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# Just the Facts, Ma'am – A Review of the Practice of the Verbatim Adoption of Findings of Fact and Conclusions of Law

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# COMMENTS

## JUST THE FACTS, MA'AM – A REVIEW OF THE PRACTICE OF THE VERBATIM ADOPTION OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

> A limited number of minor ambiguities or defects in the Federal rules have been developed, but the courts have proved themselves skillful in ironing out such difficulties, and some of the points have been or soon may be adequately dealt with by judicial construction and thus disappear.[1]

### I. INTRODUCTION

It is common, recognized practice for district courts to adopt verbatim the findings of fact and conclusions of law that the prevailing party puts forward in its memorandum of law.[2] Generally, this practice involves the district court requesting counsel to submit findings of fact and conclusions of law before or after the trial.[3] This spares the court the sometimes difficult and time-consuming process of writing its own explanation of the facts and how the law applies to them. While this practice allows courts to operate more efficiently, the procedure the court adopts in requesting and reviewing a submission, or

1. Federal Rules of Civil Procedure: Advisory Committee's Report, 1 F.R.D. 79, 80 (1940).

2. *See, e.g.*, *In re* Las Colinas, Inc., 426 F.2d 1005, 1008 (1st Cir. 1970) ("The practice of inviting counsel to submit proposed findings of fact and conclusions of law is well established as a valuable aid to decision making."); Howard v. Howard, 34 P. 1114, 1117 (Kan. 1893) ("It is not an uncommon practice for the attorneys of the respective parties to formulate such findings as they desire to have made, leaving the court to adopt them, or such of them as in its judgment have been established by the proofs."). *See also* Hon. Gunnar H. Nordbye, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 25, 30 (1940) (relaying his experience as a judge asking counsel for help in framing the findings of fact); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2578 (2d ed. 1994 & Supp. 1998).

3. *See* Hill & Range Songs, Inc. v. Fred Rose Music, Inc., 413 F. Supp. 967 (M.D. Tenn. 1976).

submissions, may cause losing parties to feel as though their position has not been thoroughly considered.[4] This results in appeals.[5] In the past, when presented with findings of fact or conclusions of law drawn verbatim from one of the party's memorandums of law, the courts of appeals struggled with the decision whether to apply the clearly erroneous standard mandated by FRCP 52[6] or review the facts with heightened scrutiny.[7] Analyzing the trial court's findings with heightened scrutiny not only expends additional court resources, but it also inevitably undermines the respect appellate courts are to give to the findings of the trial court. The Supreme Court settled the standard of review in the 1980s, but recently courts seem to have reverted back to a heightened standard. This change is based on the procedure at the lower court. Despite the precedent set by the Supreme Court and despite the Federal Rules Committee's best effort to draft a clear rule, courts remain unsettled regarding the specific procedure to apply when adopting findings and conclusions verbatim, and the proper standard of review on appeal.

Based on Rule 52, a court is required to set forth the findings of fact separately from the conclusions of law.[8] Findings of fact are defined as "[d]eterminations from the evidence of a case . . . concerning facts averred by one party and denied by the another."[9] Conclusions of law are defined as

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4. *See Las Colinas*, 426 F.2d at 1008.

5. Under Rule 52, as opposed to state law, where parties must request specific findings of fact, parties in federal court need not request findings because the district court is required to find the facts specially. On appeal, parties have the option to raise the issue of the judge's adoption of findings of fact and conclusions of law. Appellants preserve this issue under Rule 52(b), which states:

> On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings – or make additional findings – and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings [under Rule 52(c)].

FED. R. CIV. P. 52(b). *See generally* 75B AM. JUR. 2D *Trial* § 1999 (1995); 105 NY JUR. 2D *Trial* § 583 (1992); 54 A.L.R. 3d § 868 (1974).

6. FED. R. CIV. P. 52. Courts refer to the following text in Rule 52(a) when discussing verbatim adoption of findings of fact and conclusions of law:

> [T]he court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court judge to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

FED. R. CIV. P. 52(a).

7. *See infra* notes 137-54 and accompanying text.

8. FED. R. CIV. P. 52(a).

9. BLACK'S LAW DICTIONARY 437 (6th ed. 1991).

"[s]tatement[s] of court[s] as to law applicable on basis of [the] facts."[10] One commentator noted that requiring trial courts to indicate their findings of fact serves three main purposes: (1) aid the appellate court in reviewing the case,[11] (2) narrow and clarify the issues for the proper application of estoppel and res judicata,[12] and (3) ensure the trial judge carefully analyzed and reviewed the facts.[13] Arguably, the findings of fact and conclusions of law are indistinguishable.[14] However, when a judge adopts these findings and conclusions verbatim, their significance becomes more apparent.

This article analyzes the practice of the verbatim adoption of findings of fact and conclusions of law, focusing on federal district courts. Part II outlines the evolution of the practice through the history of Rule 52 and through the judiciary's response to district courts who adopt findings of fact and conclusions of law verbatim. Part III discusses circumstances in which it may, or may not, be appropriate to adopt findings and conclusions verbatim. Part IV analyzes the various procedures district courts apply when adopting findings and conclusions, and whether appellate courts consistently apply the clearly erroneous standard. Part V outlines the various ethical and professional obligations of judges and attorneys. The article concludes that the practice of adopting findings and conclusions verbatim will continue to evolve and endure in the courts. However, the history of the practice balanced with the duties of attorneys and the judiciary provides sufficient checks against abuse of the practice.

## II. THE EVOLUTION OF THE ACCEPTED PRACTICE

### A. *History of Rule 52*

Enacting the Federal Rules of Civil Procedure was a milestone in the evolution of the American judicial system, particularly in light of the significance of findings of fact and the standard of review on appeal. The purpose of the rules was to adopt a uniform system for all federal cases, thereby abolishing the procedural distinction between equity cases and common law actions that had existed since 1789.[15] Distinguishing between the

10. *Id*. at 200.

11. 9A WRIGHT & MILLER, *supra* note 2, § 2571 n.8.

12. *Id*. § 2571 n.9.

13. *Id*. § 2571 n.10.

14. *See* Nevin Van de Streek, *Why Not 'Findings of Law' and 'Conclusions of Fact' and Opinions About Both?*, 70 N.D. L. REV. 109 (1994) (suggesting that there is not really a difference between findings and conclusions).

15. *See generally* Hon. W. Calvin Chestnut, *Analysis of Proposed New Federal Rules of Civil Procedure*, 22 A.B.A. J. 533, 540 (1936) (analyzing the proposed federal rules) ("[T]he new rules as a whole professedly abolish the distinction between law and equity saving only the preservation of jury trial as required by the 7th Amendment."); Charles E. Clark & Ferdinand F.

two systems on appeal, one commentator noted that equity review on appeal consisted of a re-examination of the entire record of both the facts and the law, where Rule 70½ would apply.[16] Alternatively, an appeal at law was limited to a review of the alleged errors made by the trial court.[17] Also at law, before the trial, a party could waive a jury trial so that a judge, instead of a jury, would determine the facts of the case.[18]

While most welcomed a uniform procedural system, the rule that is now Rule 52, was first Rule 68,[19] and various commentators raised issues surrounding the appropriate weight of the findings in light of the judge's role as well as the potential for an increased number of appeals.[20] Specifically, the main issues consisted of (1) the threat of less weight being given to the findings compared to verdicts, (2) the significance of the trial judge's ability to

Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 190-91 (1937) (discussing the issues surrounding the adoption of rules uniting actions at equity and law regarding findings of fact).

16. Clark & Stone, *supra* note 15, at 190. For a more historical account of the Federal Rules of Equity, see Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary Evidence or Undisputed Evidence*, 49 VA. L. REV. 506 (1963) [hereinafter Note] (summarizing the evolution of Rule 52). Equity Rule 70½ stated in part:

> In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and, in granting or refusing interlocutory injunctions, the court of first instance shall similarly set forth its findings of fact and conclusions of law which constitute the grounds of its action.

9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 52App.01 (3d ed. 1999).

