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REPORT ON APPEALS OF INTERLOCUTORY ORDERS

I. Introduction

This Committee set out to examine New York's rules concerning the appealability of interlocutory orders and to consider whether changes in those rules were necessary or desirable. After review, and as set forth below, the Committee believes that more empirical data are needed before any recommendation for reform of the basic standard of "appealability" can be made or meaningfully evaluated. An outline of a proposed study is set forth below.

The Committee believes that two less sweeping reforms can help deter any abuses of the current "appealability" standard and should be implemented regardless of whether that standard is ultimately changed. First, because of the potential for delay and abuse, the Committee recommends that the time to perfect an interlocutory appeal be shortened. Additionally, the Committee urges the Appellate Divisions to employ their inherent power to impose sanctions for frivolous appeals.

II. Scope of the Issue

A. New York's Current Permissive "Appealability" Rule

Virtually any interlocutory order of the Supreme Court or County Court may be immediately appealed. CPLR 5701(a)(2) permits an appeal from the Supreme Court or County Court to the Appellate Divisions from an order which

(i) grants, refuses, continues or modifies a provisional remedy; or

(ii) settles, grants or refuses an application to resettle a transcript or statement on appeal; or

(iii) grants or refuses a new trial; except where specific questions of fact arising upon the issues in an action triable by the court have been tried by a jury, pursuant to an order for that purpose, and the order grants or refuses a new trial upon the merits; or

(iv) involves some part of the merits; or

(v) affects a substantial right; or

(vi) in effect determines the action and prevents a judgment from which an appeal might be taken; or

(vii) determines a statutory provision of the state to be unconstitutional, and the determination appears from the reasons given for the decision or is necessarily implied in the decision.[1]

There are few orders which cannot be characterized as "involv[ing] some part of the merits" or "affect[ing] a

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1 Although the provision is on its face limited to orders deciding motions made on notice, interlocutory review of an ex parte order can be obtained by moving on notice to vacate or modify it, and appealing the resulting order, CPLR 5701(a)(3).

substantial right." CPLR 5701(b) creates only three narrow exceptions to the broad right of appeal, for interlocutory orders in Article 78 proceedings, and orders deciding motions for a more definite statement or the striking of "scandalous or prejudicial matter."[2] Even these, and any others conceiv-

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2 The following is a sampling of the vast array of interlocutory orders which have been held appealable as of right under CPLR 5701(a):

Order denying plaintiff's motion to disqualify defendant's attorney, Yalkowsky v. Napolitano, 94 A.D.2d 683, 463 N.Y.S.2d 8 (1st Dep't), appeal dismissed, 469 N.Y.S.2d 696 (1983) (held, affirmed as premature, without prejudice to renewal);

Order appointing lead counsel in shareholders' derivative suit, Katz v. Clitter, 58 A.D.2d 777, 396 N.Y.S.2d 388 (1st Dep't 1977) (right of party who filed earlier suit "to conduct and control the litigation commenced by him" deemed a "substantial right" within CPLR 5701(a)(2)(v); order reversed);

Order denying motion to implead MVAIC without prejudice to renewal after trial held, appealable by successful opponent of motion, to the extent of the issue of permission to renew, Sherman v. Morales, 50 A.D.2d 610, 375 N.Y.S.2d 377 (2d Dep't 1975);

Denial of motion for resettlement of an order, Kay-Fries, Inc. v. Martino, 73 A.D.2d 342, 426 N.Y.S.2d 304 (2d Dep't), appeal dismissed, 50 N.Y.2d 1056, 431 N.Y.S.2d 817, and 51 N.Y.2d 994, 435 N.Y.S.2d 979 (1980) (appellant sought to modify recital portion of judgment; dictum that appeal would have been dismissed if he had sought to change "substantive or decretal" portions; held, affirmed); accord, Lewin v. New York City Conciliation & Appeals Board, 88 A.D.2d 516, 450 N.Y.S.2d 1 (1st Dep't), aff'd, 57 N.Y.2d 760, 454 N.Y.S.2d 990 (1982);

Motion to renew (as distinguished from motion to reargue), Rector v. Committee to Preserve St. Bartholomew's Church, Inc., 84 A.D.2d 309, 445 N.Y.S.2d 975 (1st Dep't), appeal dismissed, 56 N.Y.2d 645 (1982);

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ably outside the scope of CPLR 5701(a), are appealable by permission,[3] which may be sought from either or both of the nisi

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Order staying entry of judgment on arbitration until after judicial determination of mechanic's lien in related proceeding, Mansfield v. Jimden Realty Corp., 36 A.D.2d 623, 319 N.Y.S.2d 381 (2d Dep't 1971) (held, appealable as affecting a substantial right, i.e., the right to enter a judgment based on the arbitration award; arbitration had not yet taken place at time of appeal);

Order bifurcating trial as to liability and damages, Dilenbeck v. Bailey, 32 A.D.2d 735, 301 N.Y.S.2d 900 (4th Dep't 1969);

Order denying motion to consolidate, Okin v. White Plains Hospital, 97 A.D.2d 399, 467 N.Y.S.2d 225 (2d Dep't 1983) (held, reversed); or granting severance of a third party action, Todd v. Gull Contracting Co., 22 A.D.2d 904, 255 N.Y.S.2d 452 (2d Dep't 1964); Mets v. Becker, 21 A.D.2d 984, 249 N.Y.S.2d 442 (2d Dep't 1964) (without discussion of appealability);

Denial of motion on notice to set aside ex parte order, Scotti v. De Fayette, 53 A.D.2d 282, 385 N.Y.S.2d 659 (4th Dep't 1976) (dictum) (citing pre-CPLR cases); James v. Powell, 30 A.D.2d 340, 292 N.Y.S.2d 135 (1st Dep't), aff'd, 23 N.Y.2d 691, 296 N.Y.S.2d 139 (1968);

Denial of motion to dismiss for failure to prosecute, Navillus, Inc. v. Guggino, 34 A.D.2d 648, 310 N.Y.S.2d 13 (2d Dep't 1970) (held, reversed, without discussion of appealability);

Order determining motion on notice to vacate or modify pre-calendar conference order or particular provisions thereof, Everitt v. Health Maintenance Center, 86 A.D.2d 224, 449 N.Y.S.2d 713 (1st Dep't 1982) (dictum);

Order quashing subpoena by special prosecutor for handwriting sample in civil investigation, Pregent v. Hynes, 73 A.D.2d 722, 422 N.Y.S.2d 509 (3d Dep't 1979), aff'd, 49 N.Y.2d 1018, 429 N.Y.S.2d 634 (1980);

Orders of reference to hear and report, Candid Productions Inc. v. SFM Media Service Corp., 51 A.D.2d 943, 381

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(Footnote(s) 3 will appear on following pages)

prius judge or a justice of the appropriate Appellate Division. CPLR 5701(c).

