mont. 2005) (same); *Harkins v. State*, 143 P.3d 706, 709 (Nev. 2006) (same); *State v. Beltran*, 904 A.2d 709, 715 (N.H. 2006) (same); *State v. P.S.*, 997 A.2d 163, 174 (N.J. 2010) (same); *State v. Lopez*, 258 P.3d 458, 461 (N.M. 2011) (same); *People v. Gantt*, 848 N.Y.S.2d 156, 160 (N.Y. App. Div. 2007) (same); *State v. Brigman*, 632 S.E.2d 498, 504 (N.C. Ct. App. 2006) (same); *State v. Stridiron*, 777 N.W.2d 892, 901 (N.D. 2010) (same); *Beard v. Meridia Huron Hosp.*, 834 N.E.2d 323, 326 (Ohio 2005) (same); *In re J.D.H.*, 130 P.3d 245, 247 (Okla. 2006) (same); *Commonwealth v. Mitchell*, 902 A.2d 430, 456–57 (Pa. 2006) (same); *State v. Gaspar*, 982 A.2d 140, 151 (R.I. 2009) (same); *State v. Byers*, 710 S.E.2d 55, 57–58 (S.C. 2011) (same); *State v. Huber*, 789 N.W.2d 283, 298 (S.D. 2010) (same); *State v. Flood*, 219 S.W.3d 307, 313 (Tenn. 2007) (same); *Nadal v. State*, 348 S.W.3d 304, 318 (Tex. App. 2011) (same); *State v. Haner, Sr.*, 928 A.2d 518, 524 (Vt. 2007) (same); *Lynch v. Com*, 617 S.E.2d 399, 403 (Va. Ct. App. 2005) (same); *State v. Magers*, 189 P.3d 126, 133 (Wash. 2008) (same); *State v. Larry M.*, 599 S.E.2d 781, 786 (W.Va. 2004) (same); *State v. Manuel*, 697 N.W.2d 811, 818 (Wis. 2005) (same); *Boykin v. State*, 105 P.3d 481, 482–83 (Wyo. 2005) (same).

<sup>181</sup> *Blechman*, 657 F.3d at 1063 (quoting *United States v. Chavez*, 229 F.3d 946, 950 (10th Cir. 2000)) (citing *United States v. Hamilton*, 413 F.3d 1138, 1142 (10th Cir. 2005)).

ordinarily reviewing admission of hearsay evidence for abuse of discretion find that there may be some questions of law within the hearsay rule, which permits the court to review those questions *de novo*. For example, the Supreme Court of Kansas explained that anything involving statutory interpretation would require a *de novo* review.<sup>182</sup> In addition, because evidentiary rulings are within the sound discretion of the trial court and the traditional definition as “[a]n abuse of discretion will be found only where the trial court’s ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court,” the Illinois Supreme Court also describes an exception to this general rule of deference.<sup>183</sup> The court explains that evidentiary rulings will be reviewed *de novo* when “a trial court’s exercise of discretion has been frustrated by an erroneous rule of law.”<sup>184</sup>

Some jurisdictions define abuse of discretion as having a multi-layered approach that analyzes fact and law issues separately and with different standards of review. For example, the Missouri Supreme Court explained:

A trial court can abuse its discretion through the inaccurate resolution of factual issues or through the application of incorrect legal principles. Where the facts are at issue, appellate courts extend substantial deference to trial court decisions. However, when the issue is primarily legal, no deference is warranted and appellate courts engage in *de novo* review.<sup>185</sup>

The Second Circuit appears to do the best job of explaining the complicated and confusing interplay between the abuse of discretion and *de novo* standards of review:

[A] district court necessarily “abuses its discretion” if it makes an error of law. In this way, review for “abuse of discretion” and *de novo* review are not entirely distinct concepts, but rather, review for abuse of discretion

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<sup>182</sup> *State v. Robinson*, 270 P.3d 1183, 1198 (Kan. 2012) (citations omitted) (“Ordinarily, we review the admission of hearsay evidence for an abuse of discretion. However, the issue of whether the trial court complied with specific statutory requirements for admitting evidence requires statutory interpretation, which we review *de novo*.”).

<sup>183</sup> *Caffey*, 792 N.E.2d at 1188 (discussing exclusion of hearsay statements).

<sup>184</sup> *Id.* (citing *People v. Williams*, 721 N.E.2d 539, 542 (Ill. 1999)); *People v. Aguilar*, 637 N.E.2d 1221 (Ill. 1994).

<sup>185</sup> *Taylor*, 298 S.W.3d at 492 (explaining evidentiary standard of review).

incorporates, among other things, *de novo* review of district court rulings of law.<sup>186</sup>

Therefore, the abuse of discretion standard of review spans the spectrum of deference. At one extreme, it is a standard so deferential that it has been described as a “virtual shield” or “rubber stamp” of trial court rulings; but at the other end of the spectrum, when it is defined to necessarily include *de novo* review of legal conclusions, it is a standard that owes no deference to a trial court ruling.<sup>187</sup> As explored in detail in the next five subsections, despite this potential definition or rule of abuse of discretion as one that sweeps sufficiently far to encompass *de novo* review of legal rulings, many jurisdictions create special standards of review for hearsay determinations that further emphasize the many layers of inquiry in a typical hearsay ruling.<sup>188</sup>

## 2. De Novo Review

Several state jurisdictions call for a *de novo* review of hearsay rulings as its self-defined standard of review.<sup>189</sup> These jurisdictions emphasize that hearsay determinations primarily involve statutory interpretation.<sup>190</sup> They further explain that a trial court does not have discretion to interpret the rules of hearsay.<sup>191</sup> The Supreme Court in Connecticut, which claims to reject a *de novo* standard of review, describes the rationale for using a *de novo* review for hearsay rulings as one that reviews the legal questions with plenary review to ensure the trial court’s discretion of hearsay and hearsay exceptions was soundly determined.<sup>192</sup>

Of the jurisdictions that adopt the *de novo* standard of review, most recognize exceptions to that level of deference and apply a clear error or abuse of discretion review when the trial court engages in fact-finding or

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<sup>186</sup> United States v. Hasan, 586 F.3d 161, 168 (2d Cir. 2009) (emphasis in original) (quoting United States v. Legros, 529 F.3d 470, 473 (2d Cir. 2008)) (“The abuse-of-discretion standard incorporates *de novo* review of questions of law (including interpretation of the Guidelines) and clear-error review of questions of fact.”).

<sup>187</sup> See discussion *supra* Part III (elaborating on abuse of discretion standard).

<sup>188</sup> See discussion *infra* Part V.B.2-6 (explaining various standards of review for hearsay determinations).

<sup>189</sup> See discussion *infra* Part V.B.6 (explaining *de novo* standard).

<sup>190</sup> See discussion *infra* Part V.B.6 (noting importance of statutory interpretation).

<sup>191</sup> See discussion *infra* Part V.B.6 (describing *de novo* standard).

<sup>192</sup> State v. Saucier, 926 A.2d 633, 641 (Conn. 2007) (discussing plenary review); see discussion *infra* Part V.B.6 (describing inconsistencies and confusing legal reasoning in *Saucier*). *Saucier* explains its rationale for *de novo* review but ultimately applies an abuse of discretion review. See *Saucier*, 936 A.2d at 641; see also discussion *infra* Part V.B.6.

credibility determinations required for ruling. For example, appellate courts that generally use de novo review for hearsay will defer to the trial court's rulings on many different matters.<sup>193</sup> These matters include whether an excited utterance has been made, whether a conspiracy existed, whether a statement was offered for something other than the truth of the matter asserted, and whether "trustworthiness" determinations were found in several hearsay exceptions.<sup>194</sup>

*a. De Novo Review with No Exception – Maryland*

Courts in Maryland ordinarily review evidence rulings with an abuse of discretion standard.<sup>195</sup> However, in 2005 the Maryland Court of Appeals held that review of "admissibility of evidence which is hearsay is different."<sup>196</sup> The court stated that the de novo standard of review applies to both questions traditionally faced by a trial court when ruling on hearsay objections: (1) whether the statement is hearsay and (2) whether an exception to hearsay applies.<sup>197</sup>

By reversing a trial court's decision to admit a document and its contents into evidence over a hearsay objection that had been upheld by the intermediate court of appeals, the Maryland Court of Special Appeals broke from the traditional standard of review used to review all evidentiary rulings in the state.<sup>198</sup> This abuse of discretion standard was stated clearly by the intermediate court in *Bernadyn v. State*<sup>199</sup> in its explanation of what the court thought was the standard of review at the time.<sup>200</sup> The intermediate court cited three earlier cases from the Maryland Court of Appeals that articulated the abuse of discretion standard, which had used language as powerful as "plainly inadmissible," "may not be disturbed on

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<sup>193</sup> See *infra* Part V.B.2 (discussing how different appellate courts use de novo review); *Bernadyn v. State*, 831 A.2d 532, 536-37 (Md. Ct. Spec. App. 2003) (allowing deference to trial court unless abuse of discretion occurs), *rev'd*, 887 A.2d 602 (Md. 2005).

<sup>194</sup> See *infra* Part V.B.2; *Bernadyn*, 831 A.2d at 536-37.

<sup>195</sup> See *Hopkins v. State*, 721 A.2d 231, 237 (Md. 1998) (reviewing ruling on evidence with abuse of discretion).

<sup>196</sup> *Bernadyn v. State*, 887 A.2d 602, 606 (Md. 2005) (stating hearsay admissibility requires different kind of review).

<sup>197</sup> *Id.* at 606 ("Whether evidence is hearsay is an issue of law reviewed de novo."). "Hearsay . . . *must* be excluded . . . unless it falls within an exception . . . or is 'permitted by applicable constitutional provisions or statutes.' Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Id.*

<sup>198</sup> See *Bernadyn*, 831 A.2d at 541 (reversing hearsay ruling under abuse of discretion standard of review).

