University of Baltimore Law Review

Volume 35
Issue 1 *Fall 2005*

Article 3

2005

Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process

Amy E. Sloan
University of Baltimore School of Law, asloan@ubalt.edu

APPELLATE FRUIT SALAD AND OTHER CONCEPTS: A SHORT COURSE IN APPELLATE PROCESS

Foreword

Writing and arguing an appellate brief is a rite of passage in law school, an important part of the law school experience shared by virtually all lawyers.[1] Appellate brief writing was one of the first "skills education" activities introduced in the law school curriculum,[2] and it is one that continues to be used at the majority of American law schools.[3] Thousands of students participate in moot court annually through the required curriculum, co-curricular moot court competitions, or both.[4] Lawyers may recall their moot court experience with joy and exhilaration, terror and anguish, or anything in between, but no one forgets it.

Usually, instruction on the appellate problem emphasizes the substantive issues in the appeal and techniques for effective written and

1. Amy E. Sloan, *Erasing Lines: Integrating the Law School Curriculum*, 1 J. Ass'n Legal Writing Directors 3, 6 (2002); *see also* J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 53-55 (1994) (discussing common experiences that define the legal discourse community). I would describe it as part of the lawyer's secret handshake, in other words, an experience integral to membership in the legal subculture.
2. Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, With a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. Rev. 657 (1997). Sheppard describes pre-revolutionary English legal education, which used moot court arguments as tools both for teaching and evaluating students. *Id.* at 658-59. This was also true of American legal education beginning as early as the eighteenth century. *Id.* at 689-90.
3. Association of Legal Writing Directors/Legal Writing Institute, *2004 ALWD/LWI Survey Highlights* 10, http://www.alwd.org/alwdResources/surveys/ 2004surveyresults.pdf (last visited Sept. 8, 2005) [hereinafter *ALWD/LWI Survey*] (tabulating the responses of 176 schools regarding legal writing curriculum and revealing that over 80% of law schools require students to write an appellate brief as part of the required legal writing curriculum). This figure has remained fairly constant over time. *Compare id.*, *with* Committee on Appellate Skills Training, *Appellate Litigation Skills Training: The Role of the Law Schools*, 54 U. Cin. L. Rev. 129, 141 & n.13 (1985) [hereinafter *Appellate Litigation Skills Training*] (reporting data from 1984 indicating that 82% of law schools required students to participate in appellate moot court).
4. American Bar Association, *2004 Enrollment Statistics* 1, http://www.abanet.org/legaled/statistics/fall2004enrollment.pdf (last visited Sept. 8, 2005) (reporting that 48,239 first-year students enrolled in the 188 accredited law schools in the fall of 2004). At least 38,591 students, then, wrote appellate briefs in the 2004-2005 academic year alone (80% of 48,239). *See ALWD/LWI Survey*, *supra* note 3, at 10. This does not include students who elect to participate in co-curricular, intra- or inter-scholastic moot court competitions, which would increase the number significantly.

oral advocacy.[5] This is entirely appropriate. But the appellate experience is also an excellent vehicle for familiarizing students with some of the fundamental concepts of appellate process. Indeed, unless students seek out additional instruction in appellate procedure, their work on an appellate problem for a legal writing class or moot court competition may be their only exposure to the subject in law school.[6] If the appellate experience does not incorporate instruction on appellate process, most students will head into internships, clerkships, and practice without knowing much about the procedural aspects of appeals.

As is often the case, the problem is time. Unless the appellate problem turns on issues of appellate process (and very few do), it is difficult to make time to devote to instruction on matters not directly related to completing the project at hand. This article attempts to solve this problem by providing students with a short course in appellate process. It explains three important aspects of appellate procedure: standing to appeal, the timing of an appeal, and the extent of appellate review. It then provides hypothetical fact patterns and questions to review the concepts. Students can read the text and complete the questions on their own, or professors can assign the reading and use the questions for class discussion. Either way, students will benefit from exposure to some of the fundamentals of appellate process.

5. *See* Robert J. Martineau, *Moot Court: Too Much Moot and Not Enough Court*, 67 A.B.A. J. 1294 (1981), *reprinted in* ROBERT J. MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY app. 3, at 207-09 (1985).

6. *Appellate Litigation Skills Training*, *supra* note 3, at 129. This article contains the report and recommendation of the American Bar Association's Committee on Appellate Skills Training of the Appellate Judges' Conference, Judicial Administration Division. The report decries the lack of training in appellate litigation skills in American law schools. *See generally id.*

APPELLATE FRUIT SALAD AND OTHER CONCEPTS: A SHORT COURSE IN APPELLATE PROCESS

Amy E. Sloan*

I. THREE IMPORTANT CONCEPTS IN APPELLATE PROCESS

Three procedural issues are important in every appeal: (1) who is entitled to appeal; (2) when an order can be appealed; and (3) how much review the appellate court will give to the lower court's decision.[1] Each of these issues is discussed below.[2]

1. Who is Entitled to Appeal?

This may sound obvious, but only an aggrieved party to a case can appeal an order in the case.[3] Many people may have an interest in a case, but unless they become parties and subject themselves directly to the risks of litigation, they cannot appeal.[4] Further, unless the party is

---

* Associate Professor of Law, University of Baltimore School of Law. I would like to thank the participants at the 2004 Rocky Mountain Legal Writing Conference, Stephen Shapiro, and Ann MacNeille for their feedback on the ideas expressed in this paper. I would also like to thank Tamara D. Sanders for providing research assistance.

1. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 5 (1994):
   > [A]n appellate court can be activated only pursuant to a rather elaborate array of rules deriving from statutes, court-made doctrines, written rules of procedure, or some combination of these. This technically intricate body of law governs access to the appellate courts, determining when, how, and by whom appellate authority can be invoked.
2. The discussion focuses on federal law. Often, state law regarding appellate procedure tracks federal law. *Id.* at 32.
3. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980).
4. Marino v. Ortiz, 484 U.S. 301, 304 (1988) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled.") (citations omitted); United States v. Seigel, 168 F.2d 143, 144 (D.C. Cir. 1948) ("It has long been settled that one who is not a party to a record and judgment is not entitled to appeal therefrom.") (citations omitted); *see also* FED. R. APP. P. 3(c) ("The notice of an appeal shall specify the *party* or *parties* taking the appeal . . . .") (emphasis added); United States v. British Am. Tobacco (Invs.) Ltd., 387 F.3d 884, 888 (D.C. Cir. 2004) (determining that a company that intervened in a case for a limited purpose could not appeal an order relating to a different aspect of the case).

aggrieved by the outcome, he or she cannot appeal.[5]

For example, individuals or groups may seek permission to file amicus curiae briefs in a case.[6] The individuals or groups filing the briefs advocate a particular outcome in the case.[7] They often have a stake in the outcome of the litigation; their own lives may well be affected by the court's ruling. Nevertheless, because they are not parties to the litigation, they may not pursue an appeal of a decision they consider adverse.[8]

As another example, interest groups advocating particular legal views often become involved in litigation. If the group itself is a party to the case, it can appeal an adverse decision.[9] Sometimes, however,

---

Of course, rare exceptions to this principle exist, such as when a news organization is permitted to appeal a ruling that affects the organization's ability to cover a trial. In that case, the news organization is aggrieved by the decision, although it is not a party to the underlying action. *See, e.g., In re* Application of Dow Jones & Co., 842 F.2d 603, 608 (2d Cir. 1988) (recognizing news organization's standing to challenge a gag order). *See generally* Annotation, *Standing of Media Representatives or Organizations to Seek Review of, or to Intervene to Oppose, Order Closing Criminal Proceedings to Public*, 74 A.L.R. 4th 476 (2003). These exceptions, however, are few and far between.