17. Clark & Stone, *supra* note 15, at 190.

18. Act of Mar. 3, 1865, ch. 86, § 4, 13 Stat. 500, 501 (repealed 1948). The statute allowed parties to waive a jury trial, stating in part:

> [I]ssues of fact in civil cases in any circuit court of the United States may be tried and determined by the court without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk of the court waiving a jury. The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury.

*Id. See also* Edson R. Sunderland, *Findings of Fact and Conclusions of Law in Cases Where Juries are Waived*, 4 U. CHI. L. REV. 218 (1937) (reviewing the formalities of findings of fact and conclusions of law in common law actions).

19. Rule 68 stated in part:

> In all actions tried without a jury, the court shall find the facts specially and state separately the conclusions of law thereon; and in granting or refusing interlocutory injunctions, the court shall similarly set forth its findings of fact and conclusions of law which constitute the grounds of its action. The findings of the court in such cases shall have the same effect as that heretofore given to findings in suits in equity.

*See* William W. Blume, *Review of Facts in Non-Jury Cases*, 20 J. AM. JUDICATURE SOC'Y 68, 70-71 (1936) (citing Rule 68).

20. *Compare* Chestnut, *supra* note 15, at 540-41, *with* Blume, *supra* note 19, at 71-73 (supporting Rule 68 in light of Judge Chestnut's criticism), and Clark, Letter to the Editor, *Review of Facts Under Proposed Federal Rules*, 20 J. AM. JUDICATURE SOC'Y 129 (1936) (responding to Prof. Blume's article).

see and hear the witnesses as opposed to the "cold printed record,"[21] and (3) the compelling interest of reducing the number of appeals.[22]

To address one of these major issues, in an amendment in 1946, the committee drafting the Rules of Federal Procedure tried to resolve confusion regarding the use of findings of fact in court memoranda or opinions.[23] According to the Committee, the amendment would "remove any doubt that findings and conclusions are unnecessary upon decision of a motion."[24] Courts tried to conform to this standard, adapting its findings of fact to be a "fair presentation" for the appellate court.[25] The findings and conclusions only needed to include the most relevant details relating to issues in the case.[26] Courts were careful not to set a standard so high that it would "impose onerous labors on a district judge,"[27] and maintained their support for counsel's "aid" to the trial judge in drafting or correcting the findings of fact or conclusions of law.[28] In its attempt to create a uniform standard, however, the Committee drafted a rule allowing such a high degree of subjectivity that courts interpreted Rule 52(a) inconsistently.[29] This confusion resulted in various procedures of adopting findings of fact and conclusions of law verbatim, folllowed by appellate courts establishing a standard of review higher than the clearly erroneous standard.[30]

21. Chestnut, *supra* note 15, at 540.

22. *See generally* Blume, *supra* note 19, at 71-73 (arguing points presented by Judge Chestnut).

23. *See* 9 MOORE ET AL., *supra* note 16, § 52App.02. The committee added two sentences:

> If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided by Rule 41(b).

*Id.*

24. *Id*.

25. Matton Oil Transfer Corp. v. The Dynamic, 123 F.2d 999, 1001 (2d Cir. 1941).

26. *See* United States v. Forness, 125 F.2d 928, 942-43 (2d Cir. 1942).

27. *Matton*, 123 F.2d at 1001.

28. *Id*.

29. *See generally* Lundgren v. Freeman, 307 F.2d 104, 113-16 (9th Cir. 1962); Terri Y. Lea, *Federal Rule of Civil Procedure 52(a): Applicability of the "Clearly Erroneous" Test to Findings of Fact in All Nonjury Cases*, 29 HOW. L.J. 639 (1986); Edward H. Cooper, *Civil Rule 50(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 655 (1988) ("The courts apply the clear error standard to such cases, at times even when there is telling circumstantial evidence that the district judge has not undertaken the responsibility of independent decision.").

30. *See, e.g.*, Roberts v. Ross, 344 F.2d 747, 752-53 (3d Cir. 1965).

*B. The Road to the Supreme Court*

It is not surprising that district courts have interpreted Rule 52 inconsistently. There are numerous ways in which a court may request findings and conclusions from parties and review those submissions. Unfortunately, the Supreme Court has addressed the practice of adopting findings of fact and conclusions of law verbatim in only a few cases, and in those cases, the Court narrowly tailored its opinion to the facts of the case.[31] These opinions do not embrace a specific procedure; the Court merely reviews the lower court's procedure in requesting the findings of fact and conclusions of law. Generally, an upper-level court focuses on the district court's duty to demonstrate independent thought and analysis in its opinion, which is the same guideline adopted by state courts.[32]

1. The Significance of Findings of Fact and Conclusions of Law

Before the issue of the verbatim adoption of findings and conclusions even arose, the Supreme Court recognized the need for a court to draft findings of fact independent of the final opinion in *Interstate Circuit*, a case on direct appeal.[33] In *Interstate Circuit* the trial court did not write formal findings, contrary to the requirement under Rule 70½.[34] The Supreme Court stated that a district court's opinion would not constitute an adequate substitute for findings of fact.[35] Emphasizing the significance of findings in a bench-tried case, the Supreme Court noted that for a district court to satisfy its duty, it should dispose of all the issues in the case "appropriately and specifically" in special and formal findings of fact.[36] The later adoption of Rule 52 eliminated any confusion created by Rule 70½ by explicitly requiring that a court must find and state the facts at issue.[37]

While the Court thus made clear the duty to state findings of fact and conclusions of law, courts were left to determine the extent to which they could adopt findings of fact and conclusions of law into an opinion. Only a few years after *Interstate Circuit*, the Second Circuit confronted a case in which it was apparent that the lower court had "mechanically adopted" the

31. *See infra* Part II.B.3.

32. *See, e.g.*, State v. Kenley, 952 S.W.2d 250, 281-85 (Mo. 1997) (Stith, J., dissenting); Mullenix-St. Charles Properties, L.P. v. City of St. Charles, 983 S.W.2d 550, 555-56 (Mo. App. 1998); Outdoor Advertising Ass'n of Ga. v. Dep't of Transp., 367 S.E.2d 827, 828 (Ga. Ct. App. 1988).

33. Interstate Circuit, Inc. v. United States, 304 U.S. 55 (1938).

34. *Id.* at 56.

35. *Id.*

36. *Id.* at 55-56.

37. *See* Nordbye, *supra* note 2, at 28-29 (discussing the significance of findings of fact under Rule 52 in contrast to Rule 70½).

proposed findings of fact into the opinion.[38] The district court's opinion in *Forness* included the objections to the defendant's proposed findings, and upon further investigation, the Second Circuit determined that some of these findings were neither supported by the evidence[39] nor substantially consistent with the court's opinion.[40] The "mechanically adopted" term became the standard used by courts to analyze the extent to which the lower court analyzed the facts and wrote the opinion using independent thought.[41] This threshold acknowledged the court's enduring and significant role of fact-finding.[42] Judge Frank stated, "The correct finding . . . of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found."[43]

2. Standard of Review

While both courts and commentators recognized the significance of findings, the issue of the appropriate standard of review remained unresolved.[44] However, in *Gypsum*, the Supreme Court reviewed the findings in detail, and applied the clearly erroneous standard of review outlined in the newly adopted Rule 52.[45] This standard encompassed the same premise underlying the practice in equity: the district court's findings, while not determinative, should carry great weight with the appellate court since it has observed witness testimony firsthand.[46] The Court further defined the clearly erroneous standard with respect to findings, stating: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court

38. *Forness*, 125 F.2d at 930, 942.

39. *Id*. at 656. *See also* United States v. Crescent Amusement Co., 323 U.S. 173, 185 (1944) ("[The findings] must stand or fall depending on whether they are supported by evidence.").

40. *Forness*, 125 F.2d at 942. ("Such a result can usually be avoided by . . . filing findings with the opinion.").

41. *See, e.g*., United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); McDowell v. Safeway Stores, Inc., 753 F.2d 716, 717 (8th Cir. 1985) (selecting certain submitted findings and independently writing some findings was sufficient to show there was not a "mechanical" adoption of the findings of fact); Apex Oil Co. v. Vanguard Oil & Serv. Co., 760 F.2d 417, 421-22 (2d Cir. 1985) (deleting argumentative language and including independent findings were sufficient to show there was not a "mechanical" adoption of the findings and conclusions).

