This article originally appeared in the Journal of Civil Litigation, Vol. XXXI, No. 3 (Fall 2019), a publication of the Virginia Association of Defense Attorneys. It appears here with permission.

OVERVIEW OF STANDARDS OF APPELLATE REVIEW IN VIRGINIA

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The standard of review is a critical component of the appellate process. One sister state supreme court recently observed that its appellate analysis "begins with a determination of the scope of review."[1] In fact, an American Bar Association (ABA) publication has gone so far as to observe that "standards of review constitute the most important factor in a preliminary assessment of prospects for a reversal."[2]

Moreover, with the Supreme Court of Virginia and the Court of Appeals of Virginia now undertaking a two-year appellate mediation pilot project in select civil cases effective January 1, 2019,[3] the importance in the Old Dominion of the standard of review applicable to each assignment of error and assignment of cross-error could very likely increase to the extent that the standard of review is used as a tool to encourage the mediated resolution of the appeal.

This article provides a primer on Virginia law for the standards of review that an appellate litigator may likely confront when handling a civil case that is being appealed to one of Virginia's appellate courts.

I. Early Identification of the Standard of Review in the Parties' Appellate Briefs

The importance of the standard of review in an appeal is illustrated by the fact that since April 1, 2011, the Rules of the Supreme Court of Virginia have required that the standard of review that applies to each assignment of error be identified in briefs filed with both the Supreme Court of Virginia and the Court of Appeals of Virginia. If the standard of review is not identified, that particular assignment of error or assignment of cross-error is deemed waived and not considered by the appellate court.[4]

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1 Hemphill Constr. Co. v. City of Clarksdale, 250 So. 3d. 1258, 1262 (Miss. 2018) (The Mississippi court ruled that a de novo standard of review applied to both questions of law and matters of statutory interpretation.).

2 Brendon Ishikawa and Dora Curtis, *Appellate Mediation: A Guidebook for Attorneys And Mediators* (ABA, 2016).

3 *See* Supreme Court of Virginia Press Release, dated June 13, 2018.

4 *See, e.g.,* Lafferty v. School Bd. of Fairfax County, 293 Va. 354, 365, 798 S.E.2d 164, 170 (2017).

A. SUPREME COURT OF VIRGINIA

Rule 5:17(c)(6) of the Rules of the Supreme Court of Virginia requires that the petition for appeal list the standard of review that relates to each assignment of error.[5]

Rules 5:27(d) and 5:28(d) require that the opening brief of appellant and brief of appellee both contain "[t]he standard of review, the argument, and the authorities relating to each assignment of error."

Rule 5:28(e)(2) likewise states that: "With respect to assignments of cross-error, if any . . . The standard of review, the argument, and the authorities relating to each assignment of cross-error," must be contained in the brief of appellee.

B. COURT OF APPEALS OF VIRGINIA

Rule 5A:12(c)(5) requires that the petition for appeal list the standard of review that applies to each assignment of error.[6]

Rules 5A:20(e) and 5A:21(d) require that the opening brief of appellant and brief of appellee contain: "The standard of review and the argument (including principles of law and authorities) relating to each assignment of error."

II. STANDARDS OF APPELLATE REVIEW

The standard of appellate review is the test by which the appellate court reviews the ruling of the trial court on appeal. "'The purpose of standards of review is to focus reviewing courts upon their proper role when passing on the conduct of other decisionmakers.' . . . Therefore it is incumbent upon the parties and the appellate court to correctly identify and apply them."[7] "So standards of review do matter, for in every context they keep judges within the limits of their role and preserve other decisionmakers' functions against judicial intrusion."[8]

Determination of the standards of review can no doubt be challenging in appeals presenting multiple grounds for reversal as each issue requires a separate standard of review analysis. Nevertheless, identification of the applicable standard of review is always time well spent because the standard of review can often provide an indication of the way the appellate court may likely decide the issues presented on appeal.

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[5] While Rule 5:18 regarding briefs in opposition does not explicitly require that the appellee list the standard of review applicable to each assignment of error or assignment of cross-error, listing of the standard of review is implicitly required by Rule 5:18(b)'s requirement that "[t]he brief in opposition shall conform in all respects to the content requirements for the brief of appellee in Rule 5:28."

