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Standards of Review and Scopes of Review in Pennsylvania — Primer and Proposal

*Jeffrey P. Bauman**

"The wording of laws should mean the same thing to all men."[1]

Charles Louis De Montesquieu,
17th Century French Lawyer and Political Philosopher

INTRODUCTION

As Montesquieu suggests, a common understanding of the wording of our laws is essential. Nowhere is this laudable goal of universal understanding more needed than in the area of discerning the meaning and application of standards of review and scopes of review. Standards and scopes of review are integral and crucial parts of the appellate process.[2] In Pennsylvania, consideration of the standard of review and scope of review is mandatory, as an appellant is required to set forth in his or her brief a statement of both the standard of review and the scope of review.[3] Yet the bar continually struggles with what these terms mean, as well as with ascertaining and applying the appropriate standard and scope of review to a given issue on appeal.[4]

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* Law Clerk for the Honorable Ralph J. Cappy, Justice, Supreme Court of Pennsylvania. The opinions expressed in this article are those of the author and do not represent the opinions of Justice Cappy or the Supreme Court of Pennsylvania. I would like to thank Justice Cappy for his unending support and encouragement. I am indebted to Betty Minnotte, Deborah Cooper-Silvis, Julia Burns, Joy McNally, John Witherow, Professor Lu-in Wang and especially Leslie Kozler for their thoughtful comments. Finally, I am grateful to my wife Ellen Bauman, my children - Matthew and Maggie - and my parents for their patience, support and love.

1. LAWYER'S WIT AND WISDOM 17 (1995).

2. *See* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW (1986) [hereinafter CHILDRESS & DAVIS]; ALDISERT, WINNING ON APPEAL (1996) [hereinafter ALDISERT].

3. *See* PA.R.A.P. 2111.

4. The author's observation as law clerk to Justice Ralph J. Cappy of the Supreme Court of Pennsylvania is that a substantial portion of appellate briefs fail to articulate an accurate standard of review and an even greater percentage of briefs are unsuccessful in setting forth a distinct and meaningful scope of review. Moreover, the number of briefs which fail to utilize even a stated standard and scope of review in their presentation of argument is testimony to a lack of understanding of these vital concepts.

At the outset, it is necessary to introduce two concepts related to the standard of review and the scope of review to clarify the focus of this article. The appellate process has many different aspects and the terms used to describe the various components of appellate review have distinct meanings. Indeed, the term "review" itself has been used to describe a number of differing concepts. Review has been used to describe the limitations that are placed on an appellate court as to what issues or types of decisions the court may consider. Thus, an appellate court's review may be limited to constitutional errors, errors of law, procedural errors and whether the facts are supported by the substantial evidence of record.[5] The term review has been used to describe the legal analysis, or the application of the rule of law, employed by a trial court, and later by an appellate court on appeal, to resolve the merits of the dispute at issue. This can be thought of as substantive review. Review can also reflect the deference that an appellate court will accord to a lower tribunal's determination. This has traditionally been termed the "standard of review." Finally, the term review might be used to describe the materials, or matters, that the appellate court will review on appeal, and the light in which those matters are viewed. As described more fully below, this article will suggest that this aspect of appellate review be termed the "scope of review."

While each of these concepts, along with others, form the mosaic that is the appellate process, this article deals directly with only two aspects of that process. The focus of this article is on what has been termed the standard of review, as well as the scope of review. While an in-depth treatment is beyond the purview of this article, the related concepts of limitation on review and substantive review will be touched upon to more fully describe their interplay with, and to understand, standards of review and scopes of review. Having introduced these basic concepts which are essential to meaningful discussion of standards and scopes of review, I turn to the purpose and an overview of the article.

This article attempts to convey a greater meaning and understanding to the terms and phrases used in describing standards of review and scopes of review. The article will first describe how the standards of review and scopes of review have been defined as a general matter and their importance. It will explore some of the difficulties inherent in ascertaining and

5. *See* 2 PA. CONS. STAT. ANN. § 704 (West 1995).

applying a proper standard and scope of review. The article will then analyze the attempts made by Pennsylvania courts to give meaning to the terms standard of review and scope of review. An effort to reconcile the guideposts offered by the judiciary in Pennsylvania will be conducted and a proposal for more universal definitions regarding standard and scope of review shall be offered. Finally, different commonly used standards and scopes of review will then be considered to give context to the proposed definitions. It is hoped that this article will assist legal practitioners in their appellate advocacy and law students in their preparation of academic and legal materials, as well as the courts in addressing this area of the appellate process.

I. STANDARD OF REVIEW

As a general proposition, a standard of review defines the relationship and power allocation between dispute resolution tribunals.[6] It describes the degree of deference given by the reviewing court to the action or decision of the lower tribunal.[7] In this vein, a standard of review informs the appellate court of how it must look at the trial court's decision when reviewing that trial court's rulings on fact, law or discretionary matters.[8] Stated alternatively, a standard of review articulates "the positive authority the appellate court wields in its review function."[9] In essence, a standard of review answers the question — how easily will a reviewing court substitute its determination for that of the lower court on a particular issue or ruling? However, viewed as authority, it also describes the power of the lower tribunal, as it relates to the reluctance of the reviewing tribunal to reverse the lower court's decision.[10]

In metaphorical terms, the standard of review has been described as the power of the "lens" through which the appellate court may examine a particular issue in a case,[11] the "height of the hurdles over which . . . appellants must leap" to prevail on appeal,[12] the

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6. *See* CHILDRESS & DAVIS, *supra* note 2, at 1-3.

7. *See id.* at 1-2.

8. *See* J. Dickson Phillips, Jr., *The Appellate Review Function: Scope of Review*, 47 LAW & CONTEMP. PROBS. 2, 1 (Spring 1984).

9. *See* CHILDRESS & DAVIS, *supra* note 2, at 1-2.

10. *See* Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APPELLATE PRAC. & PROCESS 47, 48 (2000).

11. *See* ALDISERT, *supra* note 2, at 57.

12. *See* Ronald R. Hofer, *Standards of Review – Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 232 (1991).

"decibel level at which the appellate advocate [should] play to catch the judicial ear,"[13] and the "measuring stick" used by an appellate court.[14] Yet whether conjuring images of visual acuity, physical prowess, aural reception or valuation, the standard of review connotes, at its core, concepts of deference to, or power over, a lower tribunal. Common standards of review, discussed more fully below, are substantial evidence review, de novo review and review for an abuse of discretion. Each of these terms have been given specific meanings by courts and scholars, yet all import varying degrees of deference that an appellate court will accord to a lower tribunal's action.[15]

An understanding of what is meant by a standard of review can also be gleaned from what a standard of review is not. A standard of review relates to the process of review, but does not speak to the initial concept of appealability.[16] Appealability addresses the threshold concern of whether the appellate court can address the issue at all. Often this appealability inquiry relates to whether a trial court's order is final, whether a particular issue has been properly preserved, or whether time requirements for appeal were met.[17] It is simply premature to attempt to apply a standard of review to an issue if the initial inquiry regarding appealability has not been answered. If a decision or issue is not appealable, then there is no question regarding the deferential standard to be applied.[18]

Furthermore, although easily and often confused, a standard of review is not a review of the merits of the legal issue before the court, that is, a substantive standard. A substantive standard goes to the burden a party must meet to prevail in a particular legal context. It is the rule of law that a trial court applies to the

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13. *See* Alvin B. Rubin, *The Admiralty Case On Appeal in the Fifth Circuit*, 43 LA. L. REV. 869, 873 (1983).

14. *See* John C. Godbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal*, 30 SW. L.J. 801, 810 (1976).

15. Childress and Davis offer that the standard of review also describes the relevant and appropriate materials that the reviewing court reviews in performing its appellate function. CHILDRESS & DAVIS, *supra* note 2, at 1-3. Thus, the standard of review may not only state the level of deference, but may also include how materials are used in the reviewing process. As discussed below, this article takes the position that, at least in Pennsylvania, the scope of review is the term that describes the materials to be considered on appeal. Thus, this related but alternative meaning of standard of review will be fully explored in the context of the scope of review.

16. *See* CHILDRESS & DAVIS, *supra* note 2, at 1-19.

17. *See id.*

18. *See id.*

underlying dispute. A substantive standard, or a standard of proof, does not speak to the relationship between courts or to the deference to be accorded on review.[19] An example clarifies the distinction. The substantive standard regarding the granting of summary judgment is well traveled. In Pennsylvania, a grant of summary judgment is proper:

> [W]henever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or if after completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury."[20]

This is the standard a trial court will use in undertaking its legal analysis in ruling on a motion for summary judgment. However, the standard of review to be applied by an appellate court to a decision of a trial court granting summary judgment is related but distinct. In reviewing a grant of summary judgment by a trial court, "an appellate court may disturb the order of the trial court only where there has been an error of law or an abuse of discretion."[21] Thus, even though the reviewing court will apply the substantive standard as part of its consideration of the legal issue, i.e., it will engage in an analysis of whether genuine issues of material fact exist, it can reverse only in light of its standard of review, i.e., when the trial court committed an error of law or an abuse of discretion.[22]

In sum, standards of review can be viewed as describing the relationship between appellate courts and lower tribunals. They describe the deference accorded a lower court decision or the degree of scrutiny used by a reviewing court in considering a trial court determination. However, a standard of review is not a talisman used to affirm or reverse a lower court ruling. The meaning of a standard of review is ascertained only through

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19. *See* Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 469-70 (1988).

20. *See* PA.R.C.P. 1035.2.

21. *See* Albright v. Abington Mem'l Hosp., 696 A.2d 1159, 1165 (Pa. 1997).

