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May 15, 1987

Chief Judge Sol Wachtler
Court of Appeals
State of New York
20 Eagle Street
Albany, New York 12207

Judge Joseph Bellacosa
Court of Appeals
State of New York
20 Eagle Street
Albany, New York 12207

Judge Albert M. Rosenblatt
Chief Administrative Judge
Office of Court Administration
270 Broadway
New York, New York 10007

Dear Judges Wachtler, Bellacosa and Rosenblatt:

About two years ago, Chief Judge Wachtler asked me if the Committee on State Courts of Superior Jurisdiction of the Association of the Bar of the City of New York would prepare a report on the retention or aboliton of interlocutory appeals. I enclose for each of you a copy of that report, which has been approved by the Association's Executive Committee and will be released next week.

The Committee on State Courts has been grappling with interlocutory appeals the entire five year period that I have been a member of the Committee. At every point, we have been stymied by the fact that the court system itself does

not gather the types of data we wished to study. In an interim report released last June, which Judge Bellacosa may remember, the Committee said it could form no conclusion about the advisability of retaining or abolishing interlocutory appeals without such data, and we urged the Office of Court Administration to embark on a data-gathering project, the parameters of which we specified.

However, the Committee, while not content to rest on an inconclusive report, realized that OCA has a full plate. We have, therefore, tried to gather some data on our own, in order to study the question empirically. For a variety of reasons (which are detailed in the accompanying report), there are weaknesses inherent in our hastily and not very professionally gathered data base. Our conclusions are thus more tentative than we would like them to be. Nonetheless, the Committee concludes that the rate of reversal or modification of interlocutory orders by the Appellate Divisions in the First and Second Departments (especially the latter) is high enough to make it unwise to curtail the right of interlocutory appeal now enjoyed by litigants in New York.

Proud though I am of this fine report -- the only empirical study of the interlocutory appeal question now in existence -- I am also aware that its conclusion runs counter to views expressed by Chief Judge Wachtler and Judge Bellacosa. I confess (though only privately) that it is also not consistent with my personal predisposition -- a predisposition that is shared by any number of committee members, not just the three members who will dissent from the report (a draft of their dissent is enclosed). Thus, everyone who has helped prepare this report would like to reanalyze the question (1) with a better data base (i.e., one that does not share the weaknesses of ours, and (2) after another year or so has passed, so the effects of IAS, and perhaps even court merger, can be factored into the equation.

It is now clear to the Committee that better data can only be gathered by OCA and we urge it to do so. Unlike IAS, modification of the interlocutory appellate system can only be accomplished with the cooperation of the Legislature. Since we all know that powerful voices will be heard in opposition to any change, I personally believe OCA's position can prevail only if data show that a relatively insignificant number of interlocutory orders are reversed or modified. So if curtailing interlocutory appeals is your goal, the key lies in the files of the Appellate Divisions.

The Committee's unanimous recommendation that the nine-month rule for perfection be abolished on interlocutory appeals is self-explanatory. While it is likely to be controversial with practitioners, I cannot imagine that it will give you any problems.

Both I and the Committee remain deeply interested in this issue. While my tenure as Chair ends in June, I would welcome the opportunity to discuss the report with you or to assist in any follow-up work you may undertake. My successor as Chair, Michael Sonberg, will lend you to services of the Committee, which will revisit the issue and reconsider in conclusion if and when better data are available.

Respectfully,

CM:mr
Enclosures

Colleen McMahon

cc: Robert Kaufman, Esq.
Fern Schair Sussman, Esq.
Bettina M. Plevan, Esq.

State of New York,
Court of Appeals,

Supreme Court Building
Mineola, New York 11501

Sol Wachtler
Chief Judge

May 21, 1987

Colleen McMahon, Esq.
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Dear Colleen:

Thank you so much for your letter of May 15 and for the enormous energy which you expended in connection with the Report on Appeals of Interlocutory Orders. I recognize the difficulty in collating the necessary data and the reluctance to change a policy which seems engraved in our New York State jurisprudence. I believe, in time, that the conclusions of the McCrate Commission's report will be vindicated. In the meanwhile, I thank you and the members of the committee for your report and for your continued interest.

I will be discussing the report with Judges Bellacosa and Rosenblatt and look forward to discussing it with you personally on some future occasion.

Warmest personal regards,

Sol Wachtler

SW/bla

cc: Hon. Joseph W. Bellacosa
Hon. Albert M. Rosenblatt

The Association of the Bar of the City of New York
Committee on State Courts of Superior Jurisdiction

REPORT ON APPEALS OF INTERLOCUTORY ORDERS

Now that the choice has been made between master and individual calendar practice, the issue relating to the conduct of litigation in the state courts that excites the most comment and controversy is whether to abolish or modify New York's liberal rules regarding interlocutory appeals. This question has taken on a new urgency since the advent of the Individual Assignment System, as interlocutory appeals may have an impact on the ability of judges to manage cases in the way the new system anticipates.

I. Introduction

In 1985, this Committee began to study New York's rules concerning the appealability of interlocutory orders, with a view to recommending whether changes in those rules were necessary or desirable. After analyzing prior studies and reports, various recent proposals for change, and comparable procedures in other states, the Committee concluded that more empirical data were needed before any recommendation for reform of the basic standard of "appealability" could be made or meaningfully evaluated. Accordingly, in an interim report dated June 18, 1986, the Committee outlined what data were needed and recommended that the Office of

Court Administration ("OCA"), which was in a position to collect and verify all relevant data, make such a study.

The following September, the Committee undertook its own small-scale study of interlocutory appeals decided in the First and Second Departments between July, 1984 and December, 1985. Largely because of deficiencies in our ability to collect data, the results were not wholly conclusive:

(1) Of the 1,530 civil interlocutory appeals that resulted in a reported decision (either full opinions or memorandum), 886, or 58%, were reversed or modified.

(2) After adjusting the sample of reported decisions to eliminate orders which could be identified as interlocutory in form but final in substance and effect, the reversal/modification rate rose slightly, to 59%.

(3) When summary affirmances of orders only were added to the sample, the rate of reversal/modification was reduced to 35%.

(4) A more controlled study of a smaller sample of appeals (231) in the First Department, based on court records rather than published decisions and including summary affirmances of orders, yielded a reversal/modification rate of 33%, which rose to 36.5% when limited to "truly interlocutory" orders.

(5) The average time elapsed between entry of the order appealed from and disposition of the appeal was 13.9 months in the larger sample, 10.4 months in the smaller.

The Committee recognizes the weaknesses inherent in its data bank (which are set forth fully below) and therefore cannot take a hard and fast position on this issue. However, the Committee has concluded that the reversal/modification rate on appeals from interlocutory orders in our sample is sufficiently high that we cannot recommend abolishing or curtailing interlocutory appeals at this time.

Because many of those who favor changing the current rules do so because of the delay involved in interlocutory appeals, and because we view such delay as adverse to good litigation management, the Committee does recommend a significant shortening of the time for perfecting such appeals. Also, the Committee urges continued monitoring of actual experience with interlocutory appeals, in light of the recognized weaknesses of the data that were available to us and the possibility that IAS will lead to a reduction in interlocutory 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 when 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 substantial right." CPLR 5701(b) creates only three narrow exceptions to the broad right of appeal, for interlocutory

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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).

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

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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 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, 51 N.Y.2d 709, 435 N.Y.S.2d 1025 (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 1982);

(Continued)

(Continued)

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, Dillebeck 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 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,

(Continued)

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381 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, 489 N.Y.S.2d 332 (2d Dep't 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 & Development 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); Siegel, New York Practice § 526. 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., Siegel, New York Practice § 526, courts have found other theories on which to reach out for these cases, see Milone v. General Motors Corp., 93 A.D.2d 999, 470 N.Y.S.2d 462 (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:

Order (characterized as "judgment") of Special Term in

(Continued)

conceivably outside the scope of CPLR 5701(a), are appealable by permission,[3/] which may be sought from either or both of the nisi prius judge or a justice of the appropriate Appellate Division. CPLR 5701(c).

Thus, the Appellate Divisions hear appeals from orders of every conceivable type and magnitude. Litigants have a right to appeal from potentially dispositive orders

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(Continued)
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, one letter to the editor of the New York Law Journal (March 18, 1986, p. 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 "Unavailability of Empirical Data," below, p. 45.

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

like the denial of a motion for summary judgment,[4/] as well as a broad variety of orders whose impact on the litigation's ultimate outcome is less immediately clear. For example, all of the following have been held appealable as of right: Order permitting withdrawal of a motion to strike affirmative defenses with prejudice;[5/] order denying change of venue;[6/] order denying motions to compel answers to specific questions at a deposition;[7/] and order determining motions to compel plaintiff to separately state and number.[8/]

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

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4/ E.g., Keller v. Frank P. Eberhard Co., 110 A.D.2d 603, 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 1983).

