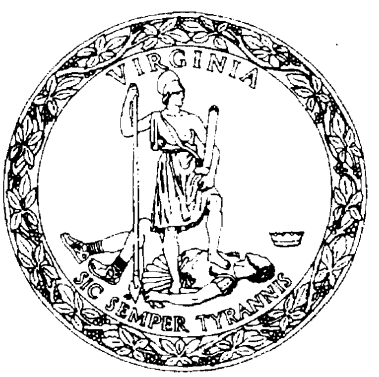
REPORT OF THE
JUDICIARY COMMITTEE OF THE
VIRGINIA BAR ASSOCIATION

INTERLOCUTORY APPELLATE REVIEW: VIRGINIA AND OTHER JURISDICTIONS

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA



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PROJECT REPORTER

Professor Kent Sinclair, University of Virginia School of Law

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Professor Sinclair was assisted by William J. Moran, a member of the Class of 1999, University of Virginia School of Law

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Interlocutory Appellate Review: Virginia and Other Jurisdictions

A Study Prepared for Use by the Virginia General Assembly

by the Judiciary Committee
of THE VIRGINIA BAR ASSOCIATION

December, 1997

Study Resolution. The General Assembly at its 1997 session passed HJR 536, sponsored by Delegate Almand, calling for study of interlocutory appeals in Virginia. The Judiciary Committee of The Virginia Bar Association undertook to study the issues raised. The Committee's review included initial study of the existing mechanisms, practices and issues concerning interlocutory appellate review in Virginia and other jurisdictions to provide an overview of the relevant practice concerns.

This memorandum sets forth descriptive background material on Virginia and national interlocutory appeals practices, assesses the current state of interlocutory appeal in Virginia, and makes recommendations concerning the need for legislative change.

> ***Interlocutory*** is defined as "something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." ***Interlocutory appeal*** is defined as "an appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits."[1]

1 BLACK'S LAW DICTIONARY 563 (6th ed. 1990).

I
OVERVIEW OF RECOMMENDATIONS

A. Summary of the Existing Situation

Based on the detailed survey of Virginia appellate review doctrines included in Part II of this study, and review of similar procedural practices in other jurisdictions (Part III), several points can be made:

- Virginia adheres strongly to the final judgment rule, with limited statutory exceptions only applicable for injunction orders and almost-completely-final decrees in equity suits. Thus the normal rule in the Commonwealth, as elsewhere, is that for the general run of cases, appeal should await final disposition of the entire litigation, and should be presented in a single appellate proceeding. This doctrine limits the number of appeals facing appellate courts, and avoids interruption of trial proceedings through a series of interim appeals. The Committee is aware of no criticism among judges or practitioners in Virginia concerning of the general principle of awaiting a final judgment for most litigation circumstances. Hence there is no proposal to alter this general approach.

- Virginia lacks a statutory or rule-based predicate for a trial judge to certify that a partial judgment should be entered when a final ruling has been made disposing of *some* claims in a multi-claim case, or terminating the litigation against *some* but not all parties. Recent case law (*Leggett v. Caudill*, discussed in the text, and cases there cited) seems to preclude treating such dispositions as partial and appealable judgments, unless the Legislature elects to create authorization for such a judgment. As set forth below, the Committee's study has suggested that consideration should be given to permitting a partial final judgment in the discretion of the trial judge.

- As detailed in Part II of this Report, Virginia statutes today permit interlocutory appeal in a small number of specifically enumerated situations, such as the provision with respect to injunction orders. Apart from cases covered by the recent Multiple Claimant Litigation Act (six or more plaintiffs with cases arising out of the same event or occurrence), Virginia does not at present authorize any form of discretionary petition for appeal. Such a procedure has been recommended by the ABA for over 20 years in its Standards for Appellate Courts. Such a provision is in place in a number of states, and a similar procedure is reflected in federal practice through the mechanism of 28 U.S.C. § 1292(b). As discussed below, the Committee recommends that the General Assembly consider creating a mechanisms to allow petitions for interlocutory appeal in extraordinary cases in Virginia. There are some clear situations where such relief would be beneficial to both litigants and the courts (both trial and appellate), and hence the device should be available. The precise *standards* for when the circumstances are exceptional enough that the normal rule of awaiting final judgment should not apply can be variously formulated. The Committee has collected several examples used in other jurisdictions and sets forth the fruits of this research for consideration by the General Assembly in several sections below.

B. Study Resolution

The enactment calling for detailed study of interlocutory appeal in Virginia reads as follows:

House Joint Resolution No. 536

WHEREAS, the Code of Virginia contains provisions for the appeal of final judgments; and

WHEREAS, parties before the courts of the Commonwealth have a limited right to appeal nonfinal decisions of the court; and

WHEREAS, historically, relief in the form of writs of prohibition and mandamus are reserved for extremely egregious situations; and

WHEREAS, other jurisdictions have provisions which allow a broader range of appeals on issues before a final judgment is rendered; and

WHEREAS, the citizens of the Commonwealth and our system of justice may benefit from a greater range of interlocutory appeals; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, that the Virginia [Bar Association] study the feasibility of expanding the use of interlocutory appeals in the courts of the Commonwealth.

All agencies of the Commonwealth shall provide assistance to the Virginia [Bar Association], upon request.

The Virginia [Bar Association] shall complete its work in time to submit its findings and recommendations to the Governor and the 1998 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

C. Executive Summary of Recommendations

(1) Partial Final Judgments

At present in Virginia, there is no rule or statute authorizing a trial judge to enter a partial final judgment. Thus if a plaintiff's claim is dismissed as to one or more parties, there no means for the plaintiff to obtain review of that disposition even though it may be months or years before the remaining defendants' liabilities are adjudicated in a final judgment. If, on the ultimate appeal, it is determined that the claims against the initially dismissed defendant should be reinstated, there is no alternative but to re-do large portions of the preparatory work in the case in a proceeding against that defendant.

Conversely, if one of several defendants wins a summary judgment motion or demurrer against the plaintiff, no mechanism exists for entry of a final judgment effectively releasing that defendant from the continued pendency of the action prior to entry of judgment on all claims in the case.

On the other hand, if a plaintiff *wins* a liability case against one defendant (perhaps by summary judgment or admission of liability) the present statutory scheme does not authorize entry of a partial final judgment in favor of plaintiff that would allow enforcement of that award, even if the amount of recovery is liquidated or agreed.

Most jurisdictions deal with these issues by having a partial final judgment rule, authorizing the trial court in those (not overly common) situations where it is helpful to direct that a partial final judgment shall be entered.

An example of a common form for such a provision reads as follows:

> Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

As is more fully discussed in Part V-A of this Report, the Committee recommends that the General Assembly create a similar rule in Virginia, recognizing that it empowers, but does not require, a trial judge to direct entry of a partial final judgment where the case makes it appropriate to consider certain claims, or the rights of plaintiff as against certain of the defendants, as being finally decided.

(2) Interlocutory Appeal in General

The final judgment rule is an important and salutary feature of the Virginia legal system, and the Committee has uncovered no reasons to think that – as a general rule of preference and guidance – that requirement for appeal should be altered. However, there are exceptional circumstances that arise, perhaps with increasing frequency today as the complexity of litigation increases, where the

existence of an avenue to request early appellate review of legal issues should be available.

Examples of important situations which may be redressed by interlocutory appeal in other jurisdictions are set forth in Part IV of this Report. Paramount among these situations are novel issues of law, under new statutes or other developments on which appellate guidance does not yet exist. In such circumstances, it may save both trial and appellate courts considerable wasted energies if there is a means by which a party may request consideration of an appeal prior to the ultimate entry of a final judgment on all claims.

At present in Virginia, unless the statutes provide for interlocutory appeal (as in injunction situations) there is no basis for appellate review. The extraordinary writ of mandamus is not available to review discretionary decisions, and would not lie as presently interpreted in Virginia where a trial judge is construing a new statutory regime and hence is not violating a clear direction on how to apply the law. Even where the gravamen of attempted appellate review is a departure by the trial court from accepted procedures, the Committee believes that availability of the remedy of mandamus is fairly restricted in Virginia (as discussed in Part V-B of this Report), and that no other tool exists to redress those uncommon situations where a party perceives that the litigation system is going seriously off track. Mandamus is not a viable remedy for discretionary rulings, and is inherently confrontational through its emphasis on accusations about the trial judge's behavior in violation of prescribed rules. There are many other situations, however, where new issues of law cry out for appellate interpretation or where guidance from an appellate court could affect extended pretrial proceedings, or the trial of several similar cases pending in various courts of the Commonwealth.

Existing statutes set forth in Part II of this report allow interlocutory appeal in the Supreme Court and the Court of Appeals for orders affecting injunctions. Secondly, orders adjudicating the principles of a cause may be appealed, and as discussed passim, that concept is also very narrowly construed in Virginia. Thirdly, in cases to be heard by the Supreme Court, orders directing the payment of money or transfer of property ownership are appealable.

Given the experience of other states which have provided data to the Committee to aid in the Legislature's consideration of these issues, the Committee has found that many jurisdictions have extensive provisions for interlocutory appeals by permission, and that the practical experience of these jurisdictions demonstrates that providing authorization for discretionary appeal would not threaten to engulf either the Supreme Court or the Court of Appeals. Such authority would allow the appellate courts to act in those rare cases where action is desirable.

Procedural steps in a discretionary appeal by petition. We support creation of code sections authorizing applications for interlocutory appeal to each of Virginia's appellate courts, using a system in which application is first made to the trial judge for certification that immediate appellate review would be beneficial, followed by a discretionary review by the appellate court to determine whether to take the appeal. As in some other states, we propose that even if the trial judge declines to provide the certificate, an aggrieved party may apply to the appellate court for leave to appeal. Those applications where the trial judge joins in seeking guidance will likely be looked upon with more favor than those in which the trial judge refuses, but an avenue should be kept open for applications without endorsement of the trial judge to allow the litigant to argue the extent of the deprivation of interests being visited upon it by the challenged ruling.

Provisions. While this Report does not suggest specific language, the general statutory provisions would resemble the examples set forth in section V-B of this Report.[2] The Committee

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2 Tennessee's Rules 9 and 10, are set forth at in Appendix 5 of this Report. In those examples, Rule 9 embodies the procedure and standards to be used where the trial judge grants a certificate indicating the importance of allowing an appeal, and the application to the appellate court proceeds with that support. Tennessee Rule 10, on the other hand,

favors inclusion in the legislation of grounds beyond those found in federal § 1292(b), such that other factors of injury, unfairness, exigency and efficiency may be recognized as sufficient by the court in granting leave for an interlocutory appeal. Specific examples of such grounds are listed in the text accompanying notes 157 through 173 below.

(3) Interlocutory Appeal of Pendente Lite Support Awards

In addition to such a general statute, the Committee believes that consideration should be given in Virginia to the creation of a specific statute concerning interlocutory review of pendente lite awards in domestic relations cases.

It appears that the impetus for the General Assembly's study resolution arose in a domestic relations context. Moreover, in discussions with personnel at the Court of Appeals, pendente lite support awards were the single category of orders which surfaced as raising concerns about the availability of interlocutory review in the Commonwealth.

As discussed in Part V-C of the present report, the Court of Appeals is presented with a number of petitions for interlocutory appeal on an annual basis relating to the setting of pendente lite support awards. At present, under the existing statutes and governing interpretations in published decisions, there is no subject matter jurisdiction for the Court of Appeals to grant such an interlocutory appeal even if the Court wanted to address the ruling below.

While the adoption of a general interlocutory appeal statute allowing for petitions for discretionary review might address some of these situations, the Committee felt that it would be appropriate for the General Assembly to consider a specific statute giving the Court of Appeals power to grant an interlocutory review of such orders if the extraordinary circumstances of a given petition make that procedure beneficial. Such a statute might take the following form:

> Any aggrieved party may appeal to the Court of Appeals from:
> * * * *
> (5) Any interlocutory order relating to support pendente lite that does not adjudicate the principles of a cause, *provided however* that the Court of Appeals shall not hear the appeal unless it determines (i) that matters of significant precedential value are raised, or (ii) that immediate review will advance the termination of the litigation or clarify important legal issues for the parties or the public, or (iii) that failure to allow appeal of the interlocutory order or decree would work an unreasonable hardship on a party.

This issue is discussed in Part V-C of this Report.

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illustrates the fall-back procedure and standards applicable where the trial court has not provided the statement of the value of an immediate appeal. Other formulations of such a procedural provision are discussed in section V-B of this Report.

II
FINALITY AND INTERLOCUTORY APPEALS IN VIRGINIA

This section of the Committee's Report to the Legislature summarizes the landscape in Virginia law relating to interlocutory appeals.

A. Rights to Appeal

There is no general right to an appeal recognized in state or federal jurisprudence. In Virginia it is held that appellate review is a statutory right and is not a necessary element of due process;[3] thus, no due process violation occurs if an appeal is not provided.[4] Federal law is to the same effect.[5]

B. The Final Judgment Rule and Limited Appellate Jurisdiction

The Virginia tradition is to enforce a final judgment rule to the effect that a case should be appealed once, at the end of the trial court litigation, when a final judgment has been entered. This tradition is enforced in part by the doctrine that there is no appellate jurisdiction in Virginia except that provided by statute.[6] The Virginia Constitution provisions bearing on appellate jurisdiction, Const., Art. VI, § 1,[7] do not confer jurisdiction upon the

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3 Hulvey v. Roberts, 106 Va. 189, 55 S.E. 585 (1906).

4 Payne v. Commonwealth, 233 Va. 460, 357 S.E.2d 500, cert. denied, 484 U.S. 933, 108 S. Ct. 308, 98 L. Ed. 2d 267 (1987).

5 See generally Carleton M. Crick, The Final Judgement as a Basis for Appeal, 41 Yale L.J. 539 (1932); Robert J. Martineau, Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution, 54 U. Pitt. L. Rev. 717 (1993) [hereinafter, Martineau, *Defining Finality*]; Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981); Cobbledick v. United States, 309 U.S. 323 (1940).

6 Richmond Cedar Works & Liberty Mut. Ins. Co. v. Harper, 129 Va. 481, 106 S.E. 516 (1921); Canova Elec. Contracting, Inc. v. LMI Ins. Co., 22 Va. 595, 471 S.E.2d 827 (1996).

7 Va. Const. Art. VI, § 1. Judicial power; jurisdiction

The judicial power of the Commonwealth shall be vested in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish. Trial courts of general jurisdiction, appellate courts, and such other courts as shall be so designated by the General Assembly shall be known as courts of record.

The Supreme Court shall, by virtue of this Constitution, have original jurisdiction in cases of habeas corpus, mandamus, and prohibition, in matters of judicial censure, retirement, and removal under Section 10 of this Article, and to answer questions of state law certified by a court of the United States or the highest appellate court of any other state. All other jurisdiction of the Supreme Court shall be appellate. Subject to such reasonable rules as may be prescribed as to the course of appeals and other procedural matters, the Supreme Court shall, by virtue of this Constitution, have appellate jurisdiction in cases involving the constitutionality of a law under this Constitution or the Constitution of the United States and in cases involving the life or liberty of any person.

No appeal shall be allowed to the Commonwealth in a case involving the life or liberty of a person, except that an appeal by the Commonwealth may be allowed in any case involving the violation of a law relating to the State revenue. The General Assembly may also allow the Commonwealth a right of appeal in felony cases, before a jury is impaneled and sworn if tried by jury or, in cases tried without a jury, before the court begins to hear or receive evidence or the

appellate courts directly, and thus all exercises of appellate jurisdiction must be by virtue of statutory authority given pursuant to the Constitution.[8]

Accordingly, it has long been recognized that the legislature may deny review of proceedings in the Supreme Court[9] and, conversely, that the appellate courts have no power to act if the matter is not an appealable matter, leaving the court without jurisdiction to decide any other issue in the case.[10]

The jurisdiction of the Supreme Court in relation to appeals from *interlocutory decrees* is also limited to statutory powers.[11] "The jurisdiction of this Court in relation to appeals from interlocutory decrees is purely statutory."[12] Thus, in the absence of statute the appellate courts have no jurisdiction over appeals from interlocutory decrees.[13]

C. Present Statutes

The basic appeal statute governing appeals to the Supreme Court is Code § 8.01-670, which provides that except as jurisdiction has been allocated to the Court of Appeals in §17-116.05, any person may present a petition for an appeal to the Supreme Court if the applicant is aggrieved by broad categories of final judgments, and specific categories of interlocutory rulings. One may seek leave to appeal if aggrieved:

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first witness is sworn, whichever occurs first, from (1) an order of a circuit court dismissing a warrant, information or indictment or any count or charge thereof on the grounds that a statute upon which it was based is unconstitutional and (2) an order of a circuit court proscribing the use of certain evidence at trial on the grounds such evidence was obtained in violation of the provisions of the Fourth, Fifth or Sixth Amendments to the Constitution of the United States or Article I, Sections 8, 10 or 11 of this Constitution proscribing illegal searches and seizures and protecting rights against self-incrimination, provided the Commonwealth certifies the evidence is essential to the prosecution.

Subject to the foregoing limitations, the General Assembly shall have the power to determine the original and appellate jurisdiction of the courts of the Commonwealth.

8 The provisions of the Constitution in this particular are carried into effect by §§ 8.01-670 and 8.01-672. Barnett v. Meredith, 51 Va. (10 Gratt.) 650 (1854); Page v. Clopton, 71 Va. (30 Gratt.) 417 (1878); Prison Ass'n v. Ashby, 93 Va. 667, 25 S.E. 893 (1896). See also, Rudacille v. State Comm'n of Conservation & Dev., 155 Va. 808, 156 S.E. 829 (1931).

9 Town of Falls Church v. County Bd., 166 Va. 192, 184 S.E. 459 (1936).

10 Lee v. Lee, 142 Va. 244, 128 S.E. 524 (1925); accord: McClure v. Carter, 202 Va. 191, 116 S.E.2d 260 (1960); NAACP v. Committee on Offenses Against Admin. of Justice, 199 Va. 665, 101 S.E.2d 631 (1958); New York P. & N.R.R.Ferry Co. v. County of Northampton, 196 Va. 412, 83 S.E.2d 773 (1954); Dean v. Paolicelli, 194 Va. 219, 72 S.E.2d 506 (1952); Southwest Va. Hosp. v. Lipps, 193 Va. 191, 68 S.E.2d 82 (1951); Anderson v. Patterson, 189 Va. 793, 55 S.E.2d 1 (1949).

11 Lancaster v. Lancaster, 86 Va. 201, 9 S.E. 988 (1889).

12 Thrasher v. Lustig, 204 Va. 399, 131 S.E.2d 286 (1963).

13 Hobson v. Hobson, 105 Va. 394, 53 S.E. 964 (1906). See Smiley v. Provident Life & Trust Co., 106 Va. 787, 56 S.E. 728 (1907).

1. By any judgment in a controversy concerning:
   a. The title to or boundaries of land,
   b. The condemnation of property,
   c. The probate of a will,
   d. The appointment or qualification of a personal representative, guardian, committee, or curator.
   e. A mill, roadway, ferry, wharf, or landing,
   f. The right of the Commonwealth, or a county, or municipal corporation to levy tolls or taxes,
   g. The construction of any statute, ordinance, or county proceeding imposing taxes; or
2. By the order of a court refusing a writ of quo warranto or by the final judgment on any such writ; or
3. By a final judgment in any other civil case; or

B. Except as provided by § 17-116.05, any party may present a petition for an appeal to the Supreme Court in any case in chancery wherein there is an interlocutory decree or order:
1. Granting, dissolving or denying an injunction; or
2. Requiring money to be paid or the possession or title of property to be changed; or
3. Adjudicating the principles of a cause.

Va. Code Ann. § 17-116.05 specifies categories of matters appealable to the Court of Appeals of Virginia:

Any aggrieved party may appeal to the Court of Appeals from:
1. Any final decision of a circuit court on appeal from a decision of an administrative agency;
2. Any final decision of the Virginia Workers' Compensation Commission;
3. Any final judgment, order, or decree of a circuit court involving:
   a. Affirmance or annulment of a marriage;
   b. Divorce;
   c. Custody;
   d. Spousal or child support;
   e. The control or disposition of a child;
   f. Any other domestic relations matter arising under Title 16.1 or Title 20; or
   g. Adoption under Chapter 11 (§ 63.1-220 et seq.) of Title 63.1;
4. Any interlocutory decree or order entered in any of the cases listed in this section (i) granting, dissolving, or denying an injunction or (ii) adjudicating the principles of a cause.

Effect of the Basic Statutes. These statutes embody the final judgment rule, and recognize essentially only two broad categories of appealable interlocutory dispositions, both in equity only: decrees affecting injunctions, and decrees which -- while not totally final in implementation -- adjudicate "the principles of a cause."

Other civil statutes. Miscellaneous other statutes affect rights of appeal, but none makes provisions for interlocutory appellate review of the subject matter. Appeal from awards of the Workers' Compensation Commission are governed by §§ 12.1-39 and 65.2-706. For appeals in habeas corpus proceedings, see §§ 8.01-664, 8.01-665. For provisions as to appeals concerning roadways, see §§ 56-16, 56-19, 56-21, 56-28, 56-31. As to appeals from the Virginia Employment Commission, see § 60.2-625.

Criminal cases. In general, the final judgment applies in criminal cases in the Commonwealth.[14] As the Supreme Court reiterated recently, "We consistently have held that criminal appeals to this Court lie only to final judgments."[15] The Court implied that no "collateral order" doctrine exists in Virginia criminal law to authorize interlocutory appeal, even on constitutionally based challenges such as Double Jeopardy claims.[16] For general provisions governing writs of error in criminal cases, see §§ 19.2-317 through 19.2-327. In addition, the provisions of Article VI, Section 1, of the Virginia Constitution proscribe the Commonwealth's right to appeal in cases involving the life or liberty of any person, except in cases relating to the State revenue or dismissal of criminal charges on certain constitutional
grounds.

Interlocutory appeal is permitted to the Commonwealth in certain narrowly restricted situations. For example, Code § 19.2-398 allows pretrial appeals from orders dismissing an indictment or information on the ground that the criminal law under which the prosecution proceeded was unconstitutional. Similarly, the Commonwealth may appeal an order of a circuit court prohibiting the use of certain evidence at trial on the grounds such evidence was obtained in violation of the provisions of the Fourth, Fifth or Sixth Amendments to the Constitution of the United States or Article I, Sections 8, 10 or 11 of the Constitution of Virginia prohibiting illegal searches and seizures and protecting rights against self-incrimination; to warrant an appeal, however, the Commonwealth must certify that the suppressed evidence will be "essential to the prosecution".[17] When the prosecution lodges such an interlocutory appeal, the defendant has no obligation to participate, but may elect to defend the trial court ruling or to cross-appeal. See Code §19.4-401. Appeal under these sections is governed by the provisions of subsections C and D of §17-116.05:2 (the regular criminal appeal petition procedure provision). The Court of Appeals is required to act within 30 days after any opposition brief is lodged.

Certain transfer orders moving a case from the juvenile and domestic relations district court to the circuit court are deemed final and appealable by the defendant, as well, since

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14 See 1B Michie's Jurisprudence, §§ 57, 71, 73, 85.

15 West v. Commonwealth, 249 Va. 241, 455 S.E.2d 1 (1995), citing Sturgill v. Commonwealth, 175 Va. 584, 7 S.E.2d 141 (1940); Saunders v. Commonwealth, 79 Va. 522 (1884).

16 Id. at 242-43, 455 S.E. at 1-2.

17 Id. See also Code § 19.2-400 (certification that the evidence is essential to be set forth in the notice of appeal). Perhaps a reason for these provisions is the doctrine that the Commonwealth may not appeal from a judgment of acquittal, a feature of double jeopardy jurisprudence. See 1B Michie's Jurisprudence, § 85.

they effectively termination of the juvenile proceeding and replace them with a prosecution of the defendant as an adult.[18]

D. Pertinent Rules of Court

Both the Supreme Court and the Court of Appeals have provisions in their appellate rules bearing tangentially on appealability of lower court decisions. No definition of finality or specification of appealable non-final orders, however, is provided in these rules. See Rules 5:1 and 5:17A, Rules of the Supreme Court.

E. Distinguishing Final and Interlocutory Decisions.

● **Final Judgments on the Merits.** A decree is final and hence generally appealable when it either refuses or grants the relief sought by the party complaining.[19] A final order has been defined, therefore, as one that disposes of the whole subject, gives all of the relief contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the order.[20] In general, therefore, if it appears upon the face of the proceedings that further action in the cause is necessary to give completely the relief contemplated by the court, then the judgment is not final.[21] Or, as it is sometimes said, a final order is one which disposes of the entire action and leaves nothing to be done except the ministerial superintendence of execution of the order.[22]

● **Appealable Interlocutory Orders or Decrees.** By statute, as noted above, certain interlocutory dispositions also may be appealed in Virginia. While the face of the governing statutes is somewhat contradictory, it appears that a party presented with an appealable interlocutory disposition has the *option* to appeal immediately, but may elect to wait and appeal the interlocutory disposition in the course of appeal of the final judgment.

Code § 8.01-671(B) appears to indicate that review of appealable interlocutory orders must be undertaken within the normal period for appeal.[23] However, Code § 8.01-670,

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18 Hairfield v. Commonwealth, 7 Va. App. 649, 656, 376 S.E.2d 796, 800 (1989).

19 Jones v. Buckingham Slate Co., 116 Va. 120, 81 S.E. 28 (1914).

20 Burch v. Hardwicke, 64 Va. (23 Gratt.) 51 (1873). See generally Alexander v. Byrd, 85 Va. 690, 8 S.E. 577 (1889); Postal Tel. Cable Co. v. Norfolk & W. Ry., 87 Va. 349, 12 S.E. 613 (1891), appeal dismissed, 163 U.S. 700, 16 S. Ct. 1205, 41 L. Ed. 315 (1896); Salem Loan & Trust Co. v. Kelsey, 115 Va. 382, 79 S.E. 329 (1913); Gills v. Gills, 126 Va. 526, 101 S.E. 900 (1920); Richardson v. Gardner, 128 Va. 676, 105 S.E. 225 (1920); Lee v. Lee, 142 Va. 244, 128 S.E. 524 (1925). See also, Brown v. Carolina, C & O Ry., 116 Va. 597, 83 S.E. 981 (1914); Ashworth v. Hagan Estates, Inc., 165 Va. 151, 181 S.E. 381 (1935); Dearing v. Walter, 175 Va. 555, 9 S.E.2d 336 (1940).

21 Salem Loan & Trust Co. v. Kelsey, 115 Va. 382, 79 S.E. 329 (1913). See Gills v. Gills, 126 Va. 526, 101 S.E. 900 (1920); Johnson v. Merrit, 125 Va. 162, 99 S.E. 785 (1919).

22 Daniels v. Truck Corporation, 205 Va. 579, 585, 139 S.E.2d 31, 35 (1964); Marchant v. Mathews Co., 139 Va. 723, 734, 124 S.E. 420, 423 (1924).

23 Code § 8.01-671(B):
When an appeal from an interlocutory decree or order is permitted, the petition for appeal shall

which authorizes appeals from certain interlocutory decrees, expressly provides that the aggrieved party "may present" a petition for an interlocutory appeal within the required period, and it has been held that a party may elect to await a final disposition for the entire case, and thereafter obtain appellate review of the interlocutory matter at the same time.[24] As the Supreme Court said recently:

> This permissive language has been in effect since 1849, and we have consistently held that it merely creates a right to appeal certain interlocutory adjudications; if the right is not exercised, the adverse interlocutory adjudication may be the subject of appeal from the final adjudication. Hess v. Hess, 108 Va. 483, 486, 62 S.E. 273, 274 (1908); Jameson v. Jameson's Adm'x., 86 Va. 51, 54-55, 9 S.E. 480, 481 (1889). Before 1977, an interlocutory adjudication could be appealed at any time before entry of a final decree, creating obvious uncertainties for the court and opposing counsel in scheduling further proceedings after an interlocutory adjudication. We think the legislature intended only to eliminate that uncertainty by its enactment of Code § 8.01-671(B). We do not find a legislative intent to require the losing party to note an interlocutory appeal or otherwise forfeit his right to later appeal the issue after a final adjudication.[25]

It appears that to preserve the right to appeal a pre-judgment ruling a party must at least object in timely fashion. The Supreme Court has spelled out the logic in the example situation of a motion for summary judgment which is denied at the trial level.[26] That ruling is not itself appealable because it is not a final order or disposition of the case. However, such a disposition is "an adjudication of one of the principles of the action that may be appealed after entry of the final judgment."[27] The Court noted that the aggrieved party had "made known its specific objection to the court's denial of its motion for summary judgment by objecting to the order, and by briefing and arguing its . . . defense. [The movant's] actions afforded opposing counsel an opportunity to respond to [the] contention, and afforded the trial court an opportunity to rule intelligently on the issue presented. Accordingly, [the movant] made a timely objection in conformity with Rule 5:25 and preserved its right of appeal."[28]

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be presented within the appropriate time limitation set forth in subsection A hereof.

24 Smith v. Woodlawn Const., 235 Va. 424, 368 S.E.2d 699 (1988). See Jameson v. Jameson, 86 Va. 51, 9 S.E. 480 (1889). See Hess v. Hess, 108 Va. 483, 62 S.E. 273 (1908). See also, Southern Ry. v. Glenn's Adm'r, 98 Va. 309, 36 S.E. 395 (1900).

25 Id. at 429, 368 S.E.2d at 634.

26 Metro Machine Corp. v. Mizenko, 244 Va. 78, 419 S.E.2d 632 (1992).

27 Id., citing Allen v. Parkey, 154 Va. 739, 749, 149 S.E. 615, 619 (1929), aff'd, 154 Va. 739, 750, 154 S.E. 919, 919 (1930).

28 *Metro*, 244 Va. at 81, 419 S.E.2d at 634, citing Weidman v. Babcock, 241 Va. 40, 44, 400 S.E.2d 164, 167 (1991).

F. Appealable Interlocutory Orders in Virginia -- a Survey.

● **Injunction-related rulings.** Orders affecting an injunction are immediately appealable.[29] Section 8.01-670(B)(1) permits an appeal from an interlocutory order or decree granting, dissolving, or denying an injunction. This expands the former provision which permitted an appeal only from the dissolution of an injunction. Conforming changes have been made in § 8.01-626, which also authorizes appeals from decrees affecting an injunction.

● **Other equitable remedies.** Older authority suggests that decrees awarding other equitable relief should similarly be appealable.[30] More recent authority allowing appeal upon entry of equitable relief has not been located, except as noted in the next paragraphs.

● **Chancery suits -- adjudications of "the principles of a cause."** On the equity side of court only, the statute provides that a substantially final order may be appealed; the test is whether the decree adjudicates the principles of a cause.[31] To qualify for this exception, the decree from which the appeal is sought is one that "respond[ed] to the chief object of the suit" and it determined an issue that "would by necessity affect the final order of the case."[32] However, "the mere possibility" that an interlocutory decree "may affect the final decision in the trial does not necessitate an immediate appeal."[33]

Courts have held that "the principles of a cause" refers to principles which affect the subject of the litigation and the rules by which the court will determine the rights of the parties in the particular suit; the term suggests that the rules or methods by which the rights of the parties are to be finally worked out have been so far determined that it is only necessary to apply those rules or methods to the facts of the case, in order to ascertain the relative rights of the parties with regard to the subject matter of the suit.[34] Thus the phrase refers to principles which affect the subject matter of the litigation and the rules by which the rights of the parties to the suit are to be finally determined.[35]

For example, the Virginia Supreme Court allowed an interlocutory appeal of an interlocutory decree that granted partial summary judgment establishing that defendants could be held personally liable as general partners for the debts of the partnership because there was a defect in the original certificate of limited partnership.[36] In an adoption suit, the Court of Appeals permitted appeal of an interlocutory order granting adoption even though the lower court could not finalize the adoption until a later, statutorily-prescribed date, because the order "effectively resolved the issues between [the] parties."[37] However, in a

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29 Elder v. Harris, 75 Va. 68 (1880).

30 See French v. Chapin-Sacks Mfg. Co., 118 Va. 117, 86 S.E. 842 (1915).

31 See Virginia Code § 8.01-670(B)(3).

32 Polumbo v. Polumbo, 13 Va.App. 306, 307, 411 S.E.2d 229 (1991) (quoting Pinkard v. Pinkard, 12 Va. App. 848, 851-53, 407 S.E.2d 339, 341 (1991).

33 Id.

34 Lancaster v. Lancaster, 86 Va. 201, 9 S.E. 988 (1889); Lee v. Lee, 142 Va. 244, 128 S.E. 524 (1925).

35 Thrasher v. Lustig, 204 Va. 399, 131 S.E.2d 286 (1963).

36 Maraudt v. Harris, 235 Va. 199, 368 S.E.2d 225 (1988).

37 Knight v. Laney, 1996 WL 8269 (Va.App. 1995).

divorce action, an award of pendente lite support is an interlocutory order which is not appealable. In *Pinkard v. Pinkard*, the Court of Appeals held that an immediate appeal is not justified by the "mere possibility that a discretionary act by the trial court during the pendency of the litigation may affect the final decision in the trial."[38] In such a case, if a party believes that the final judgment was affected by the interlocutory decree, he may appeal at that time.[39]

As noted above, even where a disposition is arguably appealable under this doctrine, appeal is not mandatory; a party may appeal immediately, or may wait for the interlocutory decree to be embodied in a final disposition clearing up the remaining issues of implementation, and then appeal.[40]

Note that the category of appealable semi-final decisions adjudicating the principles of a cause applies only in equity, and does *not* apply to judgments at law, which, under the plain terms of the statute, must be final to be appealable.[41]

G. Other Virginia Doctrines re Finality and Interlocutory Appeal.

Nonsuits. It is generally held that the granting of a nonsuit is not an appealable event. However, if a defendant argues that the nonsuit has been granted contrary to the requirements and limitations of the nonsuit statute, Code § 8.01-380, appeal will lie to test the propriety of the nonsuit.[42]

Contempts. Virginia Code § 19.2-318 provides that parties adjudicated liable for civil or criminal contempt may seek appeal in the Court of Appeals.[43] However, the statute is read to provide an appeal only when a judgment holding the party in contempt has been entered;[44] an order which reserves the imposition of penalty or punishment for a period to allow the contemnor to purge himself is *not* such an order.[45] More recently, the Court of Appeals has held that where a party was sentenced to 15 days in jail and execution of the sentence was suspended until a date certain, the fact that the court suspended execution of the sentence and

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38 Pinkard v. Pinkard, 12 Va.App. 848, 853, 407 S.E.2d 339, 342 (1991); cf., Weizenbaum v. Weizenbaum, 12 Va.App. 899, 407 S.E.2d 37 (1991) (holding that an interlocutory award of a lump-sum payment was not in the nature of pendente lite support, and, thus, was appealable.).

39 Id.

40 Harper v. Vaughan, 87 Va. 426, 12 S.E. 785 (1891).

41 Baber v. Page, 137 Va. 489,120 S.E. 137 (1923).

42 McManama v. Plunk, 250 Va. 27, 458 S.E.2d 759 (1995); Iliff v. Richards, 221 Va. 644, 272 S.E.2d 645 (1980) (e.g., when an order of nonsuit improperly dismisses a party defendant against whom a valid cross-claim has been duly filed, effectively time-barring the cause of action set forth in the cross-claim, such order is a final, appealable judgment as to the cross-claimant within the meaning of this statute).

43 § 19.2-318. Appeal on writ of error to judgment for contempt

> From a judgment for any civil contempt of court an appeal may be taken to the Court of Appeals. A writ of error shall lie from the Court of Appeals to a judgment for criminal contempt of court. This section shall also be construed to authorize an appeal from or writ of error to a judgment of a circuit court rendered on appeal from a judgment of a district court for civil or criminal contempt.

44 Weston v. Commonwealth, 195 Va. 175, 77 S.E.2d 405 (1953).

45 E.I. Du Pont de Nemours & Co. v. Universal Moulded Prods. Corp., 189 Va. 523, 53 S.E.2d 835 (1949).

continued the case until a date certain so that the appellant could purge himself of the civil contempt did not make the decree interlocutory. The contempt decree imposed a sentence and fully adjudicated all issues; it was final, and jurisdiction of the appeal was therefore proper.[46]

Eminent Domain. The principle of finality is applied in eminent domain proceedings, and the case law has spelled out the stages of such proceedings at which a right of appeal attaches.[47]

Mandamus. The Supreme Court has jurisdiction under Va. Const., Art. VI, § 1, and the laws passed in pursuance thereof, over writs of error in proceedings by mandamus, although the amount involved is less than the jurisdictional amount. A mandamus, in a proper case, always involves some matter not merely pecuniary. The Constitution does not itself confer the jurisdiction, various code sections, such as §§ 8.01-671 and 8.01-672, carry into effect the constitutional provision.[48] Some pertinent limits on this writ in Virginia are discussed in Part V-B of this report.

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46 Peet v. Peet, 16 Va. App. 323, 429 S.E.2d 487 (1993).

47 In Dove v. May, 201 Va. 761, 763-64, 113 S.E.2d 840, 841-42 (1960) the Court endorsed the following summary of the nature of finality required in eminent domain proceedings as articulated in 6 Michie's Jurisprudence, Eminent Domain, § 94, pp. 783, 784:

> "If the statute on condemnation proceedings does not declare that the judgment shall be final, the judgment of the inferior court must stand as all other judgments, and the aggrieved party is entitled to the benefit of the general law regulating writs of error and supersedeas.
>
> "To be final and, therefore, appealable, orders in condemnation proceedings must adjudge the right to appropriate to public use, ascertain and fix compensation upon the report of the commissioners and accept payment thereof by the petitioner. Prior to the entry of such orders and payment of compensation a writ of error and supersedeas will not lie, and if granted will be dismissed as improvidently awarded. Thus, an order adjudicating the rights of the applicant to take the land and appointing commissioners to ascertain what will be just compensation and damages to the landowner is not a final order to which a writ of error will lie. But an order adjudicating the right to condemn and appointing commissioners to assess compensation, and an order filing the report of the commissioners and allowing the money to be paid into court, which is done, are final so as to give jurisdiction for a writ of error and supersedeas where the right to take is in controversy, but not where the only question is the amount of compensation."