<sup>199</sup> 887 A.2d 602 (Md. 2005).

<sup>200</sup> *Id.* at 606 (stating abuse of discretion standard).

appeal,” and “great deference.”<sup>201</sup>

With the *de novo* standard in place, the court first examined whether a particular piece of evidence, a medical bill discovered at the crime scene, was hearsay.<sup>202</sup> The court held that this document constituted hearsay because it was introduced to prove the truth of the matter asserted; specifically, that defendant resided at the address on the bill.<sup>203</sup> After determining that the document was hearsay, the court turned to whether the document was admissible under the business records exception.<sup>204</sup>

In giving no deference to the trial court’s ruling on either of these questions, the court abandoned the traditional abuse of discretion standard for reviewing the admissibility of evidence over hearsay objections and separated its court system from the many courts that use a two-step review of hearsay rulings.<sup>205</sup> As discussed in Part V.B.3, although some courts consider the first question of whether a statement is hearsay to be a legal issue, these courts recognize that many fact-specific and credibility questions may arise when deciding whether an exception applies.<sup>206</sup> For example, the business records exception at issue in *Bernadyn* raises many questions that might reasonably be considered fact-specific and that might depend on the credibility of a witness. As the court correctly noted, to meet this exception, the State would have been required to show that the document was:

made at or near the time of any event; that it was made by  
a person with knowledge, or from information transmitted  
by a person with knowledge; that the bill was made and

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<sup>201</sup> *Bernadyn*, 831 A.2d at 536-37 (citing *Hopkins v. State*, 21 A.2d 231, 237 (Md. 1998)) (“[W]e extend to the trial court great deference in determining the admissibility of evidence and will reverse only if the court abused its discretion.”), *rev’d*, 887 A.2d 602 (Md. 2005). Reversal occurs “if the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion.” *Id.* at 536 (citing *Merzbacher v. State*, 697 A.2d 432, 439 (Md. 1997)). The court also reviewed *Conyers v. State*, 729 A.2d 910 (Md. 1999), and found that the trial court’s determination regarding the admissibility of evidence “may not be disturbed on appeal unless there has been an abuse of that discretion.” *Id.* The court grants deference to the trial court for “determining the admissibility of evidence and will reverse only if the court abused its discretion.” *Id.* at 537 (citing *Hopkins v. State*, 21 A.2d 231, 237 (Md. 1998)).

<sup>202</sup> *Bernadyn*, 887 A.2d at 607-12 (determining whether medical bill was inadmissible hearsay).

<sup>203</sup> *Id.* (concluding evidence constituted hearsay).

<sup>204</sup> *Id.* at 612-15. The court held that business record exception under Maryland rule 5-803(b)(6) derived from FRE 803(b)(6), did not apply. *Id.* No custodian was called to verify that the document met the specific requirements under the rule and that the document was not self-authenticating to meet exception to hearsay. *Id.* at 615.

<sup>205</sup> See discussion *infra* in Part V.B.3 (recognizing issues arising out of hearsay exception).

<sup>206</sup> See discussion *infra* in Part V.B.3 (recognizing that questions can arise when determining whether hearsay exceptions apply).



kept in the course of regularly conducted business activity;  
or that it was the regular practice of [the business] to make  
and keep that record.<sup>207</sup>

At trial, the State did not even call a witness to testify to any of these matters because the trial court held that the bill was not hearsay, so there was no need to decide whether an exception applied.<sup>208</sup>

However, the questions that are typically raised in meeting the business records exception and that are listed by the court provide a good example of why so many courts use an abuse of discretion or clear error standard when reviewing whether an exception has been met, even when they review the existence of hearsay de novo.<sup>209</sup> Specifically, a trial court might be in a better position to make these determinations because the court asks questions like: was the document made at the time of a particular event?, was it made by a person with knowledge?, was it made in the course of regularly conducted business activity?, and was it the regular practice of the business to make and keep those records?<sup>210</sup> The court's determination of the answers to these questions could very well depend on the credibility of the particular witness who is the proffered custodian of the document.<sup>211</sup>

Regardless of how other jurisdictions view the matter, Maryland courts have continued to use the de novo standard of review in evaluating the business records exception.<sup>212</sup> In addition to using the de novo standard to evaluate a business records exception, the Maryland courts have had the opportunity to use the de novo standard to review the question of whether a statement was offered for the truth of the matter, thus, constituting hearsay.<sup>213</sup> Maryland courts have also used the de novo standard to review

<sup>207</sup> *Bernadyn*, 887 A.2d at 613.

<sup>208</sup> *Id.* at 611 (addressing issue of whether medical bill with address on it is hearsay).

<sup>209</sup> *Id.* at 615 (stating proponent of evidence must establish proper foundation as to its reliability); FED. R. EVID. 803(b)(6) (defining hearsay rule relating to business records).

<sup>210</sup> *Bernadyn*, 887 A.2d at 615 (requiring evidence must to be reliable); FED. R. EVID. 803(b)(6) (defining hearsay rule for business records).

<sup>211</sup> *Bernadyn*, 887 A.2d at 614 (citing FED. R. EVID. 803(6) (“[The trial court] still must determine the truth of the information provided because rule 803(6) also requires that the information be ‘transmitted by, a person with knowledge.’”).

<sup>212</sup> *Hall v. Univ. of Md. Med. Sys. Corp.*, 919 A.2d 1177, 1193 (Md. 2007) (holding “the trial court erred, as a matter of law, by excluding two entries”). The trial court excluded medical records by deciding that the documents were hearsay. *Id.* “The entries met the requirements of the business records exception to the hearsay rule . . .” *Id.*

<sup>213</sup> *Handy v. State*, 30 A.3d 197, 208 (Md. Ct. Spec. App. 2011) (reviewing de novo whether hearsay evidence is issue of law), *cert. denied*, 37 A.3d 318 (Md. 2012). In *Handy*, the court held that the statements were not hearsay because they were offered for purposes of assessing a witness's credibility. *Id.*

whether an exception, other than business records exception, applies to a hearsay statement.<sup>214</sup>

*b. De Novo Review but Recognizing Fact-Finding Deference  
for “Truth of Matter Asserted” and Existence of  
Conspiracy Determinations – Iowa*

Similar to other jurisdictions that use a de novo standard to review hearsay rulings, Iowa courts typically review rulings on the admission of evidence for an abuse of discretion.<sup>215</sup> However, since 1998, the Iowa Supreme Court has instructed that “[during] the course of hearsay rulings, our review is for correction of errors at law.”<sup>216</sup> The standard of review was further clarified in 2003 to make it clear that the de novo standard applies to both the question of whether a particular statement constitutes hearsay and the question of whether a hearsay statement is admissible under an enumerated exception.<sup>217</sup> The Iowa Supreme Court states another justification for the de novo standard by emphasizing that review should be for corrections of errors at law because admission of hearsay evidence is presumed to be prejudicial.<sup>218</sup>

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<sup>214</sup> *Id.* at 208 (reviewing hearsay evidence with de novo standard of review); *Dulyx v. State*, 40 A.3d 416, 429 (Md. 2012) (reviewing admission of former testimony using de novo standard of review). If a witness’s out-of-court statements are offered for purposes of impeachment or rehabilitation of the witness’s credibility, then they are not hearsay. *Handy*, 30 A.3d at 208. The court in *Dulyx* reversed because Rule 5–804(b)(1) allows the defendant to have the opportunity to develop testimony during suppression hearings. *Dulyx*, 40 A.3d at 429. The opportunity to cross-examine is also found in FED. R. EVID. 804(b)(1)(B) because prior testimony must be “now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.” See FED. R. EVID. 804(b)(1)(B).

<sup>215</sup> *State v. Jordan*, 663 N.W.2d 877, 879 (Iowa 2003) (citing *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998)) (“Except in cases of hearsay rulings, trial courts have discretion to admit evidence under a rule of evidence.”).

<sup>216</sup> *Ross*, 573 N.W.2d at 910 (reviewing district court’s determination regarding jury instructions).

<sup>217</sup> *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003) (citing *United States v. McGlory*, 968 F.2d 309, 332 (3d Cir. 1992)) (“[T]he question whether a particular statement constitutes hearsay presents a legal issue.”); see also *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006) (citing *Dullard*, 668 N.W.2d at 589)) (“Subject to the requirement of relevance, the district court has no discretion to deny the admission of hearsay if it falls within an exception, or to admit it in the absence of a provision providing for admission.”). “[A] district court has no discretion to deny the admission of hearsay if the statement falls within an enumerated exception, subject, of course, to the rule of relevance under rule 5.403, and has no discretion to admit hearsay in the absence of a provision providing for it.” *Dullard*, 668 N.W.2d at 589.

<sup>218</sup> See, e.g., *Newell*, 710 N.W.2d at 23–24 (determining whether evidence is hearsay or prejudicial using de novo standard of review); *State v. Long*, 628 N.W.2d 440, 447 (Iowa 2001) (presuming prejudice to non-offering party unless contrary is established); *McElroy v. State*, 637

Despite the often-articulated rule calling for de novo review and corrections of errors of law, the Iowa Supreme Court has deviated from this standard of review or at least alluded to potential fact questions more appropriate for a trial court in three different contexts. In one context, the Iowa Supreme Court reviewed the factual question of whether testimony is being offered for something other than the truth of the matter asserted and thus is not hearsay.<sup>219</sup> In another context, the question was whether the existence of a conspiracy for purposes of Rule 801(d)(2)(E) of the Federal Rules of Evidence.<sup>220</sup> In the third context, in 2004, the court inexplicably broke from the rule, cited to a 1996 intermediate appellate court decision, and invoked an abuse of discretion standard for a hearsay ruling.<sup>221</sup>

In *McElroy v. State*,<sup>222</sup> the Iowa Supreme Court examined whether the district court improperly excluded evidence at trial of prior out-of-court statements concerning the behavior of a graduate student's supervising professor who allegedly sexually harassed her.<sup>223</sup> The issue before the court was whether the statements were offered for the truth of the matter asserted or admissible as non-hearsay to show the plaintiff's "state of mind or knowledge [or] responsive conduct by the defendants."<sup>224</sup> Rather than reviewing the statements and rule as a matter of law regarding whether the statements were hearsay, the decision mentioned several fact-specific examples for the district court to consider during a retrial and instructed the district court to consider whether the excluded evidence had value independent of the truth of the matter asserted in the statement.<sup>225</sup> The

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N.W.2d 488, 493 (Iowa 2001) (holding jury instruction was prejudicial to Appellate and consequently improper); *Ross*, 573 N.W.2d at 910 (stating hearsay is presumed to be prejudicial to non-offering party unless contrary is established).