5/ Application of Danzig, 96 A.D.2d 803, 466 N.Y.S.2d 343 (1st Dep't 1983).

6/ Pitegoff v. Lucia, 97 A.D.2d 896, 470 N.Y.S.2d 461 (3d Dep't 1983).

7/ Moroze & Sherman, P.C. v. Moroze, 104 A.D.2d 70, 481 N.Y.S.2d 699 (1st Dep't 1984).

8/ Russo v. Advance Publications, Inc., 83 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 1983), Alexander v. Kivirana, 52 A.D.2d 982, 383 N.Y.S.2d 122 (3d Dep't 1976).

time limits for perfecting such appeals. All four 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 appellant is required to file the record and brief -- measured from the date of the order in the Third Department,[9/] and from the date of the notice of appeal in all other departments.[10/] 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,[11/] and to automatic dismissal only if the cause were not "ready for argument" within six months after such filing,[12/] adopted a nine-month rule in 1986.[13/]

B. Comparison With Other Jurisdictions

New York's liberal approach to interlocutory appeals appears to be unique in American jurisprudence. It

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9/ 22 NYCRR § 800.12.

10/ 22 NYCRR §§ 600.11(a)(3) (First Department), 670.20(f) (Second Department), 1000.3(b) (Fourth Department).

11/ 22 NYCRR § 1000.3(a).

12/ Id. § 1000.3(b).

13/ Id., as amended, eff. April 1, 1986.

stands in sharp contrast to the federal rule limiting interlocutory appeals to certified questions[14/] and a few narrow categories of orders.[15/] Moreover, the Committee's research has discovered no state in which appeals as of right from interlocutory orders are as broadly available as in New York.[16/] New York's position at the far end of the spectrum

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14/ 28 U.S.C. § 1292(b).

15/ 28 U.S.C. § 1292(a).

16/ 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.

has been widely remarked upon by scholars and commentators.[17/]

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 cost of piecemeal review on the one hand and the danger of denying justice by delay on the other."[18/]

17/ E.g., American Judicature Society (MacCrate, et al., eds.), Appellate Justice in New York (1982) (hereinafter cited as "AJS Study") at 88; Siegel, New York Practice § 526 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. . . ."); Weinstein, Korn & Miller, Civil Practice ¶ 5701.3; Stern, Appellate Practice in the United States (1981) at 55 ("In New York, the exceptions have largely swallowed the rule. . . . 'almost anything can be appealed to New York's intermediate appellate court'. . . . Other states do not go that far. . . . [Citation omitted]").

18/ Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950) (citations omitted).

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. Nevertheless, many of the arguments for and against interlocutory appeals are founded on anecdotal evidence or "policy" arguments about the importance of appeals from particular kinds of orders. 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 therefore attempted to document the assumptions on the basis of which the debate has been carried on.

The Committee has been frustrated in its efforts to obtain basic statistics on interlocutory appeals.[19/] Such information is currently not being collected, and implementation of the specific recommendations in the Committee's 1986 Report would have required independent funding as well as access to court records not now public. The problem of

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19/ 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, but that category includes, but is broader than, appeals of interlocutory orders. (Appendix F).

inadequate empirical data has been noted in previously published studies of the issue,[20/] and remains. Yet compilation and review of such data are vital to any meaningful assessment of the actual costs and benefits of the present system, including changes from prior practice resulting from the adoption of the Individual Assignment System.

A. Impact of the New York Rule -- Policy Arguments

This section summarizes the principal cost/benefit arguments which appear to be most commonly cited by lawyers, judges and commentators in criticism or defense of the present system. The extent to which individual arguments are supported by the limited empirical data assembled by the Committee is discussed in Part V, below; the Committee has not attempted a study of the magnitude that would be required to validate or rebut each of these arguments.

1. Costs

Perhaps the greatest price paid for permitting wide interlocutory appeals is lost time. "Interlocutory appeals

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20/ AJS Study at 44-47; the Initial Report of the Joint Committee on Judicial Administration (unpublished, November 25, 1985), at 114.

add to the delay of litigation."[21/] Not only is the issue under review "in limbo", but the court and parties may adopt a "wait and see" attitude. Thus, progress toward resolution of a case on the merits may be stalled. The broader the range of interlocutory appeals allowed, 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. 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.[22/] This increased burden may be used as a tactic by a more well-heeled litigant.

21/ 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.

22/ As Professor Wright has observed, "the interlocutory issue that seems crucial at the time may fade into

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The inevitable delay and expense created by piecemeal review are frequently cited as 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.[23/]

It is also argued that 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), thereby increasing 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.

(Continued)
insignificance as the case progresses." Wright, supra, at 698.

23/ The Committee had no data from which to determine whether judges were utilizing tighter control of cases under the IAS system (which had been in effect for approximately one year when this Study was done) to cut down on interlocutory appeals. Cf. Grisi v. Shainswit, __ A.D.2d __, 507 N.Y.S.2d 155 (1st Dep't 1986).

2. Benefits

Interlocutory appeals are also perceived as yielding substantial benefits. 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.[24/]

Interlocutory appeals also may act to preserve rights that would be lost if the appellant were forced to wait until final judgment. Two obvious examples are the

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24/ 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, [in taking an appeal] 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) (hereafter cited as "Redish Article").

grant or denial of provisional remedies[25/] 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."[26/]

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 Appellate Divisions' supervisory function with respect to trial courts as an important benefit of New York's current system. Many pre-trial orders which would not be reviewable upon an appeal from a final judgment

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25/ 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).

26/ Redish Article at 99.

because they do not prove outcome-determinative[27/] are nevertheless of considerable practical importance. Considerations of consistency as well as fairness in the administration of justice warrant some mechanism for scrutiny of orders not otherwise reviewable. In addition, because of the limited jurisdiction of the Court of Appeals, many issues raised on interlocutory appeals are within the exclusive province of the Appellate Divisions. Abolition of interlocutory appeals in these kinds of cases would effectively insulate certain types of lower court error from redress.

B. Effect of the Change to the Individual Assignment System

New York, of course, has recently undergone a major shift in the way in which day-to-day business is conducted in most trial courts. Effective January 6, 1986, the "master calendar" system was replaced statewide by a new individual assignment system ("IAS") in which a case is assigned to one judge for all purposes from its initial entry into the court system to final disposition.[28/]

IAS is designed, among other things, to permit "judicial management" of cases. This, in turn, should bring

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27/ See CPLR 5501(a).

28/ 22 NYCRR Parts 125, 200, 202, 205-208, 210, 212, 214.

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. In particular, if stays are routinely granted pending appeal, 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.[29/]

On the other hand, the institution of the IAS System itself may discourage at least some interlocutory appeals; at least one Justice of the Appellate Division, speaking off the record, has remarked that there are noticeably fewer interlocutory appeals since January 1, 1986, when IAS went into effect. 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

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

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. The extent to which stays are granted or denied in particular kinds of cases can be expected to have significant consequences in terms of the use of interlocutory appeals for purposes of delay.

Some litigants may consider interlocutory appeals more necessary under the IAS System than under the present system. Litigants confronted with an IAS judge who has been hostile to their position in one or more pre-trial rulings may be inclined to use the interlocutory appeal escape hatch, notwithstanding the risk of incurring the judge's wrath. Indeed, in one First Department case, a writ of mandamus [was] issued to require an IAS judge to reduce to writing her oral denial of a disclosure application, in order not to "frustrate a litigant's statutorily provided right of appeal from an intermediate order."30/

30/ Grisi v. Shainswit, ___ A.D.2d ___, 507 N.Y.S.2d 155, 158 (1st Dep't 1986). It is possible that the post-IAS decline in interlocutory appeals noticed by the Justice referred to above resulted in whole or in significant part from the refusal of IAS judges to sign appealable orders.

IV. Possible Alternatives to the Current System

There are a number of alternatives to the current interlocutory appeals rules. Some are of recent vintage; others are more long-standing. They range from radical revision to relatively modest tinkering with the current approach. Some are based on past experience and others (particularly the bill introduced in the last legislative session, which is discussed below) have been formulated with specific reference to the introduction of IAS. We review the range of alternatives below and attempt to highlight potential costs and benefits of each.

The Committee has also considered the sentiment in some segments of the Bar for leaving the system as is under the time-honored theory: "If it ain't broke, don't fix it." The Committee's limited empirical study tended to support this view.

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. . . ."[31/]

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. . . . [Judicial] time . . . [is] put to better use . . . if the parties . . . [are] required to raise all issues on appeal at a single point in the proceedings.[32/]

The federal finality rule, presently codified at 28 U.S.C. § 1291 (1982), 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:

> 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. . . .

31/ Wright, supra, at 697.

32/ Redish Article, supra, at 89.

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).[33/]

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. . . ."[34/] While courts have

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33/ 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 injuctions (§ 1292(a)(1)); certain orders connected with receiverships (§ 1292(a)(2)); certain orders entered in admiralty cases (§ 1292(a)(3)); and judgments in civil actions for patent infringement that are final except for accounting (§ 1292(a)(4)).

