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## Interlocutory Appeals in New York-Time Has Come for a More Efficient Approach

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# Comment

## Interlocutory Appeals in New York—Time Has Come for a More Efficient Approach

### I. Introduction

In New York, a party may appeal, by right, almost any civil interlocutory order.<sup>1</sup> This extreme position makes New York one of the most liberal jurisdictions in the United States.<sup>2</sup> Many commentators argue that in order to supervise the lower courts effectively, the appellate division must have broad jurisdiction over interlocutory orders.<sup>3</sup>

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1. N.Y. CIV. PRAC. L. & R. 5701(a)(2) (McKinney 1978). An interlocutory order is an order which decides not the cause, but only settles some intervening matter relating to it or affords some temporary relief. BLACK'S LAW DICTIONARY 1096 (6th ed. 1990). Interlocutory orders deal solely with matters at the pre-trial stage.

2. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 268 (1957) (Brennan, J., dissenting) (citing N.Y. CIV. PRAC. ACT § 609 as an "extreme example"). See also *Mottese v. Kaufman*, 176 F.2d 301, 308 (2d Cir. 1949) (Frank, J., dissenting) (mentioning New York allows numerous interlocutory appeals by right). In sharp contrast to New York, the federal system allows only a select number of interlocutory orders to be appealed immediately. 28 U.S.C. § 1292 (1993). The limited number of interlocutory appeals is a result of Congress' strict adherence to the final judgment rule. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 13.1 (2d ed. 1993) [hereinafter FRIEDENTHAL] (stating the final judgment rule precludes any appeal until after all the issues involved in a particular lawsuit have been finally determined by the trial court). In recent times, however, Congress has deviated from the final judgment rule, allowing more interlocutory orders to be appealed. See 28 U.S.C. § 1292(b),(e). See also DAVID D. SIEGAL, NEW YORK PRACTICE § 526 (2d ed. 1991) [hereinafter SIEGAL].

3. REPORT OF THE APPELLATE DIVISION TASK FORCE OF 1989, at 36 (1990) [hereinafter TASK FORCE]. See also Jill Paradise Botler et al., *The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers & Functions as an Intermediate State Court*, 47 FORDHAM L. REV. 929, 954 (1979) [hereinafter Botler] (stating "free appealability affords the Appellate Division substantial opportunity to supervise the trial court and to ensure that its actions are within permissible legal and discretionary bounds."). See also Francis Bergan, *The Appellate Division at Age 90: Its Conception and Birth, 1894*, N.Y. STATE B.J., Jan.

However, allowing appeals as of right from almost every kind of interlocutory order increases delay and expense in litigation.<sup>4</sup> In addition, it may lead to excessive appellate intrusion, demoralizing the trial judge.<sup>5</sup> Therefore, New York must balance the appellate division's need to supervise the lower courts against the negative consequences that result when parties have the statutory authority to appeal by right almost every interlocutory order.<sup>6</sup>

Currently, the appellate division must decide an enormous number of appeals every year.<sup>7</sup> In light of this caseload crisis, New York must reevaluate its generous approach to interlocutory appeals.<sup>8</sup> This Comment discusses how the appellate division can deal most efficiently with interlocutory appeals. Part II describes the history of interlocutory appeals in New York, since the creation of the appellate division. Part III explains how other jurisdictions treat interlocutory appeals. Part IV presents the current caseload crisis in the appellate division. Part V describes the controversy over unlimited interlocutory appealability. Part VI evaluates how New York can streamline its approach without sacrificing the appellate division's ability to supervise the lower courts. Part VII suggests that a modified "single justice" approach is the fairest and most efficient solution. Part VIII concludes that the legislators must take measures to streamline New York's approach to interlocutory appeals.

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1985, at 7 [hereinafter Bergan] (describing the creation of the Appellate Division and its role as an intermediate appellate court in New York). There are four appellate departments in New York: First Department, Second Department, Third Department, and Fourth Department.

4. ADVISORY COMM. ON PRACTICE AND PROCEDURE IN NEW YORK, SECOND PRELIMINARY REPORT, at 116 (1958) [hereinafter COMMITTEE REPORT].

5. Botler, *supra* note 3, at 954.

6. ROBERT MACCRATE ET AL., APPELLATE JUSTICE IN NEW YORK 87 (1982) [hereinafter MACCRATE] (stating interlocutory appeals take up a significant amount of the appellate courts' caseload and they are often used as a delay tactic disrupting the trial process).

7. TASK FORCE, *supra* note 3, at 11 n.15.

8. See generally Botler, *supra* note 3. See also MACCRATE, *supra* note 6, at 87.

## II. The History of Interlocutory Appeals in New York

### A. *Creation of the Appellate Division*

In the Constitution of 1894, the New York Legislature created the appellate division.<sup>9</sup> At that time, the Code of Civil Procedure ("Code") governed practice in New York.<sup>10</sup> Under the Code, New York deviated substantially from the final judgment rule.<sup>11</sup> The Code allowed a party to appeal by right numerous interlocutory orders to the appellate division.<sup>12</sup> In 1920, the legislature passed the Civil Practice Act ("CPA") replacing the

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9. N.Y. CONST. art. 6, § 7 (1894) (stating the General Term, which was the existing intermediate appellate court, was reduced to four departments). The legislature intended the appellate division to "absorb many of the functions formerly exercised by the Court of Appeals and operate as the court of last resort in the overwhelming majority of cases." See MACCRATE, *supra* note 6, at 25. See also Botler, *supra* note 3, at 940-44 (stating the appellate division was structured to replace the General Term and in the process remedy many of its inefficiencies and weaknesses as an intermediate appellate court).

10. Ch. 448, [1876] N.Y. Laws 1 (repealed 1920).

11. *Id.* Before New York enacted the State Constitution of 1846, the common law governed New York's appellate procedure. 1 CHARLES Z. ZINSER, CONSTITUTIONAL HISTORY OF NEW YORK, Vol. 1, at 183 (1906) (citing the N.Y. CONST. art. 35 (1777)). Under the common law, a party could not appeal an interlocutory order until after the final judgment. *Brooks v. Hunt*, 17 Johns. Ch. 484, 486-87 (N.Y. Ch. 1820). See also Botler, *supra* note 3, at 935. See FRIEDENTHAL, *supra* note 2, at § 13.1, for definition and discussion of the final judgment rule.

12. Ch. 448, § 1347, [1876] N.Y. Laws 260 (repealed 1920) (a party may appeal an interlocutory order to the General Term of the Supreme Court that 1) grants, refuses, continues, or modifies a provisional remedy; or 2) grants or refuses a new trial; or 3) involves some part of the merits; or 4) affects a substantial right; or 5) where it determines the action, preventing a judgment from which an appeal may be taken; or 6) determines a statutory provision of the state to be unconstitutional).

Code.<sup>13</sup> Under the CPA, a party was still entitled to appeal by right almost any interlocutory order to the appellate division.<sup>14</sup>

In 1958, prior to enacting the Civil Practice Law and Rules ("CPLR"),<sup>15</sup> the Advisory Committee ("Committee") proposed to reduce the number of interlocutory orders appealable by right.<sup>16</sup> The Committee believed that "the present New York provisions allowing appeal as of right from almost every kind of intermediate determination . . . are a prime source of delay and expense in litigation."<sup>17</sup> The Committee concluded that section 609 of the CPA encouraged litigants to take intermediate appeals rather than appeals from the final judgment.<sup>18</sup> This was based on the fact that orders reviewable after final judgment were limited to those that "necessarily affect the final judgment."<sup>19</sup>

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13. Ch. 925, § 609, [1920] N.Y. Laws 214-15 (repealed 1962). An order may be appealed by right:

1) Where the order grants, refuses, continues or modifies a provisional remedy; or settles, or grants, or refuses an application to resettle a case on appeal or a bill of exceptions. 2) Where it grants or refuses a new trial; except that where specific questions of fact arising upon the issues in an action triable by the court have been tried by a jury, pursuant to an order for that purpose, an appeal cannot be taken from an order granting or refusing a new trial upon the merits. 3) Where it involves some part of the merits. 4) Where it affects a substantial right. 5) Where, in effect, it determines the action and prevents a judgment from which an appeal might be taken. 6) Where it determines a statutory provision of the state to be unconstitutional; and the determination appears from the reasons given for the decision thereupon or is necessarily implied in the decision.

*Id.*

14. *Id.*

15. The Civil Practice Law and Rules governs civil practice in New York today. N.Y. CIV. PRAC. L. & R. (McKinney 1991).

16. COMMITTEE REPORT, *supra* note 4, at 116.

17. *Id.* See also *La Buy v. Howes Leather Co.*, 352 U.S. 249, 268 (1957) (Brennan, J., dissenting) (stating New York's broad appealability of interlocutory orders is extreme in comparison to other American jurisdictions).

18. COMMITTEE REPORT, *supra* note 4, at 117.

19. *Id.* N.Y. CIV. PRAC. L. & R. 5501(a) (McKinney 1978) (stating a party may not appeal after the final judgment an intermediate order that does not necessarily affect the final judgment). See, e.g., *Fox v. Matthiessen*, 155 N.Y. 177, 179, 49 N.E.2d 673 (1898) (stating that orders denying motions to set aside verdicts and requesting a new trial, upon the ground of misconduct of a juror, and an order denying a motion to resettle such order, both made before judgment on the verdict has actually been entered, are 'intermediate' orders, affecting the final judgment); *Austrian Lance & Stewart v. Jackson*, 50 A.D.2d 735, 736, 375 N.Y.S.2d 868, 870 (1st Dep't 1975) (stating a prior order entered granting partial summary judgment was a non-final order, which had not been reviewed by the appellate division, could be reviewed on appeal from the final judgment); *Johnson v. International Har-*

Because of this restrictive test, a party could not have many orders reviewed unless he or she appealed them immediately.<sup>20</sup>

The Committee came up with a proposal<sup>21</sup> that it believed was "a realistic compromise between the 'final judgment' rule prevailing in most American jurisdictions and the present position of New York."<sup>22</sup> The Committee proposed to enumerate those selective orders that are appealable by right.<sup>23</sup> With re-

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vester Co. of America, 237 A.D. 778, 779, 263 N.Y.S. 262, 264 (3d Dep't 1933) (stating an intermediate order allowing amendment of complaint to change relief sought to one in equity to one at law "necessarily affects all the proceedings," and in equity rendered the trial and the judgment abortive).

20. COMMITTEE REPORT, *supra* note 4, at 117. See, e.g., *Two Guys From Harrison-NY v. Realty Ass'n*, 186 A.D.2d 186, 188, 587 N.Y.S.2d 962, 965 (2d Dep't 1992) (stating "a provisional remedy designed to retain the status quo while the action was pending" does not necessarily affect the final judgment); *Fonda Mfg. Corp. v. Lincoln Laminating Corp.*, 72 A.D.2d 522, 522, 420 N.Y.S.2d 904, 905 (1st Dep't 1979) (stating an order denying joint trials does not necessarily affect the final judgment); *Hirschfield v. Hirschfield*, 54 A.D.2d 656, 656, 388 N.Y.S.2d 577, 577 (1st Dep't 1976) (stating "an intermediate order which denied an application to take depositions in aid of plaintiff's cause of action" does not necessarily affect the final judgment); *Sawdon v. Sawdon*, 39 A.D.2d 883, 885, 333 N.Y.S.2d 610, 611 (1st Dep't 1972) (stating "an order granting temporary alimony does not affect the final judgment and cannot be reviewed on an appeal from the final judgment."); *Dulber v. Dulber*, 37 A.D.2d 566, 566, 322 N.Y.S.2d 862, 862 (2d Dep't 1971) (stating an order denying a motion to examination before trial is not reviewable upon final judgment); *Collins v. McWilliams*, 185 A.D. 712, 712, 173 N.Y.S.2d 850, 851 (1st Dep't 1919) (stating an order denying a motion for a bill of particulars is not reviewable on an appeal from a final judgment because it does not necessarily affect the final judgment).

21. See *infra* note 23.

22. COMMITTEE REPORT, *supra* note 4, at 117. The plan was to specify those orders that are appealable by right and make all other orders appealable only upon permission by the trial judge or appellate division. *Id.* For a discussion of the "final judgment rule" see *infra* part III.