5. *See infra* notes 16-20 (discussing when a party is aggrieved).
6. An amicus curiae is, literally, a "friend of the court," that is, "[a] person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter." BLACK'S LAW DICTIONARY 93 (8th ed. 2004). Thus, an amicus brief, is a brief filed by a non-party to assist the court in deciding a case. *Id.* The brief can only be filed with the court's permission. FED. R. APP. P. 29 (establishing the process for seeking leave to file an amicus brief in the federal appellate courts); *see also* SUP. CT. R. 37(1) ("An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored."). In *Lawrence v. Texas*, 539 U.S. 558 (2003), for example, thirty-three groups filed amicus briefs, including: the ACLU of Texas, the Pro Family Law Center, the American Public Health Association, the National Mental Health Association, the American Orthopsychiatric Association, AIDS Action, the National Alliance of State and Territorial Aids Directors, the Association of Nurses in AIDS Care, the National Minority AIDS Council, and the Whitman-Walker Clinic, among others. Amicus briefs are commonly filed with appellate courts, but they can be filed with trial courts as well. *See, e.g.*, Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (determining that the trial court did not abuse its discretion by permitting an amicus to participate in the case).
7. *See* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 704 (1963) (noting that, at the Supreme Court, "[t]he amicus is treated as a potential litigant in future cases, as an ally of one of the parties, or as the representative of an interest not otherwise represented. . . . Thus, the institution of the amicus curiae brief has moved from neutrality to partisanship, from friendship to advocacy.").
8. United States v. Louisiana, 718 F. Supp. 525, 528 (E.D. La. 1989) (noting that participation in a case as amicus does not confer standing to appeal); *see also supra* note 4.
9. A complete discussion of the requirements for an organization to have standing to initiate an action on behalf of its members is beyond the scope

the interest group's lawyers merely represent one of the parties in the case whose claim or defense is consistent with the interest group's aims.[10] In the latter case, the group is not a party to the litigation and cannot appeal an adverse decision if the party the group represents decides not to pursue an appeal.[11]

When an individual or entity has a stake in the outcome of a case, that person or group may be able to become a party to the litigation by intervening in the case. It is possible to intervene at the trial level or the appellate level.[12] Indeed, it is possible to intervene solely for the purpose of pursuing an appeal that an original party does not wish to pursue.[13] Appellate courts are hesitant, however, to allow intervention at the appellate stage. Doing so allows someone to stay on the sidelines, leaving others to take on the risk and expense of litigation,

---

of this article. *Compare* NAACP v. Button, 371 U.S. 415, 428 (1963) (holding that the NAACP had standing both to pursue its own rights and to assert the rights of its members in a challenge to Virginia state statutes), *with* Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (holding that the Sierra Club, as an organization with a special interest in environmental protection, lacked standing to challenge agency action). Suffice it to say, however, that if an organization has standing to bring an action as a party, it also has standing to appeal, assuming, of course, that the organization is aggrieved by the outcome in the trial court. *See supra* note 3.

10. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 248 (2003) (listing attorneys from the ACLU Foundation; NAACP Legal Defense and Education Fund, Inc.; ACLU Fund of Michigan, Lansing, Mich.; ACLU Fund of Michigan, Detroit, Mich.; and the Mexican American Legal Defense and Education Fund as counsel for several respondents in the case). None of these organizations, though, was a party to the case. *Id.*
11. Brown v. Grand Trunk W. R.R. Co., 124 F.2d 1016, 1016 (6th Cir. 1941) (noting that an attorney lacks standing to pursue an appeal except on behalf of a client); *see also supra* note 4.
12. Federal Rule of Civil Procedure 24 governs intervention in an action before a federal district court. FED. R. CIV. P. 24. A person or entity may seek leave of the district court to intervene after the conclusion of the case for purposes of filing a notice of appeal, although intervention must take place before the expiration of the time for filing the notice of appeal. Jenkins *ex rel.* Agyei v. Missouri, 967 F.2d 1245, 1247 (8th Cir. 1992). Further, courts have granted requests to intervene made by motion at the appellate level for the purpose of pursuing the appeal. See cases cited *infra* note 13; *see also* FED. R. APP. P. 15 (governing petitions to intervene at the appellate level in appeals of administrative decisions); FED. R. APP. P. 44 (governing intervention of the Attorney General of the United States or a state in certain actions in the appellate courts concerning the constitutionality of a statute).
13. *See, e.g.*, Baker v. Wade, 769 F.2d 289, 291-92 (5th Cir. 1985) (granting motion filed with the appellate court to intervene after the original party abandoned the appeal); *In re* Grand Jury Proceedings, 655 F.2d 882, 883 (8th Cir. 1982) (granting motion filed with the appellate court to intervene in the case); *cf.* United Airlines, Inc. v. McDonald, 432 U.S. 385, 396 (1977) (determining that a class member's post-judgment motion to intervene for purposes of appealing denial of class certification was timely filed); Marino v. Ortiz, 484 U.S. 301, 304 (1998) (holding that petitioners who failed to intervene for purpose of appeal could not appeal the consent decree entered by the district court).

until the case is resolved at the trial level.[14] Ordinarily, a person or entity that wishes to participate in the case and influence the outcome must intervene at an earlier stage, rather than waiting until the appeal.[15]

In addition to being a party, the person or entity wishing to pursue an appeal must be aggrieved by the outcome.[16] Parties who get all of the relief they requested cannot appeal.[17] You may well wonder why a winning party would want to appeal. Sometimes a victory on the merits does not accomplish a party's goal. A party may wish, for example, to establish a precedent governing future cases or persuade a court to adopt a particular legal theory in resolving the litigated issue.[18] If that party were to win with a different theory or on procedural grounds, such as lack of jurisdiction, the litigation will not have achieved the party's true goal, and the party may feel aggrieved.[19] The right result for the wrong reason, however, does not make a party aggrieved.[20] As long as the party obtained all of the requested relief and the outcome is favorable, the party cannot appeal.

---

14. Amalgamated Transit Union Int'l v. Donovan, 771 F.2d 1551, 1552-53 (D.C. Cir. 1985).
15. DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 54 (1994).
16. "Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980). In rare cases, a winning party may be able to appeal an adverse ruling collateral to the judgment on the merits, *id.*, but that is not the usual circumstance. *See generally* MEADOR & BERNSTEIN, *supra* note 15, at 53-54.
17. *Deposit Guar. Nat'l Bank*, 445 U.S. at 333.
18. Watson v. City of Newark, 746 F.2d 1008, 1010 (3d Cir. 1984).
19. A court's failure to base its decision on a party's preferred legal theory may leave open an avenue for the defeated party to accomplish an end-run around the judgment. In *Watson*, for example, city employees sought to appeal a district court's judgment in their favor based on a finding that the city charter was "impermissibly vague." *Id.* The employees had sought relief based on another theory, one that distinguished between partisan and nonpartisan political speech, to which the district court, in dictum, declined to give weight. *Id.* As the appellate court recognized, the result of the decision was that the city "lost a battle but won the war." *Id.* Although the plaintiffs won a favorable judgment, the city could justify resuming the challenged policy under the theory that was effectively rejected by the district court. *Id.* Nevertheless, the court of appeals determined that the plaintiffs were not aggrieved by the judgment and, therefore, lacked standing to appeal. *Id.*; *see also, e.g.*, Olsen v. Jacklowitz, 74 F.2d 718, 719 (2d Cir. 1935) (dismissing an appeal by a defendant concerned about a subsequent suit against him despite a favorable decision below dismissing the plaintiff's complaint for lack of jurisdiction).
20. *See Watson*, 746 F.2d at 1010; *see also* Nunez v. Canik, 576 So. 2d 1080, 1083 (La. Ct. App. 1991) ("[A] party appealing a judgment in his favor does not have the right to appeal simply in order to have the judgment based upon a different ground.").

To have standing to appeal a decision, a person or entity must be a party to the case, whether by suing, by being sued, or by intervening in the case. Participation as counsel or amicus is insufficient to confer standing to appeal. In addition, the party must be aggrieved by an adverse outcome in the case.

2. When Can an Order be Appealed?

The final order doctrine provides that an appeal can only be taken from a final order, that is, an order that finally resolves litigation on the merits.[21] Authority for federal appellate courts to hear appeals of federal district court decisions comes from 28 U.S.C. § 1291, which confers jurisdiction over appeals of "all final decisions" of federal district courts.[22] Although the final order doctrine is the rule applied in most cases, several exceptions exist. Principles found in statutes, procedural rules, and court decisions provide avenues for obtaining immediate (or interlocutory) review of an issue prior to the conclusion of the litigation and the entry of a final order. To pursue any appeal, you must know the basis of the appellate court's jurisdiction.[23]

---

21. A final decision is one that terminates the litigation on the merits and leaves nothing to be done except enforcement of the judgment. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988) (citing Caitlin v. United States, 324 U.S. 229, 233 (1945)). It cannot be a provisional disposition of the issue, nor can it be merely a step toward final disposition of the merits. Collins v. Miller, 252 U.S. 364, 370 (1920). Further, a final order is one that disposes of the entire controversy; that is, it resolves all claims with respect to all parties. *Id.*; *see also* Brooks v. Fitch, 642 F.2d 46, 48 (3d Cir. 1981); *In re* Good Deal Supermarkets, Inc., 528 F.2d 710, 712 (3d Cir. 1975).
22. This section provides that the federal circuit courts "shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." Many states have similar provisions. *See, e.g.*, FLA. CONST. art. V, § 4(b) (granting district courts of appeal jurisdiction to hear appeals of "final judgments or orders of trial courts); MD. CODE ANN., CTS. & JUD. PROC. § 12-301 (LexisNexis 2002) (granting a right to appeal the final judgment of a trial court). In the federal courts, the appeal is to an intermediate appellate court. This is also true in most states, although in a few states, the appeal is directly to the court of last resort because there is no intermediate appellate court. The ten states without intermediate appellate courts are Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. *Compare* MEADOR & BERNSTEIN, *supra* note 15, at 144-45 (listing states without intermediate appellate courts as of 1994), *with* KENT C. OLSON, LEGAL INFORMATION: HOW TO FIND IT, HOW TO USE IT 282 (1999) (providing updated data on states that have added intermediate appellate courts). *See generally* AMY E. SLOAN, BASIC LEGAL RESEARCH: TOOLS & STRATEGIES 73-75 (2d ed. 2003) (discussing the structure of federal and state court systems).
23. Federal Rule of Appellate Procedure 28(a)(4)(D) requires the appellant's brief to include "an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis." The appellee's brief may omit the jurisdictional statement unless the appellee disagrees with the appellant's statement. FED. R. APP. P. 28(b).