34/ Wright, supra, at 712. Such writs are authorized by the All Writs Act, 28 U.S.C. § 1651 (1972).

occasionally sanctioned use of the writs,[35/] the Supreme Court has stated that "[t]he extraordinary writs . . . may not be used to thwart the congressional policy against piecemeal appeals.[36/] 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."[37/]

Federal courts have also adopted judge-made exceptions to the finality rule. Most significant is the collateral order doctrine.[38/] 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

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35/ See Wright, supra, at 712-13.

36/ Parr v. U.S., 351 U.S. 513 (1956).

37/ Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980).

38/ 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.

be effectively unreviewable on appeal from a final judgment."[39/]

Revising New York's appealability rules in the federal mold would reduce the number of appeals heard by the Appellate 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, as well

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39/ Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

as the rate of reversals and modifications of particular kinds of orders.

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."40/ As Professor Wright points out:

> [I]t is not surprising that the Court should have said long ago that the cases 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. . . ."41/

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

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40/ See Wright, supra, at pp. 698-99.

41/ Wright, supra, at pp. 698-99, citing, McGourkey v. Toledo & O. Central R. Co., 146 U.S. 536 (1892) and Eisen v. Carlisle & Jacquelin, 417 U.S. 16 (1974). See Wright, supra, at pp. 697-707 for a review of the evolution in the federal courts of a "pragmatic approach" 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 pp. 90-92.

appellate courts discretion to entertain any interlocutory appeal they wished regardless of certification by the trial judge."[42/] 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."
2. That there is "substantial ground for difference of opinion" about the controlling question of law.
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, "though a great deal has been written about

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

§ 1292(b), numerically the statute has not been of great importance."[43/] 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.[44/]

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 eliminated 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, while introducing the problems peculiar to permissive appeals. Since permissive appeals are a key feature of the legislation proposed by the Office of Court Administration, those problems are discussed in the next section.

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

The Office of Court Administration has proposed a number of amendments to the CPLR which are designed to

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43/ Wright, supra, at 715.

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

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[45/] 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 or 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 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[46/] to plaintiffs, appears

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45/ 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.

46/ Obviously, orders granting complete summary judgment in toto to either party are appealable as of right under (Continued)

to add little. Courts will often stay execution of such judgments pending trial of the remaining issues, thus ameliorating the need for an interlocutory appeal. 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 have guided discretion to refuse an appeal certified by the trial court on finding that leave was "improvidently granted." OCA's proposed Section 5701(b) incorporates the three-pronged standard of the

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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.

federal scheme and requires not only that the 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 -- rather, the burden would be 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 would have the power to take an appeal even if the trial court refused 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." Perhaps most important, there are two problems inherent in the concept of permissive appeals which take on particular significance when applied to the

large volume of interlocutory orders presently appealable as of right.

The first problem is the likelihood of an increase, rather than a decrease, in the burden on the courts. The relatively large number of reversals/modifications on interlocutory appeals indicated by the Committee's limited study[47/] provides no basis for supposing that litigants would be deterred from invoking the appellate process by the mere requirement of an application for leave to appeal. Unless that procedural change substantially reduced the volume of interlocutory appeals, the only likely consequence would be the interpolation of an additional layer of motion papers, while eliminating none of the time and effort required on the merits of the appeal after the grant of leave.

Second, the question of how applications for leave to appeal would be screened at the Appellate Division level also merits close scrutiny. If it is to be the function of the Justices of the Appellate Division, the proposal would exacerbate, rather than alleviate, the problems of the present system. If preliminary review is instead to be performed by staff personnel, such delegation raises

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47/ See Part V, below, especially Tables 1 and 2.

independent questions concerning the nature of appellate justice.48/

In sum, whatever the merits of the technique of appeal by permission to courts of limited jurisdiction such as the Court of Appeals of New York and the federal courts, the sheer volume of litigation in the trial courts of New York State suggests the need for a more selectively framed approach to appealability of interlocutory orders.

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.

The OCA proposal does, however, raise at least one important public policy issue not presented in earlier proposals, namely, whether the abolition of interlocutory appeals is necessary to effective implementation of IAS. It has been argued that interlocutory appeals as of right allow

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48/ See, e.g., Fiss, The Bureaucratization of the Judiciary, 92 Yale L. J. 1442, 1467 (1983): "The use of staff attorneys to screen so-called 'meritless' cases not only produces an anonymous form of justice, but tends to insulate judges from the ebb and flow of the law and full impact of the grievances presented."

cases to be temporarily "wrested from the firm managerial grasp" of IAS judges "for months at a time," thereby lessening "the opportunities for timely and efficient dispensation of justice."[49/] The Committee believes that it is premature to evaluate the interplay between the IAS System and appellate review of interlocutory orders, and recommends continuing study of the effect, if any, of the new system on the kinds and dispositions of interlocutory appeals and the time involved, as more fully set forth in Part VI, below. In the absence of empirical evidence, there is no basis for assuming that the mere filing of an interlocutory appeal as of right will necessarily affect the "firm managerial grasp" of trial judges "for months at a time."[50/] On the contrary, the mere filing of the appeal does not divest the court of original instance of jurisdiction, even when a stay is entered;[51/] nor does it automatically stay the enforcement of either the order appealed from or any other aspect of the case.[52/]

49/ Bellacosa, "Why O.C.A. Supports Curb on Interlocutory Civil Appeals," New York Law Journal, April 22, 1986, p. 1, col. 3.

50/ Id.

51/ CPLR 5519(f).

52/ Unless the appellant is the State or a political subdivision thereof, a stay is automatic only if the order

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Voluntary inactivity on the part of litigants in the absence of a stay should be readily controllable by the IAS judges if IAS functions as it is intended to do. In other words, IAS should operate to reduce the need for interlocutory appeals in practice, without requiring elimination of the right to them in areas where Appellate Division supervision may be necessary. To the extent that calendar control under IAS may itself be such an area,[53/] elimination of interlocutory

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appealed from falls within one of the specific categories listed in CPLR 5519(a) and (b), and the conditions therein specified, involving various forms of undertakings or payment into court, are satisfied. Most of the listed categories of "judgment or order" to which stays apply are essentially final in character in any event, such as those directing the payment of money, the conveyance or delivery of real or personal property, or payment out of the proceeds of an insurance policy, and even in those instances the stay provided by statute can be limited or modified by the appellate court in all instances and the court of original jurisdiction in most instances, CPLR 5519(c). Criteria applied by the Appellate Divisions in determining the appropriateness of stays have included the presumptive merit of the appeal, the delay or prejudice involved, and the injury that might be sustained absent a stay; requirements for prompt prosecution, including expedited briefing schedules in appropriate cases, are also common. See generally Siegel, New York Practice (1978 ed.), §535 at 746.

53/ Matter of Grisi v. Shainswit, ____ A.D.2d ___, 507 N.Y.S.2d 155, 158 (1st Dep't 1986), involved the refusal of a Supreme Court Justice to enter a written order, for the express purpose of cutting off the right of interlocutory appeal, see CPLR 5512. Emphasizing that discretionary stays operate to prevent "routine" delays
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appeals may tend to subvert, rather than promote, the effective implementation of IAS.

C. Eliminating Discovery Order Appeals As of Right

Another alternative model would retain the current system of appealability but require 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.[54/] This, of course, assumes that permission would be freely available when necessary, such as with orders requiring dissemination of privileged information

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pending appellate review, the First Department based its decision on the conclusion that "fundamental rights to which a litigant is entitled, including the opportunity for appellate review of certain orders, cannot be ignored, no matter how pressing the need for the expedition of cases."

54/ The question whether the process of seeking leave may generate more, rather than less, work is discussed above, pp. 33-34. 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.

or trade secrets. The federal experience with Section 1292(b) may cast some doubt on that assumption.

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 including provisional remedies, should not be appealable absent permission of the Appellate Division or one of its justices."[55/] The suggestion leaves one obvious question unresolved -- precisely what orders should be viewed as "collateral to the merits?"

Conceptually, 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. Ultimately, whether to limit or abolish the appealability of discovery orders must rest on empirical data. If there are few such appeals, restricting their availability will have no discernible effect. And if a significant

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55/ New York Law Journal, October 5, 1984. p. 1.

percentage of discovery orders appealed from are reversed or modified, abolishing the appeals may be counterproductive.

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 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 Appellate Division 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 addressing 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 pre-trial 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. The summary procedure in the Court of Appeals is based on records and briefs compiled to prosecute an appeal in the Appellate Division; no such materials prepared with the focus on appellate review are available after proceedings at nisi prius. The letter submission would take care of part of the problem, but then the "letter" might turn into a brief. 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, even where there is no need to wait for a transcript, which is the case in nearly all interlocutory appeals.