23. COMMITTEE REPORT, *supra* note 4, at 117-18. The proposal provided that:

[A]n appeal may be taken to the Appellate Division as of right in an action, or, unless a statute otherwise provides, in a special proceeding, originating in the supreme court or a county court 2) from an order, where the motion it decided was made upon notice: i) granting, refusing, continuing or modifying a provisional remedy; or ii) granting or denying a motion for a severance or consolidation or to add or drop a party; or iii) denying a motion to dismiss before answer or for summary judgment; or iv) granting a new trial or hearing as to one or more issues after a verdict when there is a right to trial by jury; or v) denying judgment when the jury is discharged without reaching a verdict when there is a right to trial by jury; or vi) in effect, determining the case and preventing a judgment or order from which an appeal may be taken; or vii) denying a motion to open a default or to vacate a final judgment or order entered on a default; or viii) granting or denying a motion for relief from or to vacate a final judgment or order on the grounds . . . .

gard to other types of orders, a party may appeal them only upon permission, if they involve a question of law.<sup>24</sup> Essentially, the Committee enumerated the orders important enough to be appealed immediately, while introducing a new concept of permission for other types of orders.<sup>25</sup> The Committee's major modification involved eliminating appeals from orders involving "some part of the merits" and orders "affecting a substantial right," because these provisions permitted many unnecessary appeals.<sup>26</sup>

Many individuals, including some segments of the bar, greatly opposed the Committee's proposal.<sup>27</sup> Because of the opposition, the legislature modified the proposal substantially.<sup>28</sup> The legislature retained the provisions allowing broad appealability by right.<sup>29</sup> However, it adopted the Committee's recommendation, requiring a party to seek permission for certain interlocutory orders.<sup>30</sup>

As a result of the above debates, in 1962, the legislature enacted CPLR 5701.<sup>31</sup> CPLR 5701 separates interlocutory orders that may be appealed by right, and those that require permission.<sup>32</sup> The orders that are appealable by right are

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*Id.*

24. *Id.* at 119. With regard to permission, the proposal stated that:

If a question of law is involved which ought to be reviewed, an appeal may be taken to the appellate division from an order which is not appealable as of right in an action or special proceeding originating in the supreme court or a county court by permission of the judge who made the order granted before application to the appellate division or by permission of the appellate division to which the appeal could be taken, upon refusal by the judge who made the order or upon direct application.

*Id.*

25. *Id.* at 117-19.

26. *Id.* at 120.

27. 7 JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE ¶ 5701.03 (1994) [hereinafter WEINSTEIN].

28. *Id.* See also SEN. FIN. COMM. REP. OF 1961, at 143 (1961) [hereinafter SENATE REPORT].

29. N.Y. CIV. PRAC. L. & R. 5701(a)(2) (McKinney 1978).

30. N.Y. CIV. PRAC. L. & R. 5701(c).

31. N.Y. CIV. PRAC. L. & R. 5701. CPLR 5701 is the main statutory source of the appellate division's jurisdiction. N.Y. CIV. PRAC. L. & R. 5701 commentary at 573 (McKinney 1978) [hereinafter Commentary]. See also WEINSTEIN, *supra* note 27, ¶ 5701.04 (stating a party, in the New York state system, may only appeal a judgment or an order).

32. N.Y. CIV. PRAC. L. & R. 5701(a)-(c).

essentially the same types of orders that were appealable under the CPA.<sup>33</sup>

### B. *New York's Approach to Interlocutory Appeals Today*<sup>34</sup>

The appellate division has considerable authority to review nonfinal orders.<sup>35</sup> This broad appealability of interlocutory orders contrasts sharply with the federal system and most states' systems.<sup>36</sup> A party may invoke seven different provisions that allow him or her to appeal an interlocutory order by right.<sup>37</sup>

33. 6TH REPORT LEG. DOC. 1962 No. 8, at 554, 556 (stating interlocutory orders appealable by right under the new CPLR are "substantially the same as present section 609 of the Civil Practice Act—which is broader than that of other American jurisdictions in authorizing immediate appeals . . ."). For the list of orders appealable under the CPA, see *supra* note 13.

34. Because CPLR 5701 deals only with appeals taken from the supreme court and the county court, this Comment discusses only appeals from these courts. "Appeals to the Appellate Division from courts of original instance other than the Supreme Court and County Court are governed by the appropriate statute applicable to that court." THOMAS R. NEWMAN, *NEW YORK APPELLATE PRACTICE* § 1.04[2][a][i] (1991) [hereinafter NEWMAN].

35. *Nemeroff Realty Corp. v. Kerr*, 38 A.D.2d 437, 439, 330 N.Y.S.2d 632, 634 (2d Dep't 1972) (stating "[t]he Appellate Division has wide power to review nonfinal orders and judgments (see CPLR 5701)."). See also *Botler*, *supra* note 3, at 954.

36. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 268 (1957) (Brennan, J., dissenting) (referring to New York's system of interlocutory appellate review as extreme compared to other jurisdictions). See, e.g., ALA. ST. R. 4(a)(1); ALASKA R. OF APP. PRO. 402(a); ARIZ. REV. STAT. ANN. § 12-2101 (1994); ARK. CODE ANN. § 16-115-108 (Michie 1994); CAL. CIV. PROC. CODE § 904.1 (West 1995); COLO. REV. STAT. § 32 (1995); CONN. GEN. STAT. ANN. § 52-263 (West 1994); DEL. ST. S. CT. R. 42; D.C. CODE ANN. § 30-322 (1994); FLA. STAT. ANN. § 9.130 (West 1995); GA. R. S. CT. R. 22; HAW. REV. STAT. § 641-1 (1994); IDAHO ST. CT. R. 11; ILL. S. CT. R. 307; IND. ST. R. 4; IOWA R. 2; KAN. STAT. ANN. § 60-2102 (1993); KY REV. STAT. ANN. § 22.020 (Michie 1994); LA. CIV. CODE ANN. Art. 1914 (West 1993); ME. REV. STAT. ANN. tit. 26, § 6 (West 1994); MD. CODE ANN., CTS & JUD. PROC. tit. 12, § 12-303 (1994); MASS. GEN. LAWS ANN. ch. 231, § 118 (West 1994); MICH. CT. R. 5.801; MINN. R. 103.03 (1995); MISS. CODE ANN. § 11-51-79 (1993); MO. ANN. STAT. § 512.020 (Vernon 1993); MONT. ST. CT. R. 1; NEB. REV. STAT. § 25-21 (1993); NEV. ST. R. 3A; N.H. REV. STAT. ANN. § 498 (1993); N.J. R. A. R. 2:2-4; N.M. ST. CT. R. 12-203; OKLA. CT. R. 1.40; OR. REV. STAT. § 19.010 (1993); PA. ST. CT. R. 311; R.I. GEN. LAWS § 9-24-7 (1994); S.C. CODE ANN. § 14-3-330 (Law. Co-op. 1993); TENN. R. OF APP. PRO. 9; TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (West 1994); UTAH CT. R. 5(a); VT. CT. R. 5; VA. CT. R. 5; WASH. CT. R. 2.3 (b)(1)-(3); W. VA. CODE § 58-5-1 (1994); WIS. STAT. ANN. § 809.50 (West 1994); WYO. ST. CT. R. 13. *But see* N.C. GEN. STAT. § 7A-27 (1994); N.D. CENT. CODE § 28-27-02 (1993); S.D. CODIFIED LAWS ANN. § 15-26A-3 (1994).

37. N.Y. CIV. PRAC. L. & R. 5701(a)(2).



However, a party must seek permission to appeal all other interlocutory orders.<sup>38</sup>

1. *Provisions Allowing Interlocutory Appeals By Right*<sup>39</sup>

Under the first provision, a party may appeal an order by right if it grants, refuses, continues, or modifies a provisional remedy.<sup>40</sup> Provisional remedies include: attachment,<sup>41</sup> preliminary injunction or temporary restraining order,<sup>42</sup> receivership,<sup>43</sup> and notice of pendency.<sup>44</sup> The second provision allows a party to

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38. N.Y. CIV. PRAC. L. & R. 5701(b),(c).

39. To appeal an interlocutory order by right, the party's motion, that culminated in an order, must have been made upon notice to the other party. See N.Y. CIV. PRAC. L. & R. 5701(a)(2). Essentially, requiring notice precludes appeal from an ex parte order. See Commentary, *supra* note 31, at 575. The way around appealing an ex parte order is "to move on notice to vacate or set aside the order and, if this motion is denied, to appeal from the order denying the motion to vacate." See WEINSTEIN, *supra* note 27, ¶ 5701.06.

40. N.Y. CIV. PRAC. L. & R. 5701(a)(2)(i).

41. N.Y. CIV. PRAC. L. & R. 6223 (McKinney 1980). Attachment is defined as "[t]he legal process of seizing another's property in accordance with a writ or judicial order for purpose of securing satisfaction of a judgment yet to be rendered." BLACK'S LAW DICTIONARY 126 (6th ed. 1990). See, e.g., *Mfns. and Traders Trust Co. v. Lowenstein*, 91 A.D.2d 848, 458 N.Y.S.2d 117 (4th Dep't 1982); *AMF Inc. v. Algo Distrib., Ltd.*, 48 A.D.2d 352, 369 N.Y.S.2d 460 (2d Dep't 1975); *Henry Stuart (Fabrics), Ltd. v. Jules Moskowitz & Co.*, 44 A.D.2d 798, 355 N.Y.S.2d 389 (1st Dep't 1974); *Hydromar Corp. of Del. v. Constr. Aggregates Corp.*, 32 A.D.2d 749, 300 N.Y.S.2d 797 (1st Dep't 1969).

42. N.Y. CIV. PRAC. L. & R. 6314 (McKinney 1980). A preliminary injunction and a temporary restraining order are essentially provisional remedies "to preserve [the] subject matter of controversy pending trial." BLACK'S LAW DICTIONARY 785 (6th ed. 1990). See, e.g., *New York v. Barone*, 141 A.D.2d 629, 529 N.Y.S.2d 994 (2d Dep't 1988); *Honeywell, Inc. v. Technical Bldg. Serv., Inc.*, 103 A.D.2d 433, 480 N.Y.S.2d 627 (3d Dep't 1984); *Cent. Sch. Dist. v. Susquehanna Valley Teachers' Ass'n*, 43 A.D.2d 198, 350 N.Y.S.2d 805 (3d Dep't 1974); *N.Y. v. Asiatic Petroleum Corp.*, 45 A.D.2d 835, 357 N.Y.S.2d 542 (1st Dep't 1974).

43. N.Y. CIV. PRAC. L. & R. 6401 (McKinney 1980). Receivership is defined as the "[l]egal or equitable proceeding in which a receiver is appointed for an insolvent corporation, partnership or individual to preserve its assets for benefit of affected parties." BLACK'S LAW DICTIONARY 1269 (6th ed. 1990). See, e.g., *Hammond v. Hammond*, 257 A.D. 1041, 13 N.Y.S.2d 870 (4th Dep't 1939); *Scott v. Scott*, 219 A.D. 451, 220 N.Y.S. 93 (1st Dep't 1927).

44. N.Y. CIV. PRAC. L. & R. 6501 (McKinney 1980). Notice of pendency is "[a] notice filed on public records for the purpose of warning all persons that the title to certain property is in litigation, and that they are in danger of being bound by an adverse judgment." BLACK'S LAW DICTIONARY 932 (6th ed. 1990). See, e.g., *L & L Excavating Corp. v. Abcon Ass'n, Inc.*, 191 A.D.2d 539, 594 N.Y.S.2d 818 (2d Dep't 1993); *Interboro Operating Corp. v. Commonwealth Sec. & Mortgage Corp.*, 243 A.D. 626, 276 N.Y.S. 687 (2d Dep't 1935).

appeal an order by right if the order settles, grants, or refuses an application to resettle a transcript or statement on appeal.<sup>45</sup> Under the third provision, a party may appeal an order that grants or refuses a new trial.<sup>46</sup> A party may invoke the sixth provision when the order determines the action and prevents a judgment from which an appeal might be taken.<sup>47</sup> Under the seventh provision, a party may appeal an order that determines a statutory provision of the state to be unconstitutional.<sup>48</sup> These five provisions are rarely invoked because in essence all appealable interlocutory orders fall within provision four (in-

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45. N.Y. CIV. PRAC. L. & R. 5701(a)(2)(ii). "[R]esettlement of an order or decree is merely the exercise of the inherent authority of the court to alter its formal pronouncements in cases in which the initial instrument of adjudication is demonstrated to have been the result of mistake or inadvertence." *In re Bartlett's Will*, 164 Misc. 524, 525, 299 N.Y.S. 316, 318 (Sur. Ct. Kings County 1937) (citing *Matter of Wing's Estate*, 162 Misc. 551, 555, 295 N.Y.S. 336, 341 (Sur. Ct. Kings County 1937). See, e.g., *Estate of Brown v. Swartout*, 49 A.D.2d 648, 370 N.Y.S.2d 262 (3d Dep't 1975); *Robinson & Carpenter, Inc. v. Gangl*, 31 A.D.2d 665, 295 N.Y.S.2d 765 (3d Dep't 1968); *In re Tillman*, 232 A.D. 575, 251 N.Y.S. 341 (1st Dep't 1931). See also WEINSTEIN, *supra* note 27, ¶ 5701.09.

46. N.Y. CIV. PRAC. L. & R. 5701(a)(2)(iii). See, e.g., *Burdick v. Murray*, 6 A.D.2d 855, 175 N.Y.S.2d 287 (4th Dep't 1958); *Kinner v. Shane*, 268 A.D. 1022, 53 N.Y.S.2d 142 (4th Dep't 1944); *Valone v. Lucas*, 262 A.D. 939, 29 N.Y.S.2d 428 (4th Dep't 1941); *Gaetano v. Perretta*, 217 A.D. 713, 215 N.Y.S. 683 (4th Dep't 1926); *Bothman v. Thompson Bros., Inc.*, 193 A.D. 694, 184 N.Y.S. 505 (1st Dep't 1920). See WEINSTEIN, *supra* note 27, ¶ 5701.10, for a thorough discussion of the procedure and type of orders appealable under this provision.