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N.Y.S.2d 280 (1st Dep't 1976) (issue of duress in the inducement of a contract); contra, where the hearing is considered "in aid of disposition of a motion and therefore not affecting a substantial right," e.g., Bagdy v. Progresso Foods, 86 A.D.2d 589, 446 N.Y.S.2d 137 (2d Dep't 1982) (issue whether defendant amenable to service during period of limitations); Pearson v. Pearson, 108 A.D.2d 402, 489 N.Y.S.2d 332 (2d Dep't), appeal dismissed, 66 N.Y.2d 915 (1985) (order directing hearing on motion for resettlement of order); Civil Service Employees Ass'n Local 1000 v. Evans, 92 A.D.2d 669, 460 N.Y.S.2d 149 (3d Dep't 1983) (motion to hold in contempt referred for hearing; on movant's appeal, held, not appealable). The nominal test seems to be whether the hearing will be "lengthy and expensive," Grand Central Art Galleries v. Milstein, 89 A.D.2d 178, 454 N.Y.S.2d 839 (1st Dep't 1982); accord, Bezio v. New York State Office of Mental Retardation & Developmental Disabilities, 95 A.D.2d 135, 466 N.Y.S.2d 804 (3d Dep't 1983), rev'd on other grounds, 62 N.Y.2d 921, 479 N.Y.S.2d 6 (1984); D. Siegel, New York Practice § 526 (1978). In Grand Central Art Galleries, however, the only "issue" to be heard was whether or not plaintiff had been incorporated under the Not-For-Profit Corporation Law.

Discovery orders, Moroze & Sherman, P.C. v. Moroze, 104 A.D.2d 70, 481 N.Y.S.2d 699 (1st Dep't 1984) (order denying motion to compel answers to specific questions at deposition, which the deponent had refused to answer on grounds of relevance, held appealable and modified). Although the "general rule" is often stated to the contrary, see, e.g., D. Siegel, New York Practice § 526 (1978), courts have found other theories on which to reach out for these cases, see Milone v. General Motors Corp., 93 A.D.2d 999, 461 N.Y.S.2d 631 (4th Dep't 1983) (denial of motion to compel answers to deposition questions, held, appealable on theory that motion sought to "reopen discovery").

In the following cases, orders which would appear to be within CPLR 5701(b) were nevertheless held appealable as of right:

(Footnote continued)
(Footnote(s) 3 will appear on following pages)

Thus, the Appellate Divisions hear appeals from orders of every conceivable type and magnitude. Litigants are permitted to appeal from potentially dispositive orders like the denial of a motion for summary judgment[4] -- they may also appeal a broad variety of orders whose impact on the litigation's ultimate outcome is less immediately clear. For exam-

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Order (characterized as "judgment") of Special Term in Article 78 proceeding directing that Town Board pass on validity of site plan in zoning dispute, rather than review determination of Director of Planning as provided in Town Code which Special Term declared invalid, held, appealable as affecting a substantial right, Nemeroff Realty Corp. v. Kerr, 38 A.D.2d 437, 330 N.Y.S.2d 632 (2d Dep't 1972), aff'd without opinion, 32 N.Y.2d 873, 346 N.Y.S.2d 532 (1973).

The preceding discussion is based on reported decisions. It does not take into account those interlocutory appeals disposed of by summary order, nor those which are dismissed for failure to prosecute under the "nine-month rule." In the absence of reported decisions, anecdotes abound. For example, a recent letter to the editor of the New York Law Journal (March 18, 1986, at 2, col. 6) complained of a matrimonial case in which seven interlocutory appeals were dismissed for failure to perfect. Without the record in that particular case, it is difficult to second-guess the Appellate Division's denial of the respondent's request for sanctions, but the question of the extent of such occurrences is irresistible. See "Need for Empirical Data," below.

3 For an example of an appeal from an order striking three words from an affirmative defense, see Benjamin H. Tyrel Co. v. Logigraph Network, Inc., Index No. 24595/1980 (1st Dep't 1981).

4 E.g., Keller v. Frank P. Eberhard Co., 110 A.D.2d 686, 487 N.Y.S.2d 603 (2d Dep't 1985); Oak Beach Inn Corp. v. Babylon Beacon, Inc., 92 A.D.2d 102, 459 N.Y.S.2d 819 (2d Dep't), appeal dismissed, 59 N.Y.2d 967 (1983), affirmed, 62 N.Y.2d 158 (1984), cert. denied, 105 S. Ct. 907 (1985).

ple, all of the following have been held appealable as of right. Order permitting withdrawal of a motion to strike affirmative defenses with prejudice, Application of Danzig, 96 A.D.2d 803, 466 N.Y.S.2d 343 (1st Dep't), appeal dismissed, 61 N.Y.2d 669 (1983); order denying change of venue, Pitegoff v. Lucia, 97 A.D.2d 896, 470 N.Y.S.2d 461 (3d Dep't 1983); order denying motions to compel answers to specific questions at a deposition, Moroze & Sherman, P.C. v. Moroze, 104 A.D.2d 70, 481 N.Y.S.2d 699 (1st Dep't 1984); order striking three words from an affirmative defense, Benjamin H. Tyrel Co. v. Logigraph Network, Inc., Index No. 24595/1980 (1st Dep't 1980); order determining motions to compel plaintiff to separately state and number, Russo v. Advance Publications, Inc., 33 A.D.2d 1025, 307 N.Y.S.2d 916 (2d Dep't 1970) (treated as motion under CPLR 3014), contra, Yalkowsky v. Napolitano, 94 A.D.2d 683, 463 N.Y.S.2d 8 (1st Dep't), appeal dismissed, 469 N.Y.S.2d 696 (1983), Alexander v. Kiviranna, 52 A.D.2d 982, 383 N.Y.S.2d 122 (3d Dep't 1976).

