

Appellate Tips for Trial Lawyers

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Appeals can be a minefield for those who don't regularly practice in the appellate courts. This series of short articles, provided by members of the Association's Appellate Courts Committee, will help you find your way. Although the articles focus primarily on California state court appeals, much of the guidance will apply in any appellate court.

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The De Novo and Independent Judgment Standards of Appellate Review

by Herb Fox

Most Prized by the Appellant

Of the three standards of appellate review, de novo review (also called independent review – but the two are not always synonymous) is what the appellant most wants. The reason is simple: when a reviewing court applies de novo review, it does not defer to the trial court's ruling or reasons for its ruling but instead decides the matter anew. (*Stone Street Capital, LLC v. California State Lottery Comm.*, 165 Cal. App. 4th 109, 116 (2004).) In applying independent review, "an appellate court exercises its independent judgment to determine whether the facts satisfy the rule of law." (*In re George T.*, 33 Cal. 4th 620, 634 (2004).)

Thus the de novo, or independent, standard of review is the closest thing to a true second chance for the appellant who hopes to snatch victory from the jaws of trial court defeat.

For the same reason, de novo review is the riskiest standard for the respondent, who cannot rely on the trial court's broad discretion or point to "some evidence" in support of the judgment but must instead meet the appellant's legal arguments anew. That, in turn, creates the greatest risk of reversal. After all, de novo review of questions of law is the raison d'être of appellate courts. With their multi-judge panels and minimal deadlines, appellate courts have more time to research and debate an issue and so are well suited to determining questions of law—and, of course, one of the primary roles of appellate courts is to ensure uniformity of decisions. (*Hurtado v. Statewide Home Loan Co.*, 167 Cal. App. 3d 1019, 1023–1024 (1985), overruled on other grounds by *Shamblin v. Brattain*, 44 Cal. 3d 474, 479, n. 4 (1988).)

De Novo and Independent Review – Close But Not Synonymous

Although the terms "de novo" and "independent review" are frequently used interchangeably, they are not quite the same.

If the case commands true de novo review, the reviewing court "makes an original appraisal of all the evidence to decide whether or not it believes" the outcome should be different. (*In re George T.*, 33 Cal. 4th at 632, 634). Such true de novo review arises most frequently in First Amendment, due process and other cases involving constitutional principles, where the reviewing courts have a "constitutional responsibility that cannot be delegated to the trier of fact" and they must "make an independent constitutional judgment on the facts of the case." (Id. at 631-32; *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 844 (1986).)

In most, non-constitutional cases, the standard is properly labeled "independent review." The trial court's credibility determinations and findings of fact are binding on the reviewing court, but whether those facts satisfy the rule of law is independently reviewed. (*People v. Jackson*, 128 Cal. App. 4th 1009, 1019 (2005).) For cases in which there was no testimony and so no credibility to determine, however, independent review is synonymous with de novo review. (*Id.*)

Applications of the De Novo/Independent Standard of Review

The most common application of the de novo standard of review occurs in cases involving questions of law arising from undisputed facts. (*Ghirardo v. Antonioli*, 8 Cal. 4th 791, 799 (1994).) Questions of law arise in a wide variety of circumstances and proceedings, some more obvious than others. Here are some common issues and proceedings that command de novo or independent review, and some exceptions to watch out for:

Constitutional Issues: Both the application of Constitutional principles and the interpretation of constitutional provisions are questions of law. (*Baba v. Board of Supervisors of City & County of San Francisco*, 124 Cal. App. 4th 504, 512 (2004).)

Statutory Construction and Interpretation: The interpretation of a statute is a pure question of law. (*People ex rel. Lockyer v. Shamrock Foods Co.*, 24 Cal. 4th 415, 432 (2000).) But when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous. (*Judson Steel Corp. v. Workers' Comp. Appeals Board*, 22 Cal. 3d 658, 668 (1978).)

Duty of Care: Whether a party owed another a duty of care is a question of law. (*Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 47 (1975).)

Interpretation of Writings: The interpretation of a written instrument is a question of law subject to independent review, except when the parties offer conflicting extrinsic evidence. (*Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865-66 (1965).) However, if the admissibility of that extrinsic evidence turns on whether there is an ambiguity in the instrument, that threshold issue of ambiguity is also a question of law. (*Winet v. Price*, 4 Cal. App. 4th 1159, 1165 (1992).)

Demurrers: Orders sustaining demurrers are reviewed de novo. (*McCall v. PacifiCare of California, Inc.*, 25 Cal. 4th 412, 415 (2001).)

Summary Judgment: The appellate courts review de novo the trial court's decision on summary judgment, applying the same rules and standards that govern a trial court's determination of the motion. (*Carnes v. Superior Court*, 126 Cal. App. 4th 688, 694 (2005).) But there is a split of authority as to whether this de novo standard also applies to evidentiary rulings. (Compare, e.g., *Carnes*, 126 Cal. App. 4th 688, 694 [abuse of discretion] and *City of South Pasadena v. Department of Transportation*, 29 Cal. App. 4th 1280, 1291 (1994) [de novo review].) This conflict might be resolved soon by the California Supreme Court in *Reid v. Google, Inc.* (Supreme Court Case No. S158965).

Anti-SLAPP Motions to Strike: Appellate courts review de novo both prongs


of an anti-SLAPP motion—whether the action is governed by the statute (Code of Civil Procedure §425.16) and whether the plaintiff has established a probability of prevailing (***Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 269, n. 3 (2006).**)

Mixed Questions of Law and Fact: The de novo standard of review applies to mixed questions of law and fact when legal issues predominate. (***Crocker Nat'l Bank v. City & County of San Francisco*, 49 Cal. 3d 881, 888 (1989).**) But whether legal or factual issues predominate can be tricky. "If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently." (*Id.*, emphasis added.)

Parting Advice

It is not surprising that in many appeals, the most contested issue is the standard of review, as it is the "route that often leads to the determination of substantive issues." (***Jackson*, 128 Cal. App. 4th at 1019.**)

Appellants should always attempt to raise issues that require de novo review, because doing so is their best shot at reversal. Respondents should always attempt to persuade the reviewing court that it should apply the deferential substantial evidence or abuse of discretion standard. But neither side should overstate or stretch its position and thereby lose credibility. The true experts on the applicable standards of review are the appellate court justices and their research staff, for whom the standard of review is the guiding principle of their work.

	<p>Contributed by Herb Fox, a solo practitioner. Herb Fox has been certified as an appellate law specialist since 1998. He has handled over 150 appellate proceedings in the California Court of Appeal and the Ninth Circuit. He is a member of the Appellate Courts Committee of the Los Angeles County Bar Association and writes a column on appellate law for <i>Santa Barbara Lawyer</i>. Fox maintains offices in Santa Barbara and Century City and practices in appellate courts throughout California. More information about Fox's practice can be found at www.LosAngelesAppeals.com.</p>
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