Standards of Appellate Review

by George A. Somerville

You are about to appear in federal court to oppose a citizens' group that wants to stop clearing and construction on your client's prized commercial property. You have prepared carefully. You are confident that your client has complied with all legal requirements. The plaintiffs' standing is questionable, and nothing in their affidavits remotely suggests an irreparable injury. The plaintiffs' "public interest" argument seems especially thin; it earnestly points out the importance of some rather mundane archaeological finds (from around 1880). Your brief magnanimously suggests that, although old artifacts have some importance, promotion of economic activity and employment, together with protection of reasonable, investment-backed expectations, tips the balance of the equities heavily in your favor. It looks like an open-and-shut case.

At the hearing, you quickly realize that the court is not of the same opinion. A cold, heavy feeling grows in your stomach as the judge tosses plaintiffs' counsel a few softballs: "This injury really would be irreparable, wouldn't it? I mean, each of these things is handmade, am I correct? So each is unique and therefore irreplaceable?" Plaintiffs' counsel just mumbles a grateful "Yes, Your Honor."

By the time you take the podium, you expect to be chewed to shreds for your client's insensitive refusal to consider donating the property to the plaintiffs for their archaeological studies. You are not disappointed. The judge signs and hands down his order as you stand there: Your client is enjoined from disturbing the property, pending trial.

After calling your client with the bad news, your thoughts turn to appeal. The judicial code provides a right to review of interlocutory injunctive orders, and, for many lawyers, the decision is quick and easy. "I'll show that antibusiness judge," they think. After the client has added a few go-get-em's, the notice of appeal goes out.

You may end up wishing you had saved the filing fee. The problem is that, in your haste to take an appeal, any appeal, you may have gotten yourself a ruinous standard of review.

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An appellate court reviews a preliminary injunction primarily for "abuse of discretion." It will (and should) be predisposed to affirm the trial judge; getting a reversal will be difficult. Most trial courts will at least pay lip service to the usual factors for entering a preliminary injunction. This avoids reversal for simple legal error, and showing abuse in the weighing of those factors can be close to impossible.

The problem is more than just a likely loss, however. A hasty decision to take an interlocutory appeal that you then lose can hurt in the ultimate resolution of the merits. The fact that the standard of review is abuse of discretion reflects an appellate judgment that some decisions are best left to the trial court. Still, declaring the law is what appellate courts principally do; so, when they review the "possibility of success" criterion in injunction appeals, they often announce in controlling dicta the rules for later proceedings. See *West Publishing Co. v. Mead Data Central, Inc.*, 799 F.2d 1219 (8th Cir. 1986).

Unfortunately for you, the appellant, an appeals court's legal pronouncements may be affected by the sparsely developed record, especially if your opponent has shown unequal hardships and genuinely equal harms. In addition, the abuse of discretion standard, by enforcing deference to the trial court, may incline the court to fashion case-controlling legal standards that help justify the trial court's action.

Consider Not Appealing

This then is the possible penalty for an overly hasty interlocutory appeal: Partially blinded by the standards of review, the court will be inclined to affirm the preliminary injunction in a way that virtually precludes a later decision in your favor.

Therefore, if your client can live with the status quo through the trial, and probably through an appeal, he should do it. After trial and judgment, the lower court's legal conclusions will be reviewed on a full evidentiary record; they will not be protected by any deference or presumption of correctness. Avoiding the abuse of discretion standard will allow (and require) the court of appeals to make an *independent* judgment, at least of the legal issues. One of the real

consolations of appellate practice is that appellate courts usually are willing to do so.

At first glance, standards of review questions may seem obvious or boring. Why not just look it up? In reality, however, complex and subtle questions—of both law and tactics—are present in considering standards of review. One good reason for assessing these issues carefully is that local rules in some federal circuits (the Third, Ninth, Tenth, and Eleventh) require parties to state in their briefs the standards of review applicable to the issues presented. More important, a practical understanding will improve your written and oral presentations and enhance your chances of obtaining a favorable judgment on appeal.