22. As discussed more fully below, this statement as to the review of the trial court's determination might even be better described as the type of decision under review rather than the standard of review.

consideration of the purpose and contours of the standard. As stated by the leading scholars in this area, "standards of review were never meant to be the end of the inquiry but a frame and a limit on the substantive law."[23]

II. Scope of Review

As commonly used in legal opinions[24] and scholarship,[25] the term scope of review is synonymous with the concept of standard of review.[26] Indeed, the terms are often used interchangeably. Thus, in the vast majority of cases and literature, there is no practical distinction between the two terms. However, some authors have articulated possible distinctions between the terms and have imparted a meaning other than that of a standard of review to describe the term scope of review.

Specifically, the analysis regarding what issues an appellate court should consider, even if certain formal prerequisites for appeal have not been met, has been termed the scope of review. Scope of review in this light underscores the tension between the jurisprudential goals of conflict resolution and legal pronouncement, on one side, and the vehicle used to achieve those goals, i.e., specific trial court determinations that are otherwise not proper for review, on the other.[27] However, in this context, consideration of the appropriate scope of review largely involves matters of appealability.[28] As noted in the discussion of standard of

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23. *See* Steven A. Childress & Martha S. Davis, 1 Federal Standards of Review § 1.3, at 1-30 (1992). Professors Childress and Davis are unrivaled as the most prolific, and perhaps influential, scholars that have delved into this area of the law. Their work has provided both basic and in-depth understanding of these complex and difficult to apply concepts.

24. *See, e.g.*, Hartman v. Baker, 2000 Pa. Super. 140 (Pa. Super. Ct. 2000).

25. *See, e.g.*, Patrick W. Brennan, *Standards of Appellate Review*, 33 Def. L.J. 377 (1984).

26. *See, e.g.*, Childress & Davis, *supra* note 2, at 1-18 ("Often this review-limitation function [standard of review] is called *scope of review*. In a broad sense, standards of review do define the visionary scope of the reviewer's eye.").

27. *See* Phillips, *supra* note 9.

28. *See id.* In his discussion of scope of review, Judge Phillips considers scope of review in the sense of an appellate court being able to address an issue when adherence to formal requirements of appealability have not been met. Thus, considerations of non-final orders, a change of theory on appeal, issue preservation before the lower tribunal, issue development on appeal, and standing, all impact a court's decision of whether or not to reach an issue, and, thus, define the scope of review. While these legal considerations influence the appellate process, they are not considered to be part of the scope of review in Pennsylvania. The desirability of reaching an issue, and the underlying consideration of appeal requirements are addressed by appellate courts using their specific labels. *See, e.g.*, Dilliplaine v. Lehigh Valley Trust Co., 322 A.2d 114 (Pa. 1974) (rejecting basic and

review, appealability only tangentially relates to the manner in which an appellate court reviews a lower court determination.

Similarly to standard of review, the term "scope of review" has been described to mean limitations of review. This usage is most common in administrative appeals where the legislature has limited judicial review of agency determinations to particular matters. In fact, this utilization of the term scope of review in this manner has some basis in Pennsylvania law. However, even in this context of reviewability, it is unclear as to what the scope of review, as stated in both legislative[29] as well as constitutional[30] enactments, clearly refers.

In sum, as a general matter, the term scope of review has traditionally been used interchangeably with standard of review. However, certain other possible meanings of the term scope of review, independent of standard of review, have also been suggested. As more fully described below, this article proposes that in Pennsylvania, the term scope of review, as it has been used and as it has been suggested to be understood pursuant to Rule 2111, is not synonymous with standard of review and does not contemplate the above stated alternative understandings. After considering the importance of standards and scopes of review, and the problems encountered in attempting to relay a better understanding of these terms, an in-depth analysis of the unique meanings of standard and scope of review in Pennsylvania will be conducted. A proposal as to the meanings and a uniform application of these terms will be offered.

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fundamental error theory of review and mandating timely and specific objection at trial).

29. 2 PA. CONS. STAT. § 703 (1995) (part of the Administrative Agency Law) entitled "Scope of review" provides that a party before an agency shall not be precluded from questioning the validity of a statute in the appeal, but that such party may not raise upon appeal any other question not raised before the agency unless allowed by the court upon due cause shown. This suggests that scope of review encompasses both the type of issue a party may appeal and also the distinct concept of waiver. *See also* PA.R.A.P. 1551.

30. See, for example, Article V, § 18(c)(2) of the Pennsylvania Constitution that addresses the Judicial Conduct Board. "On appeal, the Supreme Court or special tribunal shall review the record of the proceedings of the court as follows: on the law, the scope of review is plenary; on the facts, the scope of review is clearly erroneous; and as to sanctions, the scope of review is whether the sanctions imposed were lawful." *Id.* As evidenced by the next sentence, the use of the term scope of review in this article of the Constitution utilizes the term both interchangeably with standard of review as well as distinct therefrom. "The Supreme Court or special tribunal may revise or reject an order of the court upon a determination that the order did not sustain this standard of review; otherwise, the Supreme Court or special tribunal shall affirm the order of the court." *Id.*

III. Importance of Standards and Scopes of Review

The importance of the standard and scope of review cannot be overemphasized. The appropriate standard and scope of review should take center stage well before an appeal is filed. A trial must be engaged in with at least an eye toward the unfortunate reality that the party represented may lose and an appeal will become necessary. The standard and scope of review for a particular issue should shape how legal and evidentiary matters are approached at trial and, to an extent, impact how the trial is conducted. Indeed, the applicable standard of review, and, thus, the appropriate deference given to lower court decisions must be a primary factor in the initial decision of whether or not to appeal an adverse trial decision, as that knowledge will assist in providing an indication of success on appeal. [31]

Knowledge and proper application of the appropriate standard of review on appeal has been elevated by at least one scholarly jurist to a question of minimum professional conduct,[32] and for good reason. The standard of review guides the court and, when properly applied, can affect the outcome of the case for both appellant and appellee.[33] An appellant faces a much more onerous struggle on appeal if the applicable standard of review is highly deferential. Utilization of a standard that is highly deferential to the lower tribunal favors the appellee, who can take some comfort in knowing that the chance of reversal of the lower tribunal's decision is slight. Conversely, an appellant's burden on an issue in which little deference is given to the court below is eased at least to a certain extent, and it is the appellee that is in greater jeopardy of losing on appeal. Those advocates who present their arguments utilizing an incorrect standard or scope of review may impose upon themselves an unnecessarily difficult burden to overcome on appeal, or may render themselves unprepared and unable to meet a more deferential standard. Moreover, by failing to include a

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31. *See* Childress & Davis, *supra* note 2, at 1-24.

32. Ruggerio J. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence – A View from the Jaundiced Eye of One Appellate Judge*, 11 Cap. U. L. Rev. 444 (1982). Judge Aldisert has been on the forefront of analysis and application of standards of review. His contribution in this area has elevated what was largely an ignored issue to a threshold consideration by appellate courts. Perhaps more importantly, his tireless efforts have transformed what were once nebulous slogans into reviewing standards of real meaning. Robert L. Byer, *Tribute to Ruggerio J. Aldisert: Judge Aldisert's Contribution to Appellate Methodology: Emphasizing and Defining Standards of Review*, 48 U. Pitt. L. Rev. 16 (1987).

33. *See* Childress & Davis, *supra* note 2, at 1-13 & 1-14.

statement of the appropriate standard of review and scope of review, an appellate advocate runs the risk of the appellate court imposing an incorrect standard upon the appellate advocate, or such a failure could lead to sanction, including dismissal of the appeal.[34] Conversely, an appellate advocate who is aware of and utilizes the appropriate standard of review will not only improve his or her chances of persuading the appellate court that the lower tribunal erred, but will gain credibility through such knowledge and advocacy.

Appellate courts also benefit from a clear and accurate statement of the standard and scope of review. Courts consistently stating and applying the appropriate standard and scope of review will not only avoid erroneous decisions, but will build stability, predictability, and credibility into the law of appeals. Moreover, appellate courts will conserve scarce judicial resources if the appropriate standard and scope of review are utilized. By adhering to appropriate levels of deference, appellate courts will confirm their status as courts of limited review, and thereby send a clear message to the bar that not all matters should be appealed, further aiding in the economy of judicial resources.

While recognition and utilization of the appropriate standard and scope of review are important, these concepts are not easily discerned or applied. The difficulties in this area can be attributed to a number of factors. As discussed earlier, practitioners often mistake the substantive standard to be applied to the legal issue for the appropriate standard of review. While the substantive standard will be a part of the appellate court's review, it is not the same as the standard of review and does not describe the level of deference that the lower tribunal decision should be accorded. Additionally, appellate advocates use distinct terms such as scope of review and standard of review interchangeably.[35] Different courts also use the same term, such as scope of review, in different contexts.[36] A single

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34. PA.R.A.P. 2101.

35. *See* Morrison v. Dep't of Pub. Welfare, 646 A.2d 565, 570 (Pa. 1994).

36. The term scope of review has been used to describe limitations on reviewability; that is, the issues that a court may consider. *See, e.g.*, Whitaker Borough v. Pennsylvania Labor Relations Bd., 729 A.2d 1109, 1110 (Pa. 1999). It has also been used to describe the level of deference to be accorded a lower court determination. *See, e.g.*, Phillips v. A-Best Prod. Co., 665 A.2d 1167, 1170 (Pa. 1995). Finally, it has been used to describe the confines of an appellate court's examination of an issue with respect to the reasons offered by a trial court for its determination. *See, e.g., Morrison*, 646 A.2d at 570. This is not to suggest that the court is incorrect in its statement of the legal tenet intended, but only to note its potential for confusion regarding the use of a particular phrase.

term might even be used to describe two distinct concepts in the same opinion.[37] Each usage is not substantively incorrect, but simply leads to confusion and misunderstanding.

