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STANDARDS AND “SECRETS” OF APPELLATE REVIEW

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I. A FEW BASIC BUT CRITICALLY IMPORTANT PRACTICAL RULES:

- A. **STUDY all applicable Rules of Court.** Each time you take on a new appeal, *study them again*. Be sure that your memory plays no tricks on you and that the Rules have not changed.

Most courts zealously guard and enforce compliance with their Rules. The Seventh Circuit is particularly well known for its repeated chastisement of attorneys who fail to adhere closely to the Rules of Court. *See, e.g., Smoot v. Mazda Motors of Am., Inc.*, 469 F.3d 675, 676-78 (7th Cir. 2006). *See also United States v. Seaboard Coast Line Railroad*, 517 F.2d 881 (4th Cir. 1975) (government’s appeal in a civil case dismissed as a sanction for its “flagran[t] violat[ion]” of the minimum requirements of F.R.A.P. 30(a) (contents of appendix); *United States v. Kush*, 579 F.2d 394 (6th Cir. 1978) (same – criminal case). An extreme example is *Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404 (3d Cir. 1980), where an appeal was dismissed and sanctions were imposed personally against counsel for filing and prosecuting an improper appeal from a non-final order and flouting numerous Federal Rules of Appellate Procedure and Third Circuit Rules in the process.

Other appellate courts, with varying degrees of frequency, dismiss appeals (or, much the same, affirm trial court judgments without considering the merits) as a sanction for violation of procedural rules regarding the preparation and contents of briefs, appendices and records on appeal. *E.g., Jacobs v. Commonwealth*, No. 0874-02-4, 2002 Va. App. LEXIS 589 (Oct. 8, 2002) (petition for appeal denied and counsel for the appellant admonished, denied fees, and removed from the list of attorneys approved for appointment by the Court of Appeals)¹; *Reyes-Garcia v. Rodriguez & Del Valle*, 82 F.3d 11 (1st Cir. 1996) (dismissal with prejudice; appellee’s counsel directed to apply for fees and costs as sanction against appellant and its counsel, jointly and severally); *N/S Corp. v. Liberty Mutual Ins. Co.*, 127 F.3d 1145 (9th Cir. 1997). Many of the cases involve *pro se* appellants, but by no means all of them do. These dismissals sometimes are explicitly described as sanctions (as in *Kushner*), but more often they are placed on the ground that the deficiencies frustrate review. The stated reasons for these dismissals include the lack of fair notice to appellees of what they need to answer to defend the judgment below; avoiding making the appellate court an advocate for a party, searching for reasons to reverse; and avoiding the unfairness to litigants who comply with the rules that comes from having their cases delayed by the time devoted to reviewing cases that are not properly presented.

¹ *Jacobs* is specifically designated as a published order, but it nevertheless does not appear in either the Va. App. or the S.E.2d reports.

- B. This should go without saying, but** behave AT ALL TIMES according to the *highest* standards of ethics and honesty. If ever you are observed by an appellate judge or her law clerk to have misrepresented the record *or* the law, you will never be trusted again. Your reputation for honesty and candor is one of the most important assets that you will ever have in any court, and you can be very certain that judges *both* remember *and* share with their colleagues the identities of lawyers who “really can’t be trusted.”
- C. This likewise should go without saying, but** treat ALL PERSONS with courtesy and respect, at ALL TIMES. You make no friends anywhere by violating this rule. If you treat Clerks’ Office personnel rudely or contemptuously, the odds are strong that the Chief Judge (and others) will learn about it sooner or later. Most judges protect and defend their Clerks’ Offices with even greater zeal than they enforce their local Rules.
- D. Seriously consider associating additional (or even substitute) counsel on appeal.** A lawyer who has tried a case has the perverse disadvantage of knowing it *too* well, often combined with an emotional attachment that may color and distort his perception of the issues. An appellate specialist lacks an emotional investment in the case and therefore is better able to make objective, dispassionate judgments on critical matters such as selection of the key issues for appeal. Consciously or not, trial counsel are at least somewhat more likely to select and present issues on appeal in a way that is designed to vindicate their theories of the case (including theories that were rejected on factual grounds and therefore are poor candidates for revival on appeal), or to settle some grievance with the trial judge, or even to vindicate their own strategies and tactics at the trial.

Of equal or even greater importance (particularly where the stakes are high and the competition keen):

An appellate attorney can do a better job because he is a specialist. Such a lawyer knows the appellate court’s rules, customs, and judges. More important, appellate lawyers know how to write a brief and make an oral argument, and do both efficiently and quickly. There is more to this than just repetition and familiarity. The way you argue and write for appeals is different from the same tasks at the trial level. An emotional, almost visceral approach can work at trial, but appellate work is usually more restrained and academic. A person at home with one style may not be comfortable with the other.

....

.... A great trial lawyer and a wonderful appellate advocate rarely exist in the same body. Consider why this is so.

The reason is that the two types of lawyer are different breeds....

Trial lawyers are impassioned and focused on the facts, actors before a silent jury audience, living by their wits, thinking on their feet, selling themselves with sincerity

and a warm voice to six or twelve strangers. By contrast, appellate advocates are cooler – laborious rewriters and self-editors who disappear into the law library and delight in reconciling apparently conflicting precedents....

D. Owens, “New Counsel on Appeal?,” in ABA Section of Litigation, *The Litigation Manual: Special Problems and Appeals* (3d Ed., 1999; J. Koeltl & J. Kiernan, eds.) at 72-73, 76. *See also, e.g.*, R. Aldisert, *Winning on Appeal* § 1.01 (1992) (explaining at length why “[a]ppellate advocacy is specialized work. It draws upon talents and skills which are far different” from those best suited for trial courtrooms “where the great stars of the legal galaxy shine”).

E. Put yourself in the shoes of the Court.

This means a number of things:

- 1. Start with the lower court’s or agency’s opinion**, as most appellate judges will do. Ask yourself, as they will, if the opinion seems sufficient and accurate on its face. Does it address all of the issues? Are there any obvious errors in its statements of the law? Any recent cases that the judge and the parties may have overlooked? Does it appear well reasoned? If the opinion passes that muster, then most appellate judges will turn to the appellant’s brief or petition for appeal with a predisposition to affirm.
- 2. Appellate courts see thousands of assignments of error in a year.** A substantial majority of them have little merit or none at all. At least in a civil action or administrative agency review, therefore, on appeal you should **present the fewest number of arguments for reversal that you can assemble without sacrifice, not the most**. Appellate judges usually are skeptical of arguments which suggest that a lower court or agency has gone “off the deep end” and committed a multitude of prejudicial errors, and many regard “shotgun” appeals as a sign of intellectual laziness. A brief or petition that presents three or four arguments for reversal is far more likely to capture the judges’ interest than one that presents ten or twelve or fifteen arguments. *See, e.g.*, R. Aldisert, *Winning on Appeal* § 8.06. In the words of the late U.S. Supreme Court Justice Robert H. Jackson,

The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at a lack of confidence in any one....

[E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

R. Jackson, “Advocacy Before the United States Supreme Court,” 37 Cornell L.Q. 1, 5 (1951).

- 3. Tell the Court what it needs to know to make its decision, and do not waste its precious time with more.** Appellate judges are busier people than you can imagine. The Justices of the Supreme Court of Virginia, for example, typically hear at least 30

cases per week, roughly every seven weeks, from September through June. Every seven weeks, therefore, each Justice must read the briefs and prepare for arguments in at least 30 cases. In the same seven weeks, each Justice also must prepare opinions in five (or more) cases argued at the previous session. On top of those duties, each Justice also must prepare for writ panel arguments in at least 30 cases about every seven weeks, year round.

Federal case loads are, if anything, even more demanding: In the year that ended on September 30, 2007, for example, the twelve active judges and one senior judge of the U.S. Fourth Circuit,² with the assistance of judges of other courts sitting by designation in numerous cases, disposed (in one fashion or another) of 4,900 appeals – down from 5,628 in the year ending September 30, 2006 – and gained some ground, unlike some recent years, with “only” 4,542 new appeals being filed. Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 2007* (<http://www.uscourts.gov/judbus2007/contents.html>).

Therefore, you would be well advised not to waste the Court’s time by writing any more than necessary. Give the Court the *facts* that are *material to the questions presented for decision*, and no more. State *how the lower court or agency ruled on the questions presented for decision*, and summarize *its reasons*. Do not bother the Court with rulings that are not challenged on appeal, except for such sketchy descriptions as are necessary to provide context and to establish appellate jurisdiction. Then present your Summary of Argument and your Argument, including citations, quotations, and discussions of authorities. Remember always that **page limits are limits. They are not requirements.** ““A brief should be brief, and if you have to go over 35 pages, you have nothing to say.”” John Frank, Esquire, *quoted in* R. Aldisert, *Winning on Appeal* § 11.01 at 199.

- 4. Make it easy for the Court.** Demonstrate right up front that it has jurisdiction. (Do this even if you are the appellee, if the appellant has not.) If your order of argument as appellee does not mimic that of the appellant, or if you are responding to multiple appellants’ briefs, provide a cross-reference table to guide the Court to the opposing arguments. Provide key quotations from your authorities; a judge or a law clerk will have more confidence in your presentation if you quote key passages (without overdoing it) rather than paraphrase, and she will be less likely to think it necessary to get the book off the shelf and check. (This is not to suggest that you should attempt to deter judges or law clerks from reading the authorities that you cite, to be sure. It is merely a way that you can minimize their workload, if they choose to use it.)

² Judges Wilkins and Widener moved from active to senior status in July 2007, and Judge Widener died in September 2007. They are included, however, in the count of twelve active judges stated in the text.

- 5. Pretend when writing your brief that you are writing the majority opinion.** Do **not**, however, take this advice as a license for flamboyance. It is instead an exhortation to be measured and (seemingly) evenhanded in your presentation, as most judicial opinions will do. Most appellate judges take deep pride in their own objectivity and in the dignity of their courts; and they strive not to sully either by taking literary excess, no matter how egregious the facts or the decision below – and if you look at it objectively, you may have to admit that your case really is not the grossly egregious exception that would warrant a tone of high moral outrage and indignation. Most judges neither choose to write nor enjoy reading purple prose. Therefore, attempt to present the case as an even-handed judge – one who is at least 51% convinced of the correctness of his decision – would do it. And by all means assure the court, for example, that as the appellant you are describing the evidence in the light most favorable to the appellee, giving it the benefit of all reasonable inferences in its favor (and do it). Likewise, present existing law in a fair perspective; if there are contrary lines of authority, for example, say so, indicate fairly which appears to be the majority, and summarize the reasons supporting each. Having done so, you should be well prepared to present an *argument* that (along with other parts of your brief) could be substantially copied into a judicial opinion – at least potentially complying further with Rule 4, above.
- 6. Consider the arguments and the case as objectively as you can.** Seek advice from colleagues who are not involved in the case. Ask them to review the lower court’s opinion, your draft brief, and any filed briefs, and interview them for their reactions. (Their first impressions may be as valuable as any others.) Test oral arguments on your spouse, your teenagers, or taxi drivers (people who may give you honest advice, because they see no incentive to flatter you); if they understand your points, then the court likely will also. Remember that appellate judges want to do justice as well as to interpret and apply the law, and tailor your presentation accordingly. If you can make the judges *want* to decide the case your way and demonstrate that they *can* do so without violence to the fabric of the law, then you are at least three-fourths of the way home.
- 7. Consider the Court’s scope and standard of review.** In other words, consider (1) whether the Court may decide an issue and (2) how stringently it will review the decision below. These concepts – standard and scope of review – often are critical to the skilled presentation or defense of an appeal. They are the subjects of the balance of this outline.