"Standard of review" refers simply to the strictness or intensity with which an appellate court will evaluate a trial court's actions. The principles developed in the federal system (the focus here) are readily transplanted elsewhere.

The strictest standard of review is plenary, or *de novo*, review, usually for legal error. Under this standard, the trial court's determination is entitled to little, if any, presumption of correctness. The other most common standards of review, arrayed from the stricter to the more forgiving, include "abuse of discretion," "clearly erroneous" review of trial court fact-findings, and "rational basis" review of jury findings. Standards of review for administrative action follow the same general pattern and add a few categories unique to the agency context, chiefly "arbitrary or capricious" and "substantial evidence on the record as a whole."

Going Up the Ladder

The reason for understanding and being able to use such standards is this: If you represent the appellant, you want to move the standard of review up the ladder to a strict ruling; if you represent the appellee, you want a standard more generous to the trial judge. More than that, you need to know that there are varying levels of review even within a single standard. They too may be used to your advantage.

To know how to move an issue up or down the review ladder, you must understand why review is structured as it is, and you must appreciate the variations within virtually every individual level of review.

Legal error is the standard of review the appellant wants. When an appellate court reviews on this basis, the theory is that it accords the trial court decision no presumption of correctness whatever. In practice, however, legal error review has its variations. Sometimes, even when the standard is legal error, the lower court opinion will have advantages. If you do not understand these advantages, your appeal will be handicapped.

On a mundane level, for example, a well-written trial court opinion is every appellant's worst enemy and every appellee's best friend. It creates its own presumption of correctness by the force of its reasoning and the quality of its examination of law and precedent. If you are an appellant stuck with a good opinion, there is not much you can do about it except advise your client and press the attack.

The intensity of legal error review will also depend on what the appellate court is asked to do. Will the court have to select a legal rule? Interpret an existing rule? Or just apply recognized legal standards?

Most cases require only application of settled law to the facts. As cases, statutes, or regulations define an area of law,

trial court decisions become more accurate and more predictable. Even though legal error is ostensibly the standard, decisions in such circumstances are more likely to be affirmed by *per curiam* opinions or unpublished orders. Appellate judges know that trial court errors occur less often in the application of settled law than in other kinds of cases where review for legal error is exercised. In effect, there is a presumption that the decision below is correct. When you represent the appellee, and face a legal error standard, you should therefore try to argue that the case requires only application of settled law to the facts.

At the other end of the spectrum is the relatively rare case in which a court must select or fashion a new legal precept, both for the case on appeal and as a precedent for future cases. Such cases ordinarily consume much of appellate judges' time and attention, and they tend to occupy many pages of the reports.

There is a reason why law selection cases occupy a lot of judicial attention. Cases requiring the choice of a rule of law represent the core of the appellate function. As a result, this is the category of cases in which any deference to the trial court's rulings is likely to be at a minimum. Such cases also are those in which the quality of advocacy can be most influential, particularly when the trial court's opinion is weak or nonexistent. When new law must be fashioned, legal error review is truly *de novo*.

A final category of legal error review, interpretation, lies between application and choice. In this broad category is most of our statutory and constitutional jurisprudence. But the lines between interpretation and its brothers are wide and gray. For example, when the question is which of two conflicting rules controls, choice and interpretation essentially merge. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In the other direction, interpretation may become indistinguishable from application of the law in a particular case. The precise categorization is not critical, however. The point is that if what the trial judge did lies between the extremes of selecting a brand new rule and applying obvious law to obvious facts, then the legal error review will be intense, but there will be some deference to the trial court.

For an appellate advocate, the significance of these seemingly subtle distinctions lies in how the brief is written. Characterizations of what the lower court did, or what the appeals court should do, are often matters of opinion or even semantics. How you describe what was done will depend on how intense you want the review to be. As appellant, for example, you would be better off saying that the trial judge adopted "an entirely new and erroneous legal standard" than

to say the court "applied the wrong rule of law to this case."