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, as in federal practice.[56/] In view of the recent decision of the Court of Appeals that New York courts lack inherent power to impose such sanctions,[57/] the Committee did not consider that alternative in detail. The desirability, scope and operation of any proposed rule on the subject of sanctions is clearly outside the scope of this Report.[58/]

V. Committee Analysis of Available Empirical Data

After reviewing the alternatives listed and the ills they are supposed to address, the Committee concluded

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56/ See, e.g., 225 Broadway Co. v. Sheridan, 807 F.2d 24 (2d Cir. 1986).

57/ A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1, 511 N.Y.S.2d, 216 (1986).

58/ On January 7, 1987, the Chief Administrative Judge announced the intention of the Chief Judge to promulgate such a rule and called for comments from the bench and bar prior to publication of a draft rule for further review and comment, see New York Law Journal, January 8, 1987, p. 1, col. 2. As of the date of this Report, no draft rule has been published.

that any proposal for change had to be both grounded in reality and designed to strike a proper balance between the competing interests reflected in the preceding discussion. Formulation of such proposals, the Committee concluded, required empirical as well as philosophical answers to the questions raised by both critics and defenders of the present system. Unfortunately, statistical information necessary for the kind of analysis the Committee considered important is not now publicly available -- a problem that has stymied previous published studies of the issue, as discussed below. Therefore, in an interim report submitted to the Association in 1986, the Committee recommended that OCA gather certain data on interlocutory appeals as well as circulate questionnaires to a representative sampling of attorneys.[59/] Once that data (much of which rests in court records not now public) was gathered, the legal community would be in a position to evaluate, for the first time, whether interlocutory appeals were a necessary corrective force and created undue delay in litigation.

This Committee was not, however, content to add yet another recommendation for further study to the already large

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59/ The text of the 1986 proposal for further study is annexed as Appendix I to this Report.

body of inconclusive analyses of the present system. In the face of the unavailability of the kind of data necessary to a thorough, reliable statistical analysis, the Committee decided to utilize the limited data that were available, both to test the assumptions underlying the debate, and to formulate recommendations for change. So, the Committee undertook a much more limited and informal study, within the restrictions imposed by both time and budgetary considerations and by access to data. The scope, limitations and results of that study are described below.

A. Unavailability of 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,[60/] 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

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60/ AJS Study at 88.

raised by these conflicting concerns," and instead recommended further study.[61/]

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.[62/] 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 appeals are "insignificant" or that many interlocutory appeals are "critically important."[63/] 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.[64/] Since these characterizations were not linked to any data about the volume, character, cost, time or

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61/ Id.

62/ Id. at 129-39.

63/ Id. at 132-33.

64/ Id.

disposition of interlocutory appeals, it was 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.[65/] 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 interlocutory orders, and urged prompt study of these questions.[66/]

Unfortunately, there was no follow-up. This Committee believes that meaningful data of the kind urged by the AJS Study in 1982 are still essential to the formulation

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65/ 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).

66/ Id. at 88.

of a meaningful proposal for change tailored to the real scope of the problem. In particular, it is important to document and analyze experience under IAS, especially the operation in practice of the one-year limit on pre-trial proceedings and the effectiveness of case management techniques developed under the new system.

B. Committee Study

The Committee's Study was done in two parts. Part I analyzed the published decisions of interlocutory appeals in the First and Second Departments decided between July 1984 and December 1985, which were reported in Vols. 103-115 of the Appellate Division Reports, Second Series.[67/] Part II analyzed certain private records of the Appellate Division, First Department, including information not available from the published reports, for 231 decisions handed down during the period January and February, 1985.[68/] The methodology, limitations and results of each part are described separately.

67/ The Committee expresses its gratitude to Justice Richard Brown of the Appellate Division, Second Department, for suggesting our methodology.

68/ The Committee thanks Presiding Justice Francis P. Murphy of the Appellate Division, First Department, for granting us access to this data.

Part I: Analysis of Published Decisions. In the basic data base, we included only decisions that (1) were identifiable as interlocutory and (2) resulted in an opinion or memorandum decision in which the character of the order appealed from was sufficiently identified to permit classification. Summary orders of disposition had to be excluded because of the absence of any convenient means of excluding from the basic data base appeals from final judgments and other non-interlocutory dispositions, such as review of Article 78 proceedings. The Committee recognized that this skewed the data base in favor of reversals and modifications, because the law only requires the Appellate Divisions to write a memorandum or full opinion in cases of reversal or modification. While the Second Department rarely avails itself of the summary affirmance procedure, a significant percentage of the First Department's interlocutory appeals are disposed of by summary affirmance.[69/] We attempted to control for this problem in two ways, which are described below.

In addition, a relatively small number of memorandum decisions had to be eliminated because they did not

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69/ The precise percentage cannot be determined from the published reports.

sufficiently describe the order appealed from to enable us to determine whether the order was truly interlocutory or how to classify it by type.

The Committee's first cut at a data base comprised 1,530 decisions of the two departments during the period studied. When adjusted to eliminate orders identifiable as interlocutory in form but final in substance and effect, the sample comprised 1,115 orders. The results are summarized in Table 1.

TABLE 1
REPORTED DECISIONS--INTERLOCUTORY APPEALS
First and Second Departments, 103-115 A.D.2d

Type of Order	Number	% of Total	% of Adjusted Total*	Aff'd or Dismissed++	Rev'd or Modified++
Summary judgment granted	138	9.1%	n/a	60 (43%)	78(57%)
Dismissal granted	166	10.8%	n/a	73 (44%)	93(56%)
Summary judgment denied	282	18.4%	25.3%	93 (33%)	190(67%)
Dismissal denied	151	9.9%	13.5%	50 (33%)	101(67%)
Discovery	153	10.0%	13.7%	62 (32%)	91(68%)
Ancillary remedies#	94	6.1%	n/a	40 (43%)	54(57%)
Matrimonial	151	9.9%	13.54%	80 (53%)	71(47%)
Contempt/Sanctions	29	1.9%	2.6%	8 (28%)	21(72%)
Case management	212	13.9%	19.0%	91 (44%)	118(56%)
Change of venue	22	1.4%	2.0%	9 (45%)	12(55%)
Miscellaneous	106	6.9%	9.5%	56 (53%)	50(47%)
Confirm ref report granted	7	[not tabulated—less than 1% of total]			
Jnov/new trial granted	14	[not tabulated—less than 1% of total]			
Confirm ref report denied	1	[not tabulated—less than 1% of total]			
Jnov/new trial denied	4	[not tabulated—less than 1% of total]			
TOTAL	1530				

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* After deducting from the total sample of 1,530 orders those considered by the Committee to be not truly interlocutory of character, i.e., orders granting summary judgment (137); orders granting or denying motions for judgment notwithstanding the verdict or new trial (18); orders granting motions to dismiss (166) and orders granting or denying ancillary remedies (94), the adjusted total of interlocutory orders in the sample was 1115. Some of the orders so excluded were undoubtedly interlocutory in nature. For example, some of the orders granting summary judgment or motions to dismiss doubtless granted only partial summary judgment or partial dismissal. Sometimes that fact was apparent from the decision or memorandum; sometimes it was not. The Committee concluded that it had no effective way of controlling for this variable.

++ Of col. 1.

\# Orders relating to preliminary injunction (53); attachment (11); arbitration (23) and accounting (7).

Column 1 shows the 15 categories into which the Committee classified the interlocutory orders comprising the sample. Column 2 shows the percentage of the gross sample of 1,530 orders falling into each category; column 3 is an alternative computation based on the smaller sample of 1,115 orders judged to be "truly interlocutory." Column 4 shows the number of cases in each category in which the result below was unchanged ("Affirmed or Dismissed");[70/] column 5 shows the cases in each category in which the result was changed ("Reversed or Modified"). In evaluating the conclusions to be drawn from these data, the following assumptions and limitations should be considered:

70/ The category of "dismissals" included in reported decisions does not include dismissals for failure to perfect the appeal in accordance with the nine-month rule. Those data, as noted in the 1986 Report, are needed in order to evaluate arguments that interlocutory appeals are frequently taken for strategic or dilatory purposes by parties not intending to prosecute. There appear to be no published data presently available from which this information can be readily calculated, since, as noted above, reports of summary dispositions include appeals from final judgments. While a data base might be constructed from the New York Law Journal, it is not clear to us that the Committee could completely and accurately identify all appeals dismissed for failure to prosecute.

Kinds of interlocutory orders.

The Committee is aware that the selection of categories involves an exercise of judgment, and that the wide variety of interlocutory orders entered into the courts of original jurisdiction can be classified in a variety of rational ways. An effort was made to relate the categories to the kinds of orders most frequently mentioned in published discussion of proposals for change -- e.g., discovery orders, orders granting or denying summary judgment, and the like. While most of the categories are self-explanatory, some comments and caveats seem needed to interpret the data properly:

Matrimonials: Interlocutory orders in matrimonial cases were categorized separately because they have been singled out by some commentators as deserving of special rules regarding appealability. However, the data generated by the Study do not appear to warrant special treatment for such orders. Nevertheless, it should be pointed out that certain kinds of "interlocutory" orders in matrimonial cases -- e.g., orders affecting custody -- are conceptually more similar to ancillary remedies or to post-judgment orders than to other types of interlocutory orders, and might merit separate examination in any future studies.