Moreover, standards of review are not always identified by an appellate court; thus, discernment of the appropriate standard of review for a particular issue can become difficult. In addition, courts at times cite to a standard of review in boilerplate fashion but fail to give meaning in terms of application. Articulation of the appropriate standard and scope of review is an ever-evolving process, and the standard itself may be in a state of flux so that knowledge of the appropriate standard is difficult to ascertain. Thus, while the standard of review and scope of review are the keystones of successful appellate advocacy and sound jurisprudence, they are often misunderstood, de-emphasized or ignored, by bar and bench alike, due to difficulties in ascertaining their meaning and their appropriate application to a particular issue.

IV. Standard and Scope of Review in Pennsylvania

Effective January 14, 1999, Rule 2111 of the Pennsylvania Rules of Appellate Procedure requires all appellants' briefs to include a statement of both the proper scope of review and the proper standard of review. [38] As stated in relevant part:

> (a) General Rule. The brief of the appellant, except as otherwise prescribed by these rules, shall consist of the following matters, separately and distinctly entitled and in the following order:
>
> (1) Statement of Jurisdiction.
>
> (2) Statement of both the scope of review and the standard of review.
>
> (3) Order or other determination in question.
>
> (4) Statement of the questions involved.
>
> (5) Statement of the case.
>
> (6) Summary of argument.
>
> (7) Argument for appellant.

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37. *See In re* Hasay, 686 A.2d 809, 811 (Pa. 1996) (scope of review used to describe both limitation of review and degree of deference).

38. Pa.R.A.P. 2111.

(8) A short conclusion stating the precise relief sought.

(9) The opinions and pleadings specified in Subdivision (b) and (c) of this rule.[39]

The note to Rule 2111[40] is limited to a discussion of the newly added requirement mandating a statement of the scope and standard of review and refers specifically to the Pennsylvania Supreme Court decision in *Morrison v. Department of Public Welfare*:

> The 1999 amendment requires a statement of the scope and standard of review. "Scope of review" refers to "the confines within which an appellate court must conduct its examination." In other words, it refers to the matters (or "what") the appellate court is permitted to examine. In contrast, "standard of review" refers to the manner in which (or "how") that examination is conducted. Morrison v. Dept. of Pub. Welfare, 538 Pa. 122, 131, 646 A.2d 565, 570 (1994). This amendment incorporates the prior practice of the Superior Court pursuant to Pa.R.A.P. 3518 which required such statements. Accordingly, rule 3518 has been rescinded as its requirement is now subsumed under paragraph (a)(2) of this Rule.[41]

While subsumed into the 1999 amendment, Pennsylvania Rule of Appellate Procedure 3518,[42] which sets forth the prior practice of the Superior Court, and the comment thereto, acts as a second reference point as to the meaning of scope and standard of review. Rule 3518 stated:

> (a) Brief of Appellant. The brief of the appellant shall include, in addition to those matters enumerated in Rule 2111, a statement of the scope and standard of review for each contention. The statement shall be separately and distinctly entitled and set forth following the statement of jurisdiction.
>
> (b) Brief of the Appellee. The brief of the appellee may, but need not, contain a statement of the scope and standard of review for each contention as described in Subdivision (a). Unless the appellee includes such a statement of the scope

39. *Id.*
40. *Id.*
41. *Id.* (citation omitted).
42. PA.R.A.P. 3518 (rescinded 1999).

> and standard of review, it will be assumed that the appellee is satisfied with the appellant's statement of the scope and standard of review.[43]

The comment to rule 3518[44] gives additional aid in discerning the difference between the scope and standard of review by referencing the case of *James P. v. Children and Youth Services:*

> For a discussion of the distinction between scope of review and standard of review, see *James P. v. Children and Youth Services of Delaware County*, 332 Pa. Super. 486, 481 A.2d 892 (1984) (Hoffman, J., concurring), rev'd, 511 Pa. 590, 515 A.2d 883 (1986).[45]

Thus, a review of the terms scope of review and standard of review as used in both *Morrison* and *James P.* is necessary to glean the meaning of these slippery concepts.

A. Morrison v. Department of Public Welfare

The Pennsylvania Supreme Court's decision in *Morrison* sets forth the most lucid statement of the meaning of scope and standard of review in Pennsylvania.[46] Morrison involved a wrongful death action in which the trial court granted a new trial based upon its determination that it erroneously permitted evidence and argument regarding the conduct of one of the parties.[47] Specifically, George Morrison was a mental health patient at Woodville State Hospital. While on a home visit, Morrison began to hallucinate and became violent. Shirley Morrison, the wife of George Morrison, requested that her husband be returned to the hospital. The Office of Mental Health arranged for the local Chief of Police to transport Mr. Morrison to the police station and for Schleifer Ambulance Service ("Schleifer") to transport Mr. Morrison to the hospital. During Schleifer's transportation of Mr. Morrison to the hospital, while the ambulance was crossing the Fort Pitt Bridge over the Monongahela River, Mr. Morrison left the ambulance and fell over the railing of the bridge to his death.[48]

Mrs. Morrison filed a wrongful death and survival action against

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Morrison*, 646 A.2d 565.
47. *Id.* at 567.
48. *Id.*

Schleifer as well as the Office of Mental Health and a Dr. Harika,[49] alleging that their negligence caused the death of her husband.[50] Before trial, Schleifer filed a motion in limine to preclude Mrs. Morrison from admitting evidence that the ambulance crew failed to remain at the scene of the fall. Schleifer argued that the ambulance attendants' leaving the scene was not relevant to their ability to assist Mr. Morrison because they could not have helped him after his fall from the bridge.[51] Mrs. Morrison countered that the evidence of abandonment went to a lack of training on the part of the crew and showed an ongoing course of negligent conduct. The trial court denied Schleifer's motion.[52]

At trial, numerous witnesses testified including the ambulance attendants. Additionally, both parties offered expert testimony as to local and national standards of care.[53] The experts' opinions were at odds as to training and transportation, as well as whether the attendants had met acceptable standards when they left the scene of the accident. The jury returned a verdict in favor of Mrs. Morrison and awarded her $450,000 in damages.[54]

The trial court granted Schleifer's motion for a new trial. The court determined that it had engaged in "very serious trial error" in permitting evidence and argument regarding the ambulance attendants' conduct after the accident.[55] The trial court limited its reason for a new trial to this single evidentiary issue. On appeal, a panel of the Pennsylvania Commonwealth Court reversed. A majority of the commonwealth court, in a 2-1 decision, framed the issue as "whether the reason the trial court gave for granting a new trial was in itself an error of law."[56] Conversely, the dissent framed the issue as whether the trial court abused its discretion. The majority determined that abandonment evidence was relevant and that the trial court's jury instruction cured any prejudice to Schleifer as it instructed the jury that if Mr. Morrison died as a result of the head injury, the ambulance crew's failure to remain at the scene did not cause his death.[57] Thus, the commonwealth court

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49. *Id.* Morrison subsequently settled her action against the Office of Mental Health and Dr. Harika. *Id.*

50. *Id.*

51. *Morrison*, 646 A.2d at 565.

52. *Id.*

53. *Id.* at 568.

54. *Id.*

55. *Id.* at 569.

56. *Morrison*, 646 A.2d at 649.

57. *Id.*

reversed the trial court's grant of a new trial.

On appeal to the Pennsylvania Supreme Court, Justice Ralph J. Cappy, writing for the court's majority, opined that the commonwealth court's framing of the issue as whether the trial court committed an error of law demonstrated a "basic misunderstanding of the standard that is to be applied in reviewing a trial court's decision to grant a new trial."[58] The source of this misunderstanding was confusion regarding the meaning of scope and standard of review. Noting that the scope of review and the standard of review were often and erroneously used interchangeably, but that they were distinct concepts, the court first gave as a general statement what is the clearest articulation of the scope and standard of review in Pennsylvania to date:[59]

> "Scope of review" refers to "the confines within which an appellate court must conduct its examination." *Coker v. S.M. Flickinger Company, Inc.*, 533 Pa. 441, 450 625 A.2d 1181, 1186 (1993). In other words, it refers to the *matters* (or "what") the appellate court is permitted to examine. In contrast, "standard of review" refers to the *manner* in which (or "how") that examination is conducted. In *Coker* we also referred to the standard of review as the "degree of scrutiny" that is to be applied. *Id.*, 625 A.2d at 1186.[60]

The court then undertook the task of considering these distinct concepts in the context of the case before it.

Taking a macro view of the appeal, the court first recognized that, at its core, the decision to order a new trial was one that was within the discretion of the trial court. Thus, the standard of review in considering whether a new trial was appropriate was ultimately an abuse of discretion standard. The court determined that this ultimate standard of review, or degree of scrutiny, did not vary. As such, the ultimate question for a reviewing court in considering a trial court's decision to grant a new trial was always whether the trial court abused its discretion.[61]

As to a general statement of the proper scope of review in reviewing the decision to grant a new trial, the *Morrison* court looked to the substance of the trial court decision. Unlike the standard of review that was considered to be a constant, the court

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58. *Id.*
59. *Id.* at 570.
60. *Id.*
61. *Morrison*, 646 A.2d at 570.

stated that the scope of the appellate court's review of the trial court's determination varies. If the trial court in granting a new trial leaves open the possibility that reasons in addition to those given might warrant a new trial, then the reviewing court's scope of review is broad, and its review encompasses "examining the entire record for any reason sufficient to justify a new trial."[62] Conversely, the court offered that if the trial court cited a finite set of reasons for its decision, and that the reasons it provided are the only basis for a new trial, then the appellate court is limited to an examination of the stated reasons.[63] This narrow scope of review was deemed to be appropriate so that an appellate court could perform its review function without improperly interfering with the trial court's discretionary power to order a new trial.[64] The primary concern was to prevent an appellate court from ordering a retrial where the trial court would not have done so. Thus, the reviewing court's scope of review, at least in the context of the granting of a new trial, varies and is defined by the trial court.[65]

The *Morrison* court then applied these more general considerations of scope of review and standard of review to the case before it. First, the supreme court dissected the trial court opinion, breaking it into its components, then engaged in a complex two-level analysis of that decision.[66]

The court explained that there were two parts to a trial court's decision concerning whether to grant, or to deny, a new trial. Initially, the trial court must discern whether a "mistake" was made at trial. This first decision might involve consideration of factual, legal or discretionary matters.[67] Thereafter, the trial court must make a second determination as to whether the mistake is sufficient to form the underpinning of a grant of a new trial. This second and ultimate decision is always discretionary as it involves attention to the specific circumstances of the case.[68]

Having found that the trial court engaged in a bi-level decision-making process, the supreme court then set forth a corresponding two-level construct for appellate review. Initially, the reviewing court examines the trial court's determination of mistake.