[6] While Rule 5A:13 regarding briefs in opposition does not explicitly require that the appellee list the standard of review applicable to each assignment of error, listing of the standard of review is implicitly required by Rule 5A:13(b)'s requirement that "[t]he brief in opposition shall conform in all respects to the requirements of the brief of appellee (Rule 5A:21)."

[7] Lawlor v. Commonwealth, 285 Va. 187, 211, 738 S.E.2d 847, 860 (2013) (quoting Evans v. Eaton Corp. Long Term Disability Plan, 514 F. 3d 315, 320 (4th Cir. 2008)).

[8] *Evans*, 514 F. 3d at 326.

The amount of deference, if any, that the appellate court gives to the lower court varies depending on the type of case and the legal issue involved. As discussed below, the standards of appellate review range from being the least deferential to the lower court (*i.e*., giving no deference whatsoever, such as with de novo review) to being the most deferential to the lower court (*i.e*., giving great deference, such as with the fairly debatable standard of review).

Because the standard of review is frequently case dispositive, appellate litigators often try to take strategic advantage of the most favorable standards of appellate review available based on the applicable facts and law. Ideally, appellants would prefer to have fresh analysis by the appellate court under the nondeferential de novo standard of review, while appellees would prefer avoiding the de novo standard in favor of the most deferential standard of review available.

If, in their appellate briefs, the parties disagree on the standard of review that applies to an assignment of error or assignment of cross-error, they must be prepared to convince the appellate court at oral argument of their respective positions on the applicable standard of review.

Standards of appellate review frequently used in the Commonwealth of Virginia include the following, with the vast majority of appeals falling into one of the first three categories of standards of review listed here.

A. DE NOVO STANDARD OF REVIEW

A de novo (*i.e.,* independent) review by an appellate court is the most lenient standard from an appellant's perspective. It is a "do over" where the reviewing appellate court gives no deference whatsoever to the lower court's legal rulings. "A *de novo* hearing means a trial anew, with the burden of proof remaining upon the party with whom it rested in the [lower] court."[9] "*De novo* review . . . signals no need to protect the primacy of another decisionmaker, because the reviewing court can perform the task as capably as the decisionmaker under review."[10]

Examples[11] wherein appellate courts use the de novo standard of review when analyzing questions of law include, but are not limited to, the following:

1. the lower court's interpretation of the Code of Virginia and/or the Rules of the Supreme Court of Virginia, which includes the Virginia Rules of Professional Conduct;[12]

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[9] Broadnax v. Commonwealth, 16 Va. App. 36, 39, 427 S.E.2d 741, 743 (1993).

[10] *Evans*, 514 F.3d at 321 n.2 (italics in original).

[11] These listings of lower court rulings that may be reviewed on appeal under the appropriate standard of review are not exhaustive but are included merely as examples.

[12] Belew v. Commonwealth, 284 Va. 173, 177, 726 S.E.2d 257, 259 (2012) (Code of Virginia and Rules of Supreme Court of Virginia); Zaug v. Va. State Bar, 285 Va. 457, 462, 737 S.E.2d 914, 917 (2013) (Rules of Professional Conduct).

2. when there are no disputed facts relevant to a plea in bar and it presents a pure question of law;[13]

3. the trial court's grant of a motion for summary judgment, which is an application of law to undisputed facts;[14]

4. whether a statute has been constitutionally applied by a government agency;[15]

5. whether the lower court applied the proper standard of review, which is a pure question of law;[16]

6. the trial court's construction of the provisions of a contract, including its arbitration provision;[17]

7. the trial court's interpretation of an insurance policy;[18]

8. whether an action is precluded by res judicata or collateral estoppel;[19]

9. the trial court's ruling on whether a person was competent to execute a notice of claim under the augmented estate statutes;[20]

10. the trial court's interpretation of a deed;[21]

11. the trial court's ruling enforcing a covenant not to compete;[22]

12. the legal effect of a court order;[23]

13. questions relating to burden of proof, including the standard of proof, and which party bears the burden to meet it are questions of law reviewed de novo;[24]

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13 Smith v. McLaughlin, 289 Va. 241, 251, 769 S.E.2d 7, 12 (2015).