48 Price v. Smith, 93 Va. 14, 24 S.E. 474 (1896).

III
INTERLOCUTORY REVIEW IN OTHER JURISDICTIONS

A. Other States -- an Overview

● **General Notions of Finality -- Like Virginia.** Most states are similar to Virginia in general practice. Thus most jurisdictions require the rendition of a final judgment as a prerequisite to appeal, and have only limited categories of matters in which interlocutory appeal is permitted.[49] Typical specific exceptions in other states parallel those in Virginia, with injunction orders being the most common form of statutorily prescribed situation in which an interlocutory ruling may be appealed. See generally the survey in Appendix 1 to this Report for an overview of such statutes, and the sample statutes and rules in Appendix 5 to this Report for examples.

● **Free Appealability – The New York Experiment.** For the last several decades the New York system has allowed essentially free appealability of a wide range of non-final dispositions. The New York legislature created the "appellate division" with the thought that errors could be corrected rapidly and that parties should be provided with readily available authoritative rulings on unclear questions of law. In recent years the burdens of that system have become palpable. For example, the New York approach to interlocutory appeals has been criticized as increasing the caseload in the appellate courts,[50] causing "excessive appellate intrusion"[51] into the trial courts, decreasing the amount of time that the appellate division can spend on other cases,[52] and generating delays in trial court proceedings.[53]

At this writing the appellate division system still exists, but New York has been considering abolition of the automatic appealability system for several years.[54] No other state has adopted the free appealability approach of the New York system, and the difficulties that New York has encountered with it in the modern era lead the Committee to recommend against moving toward that system.

● **Partial Final Judgments in State Practice.** Based on computerized searches of state rule and statute databases, the Committee believes that *most states* have provisions for entry of partial final judgments in multi-party or multi-claim litigations. A preliminary survey of many of these state statutes and rules, including several state rules paralleling federal Rule 54(b) will be found attached as Exhibit 5 to this report. The logic behind these provisions,

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49 Robert J. Stern, Appellate Practice in the United States, 77-101 (2d Edition 1989).

50 Report of the Appellate Division Task Force of 1989 (1990).

51 David Scheffel, Note and Comment: Interlocutory Appeals in New York-Time Has Come for a More Efficient Approach, 16 Pace L. Rev. 607, 608 (1996) [Scheffel, *Interlocutory Appeals in New York*]; See also Jill Paradise Botler et al., The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court, 47 Fordham L. Rev. 929, 954 (1979) [hereinafter, Botler, *Empirical Study*].

52 Robert MacCrate et al., Appellate Justice in New York 87 (1982).

53 Botler, *Empirical Study*, 47 Fordham L. Rev. at 954.

54 See Scheffel, *Interlocutory Appeals in New York*, passim. See also Report of the Appellate Task Force of 1989.

and an analysis of the need for such a provision in Virginia will be found in Part V of the present Report.

● **Discretionary Appeals by Petition.** A growing number of states permit appeal of non-final determinations *beyond the specific situations provided in statutory listings, such as injunction cases*, if the appellate courts in the exercise of discretion agree to hear the issue. The states which have adopted such provisions have been surveyed by the Committee, and many have provided statistical information on the use of such avenues for interlocutory review. None of these states has reported any problems of over-use of such mechanisms. This Report discusses the differing standards found in various state rules for appeal by petition, and makes recommendations in Part V.

B. Federal Interlocutory Appeals

1. Final Judgment Rule.

The first federal Judiciary Act, in 1789, reflected the common law rule allowing appeals only from final judgments and decrees. To this day, the broad sweep of federal law remains unchanged. The current codification of the final judgment rule is found in 28 U.S.C. § 1291, which grants "jurisdiction of appeals from all final decisions of the district courts."[55]

Advantages of and Justifications for the Final Judgment Rule

- Final dispositions on the merits renders many interlocutory issues moot.
- The rule preserves independence of trial judges by minimizing mid-stream management from above.
- Insistence upon a final judgment avoids the "obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals."[56]
- The rule conserves appellate judicial resources by having each appeal heard only once.
- Efficiency of the judicial system is thought to be fostered by this system.

Disadvantage of the Final Judgment Rule

- It leaves the possibility of delay, wasted expense and burdens in cases where the trial court makes an error affecting substantial rights before the case is completed, or where the rule of law is unclear.

The inequities created by a strict application of the final judgment rule led to piecemeal efforts to provide for exceptions to the rule. Although these efforts have been welcomed by

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55 28 U.S.C. § 1291.

56 Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (quoting Cobbledick v. United States, 309 U.S. 323, 325 (1940)).

many, they have been the target of much criticism because of their ad hoc nature. "In a patchwork process that continues today, both Congress and the courts have proceeded to weave a crazy quilt of exceptions, which are often 'overlapping . . . and each less lucid than the next.'"[57]

2. Judicially Created Exceptions

Prompted by competing policy interests, courts have been inconsistent in their application of the final judgment rule. The Rule has on occasion been construed narrowly. For example, the Supreme Court has defined a final decision as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgement."[58] Conversely, the Court has also permitted a more liberal interpretation of the definition of a final decision to allow for some appeals from interlocutory orders and has stated that the Rule have a "practical rather than a technical construction."[59] Consequently, various limited judicial exceptions to the final judgment rule have been created.

Collateral Order Doctrine. In 1948 *Cohen v. Beneficial Industrial Loan Corp.*[60] created an exception which allowed appeals in certain cases "from orders other than final judgments when they have a final and irreparable effect on the rights of the parties."[61] The three-part test in *Cohen* stated that the order must be (1) "separable from, and collateral to, rights asserted in the action", (2) "too important to be denied review", and (3) "too independent of the cause itself" to delay appellate review until the final judgment."[62]

The collateral orders doctrine was liberally used by appellate courts until the *Coopers & Lybrand v. Livesay*[63] decision in 1978 which restated the *Cohen* test: To be appealable, an order must "conclusively determine the disputed question, resolve an important issue completely separable from the merits of the action, and be effectively unreviewable on appeal from the final judgment."[64] After *Coopers & Lybrand*, the collateral order doctrine has been limited to interlocutory appeals in which a legal right is potentially jeopardized, and this approach generally does not allow for appeals dealing only with money.[65]

States Following Collateral Order Exception. Despite the federal restrictions now applied to the collateral order doctrine, several state appellate courts have held interlocutory

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57 John C. Nagel, Note, Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review, 44 Duke L.J. 200, 205 (1994).

58 Catlin v. United States, 324 U.S. 229, 233 (1945).

59 Cohen v. Beneficial Industrial Loan Corp, 337 U.S. 541, 546 (1949).

60 Id. (a stockholder's derivative action involving an issue of first impression of whether to apply the forum state's statute mandating the plaintiff to post security for the defense's expenses if the defendant prevailed.)

61 Id. at 545.

62 Id. at 546.

63 437 U.S. 463 (1978).

64 Id. at 468.

65 See, e.g., S. Christian Mullgarat, Settlement Agreements and the Collateral Order Doctrine: A Step in the Wrong Direction?, 1995 J. Disp. Resol. 155, 160-66 (1995); Michael Solimine, Revitalizing Interlocutory Appeals in the Federal Court, 58 Geo. Wash. L. Rev. 1165, 1170 (1990), Riyaz A. Kanji, The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context, 100 Yale L.J. 511 (1990).

orders appealable under state case-law versions of the collateral order doctrine recognized in *Cohen*.[66] As recently as 1992, New Mexico created a collateral order doctrine by case law.[67]

Stay Orders Exception. Because of the res judicata effects of a state court's decision on the same issue being litigated in a federal court, in a leading case the Supreme Court allowed an interlocutory appeal from a stay order in federal court in an arbitration case.[68] One commentator has speculated that the stay orders exception would logically apply to "any stay of a federal case pending the resolution of state court proceedings involving the same issue."[69]

Certain Bankruptcy Orders. Interlocutory orders, particularly those involving pre-final judgment transfers of property,[71] are more readily appealed in bankruptcy proceedings than they would be in actions sounding in other subject matters. It is sometimes said that the bankruptcy order doctrine permits interlocutory appeals for certain bankruptcy proceedings which are "distinct and conclusive either to the rights of individual parties or the ultimate outcome."[72] In general, however, in bankruptcy proceedings the courts have modified their interpretation of the final judgment rule in order to accommodate the unique nature of these proceedings.[73]

Bankruptcy proceedings were the subject of a very early decision of the United States Supreme Court on appealability, which has become known as the *Forgay v. Conrad*[74] Rule. That decision provides an exception in bankruptcy cases to the final judgment requirement for cases in which the trial court directs the defendant to convey the disputed property to the plaintiff even though the court has kept jurisdiction for an accounting. The exception to the general requirement of finality is interpreted to be limited to interlocutory orders involving the transfer or sale of property for the benefit of one party or those directing the immediate payment of money.

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66 See Virginia R. Dugan, The Adoption of the Collateral Order Doctrine in New Mexico, 24 N.M.L. Rev. 389 (1994) ("In Ass'n of Owners of Kukui Plaza v. Swinerton & Walgerg Co., 705 P.2d 28, 34 (Haw. 1985), an order denying motion for a stay pending arbitration was deemed appealable, and in Jolley v. State, 384 A.2d 91, 94 (Md. 1978), an order finding defendant incompetent to stand trial in a criminal case was appealable under *Cohen*'s collateral order doctrine").

67 Castillo v. Rostro, 114 N.M. 607, 845 P.2d 130 (1992).

68 Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,460 U.S. 196 (1988).

69 Robert J. Martineau, *Defining Finality*, 54 U. Pitt. L. Rev. at 743.

71 See Robert J. Martineau, Cases and Materials on Appellate Practice and Procedure 162 (1987).

72 In re Mason, 709 F.2d 1313, 1317 (9th Cir. 1983).

73 See 1 Collier on Bankruptcy 5-21 to 5-33, ¶5.07 (Matthew Bender 15th Ed. Revised 1996).

> A bankruptcy proceeding, in contrast [to ordinary federal litigation], is often a conglomeration of separate adversary proceedings that, but for the status of the bankrupt party which enables them to be consolidated in one proceeding, would be separate, stand-alone lawsuits. Parties to these separate proceedings should not have to wait for the end of the entire bankruptcy proceeding before they can appeal, and therefore finality in bankruptcy has been interpreted to embrace the final decision of any adversary proceeding that, but for its bankruptcy setting, would be a separate lawsuit.

In re James Wilson Assocs., 965 F.2d 160, 166 (7th Cir. 1992).

74 47 U.S. (6 How.) 201 (1848).

Certain Immunity Rulings. In certain instances, a denial of a claim for immunity from suit also is immediately appealable.[74]

3. Specific Rule-Based and Statutory Exceptions in Federal Practice

Partial Final Judgments by Order of the Trial Judge. The federal rules allow a trial judge to direct entry of a partial final judgment under Rule 54(b). For reasons discussed in Part V of this Report, the Committee believes that the General Assembly should take action to authorize similar powers for Virginia trial judges.

Statutory Grounds for Interlocutory Appeal.. Congress has also collected several additional statutory exceptions to the broad federal requirement for existence of a final judgment as a prerequisite to appeal in 28 U.S.C. § 1292. In line with most states, the exempted circumstances -- in which appeal is readily provided -- include orders pertaining to injunctions and similar provisional remedy matters.

Injunction orders -- 28 U.S.C. § 1292(a)(1)[75] Section 1292(a)(1) creates an exception to the final judgment rule which allows for appeals for interlocutory orders involving injunctive relief, regardless of whether the order is called an injunction by the court.[76] This exceptions has two limitations:

- Orders denying summary judgment motions are not within the meaning of interlocutory orders within the statute.[77]
- Appeals are limited to those instances where the appellant can show that order "might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal."[78]

Receiverships and Property Disposition Before Final Judgment -- 28 U.S.C. § 1292(a)(2). Section 1292(a)(2) creates an exception to the final judgment rule which allows for appeals from "[i]nterlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property."

Certain Admiralty Case Dispositions -- 28 U.S.C. § 1292(a)(3). Section 1292(a)(2) creates an exception to the final judgment rule which allows for appeals from"[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of

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74 See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985) (qualified immunity); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (absolute immunity).

75 Section 1291(a)(1) provides:

Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

76 See, e.g., Carson v. American Brands, Inc., 450 U.S. 79 (1981).

77 Switzerland Cheese Assoc. v. E. Horne's Market, Inc., 385 U.S. 23-25 (1966) ("Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a)(1)").

78 Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981).

the parties to admiralty cases in which appeals from final decrees are allowed."

Orders Denying Arbitration -- 9 U.S.C. § 16. This section of the Federal Arbitration Act allows for appeals of right from interlocutory orders that *deny* requests for arbitration, but does not allow an immediate appeal if the order compel arbitration.[79]

4. Discretionary Petitions for Leave to Appeal Non-Final Orders -- 28 U.S.C. § 1292(b)[80]

Section 1292(b) of the federal judicial code (Title 28, U.S.C.) creates an exception to the final judgment rule which allows for discretionary appeals from interlocutory orders in certain limited cases involving. A Section 1292(b) appeal involves a two step process:

- The district court judge characterizes the interlocutory order as involving "a controlling question of law as to which there is a substantial ground for difference of opinion and that a immediate appeal . . . may materially advance the ultimate termination of the litigation."[81]
- If the adversely affected party appeals the order within 10 days, the Court of Appeals may grant a hearing of the matter in its discretion.[82]

The Supreme Court has warned against the routine use of § 1292(b) because Congress intended that interlocutory review should be reserved for "'exceptional' cases while generally retaining for the federal courts a firm final judgment rule."[83]

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79 9 U.S.C. § 16 Appeals

(a) An appeal may be taken from--
(1) an order--
(A) refusing a stay of any action under section 3 of this title,
(B) denying a petition under section 4 of this title to order arbitration to proceed,
(C) denying an application under section 206 of this title to compel arbitration,
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award;
(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
(3) a final decision with respect to an arbitration that is subject to this title.
(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--
(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title.

80 § 1292(b) provides:

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

81 28 U.S.C. § 1292(b).

82 Id.

83 Caterpillar, Inc. v. Lewis, 117 S.Ct 467, 475 (1996) (citations omitted).

5. Extraordinary Writs Exception

Writs of Prohibition and Mandamus[84] Even though the Supreme Court has stated that the use of the writs is an "extraordinary remedy" that is justified in "only exceptional circumstances amounting to judicial 'usurpation of power,'"[85] the federal system entertains many mandamus applications each year. Virginia's mandamus doctrine is summarized in V-B of this report.

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84 28 U.S.C. § 1651. Writs
(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

85 Will v. United States, 389 U.S. 90, 95 (1967).

IV
NEED FOR INTERLOCUTORY REVIEW: EXAMPLES

The Committee searched case law in various jurisdictions for examples of situations where interlocutory relief has been felt to be needed. Several examples will illustrate the range of situations encountered elsewhere that has motivated a number of states to maintain rules or statutes providing for interlocutory appellate review. The reader may note that many of the examples could work to aid a plaintiff *or* a defendant in an appropriate case, and our sense was that interlocutory appellate review regimes do not inherently favor one side or the other.

Probably the most important category of situations where early appellate review is beneficial to litigants – and to the court system itself – is those matters where issues of first impression are involved, because of a new cause of action, new statute, or other development such that the appellate courts have not construed the situation facing the trial judge. Particularly where there may be several litigations presenting the issue, guidance rendered early by an appellate court may reduce needless expenditure of energies by the trial courts in the state, and may avoid unnecessary errors.

The examples of situations found in other jurisdictions to merit interlocutory review included the following:

✦ **Clarifying legal issues of first impression**

In a case of first impression on the issue of whether the non-use of a seat belt is admissible evidence in a products liability case and whether the statute in question is retroactively applicable, the court permitted interlocutory appeal because the issue was one of first impression.[86]

Another court permitting interlocutory appeal to decide a question of first impression explained the grant of review as follows:

> "In the case at hand, the Superior Court's Order determines the substantial issue of whether plaintiff has a claim against defendant for bad faith cancellation of health insurance. Supr.Ct.R. 42(b). The Order also meets the criteria of Supreme Court Rule 42(b)(v), in that Supreme Court review may serve considerations of justice. A review may serve considerations of justice in that it will establish the applicable law in this State regarding an insured's claim of bad faith cancellation of health insurance coverage. At the present time, no Supreme Court decision regarding the issue exists, nor is there any published Superior Court decision regarding the issue. Supr.Ct.R. 42(b)(i). Also, duplicative proceedings will be avoided if the Supreme Court decides the legal issue at this juncture. Supr.Ct.R. 42(b)(v). ***If the Supreme Court does not address the issue until appeal following final resolution by the trail court, and if the Supreme Court, in turn, holds that the Order was improper, an entire new trial will have to be held. At this point, a decision on the bad faith issue would promote judicial efficiency.***"[87]

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86 Wolhar v. General Motors Corp., 1996 WL 526756 (Del. Super. 1996).

87 Stuart v. Blue Cross Blue Shield of Delaware, Inc., 1994 WL 89338 (Del. Super. 1994).

✦ **Rulings to avoid loss of trial or hearing rights**

One court justified the grant of interlocutory review by pointing out the poor health of the plaintiff and noting that unless the party had his rights resolved expeditiously, he might not survive long enough to obtain relief through post-trial appeals, and hence immediate resolution "may be his only opportunity to participate in these proceedings."[88]

✦ **Construction of a governing instrument**

In a case arising out of an automobile-motorcycle collision, construction of exclusion provisions in an insurance policy by the trial court required coverage, but on interlocutory appeal the appellate court reversed that reading of the contract provisions.[89]

✦ **Selecting the applicable limitations period**

The trial court denied summary judgment on statute of limitations grounds, and the Court of Appeals granted a petition for interlocutory appeal because the issue raised was a matter of first impression and the outcome was not clear. The issue which of two differing statutes of limitation applied to the claim at hand.[90]

✦ **Error in conducting evidentiary proceeding**

In a class action brought by purchasers of real estate, alleging that defendants participated in fraudulent marketing scheme, the appellate court gave interlocutory review to the action of the trial court in holding a preliminary injunction hearing without considering the merits of the parties' claims as required in federal injunction doctrine.[91]

✦ **Claims arguably barred by res judicata**

A trial court refused to grant enjoining plaintiffs from re-litigating matters that had already been decided in another court, and the appellate court held that the denial of injunctive relief was an abuse of discretion.[92]

✦ **Discovery Sanctions**

In personal injury action arising out of vehicular accident, defendants sought review of order entered in the Superior Court striking their answer and imposing liability as discovery sanction. The Supreme Court granted interlocutory review and held that the sanction imposed was inappropriate for the discovery violations in

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88 Wolhar v. General Motors Corp., 1996 WL 526756 (Del. Super. 1996). Other, similar situations can readily be imagined: imminent death of plaintiff, witness, etc. which would impair the parties' ability to participate in retrials.

89 DeLap v. Dairyland Insurance Co., 1983 WL 162023 (Wis. App. 1983).

90 State v. Holland Plastics Co., 331 N.W.2d 320 (Wis. 1983).

91 Rolo v. General Development Corporation, GDV, 949 F.2d 695 (3d Cir. 1991).

92 In re SDDS, Inc., 97 F.3d 1030 (8th Cir. 1996).

question.[93]

✦ **Privilege rulings calling for disclosure**

A trial court granted plaintiff's motion to compel the production of certain documents for which defendant had claimed privilege. On interlocutory appeal, the court of appeals held that the documents sought were protected by attorney-client privilege and work product doctrine.[94]

In another case, without a judicial ruling on the merits of the claim, the District Court entered an order permitting counsel for the plaintiff to review documents claimed by defendant to be protected by attorney-client privilege. The Court of Appeals granted review and reversed the District Court's order because requiring defendant to turn over documents subject to a claim of attorney-client privilege, without a prior judicial ruling on merits of the claim, would undermine attorney-client privilege.[95]

✦ **Disqualification of Counsel**

At a late stage in a litigation, the trial court disqualified attorneys representing plaintiffs because of out-of-court remarks by counsel about the judge. The appellate court held that the petitioner-plaintiffs showed requisite irreparable harm to support mandamus relief from the trial judge's order striking the lawyers as attorneys of record in middle of liability phase of class action lawsuit due shortly to enter relief stage, noting that the plaintiffs whose attorneys were disqualified would be at decisive disadvantage if they were required to hire new counsel at so late a date in proceedings.[96]

✦ **Disqualification or Recusal of the Judge**

In a wrongful death action against the tobacco industry, the presiding judge made the following comments in a written opinion regarding discovery issues:

> In the light of the current controversy surrounding breast implants, one wonders when all industries will recognize their obligation to voluntarily disclose risks from the use of their products. All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity!
>
> As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.

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93 McGilvary v. Hansen, 897 P.2d 605 (Alaska 1995).

94 In re Ford Motor Co., 110 F.3d 954 (3d Cir. 1997).

95 Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159 (2d Cir. 1992).

96 In re Barnett, 97 F.3d 181 (7th Cir. 1996).

On interlocutory appeal it was held that the judge's comments concerning the tobacco industry's alleged concealment of the dangers of smoking required the removal of the judge and the reassignment of the case to another judge.[97]

In another case, a petition sought interlocutory review to require the respondent trial judge to refrain from presiding over further proceedings where the brother of the judge was a lawyer at the firm representing the other party. The Court of appeals held that: (1) appearance of law firm in case before respondent constituted an appearance of every lawyer in firm, including respondent's brother, though it did not necessarily mean that respondent's brother was "acting as a lawyer" within statutory prohibition; (2) it was apparent, however, that brother's financial interest in litigation could be "substantially affected" and would be so known by respondent; (3) circumstances of relationship and importance to each litigant of outcome of case made it reasonable for a member of public or party or counsel opposed to question respondent's impartiality; (4) respondent should have granted "Motion to Disqualify" and reassigned case under circumstances, and (5) failure of respondent to recuse himself represented an abuse of discretion warranted relief.[98]

✦ Review of contempt imprisonment

In an action seeking to enjoin a television network from broadcasting a film, the District Court ordered the network to produce the film so that the judge could view it for "inaccuracies." When the network declined, its counsel was imprisoned for contempt and network sought mandamus. The Court of Appeals held that district court's order requiring television network to produce film before its scheduled broadcast so that court could examine it for inaccuracies was void as an unconstitutional prior restraint of speech.[99]

✦ Rulings Barring Expert Witnesses

Plaintiffs in a negligence action against an engineering firm that did design work on a construction project appealed from an order refusing to admit plaintiffs' engineer's expert opinion. The Court of Appeals granted interlocutory review, and held that engineer's testimony was admissible despite fact that he did not practice within state and despite contention that he was not familiar with local customs dictated by unique natural conditions of local environment.[100]

✦ Issues of Immunity or Qualified Immunity

Suit was brought against a school and the principal who administered corporal punishment to a student. The trial court dismissed the cause of action against the principal on immunity grounds. The trial court also denied the plaintiff's demand for a jury trial. The plaintiffs appealed both issues. The court of appeals granted

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97 Haines v. Liggett Group, Inc. 875 F.2d 81 (3d Cir. 1992).

98 SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977).

99 Goldblum v. National Broadcasting Corp., 584 F.2d 904 (9th Cir. 1978).

100 Martin v. Barge, Waggoner, Sumner and Cannon, 894 S.W.2d 750 (Tenn. App. 1995).

interlocutory appeal and held that the trial court improperly removed the plaintiff's right to a jury trial and also improperly dismissed the complaint against the defendant principal as it related to his personal liability for actions which exceeded the scope of his official capacity.[101]

In a different case, a psychologist brought action against Board of Psychologists and others alleging defamation and negligent hiring. On interlocutory appeal the Supreme Court held that the Board enjoyed quasi-judicial immunity; and because Board's actions were judicial in nature, there was no waiver of sovereign immunity.[102]

✦ Representation by Counsel

A custodial parent, represented by the county district attorney's office, brought an order to show cause seeking a contempt finding against a former spouse and an order that he pay child support arrearages. The former spouse objected to the district attorney's office representing the custodial parent plaintiff. The trial court ruled that the district attorney could not represent the custodial parent. The State and the custodial parent took an interlocutory appeal, and the Court of Appeals held that the county district attorney was authorized to represent the custodial parent under governing law.[103]

In another court, a district attorney brought civil contempt charges against a former husband for failure to make support payments. The trial court denied the former husband's request for appointed counsel, but on interlocutory appeal the Court of Appeals held that an indigent defendant is entitled to court-appointed counsel in a civil contempt action initiated by the district attorney.[104]

✦ Abstention in Favor of Other Litigation

A father petitioned for review of an order of the Superior Court denying his motion to dismiss child custody proceedings for lack of jurisdiction. The Supreme Court on interlocutory review held that: (1) interlocutory review was appropriate since postponement of appellate consideration of merits of jurisdictional dispute would cause unnecessary hardship to parties involved, particularly minor children, the petition presented important questions regarding proper resolution of jurisdictional conflicts under Uniform Child Custody Jurisdiction Act, and interlocutory review would expedite termination of litigation by obviating hearing on merits, and (2) on the merits, a proceeding pending in Virginia was proceeding substantially in conformity with Uniform Child Custody Jurisdiction Act, and hence the Superior Court in Alaska should have declined to exercise its jurisdiction under the Act.[105]

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101 Hargrove v. York, 1993 WL 18267 (Tenn. App. 1993).

102 Shargal v. State Board of Examiners of Psychologists, 604 A.2d 559 (N.H. 1992).

103 State v. Wagner, 136 Wis.2d 1 (Wis. App. 1986).

104 Brotzman v. Brotzman, 283 N.W.2d 600 (Wis. App. 1979).

105 Morgan v. Morgan, 666 P.2d 1026 (Alaska 1983).

✦ Lack of Statutory Power to Act

Appeal was allowed from nonfinal order of the Circuit Court, granting a motion to reopen a default judgment in an eviction action. The Court of Appeals held that under applicable state law the trial court had no jurisdiction to grant the relief requested.[106]

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106 King v. Moore, 291 N.W.2d 304 (Wis. App. 1980).

V
SCOPE OF ADDITIONAL PROVISIONS NEEDED IN VIRGINIA

A. Partial Final Judgments

Many jurisdictions have a rule or statute that authorizes the trial judge, who is supervising the proceedings in a particular litigation, to direct the entry of a partial final judgment when there have been rulings finally adjudicating the claims against certain of the defendants, or adjudicating some of the claims in a multi-claim action. These provisions have been adopted in response to the increased number of suits involving multiple claims or parties. In federal practice, for example, such an increase in complexity and numerosity of parties and claims reflects the provisions for the FRCP's provisions for the liberalization of joinder of claims. The concept of judicial units, which the final judgment rule is based on, was "developed from the common law which had dealt with litigation generally less complicated than much of that today."[107]

Similar complexity is now both permitted and found in Virginia litigation. As discussed extensively in a leading treatise, joinder of claims and parties has been greatly liberalized in Virginia practice in recent decades. See Leigh Middleditch and Kent Sinclair, VIRGINIA CIVIL PROCEDURE, § 8.6 (1992). Thus under Code § 8.01-272 tort and contract claims may now be joined in a single action in Virginia. In addition, under Code § 8.01-281, alternative theories and grounds for recovery relating to an occurrence are expressly invited. Rule 1:4(k) of the Rules of Court carries these authorizations into practice by allowing alternative pleading and separate claims. Construing these provisions in a landmark case which itself exemplified the complexity of some modern Virginia litigations, *Fox v. Deese*, 234 Va. 412, 362 S.E.2d 699 (1987), the Supreme Court of Virginia noted that the modern statutes represent "a radical departure from the common law pleading rule." See generally Middleditch & Sinclair, § 8.6 at pp. 396-98.

The consequence of multi-aspect pleading is that often multiple claims in a single case are differently situated, and some may be subject to dismissal, demurrer, or summary judgment while others may not. Some party defendants may be exonerated early in a litigation while others remain active as defendants until final judgment resolves the question of their liability. A partial final judgment statute or rule allows for an immediate appeals from interlocutory orders in which the trial court has directed "the entry of a final judgment as to one or more but fewer than all of the claims or parties."[108] Rather than waiting until the final disposition as to all of the parties, appeals are made available without having to wait for the final decision on all of the claims.

As is apparent in the entries for several states within Exhibit 5 to the present Report, many states have adopted versions of such a provision, sometimes adding marginal variations to the general test articulated in the federal version of this doctrine found in Rule 54(b) of the federal civil rules.

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107 Sears & Roebuck & Co. v. Mackey, 351 U.S. 427, 432 (1956).

108 F.R.C.P 54(b).

At present in Virginia, there is no rule or statute authorizing a trial judge to enter a partial final judgment. Thus if a plaintiff's claim is dismissed as to one or more parties, there no means for the plaintiff to obtain review of that disposition even though it may be months or years before the remaining defendants' liabilities are adjudicated in a final judgment. If, on the ultimate appeal, it is determined that the claims against the initially dismissed defendant should be reinstated, there is no alternative but to re-do large portions of the preparatory work in the case in a proceeding against that defendant.

Conversely, if one of several defendants wins a summary judgment motion or demurrer against the plaintiff, no mechanism exists for entry of a final judgment effectively releasing that defendant from the continued pendency of the action prior to entry of judgment on all claims in the case.

On the other hand, if a plaintiff *wins* a liability case against one defendant (perhaps by summary judgment or admission of liability) the present statutory scheme does not authorize entry of a partial final judgment in favor of plaintiff that would allow enforcement of that award, even if the amount of recovery is liquidated or agreed.

Most jurisdictions deal with these issues by having a partial final judgment rule, authorizing the trial court in those (not overly common) situations where it is helpful to direct that a partial final judgment shall be entered. Virginia, however, does not have such a rule as yet. The Committee's study of the issue leads it to recommend to the Legislature that action be taken to create authorization for entry of partial judgments where the trial judge thinks that it would be fair and appropriate to do so.

As discussed below, case law suggests that there is no common-law equivalent of this process available in Virginia, and hence that a statute would be necessary to create this form of procedure.

Judgment regarding fewer than all party defendants. Earlier in this century the Supreme Court held that a decree might be final as to one of several parties, though as to any party remaining in the court, it can, in the nature of things, be only interlocutory.[109] As recently explained by the Supreme Court, however, the key issue is whether the *issues* on which the remaining claims will be decided touch the same matters that controlled dismissal of the claim decided early. If there is commonality in issues with the remaining claim, the initial disposition is *not* final for appeal purposes absent a statute so providing.[110]

In *Leggett v. Caudill*,[111] the trial court sustained a demurrer to Count I of a motion for judgment, dismissing claims against both defendants (an individual, and a church). Count II remained pending against another entity, and Count III remained pending on a different theory against the church. As to the church, the Court held that the order dismissing Count I was interlocutory in nature, not final.[112] A final order is one that "terminates the suit or definitely determines the rights of the parties, and leaves nothing further to be done by the court in the cause, though it may still enter such decrees and orders as may be necessary to

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109 Lee v. Lee, 142 Va. 244, 128 S.E. 524 (1925). See Dearing v. Walter, 175 Va. 555, 9 S.E.2d 336 (1940).

110 Leggett v. Caudill, 247 Va. 130, 439 S.E.2d 350 (1994).

111 247 Va. 130, 439 S.E.2d 350 (1994).

112 Id. at 133, 439 S.E.2d at 351.

carry the decree into execution."[113] In contrast, the order sustaining demurrer to Count I left something further to be done as to the church, because Count III remained pending against it.

While the theories of liability under Count I in the *Leggett* pleading (allowing emotional distress to be created) were in some ways distinct from the theory in Count III (unlawful discharge of the plaintiff from employment), there is no mechanism in Virginia practice for entry of a partial final judgment, comparable to Federal Rule 54(b). Perhaps more importantly, the bases for liability had important areas of overlap since the *conduct* of the party charged in the dismissed count was the basis for liability under the remaining count, and certain statutory issues respecting the liability of the dismissed and remaining defendants were the same.

In *Leggett* the Court noted[114] that exceptions to the general rule requiring complete finality had been recognized in *Bowles v. Richmond*,[115] and more recently in *Hinchey v. Ogden*,[116] cases in which orders dismissing one defendant from a multi-party case were held appealable. However, those decisions involved defendant's dismissed on *grounds independent* from the bases for liability asserted against the remaining parties.[117]

In *Leggett* the Court held that the "general rule"[118] is that announced in *Wells v. Whitaker*, in which the Court indicated that only a distinctly "collateral matter" resolved in a partial disposition will be appealable, stating that "an adjudication final in its nature *as to a collateral matter, separate and distinct from the general subject of the litigation* and affecting only particular parties to the controversy, may be appealed prior to the determination of the case against all defendants."[119] Thus in *Leggett* the Court held that "a

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113 Id. at 133, 439 S.E.2d at 351, quoting Lee v. Lee, 142 Va. 244, 250, 128 S.E. 524, 526 (1925).

114 Id. at 133, 439 S.E.2d at 351-52.

115 147 Va. 720, 129 S.E. 489 (1925), aff'd on reh'g, 147 Va. 729, 133 S.E. 593 (1926).

116 226 Va. 234, 307 S.E.2d 891 (1983).

117 The Court in *Leggett* summarized the relationship between the theories of liability as to dismissed and remaining parties in these two cases as follows:

> In *Bowles*, the plaintiff sued the City and a railroad for their negligent failure to safeguard an approach to a bridge. On the City's demurrer, the action of the plaintiff was dismissed as to the City, while the action remained pending as to the railroad. The demurrer was based on the ground that the plaintiff had not given written notice to the City Attorney, as required by the City Charter. *Bowles*, 127 Va. at 723-24, 129 S.E. at 489.
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> This Court held that the order sustaining the demurrer was final, because there was "no joint interest between the defendants in the matters decided by the circuit court [i.e., whether plaintiff's action was barred as against the City for failure to give proper notice], nor does it relate to the merits of the case[;] therefore the judgment is final as to the city." Id. at 725, 129 S.E. at 490.
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> Similarly, in *Hinchey v. Ogden*, in a negligence action against the operator of a motor vehicle, the plaintiff also sued the Superintendent of the Expressway for breach of official duty in failing to provide traffic controls sufficient to prevent drivers from entering the wrong lane of travel. The trial court sustained a motion to dismiss as to the Superintendent on the basis of sovereign immunity. This Court granted the plaintiff an appeal from that order, holding that, under *Bowles*, the judgment was appealable. *Hinchey*, 226 Va. at 236-37 and n.1, 307 S.E.2d at 892 and n.1.

Leggett, 247 Va. at 133-34, 439 S.E.2d at 352.

118 Id. at 134, 439 S.E.2d at 352.

119 Id. at 134, 439 S.E.2d at 352, quoting *Wells*, 207 Va. at 628, 151 S.E.2d at 432 (emphasis added).

judgment is final and appealable when the interests of the parties before the trial court are 'severable' rather than 'identical,' under the following definition:

> "[The] judgment is severable when the original determination of those issues by the trial court and reflected in the judgment or any determination which could be made as a result of an appeal cannot affect the determination of the remaining issues of the suit, nor can the determination of such remaining issues affect the issues between plaintiff and the dismissed defendants if such defendants are restored to the case by a reversal."[120]

It is apparent that under this approach if the legal theories or bases for liability asserted against the remaining defendants are at least in part the same as those governing the liability of the defendant already dismissed, the initial disposition will *not* be deemed "collateral" and hence will not merit the right to independent appeal.[121] Thus, where the liability of the remaining defendant arises from the conduct of the defendant who has secured the initial dismissal, or where the statutes on which liability of the remaining defendant will turn are the same as those governing the liability of the dismissed party, the initial adjudication did not pertain to "a collateral matter, separate and distinct from the general subject of the litigation."[122]

Judgments on Some Claims or Defenses in Multi-claim Litigation. Over 90 years ago the Supreme Court held that where two causes of action are heard together and one of them is dismissed and the other continued, the decree is final as to the one dismissed, and unless an appeal is taken within the normal time period provided by statute, the right of appeal is lost.[123] Another phrasing of this concept in the early years of the century held that a judgment in an action is final for appeal purposes when it is a determination of the particular action or suit, although it is not a final determination of the right of the parties.[124] Given the recent explanation of case law in *Leggett*, however, it appears that these holdings will be interpreted to apply only where the theories of liability are wholly distinct.

Note, however, that in *Leggett* the trial court had also expressly stated that its jurisdiction as to Count III was continued.[125] The Supreme Court held that in "the absence of a special statutory provision to the contrary, the jurisdiction of the trial court must cease before the jurisdiction of the appellate court accrues.[126] And the Court broadly suggested that

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120 Id. at 134, 439 S.E.2d at 352, quoting *Wells*, 207 Va. at 629, 151 S.E.2d at 432-33 (emphasis omitted) (citation omitted).

121 As summarized in *Leggett*, 247 Va. at 134 , 439 S.E.2d at 352 , in *Wells v. Whitaker* "it was claimed that an order dismissing one of several defendants was final at the time it was entered. In that case, a defendant, H.B. Whitaker, was dismissed when the trial court held that he was not a joint venturer with H.W. Whitaker, another defendant who remained in the case. However, we held that the order was not final, because, 'should plaintiff secure a reversal on his theory that H.B. Whitaker was a joint venturer, then H.B. Whitaker might be charged with liability for the same acts or omissions which are the basis of H.W. Whitaker's liability'."

122 *Leggett*, 247 Va. at 134 , 439 S.E.2d at 352, citing *Wells v. Whitaker*, 207 Va. at 628, 151 S.E.2d at 432.

123 Smith v. Pyrites Mining & Chem. Co., 101 Va. 301, 43 S.E. 564 (1903).

124 Brown v. Carolina, C & O Ry., 116 Va. 597, 83 S.E. 981 (1914).

125 *Leggett*, 247 Va. 133, 439 S.E.2d at 351.

126 Id., citing Allison v. Wood, 104 Va. 765, 768, 52 S.E. 559, 560 (1906).

under existing law so long as a party remains in court, an order disposing of fewer than all claims against the party "can, in the nature of things, be only interlocutory."[127]

Relationship to Consolidation. Virginia has no Rule of Court on consolidation, but case law recognizes the practice, which -- anecdotally, at least -- appears to be becoming a frequent event in Virginia litigations.[128]

The court may order separate causes of action consolidated for the trial in a single proceeding to prevent multiplicity of trials where the issues and evidence are substantially the same.[129] Consolidation is intended to expedite the proceedings and diminish the expense[130] arising from unnecessary trials. While at present there is no rule or statute which embodies the power to consolidate, Rule 3:8 has been read as giving a trial court "inherent power" of consolidation

> where cases are the same nature, arise from the same act or transaction, involve same or like issues, depend substantially on the same evidence, even though it may vary in its details in fixing responsibility, and where such a trial will not prejudice the substantial rights of any party.[131]

Consolidation is now considered by most observers to be well within the trial court's discretion,[132] providing, of course, that the parties' "elementary and fundamental" due process protections are not abridged.[133]

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127 Id., quoting *Lee*, 142 Va. at 252, 128 S.E. at 527; see Dearing v. Walter, 175 Va. 555, 561, 9 S.E.2d 336, 338 (1940).