The standard that appellants fear is abuse of discretion. It often seems as if appeals courts think a decision left to a trial judge's discretion is none of their business. Even findings of fact, which are subject to a "clearly erroneous" review, seem to be scrutinized more closely than discretionary decisions.

Such fears are not always right. As with legal error, there are several varieties of discretion. Though review of discretion can be more forgiving than clearly erroneous review, some kinds of discretionary review are in fact stricter. Careful analysis of the particular exercise of discretion in a case may convince a court to apply a tougher standard.

A warning before proceeding: It is never easy to obtain reversal of a pure exercise of discretion. The odds are against you. The point is this: Do not give up—actually or emotionally—merely because a decision against you is discretionary. A careful and discriminating argument sometimes can overcome the unhelpful standard.

Consider a few examples: A ruling on a discretionary matter involving admission of evidence or discovery rarely is reversed. These kinds of questions—especially in discovery—are committed to the "strong" discretion of the trial court. That commitment is a recognition of the trial judge's superior knowledge of the issues, the record, the proceedings, and the personalities. It also is based on the tremendous variety of situations in which such questions arise, making formulation of legal rules difficult or impossible. Furthermore, there is the principle that a litigant is entitled to a fair trial but not to a perfect one; decisions on subjects such as discovery may be wrong, but they rarely affect the basic fairness of the trial.

Contrast this with questions committed to trial court discretion, not because trial courts are in a better position to decide, but because such questions present novel issues. Committing certain decisions to trial court discretion provides a period of flexibility—almost experimentation—while appellate courts develop expertise from a series of cases. Sometimes, however, things change: Decisions move from the substantial to the limited discretion of the trial court, or even become prescribed by a rule of law. Attorneys' fees awards under fee-shifting statutes have followed that pattern. At first there were only general legal standards with much left to the trial judge. Recently, though, appellate courts have adopted more and more specific guidelines. Such cases often present opportunities for review and reversal not found in cases in which decisions are *really* committed to lower court discretion. In such "experimental" discretion situations, yours may be the case where the basis for decision moves from the trial court's discretion to a rule of law.

Close Review of Discretion

There are two other categories in which matters committed to trial court discretion may get meaningful review. In the first, the exercise of discretion must conform to standards announced in prior opinions; appellate courts may reevaluate lower courts' applications of the standards. In this category are cases seeking a preliminary injunction, a declaratory judgment, or an exercise of federal pendent jurisdiction. The second category involves subjects on which previous cases have established a preferred outcome. This includes motions for a voluntary dismissal or to approve a settlement. Even though ostensibly committed to trial court discretion, departures from the usual outcome are tolerated rarely, and only for good reasons persuasively articulated by the trial court.

There is another reason why almost all exercises of discretion may actually get meaningful review. A discretionary judgment often has the legal components. See, e.g., *Pratte v. NLRB*, 683 F.2d 1038, 1040, 1044 (7th Cir. 1982) (*de novo* review where a normally discretionary question "turns on interpretation of the law"). Legal error can be embedded in an apparently discretionary decision when the trial judge fails to recognize that a question *is* discretionary; if he thinks himself bound by a rule of law, he should be reversed for legal error and instructed to exercise his discretion on remand. Compare *United States v. Williams*, 407 F.2d 940 (4th Cir. 1969) with *United States v. McCoy*, 517 F.2d 41, 44–45 (7th Cir.), *cert. denied*, 423 U.S. 895 (1975).

More commonly, particularly in a developing area, a lawyer attuned to the substantive law may be able to persuade an appeals court that the trial court considered impermissible factors or failed to consider factors that should have been evaluated. E.g., *Kern v. TXO Production Corp.*, 738 F.2d 968, 970, 972 (8th Cir. 1984). Though appellate courts in such cases may say that the trial court did or did not abuse its discretion, in fact its choice of factors usually presents a question of law, subject to review for error and not for abuse of discretion. Once again, the aim for an appellant is to see through an apparently discouraging abuse of discretion standard, find a legal error, and make the review more intense.