14 Transportation Ins. Co. v. Womack, 284 Va. 563, 567, 733 S.E.2d 656, 667 (2012).

15 Corp. Exec. Bd. Co. v. Dept. of Taxation, 297 Va. 57, 70, 822 S.E.2d 918, 924 (2019).

16 Lamar Co. v. City of Richmond, 287 Va. 322, 325, 757 S.E.2d 15, 16 (2014).

17 TM Delmarva Power v. NCP of Va., 263 Va. 116, 119, 557 S.E.2d 199, 200 (2002).

18 Transcontinental Ins. Co. v. RBMW, Inc., 262 Va. 502, 510, 551 S.E.2d 313, 317 (2001).

19 Caperton v. A.T. Massey Coal Co., 285 Va. 537, 548, 740 S.E.2d 1, 7 (2013) (res judicata); Commonwealth v. Leonard, 294 Va. 233, 238, 805 S.E.2d 245, 249 (2017) (collateral estoppel).

20 Jones v. Peacock, 267 Va. 16, 19–20, 591 S.E.2d 83, 86 (2004).

21 Ettinger v. Oyster Bay II Prop. Owners' Ass'n, 296 Va. 280, 284, 819 S.E.2d 432, 434 (2018).

22 Preferred Sys. Solutions, Inc. v. GP Consulting, LLC, 284 Va. 382, 391, 732 S.E.2d 676, 680 (2012).

23 Alcoy v. Valley Nursing Homes, Inc., 272 Va. 37, 41, 630 S.E.2d 301, 303 (2006).

24 La Bella Dona Skin Care, Inc. v. Belle Femme Enters., LLC, 294 Va. 243, 257, 805 S.E.2d 399, 406 (2017).

14. whether a plaintiff alleging undue influence has established a prima facie case of undue influence;[25]

15. whether a plaintiff has standing to maintain his personal injury action after filing a petition for bankruptcy, causing his claim to become an asset of his bankruptcy estate;[26]

16. analysis of the proper measure of damages that may be awarded for a particular claim;[27] and

17. whether a jury instruction "accurately states the relevant law is a question of law" that the appellate court reviews de novo, for which the appellate "court's 'sole responsibility in reviewing' the trial court's decision 'is to see that the law has been clearly stated and the instructions cover all issues which the evidence fairly raises.' "[28]

B. HYBRID DE NOVO STANDARD OF REVIEW

In a number of situations involving the sufficiency of the facts alleged or the evidence introduced, the mandated review of the appellate record so significantly constrains the scope of that appellate review that it becomes an integral part of the standard of review such that a hybrid de novo standard of review is created.

While a trial court's rulings to grant a demurrer and/or to review the sufficiency of the evidence on a defendant's motion to strike the plaintiff's evidence are reviewed de novo, they cannot be classified as being governed by the standard de novo standard of review (discussed above in Section II.A.) because of the constraints placed upon them as to how the evidence used in granting them is construed in the plaintiff's favor.

A trial court grants a demurrer when the pleading fails to state a viable cause of action upon which relief can be granted.[29] While the appellate court reviews the trial court's ruling to grant a demurrer de novo, the version of the de novo standard used in review of the granting of demurrer is unique and could be characterized as a hybrid de novo standard insofar as the appellate court gives deference, as it is constrained by the rule that the moving party on the demurrer is deemed to have admitted the truth of all material facts pleaded.[30]

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25 Estate of Parfitt v. Parfitt, 277 Va. 333, 339, 672 S.E.2d 827, 829 (2009).

26 Kocher v. Campbell, 282 Va. 113, 116, 712 S.E.2d 477, 479 (2011).

27 Smith v. McLaughlin, 289 Va. 241, 267, 769 S.E.2d 7, 21 (2015) (Whether particular injuries suffered by a legal malpractice plaintiff are recoverable in a legal malpractice claim is a question of law reviewed de novo.).

28 Cooper v. Commonwealth, 277 Va. 377, 381, 673 S.E.2d 185, 187 (2009); Banks v. Commonwealth, 67 Va. App. 273, 281, 795 S.E.2d 908, 912 (2017).

29 Fisher v. Tails, Inc., 289 Va. 69, 73, 367 S.E.2d 710, 712 (2015) (citing VA. CODE § 8.01-273).

30 289 Va. at 73, 367 S.E.2d at 712.