128 A search conducted September 20, 1997 limited to the decisions of the Supreme Court of Virginia for the first 8 ½ months of 1997 reveals seven (7) reported cases in which the trial court had consolidated two or more actions for most or all purposes, including trial.

129 Burks, Pleading and Practice § 259c (4th ed. Supp.). See generally Tazewell Oil Co. v. United Virginia Bank, 243 Va. 94, 109-10, 413 S.E.2d 611, 619 (1992). In 1993 the Supreme Court appears to have recognized the possibility that an action at law and a suit in equity may in appropriate circumstances be consolidated. See Metrocall of Delaware v. Continental Cellular Corp., 246 Va. 365, 437 S.E.2d 189 (1993).

130 Deeds v. Gilmer, 162 Va. 157, 258, 174 S.E.2d 37, 77 (1934) (quoting Atkinson v. Solenberger, 112 Va. 667, 670, 72 S.E. 727, 728 (1911)).

131 Clark v. Kimnach, 198 Va. 737, 745, 96 S.E.2d 780, 786-87 (1957). In ***Clark*** three causes of action arose out of a single automobile accident. The driver of the first car, Clark, sued jointly the driver, Mrs. Kimnach, and passenger of the second car, Mr. Kimnach. Subsequently, Mr. and Mrs. Kimnach filed separate actions against Clark. The court consolidated the causes of action for trial before a single jury, which awarded Mr. Kimnach a verdict against Clark. On appeal, Clark argued that the trial court abused its discretion in consolidating the actions. The Supreme Court affirmed the lower court, holding that

> [i]n matters of procedure the trial court has a wide discretion but caution should be exercised to see that a party litigant would not be prejudiced before the court orders a consolidation of cases. If the trial court is in doubt as to the advisability of a consolidated trial, no such order should be entered. These three separate actions which arose out of the same accident presented the same basic issues and involved the same evidence and parties. No difficult, unusual or novel issues were involved and separate trials would have consumed more time and incurred additional expense.

Id. at 744-45. See also the adherence to the approach of *Clark* in Leech v. Beasley, 203 Va. 955, 962, 128 S.E.2d 293, 298 (1962).

132 Sergio's Pizza v. Soncini, 1 Va. App. 370, 373, 339 S.E.2d 204, 206 (1986).

133 Crystal Oil Co., Inc. v. Dotson, 12 Va. App. 1014, 1017, 408 S.E.2d 252, 254 (1991). See also Sergio's Pizza, 1 Va. App. at 373, 339 S.E.2d at 206.

There are, in addition, statutes in Title 8.01 of the Code inviting a party to join claims of disparate nature in a single litigation.[134]

It would appear that *to the extent that consolidation or joinder of disparate claims becomes more regularly a feature of Virginia litigation, the need increases for mechanisms to allow appeal of separable parts of such litigations after each is decided.* At present, without a rule specifying the effect of consolidation, with no provision for partial final judgments in complex cases, and especially under *Leggett*, matters that are at any point joined in one fashion or another will likely remain unappealable until all of the issues in all other collected claims are also finally determined. This may disadvantage parties involuntarily subjected to a consolidation, or parties joined in the litigation under a narrow aspect of the case.

Recommendation. In light of these considerations, the Committee concluded that it would be appropriate for the Legislature to empower Virginia trial judges to direct the entry of a partial final judgment in cases where a distinct branch of the litigation has been resolved and there is no reason to delay the entry of a final judgment. Based on the success of the following wording found in many jurisdictions, language along these lines is recommended:

> Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The Committee suggests that the General Assembly create a statutory provision along these lines in Virginia, recognizing that it empowers, but does not require, a trial judge to direct entry of a partial final judgment where the case makes it appropriate to consider certain claims, or the rights of plaintiff as against certain of the defendants, as being finally decided.

B. Interlocutory Appeal by Petition

Uncertain Law, Avoiding Wasted Time and Effort. As noted above in Part III of this Report, in federal practice a system exists for requesting interlocutory appellate review by requesting leave from both the trial judge and the court of appeals to have a non-final matter reviewed. The statute governing such proceedings is 28 U.S.C. § 1292(b). Under this

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134 See Code § 8.01-272, which allows a party to join claims but also gives the court discretion to order a separate trial for any claim. See also § 8.01-281(B) which restates the court's power to order separate trials upon the motion of any party, but also requires the court to order a separate trial of a third party claim brought by a defendant alleging that the third party defendant's negligence in the operation of a motor vehicle was the cause of the damage to the plaintiff's person or property, when the plaintiff requests a separate trial by motion five days in advance of trial.

federal remedy, the grounds for interlocutory appeal are limited to a showing that there is substantial ground for difference of opinion on the validity of a trial court ruling, and that immediate appeal may shorten the litigation.

Virginia Mass Claims Act Provision. In 1995 the General Assembly passed the Multiple Claimant Litigation Act, applicable where there are actions brought on behalf of six or more plaintiffs arising out of the same event or transaction. Acts, 1995 c. 555. Codified at §§ 8.01-267.1 through . 9, the multiple claims act contains an express provision permitting interlocutory appeal of non-final orders issued in connection with such proceedings. This statute provides for interlocutory appellate review of non-final rulings in multiple claim cases where the twin standards found in federal § 1292(b) are met:

> **§ 8.01-267.8. Interlocutory appeal**
>
> A. The Supreme Court or the Court of Appeals, in its discretion, may permit an appeal to be taken from an order of a circuit court although the order is not a final order where the circuit court has ordered a consolidated trial of claims joined or consolidated pursuant to this chapter.
>
> B. The Supreme Court or the Court of Appeals, in its discretion, may permit an appeal to be taken from any other order of a circuit court in an action combined pursuant to this chapter although the order is not a final order provided the written order of the circuit court states that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.
>
> C. Application for an appeal pursuant to this section shall be made within ten days after the entry of the order and shall not stay proceedings in the circuit court unless the circuit court or the appellate court shall so order.

Under this provision of the Multiple Claimant Litigation statute, the Supreme Court or the Court of Appeals may permit an appeal to be taken from an otherwise non-final order of a circuit court directing a consolidated trial of claims joined or consolidated pursuant to this chapter.[135] The Supreme Court or the Court of Appeals may allow an appeal from any other order of a circuit court, provided the written order involves a controlling question of law as to which there is substantial ground for difference of opinion and where an immediate appeal from the order may materially advance the ultimate termination of the litigation.[136] The advisory groups were of the view that if a large number of cases turn upon a crucial ruling, appellate review should be available.[137] Application for appeal must be made within ten days after the entry of the order and will not stay proceedings in the circuit court unless so

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135 Code § 8.01-267.8 (A).

136 Id. at subsection (B). Counsel experienced in federal litigation will recognize this as a version of the standard employed in 28 U.S.C. § 1292(b) for obtaining mid-stream appellate review of otherwise nonfinal decisions.

137 Boyd Graves Conference, *Report of Committee on Mass Claims Litigation*, October 11, 1993.

ordered.[138]

To date, the Supreme Court has not issued a reported decision under this provision of the Multiple Claimant Litigation Act and we do not believe that any applications have been made for interlocutory review pursuant to this provision.

Broader application. Dealing with new legal issues, and avoiding a bottleneck in multiple pending cases by getting early appellate guidance, are examples of common bases for interlocutory appeal in other states as well. See Part IV of this Report (sampling interlocutory appeal decisions in many jurisdictions). The Committee believes that at a minimum such provisions should be available in Virginia for other subject matters and situations than six or more related claims, and further has concluded that a *broader* permission for discretionary appeal applications -- found in several states' law -- is also advisable.

Because the legislative intent of the narrow federal discretionary appeal provision is limited to the promotion of efficiency by avoiding the time and expense of unnecessary litigation, it has been held that under this federal statute the courts need not be concerned with "considerations of hardship or injustice."[139] Other jurisdictions, however, recognize such considerations and other similar concerns of which an appellate court might take cognizance in agreeing to allow appeal of a non-final decision in a given case.

Mandamus Relief is Rare and Not Suited to Many Situations. Before considering recommendation of a new route of applying for leave to appeal, the Committee considered whether the extraordinary writ of mandamus in Virginia provided procedural protections for the sorts of cases in which other jurisdictions allow interlocutory appeals. We concluded that it clearly does not.

Writs of mandamus are rarely awarded in Virginia when a party argues that the decision of a trial judge is erroneous, or even catastrophic for a party. This reflects traditional uses of the writ, and suggests that the problems toward which mandamus relief is directed will often be quite different from the sorts of situations where interlocutory appeal is an appropriate remedy.

The Writ of Mandamus lies within the original jurisdiction of the Supreme Court, Virginia Constitution, Art. VI, section 1, and may be issued by the Court of Appeals as well. However, in Virginia, mandamus is not available to review discretionary rulings.[140] Only where the trial court is violating a rule or statute that is clear and unequivocal will the writ be available.[141] The writ is unlikely to be available, therefore, for review of most pretrial rulings, which commonly involve exercises of discretion.

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138 Id. at subsection (C).

139 Randall J. Turk, Note, *Toward a More Rational Final Judgment Rule*, 67 Geo. L. J. 1025, 1028 (1979) (proposal to amend 28 U.S.C. § 1292).

140 See Funeral Directors' Assn. v. Groth, 202 Va. 792, 797, 120 S.E.2d 467, 471 (1961) (mandamus will not issue to control the *manner* in which discretion is exercised).

141 Richlands Medical Assoc. v. Commonwealth, 230 Va. 384, 386, 337 S.E.2d 737, 739 (1985). Compare, In re: Commonwealth of Virginia, 229 Va. 159, 160-61, 326 S.E.2d 695, 969 (1985) (mandamus used to review whether trial judge could withhold stage of criminal case under governing enactments).

Mandamus is also not available to cure past mistakes of the trial court, but only to address future impact of dispositions in the trial courts.[142] The writ will also not be granted where it is in any sense a substitute for appeal, or an attempt to litigate issues that may be heard on appeal later.[143]

Thus, Virginia's approach when considering mandamus is cautious at most,[144] and the writ will be issued only when the urgency of the situation below is considered, the interests of the public and third persons, and the results of failure to grant the writ.[145] The writ will not be issued in situations where the correct procedure is doubtful, but only where the proper outcome is "clear and certain and where there is no other available specific and adequate remedy".[146] And the existence of fact issues, or complicated facts, will preclude issuance of a writ of mandamus.[147]

The result, confirmed in discussions with David Beach, Clerk of the Supreme Court, is that almost all mandamus applications presented to the Supreme Court are denied. For example, in May, 1997, a trial judge's ruling barring all proof by a defendant accounting firm at an upcoming trial based on an interpretation of a discovery rule that had never been addressed in Virginia practice, was not sufficient to obtain mandamus review.[148]

Thus the Committee concluded that mandamus is not a sufficient safety valve as to obviate the need for a means of petitioning for leave to take an interlocutory appeal.

● **General Provision for Appeal by Leave of Court**. In 1977, the ABA proposed an alternative to the traditional final judgment rule in § 3.12 of the "Standards for Appellate Courts."[149] The commentary to § 3.12 noted the inconsistencies in the application of the final judgment rule in many jurisdictions.[150] Rather than create highly specific exceptions to the final judgment rule, which might be underinclusive or overinclusive, the ABA's Standards for Appellate Courts recommended adherence to the final judgment rule while allowing for appellate review of interlocutory *orders of any kind at the discretion of the appellate court*.

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142 Board of Supervisors v. Combs, 160 Va. 487, 498, 169 S.E. 589, 593 (1933); Thurston v. Hudgins, 93 Va. 780, 784, 20 S.E. 966, 968 (1895). Compare, In re: Worrell Enterprises, 14 Va. App. 671, 675, 419 S.E.2d 271, 274 (Ct. App. 1992) (mandamus proper remedy to review trial court order limiting who may attend a trial).

143 See Moon's Administrator v. Wellford, 94 Va. 34, 4 S.E. 572 (1887).

144 E.g., Richmond-Greyhound Lines v. Davis, 200 Va. 147-151-52, 104 S.E.2d 813, 816 (1958).

145 Id.

146 Id. See also Davis v. Sexton, 211 Va. 410, 412-13, 177 S.E.2d 524, 526 (1970) (mandamus granted directing trial judge to allow attorney to participate in pending trial in circuit court).

147 R.F.&P. Railroad Co. v. Fugate, 206 Va. 159, 142 S.E.2d 546 (1965).

148 Ashley v. Coopers & Librand, Albemarle Circuit Court, records on file with the Committee's staff.

149 The Standards for the Appellate Courts were updated in 1994, but no changes were made to the provisions of § 3.12; Section 3.12 provides:

"(a) Final Judgement. Appellate review ordinarily should be available only upon the rendition of final judgement in the court from which appeal or application for review is taken. (b) Interlocutory Review. Orders other than final judgments disposing of all claims ordinarily should be subject to immediate appellate review only at the discretion of the reviewing court where it determines that resolution of the question of law on which the order is based will: (i) materially advance the termination of the litigation or clarify further proceedings; (ii) Protect a party from substantial and irreparable injury; or (iii) Clarify an issue of general public importance in the administration of justice."

150 ABA, Standards of Judicial Administration Volume III: Standards Relating to Appellate Courts (1994) at 31-32.

Review of an interlocutory order would be granted if the appellate court determined that immediate appellate review would "[m]aterially advance the termination of the litigation or clarify further proceedings, [p]rotect a party from substantial and irreparable injury, or [c]larify an issue of general public importance in the administration of justice."[151] The ABA proposal is flexible enough to capture the spirit behind many of the current exceptions to the final judgment rule, but is designed to exclude superfluous interlocutory appeals which might otherwise go forward.

Several states have adopted the ABA appellate standards insofar as interlocutory appealability is concerned. Prime among these states is Wisconsin. The Wisconsin Rules 808.03(2) provides:

> A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:
> (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;
> (b) Protect the petitioner from substantial or irreparable injury; or
> (c) Clarify an issue of general importance in the administration of justice.

Other States which have adopted, in some form, the ABA's recommended leave-to-appeal approach include New Hampshire, Tennessee,[152] and Alaska.[153] See also additional states'

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151 Standards Relating to the Appellate Courts, § 3.12.

152 Tennessee Rule of Appellate Procedure 9(a) provides:

"Except as provided in rule 10, an appeal by permission may be taken from an interlocutory order of a trial court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals only upon application and in the discretion of the trial and appellate court. In determining 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 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. Failure to seek or obtain interlocutory review shall not limit the scope of review upon an appeal as of right from entry of the final judgment."

153 Alaska Rule 402(b) provides:

"Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed because:
(1) Postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors; or
(2) The order or decision involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order or decision may materially advance the ultimate termination of the litigation, or may advance an important public interest which might be compromised if the petition is not granted; or
(3) The trial court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for the appellate court's power of supervision and review; or
(4) The issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest."

systems for similar relief noted in Appendix 1 to this Report, and set forth in Appendix 5.

Exhibit 5 to the present Report includes reprints of several state statutes and rules which embody some of the principles set forth in this Virginia statute and apply them more broadly to other circumstances. Thus, while some states have such a rule only for appeal of pre-final rulings in specific categories of litigation, such as class actions,[154] other states have such provisions available in all subject matters, subject only the discretionary judgment of the reviewing court that it would serve the interests of justice to permit a prompt appeal in order to resolve a controlling legal question.[155]

Two recommendations. The Committee's recommendation to the General Assembly is two-fold. *First*, we believe that there should be an avenue for discretionary petition for interlocutory appeal in any case, not limited to six or more claimants and not necessarily falling into a prescribed listing of subject matters for rulings. Beyond the minimum tests of § 1292(b), there are several criteria evident in the formulations of similar rules in other jurisdictions, which we believe the Legislature could adapt to fashion suggestions for the exercise of this discretion in Virginia under a statutory authorization for petitions for interlocutory appeal. Some of these criteria include: (1) the need to avoid irreparable injury,[156] (2) the need to prevent needless, expensive or protracted litigation,[157] (3) the need to develop a uniform body of law,[158] (4) whether an early ruling will likely lead to settlement of the entire litigation,[159] (5) whether it would simplify the remaining issues,[160] (6) whether a ruling would conserve judicial resources,[161] (7) whether it would affect the welfare of a child,[162] (8) whether postponement of review until the time of final judgment on all issues will impair a legal right, (9) or cause undue delay, hardship or expense,[163] (10) whether the matter at issue involves issues that might otherwise evade review,[164] (11) whether the trial court has so far departed from the accepted and usual course of proceedings that appellate court supervision is appropriate,[165] and (12) where the public interest would be served by immediate appeal,[166] or the interlocutory appeal "presents the opportunity to decide, modify

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154 See Oregon Revised Statutes § 19.015, set forth in Exhibit 5 to the present report at p. 35.

155 E.g., Alabama's Appellate Rule 5, Exhibit 5 to the present report, p. 1.

156 Tennessee Rule of Appellate Procedure 9(a).

157 Tennessee Rule of Appellate Procedure 9(a).

158 Tennessee Rule of Appellate Procedure 9(a).

159 California Rule of Court 1269.5(c).

160 Id.

161 Id.

162 Id.

163 Alaska Rule 402(b).

164 Id. See also Vermont Rule of Appellate Procedure 5.1 to the same effect.

165 Id.

166 Id.

or clarify an issue of general importance in the administration of justice."[167]

Other states simply provide for a petition for a writ of review, and leave the selection of circumstances warranting such action to the appellate court,[168] or leave it to the parties to identify the justification for departure from the norm of awaiting final judgment by setting forth a "statement of the reasons why an immediate interlocutory appeal should be permitted, including a concise analysis of the statutes, rules or cases believed to be determinative of the issues stated."[169] The Utah rule, for example, authorizes the appellate court to grant hearing to an interlocutory appeal if it determines that the matter "involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice."[170] Several states allow appeal where the ruling involves "substantial issues"[171] or "[a]ffects a substantial right".[172]

To head off efforts to appeal denials of summary judgment, some states bar efforts to obtain interlocutory review of summary judgment rulings.[173] We also note that some states go further, and make provisions for the scope of proceedings before the trial court while an interlocutory appeal is pending.[174]

Second, we recommend that the procedural steps in an interlocutory appeal by permission should require an *attempt* to obtain endorsement of the need for interlocutory appeal from the trial judge, followed by an application to the appellate court for leave to appeal. Thus there should be a two-step application process. The better system, however, does not give the trial judge a "veto," but allows a party who has exhausted efforts to have the trial judge approve an application for interlocutory appeal to make application to the appellate court in any event. In that way, the appellate court can be aided by the trial judge's approval in cases where the lower court recognizes an uncertain rule of law that would benefit from appellate guidance, and the appellate court can similarly consider the trial judge's refusal to support an interlocutory appeal when the case is presented without trial judge agreement in an application at the second stage, to the appellate court.

We believe that there are several advantages to a system which requires a party who wishes to attempt to pursue an interlocutory appeal to first present the matter to the trial judge. For example, that exercise itself may provide information needed by the trial judge in ruling on controlling matters and setting schedules for proceedings in the case. It also

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167 New Hampshire Supreme Court Rule 8(1). See also Mississippi Rule of Appellate Procedure 5(a) to the same effect.

168 See, e.g., Wyoming Rule of Appellate Procedure 13.01, which simply provides that "All applications to the supreme court for interlocutory or extraordinary relief from orders of the district courts . . . may be made as petitions for a writ of review. Granting of a petition is within the discretion of the supreme court."

169 Utah Rules of Appellate Procedure, Rule 5(c)(1)(C).

170 Utah Rule of Appellate Procedure Rule 5(e).

171 See, e.g., Delaware Supreme Court Rule 42(b).

172 North Carolina Gen. Stat. §7A-27(d).

173 See Oklahoma Sup. Ct. Rule 1.50 (second paragraph), set forth in Appendix 5 to this Report.

174 See, e.g., Texas Rule of Appellate Procedure 43, set forth in Appendix 5 to this Report.

allows the trial judge to join a party in supporting appellate review in those cases where the trial judge recognizes that it would be beneficial to obtain an early analysis of certain issues by the appellate court. However, we do not think that it would be sensible limit petitions for leave to make an interlocutory appeal to those cases where the trial judge agrees. That approach would provide no protection in situations where the trial judge has seriously misconstrued governing law yet does not recognize the chance that another reading could be correct. While it seems likely that the appellate court would look more strictly at applications for leave to appeal where the trial judge has declined to endorse the prospect, there does not seem to be reason to tie the hands of the appellate court such that it lacks jurisdiction to hear an appeal simply because a trial judge does not want the matter reviewed. In those cases where the appellate court considers the matter of sufficient importance or urgency to merit interlocutory review, the power to grant such a hearing despite the absence of trial judge support for such review seems appropriate.

Safety of the proposals. The Committee's study of discretionary petitions for appeal has revealed no basis for concern that the process would unduly burden appellate courts in Virginia. The main reason for this conclusion is that the decision to grant an appeal in an unusual case is wholly discretionary. And, as in the federal system, for example, a Court of Appeals can refuse to hear an appeal under the discretionary petition provisions of § 1292(b) "for any reason, including docket congestion."[175]

Moreover, the Committee collected information from a number of states which have versions of a discretionary appeal by petition system, and none of the states reported a significant volume of applications or appeals arising from the authorization of such a procedure. Most states show a very low number of requests to utilize of the procedure, and a low frequency in granting of such discretionary appeals.

In preparing the present Report, the Committee wrote to over 20 jurisdictions that have discretionary interlocutory provisions by statute or court rule. Many of these states responded with snapshot data addressing the issue of the volume of such attempts to obtain appellate review before final judgment.

In broad summary, none of the several responding states reported any difficulties with the interlocutory appeal system, and none reported significant volume of such appeals. The pertinent information voluntarily reported by these states to aid our study included the following:

Alabama

Alabama grants only a fraction of the requests for leave to appeal an interlocutory order, and the number of applications has declined in recent years:

YEAR	APPLICATIONS	GRANTED
1992	40	2
1993	41	11
1994	39	10
1995	37	9
1996	26	6

175 Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978).

Delaware

The Court Administrator reported that the court does not compile statistics on its use of the discretionary power to hear interlocutory appeals in civil cases, but estimates that there are 20 to 30 applications filed each year, and that the court accepts 40% of the applications. This would be 8 to 12 interlocutory appeals, for a court which reports that it has a total of 540 appeals filed on an annual basis.

District of Columbia Court of Appeals

The Court of Appeals in the District of Columbia reported to the Committee that it receives 20 to 30 "mandatory" interlocutory appeals each year under the code provisions comparable to Virginia's interlocutory appeal statute (e.g., injunction orders).

The District of Columbia also has a system allowing discretionary appeals modeled on Federal Code § 1292(b), in which the trial judge must states that it is his opinion that there is a controlling issue of law on which there is substantial ground for a difference of opinion and the resolution of which may materially advance the ultimate termination of the case. In the last five year the number of such applications has been as follows:

1992 = 0 1993= 3 1994=4 1995=2 1996=0

Oregon

Oregon has allows interlocutory appeal on partial final judgments (akin to Federal Rule 54(b)), and has statutes authorizing appeals in injunction cases. There is also a class action statute which permits a trial judge to certify controlling legal issues for early adjudication by the appellate cases. The court reported that it receives only one or two appeals each year in these categories, such that mandamus and habeas corpus applications dwarf the interlocutory appeal experience. Mandamus standards must be more forgiving in Oregon than in most states, because the volume of mandamus applications in recent years has been high:

YEAR	MANDAMUS APPLICATIONS
1990	77
1991	73
1992	88
1993	58
1994	86
1995	55
1996	99

An Oregon staff attorney wrote to advise that the Oregon legislature considered expansion of the interlocutory appeal routes in Oregon at the 1997 session but dropped the proposal when substantial opposition arose (from which quarters is unknown).

Vermont

Interlocutory appeals:

	1990	1991	1992	1993	1994	1995	1996
Total applications	28	46	49	55	59	54	48
Denied	20	30	31	35	27	35	23
Granted	8	16	18	20	22	19	25

Wisconsin

Wisconsin allows petitions for interlocutory appeal. While "regular" appeals have increased from 3,187 in 1992 to 3,629 in 1996, the petitions for interlocutory appeal do not show a trend toward increasing. The volume, however, is approximately 10% of the regular appellate volume.

YEAR	APPLICATIONS	GRANTED
1992	319	93
1993	337	78
1994	331	91
1995	370	126
1996	319	71

Another study concluded that recent statistical data concerning Wisconsin reveals for a three year period from 1988 to 1990 between 21.9% and 35% of applications for discretionary appellate review annually were granted.[176]

C. Appeal of Domestic Relations Support Orders Pendente Lite

The Committee has reviewed the legislative drafting file maintained by the Division of Legislative Services pertaining to the study resolution on interlocutory appeals. The inquiry which led to the resolution[177] was a letter from a Virginia attorney recounting the following circumstances:

> In a recent divorce case, a judge awarded against my client a pendente lite award that exceeded twice his monthly income. Assuming, arguendo, that there was no evidence introduced to support the Judge's belief that my client had the wherewithal to pay the judgment, we have a wrong without a remedy. The final divorce hearing is 13 months into the future, and a writ of prohibition and a writ of mandamus are virtually impossible to obtain.

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176 Martineau, *Defining Finality*, 54 U.Pitt. L. Rev. at 782-83.

177 Letter on file with the Committee.

The Committee discussed the review of such support awards with personnel of the Court of Appeals and learned that several times each year parties attempt to obtain review of pendente lite support awards. It appears that under present law such relief may, or may not, be available. That is, in two decisions issued the same day and issued by the same judge, the Court of Appeals allowed one appeal to review a support award and denied the other, both upon constructions of the doctrine that appeal will lie only for decisions determining the principles of a cause. Judge (later Chief Judge) Moon authored both opinions.

The Court held in Pinkard v. Pinkard, 12 Va. App. 848, 407 S.E.2d 339 (1991) that an attempt by a self-proclaimed "house husband" to appeal a trial court order setting pendente lite support of $ 750 per month on grounds of inadequacy "is not an appeal from a "final order" or from an order "granting, dissolving or denying an injunction" or "adjudicating the principles of a cause." Id. at 850, 407 S.E.2d at 340, citing Code § 17-116.05.

The Court of Appeals noted in Pinkard that the Supreme Court had held 90 years earlier in construing the "principles of a cause" statute governing its own jurisdiction that an award of pendente lite support in a suit between parties is an interlocutory order that does not adjudicate the principles of a cause and is therefore not appealable. Beatty v. Beatty, 105 Va. 213, 53 S.E. 2 (1906).

In the other decision rendered on the same day in 1991, the Court held in Weizenbaum v. Weizenbaum, 12 Va. App. 899, 407 S.E.2d 37 (1991), that the statutory scheme for spousal support does not permit the court to make a partial award, and it accordingly reversed the trial court's order granting "partial lump sum" alimony in the amount of $ 150,000. In ruling on the appealability of the partial lump sum award, the Court commented that: "It is difficult, if not impossible, to define exactly what is meant by adjudicating the principles of the cause in such a way as fit every case; but it must mean that the rules or methods by which the rights of the parties are to be finally worked out have been so far determined that it is only necessary to apply these rules or methods to the facts of the case in order to ascertain the relative rights of the parties with regard to the subject matter of the suit."

Explaining why the lump sum award was appealable, the Court expressed the view that it was an enforceable lien:

> Appellant has a judgment of $ 150,000 against him, which is a lien upon his property. Under the terms of the decree, if appellant does not now appeal, appellee may seek to execute the judgment and appellant will have no recourse against execution. The action of the trial court created a serious, permanent consequence that cannot be remedied by waiting until a final order is entered in the case. Further orders may be based upon this decision. We hold that, under the circumstances, the order is appealable as one that adjudicates the principles of a cause. . . . Therefore, on these facts, we may adjudicate the merits of the appeal.

In a footnote, the Court observed that in 1990 the General Assembly amended Code § 17-116.05 dealing with jurisdiction of the Court of Appeals and added appeals from a money judgment to the list of authorized categories of appeal. However, the governor vetoed that section and the Legislature did not reinstate it.

Thus, if the appellate court is willing to treat a support award as an adjudication of the "principles of a cause" it can hear the appeal. However, trial court orders merely setting monthly pendente lite awards, the exact subject of the inquiry which led the General

Assembly to call for the study resolution on interlocutory appeal in 1997, could not after Pinkard be construed as adjudicating the principles of a cause.

Pendente lite awards are numerous, can involve substantial sums, and in an economic sense are final once accrued. The Committee does not believe that such awards should be routinely appealable. The Committee does believe, however, that a mechanism should be available (i) to correct egregious decisions and (ii) to permit the Court of Appeals to provide guidance to the lower courts. While it may be necessary to entertain such appeals only rarely, discussions with personnel of the Court of Appeals suggest that such authority would be beneficial. To that end, statutory provision for such appeals should be made.

Such a change could not be accomplished simply by inserting reference to pendente lite support awards in the existing text of Code § 17-116.05 without rendering all such awards appealable as a matter of right.[178] Instead, a separate provision authorizing the Court of Appeals to exercise discretionary review over interlocutory support awards could be created, or a new subsection (5) of Code § 17-116.05 could be added to embody discretionary review of such orders, along these lines:

> Any aggrieved party may appeal to the Court of Appeals from:
> * * * *
>
> (5) Any interlocutory order relating to support pendente lite that does not adjudicate the principles of a cause, *provided however* that the Court of Appeals shall not hear the appeal unless it determines (i) that matters of significant precedential value are raised, or (ii) that immediate review will advance the termination of the litigation or clarify important legal issues for the parties or the public, or (iii) that failure to allow appeal of the interlocutory order or decree would work an unreasonable hardship on a party.

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178 This concern may explain the Governor's veto of the 1990 legislation mentioned in the text and referred to by the Court of Appeals in Pinkard. The effect of that legislation would have been to make Code § 17-116.05 read like 8.01-670, which authorizes the Supreme Court to hear appeals from interlocutory decrees and orders in chancery proceedings which involve (1) injunctions, (2) require money to be paid or title to property to be changed, and (3) adjudicating the principles of a cause. At present, Code § 17-116.05 does not contain the provision authorizing interlocutory appeals of rulings requiring payment of money or changing title to property.

The Virginia Bar Association appreciates the opportunity to review these issues and to prepare this report for consideration by the General Assembly and interested members of the Bar. The Judiciary Committee would welcome the chance to pursue these matters further if additional information or study of other alternatives is desired.

December, 1997

The Virginia Bar Association
JUDICIARY COMMITTEE

Appendices

Exhibit

1. *Leggett v. Caudill*, 247 Va. 130, 439 S.E.2d 350 (1994).

2. John C. Nagel, *Note: Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 Duke L.J. 200 (1994) (a survey of federal and state interlocutory appeal practices).

3. Robert Stern, Appellate Practice in the United States, 77-101 (2d ed. 1989) (multistate survey).

4. ABA, Standards of Judicial Administration Vol. III: Standards Relating to Appellate Courts at 30-36 (1994).

5. Preliminary Survey of State Statutes and Rules on Discretionary Appeals and Partial Final Judgments, May 1997.

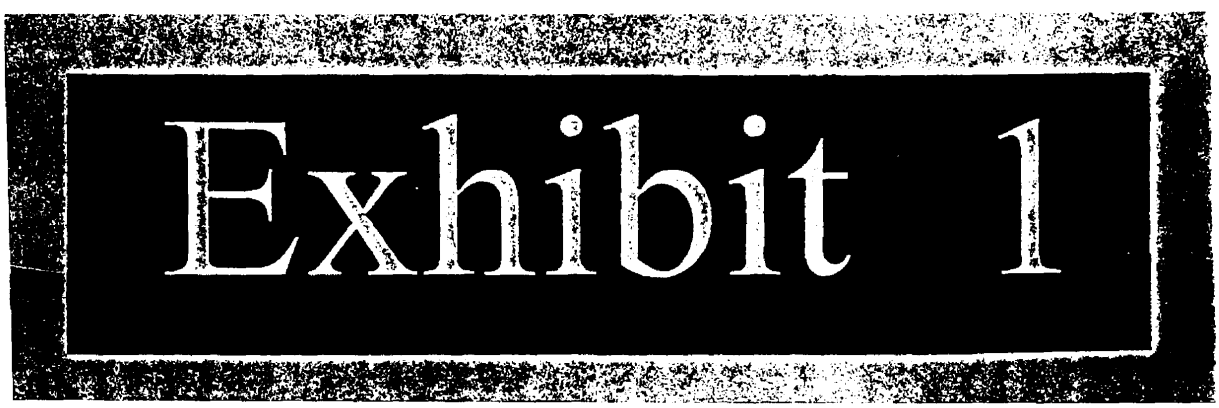
Exhibit 1

Gloria J. LEGGETT
v.
Earl M. CAUDILL, et al.

Record No. 921974.

Supreme Court of Virginia.

Jan. 7, 1994.

Former associate minister brought action alleging intentional infliction of emotional distress against supervisor and church, breach of employment agreement against church, and negligence against organization which authorized ordination of ministers. The Circuit Court, Fairfax County, Jack B. Stevens, J., dismissed intentional infliction of emotional distress claim, and employee appealed. The Supreme Court, Keenan, J., held that order was interlocutory as to both church and minister.

Appeal dismissed.

[1] APPEAL AND ERROR ⇐ 80(6)
30k80(6)
Order dismissing former employee's intentional infliction of emotional distress claim against employer and supervisor was interlocutory as it pertained to employer; constructive discharge claim remained pending against employer and trial court expressly stated in order that its jurisdiction as to discharge claim was continued.

[2] APPEAL AND ERROR ⇐ 80(6)
30k80(6)
Order dismissing former employee's intentional infliction of emotional distress claim against employer and supervisor was interlocutory as it pertained to supervisor, even though no claims remained pending against supervisor; claims remained pending against employer, issue on appeal from order was not collateral as it was same issue involved in pending claims, and, as all allegations against employer derived from supervisor's alleged actions, interests of defendants were joint and not severable.

**350 *131 Thomas G. Haskins, Richmond, (Sinnott, Nuckols & Logan, on briefs), for appellant.

Stephen A. Horvath, Fairfax, (Melissa S. Hogue, Burke, Lewis, Trichilo, Bancroft & McGavin, on brief), for appellees.

*130 Present: CARRICO, C.J., COMPTON, STEPHENSON, WHITING, LACY and KEENAN, JJ., and POFF, Senior Justice.

*131 KEENAN, Justice.

The dispositive issue in this appeal is whether the order appealed from is a "final judgment" or "other appealable order or decree," within the meaning of Code § 8.01-670(A)(3) and Rule 5:9(a).

Gloria J. Leggett appeals from the trial court's order sustaining a demurrer to Count I of her motion for judgment and dismissing that count with prejudice. The trial court sustained the defendants' demurrer, ruling that the Virginia Workers' Compensation Act (the Act), Code §§ 65.2-100 to -1310, provided the exclusive remedy for the allegations contained in Count I of Leggett's motion for judgment. The trial court's order dismissing Count I was entered on October 7, 1992, and on October 15, 1992, Leggett noted her appeal from this order.

After further considering demurrers to the remaining Counts II and III, the trial court dismissed those counts in November 1992 in two additional orders. The last order in the case was entered November 25, 1992. Leggett did not file a notice of appeal from either of the two November orders.

Leggett's motion for judgment named as defendants Earl M. Caudill, an ordained minister of the Christian Church (Disciples of Christ), the Official Board and Congregation of Springfield Christian Church (Disciples of Christ), and the Christian Church--Capital Area (Disciples of Christ). Caudill was senior pastor of the Springfield *132 Christian Church (the Springfield Church). Leggett alleged that, beginning in September 1990, and continuing during the period when she worked as associate minister for the

Springfield Church, Caudill engaged in outrageous and wrongful conduct that caused her "to suffer humiliation, embarrassment, extreme mental and emotional anguish and distress."

**351 Leggett further alleged that she voiced her concerns regarding Caudill's conduct to members of the Springfield Church's Official Board on several occasions and attempted to reconcile her differences with Caudill. Unable to resolve her difficulties, she submitted her resignation to the Springfield Church. Thereafter, the Springfield Church formed a committee to investigate the circumstances leading to Leggett's resignation and, in November 1991, released a report that failed to recommend any action against Caudill.

In April 1992, Leggett filed a formal request with the Christian Church-- Capital Area (the Capital Area Church), an office of the Disciples of Christ that authorizes the ordination and certifies the standing of ministers in the geographical area where the Springfield Church is located. In her request, Leggett sought an investigation of Caudill's fitness for the ministry. After investigating Leggett's charges, the Capital Area Church advised Leggett that it would not withdraw or suspend Caudill's standing as a minister.

In Count I of her motion for judgment, Leggett sought damages from Caudill and the Springfield Church, alleging that Caudill's conduct caused her emotional distress, and that the Springfield Church knew, or should have known, that Caudill's conduct was causing her to suffer emotional distress. In Count II, Leggett alleged that the Capital Area Church negligently failed to investigate Caudill's fitness for the ministry prior to 1992 and negligently failed to respond to Leggett's request for assistance. In Count III, she alleged that the Springfield Church wrongfully breached its written employment agreement with her by "constructively discharging" her.

After the trial court sustained the demurrer to Count I against Caudill and the Springfield Church, Leggett brought this appeal, arguing that the injury she alleges in Count I is not covered by the Act. Caudill and the Springfield Church argue that the appeal should be dismissed. They contend that the order of October 7, 1992, was not final but interlocutory, and thus the notice of appeal filed October 15, 1992, was premature. They further argue that, although Leggett could have appealed the trial court's dismissal of Count I after a final order had been entered by the trial court on November 25, 1992, by filing a notice of appeal, she did not do so within 30 days after entry of that order, as required by Rule 5:9(a).