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62. *Id.*
63. *Id.*
64. *Id.* at 570 n.5.
65. *Id.*
66. *Morrison*, 646 A.2d. at 571.
67. *Id.*
68. *Id.*

Both scope and standard must be considered at this threshold level. First, if the trial court articulated a finite set of mistakes, as was the case in *Morrison*, the appellate court's scope of review is limited to those set reasons. [69] The reviewing court then considers each particular reason under an appropriate standard. That is to say that, although the ultimate standard of review to be applied is that of abuse of discretion at this first level stage, when viewing the "mistakes" relied upon by the trial court, differing standards of review might be applicable depending upon the "mistake." If the mistake involved a discretionary matter, the review would consider an abuse of discretion. If the mistake involved a purely legal matter,[71] it would be reviewed as such.[71] These standards might be understood as sub-standards that are to be considered only at this initial "mistake" stage. However, as discussed below, the ultimate standard, which is applied at the second level of analysis when determining whether a new trial should have been granted, remains an abuse of discretion standard.

If the appellate court believed that the trial court erred in determining that a mistake was made, the inquiry would end. There would be no basis for the granting of a new trial, and the reviewing court would reverse. [72] Conversely, if the appellate court found that the trial court neither abused its discretion or committed an error of law in finding that mistakes occurred, then it would proceed to the second level of analysis.

At the second level of analysis, the reviewing court considers the decision to grant a new trial using an abuse of discretion standard.[73] In conducting this review, the appellate court addresses whether the trial court's stated reasons and factual basis for the granting of a new trial were supported by the record. In considering whether the record supported the trial court's decision,

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69. *Id.*

70. As discussed below, the generally articulated standard of review applicable to questions of law has been stated as de novo review. De novo means "anew" or "fresh." BLACK'S LAW DICTIONARY 435 (6th ed. 1990). In the context of appellate review, it even more precisely connotes no deference. However, in Pennsylvania, the standard of review with respect to errors of law has not been uniformly stated. Most recently, the term "plenary" has been utilized (although described as the scope of review). Plenary is akin to de novo and commonly means "complete" or "unqualified." BLACK'S LAW DICTIONARY 1154 (6th ed. 1990). As proposed below, de novo review, or as has been more commonly used in Pennsylvania, plenary review, would be the appropriate description of the standard of review for errors of law.

71. *Morrison*, 646 A.2d at 571.

72. *Id.*

73. *Id.*

the appellate court defers to the determination of the trial court and reverses only if the judgment was, inter alia, manifestly unreasonable or a result of partiality, prejudice, bias, or ill will.[74] If none of these factors is present and if support for the lower court's decision is found in the record, there is no abuse of discretion.

Applying this construct to the facts of the case, the Pennsylvania Supreme Court ultimately found that the trial court did not abuse its discretion in awarding a new trial.[75] Initially, the court reviewed the trial court's level one inquiry of determining whether a mistake had been made. As the trial court offered a single reason for the new trial — that the evidence of post-accident conduct should have been excluded — the reviewing court's scope of review was narrow, i.e., limited to that reason. The supreme court determined that the admission of evidence lies within the discretion of the trial court and, therefore, applied an abuse of discretion standard as the sub-standard of review. Finding that the court did not abuse its discretion with respect to determining that a mistake had occurred, it then engaged in the second level of review and considered whether the trial court abused its discretion in granting a new trial. Based upon a review of the record, the supreme court opined that the record supported the trial court's reasoning that the post-accident evidence was the focus at trial and that such evidence was prejudicial to Schleifer.[76] As the trial court's stated reasons for granting a new trial were supported by the record, and because the trial court was found to be in the best position to consider the impact of the post-accident conduct evidence on the jury, the supreme court held that the trial court did not abuse its discretion in granting a new trial.[77]

The Pennsylvania Supreme Court's decision in *Morrison* is its most comprehensive attempt to define scope of review and standard of review. *Morrison* clearly instructs that the standard of review is the "manner" in which the reviewing court examines a lower tribunal's decision.[78] It is how the examination is conducted and sets forth the "degree of scrutiny" that the appellate court is to apply.[79] In the case of the review of the granting of a new trial, a discretionary act, the standard of review is ultimately an abuse of

74. *Id.* at 571-72.
75. *Id.* at 572.
76. *Morrison*, 646 A.2d at 572.
77. *Id.* at 573.
78. *Id.* at 570.
79. *Id.*

discretion standard.[80]

The *Morrison* court also left no doubt that the scope of review represents the "matters" or "what" a reviewing court is permitted to consider when examining the lower tribunal's determination.[81] It is the "confines" within which the reviewing court examines the decision below.[82] In the context of the consideration of the granting of a new trial, the scope of review varies, depending upon the reasons articulated by the trial court for its decision.[83] The *Morrison* court used the terms "narrow" and "broad" to describe the scope of review. A narrow scope of review would apply where the reasons offered by the trial court are finite. A reviewing court, under this narrow scope of review, would be limited to a review of those set reasons given by the trial court. Conversely, a broad scope of review would be applicable to those determinations in which the trial court may give certain reasons for its decision but leaves open the possibility of other reasons for its granting of a new trial.

The teachings of *Morrison* with respect to the standard of review can be easily applied to other situations. Its definition of standard of review is in accord with other generally accepted definitions of the concept. However, guidance in other situations with respect to the scope of review is not self-evident as that decision arose in the context of the granting of a new trial. Thus, it is valuable to turn to the second guidepost offered by Pa.R.A.P. 2111 — the reference to former Rule 3518 — to consider whether it offers further aid.

B. James P. v. Children and Youth Services

Like Rule 2111, former Rule 3518 required a statement of the scope and standard of review.[84] The text of the rule offered no insight into the meaning of the terms. However, the Comment to the Rule cited Judge Hoffman's concurring opinion in *James P.* for a "discussion" as to the distinction between the scope and standard of review.[85] While the opinions in *James P.* make clear that scope of review and standard of review are amorphous concepts, Judge Hoffman's concurring opinion offers a second view of what constitutes the scope of review. To fully understand Judge

80. *Id.*
81. spn]*Morrison*, 646 A.2d at 572.
82. *Id.*
83. *Id.*
84. PA.R.A.P. 3518 (rescinded 1999).
85. *Id.*

Hoffman's view of standard and scope of review, a review of the majority's definition of those terms is required.

James P. dealt with the issue of termination of parental rights.[86] Appellant James P. and Marie J. were the natural parents of James J. Marie J. was committed to Haverford State Hospital, and, as a result, James J. was placed in the custody of Children and Youth Services of Delaware County ("CYS"). Marie J.'s parental rights were subsequently terminated. Thereafter, CYS filed a petition to terminate James P.'s parental rights.[87] After a hearing, the trial court ordered that James P.'s rights be terminated as well.[88] On appeal, the Pennsylvania Superior Court reversed. The majority opinion for the superior court sitting *en banc* set forth the standard of review as a determination of whether the trial court's termination of parental rights was supported by competent evidence.[89] Furthermore, unless the court abused its discretion or committed an error of law, the findings of the trial court were to be given the same weight as a jury verdict.[90]

The court went on to determine that the scope of review would relate to "the appellate court's duty to ensure that the trial court has satisfactorily fulfilled the requirements of examining all evidentiary resources, conducting a full hearing and setting forth its decision in a full discursive opinion."[91] Noting that a broad or searching scope of review does not permit an appellate court to make an independent determination of fact, but does not preclude a reviewing court from using abuse of discretion as the appropriate standard of review, the court spoke of the scope of review in terms of due process:

> The purpose of employing broad and searching review is for the protection of the parties in ensuring that the inquiry of the lower court is complete and that its decision was made in accordance with the due process clause of the Fourteenth Amendment in protecting the fundamental liberty interest of natural parents in their child.[92]

The court majority went on to note that the purpose of the

86. *James P.*, 481 A.2d at 892.
87. *Id.* at 893.
88. *Id.*
89. *Id.* at 894.
90. *Id.*
91. *James P.*, 481 A.2d at 894.
92. *Id.* at 895.

utilization of an abuse of discretion standard of review was to accord the fact finder the appropriate deference because that trier had the opportunity to observe witnesses and to evaluate their testimony.[93] However, while the majority clearly drew a distinction between scope and standard of review, it unfortunately closed its discussion of these concepts by lapsing back into the morass by confusing the two terms. The court stated, "[t]herefore, we reject appellant's contention that the holding in *Santosky* mandates a broader scope of review than abuse of discretion."[94]

Enter Judge Hoffman. In his concurrence, Judge Hoffman attempts to clarify the distinction between scope and standard of review. Initially, the judge agreed with the majority that the purpose of a scope of review is to ensure that the trial court has examined all the evidence, provided a full hearing, and set forth a meaningful opinion.[95] However, Judge Hoffman further offered a description of the scope of review as it relates to a comprehensive review of the record. Judge Hoffman stated that "[i]n other words, in reviewing a termination of parental rights order, our Court must consider all of the evidence before the lower court as well as the lower court's findings of fact and conclusions of law." [96]

Judge Hoffman went on to find that the breadth of the scope of review does not translate into a correspondingly broad standard of review. Judge Hoffman defined a standard of review as the appellate court's ability, or the limits on its ability, "to modify or reverse the action taken by the lower court."[97] The judge concluded that an abuse of discretion standard requires a broad comprehensive view of the entire record to determine whether the lower court abused its discretion. Unless, after such a broad review of the entire record, the reviewing court found that the lower court abused its discretion, the decision by that lower tribunal must be affirmed.