42. *See Forness*, 125 F.2d at 942. *See generally infra* Part V.A.

43. *Id.*

44. *See generally* Solomon Oliver, Jr., *Appellate Fact Review Under Rule 52(a): An Analysis and Critique of Sixth Circuit Precedent*, 16 U. TOL. L. REV. 667, 674 (1985) (analyzing the appropriate standard of review with respect to the type of evidence presented and to findings applying the law to the facts).

45. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

46. *Id. See also* Clark & Stone, *supra* note 15, at 207-08; Note, *supra* note 16, at 514-15 n.51.

on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[47]

Despite the Court's clear precedent in *Gypsum*, appellate courts remained skeptical when a lower court adopted findings and conclusions verbatim. To address this concern, the Third Circuit established a higher standard of review than the clearly erroneous standard for findings of fact prepared *ex post facto*.[48] The Fourth Circuit also adopted this standard.[49] For example, in *Roberts v. Ross,* the trial court concluded that the parties had not made a promise in an oral contract dispute regarding a commission, and found for Ross.[50] First, the trial court announced its decision for Ross as a general verdict, and did not write any facts or conclusions of law.[51] Then, the judge directed Ross' counsel to write the findings of fact, conclusions of law, and form of judgment.[52] The district court adopted those findings and conclusions verbatim.[53] On appeal, Judge Maris criticized the procedure the trial court had applied, stating the procedure "flies in the face of the spirit and purpose, if not the letter, of Rule 52(a)," and consequently, the court had "no indication of the legal standard under which the evidence was considered." [54]

According to Judge Maris, the trial court's duty is to "formulate and articulate" the facts, accomplishing two main purposes: (1) enable the parties to better understand the court's reasoning and analysis and (2) assist the

47. *Gypsum*, 333 U.S. at 395, 396 ("Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact."). At that time, therefore, the Supreme Court was "unclear" regarding whether the clearly erroneous standard applied to all categories of fact evidence. Oliver, *supra* note 44, at 674.

48. *See Roberts,* 344 F.2d at 751-52; William A. Kaplin, *Federal Procedure: Fed. R. Civ. P. 52(a): The Role of Counsel in Preparation of Special Findings of Fact:* Roberts v. Ross, *344 F.2d 747 (3d Cir. 1965)*, 51 CORNELL L. REV. 567, 569-70 (1966).

49. *See, e.g.*, Cuthbertson v. Biggers Bros., Inc., 702 F.2d 454 (4th Cir. 1983); EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983); Chicopee Mfg. Corp. v. Kendall Co., 288 F.2d 719 (4th Cir. 1961).

50. *Roberts*, 344 F.2d at 751.

51. *Id*.

52. *Id.* The appellate court did not state whether the losing party either submitted any findings or conclusions, or whether they were given an opportunity to respond to the prevailing party's findings and conclusions. The lower court opinion is not published.

53. *Id.* at 748.

54. *Id*. at 751. Judge Maris stated:

> The purpose of [Rule 52] is to require the trial judge to formulate and articulate his findings of fact and conclusions of law in the course of his consideration and determination of the case and as a part of his decision making process, so that he himself may be satisfied that he has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the basis of his decision when it is made.

*Id.*

appellate court in reviewing the case.[55] When a trial court decides the outcome of a case and then later adopts one party's findings verbatim, the appellate court lacks a sufficient foundation for knowing that the adopted findings were in fact the basis of the court's decision.[56] To discourage this practice, the Third Circuit held that unless the trial court could *prove* it had studied the facts or had written the findings, the appellate court would adopt a more stringent standard of review.[57] Under this higher standard of review, the appellate court would analyze the findings and conclusions "more narrowly" and given them "less weight."[58]

Twenty years later, in *United States v. El Paso Natural Gas Co*., the Supreme Court supported the circuits' condemnation of trial courts that "mechanically" adopt findings of fact and conclusions of law and cautioned appellate judges to uphold their duty to review.[59] In *El Paso*, after the trial, the district court judge announced he was going to dismiss the case, would not write an opinion, and instructed the prevailing party, El Paso Natural Gas Co., to write the findings of fact.[60] Counsel submitted 130 findings of fact and one conclusion of law, all of which the court adopted verbatim.[61] The Supreme Court rejected the district court's "mechanical adoption" of the findings of fact and implied the lower court had failed to satisfy its primary duty to prepare findings.[62] According to Justice Douglas, the judge must prove the findings were "the product of the workings of his mind."[63] Despite its disapproval, the Supreme Court did not reject the lower court's findings because the evidence supported them.[64] Furthermore, the Court left the issue of the appropriate standard of review for another day. Justice Douglas did not announce the

55. *Roberts*, 344 F.2d at 751.

56. *Id*. at 751-52.

57. *Id*. at 752 n.5 (citing Kinnear-Weed Corp. v. Humble Oil & Refining Co., 259 F.2d 398, 400-01 (5th Cir. 1958)); Mesle v. Kea Steamship Corp., 260 F.2d 747, 750 (3d Cir. 1958) (analyzing the facts and conclusions narrowly).

58. *Roberts*, 344 F.2d at 752.

59. 376 U.S. 651, 656-57 (1964). The United States charged El Paso Natural Gas Co. with a violation of the Clayton Act after the company acquired the assets of a pipeline company, claiming the acquisition reduced the level of competition in California's natural gas market. *Id.* at 652.

60. *El Paso*, 379 U.S. at 656.

61. *Id.*

62. *Id.* at 657 n.4 (referring to Judge J. Skelly Wright, who warned judges not to sign "what some lawyer puts under your nose," since the findings may be tainted with a zealous lawyer's version of the facts. He stated, "When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.").

63. *Id.* at 656.

64. *Id.* at 657.

clearly erroneous standard *per se*, but he did acknowledge the Court's reliance on Rule 52 in reaching its decision.[65]

A decade later, the Supreme Court again had an occasion to criticize a district court that adopted findings of fact and conclusions of law verbatim.[66] In another case on direct appeal, the lower court had failed to include citations to the transcripts, making review more difficult.[67] The Court strongly recommended that district courts assist appellate courts by entering an opinion "analyzing the relevant precedents in light of the record" so that it would not be "deprived of this helpful guidance."[68] Again, despite its criticism, the Supreme Court did not analyze the facts with greater scrutiny; instead, it applied the clearly erroneous standard pursuant to Rule 52.[69]

3. The Supreme Court Speaks

Even though the Supreme Court had repeatedly expressed its disapproval of courts adopting findings of fact and conclusions of law verbatim, it did not definitively announce the appropriate standard of review until *Anderson v. City of Bessemer City.*[70] By the adopting the clearly erroneous standard as the sole basis for review, the Supreme Court rejected the heightened standard of review that various circuits, such as the Third and Fourth Circuits, had consistently applied.[71] In *Anderson*, Phyllis Anderson, represented by the EEOC, sued Bessemer City, North Carolina in a sexual discrimination suit after the city hired a male to be recreation director.[72] The district court decided in favor of Anderson, and then asked her counsel to submit detailed findings of fact and conclusions of law, allowing the city to submit objections to the findings.[73] Ultimately, the trial judge issued its own findings of fact and conclusions of law, by adopting the "substance" of the submitted findings of fact, with some editing and additions.[74] The Fourth Circuit strongly disapproved of this practice and determined that the trial court erred in requesting the findings of fact *ex post facto* and in adopting the "substance" of the prevailing party's

65. *El Paso*, 379 U.S. at 657 n.4.

66. United States v. Marine Bancorporation Inc., 418 U.S. 602, 615 n.13 (1974) (citing *El Paso*, 376 U.S. at 656-57).

67. *Id.* The findings of fact did not include cites to the transcript.

68. *Id.*

69. *Id.*

70. *Anderson*, 470 U.S. at 573.

71. *See, e.g.*, *Roberts*, 344 F.2d at 752 (establishing a higher standard of review for findings of fact and conclusions of law adopted verbatim).