The rules regarding when orders can be appealed illustrate the tension between three sometimes-competing values that appellate courts try to balance: efficiency, finality, and accuracy.[24] The interest in efficiency supports the final order rule. It is usually more efficient to evaluate all potential errors at the conclusion of the litigation, especially because some errors may be corrected before the end of the case or may prove to be harmless.[25] The interest in the finality of litigation also supports the rule that only final orders can be appealed. Otherwise, cases could bounce back and forth between the trial and appellate levels, taking far too long to conclude.[26] The interest in accuracy, on the other hand, might counsel adherence to a rule permitting interlocutory appeals. Some mistakes cannot be corrected once they have determined the course of litigation, some cases are so complex that requiring all parties to wait until all claims are resolved to appeal may work injustice, and some questions may be so important or controversial that delaying their resolution would create unwarranted confusion or uncertainty in the legal landscape.[27] In those circumstances, interlocutory appeals might be advantageous.

The balance among these values, in most cases, supports application of the final order rule, but with exceptions for the types of issues for which delay in appellate review presents problems. Some of the more common exceptions include:[28] orders involving injunctions;[29]

24. Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 90 (1988) (recognizing appellate values of accuracy, finality, and efficiency); *see also* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 913 (1999) (arguing that accuracy should be the preeminent consideration in judicial rulemaking).
25. MEADOR & BERNSTEIN, *supra* note 15, at 45-46.
26. Justice Frankfurter explained the rationale underlying the final order rule:

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Cobbledick v. United States, 309 U.S. 323, 324-25 (1940) (footnotes omitted).

27. ROBERT J. MARTINEAU, MODERN APPELLATE CIVIL PRACTICE – FEDERAL AND STATE APPEALS §§ 4.1-.2, at 47-49 (1983) (discussing how the finality rule promotes efficiency but can be in tension with accuracy).
28. The number of exceptions may well increase in the future because the Supreme Court is now empowered to adopt rules designating additional types

orders involving unsettled questions of law, which can be certified for immediate appeal;[30] orders dismissing a claim or party in a case with multiple claims or parties;[31] and so-called "collateral" orders.[32] In addition, the extraordinary writs of prohibition and mandamus provide vehicles for obtaining immediate appellate review of issues that are not otherwise immediately appealable.[33] Comparing different types of orders to pieces of fruit, an analogy I call "appellate fruit salad," helps classify orders to determine whether they are subject to the final order rule or fall within one of its exceptions.

A case subject to the final order doctrine is analogous to a whole apple. One involving an injunction or issue certified for immediate appeal is analogous to an apple with a bite taken out of it. A case with multiple claims or parties is analogous to a bunch of grapes. A case involving a collateral order is analogous to a cashew fruit, while one involving an extraordinary writ is analogous to a watermelon.

In an appellate court's eyes, most cases are like apples. Just as an apple is a single piece of fruit, most cases are single pieces of litigation. The plaintiff sues the defendant on a claim, the claim is resolved by motion or trial, and the case is concluded. The order that concludes the litigation on the merits, leaving nothing substantive for the trial court to do, is appealable to a higher court.[34]

Appellate courts are strongly disinclined to disturb the integrity of the apple. In other words, they do not like litigants to be able to take a bite out of the apple to appeal some intermediate aspect of the case.[35] Appellate courts prefer that the entire case – the whole apple – come to them at once.[36] This makes sense when the purpose of the review is error correction, the primary function of intermediate appel-

---

of orders as immediately appealable. 28 U.S.C. § 1292(e) (2000) ("The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).").

29. 28 U.S.C. § 1292(a)(1) (2000).
30. *Id.* § 1292(b).
31. FED. R. CIV. P. 54(b).
32. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).
33. The All Writs Act, 28 U.S.C. § 1651(a) (2000).
34. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988) (quoting Caitlin v. United States, 324 U.S. 229, 233 (1945)) ("This Court long has stated that as a general rule a district court's decision is appealable under [§ 1291] only when the decision 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'").
35. *See, e.g.*, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987) (explaining that interlocutory appeals can result in disruption, delay, and expense for litigants, "burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial," and interfere with the trial judge's authority to supervise litigation without interference).
36. Cobbledick v. United States, 309 U.S. 323, 324-35 (1940).

late courts,[37] and is consistent with the values of efficiency, finality, and accuracy.

Sometimes, however, appellate courts permit litigants to take a bite out of the apple and take an interlocutory appeal of some aspect of the case. Two types of orders subject to interlocutory review are those involving injunctions and those certified for immediate appeal. Authority for the federal appellate courts to hear these cases comes from 28 U.S.C. § 1292.

Subsection (a) of the statute confers jurisdiction for interlocutory appeals of orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ."[38] In the case of injunctions, the exception is consistent with the value of accuracy, and in this case, accuracy trumps efficiency and finality. This is because the grant or denial or modification or refusal to modify an injunction can have irreversible consequences that cannot be remedied later.[39] Thus, the cost of an erroneous decision is too high to delay review until the conclusion of the case. Also, injunctions affect behavior, either requiring or prohibiting litigants to act in particular ways. For an injunction issued before the conclusion of the litigation, the grant of relief prior to proof of entitlement to it is an extraordinary remedy.[40] Given the length of time many cases take to conclude, a preliminary grant of relief may remain in effect for years.[41] To require the affected party to wait until the conclusion of the litigation to demonstrate error is too high a price to impose.

---

37. MEADOR & BERNSTEIN, *supra* note 15, at 3-4; PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2 (1976).

38. 28 U.S.C. § 1292(a)(1). The statute also provides a mechanism for appealing other types of equitable matters, such as the appointment of receivers and decisions in admiralty cases. *Id.* § 1292(a)(2)-(3). For purposes of simplicity, I have limited the appellate fruit salad analogy to cases involving injunctions and orders certified for immediate appeal.

39. *See* Smith v. Vulcan Iron Works, 165 U.S. 518, 525 (1897) (explaining that the grant or continuation of an injunction can have irreparable consequences); Cohen v. Board of Trustees of the Univ. of Med. & Dentistry of N.J., 867 F.2d 1455, 1465 (3d Cir. 1989) (explaining that the serious consequences flowing from denials and modifications of injunctions justify interlocutory appeals of those orders); *see also* Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 830 (3d Cir. 1963) (Friendly, J., dissenting) (explaining that orders denying injunctions are immediately appealable because the erroneous denial of an injunction may cause irreparable injury).

40. Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988) (recognizing that a preliminary injunction is an extraordinary remedy); *see also* Williams v. Austin Indep. Sch. Dist., 796 F. Supp. 251 (W.D. Tex. 1992) (recognizing that a preliminary injunction is an extraordinary remedy).

41. *See, e.g.*, Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health and Rehab. Servs., 225 F.3d 1208, 1225 (11th Cir. 2000) (discussing a preliminary injunction that was entered eight years before a final judgment); Pennsylvania v. Flaherty, 983 F.2d 1267, 1269 (3d Cir. 1993) (discussing a preliminary injunction that had been in effect for more than fifteen years);

In the case of orders certified for immediate appeal, 28 U.S.C. § 1292 recognizes the occasional need for such an interlocutory appeal, but makes obtaining it difficult. Subsection (b) provides as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.[42]

The statute imposes several conditions before the appeal can be heard. First, the order at issue must arise in a civil case, not a criminal case.[43] Second, it must involve "a controlling question of law as to which there is substantial ground for difference of opinion . . . ."[44] Third, the aggrieved party must persuade the district court to certify the order for immediate appeal.[45] Finally, the circuit court must choose to exercise its discretion to hear the appeal immediately.[46] Otherwise, the appeal must be taken in the normal course upon the conclusion of the litigation.