*133 [1] Initially, we hold that, as it pertained to the Springfield Church, the order of October 7, 1992, was interlocutory in nature, not final. A final order is one that "terminates the suit or definitely determines the rights of the parties, and leaves nothing further to be done by the court in the cause, though it may still enter such decrees and orders as may be necessary to carry the decree into execution." Lee v. Lee, 142 Va. 244, 250, 128 S.E. 524, 526 (1925). In contrast, the October 7, 1992 order left something further to be done as to the Springfield Church, because Count III remained pending against it.

In addition, the trial court expressly stated in the October 7, 1992 order that its jurisdiction as to Count III was continued. In the absence of a special statutory provision to the contrary, the jurisdiction of the trial court must cease before the jurisdiction of the appellate court accrues. Allison v. Wood, 104 Va. 765, 768, 52 S.E. 559, 560 (1906). Further, as this Court stated in Lee, "[a]s to any party remaining in the court, [an order] can, in the nature of things, be only interlocutory." Lee, 142 Va. at 252, 128 S.E. at 527; see Dearing v. Walter, 175 Va. 555, 561, 9 S.E.2d 336, 338 (1940).

[2] We also hold that the appeal of Count I was premature as to Caudill. Although, as a result of this order, Caudill ceased to be a party defendant to the action, this Court has held that "in the absence of a statutory provision to the contrary, a judgment is not final for purposes of appeal if it is rendered with regard to some but not all of the parties

involved in the case." Wells v. Whitaker, 207 Va. 616, 628, 151 S.E.2d 422, 432 (1966); see also Wells v. Jackson, 17 Va. (3 Munf.) 458, 459 (1814).

This Court has recognized an exception to this general rule in Bowles v. Richmond, 147 Va. 720, 129 S.E. 489 (1925), aff'd on reh'g, 147 Va. 720, 729, 133 S.E. 593 (1926), and in Hinchey v. Ogden, 226 Va. 234, 307 S.E.2d **352 891 (1983). In Bowles, the plaintiff sued the City and a railroad for their negligent failure to safeguard an approach to a bridge. On the City's demurrer, the action of the plaintiff was dismissed as to the City, while the action remained pending as to the railroad. The demurrer was based on the ground that the plaintiff had not given written notice to the City Attorney, as required by the City Charter. Bowles, 147 Va. at 723-24, 129 S.E. at 489.

This Court held that the order sustaining the demurrer was final, because there was "no joint interest between the defendants in the matters decided by the circuit court [i.e., whether plaintiff's action was barred as against the City for failure to give proper notice], nor does it relate to the merits of the case[;] therefore the judgment is final as to the city." Id. at 725, 129 S.E. at 490.

*134 Similarly, in Hinchey v. Ogden, in a negligence action against the operator of a motor vehicle, the plaintiff also sued the Superintendent of the Expressway for breach of official duty in failing to provide traffic controls sufficient to prevent drivers from entering the wrong lane of travel. The trial court sustained a motion to dismiss as to the Superintendent on the basis of sovereign immunity. This Court granted the plaintiff an appeal from that order, holding that, under Bowles, the judgment was appealable. Hinchey, 226 Va. at 236-37 and n. 1, 307 S.E.2d at 892 and n. 1.

The nature of this exception to the general rule was further explained in Wells v. Whitaker, in which this Court stated that "an adjudication final in its nature as to a collateral matter, separate and distinct from the general subject of the litigation and affecting only particular parties to the controversy, may be appealed prior to the determination of the case against all defendants." 207 Va. at 628, 151 S.E.2d at 432 (emphasis added). Thus, a judgment is final and appealable when the interests of the parties before the trial court are "severable" rather than "identical," under the following definition:

> "[The] judgment is severable when the original determination of those issues by the trial court and reflected in the judgment or any determination which could be made as a result of an appeal cannot affect the determination of the remaining issues of the suit, nor can the determination of such remaining issues affect the issues between plaintiff and the dismissed defendants if such defendants are restored to the case by a reversal."

Id. at 629, 151 S.E.2d at 432-33 (emphasis omitted) (citation omitted).

In Wells v. Whitaker, as in the present case, it was claimed that an order dismissing one of several defendants was final at the time it was entered. In that case, a defendant, H.B. Whitaker, was dismissed when the trial court held that he was not a joint venturer with H.W. Whitaker, another defendant who remained in the case. However, we held that the order was not final, because, "[s]hould plaintiff secure a reversal on his theory that H.B. Whitaker was a joint venturer, then H.B. Whitaker might be charged with liability for the same acts or omissions which are the basis of H.W. Whitaker's liability." Id. at 629, 151 S.E.2d at 433.

The facts and allegations of this case place it in the same category as Whitaker and distinguish it from Bowles and Hinchey. As in Whitaker, the interests of the defendants in this case, Caudill, the *135 Springfield Church, and the Capital Area Church, are joint and not severable. The allegations against the Churches all derive from the alleged actions of Caudill; Leggett's allegations against the Churches relate to their ratification of Caudill's conduct, their negligent failure to investigate Caudill's

fitness for the ministry and to respond to Leggett's request for assistance, and their breach of Leggett's employment contract by permitting Caudill's actions to cause her "constructive discharge."

Moreover, the bar of the Act's exclusivity provision (Code § 65.2- 307), the subject of Leggett's appeal, was the same bar that was pleaded by the other defendants and was unresolved as to them in Counts II and III when the October 7, 1992 order was entered. Thus, the trial court's adjudication of this question as to Caudill did not pertain to "a collateral matter, separate and distinct from the general subject of the litigation." Wells **353 v. Whitaker, 207 Va. at 628, 151 S.E.2d at 432.

For these reasons, we hold that the exception of Bowles and Hinchey is inapplicable, and that, pursuant to the general rule of Wells v. Jackson, the trial court's order entered October 7, 1992, dismissing some but not all of the parties involved in the case, was not an appealable order. Therefore, we dismiss this appeal as improvidently awarded.

Dismissed.

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Exhibit 2

Duke Law Journal

October 1994

Note

*200 REPLACING THE CRAZY QUILT OF INTERLOCUTORY APPEALS JURISPRUDENCE WITH DISCRETIONARY REVIEW

John C. Nagel

Crazy quilts can be useful and there are occasions when inelegance in the legal system works, but this is definitely not one of those occasions. [FN1]

INTRODUCTION

The primary gatekeeper at the door to the federal courts of appeals is the rule that only final judgments are appealable. [FN2] The final judgment rule has performed this role well, for the most part. [FN3] In certain cases, however, a trial court's error on an interlocutory issue is effectively unreviewable on appeal from a final judgment. To deal with this type of injustice, the courts and Congress have created a patchwork of exceptions to the final judgment rule.

Dissatisfaction with this patchwork is now widespread. [FN4] With *201 this consensus, and with the passage of 28 U.S.C. sections 1292(e) and 2072(c), which give the Supreme Court the power to make rules clarifying appellate jurisdiction, [FN5] the time has come to unstitch this crazy quilt so that litigants can spend more time arguing about the merits of their cases and less time arguing about when they can argue. The rulemakers should use their new power to adopt the discretionary approach recommended by the American Bar Association (ABA) and implemented in Wisconsin. [FN6] This approach eliminates the ineffective judicially created exceptions to the final judgment rule, avoids the intractable problem of creating a formula to identify ex ante all orders deserving of interlocutory review, and provides the courts of appeals with a relief valve for orders that may result in harsh consequences if appeal is delayed until a final decision. The rulemakers, Congress, and the courts should then proceed to refine this discretionary scheme by identifying classes of orders that will generally or always be allowed or denied interlocutory review.

Part I of this Note relates the current state of the law of federal circuit court jurisdiction over interlocutory appeals from the district courts. Part II examines the recent ABA recommendation for discretionary review, which has been adopted in Wisconsin, and concludes that broad discretionary review is the best way to identify orders appropriate for interlocutory review. [FN7] Part III applies the recommended discretionary standards to two recent cases, Reise v. Board of Regents of the University of Wisconsin *202 System [FN8] and Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., [FN9] and concludes that the analysis would often collapse into an evaluation of the merits of the appeal and that the standards may need refinement.

I. Appellate Jurisdiction over Interlocutory Appeals

A. The Final Judgment Rule

The final judgment rule can be traced to the writ of error at English common law. [FN10] The rule

developed because at common law an appellate court was required to consider the entire record. This requirement made appeals before a final decision problematic because it was difficult for the King's Bench and the trial court to review the record simultaneously. [FN11] Equity courts, not limited by this formality, applied a more flexible standard, allowing some appeals before a final decision. [FN12] In 1789, the United States Congress chose to adopt the common law approach to appeals as part of its basic grants of appellate jurisdiction [FN13] and the final judgment requirement remains intact, in large part, today. [FN14]

*203 Delay of appellate review until the trial court proceedings are complete has several advantages. First, many issues that a party seeks to appeal before a final decision may become moot upon the disposition of the case on the merits. [FN15] Second, piecemeal appeals threaten the independence of trial judges. [FN16] Third, the final judgment rule "avoid(s) the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." [FN17]

Despite the advantages of the final judgment rule, certain interlocutory orders are effectively unreviewable on appeal from a final decision. [FN18] A strict application of the final judgment rule can produce harsh consequences for litigants who are unable to challenge a prejudicial and erroneous pre-final order. For example, in Cohen v. Beneficial Industrial Loan Corp., the district court wrongfully refused to condition the plaintiff's continuation of his derivative suit upon his posting bond. [FN19] The right to have bond posted during trial would have been irreparably lost had the defendant been refused appeal until the trial was completed. [FN20] Cases involving preliminary injunctions are another example because the failure to prevent or require some action before a final decision is issued may irreparably harm a party. [FN21]

The battle between these competing concerns [FN22] explains why the Supreme Court, despite the clarity of the statutes conferring *204 appellate jurisdiction, [FN23] for many years failed to apply the final judgment rule rigidly, eschewing a clear definition of "final judgment." [FN24] In 1945, in Catlin v. United States, the Court appeared to settle the controversy in favor of precluding interlocutory appeals when it held that a final order is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." [FN25]

B. Over, Under, and Around the Final Judgment Rule

Catlin, however, could not overcome dissatisfaction with the inflexibility of the final judgment rule. In a patchwork process that continues today, both Congress and the courts have proceeded to weave a crazy quilt of exceptions, which are often "overlapping . . . (and) each less lucid than the next." [FN26] What follows is a brief description of the most significant exceptions to the rule. [FN27]

*205 1. The Collateral Order Doctrine. Only four years after the articulation of a rigid final judgment rule in Catlin, [FN28] the Court retreated when it pronounced the collateral order doctrine in Cohen v. Beneficial Industrial Loan Corp. [FN29] Cohen was a shareholder's derivative suit in which the district court refused to apply a statute of the forum state. This statute required the plaintiff in a derivative suit to post bond to cover the defendant's costs in the event the suit turned out to be frivolous. [FN30] The appellate court heard the appeal on the grounds that the issue was collateral and "final in its nature." [FN31]

As a threshold question, the Supreme Court considered whether the court of appeals had jurisdiction to hear the appeal. [FN32] Although the order was not formally part of a final decision, Justice Jackson, writing for a unanimous Court, reasoned that 28 U.S.C. S 1291 should be given a "practical rather than a technical construction." [FN33] To define a "final decision" under section 1291, the Court looked to the purpose of the statute, which is to "combine in one review all stages of

the proceeding that effectively may be reviewed and corrected if and when final judgment results." [FN34]

Justice Jackson listed four characteristics of the order in question that, when all are present, make an order effectively final and suitable for interlocutory appeal. First, the order was not "tentative, informal or incomplete." [FN35] Second, the order was separate from the merits of the case. [FN36] Third, delay of review risked serious irreparable harm to the defendant. [FN37] Finally, the disputed order presented a "serious and unsettled question." [FN38]

After Cohen, several commentators predicted that courts would construe the collateral order doctrine broadly until little *206 would be left of the final judgment rule. [FN39] This trend never materialized. [FN40] The Supreme Court has limited interlocutory appeals under the collateral order doctrine to a small class of cases. [FN41]

A clear signal of the Court's unwillingness to apply broadly the collateral order doctrine came in Coopers & Lybrand v. Livesay. [FN42] The Court denied the interlocutory appeal of a decertification order in a class action suit because the challenged order met none of the Cohen requirements. [FN43] The Court restated the Cohen test in a frequently cited passage: the order in question "must (1) conclusively determine the disputed question, (2) resolve an important issue (3) completely separate from the merits of the action, and (4) be effectively unreviewable on appeal from a final judgment." [FN44]

Whether an order "conclusively determines" an issue depends on the appellate court's assessment of the likelihood of reconsideration. In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., the Court held that the challenged order granting a stay, although not conclusive in a technical sense, was final in practice. [FN45] Virtually any order is not formally final until the trial judge signs it, because until then the judge has the power to alter it. [FN46] The Court held, however, that an unsigned order is not what the Coopers & Lybrand Court meant by "inherently tentative." [FN47] The dividing line between interlocutory and final orders is marked not by the formal ability to revise, but instead by the reasonable likelihood of revision. [FN48]

In contrast, in Gulfstream Aerospace Corp. v. Mayacamas Corp., [FN49] the Court considered an interlocutory appeal of an order denying a motion for a stay. The Court held that the order was *207 "inherently tentative." [FN50] "(A) district court usually will expect to revisit and reassess an order denying a stay in light of events occurring in the normal course of the litigation." [FN51]

Most courts have paid little attention to the "importance" requirement. [FN52] A handful of courts, however, have rejected appeals at least in part on the grounds that the order in question was not important. [FN53]

The "separate from the merits" requirement serves to reconcile interlocutory appeals with some of the goals of the final judgment rule. [FN54] Interlocutory review of orders that are collateral to the merits does not disrupt the trial court proceedings and does not require the reviewing court to refamiliarize itself with the merits of the case upon final appeal. [FN55] However, the collateral requirement sometimes is swept aside by concerns of hardship to litigants denied effective review. [FN56] The paradigmatic example of an order that is separate from the merits is the order denying security in Cohen. [FN57] An example of an order that is not collateral is an order dismissing counterclaims on a motion for summary judgment. [FN58]

The requirement of "effective unreviewability" is the ".central focus' and perhaps even the .dispositive criterion' of appellate *208 jurisdiction" over interlocutory appeals under the collateral order doctrine. [FN59]

(A)n order is "effectively unreviewable" only "where the order at issue involves .an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial."' . . . It is always true . . . that "there is value . . . in triumphing before trial, rather than after it," and this Court has declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order. [FN60]

Thus, for example, a litigant claiming absolute or qualified immunity from suit could obtain interlocutory review of an order denying a motion to dismiss. [FN61] The immunity from the burdens and expenses of litigation would be destroyed if the trial were allowed to continue. [FN62] Conversely, a litigant claiming that a court lacks jurisdiction cannot obtain interlocutory review, because "the right not to be subject to a binding judgment may be effectively vindicated following final judgment." [FN63]

Despite the Court's attempt to clarify the collateral order doctrine in Coopers & Lybrand and several other cases, the doctrine has proved unsatisfactory as a cure for the rigidity of the final judgment rule. It has been costly in terms of judicial and party resources, [FN64] and the results have been mixed at best. The test often is applied inconsistently from circuit to circuit, [FN65] and courts sometimes reduce the requirements to an ad hoc balancing test. [FN66] Judge Posner accurately observed that

*209 as with so many multi-"pronged" legal tests (the collateral order doctrine) manages to be at once redundant, incomplete, and unclear. The second "prong" is part of the third. If the order sought to be appealed is not definitive, an immediate appeal is not necessary to ward off harm; there is no harm yet. The first "prong" seems unduly rigid; if an order unless appealed really will harm the appellant irreparably, should the fact that it involves an issue not completely separate from the merits of the proceeding always prevent an immediate appeal? [FN67]

2.Mandamus Review-28 U.S.C. § 1651.The writ of mandamus provides a second route for litigants to obtain review of interlocutory orders. As with the final judgment rule, the power to issue extraordinary writs can be traced to the first Judiciary Act. [FN68] The current version of the All Writs Act provides that "(t)he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." [FN69]

Appellate courts should use the writ of mandamus only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." [FN70] Mandamus is a "drastic and extraordinary remed(y)" [FN71] and should be used only "where there is clear abuse *210 of discretion or 'usurpation of judicial power' . . . ." [FN72] Extraordinary writs should not be used as a general substitute for appeals. [FN73]

Despite the drastic nature of a mandamus writ, some circuit courts use it as a general method of hearing appeals of interlocutory orders. [FN74] Reliance on a writ of mandamus for interlocutory review is risky, however. The standards are stringent [FN75] and the writ is granted not as a matter of right, but as a matter of judicial discretion. [FN76] A litigant's chances of obtaining review are best when there is a "clear and indisputable" demonstration of error [FN77] or "new and important problems" of law at stake. [FN78]

3.28 U.S.C. § 1292.The most significant statutory exceptions to the finality requirement of 28 U.S.C. § 1291 are set out in section 1292. [FN79] Section 1292(a)(1) gives the courts of appeals jurisdiction over "(i)nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . ." [FN80]

The boundaries of section 1292(a)(1) are determined by the interlocutory nature of the order in question, not by the interlocutory relief at issue. [FN81] Thus, clearly within section 1292(a)(1) are interlocutory orders directly granting or refusing to grant preliminary injunctions as well as interlocutory orders granting permanent injunctions. [FN82] More troublesome are interlocutory orders that have *211 the practical effect of denying injunctive relief without directly addressing injunctive consequences. [FN83] For example, a court may dismiss a claim requesting injunctive relief for lack of jurisdiction or standing. [FN84] In such cases, section 1292(a)(1) allows appeal only if the order "might have a .serious . . . consequence,' and . . . the order can be .effectually challenged' only by immediate appeal . . . ." [FN85]

Section 1292(a)(2) gives the courts of appeals jurisdiction to hear appeals of interlocutory orders appointing receivers or refusing to wind up receiverships. [FN86] Section 1292(a)(3) allows interlocutory appeal from district court decrees in admiralty cases. [FN87]

Section 1292(b) supplements this categorical approach with a two-step discretionary process for the interlocutory appeal of certain orders. [FN88] First, the party challenging an order must obtain from the district court judge a written statement certifying the order for appeal. [FN89] The district judge's decision whether to certify is discretionary. [FN90] In order to certify, the district court judge must find that a "controlling question of law (is involved) as to which there is a substantial ground for difference of opinion and . . . (the immediate resolution of which) may materially advance the ultimate termination of the litigation . . . ." [FN91] Once the district court *212 certifies, the court of appeals has complete discretion whether to hear the appeal. [FN92]

Courts agree that an order involves a controlling question of law if reversal of that order would require reversal of the final judgment. [FN93] Conversely, an order that would have little or no effect on subsequent proceedings is not controlling. [FN94] In considering orders characterized by neither of these extremes, courts generally turn to the "materially advance" prong of section 1292(b). The result then turns on the likelihood that interlocutory appeal could save the litigants and the court time and expense. [FN95] The "substantial ground for difference" requirement depends on the trial court's estimation of the probability of reversal of the order in light of the law within the court's circuit. [FN96]

The "materially advance" requirement has posed some problems of interpretation. In addition to the requirement that interlocutory review shorten the proceedings, some courts have added the requirement that the case be large and exceptional. [FN97]

4.Rule 54(b).Rule 54(b) of the Federal Rules of Civil Procedure allows a judge to enter a final judgment for individual claims in cases with multiple claims or parties or both. [FN98] The ruling *213 involved must be otherwise final under section 1291 in order to be eligible for Rule 54(b). [FN99] The Rule was intended to protect litigants whose claims are finally determined early in a complex and protracted case. [FN100] Under Rule 54(b), such litigants do not have to await a final decision on all claims if the trial judge certifies the individual claim as final. [FN101]

5.The New Rulemaking Power-28 U.S.C. Sections 1292 and 2072.The Federal Courts Study Committee, created by statute in 1988 [FN102] to "make a complete study of the courts of the United States," [FN103] suggested that

(t)o deal with difficulties arising from definitions of an appealable order, Congress should consider delegating to the Supreme Court the authority under the Rules Enabling Act to define what constitutes a final decision for purposes of 28 U.S.C. § 1291, and to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals. [FN104]

Congress has adopted these recommendations. The Federal Courts Study Committee Implementation Act of 1990 [FN105] added subsection (c) to 28 U.S.C. § 2072 (the Rules Enabling Act), giving the Supreme Court the rulemaking power to define a "final" decision under section 1291. [FN106] In 1992, the Federal Courts Administration Act [FN107] added subsection (e) to 28 U.S.C. § 1292, giving the Supreme Court rulemaking power to create new categories of interlocutory appeals. [FN108] To date, however, the rulemakers *214 have yet to exercise their powers under either section 1292(e) or section 2072(c).

II. DISCRETIONARY INTERLOCUTORY APPEALS

In a recent article, Professor Robert Martineau suggests that Congress adopt the approach to appealability recommended by the ABA and adopted in Wisconsin. [FN109] The ABA recommends first that only judgments that are formally final be appealable as of right and second that interlocutory judgments be appealable only by permission of the reviewing court. [FN110] Before deciding how to *215 fix appellate jurisdiction, reformers must remove the parts that do not work. The first step of the ABA approach, which defines a final order as one signed and filed by the trial judge, would accomplish this goal and should be implemented regardless of how orders for interlocutory review are ultimately singled out. [FN111] By saying that final means final, [FN112] the proposed rule would eliminate all judicially created exceptions [FN113] to the final judgment rule. [FN114] With only the current statutory and rule-based exceptions to the final judgment rule intact, Congress and rulemakers could then reevaluate when to allow interlocutory appeals without worrying about interference from the judicially created patches on the crazy quilt. Eliminating judicially created exceptions to the final judgment rule also would greatly simplify questions of appellate jurisdiction over interlocutory appeals and eliminate voluminous satellite litigation of these procedural issues. [FN115]

Reform of interlocutory appeals procedure should achieve two basic goals. First, reformers should define a flexible category of orders that would be appealable whenever, in the discretion of the appellate court, justice or efficiency requires. [FN116] This policy is accomplished*216 by the second step of the Wisconsin-ABA approach, which sets out two such broad categories. [FN117] Second, reformers should attempt to identify any specific types of orders that should presumptively be allowed or denied interlocutory appeal. [FN118] These narrow categories could be superimposed on the Wisconsin- ABA approach whenever they would be helpful.

The broad "whenever justice requires" exception to the final judgment rule reflected in the Wisconsin-ABA approach [FN119] provides potential relief to a litigant who is subject to an interlocutory order that cannot be effectively reviewed on appeal. A broad discretionary exception avoids the difficult, perhaps intractable, problem of defining in advance all the categories of orders that should be appealable before final decision. A purely categorical approach would be both under- and overinclusive.

The type of order that should be appealable immediately will vary from period to period and from case to case, depending upon all of the variables that make one case different from another. It is impossible to predict when in a particular case the relative interests of the parties, the prospects for early termination of the case, or the public significance of the case will dictate the advisability of an earlier rather than later review of an interlocutory order. Thus, attempting to classify interlocutory orders for appeal purposes whether by statute, rule, or judicial decision, can be nothing other than an exercise in futility. [FN120]

Courts' experience with the collateral order doctrine confirms this assessment. At its most basic level, the doctrine represents *217 several decades of attempts to create a formula that would predictably and accurately decide whether or not a given order should be allowed interlocutory

appeal. [FN121] These attempts failed because it is impossible to define ex ante exactly what characteristics of a given order make justice require its immediate review.

The requirements comprising the collateral order doctrine-con-clusiveness, importance, separability, and effective unreviewability-are useful indicators. In different cases, however, different factors dominate. For example, it may make sense to allow interlocutory review of an order that is effectively unreviewable on appeal after final decision and would result in serious consequences for a litigant, even if that order is not truly collateral. [FN122] This need for flexibility explains the unpredictability of the outcome of attempts to appeal under the collateral order doctrine. To some extent, this unpredictability already has made interlocutory appeals de facto a matter of circuit court discretion. It also explains why courts have sometimes collapsed the collateral order doctrine into a balancing of four factors rather than a check for four requirements. [FN123] A discretionary scheme would end the charade and explicitly recognize the inefficacy of bright-line rules .

Regardless of how artfully the criteria guiding discretionary appeal are drafted, the decision to hear the appeal ultimately is left to the discretion of the appellate court. Some uncertainty is unavoidable. As Professor Rosenberg observed, "Judicial discretion remains today one of the most intricate and mysterious of the concepts judges and lawyers regularly encounter." [FN124] Ultimately, the litigant must rely on the output of a black box. The circuit courts could take steps to demystify the process by publishing opinions giving prospective appellants guidance as to the courts' reasoning in denying or permitting review. As the law of interlocutory appeals stands currently, judges explain the interlocutory appeals they deny or allow in the framework of the specific requirements of the collateral order doctrine or of extraordinary writs. If, as under the Wisconsin-ABA approach, appeals become fully discretionary, the courts of appeals will have more freedom to explain their underlying reasons for denying or allowing appeal.

*218 Wisconsin courts have not provided much guidance as to when petitions for interlocutory review will likely be denied. They have, however, indicated that three types of orders will generally be allowed interlocutory appeal. In Baxter v. Wisconsin Department of Natural Resources, [FN125] the Court of Appeals of Wisconsin observed:

(I)f (a) motion to dismiss is based on a claim to qualified immunity, an order denying the motion will usually satisfy the criteria for granting a petition for leave to appeal under sec. 808.03(2) . . . . The critical nature of qualified immunity is such that an order denying such a motion is treated as immediately appealable under the federal rules. [FN126]

Similarly in State v. Jenich, [FN127] the Supreme Court of Wisconsin exhorted:

(W)e urge the court of appeals to be careful in exercising (its) discretion when the order sought to be appealed is one which denies a motion to dismiss for double jeopardy. Given the serious constitutional questions raised by claims of double jeopardy, review of such orders will often be necessary to protect the accused from "substantial or irreparable injury"-one of the three criteria for testing the appropriateness of review under sec. 808.03(2). [FN128]

Finally in State ex rel. A.E. v. Circuit Court, [FN129] the Supreme Court of Wisconsin advised: [FN130]

Given the significance of a waiver of juvenile jurisdiction orders, (which allow juveniles to be tried as adults,) we urge that the court of appeals, in the exercise of its discretion, give careful *219 consideration to the merits presented by appeals from such orders. Review will often be necessary to protect the minor from "substantial or irreparable injury." . . . Juvenile waiver orders . . . represent a unique type of intermediate order which require prompt appellate review where necessary to prevent

"substantial or irreparable injury." [FN131]

The Wisconsin-ABA approach would not be a superfluous addition to the discretionary review already available under 28 U.S.C. S 1292(b). Section 1292(b) is seldom a successful route to an interlocutory appeal. Professor Solimine suggests that this results from circuit courts applying a big case requirement or narrowly interpreting the statutory criteria. [FN132] Between 1985 and 1989, 1,411 interlocutory appeals were certified by district courts, 504 of which were accepted by circuit courts. [FN133] During the same period, 179,998 appeals terminated after a final decision, [FN134] and approximately 21,000 interlocutory appeals were heard. [FN135] The Wisconsin-ABA reforms would provide litigants with a better chance of having their petitions granted.

The Wisconsin-ABA approach, if implemented in the federal courts, might increase the workload of the courts of appeals. The courts of appeals would have to review each petition filed, which would require some effort. Professor Martineau downplays the potential for such a result, relying on the experience of the Wisconsin Court of Appeals. Between 1988 and 1990, 6,222 appeals *220 were heard after final judgment in Wisconsin. [FN136] There were 660 petitions for interlocutory review, 198 of which were granted. [FN137]

Although these statistics show that in recent years the Wisconsin-ABA approach has not overburdened the Wisconsin system, the numbers tell little of what impact this discretionary scheme would have on the federal system. Without data on interlocutory appeals before the implementation of the discretionary standards in Wisconsin, it is unclear whether the discretionary scheme increased the number of interlocutory appeals filed or heard. Judge Richard Posner has estimated that 12% of appeals heard in the federal courts occur before a final decision. [FN138] Perhaps many more are filed and dismissed; perhaps even more would be filed if the Wisconsin-ABA approach were adopted in the federal system. Without more data, one can only speculate.

Regardless, the decrease in satellite litigation that would result from a clear definition of "final" [FN139] would balance, at least in part, any such increase in workload. [FN140] Furthermore, with the inherent flexibility of a discretionary rule, courts of appeals can limit the time that they spend reviewing interlocutory petitions as the drain on their resources demands.

The Wisconsin-ABA approach would function better than a system that uses similar criteria for granting appeals as of right. Broad categories in mandatory terms would likely lead to substantial amounts of satellite procedural litigation construing the boundaries of these categories. Such litigation would resemble the flood of litigation construing the bounds of the judicially created patches on the crazy quilt that has wasted litigant and court time. Furthermore, broad mandatory categories are likely to become de facto discretionary.

Admittedly, making appeals entirely discretionary inevitably would produce unfairness in some cases. Under the present system, if a litigant can meet the standards of the collateral order doctrine, then the court of appeals has jurisdiction to hear the appeal under 28 U.S.C. § 1291. [FN141] Under the Wisconsin-ABA approach, even if a litigant satisfied one or more of the categories *221 for interlocutory appeal, the circuit court could refuse to hear the appeal. [FN142] For example, the circuit court could conclude that its docket is too crowded.

Isolated injustices, however, would not be avoided under a scheme that would mandate hearing the interlocutory appeal once certain criteria were met. A bright-line mandatory scheme would produce injustice because such rules cannot identify all orders appropriate for review. [FN143] In any case, a broad mandatory category scheme necessarily would become, to a large extent, de facto discretionary [FN144] and would produce the same isolated injustices as well as additional satellite litigation. [FN145]

The Wisconsin-ABA approach would not require resort to statutory reform rather than rulemaking. Professor Martineau criticizes the adoption of 28 U.S.C. sections 2072(c) and 1292(e) because he believes that these provisions can be used only to expand the scope of interlocutory appeals currently available. [FN146]

With the passage of sections 2072(c) and 1292(e), the Wisconsin-ABA approach can be implemented by rulemaking rather than by statute. Nothing in the language of section 2072(c) [FN147] would prevent the use of the rulemaking power to define final rigidly. [FN148] Perhaps Professor Martineau's underlying concern is that he believes that "(i)t is highly unlikely that the rulemakers" would contract the meaning of final. [FN149]

One could argue that the language of section 1292(e) does not allow for the addition of a category to section 1292 that would give the circuit courts discretion to hear appeals under the Wisconsin-ABA approach, because under subsection (e), discretionary appeals are already provided for under subsection (b). [FN150] The *222 adoption of a broad discretionary category would make subsection 1292(b) practically useless-there would be no need to ask both the district court and the circuit court for permission to appeal under more rigid standards when a litigant could seek permission directly from the circuit court under broad standards. However, this argument fails because the terms guiding discretion under the Wisconsin-ABA approach are different from those guiding the double discretion under subsection 1292(b) and thus are literally "not otherwise provided for under (28 U.S.C. section 1292) subsection (a), (b), (c), or (d)." [FN151]

Finally, before implementing broad discretionary review, rulemakers must recognize that other factors beyond those listed in the broad discretionary category would influence an appellate court's willingness to grant review. For example, if docket pressures on the courts of appeals increase, the courts would become much more reluctant to grant petitions for interlocutory review. [FN152] Another unavoidable factor would be an appellate court's assessment of a particular trial court judge's competence. An appellate court would be more receptive to requests for interlocutory review of an order issued by a judge that it believes to be a habitual abuser of judicial discretion. Similarly, an appellate court likely would look less carefully at requests for review of orders from a trial court judge that it views favorably. These factors, in any case, probably play a significant role even under the current system.

III. APPLICATION OF THE WISCONSIN-ABA APPROACH

Even if the rulemakers decide to adopt the Wisconsin-ABA approach, many questions about the application of the standards of discretion would remain. This Part examines two cases under the Wisconsin-ABA standard, one involving discovery, the other involving Eleventh Amendment state immunity. Applying the Wisconsin-ABA*223 standards to these two cases demonstrates that the controlling factor under the proposed approach often would be the merits of the challenge to the order that a party seeks to appeal before a final decision.

Applying the Wisconsin-ABA standards to interlocutory orders involving discovery [FN153] and official immunity [FN154] is useful also because it demonstrates a potential need to refine the Wisconsin- ABA approach in the future. If a class of orders such as those involving official immunity should be allowed appeal in all cases regardless of the merits of the appeal, then rather than forcing appellate courts to repeat the time-consuming application of the discretionary standards to these orders, it would be more efficient to superimpose rules on the Wisconsin-ABA standards allowing interlocutory appeal of these orders as a matter of right. Similarly, if a class of orders, such as discovery orders, usually would not satisfy the Wisconsin-ABA standards, then it would be helpful for appellate courts to give prospective appellants notice of this fact.

A.Reise v. Board of Regents [FN155]

Discovery orders present a difficult question in the interlocutory review context because they often involve the discretion of a trial judge (and thus an appellate court is unlikely to reverse), [FN156] and yet appeal after a final decision may provide little relief. [FN157] In the circuit courts, invocations of the collateral order doctrine to appeal discovery orders have been largely unsuccessful. [FN158] However,*224 there are a number of cases allowing immediate appeal of certain discovery orders. [FN159]

In Reise, E.H. Reise applied for and was denied a position on the faculty of the law school of the University of Wisconsin. [FN160] He filed a claim in the U.S. District Court for the Western District of Wisconsin alleging that the Law School preferentially hired minorities and that because he was a white male, he was not hired. [FN161] He alleged that the law school's decision not to hire him caused him illness, emotional distress, and mental anguish, for which he sought compensatory damages. [FN162]

The law school claimed that Reise had put his mental health in issue and thus requested an order to compel him to undergo a mental examination pursuant to Rule 35 of the Federal Rules of Civil Procedure. [FN163] Reise claimed that because he had recovered from his injuries, the examination would be useless. Judge Shabaz issued the order. [FN164] Reise appealed the issuance of the order to the U.S. Court of Appeals for the Seventh Circuit. He claimed that under the collateral order doctrine established in Cohen, [FN165] the circuit court had jurisdiction to hear an appeal of this issue before the case was disposed of on its merits. [FN166] The Court of Appeals concluded that the order did not qualify for appeal under the collateral order doctrine, because such orders can be effectively reviewed on appeal from a final decision. [FN167]

*225 A discovery order such as the one in Reise is not a truly final order. Thus, under the Wisconsin-ABA standard, one must turn to the discretionary criteria. It is unlikely that appeal of this discovery order would "materially advance . . . the litigation" or "clarify further proceedings." [FN168] The purpose of this category is to allow interlocutory appeals when doing so would save the courts and litigants the time and resources involved in litigating issues under false assumptions borne of erroneous orders. It is plausible to conclude that the order in this case furthers this purpose. If the order was erroneous and were corrected immediately, the parties might be more likely to settle or to attempt to use alternative means to prove the state of Reise's mental health. However, similar benefits would accompany interlocutory appeal of most discovery orders and it would be dangerous to open the floodgates. The sounder conclusion would be to hold that this category is not satisfied. Even if the order compelling a mental examination was erroneous and were corrected immediately, Reise's mental health would still be at issue and the trial would not be substantially shortened by interlocutory appeal.

The interlocutory appeal in question is also unlikely to "clarify an issue of general importance in the administration of justice." [FN169] The order compelling a mental examination certainly is important to the parties of Reise. However, the primary goal of the general importance category is to allow interlocutory appeals when it would benefit the legal system as a whole. The general importance category would encompass orders that pose important legal questions that would evade review if interlocutory appeal were never allowed.

The critical issue, then, is whether denying appeal likely would subject Reise to "substantial or irreparable injury." [FN170] The potential injury would occur if Reise were forced to undergo a mental examination or risk losing his claim for damages. Reise could risk *226 his claim by refusing the examination. He then would face the sanctions available under Rule 37(b)(2) of the Federal Rules of Civil Procedure. The most likely sanction would be striking Reise's claim for damages resulting

from mental and physical distress. [FN171] Reise then could challenge the order striking his claim after a final decision, but if he were to lose this appeal, he would lose his claim for damages.

Wrongfully forcing someone to undergo a mental examination imposes a substantial irreparable harm. A forced medical examination is intrusive and once a litigant undergoes an examination, a reviewing court cannot undo the examination. However, in order for the harm to be wrongful, the order compelling the examination must be erroneous. Thus, in determining whether there is a substantial likelihood of injury, the appellate court must consider to the merits of Reise's challenge. [FN172] There is not a substantial likelihood of injury to Reise because he does not have a very strong case against the order. [FN173] He made a claim for damages for emotional distress, which put his mental health at issue. In addition, if the court of appeals were to review the order, the standard of review would be abuse of discretion. [FN174]

If experience were to demonstrate that a class of orders, such as discovery orders, most often do not satisfy the Wisconsin-ABA criteria, then appellate courts should not hesitate to provide litigants with guidance through opinions indicating this tendency. [FN175] Such opinions could not per se deny interlocutory appeal of a class of orders without running afoul of the terms of the discretionary statute. However, such opinions could discuss the court's reasoning for denying appeal of an order that the court finds typical of similar orders that it has denied appeal in the past.

*227 B.Puerto Rico Aqueduct Sewer Authority v. Metcalf & Eddy, Inc.

In Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., [FN176] the Puerto Rico Aqueduct and Sewer Authority (PRASA) contracted with Metcalf & Eddy, Inc. to help PRASA comply with an Environmental Protection Agency consent decree. [FN177] When PRASA withheld payments on the contract because of alleged overcharging, Metcalf & Eddy, Inc. brought suit in the District Court of Puerto Rico for breach of contract. [FN178] PRASA claimed Eleventh Amendment immunity as an "arm of the state" and moved to dismiss. [FN179] The district court found that PRASA was not an arm of the state and denied the motion. The First Circuit refused to hear an interlocutory appeal. [FN180]

The Supreme Court has held that orders denying motions to dismiss on grounds of qualified and absolute immunity from suit are categorically allowed interlocutory appeal under the collateral order doctrine. [FN181] In such cases, as in Metcalf & Eddy, the defendant is claiming "an immunity from suit rather than a mere defense to liability(, which) is effectively lost if a case is erroneously permitted to go to trial." [FN182] Thus, the collateral order doctrine allows for interlocutory appeals of orders denying claims of Eleventh Amendment immunity as well regardless of the merits of the immunity defense. [FN183]

Under the Wisconsin-ABA approach, PRASA's claim of immunity from suit would no longer be appealable as of right regardless of the merits of the immunity claim. As with discovery orders, an order denying dismissal is not truly final. [FN184]

Under the discretionary criteria, an interlocutory appeal in this case would not likely "(c)larify an issue of general importance" [FN185] *228 because the substantive issues in the immunity claim could be addressed on appeal from final judgment. However, early resolution of the immunity claim might "(m)aterially advance the termination of the litigation(,) . . . clarify further proceedings(, or p)rotect the petitioner from substantial or irreparable injury." [FN186] Whether there is a substantial likelihood that these standards will be met hinges on an assessment of the merits of PRASA's claim of error. [FN187] If the denial of the immunity defense was erroneous, then PRASA will be subject to the irreparable, potentially substantial burdens of trial. Furthermore, the entire trial will be moot if the denial of the immunity defense is overturned on appeal.