47. N.Y. CIV. PRAC. L. & R. 5701(a)(2)(vi). See, e.g., *Simmon v. Capra*, 273 A.D. 83, 75 N.Y.S.2d 574 (4th Dep't 1947) (an order dismissing the complaint for legal insufficiency determines the action and prevents a judgment from which an appeal can be taken); *Kirsch v. Herrculean Prod. Co.*, 205 A.D. 530, 199 N.Y.S. 417 (1st Dep't 1923) (granting an order to strike the defendant's answer for failure to appear at an examination before trial determines the action and prevents a judgment from which an appeal can be taken). See WEINSTEIN, *supra* note 27, ¶ 5701.20, for a discussion of the history of this provision.

48. N.Y. CIV. PRAC. L. & R. 5701(a)(2)(vii). See, e.g., *Town of Islip v. Cuomo*, 147 A.D.2d 56, 541 N.Y.S.2d 829 (2d Dep't 1989) (affirming and modifying an order which declared certain provisions of the Environmental Conservation Laws to be unconstitutional); *Diamond v. Cuomo*, 130 A.D.2d 292, 519 N.Y.S.2d 691 (2d Dep't 1987) (reversing the trial court's order declaring the state retirement provisions unconstitutional); *Comiskey v. Arlen*, 55 A.D.2d 304, 315, 390 N.Y.S.2d 122, 130 (2d Dep't 1976) (reversing the trial court's order which declared unconstitutional a state statute providing for admissibility of a medical malpractice panel's recommendation). See also WEINSTEIN, *supra* note 27, ¶ 5701.21 (stating similar to provision six, provision seven is seldom needed because of the two catch-all provisions—"involves some part of the merits" and "affects a substantial right.").

volving some part of the merits) and provision five (affecting a substantial right).<sup>49</sup>

## 2. "Merits" and "Substantial Right"

New York's generous interlocutory appealability is due largely to provision four, allowing appeal for orders that "[involve] some part of the merits" and provision five, allowing appeal for orders that "[affect] a substantial right."<sup>50</sup> These two provisions are "enormous magnets, overlapping the other listed grounds."<sup>51</sup> Most orders that are appealable by right fall within the "substantial right" provision.<sup>52</sup> However, there are certain orders that do not come within this catch-all provision.<sup>53</sup> Essentially, these orders are "preliminary to a disposition of the motion on the merits."<sup>54</sup> The legislature and the appellate division

49. WEINSTEIN, *supra* note 27, ¶ 5701.15.

50. Commentary, *supra* note 31, at 577 (stating "[b]etwixt them both they come close to licking the platter clean."). See also WEINSTEIN, *supra* note 27, ¶ 5701.15 (stating appeals that fall within these provisions range from "questions of venue, parties, consolidation and joint trial, severance, split trials, affirmative defenses, failure to prosecute, appointment and disqualification of counsel, vacating of stipulations, and disclosure.").

51. SIEGAL, *supra* note 2, at 816.

52. WEINSTEIN, *supra* note 27, ¶ 5701.15. See, e.g., *Turrisi v. Ponderosa, Inc.*, 179 A.D.2d 956, 578 N.Y.S.2d 724 (3d Dep't 1992) (holding a substantial and important right had been affected and it was in the interest of justice to permit an appeal when the lower court's finding might prejudice the party in a future proceeding); *General Elec. Co. v. Rabin*, 177 A.D.2d 354, 576 N.Y.S.2d 116 (1st Dep't 1991) (holding an order of reference to a referee to hear and report on the issue of jurisdiction was appealable because it affects a substantial right in that it would force one party or the other to submit to a lengthy expensive hearing); *Danzig v. Bank*, 96 A.D.2d 803, 466 N.Y.S.2d 343 (1st Dep't 1983) (permitting withdrawal of a party's motion to strike opposing party's affirmative defense is an appealable order because it effects the parties substantial rights as effectively as a denial of a motion); *Sherman v. Morales*, 50 A.D.2d 610, 375 N.Y.S.2d 377 (2d Dep't 1975) (holding a party's right is substantially affected by an order denying that party's motion to implead itself as a party defendant).

53. *Bd. of Managers of Oaks at La Tourette v. Management Consultants Int., Inc.*, 170 A.D.2d 636, 567 N.Y.S.2d 62 (2d Dep't 1991) (referring the matter to a judicial hearing officer to hear and report for the purposes of accounting to determine the amount owed does not affect a substantial right); *Morrissey v. Morrissey*, 153 A.D.2d 609, 544 N.Y.S.2d 643 (2d Dep't 1989) (directing a hearing on plaintiff's request for counsel fees and expenses does not determine the issue and does not effect a substantial right and therefore is not appealable by right); *Devine v. Devine*, 106 A.D.2d 487, 483 N.Y.S.2d 25 (2d Dep't 1984) (holding an order to direct a judicial hearing to aid in the disposition of a motion does not affect a substantial right).

54. WEINSTEIN, *supra* note 27, ¶ 5701.16.

adopted the rationale that the potential harm to litigants from these preliminary orders is not great, and therefore there is no need for appellate supervision.<sup>55</sup>

The "Merits" has been defined as "the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court . . . ."<sup>56</sup> Many of the orders that "involve some part of the merits" overlap the "substantial right" provision.<sup>57</sup> Hence, these two provisions are often interchangeable.<sup>58</sup>

### 3. *Permission*<sup>59</sup>

Although the Committee was unsuccessful in eliminating the two provisions that allow broad appealability by right, it was successful in introducing the concept of permission. The legislature has enumerated three orders that require permission for appealability: 1) orders in an Article 78 proceeding;<sup>60</sup> 2) orders requiring or refusing to require a more definite statement in a pleading;<sup>61</sup> and 3) orders requiring or refusing to or-

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55. *See id.*

56. *St. John v. West*, 4 How. Pr. 329, 322 (N.Y. 1850).

57. *Nemeroff Realty Corp. v. Kerr*, 38 A.D.2d 437, 330 N.Y.S.2d 632 (2d Dep't 1972) (holding that the order involved some part of the merits and affected a substantial right).

58. WEINSTEIN, *supra* note 27, ¶ 5701.15.

59. Unlike orders appealable by right, notice is not required for orders that are appealable by permission, because "both parties will have an opportunity to present their contentions on the motion for leave to appeal." *See* WEINSTEIN, *supra* note 27, ¶ 5701.06.

60. N.Y. CIV. PRAC. L. & R. 7801 (McKinney 1978). Article 78 covers the matters that at common law fell under the prerogative writs of certiorari, mandamus, and prohibition. N.Y. CIV. PRAC. L. & R. 7801 commentary at 25. Today, a party proceeds under Article 78 to challenge action (or inaction) by agencies and officers of state and local government. *Id.* *See, e.g.,* *Driscoll v. Dep't of Fire of City of Syracuse*, 112 A.D.2d 751, 492 N.Y.S.2d 249 (4th Dep't 1985) (holding an appeal from a nonfinal intermediate order pursuant to CPLR Article 78 does not lie as of right); *Schwartzberg v. Whalen*, 87 A.D.2d 665, 666, 448 N.Y.S.2d 838, 840 (3d Dep't 1982) (stating an order pursuant to an Article 78 proceeding entered prior to judgment requires permission to appeal); *Neumark v. N.Y. City Police Property Clerk*, 122 A.D.2d 210, 211, 504 N.Y.S.2d 744 (2d Dep't 1980) (holding permission is required from an order entered prior to judgment in an Article 78 proceeding).

61. *Alexander v. Kiviranna*, 52 A.D.2d 982, 383 N.Y.S.2d 122, 123 (3d Dep't 1976) (holding an order requiring the plaintiff to make a more definite statement in the complaint requires permission to appeal); *Williams v. Fitting*, 29 A.D.2d 772, 287 N.Y.S.2d 857, 858 (2d Dep't 1968) (holding an order denying a motion to

der that scandalous or prejudicial matter be stricken from the pleading.<sup>62</sup> The legislature preferred an approach that enumerated certain orders that require permission, rather than listing all the orders that are appealable by right.<sup>63</sup> The legislature should amend the statute and add orders to the list if they determine that appeals from these orders are delaying the trial process.<sup>64</sup> Despite the authority to amend the statute, the legislature has not added any new orders to the list.<sup>65</sup>

In all instances where an appeal may not be taken as of right, a party may seek permission for an immediate appeal.<sup>66</sup> A party has the option of either 1) seeking permission from the trial judge who made the order and, if he or she refuses, from a justice of the appellate division, or 2) seeking leave directly from a justice of the appellate division.<sup>67</sup> The appellate division has not set forth a standard to determine when a justice should grant permission.<sup>68</sup> Inevitably, each justice has broad discretion to decide whether to allow an immediate appeal.<sup>69</sup>

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serve an amended complaint repleading the first cause of action requires permission to appeal).

62. *Alberi v. Rossi*, 108 A.D.2d 833, 485 N.Y.S.2d 337 (2d Dep't 1985) (holding an order to strike scandalous or prejudicial matter from a pleading is not appealable as of right); *Ocean-Clear, Inc. v. Continental Casualty Co.*, 91 A.D.2d 680, 459 N.Y.S.2d 431 (2d Dep't 1982) (holding an order striking prejudicial matter from the complaint is not appealable by right).

63. SENATE REPORT, *supra* note 28, at 143.

64. *Id.* at 144.

65. N.Y. CIV. PRAC. L. & R. 5701(b).

66. N.Y. CIV. PRAC. L. & R. 5701(c).

67. *Id.*

68. WEINSTEIN, *supra* note 27, ¶ 5701.27. *But cf.* *Swartz v. Wallace*, 87 A.D.2d 926, 927, 450 N.Y.S.2d 65, 66 (3d Dep't 1982) (granting permission to appeal an interlocutory order in an Article 78 proceeding because of the 1) "significant involvement of the order in the merits of the proceeding" and 2) "the importance of the issues presented"). See *infra* text accompanying notes 139-47, for an explanation and illustrations of the different types of standards.

69. *Compare Arnofsky v. Marine Park Chiropractic Ctr.*, 81 A.D.2d 570, 437 N.Y.S.2d 422 (2d Dep't 1981) (denying an application for leave to appeal an order directing the defendants to appear for further examination before trial); *Goodman v. Nickerson*, 24 A.D.2d 726, 263 N.Y.S.2d 312 (2d Dep't 1965) (denying leave to appeal an order to dismiss an Article 78 proceeding) *with* *New York City Health and Hosp. Corp. v. City of N.Y.*, 43 A.D.2d 513, 348 N.Y.S.2d 761 (1st Dep't 1973) (granting permission to appeal an order denying intervention), *cert. denied*, 309 N.E.2d 128 (1974); *Nemeroff Realty Corp. v. Kerr*, 38 A.D.2d 437, 439, 330 N.Y.S.2d 632, 634 (2d Dep't 1972) (granting permission to appeal a determination of a town planning director, because of the importance of the determination).

Because almost any interlocutory order is appealable by right, a party rarely needs to seek permission.<sup>70</sup> Although appeals by permission are infrequently exercised, commentators maintain that this new concept provides a good framework for developing “a rational system of intermediate appeals” in the future.<sup>71</sup>

New York’s decision to allow broad appealability at the trial stage provides much supervision over the trial process.<sup>72</sup> With this added supervision, however, come many negative consequences. First, the appellate division’s caseload increases.<sup>73</sup> Second, the appellate division justices have less time to spend on other matters.<sup>74</sup> Third, the trial court must deal with the possibility of constant interruptions.<sup>75</sup> Finally, a party may abuse this generous appealability by using it as a tactic to delay the trial process.<sup>76</sup>

### III. Alternative Approaches

#### A. *The Federal System*

In contrast to New York, a party may rarely appeal an interlocutory order in federal court.<sup>77</sup> The reason is that the circuit courts are governed by the final judgment rule which precludes any interlocutory order from being appealed immediately.<sup>78</sup>

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70. Commentary, *supra* note 31, at 577. See also SIEGAL, *supra* note 2, at 818 (stating permission is rarely invoked because a party would be asking essentially that “a judge allow the appeal because of the established unimportance of the issue.”).

71. WEINSTEIN, *supra* note 27, ¶ 5701.03.

72. Botler, *supra* note 3, at 954.

73. TASK FORCE, *supra* note 3, at 1.

74. MACCRATE, *supra* note 6, at 87.

75. Botler, *supra* note 3, at 954.

76. MACCRATE, *supra* note 6, at 87.

77. SIEGAL, *supra* note 2, § 642 (stating “[i]t is in respect of the appeal from a nonfinal disposition (an interlocutory or intermediate order) that the two practices are diametrically opposed: in New York, virtually any such order can be appealed immediately and need not await the final judgment; in federal practice almost none can be, with a few exceptions.”).