Thus, while both the majority and the concurrence in *James P.* speak in terms of the scope of review and the standard of review, only Judge Hoffman unambiguously draws a distinction between the two. In doing so, Judge Hoffman, like the majority, states the standard of review in terms of deference. Judge Hoffman, agreeing with the majority, casts the scope of review in terms of due

93. *Id.*
94. *Id.* at 896.
95. *Id.* at 900.
96. *James P.*, 481 A.2d at 900.
97. *Id.*

process. Review of the trial court's obligation to review the evidence, to allow a full hearing, and to articulate the reasons for its determination, is the duty of the appellate court pursuant to its scope of review. The appellate court is to be a watchdog, ensuring that the lower tribunal has, in essence, done its job. While much of the discussion regarding scope of review focuses on these due process concerns, a closer look at the concurrence reveals that it also speaks to "what" the appellate tribunal is to consider on review. In the context of a broad scope of review, the court must consider the entire record before the lower court as well as the findings of fact and conclusions of law in determining whether the lower tribunal abused its discretion.

C. Reconciliation of Morrison *and* James P.

Rule 2111 offers the express guidepost of *Morrison*, and the "subsumed" guidepost of *James P.*, to assist appellate advocates in providing the court with the appropriate standard and scope of review. Indeed, the *Morrison* court's definitions have greatly enlightened all discussions of the meaning of the scope and standard of review as those terms are used in Pennsylvania. However, even with *Morrison*'s discussion of the meaning of scope and standard of review, uncertainty remains. The continuing failure of many advocates to articulate the appropriate scope and standard of review suggests that further analysis of the meaning of scope of review and standard of review, as described in *Morrison* as well as in *James P.*, is required.

As there appears to be greater consensus with respect to standard of review, that concept will be addressed first. *Morrison*'s articulation that the standard of review is the manner of examination, or how the lower tribunal decision is examined, and its reference to the "degree of scrutiny" that is to be applied by an appellate court, fit comfortably within the traditional understanding of the standard of review discussed above. At their core, these definitions are ways of describing the authority over the lower court decision by the reviewing tribunal. *Morrison* speaks to the type of review, adopting the abuse of discretion test in the context of the granting of a new trial and also noting that the commonwealth court's standard that is applicable to pure errors of law is de novo. Similarly, Judge Hoffman's concurrence in *James P.* looks at the deference to be given by the reviewing court when examining the decision below. Specifically, the concurrence speaks of the limits on the appellate court's ability to modify or reverse

the decision of the lower court. Unless the lower court abused its discretion, the appellate court may not alter the lower court's decision.[98]

The definition suggested in *Morrison*, with its emphasis on authority, simply suggests the flip side of the language in *James P.* emphasizing the deference to which a lower tribunal is entitled. Thus, conceptually, the standard of review as described in *Morrison* is easily reconciled with that offered in *James P.* Moreover, these definitions transcend the legal settings in which the two cases arose, that of a new trial in *Morrison* and the termination of parental rights in *James P.*

The point at which the guideposts converge is not as obvious when attempting to understand the meaning of the scope of review. Indeed, the definition of scope of review as articulated in *Morrison* cannot easily be compared to that offered by Judge Hoffman in his concurrence in *James P.* This makes it difficult to be certain of the meaning of scope of review beyond the specific context in which the term is defined. While at first blush the definitions appear to be difficult to harmonize, a comparison of the two reveals some common ground and a basis that may lead to a more universal definition of scope of review.

In *Morrison*, the court's focus was on the matters (or "what") the reviewing court "was permitted to examine." The phrase addressed the confines of appellate review. This language also connotes deference or limitation. Yet, in applying that term, the court keyed on the meaning of the term in the context of the reasons offered by the trial court for its ultimate determination and whether they were finite or whether there existed the possibility of other potential reasons for the court's decision. Conversely, Judge Hoffman in *James P.* suggested that the scope of review did not go to the substance of the review, but, rather, to the consideration of the lower court's conduct. This understanding of scope of review is concerned with ensuring that the lower court performed in accord with due process.

Nevertheless, the description of the term scope of review as offered in *Morrison*, as well as that penned by Judge Hoffman in his concurrence in *James P.*, intersect in at least one significant way. In both decisions the phrase scope of review is given meaning by reference to varying degrees of review of the record. In *Morrison*, the definition speaks to "what" the appellate court is

98. *Id.*

permitted to examine. In discussing the situation in which a trial court allows for reasons other than those stated to support the award of a new trial, the *Morrison* court found that the appellate court is guided by a broad scope of review that permits it to examine "the entire record for any reason sufficient to justify a new trial."

Likewise and in even clearer terms, in his concurrence in *James P.*, Judge Hoffman suggests that in fulfilling its duty to ensure that the trial court examined the record, conducted a satisfactory hearing, and set forth an opinion pregnant with meaning under a broad scope of review, the reviewing court is required to "conduct a comprehensive review of the record formulated in" the lower court. Stated another way, under such a scope of review, an appellate court must consider "all of the evidence before the lower court" as well as the trial court's finding of facts and conclusions of law. The review is to be of "the entire record." Thus, while seemingly expressing divergent views of what constitutes the scope of review, *Morrison* and *James P.* share some commonality.

D. Clarification of Definitions

The difficulty with citation to the guideposts offered by Rule 2111 is that they are handicapped by the nature of the source of example. By using opinions to offer guidance, the definitions that can be gleaned from those opinions are necessarily limited by the context of the appeal in which the definition arose. The fact that more comprehensive and wider ranging definitions are not offered is not a failure on the part of the appellate court. Indeed, it would be jurisprudentially unsound for a court to offer an opinion containing far reaching definitions of scope of review and standard of review that would speak to legal issues not in the case. It would transform the opinion into a law review article. However, not being bound by such jurisprudential constraints, we have in this forum the luxury of being able to attempt to arrive at some common meanings of the terms and the ability to give examples outside of a limited context to demonstrate how those definitions may be applied. Thus, perhaps even clearer definitions of standard of review and scope of review can be articulated that are consistent with the guideposts offered in *Morrison* and *James P.*, but which transcend the circumscribed issues in those cases and give broader meaning and application to these concepts, and, as a result, offer additional guidance to the bar.

As to a proposed standard of review, the definitions offered in

Morrison and *James P.* are in accord with generally used definitions and have the desirable quality of broad application. Consistent with both cases, as well as the general understanding of a standard of review, an appellate court's standard of review can be defined as the degree of deference or scrutiny that an appellate court will use in reviewing a lower tribunal's determination. That is to say, it is the manner in which an appellate court reviews the action or decision of a lower tribunal. As will be discussed below, the types of standards of review can be defined using the terms that have been traditionally utilized: de novo review, substantial evidence review, or review for abuse of discretion.

Considering the differing contexts in which the phrase scope of review has been defined, formulating a proposed definition of scope of review that is consistent with *Morrison* and *James P.*, yet one that transcends the limited circumstances of those cases and is susceptible to broader application, is much more difficult. A farther reaching definition would neither be limited to consideration of the finite or infinite reasons offered by a trial court for its decision, nor have at its core considerations of due process. Rather, a more universal definition of scope of review would focus on the common ground of review of the record developed at the trial court level. Scope of review in this broader context can be defined as "what" the appellate court is permitted to examine when reviewing the action or decision of a lower tribunal. Depending upon the particular legal issue involved, the scope may include the reasoning given by the lower tribunal; but, generally, the scope of review defines what materials, i.e., what part of the record, the appellate tribunal may consider and use in performing its review function.

Related thereto, scope of review would also include the utilization or the emphasis to be given to those materials in that reviewing process.[99] In most cases, the scope of review will be described as broad, connoting a use of the entire record. In certain limited situations, it will be described as narrow or limited. In those instances, only certain aspects of the record may be utilized

99. While this article suggests that the scope of review in Pennsylvania speaks to the reasons offered by a lower tribunal for its determination, as well as the materials that a court may consider in reviewing the decision of a lower tribunal, it must be recognized that the concept of what materials are to be reviewed has been considered by some to be part of the standard of review. *See* CHILDRESS & DAVIS, *supra* note 2, at 1-17. Needless to say, this area of the law is fraught with semantical difficulties. Thus, in light of the unique description of the scope of review articulated in *Morrison* and *James P.*, in Pennsylvania, at least, consideration of what materials are to be used by the reviewing court on appeal is better placed under the banner of scope of review than of standard of review.

and that evidence might be viewed in a manner that favors a particular party.

This conception of the scope of review is entirely consistent with *Morrison's* definition of "what" the appellate court is permitted to examine in resolving the issue before the court. Furthermore, it is in accord with *James P.*'s mandate that, in applying the appropriate standard of review (in that case, whether the trial court abused its discretion), the reviewing court must consider the entire record of the court below. While consistent with these guideposts, this definition also transcends the limited context in which the term scope of review was analyzed.

