NOTES

Appellate Review of Unclear State Law in the Ninth Circuit After *In Re McLinn*

In *In re McLinn*[1] the Ninth Circuit Court of Appeals held that it will no longer defer to a federal district court's interpretation of state law when reviewing state law issues on appeal. The traditional standard of review for state law issues had required deference to a district court's determination of state law unless the district court was "clearly wrong."[2] In rejecting the traditional standard, the court reasoned that the previous clearly wrong standard was an abdication of the court's duty as a court of review and adversely affected the appellate court's precedent adopting function.[3] The Ninth Circuit therefore adopted

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1. 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc, 6-5 decision).

2. *Id. See also* Taylor v. Sentry Life Ins. Co., 729 F.2d 652, 654 (9th Cir. 1984) ("Substantial deference will be accorded the district court's interpretation of the law of the state in which it sits. Ordinarily we will accept that determination unless it is 'clearly wrong.' ") (citation omitted); Shakey's Inc. v. Covalt, 704 F.2d 426, 436 (9th Cir. 1983) ("The Oregon District Judge's conclusion on a question of Oregon law is entitled to substantial deference and is reversible only if clearly wrong."); Camacho v. Civil Serv. Comm'n, 666 F.2d 1257, 1262 (9th Cir. 1982) ("Interpretations of local law by a district court sitting in the locality are entitled to great weight. They will not be distrubed unless clearly wrong." (quoting S.A. Empresa v. Boeing Co., 641 F.2d 746, 752 (9th Cir. 1981))); Gaines v. Haughton, 645 F.2d 761, 770 (9th Cir. 1981) ("The District Court's construction of state law will be accepted on review unless it is 'clearly wrong' or 'clearly erroneous'."); California v. United States, 235 F.2d 647, 654 (9th Cir. 1956) ("This Court defers to the interpretation of the able trial judge, himself a lawyer of the state of long standing, acquainted with the imponderables and implications inherent in the pronouncement of the courts of the state. This Court will not reject any such interpretation unless convinced that it be manifestly contrary to the holdings of the local tribunals.").

3. *In re* McLinn, 739 F.2d at 1398, 1401-02. The majority justified its departure from past practice—whereby a district court's interpretation of state law was afforded great weight—in the following manner:

> In our view, a decision to give less than full independent de novo review to the state law determinations of the district courts would be an abdication of our appellate responsibility . . . . We review questions of fact under the clearly erroneous standard and we review conclusions of law de novo. There is no justification for being less thorough, for abdicating any portion of our appellate responsibility, or for curtailing the parties' appellate rights simply because the law involved is state law.

the rule that questions of state law are reviewable under the same independent de novo standard as questions of federal law.[4]

I. Introduction

The proper weight to be given a federal district court's conclusions of state law on appeal is not clearly settled. In respect to a court's findings of fact, Rule 52(a) of the Federal Rules of Civil Procedure provides that the trial court's findings of fact shall be sustained on appeal unless "clearly erroneous."[5] Rule 52(a) is silent, however, regarding the proper standard for reviewing conclusions of law. This silence has been interpreted to mean that the clearly erroneous standard does not apply to the trial court's conclusions of law, and that such conclusions are freely reviewable on appeal.[6]

The current practice among most of the circuit courts is to give some degree of deference or weight to a district court's

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Id. at 1398. Regarding its precedent adopting function, the majority stated:

> [M]any of our decisions construing state law have significant precedential effect, even though they are not binding precedent in the state. Yet when closely analyzed, if those holdings are based on the clear error standard, they are not really holdings by appellate panels that construe state law. Instead, they are holdings that the district judges' construction of state law is not clear error. We owe a greater appellate duty than this when we establish precedent to be relied upon by other trial and appellate courts. This deficiency in our present standard of review would not be alleviated by [giving "great weight" to the federal district court's interpretation of state law,] the standard proposed in the dissent.

Id. at 1402 (footnote omitted).

4. *In re* McLinn, 739 F.2d at 1397.

5. "Findings 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." Fed. R. Civ. P. 52(a). *See infra* notes 52-54 and accompanying text.

6. *See, e.g.*, Bose Corp. v. Consumers Union, 466 U.S. 485, 501 (1984) ("Rule 52[a] applies to findings of fact . . . . Rule 52[a] does not inhibit an appellate court's power to correct errors of law . . . or [to correct] a finding of fact that is predicated on a misunderstanding of the governing rule of law."); United States v. Mississippi Valley Generating Co., 364 U.S. 520, 526 (1961) ("[O]ur reliance upon the [lower court's] findings of fact does not preclude us from making an independent determination as to the legal conclusions and inferences which should be drawn from them."); *In re* McLinn, 739 F.2d at 1398 ("We review questions of fact under the clearly erroneous standard and we review conclusions of law de novo.").

For a helpful discussion regarding appellate review of conclusions of law, *see* 5A J. Moore & J. Lucas, Moore's Federal Practice, ¶52.03[2] (2nd ed. 1985) [hereinafter cited as Moore & Lucas] and 9 C. Wright & A. Miller, Federal Practice and Procedure § 2588 (1971) [hereinafter cited as Wright & Miller].

interpretation of state law.[7] The rationale behind according deference is that a federal district court judge who sits in a particular state and who has practiced before its courts is better able to resolve complex questions of state law than a federal appellate court judge who has had no experience with the law of that state.[8]

In *McLinn*, the Ninth Circuit significantly departed from the practice of the other circuits, and from its own prior practice, when it rejected the deferential standard of review normally applied to a federal district court's interpretation of state law. This Note discusses the Ninth Circuit's decision in *McLinn* and examines the deferential standard employed in the other circuits

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7. *See, e.g.*, United States v. Burnsed, 566 F.2d 882, 884 (4th Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978) (where state supreme court has not construed state statute, court of appeals will defer to district judge who is familiar with the laws of the state); Green v. Amerada-Hess Corp., 612 F.2d 212, 214 (5th Cir. 1980) (special weight afforded the determination of the district judge who is familiar with local law); Filley v. Kickoff Publishing Co., 454 F.2d 1288, 1291 (6th Cir. 1972) (opinion of district court judge who was a long-time member of the state bar entitled to considerable weight); Murphy v. White Hen Pantry Co., 691 F.2d 350, 354 (7th Cir. 1982) (great weight given a district court's construction of a state law that has not been addressed by the state courts); Lamb v. Amalgamated Labor Life Ins. Co., 602 F.2d 155, 160 (8th Cir. 1979) (great weight given to the district court's conclusions on questions of state law); Camacho v. Civil Serv. Comm'n, 666 F.2d 1257, 1262 (9th Cir. 1982) (interpretation of local law by a district court sitting in the locality is entitled to great weight and will not be disturbed unless clearly wrong); King v. Horizon Corp., 701 F.2d 1313, 1315 (10th Cir. 1983) (deference accorded a district court's interpretation and application of state law, and clearly erroneous standard governs on appeal); Alabama Elec. Coop. v. First Nat'l Bank of Akron, 684 F.2d 789, 792, (11th Cir. 1982) (interpretation of state law by district judge sitting in that state is entitled to deference). *But cf.*, Rabon v. Guardsmark, Inc., 571 F.2d 1277, 1279 (4th Cir. 1978), *cert. denied*, 439 U.S. 866 (1978) (ruling that an oral opinion containing no citation of authority except passing reference to a case is not entitled to the significant weight normally afforded to a district court when the issue is novel, close, and important).