This process is consistent with the values of efficiency, accuracy, and finality. Although in most cases, it is more efficient to wait until the conclusion of a case to hear all errors in one appeal, in the case of a controlling question of law, it may be more efficient for the appellate court to resolve the issue immediately.[47] Unlike other types of errors

---

Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 551 (9th Cir. 1990) (discussing a preliminary injunction that had been in place for six years). Statistics collected by the Administrative Office of the United States Courts show that many civil cases in the federal courts take years to conclude. As of September 30, 2004, 12.6% of civil cases in federal district courts had been pending for three years or longer. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2004, app., tbl.C-6 at 165 (2004), http://www.uscourts.gov/judbus2004/appendices/c6.pdf.

42. 28 U.S.C. § 1292(b) (2000).
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. Hickey v. City of New York (*In re* World Trade Ctr. Disaster Site Litig.), 270 F. Supp. 2d 357, 381 (S.D.N.Y. 2003) (granting certification for interlocutory appeal of an order concerning the scope of federal jurisdiction be-

that may be corrected before the end of the litigation or may turn out to be harmless, an error in the application of a controlling question of law results in wasted resources.[48] Although the immediate appeal can delay the resolution of the case in the trial court, it can improve the overall efficiency of the judicial process by resolving the legal question before trial. This is also consistent with the goal of accuracy because it allows for immediate review of any potentially erroneous decision.

The certification process could be seen as in conflict with the value of finality. To the extent that it is, the interests in efficiency and accuracy trump finality in this instance. The provisions requiring the district court to certify the order as final and allowing the court of appeals the discretion to decline to hear the appeal immediately help reduce the effect on finality by ensuring that only those issues truly meriting immediate review get past the procedural hurdles.[49]

Of course, not all cases are like unitary, whole pieces of fruit. Some involve multiple parties or multiple claims, which, although arising from the same set of facts, are separable. The apt comparison here is not with an apple, but rather, with a bunch of grapes. In these cases, each claim (or set of claims) against each party can be separated from other aspects of the case without disturbing the integrity of the case (fruit) as a whole. Taking a grape off a bunch is not the same as taking a bite out of an apple.

Authority for an appeal under these circumstances comes from Federal Rule of Civil Procedure 54(b), which provides as follows:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.[50]

---

cause doing so would avoid uncertainty regarding the binding effect of the court's ruling and the potential duplication of proceedings).

48. Mineo v. Port Auth., 779 F.2d 939, 942 & n.7 (3d Cir. 1985) (explaining that the district court certified an order regarding coverage of the Fair Labor Standards Act for immediate appeal to avoid wasting resources with a lengthy proceeding to establish damages in the event that the district court's ruling on the controlling question of law was later overturned).

49. *See* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1172-75 (1990) (discussing the limitations on interlocutory appeals pursuant to 28 U.S.C. § 1292(b) and compiling statistics showing that appellate courts rarely exercise their discretion to accept such appeals).

50. Many states have directly adopted rules that are identical or substantially similar to Federal Rule of Civil Procedure 54(b), including, for example, Hawaii, Idaho, Massachusetts, Utah, and Wyoming. HAW. R. CIV. P. 54(b); IDAHO R. CIV. P. 54(b); MASS. R. CIV. P. 54(b); UTAH R. CIV. P. 54(b); WYO. R. CIV. P. 54(b).

This rule is similar to 28 U.S.C. § 1292(b), concerning certification of an order for immediate appeal, in that it applies only to civil cases and gives the district court the discretion to decide whether to direct entry of an order subject to immediate appeal. It differs, however, in other respects. The order at issue need not involve a controlling question of law about which there is substantial ground for difference of opinion. In addition, the appellate court does not have discretion to refuse the appeal. Once the district court directs entry of final judgment, the order becomes immediately appealable as a final order. Despite the differences between this rule and 28 U.S.C. § 1292(b), each provision reflects a similar balance among efficiency, accuracy, and finality.

Another exception to the final order rule is the collateral order doctrine. The collateral order doctrine originated in *Cohen v. Beneficial Industrial Loan Corp.*[51] This was a shareholder derivative action that required the district court to decide whether a state statute requiring the plaintiffs to post a bond applied.[52] The district court ruled that the statute did not apply, and the defendant appealed.[53] Before addressing the merits of the case, the Supreme Court had to determine whether the order was appealable, given that the district court's judgment did not resolve the litigation finally on the merits.[54] The Court determined that the order was subject to immediate appeal, saying that the

> decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.[55]

The Supreme Court's enunciation of the collateral order rule in *Cohen* was eventually distilled into three elements. A collateral order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."[56]

---

51. 337 U.S. 541 (1949).
52. *Id.* at 543.
53. *Id.* at 545. The Court of Appeals reversed, Cohen appealed, and the Supreme Court granted certiorari. *Id.*
54. *Id.* at 545-46.
55. *Id.* at 546.
56. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (quoting numerous cases to reaffirm the elements of the collateral order doctrine and rejecting the "death knell" test developed by the courts of appeals in which orders that sounded the "death knell" of an action had been immediately appealable under *Cohen* without necessarily meeting the three required elements), *superseded by rule*, 177 F.R.D. 530, 530-31 (1998). Federal Rule of Civil Procedure 23(f) now gives federal appellate courts the discretion to hear appeals of orders granting or denying class certification, including when the order at issue sounds the "death knell" of class action litigation. Blair v.

Cohen illustrates the justification for the rule: If the district court's decision denying application of the statute, thereby allowing the plaintiffs to proceed without posting a bond, had not been immediately appealable, the defendant's right to appeal that decision at the end of the litigation would have been meaningless.[57] The plaintiffs would already have been permitted to proceed without the bond. The order in *Cohen* also met the other two requirements. The district court's order allowing the case to proceed without the bond conclusively determined the issue of the applicability of the statute.[58] Further, the applicability of the statute was separate from the merits of the claims of mismanagement and fraud that formed the basis of the shareholder suit.[59] Permitting the appeal under these circumstances thus is consistent with the value of accuracy and does not conflict with the value of finality. Although it may run counter to the value of efficiency, in this case, accuracy trumps efficiency because the cost of an erroneous decision (the effective loss of the right to appeal) is too high.[60]

Cases falling under the collateral order doctrine can be compared with cashew fruits. This comparison may not be helpful to those unfamiliar with cashew fruits, so some explanation is in order. A cashew nut grows with a piece of fruit, known as a cashew fruit. In many parts of the world, people eat the fruit, whereas most of us are more familiar with the nut.[61] Collateral orders are similar to cashew fruits in the sense that the subject of the litigation (the fruit) is separate from the

---

Equifax Check Servs., Inc., 181 F.3d 832, 833 (7th Cir. 1999). This is an example of a rule designating a new type of order as immediately appealable pursuant to the Supreme Court's rulemaking power in 28 U.S.C. § 1292(e). *See supra* note 28.

57. *Cohen*, 337 U.S. at 556.
58. *Id.* at 556-57.
59. *Id.* at 546-47.
60. Courts have categorized a variety of types of orders as collateral orders. *See, e.g.*, P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 141 (1993) (allowing immediate appeal of an order denying a state's claim of 11th Amendment immunity); Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 347 & n.8 (1987) (allowing immediate appeal of an order allocating the costs of identifying class members in a class action suit); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (allowing immediate appeal of an order denying a government official's claim of qualified immunity). The collateral order doctrine can also be invoked in criminal cases. *See, e.g.*, Sell v. United States, 539 U.S. 166, 176-77 (2003) (allowing immediate appeal of an order requiring a criminal defendant to take medication in order to make him competent to stand trial); Midland Asphalt Corp. v. United States, 489 U.S. 794, 798-99 (1989) (noting that the collateral order rule has been successfully invoked in criminal cases only in limited circumstances involving the following types of orders: orders denying motions to reduce bail, to dismiss indictments on double jeopardy grounds, and to dismiss indictments under the Speech and Debate Clause of the Constitution).
61. A picture of a cashew fruit is available on the Internet. The Food Museum–Cashew, http://www.foodmuseum.com/cashew.html (last visited

collateral order (the nut), although the two parts are joined together and are part of a single entity. Nevertheless, the nut can be broken off from the fruit and eaten or processed separately, just as a collateral order can be appealed without disturbing the integrity of the proceedings on the merits.