II. THE “SCOPE” OF APPELLATE REVIEW

- A. **“Scope of review”** generally refers either (1) to the extent of the issues before the Court for decision or (2) to the record available for review.³
1. **The scope of the issues reviewable on appeal** may be limited by the statute conferring appellate jurisdiction, by an appellant’s procedural defaults, or by a party’s failure to preserve an argument for appeal by presenting it to the lower court or agency for its decision.
 - a. **Statutes that authorize interlocutory appeals** may limit the appellate court’s review to designated issues, or they may be construed as authorizing broader reviews of other existing orders in the case. For example, 28 U.S.C. § 1292(a)(1) authorizes interlocutory review of decisions relating to injunctions, but the “scope of review under [that statute] is limited to issues that are ‘inextricably bound’ to the grant or denial of a preliminary injunction.” *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138, 150 (3rd Cir. 1994) (holding that an order denying leave to file pleadings after deadlines stated in a pre-trial order did “not fall within that category”). *But cf. Show Time/Movie Channel, Inc. v. Covered Bridge Condominium Assoc.*, 881 F.2d 983, 987 (11th Cir. 1989), *vacated as moot*, 895 F.2d 711 (11th Cir. 1990) (limitation of appellate review under § 1292(a)(1) to the injunctive aspects of the order is a rule of judicial administration and not of jurisdiction; court of appeals has jurisdiction to consider otherwise nonappealable aspects of the order).
 - b. **Procedural defaults** limit the issues cognizable on appeal in several contexts. “The time period for filing the notice of appeal is not extended by the filing of a motion for a new trial, a petition for rehearing, or a like pleading unless the final judgment is modified, vacated, or suspended by the trial court pursuant to Rule 1:1” Va. S.Ct. Rules 5:5(a), 5A:3(a). *See also, e.g., Ely v. Whitlock*, 238 Va. 670, 673, 385 S.E.2d 893, 895 (1989) (review on appeal limited to trial court’s denial of demurrer, where appellant did not comply with the court’s rules (since amended) governing notice of filing of the transcript of trial); *Hall v. Hall*, 9 Va. App. 426, 388 S.E.2d 669 (1990) (in a “bifurcated” divorce proceeding, an unappealed “final decree of divorce” barred a timely appeal from a subsequent spousal support order, where the appeal was based solely on the ground that the appellee spouse was guilty of desertion, an issue decided by the original “final decree”).

³ Courts, statutes (*e.g.*, 5 U.S.C. § 706), and treatises sometimes use the term “scope of review” as synonymous with or including “standard of review.” This paper uses the two terms to refer to distinct and separate issues, as do a likely majority of current authorities (*e.g.*, F.R.A.P. 28(a)(9)(B)) and writers.

c. Preservation and contemporaneous objection

All appellate courts require that assignments of error be “preserved” by presentation to the court whose decision is subject to review. These rules sometimes are codified. *See, e.g.*, Fed.R.Civ.P. 51 (“No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection”); Fed.R.Civ.P. 46 (formal exceptions unnecessary, but parties must state their requests for action or objections “and the grounds therefor,” “at the time the ruling or order of the court is made or sought,” unless there is no opportunity to do so at that time).

Rule 5:25 of the Supreme Court of Virginia provides that in appeals to the Supreme Court, objections to lower tribunals’ rulings must be “stated with reasonable certainty at the time of the ruling” or they will not be sustained as error. In slightly different language (which probably represents little if any substantive difference), Rule 5A:18 provides that in the Court of Appeals, no ruling of a lower tribunal will be considered as a basis for reversal “unless the objection was stated together with the grounds therefor at the time of the ruling.” Each of those Rules is the basis for several pages of annotations in Michie’s Va. Code.

The Supreme Court has held, however, that in cases of conflict it must apply Va. Code § 8.01-384(A) and not Rule 5:25. *Helms v. Manspile*, 277 Va. 1, 7, 671 S.E.2d 127, 130 (2009). Section 8.01-384(A) provides:

Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to

transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.^[4]

And as discussed in *Helms v. Manspile*, the Court has held that “[o]nce a litigant informs the circuit court of his or her legal argument, ‘[i]n order for a waiver to occur within the meaning of Code § 8.01-384(A), the record must affirmatively show that the party who has asserted an objection has abandoned the objection or has demonstrated by his conduct the intent to abandon that objection.’” 277 Va. at 6, 671 S.E.2d at 129 (quoting *Shelton v. Commonwealth*, 274 Va. 121, 127-28, 645 S.E.2d 914, 917 (2007)).

Appeals from agency decisions are subject to similar rules. *E.g.*, *Pence Holdings, Inc. v. Auto Ctr. Inc.*, 19 Va. App. 703, 454 S.E.2d 732, 734 (1995) (appellants may not raise issues on appeal from an administrative agency to a circuit court (or, derivatively, in an appeal from the circuit court to the Court of Appeals) that they did not submit to the agency for its consideration). *See also, e.g.*, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553-54 (1978).

The purposes of contemporaneous objection rules are to give trial courts and agencies the opportunity to rule intelligently and avoid unnecessary appeals, reversals, and mistrials; to give opposing parties the opportunity to avoid or overcome the grounds of the objection; to prevent manipulation of the courts for delay; and to adhere to the formal rule that appellate courts cannot review lower tribunals’ failures to do what they were not asked to do. *See, e.g.*, *In re Bildisco*, 682 F.2d 72, 82 (3d Cir. 1982), *aff’d*, 465 U.S. 513 (1983); *Shelton v. Commonwealth*, 274 Va. at 126, 645 S.E.2d at 916; *Williams v. Gloucester (County of) Sheriff’s Department*, 266 Va. 409, 411, 587 S.E.2d 546, 548 (2003); *Reed v. Baumgardner*, 217 Va. 769, 773, 232 S.E.2d 778, 780 (1977); *Brown v. Commonwealth*, 8 Va. App. 126, 131, 380 S.E.2d 8, 10 (1989).

Rules 5A:18 and 5:25 include an exception to the general rule: “for good cause shown or to enable [the Court] to attain the ends of justice,” the appellate courts may review a decision not objected to below. Appellate courts typically are highly reluctant to apply such exceptions. *See, e.g.*, *Hix v. Commonwealth*, 270 Va. 335, 348-49, 619 S.E.2d

⁴ Everything after the first sentence was added by 1992 Va. Acts ch. 564. According to Professor Bryson, the amendment was designed to “clarify” the law in response to *Lee v. Lee*, 12 Va. App. 512, 404 S.E.2d 736 (1991), which held that “neither the Code nor Rule 5A:18 is complied with merely by objecting generally to an order. Since the rule provides that ‘[a] mere statement that the judgment or award is contrary to the law and the evidence is not sufficient,’ it follows that a statement that an order is ‘seen and objected to’ must also be insufficient.” *Id.* at 515, 404 S.E.2d at 738. *See Bryson on Virginia Civil Procedure* § 12.02 n.14 (4th ed. 2005).

80, 88 (2005); *Spitzli v. Minson*, 231 Va. 12, 341 S.E.2d 170, 174 (1986); compare *Brown v. Commonwealth*, 8 Va. App. 126, 380 S.E.2d 8, 10-12 (1989) (vacating and remanding for resentencing, where “a miscarriage of justice occurred when the trial court sentenced the appellant for a crime other than that for which he had been convicted”).

Federal case law may provide some assistance to Virginia litigants faced with the unenviable task of persuading an appellate court to consider an issue not presented to the court or agency below, because the federal standards for consideration of such issues are both well developed and similar to Virginia’s. Federal appellate courts generally will consider a new argument on appeal only “if the error of the trial judge resulted in a ‘miscarriage of justice.’” *Barger v. Mayor & City Council of Baltimore*, 616 F.2d 730, 733 (4th Cir.), *cert. denied*, 449 U.S. 834 (1980). See, e.g., *Haywood v. Ball*, 586 F.2d 996, 1000 (4th Cir. 1978) (“plain error” and “likely miscarriage of justice”); *Ricard v. Birch*, 529 F.2d 214, 216 (4th Cir. 1975); *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) (“there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, ... or where ‘injustice might otherwise result’”) (citations omitted; a footnote to this passage says, “These examples are not intended to be exclusive”).

2. The **record** on appeal ordinarily is fixed in the trial court or administrative agency.

In appeals from a trial court, identification of the record usually is a fairly simple task: the record generally consists of all pleadings, motions, other papers, and exhibits filed or offered by the parties; any transcripts of proceedings; and the court’s orders and opinions. See, e.g., F.R.A.P. 10; Va. S.Ct. Rules 5:10, 5:13, 5A:7, and 5A:10; see also Va. S.Ct. Rule 5:15 (record on appeal from the Court of Appeals or certification for review). Discovery materials generally are *not* part of the record, *unless* they have been filed or offered for filing in the trial court. See Va. S.Ct. Rules 5:10(a)(6), 5A:7(a)(6). Records on appeal of adversary administrative agency proceedings following a “judicial model” of conflict resolution are similar. See, e.g., F.R.A.P. 16; Va. S.Ct. Rule 5A:11(c) (record on appeal from the Virginia Workers’ Compensation Commission).

The contents of the record of informal administrative agency proceedings that are not conducted “on the record” of an adversary hearing (most permit and license applications, for example) at least theoretically are governed by the same principles. In practice, however, the contents of such records can be controversial. For example, is the record limited to materials filed by the applicant or commentators, together with the agency’s written analyses and order or decision? Does it include internal memoranda discussing the application? (*Cf. EPA v. Mink*, 410 U.S. 73, 88-89 (1973) (Freedom of Information Act case applying common law “deliberative process privilege”).) Does it include other materials in the agency’s files, which were or may have been consulted by agency staff or the agency decisionmaker? Does it include matters known to the decisionmaker or agency staff from general educational

background or experience in prior cases? These ambiguities often allow agencies a great deal of leeway in identifying the contents of their administrative records, at least in the first instance.

Nothing can be *added* to the record on appeal that was not part of the record in a trial court, and the same rule applies by default in judicial review of agency actions.⁵ However, various “safety valve” provisions allow *correction* of the record. See F.R.A.P. 10(e); Va. S.Ct. Rules 5:10(b), 5:11(d), 5:12, 5A:7(b), 5A:8(d), and 5A:9. In appeals of “informal” agency actions, limited discovery designed to identify the “true contents” of the agency record, followed by motions to supplement the record with materials identified in such discovery, is often used to allow courts to correct agency omissions in compiling administrative records. Cf. *Texas Steel Co. v. Donovan*, 93 F.R.D. 619, 621 (N.D. Tex. 1982) (plaintiff must demonstrate a reasonable basis for believing that an administrative record is incomplete before being allowed to conduct such discovery).