Thus, prior to the *McLinn* decision, eight of the federal circuit courts of appeal deferred to a district court's interpretation of state law, especially when the law in question was unsettled. Of these, the Ninth and Tenth Circuits reversed only if the district court was clearly wrong or clearly erroneous.

8. As a general proposition, a federal court judge who sits in a particular state, especially one who has practiced before its courts, may be better able to resolve complex questions as to the law of that state than is a federal judge who has no such personal acquaintance with the law of the state. For this reason, federal appellate courts have frequently voiced reluctance to substitute their own view of the state law for that of the district judge.

19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4507 at 106-07 (1982) [hereinafter cited as WRIGHT, MILLER & COOPER].

"An interpretation of local law by federal judges experienced therein should be given great weight." 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE, ¶ 0.309[2] at 3125 (2nd ed. 1985) [hereinafter cited as MOORE & TAGGART].

and in the United States Supreme Court. The Note takes the position that *McLinn* was correct in rejecting the former practice of accepting a district court's interpretations of state law unless clearly wrong, but that *McLinn* went too far in holding that a district court's rulings on unclear state law are entitled to no deference. The Note asserts that neither fairness to the parties nor concern for reaching the most accurate determination of state law is furthered by the *McLinn* decision. An appellate court, inexperienced in the law of the state, should not be given unlimited freedom to second guess the district court as to how a state court will eventually rule on an issue. When a question of state law is unsettled, resulting in little or no guidance to the federal courts in deciding how the state courts would rule on a question, then the experience of the federal district court judge in state law matters should play a significant role on appeal. The Note concludes that, absent a means for accurately predicting how a state's courts will one day decide a matter of state law,[9] a deferential standard of review similar to that applied by the other circuits[10] provides the most reliable and judicially prudent result.

II. Procedural History of *McLinn*

In re McLinn was an admiralty action brought in the United States District Court for the District of Alaska.[11] The

9. Although this Note is concerned primarily with the proper standard for reviewing a federal court's resolution of questions of unclear state law, the author notes that certification is available in some states to resolve such questions. In many instances resort to certification would seem highly desirable because it relieves federal courts from engaging in speculation as to what the state law is. *See, e.g.*, Note, *State Law In Federal Courts: The Implications of De Novo Review*, 60 Wash L. Rev. 739 (1985) (calling for liberal use of certification when state law is unclear). The United States Supreme Court has also encouraged certifying state law questions to a state's supreme court when the federal courts are not in a good position to predict how the state courts will eventually decide a question. *See infra* note 32 and accompanying text. When certification is not used, however, the district court's interpretation of state law should be given great weight on appeal. *See also infra* note 18.

10. *See supra* note 7 and *infra* notes 26-43 and accompanying text.

11. Three skiffs were involved in a collision off Kodiak Island, Alaska. A passenger in one of the skiffs was killed and the driver injured. Two of the skiffs were owned and operated as seine skiffs in conjunction with two salmon fishing vessels, although at the time of the accident the skiffs were not being used for commercial fishing. Plaintiffs brought suit in admiralty against defendants in personam and against their vessels in rem. The district court granted defendants' motion for summary judgment, holding as a matter of law that an Alaska statute (*see infra* note 12) did not impose liability because the seine skiff was not "devoted to recreational pursuits" as required by the statute. *In*

outcome of the action depended in part on the interpretation of an Alaska statute that imposed liability for the negligent operation of any "watercraft . . . devoted to recreational pursuits."[12] The trial court had to determine whether a seine skiff not normally used for recreation was a "watercraft" within the meaning of the statute. The statute had not yet been interpreted by the Alaska Supreme Court and reasonably could have been construed to favor either party.[13]

The district court decided in favor of defendants, granting partial summary judgment. On appeal, the three-judge circuit court of appeals requested an en banc hearing of the Ninth Circuit to determine the proper standard for reviewing the district court's interpretation of the statute. The appellate court determined that there was some confusion in the Ninth Circuit regarding the proper standard of review to be applied to a district court's ruling on state law.[14] The court furthermore

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re McLinn II, 744 F.2d 677, 681 (9th Cir. 1984).

12. Alaska's statutes impose liability for the negligent operation of a "watercraft." "Watercraft" are defined as "every description of vessel, other than a seaplane on the water, used or capable of being used as a means of transportation on water and devoted to recreational pursuits unless otherwise expressly provided in this chapter; and excepting vessels having a valid marine document." ALASKA STAT. § 05.25.100(4) (1984).

13. The appeals court noted that "[t]he relevant sections of the Alaska statute have not been interpreted by the Alaska Supreme Court and the legislative history is sparse. The plain language of § 05.25.100(4) is subject to either party's interpretation." *In re* McLinn II, 744 F.2d at 682.

14. "One of the issues in this case hinged on the district court's interpretation of an Alaska statute. Our review of the court's interpretation was contingent on whether we applied a de novo or clearly erroneous standard, about which there was some confusion in this court's prior decisions." *Id.* at 680. Although the practice of the Ninth Circuit had been to accord "great weight" to a district court's interpretation of state law, reversing only for "clear error," several Ninth Circuit opinions had departed somewhat from that practice. *See, e.g.*, United States v. McConney, 728 F.2d 1195, 1200-02 (9th Cir. 1984) (holding for the first time that mixed fact-law questions are reviewable "de novo" rather than under a deferential standard), *cert. denied*, McConney v. United States, 105 S. Ct. 101 (1984); Insurance Co. of North Am. v. Howard, 679 F.2d 147, 150 (9th Cir. 1982) (affording little or no special deference where the district court relies on state law that offers only general guidance); Bank of Cal. v. Opie, 663 F.2d 977, 980 (9th Cir. 1981) (giving little or no deference where state law gives only general guidance); *In re* Mistura, Inc., 705 F.2d 1496, 1497 (9th Cir. 1983) (holding that in the absence of definitive guidance from state courts, district courts will be given substantial deference and not reversed unless clearly wrong; but where state law offers only general guidance, "little or no deference" will be given).

