

STANDARDS OF REVIEW ON APPEAL
OVERLOOK THEM OR TREAT THEM LIGHTLY AT YOUR PERIL

You took the case to trial. The trial court made errors, according to you: sustaining a *Batson* challenge to your selection of jurors; improperly admitting evidence against your client; denying your motion for mistrial; and, denying your motion for directed verdict . . . all before lunch break on the first day of trial. Or at least that's how it felt. After the partial grant of summary judgment before trial and, the jury verdict against your client after trial, with a whopping damages award to boot, you quickly order the transcripts in the case, file a timely notice of appeal,¹ and tee-up your argument. Ahead of schedule, you file your appeal brief, which can only be described as a masterpiece – synthesizing your detailed factual rendition with sure-to-persuade authority and argument. In due course, you get the opinion from the Court of Appeals. But, rather than the Court lauding you as the next Ted Olson,² you read the opinion to find these words:

This appeal is deficient in several respects. [Insert Your Name Here] has failed to provide a concise statement of the applicable standards of review as required by Court of Appeals Rule 25(a)(3).³

Or perhaps:

[Insert Your Name Here] failed to provide the appropriate standard of review in his appellate brief, in violation of Court of Appeals Rule 25(a)(3).⁴

Or maybe even:

The attention of appellate counsel is further drawn to Court of Appeals Rule 15 (a) (3), providing that the portion of the brief containing the argument and citation of authorities “shall include a concise statement of the applicable standard of review for each issue presented in the brief.”⁵

Or quite possibly:

At the outset, we address multiple and flagrant deficiencies in appellant’s brief. . . Appellant’s brief also omits “a concise statement of the applicable standard of review with supporting authority for each issue presented in the brief.”⁶

These are not words you ever want to read about your brief in an opinion by the Court of Appeals. The requirements for appellate briefs are clearly set forth in the Court rules and, as the Court has stated, “were created, not to provide an obstacle, but to aid parties in presenting their arguments in a manner most likely to be fully and efficiently comprehended by this Court.”⁷ The purpose of this article is to introduce you (or *re-introduce* you, hopefully) to the rule requiring an appellate brief to have a statement of

the applicable standard of review, to familiarize you with the often incorrectly applied standards of review to be used when appealing, and to provide you with the knowledge and tools to avoid having the above-cited verbiage, or language similar thereto, directed at your appeal brief.

I. GEORGIA COURT OF APPEALS RULE 25.

A. The Rule.

Rule 25 sets forth the requirements for the structure and content of the brief of the appellant. The Rule requires there be three parts to appellant's brief. Part One is "a succinct and accurate statement of the proceedings below and the material facts relevant to the appeal," together with citations to the record to support the factual recitation.⁸ Part Two is the "enumeration of errors."⁹

Part Three, as contained in Rule 25(a)(3) is "the argument and citation of authorities" - the meat of the brief, though the impact and importance of the factual statement should not be diminished. In addition to allowing for argument and authorities, Rule 25(a)(3) *requires* "a concise statement of the applicable standard of review with supporting authority *for each issue presented in the brief.*"¹⁰

B. The Meaning of Rule 25(a)(3).

What does it mean to write a concise statement of the applicable standard of review? At the very least, at the outset of the argument section on each issue, or enumeration of error,¹¹ you, as the appellant, should write a brief statement as to the standard of review applicable to that issue or enumeration of error only, along with a citation of authority to support that statement as to standard of review. You may then proceed on to argue and cite authority. Such a statement in a brief might look something like this:

ISSUE ONE: THE TRIAL COURT ABUSED ITS DISCRETION BY QUALIFYING MALORY ARCHER AS AN EXPERT IN HOME CONSTRUCTION MATERIALS.

a. Standard of Review.

This Court reviews the trial court's decision to qualify a witness as an expert for abuse of discretion. *Williamson v. Harvey Smith, Inc.*, 246 Ga. App. 745, 749 (2000).

b. Argument and Citation of Authority.