This ability to appeal almost any kind of procedural order at any stage of the litigation is coupled with extremely generous departmental rules with respect to the time limits for perfecting such appeals. All departments have exercised their power pursuant to CPLR 5530(c) to expand the short time periods otherwise prescribed by CPLR 5530. Although these time periods have in the past varied, all departments currently have rules permitting nine months to elapse before the ap-

pellant is required to file the record and brief -- measured from the date of the order in the Third Department,[5] and from the date of the notice of appeal in all other departments.[6] The Fourth Department, whose previous practice subjected an appellant to a motion to dismiss only if the record or appendix were not filed within 60 days,[7] and to automatic dismissal only if the cause were not "ready for argument" within six months after such filing,[8] has adopted a nine-month rule effective April 1, 1986.[9]

B. Comparison With Other Jurisdictions

New York's liberal approach to interlocutory appeals appears to be unique in American jurisprudence. It stands in sharp contrast to the federal rule limiting interlocutory appeals to certified questions[10] and a few narrow categories of orders.[11] Indeed, the Committee's research has discovered no state in which appeals as of right from interlocutory orders

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5 22 NYCRR § 800.12.

6 22 NYCRR §§ 600.11(a)(3) (First Department), 670.20(f) (Second Department), 1000.3(b)(2) (Fourth Department).

7 22 NYCRR § 1000.3(a).

8 Id. § 1000.3(b).

9 Id., as amended, eff. April 1, 1986.

10 28 U.S.C. § 1292(b).

11 28 U.S.C. § 1292(a).

are as broadly available as in New York.[12] New York's position at the far end of the spectrum has been widely remarked upon by scholars and commentators.[13]

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12 Twenty-eight states, other than New York, have a three-tier court system, that is, an intermediate appellate court. They are Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Washington and Wisconsin.

Several of these states present problems similar to New York in that they have large urban centers with a high volume of litigation. Nevertheless, New York appears to be unique in allowing a virtually unlimited range of interlocutory appeals as of right from the court of original instance.

A number of comparable states, e.g., Pennsylvania and Michigan, utilize what is essentially the federal approach. New Jersey, among others, uses a certification system that gives the intermediate appellate court control of its own docket. Three states -- Iowa, Idaho and Oklahoma -- allow their highest court to control the docket of the intermediate appellate court.

13 E.g., R. MacCrate, J. Hopkins & M. Rosenberg, Appellate Justice in New York (1982) (hereinafter cited as "AJS Study") at 88; D. Siegel, New York Practice § 526 (1978) at 722 ("New York is unique in its generosity, making a broad range of non-final . . . orders immediately appealable. . . . [M]any need not be appealed immediately but can be saved and later reviewed as part of an appeal from the final judgment. But if the appellate calendars are any gauge, this waiting alternative is little exploited and does not in significant measure discourage immediate and separate appeals from intermediate orders. These impose on appellate division calendars. . . ."); J. Weinstein, H. Korn & A. Miller, Civil Practice ¶ 5701.3 (1985) (footnotes omitted); American Bar Association Standards of Judicial Administration (19__), § 3.12; Stern, Appellate Practice in the United States (1981) at 55 ("In New York, the exceptions. . . . largely swallowed the rule. . . . 'almost anything can be appealed to New York's intermediate appellate court'. . . . Other states do not go that far. . . ."

III. Impact of the New York Rule

Rules of procedure inevitably reflect choices between competing values. In determining a standard for appealability of non-final orders, the architects of a judicial system must balance "the considerations that always compete in the question of appealability. [T]he most important . . . are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[14]

Certainly, such choices may be examined in the abstract -- evaluating the costs and benefits a particular approach is likely to yield -- and the Committee has undertaken to do so here. But to fully assess the impact that New York's particular choices have had on the way litigation is conducted, empirical data are also necessary.

The Committee has been frustrated in its efforts to obtain basic statistics on interlocutory appeals;[15] such information currently is not being collected. Yet compilation and review of such data are vital to any meaningful assessment

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14 Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950) (footnote omitted).

15 The Committee compiled a brief list of desirable statistics (Appendix A) and forwarded the list to the Chief Administrative Judge and the Presiding Justices of the First and Second Departments. (Appendixes B, C and D). Relevant statistical information is not maintained by the Office of Court Administration, nor is it maintained by the courts themselves. (Appendix E). The First Department did maintain some statistics on "non-enumerated" appeals -- a category including, but broader than, appeals of interlocutory orders. (Appendix F).

of the actual costs and benefits of the present system. The Committee strongly recommends that an empirical study along the lines suggested below be undertaken so that the impact of New York's current system may be more fully understood, and any proposal for change may be directed to documented needs.

A. Impact of the New York Rule -- Generally

1. Costs

Perhaps the greatest single price paid for permitting wide interlocutory appeals is lost time. "Interlocutory appeals add to the delay of litigation."[16] Not only is the issue under review "in limbo", both the court and parties may adopt a "wait and see" attitude. Thus, progress toward resolution of a case on the merits is stalled. The broader the range of allowed interlocutory appeals, the more likely it is that the issue appealed will be relatively minor or collateral. Repeated interlocutory appeals, of course, multiply delay and do not necessarily preclude yet another appeal -- of the final judgment.

Piecemeal review also increases the expense of litigation. It multiplies the number of briefs, records, and arguments litigants may or must present to appellate courts.

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16 C. Wright, Federal Courts (4th ed. 1983) (cited hereafter as "Wright") at 697. Professor Wright goes on to observe that "[t]his delay can be justified only if it is outweighed by the advantage of settling prior to final decision an important issue in the case. In most cases such advantage is not present. . . ." Id. at 697-98.

Parties may spend substantial sums assembling and briefing appeals on seemingly vital issues, only to learn that the question diminishes in importance or disappears altogether as the case progresses.[17] This increased burden may be used as a tactic by a more well-heeled litigant.

The inevitable delay and expense created by piecemeal review are an open invitation to abuse. Certainly many practitioners have been faced with appeals obviously brought more for their expense or dilatory effect than for the issue's burning impact. Under the current system, there is little to deter the litigant who can afford the process and sees a tactical advantage in fomenting delay and driving up his opponent's costs.[18]

A party is more likely to raise a minor issue in a piecemeal appeal than in one omnibus appeal -- where there would be concern about burying the important issues. It fol-

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17 As Professor Wright has observed, "the interlocutory issue that seems crucial at the time may fade into insignificance as the case progresses." Wright, supra, at 698.

18 At least one department has held that it has inherent power to impose sanctions in response to a frivolous appeal. LTown Limited Partnership v. Sire Plan Inc., 108 A.D.2d 435, 489 N.Y.S.2d 567 (2d Dep't 1985). Even if that practice were to become more widespread -- a development the Committee would like to see -- many appeals would escape such a net. Many appeals present claims colorable enough not to be deemed frivolous where it may nonetheless be manifest -- at least to the litigants -- that appellant's primary purpose is to stall the litigation's progress.

lows inevitably that interlocutory appeals increase the number of petty and insignificant issues which the Appellate Divisions must confront. This same process serves to decrease respect for the trial courts -- making even their most routine actions subject to immediate appellate scrutiny.