78. 28 U.S.C. § 1291 (1993) (stating the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States). A final judgment is an order that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Catlin v. United States*, 324

The federal courts adhere strictly to the finality requirements.<sup>79</sup> A major policy reason behind finality is to prohibit piecemeal disposal of litigation.<sup>80</sup> A single appeal that addresses all trial court objections is more efficient than several appeals that require separate briefs, records, oral arguments and opinions.<sup>81</sup> Other reasons for adhering to the final judgment rule are: 1) the appellate court has a broader perspective when reviewing the various rulings being challenged;<sup>82</sup> 2) the trial process proceeds more swiftly;<sup>83</sup> 3) increased respect for the authority of the trial judge;<sup>84</sup> 4) to prevent parties from delaying the trial by appealing every adverse ruling;<sup>85</sup> and 5) to achieve certainty and predictability.<sup>86</sup>

Although the federal system applies a strict final judgment rule, judicial and statutory exceptions exist.<sup>87</sup> These exceptions, however, are very limited. Two well-established judicial exceptions are: 1) the Collateral Order Doctrine;<sup>88</sup> and 2) the Forgay Doctrine.<sup>89</sup> To invoke the Collateral Order Doctrine, the lower court's decision must: a) determine a matter collateral to the rights underlying the action, and b) be too important to deny review.<sup>90</sup> The collateral order exception is very limited.<sup>91</sup>

To invoke the Forgay Doctrine, a party must claim that there is some immediate harm that might occur if review is

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U.S. 229, 233 (1945). See FRIEDENTHAL, *supra* note 2, § 13.1, for the definition of the final judgment rule.

79. FRIEDENTHAL, *supra* note 2, § 13.1.

80. 9 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 110.07 (2d ed. 1985) [hereinafter MOORE].

81. FRIEDENTHAL, *supra* note 2, § 13.1. See *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 178 (1955) (expressing Congress' desire to avoid piecemeal appeals).

82. FRIEDENTHAL, *supra* note 2, § 13.1.

83. *Id.*

84. *Id.*

85. *Id.*

86. MOORE, *supra* note 80, ¶ 110.07 (stating it is essential that lawyers know what may and may not be appealed).

87. FRIEDENTHAL, *supra* note 2, §§ 13.2-3.

88. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

89. *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848).

90. *Cohen*, 337 U.S. at 546.

91. *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203, 1208 (1995) (stating only a small percentage of orders fall within the collateral order doctrine); *Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755 (10th Cir. 1993) (stating the collateral order doctrine should not be used without compelling justification).

postponed.<sup>92</sup> This occurs, for example, when the trial court's determination is such that it necessarily requires some immediate act or conduct that will be irremediable should later review reveal that it was improperly ordered.<sup>93</sup>

By statute, Congress permits interlocutory orders to be appealed by right or by permission.<sup>94</sup> Similar to the judicial exceptions, these are also limited.<sup>95</sup> Congress has expressly specified which interlocutory orders are appealable by right.<sup>96</sup> The list includes: 1) orders involving injunctions; 2) orders with respect to receivership proceedings; and 3) orders determining rights and liabilities in admiralty proceedings.<sup>97</sup> Congress has concluded that these orders need constant appellate supervision to protect the parties' rights.<sup>98</sup>

A party may appeal an interlocutory order, not appealable by right, by seeking permission from the district court judge who presides over the case.<sup>99</sup> Then, assuming the district judge certifies the order for appeal, the party must seek permission from the appellate court in his or her jurisdiction.<sup>100</sup> The order must involve a controlling question of law with substantial grounds for difference of opinion, and the immediate appeal from the order must materially advance the ultimate termina-

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92. *Foray*, 47 U.S. (6 How.) at 201.

93. FRIEDENTHAL, *supra* note 2, § 13.2.

94. 28 U.S.C. § 1292 (1993).

95. *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) (stating that: [Section] 1292(a)(1) was intended to carve out only a limited exception to the final judgment rule. [W]e have construed the statute narrowly to ensure that appeal as of right under § 1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of 'permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.').

96. 28 U.S.C. § 1292(a).

97. 28 U.S.C. § 1292(a)1-3.

98. FRIEDENTHAL, *supra* note 2, § 13.3. *See, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 86-87 n.58 (1974) (stating "[i]t is for the same reason, the possibility of drastic consequences which cannot later be corrected, that an exception is made to the final judgment rule to permit review of preliminary injunctions.") (quoting *Pan Am. World Airways Inc. v. Flight Eng'rs' Int'l Ass'n*, 306 F.2d 840, 843 (1962)); *Smith v. Vulcan Iron Works*, 165 U.S. 518, 525 (1897) (permitting the defendant to obtain immediate relief from an injunction, the continuance of which throughout the case may seriously affect his interests).

99. 28 U.S.C. § 1292(b).

100. *Id.*



tion of the litigation.<sup>101</sup> The appealing party bears the heavy burden of convincing each court to grant permission.<sup>102</sup>

Ultimately, each court has discretion whether to permit an interlocutory appeal.<sup>103</sup> This freedom allows the trial court to reflect on whether the appellant truly raises an important issue or whether he or she is merely using a delay tactic.<sup>104</sup> The appellate court can then assess its workload and decide whether the order requires immediate review.<sup>105</sup>

In 1958, Congress departed significantly from the final judgment rule when it allowed interlocutory orders to be appealed by permission.<sup>106</sup> By enacting the Interlocutory Appeals Act,<sup>107</sup> Congress created a situation which allows a party to appeal every interlocutory order if certain requirements are met.<sup>108</sup> Congress' intent was to increase judicial economy by allowing the circuit courts to decide issues at the pre-trial stage that could ultimately end the case.<sup>109</sup>

Congress continues to depart from the final judgment rule. In 1992, Congress enacted the Federal Courts Administration Act ("FCAA").<sup>110</sup> Section 101 of the FCAA permits the Supreme Court to provide for additional interlocutory appeals to the courts of appeals.<sup>111</sup> The amendment is designed to expand the number of interlocutory orders that are appealable to the courts

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101. *Id.*

102. *See* Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (illustrates the difficulty in meeting the three requirements of section 1292(b)). *See also* Case Comment, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 607 n.5 (1975) (maintaining that slightly over 1000 applications for leave to appeal under § 1292(b) had been filed and only fifty-three percent had been accepted).

103. S. REP. No. 2434, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 5255, 5257.

104. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 474-75 (1978).

105. *Id.* at 475.

106. MOORE, *supra* note 80, ¶ 110.22[1].

107. Pub. L. No. 85-919, 72 Stat. 1770 (codified as amended at 28 U.S.C. § 1292(b) (1996)).

108. MOORE, *supra* note 80, ¶ 110.22[1].

109. The purpose of section 1292(b) was to "aid in the disposition of cases before the district courts of the United States by saving useless expenditures of court time . . ." S. REP. No. 2434, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 5255, 5257.

110. Pub. L. No. 102-572, 106 Stat. 4506 (codified as amended at 28 U.S.C. § 1292(e)(1996)).

111. *Id.*

of appeals.<sup>112</sup> This indicates Congress' intent to depart from the final judgment rule and increase the number of interlocutory orders that may be appealed immediately.<sup>113</sup>

### B. *The Single Justice Approach*

Massachusetts has a unique way of dealing with civil interlocutory appeals. It allows prompt review from any interlocutory order of the Massachusetts Superior Court, the Probate Court, the Housing Court and the Land Court.<sup>114</sup> However, a party is entitled to review only by a single justice, unless the order involves a preliminary injunction.<sup>115</sup>

A "single justice" is a judge in one of the appellate courts, acting alone.<sup>116</sup> Periodically, each associate justice in the Supreme Judicial Court<sup>117</sup> and each justice in the Appeals Court<sup>118</sup> takes his or her turn for about a month and sits as the single justice.<sup>119</sup> The single justice session is a separate session conducted in the Supreme Judicial Court and the Appeals Court.<sup>120</sup> Essentially, single justice review is review by one judge, as opposed to full appellate review, which is made up of a panel of three or more judges.<sup>121</sup>

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112. H.R. REP. NO. 1006, 102d Cong., 2d Sess., pt. 1, at 1 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3921, 3927.

113. *See supra* note 109 and accompanying text.

114. MASS. GEN. LAWS ANN. ch. 231, § 118 (West 1994). The superior court, probate court, housing court and land court are various trial courts in Massachusetts.

115. *Id.* With regard to preliminary injunctions, a party has the option of single justice review or plenary appellate review. *Id.* See John H. Henn, *Civil Interlocutory Appeals to the Single Justice Under Massachusetts General Laws, Chapter 231, § 118 First Paragraph*, 33 BOSTON B.J., Jan-Feb. 1989, at 12-13 for a discussion of preliminary injunctive review in Massachusetts [hereinafter Henn, *Single Justice*].

116. Henn, *Single Justice, supra* note 115, at 10 (providing a thorough explanation of how the "single justice" approach operates in Massachusetts).

117. The Supreme Judicial Court is the highest state court in Massachusetts.

118. The Appeals Court is the intermediate court in Massachusetts. See Daniel J. Johnedis, *Massachusetts' Two-Court Appellate System in Operation*, 60 MASS. L.Q. 77 (1975), for an excellent discussion on the appellate court system in Massachusetts.

119. Henn, *Single Justice, supra* note 115, at 10.

120. *Id.*

121. *See also* John H. Henn, *Civil Interlocutory Appeals in Massachusetts State Courts*, 62 MASS. L.Q. 225, 226 (1977) [hereinafter Henn, *Interlocutory Appeals*]. The Supreme Judicial Court is one court with two dockets: "a full court docket and a single justice docket"; the court has provided by rule for these two

A party may petition a single justice for relief from any interlocutory order.<sup>122</sup> Once the petition is filed, the judge must consider it.<sup>123</sup> Hence, any interlocutory order can be taken before the single justice as a matter of right.<sup>124</sup>

The petition requirements are informal and the process is rather expeditious; the only strict requirement is that an aggrieved party must file his or her petition within thirty days of the issuance of the order.<sup>125</sup> The petition should contain: 1) introductory paragraphs (identifying the lower court's order, stating the relief sought, demonstrating proper jurisdiction, whether a prompt decision is needed, and whether oral argument is requested); 2) the names of the parties; 3) the relevant facts; 4) the error below; and 5) the relief requested.<sup>126</sup> There is no specific form for a written response by the opposing party.<sup>127</sup> One commentator advises that the opposing party should incorporate only his or her opposing arguments into the petition.<sup>128</sup>

In certain situations, the parties may be entitled to a hearing.<sup>129</sup> One commentator suggests that the party requesting a

dockets for many years by reason of the fact that "the Supreme Judicial Court" for some purposes sits as a full court and for other purposes sits by a single justice. *Id.* (quoting Supreme Judicial Court Rule 3:07(2)).

122. MASS. GEN. LAWS ANN. ch. 231, § 118. The statute provides in pertinent part:

1) [a] party aggrieved by an interlocutory order of a trial court justice . . . may file within thirty days of entry of such order, a *petition* in the appropriate appellate court seeking relief from such order. A single justice of the appellate court may, in his discretion, grant the same relief as an appellate court . . . 2) [a] party aggrieved by an interlocutory order of a trial court justice . . . granting, continuing, modifying, refusing or dissolving a preliminary injunction, or refusing to dissolve a preliminary injunction, or a party aggrieved by an interlocutory order of a single justice of the appellate court granting a petition for relief from such an order, may *appeal* . . . to the appeals court or . . . Supreme Judicial Court.

*Id.* See Henn, *Single Justice*, *supra* note 115, at 10.

123. Henn, *Single Justice*, *supra* note 115, at 10.

124. *Id.* (stating that because the single justice has a duty to consider every petition for interlocutory review, it follows therefore that "all interlocutory orders can be 'appealed'").

125. *Id.* at 11.

126. *Id.*

127. Henn, *Single Justice*, *supra* note 115, at 10.

128. *Id.* (Henn states that the general rule is "the fewer papers filed the better . . .").

129. *Id.* at 11-12. The single justice in the Appeals Court may grant a hearing as a matter of discretion. See *Tisei v. Building Inspector of Marlborough*, 3 Mass.

hearing should arrange an available time with his or her opponent and then convince the single justice's clerk that a hearing is essential to the disposition of the matter.<sup>130</sup>

Once the petition is before the single justice, he or she has the same power as an appellate court to grant relief.<sup>131</sup> In addition, the single justice enjoys broad discretion to deny the petition if he or she so chooses.<sup>132</sup> This discretion allows the single justice to eliminate frivolous petitions, grant relief and refer orders to a full bench.<sup>133</sup> One commentator states that the Massachusetts' approach is a good compromise between New York's policy that allows almost any interlocutory order to be appealed by right and reviewed before a full bench, and the federal policy that is quite strict with allowing interlocutory appeals.<sup>134</sup>

### C. *Permission— A Flexible Approach to Interlocutory Appeals*

In 1951, Judge Jerome Frank of the Judicial Conference of the United States proposed that the Federal courts of appeals be given the authority to hear interlocutory appeals by permis-

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App. Ct. 377, 378 (1975). On the other hand, the single justice in the Supreme Judicial Court sits once a week. See Henn, *Single Justice*, *supra* note 115, at 12 n.25.

130. See Henn, *Single Justice*, *supra* note 115, at 12.

131. MASS. GEN. LAWS ANN. ch. 231, § 118 (providing in pertinent part that "[a] single justice of the appellate court may, in his discretion, grant the same relief as an appellate court is authorized to grant pending an appeal. . . .").