Support for this more extensive definition of the scope of review can be found in at least two decisions rendered by the Supreme Court of Pennsylvania. In *Peak v. Unemployment Compensation Board of Review*,[100] the court spoke to the appropriate standard of review under the Administrative Agency Law.[101] Adopting the standard of review as stated in the United States Supreme Court's decision in *Universal Camera v. NLRB*,[102] the Supreme Court of Pennsylvania determined that the standard of judicial review of an administrative agency's factual determination was substantial evidence on the record.[103] Although not expressly stating the concept in terms of scope of review, the court found that a reviewing court was required to review the entire record, including that evidence which was contrary to the administrative agency's determination.[104] Thus, in post-*Morrison* terms, the scope of review focused on "what" the appellate court is to consider in making its review of the lower tribunal action.[105]

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100. 501 A.2d 1383 (Pa. 1985).

101. 2 PA. CONS. STAT. § 704 (1995).

102. 340 U.S. 474 (1951).

103. *Peak*, 501 A.2d at 1387.

104. *Id.*

105. This understanding of scope of review served as the foundation of a concurrence in the subsequent case of *Bowman v. Department of Environmental Resources*, 700 A.2d 427 (Pa. 1997). In that case, the Pennsylvania high court grappled with the issue of whether the commonwealth court exceeded its "scope of review" in reviewing the decision of the Department of Environmental Resources in filling a position under the Civil Service Act. In reviewing the determination of the Civil Service Commission that a park ranger position had been filled improperly, the commonwealth court reversed the Commission decision, on the basis that the record did not contain substantial evidence to support the Commission's findings. On appeal to the Pennsylvania Supreme Court, the majority found that the Commonwealth had reweighed the facts of the case and that there existed substantial evidence in support of the Commission's determination. Justice Cappy, joined by Justice Castille, opined that the majority relied upon a single substantive item of evidence to support the Commission's decision rather than applying the "appropriate" review which required the

More recently, in *Universal Am-Can, Ltd. v. WCAB (Minteer)*,[106] the court addressed the issue of whether a claimant of workers' compensation benefits, Clarence Minteer, was an employee or an independent contractor for purposes of the Workers' Compensation Act. The court first explained that the determination of the existence of an employer/employee relationship was a question of law and based upon the unique facts in the case. The court stated that, because the appeal dealt with a question of law, the scope of review was plenary. In doing so, the court further described this scope of review as broad. The court then noted that a reviewing court was to examine the entire record made before the workers' compensation judge, including the evidence that detracted from the agency's decision.[107] The Pennsylvania Supreme Court found support for such a review in the Administrative Agency Law that provides that an appellate court "shall hear the appeal without a jury on the record certified by the Commonwealth agency."[108] Thus, the court implicitly, if not expressly, recognized a scope of review contemplated in this article — *what*, in terms of the record, the reviewing court was permitted to use in determining whether an error of law had been committed by the lower tribunal.

Yet support for the definition offered in this article is not confined to administrative agency determinations. Consideration of a final case sharpens the point. A prime example of the usage of the scope of review as envisioned in this article is found in the context of review of a court's determination regarding the suppression of evidence. In *ex rel. D.M.*,[109] the Supreme Court of Pennsylvania stated that, when reviewing the rulings of a suppression court, the appellate court "must consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole."[110] Thus, as described in this article, the scope of the court's review is narrow or limited in this context. Although not expressly stated as a scope of review, this concept of what the

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court to review the entire record including evidence that subtracted from the agency's decision. *Id.* (citing Peak v. Unemployment Compensation Bd. of Review, 501 A.2d 1383 (Pa. 1985)). Thus, the concurrence suggested a broad scope of review even without describing it as such.

106. 762 A.2d 328 (Pa. 2000).

107. *Id.* at 331 (citing Peak v. Unemployment Compensation Bd. of Review, 501 A.2d 1383, 1387 (Pa. 1985)).

108. 2 PA. CONS. STAT. § 704 (1995).

109. 727 A.2d 556 (Pa. 1999).

110. *Id.* at 557.

reviewing court may consider and how it is to be considered is consistent with the definition of scope of review suggested in this article.[111]

One final concept must be addressed with respect to the meaning of scope of review as that term is used in Pennsylvania. Scope of review in Pennsylvania has been regularly used to describe the limitation of issues that the judiciary may review with respect to administrative agency decisions. As courts have no general supervisory power over administrative agencies, legislative enactments have circumscribed review of a final administrative order to certain issues. In Pennsylvania, the Administrative Agency Law limits review of a final order by an administrative agency to whether constitutional rights have been violated, whether an error of law has been committed, whether there has been a violation of the practice or procedure of the administrative agency, and whether the findings of fact made by the agency are supported by substantial evidence.[112] Thus, the law limits reviewability to certain types of issues.

This limitation on the issues or types of decisions that an appellate court may consider in reviewing the actions of an administrative agency has been phrased as the standard of review[113] and as the scope of review.[114] While such a statement of limitation can be shoehorned into the definition of scope or standard of review, neither of these terms, as they are contemplated above, truly embrace this concept of limitation on reviewability. Rather, both the standard of review and the scope of review, at least as used in *Morrison* and *James P.*, presume an issue already properly before the appellate court, and do not contemplate reviewability of

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111. The standard of review with respect to a trial court's denial of a motion to suppress evidence has been stated as whether the factual findings made by the court "are supported by the record and whether the legal conclusions drawn from those facts are correct." *Id.* Where the record supports the findings of fact made by the suppression court, the appellate court is bound by them and the reviewing court "may reverse only if the legal conclusions drawn therefrom are in error." *Id.* Thus, the standard of review, as stated in *D.M.*, clearly envisions the level of deference to be accorded the lower court in its determination regarding suppression of evidence. Numerous other examples exist where an appellate court's view of the matters or how the matters are to be viewed are limited resulting in a narrow scope of review. For instance, in reviewing a claim based upon the sufficiency of the evidence, the appellate court must view all the evidence in the light most favorable to the verdict winner, giving that party the benefit of all reasonable inferences to be drawn therefrom. *See, e.g.*, Commonwealth v. Chambers, 599 A.2d 630, 633 (Pa. 1991).

112. 2 PA. CONS. STAT. § 704 (1995).

113. *See, e.g.*, Cook v. Unemployment Compensation Bd. of Review, 671 A.2d 1130 (Pa. 1996).

114. *See, e.g.*, Lehigh County Vo-Tech School v. WCAB, 652 A.2d 797 (Pa. 1995).

the issue in the first instance. More specifically, the standard of review contemplates the manner of review of a lower tribunal's determination as to a particular decision.[115] Scope of review, as used in both *Morrison* and *James P.*, addresses "what" a court may consider, whether it be the reasons offered by the lower tribunal in support of its resolution of an issue or the breadth of the record utilized in reviewing that particular issue.

One option for the bar and for courts would be to continue to describe the limitations on the reviewability of certain types of issues in the administrative context as scopes or standards of review, as is currently the practice. An attempt could be made to note the distinction between the initial threshold "scope" of review and the later examination scope of review.[116] However, if clarity and lack of confusion are goals, this option is simply unsatisfactory.

Alternatively, if neither standard of review nor scope of review, as contemplated in *Morrison* or *James P.*, describe limitations on the types of issues permitted to be reviewed on appeal of an administrative agency decision, and it is desirable to limit the use of those terms to their intended meaning, then alternative verbiage must be suggested to avoid the confusion caused by using the same terms to describe two distinct concepts. A solution to this dilemma would be to speak of the types of issues that a court is able to review in the administrative context simply in generic terms of limitations without ascribing to the concept the label of either

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115. For example, in *Morrison*, the court explained its application of the standard of review. The court looked to the reason offered by the trial court for granting a new trial and determined that if the trial court's stated reason was based upon a discretionary matter, then the matter must be reviewed for an abuse of discretion. *Morrison*, 646 A.2d at 571. Conversely, if the reason offered by the trial court raised purely a question of law (such as inaccurate jury instructions), it would be reviewed as such. *Id.* Although the *Morrison* court did not further describe this review of a question of law, it can be surmised, based upon other case law, that the review would be what is commonly described as de novo or plenary.

116. Under this scenario, a hypothetical statement of the scope and standard of review can be envisioned as follows: "In reviewing the determination of the Workers' Compensation Appeal Board, this court's scope of review is limited to determining whether constitutional rights have been violated, an error of law has been committed, Board procedures have been violated, and whether necessary findings of fact are supported by substantial evidence. As the issue in this case is whether the claimant established abnormal working conditions, the appellant raises a question of law. The standard of review with respect to a question of law is de novo. The scope of review regarding this issue is broad." As can easily be determined, the use of the term scope of review to mean two distinct concepts is unsatisfactory as that term is now a term of art. Further confusing the matter is that the term scope of review has been used to describe the standard of review. Thus, in a single context, the "scope of review" might describe both the limitations on what issues the appellate court may consider as well as the standard to be utilized when examining the particular issue on appeal.

scope of review or standard of review.[117] By keeping the concept of the limitation of issues that an appellate court can review on appeal distinct from the manner and materials or reasoning to be reviewed, clarity is achieved and the integrity of the meanings of scope of review and standard of review is maintained.