2. Benefits

Interlocutory appeals can yield substantial benefits as well. By resolving issues at an early stage, an appellate decision can help the parties avoid wasting time and money going down legal "blind alleys." Indeed, early decision on a vital point can save years of litigation by eliminating entire issues or claims and, on occasion, an entire case. A well-chosen interlocutory appeal can make an important contribution to expedition and efficient dispute resolution.[19]

Interlocutory appeals also may act to preserve rights that would be lost if the appellant were forced to wait

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19 At least one commentator has suggested that "[a]side from the 'internal consequences' of delaying appeal -- those relating to the litigation itself, such as the expenditure of time, effort and money in a litigation which may prove unnecessary if a particular order is ultimately reversed -- delay often entails 'external consequences.' For example, although a trial court's denial of a motion for summary judgment may not portend an expensive or drawn-out trial, the delay before the case reaches trial may cause serious economic consequences to the moving party because of the cloud of uncertainty surrounding the financial soundness of his business or the legality of his practices." Redish, The Pragmatic Approach to Appealability in the Federal Courts, 75 Colum. L. Rev. 89, 98-99 (1975) (footnote omitted) (hereafter cited as "Redish Article").

until final judgment. Two obvious examples are the grant or denial of provisional remedies[20] and an order denying a litigant's claim of privilege or trade secret protection and thus mandating the production of documents or information. In such instances a party may rightfully claim "that the opportunity to challenge the information's discoverability on appeal after a final judgment, and after compliance with the [lower] . . . court's order, may prove a rather worthless form of protection."[21]

The mere availability of interlocutory appeals may act as a form of quality control on the lower courts. Judges are likely to pay more attention to the substance of and bases for their interlocutory orders when they know that their work may be subject to immediate scrutiny. Those dissatisfied with the performance of trial courts and the manner in which the judges of those courts are selected are particularly apt to cite the perceived "tighter rein" on trial courts as an important benefit of New York's current system.

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20 Indeed, the federal rule recognizes this as well and provides for interlocutory appeals of orders concerning injunctions and the appointment of receivers. 28 U.S.C. § 1292(a)(1) and (a)(2).

21 Redish Article at 99.

B. Effect of the Change to the Individual Assignment System

New York, of course, has just undergone a major shift in the way in which day-to-day business is conducted in most trial courts. The "master calendar" system has been replaced statewide by a new individual assignment system in which a case is assigned to one judge for all purposes from its initial entry in the court system to final disposition.

The IAS System is designed, among other things, to permit "judicial management" of cases. This, in turn, should bring about a more efficient and consistent handling of motions, discovery proceedings and other pre-trial matters. It should also permit more rational scheduling, and give the judge a greater chance to bring about settlements.

It is evident that interlocutory appeals as now provided for in the CPLR and the Appellate Division rules could frustrate these fundamental purposes of the IAS System. The pendency of such appeals could easily disrupt one-judge management of the case and make scheduling impossible. Moreover, by its very nature, even one interlocutory appeal could delay the preparation of the case well beyond the one-year limitation on discovery and other preliminary proceedings contemplated by the new rules.[22]

On the other hand, the institution of the IAS System itself will likely discourage at least some interlocutory ap-

22 Uniform Civil Rule 12(d), 22 NYCRR § 202.12(d).

peals. Certainly litigants will be reluctant to bring about the displeasure of the assigned judge by appealing his or her order. Many, if not most, litigants will only risk such displeasure for a very significant issue. Moreover, judges, at least with respect to certain orders, have the ability to frustrate the interlocutory appeal process by refusing to grant stays.

Some litigants under the IAS System will likely perceive that interlocutory appeals are more necessary than under the present system. Litigants confronted with an IAS judge who has been hostile to their position in one or more pretrial rulings may be inclined to use the interlocutory appeal escape hatch, notwithstanding the risk of incurring the judge's wrath. Indeed, appeals might be taken not only to reverse an order, but also to review the administrative judge's refusal to reassign a matter.

IV. Possible Alternatives to the Current System

The Committee has considered a number of proposals concerning interlocutory appeals. Some are of recent vintage; others are more long-standing. They range from radical revision to relatively modest tinkering with the current approach. The Committee also notes that there is sentiment in some segments of the Bar -- and within its own ranks -- for leaving the system as is under the time-honored theory: "If it ain't broke, don't fix it."

We review the range of alternatives below and attempt to highlight potential costs and benefits of each.

A. Adopting the Federal Approach

The federal approach lies at the opposite end of the spectrum from that of New York. "The historic policy of the federal courts has been that appeal will lie only from a final decision. This policy was first declared in the Judiciary Act of 1789, and is carried forward today. . . ."[23] The rationale underlying that policy is a straightforward one:

> If parties could take up on appeal each disputed ruling by a lower court as it was handed down, the case could drag on indefinitely. . . . [J]udicial time . . . [is] put to better use if the parties . . . [are] required to raise all issues on appeal at a single point in the proceedings.[24]

The federal finality rule, presently codified at 28 U.S.C. § 1291, provides in relevant part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

A number of statutory, federal rule and judge-made exceptions provide limited safety valves to this broad rule.

The most obvious escape route is the appeal by permission set out in 28 U.S.C. § 1292(b). Under that section, an otherwise unappealable order may be reviewed if the district court certifies that:

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23 Wright, supra, at 697 (footnote omitted).

24 Redish Article, supra, at 89.

> 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 . . . .

Upon such certification, and upon application, the court of appeals has discretion to entertain the appeal or to refuse to do so.

Certain narrow exceptions to the finality rule are also codified at 28 U.S.C. § 1292(a).[25]

Fed. R. Civ. P. 54(b) provides that when more than one claim is presented or when multiple parties are involved, the court may direct entry of "final judgment" as to one or more claims or parties, even though there has been no final decision in the action as a whole. To do so, the district court must expressly find that there is no just reason for delay, and specifically direct the entry of judgment.

Finally, on rare occasions interlocutory review may be had "by means of the so-called 'extraordinary writs' of mandamus and prohibition. . . ."[26] While courts have occasionally sanctioned use of the writs,[27] the Supreme Court has

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25 That section grants the courts of appeals jurisdiction over appeals from orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions (§ 1292(a)(1)); certain orders connected with receiverships (§ 1292(a)(2)); and certain orders entered in admiralty cases (§ 1292(a)(3)).