<sup>219</sup> *McElroy*, 637 N.W.2d at 501 (defining hearsay).

<sup>220</sup> See *State v. Tangie*, 616 N.W.2d 564, 569 (Iowa 2000) (reviewing trial court's determination of conspiracy under substantial-evidence test); see also *Long*, 628 N.W.2d at 447 ("We review a district court's determination that a conspiracy existed [for purposes of Iowa Rule of Evidence 801(d)(2)(E)] under the substantial-evidence test."). The language of IOWA R. EVID. 801(d)(2)(E) is identical to the Federal Rules of Evidence. See IOWA R. EVID. 801(d)(2)(E) (defining statement of coconspirator as made during conspiracy and in furtherance of conspiracy); FED. R. EVID. 801(d)(2)(E) (same).

<sup>221</sup> *State v. Tejeda*, 677 N.W.2d 744, 753 (Iowa 2004) (citing *State v. Forsyth*, 547 N.W.2d 833, 839 (Iowa Ct. App. 1996)) ("Where a party challenges the district courts exclusion of evidence as hearsay, appellate review is for an abuse of discretion.").

<sup>222</sup> 637 N.W.2d 488 (Iowa 2001).

<sup>223</sup> *Id.* at 501 (determining whether lower court misapplied hearsay rule).

<sup>224</sup> *Id.* (discussing issue of whether district court improperly excluded evidence of proper out-of-court statements).

<sup>225</sup> *Id.* at 501-02 (citing *Barrett v. Acevedo*, 169 F.3d 1155, 1163 (8th Cir. 1999)) ("For example, the statement may be offered simply to demonstrate it was made, to explain subsequent actions by the listener, or to show notice to or knowledge of the listener."); *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990) (discussing responsive conduct); *Roberts v. Newville*, 554 N.W.2d

decision also instructed that “[a]lthough a statement may be purportedly offered for a non-hearsay purpose, *the district court must still determine if the party’s true purpose in offering the evidence was in fact to prove the statement’s truth.*”<sup>226</sup> The decision gave specific cases and scenarios in sexual harassment actions for the district court to consider in making this determination.<sup>227</sup>

Although never specifically mentioning that the district court’s hearsay rulings would be reviewed for abuse of discretion or clear error, the court did not rule as a matter of law. Everything in its opinion related to this hearsay question references the fact finding and credibility determinations typically handled by the trial court. Specifically, the decision recognized that certain out-of-court statements are legally admissible when certain facts are present, but left it to the trial court to answer such factual questions as: (1) do these statements help prove notice to the defendant?; (2) do they help prove the defendant responded to allegations?; and (3) do the internal documents help explain the employer’s conduct?<sup>228</sup>

The Iowa Supreme Court has more clearly stated that preliminary fact-finding is necessary in the context of whether a conspiracy existed for purposes of Rule 801(d)(2).<sup>229</sup> To explain why appellate courts should defer to the trial court in making this determination, the court cites to *New York v. Hendrickson Bros.*,<sup>230</sup> a federal appellate court decision.<sup>231</sup>

Under [Federal] Rule 801(d)(2)(E), an out-of-court statement is not hearsay with respect to a given party if it was made by a co-conspirator of that party in furtherance

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298, 300 (Iowa Ct. App. 1996) (characterizing all examples)); 7 JAMES A. ADAMS & JOSEPH P. WEEG, *IOWA PRACTICE SERIES: EVIDENCE* § 801.4, at 578-83 (Thompson-West 2005) (same); JOHN W. STRONG ET. AL., *MCCORMICK ON EVIDENCE* § 249, at 102 (West Group, 5th ed. 1999) (same).

<sup>226</sup> *McElroy*, 637 N.W.2d at 501 (emphasis added) (citing *State v. Hollins*, 397 N.W.2d 701, 705 (Iowa 1987)); *State v. Martin*, 587 N.W.2d 606, 610 (Iowa Ct. App. 1998); ADAMS & WEEG, *supra* note 225, at 569.

<sup>227</sup> *McElroy*, 637 N.W.2d at 502 (citing *Baker v. McDonald’s Corp.*, 686 F.Supp. 1474, 1478 n.10 (S.D.Fla.1987)) (“Generally, out-of-court statements may be relevant in sexual harassment actions to prove either notice or responsive conduct on behalf of the defendant.”). “Furthermore, internal documents relied upon by an employer in making employment decisions in a discrimination case are generally not hearsay because they can be relevant to explain the employer’s conduct.” *Id.* (citing *Wolff v. Brown*, 128 F.3d 682, 685 (8th Cir.1997)).

<sup>228</sup> *See id.* at 501-02 (instructing ways that statements could be introduced as non-hearsay).

<sup>229</sup> *State v. Long*, 628 N.W.2d 440, 446-47 (Iowa 2001) (stating hearsay exception for co-conspirator).

<sup>230</sup> 840 F.2d 1065 (2d Cir. 1988).

<sup>231</sup> *Long*, 628 N.W.2d at 446-47 (citing *Hendrickson Bros.*, 840 F.2d at 1073).

of the conspiracy. In order to admit such a statement, the trial court is required to find, as preliminary facts under Fed. R. Evid. 104(a), that a preponderance of the evidence supports the conclusions that there was a conspiracy, that both the declarant and the party against whom the statement is offered were members of it, and that the statements were made in furtherance of the conspiracy . . . . The trial court's determinations of these preliminary facts may not be disturbed unless they are clearly erroneous.<sup>232</sup>

Noting these factual determinations inherent in hearsay rulings are significant. These factual determinations show that, even in a jurisdiction that reviews hearsay rulings as a matter of law, there are some obvious times when the trial court engages in fact finding to make the rulings.<sup>233</sup> In these instances, it is not the place of an appellate court to substitute its judgment in those situations.<sup>234</sup>

The Iowa Supreme Court again made a break from reviewing hearsay rulings as a matter of law in 2004.<sup>235</sup> This was the only time that the Iowa Supreme Court made a blanket statement holding that hearsay would be reviewed for an abuse of discretion, despite the many cases, before and after, that discuss the question as a legal one.<sup>236</sup> This particular standard of review was also made once afterwards by an intermediate court of appeals in 2005.<sup>237</sup> However, despite these two cases in 2004 and 2005 that inexplicably used the abuse of discretion standard, the Iowa courts seem to be clear that, other than some specific settings, like the factual finding of a conspiracy, review of hearsay rulings should be de novo.<sup>238</sup>

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<sup>232</sup> *Hendrickson Bros.*, 840 F.2d at 1073.

<sup>233</sup> See *Walker v. State*, 668 A.2d 990, 999 (Md. Ct. Spec. App. 1995) (reviewing unreserved issue from trial court).

<sup>234</sup> *Long*, 628 N.W.2d at 447 (“We review the admission of hearsay for errors of law . . . . [h]owever, we give deference to the district court’s factual findings . . . .”).

<sup>235</sup> *State v. Tejada*, 677 N.W.2d 744, 753 (Iowa 2004) (“[A]ppellate review is for an abuse of discretion.”).

<sup>236</sup> *Id.*

<sup>237</sup> *State v. Harper*, 697 N.W.2d 127, at \*1 (Iowa Ct. App. 2005) (Table) (“The Court’s decision is referenced in a ‘Decisions Without Published Opinions’ table in the North Western Reporter.”)

<sup>238</sup> See *State v. Harper*, 770 N.W.2d 316, 319 (Iowa 2009) (citing *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006)) (“We review hearsay claims for errors at law.”).

*c. De Novo Review but Recognizing Fact Finding in “Excited Utterance” Exception – D.C. Circuit*

The District of Columbia follows the majority of jurisdictions in recognizing that the trial court “is entrusted with broad discretion to determine the substance, form, and quantum of evidence which is to be presented to a jury.”<sup>239</sup> Most evidentiary rulings are only reviewed for abuse of discretion.<sup>240</sup> However, whether a particular statement is inadmissible as hearsay or admissible under an exception to the hearsay rule is a question of law that District of Columbia appellate courts review *de novo*.<sup>241</sup>

In joining the many other jurisdictions that seem to contradict themselves—or at least confuse themselves—the appellate courts in the District of Columbia recognized on several occasions that underlying factual findings may be reviewed using a clearly erroneous standard when the court evaluates a trial court’s admission of hearsay statements as excited utterances.<sup>242</sup> The courts then go one step further and state that once a statement has been found to qualify under the excited utterance exception, “the decision whether to admit or exclude the proffered statement . . . is reviewed for abuse of discretion.”<sup>243</sup> The interplay between these three standards was summarized by the District of Columbia Circuit Court in 2011 when the court explained that to evaluate the admissibility of evidence under the excited utterance exception, “our review focuses on the different aspects of the trial court’s decision-fact-finding, application of the law, and exercise of discretion.”<sup>244</sup> The court stresses that determining whether a statement is accepted under a hearsay

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<sup>239</sup> *Johnson v. United States*, 452 A.2d 959, 960 (D.C. 1982) (explaining that trial judge has wide latitude when determining if evidentiary rules are violated).