The rationale behind the holdings in *Howard*, *Opie*, and *Mistura* is unclear. The decisions do not explain why deference is given to district courts when the state law is unsettled but not when the state law offers only "general guidance." The recognition of the district court's greater familiarity with state law (which underlies the policy of deferring to district courts in matters of unsettled state law) would seem to be equally appli-

believed that the standard of review it employed would affect the outcome of the case: if the panel reviewed the district court's decision under the deferential standard normally employed in the Ninth Circuit, the panel would affirm; but if the panel reviewed the decision under a non-deferential standard, it would reverse.[15] The request for a hearing was granted, and in a six-to-five decision the Ninth Circuit held that the standard of review that applied when reviewing questions of federal law also should be applied when reviewing questions of state law, the result being that the court of appeals would no longer defer to a district court's interpretation of state law.[16]

III. Ascertaining State Law

Federal courts are regularly confronted by questions of state law that have not been decided by the courts of the state in which the federal court sits. Although a federal district court judge usually must decide even difficult questions of state law, in certain circumstances the federal judge may abstain from deciding a question,[17] or wait until a state ruling has been obtained

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cable when the state law involved offers only general guidance. In such instances it would appear that the district court relies primarily on its familiarity with and expertise in state law, much as it does when the law is unsettled, and not on the general guidance afforded to it.

15. *In re* McLinn, 739 F.2d at 1397.

The issue regarding the proper standard of review was raised for the first time on appeal by the appellate court. During oral argument, counsel for appellants was asked if he was aware of the Ninth Circuit's practice of deferring to a district court's interpretation of state law, and if counsel felt that such precedent should be followed in view of the presence of former Alaska Supreme Court Justice Boochever on the appellate panel. Counsel replied that he was aware of such precedent but felt that it had little application to the case. The three-judge panel felt otherwise, however, indicating that if they reviewed the district court's decision under a deferential standard they would affirm; but if they reviewed the decision under a non-deferential, strict de novo standard, they would reverse. Opening Supplemental Brief for Appellant at 1, *In re* McLinn, 739 F.2d 1395 (9th Cir. 1984).

16. "Today we adopt as the law of the circuit the rule that questions of state law are reviewable under the same independent de novo standard as are questions of federal law." *In re* McLinn, 739 F.2d at 1397.

17. In some instances, federal courts that are asked to rule on questions of state law may exercise discretion and abstain from ruling. This is so where "needless friction" with important state policies might result. Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 499 (1941). Abstention is not an abdication of judicial duty but is instead a "regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State." Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959). Once the state courts have been allowed to rule on the question, the parties may return to the federal courts to resolve any remaining claims. As a general rule though, a federal

through certification of the question by the state supreme court.[18] But if the federal court chooses to resolve the question, it must do so by trying to ascertain how the state supreme court would resolve it.[19] In such instances the federal court must exercise its independent judgment to determine what the legislature intended in passing the statute or what common law rule the courts might adopt, guided by analogous state court decisions, if

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district court must decide even extremely difficult and complex state law matters. *See generally* 17 WRIGHT, MILLER & COOPER, *supra* note 8, §§ 4241-48.

18. Although an examination of the merits of certification is beyond the scope of this Note, it should be noted that either the federal district court or the Ninth Circuit Court of Appeals could have certified the question in *McLinn* to the Alaska Supreme Court under Alaska's Appellate Rule 407, which states:

> (a) The supreme court may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States, or a United States district court, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.
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> (b) This rule may be invoked by any order of any of the courts referred to in Section (a).

In fact, plaintiffs (appellants) requested certification of the question on appeal. The court of appeals denied the request, however, reasoning that "when certification is requested for the first time on appeal by a movant who lost on the issue below, . . . such a movant should not be allowed a second chance at victory . . . ." *In re* McLinn II, 744 F.2d at 681. The court also believed that certification was inappropriate because of an unresolved factual issue: whether certification might prove to be "determinative of the cause" as intended by Rule 407(a) depended on how the factual question was resolved, and certification was thus viewed as "not . . . sufficiently helpful . . . ." *Id.* at 682.

Denial of certification was unfortunate for two reasons. First, the court's narrow reading of Rule 407 imposed conditions for granting certification not contained in the language of the rule. Rule 407 does not state that only a prevailing party's request for certification should be granted. It is unlikely that a prevailing party would ever request certification. Moreover, the language of Rule 407 does not require that questions certified to the Alaska Supreme Court must be determinative of the issues involved, but only that such questions "may" be determinative. The liberal language of the rule would appear to encourage rather than discourage the use of certification. Second, denial of certification was a missed opportunity to have a definitive interpretation of the statute by the Alaska Supreme Court. This was particularly unfortunate in view of the admitted speculation in which the *McLinn II* court engaged in interpreting the statute. *See infra* notes 86-88 and accompanying text.

Since November 1980, when Appellate Rule 407 took effect, certification has been used only twice. *See* Hanebuth v. Bell Helicopter Int'l, 694 P.2d 132 (Alaska 1984) (question certified was whether "discovery rule" acted to toll running of two year period of limitations in Alaska's wrongful death act); Alaska Commercial Fishing & Agri. Bank v. O/S Alaska Coast (pending) (question certified was whether Alaska Commercial Fishing & Agri. Bank is an agency of the state). Telephone conversation with David Lampen, Clerk of the Court for the Alaska Supreme Court (Oct. 1985). *See generally* 17 WRIGHT, MILLER & COOPER, *supra* note 8, § 4248 for a discussion of certification.

19. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

any, and by the court's own reasoning and experience. The federal district court must consider any data tending to show convincingly what the state law is, including decisions from other jurisdictions, other federal decisions, the American Law Institute's Restatement of the Law, scholarly treatments of the law, and any other pertinent authority.[20]

Once the federal district court rules on the question of state law, the parties may appeal the decision to the appropriate circuit court of appeals.[21] In the Ninth Circuit, an appeal must identify the proper standard of review for each contention raised.[22]

The proper standard for reviewing a federal court's findings of fact is governed by Rule 52(a) of the Federal Rules of Civil Procedure, which provides that the trial court's findings of fact shall not be set aside unless clearly erroneous.[23] The Ninth Circuit has noted that one of the policy objectives of Rule 52(a) is to promote judicial efficiency by relieving the appellate courts of the burden of completely reviewing the evidence.[24] The primary policy underlying the deferential standard of Rule 52(a), however, is the recognition that a trial judge is in a better position than an appellate panel to evaluate the credibility of witnesses and to weigh the evidence. For this reason a circuit court of appeals must defer to a district court's findings of fact unless the findings are clearly erroneous.[25]

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20. 19 WRIGHT, MILLER & COOPER, *supra* note 8, § 4507, at 94-103.

21. Parties in a civil action may appeal from a final judgment of a district court "as a matter of right." FED. R. APP. P. 3.

22. (2) Standard of Review; Appeal Based on Trial Ruling.

> A. *The standard of review on appeal.* With respect to each contention raised on appeal, each party shall identify the proper standard of review on appeal at the outset of the discussion of that contention. (E.g., "abuse of discretion," "clearly erroneous," "substantial evidence in the record as a whole," "de novo review.")

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23. *See supra* note 5.

24. United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984), *cert. denied*, McConney v. United States, 105 S. Ct. 101 (1984).