The trial court abused its discretion by qualifying Mr. Malory Archer, a handyman by trade, as an expert in home construction materials....

The process would then be repeated for each successive enumeration of error. Another way to set out the standards of review would be to add a section in the brief, after the enumeration of errors section and before the argument section, entitled “Standards of Review,” in which the standard of review applicable to each enumeration of error would be listed in order, with numbers matching those of the enumeration of errors. However, if this practice is followed, the appropriate standard of review should again be referenced within the argument section, but need not be set apart as illustrated above.

C. The Consequences of Failing to Follow Rule 25(a)(3).

The bad news is, because Rule 25(a)(3) is mandatory, failure to set forth the applicable standard of review could result in your being held in contempt of court, your arguments being deemed abandoned, or your appeal being dismissed.¹² The good news is that the Appellate Practice Act dictates that appeals “shall be liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case,”¹³ and the Court of Appeals has followed that dictate.¹⁴

You can rest assured, however, that at the very least, failure to comply with Rule 25(a)(3) or any of the other structural rules will cause the Court to vividly point out your failings, as shown above, or in this example:

As a threshold matter, we must address [Insert Your Name Here]'s disregard of this Court's rules as they pertain to his brief. . . . “This Court does not look with favor upon one who fails to follow the rules of this Court. In fact, the failure to comply with this Court's rules may subject the offending party to contempt and may subject the appeal to dismissal or cause the appellant's brief to be stricken.” In this case, however, we nonetheless endeavor to discern and address the enumerations of error that are supported by argument.¹⁵

II. DIFFERENT STANDARDS OF REVIEW.

Now that you understand the requirement to set forth the applicable standard of review for each enumeration of error in your brief, as well as the seriousness with which the Court of Appeals views this requirement, it is imperative to know what standards of review exist and in what circumstances they are to be applied. There are essentially four standards of review: abuse of discretion (probably the most common), *de novo* review, the “any evidence” test, and the clearly erroneous standard.¹⁶ Sometimes, rulings by the trial court require the Court of Appeals to employ more than one standard of review. Each standard, and its application, will be discussed, below.

A. Abuse of Discretion.

Whenever the trial court exercises its broad discretion, typically in the areas of trial management and conduct, the review will be for abuse of that discretion. “No

principle is better settled than that in the conduct of trials, both civil and criminal, a broad discretion is vested in the judge below, and that that discretion will not be controlled by this court unless it is manifestly abused.”¹⁷ This is a highly deferential standard – meaning the Court of Appeals will typically not reverse a trial court’s use of its discretion absent some manifest abuse.¹⁸ Some examples of when the standard of review is abuse of discretion:

1. Discovery rulings.¹⁹
2. Bifurcation or severance of trial.²⁰
3. Selection of jurors.²¹
4. Evidentiary ruling.²²
5. Qualifying witness as expert.²³
6. Denial of motion for mistrial.²⁴
7. Submission of special verdict form or special interrogatories to the jury.²⁵

Whenever you have an issue that arises in the lead-up to trial, such as discovery or the manner in which the trial is going to proceed; during the conduct of the trial itself, such as matters involving admissibility of evidence or testimony of witnesses; or, in any situation involving the jurors or the attorneys during trial, you should be thinking “abuse of discretion” as your standard on appeal.

B. *De Novo* Review.

Whenever the trial court makes conclusions of law, that determination is not due the deference the Court of Appeals gives to trial court’s on discretionary matters, and the Court of Appeals will review the conclusions of law *de novo*, meaning “anew” or “from the beginning.”²⁶ A strictly *de novo* review will be conducted only when there is no dispute as to the evidence or the credibility of the witnesses *and* the trial court decides a question of law.²⁷ In this instance, the trial court is owed no deference whatsoever, and the Court of Appeals will review the legal matter “anew” and determine whether or not “plain legal error” exists.²⁸

Some examples of where *de novo* review has been utilized are:

1. Whether attorney’s fees may be determined based on disparity of income in action under the Family Violence Act.²⁹
2. Whether a settlement is an enforceable agreement.³⁰
3. When the construction of a contract is in question.³¹
4. Trial court’s ruling on motion to dismiss.³²
5. Trial court’s conclusions of law as to confirmation in a foreclosure proceeding.³³

Perhaps the most often appealed issue in which the *de novo* review standard is used is the trial court’s granting or denying of a motion for summary judgment.