<sup>240</sup> *Perritt v. United States*, 640 A.2d 702, 705 (D.C. 1994) (“[C]ourt’s scope of review is limited to whether the trial court abused its discretion.”).

<sup>241</sup> See *Dutch v. United States*, 997 A.2d 685, 689 (D.C. 2010) (emphasis in original) (citing *Brown v. United States*, 840 A.2d 82, 88 (D.C. 2004)) (“[T]he determination of whether a statement falls under [the excited utterance] exception . . . is a legal conclusion, which we review *de novo*.”); see also *Melendez v. United States*, 26 A.3d 234, 245 (D.C. 2011) (holding statement by child witness of murder was excited utterance under hearsay exception).

<sup>242</sup> *Odemns v. United States*, 901 A.2d 770, 776 (D.C. 2006). (“[T]he underlying factual findings are reviewed under the ‘clearly erroneous’ standard . . . .”); see also *Graure v. United States*, 18 A.3d 743, 755 (D.C. 2011) (recognizing excited utterance as well-known exception to hearsay), *cert. denied*, 132 S. Ct. 360 (2011); *Melendez*, 26 A.3d at 245 (interpreting excited utterance exception to hearsay rule).

<sup>243</sup> *Melendez*, 26 A.3d at 245 (quoting *Odemns*, 901 A.2d at 776).

<sup>244</sup> *Brown v. United States*, 27 A.3d 127, 130 (D.C. 2011) (summarizing interplay between three standards of review), *cert. denied*, 133 S. Ct. 274 (U.S. 2012).

exception is dependent on the specific facts in each case.<sup>245</sup>

Fact questions that must be answered by the trial court include whether there is: (1) the presence of a serious occurrence which causes a state of nervous excitement *or* physical shock in the declarant, (2) a declaration made within a reasonably short period of time after the occurrence so as to assure that the declarant has not reflected upon his statement or premeditated or constructed it, and (3) the presence of circumstances, which in their totality suggest spontaneity and sincerity of the remark.<sup>246</sup>

These questions call for fact-finding determinations into such matters as what did the witness observe and is there evidence or testimony that it caused excitement or stress?; how much time transpired between occurrence and the reaction?; and do the totality of circumstances suggest “sincerity,” a clear credibility determination?<sup>247</sup> Therefore, the excited utterance rule has been noted as another example of an exception to hearsay where a court articulates particular underlying fact questions that must be decided, even in a jurisdiction that typically calls for a *de novo* review of hearsay.<sup>248</sup>

*d. De Novo Review Unless Trial Court Makes Determinations  
of “Trustworthiness” – Hawaii*

In Hawaii, courts mention on several occasions that there *can only be one correct result* and, therefore, the application of the hearsay rule is reviewed under the right/wrong standard.<sup>249</sup> This right/wrong standard is

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<sup>245</sup> *Id.* (alteration in original) (quoting *Smith v. United States*, 666 A.2d 1216, 1222 (D.C. 1995)).

<sup>246</sup> *Id.* at 131 (emphasis added) (quoting *Odemns*, 901 A.2d at 776).

<sup>247</sup> See *Odemns*, 901 A.2d at 778 (analyzing elements of excited utterance).

<sup>248</sup> *Dutch v. United States*, 997 A.2d 685, 689 (D.C. 2010) (quoting *Brown v. United States*, 840 A.2d 82, 88 (D.C. 2004)) (“[T]he determination of whether a statement falls under [the excited utterance] exception . . . is a legal conclusion, which we review *de novo*.”).

<sup>249</sup> See *State v. Fitzwater*, 227 P.3d 520, 528 (Haw. 2010) (emphasis added) (quoting *State v. Machado*, 127 P.3d 941, 946 (2006)) (“Where admissibility of evidence is determined by application of the hearsay rule, there can only be one correct result, and the appropriate standard for appellate review is the right/wrong standard.”); see also *State v. Yamada*, 57 P.3d 467, 475 (Haw. 2002) (“We review the admissibility of evidence pursuant to HRE Rule 803 under the right/wrong standard, because ‘[t]he requirements of the rules dealing with hearsay are such that application of the particular rules can yield only one correct result.’”); *State v. Ortiz*, 981 P.2d 1127, 1135 (Haw. 1999) (holding trial court should determine whether specific requirements of the rule were met); *State v. Moore*, 921 P.2d 122, 137 (Haw. 1996) (quoting *Kealoha v. County*

applied to all conclusions of law and has been equated with a de novo standard of review.<sup>250</sup> Despite the fact that Hawaiian courts explain that there should be no discretion in deciding whether the requirements of a particular hearsay rule or exception are met, they also note one category in hearsay rules that should be left to the trial courts discretion: “trustworthiness.”<sup>251</sup>

The Hawaii courts recognize that there are several instances when a trial court is in a better position to make a “judgment call.”<sup>252</sup> Thus, the standard of review used in those cases is abuse of discretion.<sup>253</sup> Hawaii self identifies as using a de novo standard of review to hearsay rulings, yet carves out a common-sense exception for abuse of discretion when the trial court must listen to witness testimony and review documents for reliability.<sup>254</sup>

### 3. Hybrid Approach of De Novo Review and Abuse of Discretion

Most federal and state jurisdictions that have broken down the standard of evaluating hearsay rulings into multiple layers of review, as opposed to simply using abuse of discretion or de novo. These jurisdictions list two issues to review: (1) whether the statement is hearsay, which is reviewed de novo, and (2) whether an exception to the hearsay

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of Hawaii, 844 P.2d 670, 675 (Haw. 1993)) (“[W]here the admissibility of evidence is determined by application of the hearsay rule, there can be only one correct result, and the appropriate standard for appellate review is the right/wrong standard.”); *State v. Sale*, 133 P.3d 815, 824 (Haw. Ct. App. 2006) (“We apply the right/wrong standard of review to a trial court’s decision to admit or exclude evidence based on its application of the hearsay rule.”).

<sup>250</sup> See *Assocs. Fin. Servs. Co. of Hawaii, Inc. v. Mijo*, 950 P.2d 1219, 1228 (Haw. 1998) (citing *State v. Soto*, 933 P.2d 66, 73 (Haw. 1997)) (“A trial court’s findings of fact are reviewed under the clearly erroneous standard, whereas its conclusions of law are reviewed under the right/wrong or *de novo* standard.”).

<sup>251</sup> See, e.g., *State v. Haili*, 79 P.3d 1263, 1274 (Haw. 2003) (“Similarly, this court will review the circuit court’s determination of trustworthiness under HRE Rules 804(b)(5) and 804(b)(8) for an abuse of discretion.”); *State v. Christian*, 967 P.2d 239, 250 (Haw. 1998) (applying abuse of discretion standard to review determination that evidence was untrustworthy); *State v. Jhun*, 927 P.2d 1355, 1360 n.4 (Haw. 1996) (applying de novo review to admissibility of evidence under public records exception); *State v. Forman*, 263 P.3d 127, 132 (Haw. Ct. App. 2011) (applying de novo review for business records exception). The court noted that the question of whether there was evidence of a “lack of trustworthiness” under the rule would be reviewed for abuse of discretion. *Jhun*, 927 P.2d at 1360 n.4.

<sup>252</sup> *Jhun*, 927 P.2d at 1360 n.4.

<sup>253</sup> *Id.* (“If, instead, the trial court had based its ruling on the ‘judgment call’ of whether the sources of information or other circumstances indicated a lack of trustworthiness, then we would review the trial court’s ruling according to the abuse of discretion standard.”).

<sup>254</sup> See *Jhun*, 927 P.2d at 1360 n.4 (laying out the abuse of discretion standard).



rule applies, which is reviewed for an abuse of discretion.<sup>255</sup> This standard has been most clearly, repeatedly, and simply stated in the United States Third Circuit Court of Appeals, including a recent articulation of the rule in *United States v. Dwyer*:<sup>256</sup> “[w]e exercise plenary review over the question whether a statement is hearsay, and review for abuse of discretion a district court’s application of hearsay exceptions.”<sup>257</sup>

The Sixth and Ninth Circuits, as discussed earlier, appear to have a lack of clarity as to what standard of review should apply. On many occasions, the Sixth and Ninth Circuits use a two-part test. The appellate courts review (1) “[w]hether a district court correctly construed the hearsay rule” as a “question of law [that] we review de novo” and (2) “a district court’s decision to admit evidence as non-hearsay for an abuse of discretion.”<sup>258</sup>

In Florida, the courts break the inquiry down by explaining that the “question of whether evidence falls within the statutory definition of hearsay is a question of law.”<sup>259</sup> Although it’s unclear why a jurisdiction would create a rule like this, the two-part test does emphasize that deciphering the hearsay definition involves purely statutory interpretation whereas the exceptions involve many fact and credibility determinations. This is similar to the jurisdictions described above that call for a de novo review of hearsay rulings and who break from that general rule and use clear error or abuse of discretion review when exploring certain exceptions.<sup>260</sup> In the jurisdictions that ask both questions of (1) “is it hearsay?” and (2) “does an exception apply?,” all of the exceptions are lumped into one category, which necessarily involves fact finding.<sup>261</sup>

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<sup>255</sup> See, e.g., *United States v. Price*, 458 F.3d 202, 205 (3d Cir. 2006) (“Whether a statement is hearsay is a legal question subject to plenary review . . . . If the district court correctly classifies a statement as hearsay, its application of the relevant hearsay exceptions is subject to review for abuse of discretion.”); *United States v. Washington*, 462 F.3d 1124, 1135 (9th Cir. 2006) (offering de novo standard of review for abuse of discretion); *United States v. Gibson*, 409 F.3d 325, 337 (6th Cir. 2005) (offering standard of review).

<sup>256</sup> No. 05-3140, 2012 WL 2948189 (3d Cir. July 20, 2012).