"Case Management" includes orders relating to pleadings, parties, and calendar control, e.g., grant or

denial of leave to amend, orders of consolidation or severance, orders relating to the placing of cases on trial calendars, striking jury demands, and similar matters. Some such orders may become obsolete under IAS, and the incidence of interlocutory appeals may vary; this category may accordingly be particularly appropriate for further monitoring.

"Miscellaneous" orders are those which did not fall into any of the enumerated categories. Orders relating to defaults occurred with sufficient frequency to suggest that they might better have been broken out in separate categories, particularly since an order denying a motion to vacate a default judgment would not appear to be truly interlocutory in character. Memorandum decisions do not, however, always describe the order appealed from sufficiently to distinguish orders relating to default judgments from orders relating to the kinds of technical default that are routinely forgiven before being reduced to judgment.

Limitations of the Data. A study based on published decisions, without resort to original court papers, presents inevitable problems of interpretation. One of the most serious is the meaning of decisions resulting in modification of the order appealed from. Memorandum decisions often do not include sufficient information about the nature of the modification. Some modifications are tantamount to reversal; others not substantive in character and are, hence,

tantamount to affirmance. The problem arises in several ways, including (1) orders granting or denying multiple relief, which on appeal are "modified" in only one respect; (2) decisions cast in such terms as "deletion of the third decretal paragraph" (which cannot be understood without reference to the original order); and (3) orders which are "modified on the law" without seeming to change the result.[71/] While the percentage of orders in any given category shown as "reversed or modified" should therefore be read with caution, the fact of modification is an empirical reality that deserves consideration, even where it is not outcome-determinative.

Finally, given the limitations imposed by the limited scope and methodology of the study, it must be assumed that some statistical inaccuracies are inherent in the data. A more comprehensive study, using more sophisticated sampling techniques, might yield data that would support different or stronger conclusions. For example, it

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71/ The latter category did not appear to comprise a large percentage of the 1530 orders appeals studied, but might warrant further analysis to the extent that the criterion of Appellate Division supervision is considered relevant to the retention of the present broad right of interlocutory appeal; in view of the Committee's conclusion not to recommend any change at the present time, that question was not reached.

has been suggested that some categories of interlocutory orders, such as discovery, may be summarily affirmed more often than other types of orders. The Committee's inability to identify whether a particular summary affirmance related to discovery of some other matter may have resulted in a significant overstatement of the reversal/modifications ratio for discovery orders. After careful consideration, the Committee concluded that the limitations of its study required disclosure and discussion, but did not warrant rejection of the conclusion that the overall rate of reversal and modification of interlocutory orders is high enough to suggest that there be no change in existing practice.

One readily identifiable problem with our data base was the exclusion of summary affirmances, because we could not tell whether a particular summary affirmance was truly interlocutory. This omission might have inflated the percentage of reversals/modifications in our data base, since the First Department often uses the summary procedure when affirming a trial court order.

To check whether we were missing a significant number of affirmances we added to the 1530 reported decisions all summary affirmances of <u>orders</u> that were reported in the same volumes of the Appellate Division Reports from which the

original data were drawn. (Vol. 103-115)[72/] There were 689 such summary affirmances. When added to the original data base, this yielded a total of 2,219 decisions from the two departments, of which 1,312 (60%) were affirmed and 886 (40%) were reversed or modified. Summary affirmances accounted for 52.5%, or just over half, of the affirmances. Of these, all but a negligible number were handed down by the First Department.

While the reduction between the percentage of orders that were reversed or modified in our original sample and this expanded sample was substantial, a two-in-five rate of reversal/modification is still significant.

Obviously, this expanded data base shares some of the problems of the smaller base. In particular, there was no way to eliminate from the 689 summary affirmances of orders either (i) final orders or (ii) orders that were in effect final orders, such as appeals from Article 78 proceedings, appeals from orders granting summary judgment or dismissing a complaint, and the like. Therefore, there is no way of knowing how many of these 2,219 decisions were truly

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72/ We did not include summary affirmances listed under titles like "Judgment Affirmed," "Order and Judgment Affirmed," "Dismissal of Petition Affirmed" and the like.

interlocutory appeals.[73/] Nonetheless, the Committee felt that this expanded data base was worth a brief look, if only because it was our perception that the 1530 decision data base missed too many affirmances -- and, in fact, it appears our perception was correct.

The average length of time elapsed between entry of the order appealed from and disposition of the appeal was 13.9 months for the sample of 1,530 reported decisions. The length of time elapsed per appeal was computed on the basis of the date of the order appealed from and the date of the published decision. The published data do not permit identification of the portion of the total time elapsed between notice of appeal and perfection, as distinguished from the time elapsed between perfection and decision. Nor do they give any information that would have enabled us to compute the lapsed time for summary affirmances, which might take less time than a decision or memorandum.

73/ It was for this reason that the Committee used the full 1,530 decisions in this expanded sample, rather than the 1,115 decisions obtained by paring from the full sample orders that were not truly interlocutory. See above, Table I, n.*.

Part II -- Analysis of First Department Dispositions.

As a second check on the Committee's analysis, we gathered a much smaller sample of appellate decisions, with much more complete information about each of the decisions included. The Committee was granted access, for purposes of the study, to records of the Appellate Division, First Department, relating to all appeals decided during January and February, 1985. The sample included 231 appeals that were apparently interlocutory, which was adjusted to 145 after excluding 86 orders that were interlocutory in form only.[74/] The results are shown in Table 2.

74/ Motion to dismiss granted (29); summary judgment granted (27); stay or compel arbitration (12); ancillary remedies (17); vacate arbitration award (1). The same caveat applies as is noted in the first footnote to Table 1: some of the appeals "purged" from the sample were actually interlocutory, since the Committee could not, in most cases, distinguish partial dismissals or partial summary judgment from dismissal or summary judgment in toto. Defaults, although shown as a separate category in Table 2, were not eliminated for this purpose because the compilers did not distinguish orders relating to default judgments from, e.g., orders under CPLR 2004.

Table 2

Analysis of First Department Decisions - January-February 1985

	Total # of Decisions	Aff'd or Dismissed (Total	Aff'd w/ Opinion	Aff'd w/o Opinion	Rev'd/Mod.
Motion to Dismiss - Granted	29	20 (69%)	9 (31%)	11 (38%)	9 (31%)
Sum. Judgment - Granted	27	19 (70%)	5 (18%)	14 (52%)	8 (30%)
Motion to Dismiss - Denied	22	13 (59%)	5 (23%)	8 (36%)	9 (41%)
Sum. Judgment - Denied	40	24 (60%)	2 (5%)	22 (55%)	16 (40%)
Stay or Compel Arbitration	12	9 (0%)	0 (0%)	9 (75%)	3 (25%)
Housekeeping	15	9 (60%)	1 (7%)	8 (53%)	6 (40%)
Disclosure	23	20 (87%)	4 (17%)	16 (70%)	3 (13%)
Calendar	4	2 (50%)	1 (25%)	1 (25%)	2 (50%)
Ancillary Remedies*	17	14 (82%)	3 (18%)	11 (64%)	3 (18%)
Defaults	13	9 (69%)	-0-	9 (69%)	4 (31%)
Services of Pleadings/ Repleadings	8	6 (75%)	2 (25%)	4 (50%)	2 (25%)
Sanctions (Pleadings)	3	2 (67%)	-0-	2 (67%)	1 (33%)
Sanctions (Money)	3	1 (33%)	1 (33%)	0 (0%)	2 (67%)
Confirm Referee's Report	4	1 (25%)	-0-	1 (25%)	3 (75%)
Vacate Arbitration Award	1	-0-	-0-	1 (100%)	-0-
Matrimonial (Pendente Lite)	10	5 (50%)	-0-	5 (50%)	5 (50%)
TOTALS	231	155	33	122	76 (33%)

* The breakdown of ancillary remedies was as follows:

	Total # of Decisions	Aff'd or Dismissed (Total	Aff'd w/ Opinion	Aff'd w/o Opinion	Rev'd/Mod.
Preliminary	14	12 (85%)	3 (21%)	9 (64%)	2 (14%)
Attachment	1	-0-	-0-	-0-	1 (100%)
Receiver	1	1	-0-	1 (100%)	-0-
Lis Pendens	1	1	-0-	1 (100%)	-0-

Access to the First Department's records made it possible for the Committee to classify those appeals that were disposed of by summary affirmance by type of order appealed from. Thus, the data in this smaller sample are free of some of the elements of bias discussed above with respect to the sample of published decisions (Part I). The problem of evaluating whether a modification is closer to an affirmance or reversal remains, however, and the Committee did not attempt to resolve it by making value-judgments about the extent to which particular kinds of modifications of non-final orders warrant the time, expense and effort of an interlocutory appeal. Since, as noted above, the Committee considered the reversal/modification rate to be a significant figure in its own right, independently of the "quality" of the change, those totals are grouped as they were in the study of published decisions.