Was the Decision Explained?

There is another point for those facing an appeal of a discretionary decision: How much did the trial court explain its decision? This can be important, but it is hard to evaluate. Even though a thoughtful trial court opinion should be an appellant's worst enemy, some judges have complained that the opposite is true. They believe that a trial judge who explains in detail her reasons for an exercise of discretion is more likely to be reversed than one who states no reasons at all. The problem is that the more that is said, the more there is to criticize. To the extent this is true, it is lamentable. It may also be true that if the trial judge stated no reasons and her exercise of discretion is attacked, an appellee will have a freer hand in suggesting proper factors that may have influenced the decision. Nonetheless, an opinion that states no reasons is usually good news for the appellant. Your opponent can talk all he wants about what the trial judge thought, but he will be inevitably hamstrung by a lack of any visible support from the ruling below.

If you must attack an exercise of discretion, and the trial judge acted without explaining her reasons, rejoice. You can argue that the appellate court's institutional interest in reviewability demands articulation of the trial court's reasons. E.g., *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 436 F.2d 699, 701–02 (1st Cir. 1970). The point is obvious: If the trial judge said nothing, the appeals court will have no basis for its review. Such an argument may be effective—especially in a delicate or developing area—but a reversal is likely to be cold comfort. The usual result will be a remand to the trial court for a statement of its reasons or, worse yet, a decision announcing a prospective rule that is not applied to your case.

What about review of findings of fact? Most litigators know that appellate review of fact findings is exceedingly forgiving. All of us have told clients that chances for an appeal are slim because the judge "killed us on the facts."

A common response to such difficulties is to try to characterize an issue of fact as a question of law. This happens very often with matters that are mixed questions of law and fact. But the line between law and fact is not always sharp. It wavers and can be moved. Courts sometimes will characterize matters that appear factual as legal, usually to permit them to reach what they consider a just result. As an appellant you want to take advantage of this malleability.

Mixed Questions

What *is* the standard for findings of fact? In federal *civil* cases, Rule 52(a) forbids appellate courts from setting aside trial court fact findings unless "clearly erroneous." The Supreme Court recently explained this standard as follows:

> [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. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.
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> *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985).

This is a tough standard, and, perhaps as a result, it has had exceptions and odd wrinkles. For example, until recently, many federal courts employed a much stricter standard of review, often virtually *de novo*, of findings based on documentary evidence. The idea was that no credibility concerns were involved. This view was firmly put to rest in *Bessemer City* and by the adoption a few weeks after that case of the 1985 amendment to Rule 52. In *Bessemer City*, the Supreme Court observed that the clearly erroneous standard applies "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." 470 U.S. at 574. The Rule 52 amendment added the italicized phrase in the following: "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 to judge of the credibility of the witnesses."

The "credibility" clause deserves attention. In *Bessemer City*, the Supreme Court said that clause was not merely a justification of the clearly erroneous rule. Instead, it defined an occasion for even more stringent application of the standard: "[W]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands *even greater* deference to the trial court's findings. . . . when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can *virtually never* be clear error." 470 U.S. at 575. (emphasis added)

Language like that makes it obvious why parties to an appeal often spend much of their time tussling over whether the issue in dispute is a factual or legal conclusion.

Review of fact-findings in federal *criminal* cases is not as well defined, because the Federal Rules of Criminal Procedure (unlike the Rules of Civil Procedure) do not prescribe a standard. Most courts apply the clearly erroneous standard in criminal cases, but sometimes they add the qualification that the "ultimate finding" of guilt will be reviewed only for "substantial evidence" to support it. E.g., *United States v. Delerme*, 457 F.2d 156, 159–60 (3rd Cir. 1972).