One final way of obtaining immediate review of a lower court's actions is through the extraordinary writs of mandamus and prohibition.[62] These writs, of course, direct an official, such as a district court judge, to act in a manner necessary to fulfill her duties or stop acting in a way that is contrary to her authority.[63] Although these writs look like and, in many ways, operate like appeals, they are not appeals. A petition for a writ of mandamus or prohibition is a request separate from the underlying case that is filed as an original matter with the appellate court.[64] If the petition is granted, the order is directed to the judge.[65] Thus, although the extraordinary writs are methods for obtaining immediate review of lower court actions, they are not true appeals.

Because of the differences between direct appeals and petitions for extraordinary writs, the extraordinary writs are best analogized to watermelons. The reason for the comparison might not be apparent at first. A petition for an extraordinary writ is comparable to a watermelon because a watermelon is not a fruit. According to the National Watermelon Promotion Board, a watermelon is a vegetable.[66] Thus, just as a watermelon seems like a fruit, a petition for an extraordinary writ seems like a procedure for an interlocutory appeal.

Sept. 4, 2005). A Google image search for "cashew fruit" also retrieves a number of pictures. The fruit is sometimes called a cashew apple. *Id.*

62. The All Writs Act, 28 U.S.C. § 1651(a) (2000), provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

63. *Ex parte* Republic of Peru, 318 U.S. 578, 582-83 (1943); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943); *see also* 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3932.2 (2d ed. 1996) (stating that the technical and historic differences between mandamus and prohibition are of little concern).

64. Skil Corp. v. Millers Falls Co., 541 F.2d 554, 558 (6th Cir. 1976) ("A proceeding upon a petition for a writ of mandamus is a separate action, not an appeal . . . ."); People *ex rel.* Tinkoff v. Campbell, 212 F.2d 785, 786 (7th Cir. 1954) (explaining that a petition for a writ of mandamus, as a collateral proceeding, is separate from the parent case and is filed as an original cause with the appellate court); *see also* WRIGHT, MILLER, & COOPER, *supra* note 63, at § 3932 (stating that extraordinary writ proceedings are commenced by an original application to an appellate court).

65. The court below is often named as a party in the mandamus action. *See, e.g.*, Cheney v. U.S. Dist. Ct., 542 U.S. 367, 124 S.Ct. 2576 (2004), *mandamus granted*, 406 F.3d 723, 731 (D.C. Cir. 2005).

66. National Watermelon Promotion Board-Fun Facts, http://www.watermelon.org/index.asp?a=dsp&htype=funn&pid=32 (last visited Sept. 13, 2005).

In reality, however, the watermelon is a vegetable, not a fruit, and a petition for an extraordinary writ is a vehicle for obtaining immediate review of certain actions by the court below, not a true interlocutory appeal of the underlying case.

Writs of mandamus and prohibition are extraordinary remedies.[67] To obtain a writ of mandamus, the petitioner must first show that he or she has no other adequate way to obtain the relief sought.[68] This requirement is intended to prevent litigants from using a petition for a writ as a substitute for the ordinary appellate process.[69] The petitioner must then demonstrate that the right to the writ is "clear and indisputable."[70] If the petitioner satisfies both of these requirements, the issuing court must satisfy itself that issuing the writ is an appropriate exercise of discretion under the circumstances.[71] Even if the appellate court disagrees with a decision and might well reverse the decision on a direct appeal, it is rare for an appellate court to enter an order telling a lower court that it has acted in an unauthorized or unacceptable way.[72] This is not to say that petitions for extraordinary

---

67. The Supreme Court has explained the purpose of a writ of mandamus:

> [It] has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." While the courts have never confined themselves to an arbitrary and technical definition of "jurisdiction," it is clear that only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.

Will v. United States, 389 U.S. 90, 95 (1967) (citation omitted); *accord Cheney*, 542 U.S. at ___, 124 S. Ct. at 2586 (characterizing mandamus as "drastic and extraordinary" (quoting *Ex parte* Fahey, 332 U.S. 258, 259 (1947))); Steward v. West, 449 F.2d 324, 325 (5th Cir. 1971) (noting the extraordinary nature of writs of prohibition and mandamus and stating that courts will not issue the writs absent a strong showing that their use is necessary); Zerilli v. Thornton, 428 F.2d 476, 477 (6th Cir. 1970) (noting the exceptional nature of a writ of mandamus).

68. *Ex parte* Fahey, 332 U.S. 258, 260 (1947) (denying petition for a writ of mandamus to vacate the district court's orders allowing attorneys' fees because the issue could be addressed adequately through an appeal in the ordinary course of litigation).

69. *Id.*; *see also* Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964) (noting that it is not appropriate to use a petition for a writ of mandamus as a substitute for a direct appeal).

70. *Will*, 389 U.S. at 96 (quoting Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953)).

71. *Id.* at 95.

72. *See, e.g.*, *Fahey*, 332 U.S. at 260 (denying petition for a writ of mandamus to vacate the district court's orders allowing attorneys' fees because the issue could be addressed adequately through an appeal in the ordinary course of litigation); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 27 (1943) (reversing circuit court's issuance of a writ of mandamus directed toward a district court because the district court's decision, even if erroneous, was not an abuse of power, was within its jurisdiction, and was subject to effective review through the normal appellate process).

writs are never granted, only that the standard for obtaining them is very high.[73]

In any appeal, the appellate court must have jurisdiction to hear the case. Jurisdiction attaches when a final order resolves the litigation below or when one of the exceptions to the final order rule permits the appeal. In addition, the appellate court has jurisdiction to resolve a petition for one of the extraordinary writs.

3. How Much Review Will the Appellate Court Undertake?

Once a case makes its way to the appellate stage, the appellate court must decide how much review of the trial court's decision it will provide. The answer turns on two concepts: scope of review and standard of review. Scope of review refers to the breadth of issues the appellate court is willing to review. Standard of review refers to the depth, or degree, of scrutiny the appellate court will give to an issue. Ordinarily, an appellate court first evaluates whether an issue falls within the scope of its review and then assesses the merits of the issue according to the appropriate standard of review.

A litigant may identify many errors below that it would like the appellate court to review. Scope of review concerns how many of those issues the appellate court is willing to consider.[74] A litigant usually cannot raise an issue for the first time on appeal.[75] An appellate court rarely considers issues that were not raised below or that were not preserved in the record.[76] The historical basis for this rule goes back

73. For example, a petition for a writ of mandamus may be the only way to get review in a criminal case because Federal Rule of Civil Procedure 54(b) and 28 U.S.C. § 1292(b), permitting certification of certain orders as final, do not apply to criminal cases. Walter J. Bonner, *Federal Interlocutory Appeals and Mandamus* 228 in APPELLATE PRACTICE FOR THE MARYLAND LAWYER: STATE AND FEDERAL (Paul Mark Sandler & Andrew D. Levy eds., 2d ed. 2001). For a discussion of writs of mandamus in the criminal context, see generally *Will*, 389 U.S. at 97-98.

74. Kathleen L. Coles, *Mixed Up Questions of Fact and Law: Illinois Standards of Appellate Review in Civil Cases Following the 1997 Amendment to Supreme Court Rule 341*, 28 S. ILL. U. L.J. 13, 17 (2003) ("[Scope of review], in its narrower meaning, refers to the particular actions or omissions by the decision-maker that are or are not subject to review on appeal.").

75. *See, e.g.*, Hormel v. Helvering, 312 U.S. 552, 556-57 (1941) (noting that appellate courts generally do not consider issues not raised below except in the exceptional cases in which failure to consider the issue might result in injustice); United States v. Slade, 980 F.2d 27, 30 (1st Cir. 1992) ("It is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals.").

76. *See supra* cases cited in note 75. Federal Rule of Civil Procedure 46 requires parties to bring errors to the district court's attention:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objec-

hundreds of years.[77] Before appellate courts existed, litigants who believed the judge or jury made errors in deciding a case brought a new suit against the judge or jury to hold them responsible for those errors.[78] In the subsequent suit, the judge or jury could not be held responsible for matters that had not been raised in the initial suit.[79]

The modern justification for the rule takes us back to the values of efficiency, finality, and accuracy. If errors are brought to the trial court's attention when they occur, the trial judge has an opportunity to correct them, thus fostering efficiency and accuracy.[80] The objection or exception ordinarily must be reflected in the trial record to demonstrate that the litigant claiming error brought the purported error to the trial court's attention.[81] The objection or exception may be in writing, as is often the case with exceptions to jury instructions, or oral, as is often the case when a lawyer objects to the introduction of evidence at trial.[82] In addition, appellate courts do not want litigants to hold back arguments, wait to see how the case is resolved, and then take another bite at the apple, to use the fruit metaphor in a different context, with a new argument on appeal.[83] Allowing that type of litigation strategy runs counter to efficiency and finality by requiring a second forum in which to raise issues that could have been resolved below.[84] It also runs counter to accuracy. Waiting until appeal to raise an issue deprives the trial court of the opportunity to make an accurate decision if the issue is, in fact, dispositive.[85]

---

tion to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

The same is true in criminal cases. FED. R. CRIM. P. 51(b).