25. Notwithstanding Judge Learned Hand's observation that "[i]t is idle to try to define the meaning of the phrase 'clearly erroneous'," (United States v. Aluminum Co., 148 F.2d 416, 433 (2nd Cir. 1945) *cited in* 5A MOORE & LUCAS, *supra* note 6, ¶52.03[1] at 52-24), the United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

IV. Deferential Review in the Federal Courts

In the absence of a rule governing the standard of review to be given to a trial court's conclusions of law, the United States Supreme Court and a majority of the circuit courts of appeal have developed the practice of deferring to the interpretations of state law by federal district court judges.[26] Although no single standard of deference has emerged from the decisions, most of the circuits accord some form of "great weight" or "substantial deference" to the district court's determinations of state law.[27] A few of the circuits have applied a clearly wrong test, reversing the district court only for clear error, or when clearly wrong.[28]

The United States Supreme Court initiated the practice of deferring to lower federal courts on matters of unclear state law.[29] The Court has recognized that federal district and circuit court judges are in a better position to ascertain state law

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26. *See supra* note 7.

27. *Id.*

28. The clearly wrong standard is confusing because of its similarity to the clearly erroneous standard of Rule 52(a) which applies only to the trial court's findings of fact and not to the court's conclusions of law. Apparently, only the Tenth Circuit continues to review a trial court's conclusions of law under a clearly wrong or clearly erroneous standard. *See, e.g.*, Carter v. City of Salina, 773 F.2d 251, 254 (10th Cir. 1985) ("The challenges posed on appeal relate to the district court's interpretation and/or application of controlling state law. We have held that Fed. R. Civ. P. 52(a) applies under these circumstances."). *But see* the concurring opinion of Judge Seymour in *Carter*. Carter v. City of Salina, 773 F.2d at 256 (Seymour, J. concurring) ("I believe that application of the clearly erroneous standard of Rule 52(a) is inappropriate and reflects the confusion over this issue within our own circuit."). *See also supra* note 7 and *infra* notes 41-49 and accompanying text.

29. *See, e.g.*, Diaz v. Gonzalez, 261 U.S. 102 (1923):

> This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books.

Id. at 105-06 (citation omitted). *See also* Thompson v. Consolidated Gas Util. Co., 300 U.S. 55, 74-75 (1937):

> When not instructed by some decision of a state court, we are disposed, in exercising appellate jurisdiction, to accept the construction given by the lower federal court to a statute of the State, particularly when that court is composed, as in this instance, wholly of citizens of the State, familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws.

because the lower federal courts deal regularly with questions of state law and are more often than not better acquainted with, and therefore "closer" to, the law of the states in which they sit.[30] The Court has stated that it will "leave undisturbed the interpretation placed upon purely local law by a . . . federal judge of long experience and by three circuit judges whose circuit includes [the state whose law is in question]."[31] By the same token, the Court has reversed decisions of the lower federal courts when they were not in an adequate position to make a "confident guess" as to how the state courts would have decided an issue.[32]

The Supreme Court's policy of deference seems justifiable not only because the lower federal courts are in a better position to ascertain state law, but also because the Court's heavy workload makes scrutiny of trial court conclusions impractical.[33] By deferring to the lower federal courts on matters of state law, the Supreme Court frees itself to adjudicate more far-reaching constitutional issues.[34] The Supreme Court's policy of deference

30. "The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." Butner v. United States, 400 U.S. 48, 58 (1979). "Since the federal judge making those findings is from the Vermont Bar, we give special weight to his statement of what the Vermont law is." Bernhardt v. Polygraphic Co., 350 U.S. 198, 204 (1956). *See also* United States v. Durham Lumber Co., 363 U.S. 522, 527 (1960), wherein the Supreme Court deferred to a court of appeals decision on state law after reasoning that the lower court was "much closer" to state law than it was.

31. MacGregor v. State Mut. Life Assur. Co., 315 U.S. 280, 281 (1942).

32. In Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960), the Supreme Court vacated and remanded a decision by the Fifth Circuit Court of Appeals because the court could not make a "confident guess" as to how the statute in question eventually would be construed by the state supreme court. *Id.* at 212. And in Lehman Bros. v. Schein, 416 U.S. 386 (1974), the Court appeared to chide the Second Circuit Court of Appeals for attempting to predict how the Florida Supreme Court would eventually rule on a novel question of law instead of using Florida's certification procedure to allow the Florida Supreme Court to first settle the question. "[W]hen federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Schein*, 416 U.S. at 391.

Attempts by federal courts to predict how a state's courts will eventually rule on an issue have been characterized as "dubious and tentative forecast[s]," Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. at 29, and as "prophetic judgment[s]," Criqui v. Blaw-Knox Co., 208 F. Supp. 605, 606 (D.C. Kan. 1962).

33. For an article by Chief Justice Burger discussing the problem of case overload, see 71 A.B.A. J. 86 (Apr. 1985).

34. Justice Frankfurter commented that the most important function of the Supreme Court is the construction and application of the Constitution. Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 503 (1928).

thus is based on considerations of judicial economy as well as on the premise that lower federal court judges are closer to and therefore better able to decide state law issues.

Most of the circuit courts of appeal that have adopted the Supreme Court's practice of deferring to a federal district judge's interpretation of state law accord deference or great weight to the views of the district judge.[35] A few of the circuits have articulated the standard as giving great weight to the district court's interpretation of state law, reversing only if the court was clearly wrong.[36] The different formulations used by federal appellate courts when deferring to district courts have resulted in some confusion and criticism regarding what the formulations mean and how they should be applied.[37]

What is meant by giving great weight has not been precisely defined. Generally, appellate courts accord great weight (or "substantial deference" or "special consideration") to trial courts by treating the experience of the trial judge in matters of state law as an important factor to consider before reaching a different conclusion.[38] Under a great weight standard of review, an appellate court would reverse a district court only if it believed, after thoroughly reviewing the district court's application of state law as well as any additional pertinent authority, that a state court would have ruled differently. For example, in the Fifth Circuit a district judge's interpretation of state law is deferred to unless it is against the more cogent reasoning of the best and most widespread authority.[39] Where such authority is scanty or lacking, the circuit courts have repeatedly deferred to

35. *See supra* note 7.

36. *See supra* notes 2 and 7.

37. The three-judge appellate panel in *McLinn* noted that there had been some confusion in the Ninth Circuit's prior decisions regarding the proper standard to be applied when reviewing a district court's conclusions of law. *In re* McLinn II, 744 F.2d at 680. *See also* Judge Seymour's concurring opinion in Carter v. City of Salina, 773 F.2d 251, 256-57 (10th Cir. 1985) (Seymour, J. concurring) ("I believe that application of the clearly erroneous standard of Rule 52(a) is inappropriate and reflects the confusion over this issue within our own circuit. Judge Schroeder acknowledged this confusion in her well-reasoned dissent in *McLinn* . . . . At best we are inconsistent; at worst we are confused . . . ."); *see also supra* note 28 and *infra* note 42.