<sup>257</sup> See *id.* at \*3 (articulating standard of review for hearsay rulings); see also *United States v. Johnson*, 449 F. App’x 149, 151 (3d Cir. 2011) (stating court has plenary review and standard looks for abuse of discretion); *United States v. Tyler*, 281 F.3d 84, 98 (3d Cir. 2002) (“We review for abuse of discretion.”); *United States v. Sallins*, 993 F.2d 344, 346 (3d Cir. 1993) (reviewing hearsay evidence as question of law subject to plenary review).

<sup>258</sup> *Washington*, 462 F.3d at 1135 (outlining de novo standard); see also *Gibson*, 409 F.3d at 337 (outlining abuse of discretion standard).

<sup>259</sup> *K.V. v. State*, 832 So.2d 264, 265 (Fla. App. 2002) (specifying standard for determining if trial court erred in its hearsay ruling).

<sup>260</sup> See *Bernadyn v. State*, 887 A.2d 602, 606 (Md. 2005) (discussing standards of review for hearsay issues of law).

<sup>261</sup> See *id.* (outlining questions presented for hearsay review).

However, the two-part test that requires de novo review of that first question fails to take into account that there might be fact or credibility determinations in deciding if a statement fits the definition.<sup>262</sup> For example, deciding whether a statement is offered for the truth of the matter asserted might require a trial judge to listen to the witness explain the context and meaning of the statement and make a judgment call on what the statement's true purpose was.<sup>263</sup> Additionally, reviewing the second question of whether an exception is met might certainly involve the legal interpretation of the statute or prior case law, which interprets the exception.<sup>264</sup> For example, the decision of whether a statement was made to show "intent, plan, motive" for purposes of Rule 803(3) of the Federal Rules of Evidence might involve a comparison of the hearsay statement being offered at trial to one that was found, as a matter of law, to be for purposes of plan or motive in prior cases and might not have anything to do with a disagreement in facts at trial or witness credibility.<sup>265</sup>

The next three tests were all written broadly and ambiguously. The tests are broad enough that courts can take into account legal determinations and factual determinations at any point in the analysis of whether a statement is admissible over a hearsay objection, regardless of whether the legal issues involve defining hearsay or applying an exception.<sup>266</sup> However, the tests were also written vaguely enough that they provide no true guidance to the appellate courts.<sup>267</sup>

#### 4. Two-Part Test of Clear Error and De Novo – Nebraska and Oregon

Nebraska and Oregon courts use similar two-part tests for reviewing hearsay rulings. The appellate courts (1) review for clear error the factual findings underpinning a trial court's hearsay ruling and (2)

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<sup>262</sup> See *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003) (citing *United States v. McGlory*, 968 F.2d 309, 332 (3d Cir. 1992)) ("[T]he question whether a particular statement constitutes hearsay presents a legal issue.").

<sup>263</sup> *Washington*, 462 F.3d at 1135 (analyzing judge's role in hearsay rulings); *United States v. Gibson*, 409 F.3d 325, 337 (6th Cir. 2005) (same).

<sup>264</sup> See *infra* Part V.B.3 (analyzing hybrid approach of de novo review and abuse of discretion).

<sup>265</sup> See FED. R. EVID. 803(3) (allowing state of mind as hearsay exception); *Wilks v. State*, 983 S.W.2d 863, 865 (Tex. App. 1998) (determining whether statements representing witness's state of mind were admissible under hearsay exception).

<sup>266</sup> See *State v. Workman*, 122 P.3d 639, 642 (Utah 2005) (presenting three-part test); see also discussion *infra* Part V.B.4-6 (explaining three-part test).

<sup>267</sup> See *Workman*, 122 P.3d at 642 (declining to elaborate three-part test). See generally discussion *infra* Part V.B.4-6 (discussing lack of specificity when courts analyze hearsay rulings).

review de novo the court's ultimate determination to admit evidence over a hearsay objection.<sup>268</sup> The Nebraska Supreme Court explained its two-part test in *State v. McCave*<sup>269</sup> when it held that the "reasoning for adopting a de novo standard applies equally to a court's exclusion of evidence on hearsay grounds."<sup>270</sup> In other words, the court clarified that it would review de novo the court's ruling by evaluating whether the court admitted evidence, despite a hearsay objection, or excluded evidence because of hearsay.<sup>271</sup>

This two-step standard of review began its evolution in 1993 when the Nebraska Supreme Court explicitly overruled cases applying an abuse of discretion standard to review rulings under the excited utterances exception to hearsay.<sup>272</sup> This *State v. Jacob*<sup>273</sup> opinion cited two cases, *In re Interest of R.A. and V.A.*<sup>274</sup> and *State v. Lee*,<sup>275</sup> that held as recently as 1987 that "the determination as to the admissibility of an excited utterance generally rests within the discretion of the trial court and that the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion."<sup>276</sup> In *Jacob*, the Nebraska Supreme Court clarified that these holdings were "an outgrowth of the regrettably overly broad and recently rejected expression that the admission or exclusion of evidence is a matter left largely to the discretion of the trial court" and, therefore, overruled those cases.<sup>277</sup>

Shortly after issuing the *Jacob* decision, the Nebraska Supreme Court carved out an exception in *State v. Toney*<sup>278</sup> and identified one example where an abuse of discretion review should apply to hearsay rulings: the residual exception.<sup>279</sup> In *Toney*, the Court explained that a trial

<sup>268</sup> *State v. Reinhart*, 811 N.W.2d 258, 261 (Neb. 2012) (introducing two-part test); *see also State v. McCave*, 805 N.W.2d 290, 305 (Neb. 2011) (outlining standard of review).

<sup>269</sup> 805 N.W.2d 290.

<sup>270</sup> *Id.* at 316 (explaining standard of review for admittance and exclusion of hearsay).

<sup>271</sup> *Id.* (clarifying decision to use de novo standard).

<sup>272</sup> *State v. Jacob*, 494 N.W.2d 109, 118 (Neb. 1993) ("Thus, language in cases . . . which suggests that the admission of an excited utterance is left to the discretion of the trial court rather than being controlled by § 27-803(1), is overruled.")

<sup>273</sup> 494 N.W.2d 109.

<sup>274</sup> 403 N.W.2d 357 (Neb. 1987), *overruled by State v. Jacob*, 494 N.W.2d 109 (Neb. 1993).

<sup>275</sup> 341 N.W.2d 600 (Neb. 1983), *overruled by State v. Jacob*, 494 N.W.2d 109 (Neb. 1993).

<sup>276</sup> *Jacob*, 494 N.W.2d at 117 (citing *In re Interest of R.A. and V.A.*, 403 N.W.2d at 362 and *Lee*, 341 N.W.2d at 604) (holding determination as to admissibility of excited utterance rests with trial court).

<sup>277</sup> *Id.* at 117-18 (rejecting notion that admission or exclusion of evidence left largely to discretion of trial court).

<sup>278</sup> 498 N.W.2d 544 (Neb. 1993).

<sup>279</sup> *Id.* at 551 ("Thus, an appellate court, reviewing a trial court's ruling on admissibility under Rule 804(2)(e), will affirm the trial court's ruling unless the trial court has abused its discretion concerning admissibility."); *see* FED. R. EVID. 807 (stating residual exception); NEB. R.

court must weigh in on a multitude of factors to make the determination as to whether to admit evidence under this exception necessarily involved judicial discretion.<sup>280</sup> In reference to a United States Seventh Circuit Court of Appeals case, *Toney* lists five factors that a trial court must weigh: “a statement’s trustworthiness, materiality of the statement, probative importance of the statement, interests of justice, and whether notice of the statement’s prospective use as evidence was given to an opponent.”<sup>281</sup> Interestingly, similar carved out rules for reviewing trial court determinations of “trustworthiness” for an abuse of discretion are also found in the state jurisdictions that use a de novo review.<sup>282</sup>

Similar to Nebraska, the Oregon courts use a two-part standard of review that “controls [how to] review a ‘trial court evidentiary ruling [as to whether] a statement fits within an exception to the hearsay rule.’”<sup>283</sup> First, the court will uphold the trial court’s preliminary factual determinations if any evidence in the record supports those determinations.<sup>284</sup> The Supreme Court recently explained that, “if the trial court does not make findings on pertinent facts, and there is conflicting evidence, we will presume that the trial court found facts in a manner consistent with its ultimate conclusion.”<sup>285</sup> The Supreme Court gives two examples where fact-finding by a trial court would be common: (1) whether “there were conflicting evidence as to when, relative to the ‘startling event,’ a declarant made a statement for purposes of [the excited utterance exception under] OEC 803(2)” and (2) “whether a witness had a motive to falsely ascribe an inculpatory statement to the declarant under [the statement against interest exception found in] OEC 804(3)(c), we would presume that the trial court resolved those factual disputes consistently with its ultimate evidentiary ruling.”<sup>286</sup> Second, the Oregon appellate court reviews the trial court’s final legal conclusion de novo. The court determines “whether the hearsay

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EVID. 804(2)(e) (setting forth residual exception).

<sup>280</sup> *Toney*, 498 N.W.2d at 551.

<sup>281</sup> *Id.* at 550-51 (citing *Huff v. White Motor Corp.*, 609 F.2d 286, 292-95 (7th Cir. 1979)) (listing factors trial court must weigh before exercising judicial discretion).

<sup>282</sup> See *supra* Section V.B.2.d (discussing Hawaiian cases).

<sup>283</sup> *State v. Cazares-Mendez*, 227 P.3d 172, 180-81 (Or. 2010) (quoting *State v. Cook*, 135 P.3d 260, 264 (Or. 2006)) (outlining two-part standard for evidentiary rulings), *review allowed*, 243 P.3d 69 (Or. 2010), *aff’d.*, 256 P.3d 104 (Or. 2011); see also *Cook*, 135 P.3d at 264 (same).