77. Edson R. Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 7, 9 (1940).
78. *Id.* at 7.
79. *Id.* at 9.
80. Busy v. Nevada Const. Co., 125 F.3d 213, 218 (9th Cir. 1942).
81. Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 457 n.1 (3d Cir. 1982), *vacated on other grounds*, 462 U.S. 523 (1983).
82. Federal Rule of Appellate Procedure 10(a) provides that:

> The following items constitute the record on appeal:
> (1) the original papers and exhibits filed in the district court;
> (2) the transcripts of the proceedings, if any . . . .
> An objection must appear in the record to be preserved for appeal.

83. Moore v. United States, 262 F.2d 216, 218 (D.C. Cir. 1958) (explaining that a defendant cannot hold back an argument in the trial court and then rely on that argument to seek reversal of his conviction); *Busy*, 125 F.2d at 218 (explaining why litigants cannot hold arguments aside until the appellate stage).
84. MEADOR & BERNSTEIN, *supra* note 15, at 56.
85. *Pfeifer*, 678 F.2d at 457 n.1; *see also* MEADOR & BERNSTEIN, *supra* note 15, at 56 (explaining that the requirement that issues be raised in the first instance with the trial court flows from concerns of accuracy, efficiency, and finality).

One exception to this rule is the plain error doctrine. If the failure to raise an issue below is so egregious that refusal to consider it on appeal would amount to a denial of justice, the appellate court will consider it for the first time on appeal.[86] For an issue to qualify for review in the absence of a proper objection below, an error must have occurred, the error must be "plain," and the error must affect substantial rights.[87] Even when all three factors exist, correction of the error is within the appellate court's discretion, which it should exercise only if "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[88] This is obviously a difficult standard to meet; appellate courts are rarely persuaded to reverse for plain error, although they do so from time to time.[89]

One interesting aspect of the plain error doctrine concerns its relationship to standard of review. The plain error doctrine effectively collapses the two-step process appellate courts usually use to evaluate the amount of review they will provide on an issue into one step. As noted above, an appellate court usually determines first whether the issue was raised and preserved below and then evaluates the issue on the merits. With the plain error doctrine, the evaluation of the merits determines both the court's willingness to consider the issue and its

86. In criminal cases, Federal Rule of Criminal Procedure 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The federal appellate courts also apply the plain error doctrine in civil cases. *See, e.g.*, Smith v. Kmart Corp., 177 F.3d 19, 26 (1st Cir. 1999) (applying the plain error standard in a civil case); Crawford v. Falcon Drilling Co., Inc., 131 F.3d 1120, 1124 (5th Cir. 1997) (applying plain error in a civil case). Harmless errors, by contrast, do not affect substantial rights and must be disregarded. FED. R. CRIM. P. 52(a); FED. R. CIV. P. 61. A harmless error will not justify reversal. Burgess v. Premier Corp., 727 F.2d 826, 833 (9th Cir. 1984) (noting that a trial court's ruling will not be overturned for harmless error). A discussion of plain error would be incomplete without an explanation of the difference between forfeiture and waiver of a claim. An error to which no objection is made is forfeited. United States v. Olano, 507 U.S. 725, 733 (1993). The plain error doctrine is a mechanism for obtaining review of a forfeited claim. *Id.* at 732. Claims that have been waived, by contrast, will not be reviewed by an appellate court at all. *Id.* at 733. Waiver is the voluntary relinquishment of a known right. *Id.* For example, a defendant who enters a guilty plea waives the right to a trial. *Id.* Much litigation centers on whether a particular waiver is valid, but once a court determines that the claim was waived, it will not review the claim. *Id.*

87. *Id.* at 732; *see also Kmart Corp.*, 177 F.3d at 26.

88. *Olano*, 507 U.S. at 732 (internal quotation marks omitted) (alteration in original).

89. The cases in which courts have found plain error are factually varied. *See, e.g.*, United States v. Hanno, 21 F.3d 42, 48-49 (4th Cir. 1994) (accepting removal of jurors without notice to the defendant as justification for vacating convictions on plain error review); United States v. Fuchs, 218 F.3d 957, 963 (9th Cir. 2000) (accepting "highly prejudicial" jury instructions as justifying reversal for plain error).

resolution on the merits.[90] If, after evaluating the merits, a court determines that a plain error exists and is therefore within its scope of review, the court does not then apply a separate standard of review to resolve the issue.[91] Rather, a finding of plain error will result in reversal, without reference to the standard of review that otherwise would apply if the error had been properly preserved. Stated differently, because a plain error is so serious that it requires reversal on the merits, the court will relax its usual rule requiring that the issue be raised below.

Once the appellate court determines the breadth of issues it will consider, it must then determine how closely to review the decision below, or in other words, the depth of its review. The standard of review refers to the depth of review the court will provide.[92]

Appellate courts generally apply one of three standards of review: de novo, clearly erroneous, or abuse of discretion. De novo review gives no deference to the decision below, allowing the appellate court to reevaluate an issue on its own.[93] It applies primarily to questions of law.[94] Two reasons are usually advanced for this searching degree of review. First, a trial court may have to make decisions quickly, in the heat of trial, whereas the appellate court can take as much time as it needs to consider and resolve the issue.[95] Second, one of the functions of appellate courts is to clarify ambiguities in the law or even make new legal rules when necessary, and appellate decisions have precedential value affecting the resolution of future cases.[96] Giving

90. *See Fuchs*, 218 F.3d at 962 (noting the discretionary nature of plain error review).

91. Review for plain error, in effect, is itself a standard of review, obviating the need for application of additional standards. *See* Williams v. Taylor, 529 U.S. 362, 385 (2000) (characterizing plain error review as a "familiar standard of review").

92. MEADOR & BERNSTEIN, *supra* note 15, at 59. Federal Rule of Appellate Procedure 28(a)(9)(B) requires that the appellant's brief contain "for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues) . . . ." The appellee's brief may omit the statement of the standard of review unless the appellee disagrees with the appellant's statement. FED. R. APP. P. 28(b)(5).

93. Salve Regina College v. Russell, 499 U.S. 225, 238 (1991); United States v. George, 971 F.2d 1113, 1118 (4th Cir. 1992); Heggy v. Heggy, 944 F.2d 1537, 1539 (10th Cir. 1991).

94. Elder v. Holloway, 510 U.S. 510, 516 (1994).

95. United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984) (en banc) (explaining that one reason why appellate courts are better positioned than trial courts to resolve questions of law is that they are not encumbered by the process of hearing evidence), *abrogated on other grounds by* Estate of Merchant v. Comm'r., 947 F.2d 1390 (9th Cir. 1991).

96. In reality, a large number of appellate decisions are non-precedential. Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 718-19 (2004). Nevertheless, when an appellate court chooses to make its opinion precedential, the

appellate courts plenary review of questions of law is consistent with this function.

Clearly erroneous is the standard applied to review of questions of fact decided by the judge.[97] This is a more deferential standard than de novo review. According to the Supreme Court, "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[98] The appellate court will not substitute its judgment for that of the trial court, even if the appellate court might have ruled differently if it had been the trier of fact.[99]

The justifications for this deferential standard also turn on the respective functions of trial and appellate courts. Trial courts find facts.[100] Appellate courts will not encroach on that function in the absence of clear error. In addition, trial courts viewing live testimony are better positioned to assess the credibility of witnesses than are appellate courts that review only transcripts of the testimony.[101] The paper record does not allow the appellate court to get the same sense of the credibility of a witness that the trial court's actual observation provides.[102] Although credibility determinations are one justification for the clear error standard, the same standard applies to all factual find-

---

opinion is binding within the court's jurisdiction. *Id.* at 727 & n.80. For a discussion of non-precedential opinions, see generally *id.*

97. FED. R. CIV. P. 52(a). This rule governs only findings of fact made by the trial judge. In reviewing facts found by a jury, "[a]ppellate courts are bound by a jury's findings when the jury has been properly instructed by the trial court and there is competent evidence in the record to support the findings." I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882, 887 (Colo. 1986). A discussion of review of jury decisions is beyond the scope of this article, but for a discussion of reviewing such verdicts, see generally STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW (3d ed. 1999) and Steven Alan Childress, *A Standards of Review Primer*, 125 F.R.D. 319 (1989).

98. Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (internal quotation marks omitted) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).

99. *Id.*; Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988) ("To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.").

100. Fisher v. Roe, 263 F.3d 906, 912 (9th Cir. 2001) (pronouncing the axiom that finding facts is the role of trial courts, not appellate courts, as a "bread and butter" principle of appellate review).

101. Nishikawa v. Dulles, 356 U.S. 129, 143 (1958) (Harlan, J., dissenting) (explaining that an appellate court should not substitute its judgment for that of the trial courts on factual questions because the trial court had the opportunity to hear and observe the witnesses' testimony).

102. *Id.*

ings, regardless of whether they are based on the testimony of witnesses or other forms of evidence.[103]

The third standard of review is abuse of discretion. This standard is also deferential to the trial court. Discretion is the authority to make a reasoned choice.[104] Many matters within the course of litigation are committed to the trial court's discretion. That is, the trial judge has the authority to choose from among a range of options. If the trial judge could legitimately have chosen one course of action over another, the appellate court will not substitute its judgment for that of the trial judge.[105]

A judge can commit an abuse of discretion in three ways: (1) by failing to consider a factor relevant to the decision; (2) by considering and giving significant weight to an irrelevant or improper factor; or (3) by making a clear error of judgment.[106] Challenging a discretionary decision on the ground that the judge made a clear error of judgment is possible, but is an uphill climb because trial judges do not often make decisions entirely outside the range of the appropriate options. Arguments based on the other two forms of error are more likely to be successful because they focus on the decision-making process. For example, if a statute requires a judge to consider specific factors in making child custody decisions, the judge may abuse her discretion by failing to consider one of the factors. The error in the result stems from error in the decisional process, not the judge's error in judgment.

Often, the character of an issue as one of law, fact, or discretion will be uncontroversial. In those cases, the determination of the appropriate standard of review will be similarly uncontroversial. In some cases, however, the category into which the issue falls will be subject to debate. Some appeals turn on the resolution of the character of the issue and the corresponding standard of review.[107] If an issue could arguably be categorized as one of law, fact, or discretion, you may be able to persuade a court to characterize it in a way that results in application of the standard of review that favors your position.[108]

In addition, some issues are mixed questions of fact and law. Mixed questions of fact and law are those "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is

103. *Anderson*, 470 U.S. at 574.
104. *See* Kern v. TXO Prod. Corp., 738 F.2d 968, 970 (8th Cir. 1984).
105. *Kern*, 738 F.2d at 971 ("The very concept of discretion presupposes a zone of choice within which the trial courts may go either way.").
106. *Id.* at 970.
107. *See, e.g.*, Salve Regina College v. Russell, 499 U.S. 225, 227 (1991) (stating the issue in the case as whether the district court's decision was subject to de novo review or some more deferential standard of review); *see also* CAROLE C. BERRY, EFFECTIVE APPELLATE ADVOCACY § 1.10, at 5 (3d ed. 2003).
108. For a discussion of strategies for persuading a court to apply a standard of review favorable to your position, see George A. Sommerville, *Standards of Appellate Review*, LITIG., Spring 1989, at 23, 24 and Childress, *supra* note 97.

whether the facts satisfy the [legal] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."[109] Some mixed questions are reviewed under the clearly erroneous standard, while others are reviewed under the de novo standard. To decide the applicable standard of review for a mixed question of fact and law, the court evaluates whether resolution of the issue turns more on factual considerations or on the application of legal principles.[110] If you are arguing a mixed question of fact and law, the standard of review may well be a critical element in your argument.

These three standards of review – de novo, clearly erroneous, and abuse of discretion – are all standards of *judicial* review. They must be distinguished from standards of *legislative* review – strict scrutiny, intermediate or heightened scrutiny, and rational basis.[111] Standards of legislative review refer to the standards courts use to evaluate the constitutionality of statutes enacted by the legislative branch, a coordinate branch of government. Standards of judicial review refer to standards

---

109. Pullman-Standard v. Swint, 456 U.S. 273, 290 n.19 (1982). Examples of mixed questions include the following: whether a defendant received ineffective assistance of counsel, Washington v. Watkins, 655 F.2d 1346, 1352 (5th Cir. 1981); whether the parties entered into an oral employment contract, Scully v. US WATS, Inc., 238 F.3d 497, 505 (3d Cir. 2001); and whether Internal Revenue Service agents acted in good faith in disclosing taxpayer information during an investigation, Gandy v. United States, 234 F.3d 281, 284 (5th Cir. 2000).

110. The concerns of judicial administration are key to the court's analysis of the appropriate standard of review for mixed questions of fact and law:

> If application of the rule of law to the facts requires an inquiry that is "essentially factual," – one that is founded "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct," – the concerns of judicial administration will favor the district court, and the district court's determination should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.

McConney v. United States, 728 F.2d 1195, 1201 (9th Cir. 1984) (citations omitted), *abrogated on other grounds by* Estate of Merchant v. Comm'r., 947 F.2d 1390 (9th Cir. 1991); *accord* Vinick v. United States, 205 F.3d 1, 6 (1st Cir. 2000) (citing United States v. Howard, 996 F.2d 1320, 1328 (1st Cir. 1993)) (noting that the court uses a sliding scale of deference in evaluating mixed questions of fact and law, depending on how fact-dependent the issue is); *see also* Miller v. Fenton, 474 U.S. 104, 114 (1985) (noting that the classification of an issue as one of fact, law, or mixed fact and law at times turns on the court's assessment of which judicial actor, the trial court or the appellate court, is in the best position to decide the issue).

111. *See* CHILDRESS & DAVIS, *supra* note 97, § 1.03, at 1-22 to 1-23 (distinguishing "judicial" review of lower court decisions from "constitutional" review of legislative choices).

appellate courts use to review the decisions of lower courts within the judicial branch.[112]

To see the difference, assume that a litigant challenges the constitutionality of a statute by filing suit in the appropriate trial court. The trial court will apply one of the three standards of legislative review to determine whether the statute is constitutional. Whether a statute comports with constitutional requirements is generally a question of law.[113] Therefore, if the trial court's decision were appealed, the appellate court would ordinarily apply de novo review to determine the correctness of the trial court's decision regarding which legislative standard of review should be applied and whether the statute comports with the appropriate standard.

In every appeal, the appellate court must determine whether the issue or issues presented are within the scope of its review. It must then determine whether the issue is one of fact, law, or mixed fact and law. That determination will dictate whether the court will conduct an independent review of the issue using the de novo standard or give deference to the decision below using the clearly erroneous or abuse of discretion standard. Although this determination is routine in a large number of cases, in some cases the determination of the applicable standard effectively determines the outcome of the case.

II. CONCLUSION

Understanding who can appeal, when an appeal can be taken, and how much review an appellate court will undertake is essential to understanding appellate process. A lawyer who does not understand these concepts may waste a client's time and money by pursuing a frivolous appeal or may lose an opportunity to appeal. The preceding discussion does not address every nuance of appellate procedure, but it does provide a foundation upon which to build. It should at least give you a sufficient understanding of appellate process to recognize when issues of standing, appellate jurisdiction, or scope and standard of review may affect the conduct of an appeal so that you can research these issues in greater depth when appropriate.

---

112. Courts also sometimes use the judicial standards of review to evaluate decisions of administrative tribunals in the executive branch. A discussion of review of administrative decisions is beyond the scope of this article. For a discussion of review of administrative decisions, see generally CHILDRESS & DAVIS, *supra* note 97, pt. 4, §§ 14.01 – 17.06.

113. United States v. Tinoco, 304 F.3d 1088, 1104 (11th Cir. 2002) (noting that a trial court's decision regarding the constitutionality of a statute is a question of law to be reviewed de novo on appeal).

APPENDIX A: TESTING YOUR UNDERSTANDING

In answering the questions below, assume that federal law applies.

1. During a criminal trial, two jurors hearing the case (Jurors 4 and 7) appear to be sleeping. One alternate juror could be substituted for one of the sleeping jurors. If both sleeping jurors are dismissed, however, the judge will have to declare a mistrial. The judge calls counsel to the bench to discuss the situation, but they cannot agree on which juror should be replaced. To make the decision, the judge calls her deputy to the bench and asks the deputy to flip a coin. Heads means Juror 4 is replaced, and tails means Juror 7 is replaced. The defendant's attorney says, "I'm not too sure about this, your honor." The judge ignores the attorney and directs the deputy to flip the coin. It comes up tails. Juror 7 is replaced, and Juror 4 remains on the panel.

The defendant is convicted. He appeals, asserting error based on the judge's juror replacement decision.