In Virginia, admission of additional evidence in Administrative Process Act appeals is expressly authorized by Va. Code § 2.2-4027, which says in part that the agency’s record may be “augmented, if need be, by the agency pursuant to order of the court or supplemented by any allowable and necessary proofs adduced in court.” *State Board of Health v. Godfrey*, 223 Va. 423, 433-34, 290 S.E.2d 875, 880-81 (1982), holds, however, that while evidence may be properly admitted to show that an agency decided a case “arbitrarily or in bad faith ... such evidence should be limited to that purporting to show that the agency denied the applicant a fair and impartial review of

⁵ There is at least one well established exception to that rule. Evidence that the case (or any of the issues on appeal) is moot, for reasons not shown by the record, may be offered for the first time on appeal. *E.g.*, *Crist v. Bretz*, 437 U.S. 28, 29 n.2 (1978); *Matter of Manges*, 29 F.3d 1034, 1041 (5th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995); *Department of Assessments v. St Mary’s Ronald View Towers, Inc.*, 244 Md. 478, 484, 224 A.2d 266, 268-69 (1966). See also, *e.g.*, *Rountree v. Rountree*, 200 Va. 57, 62-63, 104 S.E.2d 42 (1958) (*dictum*); *Ward v. Charlton*, 177 Va. 101, 12 S.E.2d 791 (1941) (proof of intervening judgment admitted in support of motion to dismiss appeal, to show that claim on appeal was barred by *res judicata*); *Bank of Alexandria v. Patton*, 40 Va. (1 Rob.) 499, 515-26 (1843) (appellant Bank’s charter expired while the appeal was pending; appellees’ motion to abate the appeal denied on the ground that the Bank had assigned its rights before dissolution (which the appellees did not deny) and that the appeal should continue on behalf of the assignees). Indeed, as stated in *Board of License Comm’rs v. Pastore*, 469 U.S. 238, 240 (1985) (*per curiam*), counsel “have a ‘continuing duty to inform the Court of any development which may conceivably affect the outcome’ of the litigation.... When a development after this Court grants certiorari or notes probable jurisdiction could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that development should be called to the attention of the Court *without delay*.” (Citation omitted; emphasis in original.)

his application in accordance with proper procedures.” *But see Crutchfield v. State Water Control Board*, 45 Va. App. 546, 556, 612 S.E.2d 249, 254 (2005) (citing *dictum* in *School Board v. Nicely*, 12 Va. App. 1051, 1062 n. 2, 408 S.E. 2d 545, 551 n. 2 (1991)): “Code § 2.2-4027 allows the record to be supplemented by ‘any allowable and necessary proofs adduced in court’ only where there is no agency record.” To this author, *Crutchfield* appears to be inconsistent with *Godfrey* and wrong. *Godfrey* clearly does anticipate introduction of a limited set of additional evidence, even when there is an agency record. In addition, *Nicely* stated only that § 2.2-4027 “only allows circuit courts to *assemble* a record where no agency record exists” (Emphasis added.) That does *not* mean that a circuit court may not allow a party to *supplement* an agency record, however; and both the statute and *Godfrey* say that (under very limited circumstances, to be sure) it may. Logically, moreover, one might ask how a record can be “supplemented” if there *is no* such record, as suggested by *Crutchfield*.

Under the federal APA, courts will admit supplemental evidence where:

- (1) an agency deliberately or negligently excludes information from the record;
- (2) it is needed to determine whether the agency considered all the relevant factors;
- (3) it is necessary to determine what the agency did not consider;
- (4) the court must determine whether the administrative record is adequate;
- (5) an agency fails to explain its actions so as to defeat effective judicial review; or
- (6) an agency is charged with acting in bad faith.

See U.S. v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1427 (6th Cir. 1991) (listing factors and citing cases). *See also 1902 Atlantic Ltd v. Hudson*, 574 F.Supp. 1381, 1397 (E.D. Va. 1983) (under federal APA, court can consider extra-record evidence where the agency has failed to explain its actions in such a way as to frustrate judicial review, or “to see what the agency may have ignored”); *Asarco, Inc. v. U.S. E.P.A.*, 616 F.2d 1153, 1160 (9th Cir. 1980) (where “highly technical” matters are at stake, it may be impossible for a reviewing court to “determine whether the agency took into consideration all the relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not”).

III. STANDARDS OF APPELLATE REVIEW

- A. **The “standard of review” defines the analytical process that an appellate court applies to an issue presented for decision.** The applicable standard depends on the nature of the decision under review (*i.e.*, conclusion of law, finding of fact, exercise of discretion, etc.). Where such guideposts are indistinct, however, selection of applicable standards of review often depends on judgments regarding institutional competence, *i.e.*, whether trial or appellate judges are better positioned or equipped to make the decision, and related (but distinct)

considerations regarding appropriate allocations of judicial resources. *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985); *United States v. Felder*, 548 A.2d 57, 62-65 (D.C. 1988); *Gall v. United States*, 128 S.Ct. 586, 598, 169 L.Ed.2d 445, 458 (2007) (“Moreover, ‘[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, ... especially as District Courts see so many more Guidelines sentences than appellate courts do’”) (quoting *Koon v. United States*, 518 U.S. 81, 98 (1996)).

The most common and generally recognized standards of review include:

1. **legal error;**
2. **abuse of discretion;**
3. **“clearly erroneous”** review of trial court fact findings in the federal courts;
4. **“plainly wrong”** or **“without supporting evidence”** review of trial court fact findings, in Virginia courts;
5. **“rational basis”** review of jury findings of fact, in federal courts;
6. **“substantial evidence in the record as a whole,”** applied (1) to fact findings of administrative agencies in cases subject to the Virginia Administrative Process Act (VAPA), (2) to fact findings of federal administrative agencies in rulemaking proceedings and (3) to fact findings of federal administrative agencies in cases decided on the record of an evidentiary hearing;
7. **“arbitrary [or] capricious,”** applied to substantive (*i.e.*, policy) decisions of state administrative agencies and to both findings of fact and substantive decisions of federal administrative agencies;
8. **“fairly debatable,”** applied to “legislative” decisions of local governing bodies and other entities in particular cases (*e.g.*, requests for rezoning).

This list states the most frequently used standards *roughly* in descending order of stringency, *i.e.*, from the most demanding to the most forgiving tests applied to decisions under review. These concepts are discussed in more detail below, along with review of “mixed” questions – which is perhaps the most critical (and the slipperiest) concept in this entire area of the law.

B. Why is the standard of review important?

1. In the U.S. Courts of Appeals, F.R.A.P. 28(a)(9)(B) and 28(b) require “a concise statement of the applicable standard of review” for each issue, in each party’s initial brief. (The appellee may omit the statement of the standard of review, however, unless she is “dissatisfied with the appellant’s statement.” F.R.A.P. 28(b)(5).)
2. In the Virginia courts, which do not yet require a statement of the standard of review in briefs, a voluntary statement and the analyses that precede it may help greatly to focus the Court and counsel on the nature of the issues presented. Counsel who review potential appellate issues through the “filter” of the applicable standard of review are

better able to select the best issues for appeal, and they are far more able to present issues in terms that facilitate a favorable decision. Appellants, for example, should emphasize (to the extent possible) that the issues are purely legal and subject to *de novo* review. Appellees should emphasize (when possible) that rulings challenged by the appellant may be reviewed only for abuse of discretion or for clear error in factual findings. (If the appellant argues purely legal issues but does not stress the point, however, then of course the appellee may choose not to emphasize the standard of review.)

3. The standard of review helps to determine the extent and (more often) the limitations of the appellate court's power to decide questions that are within the scope of its review. In many cases, it virtually dictates the decision.
4. For appellants' counsel, potential assignments of error *cannot* be evaluated intelligently without consideration of the standards of review. A proper and objective evaluation of the substantive strengths and weaknesses of each potential argument on appeal, in light of the review standard applicable to each, allows intelligent selection of the two or three best arguments to be presented in a petition for appeal or a brief.

For appellees' counsel, careful evaluation (and research) regarding the issues on appeal will allow effective "policing" of appellants' counsel – and sometimes the court as well, which may need to be reminded at argument (for example) that the appellant has challenged only the discretionary aspects of the trial court's decision, and not the court's selection of factors to be considered in its exercise of discretion or the basic proposition that the issue is committed to the trial court's discretion.

5. Standards of review often can be "manipulated" by careful argument. Issues that may seem governed by an abuse of discretion standard, for example, may include a legal component, such as the choice of factors that must be considered in the exercise of discretion. The appellant usually should, if possible, focus on the legal components of the mixed question, and often may even disavow any challenge to the way that the trial court or agency exercised its discretion (based on its legally erroneous selection of factors to consider). The appellee, on the other hand, should emphasize the discretionary aspects of the decision below; and if appropriate she should even argue that the choice of factors is itself committed to the lower court's discretion or that its choice of factors merits some deference on appeal.

Skillful appellate advocates always tailor their arguments to the most favorable standard of review. Appellants' counsel should try to "climb the ladder" to the most stringent (least deferential) standard available. Appellees' counsel should advocate more deferential standards, to increase appellants' burden of proving an error. Standards of appellate review are analogous to burdens of proof at trial; just as a plaintiff's attorney will argue that he need only prove his case by a preponderance of the evidence and not by clear and convincing evidence, for example, an appellant's lawyer should urge the appellate court to review the trial court's decision for legal

error and not for abuse of discretion or clear error in its factual findings.

Appellants' counsel have an advantage, however; they select the assignments of error, and therefore they have the opportunity to define the debate with precision. *See, e.g., Technical Land, Inc. v. Firemen's Insurance Co.*, 756 A.2d 439, 443 (D.C. 2000) ("Whether a person has an insurable interest is a question of fact.... Although Firemen's Insurance contends that Technical Land is seeking review of the trial court's finding of fact that Technical Land did not have an insurable interest, Technical Land maintains that the trial court's finding ... is wrong as a matter of law because the trial court did not consider the appropriate factors. We agree with Technical Land and review the trial court's ruling *de novo*").

6. If you are not yet convinced, consider the advice of an experienced and highly respected jurist, Senior Judge (and former Chief Judge) Ruggero J. Aldisert of the U.S. Third Circuit:

Standards of review are critically important in effective advocacy. In large part, they determine the power of the lens through which the appellate court may examine a particular issue in a case. The error that may be a ground for reversal under one standard of review may be insignificant under another....

I elevate the necessity of correctly stating the review standard to a question of minimum professional conduct....

R. Aldisert, *Winning on Appeal* § 5.02 at 57-58 (emphasis added).

IV. REVIEW FOR LEGAL ERROR

- A. **Review for "legal error"** (also known as **independent, plenary**, or *de novo* review) is the most stringent standard in general use. It should be applied in all cases to pure questions of law, and it is applied in some other, specialized circumstances. Under this standard, the appellate court accords the lower court's or agency's conclusion no deference at all; it decides the issue for itself. A lower court's *reasoning* may be persuasive or even compelling, of course; but the very nature of the relationship between trial and appellate courts dictates that appellate courts not review legal issues with any predisposition to sustain lower courts' conclusions. Appellate courts must make their own, independent decisions.

Like other standards, however, "legal error" has no single, fixed definition that applies in all circumstances. It is subject to considerable variation in shades or color of meaning, depending on the nature of the legal issue presented. More specifically, virtually all issues of law can be classified as presenting questions of (1) selection of a governing rule, (2) interpretation of the chosen rule, or (3) application of the rule to the particular facts:

1. **Selection of the applicable rule.** Decisions of this nature receive the most stringent appellate review. A court must choose the applicable legal rule when the choice is not settled by a statute or a prior decision and the parties disagree, for example, as to

whether a statute or a constitutional provision applies; what statute applies, or what subsection of a statute; or whether a common law rule applies, and if so what is the applicable rule (and/or whose law applies). In cases of first impression, “selection” not uncommonly equals “creation.”

2. **Interpretation of the governing rule.** When the parties agree on the selection, or after the court has identified the applicable rule, the court may be required to decide the meaning of that rule. *See, e.g., Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 65-66, 481 S.E.2d 460, *cert. denied*, 522 U.S. 813 (1997) (reviewing trial court’s “interpretation of the relevant legal standards used to determine whether property has been taken under the federal and state constitutions,” for error). For example, if the parties agree (or the court decides) that Virginia Code § 65.2-804(B) controls the question whether an insurer validly cancelled a workers’ compensation insurance policy, but the parties disagree as to whether the statute’s requirement of “thirty days’ notice to the employer and the Workers’ Compensation Commission” allows oral notice or requires notice in writing, then the court faces a question of interpretation of applicable law. (*Cf. Villwock v. Insurance Co. of North America/CIGNA*, 22 Va. App. 127, 468 S.E.2d 130 (1996) (addressing whether § 65.2-804(B) requires that the notice of cancellation be received or merely mailed).)