<sup>284</sup> *Cook*, 135 P.3d at 264 (citing *State v. Cunningham*, 99 P.3d 271, 277 (Or. 2004)) (stating when factual determinations are upheld).

<sup>285</sup> *Cazares-Mendez*, 227 P.3d at 180 (internal citations omitted) (citing *State v. Carlson*, 808 P.2d 1002, 1010 (Or. 1991)) (discussing result of two-part standard).

<sup>286</sup> *Id.* (articulating trial court’s review of conflicting evidence of shocking events); see FED. R. EVID. 804(b)(3) (employing similar language to statement against interest exception in OR. EVID. CODE 804(3)(C)).

statement is admissible under an exception to the hearsay rule to determine if the trial court made an error of law.<sup>287</sup>

Nebraska and Oregon courts both identify a two-part test specifically for hearsay rulings that examines both questions of fact and law. An abuse of discretion standard is never mentioned for hearsay rulings in the Oregon courts.<sup>288</sup> However, the Nebraska courts noted the unique quality of the residual exception, which involves trustworthiness, reliability, and credibility determinations traditionally left to discretion of trial court.<sup>289</sup>

### 5. Three-Tiered Approach of De Novo, Clear Error, and Abuse of Discretion – Utah

The standard of review for evidentiary rulings on hearsay has also been problematic in Utah. For example, in the 1980's the Supreme Court applied two different standards of review to a finding of admissibility of hearsay evidence under the existing mental, emotional, or physical condition.<sup>290</sup> Further, the Supreme Court apparently disagreed with itself again in 1989 when reviewing whether evidence should be admitted under the excited utterance exception.<sup>291</sup>

In the 1990's the Utah Supreme Court recognized this problem. The Utah Supreme Court noted that these variations arise because the exceptions to Utah's version of Rule 803 vary the trial court's analysis between factual issues, legal issues, and a mixture of both.<sup>292</sup> As a result, "the appropriate standard of review of a trial court's decision admitting or excluding evidence under Rules 802 and 803 depends on the particular

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<sup>287</sup> *Cook*, 135 P.3d at 264 (setting out second part of two-part test).

<sup>288</sup> See *Cazares-Mendez*, 227 P.3d at 180 (excluding abuse of discretion standard from discussion); *Cook*, 13 P.3d at 264 (same).

<sup>289</sup> *State v. Toney*, 498 N.W.2d 544, 551 (Neb. 1993) (describing second part of two-part test); see discussion *supra* Part V.B.4 (elucidating two-part test applied in Oregon and Nebraska).

<sup>290</sup> Compare *State v. Ireland*, 773 P.2d 1375, 1378 (Utah 1989), and *State v. Auble*, 754 P.2d 935, 937 (Utah 1988) (applying correctness standard to finding of admissibility under Rule 803(3)), with *State v. Kaytso*, 684 P.2d 63, 64 (Utah 1984) (holding no "abuse of prerogative" occurred when court admitted evidence under Rule 63(4) (now 803(3))).

<sup>291</sup> Compare *State v. Cude*, 784 P.2d 1197, 1201 (Utah 1989) (applying clear error standard to find that statement did not fall within Rule 803(2)), with *State v. Thomas*, 777 P.2d 445, 449 (Utah 1989) (stating whether evidence meets requirements of Rule 803(2) are within "sound discretion" of trial court).

<sup>292</sup> See *Hansen v. Heath*, 852 P.2d 977, 978 n.4 (Utah 1993) (noting trial court determination contains a "number of rulings"); see also *State v. Thurman*, 846 P.2d 1256, 1270 n.11 (Utah 1993) (stating admissibility decisions are the "sum of several rulings"). "[E]ach [separate ruling] of which may be reviewed under a separate standard" of review. *Thurman*, 846 P.2d at 1270 n.11.

ruling in dispute.”<sup>293</sup>

Ultimately, Utah has developed what it calls a three-tiered standard of review.<sup>294</sup> Utah courts have recognized that their standard of review regarding the admissibility of hearsay evidence is complicated because multiple rulings within each determination require a different standard of review.<sup>295</sup> In sum, courts in Utah (1) review legal questions for correctness or legal error under a de novo review; (2) review questions of fact for clear error; and (3) review the final ruling on admissibility for abuse of discretion.<sup>296</sup>

This paradigm allows the Utah appellate courts to have the ability to review each individual ruling for its function over form in each particular ruling. The advantage of the three-tiered system of review is that the appellate courts are forced to consider each layer of review as it relates to each individual finding of the trial court.<sup>297</sup> Also, the three-tiered standard ends with abuse of discretion, which emphasizes the trial court’s traditional role of original gatekeeper regarding evidentiary issues.<sup>298</sup>

#### 6. No Bright-Line Rule in Connecticut?

In a somewhat confusing opinion that best encapsulates the conflict and confusion underlying the question of what standard of review should apply to hearsay rulings, the Supreme Court of Connecticut seems to adopt a de novo standard of review rule for pure hearsay questions by definition, but then actually applies an abuse of discretion standard to the facts of the case.<sup>299</sup> The Supreme Court of Connecticut claims that it is not adopting

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<sup>293</sup> *Hansen*, 852 P.2d at 978 (indicating factual or legal determination invokes certain standard of review).

<sup>294</sup> *State v. C.D.L.*, 250 P.3d 69, 79 (Utah Ct. App. 2011) (citing *State v. Workman*, 122 P.3d 639, 642 (Utah 2005)) (“In reviewing the admissibility of hearsay, legal conclusions are reviewed for correctness, factual determinations are reviewed for clear error, and the ultimate question of admissibility is reviewed for abuse of discretion.”).

<sup>295</sup> *Workman*, 122 P.3d at 642 (pointing to complexity of standard of review for various reasons).

<sup>296</sup> *Id.*

<sup>297</sup> *See id.* (approving three-tiered approach).

<sup>298</sup> *See id.* (“[F]inally, we review the district court’s ruling on admissibility for abuse of discretion.”).

<sup>299</sup> *State v. Saucier*, 926 A.2d 633, 641 (Conn. 2007) (emphasis added) (“[A]fter a trial court has made the *legal* determination [regarding whether] a particular statement is or is not hearsay, or is subject to a hearsay exception, is . . . [can] . . . admit or . . . bar the evidence based upon relevancy, prejudice, or other . . . grounds . . .”). The court determined that the trial court did not abuse its discretion when it decided that the statement was hearsay and was not admissible under any exception. *Id.* at 636. The trial court’s interpretation of the victim’s statement requires the appellate court to review rulings using an abuse of discretion standard. *Id.* at 645.

any bright line rule.<sup>300</sup> Yet, the court holds that it will apply a different standard of review depending on the context of each specific hearsay ruling.<sup>301</sup>

One ruling that came under review was the trial court's decision to exclude evidence that did not meet Connecticut's definition of a statement of then-existing mental or emotional condition exception.<sup>302</sup> The intermediate appellate court engaged in plenary review of the trial court's ruling and upheld the decision to exclude the evidence.<sup>303</sup> The first issue on appeal was to clarify which standard of review was required to review the trial court's ruling regarding the admissibility of evidence pursuant to an exception to the hearsay rule.<sup>304</sup> In what is probably the most ironic line of this confusing opinion, the majority recognized "that the decisions by our appellate courts have not been a model of clarity in this regard and we take this opportunity to resolve the confusion."<sup>305</sup>

This case is also notable because an en banc panel of seven justices heard the case and, despite the fact that the judgment of the intermediate appellate court was unanimously affirmed, Justice Norcott authored a concurring opinion that solely addressed and disagreed with the standard of review decision made in the majority opinion.<sup>306</sup> There are many issues that create the overarching confusion that serves as the backdrop for this case, including the fact that the majority opinion upholds the trial court decision to exclude evidence under a hearsay exception because it holds "the trial court did not abuse its discretion."<sup>307</sup> Additionally, the majority opinion affirms the intermediate appellate court on the exclusion of the evidence but writes to "clarify" the proper standard of review, which it

<sup>300</sup> *Id.* at 641.

<sup>301</sup> *Id.* (rejecting bright line rule and opting for standard dependent on specific context).

<sup>302</sup> *Saucier v. Warden, State Prison*, No. CV-054000607, 2010 WL 4276740, at \*4 (Conn. Super. Sept. 24, 2010) (describing trial court's reasoning). Compare CONN. CODE OF EVID. 8-3(4) ("A statement of the declarant's then-existing mental or emotional condition . . . provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed."), with FED. R. EVID. 803(3) ("A statement of the declarant's then-existing state of mind . . . or emotional, sensory, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.").

<sup>303</sup> *State v. Saucier*, 876 A.2d 572, 581 (Conn. App. Ct. 2005) (quoting *State v. Gonzalez*, 815 A.2d 1261, 1270 (Conn. App. Ct. 2003)) ("Whether evidence offered at trial is admissible pursuant to one of the exceptions to the hearsay rule presents a question of law. Accordingly, our review of the state's claim is plenary."), *aff'd*, 926 A.2d 633 (Conn. 2007).

<sup>304</sup> *Saucier*, 926 A.2d at 638 (clarifying standard of review).

<sup>305</sup> *Id.* at 638-39 (attempting to clarify decision).

<sup>306</sup> *Id.* at 651-56 (Norcott, J., concurring) (disagreeing with standard of review decision made by majority).

