

## **The Abuse of Discretion Standard: How to Argue it if You Must and Avoid it if You Can**

Virtually every argument in an opening brief is deficient without setting forth the standard of review and explaining how there was error under the standard. Failure to acknowledge the proper scope of review or to tailor the argument to show how there was error under the standard of review can be considered to be a concession that the claim lacks merit. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021; *Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1388; see also *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 102.) More than once, the Sixth District Court of Appeal has deemed an argument abandoned for failure to explain how there was error under the applicable standard of review.

Generally, a claim in an opening brief should state near the beginning of the argument the applicable standard of review: usually independent or de novo review, abuse of discretion, or substantial evidence. For some issues, the findings of fact are reviewed for substantial evidence while the application of the law is reviewed independently. (See, e.g. *People v. Glaser* (1995) 11 Cal.4th 354, 362 [review of suppression motion].)

Some people view the abuse of discretion standard as a judicial rubber stamp. (Cf. *Wilson v. Volkswagen of America* (4th Cir. 1977) 561 F.2d 494, 505-506.) It has often been said that a court acts within its discretion whenever there is an “absence of arbitrary determination, capricious disposition or whimsical thinking.” (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573.) As long as the court acts within the “bounds of reason” (*ibid.*), the court does not abuse its discretion.

The abuse of discretion standard, however, is not an abstract test based on whether the trial court judge was totally irrational. Instead, the court discretion is grounded in the policy and purpose of the statutes or laws being applied. “[T]rial court discretion is not unlimited. ‘The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]’ (6 Witkin (2d ed. 1971) Appeal, § 244, p. 4235 . . .)” (*Westside Community for Independent Living v. Obledo* (1983) 33 Cal.3d 348, 355.) “[J]udicial discretion must be measured against the general rules of law and, in the case of a statutory grant of discretion, against the specific law that grants the discretion. [Citations.]” (*Horsford v. Board of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 393-394.)

A good discussion of the practical limits of a court's discretion is contained in *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, at pages 1297 to 1298: "The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action . . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation.] If the trial court is mistaken about the scope of its discretion, the mistaken position may be 'reasonable', i.e., one as to which reasonable judges could differ. [Citation.] But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law. [¶] The legal principles that govern the subject of discretionary action vary greatly with context. [Citation.] They are derived from the common law or statutes under which discretion is conferred. . . . The pertinent question is whether the grounds given by the court . . . are consistent with the substantive law . . . and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under [the statute], read in light of the purposes and policy of the statute. (*Id.*, at pp. 1297-1298; see also *People v. Jacobs* (2007) 156 Cal.App.4th 728, 735-740.)

There are several components to an abuse of discretion standard. "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a court's ruling under review. [1] The trial court's findings of facts are reviewed for substantial evidence, [2] its conclusions of law are reviewed de novo, and [3] its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.)

Thus, in arguing the court abused its discretion, simply listing all of the evidence in favor of the client or ignoring the standard of review after the first few paragraphs of the argument is ineffective. Instead, it is important to show how the court failed to properly exercise its discretion. This usually requires proving the record affirmatively showed the court made a legal error or misunderstood the facts in arriving at its decision. In a recent Sixth District case, for example, appellate counsel successfully argued the court abused its discretion in not dismissing a prior strike conviction because the court misunderstood the facts it relied on in making its decision. (*People v. Thimmes* (2006) 138 Cal.App.4th 1207, 1212-1213.) Depending on the circumstances of the case, it can be argued:

The court misunderstood the facts or there was insufficient evidence to support the facts it relied on. (See, e.g., *People v. Cortez* (1971) 6 Cal.3d 78, 85-86; *People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

The court misunderstood the law. “There is an abuse of discretion when the trial court’s action ‘transgresses the confines of the applicable principles of law.’ [Citation.]” (*Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, 862.) Thus, “an abuse of discretion arises if the trial court based its decision on impermissible factors (see *People v. Carmo[n]y* (2004) 33 Cal.4th 367, 378) or on an incorrect legal standard (see *Linder v. Thrifty Oil Co.* (2001) 23 Cal.4th 429, 435-436; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496.)” (*People v. Knoller* (2007) 41 Cal.4th 139, 156; see also *In re Alex N.* (2005) 132 Cal.App.4th 18, 25-27; *People v. Downey* (2000) 82 Cal.App.4th 899, 912.)

The court misunderstood the scope of its discretion. (*People v. Lara* (2001) 86 Cal.App.4th 139, 165-166; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297- 1298; see *People v. Belmontes* (1983) 34 Cal. 3d 335, 348, fn. 8.)

The court failed to follow the proper procedure for exercising its discretion. “ ‘[W]hen a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction. . . . ’ [Citations.]” (*Rodman v. Superior Court* (1939) 13 Cal.2d 262, 269; *Los Angeles County Dept. of Children and Family Servs. v. Superior Court* (2005) 126 Cal.App.4th 144, 152.)

The record affirmatively shows the court was unaware of its discretion. (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 944; *In re Sean W.* (2005) 127 Cal.App.4th 1177, 1188-1189.)

The court failed to exercise its discretion. (See, e.g., *People v. Duran* (1976) 16 Cal.3d 282, 290-293; *People v. Penoli* (1996) 46 Cal.App.4th 298, 302.)

Another method is to redefine the issue so that the independent or de novo standard applies. Here are some examples:

If the claim of error derives from the court’s interpretation of a statute, the interpretation of the statute should be reviewed independently. For instance, an abuse of discretion standard applies to the review to a ruling on the admissibility of evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1140) “To the extent to the trial court’s ruling depends on the proper interpretations of the

Evidence Code, however, it presents a question of law; and our review is de novo.” (*People v. Walker* (2006) 139 Cal.App.4th 782, 792; see also *Amdahl Corp. v. County of Santa Clara* (2004) 116 Cal.App.4th 604, 611.)

Where there are no factual disputes or where the facts are presented in documentary evidence, independent review might be appropriate. (See, e.g., *People v. Avila* (2006) 38 Cal.4th 491, 529 [although removal of potential jurors is normally reviewed for abuse of discretion, independent review is used when the decision was based solely on questionnaires]; *People v. Maury* (2003) 30 Cal.4th 342, 404 [independent review of whether a confession was voluntary when the interrogation was tape recorded]; *People v. ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144 [independent review of a finding counsel had a conflict of interest when there were no disputed facts].)

When a category of issues are normally reviewed for abuse of discretion, certain questions within the category might be reviewed independently. For instance, evidentiary rulings are normally reviewed for abuse of discretion, but whether evidence violates the defendant's right to confrontation is reviewed de novo. (See, e.g., *People v. Cervantes* (2004) 118 Cal.App.4th 162, 174.)

While denial of a new trial motion or mistrial motion is normally reviewed for abuse of discretion (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986; *People v. Delgado* (1993) 5 Cal.4th 312, 329), the underlying error might be reviewed independently. For example, if the defendant moves for a new trial based on instructional error, argue the instructional error (which is often reviewed de novo (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838)), not the denial of the mistrial motion.