Issues of interpretation often rise to a level equal or similar to that of selection, with respect to both the stringency of the appellate court’s review and the intensity of its interest in the question presented. (For obvious reasons, the two often are directly related.) For example, interpretation of constitutional norms such as “due process” and “equal protection” may be at least as interesting as the choice of a controlling statute. Such decisions also may be among those that appellate courts consider the highest and best uses of their time, skills, and institutional competence. Further, the line between selection and interpretation is indistinct, and the two functions often mix and overlap. Selection of an applicable statute, for example, frequently requires interpretation of several statutes to determine which (if any) applies.

3. **Application of the governing rule to the facts.** *See, e.g., Board of Zoning Appeals v. CaseLin Systems, Inc.*, 256 Va. 206, 211, 501 S.E.2d 397 (1998) (proper application of legal “test” to facts poses a question of law, and therefore appellate court does “not accord a presumption of correctness to the trial court’s decision”); *but see Bottoms v. Bottoms*, 249 Va. 410, 414, 457 S.E.2d 102 (1995) (“Absent clear evidence to the contrary in the record, the judgment of a trial court comes to an appellate court with a presumption that the law was correctly applied to the facts”). Like interpretation and selection, the line between application and interpretation often is indistinct, and courts frequently do not draw explicit distinctions between them but instead blend interpretation and application into a single analysis. Where selection and interpretation are less controversial and a “pure” question of application is presented (or analytically isolated) for decision, however, an appellate court’s review for “legal error” in application of the rule is likely to be somewhat less stringent in practice than its review of the lower court’s selection or interpretation of the rule. This occurs both

- because application of the rule to the facts tends to blend into the findings of facts themselves and because appellate judges tend to regard matters of application as less significant in the development of the overall body of the law. *Cf.* United States Supreme Court Rule 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law”).
4. U.S. Courts of Appeals must conduct independent, *de novo* reviews of district courts’ determinations of state law. *Salve Regina College v. Russell*, 499 U.S. 225 (1991). The opposite rule prevails, however, when the U.S. Supreme Court reviews a U.S. Court of Appeals’ reading of state law. *See McMillian v. Monroe County, Alabama*, 520 U.S. 781, 786-87 (1997); *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 738 (1989).
 5. Appellate courts occasionally exercise “independent judgment” on pure questions of fact. The ultimate scope of this exception to normal rules of appellate review is unpredictable, but it is likely to be narrowly confined. To date, it has been applied primarily (but not exclusively) in suits for libel or similar torts, where judicial concern for protection of freedom of expression has generated a variety of special rules in the decades since the U.S. Supreme Court decided *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (“in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure ‘that the judgment does not constitute a forbidden intrusion on the field of free expression.’”). *See also, e.g., Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 567 (1995) (“review of petitioners’ claim that their activity [annual St. Patrick’s Day - Evacuation Day parade] is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court”); *Randall v. Sorrell*, 548 U.S. 230, 248-49 (2006) (plurality opinion) (exercising “independent judicial judgment” with respect to constitutional limits on statutes regulating campaign contributions); *Veilleux v. National Broadcasting Co.*, 206 F.3d 92, 106-07 (1st Cir. 2000); *Gazette, Inc. v. Harris*, 229 Va. 1, 19, 325 S.E.2d 713, 727-28, *cert. denied*, 472 U.S. 1032 and 473 U.S. 905 (1985) (citing and quoting *Bose*):

[W]e hold that an appellate court in Virginia, on the issue of punitive damages or where *New York Times* malice must be proven, must independently decide whether the evidence in the record on appeal is sufficient to support a finding of *New York Times* “actual malice” by clear and convincing proof.... This does not mean that the reviewing court may disregard the determinations made on credibility of witnesses by the trier of fact or that the presumption of correctness that attaches to factual findings is to be discounted.... The rule simply means that appellate judges in such a case must examine the facts pertinent to the punitive-damage award and exercise independent judgment to “determine whether the record establishes actual malice with convincing clarity.”

See also *Ex parte Anonymous*, 808 So. 2d 1030, 1034-40 (Ala. 2001) (Moore, C.J., concurring specially), for an excellent discussion of applicable cases and their underlying principles, in the context of an argument for application of the independent judgment standard of review to an appeal of a trial court order denying a “judicial bypass” petition for a minor’s abortion.

- B. The Chevron rule.** Federal courts review the interpretation of a statute by an agency charged with its administration under a different, openly deferential “legal error” standard, on the ground that when a statute is ambiguous, Congress intended to delegate its interpretation as well as its administration to the agency. The courts therefore accept agency interpretations of such statutes if they are merely “reasonable.” See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (*Chevron*).⁶

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.... Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44 (footnotes omitted). The *Chevron* doctrine may be summarized as follows:

Step One: “The starting point in interpreting a statute is its language, for ‘[i]f the intent of Congress is clear, that is the end of the matter.’” *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409 (1993) (quoting *Chevron*, 467 U.S. at 842).

“Step One” is not strictly limited to the language of the statute but includes the use of legislative history and other “traditional tools of statutory construction.” *Chevron*, 467 U.S. at 843 n.9; *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). See, e.g., *Independent Insurance Agents v. Ludwig*, 997 F.2d 958, 960 (D.C. Cir. 1993).⁷

⁶ Reviewing courts also defer to agencies’ application of statutes that they administer to the facts of the case, reflecting the fact that interpretation and application tend to merge. *E.g.*, *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1366, 1369, 1372 (4th Cir. 1995), *aff’d*, 517 U.S. 392 (1996) (affirming NLRB’s conclusion that employees were not “agricultural laborers” under the National Labor Relations Act’s protection “because that conclusion is based on a reasonable interpretation of the Act ...”).

⁷ *But cf. American Rivers v. FERC*, 201 F.3d 1186, 1196 n.16 (9th Cir. 1999) (“We acknowledge the debate over the propriety, under *Chevron*, of venturing beyond plain meaning analysis and resorting to traditional implements of statutory construction to ascertain a clear

(footnote continued on next page)

Step Two: If Congress' intent is not clear, after consideration of the statutory language and other "traditional tools," then – and only then – the court must defer to the agency's interpretation. *Chevron*, 467 U.S. at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

An agency's interpretation is "permissible" if it is "reasonable." *E.g.*, *Mowbray v. Kozlowski*, 914 F.2d 593, 601 (4th Cir. 1990). The real battle therefore is generally fought under "Step One"; when courts reach the second step, they rarely set aside an agency's interpretation. *But see American Trucking Ass'n, Inc. v. Federal Highway Administration*, 51 F.3d 405, 412 (4th Cir. 1995) ("...the statute is in critical respects ambiguous," but "the agencies' actual interpretation – which ignored all the ambiguities that we have identified – is not reasonable. We must, therefore, vacate the final rule").

The U.S. Supreme Court has not always steered a straight course in this area. A line of cases under Title VII of the Civil Rights Act of 1964, beginning with *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), may be read as indicating that the extent of the deference granted an agency's interpretation of a statute depends on whether it has the authority to issue regulations implementing that statute.⁸ *But see General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (EEOC's lack of authority to promulgate rules or regulations "does not mean that EEOC guidelines

(footnote continued)

congressional directive. *Compare INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48, 107 S.Ct. 1207, 1221-22, 94 L.Ed.2d 434 (1987) (suggesting that, under the first prong of *Chevron*, courts should employ 'traditional tools of statutory construction') *with id.* at 454, 107 S.Ct. at 1225 (Scalia, J., concurring) (rejecting this suggestion). This Court has followed *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. at 2781-82 n.9, and availed itself of the full range of tools to ascertain legislative intent.... We cautiously adhere to this practice as necessary.")

⁸ *Griggs* predated *Chevron*; but *Chevron* is not the first articulation of the doctrine of deference to agency interpretation of statutes, by a long shot, although it is the most frequently cited decision in the area. Numerous earlier cases are cited in *Chevron*, 467 U.S. at 843-45 & nn.11-14; *see also Power Reactor Development Co. v. International Union of Elec., Radio and Mach. Workers*, 367 U.S. 396 (1961) (cited in *Griggs*). *Chevron* is perhaps best seen as the decision which crystallized the current theoretical framework for the deference doctrine – the notion that a statutory ambiguity is an implicit legislative delegation of authority to an agency to "elucidate" the statute (which has plagued and troubled the federal courts ever since). *Cf. United States v. Mead Corp.*, 533 U.S. 218, 237 (2001) ("*Chevron* was simply a case recognizing that even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation present a particularly insistent call for deference").

are not entitled to consideration in determining legislative intent But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law ... or to regulations which under the enabling statute may themselves supply the basis for imposition of liability”)

This line of cases culminated in *United States v. Mead Corp.*, 533 U.S. 218 (2001), which presented questions regarding the application of *Chevron* deference to tariff ruling letters issued by the Customs Headquarters Office and 46 port-of-entry Customs Offices.⁹ *Mead* appears to establish a hierarchy of judicial deference with at least two levels, depending on the existence (and perhaps the nature) of an express or implicit congressional delegation of rulemaking authority.

Under the *Mead* analysis, the highest level of deference is accorded agency decisions made pursuant to a congressional delegation of authority to make rules carrying the force of law, which “may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent.” 533 U.S. at 226-27. Another category of agency decisions, which apparently warrant equal deference, are those made pursuant to “implicit” delegations of rulemaking authority (as in *Chevron*):

Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which “Congress did not actually have an intent” as to a particular result.... When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency’s exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency’s chosen resolution seems unwise ..., but is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable....

Id. at 229 (citations omitted).

The second level of the hierarchy, exemplified by the tariff rulings at issue in *Mead*, applies to agency decisions in areas lacking sufficient evidence of congressional intent to delegate authority to make rules with the force of law. This category of agency actions includes “interpretations contained in policy statements, agency

⁹ See also *Wyeth v. Levine*, ___ U.S. ___, No. 06-1249, slip op. at 20-22 (March 4, 2009) (<http://www.supremecourtus.gov/opinions/08pdf/06-1249.pdf>).

manuals, and enforcement guidelines.” *Id.* at 234 (quoting *Christenson v. Harris County*, 529 U.S. 576, 587 (2000)). Regrettably, however, the Court’s analysis of this issue in *Mead* offers little of apparent relevance beyond the bare statement that the “face of the statute” provides “no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law.” 533 U.S. at 231-32. The point that the 46 different Customs offices collectively issue 10,000 to 15,000 such rulings per year has teeth, but the context of that discussion at least suggests that this occurs as a matter of agency practice rather than congressional direction; and the *agency* practices discussed in the opinion – which also include the lack of notice-and-comment procedures for issuing tariff rulings and limitation of a ruling’s effect to the importer to whom it is issued (*id.* at 233) – appear to have limited value as indicators of *Congress*’ legislative intent.

In any event, agency decisions in this second category do not receive *Chevron* deference; but this “is not, however, to place them outside the pale of any deference whatever.” *Id.* at 234. In this area, the Court hearkened back to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944):

“The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S., at 140.

....

Chevron did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form, given the “specialized experience and broader investigations and information” available to the agency, 323 U.S., at 139, and given the value of uniformity in its administrative and judicial understandings of what a national law requires, *id.*, at 140.

Mead, 533 U.S. at 228, 234. The *Mead* Court found

room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case A classification ruling in this situation may therefore at least seek a respect proportional to its “power to persuade,” *Skidmore, supra*, at 140 Such a ruling may surely claim the merit of its writer’s thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight.