132. *Packaging Indus. Group v. Cheney*, 405 N.E.2d 106, 110 (Mass. 1980) (holding the single justice enjoys broad discretion to deny the petition, to modify, annul or suspend the execution of the interlocutory order, or finally, to report the request for relief to the appropriate appellate court). See Henn, *Single Justice*, *supra* note 115, at 10 (stating "any interlocutory order can be brought before a single justice who will then consider it and is empowered to do something about it; whether he or she will do so is an entirely different matter.").

133. Henn, *Single Justice*, *supra* note 115, at 12.

134. Henn, *Interlocutory Appeals*, *supra* note 121, at 233-34 (Henn states that unlike the federal system, but similar to New York, a party may take any interlocutory order to the intermediate appellate court. However, unlike New York but similar to the federal system, a party is only entitled to review before a single justice). The single justice approach which is a

'second bite at the apple' before another judge, reflects a wise compromise between those who would like plenary appellate review for any interlocutory order— an impossible task for the present appellate courts and a potential source of dramatic growth in litigation costs— and those who would wish no appeals from interlocutory orders (other than preliminary injunctions).

Henn, *Single Justice*, *supra* note 115, at 14.

sion.<sup>135</sup> In 1958, Congress enacted the Interlocutory Appeals Act ("Act").<sup>136</sup> The Act substantially eroded the final judgment rule by allowing a party to appeal potentially every interlocutory order immediately.<sup>137</sup>

Many states followed this new concept, which allows courts to grant permission to review immediately certain interlocutory orders.<sup>138</sup> Unlike the federal system, however, most states do not have such a strict criteria that must be met before an interlocutory order may be appealed upon permission.<sup>139</sup> Some states give courts great flexibility to decide which interlocutory orders may be appealed;<sup>140</sup> the legislature achieves this flexibility by broadly defining the statute that determines when permission may be granted.<sup>141</sup>

The American Bar Association ("ABA") has taken the approach that the standard for granting permission must be broad

135. MOORE, *supra* note 80, ¶ 110.22[1].

136. Pub. L. No. 85-919, 72 Stat. 1770 (codified as amended at 28 U.S.C. § 1292(b) (1996)). Section 1292(b) states in pertinent part: an order is appealable if it involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. *Id.*

137. *Id.* See *supra* notes 106-09 and accompanying text.

138. Code Me. R. § 72(c) (1992); GA. R. S. CT. R. 22; N.J. R. A. R. 2:2-4; N.Y. CIV. PRAC. L. & R. 5701(b),(c) (McKinney 1978); TENN. R. OF APP. PRO. 9; WASH. CT. R. 2.3(b)(1)-(3); WIS. STAT. ANN. § 809.50 (West 1994).

139. 28 U.S.C. § 1292(b).

140. See DEL. ST. S. CT. R. 42(d)(v) (stating the court may consider all relevant factors, including the decision of the trial court whether to certify the interlocutory appeal); GA. R. S. CT. R. 22 (stating permission to appeal an interlocutory order will be granted only when: "1) [t]he issue to be decided appears to be dispositive of the case, or 2) [t]he order appears erroneous and will probably cause a substantial error at trial, or 3) [t]he establishment of a precedent is desirable."); Code Me. R. § 72(c) (stating "[i]f the court is of the opinion that a question of law involved in an interlocutory order or ruling made by it in any action in the Superior Court ought to be determined by the Law Court before any further proceedings are taken therein, it may on motion of the aggrieved party report the case to the Law Court for that purpose . . ."); N.J. R. A. R. 2:2-4 (stating "the Appellate Division may grant leave to appeal, in the interest of justice, from any interlocutory order . . ."); WASH. CT. R. 2.3 (b)(1)-(3) (stating review will be granted if the lower court "has committed an obvious error which would render further proceedings useless; or . . . has committed probable error and the decision . . . substantially alters the status quo or substantially limits the freedom of a party to act; or . . . has so far departed from the accepted and usual course of judicial proceeding, or so far sanctioned such a departure . . . as to call for review by the appellate court.").

141. ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 86 (2d ed. 1988) [hereinafter STERN].

enough to allow sufficient flexibility, but specific enough for judges and lawyers to know what is and is not potentially appealable.<sup>142</sup> Under the ABA approach, an appellate court may grant permission on a showing:

that review of the judgment or order immediately rather than on an appeal from the final judgment in that case or proceeding will materially advance the termination of the litigation or clarify further proceedings therein, protect a party from substantial and irreparable injury, or clarify an issue of general importance in the administration of justice.<sup>143</sup>

Some states have adopted the ABA approach.<sup>144</sup> The approach is broad enough to allow the court enough flexibility to grant permission.<sup>145</sup> However, it is narrow and requires the court to consider specific factors in its determination.<sup>146</sup> The factors reduce uncertainty by informing lawyers and judges what is potentially appealable.<sup>147</sup>

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142. *Id.* at 87 (citing STANDARDS RELATING TO APPELLATE COURTS § 3.12 (1977)).

143. *Id.*

144. TENN. R. OF APP. PRO. 9(a):

[D]etermining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the courts' discretion, indicate the character of the reasons that will be considered: 1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of the final judgment will be ineffective; 2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and 3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment.

*Id.* See also WIS. STAT. ANN. § 809.50(1)(c) (West 1994) (stating an interlocutory order will be granted, if a party can show an immediate appeal of an order "will materially advance the termination of the litigation or clarify further proceedings therein, protect a party from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice"). See also ALASKA R. OF APP. PRO. 402(b)(1)-(4).

145. See STERN, *supra* note 141, at 87.

146. *Id.*

147. *Id.*

The federal system conditions interlocutory review on a district judge's certificate stating the standard has been met.<sup>148</sup> Some states have followed this approach.<sup>149</sup> Other states require a party to seek permission directly from the appellate court.<sup>150</sup> The ABA has recommended that the lower court give its opinion on whether review is appropriate, but that this opinion should not bind the appellate court.<sup>151</sup>

Requiring certification by the trial judge reduces the burden on the appellate court from having to review each petition.<sup>152</sup> On the other hand, because certification lies largely in the discretion of the trial judge, he or she may prevent the appellate court from hearing certain meritorious appeals.<sup>153</sup>

The benefit of direct application to the appellate court is that it creates a simpler process because only one application is required in one court.<sup>154</sup> If the appellate court is already overwhelmed with cases, however, and there is a genuine fear that attorneys will file frivolous petitions, then the direct application method may unduly burden the appellate court.<sup>155</sup>

#### IV. The Caseload Crisis in the Appellate Division

On September 20, 1989, Former Governor Mario M. Cuomo and Former Chief Judge Sol Wachtler of the New York Court of Appeals established the Appellate Division Task Force ("Task

148. 28 U.S.C. § 1292(b). See *supra* notes 138-47 and accompanying text for an explanation and illustrations of the different types of standards.

149. DEL. ST. S. CT. R. 42(b); GA. R. S. CT. R. 22; Code Me. R. § 72(c) (1994); TENN. R. OF APP. PRO. 9(b).

150. ALASKA R. OF APP. PRO. 402(a)(1); IOWA R. 2(a); WIS. STAT. ANN. § 809.50(1) (West 1994).

151. The ABA recommendation states in pertinent part:

[t]he most desirable combination is to provide that, in every case where interlocutory review is sought, the lower court should give its opinion whether such review is appropriate, but that its determination should not bind the appellate court. Such an arrangement would give the appellate court the benefit of the lower court's view of the matter, but reserve the ultimate decision to the appellate court.

STERN, *supra* note 141, at 91 (citing STANDARDS RELATING TO APPELLATE COURT § 3.12 (1977)).

152. STERN, *supra* note 141, at 89.

153. *Id.* at 90. See also MOORE, *supra* note 80, ¶ 110.22[3].

154. STERN, *supra* note 141, at 89.

155. *Id.*

Force").<sup>156</sup> At the end of its research, the Task Force concluded that there is a significant caseload crisis in the Second Department of the Appellate Division ("Second Department").<sup>157</sup> The Task Force decided that to address this crisis, temporary and long-term measures are needed.<sup>158</sup>

Due to the strain on the Second Department, the Task Force concluded that justices are required to decide too many cases and litigants must wait unconscionably long for a decision.<sup>159</sup> Essentially, this pressure is jeopardizing the consistent high quality of appellate justice in the Second Department.<sup>160</sup>

The population growth in the Second Department, compared to the other three departments, is a major reason for its tremendous workload.<sup>161</sup> Another major reason is the drastic increase in the number of appeals filed in the Second Department.<sup>162</sup> In 1989, forty-two percent of the appeals filed in the state were filed in the Second Department.<sup>163</sup> Another factor for the tremendous workload is increased delay in the Second Department caused by a backlog of uncalendared appeals.<sup>164</sup> In 1989, it took twice as long for a civil appeal to be disposed of in the Second Department than in the other three departments.<sup>165</sup> Based on this statistic, the Task Force concluded that parties must wait unreasonably long to have their appeals decided.<sup>166</sup>

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156. TASK FORCE, *supra* note 3, at 1. The research of the Task Force was "over one year of careful and thorough study, intense discussions, analysis of case load statistics and receipt of reports from numerous justices and clerks of the Appellate Divisions, as well as from bar associations throughout the State . . ." *Id.*

157. *Id.*

158. *Id.* at 37.

159. *Id.* at 16.

160. TASK FORCE, *supra* note 3, at 16.

161. *Id.* at 6-8. The Second Department covers half the population. *Id.* at 6.

162. *Id.* at 8-13.

163. TASK FORCE, *supra* note 3, at 11.

164. *Id.* at 13.

165. *Id.*

166. *Id.* at 14. See tables indicating that from the time appellants filed their brief, it took the court about 4.5 months to render a decision in the First Department, 11.97 months in the Second Department, 6.3 months in the Third Department, and 5.3 months in the Fourth Department. *Id.* In 1993, the Second Department had "a twenty-one month delay in calendaring civil appeals from the date of the appellant's perfection of the appeal . . ." Spiros A. Tsimbinos, *Some Possible Solutions to the Crisis in the Appellate Division, Second Department*, 209 N.Y. L.J. 1 (1993) [hereinafter Tsimbinos].



The Task Force considered a number of alternatives to help alleviate the current caseload crisis.<sup>167</sup> The list included: 1) adding more justices to the Second Department; 2) transferring some of the Second Department appeals to other departments; 3) creating a Fifth Department; 4) transferring judicial districts from one department to another; 5) limiting the number of interlocutory appeals; and 6) reducing the panel of justices to three.<sup>168</sup>

The Task Force concluded unanimously that additional justices should be added to the Second Department.<sup>169</sup> They also advocated continuing the Interdepartmental Case Transfer Plan.<sup>170</sup> In addition, the Task Force unanimously recommended that the Second Department should return to sitting in panels of five justices.<sup>171</sup> Further, they advocated that the personnel from the four departments should meet on a regular basis.<sup>172</sup> Finally, the Task Force concluded that a long-term structural solution to the work-load problem must be implemented.<sup>173</sup> Other proposals that gained endorsement were: 1) creation of a Fifth Department;<sup>174</sup> and 2) moving the Ninth Judicial District from the Second to the Third Department.<sup>175</sup>

However, the Task Force was unanimously opposed to any proposal that would limit the right to appeal interlocutory orders to the appellate division.<sup>176</sup> The report stated that the review of interlocutory orders "is an important provision by which

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167. TASK FORCE, *supra* note 3, at 17.

168. *Id.*

169. *Id.*

170. *See id.* The plan requires certain appeals to be transferred from the Second Department to the other departments. *Id.*

171. *Id.*

172. TASK FORCE, *supra* note 3, at 17.

173. *Id.*

174. *See id.* Seven members believed a Fifth Department should be created to distribute the appellate work more equally among the departments in the appellate division. *Id.*

175. *See id.* Moving the Ninth Judicial District would distribute the workload among the departments more equally. *Id.*

176. TASK FORCE, *supra* note 3, at 35-36. The Task Force relied on a two year study of interlocutory appeals by the Association of the Bar of the City of New York which indicated that about thirty-five percent of the interlocutory appeals resulted in a reversal or a modification. *Id.* at 36. This statistic was "enough to persuade that Association, and the members of this Task Force, to conclude that the Appellate Divisions play an important error correcting role in their review of interlocutory orders." *Id.*

the appellate division exercises both its supervisory and error correcting roles as an intermediate appellate court."<sup>177</sup> The Task Force concluded that interlocutory appellate review should not be sacrificed for the sake of expediency.<sup>178</sup>

In recent times, commentators have advocated the need to confront the workload problem in the appellate division.<sup>179</sup> One of the most popular recommendations is the creation of a Fifth Department.<sup>180</sup> However, this proposal poses certain obstacles.<sup>181</sup> First, a constitutional amendment is required.<sup>182</sup> Second, it would take approximately three years before a Fifth Department could be implemented.<sup>183</sup> Finally, a new department would cost between twenty and twenty-five million dollars.<sup>184</sup>

On the other hand, commentators have argued that a limitation on the ability to appeal interlocutory orders would save the appellate division valuable judicial resources.<sup>185</sup> In addition, this proposal does not pose any of the problems the Fifth Department experienced.<sup>186</sup> First, the New York State Constitution already permits the legislature to restrict interlocutory appeals, and therefore only a legislative amendment is required.<sup>187</sup> Second, because only a legislative amendment is

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177. *Id.*

178. *Id.*

179. Gary Spencer, *Mangano Backs a New Fifth Department Appellate Division Called Only Solution to Increasing Backlog*, 209 N.Y. L.J. 1 (1993); See also Gary Spencer, *Relief for Third Dep't Proposed First, Second Dept's would Split Ninth District's Appellate Load*, 209 N.Y. L.J. 1 (1993); Tsimbinos, *supra* note 166, at 1; Daniel Schulman, *Too Few Judges or Too Many Appeals*, 210 N.Y. L.J. 2 (1993) [hereinafter Schulman].

