



Importance

- ▶ Why is it important to consider how you issue oral and written orders?
- ▶ Judicial opinions "are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic."
- ▶ See *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 313 (Tenn. 2014) (citation omitted).



**Step 1:
Know the
Standard of
Appellate
Review**



**Standards of
Appellate
Review**

- ▶ Why is knowing the standard of appellate review helpful?
- ▶ The standards can guide the decision-making process and help ensure the orders contain the essential information.
- ▶ It helps keep the issue resolved, rather than coming back for another hearing.



Standards of Appellate Review

► Review of your factual findings:

- Civil Cases: Tenn. R. App. P. 13(d)
 - Review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.
- Criminal Cases:
 - The same is largely true for criminal cases where the court makes findings.
 - See *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996) (“[A] trial court’s findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise.”).



Standards of Appellate Review

► Abuse of Discretion Review:

A court abuses its discretion when it causes an injustice to the party challenging the decision by

- (1) applying an incorrect legal standard,
- (2) reaching an illogical or unreasonable decision, or
- (3) basing its decision on a clearly erroneous assessment of the evidence.

See *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (citations omitted).



Standards of Appellate Review

► Abuse of Discretion Review (cont'd):

When practical, under an abuse of discretion standard of review,

- (1) Identify the legal standard on the record;
- (2) Explain what options are open and why a particular option is selected;
- (3) Identify the factual findings upon which the and, if the facts depend on credibility, say so.



Standards of Appellate Review Abuse of Discretion

- ▶ Abuse of Discretion Review (cont'd):
- ▶ **Civil Cases:**
 - ▶ Motions made pursuant to TRCP 52.02, 59 and 60
 - ▶ Awards of alimony
 - ▶ Decision to impose sanctions and determination of the appropriate sanction
 - ▶ Grant or denial of permissive intervention
 - ▶ Rulings on discovery issues
 - ▶ Rulings on continuances
 - ▶ Rulings on evidentiary issues
 - ▶ Determination of whether to grant a mistrial
 - ▶ Setting child support
 - ▶ Custody determination or decisions concerning a parenting schedule



Standards of Appellate Review Abuse of Discretion

- ▶ Abuse of Discretion Review (cont'd):
- ▶ **Criminal Cases:**
 - ▶ Most evidentiary rulings
 - ▶ Decision to change venue
 - ▶ Appointment of interpreter
 - ▶ Severance of cases or defendants
 - ▶ Amendment of the indictment
 - ▶ Denial of expert funding
 - ▶ Conduct of trials, including excusal of jurors, examination of witnesses, and arguments of counsel
 - ▶ Rule 35 Motions



Standards of Appellate Review Mixed Standards

- ▶ **Mixed Standards of Appellate Review:**
- ▶ Sometimes, the standard of appellate review is mixed.
- ▶ **Attorney's Fees Example:**
 - ▶ Regarding whether the Wife was entitled to a grant of attorney's fees under the MDA, the proper standard of review is de novo because the issue is a question of law. The proper standard for reviewing the **amount** of the fees awarded under the MDA is abuse of discretion.
 - ▶ Conversely, with regard to a trial court's award of attorney's fees under section 36-5-103(c), the standard of review is abuse of discretion for **both** the issue of whether the party is entitled to an award **and** the issue of the amount of the fees awarded.
- ▶ See **Eberbach v. Eberbach**, 535 S.W.3d 467, 477 (Tenn. 2017).



Standards of Appellate Review
Mixed Standards

- **Mixed Standards of Appellate Review**(cont'd):
- Hearsay Example:
 - The standard of review for rulings on hearsay evidence has "multiple layers."
 - The trial court's "factual and credibility findings" when considering whether a statement is hearsay "are binding on a reviewing court unless the evidence in the record preponderates against them."
 - "Once the trial court has made its factual findings, the next questions—whether the facts prove that the statement (1) was hearsay and (2) fits under one [of] the exceptions to the hearsay rule—are questions of law subject to de novo review."
 - See *Kendrick v. State*, 454 S.W.3d 450, 479 (Tenn. 2015).
- Motions to Suppress Evidence
 - See, e.g., *State v. Echols*, 382 S.W.3d 266, 277 (Tenn. 2012).