38. For example, the dissent in *McLinn* defined great weight as "treat[ing] the expertise of the district judge in local law as a factor that requires a careful review of the district court's decision before the appellate court reaches a different conclusion." *In re* McLinn, 739 F.2d at 1404. This is essentially the same application of the great weight standard employed by the other circuits. *See supra* note 7.

39. Harville v. Anchor-Wate Co., 617 F.2d 567, 569 (5th Cir. 1981).

a district judge experienced in local law.[40] Thus, an appellate court would not attempt to substitute its opinion for that of the district court without more than a mere suspicion that the district court may have erred in applying the law.

Some circuits have accepted a district court's interpretation of state law unless clearly wrong or clearly erroneous.[41] A conclusion of law presumably is clearly wrong when there is some clear, objective indication that the district court failed to consider adequately and apply all relevant authority. This standard is extremely deferential to district court conclusions of state law, especially in contexts in which state law is unclear or unsettled. But such formulations have tended to disregard the distinction between the great weight standard of deference used when reviewing a district court's conclusions of law and the clearly erroneous standard of Rule 52(a), which applies only to the

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40. Caspary v. Louisiana Land and Explor. Co., 707 F.2d 785, 788-89 (4th Cir. 1983) (federal district judge familiar with state law is accorded substantial deference when state law provides no clear precedent); Campbell v. Joint Dist. 28-J, 704 F.2d 501, 504 (10th Cir. 1983) (according extraordinary force to district court when no controlling state decisions provide clear precedent); Lamb v. Briggs Mfg., 700 F.2d 1092, 1094 (7th Cir. 1983) (district court's construction of state law entitled to great weight where no authoritative resolution of issue has been rendered by state courts); Renfroe v. Eli Lilly & Co., 686 F.2d 642, 648 (8th Cir. 1982) (according special deference to district court in absence of controlling state precedent); Golden v. Cox Furniture Mfg. Co., 683 F.2d 115, 117 (5th Cir. 1982), *reh'g denied*, 685 F.2d 1385 (5th Cir. 1983) (giving special deference to district court's interpretation of a state statute that was unclear and capable of varying interpretation). *But see* Kansas City Power & Light Co. v. Burlington N. R.R. Co., 707 F.2d 1002, 1003 (8th Cir. 1983) (according a district court's interpretation of state law great weight unless interpretation deficient in analysis or lacking in authority).

41. *See, e.g.*, Knaefler v. Mack, 680 F.2d 671 (9th Cir. 1982) (according a district court's interpretation of unsettled state law substantial deference unless clearly wrong or clearly erroneous); Loveridge v. Dreagoux, 678 F.2d 870 (10th Cir. 1982) (clearly erroneous standard of review of Rule 52(a) is proper standard when reviewing a resident district court's interpretation of state law).

The clearly wrong standard also was applied by the Eighth Circuit until Luke v. American Family Mutual Insurance Co., 476 F.2d 1015 (8th Cir. 1972), *cert. denied*, 414 U.S. 856 (1973), wherein the Eighth Circuit adopted a substantial deference standard, essentially the same as that proposed by the dissent in *McLinn*, and the same as the standard used in most of the other circuits. *See In re* McLinn, 739 F.2d at 1406; *see also supra* note 7.

The Supreme Court occasionally has used variations of the clearly erroneous language when reviewing the rulings of United States territorial courts. *See, e.g.*, De Villanueva v. Villanueva, 239 U.S. 293, 299 (1915) (sustaining the application of local law by a territorial court absent a "sense of clear error," while requiring a "conviction of clear error" before reversing a court's findings of fact); Fox v. Haarstick, 156 U.S. 674, 679 (1894) (concurring with the supreme court of a territory absent a showing of "manifest error").

court's findings of fact.[42]

Conclusions of law historically have been given independent, de novo review.[43] The United States Supreme Court and the circuit courts of appeal uniformly have held that an appellate court must exercise independent review over all questions of law and that a district court judge's conclusions of law are freely reviewable on appeal unfettered by the clearly erroneous standard of Rule 52(a). But a de novo standard for reviewing conclusions of law has not precluded the United States Supreme Court and a majority of the circuit courts from factoring in the federal trial judge's state law expertise in their decisions and thereby according great weight to the trial court's conclusions of law on appeal.

Following the Supreme Court's example, and the example of several other circuits, the Ninth Circuit in *California v. United States*[44] announced that it would "defer" to a federal district court's interpretation of complex questions of state law unless the result was "manifestly contrary" to state court decisions.[45]

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42. In those circuits which have adopted the clearly wrong or clearly erroneous standard for reviewing conclusions of law, the result has been in some instances to accept the district court's conclusions of state law unless clearly wrong, much the same as the clearly erroneous standard of Rule 52(a) applies to the court's findings of fact. This result has been criticized by Professor Moore as erroneous, *see* 1A MOORE & TAGGART, *supra* note 8, ¶0.309[2] at 3128 n.28, and by Professor Wright as giving "too much weight to the view of the trial court," 9 WRIGHT & MILLER, *supra* note 6, § 2588 at 752. *See also* Note, *Unclear State Law in the Federal Courts: Appellate Deference or Review?*, 48 MINN. L. REV. 747, 758-59 (1964):

> [W]here parties are litigating in an action before a federal court, they have but that single opportunity to be heard. If their day in court is to be at all meaningful the litigation must be governed by the most proper rule of law available. *Erie* decided that the rule was to be state law. If an appellate court reviewing the case for errors dogmatically refuses to reconsider the rule of law, the parties' day in court is not meaningful.

43. *See supra* note 3. The *McLinn* dissent agreed that de novo review is the appropriate standard:

> Appellate courts exercise de novo review over all questions of law, whether state or federal.
>
> . . . .
>
> The district court's conclusions of law . . . are freely reviewable by the appellate court unfettered by the ["clearly erroneous"] limitations of Rule 52(a). The record is not closed, and the appellate court may review all relevant legal authorities. In questions of law "we are not confined to the 'clearly erroneous' or some other restricted standard of review, but it is our duty to exercise our independent judgment . . . .

In re McLinn, 739 F.2d at 1404-05 (citations omitted) (quoting United States v. Rosales, 584 F.2d 870, 872 (9th Cir. 1978)).

44. 235 F.2d 647 (9th Cir. 1956).

45. *Id.* at 654.

Later Ninth Circuit opinions spoke of according great weight instead of deferring, and "clearly wrong" instead of "manifestly contrary."[46] This reformulation proved unfortunate for several reasons. First, the great weight standard as applied in the other circuit courts is arguably consistent with the role of an appellate court since the parties are still entitled to a thorough and independent review of all questions of law.[47] However, when the Ninth Circuit defined great weight as accepting the district court's determination of state law unless clearly wrong or clearly erroneous,[48] the distinction between the great weight standard and the clearly erroneous standard that applies to findings of fact blurred. The great weight standard that typically had treated the district judge's experience in state law as a factor to be carefully considered, but not a determination binding the appellate court, carried far more weight when the clearly wrong or clearly erroneous term was added to the formula.