In considering review of factual findings in criminal cases, remember the difference in evidentiary burdens between civil and criminal cases. Since *Jackson v. Virginia*, 443 U.S. 307 (1979), it has been clear that a reviewing court must determine whether the evidence is "sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." Id. at 313–14. Thus, a finding not clearly erroneous under the civil "preponderance of evidence" standard might be found clearly erroneous in a criminal case. The same principle applies to review of facts that must be proved by clear and convincing evidence in a civil case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252–55 (1986).

Given this law, what can you do if you are an appellant attacking a judgment based largely on factual considerations? First, learn to recognize lost causes: If your case arises in a settled area of the law and you lost at trial because the court found that the historical facts favored the other side, you have almost no chance on appeal. Such pure findings of fact generally can be attacked successfully only where they lack any rational connection to the record—where they seem to have materialized out of thin air—or occasionally when the vast weight of the evidence persuades the appellate court that a finding is surely wrong. Such circumstances are exceedingly rare. Appellate courts seem to take the view that while puzzling or questionable findings may reflect confusion or prejudice, they far more often are the product of the trial judge's hands-on familiarity with the case.

But clear errors do sometimes occur. Chiefly this happens in areas where the trial court's greater familiarity is a weakness and not an asset—for example, when a fact has been pleaded and asserted in briefs, and repeated so often it is almost second nature to the judge. The party asserting the fact may forget to support it with evidence, and the court may just assume it was proven. Absent such a special situation, however, you will have a hard time attacking the findings below.

Criminal Findings

Criminal cases may be an exception. Some skillful practitioners argue that sufficiency of the evidence should be challenged in a criminal appeal whenever possible, consistent with professional ethics. At the very least, this will help avoid having the appeals court reach the easy conclusion that any legal errors were harmless. See Tigar, *Federal Appeals* § 5.06 (1987).

Much better than attacking findings of fact is trying to turn them into conclusions of law. Isolating the legal components of the critical findings is what you want to do. Judge Aldisert described the process well in *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 103 (3d Cir. 1981)—

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a fax directory of major firms.

Among the new fans of this avalanche of slick'n'slimy parchment is Judge Richard S. Lane of the Civil Court of the City of New York. With a few paragraphs, Judge Lane put the Civil Court on the national map of jurisprudence—no mean feat for a tribunal with a $25,000 jurisdictional ceiling and an atmosphere straight out of *The Bonfire of the Vanities*. Judge Lane was the first to give a judicial imprimatur to what everyone hoped would be true: Service of interlocutory papers by fax, he held, equals service by hand. *Calabrese v. Springer Personnel of New York, Inc.*, 534 N.Y.S.2d 83 (N.Y. City Civ. Ct. 1988).

The case itself was a dud. Some months earlier, Judge Lane had issued what he called "a common garden variety of conditional order" striking the answer unless the defendant responded to interrogatories within 20 days. The 20 days were to commence when the plaintiff served the conditional order, which plaintiff's attorney did by faxing a copy to defense counsel. Defendant refused to accept fax service and denied that the 20 days had begun to run, but then answered the interrogatories 28 days later. Too late, said plaintiff, and sought a default.

Conceding that the state rules on service do not expressly mention fax, Judge Lane nevertheless refused to engage in the "Augustinian folly" of parsing the rules to determine whether fax fits within them. Instead, he pointed out what everyone already knows: Faxes are at least as quick and every bit as reliable (probably more so) than the sundry messengers, process servers, postal workers, and other go-betweens used in law practice every day. Moreover, an office that has a fax machine hooked in and turned on is "open" for purposes of receiving service. In short, fax service satisfied all of the requirements for service under the state rules. To hold otherwise

> would justify the blunt observation about the Law which Charles Dickens put in the mouth of Mr. Bumble in *Oliver Twist*.

Since the fax service was good, the responses to interrogatories were late. Nevertheless, Judge Lane exercised his discretion to let them in. And finally he commanded, "[L]et's get on with the merits of this case." 534 N.Y.S.2d at 84.