180. See Tsimbinos, *supra* note 166, at 1; Schulman, *supra* note 179, at 2.

181. See Tsimbinos, *supra* note 166, at 1.

182. *Id.* Amendments can be enacted either through 1) approval by a majority of the State Senate and Assembly in two consecutive legislative sessions, and the people approve the amendment by majority vote or 2) approval by a majority vote of the delegates to a constitutional convention, and the people approve the amendment by a majority vote. N.Y. CONST. art. 19, §§ 1, 2. In addition, the voters in New York have already turned down a proposal to create a Fifth Department in 1967 and in 1971. Tsimbinos, *supra* note 166, at 1.

183. Tsimbinos, *supra* note 166, at 1.

184. Schulman, *supra* note 179, at 2.

185. *Id.*

186. *Id.*

187. N.Y. CONST. art. 6, § 4(k). Section 4(k) states in pertinent part "that the right to appeal to the appellate divisions from a judgment or order which does not

needed, New York can restrict interlocutory appeals in less time than it can create a Fifth Department.<sup>188</sup> Finally, restricting interlocutory appeals costs New York nothing financially; however, it preserves judicial economy at the appellate division level.<sup>189</sup>

### V. The Controversy Over Unlimited Interlocutory Appealability

Despite the Task Force's conclusion, continuing debate exists over the efficiency of New York's interlocutory appellate review system.<sup>190</sup> In 1979, in a study of the appellate division's history and role as an intermediate appellate court, two proposals were offered to streamline the system.<sup>191</sup> Under the first proposal, a party could appeal an interlocutory order upon permission only, banning appealability as of right.<sup>192</sup> Under the second proposal, a party could appeal certain types of interlocutory orders by right but then he or she must obtain permission to appeal all other orders.<sup>193</sup> The standard for permission would be "whether the appeal will advance the litigation or delay it."<sup>194</sup> Each proposal would require a party to petition the trial judge for leave to appeal.<sup>195</sup>

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finally determine an action or special proceeding may be limited or conditioned by law." *Id.*

188. Schulman, *supra* note 179, at 2.

189. *See id.*

190. WEINSTEIN, *supra* note 27, ¶ 5701.03. *See also* MACCRATE, *supra* note 6, at 86-87. Many argue that

the extreme use of appealability of intermediate orders has had a serious impact on the courts. At the appellate level, it contributes to burdensome caseloads, specifically in the First and Second Departments. For the trial courts, intermediate appeals create drawn-out, piecemeal litigation and present opportunities for abuse by litigants who use appeals as devices to delay and harass their adversaries. . . . [On the other hand,] it is argued that the review of intermediate orders is an important means by which the Appellate Division exercises both its supervisory and its error-correcting roles as an intermediate court.

MACCRATE, *supra* note 6, at 86-87. *See also* Botler, *supra* note 3, at 992 (stating that there is a "belief that intermediate orders are often perfunctory and are frequently used as a delaying tactic.").

191. Botler, *supra* note 3.

192. Botler, *supra* note 3, at 1006-07.

193. *Id.* at 1007.

194. *Id.* at 1008.

195. *Id.* at 1007.

The researchers considered the second proposal more efficient than the first.<sup>196</sup> The reasons offered were: 1) it would require only a simple redrafting of the statute;<sup>197</sup> and 2) it would be a good balance between the strict finality requirements in the federal system and New York's generous approach.<sup>198</sup>

In 1987, a Committee on State Courts of Superior Jurisdiction of the Association of the Bar of the City of New York ("Committee") recommended that the rules governing the time allowed for perfection of interlocutory appeals be amended.<sup>199</sup> Specifically, the Committee advocated that "much of the problem of delay can be alleviated if the time for perfecting the appeals in the First and Second Departments is shortened from the present nine months."<sup>200</sup> The Committee stated that ninety days should be sufficient time to prepare an appeal from an interlocutory order.<sup>201</sup> To this date, the four departments in the appellate division have not changed their rules.<sup>202</sup>

196. Botler, *supra* note 3, at 1007.

197. *Id.* at 1007-08, suggesting that

[t]he catch-all categories of orders affecting a substantial right and orders involving a part of the merits could be transferred to section 5701(b), which lists the orders appealable by permission. This would limit appealability as of right to the specific situations which would remain in section 5701(a): orders respecting provisional remedies, new trials, transcripts or statements on appeal, and the constitutionality of state statutes, and orders which would prevent judgments from which an appeal could be taken.

*Id.*

198. *See id.* at 1008.

199. COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON APPEALS OF INTERLOCUTORY ORDERS 66-68 (1987) [hereinafter REPORT]. Based on the data that the Committee gathered, it concluded that New York should not alter CPLR 5701. *Id.* at 64-66. In addition, the Committee recommended that CPLR 5701 should be altered only based upon empirical evidence. *Id.* at 69.

200. *Id.* at 68.

201. *Id.*

202. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 600.11(a)(3) (1986) (stating in the First Department "[t]he clerk will place no civil appeal or cause on the calendar where the necessary papers and briefs are not offered for filing within nine months of the date of the notice of appeal from the judgment or order appealed from, . . . and in appeals to the Appellate Division by permission within nine months from the date of the order granting leave to appeal, unless the time for filing has been enlarged by order of the court.;" N.Y. COMP. CODES R. & REGS. tit. 22, § 800.12 (1991) (stating in the Third Department "[a] civil appeal or proceeding shall be deemed to have been abandoned where appellant or petitioner shall fail to serve and file a record and brief within the nine months after the date of the notice of appeal or order of transfer . . . ."); N.Y. COMP. CODES R. & REGS. tit. 22,

In the early 1980's, a questionnaire concerning the caseload crisis in the appellate division was sent to the appellate division justices.<sup>203</sup> The justices were asked whether the appellate division's jurisdiction to hear interlocutory appeals should be curtailed.<sup>204</sup> Forty-four percent supported curtailing jurisdiction, while fifty-six percent opposed such a measure.<sup>205</sup> The reasons given in support were that interlocutory appeals often are used to delay the trial process and reduce the amount of time spent on more important matters.<sup>206</sup> In opposition, many justices argued that interlocutory appeals can sometimes determine the case, and they may provide guidance to the lower courts.<sup>207</sup>

In order to supplement the questionnaire sent to the appellate division justices in the early 1980's, this author sent a questionnaire on September 12, 1994.<sup>208</sup> Ten questions were advanced.

The first question asked how many years the justice had served on the appellate division.<sup>209</sup> The average time was eleven years.<sup>210</sup> The second question was whether the jurisdiction of the appellate division to hear interlocutory appeals should be curtailed.<sup>211</sup> Fifty-nine percent responded that the appellate division's jurisdiction to hear interlocutory appeals

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§ 1000.3(b)(2)(i) (1992) (stating in the Fourth Department "[a] civil appeal . . . shall be deemed to have been abandoned and dismissed . . . where the appellant or petitioner shall fail to serve and file the records and briefs within nine months from the date of the notice of appeal or order of transfer."). *But cf.* N.Y. COMP. CODES R. & REGS. tit. 22, § 670.8(d), (e) (1993) (stating in the Second Department there is a six month period to perfect an appeal from the date of the notice of appeal or order granting leave to appeal but there is a good cause exception to enlarge the time).

203. MACCRATE, *supra* note 6, at 129. The Study Group mailed forty-nine questionnaires to current and recently retired members of the appellate division. *Id.* The Group received a response of sixty-nine percent (thirty-four questionnaires were returned). *Id.* The justices were asked specific questions on appealability, scope of review, possibility of a three judge panel and current workload. *Id.* at 129-39.

204. *Id.* at 132.

205. MACCRATE, *supra*, note 6, at 132.

206. *Id.* at 132-33.

207. *Id.*

208. *See infra* Appendix A- Questionnaire to the appellate division justices. The author of this article sent a questionnaire to each justice in the First, Second, Third and Fourth Departments of the appellate division. This encompassed forty-five justices. Seventeen justices responded.

209. *See infra* Appendix A and accompanying text.

210. *See infra* Appendix B and accompanying text.

211. *See infra* Appendix B and accompanying text.

should be curtailed.<sup>212</sup> Forty-one percent opposed curtailing the appellate division's jurisdiction.<sup>213</sup> Some of the justices commented on this question.<sup>214</sup> Eight justices advocated that interlocutory appeals should be granted only upon permission by the appellate division.<sup>215</sup> One justice suggested limiting appeals only to summary judgment, while eliminating appeals from discovery type orders.<sup>216</sup> Another justice suggested that the New York Constitution should be amended to require the appellate term<sup>217</sup> to hear interlocutory appeals. Thereafter, leave to appeal should be required for a further appeal to the appellate division.<sup>218</sup> Another justice suggested allowing review by a single justice, similar to applications for leave to appeal from Criminal Procedure Law Article 440 motions.<sup>219</sup>

The third question was whether the justice supported increasing the appellate division's reviewability on final judgments and orders, while decreasing the interlocutory orders that are appealable as of right.<sup>220</sup> Twenty-nine percent supported such a proposal, while sixty-five percent opposed increas-

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212. See *infra* Appendix B and accompanying text.

213. See *infra* Appendix B and accompanying text.

214. See *infra* Appendix B and accompanying text.

215. See *infra* Appendix B and accompanying text.

216. See *infra* Appendix B and accompanying text.

217. The appellate division in each judicial department may establish an appellate term. N.Y. CONST. art. 6, § 8. An appellate term's jurisdiction depends on the appellate division and the legislature. See N.Y. CONST. art. 6, § 8(d), (e). At this time, appellate terms exist in the First and Second Department.

218. See *infra* Appendix B and accompanying text.

219. See *infra* Appendix B and accompanying text. Article 440 motions deal with collateral attacks on a criminal judgment or a sentence. N.Y. CRIM. PROC. LAW §§ 440.10-20 (McKinney 1994). To appeal a denial of a 440 motion, a defendant must seek permission from an appellate division judge. N.Y. CRIM. PROC. LAW § 460.15 (McKinney 1994). See N.Y. CRIM. PROC. LAW § 450.15 (McKinney 1994) (a judge in the appellate division may grant permission and certify that a case "involves questions of law or fact which ought to be reviewed by the immediate appellate court"). N.Y. CRIM. PROC. LAW § 460.15(1) (McKinney 1994). The statute further states that "[a]n application for such a certificate must be made in a manner determined by the rules of the appellate division of the department in which such intermediate appellate court is located." N.Y. CRIM. PROC. LAW § 460.15(2) (McKinney 1994). See Appendix C, for the procedures in each appellate division to apply for a certificate granting leave to appeal.

220. See *infra* Appendix A and accompanying text.

ing reviewability on final judgments and orders.<sup>221</sup> Six percent did not comment on this question.<sup>222</sup>

The fourth question asked whether interlocutory appeals provide a needed supervision over the trial courts.<sup>223</sup> Fifty-three percent of respondents believed that interlocutory appeals provide a necessary supervision over the trial courts.<sup>224</sup> Forty-seven percent disagreed, indicating that the broad jurisdiction over interlocutory appeals does not provide a necessary supervision.<sup>225</sup>

The fifth question was whether allowing numerous interlocutory appeals as of right adversely effects the trial court process.<sup>226</sup> Forty-seven percent of respondents believed that under New York's present system, interlocutory appeals as of right hinder the trial court process.<sup>227</sup> An equal number believed that interlocutory appeals do not adversely effect the lower courts.<sup>228</sup> Six percent stated that interlocutory appeals may sometimes adversely effect the trial court process.<sup>229</sup>

The sixth question asked whether interlocutory appeals are often frivolous and used as a delay tactic.<sup>230</sup> Fifty-nine percent responded in the affirmative, while eighteen percent stated that they are not used as a delay tactic.<sup>231</sup> Twenty-three percent stated that interlocutory appeals are sometimes used as a delay tactic.<sup>232</sup>

The seventh question asked whether 22 N.Y.C.R.R. Part 130<sup>233</sup> curtails filing of frivolous interlocutory appeals.<sup>234</sup> Sev-

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221. See *infra* Appendix B and accompanying text.