26 Wright, supra, at 711. Such writs are authorized by the All Writs Act, 28 U.S.C. § 1651.

27 See Wright, supra, at 712-13.

stated that "[t]he extraordinary writs . . . may not be used to thwart the congressional policy against piecemeal appeals."[28] More recently, the Supreme Court reiterated that "[o]nly exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy."[29]

Federal courts have also adopted judge-made exceptions to the finality rule. Most significant is the collateral order doctrine.[30] As recently explained by the Supreme Court, to be "collateral," "the 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."[31]

Revising New York's appealability rules in the federal mold would reduce the number of appeals heard by the Ap-

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28 Parr v. U.S., 351 U.S. 513, 521 (1956) (citation omitted).

29 Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980) (citation omitted).

30 The leading case is Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). In Cohen, a stockholder's suit, defendant, pursuant to New Jersey law, moved to require plaintiff to post security for defendant's costs and appealed from the denial of its motion. Holding the order denying the motion to be appealable, the Supreme Court said that it fell within that "small class [of orders] 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. . . ." Id. at 546.

31 Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (footnote & citation omitted).

pellate Divisions and thus undeniably would promote judicial economy. A federal style system at least arguably would promote litigant economy as well for the reasons reviewed above. It would serve convenience by providing parallel practice in New York's state and federal courts. It would also complement the IAS system by increasing the effective power of the trial court judge, thus enhancing his ability to be an effective manager. Finally, a well developed body of federal caselaw could provide potential answers to many questions that would arise under a new system.

Adoption of the federal standard would, of course, involve costs as well as benefits. The federal system, in large measure, sacrifices correction of error and occasional injustice on the altar of expedition and judicial economy. While that trade-off may be a sensible one in typical federal litigation, the analysis may differ when the volume and nature of New York's civil litigation is factored in.

Importing the federal rule wholesale would also include the problems that accompany it. Federal courts repeatedly have grappled with precisely what does and does not constitute a "final order."[32]

Thus:

> "It is not surprising that the Court should have said long ago that the cases

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32 See Wright, supra, at 698-99.

> on finality 'are not altogether harmonious,' nor more than eighty years later it should have said: 'No verbal formula yet devised can explain prior finality decisions with unerring accuracy. . . .'"[33]

The federal experience with interlocutory appeals by permission should also provide food for thought. The Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), "was recommended by the Judicial Conference of the United States as a compromise between those who opposed any broadening of interlocutory review and those who favored giving the appellate courts discretion to entertain any interlocutory appeal they wished regardless of certification by the trial judge."[34] Those in favor of sharply limiting interlocutory appeals as of right often point to Section 1292(b) and argue that a provision like it would provide the necessary safety-valve to a strict finality rule.

Section 1292(b) puts a litigant through his or her paces. A prospective appellant must show:

> 1. That there is a "controlling question of law."

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33 Wright, supra, at pp. 698-99, citing, McGourkey v. Toledo & Ohio Central Railroad Co. 146 U.S. 536 (1892) and Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). See Wright, supra, at 697-707 for a review of the evolution in the federal courts of a "pragmatic aproach" to finality, the rise and fall of the "death knell" doctrine and other glitches and anomalies in the application of the finality rule. See also Redish Article, supra, at 90-92.

34 Wright, supra, at 713 (citing Gottesman v. General Motors Corp., 268 F.2d 194, 196 (2d Cir. 1959)).

> 2. That there is "substantial ground for difference of opinion" about the controlling question of law.
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> 3. That immediate appeal "may materially advance the ultimate termination of the litigation."

Assuming the litigant has convinced the lower court that the statute's requirements have been met, the court will issue a certificate to that effect. The party must then make application to the appellate court which has discretion to review the case -- but is not obligated to do so.

The triple showing required by the statute, coupled with the requirement that both the lower and appellate courts approve the appeal, substantially limits its "safety valve" effect. Thus, "[t]hough a great deal has been written about § 1292(b), numerically the statute has not been of great importance."[35] For example,

> [i]n the fiscal year 1981 26,362 appeals were taken to the eleven courts of appeals. By contrast trial court certificates under § 1292(b) are made in only about 100 cases a year and the courts of appeals allow interlocutory appeal in about half of those cases.[36]

Needless to say, the statute need not be adopted in haec verba if it were to be incorporated in New York. The three-pronged showing could be changed, restructured or elimi-

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35 Wright, supra, at 715.

36 Wright, supra, at 715-16 (citing Ann. Rep. of the Director of the Administrative Office of the U.S. Courts, 1981 at 346).

nated entirely. Leave to appeal could be granted by either court, or solely within the discretion of one or the other -- thus cutting down, if not eliminating, the additional time and expense incurred simply in seeking leave.

B. Adopting a Modified Federal Approach -- The OCA Proposal

The Office of Court Administration has developed a number of amendments to the CPLR which are designed to increase the effectiveness of the new Individual Assignment System. Among them is a proposed revision of the New York interlocutory appeal rule. The proposed amendment would drastically revise CPLR 5701[37] and bring New York largely, though not completely, in line with the federal system.

Under OCA's proposal, appeals as of right would be limited, in essence, to final judgments and orders which "finally determine the action." Also appealable as of right would be "any other order where the motion it decided was made on notice and it grants, refuses, continues or modifies a provisional remedy or grants an application by a plaintiff for summary judgment as to one or more causes of action, or part thereof."

With the exception of the language concerning summary judgment, the OCA proposal tracks 28 U.S.C. §§ 1291 and

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37 A copy of the proposed amendment is annexed as Appendix G. A summary of the changes in CPLR 5701 proposed by OCA is annexed as Appendix H.

1292(a). The Committee's comments concerning wholesale adoption of the federal finality rule are thus applicable here as well. The one addition, permitting appeals of orders granting partial summary judgment[38] to plaintiffs, appears to add little. Courts will often stay execution of such judgments pending trial of the remaining issues thus ameliorating the need for the addition. The provision's utility is most apparent where summary judgment is granted on liability and a trial remains to be held on damages. Prompt review can avoid much duplication of effort in the event summary judgment on liability is reversed. On the other hand, affirmance on the liability issue may well prompt settlement.