Within weeks, *Calabrese* had become a celebrity. It was annotated far and wide. Soon after, another New York court followed Judge Lane. *Infilco Degremont, Inc. v. Carland Construction Co.*, N.Y.L.J., Dec. 27, 1988, at 25, col. 2 (Sup. Ct. N.Y. County). Within months, a committee of the New York State Bar Association enthusiastically recommended that Judge Lane's decision be officially adopted as a rule of court. (The committee also proposed a further study of the prospect of serving process by fax.)

Does anyone seriously dispute that service by fax is easy, reliable, and inexpensive? Does anyone doubt that, from now on, fax service will be as much a part of law practice as yellow pads, paper clips, and clients who don't pay their bills? Technology in law offices sometimes seems like equal parts of hype and boondoggle. But the fax machine is a real boon, and it belongs in every lawyer's office.

So let us salute Judge Lane for marking yet another milestone on the path of the law. Let us adopt the practical wisdom of his decision. Let us resolve to use technology to litigate more efficiently.

And let's get on with the merits. ☐

Review Standards

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where the issue was whether personal property had been abandoned:

> Abandonment is not a question of narrative or historcal fact but an ultimate fact, a legal concept with a factual component. . . . It is "a conclusion of law or at least a determination of a mixed question of law and fact," . . . requiring "the application of a legal standard to the historical-fact determinations," . . . . In reviewing the ultimate determination of abandonment, . . . we are therefore not limited by the "clearly erroneous" standard, . . . but must employ a mixed standard of review. We must accept the trial court's findings of historical or narrative facts unless they are clearly erroneous, but we must exercise a plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.

See also *United States v. McConney*, 728 F.2d 1195, 1200–04 (9th Cir.) (*en banc*), *cert. denied*, 469 U.S. 824 (1984). Many of the findings that burden appellants will, on close analysis, be seen to have a legal component. If a "factual" finding troubles you, look for the law.

Do not waste much time analyzing jury verdicts, however. Appellate challenges to jury findings rarely succeed. In federal courts, the Seventh Amendment's proscription of reexamination of jury findings except "according to the rules of the common law" limits review of jury verdicts even more than Rule 52 already restricts review of trial court findings. A jury's verdict should not be set aside unless it has no rational basis in the evidence. See generally 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 2524–2529 (1971). Showing *that* is an uphill path so steep it is almost vertical. If you do want to undertake the daunting climb, pay careful attention to Rule 50's requirements for direct verdicts and judgments notwithstanding the verdict.

There is a limited exception to the appellate protections accorded findings of fact. Appellate courts occasionally exercise "independent judgment" on pure questions of fact, despite Rule 52(a) and the Seventh Amendment. In *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984), for example, the Court said that "in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" The potential scope of this exception is enormous, but its actual reach is uncertain. *Bose* may be a good starting place for research, but its value outside free speech or free press litigation is unclear.

The final frontier is review of administrative agency action. Unfortunately, it is a wilderness too complex and vast to be mapped here. Suffice it to say that the standards for such review are set out in the federal Administrative Procedure Act (and state equivalents). See 5

U.S.C. § 706. They include every standard explained thus far in this article, and then some. As complicated as they may seem, these statutory catalogs simply hide further complexities. When agency action is involved, there are at least two kinds of legal error review, two kinds of abuse of discretion review, and three kinds of review of findings of fact. It would take many pages to sketch this out, much less to explain how to use it. It is a subject for another day.

Dangers, Toils

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briefing schedule.

Just knowing the five main roads to interlocutory review does not mean you understand all the byways and dead ends. Consider this: Suppose that, having done your homework, you got interlocutory review of the order staying Goodco's suit. Suppose further that, against all odds, you got the stay reversed. However, after a bench trial, before the same district judge, Breach Corp. prevailed on the merits against Goodco's claims and also obtained a judgment for damages and unspecified attorneys' fees against Goodco on its counterclaim. You want to oppose the amount of fees Breach Corp. has requested.