222. See *infra* Appendix B and accompanying text.

223. See *infra* Appendix A and accompanying text.

224. See *infra* Appendix B and accompanying text.

225. See *infra* Appendix B and accompanying text.

226. See *infra* Appendix A and accompanying text.

227. See *infra* Appendix B and accompanying text.

228. See *infra* Appendix B and accompanying text.

229. See *infra* Appendix B and accompanying text.

230. See *infra* Appendix A and accompanying text.

231. See *infra* Appendix B and accompanying text.

232. See *infra* Appendix B and accompanying text.

233. N.Y. COMP. CODES R. & REGS. tit. 22, § 130 (1986). Section 130(a) allows "[t]he court, in its discretion, [to award] costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct . . . [and/or] impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct . . ." *Id.* § 130-1.1(a).

enty percent stated that 22 N.Y.C.R.R. Part 130 does not prevent lawyers from filing frivolous interlocutory appeals, while eighteen percent disagreed.<sup>235</sup> Six percent answered that he or she had not been presented with the issue yet.<sup>236</sup>

The eighth question asked what the justice believed would be the most negative consequence if the appellate division's jurisdiction to hear interlocutory appeals was curtailed.<sup>237</sup> The general consensus expressed the fear that a party may have to endure an unjust order until he or she appealed the final judgment.<sup>238</sup>

The ninth question asked what the justice believed would be the most beneficial consequence if the appellate division's jurisdiction to hear interlocutory appeals was curtailed.<sup>239</sup> The general consensus was that curtailing the number of interlocutory appeals would conserve judicial resources at the appellate level.<sup>240</sup>

The tenth and final question asked if the justice would support a legislative amendment curtailing the number of interlocutory orders appealable by right.<sup>241</sup> Forty-seven percent of the respondents said they would support an amendment, while thirty-five percent would not.<sup>242</sup> Six percent were undecided and twelve percent would support an amendment if it were drawn carefully.<sup>243</sup>

The responses to the questionnaire and the continuing debate over New York's system of interlocutory appeals indicate that a new approach is needed. The new approach must be efficient in order to allow the appellate division to handle its ever-increasing caseload.<sup>244</sup> However, the appellate division must be able to carry out its responsibility of supervising the lower

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234. See *infra* Appendix A and accompanying text.

235. See *infra* Appendix B and accompanying text.

236. See *infra* Appendix B and accompanying text.

237. See *infra* Appendix A and accompanying text.

238. See *infra* Appendix B and accompanying text.

239. See *infra* Appendix A and accompanying text.

240. See *infra* Appendix B and accompanying text.

241. See *infra* Appendix A and accompanying text.

242. See *infra* Appendix B and accompanying text.

243. See *infra* Appendix B and accompanying text.

244. TASK FORCE, *supra* note 3, at 1.



courts to ensure that parties do not suffer through an unjust order.<sup>245</sup>

## VI. An Evaluation of the Options to Streamline New York's Approach to Interlocutory Appeals

The legislature must ensure that the appellate division is able to provide adequate appellate justice for litigants.<sup>246</sup> Because of the increase in filing of appeals, especially in the Second Department, various committees and commentators have suggested ways in which the legislature can alleviate the burden on the appellate division.<sup>247</sup> Suggestions include long-term major structural changes,<sup>248</sup> minor changes,<sup>249</sup> and moderate changes.<sup>250</sup>

Curtailing the jurisdiction of the appellate division over interlocutory appeals will not solve the ongoing burden of the appellate division. However, alterations to the present system could streamline the appellate process for the better. The following are various options which the legislature could employ to streamline the interlocutory review system in New York.

245. See Botler, *supra* note 3, at 954-55.

246. If the appellate division believes that existing procedures are detrimental to the appellate process, it "may make a direct appeal to the legislature for a change in the law." See James D. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOK. L. REV. 459, 464 (1975) [hereinafter Hopkins]. Hopkins states that the appellate division's influence is most persuasive in the area of procedural law. See *id.* at 465. He reasons that "[t]he intermediate court is closer to the trial court; it reviews the procedural aspects of litigation more often and with greater influence than does the highest court; and it therefore deals in these areas with larger concern for the efficiency and justice of the process in disposing of cases." *Id.* In addition, Hopkins states that the appellate division may "make a direct statement to the highest court in support of a change in existing doctrine." *Id.* Finally, Hopkins evaluates certain factors which determine the potential success of the appellate division's plea for change. See *id.* at 466.

247. See *supra* notes 167-68, 179-189, 190-202 and accompanying text.

248. See *supra* notes 180-184 and accompanying text, for a discussion of the creation of a Fifth Department.

249. See *supra* notes 169-70 and accompanying text, for a discussion of the proposal to add more justices to the Second Department and continue the Interdepartmental Case Transfer Plan.

250. See *supra* notes 185-198 and accompanying text, for a discussion of proposals to limit the number of interlocutory appeals. See also *supra* text accompanying note 168, for a proposal to reduce the panel of justices to three.

### A. *Adopting the Federal Approach*

The legislature could adopt the federal system's current approach to interlocutory appeals.<sup>251</sup> Adopting the federal approach would drastically alter New York's treatment of interlocutory appeals.

One advantage is that the appellate division could use federal case law for guidance. Another advantage is that judicial economy would be promoted because the court would only have to deal with a limited number of interlocutory matters. In addition, confusion regarding appealability would be reduced because the federal system has explicitly established which matters are appealable at the pre-trial stage.<sup>252</sup>

One disadvantage is that the federal system has its own inherent problems.<sup>253</sup> Another disadvantage is that the appellate division would lose its ability to supervise the lower courts on many matters at the pre-trial stage. Because the circuit courts have a different role than the appellate division, a drastic limitation on the jurisdiction of the appellate division would be inconsistent with legislative intent. The legislature created the appellate division with the intent that it have broad power over the lower courts.<sup>254</sup> In contrast, the circuit courts were not created with such broad power to supervise the district courts.<sup>255</sup>

Broad review of interlocutory appeals is an effective tool to supervise the lower courts and is consistent with legislative in-

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251. See *supra* part III.A.

252. But see 15A CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3909 (1992) [hereinafter WRIGHT], for a discussion of the difficulty in determining what is a final decision.

253. *Id.* See also *supra* notes 106-13 and accompanying text, for a discussion of Congress' departure from the final judgment rule in recent times.

254. See *supra* note 9, for a brief discussion of the legislative intent behind the creation of the appellate division. See also Botler, *supra* note 3, at 940-44. See also Bergan, *supra* note 3.

255. See 13 WRIGHT, *supra* note 252, at § 3504, for a discussion of the creation of the Circuit Court of Appeals. The circuit courts supervise the district courts more through the "law of the circuit" rule as opposed to interlocutory review. See Botler, *supra* note 3, at 1003-04. Essentially, the "law of the circuit" rule "binds the district courts to the decisions of their particular circuit courts." *Id.*

tent.<sup>256</sup> Therefore, adopting the federal approach would be inappropriate in New York.

### B. *More Emphasis on Permission*

The concept of permission, when dealing with interlocutory appeals, has received endorsement.<sup>257</sup> By focusing more on permission, the legislature increases the appellate division's discretion to decide which orders should be appealed immediately. The legislature has two options when further developing the permission concept.

First, the legislature could add more orders to CPLR 5701(b), which enumerates the orders appealable by permission only.<sup>258</sup> The legislature could create a task force comprised of various appellate division justices to determine which additional orders should be added.<sup>259</sup> The justices could rely on personal experience to decide which orders are consistently used as delay tactics, or do not warrant immediate review.

Second, the legislature could eliminate the catch-all provisions of "involves some part of the merits" and "affects a substantial right."<sup>260</sup> The legislature could then retain the other five provisions.<sup>261</sup> With regard to all other interlocutory orders, a party would be required to seek permission from either the trial judge or an appellate division justice before he or she could have his or her order appealed immediately.

The legislature could look to various states and the ABA proposal<sup>262</sup> for help in devising a standard for granting permis-

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256. See Botler, *supra* note 3, at 954. "[F]ree appealability affords the Appellate Division substantial opportunity to supervise the trial court and to ensure that its actions are within permissible legal and discretionary bounds." *Id.*

257. See *supra* note 71 and accompanying text. In the questionnaire sent by this author, of the justices who supported curtailing the appellate division's jurisdiction over interlocutory appeals, eight justices supported the concept of permission. See *supra* text accompanying note 215. See *supra* part III.C, for the use of the permission concept in various states and the federal court.

258. See *supra* notes 60-62 and accompanying text, for a list of the three orders which require permission.

259. See Hopkins, *supra* note 246, at 465. The appellate division is in the best position to decide procedural changes in the law. See *id.*

260. See *supra* part II.B.2. See *supra* notes 21-26 and accompanying text, for committee proposal made in 1958.

261. See *supra* part II.B.1.

262. See *supra* text accompanying note 143.

sion.<sup>263</sup> In any event, the standard should be specific and clear to reduce any confusion regarding appealability.

Adding orders to the permission list would be consistent with the intent of the drafters of CPLR 5701.<sup>264</sup> Another advantage is that lawyers and judges would have a clear standard as to what is appealable by right and what requires permission. Finally, instead of allowing almost every interlocutory order to be appealed, the legislature would increase the appellate division's discretion to decide what should be reviewed immediately.

A potential disadvantage is that the trial court or the appellate division could be flooded with petitions for review.<sup>265</sup> This is avoidable with a specific and clear standard for granting permission. In addition, developing case law will guide lawyers in determining appealability.

The advantage of the second proposal is that the appellate division can utilize its experience when deciding appealability. In addition, the appellate division could reduce any frivolous appeals and thereby conserve judicial economy. A disadvantage to the second proposal is that the trial court or the appellate division could be flooded with petitions. In addition, judges may inconsistently grant or deny certification to appeal.

C. *Review by a Single Justice Similar to Applications for Leave to Appeal from CPL Article 440 Motions*

In a response to the questionnaire sent by this author, one justice suggested using Criminal Procedure Law Article 440 as a model in seeking leave to appeal.<sup>266</sup> Essentially, this procedure would create a permission statute for dealing with interlocutory appeals. This is a good suggestion because the legislature could adopt a familiar procedure.<sup>267</sup> The permission statute could read as such:

CERTIFICATE GRANTING LEAVE TO APPEAL TO INTERMEDIATE APPELLATE COURT

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263. See *supra* part III.C.

264. See *supra* text accompanying notes 63-64.

265. See STERN, *supra* note 141, at 89.

266. See *supra* text accompanying note 219.

267. See N.Y. CRIM. PROC. § 460.15 (McKinney 1994).

1. A certificate granting leave to appeal to an intermediate appellate court is an order of one judge or justice of the intermediate appellate court to which the appeal is sought to be taken granting such permission and certifying that the case involves questions of law or fact which ought to be reviewed by the intermediate appellate court.
2. An application for such a certificate must be made in a manner determined by the rules of the appellate division of the department where such intermediate appellate court is located.<sup>268</sup>

Then, the legislature could require each department to adopt rules expressed in either the First or Second Department.<sup>269</sup> For example, the rule to apply for certification granting leave to appeal could read as such:

- 1) Application for a certificate granting leave to appeal to this court shall be made, in writing, within 30 days after service of the order upon the applicant, shall give 15 days' notice to the [respondent], shall be filed with proof of service and shall be submitted without oral argument.
- 2) The moving papers for a certificate granting leave to appeal shall be addressed to the court for assignment to a justice, and shall state:
  - (i) the return day; (ii) the name and address of the party seeking leave to appeal and the name of the [respondent]; and
  - (iii) the question of law and fact which ought to be reviewed.
- 3) The moving papers must include:
  - (i) a copy of the order sought to be reviewed; . . . and [(ii) a brief in support of granting certification.]
- 4) Answering papers . . . shall be served and filed not later than noon of the third day before the return date stated in the application. Answering papers shall discuss the merits of the application . . .<sup>270</sup>

The advantage to this proposal would be that every interlocutory order would be potentially appealable. Another advantage would be assured review by one justice. In addition, the pre-trial process would proceed more efficiently to trial.

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268. *Id.*

269. See *infra* Appendix C, for procedures in each appellate division to apply for a certificate granting leave to appeal from a denial of a 440 motion.

270. The author has taken language from N.Y. COMP. CODES R. & REGS. tit. 22, § 600.8(d) (1994) to construct this rule. See *infra* Appendix C.

The disadvantage would be that much discretion would be put in the hands of one justice. In addition, certain orders which should be appealable by right<sup>271</sup> may be denied certification. Therefore, this suggestion may be more appropriate if the legislature enumerated four or five orders that would be appealable by right and then used the above procedure to grant permission for all other orders.

#### D. *Single Justice Review*

Another option is the "single justice" approach used in Massachusetts.<sup>272</sup> This would be a good compromise between New York's current system and the federal system.<sup>273</sup> Each justice in the appellate division would be required to take his or her turn to sit as the single justice.<sup>274</sup> Under the "single justice" approach, a party would be able to petition an appellate judge for relief from any interlocutory order.<sup>275</sup> The judge would then have to consider the petition and he or she would have the same power as a full bench.<sup>276</sup>

The advantage to this proposal is that the appellate division would conserve judicial resources because it would need only one justice to decide the interlocutory appeal. Another advantage is that the trial process would proceed with less delay.<sup>277</sup> In addition, litigants would always have some appellate review of every pre-trial matter. Although in most cases it would only be reviewed before one appellate judge, litigants would still be assured of some appellate review. Finally, due to the informal requirements of "single justice review," less time and money would be spent on intermediate appeals.<sup>278</sup>

The disadvantage of this proposal is that litigants would not have review before a full bench in most cases. Another dis-

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271. See *supra* notes 40-44 and accompanying text, for a discussion of the provisional remedies.