The rate of reversal/modification in the smaller sample was considerably lower than in the study of published decisions. Only 33% of the total Part II sample of 231, as opposed to 58% of the corresponding orders in the Part I study and 40% of the Part I sample plus summary affirmances of orders, were reversed or modified. That number rose to 36.5% when only the 145 "truly interlocutory" orders were included in the Part II sample.

Part of the discrepancy is undoubtedly accounted for by the high proportion of summary affirmances in the smaller study: in the 231-order sample, there were 155 affirmances, and 122 of them, or 78%, were affirmed without opinion. Adjusted to eliminate orders not truly interlocutory, there were 145 orders of which 92 were affirmed; 76 of those affirmances, or 82.6%, were without opinion. To the extent that a high percentage of summary affirmances indicates the appeal raised no real or substantial issue, these data lend some support to the advocates of change. The sample is much too small, however, to permit statistically significant determination whether any particular kinds of orders are more likely to be summarily affirmed.

There are, moreover, other reasons for using with caution the rate of summary affirmance in the First Department sample as reflected in Table 2.

First, the study of published decisions reflected in Table 1 included appeals in both the First and Second Departments, but only the First Department makes extensive use of summary dispositions. Thus, to the extent that exclusion of summary affirmances skewed the results of the study of published decisions, the bias would affect only the First Department statistics; it would not appear by itself to account for the higher reversal/modification rate in the

orders from both Departments which comprised the Part I sample.

Second, and more important, despite the high rate of summary affirmances, the smaller First Department sample shows results that are not too different from the reversal/modification rate for the expanded data base (1,530 reported decisions plus 689 summary affirmances) mentioned at the end of Part I of this study (see supra; pp.56-58). The First Department reversed or modified decisions of lower courts in 33% of the 231 cases decided during January and February 1985, and the two Departments collectively did so in 40% of 2,219 cases, whether the dispositions were reflected in opinions, memorandum decisions, or summary orders.

The average length of time from entry of order appealed from to disposition by the First Department was 10.4 months in the Part II Study. The Committee notes that the average might be somewhat longer if dispositions during October and November (when the Court decides many cases pending during the summer recess) had been studied instead of January and February. Summary affirmances may account for some of the discrepancy between this sample and the larger sample, where we were examining reported decisions.

VI. Committee Recommendations

A. Continuation of Interlocutory Appeals as of Right.

The Committee concludes that the data collected do not support the abolition or modification of interlocutory appeals at this time.

Despite the acknowledged limitations of the Committee study,[75/] the data analyzed by the Committee appeared to validate a number of the traditional arguments in favor of prompt appellate review of lower court determinations. Unlike the Court of Appeals, whose jurisdiction is narrowly limited,[76/] the four Appellate Divisions have traditionally served the function of assuring that error is corrected and justice done on the facts of particular cases.[77/] It seems clear that access to an appellate court should be available where there is evidence of a significant incidence of error. The Committee believes that the reversal or modification rate of between 33% and 60% provides such evidence. Even assuming that all of the limitations of the Study's methodology had the cumulative effect of overstating the total interlocutory

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75/ See Part V, above.

76/ N.Y. Const., art. VI, § 3; CPLR 5601, 5602.

77/ See AJS Study at 25-26.

orders reversed or modified on appeal, the overall reversal/modification rate is high enough so that due regard for the administration of justice should preclude any wholesale revision of the right to interlocutory appeals.[78/]

Furthermore, the data compiled by the Committee indicates no basis for singling out any particular category of interlocutory appeal for abolition. On the contrary, the high rate of reversal/modification cut across all categories. Discovery orders, appeals from which are most frequently cited as abusive, were reversed or modified in 68 percent of the cases included in Part I, while only comprising 13.7% in that sample. The resort to interlocutory appeals for a wide range of orders, not all of which would necessarily be subject to review on appeal from a final judgment,[79/] sup-

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78/ It does not, of course, follow that correction of all the "defects" would affect the results in the same recommendation. Furthermore, the Committee's data are consistent with the only prior published study our research has discovered, see Project, The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court, 47 Fordham L. Rev. 929, 993 (Table 2), 994 (Table 3) (1979). According to that study, the rate of reversal/modification of non-final orders in the First Department was 44.2% in 1956 and 36% in 1975.

79/ An appeal from a final judgment brings up for review only those intermediate orders "which necessarily affect[] the final judgment," CPLR 5501(a). Many of the orders in the "case management" category would not fall within this provision.

ports the theory that interlocutory appeals are an important means by which the Appellate Divisions exercise their supervisory function.

B. Amendment of the Nine-Month Rule

The Committee's data did indicate that criticism of the delay involved in interlocutory appeals is well founded. The average elapsed time (13.9 months in the study of published decisions; 10.4 months in the smaller sample) is long enough to have considerable potential for abuse. The Committee concluded, however, that the abuses that do exist are probably a function of the extremely liberal time periods presently allowed for perfection of interlocutory appeals, rather than an inherent feature of a system allowing interlocutory appeals as of right.

Although the sound exercise of the trial court's discretion in granting or denying stays can be a powerful weapon in controlling dilatory appeals, as the First Department recently observed,[80/] not all problems of delay can be

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80/ "Doubtless, there are instances, especially where a note of issue has been filed and trial is imminent, where the motion and the appeal from an adverse determination are calculated to delay and hinder the expeditious disposition of the case. We recognize that if the trial and disposition of cases were to be deferred routinely pending appellate review of interlocutory orders the (Continued)

solved in that way. On the contrary, the denial of a stay may work to the advantage of the party taking the dilatory appeal. For example, disclosure and motion practice may go forward while a party appeals an order directing the production of documents, but if the documents are material, the interlocutory appeal can effectively stymie the adversary's conduct of disclosure without them, or frustrate his ability to make effective use of them when they are finally produced. Conversely, the grant of a stay may in some situations work real injustice to the party who has been denied disclosure.81/

Short, consistently enforced time limits for the perfection of interlocutory appeals could curb the purely

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(Continued)
system would collapse of its own weight. We note, though, that the granting of stays pending appeal in such cases is, for the most part, a matter of discretion." Grisi v. Shainswit, note 30, supra, 507 N.Y.S.2d at 158.

81/ For example, in Grisi v. Shainswit, cited above, plaintiff, after filing a note of issue and statement of readiness, served a supplemental bill of particulars claiming for the first time additional special damages of one million dollars. The IAS judge's denial of defendant's motion for a further physical examination, coupled with her refusal to embody the denial in an appealable paper, were obviously intended to speed the case to trial without the delay caused by an interlocutory appeal. We question whether mandamus would nevertheless have issued if the Court had entered a written order denying the motion, but declined to order a stay of the trial pending appeal.

dilatory appeal without closing off an avenue of redress in those cases where justice is served by prompt review. Accordingly, the Committee recommends amending the rules relating to the time for perfecting interlocutory appeals, without any change in the standards of appealability.

In the view of the Committee, much of the problem of delay 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. This change will not require an amendment to the CPLR, but merely a change to the First and Second Department Rules.

The nine-month rule seems excessive with respect to interlocutory appeals, which typically do not involve voluminous records or the settlement of a transcript. Since there is a 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. The rare case in which the record on an interlocutory appeal is so voluminous as to require more time could be dealt with by

the court -- or its clerk -- by a single extension of time "for good cause shown."[82/]

C. Continuing Study

The Committee remains of the view, expressed in its 1986 Report, that any recommendations for change must be based on empirical evidence. To that end, the Committee would encourage further studies, particularly those designed to cure some of the limitations of the present study, and strongly recommends that the practice under IAS be analyzed. In the event that experience under IAS differs substantially from previous practice with respect to the kinds of orders

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82/ In addition, a 60-day time limit for the perfection of all interlocutory appeals, whether prosecuted by the full record method or the appendix method, if coupled with enforcement of existing rules, could permit more efficient employment of the full record method permitted under CPLR 5528(a)(5) and the rules of both First and Second Departments, 22 NYCRR §§ 600.5(c), 600.10(b) and § 670.8(c). Where the full record method is used and no transcript is involved, both the First and Second Departments presently have rules requiring that the record be filed within 30 days of the notice of appeal, 22 NYCRR § 600.5(d) (1st Dep't); § 670.8(e) (2d Dep't), and the First Department requires that the appeal be placed on the calendar within 20 days thereafter, 22 NYCRR § 600.11(a). Many interlocutory appeals are particularly well suited for prosecution by the full record method, since the papers comprising the record on most litigated motions are not only quantitatively limited but relevant to the order appealed from, so that the selection of portions of the record to be included in an appendix adds, rather than saves, time and expense.

appealed, rate of reversal/modification of particular categories of orders, or elapsed time, experience-based recommendations can be formulated on the basis of the new data.