Applying the Wisconsin-ABA approach to PRASA's claims demonstrates that if this approach is adopted, many orders denying claims of immunity from suit may be denied interlocutory review. Even if the defendant has a meritorious claim, which certainly would not always be the case, the ultimate decision to hear an interlocutory appeal would depend on the discretion of the courts of appeals. Congress, the courts, or the rulemakers would have to address directly whether claims of immunity should categorically or presumptively be allowed interlocutory appeal as an exception to the broad discretionary standards of the Wisconsin-ABA approach.

Ultimately such a decision would turn on an assessment of the extent of harm if an erroneous order of a given type were left in place until a final decision was issued and on the likelihood that a given class of orders is erroneous. With discovery orders, for instance, although the harm will vary, the reversal rate is likely low because the standard of review is abuse of discretion. [FN188] On the other hand, in cases of qualified official immunity, the reversal rate is high [FN189] and the potential harm is great because the immunity is from facing trial altogether. [FN190]

CONCLUSION

Currently, whether interlocutory appeals are allowed is determined by a patchwork of judge-made and statutory rules. The *229 various exceptions to the final judgment rule are overlapping, confusing, and often inefficient. With the passage of 28 U.S.C. sections 2072(c) and 1292(e), which allow the rulemakers to define "final" under section 1291 and add categories to section 1292, the time has come to tear apart the judicially created patches of this crazy quilt and start sewing anew.

The rulemakers should adopt the first portion of the Wisconsin-ABA approach, deciding that final means final. This change would eliminate the judicially created exceptions to the final judgment rule and would force those who control appellate jurisdiction to address the issue of interlocutory appeals directly. The rulemakers should then adopt the second portion of the Wisconsin- ABA approach, allowing for broad discretionary review. Such review would provide the courts with the flexible power needed to respond to requests for interlocutory appeals. In the future, narrow categories of orders that should be allowed or denied interlocutory appeal presumably could be superimposed on this discretionary scheme.

FN1. Maurice Rosenberg, Solving the Federal Finality-Appealability Problem, Law & Contemp. Probs., Summer 1984, at 170, 172.

FN2. See 28 U.S.C. S 1291 (1988) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . .").

FN3. Most commentators who advocate reform recommend keeping the final judgment rule but creating certain exceptions. The only ones who recommend abolishing the final judgment rule are those who favor abolishing appeals as of right altogether. Compare Paul D. Carrington, Toward a Federal Civil Interlocutory Appeals Act, Law & Contemp. Probs., Summer 1984, at 165, 165-66 (advocating final judgment rule plus categories of interlocutory appeals) and Robert J. Martineau, Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution, 54 U. Pitt. L. Rev. 717, 747 (1993) (advocating final judgment rule plus discretionary review) and Randall J. Turk, Note, Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. S 1292, 67 Geo. L.J. 1025, 1038 (1979) (advocating final judgment rule plus one new category of interlocutory appeals) with Carleton M. Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539, 564 (1932) (arguing for the elimination of appeals as of right) and Harlon L. Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62 (1985) (same).

FN4. See, e.g., Federal Courts Study Comm., Judicial Conference of the United States, Report of the Federal Courts Study Committee 95 (1990). The Committee explained,

The state of the law on when a district court ruling is appealable because it is "final," or is an appealable interlocutory action, strikes many observers as unsatisfactory in several respects. The area has produced much purely procedural litigation. Courts of appeals often dismiss appeals as premature. Litigants sometimes face the possibility of waiving their right to appeal when they fail to seek timely review because it is unclear when a decision is "final" and the time for appeal begins to run. Decisional doctrines-such as "practical finality" and especially the "collateral order" rule-blur the edges of the finality principle, require repeated attention from the Supreme Court, and may in some circumstances restrict too sharply the opportunity for interlocutory review.

Id. See also Carrington, supra note 3, at 165-66; Martineau, supra note 3, at 747.

FN5. 28 U.S.C. SS 1292(e), 2072(c) (Supp. V 1993).

FN6. See infra note 110.

FN7. This Note analyzes the process by which courts identify those orders that should be allowed interlocutory review. I recommend that the general process embedded in the Wisconsin-ABA approach-broad discretionary review-be adopted. I do not address in detail the adequacy of any specific standards used to single out orders for interlocutory review.

FN8. 957 F.2d 293 (7th Cir. 1992).

FN9. 113 S. Ct. 684 (1993).

FN10. 15A Charles A. Wright et al., Federal Practice and Procedure S 3906, at 264 (1992).

FN11. Gerald T. Wetherington, Appellate Review of Final and Non-Final Orders in Florida Civil Cases-An Overview, Law & Contemp. Probs., Summer 1984, at 61, 62.

FN12. Id. For a thorough discussion of the early history of the final judgment rule, see 15A Wright et al., supra note 10, S 3906, at 264-68.

FN13. See The Judiciary Act of 1789, ch. 20, SS 21, 22, 25, 1 Stat. 73, 83- 87:

(Section 21:) (F)rom final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court . . . .

(Section 22:) (F)inal decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court . . . upon a writ of error . . . . And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court . . . where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court . . . .

. . . .

(Section 25:) (A) final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . .

FN14. See 28 U.S.C. S 1291 (1988) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . .").

FN15. See, e.g., Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987).

FN16. See, e.g., Flanagan v. United States, 465 U.S. 259, 263-64 (1984) ("(The final judgment rule) helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation."). Similar arguments underlie the relationship between the final judgment requirement for U.S. Supreme Court review of state court decisions and the independence of state courts. See 15A Wright et al., supra note 10, S 3908, at 284-90.

FN17. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (quoting Cobbledick v. United States, 309 U.S. 323, 325 (1940)).

FN18. Michael E. Solimine, Revitalizing Interlocutory Appeals in the Federal Courts, 58 Geo. Wash. L. Rev. 1165, 1169 (1990).

FN19. 337 U.S. 541, 546 (1949). For a more complete discussion of Cohen, see infra text accompanying notes 29-44.

FN20. Cohen, 337 U.S. at 546.

FN21. Solimine, supra note 18, at 1169.

FN22. For a more thorough discussion of the benefits and detriments of interlocutory review, see Edward H. Cooper, Timing as Jurisdiction: Federal Civil Appeals in Context, Law & Contemp. Probs., Summer 1984, at 157, 157-58; Crick, supra note 3; Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351, 351-53 (1961).

FN23. See supra notes 13-14.

FN24. See, e.g., McGourkey v. Toledo & Ohio Cent. Ry., 146 U.S. 536, 544-45 (1892) ("Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees . . . . The cases, it must be conceded, are not all together harmonious.").

FN25. 324 U.S. 229, 233 (1945).

FN26. Carrington, supra note 3, at 166.

FN27. Less significant exceptions to the final judgment rule include the Forgay v. Conrad rule, the appeal of attorney's fees orders, the appeal of bankruptcy orders, the Gillepsie balancing approach, and the death knell doctrine. See Martineau, supra note 3, at 738-46; Turk, supra note 3, at 1033-38.

The Forgay v. Conrad rule is a narrow exception that allows appeal in the rare case when a court orders a transfer of property but retains jurisdiction for accounting purposes. Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1848); Martineau, supra note 3, at 738-39. In Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988), the Supreme Court adopted a rule whereby orders concerning attorney's fees are per se appealable regardless of the status of the decision on the merits.

Interlocutory appeals from bankruptcy court orders have been allowed more liberal appeal under 28 U.S.C. S 158(d), Supp. V (1993) because many interlocutory orders in bankruptcy cases conclusively resolve the rights of parties. Martineau, supra note 3, at 745. In Gillepsie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964), the Supreme Court articulated a balancing approach to interlocutory appeals, allowing the appeal of an interlocutory order because the costs of continuing the litigation before an appeal outweighed the costs of piecemeal review. Id. at 153. This potentially sweeping new approach to interlocutory appeals has been "criticized by the commentators and

avoided by the courts." Turk, supra note 3, at 1034. Finally, according to the death knell doctrine, an order is final if that order as a practical matter ends the litigation even though no formal final order has been entered. 15A Wright et al., supra note 10, S 3912, at 439. This theory serves as an adjunct to the collateral order doctrine and prevents injustice when orders involve the merits of the case. Id. at 440.

FN28. 324 U.S. 229, 243 (1945).

FN29. 337 U.S. 541, 546-47 (1949).

FN30. Id. at 544-45.

FN31. Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44, 49 (3d Cir. 1948) (quoting United States v. River Rouge Improvement Co., 269 U.S. 411, 414 (1926)).

FN32. Cohen, 337 U.S. at 545.

FN33. Id. at 546.

FN34. Id.

FN35. Id.

FN36. Id.

FN37. Id.

FN38. Id. at 547.

FN39. See, e.g., Theodore D. Frank, Requiem for the Final Judgment Rule, 45 Tex. L. Rev. 292, 301-02, 317-20 (1966).

FN40. Solimine, supra note 18, at 1171.

FN41. Id.

FN42. 437 U.S. 463 (1978).

FN43. Id. at 469.

FN44. Id. at 468. For a list of Supreme Court and circuit court decisions applying the Coopers & Lybrand formula, see 15A Wright et al., supra note 10, S 3911, at 349 n.59.

FN45. 460 U.S. 1, 11-12 (1983).

FN46. Id. at 12.

FN47. Id. at 12 n.14.

FN48. See id.

FN49. 485 U.S. 271 (1988).

FN50. Id. at 278.

FN51. Id.

FN52. 9 James Wm. Moore et al., Moore's Federal Practice _ 110.10, at 71-72 (2d ed. 1993 & Supp. 1993-1994).
FN53. E.g., Minnesota v. Pickands Mather & Co., 636 F.2d 251, 255 (8th Cir. 1980) (holding that an order denying leave to file a third-party complaint for contribution against a former codefendant "does not present a .serious and unsettled' question of law"); Wilk v. American Medical Ass'n, 635 F.2d 1295, 1298 n.6 (7th Cir. 1980) (observing that refusal to modify protective discovery order did not present an important and unsettled question).

FN54. 15A Wright et al., supra note 10, S 3911.2, at 379; see supra text accompanying notes 15-17.

FN55. 15A Wright et al., supra note 10, S 3911.2, at 379-80.

FN56. 15A id. at 379. For example, in Mitchell v. Forsyth, 472 U.S. 511, 527-29 (1985), the Court allowed the interlocutory appeal of the denial of a motion for dismissal based on qualified official immunity, despite the entanglement of the official immunity claim with the merits of the case.

FN57. See 15A Wright et al., supra note 10, S 3911.2, at 380-81.

FN58. See, e.g., Western Elec. Co. v. Milgo Elec. Corp., 568 F.2d 1203, 1207 (5th Cir. 1978) ("The district court's decision that certain counterclaims must fail . . . is a decision sustaining a substantive defense to the cause of action asserted; it is a .step toward the final disposition of the merits of the case."' (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949))).

FN59. Boreri v. Fiat S.P.A., 763 F.2d 17, 21 (1st Cir. 1985) (quoting In re San Juan Star Co., 662 F.2d 108, 112 (1st Cir. 1981)); see also Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986) (reaching the same conclusion), cert. denied, 481 U.S. 1049 (1987).

FN60. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 498-99 (1989) (citations omitted).

FN61. Nixon v. Fitzgerald, 457 U.S. 731, 742-43 (1982).

FN62. Mitchell v. Forsyth, 472 U.S. 511, 525 (1985).

FN63. Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988).

FN64. See Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986) (observing that the collateral order doctrine has "spawned an immense jurisprudence"). As of September 1994, 1,380 reported federal cases discussed the "collateral order doctrine." Search of Westlaw, Allfeds database (Sept. 6, 1994).

FN65. Compare, e.g., Reise v. Board of Regents, 957 F.2d 293, 294-95 (7th Cir. 1992) (holding that an order compelling a physical examination under Rule 35 of the Federal Rules of Civil Procedure is not appealable under the collateral order doctrine) with Acosta v. Tenneco Oil Co., 913 F.2d 205, 207-08 (5th Cir. 1990) (granting interlocutory review of a similar order).

FN66. See, e.g., Bender v. Clark, 744 F.2d 1424, 1427 (10th Cir. 1984) ("(I)n the unique instance where the issue is not .collateral' but justice may require immediate review, a balancing approach should be followed . . . ."); Shakur v. Malcolm, 525 F.2d 1144, 1147 (2d Cir. 1975) ("(T)he Cohen exception, as applied, has evolved into a balancing test with the disadvantages of piecemeal appeal weighed against the importance of the questions raised by the interlocutory order.").

FN67. Palmer, 806 F.2d at 1318.

FN68. See Act of Sept. 24, 1789, ch. 20, S14, 1 stat. 73, 81-82 ("(A)ll the before-mentioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus . . . and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.").

FN69. 28 U.S.C. S 1651 (Supp. V 1993).

FN70. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382 (1953) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)). Many cases have cited this formulation of the purpose of extraordinary writs. See, e.g., Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661 (1978); Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976); Will v. United States, 389 U.S. 90, 95 (1967); United States Alkali Export Ass'n v. United States, 325 U.S. 196, 202 (1945); Ex parte Republic of Peru, 318 U.S. 578, 583 (1943).

FN71. Ex parte Fahey, 332 U.S. 258, 259 (1947).

FN72. Bankers Life & Casualty Co., 346 U.S. at 383 (citation omitted).

FN73. Id.

FN74. Martineau, supra note 3, at 747. For a survey of cases delineating the use of the writ of mandamus as a tool for interlocutory review, see 16 Charles A. Wright et al., Federal Practice and Procedure S 3935 (1977 & Supp. 1994).

FN75. See supra text accompanying notes 71-72.

FN76. Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976); Parr v. United States, 351 U.S. 513, 520 (1956); United States Alkali Export Ass'n v. United States, 325 U.S. 196, 202 (1945).

FN77. Will v. United States, 389 U.S. 90, 96 (1967) (quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953)).

FN78. Schlagenhauf v. Holder, 379 U.S. 104, 111 (1964).

FN79. 28 U.S.C. S 1292 (1988 & Supp. V 1993). Another exception for interlocutory orders not favoring arbitration is found at 9 U.S.C. S 16(a)(2) (Supp. IV 1992). For a brief discussion of S 16, see Martineau, supra note 3, at 734-36.

FN80. 28 U.S.C. S 1292(a)(1) (1988).

FN81. 16 Wright et al., supra note 74, S 3924, at 67.

FN82. 16 id.

FN83. 16 id.

FN84. 9 Moore et al., supra note 52, _ 110.20(1).

FN85. Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981). For a more thorough discussion of the scope of S 1292(a)(1), see 9 Moore et al., supra note 52, _ 110.20(1); 16 Wright et al., supra note 74, SS 3921-3924.

FN86. 28 U.S.C. S 1292(a)(2) (1988).

FN87. Id. S 1292(a)(3).

FN88. 28 U.S.C. S 1292(b) (1988) states in full:

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

FN89. See id.

FN90. See D'Ippolito v. Cities Serv. Co., 374 F.2d 643, 649 (2d Cir. 1967) ("(W)e cannot conceive that we would ever mandamus a district judge to certify an appeal under 28 U.S.C. S 1292(b) in plain violation of the Congressional purpose that such appeals should be heard only when both the courts concerned so desire.").

FN91. 28 U.S.C. S 1292(b) (1988).

FN92. See id.

FN93. 16 Wright et al., supra note 74, S 3930, at 159.

FN94. 16 id.

FN95. 16 id. at 159-60; see Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974). But see In re Cement Antitrust Litig., 673 F.2d 1020, 1027 (9th Cir. 1982) (pointing out that this approach makes the controlling question requirement superfluous), aff'd, 459 U.S. 1190 (1983). For a discussion of numerous cases holding orders to be either controlling or not controlling, see 9 Moore et al., supra note 52, _ 110.22(2), at 268-76.

FN96. 16 Wright et al., supra note 74, S 3930, at 158-59.

FN97. Kraus v. Board of County Rd. Comm'rs, 364 F.2d 919, 922 (6th Cir. 1966); United States Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966); Gottesman v. General Motors Corp., 268 F.2d 194, 196 (2d Cir. 1959). This added requirement has been criticized. See 9 Moore et al., supra note 52, _ 110.22(2), at 276 ("(C)ritics have the better argument."); Solimine, supra note 18, at 1193-96. The House Report supports the "big case" interpretation, but the Senate Report does not. Id. (referring to H.R. Rep. No. 1667, 85th Cong., 2d Sess. 3 (1958); S. Rep. No. 2434, 85th Cong., 2d Sess. 1 (1958), reprinted in 1958 U.S.C.C.A.N. 5255).

FN98. Fed. R. Civ. P. 54(b) states:

(w)hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision,

however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all parties.

FN99. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 438 (1956).

FN100. Turk, supra note 3, at 1031.

FN101. Id. at 1030.

FN102. Federal Courts Study Act, 28 U.S.C. S 331 (1988).

FN103. Federal Courts Study Comm., supra note 4, at 31.

FN104. Id. at 95.

FN105. Pub. L. No. 101-650, S 315, 104 Stat. 5104, 5115.

FN106. As amended, S 2072(c) provides that "such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 . . . ." 28 U.S.C. S 2072(c) (Supp. V 1993).

FN107. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, S 101, 106 Stat. 4506, 4506.

FN108. As amended, S 1292(e) provides that "(t)he Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)." 28 U.S.C. S 1292(e) (Supp. V 1993).

FN109. Martineau, supra note 3, at 719.

FN110. ABA Comm'n on Standards of Judicial Admin., Standards Relating to Appellate Courts S 3.12, at 25 (1977) (hereinafter ABA Standards). The text of S 3.12 reads:

Appealable Judgments and Orders.

(a) Final Judgment. Appellate review ordinarily should be available only upon the rendition of final judgment in the court from which appeal or application for review is taken.

(b) Interlocutory Review. Orders other than final judgments ordinarily should be subject to immediate appellate review only at the discretion of the reviewing court where it determines that resolution of the questions of law on which the order is based will:

(1) Materially advance the termination of the litigation or clarify further proceedings therein;

(2) Protect a party from substantial and irreparable injury; or

(3) Clarify an issue of general importance in the administration of justice.

Subsection (a) is similar to 28 U.S.C. S 1291, which provides that "(t)he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . ." Thus, the adoption of S 3.12(a) as it stands would do little to prune the "practically final" exceptions to the final judgment rule such as the collateral order doctrine. What is missing from subsection (a), and is relegated to the

comments following S 3.12, is a clear definition of "final." See ABA Standards, supra, at 21-24.

The Wisconsin statute adopting the ABA recommendation remedies this deficiency:

(1) Appeals as of right. A final judgment or a final order of a (trial) court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order (entered in accordance with s. 806.06(1)(b) or 807.11(2) or a disposition recorded in docket entries in ch. 799 cases or traffic regulation or municipal ordinance violation cases prosecuted in circuit court) which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

(2) Appeals by permission. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:

(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;

(b) Protect the petitioner from substantial or irreparable injury; or

(c) Clarify an issue of general importance in the administration of justice.

Wis. Stat. Ann. S 808.03 (West 1994).

FN111. This approach would not apply to reforms that would eliminate appeals as of right altogether. See, e.g., the reforms discussed in the sources cited supra note 3.

FN112. Wis. Stat. Ann. S 808.03(1) provides that "(a) final judgment or final order is a judgment or order entered in accordance with s. 806.06(1)(b) or 807.11(2) (i.e., when it is filed with the office of the clerk of the court) . . . ."

FN113. See supra Part I.

FN114. Although this simplification still would leave the writ of mandamus portion of the quilt intact, the second part of the Wisconsin-ABA approach (broad discretionary review) would remedy this situation. The writ of mandamus is not formally a judicially created exception to the final judgment rule because it is authorized by statute. See 28 U.S.C. S 1651 (1988). Nevertheless, by creating a relief valve for interlocutory appeals, extraordinary writs can return to the use for which they were intended-to remedy gross abuses of judicial power.

FN115. See supra note 64 and accompanying text.

FN116. For examples of such broad categories, see Judicial Conference of the United States, Report of the Judicial Conference of the United States 32 (1951) ("(A) court of appeals, on the application of a party, may in its discretion authorize an appeal from an interlocutory order, judgment or decree if such court determines that such authorization is necessary or desirable to avoid substantial injustice."); Carrington, supra note 3, at 167 ("The courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts when essential to protect substantial rights which cannot be effectively enforced on review after final decision."). One commentator posited the following:

When the court of appeals shall be of the opinion that delaying review of a district court order not otherwise appealable under this section may render the right of ultimate appeal of little or no value to the appellant, and that the cost of delay in review to the appellant outweighs the cost of delay in

trial to the appellee, then it may permit an appeal to be taken from such order if, in its discretion, it deems it likely that the order appealed from will be reversed.

Turk, supra note 3, at 1040.

FN117. These two categories are orders that if subjected to interlocutory appeal will "materially advance the termination of the litigation" or "protect the petitioner from substantial or irreparable injury." Wis. Stat. Ann. S 808.03(2)(a)-(b).

FN118. For example, Congress has decided that orders related to injunctions should categorically be allowed appeal. See supra text accompanying notes 79- 85.

FN119. Under the Wisconsin approach, the criteria for discretionary review are whether (1) the termination of the proceedings will be materially advanced, (2) the proceedings will be clarified, (3) the litigant will suffer substantial or irreparable harm absent appeal, or (4) appeal will clarify an issue of general importance. See Wis. Stat. Ann. S 808.03(2).

FN120. Martineau, supra note 3, at 775.

FN121. See supra Section I(A).

FN122. See supra note 67 and accompanying text.

FN123. See supra note 66.

FN124. Rosenberg, supra note 1, at 176.

FN125. 477 N.W.2d 648 (Wis. Ct. App. 1991).

FN126. Id. at 650 n.3 (citing Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985)).

FN127. 292 N.W.2d 348 (Wis. 1980), overruled in part on other grounds, State v. Copening, 303 N.W.2d 821 (Wis. 1981).

FN128. Id. at 349.

FN129. 292 N.W.2d 114 (Wis. 1980).

FN130. Under the Wisconsin system, the court of appeals has complete discretion whether to hear an appeal under Wis. Stat. Ann. S 808.03(2). The Supreme Court of Wisconsin does not review the decision of the court of appeals to refuse to hear an interlocutory appeal. Town of Fitchburg v. City of Madison, 299 N.W.2d 199, 210 n.4 (Wis. 1980). Presumably one could appeal a refusal to hear an interlocutory appeal if the court of appeals refused to exercise its discretion. For example, the court of appeals cannot hold that a certain class of orders is per se not appealable. Similarly, if the court of appeals grounded its decision not to hear an appeal on unconstitutional grounds, the refusal should be reversed.

FN131. State ex rel. A.E., 292 N.W.2d at 115-16.

FN132. Solimine, supra note 18, at 1193.

FN133. Id. at 1176.

FN134. Administrative Office of the United States Courts, Annual Report of the Director of the Administrative Office of the United States Courts 106 (1990) (38,520 terminated appeals); Administrative Office of the United States Courts, Annual Report of the Director of the Administrative Office of the United States Courts 137 (1989) (37,372 terminated appeals); Administrative Office of the United States Courts, Annual Report of the Director of the Administrative Office of the United States Courts 141 (1988) (35,888 terminated appeals); Administrative Office of the United States Courts, Annual Report of the Director of the Administrative Office of the United States Courts 138 (1987) (34,444 terminated appeals); Administrative Office of the United States Courts, Annual Report of the Director of the Administrative Office of the United States Courts 138 (1986) (33,774 terminated appeals).

FN135. This figure is obtained by multiplying 180,000 by 12%, Judge Richard Posner's estimated percentage of interlocutory appeals heard by federal courts. Richard A. Posner, Federal Courts: Crisis and Reform 72-73 (1985).
FN136. Martineau, supra note 3, at 782-83.

FN137. Id.

FN138. See Posner, supra note 135, at 72-73.

FN139. See supra text accompanying note 112.

FN140. See Martineau, supra note 3, at 784-85.

FN141. See supra text accompanying notes 33-38.

FN142. David L. Walther et al., Appellate Practice and Procedure in Wisconsin S 9.2 (1993).

FN143. See supra text accompanying note 120.

FN144. See supra text following notes 122-23.

FN145. See supra text accompanying notes 64, 67.

FN146. Martineau, supra note 3, at 772.

FN147. 28 U.S.C. S 2072(c) (Supp. V 1993) ("Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291.").

FN148. See Thomas D. Rowe, Jr., Defining Finality and Appealability by Court Rule: A Comment on Martineau's "Right Problem, Wrong Solution," 54 U. Pitt. L. Rev. 795, 799-800 (1993).

FN149. Martineau, supra note 3, at 772.

FN150. 28 U.S.C. S 1292(e) (Supp. V 1993) ("The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).").

FN151. Id; see Rowe, supra note 148, at 798 (reaching a similar conclusion).

FN152. See Rosenberg, supra note 1, at 177 ("The appellate court, with high volumes of appeals of right pressing on it, now has to decide whether to add to its burden by accepting the certified interlocutory appeal as a matter of grace."). Higher caseloads also would diminish the quality of the review of petitions for interlocutory review. Cf. Dalton, supra note 3, at 63 (arguing that because caseload burdens on the courts of appeals have increased, the quality of appellate review in general has diminished, in some cases to a "mere formality").

FN153. Discovery orders generally are not allowed interlocutory appeal under current law. See infra note 158 and accompanying text.

FN154. Orders involving questions of official immunity generally are allowed interlocutory appeal under current law. See infra note 181.

FN155. 957 F.2d 293 (7th Cir. 1992).

FN156. See id. at 295.

FN157. Nicole E. Paolini, Note, The Cohen Collateral Order Doctrine: The Proper Vehicle for Interlocutory Appeal of Discovery Orders, 64 Tul. L. Rev. 215, 216 (1989).

FN158. See Dow Chem. Co. v. Taylor, 519 F.2d 352, 355 (6th Cir.) (denying immediate review of an order requiring party to answer interrogatory because review is available upon refusal to obey the order), cert. denied, 423 U.S. 1033 (1975); Ryan v. Commissioner, 517 F.2d 13, 19 (7th Cir.) (same), cert. denied, 423 U.S. 892 (1975); International Business Mach. Corp. v. United States, 480 F.2d 293, 298 (2d Cir. 1973) (en banc) (denying immediate review of discovery orders in a civil antitrust suit because there was no important wide-ranging issue in question), cert. denied, 416 U.S. 980 (1974); see also Borden Co. v. Sylk, 410 F.2d 843, 845-46 (3d Cir. 1969), in which the court stated,

We have detected what appears to be an irresistible impulse on the part of appellants to invoke the "collateral order" doctrine whenever the question of appealability arises. Were we to accept even a small percentage of these sometime exotic invocations, this court would undoubtedly find itself reviewing more "collateral" than "final" orders.

FN159. See Acosta v. Tenneco Oil Co., 913 F.2d 205, 207 (5th Cir. 1990) (holding that an order that plaintiff submit to examination under Rule 35 of the Federal Rules of Civil Procedure satisfies the Cohen requirements); Smith v. B.I.C. Corp., 869 F.2d 194, 198-99 (3d Cir. 1989) (holding that denial of a protective order to protect against disclosure of trade secrets satisfies the Cohen requirements); American Tel. & Tel. Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978) (holding that an order revoking a protective order involving a third party satisfies the Cohen requirements), cert. denied, 440 U.S. 971 (1979); Carr v. Monroe Mfg. Co., 431 F.2d 384, 387 (5th Cir. 1970) (holding that discovery orders may be appealable when a governmental privilege is asserted in cases in which the government is not a party), cert. denied, 400 U.S. 1000 (1971).

FN160. Reise, 957 F.2d at 293.

FN161. Id.

FN162. Id. at 294.

FN163. Id.

FN164. Id.

FN165. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

FN166. Reise, 957 F.2d at 294.

FN167. Id. at 295-96.

FN168. Wis. Stat. Ann. S 808.03(2)(a) (West 1994).

FN169. Id. S 808.03(2)(c).

FN170. Subsection 808.03(2)(b) requires the appellate court to conclude that delay of appeal "will . . . protect the petitioner from substantial or irreparable injury." Id. S 808.03(2)(b) (emphasis added). A reviewing court never can be absolutely sure that a petitioner will be harmed by delaying review until it hears the appeal and concludes that the trial court has made an error. The statute should be read as requiring the substantial likelihood of harm rather than definite harm. The statute seems to have been interpreted this way. See, e.g., State v. Jenich, 292 N.W.2d 348, 349 (Wis. 1980).

FN171. Reise v. Board of Regents, 957 F.2d 293, 295 (7th Cir. 1992).

FN172. Collapsing the inquiry into an assessment of the merits of the underlying appeal has already occurred in Wisconsin. State v. Webb, 467 N.W.2d 108, 112 (Wis.) ("The (appellant) must also show a substantial likelihood of success on the merits."), cert. denied, 112 S. Ct. 249 (1991).

FN173. Although Judge Easterbrook did not address the merits of Reise's claim, his hostile language indicated that he did not think it had merit. Reise, 957 F.2d at 293, 295 ("Reise is engaged in jousting . . . . It is too late in the day to waste words . . . .").

FN174. Id. at 295.

FN175. A Westlaw search revealed only two unpublished Wisconsin decisions allowing appeal of a discovery order. See Balogh v. Warren, 393 N.W.2d 799 (Wis. Ct. App. 1986) (unpublished disposition available on Westlaw); Nelson v. O'Horo, 375 N.W.2d 220 (Wis. Ct. App. 1985) (unpublished disposition available on Westlaw); Search of Westlaw, WIS- CS database (Sept. 27, 1994).

FN176. 113 S. Ct. 684 (1993).

FN177. Id. at 686.

FN178. Id.

FN179. Id.

FN180. Id. at 686.

FN181. Id. at 687 (citing Mitchell v. Forsyth, 472 U.S. 511 (1985); Nixon v. Fitzgerald, 457 U.S. 731 (1982)).

FN182. Id. (quoting Mitchell, 472 U.S. at 526).

FN183. Id. at 686 n.1, 689 ("We . . . express no view on the merits of the immunity claim."); id. at 689.

FN184. See supra text accompanying note 25.

FN185. Wis. Stat. Ann. S 808.03(2)(a) (West 1994).

FN186. Id. S 808.03(2).

FN187. See supra note 172 and accompanying text.

FN188. See supra note 174 and accompanying text.

FN189. Solimine, supra note 18, at 1190 (estimating a reversal rate of five times that in other cases).

FN190. See supra note 62.

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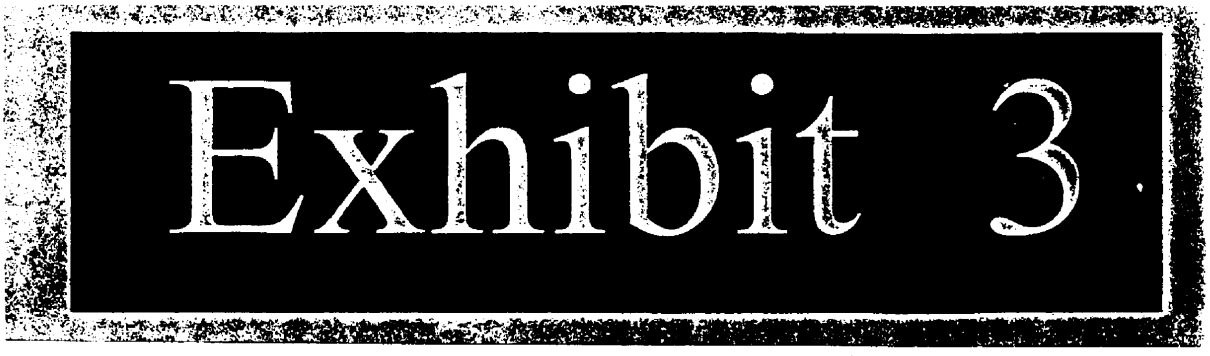
Exhibit 3

Appellate Practice
in the United States

Second Edition

Robert L. Stern

The Bureau of National Affairs, Inc., Washington, D.C.

4

What Orders Are Appealable—The Finality Doctrine and Exceptions

4.1 The General Principle That Appeals May Be Taken Only From Final Judgments or Orders

The fact that a case may ultimately be appealable does not mean that every preliminary order can be taken to an appellate court. The general rule in most jurisdictions is that only final judgments are reviewable,[1] with the substance of any prior order which still remains significant at the end of the trial being reviewable along with the judgment.[2]

Although this principle is now embodied in many statutes, rules, and decisions, it stems from the English rule at common law (but not in equity) extant long before the Constitution. It was first embodied in the federal structure by three sections of the Judiciary Act of 1789,[3] and in some state laws before that.[4] In the United States the statutory exceptions which have long been recognized in most jurisdictions for such equitable functions as the granting or denying of temporary injunctions or the appointment of receivers have had both a historical and a pragmatic justification.

At least two reasons underlie limiting appeals to final judgments.

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[1]Often with an exception for cases involving small amounts. See Sec. 1.5, *supra*.

[2]F. JAMES AND G. HAZARD, CIVIL PROCEDURE, Secs. 12.41–12.42 (3d ed., 1985); 15 C. WRIGHT, A. MILLER, AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE, Secs. 3905–3919 (1976 and 1986 Supp.); C. WRIGHT, FEDERAL COURTS, Secs. 101–102 (4th ed., 1983); 9 MOORE'S FEDERAL PRACTICE, ¶¶110.06–110.30 (1987); J. Sobieski, *The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure*, 45 TENN. L. REV. 161, 217 n. 308 (1978), and authorities cited therein.

[3]1 Stat. 72 (1789), §§21, 22, and 25. The difference between law and equity in England seems to have resulted from the practice in equity where a Master initially merely took depositions and submitted them with his recommendations to the Chancellor, who would issue all orders, interlocutory or final.

[4]Virginia Act of (May) 1779 (c.22, 10 Stat. Large 89, 101); Maryland Act of 1785 (c.72).

Usually a party is not seriously aggrieved or injured until a case is finally decided; the cost and annoyance of litigating are regarded as necessary and normal incidents of the judicial process, and do not count. Of greater significance is the feared delaying effect of allowing appeals from preliminary orders. Even the fastest appeals usually take a number of months. A trial might often be impeded while trial court rulings are under consideration by a reviewing tribunal, and if no stay were granted pending appeals from one or more orders dealing with preliminary matters, there might be a need to repeat different aspects of the lower court litigation. As stated by the Supreme Court, speaking through Justice Frankfurter:

> "Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be lead-enfooted. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause."[5]

The taking of a number of appeals from different orders in the same case would only be confusing; appellate courts in busy jurisdictions could easily be overloaded, as has occurred in New York where a great many interlocutory orders are appealable.[6]

In most cases and in most circumstances the rule accomplishes its purposes and is unobjectionable. Immediate and separate appeals should not be allowed from rulings made during a trial, in part because the final judgment usually follows closely after the trial. And when the trial follows shortly after the institution of the case, or when the trial is short and uncomplicated, it makes much more sense to let the case proceed to its conclusion and then allow a single appeal raising all the questions than to permit separate appeals from separate prejudgment orders. Undoubtedly most cases fall within these categories, although in many metropolitan jurisdictions where the trial courts are overloaded with work even such cases may take months or years.

On the other hand, if the trial will not take place until long after the pleadings are filed because of the state of the calendar or the nature of the case, some interlocutory appeals may expedite rather than retard the litigation. Complex cases involving long discovery often fall in this category. Furthermore, in such cases particular pretrial orders, such as those allowing or denying temporary injunctions, bail, changes of venue, class actions, or the use of alleged

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[5] *Cobbledick v. United States*, 309 U.S. 323, 325 (1940), quoted with approval in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 n. 8 (1978), and *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1982).

[6] H. Korn, *Civil Jurisdiction of the New York Court of Appeals and Appellate Divisions*, 16 BUFFALO L. REV. 307, 330 (1967).

privileged testimony, may often have serious and continuous effects which cannot be remedied on appeal from the final judgment long in the future. An appeal from a denial of a motion to dismiss, which by its very nature is not a "final" order, might be disposed of before the case would be tried in normal course, so that what the appellate court decides or says might make the trial completely unnecessary or give guidance as to how it should be conducted. In such circumstances appeal from an interlocutory order may well put the litigation on the right track, or prevent irreparable injury, or resolve an issue separable from the merits so as to avoid the loss of a right or privilege.[7] This can often speed up rather than delay otherwise prolonged litigation. Awareness of these countervailing considerations has produced general agreement in recent years that

> "(1) no type of order other than a final judgment is invariably of such importance that it should be appealable of right, and (2) almost any type of order can be, under certain circumstances, an appropriate occasion for corrective action through appellate review."[8]

4.2 Exceptions to the Finality Doctrine—In General

General recognition that invariably prohibiting appeals from nonfinal orders would often be unfair to a party and not justified by the needs of effective judicial administration has produced a number of exceptions to the final judgment rule. Indeed, many years ago it was said that the final judgment rule caused more litigation than it prevented.[9] The volume of litigation on the subject has certainly not diminished since then.[10] There is both a diversity of exceptions among the various jurisdictions and confusion as to the scope of the exceptions in particular jurisdictions, including the federal courts.[11]

In New York, the exceptions may have largely swallowed the rule. The Commentaries to §5701 of the New York Civil Practice Act and Rules, which section allows appeals as of right from any interlocutory order which, *inter alia*, "involves some part of the merits" or "affects a substantial right," conclude that "almost anything can be appealed to New York's intermediate appellate court," the Appellate Division. These two provisions "betwixt them both * * * come close to licking the platter clean," although a lawyer should still check

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[7] C. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 553 (1932).