A similar hybrid de novo standard of review is used when an appellate court reviews, as a matter of law, the sufficiency of the evidence upon a defendant's motion to strike the plaintiff's evidence, as it is "the duty of the court to accept as true all of evidence favorable to the plaintiff as well as any reasonable inference a jury might draw therefrom."[31]

Also in reviewing a trial court's refusal to grant a motion to strike the plaintiff's evidence or to set aside a jury verdict, the appellate court reviews the evidence in the light most favorable to the plaintiff, and the trial court's judgment will not be set aside unless it is plainly wrong or without evidence to support it.[32]

C. ABUSE OF DISCRETION STANDARD OF REVIEW

In contrast to the de novo standard of review, where no deference is given to the trial court, the appellate court often upholds and gives great deference to the decisions of the trial judge concerning trial-related matters unless they rise to the level of being an "abuse of discretion."

"The abuse-of-discretion standard . . . is 'a standard that, though familiar in statement, is not necessarily that simple in application' . . . . That is because an abuse of discretion 'can occur in a number of ways' . . . [w]hen a decision is discretionary, 'we do not mean that the [trial] court may do whatever pleases it.'" The phrase means instead that the court has a range of choices and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.[33]

Abuse of discretion is "a strict legal term synonymous with a failure to exercise a sound, reasonable and legal discretion, a clearly erroneous conclusion and judgment—one . . . clearly against logic . . . [and] the reasonable and probable deductions to be drawn from the facts disclosed. . . . The discretion of the able, learned and experienced trial judge . . . will not be interfered with upon review of an [appellate] Court, unless some injustice has been done."[34]

"An abuse of discretion cannot be shown merely because 'reasonable trial judges and even some members of [the Supreme Court of Virginia], had they been sitting as trial judges in this case,' might have reached a different conclusion than the one under review . . . . 'Only when reasonable jurists could not differ can we say an abuse of discretion has occurred . . . .'"[35]

In *Lawlor v. Commonwealth*,[36] the Supreme Court of Virginia, speaking through Justice Mims, described the abuse of discretion standard of review as follows:

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[31] Owens v. DRS Auto Fantomworks, Inc., 288 Va. 489, 495, 764 S.E.2d 256, 259 (2014) (citing Austin v. Shoneys, Inc., 254 Va. 134, 138, 486 S.E.2 285, 287 (1997)).

[32] VA. CODE § 8.01-680.

[33] Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011) (citations omitted.)

[34] Jefferson v. Commonwealth, 27 Va. App. 477, 487–88, 500 S.E.2d 219, 224–25 (2016).

[35] Minh Duy Du v. Commonwealth, 292 Va. 555, 564–65, 790 S.E.2d 493, 499 (2016) (citations omitted).

[36] 285 Va. 187, 213, 738 S.E.2d 847, 861–62 (2013).

> In contrast to the *de novo* standard of review, "the abuse of discretion standard requires a reviewing court to show enough deference to a primary decisionmaker's judgment that the court does not reverse merely because it would have come to a different result in the first instance" . . . Accordingly, "when a decision is discretionary . . . the court has a range of choice, and . . . its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law" . . . We recently focused this standard of review by identifying the "three principal ways" by which a court abuses its discretion: "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment" . . . . Naturally, the law often circumscribes the range of choice available to a court in the exercise of its discretion. In such cases, "the abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions," because a court also abuses its discretion if it inaccurately ascertains its outermost limits. Such an error may occur when the court believes it lacks authority it possesses, . . . when it believes the law requires something it does not, . . . or when it fails to fulfill a condition precedent that the law requires.[37]

Examples of an appellate court applying the abuse of discretion standard of review giving great, but not unlimited, deference to most trial-related rulings by the lower court include, but are not limited to, the following:

1. the granting or denial of a motion to transfer venue;[38]

2. the granting or denial of a motion for continuance;[39]

3. the admission, restriction or exclusion of expert testimony (but there is no discretion to admit inadmissible testimony);[40]

4. the manner of conducting voir dire, including the exclusion of questions to the venire;[41]

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[37] *Id*. (Citations omitted.)

[38] Virginia Elec. & Power Co. v. Dungee, 258 Va. 235, 245, 520 S.E.2d 164, 170 (1999).

[39] Ortiz v. Commonwealth, 276 Va. 705, 723, 667 S.E.2d 751, 762 (2018) ("It is well-settled that a ruling on a motion for continuance will be reversed 'only upon a showing of abuse of discretion and resulting prejudice to the movant.'").