Standards of Appellate Review
Conditional Standards

- **Conditional Standards of Appellate Review:**
- Sometimes, the standard of appellate review will depend upon the trial court's actions:
 - Tenn. R. Evid. 404(b):
 - If the trial court substantially complied with Tennessee Rule of Evidence 404(b), its ruling will overturn the ruling only if the trial court abused its discretion.
 - See *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997)
 - Sentencing Decisions. See *State v. Bise*, 380 S.W.3d 682, 705 (Tenn. 2012)
 - Probation Revocation. See *State v. Dagnan*, 441 S.W.3d 751, 759 (Tenn. 2022)



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Step 2:
Advanced Preparation



Preparing in Advance

- ▶ Why would a judge prepare for a hearing in advance?
 - ▶ Preparation makes for a better hearing and a better order.



Preparing in Advance

- ▶ Back to Basics:
 - ▶ Read the pleadings, the legal issues, and the relevant parts of the record.
 - ▶ Review the applicable law, including especially:
 - ▶ Burdens of proof
 - ▶ Legal standards or criteria



Preparing in Advance

- ▶ Back to Basics (cont'd):
 - ▶ Consider preparing a rough draft or outline
 - ▶ Incorporate applicable legal standards and basic facts
 - ▶ Consider developing checklists or forms for common issues, particularly involving statutory factors:
 - ▶ Custody, alimony, property division
 - ▶ Bail Modification



Step 3:
Know When to Trust the Lawyers and the Parties



►Principal danger of relying on the parties:

- Don't assume the lawyers know
 - the applicable law; or
 - What is required to meet the burden of production
- The burden is always on the court to identify and apply the correct law.



► [Not so] Hypothetical:

- Your pre-hearing preparation reveals the court should consider several factors to decide the particular legal issue.
- But, the attorneys have not introduced proof about those factors or, by blind luck, only asked about a few.
- What do you do when the lawyers don't put on the evidence you need to make a decision?



- ▶ (Not so) Hypothetical (cont'd):
- ▶ What does the judge do?
 - ▶ Identify the burdens of proof
 - ▶ Identify the missing factors in your analysis
 - ▶ Explain how the missing evidence affects your ability to decide the issue under the law.