QUESTION A: The defendant waited until the conclusion of the case to seek appellate review of the coin flip decision. Was he required to wait, or could he have obtained immediate review of the coin flip decision?

QUESTION B: Was the issue properly preserved at the trial level?

QUESTION C: Assuming that the issue was properly preserved, what standard of review will the appellate court apply?

QUESTION D: Assuming that the issue was *not* properly preserved, will the appellate court review the coin flip decision?

QUESTION E: Will the defendant win on appeal?

2. A private school promulgates a policy under which no student is permitted to pray in school. At the beginning of the first class period each day, students stand and recite the pledge of allegiance, after which the students observe a moment of silence. When one student begins praying loudly during the moment of silence, the teacher throws a whiteboard eraser at her head and tells her to be quiet. The eraser misses the student, but the incident upsets her greatly.

The student decides to sue the school and the teacher. She contacts an advocacy organization devoted to the protection of religious freedom, and the organization's legal department agrees to represent her. Acting on the student's behalf, the organization files suit in U.S. District Court, claiming that the school's policy violates the student's First Amendment rights and that the teacher committed the common law tort of assault against the student by throwing the eraser at her. The complaint in the case of *Student v. Teacher and School* seeks an injunction to force the school to change its policy and money damages against the teacher.

At the close of the discovery phase of the case, the teacher files a motion for summary judgment on the assault claim, which the plaintiff opposes. The court denies the motion on the ground that there

are disputes of material fact on the assault claim. Thereafter, the plaintiff and the school file cross-motions for summary judgment on the First Amendment claim. The court grants the school's motion, enters judgment in favor of the school, and denies the request for an injunction requiring the school to change its policy. The case goes to trial against the teacher. The plaintiff wins at trial.

The student decides not to appeal the ruling in favor of the school, so the organization files its own notice of appeal in the case.

QUESTION A: Could the teacher have taken an immediate appeal of the order denying the motion for summary judgment?

QUESTION B: Could the order granting summary judgment in favor of the school have been immediately appealed?

QUESTION C: Is the organization entitled to appeal the order granting summary judgment in favor of the school?

APPENDIX B: ANSWERS

1. Coin flip hypothetical. (This scenario is based on *Golsun v. United States*, 592 A.2d 1054 (D.C. 1991).)

QUESTION A: The defendant waited until the conclusion of the case to seek appellate review of the coin flip decision. Was he required to wait, or could he have obtained immediate review of the coin flip decision?

The only way the defendant could have obtained immediate review of the coin flip decision is through a petition for a writ of mandamus. It seems unlikely, however, that the defendant would have availed himself of this procedure, given that his attorney was ambivalent at best about the coin flip, as discussed more fully below.

The order was not a final order; thus, 28 U.S.C. § 1291 would not confer appellate jurisdiction. Immediate review under 28 U.S.C. § 1292(a) would not be available because the order does not involve an injunction. This is a criminal case, not a civil case. Thus, neither 28 U.S.C. § 1292(b) nor Federal Rule of Civil Procedure 54(b) applies. The decision regarding the substitution of the juror is not a collateral order because it does not finally resolve the disputed question. The judge could revisit the decision regarding substitution of the juror and declare a mistrial if necessary. Further, the order is effectively reviewable on appeal.

QUESTION B: Was the issue properly preserved at the trial level?

Although expressing some doubt about the coin flip procedure, the defendant's attorney did not state an objection on the record. The attorney's ambivalent statement is not sufficient to put the judge on notice that the coin flip was a problem. Thus, it did not give the judge adequate opportunity to choose another method of decision-making. The defendant's attorney seemed to be hedging his or her bets, hoping the result of the coin flip would be favorable to the defendant, but trying to keep the defendant's options open for appeal if the result did not turn out favorably. This is not a permissible strategy. The attorney's expression of doubt would not qualify as a proper objection and would not be sufficient to preserve the issue for appeal.

QUESTION C: Assuming that the issue was properly preserved, what standard of review will the appellate court apply?

The court will apply abuse of discretion. The judge had a choice to make and could validly have chosen to replace Juror 4 or Juror 7, declare a mistrial, or take other corrective measures to ensure that the jury was paying attention to the case.

QUESTION D: Assuming that the issue was *not* properly preserved, will the appellate court review the coin flip decision?

The only way for the court to review the issue on appeal if it was not properly preserved is under the plain error doctrine. This seems like an attractive case in which to apply the plain error doctrine because it

seems so obvious that the defendant's attorney should have objected strenuously to the coin flip. Under the Supreme Court's test, however, the error probably does not rise to the level of plain error.

The first two elements of the test are satisfied. The judge committed an error by leaving a discretionary decision to chance. Further, the error is plain. Clearly, a coin flip is not an acceptable method of judicial decision-making. The question is whether the error affected substantial rights. The defendant's attorney was permitted to participate in the juror substitution decision, and as noted above, seemed to be hedging his or her bets as a litigation strategy. Because the judge, in the exercise of her discretion, could validly have substituted either juror, it is not clear that the decision-making methodology employed actually affected the defendant's rights. The court in *Golsun* found that using a coin flip to decide which of two sleeping jurors to dismiss was not plain error, although the facts of that case are more complex than those of the hypothetical. 592 A.2d at 1058-59. This illustrates how difficult it is to obtain review using the plain error doctrine.

Of course, if the court were to find that the error affected substantial rights, it probably would exercise its discretion to correct the error because using a coin flip to decide a discretionary matter seriously affects the fairness, integrity, and public reputation of judicial proceedings. Note also that the defendant might have other options for challenging his conviction even if the appellate court refuses to consider the coin flip issue on direct appeal. For example, the defendant might be able to mount a collateral attack on his conviction on the ground that he received ineffective assistance of counsel.

QUESTION E: Will the defendant win on appeal?

If the issue had been properly preserved so that the appellate court would apply the abuse of discretion standard, the defendant would win. Flipping a coin is not an exercise of discretion; it is the abdication of discretion because it leaves the decision to chance, not reasoned choice. *Golsun*, 592 A.2d at 1057-58. Because the issue was not properly preserved, however, the defendant will lose because the error does not rise to the level of plain error, as discussed above.

2. First Amendment hypothetical.

QUESTION A: Could the teacher have taken an immediate appeal of the order denying the motion for summary judgment?

The teacher would not be able to take an immediate appeal. The denial of summary judgment is not a final order resolving the litigation pursuant to 28 U.S.C. § 1291; all it does is allow the trial to go forward.

The order does not involve an injunction; thus, 28 U.S.C. § 1292(a) does not apply. Because the court denied the teacher's motion on the basis of factual disputes, 28 U.S.C. § 1292(b) probably is not applicable. A factual dispute is unlikely to raise any controlling question of law about which there is substantial basis for difference of opinion.

Even if it did, allowing an immediate appeal probably would not materially advance the ultimate termination of the litigation because the First Amendment claim would remain pending.

Federal Rule of Civil Procedure 54(b) does not apply because, although the case involves multiple claims and parties, the order did not resolve any claim against any party. The order is not a collateral order. The assault claim is integral to the merits of the dispute, and the order can effectively be reviewed on appeal.

A petition for a writ of mandamus to force the trial court to enter judgment in the teacher's favor on the assault claim is not likely to succeed because the judge acted within his jurisdiction in deciding the motion.

QUESTION B: Could the order granting summary judgment in favor of the school have been immediately appealed?

The order granting the school's motion for summary judgment could have been appealed immediately. It is not a final order under 28 U.S.C. § 1291, but appellate jurisdiction would lie pursuant to 28 U.S.C. § 1292(a) because the order denies a request for an injunction. Further, the order resolves all of the claims against the school, thus making it eligible for certification as a final order pursuant to Federal Rule of Civil Procedure 54(b).

Depending on the nature of the issues in the case, it is possible that the First Amendment claim raises a controlling question of law about which there is substantial ground for difference of opinion. This would potentially make the order eligible for immediate appeal pursuant to 28 U.S.C. § 1292(b), although an immediate appeal probably would not materially advance the termination of the litigation, given the pending assault claim. The order is not a collateral order because it goes to the very heart of the case and is effectively reviewable on appeal.

A petition for a writ of mandamus to force the district court to grant the injunction is unlikely to succeed and in any event is unnecessary because the order is immediately appealable on the grounds discussed above.

QUESTION C: Is the organization entitled to appeal the order granting summary judgment in favor of the school?

Although the organization may feel aggrieved by the decision, it is not a party to the case. The student is the plaintiff; the organization's lawyers were merely representing her. Unless the organization is permitted to intervene for purposes of the appeal, it will not be allowed to pursue the appeal.