<sup>307</sup> *Id.* at 636 (majority opinion) (laying out issues causing confusion).

claims the intermediate appellate court got wrong, even though the majority opinion ultimately applies the exact same abuse of discretion standard to the ruling.<sup>308</sup> In addition, three of the seven justices are part of a concurring opinion that upholds the ruling that the trial court did not abuse its discretion but write separately to disagree with the majority opinion's articulation of the what standard of review should be used because the author of the concurring opinion states, "we should review all purely evidentiary claims, including determinations of whether out-of-court statements are hearsay, solely for abuse of the trial court's discretion."<sup>309</sup>

To examine the opinion, the court tries to clarify the incredibly perplexing issue of selecting the proper standard of review. The majority begins its legal reasoning by stating, "whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review."<sup>310</sup> The court further explains that these questions require deciding issues of unanimous support and call for the trial court to never admit hearsay without an explicit provision for its admissibility.<sup>311</sup>

These are almost textbook definitions of de novo review. However, the dilemma still remains as to what standard should be used. The court claims that it "decline[s] to adopt a categorical de novo or abuse of discretion standard because application of either standard will afford unwarranted deference in some cases and unwarranted interference in others . . . ."<sup>312</sup> The court then goes on to "conclude that the appropriate standard of review is best determined, not as a strict bright line rule, but as one driven by the specific nature of the claim."<sup>313</sup>

The Supreme Court of Connecticut further added to the disarray when it described how it viewed the split among jurisdictions regarding how evidentiary rulings addressing admissibility under the hearsay rule and its exceptions should be reviewed.<sup>314</sup> Although the opinion addresses the split in authority and fairly lists the jurisdictions in categories of whether they use (1) an abuse of discretion, (2) a de novo, (3) a "hybrid," or (4) jurisdictions that "have recognized that the function performed by the trial court in issuing its ruling should dictate the scope of review," the opinion can confuse readers as to what jurisdictions are truly compiled in each

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<sup>308</sup> *Id.* at 638.

<sup>309</sup> *Id.* at 650 (Norcott, J., concurring).

<sup>310</sup> *Saucier*, 926 A.2d at 641 (majority opinion) (determining appropriate standard of review).

<sup>311</sup> *Id.* (discouraging trial courts from admitting hearsay on frivolous grounds).

<sup>312</sup> *Id.* at 640 (explaining court's rationale behind declining to adopt categorical standards).

<sup>313</sup> *Id.* at 641 (stating bright line rule as inappropriate).

<sup>314</sup> *Id.* at 641.



category.<sup>315</sup> As detailed throughout this paper, the categorization of jurisdictions by their standard of review can, at times, be challenging.

Aside from any disagreement as to what jurisdiction falls into which category, the main confusion in the opinion seems to be that the court goes to great lengths to claim that it is not creating any bright line rule. Yet when comparing the application and justification of its “no bright line rule” to what happens in other jurisdictions, after *Saucier*, Connecticut has done one of two actions. The court either (a) adopts a de novo standard that recognizes a couple of rare exceptions that call for underlying fact-finding or credibility assessments, as most of the states do that adopt the de novo rule, or, (b) as recognized by the concurring opinion, “the majority . . . [adopts] a bright line rule . . . the hybrid approach.”<sup>316</sup>

To determine which standard of review is actually articulated by the majority, the reasons that the court claims to reject a de novo review for hearsay should first be reviewed. Notably, the court lists a couple of exceptions to hearsay that would require fact-finding and credibility assessments.<sup>317</sup> The examples listed are (1) “whether a statement is truly spontaneous as to fall within the spontaneous utterance exception will be reviewed with the utmost deference to the trial court’s determination,” and (2) “a trial court’s conclusion that a hearsay statement bears the requisite indicia of trustworthiness and reliability necessary for admission under the residual exception to the hearsay rule, which would be reviewed for an abuse of discretion.”<sup>318</sup>

As to the first example, the District of Columbia, which is listed in the majority opinion as a jurisdiction using the de novo standard and whose de novo approach to reviewing trial court’s hearsay rulings is rejected by the majority, has on numerous occasions recognized that the determination

<sup>315</sup> *Id.* at 639-42 nn.8-10 (commenting on use of different standards of review in various jurisdictions). Florida is a hybrid jurisdiction, while Oregon uses the de novo standard. *Id.* at 640 n.10, 642. Oregon uses a fairly straight-forward two-part inquiry in deciding fact questions for clear error and reviews de novo the legal conclusions. *Id.* at 642 n.9. Oregon is not a jurisdiction that simply uses a de novo standard to review hearsay. *Id.* Hawaii is a state that uses the “no bright line” approach that *Saucier* attempts to align itself with, however, Hawaii is more fairly characterized as one that uses a de novo standard, as discussed *supra* Section Part V.B.2.d. *Id.* at 642; see discussed *supra* Section Part V.B.2.d.

<sup>316</sup> See *State v. Saucier*, 926 A.2d 633, 641 (Conn. 2007) (“Accordingly, we conclude that the appropriate standard of review is best determined, not as a strict bright line rule, but as one driven by the specific nature of the claim.”); discussion *supra* Part V.B.2 (discussing rare exceptions for de novo review).

<sup>317</sup> *Saucier*, 926 A.2d at 641 (“Similarly, appellate courts will defer to the trial court’s determinations on issues dictated by the exercise of discretion, fact finding, or credibility assessments.”).

<sup>318</sup> *Id.* (offering examples of hearsay exception).

of whether a statement meets the excited or spontaneous utterance exception will be reviewed for an abuse of discretion.<sup>319</sup> In Hawaii, the courts have adopted a “right/wrong” or *de novo* standard as a general rule for reviewing hearsay, yet the Hawaii courts recognize that questions of “trustworthiness” call for an abuse of discretion review.<sup>320</sup> For example, to meet certain hearsay exceptions like the business records, public records and reports, or the residual exception, the rule explicitly requires “trustworthiness” in the evidence.<sup>321</sup> Therefore, even jurisdictions that self-identify as jurisdictions that use the *de novo* standard as a general rule to review hearsay rulings note this exception to the rule.

To add some confusion to what standard or rule is being advanced by the majority, the concurring opinion describes how the majority’s articulation of its standard of review for hearsay is one that is actually a hybrid rule where the court must answer two questions with two different standards of review: *de novo* and abuse of discretion.<sup>322</sup> The concurring opinion describes the majority’s hybrid rule using the following two-step inquiry.<sup>323</sup> First, the court must determine whether the statement categorized as hearsay is a question of law that the trial court determined after analyzing whether a particular statement is or is not hearsay or is subject to a hearsay exception.<sup>324</sup> Second, the court “is vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds.”<sup>325</sup>

The concurring opinion’s description is not actually a hybrid

<sup>319</sup> See *id.* at 640 (“We therefore decline to adopt a categorical *de novo* or abuse of discretion standard.”); *Odemns v. United States*, 901 A.2d 770, 776 (D.C. 2006) (differentiating when to review under clearly erroneous and abuse of discretion); see also *Graure v. United States*, 18 A.3d 743, 755 (D.C. 2011) (same), *cert. denied*, 132 S. Ct. 360 (2011); *Melendez v. United States*, 26 A.3d 234, 245 (D.C. 2011) (describing excited utterance exception to hearsay rule); *State v. Jacob*, 494 N.W.2d 109, 118 (Neb. 1993) (overruling use of abuse of discretion review for excited utterance exception).

<sup>320</sup> See *supra* Part V.B.2.d.

<sup>321</sup> Compare HAW. R. EVID. 803(b)(6) (“unless the sources of information or other circumstances indicate lack of trustworthiness.”), with FED. R. EVID. 803(6) (containing language of “indicate lack of trustworthiness” as contained in Hawaii rule); compare HAW. R. EVID. 803(b)(8) (“unless the sources of information or other circumstances indicate lack of trustworthiness.”), with FED. R. EVID. 803(8) (containing exact same language as Hawaii rule); compare HAW. R. EVID. 804(b)(8) (“A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . .”), with FED. R. EVID. 807(a)(1) (“A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule.”).

<sup>322</sup> See *State v. Saucier*, 926 A.2d 633, 651 n.4 (Conn. 2007) (Norcott, J., concurring) (rejecting defendant’s claims of improper hearsay rulings in appellate court).

<sup>323</sup> *Id.* at 651 n.4 (describing two-step process for hybrid rule).

<sup>324</sup> *Id.* at 641 (majority opinion).

<sup>325</sup> See *id.* at 651 n.4 (Norcott, J., concurring) (proposing hybrid rule).

approach to reviewing hearsay rulings but is a de novo approach to reviewing hearsay and an abuse of discretion standard to review on grounds of relevance, prejudice, or other non-hearsay grounds. Jurisdictions that apply a hybrid standard to review hearsay rulings typically decide the two basic questions that must be answered *solely for the hearsay determination* under two different standards: first, whether a statement is hearsay, which is reviewed de novo, and, second, whether an exception applies to the hearsay rule, which is reviewed for abuse of discretion.<sup>326</sup> This more accurate characterization of the hybrid approach to reviewing hearsay is noted in the concurring opinion when it cites several cases and parentheticals from those cases articulating this approach.<sup>327</sup>

The concurring opinion emphasizes why, by definition, the majority uses a de novo review for the hearsay rulings by noting the two underlying questions for most hearsay rulings: whether the statement is hearsay and whether an exception applies.<sup>328</sup> The majority opinion states that these are legal questions that require decision-making that reasonable minds do not disagree about.<sup>329</sup> The concurring opinion states that the court should “evaluate *both* determinations under the abuse of discretion standard of review.”<sup>330</sup>

In addition to the plain reading of the opinion itself, courts that have applied *Saucier* seem to recognize that, in reviewing a hearsay ruling, the two questions that must be answered are reviewed de novo.<sup>331</sup> As an example, three years later, the Connecticut Supreme Court started its discussion of the standard of review of evidentiary rulings with the belief that its standard of review for admissibility of evidence is fully settled.<sup>332</sup> The court quotes *Saucier* and lists as an example that, “whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review.”<sup>333</sup> Therefore, it appears that the rule articulated by the Connecticut Supreme Court and as taken from *Saucier* is that both questions of whether a statement is hearsay and whether an exception

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<sup>326</sup> See *supra* Part V.B.3 (discussing hybrid approach of de novo review and abuse of discretion).