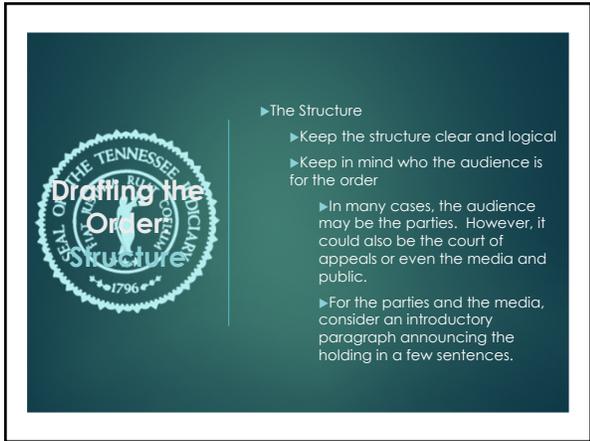


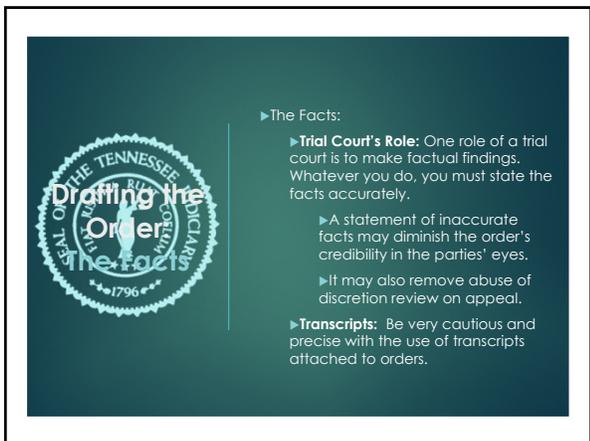
- ▶ Orders Submitted by Counsel:
 - ▶ READ the Order.
 - ▶ Review proposed orders carefully to ensure the order identifies **your view** of the relevant facts and law.
 - ▶ Make sure the order includes **only** matters appropriate for the determination.
 - ▶ Where **objections** are present, consider revising the proposed order to address the objections.



- ▶ Orders Submitted by Counsel (cont'd):
 - ▶ "We wish to point out that before adopting findings prepared by counsel, the trial judge should carefully examine them to establish that **they accurately reflect [the judge's] views and conclusions, and not those of counsel.** [The judge] should also ascertain that they adequately dispose of all material issues, and to assure that matters not a proper part of the determination have not been included."
 - ▶ See *Delevan-Delta Corp. v. Roberts*, 611 S.W.2d 51, 53 (Tenn. 1981) (emphasis added).









▶The Facts (cont'd):

- ▶Draft the statement of facts using the relevant legal factors as a guide. This will help the order focus only on the relevant facts.
- ▶That said, set forth the facts needed to address the issues raised in the case.
 - ▶You may choose to present all the facts in one section.
 - ▶But depending on the complexity and number of issues, you may wish to address specific facts when discussing each legal issue.



▶The Facts (cont'd):

- ▶A statement of facts is not the same as a finding of fact.
- ▶**Conflicts in the Evidence:**
 - ▶Make sure to resolve all factual issues and conflicts in the evidence.
 - ▶When possible, make credibility determinations expressly.
 - ▶The implicit credibility determinations may sometimes be evident from the ultimate holding.
 - ▶But the findings will help appellate review, particularly on a de novo standard.



▶The Analysis:

- ▶**Address All Issues:** Make sure to address all of the legal issues raised by the parties.
- ▶**Legal Standards:** Identify the legal standards governing the particular issue and use these standards as a roadmap to guide the analysis.



► The Analysis:

- **Alternate Factual Findings:** If the legal conclusion follows from a particular factual finding, consider the result if the finding cannot be made.
 - Child custody issues addressing a material and substantial change in circumstances.
 - Probation revocations with several violations.
- **Alternate Legal Grounds:** If an alternate legal ground can justify the reasoning, please say so. This analysis will greatly help appellate review.
 - Post-conviction review with issues that are either waived or previously determined.



► The Analysis (cont'd):

- **Formatting:**
 - Consider rearranging issues if needed.
 - Consider breaking the analysis up with a heading for each issue.
 - A single citation is generally better than a string citation without parentheticals.
- **Be Judicious:** Refrain from sarcasm or criticizing an argument or lawyer unnecessarily.



► Conclusion:

- Consider having a conclusion at the end clearly stating the holding(s) of the court.
- Make sure the conclusion is consistent with the holdings reached in the analysis.









► In the editing stage of an order:

- **Structure:** Check the overall structure of the order.
 - Review the organization.
 - See whether the order can be shortened by eliminating unnecessary facts or analysis.
 - Review whether footnotes are necessary or whether the footnoted text should be part of the analysis.



► In the editing stage of an order (cont'd):

- Check for wordiness.
- Try to identify unclear passages or confusing language.
 - Use plain language where possible and where it does not sacrifice needed accuracy.
 - Also eliminate unnecessary words, such as "clearly" and "that."
- Minimize unnecessary humor or characterizations ("red herring").



► In the editing stage of an order (cont'd):

- Consider investing in a grammar checker, such as Grammarly.
- Consider using Westlaw Drafting Assistant to check for quotes and citations.