- C. **Deference to Agency Interpretations of Regulations.** Federal courts also “defer” to agencies’ interpretations of their own regulations, although the reasons for such deference are

different (and stronger), and Congress' intent has little relevance. *See, e.g., Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994). As stated in *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965):

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.... When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

“Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.... [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414.

D. The Virginia Rule. The federal *Chevron* doctrine does not appear to be recognized generally in Virginia. *See, e.g., Sims Wholesale Corp. v. Brown-Forman Corp.*, 251 Va. 398, 404, 468 S.E.2d 905, 908 (1996) (rejecting Attorney General's argument for “great deference” to ABC Board's decision on a question of statutory interpretation: “Pure statutory interpretation is the prerogative of the judiciary”). *But see Commonwealth v. General Electric Co.*, 236 Va. 54, 64, 372 S.E.2d 599, 605 (1988) (citing *Winchester TV Cable Co. v. State Tax Commissioner*, 216 Va. 286, 290, 217 S.E.2d 885, 889 (1975)) (“construction of a statute by a State official charged with its administration is entitled to great weight”). *See also, e.g., Virginia Real Estate Board v. Clay*, 9 Va. App. 152, 159, 384 S.E.2d 622, 626 (1989), *appeal dismissed*, 398 S.E.2d 78 (1990) (accorded “great deference” to agency's interpretation of its own regulations); *Jackson v. Marshall*, 19 Va. App. 628, 633-35, 454 S.E.2d 23, 26-27 (1995) (rejecting agency's reading of statute, giving lip service to deference rule but emphasizing that “courts must construe and determine compliance with ... statutes ... irrespective of the agency's construction, and not merely rubber-stamp an agency determination” (citations and internal quotation marks omitted); *J. B. v. Brunty*, 21 Va. App. 300, 303-05, 464 S.E.2d 166, 168-69 (1995) (affirming agency's interpretation with no suggestion of any deference).¹⁰

¹⁰ The Attorney General of Virginia, who is responsible for defending agency decisions against petitions for judicial review, has officially opined that “[t]he Supreme Court of Virginia has recognized a presumption in favor of an administrative agency's regulatory interpretation of the statutes that agency implements.” 1991 Op. A.G. 312 (citing *Commonwealth v. Wellmore Coal*, 228 Va. 149, 320 S.E.2d 509 (1984); *Peyton v. Williams*, 206 Va. 595, 145 S.E.2d 147 (1965); *Aetna Ins. Co. v. Commonwealth*, 160 Va. 698, 169 S.E. 859 (1933); and *Huffman v. Unemployment Comm.*, 184 Va. 727, 36 S.E.2d 641 (1946)).

V. REVIEW OF TRIAL COURTS' AND JURIES' FINDINGS OF FACT

- A. **Federal appellate review of trial courts' findings in civil cases** is governed by Fed.R.Civ.P. 52(a), which provides (in pertinent part), “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.” *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985): “Finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.... If district court’s account of evidence is plausible in light of record viewed in its entirety, court of appeals may not reverse it even though convinced that had it been sitting as trier of fact, it would have weighed evidence differently.”

Bessemer City, together with a Rule 52(a) amendment adopted a few weeks later, put to rest the notion (previously followed by several courts of appeals) that the “clearly erroneous” standard did not apply to findings based on documentary evidence. *Bessemer City* held that the “clearly erroneous” standard applies “even when the district court’s findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.” Rule 52(a) was subsequently amended by adding the words “whether based on oral or documentary evidence.” The Advisory Committee’s Note recognized the strength of the argument that the rationale for deference to trial courts’ findings is weakened where witness credibility is not a factor, but it found such considerations “outweighed by the public interest in the stability and judicial economy that would be promoted” by recognizing that trial courts should be the finders of facts, thus promoting “the legitimacy of the district courts in the eyes of litigants” and avoiding inappropriate appeals and needless reallocation of judicial authority.

Bessemer City also held that the Rule’s “credibility” clause requires “even greater deference to the trial court’s findings” based on the credibility of the witnesses. “[W]hen a trial judge’s finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can *virtually never* be clear error.” 470 U.S. at 575 (emphasis added).

- B. **Review of jury findings of fact in the federal courts** is perhaps the least stringent – certainly among the least stringent – of any process of judicial review known to the American legal system. Federal appellate courts are particularly sensitive to jury findings because the Seventh Amendment of the U.S. Constitution forbids reexamination of jury findings, “except according to the rules of the common law.” If *any* reasonable jury *could have* reached the same conclusion, under the applicable standard of proof, and assuming no legal error in the instructions, its findings should not be set aside on appeal. Essentially the same standard is applied to a directed verdict or judgment as a matter of law. It is sometimes referred to as “rational basis” review. *See generally, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500, 514 (1988).

C. **Appellate Review of Findings of Fact In Virginia.** In Virginia, appellate review of *both* juries' *and* trial courts' findings of fact, in both civil and criminal cases, is governed by Va. Code § 8.01-680. Section 8.01-680 provides that where a party challenges *either* the trial court's decision to grant or to deny a motion to set aside a jury verdict and order a new trial *or* the trial court's own findings of fact, on the ground that it is (or they are) contrary to the evidence, the judgment shall not be set aside "unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it." The Virginia Supreme Court has held expressly that under this and a predecessor statute, in both civil and criminal cases, trial courts' findings are "given the same effect as a jury verdict." *City of Richmond v. Beltway Properties, Inc.*, 217 Va. 376, 379, 228 S.E.2d 569, 572 (1976); *Pugh v. Commonwealth*, 223 Va. 663, 667, 292 S.E.2d 339, 341 (1982).

This standard is not entirely toothless. The Supreme Court occasionally has reversed a judgment on the ground that there was *no* evidence to support a finding for a prevailing party, on one or more issues as to which it had the burden of proof (*e.g.*, *Thompson v. Bacon*, 245 Va. 107, 111-12, 425 S.E.2d 512, 515 (1993)), or on the ground that undisputed evidence established a disputed fact as a matter of law, contrary to the trial court's finding (*e.g.*, *Schweider v. Schweider*, 243 Va. 245, 250, 415 S.E.2d 135, 138 (1992)), and even on the ground that the evidence was insufficient to prove beyond a reasonable doubt that a defendant committed a crime (*Hickson v. Commonwealth*, 258 Va. 383, 520 S.E.2d 643 (1999)). "The findings of a trial court after an *ore tenus* hearing should not be disturbed on appeal unless they are plainly wrong or without evidence to support them. A trial court's conclusion based on undisputed evidence, however, does not have the same binding weight on appeal.... Moreover, a fact finder may not arbitrarily disregard uncontradicted evidence that is not inherently incredible." *Schweider*, 243 Va. at 250, 415 S.E.2d at 138 (citations omitted). *Accord, e.g.*, *Black v. Edwards*, 248 Va. 90, 92-93, 445 S.E.2d 107, 109 (1994).

Where the trial court sets aside a verdict and enters final judgment, pursuant to Va. Code § 8.01-430, the reviewing court applies a standard similar to that applied to judgments entered on jury verdicts – it reviews the record to determine whether there is credible evidence to support the verdict, and if it finds such evidence it must reinstate the verdict and enter final judgment on it. *E.g.*, *Rogers v. Marrow*, 243 Va. 162, 166, 413 S.E.2d 344, 346 (1992). "In analyzing the evidence, even where the trial court has set aside the verdict, we accord the recipient of the verdict the benefit of all substantial conflict in the evidence, as well as all inferences which may be reasonably drawn from the evidence." *Id.* The appellate court's review of the trial court's decision thus appears to be entirely *de novo*, without any deference or presumption of correctness; the appellate court reviews the record and the verdict using the same standards that the trial court was required to use. This approach is appropriate because the trial court in such a case does not sit as the finder of facts, or as an additional juror, and therefore it is not entitled to make any decisions based on its view of the credibility of the witnesses or to resolve any conflicts in the evidence.

Case law, however, also supports the contrary proposition, *i.e.*, that a verdict that has been

disapproved by the trial court is not entitled to the same weight as a verdict that the trial court has approved.

When the verdict of a jury has been set aside by the trial court, the verdict is not entitled to the same weight upon appellate review as one which has received the trial court's approval. *Guill v. Aaron*, 207 Va. 393, 396, 150 S.E.2d 95, 98 (1966). But in considering the facts under these circumstances, "we accord the plaintiff benefit of all substantial conflicts in the evidence and all reasonable inferences that may be drawn from the evidence." *Oberbroeckling v. Lyle*, 234 Va. 373, 378, 362 S.E.2d 682, 685 (1987).

Kelly v. Virginia Electric and Power Company, 238 Va. 32, 35, 381 S.E.2d 219 (1989); *see also, e.g., Deskins v. T.H. Nichols Line Contractor, Inc.*, 234 Va. 185, 361 S.E.2d 125, 125 (1987) ("Because the jury verdict in this case has been disapproved by the trial judge, it is not entitled to the same weight as a verdict which has been approved.... Even so, we must consider the evidence in the light most favorable to ... the recipient of the verdict") (citations omitted). Defining the degree of difference appears akin to counting angels dancing on a pin; perhaps the only point that is clear is that the appellate courts retain sufficient latitude to allow them to enter the judgment that appears most likely to serve justice in the particular case.

Under Va. Code § 8.01-610, the report of a commissioner in chancery "shall not have the weight given to the verdict of a jury on conflicting evidence." This statute applies expressly to the trial court's function ("the court shall confirm or reject such report" according to its view of the law and the evidence). On appeal,

a decree which approves a commissioner's report will be affirmed unless plainly wrong ...; but where the chancellor has disapproved the commissioner's findings, this Court must review the evidence and ascertain whether, under a correct application of the law, the evidence supports the finding of the commissioner or the conclusions of the trial court.... Even where the commissioner's findings of fact have been disapproved, an appellate court must give due regard to the commissioner's ability, not shared by the chancellor, to see, hear, and evaluate the witnesses at first hand.

Hill v. Hill, 227 Va. 569, 577, 318 S.E.2d 292 (1984) (citations omitted). Of course this rule "is not applicable to pure conclusions of law contained in the report." *Id.* (reversing for legal error "in finding that a *de facto* corporation existed ...").

- D. Reviews of Unliquidated Damage Awards – especially punitive damages** – are conducted under somewhat different standards. Such awards are within the "discretion" of the trier of the facts, be it judge or jury; but an appellate court itself must decide whether an award is so excessive as to shock the conscience and/or to create the impression that it was influenced by partiality, passion, or prejudice, or whether a punitive damage award is so out of proportion to the plaintiff's actual damages as to suggest that it was not the product of a fair and impartial decision. *E.g., Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214, 220 (1973) (physical and emotional suffering); *Schnupp v. Smith*, 249 Va. 353, 368, 457 S.E.2d 42 (1995) (conducting

“an independent examination of the entire record,” to determine whether the evidence was sufficient to prove “*New York Times* malice by clear and convincing evidence,” because punitive damages awarded) (citing *Bose, supra*, 466 U.S. 485, 514); *Gazette, Inc. v. Harris*, 229 Va. 1, 48, 325 S.E.2d 713, *cert. denied*, 472 U.S. 1032 and 473 U.S. 905 (1985) (holding compensatory damage award for libel “excessive as a matter of law”); *Hamilton Development Co. v. Broad Rock Club, Inc.*, 248 Va. 40, 46, 445 S.E.2d 140 (1994) (punitive damages). See also *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994), and cases cited therein, regarding constitutionally required review of punitive damages awards; and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), mandating *de novo* appellate review of trial courts’ determinations of the constitutionality of punitive damage awards.

