

CPCS, CAFL Division
Appellate Panel Support Unit
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Appellate Practice Tip

***De Novo* Review of Findings of Fact Based on Documentary Evidence**

Do you have a case where certain of the judge's findings of fact are based solely on documentary evidence? Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 302 (2009), tells us that the appellate courts "do not accord them any special deference," and they review such findings *de novo*. The SJC, in a case issued today, Commonwealth v. Tremblay, ___ Mass. ___, SJC-12493 (Oct. 3, 2018), revisited this rule. After extensive discussion, the SJC reaffirmed "the principle that an appellate court may independently review documentary evidence, and that lower court findings drawn from such evidence are not entitled

to deference." By its terms, Tremblay applies to civil cases. (The SJC notes that the federal rule is different.)

Accordingly, if you are challenging a finding of fact based purely on a § 51B or court investigator's report (and the declarant hasn't testified), you are *not* restricted to a clear error standard of review. The Appeals Court can review those findings *de novo*. But if the finding is based on documentary evidence *and* testimony, it is reviewed only for clear error.

Given the choice, it's always better to argue for a *de novo* review by the panel. A *de novo* review permits the panel to substitute its judgment for that of the trial court.