OCA's proposal for interlocutory appeals by permission is broader than the federal scheme and more restrictive than the current New York rule. As under the current New York statute, CPLR 5701(c), OCA's proposed CPLR 5701(b) would permit both the trial court and the appellate court to grant leave to appeal -- though a single appellate division justice would no longer be able to do so. Unlike current CPLR 5701(c), the Appellate Divisions would now have guided discretion to refuse an appeal certified by the trial court on find-

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38 Obviously, orders granting complete summary judgment to either party are appealable as of right under the federal system and under the OCA proposal. Such orders are indisputably final. Presumably, the provision applies to defendants pressing counterclaims as well as to plaintiffs -- this should be made clear.

ing that leave was "improvidently granted." OCA's proposed Section 5701(b) incorporates the three-pronged standard of the federal scheme and requires not only that that trial judge find, in writing, that the test has been satisfied, but also that he or she set forth the basis for that opinion. Both the incorporation of a specific standard for leave and the ability of the Appellate Division to reject an appeal certified by the lower court would be new to New York practice. Both would clearly act to restrict the number of appeals by permission that reached the appellate court.

The essential differences between 28 U.S.C. § 1292(b) and OCA's proposed CPLR 5701(b) are two. First, under the OCA proposal, the trial court may grant leave to appeal and no further application need be made by appellant -- the burden is then on the appellate court to reject the case and it must apply something less than unbridled discretion. Second, under the OCA proposal, the appellate court is not a captive of the lower court. Unlike its federal counterpart, an Appellate Division panel may agree to take an appeal even if the trial court refuses to send the case up.

As in the federal courts, potential definitional problems lurk on each prong of the three-pronged standard. Similarly, there is much room for play in the definition of "improvidently granted." It is not unreasonable to suppose that the Appellate Divisions would be inclined to interpret

that particular phrase broadly, which, in turn, would maximize their control over their own docket.

OCA's attempt to "fine tune" the federal standard does not seem rooted in peculiarities of New York practice. The proposal similarly does not tie in specifically to discovery, scheduling and other "case management" issues most likely to impede the smooth functioning of the Individual Assignment System.

C. Eliminating Discovery Order Appeals As of Right

Another alternative considered by the Committee proposes retaining the current system of appealability, but requiring permission for interlocutory appeals from discovery orders. The Committee recognizes that such appeals can delay expeditious resolution of cases, and may frequently relate to tangential points of little importance. In theory, requiring permission for appeals from discovery orders would lessen the possibility of intentional delay attendant with the present system, while fully protecting the rights of litigants with meritorious needs for appeal.[39] This, of course, assumes that permission would be freely available when necessary, such as with orders requiring dissemination of privileged information or trade secrets. The federal experience with Section 1292(b) may cast some doubt on that issue.

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39 As with any system of appeals by permission, a determination must be made whether leave can be granted by only the "sending court," only the "receiving court," both, or either, and what standard should be applied.

A variant on this proposal was advanced several years ago by Judge Vito J. Titone, then an Appellate Division Justice. Judge Titone argued that "[d]iscovery and other orders collateral to the merits, other than those involving provisional remedies, should not be appealable absent permission of the Appellate Division or one of its justices."[40] The suggestion leaves one obvious question unresolved -- precisely what orders should be viewed as "collateral to the merits?"

Interlocutory appeal of discovery orders is an obvious area of potential abuse, and there is little systemic justification for their allowance. Moreover, carving out a specific and easily defined group of orders from the general rule would minimize the kind of murky definitional problems occasionally seen in the federal courts. It remains to be determined whether such appeals constitute a significant percentage of the interlocutory matters brought before the Appellate Divisions. In short, do they create a problem and, if so, to what extent? If appeals of such orders are rarely brought, reform aimed solely at them seems a wasted effort.

D. Adopting the New York State Bar Association Omnibus Motion Approach

The New York State Bar Association has advanced a proposal which would preserve interlocutory appeals, but change the manner and timing of their presentation. According

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40 New York Law Journal, October 5, 1984. at 1, col. 3.

to this model, there would be no interlocutory appeal of any order which does not finally determine the rights of the parties until the conclusion of all pre-trial proceedings. Then the parties could present a single omnibus motion renewing their application for relief previously requested and denied. Resolution of this motion would be appealable as of right.

An obvious positive aspect of this approach is the reduction of piecemeal appeals. One appeal of all the issues resolved by the omnibus motion would also be beneficial as the Appellate Division would have to learn the necessary underlying facts of the litigation only once to review these many issues, and the litigation costs associated with several appeals to the same court would be reduced. The New York State Bar proposal would also retain one significant advantage of New York's current appeal rules -- the elimination of unnecessary or overly broad trials. Unnecessary or overly broad discovery would obviously not be reduced.

Among the countervailing negative aspects of the New York State Bar Association approach is the delay of resolution of an issue which ultimately may terminate the litigation. This delay may prove to be less of a problem if the one-year limitation on pre-trial proceedings proves to be both workable and strictly enforced.

A more fundamental criticism of the New York State Bar approach is that it attempts to reach a compromise reducing the total number of interlocutory appeals without address-

ing the pros and cons of such appeals in particular situations. For example, if an order directs the disclosure of information claimed to be privileged, challenging it in a delayed interlocutory appeal would serve neither the interests served by the present system (resolution of the issue before irremediable disclosure) nor the interests advanced by limiting or eliminating interlocutory appeals (avoidance of pretrial delay).

E. Utilizing Simplified Procedure

A simplified "letter brief" procedure, like that sometimes employed by the New York Court of Appeals, could allow for review of some or all interlocutory orders. Such a procedure would address, at least in part, both the delay and the expense concerns associated with interlocutory review.

New York Court of Appeals Rule 500.4(a) provides that the court may examine the merits of an appeal by an expedited summary procedure. The legal issues to be determined under such a procedure are based on the Appellate Division briefs and record together with counsels' letter submissions on the merits.

An obvious advantage of the summary appeal is its elimination of the expense and delay associated with the preparation of briefs and records. Indeed, use of the summary procedure coupled with shortened time requirements could eliminate much of the undue delay now associated with interlocutory appeals.

Several problems exist, however, with the mechanics of a summary appeal of a trial court order. While the summary procedure in the Court of Appeals may be based on records and briefs compiled for an appeal in the Appellate Division, no such materials prepared with the focus on appellate review are available from the trial proceedings. The letter submission would take care of part of the problem, some form of simple appendix system could readily replace a more formal record in most instances. More fundamentally, summary procedure at the Appellate Division level denies appellant the opportunity to present his or her position fully. The process thus should be considered carefully.