[40] *Dungee*, 258 Va. at 258, 520 S.E.2d at 177; Holiday Motor Corp. v. Walters, 292 Va. 461, 483, 790 S.E.2d 447, 458 (2016).

[41] Lawlor v. Commonwealth, 285 Va. 187, 212, 738 S.E.2d 847, 861 (2013).

5. the admission or exclusion of evidence, including the questioning of witnesses (but there is no discretion to admit inadmissible testimony);[42]

6. the trial court's denial of a motion for mistrial;[43]

7. determinations regarding the propriety of trial counsel's opening statement and closing argument;[44]

8. the trial court's award or denial of a sanction;[45]

9. the trial court's dismissal of a claim with prejudice, instead of without prejudice;[46]

10. the trial court's determination of the appropriate sanction for failure to comply with an order relating to discovery;[47]

11. the trial court's application of judicial estoppel;[48]

12. the trial court's denial of an application for a name change;[49]

13. the lower court's granting or refusal of a jury instruction;[50]

14. the trial court's granting or denial of a motion to set aside a jury verdict as being excessive or, alternatively, to order remittitur;[51] and

15. where a new trial is required because the jury awarded inadequate damages, the trial court's decision whether to order retrial on all issues or on damages only.[52]

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[42] Preferred Sys. Solutions, Inc. v. GP Consulting, LLC, 384 Va. 382, 396, 732 S.E.2d 676, 683 (2012); Smith v. Irving, 268 Va. 496, 501, 604 S.E.2d 62, 65 (2004).

[43] Allied Concrete Co. v. Lester, 285 Va. 295, 308, 736 S.E.2d 699, 706 (2013).

[44] Smith v. McLaughlin, 289 Va. 241, 270, 769 S.E.2d 7, 22 (2015).

[45] Oxenham v. Johnson, 241 Va. 281, 286, 402 S.E.2d 1, 4 (1991).

[46] Primov v. Serco, Inc., 296 Va. 59, 66, 817 S.E.2d 811, 814 (2018).

[47] Allied Concrete Co. v. Lester, 285 Va. 295, 307–308, 736 S.E.2d 699, 705–706 (2013).

[48] Bentley Funding Group, L.L.C. v. SK&R Group, L.L.C., 269 Va. 315, 323, 609 S.E.2d 49, 52–53 (2005).

[49] Leonard v. Commonwealth, 296 Va. 479, 484, 821 S.E.2d 551, 552–53 (2018).

[50] Cooper v. Commonwealth, 277 Va. 377, 381, 673 S.E.2d 185, 187 (2009) ("Our sole responsibility in reviewing jury instructions is to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises . . . . And in deciding whether a particular instruction is appropriate, we view the facts in the light most favorable to the proponent of the instruction.").

[51] Virginia Elec.& Power Co. v. Dungee, 258 Va. 235, 261–63, 520 S.E.2d 164, 179–81 (1999); Allied Concrete Co. v. Lester, 285 Va. 295, 311–12, 736 S.E.2d 699, 707–708 (2013).

[52] Davoudlarian v. Krombein, 244 Va. 88, 93, 418 S.E.2d 868, 871 (1992).

D. JURY TRIALS

When a trial court strikes a party's evidence, the appellee is in a most precarious position on appeal since the appellate court will review the evidence in the light most favorable to the party whose evidence was struck, "giving [the losing party] the benefit of all inferences which a jury might fairly draw from the evidence."[53] "If several inferences may [be] drawn from the evidence, though they may differ in degree and probability, [the appellate court adopts] those most favorable to the [losing party] 'unless they are strained and forced or contrary to reason.'"[54]

"When parties come before us with a jury verdict that has been approved by the trial court, they hold the most favored position known to the law. The trial court's judgment is presumed to be correct, and we will not set it aside unless the judgment is plainly wrong or without evidence to support it. We review the evidence and all reasonable inferences fairly deductible from it in the light most favorable to the prevailing party at trial."[55]