Dated: New York, New York
March 18, 1987

Respectfully submitted,

COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION*/

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*/ The Committee thanks Jonathan Horn, a former member of the Committee and Chair of the Subcommittee on Appellate Practice during 1985-1986, under whose guidance Parts II-IV of this report were drafted as part of the interim report of the Committee, issued June 18, 1986. Mr. Horn does not subscribe to the Committee's conclusion -- indeed, the Chair notes that Mr. Horn would have dissented vigorously from the Committee's conclusion -- so we are all the more grateful for the use of his handiwork.

Special thanks to Paul, Weiss, Rifkind, Wharton & Garrison and Jennifer Carey, and Kramer, Levin, Nessin, Kramer & Frankel and Philip Bernstein, who gathered the data from the Appellate Division Reports that was analyzed in Part V of the report; and to Dewey, Ballentine, Bushby, Palmer & Word, which transcribed the data gathered from the Appellate Division: First Department.

**/ Members of the Subcommittee that prepared the report.

John R. Horan
Meryl Sali Justin
Jerome I. Katz
Richard Corper Laskey
Barbara A. Lee**
Minna Schrag
John A. Schultz
Thomas H. Sear
Daniel M. Semel
Jamie B.W. Stecher
Vincent J. Syracuse
William J. Toppeta
Robert F. Wise
Mark C. Zauderer

INTERLOCUTORY APPEALS

STATISTICS WISH LIST

1. How many interlocutory notices of appeal filed in N. Y. County in 1984?

2. How many perfected? Of these, how many related to decision on merits.

3. How many stays granted due to interlocutory appeals:

   - Before perfection?
   - After perfection?
   - By what court?
   - Subject

4. Of the interlocutory appeals perfected, how many perfected within:

   a. 30 days
   b. 60 days
   c. 90 days
   d. 6 months
   e. 9 months.

5. Of the interlocutory appeals decided, how many were:

   a. Reversed with opinion (Subject?);
   b. Reversed without opinion (Subject?);
   c. Affirmed with opinion (Subject?);
   d. Affirmed without opinion (Subject?).

6. Of the interlocutory appeals decided, how many were decided within 4 to 8 weeks after briefing?

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036

COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION

COLLEEN McMAHON
CHAIR
345 PARK AVENUE, 28TH FLOOR
NEW YORK 10154
(212) 644-2732

ROBERT P. HANEY, JR.
SECRETARY
345 PARK AVENUE, 28TH FLOOR
NEW YORK 10154
(212) 644-2720

October 28, 1985

BY HAND

Honorable Joseph Bellacosa
Chief Administrative Judge
Office of Court Administration
270 Broadway
New York, New York

Dear Judge Bellacosa:

The Committee on State Courts of Superior Jurisdiction is busily preparing suggestions for changing the current interlocutory appeals system, in response to a request from Chief Judge Wachtler that we look into the impact of IAS on interlocutory appeals and vice versa. Does your office maintain any statistics or data of the sort enumerated on the attached "wish list" of data we would like to see in order to complete our study? If you do, could we take a look at it?

As always, thank you in advance for your help. And keep up the good work; you are obviously thriving in your new job!

Sincerely,

Colleen McMahon

CM/jb

bcc: Jonathan F. Horn
Peter W. Birkett

APPENDIX B

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
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NEW YORK 10036

COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION

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October 28, 1985

BY HAND

Honorable Francis T. Murphy
Presiding Justice
Appellate Division, First Department
Madison Avenue and 25th Street
New York, New York

Dear Justice Murphy:

Several years ago, members of the City Bar Association's Committee in State Courts of Superior Jurisdiction met with you and Justice Kupferman to discuss the impact of interlocutory appeals on the work of your court. That meeting was most informative and helpful. Chief Judge Wachtler has now asked our Committee to give some thought to how the pendency of interlocutory appeals might affect the new Individual Assignment System. We would certainly be remiss in going forward without hearing your views on the issues, so I am writing to ask if it would be possible for us to meet with you and perhaps other members of the Court in the near future to discuss this issue. A small subcommittee would be happy to get together at your convenience.

At our meeting several years ago, you and your Clerk provided us with some statistics about interlocutory appeals, which we found most enlightening. One of the members of our Committee has compiled a "wish list" of the data he would like to have available in order to study the question put to us by the Chief Judge. While I doubt very much if your busy clerks are able to keep all of the data in readily available form, anything you can provide us will be greatly appreciated.

I look forward to speaking with you soon.

Respectfully,

Colleen McMahon

APPENDIX C

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
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COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION

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ROBERT P. HANEY, JR
SECRETARY
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NEW YORK 10154
(212) 644-2720

October 28, 1985

BY HAND

Honorable Milton Mollen, Presiding
Justice
Appellate Division, Second Department
45 Monroe Place
Brooklyn, New York 11201

Dear Justice Mollen:

Several years ago, members of the City Bar Association's Committee in State Courts of Superior Jurisdiction met with you to discuss the impact of interlocutory appeals on the work of your court. That meeting was most informative and helpful. Chief Judge Wachtler has now asked our Committee to give some thought to how the pendency of interlocutory appeals might affect the new Individual Assignment System. We would certainly be remiss in going forward without hearing your views on the issues, so I am writing to ask if it would be possible for us to meet with you and perhaps other members of the Court in the near future to discuss this issue. A small subcommittee would be happy to get together at your convenience.

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I look forward to speaking with you soon.

Respectfully,

Colleen McMahon

CM/jb
bcc: Jonathan F. Horn ✓
Peter W. Birkett

APPENDIX D

STATE OF NEW YORK
UNIFIED COURT SYSTEM
OFFICE OF MANAGEMENT SUPPORT
(OFFICE OF COURT ADMINISTRATION)
270 BROADWAY
NEW YORK, NEW YORK 10007
(212) 587-2007

JOSEPH W. BELLACOSA
Chief Administrative Judge

MATTHEW T. CROSSON
Deputy Chief Administrator

November 12, 1985

Colleen McMahon, Esq.
Chair
Committee on State Courts
of Superior Jurisdiction
345 Park Avenue
New York, New York 10154

Dear Ms. McMahon:

On behalf of Chief Administrative Judge Joseph W. Bellacosa, I acknowledge receipt of your letter of October 28, 1985, with its "Statistics Wish List" regarding interlocutory appeals.

The appellate courts do not report the data requested on the list to the Office of Court Administration. Thus, none of the items you requested for New York County are available from us.

Moreover, I believe that data is not readily available from the First Department of the Appellate Division or from the New York County Clerk. Developing the data at those sites would require research and compilation from court records.

I am sorry that I cannot be of more assistance.

Very truly yours,

Matthew T. Crosson

MTC:ms

Supreme Court Appellate Division
First Department
27 Madison Avenue
New York, N. Y. 10010
212-340-0400

Francis X. Galdi
Deputy Clerk

January 9, 1986

Ms. Colleen McMahon
The Association of the Bar
of the City of New York
345 Park Avenue
28th Floor
New York, N.Y. 10154

Re: Interlocutory Appeals (1984)

Dear Ms. McMahon:

Your request to Presiding Justice Murphy for this Court's experience with interlocutory appeals has been referred to me and this is my response.

Such appeals are denominated in this Court as non-enumerated appeals. See: 22 NYCRR Sec. 600.4. The following consists of the only relative statistical informastion maintained by the clerks' office for the year 1984.

During the ten terms of the Court, 367 such appeals were submitted for the Court's determination. During that same period, the Court rendered the following determinations:

a)	Affirmed	234	
b)	Reversed	70	
c)	Modified	46	
d)	Dismissed on calendar		30
e)	Withdrawn on calendar		2
f)	Dismissed prior to argument		70
g)	Withdrawn prior to argument		20

There are no definitive statistics relative to the time within which appellants perfected their appeals, but it is probable that most were perfected before six months had elapsed.

I trust that this has been of some assistance to you and regret that we are not able to provide all of the answers to your inquiries.

Very truly yours,

Francis X. Galdi

FXG:RS

AN ACT to amend the civil practice law and rules, in relation to abolishing appeals to the appellate divisions as of right from interlocutory orders

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section fifty-seven hundred of the civil practice law and rules is amended to read as follows:

§5701. Appeals to appellate division from supreme and county courts. (a) Appeals as of right. An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court:

1. from any final [or interlocutory] judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action; or

2. from [an] any order [not specified in subdivision (b),] which finally determines the action and from any other order where the motion it decided was made upon notice and it[:

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

March 3, 1986

MEMORANDUM ON PROPOSED CHANGES TO CPLR § 5701:

I have briefly analyzed the proposed changes to the CPLR section relating to appeals from the supreme and county courts to the appellate division. As you know, the proposed section basically focuses on finality; therefore it significantly curtails the current right to appeal. The proposed section would allow appeal as of right in instances akin to those which allow appeal in federal court. Appeal by permission under the proposed section is limited to orders involving important issues of law, at least when permission is granted by the judge who entered the order at issue. Permission to appeal may be granted by the appellate division, it appears, in its discretion.