F. Shortening Perfection Requirements

Delay is the most commonly cited negative "side effect" of interlocutory appeals. Relief can be provided, at least in part, simply by shortening and enforcing the perfection requirements for interlocutory appeals without modifying the "appealability" rules at all. As noted above, the present perfection time requirements, found in Article 55 of the CPLR, have been superseded by court rule in all departments. According to CPLR § 5530, the appellant must file the record on appeal or the statement in lieu of record and the required number of copies of his brief within 20 days after settlement of the transcript or statement in lieu of the transcript. It is common knowledge that that schedule is virtually never followed.

Shortening and enforcing perfection time limitations certainly could drastically reduce the delay between a judgment and an appeal, while preserving litigants' liberal rights to appellate review. Such a proposal, however, does not address the other detrimental side effects of the current appealability rules. These may be addressed by simultaneous or subsequent reform.

G. Assessing Sanctions for Frivolous Appeals

Another model not curtailing the right to appeal proposes sanctioning litigants and/or their attorneys for frivolous appeals. Under this model, attorney's fees would be assessed where an appeal was clearly not warranted under the law or was clearly designed to cause delay or undue expense.

Sanctions for frivolous appeals provide a balanced complement to the present system; the right to appeal would not be curtailed and clearly unsupportable appeals would be discouraged.[41] The wariness of courts to conclude that an appeal is frivolous, however, makes enforcement through this mechanism difficult.[42] Moreover, due process requirements may necessitate an evidentiary hearing in limited instances.

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41 As noted above, at least one Department has found that it has inherent power to impose sanctions for frivolous appeals. See note 18, supra.

42 For a recent decision reflecting the difficulty of drawing the line between frivolousness and advocacy of change in existing law, see Eastway Construction Corp. v. City of New York, No. CV-84-0690 (E.D.N.Y. May 27, 1986) (Weinstein, J.)

Thus, assessment of attorney's fees would be effective in attacking only the most egregious cases and might indeed prolong the litigation process -- particularly if the parties were required separately to litigate the "frivolity issue." The courts' traditional reluctance to impose sanctions, coupled with the difficulty in applying a consistent standard, limit the effectiveness of sanctions as a deterrent.

V. Recommendations

A. Proposal for Additional Study

Most fundamentally, the Committee believes that review of the alternatives listed and the ills they are supposed to address serves to underscore the need for careful study. Without further empirical data, the Committee does not have enough information to take a position as to the merit of any proposal to change to the standard of appealability. For the same reason, the Committee is unable to take a position on the desirability of maintaining the current standard. We hope the listing of alternatives above will stimulate discussion among the bench and the bar. Such discussion may prompt development and consideration of still more alternatives. Any proposal for change must, however, be grounded in reality, and should be designed to strike a proper balance between the competing interests reflected in the preceding discussion.

1. Need for Empirical Data

Any review of New York's appealability rule that is not to be merely anecdotal or purely theoretical requires the collection and analysis of empirical data which are for the most part not at present routinely compiled or published. The American Judicature Society, in its 1982 report on a study undertaken in response to a request of the Court of Appeals of New York, so concluded,[43] and this Committee concurs. After summarizing the principal criticisms and defenses of the present system, the AJS Study found the available information "insufficient to decide the issues raised by these conflicting concerns," and instead recommended further study.[44]

The AJS Study included a summary of responses to a questionnaire circulated to the 49 then sitting Appellate Division justices (of whom 34 replied), and quoted representative responses to certain questions.[45] These reflected a number of inconsistent perceptions, for example that "the interlocutory appeal is used to serve the purposes of the wealthy" or that the "higher cost of taking an appeal is already cutting down on frivolous appeals from orders"; that such appeals are "dilatory" and "employed to seek delay" or that "procedural appeals are rarely time-consuming"; that many interlocutory

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43 AJS Study at 88.

44 Id.

45 Id. at 129-139.

appeals are "insignificant" or that many interlocutory appeals are "critically important."[46] Discovery orders were singled out by those favoring curtailment of appeals as of right; review of motions to dismiss and for summary judgment were emphasized as an advantage of the present system.[47] Since these characterizations were not linked to any data about the volume, character, cost, time or disposition of interlocutory appeals, it is impossible to extract from the experience of individual justices a more general conclusion about whether the different interests cited are in fact being served or disserved by the current system.

Among the categories of unavailable information the Study cited as bearing on the question were statistics as to the volume of interlocutory appeals; the volume of interlocutory orders not appealed; and the subject matter of interlocutory appeals.[48] It also raised broader questions of the effect of interlocutory appeals on the work of the trial courts, and the relative importance of the review of various types of

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46 Id. at 132-33.

47 Id.

48 Id. Appendices to the AJS Study reported certain statistics concerning filings and dispositions of enumerated and non-enumerated appeals, id. at 156-175, 195. These data are not only not helpful but are affirmatively misleading, in that enumerated appeals include several kinds of interlocutory orders, such as denials of motions to dismiss or for summary judgment, 22 NYCRR §§ 600.4(a) (First Department); 670.19(b)(Second Department).

interlocutory orders.[49] It urged prompt study of these questions because

> In light of the great volume of cases which the Appellate Division must review, we believe that measures which would limit the number of interlocutory appeals heard should be given immediate and serious consideration.[50]

This Committee believes that any proposal for change designed to deal with the conflicting interests addressed by the present system must be firmly grounded in practical reality. Not all of the questions bearing on the formulation of such a proposal can be framed in such a way as to be readily answered by data gathering, but it is important to recognize that they require empirical as well as philosophical answers. Meaningful data of the kind urged by the AJS Study in 1982 are essential to the formulation of a meaningful proposal for change tailored to the real scope of the problem.

2. Need to Accumulate Experience with IAS System

Considering the great uncertainty as to how the IAS System is going to work, it seems premature to decide whether interlocutory appeals are appropriate or not. First, we have no idea of the extent to which the one-year limit on pre-trial proceedings is going to be honored. If, in fact, there is an effective effort to make that a realistic goal, then interloc-

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49 Id. at 88.

50 Id.

utory appeals will be clearly counter-productive. If, however, it takes four and five years to process cases through pretrial under the IAS, then the disadvantage of delay of interlocutory appeals is not as great.

Moreover, there are serious questions of how well judicial management is going to work. If review of arbitrary decisions by judges is felt to be needed, interlocutory appeals may be a necessary solution. If practitioners are generally satisfied with case management under IAS, then the disadvantages of interlocutory appeals as perceived under the previous system would still obtain.

A final answer can only be given after the development experience under IAS. The Committee suggests that reform await the accumulation of some experience under IAS as well as empirical study.