¹ O.C.G.A. § 5-6-38(a).

² <http://www.gibsondunn.com/lawyers/tolson>

³ *Keita v. K & S Trading*, 292 Ga. App. 116, 117 (2008).

⁴ *Vickers v. Meeks et al*, 273 Ga. App. 293, 294 n.1 (2005).

⁵ *Robinson v. State*, 210 Ga. App. 278, 278-279 (Ga. Ct. App. 1993)(citing former rule requiring that statement of standard of review be included in appeal brief).

⁶ *Parekh v. Wimpy*, 288 Ga. App. 125-26 (2007).

⁷ *Id.* at 126.

⁸ Court of Appeals Rule 25(a)(1); The Court of Appeals has stated “it is not our responsibility to cull the record on [appellant’s] behalf. *Williams v. State*, 208 Ga. App. 153, 155 (1993).

⁹ Court of Appeals Rule 25(a)(2).

¹⁰ Court of Appeals Rule 25(a)(3) (emphasis added).

¹¹ Court of Appeals Rule 25(c)(1) requires that the sequence of the arguments in the brief follow the order of the enumeration of errors from Part Two of the brief and “shall be numbered accordingly.”

¹² *Rathbone v. Ward*, 268 Ga. App. 822, 823 (2000).

¹³ O.C.G.A. § 5-6-30.

¹⁴ *Parekh v. Wimpy*, 288 Ga. App. at 126.

¹⁵ *Rathbone v. Ward*, 268 Ga. App. at 823.

¹⁶ *McFadden, Brewer & Sheppard’s Georgia Appellate Practice*, § 17.12 (West 2009-2010 Ed.).

¹⁷ *May v. State*, 120 Ga. 497 (1904).

¹⁸ *Id.*

¹⁹ *Time Warner Entertainment Co. v. Six Flags Over Georgia*, 245 Ga. App. 334, 350 (2000).

²⁰ *Whitley v. Gwinnett County*, 221 Ga. App. 18, 19 (1996); *York v. State*, 242 Ga. App. 281, 287 (2000).

²¹ *Walls v. Kim*, 250 Ga. App. 259 (2001); *Brown v. Egleston Children’s Hosp.*, 255 Ga. App. 197, 198 (2002) (review of trial court rulings on *Batson* challenges).

²² *Dep’t of Transportation v. Mendel*, 237 Ga. App. 900, 902 (1999).

²³ *Williamson v. Harvey Smith, Inc.*, 246 Ga. App. 745, 749 (2000).

²⁴ *Whitley v. Gwinnett County*, 221 Ga. App. 18, 25 (1996).

²⁵ *S. Water Techs. v. Kile*, 224 Ga. App. 717, 719 (1997).

²⁶ <http://dictionary.law.com>

²⁷ *Suarez v. Halbert*, 246 Ga. App. 822, 824 (2000).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Auto-Owners Ins. Co. v. Crawford*, 240 Ga. App. 748, 750 (1999); *Morrow v. Vineville United Methodist Church*, 227 Ga. App. 313, 317 (1997).

³¹ *Sagon Motorhomes v. Southtrust Bank N.A.*, 225 Ga. App. 348, 349 (1997).

³² *Chandler v. Opensided MRI of Atlanta, LLC*, 299 Ga. App. 145 (2009).

³³ *Farmer v. Branch Banking & Trust Co.*, 312 Ga. App. 519, 520 (2011).