By now, of course, you think you are thoroughly familiar with the law on interlocutory appeals. You have considered taking immediate appeal from the judgment on liability and damages; however, solicitous of the interests of justice and Goodco's cash resources, you decide to avoid piecemeal appeals. You know that Rule 54(b) provides that a merits judgment can be revised at any time until all rights and liabilities are determined, and that seems to you a good test for whether your judgment is final. Since the attorneys' fees claim of Breach Corp. remains unresolved, you conclude that the judgment on the merits remains interlocutory and that you may postpone your appeal from it until the whole case—merits *and* fees—is resolved.

Wrong. The problem is that the order you thought was interlocutory was in fact final, and it started the time running for taking an appeal. You have been fooled by an "illusory" interlocutory order. This trap exists because the Supreme Court, author of Rule 54(b), ignored that rule in *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717 (1988), and adopted a new test for determining when a judgment is final. Under *Budinich*, a judgment disposing of everything *except* attorneys' fees is final, and must be appealed even though the request for attorneys' fees remains for adjudication.

Budinich leaves you four options. First, if it is not already too late, you can ask the district court to delay entry of the merits judgment pending determination of the attorneys' fees question. Given the length of some attorneys' fees disputes, Breach Corp. is likely to oppose this vigorously. Second, you can seek leave from the district court to wait 60 days before filing a notice of appeal, Fed. R. App. P. 4(a)(5), and hope the fee motion is decided within that time. Absent a district court rule requiring prompt filing of a motion for attorneys' fees, however, the hope may be vain. Even if the motion is quickly filed, even moderately complex fee applications can take many months to resolve. Third, you can file a timely notice of appeal on the merits and then immediately move to stay action on the appeal until the fee question is resolved. In some circuits, the clerk can grant this motion if it is unopposed.

Finally, you can simply appeal and fight in two courts; that, of course, can turn out to be wasteful. If you win on appeal and the merits judgment is reversed, any right to fees may well evaporate. Even a modification on appeal may affect fees entitlement. This means that time spent litigating fees at the trial level may have been wholly or partly wasted.

Budinich leaves few avenues of escape for the lawyer who fails to take these precautions and allows the time for appeal to expire. Appeal periods are jurisdictional; they are rarely equitably extended. Letting them run out is big trouble. One option would be to request relief from judgment under Fed. R. Civ. P. 60(b) in the hope of obtaining a new judgment from which an appeal can be taken. Such a request is beyond the intended scope of Rule 60(b), however; a party making it would, in the words of Professor Moore's treatise, be "truly in extremis."

The moral of our final example is this: In your zeal to learn if you *can* take an appeal, do not forget to consider whether you *must* take an appeal. To borrow from the hymn, taking an appeal—particularly an interlocutory one—requires contemplation of many "dangers, toils, and snares." Even the most seasoned litigator may need "amazing grace" to survive.

Questions, Answers

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you cannot run away from concessions that must be made, and some concessions can actually improve a lawyer's credibility. This is particularly true of factual matters. For example, if a judge asks: "Isn't it true that your client testified _____?" an answer must be given in the affirmative if that is the case. In dealing with a question calling for a concession, *it is essential first to answer the question*, and only then explain why the conceded matter is not damaging. If a judge is disturbed that you are not making a concession that you must make, simply say "I do acknowledge Your Honor's point. The record shows _____. That, however, is not dispositive here because . . . ."

Even greater care must be used in dealing with questions calling for a concession of law. For example, an appellate judge may ask: "Wouldn't you agree that the result would be different if the facts were _____?" If you are willing to stand on the distinction between your case and the variation described by the judge, you should answer in the affirmative. On the other hand, if it is not clear that the distinction is a dispositive one, or if your case is not greatly different from the hypothetical case, it is best not to concede the point at all. It is permissible to respond: "I wouldn't concede that this variation would produce a different result. Your Honor has, of course, described a far less favorable case for applying the principle we rely on, but it would still control because . . . ."