72. *Id.*

73. *Id.*

74. *Id.* at 572-73; *see* Anderson v. City of Bessemer City, 717 F.2d 149, 156 (4th Cir. 1983).

findings.[75] Following precedent, the Fourth Circuit analyzed the facts with heightened scrutiny.[76]

The Supreme Court rejected this reasoning, stating that the determining factor was whether the judge "uncritically accepted" the findings submitted by the prevailing party.[77] In *Anderson*, this did not appear to be the situation. First, the Court reasoned that the lower court had presented a general framework and had requested Anderson to provide more detailed findings.[78] Also, the city had sufficient opportunity to respond to the proposed findings.[79] Finally, the trial court had "considerably" modified the original findings of fact in both organization and content.[80] Considering these factors, the Supreme Court did not undergo the same heightened standard of review that had been applied by circuits that condemned the practice. Instead, the Supreme Court deferred to the clearly erroneous standard under Rule 52(a).[81]

The Court acknowledged the meaning of clearly erroneous is "not immediately apparent," but citing the clearly erroneous standard and the language in *Gypsum*,[82] the Court would not overturn the findings unless there was evidence that a mistake had been committed.[83] Moreover, based on the history of Rule 52, the Court stated that the duties of an appellate judge do not include a *de novo* review of factual issues.[84] The court maintained that the determination of whether a mistake has been made does not allow an appellate judge to reverse a decision because he or she would have decided the case differently.[85] Instead, the appellate court must defer to the trial judge's findings of fact.[86]

75. *Anderson,* 717 F.2d at 156.

76. *Id. See supra* note 49 and accompanying text.

77. *Anderson*, 470 U.S. at 572.

78. *Id*.

79. *Id*.

80. *Id.* at 572-73.

81. *Id*. at 573. *See supra* note 2 and accompanying text.

82. *See supra* notes 45-47 and accompanying text.

83. *Anderson*, 470 U.S. at 573; *see also Gypsum*, 333 U.S. at 395.

84. *Anderson*, 470 U.S. at 573 (citing Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U.S. 100, 123 (1969)). *Compare* Hon. John F. Nangle, *The Even Widening Scope of Fact Review in Federal Appellate Courts – Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. U. L.Q. 409 (1981) (warning readers of the expansion of the appellate courts who review the facts), *with* Hon. John C. Goldbold, *Fact Finding by Appellate Courts – An Available and Appropriate Power*, 12 CUMB. L. REV. 365, 366 (1982) (supporting the appellate courts' review of the facts).

85. *Anderson*, 470 U.S. at 573.

86. *Id*. at 575. Rule 52 requires the appellate court to defer to the trial judge's findings of fact especially if they are based on "determinations of credibility," as opposed to findings based strictly on documentary evidence. In so deciding, the Supreme Court codified the language in Rule 52(a) stating, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . ." STEPHEN C. YEAZELL, CIVIL PROCEDURE 778 (4th ed.

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The Court thus concluded the Fourth Circuit interpreted the evidence and ruled according to the decision it would have made at the trial court level, which amounted to a *de novo* review of the findings.[87] This violated the appellate court's obligation to defer to the trial court's findings of fact.[88] Therefore, the clearly erroneous standard applied only to the trial court's findings, and the Court's review of those findings did not indicate that they were clearly erroneous.[89]

## III. KNOWING WHEN TO SAY WHEN: CONSIDERING THE GRAVITY AND COMPLEXITY OF A CASE

### A. *Intellectual Property: Patents*

In cases involving intellectual property, such as patents, commentators and courts seems less likely to criticize the verbatim adoption of findings of fact and conclusions of law.[90] The inherently complex and sometimes confusing nature of patents makes the facts difficult to discern for judges who are not technically oriented. Most circuits have explicitly recognized the distinction between "ordinary" cases and complex patent cases. These circuits seem to

1996). *See generally* Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1429 (7th Cir. 1985); 9 MOORE ET AL., *supra* note 16, § 52App.06 and accompanying text.

In a concurring opinion, however, Justice Blackmun stated he might decide differently if the findings of fact were based on documentary evidence. *Anderson*, 470 U.S. at 581. *See* Lea, *supra* note 29, at 651-52.

87. *Anderson*, 470 U.S. at 576. The district court read the evidence independently and then decided in favor of Phyllis Anderson based on her diverse qualifications, which fit the job description. The appellate court, however, interpreted the job differently and concluded that another (male) applicant was better qualified. *Id.* at 576-77.

88. *Id.* at 577. Justice White had already confirmed the credibility of the trial judge's findings of fact. *See infra* note 126 and accompanying text.

89. *Anderson*, 470 U.S. at 577, 580-81. Justice Powell, in his concurring opinion, cautioned appellate courts not to apply the clearly erroneous standard in Rule 52(a) in a "conclusory fashion." He stated the majority's discussion of the Fourth Circuit's "meticulous" review of the record was not criticism of its "comprehensive review of the entire record of the case," since some cases may require this kind of "burdensome" review. *Id.* at 581.

90. *See generally* Bradley G. Lane, Note, *A Proposal to View Patent Claim Nonobviousness from the Policy Perspective of Federal Rule of Civil Procedure 52(a)*, 20 U. MICH. J.L. REV. 1157 (1987) (providing a detailed explanation of appellate review of patents); Maureen McGirr, Note, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit:* Note, Panduit Corp. v. Dennison Mfg. Co.: *De Novo Review and the Federal Circuit's Application of the Clearly Erroneous Standard*, 36 AM. U. L. REV. 963 (1987) (discussing the Federal Circuit's application of the clearly erroneous standard of review may overstep the boundaries of Rule 52(a)); WRIGHT & MILLER, *supra* note 2, § 2591.

recommend courts *should* adopt the proposed findings verbatim if the court lacks the requisite knowledge to draft its own findings.[91]

In addition to such substantive issues, the procedural posture in patent cases differs from other civil cases because patent disputes may originate at the United States Patent and Trademark Office ("USPTO").[92] If an applicant is dissatisfied with the decision made by the Board of Patent Appeals and Interferences ("BPAI") at the USPTO, the applicant may appeal at the district court level or at the Court of Appeals for the Federal Circuit Court.[93] In *Gechter v. Davidson*, the Federal Circuit held that the BPAI must write specific findings of fact and conclusions of law.[94] Similar to district courts, predicted one commentator, administrative patent judges will soon require submission of findings and conclusions – on disks, making it easier for courts to revise and edit those submissions.[95] If the case is appealed, the Federal Circuit will apply the "clearly erroneous" standard of review.[96] As a result, similar to other civil cases, parties might request the appellate court to analyze

91. Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 616 F.2d 464, 468 n.6 (10th Cir. 1980) (citing Photo Elecs. Corp. v. Ferrex Corp., 581 F.2d 772, 777 (9th Cir. 1978) ("Although the practice has been disapproved, we have indicated that it may be permissible in cases 'involving highly technical issues such as may be involved in patent cases and complex scientific problems.'") (citation omitted); Keystone Plastics, Inc. v. C & P Plastics, Inc., 506 F.2d 960, 962 (5th Cir. 1975) ("[I]n areas of highly specialized litigation the typical judge is apt to be unfamiliar with the nomenclature common to the art or science involved. In such cases he needs help in reducing his ultimate decision to accurate and understandable words."); Louis Dreyfus & Cie. v. Panama Canal Co., 298 F.2d 733, 738 (5th Cir. 1962) (stating the "indispensable" aid of counsel submitting findings in cases where the facts deal with patents); *Las Colinas*, 426 F.2d at 1009 (citing Nyyssonen v. Bendix Corp., 342 F.2d 531, 532 (1st Cir. 1965) (supporting the verbatim adoption of the findings and conclusions to avoid scientific error)).

92. Gechter v. Davidson, 116 F.3d 1454, 1457-58 (Fed. Cir. 1997). After review of the Board of Patent Appeals and Interferences, a party may appeal a decision to the United States Court of Appeals under 35 U.S.C. § 141. *See* 37 C.F.R. § 1.301 (1996), *construed in Gechter*, 116 F.3d at 1457.