"[W]here the trial court has declined to strike the plaintiff's evidence or to set aside a jury verdict, the standard of appellate review in Virginia requires this Court to consider whether the evidence presented, taken in the light most favorable to the plaintiff, was sufficient to support the jury verdict in favor of the plaintiff . . . . Where a trial court denies a motion to strike, we review the evidence to determine whether the action was in error because either 'it is conclusively apparent that [the] plaintiff has proven no cause of action against [the] defendant,' or 'it plainly appears that the [circuit] court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it.' . . . As a general rule, '[w]e do not set aside a trial court's judgment sustaining a jury verdict unless it is 'plainly wrong or without evidence to support it."[56]

In the recent case of *Parson v. Miller*,[57] which involved the appeal of a judgment in a will contest, the court reversed the trial court's entry of judgment for the plaintiff and remanded. The court held that the trial court erred in refusing to grant the defendant's motion to strike the evidence at the close of all the evidence and by holding that the evidence was sufficient as a matter of law to support the jury's verdict that the will was the result of undue influence.

E. BENCH TRIALS

"We give the findings of fact made by a trial court that heard the evidence and evaluated the credibility of the witnesses at a bench trial the same weight as a jury verdict. Those factual findings will not be disturbed on appeal unless they are plainly wrong or without evidence to support them . . . . For those issues that

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53 Brown v. Hoffman, 275 Va. 447, 449, 657 S.E.2d 150, 151 (2008) (citations omitted).

54 *Id.*

55 Banks v. Mario Indus., 274 Va. 438, 450, 650 S.E.2d 687, 694 (2007).

56 Parson v. Miller, 296 Va. 509, 525, 822 S.E.2d 169, 178 (2018) (citations omitted).

57 *Id.*

present mixed questions of law and fact, we give deference to the trial court's findings of fact and view the facts in light most favorable to the prevailing party, but we review the trial court's application of law to those facts *de novo*."[58]

F. BZA CASES

"When there is judicial review of a decision of a board of zoning appeals, the BZA's decision is presumed to be correct and can be reversed or modified only if the trial court determines that the BZA applied erroneous principles of law or was plainly wrong and in violation of the purposes and intent of the ordinance." The burden of proof on these issues is upon the party challenging the BZA's decision.[59]

Appellate courts also apply the "plainly wrong or without evidence to support it" standard of review to a chancellor's decree approving a commissioner in chancery's report as to the chancellor's factual findings but not to his or her conclusions of law or his or her interpretation of the contract.[60]

G. SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE STANDARD OF REVIEW

The "substantial evidence in the record" standard of review is used in a variety of situations, including when an attorney exercises his appeal of right from an order of the Virginia State Bar Disciplinary Board (VSB) and when the Virginia Real Estate Commission ("Commission") acts upon a complaint filed against a real estate broker.

In an attorney disciplinary proceeding, the VSB has the burden to prove by clear and convincing evidence the alleged violation of the Rules of Professional Conduct. In reviewing the disciplinary decision, be it by the Disciplinary Board or by a three-judge panel, the reviewing appellate court makes an independent examination of the entire record, giving the factual findings substantial weight and viewing them as prima facie correct. The evidence and all reasonable inferences that may be drawn therefrom is viewed in the light most favorable to the prevailing party below. While the factual conclusions are not given the weight of a jury verdict, they will be sustained unless it appears that they are not justified by a reasonable view of the evidence or are contrary to the law.[61] In *Kuchinsky*, the court held that the three-judge panel did not err in affirming the district committee's findings that the attorney had violated several rules of the Rules of

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58 Collins v. First Union National Bank, 272 Va. 744, 749, 636 S.E.2d 442, 449 (2006) (citations omitted; italics in original); VA. CODE § 8.01-680.

59 Foster v. Geller, 248 Va. 563, 566–70, 449 S.E.2d 802, 804–807 (1994) (applying the clearly erroneous/plainly wrong standard of review and holding that the BZA's decision below was not based on erroneous principles of law, was supported by the record, and was, therefore, not plainly wrong or in violation of the purpose and intent of the ordinance, the Supreme Court of Virginia reversed the judgment of the trial court and entered judgment in favor of the BZA and the neighbors).

60 Shepherd v. Davis, 265 Va. 108, 117, 574 S.E.2d 514, 519 (2003).

61 Kuchinsky v. Virginia State Bar, 287 Va. 491, 499–500, 756 S.E.2d 475, 479 (2014).

Professional Conduct but that the three-judge panel had erred in affirming the district committee's findings that the attorney had violated another rule.