272. See *supra* part III.B.

273. See *supra* note 134 and accompanying text.

274. See *supra* notes 116-19 and accompanying text.

275. See *supra* notes 122-24 and accompanying text.

276. See *supra* notes 131-33 and accompanying text.

277. See *supra* text accompanying notes 125-28, for a discussion of the informal requirement for "single justice" review.

278. *Id.*

advantage is that inconsistent relief could result from the increased discretion of the judge.

## VII. Suggestion

A modified "single justice" approach would accommodate the appropriate balance between supervising the lower court while conserving judicial resources. First, the legislature could enumerate five or six specific interlocutory orders that are appealable as of right to the full bench of the appellate division.<sup>279</sup> These orders that are appealable by right must be so important that immediate appellate review is essential to determine whether the trial court acted appropriately. Examples could be the provisional remedies,<sup>280</sup> where a party may suffer great hardship before an appellate court determines if the trial court acted appropriately.

After the legislature enumerated those orders that would be appealable by right to a full bench, a party would be able to petition to the single justice for review of all other interlocutory orders.<sup>281</sup> The single justice would have the same power as the full bench to grant and deny relief.<sup>282</sup>

Under this proposal, the appellate division could effectively supervise the lower court because essentially every interlocutory order would be either appealable to a full bench or reviewed before a single judge.<sup>283</sup> Further, the appellate division's resources would be conserved considerably, because it would not have to provide plenary appellate review for every interlocutory order.

Also, parties would save time and money on preparation for an appeal.<sup>284</sup> In addition, parties would be assured of an immediate appeal of orders which involve a preliminary injunction, attachment, or notice of pendency. Finally, litigants would get

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279. See *supra* part II.B.1, for a list of the potential orders that could be appealable by right.

280. See *supra* notes 40-44.

281. See *supra* part III.B.

282. See *id.*

283. Henn, *Single Justice*, *supra* note 115, at 10.

284. See *supra* text accompanying notes 125-28, for a discussion of the informal requirements of "single justice" review.

to trial more swiftly, because it would take less time to decide the appeal.

### VIII. Conclusion

In 1958, the drafters of the CPLR proposed to reduce the number of interlocutory orders that can be appealed by right.<sup>285</sup> Despite the modification of the proposal, the drafters successfully introduced the concept of permission.<sup>286</sup> Since the legislature enacted the CPLR, continuing debate has existed over whether New York should allow such generous interlocutory appellate review as a matter of right.<sup>287</sup> Studies and surveys indicate that interlocutory appeals are a burden on the appellate division.<sup>288</sup>

Currently, the appellate division is overwhelmed with cases; consequently, New York must streamline its appellate system in order to provide a high quality of appellate justice.<sup>289</sup> Streamlining the state's approach to interlocutory appeals is one way to conserve judicial resources at the appellate level. The legislature has many options that would make the system more efficient but would still allow the appellate division to effectively supervise the lower courts.<sup>290</sup> Before it is too late, the legislature should implement one of these options.

*David Scheffel\**

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285. COMMITTEE REPORT, *supra* note 4, at 117.

286. SENATE REPORT, *supra* note 28, at 143.

287. WEINSTEIN, *supra* note 27, ¶ 5701.03. *See also* Botler, *supra* note 3. *See also* MACCRATE, *supra* note 6, at 87.

288. Botler, *supra* note 3, at 992. *See also* MACCRATE, *supra* note 6, at 129.

289. TASK FORCE, *supra* note 3, at 1.

290. *See supra* part VI.

\* J.D., Pace University School of Law, 1996. I dedicate this article to my Mom and Dad. Without their love and support, I would accomplish so little.



Appendix A—Questionnaire to the Appellate  
Division Justices<sup>291</sup>

1. How many years have you served in the appellate division?

2. Should the jurisdiction of the appellate division to hear interlocutory appeals be curtailed?

Yes            No

If yes, do you agree with a) allow only a select few by statute; b) allow only upon permission by the appellate division; or c) limit altogether.

*Comments or Reasons for Response*

3. Would you support increasing the appellate division's reviewability on final judgments and orders, while decreasing the interlocutory orders that are appealable as of right?

Yes            No

4. Do you believe that interlocutory appeals provide a needed supervision over the trial courts?

Yes            No

5. Do you believe that allowing numerous interlocutory appeals as of right adversely effects the trial court process?

Yes            No

6. Do you believe that interlocutory appeals are often frivolous and used as a delay tactic?

Yes            No

7. Do you believe that 22 N.Y.C.R.R. Part 130 (sanctions) curtails filing of frivolous interlocutory appeals?

Yes            No

8. What do you believe would be the most negative consequence, if the appellate division's jurisdiction to hear interlocutory appeals was curtailed?

9. What do you believe would be the most beneficial consequence, if the appellate division's jurisdiction to hear interlocutory appeals was curtailed?

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291. The following questionnaire was sent to forty-five justices of the appellate division. The justice's responses were anonymous. Seventeen justices responded.

10. Would you support a legislative amendment curtailing the number of interlocutory orders appealable as of right?

Yes            No

*Please feel free to mention any comments or concerns*

## Appendix B—Responses to Questionnaire

1. How many years have you served in the appellate division?

The average time served was eleven years.

2. Should the jurisdiction of the appellate division to hear interlocutory appeals be curtailed?

Yes            No

If Yes, do you agree with a) allow only a select few by statute; b) allow only upon permission by the appellate division; or c) limit altogether.

*Comments or Reasons for Response*

Some of the comments were:

One justice, who supported allowing only a select number of appeals by statute, stated “I would limit interlocutory appeals to summary judgment motions and the like but I would eliminate appeals from discovery motions and the like.”

Many of the justices, who supported allowing interlocutory appeals only upon permission, stated:

“This proposed limitation would not affect interlocutory appeals that have merit—leave to appeal, in such cases, would not be unreasonably denied.”

“Interlocutory appeals are taken frequently from the denial of summary judgment and from discovery orders. A rather high percentage of these appeals are frivolous or result in affirmances. A permissive procedure would enable the court to cull those appeals that are frivolous or that clearly do not show an abuse of discretion that would impair the right to a fair trial.”

“Permission should be sought to appeal a denial of a motion for summary judgment. [However], appeals as of right [should be allowed] from orders granting summary judgment.”

“The appellate division is in the best position to decide which interlocutory orders should be reviewed.”

“The constitution should be amended to require that interlocutory appeals be taken to the Appellate Term; thereafter, leave to appeal should be required for a further appeal to the appellate division.”

"I would provide for review by a single justice, similar to applications for leave to appeal from CPL art. 440 motions. This would permit appropriate appeals to be heard."

3. Would you support increasing the appellate division's reviewability on final judgments and orders, while decreasing the interlocutory orders that are appealable as of right?

Yes            No

The responses were:

"The appellate division's reviewability of final judgments/orders need not be increased."

"Our reviewability of final judgments is complete and adequate."

4. Do you believe that interlocutory appeals provide a needed supervision over the trial courts?

Yes            No

The responses were:

"Only in rare instances."

"Only to a limited extent."

"Yes but too much burden on the appellate division."

5. Do you believe that allowing numerous interlocutory appeals as of right adversely affects the trial court process?

Yes            No

The responses were:

"It sometimes does."

"It delays trials."

"Somewhat because trial courts wrongfully believe that there is an automatic stay."

6. Do you believe that interlocutory appeals are often frivolous and used as a delay tactic?

Yes            No

The responses were:

"Often but not always."

"I do not dispute that the filing of such an appeal is to seek a tactical advantage such as a stay."

Two justice responded "Sometimes" and another justice stated "Occasionally."

7. Do you believe that 22 N.Y.C.R.R. Part 130 (sanctions) curtails filing of frivolous interlocutory appeals?

Yes            No

The responses were:

"Not adequately."

"Not enforced often enough."

"Not yet, but in time it should have such effect."

8. What do you believe would be the most negative consequence, if the appellate division's jurisdiction to hear interlocutory appeals was curtailed?

The comments varied: "None"; "An occasional meritorious meaningful appeal might not reach the appellate level"; "The grant of summary judgment would be a thing of the past"; "The appellate division would not be fulfilling its role"; "No negative consequence"; "In certain categories of cases, the cost of litigation would be increased"; "Lawyers might complain"; "Cases unnecessarily tried which should have been disposed of at an earlier stage— summary judgment"; "Orders effecting an unjust result would be allowed to stand pending appeal"; "It would lead to more reversals after trial"; "Perhaps some cases might be settled inappropriately"; "Delay in resolving procedural issues"; "The trial of many cases that should not be tried"; "Check on unbridled power of trial court".

9. What do you believe would be the most beneficial consequence, if the appellate division's jurisdiction to hear interlocutory appeals was curtailed?

The comments varied: "Faster resolution of trials and more cases settled"; "Disposition of cases would improve"; "Our caseload would be lightened but at a tremendous cost"; "Less appeals for the appellate division"; "The increase in depth analysis of meritorious appeals"; "Conservation of judicial resources at appellate level"; "Trials would proceed and we could hear appeals from judgments"; "Speedier processing to completion at

trial and hearing levels”; “Fewer appeals”; “Interlocutory appeals designed to achieve delay or perpetuate an unfair result might be avoided”; “If the appeal initially was to the Appellate Term, we would eliminate the inordinate delay”; “We would have more time to devote to significant matters”; “Time saved”; “Appellate calendars would be reduced”; “Frees up court time for other matters”.

10. Would you support a legislative amendment curtailing the number of interlocutory orders appealable as of right?

Yes                      No

*Please feel free to mention any comments or concerns*

Some of the comments were “I would ‘favor’, but not ‘support’”; “Probably not. It would have to be very carefully circumscribed”; “We do not favor appeals from denials of summary judgment and discovery orders and have advised the bar of [such] fact. Delay can be monitored by denials of stays.”

### Appendix C—Application for Certificate Granting Leave to Appeal

#### First Department

1) Application for a certificate granting leave to appeal to this court shall be made, in writing, within 30 days after service of the order upon the applicant, shall give 15 days' notice to the district attorney, shall be filed with proof of service and shall be submitted without oral argument.

2) The moving papers for a certificate granting leave to appeal shall be addressed to the court for assignment to a justice, and shall state:

(i) the return day; (ii) the name and address of the party seeking leave to appeal and the name of the district attorney; (iii) the indictment number; (iv) the questions of law and fact which ought to be reviewed; and (v) that no prior application for such certificate has been made.

3) The moving papers must include:

(i) a copy of the order sought to be reviewed; and (ii) a copy of the memorandum of opinion of the court below or a statement that there was none.

4) Answering papers or a statement that there is no opposition to the application shall be served and filed not later than noon of the third day before the return date stated in the application. Answering papers shall discuss the merits of the application, or shall state:

(i) that the file has been reviewed and includes a response by the district attorney covering the matters raised in the paper submitted by the applicant in the court below and an opinion or memorandum of the justice of that court; and (ii) that the application for a certificate granting leave to appeal does not contain any new allegations.

N.Y. COMP. CODES R. & REGS. tit. 22, § 600.8(d) (1994).

#### Second Department

(B)(1) An application pursuant to CPL 450.15 and CPL 460.15 for leave to appeal to this court from an order shall be made in writing within 30 days after service of the order upon the applicant, on 15 days' notice to the district attorney, or other prosecutor, as the case may be.

(2) The application shall be addressed to the court for assignment to a justice and shall include:

(i) the name and address of the applicant and the name and address of the district attorney or other prosecutor, as the case may be; (ii) the indictment, or superior court information number; (iii) the questions of law or fact which it is claimed ought to be reviewed; (iv) any other information, data, or matter which the applicant may deem pertinent in support of the application; (v) a statement that no prior application for such certificate has been made; and (vi) a copy of the order sought to be reviewed and a copy of the decision of the court of original instance or a statement that there was no decision.

(3) Within 15 days after service of a copy of the application the district attorney or other prosecutor shall file answering papers or a statement that there is no opposition to the application. Such answering papers shall include a discussion of the merits of the application or shall state, if such be the case, that the application does not contain any allegations other than those alleged in the papers submitted by the applicant in the trial court and that the prosecutor relies on the record; the answering papers in the trial court; and the decision of such court, if any.

(4) Unless the justice designated to determine the application shall otherwise direct, the matter shall be submitted and determined upon the foregoing papers and without oral argument. N.Y. COMP. CODES R. & REGS. tit. 22, § 670(b)1-4 (1994).

### Third Department

An application to a justice of the appellate division for leave to appeal in a civil case (CPLR 5701(c)), or in a criminal action or proceeding (CPL 460.15; CPL 460.20), may, but need not be, addressed to a named justice, and, unless otherwise directed by order to show cause, shall be made returnable at the court's address in Albany, in the manner provided in section 800.2(a) of this Part. Such an application may not be argued unless the justice to whom it is made or referred otherwise directs.

N.Y. COMP. CODES R. & REGS. tit. 22, § 800.3 (1994).

### Fourth Department

An application for a certification for a certificate granting leave to appeal to the appellate division pursuant to CPL 460.15(2)



shall be made to the court and shall be assigned to an individual justice thereof.

N.Y. COMP. CODES R. & REGS. tit. 22, § 1000.3 (1994).