[8] F. JAMES AND G. HAZARD, CIVIL PROCEDURE, Sec. 12.9 (3d ed., 1985). See also Sobieski, *supra* note 2, at 217–220.

[9] C. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 553 (1932).

[10] As of 1986, the United States Code Annotated contained 689 pages of annotations to the statutes (28 U.S.C. §§1291, 1292) which embody the finality rule and the exceptions thereto.

[11] The authorities are collected in the material cited in note 2, *supra*.

the cases since "there are a few instances in which orders have [still] been held unappealable."[12]

Other states do not go that far, although a few others do use criteria of similar breadth. South Dakota allows appeals as of right not only from judgments but also from orders "affecting a substantial right" which "in effect determine the action and prevent a judgment from which an appeal might be taken." S.D. Rule 15-26A-3. In Minnesota "orders involving the merits or some part thereof" are appealable (Supreme Court Rule 103.03(d)); in Arizona a party may seek interlocutory review by filing a "special action" in the reviewing court. That is a remedy which supersedes the extraordinary writs and other means of seeking such review. There are no specific standards, so that the appellate courts have broad discretion to grant review when they think it warranted, but in fact they do so extremely sparingly. It does not appear that these broad statements have been construed so as to allow most, or indeed many, interlocutory orders to be appealed. In Minnesota few interlocutory appeals are allowed, and then only in extraordinary circumstances.

In several states the trial court may "reserve" questions of law for the appellate court, which means that it is certifying them to the appellate court before deciding them itself. In Connecticut this can be done only with the consent of the parties. Connecticut Supreme Court Rules 4147–4148 (1986). The appellate court must find that the questions presented are "reasonably certain to enter into the decision of the case, and it appears that their present determination would be in the interest of simplicity, directness and economy of judicial action."

The final judgment requirement is usually embodied in a statute or rule of court, where it is followed either by a list of specific exceptions or by standards for the court to follow in determining whether to authorize interlocutory appeals, or both.[13]

4.3 Interlocutory Appeals as a Matter of Right

The first class of exceptions lists particular categories of interlocutory orders from which appeals can be taken as of right. In the federal system, the courts of appeals have jurisdiction to review interlocutory orders granting, modifying, continuing, or denying in-

[12]See 7B McKinney's Consolidated Laws of New York, Civil Practice and Rules §5701, at pp. 573, 577 (1978). Professor Harold L. Korn, an authority on New York practice, wrote in 1967: "It is generally recognized that this broad authority for appeal as of right from almost every kind of intermediate determination is a prime source of delay and expense in litigation and imposes an undue burden on the Appellate Divisions. Nevertheless, the proposal of the CPLR revisers to eliminate the broad catch-all language met with substantial opposition from some segments of the bar." H. Korn, *Civil Jurisdiction of the New York Court of Appeals and Appellate Divisions*, 16 Buffalo L. Rev. 307, 330 (1967). There has been no significant change in the New York law since 1967.

[13]Sobieski, *supra* note 2, at 219–222.

junctions, appointing receivers or refusing to wind up receiverships or to take steps to accomplish the purposes thereof, determining rights and liabilities in admiralty cases in which appeals from final decrees are allowed, and judgments in patent cases which are final except for accounting.[14] Under the Classified Information Procedures Act of October 15, 1980 (94 Stat. 2025, 18 U.S.C.A. App. after §6005, at pp. 621–634 (1985)), the United States may take an interlocutory appeal in a criminal case from an order authorizing the disclosure of classified information within 10 days after the order if the criminal trial has not commenced; if an appeal is taken during trial, the court of appeals shall, if necessary without briefs or written opinion, hear argument within four days after the required adjournment of the trial, and decide the case within four days thereafter. How this novel method of expediting interlocutory appeals will work will be of interest.[15]

Most state courts are governed by similar provisions as to injunctions[16] and receiverships.[17] Other exceptions cover orders requiring payment of money or the immediate delivery of property,[18] certain types of orders in probate,[19] tax,[20] and partition[21] litigation, and orders terminating parental rights.[22] In a number of states, orders granting or denying new trials or certain types of new trials are appealable either as a matter of right, as in Florida, Idaho, Iowa, New York, Pennsylvania, South Dakota, and Washington, or by leave of the appellate court, as in Illinois.[23] Orders changing or refusing to change the place of trial are reviewable in Nevada.[24] Nevada also has an unusual rule (3A(b)(5)) that a denial of summary judgment may not be reviewed on appeal but may on mandamus (as to which see Sec. 4.7, *infra*). Florida permits review of nonfinal orders only in some of the above situations and also for orders determining venue,

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[14]28 U.S.C. §1292(a); C. WRIGHT, A. MILLER, E. COOPER, AND E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE, Secs. 3920–3936 (1977 and 1987 Supp.); C. WRIGHT, FEDERAL COURTS, Sec. 102, at p. 512 (4th ed., 1983). Prior to the enactment of 28 U.S.C. §1293, in Section 236(a) of the Bankruptcy Reform Act of 1978 (92 Stat. at 2667), interlocutory appeals could often be taken in bankruptcy cases. The law governing bankruptcy appeals before and after the 1978 Act and its effective dates is discussed in the text and pocket part of §3926 in FEDERAL PRACTICE AND PROCEDURE, which finds the meaning of the new statute not at all clear.

[15]This statute has been given effect in a small number of cases. *United States v. Smith*, 750 F.2d 1215 (CA 4, 1984); *United States v. Wilson*, 750 F.2d 7 (CA 2, 1984), which cites earlier authorities.

[16]Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Kansas, Maryland, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Texas, Virginia.

[17]Alabama, Arizona, Arkansas, California, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Texas.

[18]California, Florida, Illinois, Indiana, Kansas, Maryland, Montana, Nevada, Virginia.

[19]California, Idaho, Montana, Texas.

[20]California, Kansas.

[21]Montana, Nevada, Pennsylvania, Texas.

[22]Illinois, Washington.

[23]New York Civil Practice Laws and Rules, §5701(a)(2), 4402–4404; Korn, *supra* note 12, at 333–336; Washington Appellate Rule 2.2(a)(9); Idaho Rule 11; Iowa Rule 1(a); Florida Rule 9.110, 9.130(a)(4); Illinois Rule 306; Pennsylvania Appellate Rule 311(a)(5) (granting).

[24]See Nevada Rule 3A(b)(2).

jurisdiction of the person, the issue of liability in favor of a party seeking affirmative relief, and the right to immediate monetary relief or child custody in domestic relations matters. Florida Rule of Appellate Procedure 9.130(a). In criminal cases the state is often allowed to appeal from orders suppressing evidence where the practical effect is to terminate the case and the defendant has not been placed in double jeopardy by the appeal.[25] This list of exceptions is not complete; each jurisdiction's rules and case law should, of course, be consulted.

4.4 Judgment Final as to Some but Not All of the Claims or Parties

Rule 54(b) of the Federal Rules of Civil Procedure, as well as the rules or statutes of many states,[26] provides that the trial court "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."[27] Although such a judgment does not terminate the entire litigation, the United States Supreme Court regards the rule as consistent with the final judgment statute because such orders are in fact final as to particular parties or claims. *Sears Roebuck & Co. v. Mackey*, 351 U.S. 427, 435–437 (1956). Certification under provisions like Rule 54(b) would seem appropriate when ultimate determination of the remainder of the case in the trial court both will involve separable issues and will take considerable time, and when there is good reason for not delaying the appeal as to the matters disposed of. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980). If the remainder of the case is soon to be decided, however, there is little to be gained by allowing the case to be divided for purposes of appeal.[28]

The two Supreme Court decisions cited above recognize that under the federal rule the district court's certification is not conclusive;

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[25]E.g., 18 U.S.C. §3731; Washington Rule 2.2(b); Florida Rule 9.140(c) and Committee Note. In November 1980, an amendment to the Texas constitution was approved permitting appeals in similar circumstances. Under Colorado Rule 4.1, the state's notice of appeal must be filed within 10 days of the entry of the order complained of, the state's brief within 10 days after the filing of the record in the Supreme Court, the appellee's brief within 10 days thereafter, and the reply brief within 5 days.

[26]E.g., Arizona, California, Idaho, Illinois, Texas.

[27]See 10 C. WRIGHT, A. MILLER, AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE, Sec. 2654 (1983); C. WRIGHT, FEDERAL COURTS 699–701 (4th ed., 1963).

[28]*De Melo v. Woolsey Marine Indus.*, 677 F.2d 1030 (CA 5, 1982) (court can review under 1292(b) an order which could have been certified under Rule 54(b). The *De Melo* opinion (*id.* at 1032) quotes contrary analyses of the question in 10 C. WRIGHT, A. MILLER, AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE, Sec. 2658, at p. 62 (1973), and 16 C. WRIGHT, A. MILLER, E. COOPER, AND E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE, Sec. 3929, at p. 147 (1977). The 1983 revision of Vol. 10 (10 C. WRIGHT, A. MILLER, AND M. KANE, FEDERAL PRACTICE AND PROCEDURE, Sec. 2658.2, at p. 84) and the 1986 Supplement to Vol. 16 (p. 109) cite and agree with *De Melo*.

it is reviewable in the court of appeals for "abuse of discretion." See also *Brunswick Corp. v. Sheridan*, 582 F.2d 175, 183 (CA 2, 1978). Judge Friendly stated in the *Brunswick* case that Rule 54(b) orders "should be used only in the infrequent harsh case" where there is "some danger of hardship or injustice through delay which would be alleviated by immediate appeal." The rule should not be invoked when the issues still to be tried are intertwined with the supposedly "separable" issue already decided. Subsequently in *Curtiss-Wright* the Supreme Court emphasized the "substantial deference" to be given the district court's assessment; "the task of weighing and balancing the contending factors is peculiarly for the trial judge." 446 U.S. at 10, 12. In that case, where the trial court had provided a carefully considered statement of reasons, the Supreme Court held that the court of appeals should have accepted the district court's ruling. The trial court's certification, which gives the order deciding part of the case the status of a final judgment, begins the running of the time to appeal and makes the order *res judicata* if not reversed. 10 C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure*, Sec. 2661 (1983); 6 *Moore's Federal Practice*, ¶54.42 (2d ed., 1987). It therefore may push the losing party into taking an immediate appeal from the certified order. Each party should carefully consider, before requesting a certification, whether this will be strategically wiser than waiting to see what happens to the rest of the case.

4.5 Review of Interlocutory Orders as a Matter of Discretion

In some states (such as Florida and Colorado) interlocutory appeals may be taken only where authorized as a matter of right, as described in Sec. 4.3, *supra*. In the federal system and many of the states, however, the courts have discretion to authorize interlocutory review in accordance with prescribed standards. These standards are applied either by the trial court in the first instance and then by the reviewing court, or by the reviewing court alone. They are phrased in various ways, but in general they relate to the urgency of immediate review, whether it will expedite and not retard the completion of the litigation, and the importance and doubtfulness of the question as to which review is sought.

(a) The Federal Standards

The most common provision for appeals from nonfinal orders appears in the Federal Interlocutory Appeals Act of 1958 (28 U.S.C.

§1292(b)), and similar statutes or rules of a number of states.[29] Section 1292(b) permits interlocutory appeal when the district judge entering an interlocutory order certifies "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The appellant must file a petition for leave to appeal in the court of appeals within 10 days after the trial court's certificate explaining why the standards for interlocutory review have been met and why the appeal should be heard. Adverse parties have seven days to answer.[30]

As stated in the House Committee Report supporting the enactment of the Interlocutory Appeals Act, such a certification by the trial court of

> "the case as appropriate for appeal serves the double purpose of providing the Appellate Court with the best informed opinion that immediate review is of value, and at once protects appellate dockets against a flood of petitions in inappropriate cases. * * * [A]voidance of ill-founded applications in the Courts of Appeals for piece-meal review is of particular concern. If the consequence of change is to be crowded appellate dockets as well as any substantial number of unjustified delays in the Trial Court, the benefits to be expected from the amendment may well be outweighed by the lost motion of preparation, consideration, and rejection of unwarranted applications for its benefits."[31]

The trial court certification brings the interlocutory order before the appellate court, but does not require the latter court to hear the appeal. As stated by Justice Stevens for the Supreme Court in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978):

> "even if the District Judge certifies the order under §1292(b), the appellant still 'has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.' *Fisons Ltd. v. United States*, 458 F.2d 1241, 1248 (CA7, 1972). The appellate court may deny the appeal for any reason, including docket congestion."

The Interlocutory Appeals Act was designed "to meet the recognized need for prompt review of certain nonfinal orders" (*id.* at 474) which do not fall within categories readily definable in advance.

(b) State Deviations From the Federal Standards

A number of states which provide for discretionary interlocutory review deviate from the §1292(b) pattern in one or more respects:

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[29] Alabama (only to Supreme Court in cases within its "original appellate jurisdiction"), Idaho, Illinois, Kansas, Michigan, New Mexico, Pennsylvania, Rhode Island, Tennessee, Vermont. Colorado, which in general follows the federal practice, omits §1292(b).

[30] Federal Rule of Appellate Procedure 5(a). The time limits differ in some of the states. E.g., Illinois (14 days for each party).

[31] H.R. REP. NO. 1667, 85th Cong., 2d Sess. 6 (1958).

(1) The guiding standard is phrased differently;
(2) The application is made only to the reviewing court and not initially to the trial court; and
(3) Application may be made to the reviewing court even if the trial court may, but refuses to, certify.

The states which depart from the 1292(b) standards do so in varying degrees. Some use the federal language with minor or major modifications.

Illinois Supreme Court Rule 308 follows the federal model but omits the word "controlling" because:

> "The meaning of 'controlling' has not been clear, despite many cases on the point, and experience has shown that sometimes an important question of law that only arguably could be said to be controlling should be heard on appeal without awaiting final judgment"[32]

To certify that determination of an important question as to discovery, privilege, venue or class action status, for example, would be "controlling" in the litigation as a whole was frequently difficult unless "controlling" was construed so broadly as to be practically meaningless. As might be expected, the federal courts differ as to how this provision should be applied, and its presence in the federal statute is more confusing than helpful.

Oklahoma (12 Oklahoma Stat. §952(b)(3), Oklahoma Rule of Appellate Procedure 1.50) incorporates the second 1292(b) requirement that the trial court must certify "that immediate appeal may materially advance the ultimate termination of the litigation." It omits the need for a controlling and doubtful question of law. The state Supreme Court then has discretion whether to accept the appeal.

Many of the states add to the factors which must be considered under §1292(b) irreparable injury to appellant if appellate review must await final judgment.[33] Thus, the standard embodied in Indiana Rule 4(B)(5) requires a finding by both trial and appellate courts that:

> "(a) the appellant will suffer substantial expense, damage or injury if the order is erroneous and the determination thereof is withheld until after judgment, or (b) the order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case, or (c) the remedy by appeal after judgment is otherwise inadequate."

Clause (b) embodies the substance of §1292(b), but (a) and (c) emphasize irreparable injury and the inadequacy of the ordinary remedy of appeal after judgment. Significantly, the three clauses are in the

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[32] Committee Comments to Illinois Supreme Court Rule 308.

[33] See the Indiana, Tennessee, Wisconsin, New Hampshire, Alaska, and Washington rules discussed *infra*. New Jersey Rule 2:2-2 authorizes interlocutory appeals to the Supreme Court by leave of court when necessary to prevent irreparable injury and in death cases.

disjunctive; a finding of any one of them is sufficient. Michigan Rule 7.203(B)(1)(a)(ii) adds two alternative grounds to those mentioned in §1292(b): a showing "that the matter is either of major significance to the jurisprudence of the state or that the decision is clearly erroneous and appellant will suffer substantial harm by awaiting final judgment before taking appeal."[34] In Minnesota the trial court must certify that the question is important and doubtful. Rule 480.103.03.

Other states employ broad general language which gives the courts wide discretion either through the controlling standard or through an alternative with somewhat more specific criteria. Georgia allows review of interlocutory orders when they are "of such importance that immediate review should be sought" (Georgia Code 3629, 4522). In Maine and Massachusetts[35] the test is whether the matter ought to be determined by the appellate court "before any further proceedings are taken" below. In South Dakota and New Jersey the test is whether justice will be served by deciding an appeal before a final determination below (South Dakota Rule 15-26A-3; New Jersey Rule 2:2–4). Iowa Rule of Appellate Procedure 2 provides for review of any interlocutory ruling upon a finding by the Supreme Court or a justice that the ruling "involves substantial rights and will materially affect the final decision and that a determination of its correctness before trial on the merits will better serve the interests of justice." Utah Rule 5(d) is similar.

Delaware Rule 42, after referring to the trial court's order as determining "a substantial issue and establish[ing] a legal right" and specifying criteria of importance (such as novelty, conflict, and constitutionality), adds the alternative factor whether the immediate appeal "may terminate the litigation or otherwise serve considerations of justice."

Washington Rule 2.3 allows interlocutory review as a matter of discretion if the trial court "has committed an obvious error which would make further proceedings useless" or a "probable error" which "substantially alters the status quo," or so far departs "from the accepted and usual course" of a judicial proceeding or (sanctions such departure by lower courts or agencies) as to call for action by the appellate court. This both serves the same purpose as §1292(b) and supersedes the extraordinary writs. See Sec. 4.7, *infra*.

Some of the above standards for allowing review of nonfinal orders appear to be very broad, some omit relevant considerations,

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[34] Vermont Rule 5, in addition to adopting the §1292(b) standards, permits an appeal by agreement of the parties of an important or doubtful question of law if its disposition will dispose of at least one alternative gound of decision.

[35] Maine Rule 72 and Massachusetts Ann. Laws, Chap. 231, Sec. 111. In both states the trial court "reports" the question to the appellate court, or the aggrieved party may petition. Maine and Vermont also permit the trial court, with the agreement of the parties, to report prior to judgment any question of law to the supreme court if the question is of sufficient importance or doubt, and its disposition would in at least one alternative finally dispose of the action. Maine Rule 72(2); Vermont Rule 5(a). Vermont Rule 5(b) is the equivalent of 28 U.S.C. §1292(b).

and some are complicated. This does not necessarily mean that they do not work satisfactorily. That would depend on how the courts apply them, whether strictly or liberally. A completely flexible system, with no standards which limit the court's discretion, such as Arizona's special action practice (see Sec. 4.2, *supra*), may function as well as or better than those that limit a court's discretion by specific standards, so long as it does not result in a flood of unwarranted applications which burden the appellate courts even if only a few are granted. How different standards operate in practice can only be determined by studies in depth of both the statistics as to judicial workload and the reaction of the bench and bar in each jurisdiction.

Several recent formulations state the reasons why interlocutory review should be allowed in language specific enough to be meaningful to judges and lawyers, and yet broad enough to allow ample room for judicial discretion. In 1977, the American Bar Association approved the *Standards Relating to Appellate Courts* proposed by a commission composed of many distinguished judges and lawyers. Section 3.12, p. 29, which was immediately taken almost verbatim into Wisconsin Rules 809.50, and 808.03(2), represents "a synthesis" both of the federal practice "and the corresponding rules of a number of the states." It provides for review at the discretion of the appellate court on a showing

> "that review of the judgment or order immediately rather than on an appeal from the final judgment in the 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."

This formulation differs from §1292(b) in adding protection "from substantial and irreparable injury" and clarification of an issue of general importance. It also makes the factors listed alternative gounds for immediate review by substituting "or" for "and." It omits the limitation to "controlling question of law as to which there is substantial ground for difference of opinion," although the word "clarify" more broadly embodies the same concept of uncertainty in the existing law. New Hampshire Rule 8, adopted in 1979, combined the language of §1292(b) with the last three classes of the *Appellate Standards* quoted above and in the Wisconsin rule.

Shortly thereafter, in 1979, new Tennessee Rule of Appellate Procedure 9(a) spelled out substantially the same factors but in greater and perhaps more helpful detail,[36] as follows:

> "In determining 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

[36] As to the theory underlying the recent Tennessee rules, see J. Sobieski, *The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Practice*, 45 TENN. L. REV. 161, 220–226 (1978).

> the probability that review upon entry of 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. Failure to seek or obtain interlocutory review shall not limit the scope of review upon an appeal as of right from entry of the final judgment."

In 1980 Alaska completely revised its standards for interlocutory appeals to its Supreme Court and Court of Appeals. Rule 402 provides:

> "Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed because:
>
> "(1) postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors; or
>
> "(2) the order or decision involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order or decision may materially advance the ultimate termination of the litigation, or may advance an important public interest which might be compromised if the petition is not granted, or
>
> "(3) the trial court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for the appellate court's power of supervision and review; or
>
> "(4) the issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest."

The accompanying Comment, prepared by the Clerk, explained the deletion of the word "controlling" from the prior Alaska rule, which had been modeled on 28 U.S.C. §1292(b). The revised rule "expressly provided for review in the class of cases in which the termination of the instant case may not be sufficiently important to justify review, but the public interest in settling the question is. The Alaska Supreme Court currently grants review in such cases, although there is no clear authority for it in the rules." The fourth reason for granting review when "the issue is one which might otherwise evade review" when an immediate appellate decision is needed in the public interest was said to reflect judicial practice but without "specific authority" in the rules.

These criteria proposed by the *Appellate Standards*, Wisconsin, New Hampshire, Tennessee, and Alaska, which rest on studies of the practice throughout the country, best describe the factors which should guide courts in determining whether to allow interlocutory appeals.

(c) Application to Both Courts or Only to the Reviewing Court

Many jurisdictions, including the federal, condition interlocutory review on a certificate by the trial court to the appellate court that the order in question satisfies the prescribed standards,[37] or at least that the party has requested such a certificate below, whether the request is approved or disapproved. Idaho Rule 12(c). The reviewing court then exercises its own discretion independently, presumably applying the same standards but without being restricted to them, as the Supreme Court recently declared in the *Coopers & Lybrand* case (437 U.S. 463), quoted in Sec. 4.5(a), *supra*.

In other jurisdictions the party seeking review applies directly to the reviewing court to allow the interlocutory appeal.[38] The latter system is simpler; it avoids the need for filing two applications in two different courts which may apply different standards. It also avoids requiring the trial court to undertake the difficult task of objectively evaluating and determining the appealability of its own ruling. On the other hand, having the trial court sift out the "ill founded" applications lessens the burden on the appellate courts which might result if they were required to pass upon all applications for discretionary interlocutory review in the first instance.

Whether an appellate court will be unduly burdened without such a preliminary screening by the court below will depend not only on the workload in the particular jurisdiction but also on the extent to which counsel are likely to abide by the limitations imposed by judicial interpretation of the state's standards. The experience under the Wisconsin standard quoted in the preceding section was that not too many unwarranted applications were filed and that the system was working quite well without requiring preliminary trial court certification.[39]

In general, certification by the trial court should not be required except when necessary to protect the reviewing court against a flood of unwarranted applications. But this "exception" may encompass most of the state appellate courts as well as the federal courts of appeals. It may not be a coincidence that few of the more populous states dispense with the certificate from the trial court. The experience of New York, which freely allows interlocutory appeals, may prove the wisdom of the other jurisdictions in this respect.

No matter how the standards for discretionary review are formulated, the procedure whereby the matter is presented to the appellate courts is very much the same. Where leave of the trial court

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[37] Delaware, Georgia, Illinois, Indiana, Maine, Oklahoma, Tennessee.

[38] Alaska, Arizona, Iowa, South Dakota, Utah, Wisconsin.

[39] Texas Rule 385 provides for an accelerated appeal from interlocutory or *quo warranto* orders. The record is to be filed within 30 days of the judgment below, the briefs of the appellant within 20 days after that, and the briefs of the appellee 20 days thereafter. The court may then advance the case and hear it on the original papers or sworn copies instead of a transcript.

as well as the appellate court is required, as in the federal courts and in many of the states, the trial court must be persuaded to enter a certificate, order, or other document containing the necessary findings. A petition or application for permission to appeal is then filed in the appellate court with the certificate or order attached, usually within 10 days after the entry in the trial court of the order being appealed or the certificate of appealability, whichever is later. If leave need be obtained only from the appellate court, the petition or application should be filed in that court within the specified number of days after the entry of the order below.[40] In either event, enough copies should be filed to provide each member of the appellate court with a copy, along with proof of service. The opposing party then has a specified number of days to respond, seven under Federal Rule of Appellate Procedure 5(b) and Tennessee Rule 9(d) and 10 under Wisconsin Rule 809.50 and South Dakota Rule 15-26A-13.

If permission to appeal is granted, the appellant files the cost bond, usually required within 10 days, and pays the required fees. In general, the date of granting leave to appeal is the date from which the time for further steps, such as the preparation of the record, is to run. The application for leave to appeal, or the grant thereof, does not stay proceedings in the trial court unless the trial court or the appellate court, or a judge thereof, so orders.

(d) Conclusiveness of Trial Court's Refusal to Certify

The §1292(b) technique makes the trial court's determination *not* to certify conclusive; it is not made reviewable in any way.[41] See *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). That approach has the obvious disadvantage of committing to the trial judge the determination as to whether his own ruling is to be subject to immediate appeal—which sometimes may in practical effect mean subject to any review at all. While some judges may be happy to pass the buck upstairs, others may not be entirely objective in deciding whether their own rulings are sufficiently doubtful to warrant further review. Presumably for this reason Professors James and Hazard's treatise on *Civil Procedure* has proposed a procedure

> "in which trial judges can indicate whether they believe interlocutory appeals would be appropriate with regard to particular orders, but in which their adverse views in this respect would not foreclose the appellate court from granting review."[42]

This would have the advantage of not giving an obdurate trial judge power absolutely to preclude an immediate appeal from his ruling, and "would seem to represent a better balance of the practical con-

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[40] E.g., South Dakota Rule 15-26A-13; Wisconsin Rule 809.50. Both allow 10 days.

[41] As to the use of the extraordinary writs to review otherwise unappealable orders, see Sec. 4.7, *infra*.

[42] E. JAMES AND G. HAZARD, CIVIL PROCEDURE 673 (3d ed., 1985).

siderations that should govern allowance of interlocutory review in contemporary procedural context."[43]

The American Bar Association's *Standards Relating to Appellate Courts* similarly recommends (Sec. 3.12, pp. 28–29):

> "The 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."

Three states, Delaware, Idaho, and Vermont, permit applications to their supreme courts to review interlocutory orders after the trial court has refused to grant a certificate. In these states the applicant has 30, 14, and 5 days, respectively, to file an application setting forth the reasons why interlocutory review should be allowed. The disadvantage of this modification of the §1292(b) system is that it might subject the presently overloaded appellate courts in the more populous states to a mass of unworthy petitions to review interlocutory orders. That only states with small populations and presumably little appellate overload have permitted what is in substance an appeal from the trial court's refusal to certify may not be a coincidence.

(e) Review of Interlocutory Orders of Intermediate Appellate Courts

In the federal system and most states with two tiers of appellate courts, an interlocutory order of a trial court which has been reviewed by an intermediate appellate court is subject to review in the higher court. The supreme court's discretionary authority is not limited to final orders. Accordingly, the ordinary route of petition for certiorari or leave to appeal may be utilized.

The fact that an order is interlocutory is a factor counting against the exercise of discretion in favor of review, but it is not a jurisdictional barrier. See Illinois Rule 315(a). When there is good reason, review is frequently granted of nonfinal orders, such as a ruling of the intermediate court reversing a trial court's dismissal of a complaint. Such cases may present important questions of law, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).[44] Under New Jersey Rule 2:2–5, however, the judgment of the Appellate Division on an interlocutory appeal is not appealable to the Supreme Court unless it is dispositive of the action.

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[43]*Ibid.*

[44]See also R. STERN, E. GRESSMAN, AND S.M. SHAPIRO, SUPREME COURT PRACTICE, Sec. 4.18 (6th ed., 1986).

4.6 Judge-Made Exceptions to the Finality Rule

The above exceptions to the final judgment rule, which appear in statutes or rules of courts, are supplemented by others that are judge-made. In the federal courts a large body of law has interpreted the statutory word "final" as including many orders which do not terminate the litigation. Although these decisions literally constitute "interpretations" of the statutory language, even the Supreme Court refers to them as establishing "exceptions" to the finality rule. See *United States v. MacDonald*, 435 U.S. 850, 854 (1978); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978).

These decision have been concerned with the concept of finality under both §1291 of 28 U.S.C., which gives the courts of appeals jurisdiction over appeals from "final decisions" of the district courts, and §1257, which authorizes the Supreme Court to review "final judgments or decrees rendered by the highest court of a State in which a decision could be had." Both lines of cases reflect "the pragmatic approach that we have followed * * * in determining finality" (*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975)). They emphasize that the statutory language is to be given a "practical rather than a technical construction" (*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *Abney v. United States*, 431 U.S. 651, 658 (1977)). In the *Cox* case, the Court stated that there were "at least four categories" of cases in which the Court has reviewed state court decisions under §1257 even though "additional proceedings [were] anticipated in the lower state courts" (420 U.S. at 477).[45]

In more recent cases the Court has explained that the collateral order doctrine articulated in *Cohen* identifies the following factors as significant in giving the phrase "final decision" in §1291 a practical or pragmatic construction:[46]

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[45]These categories were (420 U.S. at 479–483):

(1) Those cases "in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained."

(2) Cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings."

(3) Cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." See also *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984).

(4) Cases "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation."

[46]As the Court summarized the rule in *Cohen* (337 U.S. at 546):

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

> "First, the District Court's order had fully disposed of the question of the state security statute's applicability in federal court; in no sense did it leave the matter 'open, unfinished or inconclusive' [337 U.S. at 546]. Second, the decision was not simply a 'step toward final disposition of the merits of the case [which would] be merged in final judgment'; rather, it resolved an issue completely collateral to the cause of action asserted. *Ibid.* Finally, the decision has involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment; hence, to be effective, appellate review in that special, limited setting had to be immediate. *Ibid.*" *Abney v. United States*, 431 U.S. 651, 658 (1977); *United States v. MacDonald*, 435 U.S. 850, 855 (1978).

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), the Court, through Justice Stevens, relying on *Abney* and *MacDonald*, stated:

> "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."

Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981), which again reviews the authorities, emphasizes the narrowness of this exception.[47]

None of the cases explicitly suggests that the collateral order exception of the *Cohen* case, which came up from a federal court of appeals under §1291, differs from the exceptions categorized in *Cox Broadcasting* and other cases taken from state courts to the Supreme Court under §1257. Nevertheless the pragmatic approach has resulted in giving special weight, in construing §1257, to considerations of federalism and the special need for ensuring that effective Supreme Court review of state court decisions on federal questions is not impeded, or federal statutory or constitutional policy obstructed; these factors would not apply to §1291 cases. So long as emphasis is placed on obtaining the best practical result in the individual case, the Court's pragmatic approach appears to have generally operated reasonably. But the cost of such an open-ended approach which pays little heed to the statutory language—"final judgments" and "final decisions"—could be to stimulate many unjustified appeals or attempts to appeal which would undermine the underlying policy against piecemeal review.[48]

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[47]The difficulty in applying this rule was illustrated by the holding of a closely divided Second Circuit *en banc* that orders denying motions to disqualify counsel are not appealable but orders granting such motions are. *Armstrong v. McAlpin*, 625 F.2d 433, 437, 440 (CA 2, 1980), vacated and remanded, 449 U.S. 1106 (1981), which cites conflicting decisions in other circuits. In *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368 (1981), the Supreme Court agreed as to the unappealability of orders denying motions to disqualify (as to which 10 circuits had divided evenly), but (in n. 8) reserved judgment as to orders granting motions to disqualify. Subsequently in *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985), and *Flanagan v. United States*, 465 U.S. 259 (1984), the Supreme Court held that orders disqualifying counsel are not appealable. Two days later the Court held that a denial to the Attorney General of qualified immunity from a damages suit was appealable because the object of the immunity was to protect the defendant against having to stand trial. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

[48]"Although well-established rules of appealability might at times cause an action to be determined unjustly, slowly, and expensively, they have nonetheless the great virtue of forestalling the delay, harassment, expense, and duplication that could result from multiple or ill-

Coopers & Lybrand v. Livesay, supra, which involved §1291, relied largely on the fact that in enacting §1292(b) Congress had established a flexible means of differentiating between those interlocutory orders which should and should not be appealed prior to the entry of the final judgment; *Livesay* held that orders disallowing class actions were not appealable, even though limiting a case to a few plaintiffs with only a nominal financial interest instead of a large class would in substance sound its "death knell." The practical dilemma there facing the plaintiffs might well have led the Court to the opposite conclusion. The case may thus foreshadow at the least an unwillingness to expand the collateral order exception, in recognition of the congressional understanding that §1292(b) provides the necessary escape hatch from the inflexibility of the finality statutes strictly construed.

Section 1292(b), however, applies only to federal civil appeals, not to criminal appeals to the courts of appeals under §1291 or to appeals to the Supreme Court from state courts under §1257. Flexibility is available in the last two categories of cases[49] only through continued resort to the exceptions which the Court has read into the concept of finality. A number of these cases, including the *Cohen* case itself (337 U.S. 541 (1949)), antedate the enactment of §1292(b) in 1958, and possibly for that reason the principles governing the three types of cases have thus far been the same. The recent decisions suggest, however, that the Court may be more rigid in its interpretation of finality under §1291, where §1292(b) may provide the needed flexibility at least in civil cases, than under §1257, where federal-state relationships are properly regarded as significant.[50] The failure

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timed appeals. The great value of the final judgment rule may be that it combines generally effective review with guides sufficiently clear to prevent most of the great waste that could result from protective appeals and litigation over appellate jurisdiction. Earnest pursuit of a 'practical approach' could quickly destroy this accomplishment." 15 C. WRIGHT, A. MILLER, AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE, Sec. 3913, at p. 523 (1976).

[49] *Abney v. United States*, 431 U.S. 651, 658 (1977); *United States v. MacDonald*, 435 U.S. 850, 855 (1978); and *Helstoski v. Meanor*, 442 U.S. 500 (1979), were criminal cases. *Abney* held that an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds was appealable under the collateral order doctrine, but *MacDonald* refused to extend *Abney* to a pretrial order denying a defendant's speedy trial claim. *Helstoski*, in denying mandamus, stated that appeal from dismissal of an indictment to enforce the commands of the Speech or Debate Clause of the Constitution would have been appropriate.

[50] This difference in approach is illustrated by the Court's treatment of *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). *Gillespie*, in order to resolve "an unsettled issue of national significance" as to the exclusivity and coverage of a federal statute, had extended the *Cohen* collateral order exception to an order which was not at all collateral, but was fundamental to the further conduct not only of the particular case but of litigation generally on the same subject. That "trouble inheres in *Gillespie*" was soon noted by leading commentators. 6 MOORE'S FEDERAL PRACTICE ¶54.43(5) (1975); C. WRIGHT, FEDERAL COURTS 705, 707 (4th ed., 1983); 15 C. WRIGHT, A. MILLER, AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE, Sec. 3913 (1976 & 1981 Supp.). For a less critical view of *Gillespie*, see 9 MOORE'S FEDERAL PRACTICE, Sec. 110.12 (1987). Subsequently, in *Livesay*, which like *Gillespie* was an appeal from the lower federal courts under §1291, the Court seemed to have effectively devitalized *Gillespie* as an authority, noting that if that case "were extended beyond [its] unique facts * * * §1291 would be stripped of all significance" (437 U.S. at 477 n. 30). Two years later in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), a §1257 case from a state court, the plurality opinion of four Justices, including Justice Stevens who had written *Livesay*, twice cited *Gillespie* with approval, emphasizing that "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings," and that it would be less costly for the Court to decide the question then than to send the case back with those issues undecided.

of Congress to modify §1257, which contains the original 1789 language, may be attributable to lack of dissatisfaction with the pragmatic approach which the Supreme Court has followed in interpreting it, to mere inertia, to the failure of anyone to call the matter to the attention of the legislators, or to difficulty in applying the §1292(b) technique to appeals coming to the United States Supreme Court from state courts.

4.7 The Extraordinary Writs

The extraordinary writs of mandamus, prohibition, and certiorari also are means whereby review is obtained of some types of interlocutory orders. Since they take the form of new proceedings filed in the appellate court, they are in one sense an exercise of that court's original jurisdiction, as described in Sec. 1.4, *supra*. In the federal courts the writs are authorized by 28 U.S.C. §1651, which in essence embodies the common law. In substance, however, they are almost always means of obtaining review of otherwise unappealable orders. The procedure in such cases is described in Sec. 1.4(b), *supra*.

The writ of habeas corpus, which is designed to release persons unlawfully held in custody, is much more frequently invoked than the other writs. It has a constitutional as well as common law foundation, and a history uniquely its own of which its use in appellate courts, now also based upon statutes and court rules, is an inseparable part. That subject is treated at length elsewhere.[51]

Historically, mandamus and prohibition were writs used to compel an inferior court or official to perform a nondiscretionary duty,[52] or to confine a court to a lawful exercise of its prescribed jurisdiction. Mandamus was a prayer for an affirmative order; prohibition for a negative one. Since most issues can be framed either affirmatively or negatively, this line was not strictly observed, and most cases seemed to have been characterized as mandamus.[53]

The common law writ of certiorari orders a lower court to certify a record to a higher court for review. Although the discretionary statutory writ of certiorari issued by the Supreme Court of the United States and other supreme courts was doubtless derived from this common law writ, they are not to be confused and do not serve the same function.

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[51] See 8C MOORE'S FEDERAL PRACTICE, ch. 14 (1987); 16 C. WRIGHT, A. MILLER, E. COOPER, AND E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE, Secs. 3968–3970 (1977); 17 C. WRIGHT, A. MILLER, AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE, Secs. 4261–4268 (1978); C. WRIGHT, FEDERAL COURTS, Sec. 53 (4th ed., 1983); C. Wright, *Procedure for Habeas Corpus*, 77 F.R.D. 227 (1977).

[52] As to the writs, generally see 16. C. WRIGHT, A. MILLER, E. COOPER, AND E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE, Secs. 3932–3936 (1977); 9 MOORE'S FEDERAL PRACTICE, Secs. 110.26–110.30 (1986). The writs could also be used against governmental or corporate officers as well as lower courts.