93. This circuit was created in 1982 and is assigned to hear patent cases. *See* 35 U.S.C. § 144 (1994) stating in part, "The United States Court of Appeals for the Federal Circuit shall review the decision form which an appeal is taken on the record before the Patent and Trademark Office." *See also* McGirr, *supra* note 90, at 964-65 n.8; notes 40-59 and accompanying text.

94. *Gechter*, 116 F.3d at 1460.

95. *See* Charles L. Ghols, *The BPAI and the TTAB are Required to Set Forth Specific Findings of Fact and Conclusions of Law Adequate to Form a Basis for Appellate Review,* 80 J. PAT. & TRADEMARK OFF. SOC'Y 5 (1998); *see also* Roger G. Strand, *The Courtroom of the Future*, 28 JUDGES J. 8 (1989) (suggesting that computer-integrated courtrooms should become more widespread to increase efficiency and production).

96. *Gechter,* 116 F.3d at 1457-58. *See also* Roton Barrier, Inc. v. Stanley Works, 79 F.3d 1112, 1116 (Fed. Cir. 1996) (supporting the clearly erroneous standard of review); Hybritech Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367, 1374 (Fed. Cir. 1986) (discussing the application of Rule 52 in the Federal Circuit in light of the *Anderson* decision). *See generally* 119 F.R.D. 45, 167 (1988); WRIGHT & MILLER, *supra* note 2, § 2591; Lane, *supra* note 90, at 1164 n.38.

the facts and accord them less weight.[97] The Federal Circuit stated that it will not apply this higher standard because "[i]t is acceptable for a trial court to adopt 'many or most of the parties' proposed findings of fact and conclusions of law, particularly if skillfully and wisely drafted."[98]

### *B. Civil Cases v. Criminal (Death Penalty) Cases*

Adopting findings of fact and conclusions of law outside the civil law context creates new issues since a court may be deciding the fate of a defendant, an especially solemn duty in death penalty cases.[99] In *Kenley*, the Missouri Supreme Court concluded that in light of the common practice of adopting findings and conclusions, so long as the court "thoughtfully and carefully" considered the parties' proposed findings, the lower court did not err.[100] But the lone dissenter highlighted the "qualitative difference" between death and other forms of punishment, both in criminal and civil law the obvious difference being the finality of death.[101] In light of these differences, the Florida Supreme Court stated: "The trial judge has the single most important responsibility in the death penalty process. Under this process, a trial judge may not impose the death penalty unless he or she articulates in writing his or her factual findings and the reasons for imposing the death penalty."[102] Continuing her analysis in *Kenley* of the verbatim adoption in death penalty cases, Judge Stith also added that upper-level courts have a duty to review to the findings to "determine whether the judge below, the judge who actually heard the evidence, exercised his or her independent judgment in adopting the . . . findings."[103] Nevertheless, if the judge adopts the findings of fact and conclusions of law verbatim, the analysis on appeal will not change; the appellate judge must still determine whether the trial judge reviewed the facts independently.[104]

97. *Roton*, 79 F.3d at 1116.

98. *Id*. (citing Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 23 (7th Cir. 1992)). *See generally* McGirr, *supra* note 90 and accompanying text.

99. *See* State v. Kenley, 952 S.W.2d 250, 282-83 (Mo. 1997) (Stith, J., dissenting). The court had written its own findings and conclusions, but the assistant attorney general submitted a new set of findings and conclusions. The trial judge adopted the submitted suggestions verbatim. *Id*. at 278-79.

100. *See Kenley*, 952 S.W.2d at 260-61 ("Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence." (quoting *El Paso*, 376 U.S. at 656)).

101. *Id*. at 285 (citations omitted).

102. Corbett v. State, 602 So.2d 1240, 1243-44 (Fla. 1992).

103. *Kenley*, 952 S.W.2d at 283 ("I do not believe we can affirm simply by deciding that a reasonable judge could reach the findings and conclusions set out in the court's judgment.").

104. *Id.* at 281-85.

## IV. DOUBLE TROUBLE: THE DISTRICT COURT'S PROCEDURE AND THE APPELLATE COURT'S STANDARD OF REVIEW

### A. *"Timing Is Everything"*

In *Anderson*, the Court seemed to rely on the procedure used by the district court as sufficient support to uphold the findings.[105] In other cases, however, parties may not have had the opportunity to review and respond to the submitted findings of fact and conclusions of law. In such cases parties have argued on appeal that their Due Process rights have been violated.[106] This is particularly so when judges have requested findings and conclusions *ex parte*, and subsequently adopted those findings of fact and conclusions of law verbatim.[107] Without explicit guidance regarding the procedural aspects of adopting findings and conclusions verbatim, courts remain confused as to whether this practice is acceptable in *all* cases, and on appeal, whether the clearly erroneous standard is the appropriate standard for review.

Generally, a court will request findings either prior to the trial, before the case is submitted to the court, or after a full presentation of the evidence.[108] For example, one Tennessee district court explained that it would request each party's counsel to submit proposed findings of fact and conclusions of law after the trial as though that party had prevailed.[109] It will then use those findings and conclusions to write its memorandum opinion, "rarely . . . adopt[ing] proposed findings of fact and conclusions of law without making alterations, based on the court's independent research and consideration."[110]

The Tennessee court also emphasized that occasionally cases will be of such length or complexity that it requires counsel to assist in preparing the opinion.[111] If this occurs, the court explained that it would notify the parties in writing and include the notification in the court file.[112] Again, this step in the court's procedure indicates its attempt at being fair to both parties. An extreme

105. *Anderson,* 470 U.S. at 572 (concluding that the lower court's procedure was fair because the losing party had the opportunity to respond to the submitted findings of fact).

106. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."). *See, e.g.*, Bilzerian v. Shinwa Co. Ltd., 184 B.R. 389, 392 (M.D. Fla. 1995) ("Due process is denied a party when a judge adopts a party's order verbatim, without previously conclusively ruling on the matters in it.").

107. *See also* Mullenix-St. Charles Properties, L.P. v. City of St. Charles, 983 S.W.2d 550, 555-56 (Mo. App. 1998).

108. *See* Kaplin, *supra* note 48, at 569.

109. *See Hill & Range Songs*, 413 F. Supp. at 969.

110. *Id.* (discussing its deviation from its normal procedure because the findings and conclusions had been extensively briefed). *See also* Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 332 (4th Cir. 1983) (charging district courts to request findings and conclusions before reaching and announcing a decision to use the submissions to analyze the relevant issues).

111. *Id.*

112. *Id.*

example of court adopting findings and conclusions *without* independent research and consideration is a court's order that some appellate courts call a "ghostwritten" order.[113] A Florida district court described a ghostwritten order as "an *ex parte* order which is not the product of personal analysis and determination by the judge, but the overreaching and exaggeration of the attorney who drafted it."[114] This inherent risk creates the need for an impartial court[115] to analyze the findings of fact and conclusions of law under a process that is "fundamentally fair."[116]

Reviewing the district court's process to determine whether it is "fundamentally fair" requires the cooperation of the court and counsel. An appellate court will often analyze the orders or the opinion to determine whether the district court played an "active and inquiring role" in applying the submitted facts and conclusions.[117] Therefore, the demonstration of independent review is essential.[118] While the court retains the duty to review the submissions independently, counsel also has a duty to take advantage of any opportunity to be heard. For example, in *In re Dixie Broadcasting*, the court directed the prevailing counsel to address specific points to reach a particular result when writing the court's order.[119] Instead of notifying the parties in writing, as the Tennessee district court described, the lower court announced its request in open court when all counsel were present.[120] After

113. *See Bilzerian*, 184 B.R. at 392; *In re* Dixie Broad., Inc., 871 F.2d 1023, 1029 (11th Cir. 1989); *In re* Colony Square Co., 819 F.2d 272, 274-76 (11th Cir. 1987); *see also* Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 950 (1995) (rejecting the possibility that appellate courts could use the same "ghostwriting" procedures as district courts); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 287 (1996) (discussing the recent, drastic changes in federal appellate courts).

114. *Bilzerian*, 184 B.R. at 392.