Thus, this article proposes a two level, and possibly a three level statement, as to the appropriate standard of review and scope of review for each issue raised on appeal. First, the advocate may describe the limitation on the court as to the types of issues that it can review. Second, the party must define the issue and give the proper standard of review. Finally, the litigant should set forth the proper scope of review. Such a statement may be expressed as follows:

> Appellate review in workers' compensation proceedings is limited to determining whether constitutional rights have been violated, an error of law has been committed, or Board procedures have been violated, and whether the necessary findings of fact are supported by substantial evidence. The issue presently before the court involves an assertion that the appeal board committed an error of law in determining that the claimant has been exposed to abnormal working conditions. The standard of review as to determinations of law is de novo. The scope of review is broad. That is, the court may review the entire record in considering the decision of the appeal board.

E. Amendment of Rule 2111

Before turning to consider some of the more common applications of the definitions of standard of review and scope of review to give some context to these terms, two final proposals regarding Rule 2111 are offered. As noted above, Rule 2111 simply requires a statement of the scope and standard of review.[118] Moreover, the Rule speaks to inclusion of these concepts only in

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117. Under this scenario, a hypothetical statement of the limitations on court review might be drafted as follows: "Appellate review in workers' compensation proceedings is limited to determining whether constitutional rights have been violated, an error of law has been committed, Board procedures have been violated, and whether necessary findings of fact are supported by substantial evidence." The statement would then set forth the appropriate standard and scope of review.

118. PA.R.A.P. 2111.

the appellant's brief.[119] For the bar and the bench to gain maximum benefit from an increased understanding and usage of the concepts of standard of review and scope of review, Rule 2111 should be expanded in two ways.

First, to ensure that both the bar and the bench benefit from consideration of these concepts to their fullest extent, the requirement that the scope of review and the standard of review be stated should be mandated for each issue raised on appeal. That is to say, if the appeal raises more than one type of issue, a statement of both the standard and scope of review for each point should be required. This modification to the Rule would simply set forth in express terms that which is arguably already incorporated from former Rule 3518, which required a statement of the scope and standard of review "for each contention."[120] Requiring such a statement for each issue raised on appeal would also be consistent with the federal rules of appellate procedure.[121] Mandating a statement of the scope of review and the standard of review for each issue will ensure that both the bar and the bench are equipped with what is necessary to engage in a full analysis of each issue.

Second, Rule 2111 should be expanded to clarify appellee's concerns, if necessary, regarding the scope and standard of review. Again, former Rule 3518 expressly indicated that the appellee's brief, may, but need not, contain a statement of these concepts.[121] Moreover, pursuant to former Rule 3518, unless the appellee included such a statement of the scope and standard of review, it was assumed that the appellee adopted appellant's statement of the standard and scope of review.[123] Modification of Rule 2111 to expressly address appellee's opportunity to supply, clarify or correct the appropriate standard and scope of review for each point will clear any ambiguity as to appellee's role, or the

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119. *Id.*

120. Pa.R.A.P. 3518 (rescinded 1999).

121. Federal Rule of Appellate Procedure 28(a), in pertinent part, states:

> The appellant's brief must contain . . .
>
> . . . .
>
> (9) The argument . . . must contain: (B) For each issue, a concise statement of the applicable standard of review (which may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues) . . . .

FED. R. APP. P. 28(a).

121. PA.R.A.P. 3518 (rescinded 1999).

123. *Id.*

consequences for failing to act, in the briefing process.[124] Commentary on appellee's brief would also be in accord with the Federal Rules of Appellate Procedure.[125] Not only will the appellee have the express opportunity to participate in the formulation of the scope and standard of review, but such additional input will aid in the advocacy and resolution of the issues before the court.

V. Applications of Standards of Review and Scopes of Review

Having set forth proposed definitions of standard of review and scope of review, it is beneficial to consider some of the types of decisions rendered by courts and the more widely used standards and scopes of review that have been applied in Pennsylvania, or may be applied, to these decisions. The appropriate standard typically depends upon a number of factors. To ascertain and apply the appropriate standard and scope of review, generally two basic inquiries must be made. First, what type of issue or decision is being reviewed? For purposes of this article, three principal types of issues or decisions will be considered: review of fact, review of law, and review of discretion.[126] The second question is what body or tribunal made the decision being reviewed? For each type of decision, the discussion will include, where applicable, the differing standards of review for decisions made by a jury, a judge and an administrative agency.

A. Factual Determinations[127]

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124. The obvious danger in failing to set forth the appropriate scope and standard of review as an appellee is the possibility of being saddled with an inaccurate or inappropriate scope or standard that is to an appellee's disadvantage. *See* PA.R.A.P. 302. A failure to set forth the appropriate standard amounts to a waiver of the issue. *See id.*

125. Fed. R. App. P. 28(b).

126. It must be recognized that distinguishing between fact and law is fraught with difficulty. This confusion is compounded when the hybrids of mixed questions of law and fact and discretionary matters are considered. As the purpose of this article is to provide a basic overview of concepts and to offer some common definitions in this semantical game of tag, a discussion on how to discern the differences between fact, law, mixed questions of fact, and discretionary decisions is beyond its purview. For a general discussion of these problems and proposals to aid in distinguishing between these concepts, see Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. Rev. 469, 472 (1988) and Hofer, *supra* note 12, at 235.

127. When used in this manner, findings of fact are basic facts or historical facts as contrasted with inferred facts or ultimate facts. *See* Aldisert, *supra* note 2, at 60.

1. Judicial Findings of Fact and Jury Verdicts

As a general matter, basic findings of fact made by a trial court,[128] or by a jury,[129] are binding on the appellate court unless those findings are not supported by competent evidence.[130] Competent evidence is admissible evidence.[131] This is an extremely deferential standard of review. Utilization of such a deferential standard is well founded. The tribunal that is present when testimony is given is in a better position to evaluate the evidence than an appellate court reading a cold record.[132] An appellate court cannot judge a witness's demeanor, conviction or veracity. Credibility determinations are left for the trial court.[133] Thus, because of these policy considerations, courts are willing to defer, to a large extent, to the lower body's findings of fact. Thus, appellate review of a trial court's findings of fact or a jury's findings of fact is governed by the competent evidence standard of review.[134]

The scope of review would be broad in determining whether the facts are supported by competent evidence. Review of the entire record for evidence would be required to make this determination.

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128. *See* Triffin v. Dillabough, 716 A.2d 605 (Pa. 1998); Thatcher's Drug Store, Inc. v. Consol. Supermarkets, Inc., 636 A.2d 156 (Pa. 1994); Allegheny County v. Monzo, 500 A.2d 1096 (Pa. 1985); *In re* Eshelman's Estate, 89 A.2d 775 (Pa. 1952).

129. *See In re* Kaufmann's Estate, 127 A. 133 (Pa. 1924) and Warehime v. Warehime, 761 A.2d 1138 (Pa. 2000) (Saylor, J., concurring) (factual findings are to be reviewed on a deferential basis so long as they are supported by the evidence). *See also* Burbage v. Boiler Eng'g & Supply Co., 249 A.2d 563 (Pa. 1969) (appellate court will not substitute its judgment for that of the fact-finding jury if sufficient evidence in the record exists to support the jury's findings of fact). Interestingly, the *Burbage* court continued to opine that it would not set aside the findings of fact of the jury implicit in its verdict for which there was evidentiary support and where there was no abuse of discretion or error of law. In utilizing this amalgam of standards, the court most likely was attempting to describe the standards applicable to a jury's legal conclusions rather than its findings of fact.

130. *See also* Commonwealth v. Nester, 709 A.2d 879 (Pa. 1998) (suppression court's findings of facts are binding if those findings are supported by the record).

131. BLACK'S LAW DICTIONARY 257 (5th ed. 1979).

132. *In re* Meyers (Girsh Trust), 189 A.2d 852, 859-60 (Pa. 1963).

133. *Id.*

134. A notable exception to this standard is the supreme court's review of disciplinary matters. The supreme court's review is de novo both as to determinations of fact and determinations of law. *See* Office of Disciplinary Counsel v. Surrick, 749 A.2d 441 (Pa. 2000). Also, such is not the case for inferred or ultimate facts. If facts are a deduction from other facts and the ultimate fact in question is purely a result of reasoning, then the review is de novo. That is to say that the reviewing court may draw its own conclusions from the basic facts as they are applied to law. *See* Hutchison v. Sunbeam Coal Corp., 519 A.2d 385 (Pa. 1986).

2. Administrative Agency Findings of Fact

The factual findings by an administrative agency in Pennsylvania are reviewed based upon a substantial evidence standard, as required by statute.[135] Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[136] Thus, if the findings of fact are supported by substantial evidence, they are conclusive upon review. It is not the appellate role to reweigh the evidence or review the credibility of the witnesses, but to determine whether the referee's findings have the requisite measure of support in the record.[137]

The scope of review is broad, as an appellate court can use any evidence in its consideration of support for the lower tribunal's findings of fact.[138]

B. Legal Determinations

1. Judicial Legal Determinations

Decisions of law are freely reviewable by Pennsylvania appellate courts. Appellate courts are not only entitled to review a lower court's conclusions of law without restraint, they have a duty to do so.[139] Errors of law take different forms. A court may misinterpret a statute, apply an incorrect legal standard to facts, or improperly apply an appropriate standard to facts. The appellate court engages in consideration of the particular legal issue before it without deference to the lower tribunal's conclusions.[140] Thus, legal questions are reviewed anew by the appellate court. In this de novo review, the court steps into the shoes of the lower court and re-decides the issue. If the appellate court reaches the same decision as the lower tribunal, the legal determination is affirmed. If the appellate court comes to a different conclusion than that reached by the lower court, the legal determination is reversed. Legal determinations can include constitutional interpretation and application, statutory interpretation and application, and the grant or denial of summary judgment or judgment notwithstanding the

135. 2 PA. CONS. STAT. § 704 (1995).