Second, a clearly wrong or clearly erroneous standard for a trial court's conclusions of law is an abdication of the proper role of the appellate court.[49] The purpose of appellate review is to examine the trial court's application of the law. Moreover, the reasons underlying Rule 52(a)'s clearly erroneous standard regarding a trial court's findings of fact do not apply to conclusions of law. This is so because conclusions of law are based on an evaluation of all relevant legal authority, not on the trial judge's unique position to weigh the evidence and judge the credibility of witnesses.

V. THE *McLINN* DECISION AND ITS PROBLEMS

Both the majority and the dissent in *McLinn* recognized the shortcomings of the clearly wrong standard of review previously

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46. *See supra* note 2.

47. *See, e.g.*, 9 WRIGHT & MILLER, *supra* note 6, § 2588 at 752, citing with approval the position adopted by the Fifth Circuit, which gives great weight to the district court's ruling on state law while acknowledging that the parties are entitled to a review of the state law questions:

> We give great weight to the view of the state law taken by a district judge experienced in the law of that state, although of course the parties are entitled to review by us of the trial court's determination of state law just as they are of any other legal question in the case.

Freeman v. Continental Gin Co., 381 F.2d 459, 466 (5th Cir. 1967), *reh'g denied*, 384 F.2d 365 (5th Cir. 1967).

48. *See supra* note 2.

49. *See supra* note 3.

followed in the Ninth Circuit.[50] Where they differed, however, was in how much weight to give a federal district court's interpretation of state law. The *McLinn* court did say that a district court's reasoned opinion on state law would be given "full, thorough, and respectful consideration" just as it is on matters of federal law.[51] The *McLinn* court was sharply divided, however, over whether it should give additional deference on the basis of a district court judge's proximity to and familiarity with state law generally, and with local policies, attitudes and biases.

The majority in *McLinn* stated that all parties are entitled to a thorough, independent review of all questions of law, whether state or federal.[52] The majority reasoned that parties are accorded independent review of issues of law not because of any greater wisdom of appellate court judges, but because of two structural differences between the courts.[53] First, appellate judges are not burdened with finding facts and therefore are freer to concentrate on disputed questions of law.[54] Second, an appellate decision is the collaborative effort of three judges,

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50. *See infra* note 63 and text accompanying notes 71-75.

51. "[W]e have emphasized that the district court's reasoned explanation for a holding on a question of state law will be given full, thorough, and respectful consideration, just as it is on questions of federal law." *In re* McLinn, 739 F.2d at 1401. There is, however, a significant distinction between the majority's "full, thorough, and respectful consideration" standard and the *McLinn* dissent's great weight standard. As noted by the majority, a federal appellate court gives full, thorough and respectful consideration to a district court's conclusions of law, whether state or federal. The reason for such respect is presumably a matter of professional courtesy as well as a due regard for the competency of district judges. The majority adamantly refuses, however, to accord greater respect to a district court's determinations of state law.

The dissent's great weight standard of review would give the same "respectful consideration" that the majority offers, but would give additional deference on the basis of a district judge's proximity to and familiarity with state law generally, and with local policies, attitudes and biases. The practical difference between these two standards when applied to appellate review of district court interpretations of state law is the likelihood of a greater number of reversals of trial courts by appellate panels who have less expertise in state law.

52. "The parties are entitled to the same careful, independent consideration of the issues of law by the appellate court whether the case involves state law or federal law." *Id.* at 1398.

53. Citing United States v. McConney, 728 F.2d 1195, 1201-04 (9th Cir. 1984) (en banc), a Ninth Circuit decision dealing with the proper standard for reviewing a district court's determinations of mixed questions of fact and law, the majority reviewed the structural advantages that appellate courts have when reviewing questions of law. *See infra* notes 54 & 55.

54. "[A]ppellate judges are freer to concentrate on legal questions because they are not encumbered, as are trial judges, by the vital, but time-consuming process of hearing evidence." *In re* McLinn, 739 F.2d at 1398 (quoting United States v. McConney, 728 F.2d at 1201).

which reduces the risk of judicial error.[55] Moreover, any standard of review that might hinder the independent review of questions of law was viewed as an abdication of appellate responsibility.[56]

The *McLinn* majority characterized the United States Supreme Court practice of declining to review state law questions on appeal from the lower federal courts as a "jurisprudential decision" aimed at conserving the Court's discretionary powers.[57] In an attempt to refute the argument that the Supreme Court has deferred to the pronouncements of state law by local federal judges, the majority asserted that "the Supreme Court . . . is not giving weight or deference to the decision of the district judge or the court of appeals, rather it is simply not reviewing the state law question that has been fully reviewed and determined by the intermediate appellate court."[58]

In addition, the *McLinn* majority criticized the deferential standard of review proposed by the dissent because such a standard is not based on the trial judge's reasoning but on the assumption that the trial judge has some special knowledge about state law. This assumption is unsound ground on which to base appellate decisions because it depends on factors such as the judge's actual experience, and the reviewing court's focus therefore shifts from the appropriate legal authorities to the judge's biography.[59] Independent review of a district court's con-

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55. "[T]he judgment of at least three members of an appellate panel is brought to bear on every case. It stands to reason that the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law." *In re* McLinn, 739 F.2d at 1398 (quoting United States v. McConney, 728 F.2d at 1201).

56. *See supra* note 3.

57. *In re* McLinn, 739 F.2d at 1399.

58. *Id.*

> It has been argued that Supreme Court precedent requires our deference to conclusions of state law by the district court because the Supreme Court has chosen not to review questions of state law in a number of cases and has deferred to the interpretation of the lower courts. In each instance, however, the parties had already received the mandatory appellate review in the circuit court. In none of these cases was the Supreme Court exercising direct appellate review from the district court.

Id.

The majority's assessment that the Supreme Court "is not giving weight or deference to the decision of the district judge" is misleading because it ignores the reasoning behind the Court's policy. On numerous occasions the Supreme Court has reiterated its recognition that lower federal court judges who deal regularly with questions of state law are in a better position to decide such questions. *See supra* notes 29-31 and accompanying text.

59. *In re* McLinn, 739 F.2d at 1400.

clusions of state law should "not be based upon some undefined special knowledge or feeling for the state law that the district judge may be presumed to have, but that cannot be articulated by the judge, argued by the parties, or reviewed by the appellate court,"[60] but instead should be based on recognized legal sources available to the parties.