[53] Mandamus is also used to compel a lower court to comply with the mandate of a higher court (*In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *United States v. United States District Court*, 334 U.S. 258, 263 (1948)).

With respect to lower courts, the writs were used to compel compliance with mandatory requirements and were often described as a means of correcting jurisdictional error. Such errors often occur early in a litigation, as when a right to trial by jury is denied,[54] when a court is exercising a jurisdiction committed by Congress to another court or to an administrative agency,[55] or when one court exceeds its power in transferring a case to another.[56] The writs in such circumstances were in substance means of reviewing otherwise unappealable interlocutory orders.[57] Indeed, one of the prerequisites to issuance of a writ was a showing of unavailability of other means of obtaining relief, such as appeal through the usual channels. *Helstoski v. Meanor*, 442 U.S. 500 (1979). The Court reiterated in *Heckler v. Ringer*, 466 U.S. 602, 616 (1984) that:

> "The common law writ of mandamus, as codified in 28 U.S.C. §1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty."

The federal courts, however, have not confined themselves to "an arbitrary and technical definition of 'jurisdiction' " (*Will v. United States*, 389 U.S. 90, 95 (1967); *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976)). Indeed, on occasion, the line between lack of jurisdiction and abuse of discretion became very faint.[58] The Supreme Court, concerned that the writs might breach too widely the rule banning interlocutory appeals (*Will, supra* at 96; *Kerr, supra* at 403), has retreated in the direction of the original lack-of-power approach, pointing out in *Will v. United States*, 389 U.S. at 98 n.6:

> "Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.' "

See also *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 665 n.7 (1978). The Court has reemphasized "that the writ will issue only in extraordinary circumstances" and

> "that the party seeking issuance of the writ have no other adequate means to attain the relief he desires, * * * and that he satisfy 'the burden

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[54] *Beacon Theatres v. Westover*, 359 U.S. 500, 511 (1959).

[55] *Ex parte Northern Pac. Railway Co.*, 280 U.S. 142 (1929); *Matter of National Labor Relations*, 304 U.S. 486 (1938); *United States Alkali Ass'n v. United States*, 325 U.S. 196 (1945).

[56] *Hoffman v. Blaski*, 363 U.S. 335 (1960); *Van Dusen v. Barrack*, 376 U.S. 612, 615 (1964).

[57] This is recognized in Montana Rule 17(a), which states:

"The institution of such original proceedings in the supreme court is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary or proper."

[58] E.g., *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957). Whether *LaBuy* still has authority is now doubtful. See *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665 n.7 (1978).

> of showing that [his] right to issuance of the writ is "clear and indisputable." [59]

Subsequently reiterating these limitations, the Court held that mandamus may "rarely, if ever" be used to review "a trial judge's ordering of a new trial." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34–36 (1980).

The difficulty in determining where the Court will draw the line is demonstrated by the *Calvert Fire Insurance* case in which four Justices found that Judge Will's "decision to defer proceedings because of concurrent state court litigation" was a discretionary matter not subject to mandamus (437 U.S. at 665). Four other Justices described his action as "depriving Calvert of a federal court determination of a legal issue within the exclusive jurisdiction of the federal courts" (*id.* at 677), and the ninth Justice concurred with the first four on different grounds (*id.* at 667–668).

In sum, the writs are occasionally usable in the federal courts to review interlocutory orders in certain circumstances: when a lower court exceeds its power, when no other adequate remedy is available, and when the court thinks the matter is of substantial importance.[60]

A few of the states, notably California, treat writs more hospitably as an accepted method of providing interlocutory review. In California, "the writ is ordinarily allowed whenever the question presented is either of great practical importance in a particular case," as when great hardship would result to the petitioner if he could not appeal until after the final judgment, or "of general importance as a matter of procedural law."[61] In Missouri, where the statutes permit interlocutory appeals in only a few situations, the appellate courts grant writs when the result will be "attractive," which presumably means fair and just.[62] Other states, such as Arizona, Pennsylvania, Tennessee, Vermont, and Washington, accomplish substantially the same result by abolishing the writs, at least in name, and establishing a new remedy for reviewing otherwise unappealable orders previously reviewable by a writ or under one of the more modern procedures permitting review of interlocutory orders. In Arizona, the new

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[59] *Kerr v. United States District Court*, 426 U.S. at 403; *Pepsico v. McMillen*, 764 F.2d 458 (CA 7, 1985), in which recusal of a district judge was ordered because of conduct which might have given the impression that he would not be impartial. But see *United States v. Denson*, 603 F.2d 1143 (CA 5, 1979, *en banc*), holding that if a district court exceeds the scope of its judicial authority, the aggrieved party should be granted the writ almost as a matter of right, and that the district court should not have suspended execution of sentence and placed defendants on probation.

[60] 6 MOORE'S FEDERAL PRACTICE, ¶54.43(5), at p. 953 (2d ed., 1975), criticizing *Gillespie* (see Sec. 4.6, n.50, *supra*), recognizes that "there comes a point when mental honesty balks in transforming an interlocutory order into a 'final' order"; Moore suggests that the remedy is to use the extraordinary writs instead. That technique for accomplishing the same result would not "pervert" a statute, but it would strain the historical understanding of the purpose and function of the writs, and thereby lead to confusion and misunderstanding. To start afresh, as some states have done, with standards that reflect the factors which justify interlocutory appeals is a better approach to the problem.

[61] F. JAMES AND G. HAZARD, CIVIL PROCEDURE, Sec. 12.11 (3d ed., 1985).

[62] See D. Tuchler, *Discretionary Interlocutory Review in Missouri: Judicial Abuse of the Writ?* 40 MISSOURI L. REV. 577 (1975).

flexible remedy is called "special action"; in Washington, "discretionary review." Tennessee Rule 10 provides for filing an "application for extraordinary appeal" addressed to the discretion of the appellate court to be exercised

> "(1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in these rules. The appellate court may issue whatever order is necessary to implement review under this rule."

In Vermont a complaint showing that no adequate remedy is otherwise available may be filed in the Supreme Court or with a justice thereof.

Pennsylvania Appellate Rules 1501–1502, 1511–1513 abolish the writs and also actions for declaratory judgment against government officials and substitute a petition for review of governmental action. The governmental agency (including a lower court) is the respondent unless it in fact has no interest in the proceeding, in which case the real parties in interest are to be named as respondents.

The Illinois Supreme Court has been utilizing its general "supervisory authority" (Ill. Const. Art. V, §16) as a substitute for the writs, in order to review administrative and other orders which otherwise would not be appealable "whenever the court feels that a lower court has erred or abused its discretion and immediate correction is needed."[63] The effect of such provisions is to eliminate the historical, often technical, restrictions on the use of particular writs, and either to leave the court with unfettered discretion to do what seems right, as in Arizona, or to substitute general standards which concentrate on the practical reasons why allowing review before termination of a case is reasonable in the circumstances, as in Washington Rule 2.3 quoted in Sec. 4.5(b), *supra*. The latter course would be more helpful to the bar, and probably also to other judges.

The application should state the pertinent facts and supporting reasons and be accompanied by copies of any relevant orders or opinions below and other essential parts of the record, and also, if necessary, by affidavits. The judge below is usually the respondent, but in many jurisdictions he need not answer if he does not choose to, but may leave the defense to the opposing parties below. E.g., Delaware Rule 43; Pennsylvania Rules 1513–1516. This is the preferable procedure, since the controversy is really between the original parties and not with the judge. The appellate court may either deny the application without more, request the filing of an answer or briefs, set the case for oral argument, or dispose of the proceeding in whatever manner seems appropriate. This is the usual procedure for dealing with applications for writs.

Lawyers must, of course, study the case law in their own juris-

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[63] H. FINS, ILLINOIS APPELLATE PRACTICE UNDER THE NEW CONSTITUTION 563 (1977). Illinois Rule 303 establishes a motion procedure to review supervisory orders.

dictions to determine to what extent mandamus and the other writs, or substitutes therefor, can be used to obtain appellate review of interlocutory orders. Most jurisdictions, however, are still likely to heed the Supreme Court's admonition in *Kerr v. United States District Court*, 426 U.S. 394, 402–403 (1976), that

> "mandamus actions such as the one involved in the instant case 'have the unfortunate consequence of making the [district court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him' in the underlying case. *Bankers Life & Cas. Co. v. Holland, supra*, at 384–385, quoting *Ex parte Fahey, supra*, at 260. More importantly, particularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed * * * until after final judgment has been rendered by the trial court.' *Will v. United States, supra*, at 96; *Parr v. United States*, 351 U.S. 513, 520–521 (1956). A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress."

The unreasonableness of strict adherence to the finality statutes in many situations has induced some courts to stretch almost beyond recognition the meaning of the concept of jurisdiction which has been the traditional guideline to the issuance of extraordinary writs, just as the courts have done with such seemingly simple statutory words as "final judgment" or "final decision." The characterization of "the use of extraordinary writs for interlocutory review" as "little less than a perversion of the concept of 'jurisdiction' "[64] even more aptly applies to the interpretation of the statutory word "final" in §§1257 and 1291 to embody the exceptions to finality enumerated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and other cases.

Judge-made law in such circumstances, when judges are understandably prone to differ as to how far they can go in disregarding established legal principles or legislative language, is likely to substitute a wavering line of case-by-case law for a standard upon which litigants can rely with some certainty. There would seem to be little excuse for confusion and uncertainty as to such procedural matters as when and how decisions can be appealed. This result can be avoided by the formulation of standards in statutes or rules along the lines proposed in the *Standards Relating to Appellate Courts* or the Tennessee rules described in Sec. 4.5(b), *supra*.

4.8 Contempt

A hazardous route for obtaining interlocutory review is deliberately to disobey a nonappealable order and to invite the trial court

[64] F. James and G. Hazard, Civil Procedure 672 (3d ed., 1985).

to impose a sanction for contempt of court which would constitute a separate appealable order. Resort to such a stratagem would be feasible only when the party or lawyer risking punishment could count on leniency because the purpose was to obtain a prompt appellate ruling before the client suffered severe irreparable injury, or when the result of obeying the order would be serious enough to justify running the risk of substantial punishment and the likelihood of reversal was substantial.

The general rule is that violation of a court order is punishable as contempt even if the order was erroneous; the proper way to attack an order is by appeal, not disobedience. *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947); *Maness v. Meyers*, 419 U.S. 449, 458–459 (1975); *Walker v. Birmingham*, 388 U.S. 307, 313 (1967); 17 Am. Jur.2d *Contempt* §§42–47 (1964). This rule may not apply in some circumstances if the lower court lacks jurisdiction to issue an order (*In re Green*, 369 U.S. 689 (1962)), but the difficulty in guessing what errors will be deemed jurisdictional makes reliance on this avenue of review dangerous indeed.[65]

A prominent example of such a tactic is Attorney General Bell's refusal to disclose to plaintiffs, in a suit against government officers for damages, the identity of informers to the FBI. When the district court ordered the disclosure of the names, the Government initially sought review both under the collateral order exception to §1291 (see Sec. 4.6, *supra*) and through an extraordinary writ authorized by §1651, the All Writs Act. The Second Circuit concluded that only "extraordinary circumstances" or "abuse of discretion" would warrant review of interlocutory discovery orders in the absence of a certification under §1292, and accordingly denied review. *In re United States*, 565 F.2d 19, 22–23 (CA 2, 1977). Thereafter, the Attorney General, believing that the public interest in criminal law enforcement would be seriously impaired if the identity of informants had to be revealed, and that the Second Circuit's adherence to the finality requirement meant that there was no other means for obtaining appellate review before the disclosure of identity, refused to comply with the district court's ruling requiring disclosure in order to obtain a contempt order which could be appealed. He explained that he would, of course, comply with any final appellate determination. The district court thereupon found him in contempt and refused a stay pending appeal, but a stay was granted by a circuit judge, and the finding of contempt was then set aside by the Second Circuit.[66]

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[65]See Annotation, 12 A.L.R.2d 1059 (1950). Professor Wright suggests that the Supreme Court's cases can be reconciled, as establishing "that the validity of an order can be challenged in a contempt proceeding for violation of the order only if there was no opportunity for effective review of the order before it was violated." C. WRIGHT, FEDERAL COURTS 88 (4th ed., 1983).

[66]*Socialist Workers Party v. Attorney General*, 458 F. Supp. 895 (S.D.N.Y. 1978), contempt order vacated, 596 F.2d 58 (CA 2, 1979), cert. denied, 444 U.S. 903 (1979).

Needless to say, such a means of obtaining review of an interlocutory order should only be used *in extremis*, both because the outcome in terms of penalty or sanction cannot be predicted and may be very unpleasant and because no lawyer or party wants to deliberately place himself in the position of disregarding the order of a court.

Exhibit 4

American Bar Association
Judicial Administration Division

Standards of Judicial Administration
Volume III

STANDARDS RELATING TO APPELLATE COURTS

1994

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of the Scope of Review, the Judge/Jury Question and Procedural Discretion," 64 *N.C. L. Rev.* 993 (1986).

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Lynn Weisberg, "New Law Eliminates Supreme Court's Mandatory Jurisdiction," 72 *Judicature* 138 (1988).

Section 3.12 Applicable Judgments and Orders.

(a) Final Judgment. Appellate review ordinarily should be available only upon the rendition of final judgment in the court from which appeal or application for review is taken.

(b) Interlocutory Review. Orders other than final judgments disposing of all claims ordinarily should be subject to immediate appellate review only at the discretion of the reviewing court

where it determines that resolution of the question of law on which the order is based will:

(i) Materially advance the termination of the litigation or clarify further proceedings;

(ii) Protect a party from substantial and irreparable injury; or

(iii) Clarify an issue of general public importance in the administration of justice.

Commentary

Final judgment rule.

Under the final judgment rule, appellate review of a lower court order may be obtained only upon an appeal from the final judgment rendered in the court below. The rule is of greatest practical importance with respect to review of trial court decisions, but applies as well to review of determinations made by a lower appellate court. It expresses a basic principle of procedure. Affording a party an appeal of right from orders other than final judgments results in interruption of the proceedings in the court below and can result in piecemeal appellate review of a single case. Moreover, such a rule results in needless appellate review of questions that may be rendered moot or insubstantial by the final outcome in the lower court; it also creates opportunity for delay.

The final judgment rule is recognized in most jurisdictions. It is often qualified by exceptions that permit appeal of right from designated types of interlocutory orders. The theory of such exceptions is that some types of orders so affect a party's right to an orderly and correct resolution of the litigation that a right should be afforded to correct them by immediate appeal. In practice it has proved very difficult to formulate satisfactory definitions of orders having this effect. The attempted definitions inevitably include orders which in some cases do not have important immediate effects, but are appealable nevertheless, and exclude orders which in particular circumstances ought to be subject to immediate review but are not. On the other hand, in a few jurisdictions the final judgment rule is subject to so few qualifications that immediate appellate review is unobtainable even in circumstances where it would

manifestly expedite the just determination of the litigation. In these jurisdictions there is often a tendency to ameliorate the final judgment rule by fashioning other rules that avoid its effect. Under either of these approaches, there is likely to develop a highly technical and not very useful body of procedural doctrine dealing with questions of appealability.

Discretionary review.

A more satisfactory approach to interlocutory review is expressed in a twofold rule: appeal of right may be had only from a final judgment, but discretionary review of any interlocutory order may be granted where immediate review is justified in the particular circumstances. In this approach, "final judgment" should be strictly defined. A "final judgment," from which an appeal may be taken of right, should mean a judgment that determines all claims in an action or an order that entails a sanction, such as punishment for contempt, that is final in the sense that it is immediately enforceable rather than being suspended until the rendition of final judgment. Thus, appeal of right should not be available in a civil action until all pending claims—counterclaims, cross-claims, etc.—have been determined, nor should it be available from a temporary restraining order or injunction, an order granting or denying discovery, or an order granting a new trial.

In criminal cases, appeal should generally be permitted only after imposition of sentence or order of commitment for rehabilitative treatment, except that where the prosecution is allowed an appeal, such an appeal should be permitted upon final judgment for the accused. At the same time, liberal provisions should be made for interlocutory appellate review on a discretionary basis. This approach limits the possibilities for disrupting the course of proceedings in the trial court through unjustified or premature appeals while affording opportunity for immediate review when warranted by practical exigencies, regardless of the type of lower court order that is involved.

Within this basic framework, it may nevertheless be appropriate to provide for narrowly defined exceptions, in which interlocutory review of right may be available with respect to certain types of orders. In many jurisdictions, the grant or denial of a temporary

injunction, for example, is made appealable of right; it might be appropriate to provide appeal of right from the determination of any claim or issue that was severed and separately tried in the trial court; in criminal cases, the prosecution might be allowed an appeal of right from a pretrial order suppressing evidence. The relevant consideration in defining any such exceptions should be whether the order is one which, if erroneous, would have substantial practical consequences that could not be remedied by an appeal from the judgment finally entered in the proceeding. It should also be recognized that, to the extent that such exceptions are made, they carry with them the possibilities for protraction of litigation and superfluous appeals and thus undercut the purpose of the final judgment principle.

Procedure for exercising discretion.

Three different arrangements can be made for vesting discretion to permit interlocutory review. Review may be permitted on order of the court *from* which review is sought; review may be permitted on order of the court *in* which review is sought; or review may be permitted upon the joint permission of the court to be reviewed and the reviewing court.

The first of these arrangements is exemplified by Rule 54(b) of the Federal Rules of Civil Procedure. Under that rule, when the trial court enters judgment determining one or more but less than all of the claims in an action (for example, when it dismisses one of several claims in a complaint, or enters judgment on the claims on the complaint without determining a pending counterclaim or cross-claim), it may direct that a separate judgment be entered on the claims determined. This has the effect of making appeal available with regard to those claims without waiting for judgment on the claims still pending. Permission to take such an appeal need not be obtained from the appellate court and for that reason can result in interlocutory appeals that may be inappropriate in specific instances.

The second arrangement, in which permission to appeal must be obtained from the appellate court, is exemplified in the procedures of several jurisdictions. In some jurisdictions, extraordinary writs—mandamus and prohibition issuing from the appellate court—are

employed on a routine basis to the same effect: if the appellate court considers that immediate review is warranted, it issues an order to show cause why such a writ should not be granted and reviews the merits of the order below through a hearing on the return of the writ.

The third arrangement, in which concurrent permission is required from both the trial court and the appellate court, is exemplified in the Federal Interlocutory Appeals Act, 28 U.S.C. § 1292(b). Under this arrangement, the trial court may certify that an order otherwise not appealable involves a question of such importance that immediate review is warranted; the aggrieved party may thereupon apply to the appellate court for leave to appeal; if the appellate court grants leave, an appeal is allowed.

These arrangements can be used in various combinations. Some types of interlocutory determinations might be made reviewable through one of them, others by another. The 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.

The procedure for seeking interlocutory review should be essentially the same as that for taking an appeal of right. See Section 3.13. However, the time limits within which application for interlocutory review must be made may appropriately be less than that permitted for appeals from final judgments.

Criteria for exercise of discretion.

The criteria stated in subsection (b) of this section represent a synthesis of those stated in Rule 54(a) of the Federal Rules of Civil Procedure, the Federal Interlocutory Appeals Act, and the corresponding rules of a number of the states. They express aspects of the basic concept that interlocutory review should be allowed only where it serves the interests of justice. The interests involved are generally incident to the immediate litigation, because the question posed is ordinarily one of timing—whether the aggrieved party should be compelled to wait until final judgment

to obtain appellate review of the order complained of. That question usually is to be answered by reference to the particular equities of the individual case. However, there are many situations in which the pertinent interest is that of the proper administration of justice generally—for example, when an order involves a question of procedure that would likely become moot by the time final judgment was entered but which should be authoritatively resolved for purposes of future guidance of the courts below.

An appellate court's decision whether to allow an interlocutory appeal should be made by simple order, without a requirement that it give an accompanying statement of reasons. The decision involved is essentially similar to that made by a supreme court in deciding whether to allow successive review from the decision of a lower appellate court. See the Commentary to Section 3.10. Denial of an application for interlocutory appeal should not affect the right to challenge the order involved in a subsequent appeal from final judgment in the proceeding below.

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Section 3.13 Procedure for Appeal from Trial Court.

(a) Time to Appeal. The time within which to take an appeal from a final judgment, or to apply for appellate review of an interlocutory order of a trial court should not exceed 30 days after rendition of the judgment or order. Rules of procedure should:

(i) Provide that, if one or more motions after trial have been made, the time to appeal commences when all such motions have been decided.

(ii) Specify what constitutes "rendition" of a judgment or order so that the time within which to appeal can be readily calculated by reference to a definite procedural event.

(iii) Permit a party to take an appeal from a final judgment, notwithstanding that the time to do so has expired, upon a showing that extraordinary circumstances prevented taking a timely appeal, except where permitting the late appeal would unfairly disturb another party's reliance on the finality of the judgment.

(iv) Permit a party to cross-appeal from a final judgment within a short additional period running from the original notice of appeal.

(b) Notice of Appeal. Appellate review, whether of a final judgment or of an interlocutory order, should be initiated by a simple notice of appeal filed in the trial court with a copy to the appellate court. The notice should be deemed effective to confer jurisdiction upon the appellate court to which the appeal should properly have been taken. Where the appeal has been directed to the wrong appellate court, it should be transferred to the proper court on motion of a party or on the motion of the court to which the appeal has been directed.

Exhibit 5

State Statutes and Rules

Interlocutory Appeal and Partial Final Judgments

A Preliminary Collection of Examples, as of May 1997

ALABAMA

ALABAMA RULES OF APPELLATE PROCEDURE

Rule 5. Appeal by permission.

(a) Petition for permission to appeal. A party may request permission to appeal from an interlocutory order in civil actions under limited circumstances. Appeals of interlocutory orders are limited to those civil cases which are within the original appellate jurisdiction of the supreme court. A petition to appeal from an interlocutory order must contain a statement by the trial judge that he is of the opinion that the interlocutory order involves a controlling question of law as to which there is substantial ground for difference of opinion, that an immediate appeal from the order would materially advance the ultimate termination of the litigation and that the appeal would avoid protracted and expensive litigation. The petition for permission to appeal shall be filed with the clerk of the supreme court within 14 days (two weeks) after the entry of the interlocutory order in the trial court with a certificate of service on all other parties to the action in the trial court. In the event an interlocutory order is amended, permission to appeal may be sought within 14 days (two weeks) after entry of the order as amended.

(b) Content of petition; answer. The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the trial court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question, why an immediate appeal would materially advance the termination of the litigation and why the appeal would avoid protracted and expensive litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 14 days (two weeks) after service of the petition an adverse party may file an answer in opposition with the clerk of the supreme court, with proof of service on all other parties to the action in the trial court. The application and answer shall be submitted without oral argument unless otherwise ordered.

(c) Grant of permission; security for costs; filing of record. If permission to appeal is granted by the supreme court, the appellant shall file security for costs as required by Rule 7 and the docket fee as required by Rule 12(a) within 14 days (two weeks) after entry of the order granting permission to appeal, and the record on appeal shall be transmitted and filed and the appeal docketed in accordance with Rules 10, 11 and 12. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of the entry of the order granting permission to appeal. A notice of appeal need not be filed.

(d) Effect on trial court proceedings. The petition for an appeal hereunder shall not stay proceedings in the trial court unless the trial judge or the supreme court shall so order.

(e) Form of papers; number of copies. All original papers may be typewritten. A sufficient number of copies shall be filed with the clerk of the supreme court to provide each justice of the court with one copy, but the court may direct that additional copies be furnished.

HISTORY: (Amended 2-9-82.)

Committee Comments

Rule 5 is a composite of FRAP Rule 5 and 28 U.S.C. § 1292(b). It supersedes Code 1940, Title 7, § 755. Alabama Rule 5, however, extends the time from the seven days provided by FRAP Rule 5 to 14 days for the adverse party to file an answer in opposition. Such answer is filed with the clerk of the supreme court, and the answer must be served on all other parties to the action in the trial court. The number of copies is to be one for each justice of the supreme court, unless the court directs that additional copies be filed. See Form 16 for petition and Form 17 for certificate of trial judge.

The rule does not apply to criminal cases, since it was felt that the potentiality for abuse in criminal cases on such matters as search warrants, etc., was extremely great. Neither does the rule apply to cases appealable to the court of civil appeals.

ALABAMA RULES OF APPELLATE PROCEDURE
APPENDIX I. FORMS; EXAMPLES

ARAP, Form 17

FORM 17. Certificate of Trial Judge of Appealability of Order Not Otherwise Appealable.

To the Supreme Court of Alabama

On ---, 19-- (the following order was entered in Civil Action Number

---: ----------.) (the order attached hereto was entered in Civil Action Number ----.)

In my opinion, the order:

(a) involves a controlling question of law as to which there is a substantial ground for difference of opinion,

(b) that an immediate appeal from the order would materially advance the ultimate termination of the litigation, and

(c) an appeal would avoid protracted and expensive litigation.

DATED this ---- day of ---, 19--.

ALASKA

ALASKA COURT RULES ANNOTATED

Rule 402. PETITIONS FOR REVIEW OF NON-APPEALABLE ORDERS OR DECISIONS

(a) When Available.

(1) An aggrieved party, including the state of Alaska, may petition the appellate court as provided in Rule 403 to review any order or decision of the trial court, not appealable under Rule 202, and not subject to a petition for hearing under Rule 302, in any action or proceeding, civil or criminal. In addition, a party may petition the supreme court as provided in Rule 403(h) to review an unsuspended sentence of imprisonment which is not appealable under Appellate Rule 215(a)(1).

(2) A petition for review shall be directed to the appellate court which would have jurisdiction over an appeal from the final judgment of the trial court in the action or proceeding in which it arises.

(b) When Granted. -- Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed because:

(1) Postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors; or

(2) The order or decision involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order or decision may materially advance the ultimate termination of the litigation, or may advance an important public interest which might be compromised if the petition is not granted; or

(3) The trial court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for the appellate court's power of supervision and review; or

(4) The issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest.

ARKANSAS

ARKANSAS CODE OF 1987 ANNOTATED

ARAP Crim. Rule 3 (1996)

Rule 3. APPEAL BY STATE

(a) An interlocutory appeal on behalf of the state may be taken only from a pretrial order in a felony prosecution which (1) grants a motion under ARCrP 16.2 to suppress seized evidence or (2) suppresses a defendant's confession. The prosecuting attorney shall file, within ten (10) days after the entering of the order, a notice of appeal together with a certificate that the appeal is not taken for the purposes of delay and that the order substantially prejudices the prosecution of the case. Further proceedings in the trial court shall be stayed pending determination of the appeal.

(b) Where an appeal, other than an interlocutory appeal, is desired on behalf of the state following either a misdemeanor or felony prosecution, the prosecuting attorney shall file a notice of appeal within thirty (30 days after entry of a final order by the trial judge.

(c) When a notice of appeal is filed pursuant to either subsection (a) or (b) of this rule, the clerk of the court in which the prosecution sought to be appealed took place shall immediately cause a transcript of the trial record to be made and transmitted to the attorney general, or delivered to the prosecuting attorney, to be by him delivered to the attorney general. If the attorney general, on inspecting the trial record, is satisfied that error has been committed to the prejudice of the state, and that the correct and uniform administration of the criminal law requires review by the Supreme Court, he may take the appeal by filing the transcript of the trial record with the clerk of the Supreme Court within sixty (60) days after the filing of the notice of appeal.

(d) A decision by the Arkansas Supreme Court sustaining in its entirety an order appealed under subsection (a) hereof shall bar further proceedings against the defendant on the charge.

CALIFORNIA

CALIFORNIA RULES OF COURT

TITLE FIVE. Special Rules for Trial Courts
DIVISION I. Family Law Rules
CHAPTER 3.2. Bifurcation and Appeals

Rules of Court R 1269.5 (1996)

Rule 1269.5. Interlocutory appeals

(a) [Applicability]

This rule does not apply to appeals from the court's termination of marital status as a separate issue, nor to appeals from other orders that are separately appealable. (Subd (a) as amended effective January 1, 1994.)

(b) [Certificate of probable cause for appeal]

The order deciding the bifurcated issue may, at the judge's discretion, include an order certifying there is probable cause for immediate appellate review of the issue. If it was not in the order, within 10 days after the clerk mails the order deciding the bifurcated issue a party may notice a motion requesting the court to certify there is probable cause for immediate appellate review of the order. The motion shall be heard within 30 days after the order deciding the bifurcated issue is mailed.

The clerk shall promptly mail notice of the decision on the motion to the parties. If the motion is not determined within 40 days after mailing of the order on the bifurcated issue, it shall be deemed granted on the grounds stated in the motion.

(c) [Content and effect of certificate]

A certificate of probable cause shall state, in general terms, the reason immediate appellate review is desirable, such as a statement that final resolution of the issue (1) is likely to lead to settlement of the entire case; (2) will simplify remaining issues; (3) will conserve the courts' resources; (4) will benefit the well-being of a child of the marriage or the parties.

If a certificate is granted, trial of the remaining issues may be stayed. If trial of the remaining issues is stayed, unless otherwise ordered by the trial court on noticed motion, further discovery shall be stayed while the certification is pending. These stays terminate upon the expiration of time for filing a motion to appeal if none is filed, or upon the Court of Appeal denying all motions to appeal, or upon the Court of Appeal decision becoming final.

(d) [Motion to appeal]

If the certificate is granted, a party may within 15 days after the mailing of the notice of the order granting it serve and file in the Court of Appeal a motion to appeal the decision on the bifurcated issue. On ex parte application served and filed within 15 days, the Court of Appeal or the trial court may extend the time for filing the motion to appeal by not more than an additional 20 days. The motion shall contain a brief statement of the facts necessary to an understanding of the issue; a statement of the issue; and a statement of why, in the context of the case, an immediate appeal is desirable. The motion shall include or have annexed a copy of the decision of the trial court on the bifurcated issue; any statement of decision; the certification of the appeal; and a sufficient partial record to enable the Court of Appeal to determine whether to grant the motion. A summary of evidence and oral proceedings, if relevant, supported by a declaration of counsel may be used when a transcript is not available. The motion shall be accompanied by the filing fee for an appeal under rule 1(c) and Government Code sections 68926 and 68926.1. A copy of the motion shall be served on the trial court.

(e) [Proceedings to determine motion]

Within 10 days after service of the motion, an adverse party may serve and file an opposition to it. The motion to appeal and any opposition shall be submitted without oral argument, unless otherwise ordered.

The motion to appeal shall be deemed granted unless it is denied within 30 days from the date of filing the opposition or the last document requested by the court,

whichever is later. Denial of a motion to appeal is final forthwith and is not subject to rehearing. A party aggrieved by the denial of the motion may petition for review by the Supreme Court.

(f) [Proceedings if motion to appeal is granted]

If the motion to appeal is granted, the moving party is deemed an appellant, and the rules governing other civil appeals apply except as provided in this rule. The partial record filed with the motion shall be considered the record for the appeal unless, within 10 days from the date notice of the grant of the motion is mailed, a party notifies the Court of Appeal of additional portions of the record that are needed for a full consideration of the appeal. If a party notifies the court of the need for an additional record, the additional material shall be secured from the trial court by augmentation under rule 12, unless it appears to the Court of Appeal that some of the material is not needed.

Briefs shall be filed pursuant to a schedule set for the matter by the Court of Appeal.

(g) [Review by writ or appeal]

The trial court's denial of a certification for immediate appeal does not preclude review of the decision on the bifurcated issue by extraordinary writ. Neither the trial court's denial of a certification for immediate appeal nor the Court of Appeal's denial of a motion to appeal precludes review of the bifurcated issue upon appeal of the final judgment in the proceeding.

COLORADO

COLORADO REVISED STATUTES
ARTICLE 10. GOVERNMENTAL IMMUNITY
C.R.S. 24-10-108 (1996)

24-10-108. Sovereign immunity a bar

Except as provided in sections 24-10-104 to 24-10-106, sovereign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant. If a public entity raises the issue of sovereign immunity prior to or after the commencement of discovery, the court shall suspend discovery, except any discovery necessary to decide the issue of sovereign immunity, and shall decide such issue on motion. The court's decision on such motion shall be a final judgment and shall be subject to interlocutory appeal.

COLORADO COURT RULES
Colo. Crim. P. 37.1 (1997)

Rule 37.1. Interlocutory Appeal From County Court.

(a) Grounds. The prosecuting attorney may file an interlocutory appeal in the district court from a ruling of a county court granting a motion made in advance of trial by the defendant for return of property and to suppress evidence or granting a motion to suppress evidence or granting a motion to suppress an extra-judicial confession or admission; provided that the prosecuting attorney certifies to the judge who granted such motion and to the district court that the appeal is not taken for purposes of delay and that the evidence is a substantial part of the proof of the charge pending against the defendant.

(b) Filing Notice of Appeal. The prosecuting attorney shall file the notice of appeal with the clerk of the district court and shall serve the defendant and the clerk of the trial court with a copy thereof. Such notice of appeal shall be filed within ten days of the entry of the order being appealed and any docket fee shall be paid at the time of the filing.

(c) Contents of Record on Appeal. The record for an interlocutory appeal shall consist of the information or charging document, the motions filed by the defendant or defendants and the grounds stated in Section (a) above, a transcript of all testimony taken at the hearing on said motions and such exhibits or reasonable copies, facsimiles, or photographs thereof as the parties may designate (subject to the provisions in C.A.R. 11(b) pertaining to exhibits of bulk), the order of court ruling on said motions and the date, if one has been fixed, that the case is set for trial or a certificate by the clerk that the case has not been set for trial. The record shall be filed within ten days of the date of filing the notice of appeal, and may be supplemented by order of the district court.

(d) Briefs. Within ten days after the record has been filed in the district court, the prosecuting attorney shall file an opening brief. Within ten days after service of said opening brief, the defendant shall file an answer brief, and the prosecuting attorney shall have five days after service of said answer brief to file a reply brief.

(e) Disposition of Cause. Unless oral argument is ordered by the court and it rules on the record and in the presence of the parties, the decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to all parties. No petition for rehearing shall be permitted. A certified copy of the judgment and directions to the county court, and a copy of the written opinion, if any shall constitute the mandate of the district court,

concluding the appeal and restoring jurisdiction to the county court. Such mandate shall issue and be transmitted by the clerk of the court by mail to the trial judge and all parties on the thirty-second day after the district court's oral or written order, unless the district court is given notice by one of the parties that it has sought further review by the supreme court upon a writ of certiorari pursuant to the rules of that court, in which case the mandate shall issue upon notification that certiorari has been denied or upon receiving the remittitur of the supreme court.

(f) Time. The time limits herein may only be enlarged by order of the appropriate court before the existing time limit has expired.

(g) If no procedure is specifically prescribed by this rule, the court shall look to the rules of appellate procedure for guidance.

(h) Nothing in this Rule 37.1 shall be construed to deprive the county court of jurisdiction to consider bail issues during the pendency of the interlocutory appeal.

COLORADO APPELLATE RULES
C.A.R. 4.1 (1997)

Rule 4.1. Interlocutory Appeals in Criminal Cases.

(a) Grounds. The state may file an interlocutory appeal in the Supreme Court from a ruling of a district court granting a motion under Crim. P. 41(e) and (g) and Crim. P. 41.1(i) made in advance of trial by the defendant for return of property and to suppress evidence or granting a motion to suppress an extra-judicial confession or admission; provided that the state certifies to the judge who granted such motion and to the Supreme Court that the appeal is not taken for purposes of delay and the evidence is a substantial part of the proof of the charge pending against the defendant.

(b) Limitation on Time of Issuance. No interlocutory appeal shall be filed after ten days from the entry of the order complained of. It shall not be a condition for the filing of such interlocutory appeal that a motion for a new trial or rehearing shall have been filed and denied in the trial court.

(c) How Filed. To file an interlocutory appeal the state, within the time fixed by this Rule, shall file the notice of appeal with the clerk of the appellate court with an advisory copy served on the clerk of the trial court.

(d) Record. The record for an interlocutory appeal shall consist of the information or indictment, the plea of the defendant or the defendants, the motions filed by the defendant or defendants on the grounds stated in section (a) above, the reporter's transcript of all testimony taken at the hearing on said motions and such exhibits or reasonable copies, facsimiles, or photographs thereof as the parties may designate (subject to the provisions in C.A.R. 11(b) pertaining to exhibits of bulk), the order of court ruling on said motions together with the date, if one has been fixed, that the case is set for trial or a certificate by the clerk that the case has not been set for trial. After the filing of the record, such other exhibits or reasonable copies, facsimiles, or photographs thereof shall be transmitted by the clerk of the trial court to the appellate court as the appellate court may order. The record shall be filed within ten days of the date of filing the notice of appeal.

(e) Appearances. The state in these proceedings shall be represented by the district attorney, and briefs shall be prepared by him and responsive briefs or pleadings served upon him.

(f) Briefs. Within ten days after the record has been filed in the Supreme Court, the state shall file ten copies of a typewritten, mimeographed, or otherwise reproduced brief, and within ten days thereafter, the appellee shall file ten copies of a typewritten, mimeographed, or otherwise reproduced answer brief, and the state shall have five days after service of said answer brief to file ten copies of a typewritten, mimeographed, or otherwise reproduced reply brief.

(g) Disposition of Cause. No oral argument shall be permitted except when ordered by the court. The decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to one attorney on each side of the case. No petition for rehearing shall be permitted. Remittitur shall accompany said opinion.

(h) Time. The time limits herein may only be enlarged by order of the appropriate court before the existing time limit has expired.

DELAWARE

DELAWARE RULES
RULES OF THE SUPREME COURT OF THE STATE OF DELAWARE

Del. Sup. Ct. R. 42 (1996)

RULE 42. INTERLOCUTORY APPEALS

(a) Exercise of Jurisdiction. The Court's jurisdiction to hear and determine appeals in civil cases from interlocutory orders of a trial court, including a trial court acting as an intermediate appellate court in the review of a ruling, decision or order of a court or an administrative agency, shall be exercised in accordance with this rule as to certification and acceptance of interlocutory appeals.

