

Jonathan Cohen

March 28, 2024

H. Thomas Byron III
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of United States Courts
Room 7-300
One Columbus Circle, NW
Washington, D.C. 20544

re: Proposal for an amendment to Federal Rules of Appellate Procedure
(Standards of Review)

To Whom It May Concern,

This is a proposal for an amendment to the Federal Rules of Appellate Procedure.

Under the current Federal Rules of Appellate Procedure, Rule 28(a)(8), an appellant's brief must contain "a concise statement of the applicable standard of review..." However, the federal rules do not define what a Standard of Review is.

I propose a rule amendment or advisory comment to provide guidance on the standards of review. A draft rule, FRAP 28(h), is enclosed on the next page.

Sincerely,
Jonathan Cohen

Draft rule FRAP 28(h)

- (a) When a party proposes the standards of review, for the appellate court to apply in the course of its appellate jurisdiction, the party may address any of the following issues:
- (1) When the appellate court may affirm, reverse, modify, set aside, or vacate the judgment or order below, or address other issues
 - (2) Whether the issues on appeal are questions of law, questions of fact, questions of judicial or agency discretion, or a combination of the foregoing
 - (3) Whether any court or administrative agency below was required to defer to the decision of another court or administrative agency, a jury, or one of the parties
 - (4) Whether the appellate court should review any of the issues with additional scrutiny or lenity
 - (5) Any other issue relevant to how the appellate court should review the case
- (b) If a party identifies any of the issues on appeal as questions of discretion, the party may further explain how the court or agency below abused its discretion or did not abuse its discretion with respect to any of the following issues:
- (1) Reasonableness
 - (2) Sequencing the issues
 - (3) Weighing multiple factors
 - (4) Ruling on discovery issues
 - (5) Including/excluding evidence
 - (6) Granting/denying any request
 - (7) Use of legal citations and authority
 - (8) Responding to or ignoring arguments
 - (9) Including/excluding points of discussion
 - (10) Ordering an examination of any party
 - (11) Addressing issues *sua sponte* or *sub silencio*
 - (12) Logical reasoning
 - (13) Explaining the decision
 - (14) Surprise or delay
 - (15) Fairness
 - (16) Procedures
 - (17) Other relevant issues
- (c) If a party explicitly identifies an established standard of review, the party may make an argument for the extension, modification, or reversal of existing standards of review