Lastly, the *McLinn* court contended that the "two-fold" function of the appellate court—reviewing for correctness and clarifying and harmonizing the law[61]—also weighed against a deferential standard of review. Although a federal court's decision on state law is not binding on state courts, the majority reasoned that de novo review was the appropriate standard of review because such decisions have significant precedential importance for future litigants and other courts.[62] Appellate courts should, therefore, independently review the district court's decision for correctness rather than merely hold that the trial court was not "clearly wrong" or "clearly erroneous" in its application of state law.[63]

The dissent in *McLinn* characterized the new standard of review adopted by the majority as "completely out of step"[64] with the deferential standard employed by the United States Supreme Court and by a majority of the circuit courts of appeal.[65] The majority's "novel view" not only would increase the Ninth Circuit's workload, but also would be a disincentive

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60. *Id.*

> 61. The functions of the appellate court have traditionally been described as two-fold. The first is to review for correctness, which is the prime consideration of the parties. The second is the institutional function of announcing, clarifying, and harmonizing the rules of decision employed by the legal system in which they serve.

Id. at 1401.

62. One writer commented recently that de novo review of questions of unsettled state law is inappropriate. This is so because appellate courts are less able to accurately predict state law than district courts, and because the precedential value of such decisions in federal courts—but not state courts—creates the potential for forum shopping between state and federal courts. *See* Note, *supra* note 9, at 746-48.

> 63. "[I]t is clear that many of our decisions construing state law have significant precedential effect, even though they are not binding precedent in the state. Yet when closely analyzed, if those holdings are based on the clear error standard, they are not really holdings by appellate panels that construe state law. Instead, they are holdings that the district judges' construction of state law is not clear error. We owe a greater appellate duty than this when we establish precedent to be relied upon by other trial and appellate courts.

In re McLinn, 739 F.2d at 1402.

64. *Id.* at 1404.

65. *Id.* at 1403.

for district judges to explore thoroughly and explain all relevant authorities because appellate courts now may freely substitute their own interpretations of state law for those of the district court judge.[66]

The dissent rejected the majority's assertions that a de novo standard of review is inconsistent with a deferential standard of review[67] and that a deferential standard would make appellate review less thorough:[68]

> The special weight that should be given to a district court's decision is not intended to make our examination any less thorough or independent. It is intended to make us more careful. Its purpose is to prevent hasty and perhaps arbitrary decisions in areas of local law with which we may not be fully familiar. Giving special consideration to a district court's decision on a state law question is a responsible exercise of appellate authority.[69]

Trial court decisions should be accorded great weight; the reviewing court should "treat the expertise of the district judge in local law as a factor that requires a careful review of the district court's decision before the appellate court reaches a different conclusion."[70]

The dissent acknowledged that the articulation of the standard previously used in the Ninth Circuit[71] was unfortunate because it meant that a district court's construction of state law

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> The result can only serve as a disincentive to our district courts to explore and explain the authorities which bear on an issue of local law. It will tend to deprive the litigants of the benefit of that effort. It will encourage unsuccessful counsel to appeal on the assumption that reversals will become more frequent. Our own work will multiply. Sadly, the majority arrives at this result without an analysis of purpose, and in the face of overwhelming authority from the other circuits.

Id.

67. The *McLinn* majority stated: "We cannot have independent de novo review and still defer to the decision of the district judge. The concepts are inconsistent." *Id.* at 1401.

68. Early in its opinion the majority stated that "[t]here is no justification for being less thorough" when reviewing questions of state law than when reviewing questions of federal law. *Id.* at 1398. The majority later stated that "[t]he dissent also agrees . . . that our appellate court review of state law questions should not be 'narrower in character than its review of other legal questions.' " *Id.* at 1402 (quoting *In re* McLinn, 739 F.2d at 1403 (Schroeder, J., dissenting)).

69. *Id.* at 1406.

70. *Id.* at 1404.

71. A district court's interpretation of state law is entitled to great weight and will not be disturbed unless clearly wrong. *See supra* note 2 and accompanying text.

was binding on the appellate court, and in fact did result in some cases in an appellate court looking "only to whether plausible support exist[ed] for the district court's legal conclusion, thereby according it presumptive validity."[72] The dissent, however, turned to the standard of review adopted in the Eighth Circuit.[73] The Eighth Circuit had employed a standard of review for conclusions of law similar to the Ninth Circuit's clearly wrong standard but abandoned the formulation in favor of a standard which accorded substantial deference to the district courts.[74] The impetus behind the change was the fear that the clearly wrong formulation might "preclude appellate consideration of an issue involving a significant question of law."[75]

The *McLinn* dissent argued that sound practical reasons underlie the practice of giving special consideration to a district court's pronouncements on state law, primarily the district judge's "past experience and day to day familiarity with state law."[76] The special consideration reflects a recognition of the differences that exist between the appellate and the district courts' relationship to the law of a particular state.

> As a practical matter district judges hear a great number of cases involving the law of their home states. This court's appellate jurisdiction, on the other hand, encompasses nine states, and questions of state law arise from all of them. Moreover, district judges generally have practiced within a state for some years while appellate court judges, more often than not, have no similar relationship to the law of the state in question.[77]

Lastly, the dissent pointed out that the majority failed to explain why the Supreme Court's deference to the lower courts on matters of local concern did not justify the circuit courts deferring to the district courts on state law questions. Since the

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72. *In re* McLinn, 739 F.2d at 1405 (citation omitted).

73. *Id.* at 1406 (citing Luke v. American Family Mut. Ins. Co., 476 F.2d 1015, 1019 n.6 (8th Cir. 1972), *cert. denied*, 414 U.S. 856 (1973)).

74. *In re* McLinn, 739 F.2d at 1406.

75. *Id.* (citing *Luke*, 476 F.2d at 1019 n.6).

76. In addressing state law issues on appeal, circuit courts have developed the practice of giving special consideration to a district court's decisions on state law questions arising under the law of the district court's home jurisdiction. Sound practical reasons underlie the development: the appellate courts can benefit greatly from a district judge's past experience and day to day familiarity with issues of state law within that judge's state.

Id. at 1404; *see also* 9 WRIGHT & MILLER, *supra* note 6 § 2588, at 752.

77. *In re* McLinn, 739 F.2d at 1405.

Supreme Court's deference is based on the presumption that lower federal courts are much closer to and have more expertise in state law, in the same sense district courts are closer to state law than are the circuit courts of appeal.[78]

One of the primary reasons the *McLinn* majority rejected a deferential standard of review is that the structure of the court system does not warrant giving deference to a district court. The court of appeals is in a better position than the trial court to decide questions of law because appellate courts are not burdened with having to make findings of fact and because appellate review is the collaborative effort of three judges.[79]

Although this observation has merit, its validity in situations where a question of state law is unsettled is doubtful. In such instances, the decisional law and other relevant authority which normally guides a federal court in making its decision is absent. In that respect, the collaborative effort of the appellate court judges would appear to be of little or no advantage. If an appellate court can reach a better-reasoned opinion than the district court by pointing to some specific, relevant authority which the district judge has overlooked, or by exposing some flaw or weakness in the district court's opinion, then certainly the opinion of the district court should be set aside. When the issue of state law has not yet been addressed by the state courts, however, leaving federal courts with little if any relevant authority to guide them in deciding how the state courts will eventually decide the issue, it is difficult to see how the structural differences between the district and appellate courts puts an appellate court in a position to reach a more reliable result.

