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Findings of Fact: Critical, Yet Underdeveloped, Tools

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I. Introduction

A. Words of Thanks

In the practice of law, we stand on the shoulders of those coming before us. We attempt to build on their work. We labor to expand on the concepts and theories with which they inspired and intrigued us. This is no less true in the CLE world. So this short paper must start with thanks to Georgetown University Law Center's Writing Center, the Office of the State Prosecuting Attorney, past and present staff attorneys at the Texas Court of Criminal Appeals who are ever ready to assist the habeas bar – Michael Stauffacher and Michael Falkenberg, Baldwin Chin, Andrea Jacobs, David Keltner, and Laurie Ratliff (for tips from the civil side).

B. Paper's Goals

The underlying premise of this paper: attorney-drafted findings of fact are an undervalued and underused tool in appellate and habeas advocacy.

This paper is designed as a persuasive piece set against a backdrop of applicable statutes and relevant case law. It is intended for use equally by defenders and state's attorneys. By its end, the user should be able to answer two foundational questions:

- **Why should the advocate bother with drafting findings of fact**
  - Short term, mid-range and long term uses for findings of fact
  - When findings of fact are mission critical in direct appeals and in habeas litigation
  - How to create "space" for their consideration
- **What are the best techniques for drafting findings of fact**
  - When to begin the drafting process
  - Relationship to underlying pretrial motions on direct appeal and ODI [Order Designating Issues] on collateral attack
    - Adapting and amending fact findings
    - Objecting to Unfavorable Findings
  - Writing tips

The paper is intended as a skills paper addressing "why" and "how to" rather than an academic thesis. It is not a lengthy paper since this is a niche in the larger topic of appellate and habeas litigation and effective advocacy; but, its concepts are no less important due to that brevity.

II. STANDARDS OF REVIEW

This is a foundational issue for the advocate to consider in determining if there is a viable issue for appeal or collateral attack, and if so, how it needs to be supported. At its most basic level, it defines how much deference will be given to the proceedings below. Standards of review exist on a continuum. While often left unstated by appellate players, identifying the correct standard of review can be *the* determinate for success.

A. The Standards of Review / Deference Continuum

Degree of Deference	No Deference	Some Deference	More Deference	Great Deference	Total Deference
Standard of Review	De Novo	Reasonableness [Substantial Evidence]	Abuse of Discretion	Clearly Erroneous	No Review
Application Example	Questions of Law	Jury Verdict	Credibility Determination; Evidentiary Rulings	Questions of Fact [Supported]	Decisions not to Prosecute

B. Why Differing Standards Exist

In a multi-tiered judicial system, appellate courts have a somewhat limited function; they primarily serve to correct legal errors and develop the jurisprudence of an area of law. In contrast, trial court judges resolve contested factual disputes and make credibility determinations regarding the witnesses appearing before them. Consider the standards of review as a general summary of these discrete institutional roles.

C. De Novo Review

Questions of law are reviewed de novo; the trial court's assessment of purely legal questions is given no deference by the appellate court.

1. Examples – Purely Legal Questions

- Question of constitutional interpretation – e.g., whether third party may consent to a search, *Hubert v. State*, 312 S.W.3d 554 (Tex. Crim. App. 2010); whether probable cause existed for search, *Guzman v. State*, 955 S.W.2d 85 (Tex. Crim. App. 1997); whether assessment of court costs and DNA record fee violates separation of powers, *Peraza v. State*, 467 S.W.3d 508 (2015)
- Meaning of statutory language – e.g., whether statute limited trial court's authority to stack sentences. *Williams v. State*, 253 S.W.3d 673 (Tex. Crim. App. 2008)

2. The "Mixed Question" Muddle

The challenge for advocates and reviewing courts is that many appellate issues involve mixed questions of law and fact. And, it is not always easy to distinguish between them. *Robinson v. State*, 377 S.W.3d 712 (Tex. Crim. App. 2012) (was the car's movement a "turn", or was it a "merge").

The United States Supreme Court treats "mixed questions" as cases in which the issue to be resolved is whether the rule of law as applied to the established facts is or is not violated. *Ornelas v. United States*, 517 U.S. 690 (1996). In such cases the historical facts are admitted or established and the rule of law is undisputed. The issue then becomes whether the facts satisfy the relevant constitutional standard.

a. Examples – Mixed Law and Fact Questions:

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