- E. The Effect of the Standard of Proof at Trial.** Whether the facts are found by a judge or a jury, **appellate review of findings of fact must take into account the applicable burden of proof.** Thus, in a criminal case, the reviewing court must determine whether the evidence is “sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 313-14 (1979). The same principle applies to review of findings in civil cases, on issues that are governed by a heightened standard of proof such as “clear and convincing evidence,” for example. See, e.g., *Ingles v. Dively*, 246 Va. 244, 254, 435 S.E.2d 641, 646-47 (1993); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-55 (1986).

VI. REVIEW OF ADMINISTRATIVE AGENCIES’ FINDINGS OF FACT

Review of federal administrative agency decisions generally is governed by the federal Administrative Procedure Act (APA), 5 U.S.C. § 706. Review of most State agency decisions in Virginia is governed by the VAPA, Va. Code § 2.2-4027.

- A. The Principal Standards of Review of Agency Findings are:**

(1) “arbitrary [or] capricious” and

(2) “substantial evidence on the record as a whole.”

The “substantial evidence” standard is used in the federal courts (1) to review the factual components of agency rulemakings and (2) to review agencies’ findings in adjudicative decisions based on the record of evidentiary hearings. The “arbitrary [or] capricious” standard applies in essentially all other cases subject to the APA.

These standards are highly deferential. It has been said, for example, that the “arbitrary [or] capricious” standard requires only a “rational basis” for the agency’s “treatment of the evidence.” *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974). A reviewing court must not “become a superagency that can supplant the agency’s expert decision-maker. To the contrary, the court must give due deference

to the agency's ability to rely on its own developed expertise." *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976). And when it reviews an agency's scientific determinations "within its area of special expertise, at the frontiers of science.... a reviewing court must generally be at its most deferential." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983). *Accord, e.g., Shenandoah Ecosystems Def. Group v. United States Forest Service*, 144 F. Supp. 2d 542, 550 (W.D. Va. 2001), and cases cited.

"Substantial evidence" has been defined as "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' ... '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict' ... This is something less than the weight of the evidence" *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-20 (1966) (citations omitted). Under this standard, a reviewing court may not set aside an agency's finding based on conflicting evidence, "even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

It cannot be said with confidence that either the "arbitrary [or] capricious" or the "substantial evidence" standard is more stringent than the other, or even that they are different. Indeed, the D.C. Circuit has held that the "level of factual support" demanded of "substantial evidence" is "no different from that demanded by the arbitrary or capricious standard." *Association of Data Processing Serv. Organizations v. Board of Governors*, 745 F.2d 677, 686 (D.C. Cir. 1984). *See also, e.g., State Board of Health v. Godfrey*, 223 Va. 423, 435, 290 S.E.2d 875, 881 (1982). *Cf. State of North Carolina v. Hudson*, 665 F. Supp. 428, 437 n.9 (E.D. N.C. 1987) ("the court sees little difference between the undertaking required pursuant to the 'arbitrary and capricious' standard and the 'reasonableness' standard. *See City of Alexandria, Virginia v. Federal Highway Administration*, 756 F.2d 1014, 1017 (4th Cir. 1985). *Contra, River Road Alliance, Inc. v. Corps of Engineers of United States Army*, 475 U.S. 1055, 106 S.Ct. 1283, 89 L.Ed.2d 590 (1986) (White, J., dissenting from denial of writ of certiorari)").

The D.C. Circuit has elaborated on its view as follows:

The APA's "substantial evidence" and "arbitrary and capricious" standard connotes the same substantive standard of review. The substantial evidence standard is "only a specific application of [the more general arbitrary and capricious standard of review], separately recited in the APA not to establish a more rigorous standard of factual support but to emphasize that in the case of formal proceedings the factual support must be found in the closed record as opposed to elsewhere." *Association of Data Processing Serv. Orgs., Inc. v. Board of Governors*, 240 U.S. App. D.C. 301, 745 F.2d 677, 683 (D.C. Cir. 1984). *See also Maryland People's Counsel v. FERC*, 245 U.S. App. D.C. 365, 761 F.2d 768, 774 (D.C. Cir. 1985). But, the term "arbitrary and capricious" more naturally fits a determination of a mixed question of factfinding and policy implementation *See, e.g., Kissner v. Cisneros*, 304 U.S. App. D.C. 317, 14 F.3d 615, 619 (D.C. Cir. 1994) (in applying the "arbitrary and capricious" standard a

court examines whether there is a rational connection between the facts and the choice made).

Bangor Hydro-Electric Co. v. FERC, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996).

The federal APA authorizes *de novo* review when “the [agency] action is adjudicatory in nature and the agency fact-finding procedures are inadequate” or “when issues that were not before the agency are raised in a proceeding to enforce adjudicatory agency action.” Such cases are rare.

- B. The Virginia Rule.** In general, the VAPA provides that “the duty of the court with respect to issues of fact is limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did.” Va. Code § 2.2-4027. See *State Board of Health v. Godfrey*, *supra*, 223 Va. at 435, 290 S.E.2d at 881 (under the VAPA, “whether the agency action is formal or informal, the sole determination by the reviewing court as to issues of fact before the agency is whether there was substantial evidence in the agency record to support the agency decision”).

The Virginia Supreme Court has defined “substantial evidence” consistently with federal case law, as “such relevant evidence as a reasonable mind *might* accept as adequate to support a conclusion” and held that under this standard, “the court may reject the agency’s findings of fact ‘only if, considering the record as a whole, a reasonable mind would *necessarily* come to a different conclusion.’” *Virginia Real Estate Commission v. Bias*, 226 Va. 264, 308 S.E.2d 123, 125 (1983) (citations omitted; first emphasis added in *Bias*, second in the original source).

“[Va.] Code § 9-6.14:17 [now § 2.2-4027] clearly mandates that agency findings of fact are to be accorded great deference under the substantial evidence standard of review.” *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 243, 369 S.E.2d 1, 7 (1988).

The court may reject the agency’s finding of fact “only if, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion.” This standard is designed “to give great stability and finality to the fact-finding process of the administrative agency.”

In addition, we review the facts in the light most favorable to sustaining the Board’s action and “take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted.”

Branch v. Virginia Dept. of Alcoholic Beverage Control, 21 Va. App. 242, 251, 463 S.E.2d 340, 344 (1995) (quoting *Atkinson v. Virginia Alcoholic Beverage Control Commission*, 1 Va. App. 172, 176, 336 S.E.2d 527, 529-30 (1985)) (citations omitted).

The “substantial evidence” concept has been developed at length in case law under the federal APA, which has substantially influenced development of the VAPA. Federal case law therefore should have substantial persuasive value in the interpretation of Virginia law. *See, e.g., State Board of Health v. Godfrey*, 223 Va. at 434 n.6, 290 S.E.2d at 881 n.6 (the “scope” of judicial review under the VAPA is “virtually identical” to that under the federal APA).

The State Corporation Commission and various other agencies are expressly exempted from the operation of the VAPA,¹¹ and judicial review of SCC findings *appears* to be even narrower than that provided in the VAPA. The SCC’s findings of fact “are binding on appeal unless they are contrary to the evidence, lack evidence to support them, or are based upon erroneous principles of law.” *Purolator Courier Corp. v. Clemmons Courier Corp.*, 236 Va. 394, 397, 374 S.E.2d 42 (1988).

Review of Virginia Employment Commission decisions also is not governed by the VAPA. The test used in those cases is “supported by evidence” and “absence of fraud.” *Bell Atlantic Network Services v. Virginia Employment Commission*, 16 Va. App. 741, 433 S.E.2d 30, 32 (1993). Findings apparently are “supported by evidence” unless there is “no evidence” to support them. *Id.*

Findings of other agencies that are not subject to the VAPA also are accorded different treatment from those governed by that statute. For example, “review” of a hearing examiner’s decision concerning special education programs for handicapped children is a trial *de novo*. *See* Va. Code § 22.1-214.D; *School Board v. Beasley*, 238 Va. 44, 50-51, 380 S.E.2d 884 (1989); *School Board v. Nicely*, 12 Va. App. 1051, 408 S.E.2d 545, 550-52 (1991). Subsequent appellate review of trial court decisions in such cases “should be no different than in any other civil appeal,” and review of a trial court’s findings therefore is governed by Va. Code § 8.01-680 (see Section V.C, *supra*). *School Board v. Beasley*, 238 Va. at 51.

¹¹ *See* Va. Code § 2.2-4002. The SCC is included in subsection A.2, as an agency granted powers of a court of record by the Constitution.

VII. REVIEW OF ADMINISTRATIVE AGENCIES' SUBSTANTIVE DECISIONS¹²

- A. **Federal Agencies' Substantive Decisions** on matters within their regulatory jurisdiction generally are reviewed only to determine whether they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706 (APA). To determine whether a substantive agency decision was arbitrary or capricious,

the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment....

Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). *See also Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42-43 (1983):

The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “*rational connection* between the facts found and the choice made.” ... In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” ... *Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.* [Emphases added; citations omitted.]

Puerto Rico Sun Oil Co. v. United States EPA, 8 F.3d 73 (1st Cir. 1993), is a rare example of a federal agency decision that was held *not* to pass muster under “arbitrary and capricious” review.

¹² The term “substantive” is used here to refer to the exercise of authority (1) to make governmental policy (by promulgating regulations or announcing agency “guidance,” for example) or (2) to apply governmental policies or standards to the facts of particular cases, whether exercised under a grant of legislative power, executive power, or a mix of the two. Such actions often are described as discretionary, but the nature of such “discretion” and the reasons for its existence are quite different from those conventionally addressed under that rubric and discussed in those terms herein.

- B. Review of Agency Action under the VAPA** is addressed at length in *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 369 S.E.2d 1, 6-9 (1988). *Johnston-Willis* discusses the standards used in review of “the four issues of law subject to judicial review” pursuant to Va. Code § 2.2-4027 in terms of the different degrees of deference to be accorded the agency’s decision. Where the issue is whether the agency properly applied its “expert discretion,” a reviewing court will reverse only if the agency decision was arbitrary and capricious; and “the courts are required to consider the experience and specialized competence of the agency and the purposes of the basic law under which the agency acted.” “Where the issue falls outside the specialized competence of the agency, such as constitutional and statutory interpretation issues,” however, “little deference is to be accorded the agency decision.”

More generally, as noted above, the Virginia Supreme Court has suggested that the “scope” of judicial review under the VAPA is “virtually identical” to that under the federal APA, *State Board of Health v. Godfrey*, 223 Va. at 434 n.6, 290 S.E.2d at 881 n.6; and Virginia courts often have cited federal case law as authority on standard of review issues. It is likely that the standards applied in practice in the Virginia courts are similar to those articulated by the U.S. Supreme Court in the *Overton Park* and *Motor Vehicle Mfrs. Ass’n* cases.

- C. “Legislative” Decisions of Local Governing Bodies** (and other entities) in particular cases are reviewed very gently, under the “fairly debatable” standard of review. *E.g.*, *Gregory v. Board of Supervisors*, 257 Va. 530, 537-39, 514 S.E.2d 350 (1999) (denial of rezoning); *Board of Supervisors v. McDonald’s Corp.*, 261 Va. 583, 589, 544 S.E.2d 334, 338 (2001) (special exceptions). *See also, e.g.*, *Norton v. City of Danville*, 268 Va. 402, 408-09, 602 S.E.2d 126, 129-30 (2004) (City Council affirmance of Architectural Review decision to deny a certificate of appropriateness); *Industrial Development Authority v. La France Cleaners*, 216 Va. 277, 282, 217 S.E.2d 879, 883 (1975) (industrial development authority’s decision to authorize a bond issue held “legislative” action, reviewed under the “fairly debatable” standard).

An issue is “fairly debatable” if, measured both quantitatively and qualitatively, the evidence “could lead objective and reasonable persons to reach different conclusions.” *Gregory*, 257 Va. at 537. “The burden of proof is on him who assails [a zoning ordinance] to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare.” *Turner v. Board of Supervisors*, 263 Va. 283, 288, 559 S.E.2d 683, 686 (2002).

Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the ordinance “must be sustained”. If not, the evidence of unreasonableness defeats the presumption of reasonableness and the ordinance cannot be sustained.

E.g., *Turner, supra* (quoting *Board of Supervisors v. Snell Construction Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974), and reversing City Council decision for failure to produce any evidence of reasonableness).

The **application** of an ordinance to particular facts is **not a legislative act**, however. It is reviewed under principles similar to those applied to review of any other administrative action. *E.g.*, *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502, 506-08, 436 S.E.2d 453, 457 (1993) (reversing BZA’s grant of a “hardship” exemption, for legal error).

Even a “legislative” action may be reviewed for legal error – in choosing, interpreting, or applying the law that authorizes the action; in complying with the procedural mandates of such laws; or in exceeding the agency’s jurisdiction. *E.g.*, *City of Alexandria v. Potomac Greens Assocs. Partnership*, 245 Va. 371, 376-78, 429 S.E.2d 225 (1993); *Andrews v. Board of Supervisors*, 200 Va. 637, 639-40, 107 S.E.2d 445 (1959).

For the same reason, you must not fall into the trap of assuming that a state (or local) administrative agency’s decision is entirely unassailable, merely because its findings are supported by substantial evidence and its action is rational, any more than you would do in an appeal from a trial court. Despite those factors, an agency’s decision should be reversed for legal error if “the agency failed to observe required procedures or to comply with statutory authority.” *Johnston-Willis Ltd. v. Kenley*, 6 Va. App. at 243, 369 S.E.2d at 7. *See, e.g.*, *Browning-Ferris Industries v. R.I.S.E.*, 254 Va. 278, 492 S.E.2d 431 (1997) (reversing agency action and remanding for “an explicit demonstration on the face of the record” that a permitted facility posed no substantial danger to health or environment, a statutory requirement to issuance of a permit); *Commonwealth ex rel. State Water Control Board v. Appalachian Power Co.*, 9 Va. App. 254, 386 S.E.2d 633 (1989), *aff’d en banc*, 12 Va. App. 73, 402 S.E.2d 703 (1991) (invalidating water quality standards for failure to hold a formal “evidential hearing” as required by law).

VIII. SUBSEQUENT LEVELS OF APPELLATE REVIEW OF AGENCY ACTION

In the Fourth Circuit, at least, “district courts are generally accorded no deference in their review of agency actions where review is limited to the administrative record.” *Virginia Agricultural Growers Ass’n v. Donovan*, 774 F.2d 89, 93 (4th Cir. 1985). The court of appeals reviews the agency’s decision, and not the district court’s decision, applying the same standards as the district court. *E.g.*, *id.*; *Roanoke River Basin Ass’n v. Hudson*, 940 F.2d 58, 61 (4th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992).

Ravindranathan v. Virginia Commonwealth University, 258 Va. 269, 519 S.E.2d 618 (1999), suggests that the Virginia rule may be different. Ravindranathan challenged the University’s Residency Appeals Committee’s decision that she had not established Virginia domicile, under a statute (Va. Code § 23-7.4:3) which limits the Circuit Court’s review to determining whether the decision “could reasonably be said, on the basis of the record, not to be arbitrary, capricious, or otherwise contrary to the law.” On appeal of the Circuit Court’s decision, the Supreme Court held that “the sole issue that we may consider is *whether the circuit court was plainly wrong.*” 258 Va. at 275 (emphasis added).

IX. REVIEW FOR ABUSE OF DISCRETION

- A. **“Abuse of Discretion” Standards** are applied to lower courts’ and agencies’ decisions on issues that, for one or more of a variety of reasons, are committed initially to the lower tribunal’s discretionary powers of decision – meaning primarily that the tribunal has less accountability and greater freedom to decide the matter as it sees fit in the particular case and to decide different cases differently with less justification. This standard “allows the trial judge a ‘limited right to be wrong’” and “requires the appellate court to assure itself only that certain ‘indicia of rationality and fairness’ have been met.” *United States v. Felder*, 548 A.2d 57, 62 (D.C. 1988) (quoting Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 176 (1975), and *Johnson v. United States*, 398 A.2d 354, 362 (D.C. 1979)).

“Abuse of discretion” is not a stringent standard of review, to be sure; but it is not a single, determinate (or determinable) standard, as often supposed. There are numerous shades to the stringency or weakness of discretionary review, which often depend on the reasons a matter is committed to the discretion of the lower tribunal in the first instance.¹³

Some issues are committed to trial court discretion because institutional policies counsel allowing the trial courts to make *final* decisions, except in cases of truly egregious abuse. Such issues therefore generally are committed to the “strong” discretion of the trial courts. They include many or most procedural matters, most decisions made from the bench in the heat of trial (particularly admission of evidence), and most adjudicated issues in discovery. Such allocations typically are based on (1) a belief that the trial courts are in a better position to make just and appropriate decisions, in view of the trial judges’ superior knowledge of the issues, the record, the proceedings, and the personalities; (2) a belief that improvident decisions of such issues are unlikely in most cases to affect the overall fairness or the outcome of the proceeding; (3) considerations of speed, finality, economy and efficiency expressed in the maxim that each litigant is entitled to a fair trial but not a perfect one; and (4) the tremendous variety of situations in which such questions arise, making formulation of legal rules difficult or impossible. *See generally, e.g., Pierce v. Underwood*, 487 U.S. 552, 559-62 (1988).¹⁴

¹³ *See, e.g., United States v. Evans*, 526 F.3d 155, 166 n.1 (4th Cir.), *cert. denied*, 129 S.Ct. 476 (2008) (Gregory, J., concurring in the judgment): “The abuse of discretion standard itself is of limited use. Indeed, as Judge Friendly once observed, ‘[t]here are a half dozen different definitions of abuse of discretion, ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes.’ Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 763 (1982) (internal quotation marks omitted).”

¹⁴ *Pierce* addressed the standard of review of a finding that a federal agency’s litigation position was not “substantially justified,” under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). The Court held that an abuse of discretion standard applied and observed that

(footnote continued on next page)

Issues in the last of these categories, lack of a single rule to fit all situations, sometimes fall into a different category. Patterns of preferred judicial reactions to patterns of litigant behavior may emerge from a series of trial and appellate decisions. Those preferences may never harden into rules of law, depending on the variety of patterns to be addressed, but exercises of discretion nevertheless may be reviewed somewhat more closely if they appear to deviate from a recognized norm.

Similarly, some matters appear to be committed to trial court discretion in part because they present novel issues, and not necessarily because the trial courts are in a better position to decide. Allocating such matters to trial court discretion provides for a period of flexibility and even experimentation, while appellate courts develop expertise from a series of cases. As trial and appellate courts accumulate experience, similar exercises of discretion or similar choices of criteria in series of cases may establish a preferred disposition or method of analysis and eventually (often accidentally) harden into a rule of law. (See the discussion in *Pierce*, 487 U.S. at 562.) Review of attorneys' fee awards under federal fee-shifting statutes, for example, has followed that pattern.¹⁵ Even while such issues remain discretionary, they often present opportunities for closer review and reversal that are not found with respect to issues committed to trial court discretion because of the trial courts' superior position to decide, much as in the similar category (4) cases discussed just above.

Trial courts have a great deal of discretion even in deciding whether evidence is relevant, which at first blush might appear to present a pure question of law. *E.g.*, *U.S. v. Brandon*, 17 F.3d 409, 444 (1st Cir.), *cert. denied*, 513 U.S. 820 (1994); *Peacock Buick, Inc. v. Durkin*, 221 Va. 1133, 1136, 277 S.E.2d 225 (1981). Even so, such issues should be viewed on a sliding scale applicable to mixed questions of law and discretion. Thus, for example, review for abuse of discretion on an assignment of error presenting issues of relevance and materiality *should* be significantly more stringent than abuse of discretion review of a decision to exclude relevant evidence on the ground that its prejudicial effect exceeds its probative value. *See, e.g.*, *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 361 S.E.2d 436, 441-42, 444 (1987) (holding that the trial court erred in admitting evidence that was not relevant to the issues; and ruling further that the trial court "should have" excluded evidence whose prejudicial effect outweighed its probative value, in the appellate court's "view," but without identifying the standard of review); *U.S. v. Ham*, 998 F.2d 1247, 1252-54

(footnote continued)

"[i]t is especially common for issues involving what can broadly be labeled 'supervision of litigation' ... to be given abuse-of-discretion review." 487 U.S. at 558 n.1.

¹⁵ Appellate courts continue to hold that the *amounts* of attorneys' fee awards "are reserved to the trial court's discretion," but the *factors* that trial courts must employ in that exercise of discretion are now well established as a matter of law. *E.g.*, *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1359 (4th Cir. 1995). Findings of fact related to such awards are, of course, reviewed under a "clearly erroneous" standard. *See id.* at 1360 (findings of overbilling and commitment of excessive resources to the case were not "clearly wrong").

(4th Cir. 1993) (holding that the trial court abused its discretion in admitting several items of evidence whose prejudicial effect was “almost certain and considerable” and whose “incremental probative value [was] slight”).

A rich miscellany of issues are committed to trial court discretion for reasons that often are mysterious, or based more on tradition, rhetoric, or historical accident than on considerations of rough justice, efficiency, institutional competence, or experimentation. *See, e.g., Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 344 (4th Cir. 1992), *vacated*, 1993 U.S. App. LEXIS 33286, 1993 WL 524680 (4th Cir. Apr. 7, 1993) (resolution of “full and fair opportunity to litigate” element of claim preclusion (*res judicata*) is committed to trial court discretion, subject to reversal and even to appellate court’s “discretion to decide such issues in the first instance where the ‘proper resolution’ is clear ‘beyond any doubt’”; other elements reviewed *de novo*). The task of counsel in such cases is to understand the reasons the issue is committed to trial court discretion and then to explain to the court why those reasons support more stringent or more deferential review.

X. REVIEW OF DECISIONS OF “MIXED” QUESTIONS

- A. **Review of Mixed Conclusions** of law and findings of fact and other mixes such as legal conclusions and acts of discretion – and, too often, including vaguely-articulated trial court or agency rulings that concisely mix law, fact and discretion or other combinations but leave few clues to the roles that each played in the decision – is a slippery concept, not often easily or well understood. For example, courts sometimes fall into the trap of applying either the highest applicable standard (legal error) or the lowest (*e.g.*, clearly erroneous) to mixed questions as a whole. “So-called ‘mixed questions’ of law and fact are assigned, sometimes clumsily, either to the ‘clearly erroneous’ or to the ‘de novo’ category, depending, ostensibly, on whether the reviewing court regards the matter as more closely resembling a question of fact or a question of law.” *United States v. Felder*, 548 A.2d 57, 61 (D.C. 1988). *Cf. Wilder v. Attorney General*, 247 Va. 119, 124, 439 S.E.2d 398, 401 (1994) (trial court’s “‘finding’” on a mixed question of law and fact “is not binding on this Court”).

The better approach is either to isolate the separate components and apply the appropriate standard to each; or, what largely amounts to the same thing, to apply a “sliding scale” weighted according to the nature of the mix.