In a similar vein, although an appellate court does not have to engage in factfinding and is, therefore, able to concentrate more fully on the legal issues involved, this structural advantage is minimized when state law is unsettled. In such instances, an appellate court is engaged more in speculation than in legal reasoning as to how it thinks the state's courts eventually will decide the issue. For this reason, the federal district court judge's familiarity with the inherent subtleties of the state's

78. *Id.* at 1406. The Supreme Court recently reiterated its view that the lower federal courts are better able to decide issues of state law. "The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." Butner v. United States, 440 U.S. 48, 58 (1979).

79. *See supra* notes 53-55 and accompanying text.

legal system should be given great weight by an appellate tribunal unfamiliar with the "tacit assumptions" and "unwritten practices"[80] of that state's laws. Such a policy is not an abdication of an appellate court's responsibility, but is instead a judicially prudent and sound recognition of the relative expertise between the appellate courts and the district courts in matters of state law. If a situation arises in which giving great weight to the district court would be inappropriate, such as where the district court judge interprets another state's law[81] or where the judge is temporarily sitting by designation,[82] the appellate court should not do so.[83]

A second argument urged by the majority in *McLinn* for not according weight to a district court's interpretation of state law was based on the precedential importance of the Ninth Circuit's decisions.[84] The two-fold function of the appellate court—reviewing for correctness and clarifying and harmonizing the law[85]—requires that questions of law be decided correctly because of their precedential effect. As the majority correctly pointed out, however, a state court is not bound by a federal

80. *See supra* note 29.

81. *See, e.g.*, Allen v. Greyhound Lines, Inc., 656 F.2d 418, 421 (9th Cir. 1981) (deference normally accorded a district court's interpretation of state law need not be given when the district court judge is interpreting the law of another state).

82. *See, e.g.*, Safeco Ins. Co. v. Guyton, 692 F.2d 551, 553-54 (9th Cir. 1982) (interpretations of state law by a district judge sitting in the state are normally entitled to deference, but such interpretations are entitled to no deference when the district judge is from another jurisdiction and is sitting by designation).

83. A secondary factor favoring giving great weight to a district court's views on state law is the likelihood of an unnecessary increase in the Ninth Circuit's workload in the wake of *McLinn*. In the decade prior to 1974, the caseload of the United States Court of Appeals increased 400 percent, while during the same period judgeships increased only 20 percent. P. CARRINGTON, D. MEADOR, M. ROSENBERG, JUSTICE ON APPEAL, at 187 (1976). This increase prompted the comment that "[t]hese figures by themselves create a presumption that the imperatives of appellate justice have not been preserved." *Id.* Moreover, the Ninth Circuit had a greater caseload per judgeship than all of the other circuits except for the Fifth. *Id.* at 197. The Ninth Circuit's caseload per judgeship was nearly twice that of the Eighth, Tenth, and D.C. Circuits. *Id.* If the Ninth Circuit's workload increases as a result of its decision in *McLinn*, as the dissent asserted it will, any resulting benefit should be carefully weighed against the perceived necessity for the increase. Since neither the Federal Rules nor any decisional law from the Supreme Court or from the other circuits dictates the result reached in *McLinn*, and since it is unclear how an appellate court's decision will be any more reliable—let alone more fair to the parties involved—than a district court's decision regarding a question of unsettled state law, any increase in the Ninth Circuit's workload that will result from the *McLinn* decision appears to be unwarranted.

84. *See supra* notes 61-63 and accompanying text.

85. *Id.*

court's decision on state law.[86] Only a state's highest court can ultimately settle state law questions. In the interest of accuracy, fairness, and economy of judicial resources, a circuit court should be less concerned with establishing precedent that the state supreme court may in the future overrule, and more concerned with how best to ensure a fair adjudication of the parties' rights. In view of the practice of the Supreme Court and of a majority of the circuit courts in giving special consideration to the determination of state law by a district judge familiar with the law of that state, a correct determination of state law is most likely to be achieved by according special consideration or great weight to the views of the district judge on matters of state law.

The different results that will be reached under the majority and dissenting opinions may be illustrated by what occurred after the Ninth Circuit reached its decision in *McLinn*. After the question of the proper standard of review had been certified by the en banc Ninth Circuit Court of Appeals, the three-judge appellate panel reviewed the district court's interpretation of the state statute without giving great weight to the district court's conclusions of law. Although the appellate panel noted that "[t]he plain language of [the statute] is subject to either party's interpretation,"[87] that "we are left to speculate as to the legislature's purpose,"[88] and that "the district court employed a reasonable interpretation of state law,"[89] the court nevertheless reversed. The result is an example of the kind of second guessing in which appellate courts are invited to engage by the *McLinn* decision. Unfortunately, the resulting body of federally decided state law will come with no greater assurance of accuracy or reliability than the respective decisions of the federal trial courts.

VI. Conclusion

The clearly wrong standard of deference that the Ninth Circuit traditionally had applied when reviewing a district court's conclusions of state law was correctly rejected in *McLinn*. The *McLinn* court went too far, however, when it held that a district court's views on state law are entitled to no deference on appeal. The practice of the United States Supreme Court and a majority

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86. *In re* McLinn, 739 F.2d at 1401.
87. *In re* McLinn II, 744 F.2d at 682.
88. *Id.*
89. *Id.* at 681.

of the circuit courts, as well as the views of scholarly authority, weighs against the result reached in *McLinn*. According great weight to the views of a federal district judge on complex or unsettled matters of state law is a better standard of review because the district judge has greater familiarity with the law of the state in which he or she sits. Moreover, the great weight standard of review proposed by the *McLinn* dissent would not make the appellate court's review of questions of state law any less thorough than that given other questions of law, but instead would treat the expertise of the federal district judge who adjudicates questions of state law as an important factor to consider before reaching a different conclusion.

It is unclear how the concerns regarding efficiency, accuracy, and precedential effect that persuaded the Ninth Circuit to arrive at its decision in *McLinn* are reflected in a rule that would allow an appellate panel, generally inexperienced in the law of the state, to second guess a district court as to how a state court eventually will rule on a question of state law. Indeed, the *McLinn* dissent noted that the majority's reasoning falls far short of satisfactorily explaining why justice or fairness to the parties requires such a result. At its best, *McLinn* allows the Ninth Circuit to reverse a district court unhampered by the previously adhered to clearly wrong standard. At its worst, *McLinn* gives too much discretion to appellate courts and too little weight to the district judge's experience in state law. *McLinn* opens the door to more appeals, while reversals will be based on little more than the "dubious and tentative forecast[s]"[90] of "outsiders."[91]

Daniel L. Brewster

90. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959).
91. Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 499 (1941).