1. Appeals as of Right

CPLR	Proposed section
5701(a) - appeals to appellate division as of right -- may be taken	same
1. from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues; or	1. deletes the appeal of right from interlocutory judgments

ADD H

2. from an order not specified in (b), where the motion it decided was made upon notice and it:	2. (a) there is no reference to (b), which is deleted.
(i) grants, refuses, continues or modifies a provisional remedy; or	(b) there is an appeal of right from any order which finally determines the action and from any other order from a motion made on notice which grants, refuses, continues or modifies a provisional remedy
(ii) settles grants or refuses an application to resettle a transcript or statement on appeal; or (iii) grants or refuses a new trial, with certain exceptions; or (iv) involves some part of the merits; or (v) affects a substantial right, or (vi) in effect determines an action; or (vii) determines that a state statute provision is unconstitutional and reasoning is in the opinion	CPLR 2(ii)-(vii) are deleted unless they finally determine the action
3. from an order from a motion made on notice, refusing to vacate or modify a prior order if the prior order would have been appealable as of right had it decided a motion made upon notice	3. deleted
(b) Orders not appealable as of right --	(b) deleted
1. when made in a proceeding against a body or officer pursuant to article 78	
2. when it requires or refuses a more definite statement in a pleading,	

3. when it refuses to order that a prejudical or scandalous matter be striken from a pleading.

there is an appeal as of right from an order which grants an application by a plaintiff for summary judgment as to one or more causes of action or part thereof

Summary of Changes: CPLR § 5701 allows for appeal as of right in a vast array of instances. Under the proposed section appeals as of right would be severely curtailed. Under proposed section 5701(a)(1) interlocutory judgments generally would not be appealable as of right as they are now (section 5701(2), however, does provide for appeals as of right from orders granting summary judgment on plaintiff's motion.)

Section 5701(a)(2) is drastically changed to limit appeals from orders which decide motions. Under the current section provision an order is appealable if (1) it does not fall within the narrow exceptions of provision (b), and (2) it falls within one of seven categories listed in 5701(a)(2). Among these seven categories listed in (a)(2) are two which allow for the appeal of almost any motion; they are (iv) orders which involve some part of the merits and (v) orders which affect a substantial right.

Unlike the current provision, proposed § 5701(a)(2) focuses on finality. Any order which finally determines the action may be appealable as of right. Other

orders may be appealed as of right only when they grant, refuse, continue or modify a provisional remedy, or grant an application for summary judgment on plaintiff's motion.

2. Appeals by Permission

Currently any order not appealable as of right may be appealed by permission. Permission may be granted through various avenues, either by the judge who ruled on the motion or by an appellate division justice. Of course, since almost any order is appealable as of right, this provision is not often used.

Under the proposed section, there may be an appeal by permission from any interlocutory judgment or any order not appealable as of right by permission of the judge who directed entry of the interlocutory judgment or the order granted. The judge may only grant permission, however, if he or she determines that (1) the appeal involves a controlling question of law as to which there is a substantial ground for difference of opinion and (2) immediate appeal may advance the ultimate termination of the litigation. If the judge grants permission the appellate division may dismiss the appeal. The appellate division, rather than a justice of that court, may grant permission if the judge refuses.

Thus the proposed section only allows appeals by permission of the judge when an important issue of law which will materially advance the litigation is present. These conditions for permission to appeal do not appear to apply

to the appellate division. The general authority of the appellate division to grant permission to appeal may be an important safety valve as some orders may be devastating to a party or the public and still not present an important question of law. Of course the local rules of each appellate division may limit the instances in which they will grant permission to appeal.

Additionally, it does not appear that a specific provision exists to allow the appeal of one claim of many or judgment as to less than all parties in a multiple party action. Under Fed. R. Civ. P. 54(b) when more than one claim is present in an action or when multiple parties are involved, the court may direct entry of a final judgment as to less than all the claims. Thus, an "interlocutory" judgment may be converted into a final judgment for purposes of appeal.

Under current CPLR § 5012, where the court severs claims, the court may direct judgment as to a part of the cause of action. Section 5012 does not address the separation of claims.

Under the proposed CPLR section, there will be no appeal as of right for one of multiple claims which have been separated but not severed. There may be an appeal by permission if the issuing judge concludes that there is a controlling question of law involved if there are substantial grounds for difference of opinion. Since the appellate division may grant permission to appeal in its discretion,

interlocutory judgments on fewer than all claims in an action could still be appealed.

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.

App I

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.

STATEMENT OF RICHARD CORPER LASKEY, ROBERT POLSTEIN AND JAMIE B.W. STECHER IN DISSENT

The Committee's Report on Appeals of Interlocutory Orders (the "Report") appears to be the first systematic attempt to quantify the principal philosophical justification for New York's extremely liberal procedures allowing immediate appeals as of right from interlocutory orders: that state court trial level judges require the attention of the Appellate Division to effect a sufficient degree of trial level justice. Although the Committee, in its own words, "recognizes the weaknesses inherent in its data bank" it nonetheless relies on its analysis of the data to conclude that the "reversal/modification rate on appeals from interlocutory orders . . . is sufficiently high that we cannot recommend abolishing or curtailing interlocutory appeals at this time."

We dissent from the Report primarily on philosophical grounds.[1] Even without interlocutory appeals, litigation takes too long and costs too much money; in our view, whatever added "justice" interlocutory appeals may effect is not worth the additional costs, as measured in time or money. On the financial side, an interlocutory appeal almost necessarily entails a

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[1] We are not unmindful of some of the Report's methodological problems, as well, but since we have a more basic philosophical disagreement with the Report, we are prepared in this dissent to assume that the data are meaningful, and thus to leave the methodology outside the scope of this dissent.

total of three appellate briefs, a record or appendix, and perhaps oral argument as well. The Report nowhere considers these very substantial costs, which should not lightly be ignored in evaluating the benefits of the current process of interlocutory appeals as of right. It almost goes without saying, but these added costs present obvious opportunities for abuse when there is a great disparity in the parties' financial resources.

The Report does address the cost to litigants as measured in time.[2] It finds that there is an average delay of from 10.4 to 13.9 months from entry of the interlocutory order appealed from and the disposition of the appeal, and it recommends that the current rules, which allow an appellant nine months in which to perfect an appeal, should be amended to reduce the period to sixty days. However, the Report does not seem to examine whether abuse of the nine month rule is a substantial cause of the current delays, and so there is no basis on which to conclude that shortening the nine month rule will effect any meaningful salutary change at all. However, even if amending the nine month rule does significantly reduce the delay, the time factor will still be a substantial added cost inherent in the system.

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[2] The Report did not purport to analyze what happened at the trial level while interlocutory appeals were being taken. Our own experience, which we suspect is not atypical, is that interlocutory appeals usually effect a de facto, if not a de jure, stay of proceedings. This de facto stay is generally not the product of inertia, but rather a recognition of economic realities: litigation is costly enough without expending time and money on elements of a litigation which might easily become moot after the appeal of the interlocutory order.

Moreover, in spite of the data presented by the Report, We do not view interlocutory appeals as a "necessary" check upon State Supreme Court Justices. Our own experience, primarily in New York and Kings Counties, belies what we perceive to be the Report's lack of confidence in these judges.

Finally, we are constrained to acknowledge that interlocutory appeals in many cases can streamline the litigation process, and so we would not favor eliminating all appeals of interlocutory orders. Rather, we would like to see New York adopt something akin to the proposal of the Office of Court Administration, which is amply described in the Report, and which might substantially improve the current system.

STATEMENT OF RICHARD CORPER LASKEY, ROBERT POLSTEIN AND JAMIE B.W. STECHER IN DISSENT

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[1] We are not unmindful of some of the Report's methodological problems, as well, but since we have a more basic philosophical disagreement with the Report, we are prepared in this dissent to assume that the data are meaningful, and thus to leave the methodology outside the scope of this dissent.

Moreover, in spite of the data presented by the Report, We do not view interlocutory appeals as a "necessary" check upon State Supreme Court Justices. Our own experience, primarily in New York and Kings Counties, belies what we perceive to be the Report's lack of confidence in these judges.

Finally, we are constrained to acknowledge that interlocutory appeals in many cases can streamline the litigation process, and so we would not favor eliminating all appeals of interlocutory orders. Rather, we would like to see New York adopt something akin to the proposal of the Office of Court Administration, which is amply described in the Report, and which might substantially improve the current system.