1. The “**sliding scale**” approach is explained in *U.S. v. Daughtrey*, 874 F.2d 213, 217-18 (4th Cir. 1989) (quoting *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) (*en banc*), *cert. denied*, 469 U.S. 824 (1984)):

The amount of deference due a sentencing judge’s application of the guidelines to the facts thus depends on the circumstances of the case. If the issue turns primarily on a factual determination, an appellate court should apply the “clearly erroneous” standard.... If the issue, for example, turns primarily on the legal interpretation of a guideline term, which of several offense conduct

guidelines most appropriately apply to the facts as found, or the application of the grouping principles, *see* Guideline §§ 3D1.1, *et seq.*, the standard moves closer to *de novo* review. The due deference standard is, then, the standard courts have long employed when reviewing mixed questions of fact and law. On mixed questions, courts have not defined any bright-line standard of review. Rather, the standard of review applied varies with the “mix” of the mixed question. If the question:

[I]s ‘essentially factual,’ ... the concerns of judicial administration will favor the district court, and the district court’s determination should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed *de novo*.

2. The “**components**” approach is described in *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 103 (3d Cir. 1981) (applying federal standards of appellate review in a case governed substantively by Pennsylvania law):

Abandonment [of personal property] is not a question of narrative or historical fact but an ultimate fact, a legal concept with a factual component.... It is “a conclusion of law or at least a determination of a mixed question of law and fact,” ... requiring “the application of a legal standard to the historical-fact determinations” In reviewing the ultimate determination of abandonment, as an appellate court, we are therefore not limited by the “clearly erroneous” standard, ... but must employ a mixed standard of review. We must accept the trial court’s findings of historical or narrative facts unless they are clearly erroneous, but we must exercise a plenary review of the trial court’s choice and interpretation of legal precepts and its application of those precepts to the historical facts.... Thus we separate the distinct factual and legal elements of the trial court’s determination of an ultimate fact and apply the appropriate standard to each component.

We employ the same approach when we review a jury’s findings on a mixed question, but the distinction is more easily understood in that context because of the strict division of competences between the jury and the trial court and the intercession of the seventh amendment. If a jury finds that a party has abandoned an interest in property, we review the court’s jury instructions to determine whether the court erred in its explanation of the law, and if we find no error we examine the record to determine whether the evidence was sufficient to justify a reasonable mind in drawing the factual inferences underlying the conclusion. With the sole exception of the different review standard of judicial findings expressed by the phrase “clearly

erroneous,” we go through the same process when the court sits as both finder of the facts and arbiter of the law. [Citations and footnotes omitted.]

See also, e.g., Gilbane Building Co. v. Federal Reserve Bank of Richmond, 80 F.3d 895, 905 (4th Cir. 1996) (“[W]e do not review mixed questions for abuse of discretion. We review them under a hybrid standard, applying to the factual portion of each inquiry the same standard applied to questions of pure fact and examining *de novo* the legal conclusions derived from those facts”); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 344, 350 (4th Cir. 1992), *vacated*, 1993 U.S. App. LEXIS 33286, 1993 WL 524680 (4th Cir. Apr. 7, 1993); *Bass v. City of Richmond Police Dept.*, 258 Va. 103, 114, 115, 117, 515 S.E.2d 557 (1999) (Workers’ Compensation Commission’s awards held “conclusive and binding as to all questions of fact” but cases remanded for reconsideration of evidence using proper statutory standard); *A New Leaf, Inc. v. Webb*, 257 Va. 190, 196, 511 S.E.2d 102 (1999) (isolating legal and factual components of Commission’s award). *Cf. Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1526 (4th Cir. 1984) (“Nor will the clearly erroneous rule protect findings which have been made on the basis of the application of incorrect legal standards”); *NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 260 (4th Cir. 2008) (“The substantial evidence standard likewise governs our review of the Board’s resolution of mixed questions of law and fact. *See Sam’s Club, a Div. of Wal-Mart Stores, Inc. v. N.L.R.B.*, 173 F.3d 233, 239 (4th Cir. 1999) (“When we review mixed questions, the Board’s application of legitimate legal interpretations to the facts of a particular case should be upheld if they are supported by substantial evidence based upon the record as a whole.”)); *Hill v. Hill*, 227 Va. 569, 577, 318 S.E.2d 292 (1984), quoted in Section IX.D, *supra*.

Preliminary injunction cases often present mixed questions that require either the application of a sliding scale or separation into legal, factual, and discretionary components. At least in this context, the Fourth Circuit follows the “components” approach. It has explained, for example, that its review of the factual components of a trial court’s decision is governed by the “clearly erroneous” standard; “[t]he [trial] court’s application of legal principles, however, presents a legal question that is reviewed *de novo*.” *State of North Carolina v. City of Virginia Beach*, 951 F.2d 596, 601 (4th Cir. 1991). *See WV Association of Club Owners and Fraternal Services, Inc., v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (“We review the district court’s grant of a preliminary injunction for abuse of discretion. Accordingly, we review factual findings for clear error and legal conclusions *de novo*”). And while appellate courts sometimes hold that a grant or denial of injunctive relief will be set aside only for an abuse of discretion (echoing a fading tradition), that statement alone is too “simplistic”; for example “the trial court may have “failed to exercise its discretion in some respect or else exercised it counter to established equitable principles.” *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193 (4th Cir. 1977). *But cf. Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 664 (2004) (quoting *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 336 (1985) (O’Connor, J., concurring)) (“This Court, like other appellate courts, has

always applied the abuse of discretion standard on the review of a preliminary injunction”).

To the extent that decisions on issues of preliminary (or permanent) equitable relief remain discretionary, the trial courts’ discretion has grown “weaker” than when appellate courts began applying the rubric of discretion because today it is largely governed by rules of law that courts have established after much institutional experience. Either application of legally erroneous criteria to an issue committed to discretion or a failure to exercise discretion that is conferred (on the ground that the issue is legal or factual, or out of simple carelessness) is a legal error and *not* an abuse of discretion.

Illustrating how appellate courts exercise a mixed standard of review in injunction actions, the *Blackwelder* court held that the trial court had failed to apply settled principles of law and reversed its refusal to grant preliminary relief. *Id.* at 193-98. It also found that the trial court’s findings in part were clearly erroneous. *Id.* at 196-97. Key to this analysis is that it did not even review the trial court’s *exercise* of discretion or hold that it was abused; it held that the court entered that exercise with the wrong questions.

Similarly, in *North Carolina v. Virginia Beach* the Fourth Circuit ordered the trial court to modify an injunction, holding that the restraint went beyond what was reasonably required to accomplish its end and to that extent could not “as a matter of law be justified.” 951 F.2d at 602-03. The court accorded “due regard to the factual findings of the court below” but reviewed the trial court’s application of prior case law to those facts *de novo*, as a matter of law. *Id.* at 601. (It did, however, refer to uncontradicted evidence in the record in support of its holding that the injunction was excessive as a matter of law. *Id.* at 602.) And like the *Blackwelder* court, it did not explicitly review the trial court’s exercise of discretion or hold that it had been abused.

XI. A WORD OF CAUTION:

Courts are not always comfortable with these distinctions. The most common confusion appears to be in applying (correctly) a legal error standard of review to questions that are thought (incorrectly) to be governed by an abuse of discretion standard. *See, e.g., Meyer v. Brown*, 256 Va. 53, 56-58, 500 S.E.2d 807 (1998) (reviewing a trial court’s decision overruling a defendant’s objection to venue, ostensibly for abuse of discretion, but reversing the decision at least seemingly for legal error in the trial court’s reading of the governing statute (Va. Code § 8.01-262)); *Advanced Marine Enterprises, Inc. v. PRC, Inc.*, 256 Va. 106, 125-26, 501 S.E.2d 148 (1998) (reversing chancellor’s award of litigation expenses for legal error – awarding costs not authorized by statute – but rhetorically charging the chancellor with an abuse of discretion)).

Courts which believe that they are required to apply an abuse of discretion standard to issues of law commonly dodge the issue by intoning that “[a]n error of law constitutes an abuse of discretion.” *E.g., A Helping Hand v. Baltimore County*, 515 F.3d 356, 370 (4th Cir. 2008); *Lynchburg Division of Social Services v. Cook*, 276 Va. 465, 484, 666 S.E.2d

361, 370 (2008) (“A court by definition abuses its discretion when it makes an error of law”) (citations and internal quotation marks omitted); *DirectTV, Inc. v. Rawlins*, 523 F.3d 318, 323 (4th Cir. 2008) (quoting *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993)): “A district court abuses its discretion if it fails ‘adequately to take into account judicially recognized factors constraining its exercise,’ or if it bases its exercise of discretion on an erroneous factual or legal premise.”

The confusion is not universal. Many appellate courts understand and reflect in their opinions the difference between discretionary and *de novo* review in areas that superficially are governed by the looser abuse of discretion standard. In *Orndorff v. Commonwealth*, 271 Va. 486, 505, 628 S.E.2d 344, 355 (2006) (citing *Thomas v. Commonwealth*, 263 Va. 216, 233, 559 S.E.2d 652, 661 (2002)), for example, the Court observed that “[b]ecause the circuit court employed an improper legal standard in exercising its discretionary function, the standard of appellate review examining whether the court abused its discretion could not be applied.” *See also, e.g., Commonwealth v. Wynn*, 277 Va. 92, 97-98, 671 S.E.2d 137, 139-40 (2009):

Generally, we review a circuit court’s evidentiary rulings under an abuse of discretion standard. *See, e.g., John v. Im*, 263 Va. 315, 320, 559 S.E.2d 694, 696 (2002). However, “[a] ‘trial court has no discretion to admit clearly inadmissible evidence because “admissibility of evidence depends not upon the discretion of the court but upon sound legal principles.”” [Citations.] Evidence that is hearsay and does not fall under an exception is clearly inadmissible. *See, e.g., Teleguz v. Commonwealth*, 273 Va. 458, 481, 643 S.E.2d 708, 723 (2007) (“In the absence of any applicable exception to the hearsay rule which would have rendered the testimony admissible, we hold that the trial court erred in admitting the testimony.”) (citation omitted); *Setliff v. Commonwealth*, 162 Va. 805, 814, 173 S.E. 517, 520 (1934) (holding evidence is “clearly hearsay and for that reason inadmissible in any form before the jury”).

The U.S. Supreme Court also has weighed in on this issue, and perhaps its approach suggests the wisest judicial resolution of this complicated standard of review issue. *See Koon v. United States*, 518 U.S. 81, 100 (1996) (Sentencing Guideline decision):

Little turns, however, on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. *Cooter & Gell [v. Hartmarx Corp.]*, 496 U.S. 384 (1990), *supra*, at 402. A district court by definition abuses its discretion when it makes an error of law. 496 U.S., at 405.... The abuse-of-discretion standard includes

review to determine that the discretion was not guided by erroneous legal conclusions.^[16]

The wisest *judicial resolution* does not, however, necessarily point counsel toward the best *appellate argument*. My recommendation to appellate counsel, for whatever it is worth, is (1) to state the legal error standard of review openly and confidently whenever it should be applied, but also (2) to add something to the effect that “a legal error is by definition an abuse of discretion” and cite appropriate cases (such as *Lynchburg Division of Social Services*, *A Helping Hand* and *Koon*) in support of that approach, with respect to issues that may be thought to be governed by an abuse of discretion standard of review, to avoid losing any judges who otherwise might be mired in the rhetoric of discretion.

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¹⁶ In the *Cooter & Gell* case, cited in *Koon*, the Court appears to have strained mightily to hold that district courts’ Rule 11 decisions are reviewed under an overall abuse of discretion standard while maintaining the appellate courts’ ability to reverse district courts for errors of law. See 496 U.S. at 402 (“this [abuse of discretion] standard would not preclude the appellate court’s correction of a district court’s legal errors, e.g., ... relying on a materially incorrect view of the relevant law in determining that a pleading was not ‘warranted by existing law or a good faith argument’ for changing the law. An appellate court would be justified in concluding that, in making such errors, the district court abused its discretion”). The *Cooter & Gell* decision also includes the interesting observation that “[w]hen an appellate court reviews a district court’s factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous.” *Id.* at 401.