115. *See* 28 U.S.C.A. § 455(a) (1998) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."). *See also* Aiken County v. BSP Division of Envirotech Corp., 866 F.2d 661, 679 (4th Cir. 1989) (citing Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978) ("The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his [or her] impartiality on the basis of all the circumstances.").

116. *See Colony Square*, 819 F.2d at 276-77.

117. *See id.*

118. *See, e.g.*, Pennsylvania Envtl. Defense Found. v. Canon-McMillan Sch. Dist., 152 F.3d 228, 233 (3d Cir. 1998) ("The central issue is whether the district court has made an independent judgment.").

119. *See Dixie Broad.*, 871 F.2d at 1030.

120. *Id*. In other cases, the courts have outlined the general framework of the opinion for counsel. *See, e.g.*, *Anderson*, 470 U.S. at 572.

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the order was written, the losing party did not request to review the draft or to make objections to it, even though opportunity to do so existed.[121]

Because there are numerous ways to achieve fairness to both parties, courts will not always scrutinize the lower court's exact procedure.[122] If the appellate court simply relies on the lower court's integrity, appellants may feel as though they are left without any recourse.[123] If, however, the court follows a general procedure that has been deemed to be "fundamentally fair," then an appellant's claim of a due process violation will fail and the lower court's opinion, adopting the findings and conclusions verbatim, will be upheld.[124]

### B. *Stricter Standard of Review*

Since the decision in *Anderson*, the Supreme Court has continued to uphold the clearly erroneous standard in cases where a lower court has adopted findings and conclusions verbatim in its opinion.[125] Unlike due process challenges where the appellate court usually analyzes the lower court's procedure,[126] in cases where parties challenge the clearly erroneous standard of

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121. *Dixie Broad*., 871 F.2d at 1030. *See*, *e.g*., *Lilly*, 720 F.2d at 330 (rejecting the claim that the trial court failed to perform its duty because the court had invited the losing party – twice – to either respond or submit its own findings of fact and conclusions of law and the losing party failed to do so).

122. *See, e.g.*, Marine Shale Processors, Inc. v. EPA, 81 F.3d 1371, 1386 (5th Cir. 1996) ("We tolerate the occasional use of this device because of our *trust* that district courts will closely examine the proposed findings and will carefully consider the objections and arguments of the opposing party.") (emphasis added); Triad Elec. & Controls, Inc. v. Power Sys. Eng'g, Inc., 117 F.2d 180, 187 (5th Cir. 1997) ("[B]ased on our review of the record, we are *confident* that the district court closely examined the proposals and likewise considered most carefully Triad's position.") (emphasis added).

123. *See* Walton v. United Consumers Club, Inc., 786 F.2d 303, 313 (7th Cir. 1986):

> The wholesale adoption of a party's proposed findings obscures the reasoning process of the judge. It deprives this court of the findings that facilitate intelligent review. It causes the losing litigants to conclude that they did not receive a fair shake from the court. If a judge allows himself to act as a mouthpiece for the winning party, the loser may conclude that the judge was not impartial – that he was an advocate, using an advocate's words, rather than a disinterested evaluator of the several advocates' urgings. This is an especially serious problem when the judge adopts language from a brief as opposed to selecting from among findings of fact that have been proposed by one side and subject to criticism by the other side.

*Id.* (citations omitted).

124. *See Colony Square*, 819 F.2d at 277.

125. *See generally* United States v. Bajakajian, 118 S. Ct. 2028, 2038 n.10 (1998) (upholding the clearly erroneous standard regarding district court's findings of fact); *Anderson*, 470 U.S. at 564, 572; United States v. United States Gypsum Co., 333 U.S. 364, 394-96 (1948). *See also* MICHOL O'CONNOR, O'CONNOR'S FEDERAL RULES: CIVIL TRIALS 565 (1998).

126. *See Marine Shale*, 81 F.3d at 1386 ("While we discourage this practice [of adopting findings and conclusions verbatim], we have never radically altered the standard of review in such cases, much less concluded that such an adoption results in a *per se* due process violation.").

review in Rule 52, the appellate court will examine the sufficiency of the findings of fact and conclusions of law.[127] If a party can present evidence proving the trial court did not review and analyze the facts independently, some circuits, the Fifth Circuit in particular, may fall away from the court's explicit application of the clearly erroneous standard and review the facts with greater scrutiny.[128] For example, the Fifth Circuit stated that if a court mechanically adopts the findings, regardless of who prepared them, the court will "take into account the District Court's lack of personal attention to factual findings in applying the clearly erroneous rule."[129] In these cases, however, it may be important to note that the precedent pre-dates the *Anderson* decision.[130]

Conversely, in some cases, appellants distinguish the facts in their case from those in *Anderson*, attempting to prove the facts are "inadequate" to undergo judicial review.[131] Having proven this, the appellant will then request that the court analyze the facts with greater scrutiny – despite the Supreme Court's decision in *Anderson*. When parties request this form of review, appellate courts look for evidence of independent thought, such as revisions to the findings of fact and conclusions of law.[132] For example, if the trial judge made minimal revisions to the submitted facts, then an appellate court may analyze the facts with stricter scrutiny.[133] In *Andre v. Bendix Corp.*, *both* parties requested the court to give the findings a "more critical" reading on appeal because the district court adopted "substantial portions" of Andre's

127. Andre v. Bendix Corp., 774 F.2d 793. *See generally* 5A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 52.6 (Supp. 1997).

128. *See* Sierra Club, Lone Star Ch. v. Cedar Point Oil Co. Inc., 73 F.3d 546, 574 (5th Cir. 1996) (citing FDIC v. Texarkana Nat'l Bank, 874 F.2d 264, 267 (5th Cir. 1989)); *cf.* SEC v. Rogers, 790 F.2d 1450, 1456 n.11 (9th Cir. 1986) (declining to grant little deference to the findings since they were adopted verbatim); *see generally* MANUAL FOR COMPLEX LITIGATION § 22.52 (3d ed. 1995).

129. *Texarkana Nat'l Bank*, 874 F.2d at 267 (citing Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 258 (quoting Wilson v. Thompson, 593 F.2d 1375, 1384 n.16 (5th Cir. 1979))).

130. *See id.*

131. *Andre*, 774 F.2d at 793-94 (7th Cir. 1985) (citing *Anderson*, 470 U.S. at 573).

132. Pepsico, Inc. v. Redmond, 54 F.3d 1262, 1267 n.4 (7th Cir. 1995) ("Our review of the district court's opinion remains deferential, but, in these circumstances, requires a closer and harder look."). Here, the district court adopted the findings of fact and conclusions of law without any changes whatsoever, including the adoption of typographical errors. *Id.*

133. *Id.* *See also* Sierra Club v. Cedar Point Oil Co. Inc., 73 F.3d 546, 574 (5th Cir. 1996) (citing *Texarkana Nat'l Bank*, 874 F.2d at 267 (upholding the Fifth Circuit's application of stricter scrutiny if the trial judge adopts the prevailing party's findings of fact and conclusions of law verbatim)). *Compare* Alcock v. Small Bus. Admin., 50 F.3d 1456, 1459 n.2 (9th Cir. 1995) (applying the clearly erroneous standard but exercising greater scrutiny since the trial judge did not author the findings of fact in a bankruptcy case, where the court reviewed the facts de novo), *with* Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 567 (9th Cir. 1990) (applying the clearly erroneous standard after due to the trial judge's modifications to the findings of fact were evidence he did not uncritically accept the findings submitted by the prevailing party).

post-trial brief.[134] This heightened review has not been universally accepted, however, and appellate courts are wary to review the facts with a standard different from the clearly erroneous standard.[135] Because most circuits strictly adhere to the clearly erroneous standard, instead of analyzing the findings with greater caution, appellate courts may choose to reverse and remand the case.[136]

2. The Inevitable Return

If the court declines to review the facts with greater scrutiny, the appellant may request the case be remanded for a new trial, after either vacating or reversing the decision.[137] There are two main benefits to this option.[138] Remanding the case "ensure[s] proper consideration of the district court," and it maintains the clearly erroneous standard without controversy.[139] The *Pentec* court explained that the clearly erroneous standard has been "undermined *sub silencio* in some cases on appeal in an effort by the Courts of Appeal to

134. *Andre*, 774 F.2d at 793 n.6. While the verbatim adoption of findings and conclusions is an accepted practice, the Second Circuit sharply criticized a trial court who partially adopted one of the party's briefs verbatim, stating, "We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of its own . . . . Unvarnished incorporation of a brief is a practice we hope to see no more." DiLeo v. Ernst & Young, 901 F.2d 624, 626 (7th Cir. 1990).

135. Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1215-16 (3d Cir. 1993) (denying the request to review the findings, which had been adopted verbatim, with greater scrutiny); Photo Elecs. v. Ferrex Corp., 581 F.2d 772, 776-77 (9th Cir. 1978) (reviewing the procedure used by the trial judge and the evidence to review the adopted findings and then applying the clearly erroneous standard of review); Edward Valves, Inc. v. Cameron Iron Works, 289 F.2d 355, 356 (5th Cir. 1961) ("[T]he same test is applied to the findings, whether the court prepared them or adopted those submitted by counsel. The court's adoption of appellee's findings does not impeach or discredit them. We accord them full weight."); *cf. Roberts*, 344 F.2d at 751-52.

136. *See supra* Part IV.A; *see also* Falcon Const. Co. v. Economy Forms Corp., 805 F.2d 1229, 1232 (5th Cir. 1986) (denying a request to reverse in remand despite defects in the procedure used by the trial judge); *In re* X-Cel, Inc., 776 F.2d 130, 133-34 (7th Cir. 1985) (reversing and remanding the case because the facts were inadequate to undergo judicial review); *Amstar Corp*., 615 F.2d at 258 (citing Armstrong Cork Co. v. World Carpets, Inc., 597 F.2d 496, 501 (5th Cir. 1979) ("[W]e reverse when the result in a particular case does not reflect the truth and right of the case.")). *See generally* MANUAL FOR COMPLEX LITIGATION, *supra* note 128, § 22.52 n.454.

137. *See* Pentec, Inc. v. Graphic Controls, Corp., 776 F.2d 309, 319 (Fed. Cir. 1985) (suggesting the appellate court reverse and remand to allow the district court to reconsider its original holding); *see also* Kelson v. United States, 503 F.2d 1291 (10th Cir. 1974); State v. Kenley, 952 S.W.2d 250 (Mo. 1997). *Cf. Chicopee Mfg. Corp*., 288 F.2d at 724-25; *Cuthbertson*, 702 F.2d at 465 (reversing and remanding as a policy of the Fourth Circuit if the trial judge adopted the findings of fact and conclusions of law verbatim). *See generally* Oliver, *supra* note 44, at 699-701 (proposing that appellate court treat the determination of all applications of law to fact as fact issues to unite both technical and non-technical legal standards).

138. *Pentec*, 776 F.2d at 319.

139. *Id*.

compensate for inadequate consideration by a District Court."[140] This alternative applies when there is absolutely no indication of the trial court's independent review.[141] For example, in a recent Third Circuit case, the remaining issue on appeal was the determination of attorneys' fees.[142] The district court announced its intent for the parties to write findings of fact and conclusions of law, whereupon the court would adopt one party's findings of fact as its opinion "without modification."[143] In making this announcement, the court eliminated its duty to analyze the submissions from both parties and come to its own independent judgment.[144] The Third Circuit rejected this procedure and remanded the case.[145] In other cases, the court may reverse and remand when the losing party has not had the opportunity to respond to the other party's findings of fact.[146]

An example of the potential effect of this method is in the final outcome of *Roberts v. Ross*.[147] After the Third Circuit vacated and remanded,[148] the trial court reversed its prior decision without a hearing or a new trial.[149] Where the court had previously determined the parties had not made a promise, on remand, the court concluded the parties had made a promise on several occasions.[150]

In a recent Seventh Circuit case, the court criticized the lower court for adopting findings of fact so skewed that the opinion did not reflect the decision of a neutral judge.[151] Each party had presented only the most drastic remedies to the court in their conclusions of law.[152] When the trial judge adopted the findings verbatim, the losing party had to endure the most drastic remedy while the prevailing party "hit a home run."[153] On appeal, the Seventh Circuit supported the practice of adopting findings verbatim, but suggested that if the

140. *Id*.

141. *Id*.

142. Pennsylvania Envtl. Defense Found. v. Canon-McMillan Sch. Dist., 152 F.3d 228, 232 (3d Cir. 1998).

143. *Id.* Neither party objected to this practice, thereby making the "strategic decision" to waive their right to pursue this issue on appeal. *Id*. at 236.

144. *See generally id.* at 233.

145. *Id.* at 233, 235.

146. *Id*.

147. *See* Kaplin, *supra* note 48 and accompanying text.

148. *Roberts*, 344 F.2d at 753.

149. Kaplin, *supra* note 48, at 567-68.

150. *Id*.

151. Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 23 (7th Cir. 1992).

152. *Id.*

153. *Id.*

parties submit findings that "hug the extremes," the court should develop alternatives of its own.[154]

## V. ETHICS AND OBLIGATIONS

### *A. Judges*

In light of the Federal Rules, the district court has a duty to identify the facts that satisfy the standards of Rule 52.[155] Judge Frank described this fact-finding duty as an "art," involving "skill and judgment," because the correct facts will determine the outcome of a case.[156] The wrong application of the law may be corrected on appeal, but wrong facts cannot be changed unless the appellant "overcomes the heavy burden of showing the facts are 'clearly erroneous'."[157] The importance of the judge's fact-finding role cannot be underestimated. Because the trial judge is "absorbed in the law administration at first hand," she holds "the most important office of government."[158]

Ultimately, a court has an overarching duty to review the facts and conclusions independently. A court's failure to satisfy this duty usually results in embarrassment in addition to wasted time and money. An extreme example of this failure was the final outcome in *Andre v. Bendix Corp.*, where an employee claimed she had been discharged based upon her gender.[159] After both parties submitted findings of fact and conclusions of law, the trial court adopted fifty-four out of the fifty-five pages of findings of fact from the prevailing party's post-trial brief, including footnotes, citations, spelling, and typographical errors,[160] essentially "photocopying" the brief.[161] On appeal, the court looked for evidence of a "disinterested mind," and included criticism of the trial court's verbatim adoption of the findings of fact.[162] Due to the court's discretion, or lack thereof, the appellate court could not discern the lower

154. *Id. See also Pennsylvania Envtl. Defense Found.*, 152 F.3d at 239-40 (Garth, J., dissenting) (criticizing the majority for stifling "innovative and nontraditional approaches" in deciding cases in the district courts).

155. United States v. Forness, 125 F.2d 928, 942-43 n.42 (2d Cir. 1942).

156. *Id*. at 942-43.

157. *Id*. at 942.

158. *Forness*, 125 F.2d at 942 n.43 (citing Leon Green, *The Duty Problem in Negligence Cases*, 28 COL. L. REV. 1014, 1037 (1948)).

159. *Andre*, 774 F.2d at 787.

160. *Id*. at 800. The court also noted that this wholesale adoption was even more harmful and "embarrassing" because the district court failed to adopt a page containing the numbered facts. Therefore, the court referred to numbered facts that did not exist in the final opinion. *See id.* (citing Andre v. Bendix, 584 F. Supp. 1485, 1505-07 (N.D. Ind. 1984)).

161. *Andre*, 774 F.2d at 791.

162. *Id*. at 800.

court's reasoning, and thus vacated the prior judgment and remanded for a new trial, each party bearing its own costs.[163]

The recognized source for guidance on ethical issues for the judiciary is the Code of Conduct for United States Judges.[164] The canons in this code are the same as those in the Model Code of Conduct.[165] The canons do not explicitly state specific or formal direction for judges adopting findings of fact and conclusions of law verbatim, but the Codes aid judges in their role as impartial administrators of the law.[166] When a court adopts findings and conclusions verbatim without an independent review, the court abdicates its role. Judicial opinions should reflect an unbiased review because, as one commentator noted, "it is important that the parties be shown that their case has been treated with intelligence and respect, [and] the way the opinion is written has large consequences for the future."[167] Therefore, while the practice of adopting findings and conclusions verbatim is not unethical *per se*, if a court relinquishes its role, then critical issues arise regarding the court's failure to fulfill its duty.