3. Proposed Study

The debate over interlocutory appeals has taken place in the absence of meaningful empirical data and the actual costs and benefits to litigants and to trial or appellate courts. This Committee believes such data should be obtained and analyzed prior to any comprehensive overhaul of New York's interlocutory appeal rules. In order partly to fill this gap, we propose a year-long study of all interlocutory appeals taken from orders entered in the Supreme Court in a number of representative counties. The Office of Court Administration is in the best position to gather the necessary data.

The initial task is to identify all interlocutory appeals. We believe that the most efficient means of doing this is to obtain a copy of each statement filed pursuant to Rule 600.17 of the Appellate Division, First Department. Appeals by permission pursuant to CPLR 5701(c) should be separately tabulated.

For purposes of this study, all appeals from orders (rather than judgments) will be tabulated in the first instance. Orders which are dispositive of a party's claim or defense and should not therefore conceptually be treated as interlocutory -- e.g., an order granting summary judgment of dismissal as to one defendant -- would be included at this stage, although separately treated for other purposes, as discussed below. Thereafter, all interlocutory appeals identified by this method will be monitored by analyzing the results at the end of the year as follows:

1. Type of order appealed from. Certain types of orders are invariably cited as examples of the best and worst aspects of the present system. Orders granting summary judgment as to one but not all defendants, or granting or denying a preliminary injunction, are interlocutory in form, but are dispositive of the case in whole or in part, and few would advocate "reforms" that would eliminate these kinds of appeals. Appeals from discovery orders and other housekeeping matters where the cost of the appeal is disproportionate to the importance of the issue are commonly cited examples of the kinds of

appeals critics would like to eliminate. In order to frame a realistic, practical proposal for change that would eliminate the worst abuses without sacrificing important rights, we need information about the relationship of the volume, delay, cost and disposition of interlocutory appeals broken down by types of orders appealed from.

For that purpose and specifically to determine whether the various arguments pro and con can be empirically supported, we propose to group appeals initially according to the following categories, which will then be utilized in the steps described in ¶¶ 2-7:

A. Orders granting accelerated judgment pursuant to CPLR 3211, 3212 or 3213. The arguments for and against such appeals are quite different from those relating to orders denying similar motions, discussed below, and should therefore be separately classified.

B. Orders granting or denying provisional remedies.

C. Orders denying motions to dismiss or for summary judgment pursuant to CPLR 3211, 3212 or 3213. In light of the argument that groundless pre-answer motions under 3211(a)(7) or (8) are often interposed for dilatory purposes, and the denial thereafter appealed causing further delay, it seems appropriate to break out this category statistically to determine whether appeals of this type are significantly greater in volume, involve more delay, or are otherwise dis-

tinguishable from category A. It might be desirable further to subdivide this group to distinguish pre-answer motions from motions for summary judgment, or to distinguish motions based on legal insufficiency or lack of jurisdiction from those based on the grounds enumerated in CPLR 3211(a)(1), (3)-(6) or (10).

D. Orders disposing of other pre-answer motions, such as motions for change of venue.

E. Orders adding or dropping parties, or granting or denying class certification.

F. Orders relating to disclosure and bills of particulars, including conditional orders of preclusion. Depending on volume, it might be desirable further to subdivide this category into orders pursuant to CPLR 3103, 3124 and 3126.

G. Orders relating to consolidation or severance, bifurcated trials or references; and other orders relating to calendar practice.

H. Miscellaneous orders. If any particular type of order seems to generate an especially high volume of appeals, it should be broken out into a separate category.

2. Number of appeals filed that are not perfected. This information should be broken down into

(a) Type of order;

(b) Whether the appeal was dismissed on motion or automatically under the rules; and

(c) Whether any other activity occurred in the case while the appeal was pending.[51]

3. Length of time elapsed from.

(a) Notice of appeal to perfection;

(b) Perfection to disposition.

4. Dispositions of each type of appeal, broken down as follows:

(a) Reversals;

(b) Summary orders of affirmance; and

(c) Affirmance with reported opinion.

5. History on remand. The argument that certain types of interlocutory appeals result in saving time by eliminating issues and giving necessary guidance should be subject to empirical verification. Because not all activity in a case is reflected in papers filed in court, some type of questionnaire to counsel in a percentage of cases would be needed.

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51 Information available from court records is probably limited to "activity" consisting of motions on papers disposed of by order. To determine whether disclosure went forward, further pleadings were filed, or the "IAS judge" disposed of motions by informal conference, questionnaires to counsel in a selected percentage of cases will be needed.

6. Cost of the appeal. If a questionnaire is developed for the purposes discussed in ¶¶ 2(c) and 5, it should include a request for information about the amount of fees and disbursements directly attributable to the appeal. This information may not be available in all cases (particularly contingent-fee cases), or counsel may be unwilling to disclose it. Nevertheless, because the cost in interlocutory appeals is a factor so often cited by critics of the present system, some effort should be made to develop a data base.

7. Multiple interlocutory appeals. The possibility of multiple interlocutory appeals in the same case is often cited as one of the abuses of the present system. Some effort thus should be made to determine the actual frequency of such occurrences. While it is unlikely that more than one interlocutory appeal in the same case will be taken during the comparatively short period proposed for the study, the county clerk's index number is retained at the Appellate Division level, so that it should not be difficult to locate earlier appeals in cases in which new notices of appeal are filed during the period of the study. If the number of multiple appeals proves significant, further analysis of those appeals may be warranted.

B. Amendment of the Nine-Month Rule

While the Committee believes that any change in the appealability standard should await further study, it also notes that certain abuses can be corrected without changing that standard.

Even defenders of the current system often admit that it permits too many delays. Much of this problem can be alleviated if the time for perfecting appeals in the First and Second Departments is shortened from the present nine months. The Committee therefore recommends that the First and Second Department Rules be amended to require interlocutory appeals to be placed on the calendar within sixty days from the filing of the notice of appeal.

The nine-month rule seems excessive with respect to interlocutory appeals, which typically do not involve voluminous records or the settlement of a transcript. Given the thirty-day period within which a party may file a Notice of Appeal, an appellant will effectively have ninety days in which to prepare appeal papers. This period should be more than sufficient for virtually all interlocutory appeals.

This change will not require an amendment to the CPLR, but merely a change to the First and Second Department rules.

C. Sanctions for Frivolous Appeals

Though, as pointed out above, their utility may be limited, sanctions for frivolous appeals or appeals clearly interposed for delay or other tactical reasons should be imposed. There is little downside risk (or "cost") to such a provision -- particularly if such findings are to be made sua sponte by the Appellate Division Panel. Deterrence of potential abusers and potential compensation for victims of such abuse are the major benefits provided by such sanctions.