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Findings of Fact: Critical, Underused Advocacy Tool

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I. Introduction

So much of what we do is derives from the work of others and so we must begin with gratitude for them. This paper is designed as a skills paper addressing "why" and "how to" when approaching findings of fact, rather than as an academic thesis. It is not a lengthy. Findings of Fact occupy a niche in the larger topics of (1) pretrial motion practice and (2) appellate/habeas litigation and effective advocacy. However, its concepts are no less important due to that niche designation or this paper's brevity.

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 staff attorneys at the Texas Court of Criminal Appeals Michael Stauffacher and Michael Falkenberg, Baldwin Chin, Andrea Jacobs, David Keltner, Robert Dubose, 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

II. STANDARDS OF REVIEW

"How will the reviewing court consider and adjudicate our claim?" This is a foundational issue in pretrial motion practice and also for appellate review and post-conviction challenges. Despite its critical nature, careful consideration of the standard of review that will be used is often skipped over in the rush to reach case specific considerations. The skillful advocate should always undertake a decision analysis that asks:

1) What is the viable legal issue for appeal or collateral attack
2) How does it need to be supported factually

3) Is there a need for specific fact findings to be made at the trial court level
4) If so, who should draft them and when

At its most basic level, the standard of review 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*	*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; Many 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. Even that description is an oversimplification, for the higher the court, the less emphasis is placed on individual case error correction. 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 and the relationship between the courts at each level.

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*:
➢ 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);

Title search: Findings of Fact: Critical, Underused Advisory Tool

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