### *B. Lawyers*

Requiring a court to single-handedly write findings of fact and conclusions of law in all applicable cases is unrealistic.[168] Simply stated, trial courts operate more efficiently by relying on counsel to assist in preparing the findings of fact and conclusions of law.[169] This honors the tradition of lawyers

163. *Id.* at 801.

164. OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, GETTING STARTED AS A FED. JUDGE 59 (1997). Materials regarding the judicial codes are also available in the Westlaw database under "CONDUCT."

165. MODEL CODE OF JUDICIAL CONDUCT Canons 1-5 (1990). The Canons are the following:

> (1) A judge shall uphold the integrity and independence of the judiciary.
> (2) A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.
> (3) A judge shall perform the duties of judicial office impartially and diligently.
> (4) A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.
> (5) A judge or judicial candidate shall refrain from inappropriate political activity.

*Id.*

166. JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS, § 1.02 at 3-4 (stating that codes and rules are not used as an enforcement mechanism).

167. James Boyd White, *What's An Opinion For?*, U. CHI. L. REV. 1363, 1368 (1995).

168. SHAMAN ET AL., *supra* note 166, § 6.01, at 167-68. *See also* DAVID STEIN, JUDGING THE JUDGES: THE CAUSE, CONTROL, AND CURE OF JUDICIAL JUSTICE 110-13 (1974).

169. Dearborn Nat. Cas. Co. v. Consumers Petroleum Co., 164 F.2d 332, 333 (7th Cir. 1947), *cited in Louis Dreyfus & Cie.*, 298 F.2d at 739 n.5. Judge Minton stated:

> While the burden and responsibility to make findings of fact and state conclusions of law thereon are primarily upon the trial court, certainly counsel for the parties, especially the

assisting judges in "clerical" matters, such as writing the findings of fact and conclusions of law.[170] Justice Miller analogized the trial judge's need for assistance from the lawyer to the appellate court's need for the brief and oral arguments.[171]

The duty to assist courts may, however, conflict with the attorney's duty to be a zealous advocate for the client.[172] The conflict is heightened when a judge adopts findings strictly verbatim.[173] The findings, once signed, become the findings of the court.[174] One judge noted, "[e]xperience shows that counsel, the most able, honorable, and conscientious . . . after the close of a hotly-contested case, are not in the frame of mind, ordinarily best suited to drafting the findings, which must express the judgment of the court."[175] Due to the nature of this inherent conflict, there is an even greater duty on the trial court to review the findings and conclusions before adopting them verbatim.

> prevailing party, have an obligation to a busy court to assist is in the performance of its duty in this regard.

*Id.*

170. English v. English, 35 P. 1107, 1108 (Kan. 1894) ("[W]e see no objection to allowing an attorney in the case to perform the clerical labor of writing up findings in accordance with the decision of the court as announced, leaving to the judge only the duty of examining, correcting, if necessary, and finally approving.").

171. Schilling v. Schwitzer-Cummins Co., 142 F.2d 82, 83-84 (D.C. Cir. 1944). While the courts may rely on attorneys to draft the findings and conclusions, what most judges do not mention in their opinions is the extensive use of law clerks to aid judges in their duties. With respect to drafting the findings, according to Judge Morton, preparing a final draft is "largely ministerial, and certainly rises to no higher level than the service performed by a law clerk." Hill & Range Songs, Inc. v. Fred Rose Music, Inc. 413 F. Supp. 967, 969 (M.D. Tenn. 1976). *See generally* Mark W. Cannon & David M. O'Brien, *Introduction to the Dynamics of the Judicial Process, in* VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS 31 (1985). Justice William H. Rehnquist stated:

> I think [people] would be shocked, and properly shocked to learn that an appellate judge simply 'signed off' on such a draft without fully understanding its import and in all probability making some changes in it. The line between having law clerks help one with one's work, and supervising subordinates in the performance of *their* work, may be a hazy one, but it is at the heart . . . [of] the fundamental concept of 'judging'.

*Id.* at 31 n.23.

172. MODEL RULES OF PROFESSIONAL CONDUCT Preamble: A Lawyer's Responsibilities (1998) ("As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."). *See id.* at Rule 1.3; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1983).

173. *See* Otero v. Mesa County Valley Sch. Dist., 470 F. Supp. 326, 328-29 (D. Colo. 1979) ("It is impossible for counsel in a case in which they are engaged to do anything impartially.").

174. Anderson v. City of Bessemer City, 470 U.S. 564, 571-73 (1985).

175. Brenger v. Brenger, 125 N.W. 109 (1910), *quoted in* 1 F.R.D. at 85; *In re* Las Colinas, 426 F.2d 1005, 1009 n.4 (1st Cir. 1970).

## VI. CONCLUSION

There are two major unresolved issues at the heart of the accepted practice of adopting findings of fact and conclusions of law verbatim. First, there must be a "fundamentally fair" procedure. At the time the rules were proposed, one commentator suggested that instead of requiring findings and conclusions in *all* cases, they should be required only in cases that would be appealed.[176] As a condition of appeal, the appealing party would "submit a draft of the proposed findings to the trial judge with the option, if not the obligation, on the part of the appellee to submit alternative findings for the judge's consideration."[177] The present-day practice seems to reflect the commentator's sentiments, but fails regarding the unconditional "obligation" to share the findings with the opposing party. Were this obligation to exist and become part of the practice of adopting findings and conclusions verbatim, it would seem to reflect the ambiguous notion of a procedure that is "fundamentally fair."

Most circuits have outlined individual procedures for trial judges to follow.[178] For a procedure to be deemed "fundamentally fair," the court should request findings and conclusions from both parties, or at a minimum, allow the losing party to respond to the opposing party's submitted facts and conclusions. Moreover, once those findings and conclusions have been submitted and argued by both parties, the district court has a steadfast duty, mandated by Model Code of Judicial Conduct and by the Supreme Court, to review the facts independently. This review will largely determine whether parties feel that the trial judge actually considered their arguments and issues.[179]

The second major issue entails the proper standard of review on appeal. The Supreme Court's review of the procedure and eventual application of the clearly erroneous standard seemed to resolve the issue. However, appellate courts have still found occasions to review findings and conclusions adopted verbatim by the trial court with heightened scrutiny by relying on precedent existing before *Anderson*. Alternatively, the courts might forego any analysis and remand the case. Despite the Federal Rules Committee's best efforts at drafting an unambiguous rule, the same issues that commentators emphasized at its adoption still remain. The Supreme Court, meanwhile, has *not* "ironed out" the difficulties arising from the practice that grew out of Rule 52: the verbatim adoption of findings of fact and conclusions of law.

In light of these issues and the fact that a court has the ultimate discretion, a final resolution of this issue probably does not exist. There is nothing formal

176. Chestnut, *supra* note 15, at 572.

177. *Id.*

178. *See Roberts*, 344 F.2d at 752-53; *Lilly*, 720 F.2d at 332; Professional Golfers Assoc. of Am. v. Bankers Life & Cas. Co., 514 F.2d 665, 672 (5th Cir. 1975).

179. *See generally* MANUAL FOR COMPLEX LITIGATION, *supra* note 128, § 22.52.

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in Rule 52 addressing this issue, but there are certain prudential incentives that prevent courts from abusing the practice. First, if serious attention was not given to the submitted findings and conclusions, then a court will lose the respect of the bar and the appellate court that oversees it. Undoubtedly, no court wants to be in that position. As with the law itself, we rely on the judiciary to carry out its duty to be impartial, which entails reviewing submitted findings and conclusions – in *fairness* to both parties. Additionally, we rely on parties who feel as though they have been wronged to appeal. On appeal, we trust that the judiciary will apply a standard of review, whether or not it applies a standard higher than the clearly erroneous standard in Rule 52, again – in *fairness* to both parties.

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