<sup>327</sup> *Saucier*, 926 A.2d at 656 n.12 (Norcott, J., concurring).

<sup>328</sup> *Id.* at 650 n.2 (“I agree that the trial court first should determine whether the proffered statement is hearsay before considering the applicability of any hearsay exceptions.”).

<sup>329</sup> *Id.* at 641 (majority opinion).

<sup>330</sup> *Id.* at 650 n.2 (Norcott, J., concurring) (emphasis in original) (disagreeing with majority evaluation of hearsay exception).

<sup>331</sup> *State v. Boyd*, 992 A.2d 1071, 1092 (Conn. 2010), *cert. denied*, 131 S. Ct. 1474 (2011).

<sup>332</sup> *Id.* (stating standard of review does not require clarifying).

<sup>333</sup> *Id.* (quoting *Saucier*, 926 A.2d at 641).

applies are legal questions and that neither determination is owed any deference to the trial court.<sup>334</sup> As applied—and as has been applied in other courts using a de novo review—some questions inherent in hearsay rulings require fact-finding and credibility determinations.<sup>335</sup>

If the *Saucier* court clarifies anything, it is that the debate over the proper standard of review to employ when reviewing hearsay rulings is ongoing and confusing. Even in a case where the ultimate decision of the trial court to exclude evidence is upheld under an abuse of discretion rationale, the Connecticut Supreme Court is split, four-three.<sup>336</sup> The Supreme Court of Connecticut continues to struggle as to whether some vague “no bright-line” rule or standard that is amorphous and applied inconsistently in future cases by the same court or whether an abuse of discretion should always be applied to all evidentiary rulings.<sup>337</sup>

## VI. CONCLUSION

A review of all of the various tests shows that a few areas of commonality emerge. First, all of the jurisdictions seem to recognize that there are both fact and legal determinations that must be made when evaluating hearsay. Even the jurisdictions that call for an abuse of discretion level of review often will define abuse of discretion to include a de novo review of the legal conclusions and a clear error review for the factual conclusions of the court below. In addition, even the jurisdictions that call for de novo review recognize many circumstances where there must be fact finding by the trial court that is entitled to deference. Most of the jurisdictions recognize that hearsay presents unique problems that make it difficult to use one label or rule for its standard of review. Also, all of the various tests have limitations.

Before examining the limitations, each test has some advantages. An abuse of discretion level of review comes with two major positives. First, this standard of review recognizes all of the benefits of deferring to a trial court’s expertise and experience in evaluating the evidence in the context of the trial. This rationale has been the traditional and historic reason why evidentiary rulings are given deference by appellate courts. Second, the abuse of discretion standard of review encompasses an appellate court’s ability to review both legal and fact questions. The

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<sup>334</sup> See *Id.* at 650 (asserting legal questions require plenary review without deference to trial court).

<sup>335</sup> See generally *id.* at 649 (discussing nuances of de novo review).

<sup>336</sup> *Saucier*, 926 A.2d at 633.

<sup>337</sup> See *id.* (indicating court split).

United States Supreme Court has instructed that “little turns . . . on whether we label review . . . abuse of discretion or de novo [because] . . . *a district court by definition abuses its discretion when it makes an error of law.*”<sup>338</sup>

This seems to settle it. If abuse of discretion allows an appellate court to review legal conclusions as potential errors of law with the same result regardless of which standard is used, then appellate courts could simply use this standard and review legal conclusions for error of law and all other determinations for abuse of discretion or clear error. However, appellate courts have deviated from doing this, as illustrated by the different tests outlined above. The most likely reasons why the courts have created new tests that explicitly outline a use of de novo review as part of that test is that a different understanding of how abuse of discretion is defined, in spite of the instructions from the United States Supreme Court, or the prevailing thought that abuse of discretion is simply a rubber stamp of the trial court’s ruling.

In some jurisdictions, abuse of discretion has been defined as meaning more than an error of law, and other courts have explained that “[w]hen a court’s judgment is based on an erroneous interpretation of the law, an abuse of discretion standard is not appropriate.”<sup>339</sup> The notion that an abuse of discretion standard is simply a rubber stamp is detailed above in Part II.D.4 and is well-documented by Judge Markus.<sup>340</sup> Judge Markus explains how abuse of discretion has been defined as only occurring when “the trial court’s attitude was unreasonable, arbitrary, or unconscionable” or “only if no reasonable judge could logically make that decision.”<sup>341</sup>

<sup>338</sup> *Koon v. United States*, 518 U.S. 81, 100 (1996) (emphasis added) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)) (providing example of abuse of discretion).

<sup>339</sup> See *Am.’s Floor Source, L.L.C. v. Joshua Homes*, 946 N.E.2d 799, 807 (Ohio Ct. App. 2010) (citing *Blakemore v. Blakemore*, 450 N.E.2d 1140, 1141 (Ohio 1983)) (“An abuse of discretion is more than an error of law or in judgment; rather, it implies that the trial court’s attitude was arbitrary, unreasonable, or unconscionable.”); *State v. Futrall*, 918 N.E.2d 497, 498 (Ohio 2009) (quoting *Swartzentruber v. Orrville Grace Brethren Church*, 836 N.E.2d 619, 621 (Ohio Ct. App. 2005)) (reviewing under abuse of discretion standard).

<sup>340</sup> J. Richard M. Markus, *A Better Standard for Reviewing Discretion*, 2004 UTAH L. REV. 1279, 1279 (2004) (“[A]ppellate courts seemingly give themselves unlimited discretion when they decide whether a trial court abused its discretion.”).

<sup>341</sup> *Id.* (citing *Best v. Yerkes*, 77 N.W.2d 23, 33 (Iowa 1956)) (upholding trial court because did not act unfairly, arbitrarily, or unreasonably in denying motion); *Zajac v. Old Republic Ins. Co.*, 372 N.W.2d 897, 899 (N.D. 1985) (holding abuse of discretion implies trial court had “unreasonable, arbitrary, or unconscionable attitude”); *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985) (stating test for abuse of discretion is whether trial court’s act was arbitrary or unreasonable); *Marrs v. Bd. of Med.*, 375 N.W.2d 321, 324 (Mich. 1985) (explaining abuse of discretion requires result grossly erroneous in fact and logic); *Barrett v. Mo. Pac. R.R. Co.*, 688 S.W.2d 397, 399 (Mo. Ct. App. 1985) (stating abuse occurs only when ruling is against logic and reasonable people could not disagree); *Huffman v. Hair Surgeon, Inc.*, 482 N.E.2d 1248, 1252 (Ohio 1985) (same). The abuse of discretion “evidences not the exercise of

When comparing the abuse of discretion standard, which has been interpreted to overturn rulings only if the trial judge is illogical, with the standard from *Saucier* that claims hearsay is not an issue where reasonable minds can differ, it becomes clear why appellate courts are reluctant to adopt a wholesale abuse of discretion review.<sup>342</sup>

Turning next to the advantages of the other five tests used to review hearsay, they all are explicit in their instructions to the appellate court to look for legal conclusions. However, the tests are not helpful because they are either too narrow or too broad. For example, the jurisdictions that use de novo review will almost always break from that rule when convenient or even necessary. A rule is not particularly helpful if the appellate court is free to break from it on a case-by-case basis. These jurisdictions might as well have a rule similar to those in Nebraska or Utah, which breaks down the various levels of review into findings of fact or law. In addition, the rule asking courts to review whether hearsay exists as a matter of law and whether an exception is met for the abuse of discretion review seems to arbitrarily be breaking those determinations into broad categories of law or fact when there are law and fact questions within each inquiry.

Jurisdictions like Nebraska, Oregon, and Utah that tell the appellate courts to review legal conclusions de novo and fact conclusions for clear error get closer to a better rule because they recognize that the determinations in a hearsay ruling encompass multiple layers of inquiry. In Connecticut, which claims not to have a “bright line” rule, the advantage is different. The appellate court in Connecticut is free to use its judgment to figure out if there is a legal or fact question present, but again having no rule is not entirely helpful.

## V. RECOMMENDATIONS

So what should appellate courts do when reviewing hearsay rulings by trial courts below? I would recommend a return to the traditional abuse of discretion standard with a true definition in line with Supreme Court precedent in *Koon* that has been explained thoroughly by the Second Circuit.<sup>343</sup> This would also return the traditional deference afforded to trial

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will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather passion of bias.” *Marrs*, 375 N.W.2d at 324 (citing *Spalding v. Spalding*, 94 N.W.2d 810, 811-12 (Mich. 1959)).

<sup>342</sup> *State v. Saucier*, 926 A.2d 633, 650 (Conn. 2007) (Norcott, J., concurring) (illuminating why appellate courts are reluctant to apply wholesale standards of review).

<sup>343</sup> *See United States v. Hasan*, 586 F.3d 161, 168 (2d Cir. 2009) (exercising abuse of

courts on evidentiary rulings. For the traditional abuse of discretion standard to work, each jurisdiction would have to define the standard explicitly to include the line “*a district court by definition abuses its discretion when it makes an error of law.*”<sup>344</sup> The confusion noted by the Sixth and Ninth Circuit would be easily resolved with a definition of abuse of discretion that explicitly included this instruction. As one line from *Wagner* stated, “it is not entirely clear whether construction of a hearsay rule is a matter of discretion or a legal issue subject to de novo review” would be rendered irrelevant because the “matter of discretion” would necessarily include a de novo review of all legal issues.<sup>345</sup>

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discretion standard); *Koon v. United States*, 518 U.S. 81, 100 (1996) (articulating abuse of discretion standard).

<sup>344</sup> *Koon*, 518 U.S. at 100 (emphasis added) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

<sup>345</sup> *Wagner v. County of Maricopa*, 701 F.3d 583, 587 (9th Cir. 2012) (recognizing complexities of reviewing trial court’s determinations).