In a real estate complaint proceeding, the Code of Virginia, pursuant to the Administrative Process Act, statutorily provides the substantial evidence standard of review.[62]

"The 'substantial evidence' standard . . . is designed to give great stability and finality to the fact-findings of an administrative agency. The phrase 'substantial evidence' refers to 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' . . . Under this standard, applicable here, 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.'"[63]

Applying this "substantial evidence" standard of review, the court held that "there was ample and substantial evidence to support the Commission's finding that [the real estate agent] had violated his duty under the regulation [to promptly tender to the seller every written offer to purchase on the property]. A reviewing court need inquire no further."[64]

H. ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW

The "arbitrary and capricious" standard of review is the standard of review that an appellate court applied when, for instance, there is a review of a challenge by a school security guard to his termination for absenteeism by his employer, the school board.[65] The trial court set aside the school board's termination on the sole ground that it was arbitrary and capricious. Arbitrary and capricious actions include those which are "willful and unreasonable, taken without consideration or in disregard of facts or law or without determining principle, [or] if the board departed from the appropriate standard in making its decision."

The appellate court's review revealed that the record was replete with instances where the need for consistent attendance by the security guard was explained to the plaintiff. The court ruled that it could not conclude that the board's decision was arbitrary and capricious because the record supported the reasons that the board advanced for his termination, that its decision constituted just cause and that the termination decision was supported by substantial evidence.[66]

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62 *See* VA. CODE § 2.2-4027 ("When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be to determine whether there was substantial evidence in the agency record to support the agency decision. The duty of the court with respect to the issues of law shall be to review the agency decision *de novo*.")

63 *Id*. at 268–69, 308 S.E.2d at 125.

64 Virginia Real Estate Comm'n v. Bias, 226 Va. 264, 268–69, 308 S.E.2d 123, 125–26 (1983).

65 *E.g.,* School Bd. v. Wescott, 254 Va. 218, 492 S.E.2d 146 (1997).

66 *Id.* at 223–24, 492 S.E.2d at 149–50.

I. FAIRLY DEBATABLE STANDARD OF REVIEW

The "fairly debatable" standard is the most lenient standard of appellate review because it defers to the legislative process. "[A]n issue is 'fairly debatable' if, 'when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions.'" This is the standard of review that a court applies when a governing body such as a county board of supervisors acts in a legislative capacity, as when it regulates the use of its land by zoning, in adopting a zoning ordinance, or by granting a special use permit.[67]

The regulation of the use of land by zoning laws "involves the same balancing of the consequences of private conduct against the interests of public welfare, health, and safety as any other legislative decision."[68] In *Board of Supervisors v. Southland Corp.*,[69] the court applied the fairly debatable standard of review in determining whether a local zoning ordinance was unconstitutional. In reviewing the legislative zoning decision, the court pointed out that, at the outset, zoning ordinances are presumed to be valid with the presumption that the ordinance is reasonable.[70] Where the presumptive reasonableness is challenged, the burden of the governing body is not required to introduce its own evidence sufficient to persuade the fact finder of the reasonableness of the ordinance by a preponderance of the evidence. As long as the evidence of the reasonableness of the ordinance is sufficient to make the issue "fairly debatable," the ordinance must be upheld. In *Southland Corp*., the court held that it did not need to resolve the challenge in as much as the ordinance had to be sustained because Fairfax County had presented sufficient evidence to render the reasonableness of the challenged ordinance "fairly debatable." "Given the human tendency to debate any question, an issue may be said to be fairly debatable when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach difference conclusions."[71]

III. CONCLUSION

In summary, standards of review are the tests by which the appellate court decides if the errors or cross-errors assigned constitute legal error and, if so, whether that error will result in changes to the judgment entered below. Familiarity with the standards of review and the process by which they can be used by the appellate courts will go a long way in helping the attorney handling the appeal to realistically assess the client's prospects for success on appeal.

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67 Lamar Co. v. City of Richmond, 287 Va. 322, 326, 757 S.E.2d 15, 17 (2014).

68 Board of Supervisors v. Southland Corp., 224 Va. 514, 533, 297 S.E.2d 718, 722 (1982).

69 *Id*.

70 *Id.* at 521–24, 297 S.E.2d at 721–23.

71 *Id.* at 524, 297 S.E.2d at 723 (quoting Fairfax County v. Williams, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975)).