136. Peak v. Unemployment Compensation Bd. of Review, 501 A.2d 1383, 1387 (Pa. 1985) (quoting Murphy v. Commonwealth, 480 A.2d 382, 386 (Pa. Commw. Ct. 1984)).

137. *See* Bethenergy Mines, Inc. v. WCAB, 612 A.2d 434, 437 (Pa. 1992).

138. *Id.*

139. *See* Triffin v. Dillabough, 716 A.2d 605 (Pa. 1998).

140. *See* Banks Eng'g Co. v. Polons, 697 A.2d 1020 (Pa. Super. Ct. 1997).

verdict. In Pennsylvania, the term most frequently applied to describe the degree of deference to be accorded a lower court's conclusions of law is "plenary."[141] This term has been deemed to be synonymous with de novo review which is commonly used at the federal level.[142] For purposes of this article, the terms de novo and plenary can and should be used interchangeably.[143]

A plenary standard of review is entirely proper with respect to review of errors of law. Appellate courts are law courts and are deemed to be experts in the law. Moreover, the high court of a state is generally considered to be the final word on matters of state law. Thus, with respect to legal determinations, an appellate court should and must be able to reverse lower court legal determinations without deference or reservation. Compared to facts, which are particular to the parties and case, legal pronouncements transcend the case and are universally applicable.

As a practical matter, the appellant who can legitimately present his or her claim as an error of law enjoys the least deference to the decision below and the best chance for success on appeal. With respect to pure questions of law, there are no real materials to be reviewed, but merely the law to discern, and, thus, no necessary statement of the scope of review. For the application of the law to particular facts, the scope of review is generally broad in that the appellate court will review the entire record presented to the lower tribunal to determine if the lower court erred as a matter of law. However, this would be issue specific.[144]

Mixed questions of fact and law raise a unique issue as to the appropriate standard of review. The Pennsylvania Supreme Court has acknowledged the concept of mixed questions of fact and law.[145] Recently, Justice Saylor noted that the Pennsylvania high

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141. *See* Commonwealth v. Nester, 709 A.2d 879 (Pa. 1998) (conclusions of law are subject to plenary review). *See also* Phillips v. A-Best Prod. Co., 665 A.2d 1167 (Pa. 1995). In *Phillips*, as well as in numerous other decisions, plenary has been utilized to describe the standard of review as that term is understood in this article. However, in *Phillips*, as well as in numerous other decisions, it has been labeled the scope of review. For purposes of consistency, this article recommends that the term plenary be used to describe the degree of deference a reviewing court gives to a lower court's conclusions of law.

142. *See* Warehime v. Warehime, 761 A.2d 1138 (Pa. 2000) (Saylor, J., concurring) (legal conclusions are subject to de novo review); Commonwealth v. Nester, 709 A.2d at 881 (whether a statement was voluntary is a question of law reviewed de novo) (citing United States v. Hernandez, 93 F.3d 1493 (10th Cir. 1996)).

143. *See* ALDISERT, *supra* note 2, at 72 (explaining that review of legal determinations is plenary, and often called de novo review).

144. *See* Morrison v. Dep't of Pub. Welfare, 646 A.2d 565 (Pa. 1994).

145. *See* Warehime v. Warehime, 761 A.2d 1138 (Pa. 2000).

court has not given a "universal" standard of review that would be applicable to these types of determinations.[146] However, he noted two possible standards that have been applied to mixed questions of law and fact. First, Justice Saylor offered a deferential approach that applies an abuse of discretion or lack of supporting evidence standard.[147] Alternatively, other case law recognizes a less deferential standard, that of de novo review.[148] However, Justice Saylor opined that these divergent views on the appropriate standard could be attributed to the variance among individual cases; that is, whether legal aspects predominate or are subordinate to factual aspects.[149] Indeed, a spectrum of review for these types of decisions has been suggested, depending upon the tipping of the analytical scale to fact or law.[150] Needless to say, the applicable standard of review in mixed questions of fact and law is in a state of flux. As a practical matter, until the Supreme Court offers additional guidance, counsel will be well advised to advocate the standard of review that benefits him or her the most on appeal.

2. Administrative Agency Legal Determinations

The Administrative Agency Law permits a court to reverse a determination by an administrative agency if it is not in accordance with law.[151] This "in accordance with law" standard "is to establish limited appellate review of agency conclusions to ensure that they are adequately supported by competent factual findings, are free from arbitrary or capricious decision making, and, to the extent relevant, represent a proper exercise of the agency's discretion."[152] Thus, it remains within the reviewing court's "purview to review the agency's conclusions to determine 'if a reasonable mind might make the same determination based on the evidence before [it].'"[153] However, the review of an administrative agency's conclusions of law has been held to be plenary.[154] While these two descriptions of the standard of review are associated with determinations of law,

146. *Id.*

147. *See* Mars Area Sch. Dist. v. United Presbyterian Women's Ass'n, 721 A.2d 360, 361 (Pa. 1998).

148. *See* City of Chester v. Dep't of Transp., 434 A.2d 695, 699 (Pa. 1981).

149. *See generally* Commonwealth v. Santiago, 654 A.2d 1062, 1072 (Pa. Super. 1994).

150. *Id.*

151. 2 PA. CONS. STAT. § 704 (1995).

152. *See* Fraternal Order of Police v. Pennsylvania Labor Relations Board, 735 A.2d 96, 98 (Pa. 1999); *accord* Vista Int'l Hotel v. WCAB, 742 A.2d 649 (Pa. 1999).

153. *Id.* at 100 (quoting Williams v. Civil Serv. Comm'n, 327 A.2d 70, 72 (Pa. 1974)).

154. *See* Universal Am-Can, Ltd. v. WCAB, 762 A.2d 328 (Pa. 2000).

and appear to be at odds with each other, they are most likely addressing two different aspects of that type of determination. Specifically, with respect to pure errors of law, for example, statutory interpretation, a plenary review will be appropriate. With respect to mixed questions, a more deferential standard may apply.[155] Legal determinations made by an administrative agency are subject to a broad scope of review.

C. Discretionary Determinations

1. Judicial Discretionary Determinations

Decisions involving discretion arise due to the presence of legal matters upon which a tribunal must render a judgment while "on the scene" at trial.[156] Discretionary decision making arises typically in trial supervision and admission of evidence determinations.[157] Discretionary determinations made by lower tribunals are reviewed according to an abuse of discretion standard. Discretion connotes choice and a range of acceptable conclusions with respect to a legal issue. Thus, unlike the right/wrong determination made under a de novo review, an abuse of discretion standard is deferential and accepts a range of conclusions even if an appellate court may have reached a different conclusion.[158] Consistent with this understanding of discretion, Pennsylvania courts have described abuse of discretion as follows:

> [A]n abuse of discretion may not be found merely because the appellate court might have reached a different conclusion, but requires a showing of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous.[159]

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155. Similarly, in the case of agency discretionary action, an abuse of discretion standard would apply. *See* Pennsylvania Game Comm'n v. Civil Serv. Comm'n, 747 A.2d 887, 891 n.6 (Pa. 2000) (appellate review of whether an agency decision is in accordance with law may include, as a component, consideration of whether the agency's determination represents an abuse of discretion) (citing Fraternal Order of Police v. Pennsylvania Labor Relations Bd., 735 A.2d 96, 99 (Pa. 1999)).

156. *See* Davis, *supra* note 10, at 49.

157. *See id.* at 50.

158. Again, while beyond the parameters of this article, a great deal of ambiguity exists as to the deference to be accorded a trial court in making discretionary decisions and how such a standard should be applied. *See generally* Davis, *supra* note 10; Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982).

159. *See* Paden v. Baker Concrete Constr., 658 A.2d 341, 343 (Pa. 1995).

Thus, although not entitled to the deference accorded findings of fact, discretionary decisions by trial courts are reviewed by a less rigorous standard than decisions of law. The scope of review in discretionary decision making is generally broad, but the scope will be issue specific. As noted above, the granting of a new trial is subject to a narrow scope of review.[160]

2. Administrative Agency Discretionary Determinations

Discretionary acts by an administrative agency are subject to an abuse of discretion standard under the rubric of an "in accordance with law" limitation on appellate review.[161] Thus, the same criteria used for gauging trial court utilization of discretion would apply to discretionary determinations made by an administrative agency.[162] Again, the scope of review would generally be broad, but would be issue specific.

CONCLUSION

The concepts of standard of review and scope of review have great importance in the appellate process. However, these terms are a challenge to define as well as to apply. While the Supreme Court of Pennsylvania has supplied a clear definition of these terms, the meaning of these terms beyond the specific contexts addressed by the court has been difficult to ascertain. By defining the standard of review as the level of deference to be accorded a lower court decision, and the scope of review to connote what legal reasoning or materials a reviewing court may use and the light in which those materials are to be viewed, a more universal understanding and usage of these terms can be achieved. Appellate advocates are urged to follow a three-part statement to frame the appropriate standard and scope of review. By stating the limitations on the issues a court may consider, followed by the appropriate standard of review, and finishing with an expression of the scope of review, both the bench and the bar will benefit from a greater understanding and a more efficient application of these terms and will be aided in the appellate process.

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160. *See* Morrison v. Dep't of Pub. Welfare, 646 A.2d 565 (Pa. 1994).

161. *See* Fraternal Order of Police v. Pennsylvania Labor Relations Bd., 735 A.2d 96 (Pa. 1999); Pennsylvania Game Comm'n v. Civil Serv. Comm'n, 747 A.2d 887, 891 n.6 (Pa. 2000).

162. *See* Fraternal Order of Police v. Pennsylvania Labor Relations Bd., 735 A.2d 96 (Pa. 1999); Pennsylvania Game Comm'n v. Civil Serv. Comm'n, 747 A.2d 887, 891 n.6 (Pa. 2000).