(b) Criteria to be Applied in Determining Certification and Acceptance of Interlocutory Appeals. No interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the following criteria:

(i) Same as Certified Question. Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or

(ii) Controverted Jurisdiction. The interlocutory order has sustained the controverted jurisdiction of the trial court; or

(iii) Substantial Issue. An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or

(iv) Prior Judgment Opened. The interlocutory order has vacated or opened a judgment of the trial court; or

(v) Case Dispositive Issue. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

(c) Procedure for Certification of Interlocutory Appeals in the Trial Court. An application for certification of an interlocutory appeal shall be made in the first instance to the trial court in accordance with the following procedures:

(i) Application. Such application shall be served and filed within 10 days of the entry of the order from which the appeal is sought or such longer time as this Court may in its discretion order, upon appropriate motion, for good cause shown, or upon this Court's order sua sponte;

(ii) Response. An opposing party shall have 10 days (or such shorter time as the trial court shall in its discretion order, upon notice for good cause shown or upon the trial court's order sua sponte) after such service within which to serve and file a written response or, if the trial court so directs, present an oral response in lieu of a written response;

(iii) Action by Trial Court. Within 10 days after filing of the response or, if there is none, within 20 days after filing the application, the trial court shall enter an order certifying or refusing to certify the interlocutory appeal;

(iv) Form of Order. Such order shall be substantially in the form set forth in Official Form L, setting forth the basis for the certification and indicating which of the criteria set forth in paragraph (b) of this rule is applicable;

(v) Service on Trial Court. A copy of the application and response referred to in subparagraphs (i) and (ii) of this paragraph shall, concurrently with service and filing, be delivered by the party serving and filing it to the judge of the trial court whose order is sought to be reviewed.

(d) Procedure for Acceptance of Interlocutory Appeals in the Supreme Court. No interlocutory order shall be reviewed by this Court unless the appeal therefrom has been accepted by this Court in accordance with the following procedure:

(i) Time to File. The notice of appeal may be filed at any time after the filing of the application for certification in the trial court, except that it shall be the obligation of appellant to serve and file in this Court a notice of appeal of an interlocutory order within 30 days after the entry of the order from which the appeal is sought to be taken;

(ii) Form of Filing. The notice of appeal and any cross-appeal shall comply with this rule, Rules 6 and 7 of this Court and with such version of Official Form M as shall be applicable to the situation;

(iii) Supplemental Notice. If the notice of appeal is filed before action has been taken by the trial court on the application for certification, appellant shall file a supplementary notice of appeal within 10 days after the expiration of the time periods set forth in paragraph (c) of this rule.

(iv) Contents of Notice. The notice of appeal and the supplementary notice of appeal, if any, shall include a

true and correct copy of such of the following papers as shall have been filed below except that the supplementary notice of appeal shall not contain any papers previously attached to the notice of appeal:

(A) Application. The application for certification and attachments thereto; the Court discourages unnecessary attachments to the application for certification;

(B) Order on Review. The interlocutory order from which the appeal is sought to be taken together with any opinion of the trial court with respect thereto;

(C) Response. The written response, if any, to the application for certification, or the transcript, if and when available, of an oral response in lieu of a written response;

(D) Action by Trial Court. The order, if any, of the trial court certifying or refusing to certify the interlocutory appeal and any opinion with respect thereto; and

(E) No Action by Trial Court. If no order has been entered by the trial court on the application for certification within 30 days of the entry of the interlocutory order, a separate certificate of appellant's counsel so stating shall be attached.

(v) Action by This Court. Unless otherwise ordered, this Court shall thereupon and without further argument determine in its discretion whether to accept or refuse the interlocutory appeal. In exercising that discretion, this Court may consider all relevant factors, including the decision of the trial court whether to certify the interlocutory appeal.

(vi) Proceedings After Acceptance. From the date of the acceptance of the interlocutory appeal, further proceedings shall be governed by these Rules, except:

(A) Trial Record Not Transmitted. The record shall not, in the first instance, be transmitted to the Clerk of this Court. Instead, the respective appendices of the parties, or a joint appendix if one is agreed upon, shall contain such record materials as each party believes relevant to the determination of the issue on appeal. The Court may, at its option, thereafter direct the clerk of the trial court to transmit all of the record, or such portions as the Court deems relevant to consideration of the interlocutory appeal.

(B) Brief Schedule. The time schedule for the filing of briefs and appendices, pursuant to Rule 15, shall commence upon the third day following the acceptance of the interlocutory appeal.

(vii) Proceedings After Refusal. If the appeal is refused, a certified copy of the order shall be sent to the trial court and a copy thereof to each counsel.

(e) Continuation of Other Proceedings in the Trial Court. The pendency of proceedings under this rule shall not operate as an automatic stay. Applications for stays shall be processed in the same manner as stays pending appeal under Rule 32.

(f) Failure to Seek or Obtain Review of Interlocutory Order. The failure to seek review of or the refusal of the Court to accept an appeal from an interlocutory order under this rule shall not bar a party from seeking review of such interlocutory order on appeal from the final order, judgment or decree.

HISTORY: Amended, effective Jan. 1, 1980; May 1, 1981; Nov. 1, 1983; Jan. 31, 1989; Jan. 1, 1995.

NOTES:
Committee commentary. -- There is no comparable prior rule relating to interlocutory appeals. The rule is an innovation. It borrows the certification concept of new Rule 41 and it specifically incorporates part of former Rule 20 on certification. See, former Rule 20(2)(d). Under the rule, application for an interlocutory appeal must be made in the first instance to the trial court; however, there is provision for review in the event that the trial court declines to certify the interlocutory appeal or fails to act within the requisite time period. It is necessary that application be made to the trial court within 10 days of the entry of the order, and in all events the notice of appeal of the interlocutory order must be filed in the Supreme Court within 30 days of the entry of the interlocutory order. This provision is intended to comply with 10 Del. Code, § 144.

The purpose of the rule is to get at the dilemma posed by interlocutory appeals. On the one hand, they can serve a very salutary purpose in the administration of justice by advancing the termination of litigation and saving time below if a threshold question can be resolved. On the other hand, interlocutory appeals have caused unnecessary delay and there is substantial danger of abuse of a right to file interlocutory appeals. The existence of the right to file interlocutory appeals is consistent with ABA Standard 3.12(b) which encourages interlocutory review but only at the discretion of the reviewing court where it determines that resolution of the questions of law on which the order is based will materially advance the litigation, protect a party from irreparable injury or clarify an issue of general importance in the administration of justice. The criteria applicable to the discretion of the trial court, and ultimately the Supreme Court, in deciding whether or not to accept an appeal of an interlocutory order are substantially in compliance with this standard.

CASENOTES

An appeal from an interlocutory ruling, which is made within the course of deciding a particular request for ancillary relief, is subject to the requirements of this rule. Memmolo v. Memmolo, Del. Supr., 576 A.2d 181 (1990).

Interlocutory order is appealable only if it determines substantial legal issues and establishes rights. Phillips v. Liberty Mut. Ins. Co., Del. Supr., 232 A.2d 101 (1967); F.H. Simonton, Inc. v. Conestoga Chem. Corp., Del. Supr., 247 A.2d 214 (1968), overruled on other grounds, Pepsico, Inc. v. Pepsi-Cola Bottling Co., Del. Supr., 261 A.2d 520 (1969).

If the order below involves substantial legal rights of the parties, it is appealable though interlocutory. Northumberland Ins. Co. v. Wolfson, Del. Supr., 251 A.2d 194 (1969).

The oft-repeated test of the appealability of an interlocutory order is that it must determine a substantial issue and establish a legal right. Castaldo v. Pittsburgh-Des Moines Steel Co., Del. Supr., 301 A.2d 87 (1973).

DELAWARE RULES ANNOTATED

Del. Super. Ct. Civ. R. 74 (1996)

RULE 74. INTERLOCUTORY APPEALS TO THE SUPREME COURT

Appeals from interlocutory orders of the Superior Court shall be upon such terms and conditions and in accordance with the procedures set forth in Supreme Court Rule 42.
HISTORY: Added, effective Oct. 15, 1980.

DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA CODE ANNOTATED

Code § 11-721 (1996)

§ 11-721. Orders and judgments of the Superior Court

(a) The District of Columbia Court of Appeals has jurisdiction of appeals from –

(1) all final orders and judgments of the Superior Court of the Districtof Columbia;

(2) interlocutory orders of the Superior Court of the District ofColumbia--

(A) granting, continuing, modifying, refusing, or dissolving orrefusing to dissolve or modify injunctions;

(B) appointing receivers, guardians, or conservators or refusing towind up receiverships, guardianships, or the administration of conservators or to take steps to accomplish the purpose thereof; or

(C) changing or affecting the possession of property; and

(3) orders or rulings of the Superior Court of the District of Columbiaappealed by the United States or the District of Columbia pursuant to section 23-104 or 23-111(d)(2).

(b) Except as provided in subsection (c) of this section, a party aggrieved by an order or judgment specified in subsection (a) of this section, may appeal therefrom as of right to the District of Columbia Court of Appeals.

(c) Review of judgments of the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia and of judgments in the Criminal Division of that court where the penalty imposed is a fine of less than $50 for an offense punishable by imprisonment of one year or less, or by fine of not more than $1,000, or both, shall be by application for the allowance of an appeal, filed in the District of Columbia Court of Appeals.

(d) When a judge of the Superior Court of the District of Columbia in making in a civil case (other than a case in which a child, as defined in section 16-2301, is alleged to be delinquent, neglected, or in need of supervision) a ruling or order not otherwise appealable under this section, shall be of the opinion that the ruling or order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from the ruling or order may materially advance the ultimate termination of the litigation or case, the judge shall so state in writing in the ruling or order. The District of Columbia Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from that ruling or order, if application is made to it within ten days after the issuance or entry of the ruling or order. An application for an appeal under this subsection shall not stay proceedings in the Superior Court of the District of Columbia unless the judge of that court who made such ruling or order or the District of Columbia Court of Appeals or a judge thereof shall so order.

(e) On the hearing of any appeal in any case, th District of Columbia Court of Appeals shall give

judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

(f) The District of Columbia Court of Appeals shall hear an appeal from an order of the Superior Court of the District of Columbia holding an individual in contempt and imposing the sanction of imprisonment on such individual in the course of a case for custody of a minor child not later than 60 days after such individual requests that an appeal be taken from that order.

Code § 16-2328 (1996)

§ 16-2328. Interlocutory appeals

(a) A child who has been ordered transferred for criminal prosecution under section 16-2307 or detained or placed in shelter care or subjected to conditions of release under section 16-2312, may, within two days of the date of entry of the Division's order, file a notice of interlocutory appeal.

(b) The District of Columbia Court of Appeals shall (1) hear argument on an appeal under subsection (a) on or before the third day (excluding Sundays) after the filing of notice under that subsection, (2) dispense with any requirement of written briefs other than the supporting materials previously submitted to the Division, and (3) render its decision on or before the next day following argument on appeal. The court may in rendering its decision dispense with the issuance of a written opinion.

(c) In cases involving transfer for criminal prosecution, the pendency of an interlocutory appeal shall act to stay criminal proceedings. Until the time for filing an interlocutory appeal has lapsed, or if an appeal is filed until its completion, no child who has been ordered transferred for criminal prosecution shall be removed to a place of adult detention, except as provided in section 16-2313, or otherwise treated as an adult.

(d) The decision of the District of Columbia Court of Appeals shall be final.

D.C. Ct. App. Rule 54 (1996)

Rule 54. Certification of questions of law.

(a) Upon certification of a question of law to this court pursuant to D.C. Code § 11-723 (1987 Supp.), counsel who is not a member of the Bar of this court shall within twenty days of the date of certification comply with the provisions of Rule 49 (c) (1).

(b) (1) Within thirty days of the date of the certification order, counsel shall file with the clerk of this court statements (joint or separate) indicating whether the certification and accompanying papers are deemed adequate to enable the court to decide the certified question.

(2) The clerk promptly thereafter shall assign a regularly selected division of the court to decide the question and any related matters.

(3) If for any reason the court determines that additional record from the certifying court or further briefs are needed, the clerk, upon directions of the court, shall request counsel or the certifying court, or both, to provide what is needed.

(4) The court may order oral argument.

(c) The question certified shall be deemed answered twenty-one days after the court's opinion is filed with the clerk unless the time is shortened or extended by order. The clerk shall send a certified copy of the opinion to the certifying court unless otherwise ordered by the court.

(d) The provisions of Rule 40 shall apply. The timely filing of a petition for rehearing or rehearing en banc will stay the transmittal of the opinion to the certifying court unless otherwise ordered by the court. (Added, Sept. 23, 1987.)

GEORGIA

OFFICIAL CODE OF GEORGIA ANNOTATED

TITLE 5. APPEAL AND ERROR
CHAPTER 6. CERTIORARI AND APPEALS TO APPELLATE COURTS GENERALLY
ARTICLE 2. APPELLATE PRACTICE

O.C.G.A. § 5-6-34 (1996)

§ 5-6-34. Judgments and rulings deemed directly appealable; procedure for review of judgments, orders, or decisions not subject to direct appeal; scope of review; hearings in criminal cases involving a capital offense for which death penalty is sought

(a) Appeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which appeals are authorized by the Constitution and laws of this state:

(1) All final judgments, that is to say, where the case is no longerpending in the court below, except as provided in Code Section 5-6-35;

(2) All judgments involving applications for discharge in bail trover andcontempt cases;

(3) All judgments or orders directing that an accounting be had;

(4) All judgments or orders granting or refusing applications forreceivers or for interlocutory or final injunctions;

(5) All judgments or orders granting or refusing applications forattachment against fraudulent debtors;

(6) All judgments or orders granting or refusing to grant mandamus or anyother extraordinary remedy, except with respect to temporary restraining orders;

(7) All judgments or orders refusing applications for dissolution ofcorporations created by the superior courts; and

(8) All judgments or orders sustaining motions to dismiss a caveat to theprobate of a will.

(b) Where the trial judge in rendering an order, decision, or judgment, not otherwise subject to direct appeal, certifies within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that immediate review should be had, the Supreme Court or the Court of Appeals may thereupon, in their respective discretions, permit an appeal to be taken from the order, decision, or judgment if application is made thereto within ten days after such certificate is granted. The application shall be in the nature of a petition and shall set forth the need for such an appeal and the issue or issues involved therein. The applicant may, at his or her election, include copies of such parts of the record as he or she deems appropriate, but no certification of such copies by the clerk of the trial court shall be necessary. The application shall be filed with the clerk of the Supreme Court or the Court of Appeals and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties in the case in the manner prescribed by Code Section 5-6-32, except that such service shall be perfected at or before the filing of the application. The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 30 days of the date on which the application was filed. Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, may file a notice of appeal as provided in Code Section 5-6-37. The notice of appeal shall act as a supersedeas as provided in Code Section 5-6-46 and the procedure thereafter shall be the same as in an appeal from a final judgment.

(c) In criminal cases involving a capital offense for which the death penalty is sought, a hearing shall be held as provided in Code Section 17-10-35.2 to determine if there shall be a review of pretrial proceedings by the Supreme Court prior to a trial before a jury. Review of pretrial proceedings, if ordered by the trial court, shall be exclusively as provided by Code Section 17-10-35.1 and no certificate of immediate review shall be necessary.

(d) Where an appeal is taken under any provision of subsection (a), (b), or (c) of this Code section, all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court, without regard to the appealability of the judgment, ruling, or order standing alone and without regard to whether the judgment, ruling, or order appealed from was final or was appealable by some other express provision of law contained in this Code section, or elsewhere. For purposes of review by the appellate court, one or more judgments, rulings, or orders by the trial court held to be erroneous on appeal shall not be deemed to have rendered all subsequent proceedings nugatory; but the appellate court shall in all cases review all judgments, rulings, or orders raised on appeal which may affect the proceedings below and which were rendered subsequent to the first judgment, ruling, or order held erroneous. Nothing in this subsection shall require the appellate court to pass upon questions which are rendered moot.

OFFICIAL CODE OF GEORGIA ANNOTATED

O.C.G.A. § 5-7-2 (1996)

§ 5-7-2. Certification required for immediate review of nonfinal orders, decisions, or judgments

Other than from an order, decision, or judgment sustaining a motion to suppress evidence illegally seized, in any appeal under this chapter where the order, decision, or judgment is not final, it shall be necessary that the trial judge certify within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that an immediate review should be had.

GEORGIA RULES OF COURT ANNOTATED
III. INTERLOCUTORY APPEALS

GRSC, Rule 29 (1996)

Rule 29. Requirements.

Applications for interlocutory appeal shall contain a jurisdictional statement and have attached a copy of the trial court's order to be appealed and its certification for immediate review. See Rule 19. A transcript is not necessary, but affidavits and exhibits should be attached to the application to demonstrate to the Court what the record will show if the application is granted.

Responses, due within 10 days of docketing, are encouraged and should be filed as briefs. See Rule 20.

GEORGIA RULES OF COURT ANNOTATED

RULES OF THE SUPREME COURT OF GEORGIA
III. INTERLOCUTORY APPEALS

GRSC, Rule 30 (1996)

Rule 30. Standard for granting.

An application for leave to appeal an interlocutory order will be granted only when:

(1) The issue to be decided appears to be dispositive of the case;

(2) The order appears erroneous and will probably cause a substantial error at trial; or

(3) The establishment of a precedent is desirable.

Rule 30. Applications.

An application for leave to appeal an interlocutory order will be granted only when it appears from the documents submitted that:

(a) The issue to be decided appears to be dispositive of the case; or

(b) The order appears erroneous and will probably cause a substantial error at trial or will adversely affect the rights of the appealing party until entry of final judgment in which case the appeal will be expedited; or

(c) The establishment of precedent is desirable.

Rule 31. Time of Filing.

(a) An application for interlocutory appeal shall be filed in this Court within ten days of the granting of the trial court's certificate for immediate review. The certificate is deemed granted on the date it is filed in the trial court clerk's office.

(b) Applications to appeal interlocutory orders of which the Supreme Court has jurisdiction may be transferred to that Court no fewer than ten days before the last day to act thereon, or may be dismissed for improper filing.

(c) Applications for interlocutory appeal shall contain a jurisdictional statement and have attached a stamped "filed" copy of the court's order to be appealed and a stamped "filed" copy of the certificate of immediate review. Copies of all materials from the record, which materials must be sufficient to apprise the Court of the appellate issues, in context, and support the arguments advanced, shall be tabbed and indexed. If the application is not tabbed and indexed, it will not be docketed, but will be returned for correction. If the application is granted, appellant must file a notice of appeal as required by OCGA § 5-6-34 (b).

HAWAII

HAWAII CODE ANNOTATED
COURTS AND JUDICIAL PROCEEDINGS
TITLE 35. APPEAL AND ERROR

§ 641-1. Appeals as of right or interlocutory, civil matters

(a) Appeals shall be allowed in civil matters from all final judgments, orders, or decrees of circuit and district courts and the land court, to the supreme court or to the intermediate appellate court, except as otherwise provided by law and subject to the authority of the intermediate appellate court to certify reassignment of a matter directly to the supreme court and subject to the authority of the supreme court to reassign a matter to itself from the intermediate appellate court.

(b) Upon application made within the time provided by the rules of court, an appeal in a civil matter may be allowed by a circuit court in its discretion from an order denying a motion to dismiss or from any interlocutory judgment, order, or decree whenever the circuit court may think the same advisable for the speedy termination of litigation before it. The refusal of the circuit court to

allow an appeal from an interlocutory judgment, order, or decree shall not be reviewable by any other court.

(c) An appeal shall be taken in the manner and within the time provided by the rules of court.

HAWAII CODE ANNOTATED
HRS § 641-17 (1996)

§ 641-17. Interlocutory appeals from circuit courts, criminal matters

Upon application made within the time provided by the rules of the supreme court, an appeal in a criminal matter may be allowed to a defendant from the circuit court to the supreme court, subject to chapter 602, from a decision denying a motion to dismiss or from other interlocutory orders, decisions, or judgments, whenever the judge in the judge's discretion may think the same advisable for a more speedy termination of the case. The refusal of the judge to allow an interlocutory appeal to the appellate court shall not be reviewable by any other court.

ILLINOIS

ILLINOIS COMPILED STATUTES ANNOTATED
SUPREME COURT RULES

ARTICLE III. CIVIL APPEALS RULES
PART A. APPEALS FROM THE CIRCUIT COURT

Supreme Ct., R 304 (1996)

Rule 304. Appeals from Final Judgments that Do Not Dispose of an Entire Proceeding

(a) Judgments As To Fewer Than All Parties or Claims – Necessity for Special Finding. If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party. The time for filing a notice of appeal shall be as provided in Rule 303. In computing the time provided in Rule 303 for filing the notice of appeal the entry of the required finding shall be treated as the date of the entry of final judgment. In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties.

(b) Judgments and Orders Appealable Without Special Finding. The following judgments and orders are appealable without the finding required for appeals under paragraph (a) of this rule:

(1) A judgment or order entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party.

(2) A judgment or order entered in the administration of a receivership,rehabilitation, liquidation, or other similar proceeding which finally determines a right or status of a party and which is not appealable under Rule 307(a).

(3) A judgment or order granting or denying any of the relief prayed in apetition under section 2-1401 of the Code of Civil Procedure [735 ILCS 5/2-1401].

(4) A final judgment or order entered in a proceeding under section 2-1402of the Code of Civil Procedure [735 ILCS 5/2-1402].

(5) An order finding a person or entity in contempt of court which imposesa monetary or other penalty.

ILLINOIS COMPILED STATUTES ANNOTATED
SUPREME COURT RULES
CIVIL APPEALS RULES
PART A. APPEALS FROM THE CIRCUIT COURT

Supreme Ct., R 307 (1996)

Rule 307. Interlocutory Appeals as of Right

(a) Orders Appealable; Time. An appeal may be taken to the Appellate Court from an interlocutory order of court:

(1) Granting, modifying, refusing, dissolving, or refusing to dissolve ormodify an injunction;

(2) Appointing or refusing to appoint a receiver or sequestrator;

(3) Giving or refusing to give other or further powers or property to areceiver or sequestrator already appointed;

(4) Placing or refusing to place a mortgagee in possession of mortgaged premises;

(5) Appointing or refusing to appoint a receiver, liquidator,rehabilitator, or other similar officer for a bank, savings and loan association, currency exchange, insurance company, or other financial institution, or granting or refusing to grant custody of the institution or requiring turnover of any of its assets;

(6) Terminating parental rights or granting, denying or revoking temporarycommitment in adoption cases;

(7) Determining issues raised in proceedings to exercise the right ofeminent domain under section 7-104 of the Code of Civil Procedure [755 ILCS 5/7-104], but the procedure for appeal and stay shall be as provided in that section;[.]

Except as provided in paragraph (b), the appeal must be perfected within 30 days from the entry of the interlocutory order by filing a notice of appeal designated "Notice of Interlocutory Appeal" conforming substantially to the notice of appeal in other cases. The record must be filed in the Appellate Court within the same 30 days unless the time for filing the record is extended by the Appellate Court or any judge thereof.

(b) Motion to Vacate. If an interlocutory order is entered on ex parte application, the party intending to take an appeal therefrom shall first present, on notice, a motion to the trial court to vacate the order. An appeal may be taken if the motion is denied, or if the court does not act thereon within 7 days after its presentation. The 30 days allowed for taking an appeal and filing the record begins to run from the day the motion is denied or from the last day for action thereon.

(c) Time for Briefs and Abstract if an Abstract Is Required. Unless the Appellate Court orders a different schedule or orders that no briefs be filed, the schedule for filing briefs shall be as follows: The brief of appellant shall be filed in the Appellate Court, with proof of service, within 7 days from the filing of the record on appeal. Within 7 days from the date appellant's brief is filed, the appellee shall file his brief in the Appellate Court with proof of service. Within 7 days from the date appellee's brief is filed, appellant may serve and file a reply brief. The briefs shall otherwise conform to the requirements of Rules 341 through 344. If the Appellate Court so orders, an abstract shall be prepared and filed as provided in Rule 342.

(d) Appeals of Temporary Restraining Orders; Time; Memoranda.

(1) Petition; Service; Record. Unless another form is ordered by theAppellate Court, review of the granting or denial of a temporary restraining order as authorized in paragraph (a) shall be by petition filed in the Appellate Court, but notice of interlocutory appeal as provided in paragraph (a) shall also be filed, within the same time for filing the petition. The petition shall be in writing, state the relief requested and the grounds for the relief requested, and shall be filed in the Appellate Court, with proof of personal service, within two days of the entry or denial of the temporary restraining order from which review is being sought. An appropriate supporting record shall accompany the petition, which shall include the notice of interlocutory appeal, the temporary restraining order or the proposed temporary restraining order, the complaint, the motion requesting the granting of the temporary restraining order, and any supporting documents or matters of record necessary to the petition. The supporting record must be authenticated by the certificate of the clerk of the trial court or by the affidavit of the attorney or party filing it.

(2) Legal Memoranda. The petitioner may file a memorandum supporting thepetition which shall not exceed 15 typewritten pages and which must also be filed within two days of the entry or denial of the temporary restraining order. The respondent shall file, with proof of personal service, any responding memorandum within two days following the filing of the petition, supporting record, and any memorandum which must be personally served upon the respondent. The respondent's memorandum may not exceed 15 typewritten pages and must also be personally served upon the petitioner.

(3) Replies; Extensions of Time. Except by order of court, no replieswill be allowed and no extension of time will be allowed.

(4) Time for Decision; Oral Argument. After the petitioner has filed thepetition, supporting record, and any memorandum and the time for filing any responding memorandum has expired, the Appellate Court shall consider and decide the petition within two days thereafter. Oral argument on the petition will not be heard.

(5) Variations by Order of Court. The Appellate Court may, if it deems itappropriate, order a different schedule, or order that no memoranda be filed, or order the other materials need not be filed.

ILLINOIS COMPILED STATUTES ANNOTATED
SUPREME COURT RULES
Supreme Ct., R 308 (1996)

Rule 308. Interlocutory Appeals by Permission

(a) Requests. When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance

the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order.

(b) How Sought. The appeal will be sought by filing an application for leave to appeal with the clerk of the Appellate Court within 14 days after the entry of the order in the trial court or the making of the prescribed statement by the trial court, whichever is later. An original and three copies of the application shall be filed.

(c) Application; Answer. The application shall contain a statement of the facts necessary to an understanding of the question of law determined by the order of the trial court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The application shall be accompanied by an original supporting record (Rule 328), containing the order appealed from and other parts of the trial court record necessary for the determination of the application for permission to appeal. Within 14 days after the due date of the application, an adverse party may file an answer in opposition, with copies in the number required for the application, together with an original of a supplementary supporting record containing any additional parts of the record the adverse party desires to have considered by the Appellate Court. The application and answer shall be submitted without oral argument unless otherwise ordered.

(d) Record; Briefs. If leave to appeal is allowed, any party may request that an additional record on appeal be prepared as provided in Rule 321 et seq., or the court may order the appellant to file the record, which shall be filed within 35 days of the date on which such leave was allowed. The appellant shall file a brief in the reviewing court within the same 35 days. Otherwise the schedule and requirements for briefs shall be as provided in Rules 341 through 344. If the reviewing court so orders, an abstract shall be prepared and filed as provided in Rule 342.

(e) Stay. The application for permission to appeal or the granting thereof shall not stay proceedings in the trial court unless the trial court or the Appellate Court or a judge thereof shall so order.

HISTORY: Amended eff. 9-1-74; amended 7-30-79, eff. 10-15-79; amended 12-17-93, eff. 2-1-94.

COMMITTEE COMMENTS

(Revised 1979)

This rule was new in 1967. Prior to that time appeals from interlocutory orders had been permitted in Illinois only in a few specified classes of cases. (See former Rule 31 and its predecessor, former section 78 of the Civil Practice Act (Ill. Rev. Stat. 1961, ch. 110, par. 78).) This was also generally true in the Federal courts. In 1958, however, Congress adopted what is now 28 U.S.C. § 1292(b), which permits an interlocutory appeal from other than final orders when the trial court "shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate termination of the litigation." The Court of Appeals may then "in its discretion" permit the appeal to be taken. Thus, this type of interlocutory appeal is allowed when both the trial and appellate courts agree that an appeal will expedite the disposition of the litigation, and also that there is a substantial question of law to be decided. The appellate courts themselves can insure that this authority to allow interlocutory appeals is not abused. This power has been sparingly exercised in the Federal courts, but it has proved valuable.

This rule establishes a similar procedure for Illinois. One change from the Federal rule is to eliminate the requirement that the question raised be a "controlling" one. The meaning of "controlling" has not been clear, despite many cases on the point, and experience has shown that sometimes an important question of law that only arguably could be said to be controlling should be heard on appeal without awaiting final judgment.

The 1964 Judicial Article authorized the Supreme Court to provide by rule for appeals to the Appellate Court of other than final judgments of the circuit court. Arguably, however, it made no provision for rules permitting direct appeal to the Supreme Court except in the case of final judgments. Accordingly, Rule 308 was made applicable only to appeals to the Appellate Court, but it permits the Appellate Court to allow interlocutory appeals in classes of cases in which the final judgment is appealable only to the Supreme Court. Though the reference to "final judgments" in § 5 of the 1964 Judicial Article was not carried forward into article VI, § 4 of the new Constitution, direct appeals to the Supreme Court remain limited to appeals from final judgments. See Rule 302.

Normally the interlocutory appeal will not stay proceedings in the trial court. The case may proceed in that court unless the trial court or the Appellate Court or a judge thereof otherwise orders. This will discourage an attempt to take an interlocutory appeal with a motive o delay.

In 1974, paragraph (b) was amended to substitute the word "application" appearing in the last sentence of the paragraph for the word "petition" to make the terminology uniform. At the same time paragraph (d) was amended to insert the clause "the appellant shall file his brief in the reviewing court within 35 days of the date on which such leave was allowed." This requirement formerly appeared in Rule 343(a). See the committee comments to Rule 306, paragraph (g).

Until 1979, paragraph (d) provided that, if appeal were allowed, "[e]xcerpts from record or an abstract shall be prepared and filed as provided in Rule 342." In that year Rule 342 was amended to eliminate altogether the practice of duplicating and filing excerpts from the record and to provide that no abstract shall be filed unless by order of the reviewing court. Accordingly, paragraph (d) was amended to reflect this change. See the committee comments to Rule 342.

ILLINOIS COMPILED STATUTES ANNOTATED

§ 775 ILCS 5/8-111. Court Proceedings

Sec. 8-111. Court Proceedings. (A)(1) Judicial Review. Any complainant or respondent may apply for and obtain judicial review of any final order entered under this Act by filing a petition for review in the Appellate Court within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision. If a 3-member panel or the full Commission finds that an interlocutory order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, any party may petition the Appellate Court for permission to appeal the order. The procedure for obtaining the required Commission findings and the permission of the Appellate Court shall be governed by Supreme Court Rule 308, except the references to the "trial court" shall be understood as referring to the Commission.

(2) In any proceeding brought for judicial review, the findings of fact made at the administrative level shall be sustained unless the court determines that such findings are contrary to the manifest weight of the evidence.

(3) Venue. Proceedings for judicial review shall be commenced in the appellate court for the district wherein the civil rights violation was allegedly committed.

(B) Judicial Enforcement.

(1) When the Commission, at the instance of the Department or an aggrieved party, concludes that any person has violated a valid order of the Commission issued pursuant to this Act, and the violation and its effects are not promptly corrected, the Commission, through a panel of 3 members, shall order the Department to commence an action in the name of the People of the State of Illinois by complaint, alleging the violation, attaching a copy of the order of the Commission and praying for the issuance of an order directing such person, his or her or its officers, agents, servants, successors and assigns to comply with the order of the Commission.

(2) An aggrieved party may file a complaint for enforcement of a valid order of the Commission directly in Circuit Court.

(3) Upon the commencement of an action filed under paragraphs (1) or (2) of subsection (B) of this Section the court shall have jurisdiction over the proceedings and power to grant or refuse, in whole or in part, the relief sought or impose such other remedy as the court may deem proper.

(4) The court may stay an order of the Commission in accordance with the applicable Supreme Court rules, pending disposition of the proceedings.

(5) The court may punish for any violation of its order as in the case of civil contempt.

(6) Venue. Proceedings for judicial enforcement of a Commission order shall be commenced in the circuit court in the county wherein the civil rights violation which is the subject of the Commission's order was committed.

(C) Limitation. Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act.

(D) This amendatory Act of 1996 applies to causes of action filed on or after January 1, 1996.

BURNS INDIANA STATUTES ANNOTATED

TITLE 34. CIVIL PROCEDURE
ARTICLE 1. CIVIL CODE OF 1881
CHAPTER 47. JUDGMENTS FROM WHICH APPEALS MAY BE TAKEN

§ 34-1-47-1. Judgments from which appeals may be taken

(a) Appeals may be taken from the circuit courts and superior courts by either party from all final judgments. The party obtaining a judgment shall not take an appeal after receiving any money paid or collected thereon.

(b) A ruling or order of the court granting a motion for a new trial shall be treated as a final judgment and an appeal may be taken on the ruling or order.

HISTORY: Acts 1881 (Spec. Sess.), ch. 38, § 628, p. 240; 1959, ch. 25, § 1; P.L.1-1990, § 333.

BURNS INDIANA STATUTES ANNOTATED COURT RULES

INDIANA RULES OF PROCEDURE
RULES OF TRIAL PROCEDURE
VII. JUDGMENT

Burns Ind. TR 54 (1996)

Trial Rule 54 JUDGMENT; COSTS

(A) Definition -- Form. "Judgment", as used in these rules, includes a decree and any order from which an appeal lies. A judgment shall contain all matters required by Rule 58 but need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(B) Judgment upon multiple claims or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment, and an appeal may be taken upon this or other issues resolved by the judgment; but in other cases a judgment, decision or order as to less than all the claims and parties is not final.

* * * *

(E) Judgments severable. Unless otherwise specified therein, judgments against two (2) or more persons or upon two (2) or more claims shall be deemed joint and several for purposes of:
(1) Permitting enforcement proceedings jointly or separately against different parties or jointly or separately against their property; or (2) Permitting one or more parties to challenge the judgment (by appeal, motion and the like) as against one or more parties as to one or more claims or parts of claims.

Nothing herein is intended to dispense with notice requirements, or provisions requiring or permitting parties to join or participate in the same appeal.

IOWA

CODE OF IOWA 1996

JUDICIAL BRANCH AND JUDICIAL PROCEDURES
CIVIL PROCEDURE
CHAPTER 631. SMALL CLAIMS

Iowa Code § 631.16 (1996)

631.16 Discretionary review.

1. A civil action originally tried as a small claim shall not be appealed to the supreme court except by discretionary review as provided herein.

2. "Discretionary review" is the process by which the supreme court may exercise its discretion, in like manner as under the rules pertaining to interlocutory appeals and certiorari in civil cases, to review specified matters not subject to appeal as a matter of right. The supreme court may adopt additional rules to control access to discretionary review.

3. The party seeking review shall be known as the appellant and the adverse party as the appellee, but the title of the action shall not be changed from that in the court below.

4. The record and case shall be presented to the appellate court as provided by the rules of appellate procedure; and the provisions of law in civil procedure relating to the filing of decisions and opinions of the appellate court shall apply in such cases.

5. The appellate court, after an examination of the entire record, may dispose of the case by affirmation, reversal or modification of the lower court judgment, and may order a new trial.

6. The decision of the appellate court with any opinion filed or judgment rendered must be recorded by the supreme court clerk. Procedendo shall be issued as provided in the rules of appellate procedure.

7. The jurisdiction of the appellate court shall cease when procedendo is issued. All proceedings for executing the judgment shall be had in the trial court or by its clerk.

CODE OF IOWA 1996
CRIMINAL LAW AND PROCEDURE
CHAPTER 814. APPEALS FROM THE DISTRICT COURT

Iowa Code § 814.1 (1996)

814.1 Definition of appeal and discretionary review.

For the purposes of this chapter, unless the context otherwise requires:

1. "Appeal" is the right of both the defendant and the state to have specified actions of the district court considered by an appellate court.

2. "Discretionary review" is the process by which an appellate court may exercise its discretion, in like manner as under the rules pertaining to interlocutory appeals and certiorari in civil cases, to review specified matters not subject to appeal as a matter of right. The supreme court may adopt additional rules to control access to discretionary review.

IOWA COURT RULES

RULES OF APPELLATE PROCEDURE
DIVISION I. APPEALS IN CIVIL CASES

Iowa Rules App. Proc. 6 (1997)

Rule 6. How taken.

a. An appeal other than those allowed or certified by order under rule 2, rule 3 or rule 5"a," rules of appellate procedure, is taken and perfected by filing a notice with the clerk of the court where the order, judgment or decree was entered, signed by appellant or his attorney. It shall specify the parties taking the appeal and the decree, judgment, order or part thereof appealed from. The appellant shall serve a copy of the notice on each other party or his counsel in the manner prescribed in R.C.P. 82"b." The notice presented to the clerk of the trial court for filing shall be accompanied by a proof of service in the form prescribed in R.C.P. 82"g." Promptly after filing the notice of appeal with the clerk of the trial court appellant shall mail or deliver to the clerk of the supreme court a copy of such notice for his information.

b. An interlocutory appeal under rule 2, rules of appellate procedure, or an appeal certified under rule 3, rules of appellate procedure, shall be deemed taken and perfected when the order allowing or certifying it is filed with the clerk of the supreme court. No notice of such appeal is necessary. The time for any further proceeding on such appeal which would run from the notice of appeal shall run from the date such order is so filed. The clerk of the supreme court shall promptly transmit a copy of such order to the attorneys of record and the clerk of the trial court. The clerk of the trial court shall timely comply with rule 11"a," rules of appellate procedure.

IOWA COURT RULES

RULES OF APPELLATE PROCEDURE
DIVISION I. APPEALS IN CIVIL CASES

Iowa Rules App. Proc. 2 (1997)

Rule 2. From interlocutory orders.

a. Any party aggrieved by an interlocutory ruling or decision, including a party whose objections to jurisdiction have been overruled, may apply to the supreme court or any justice thereof to grant an appeal in advance of final judgment. Such appeal may be granted, after service of the application and hearing as provided in Iowa Rules of Appellate Procedure 22 and 30, on finding that such ruling or decision involves substantial rights and will materially affect the final decision and that a determination of its correctness before trial on the merits will better serve the interests of justice. No such application is necessary where the appeal is, pursuant to rule 1, rules of appellate procedure, from a final adjudication in the trial court under R.C.P. 86.

b. The order granting such appeal may be on terms advancing it for prompt submission. It shall stay further proceedings below and may require bond.

KANSAS

KANSAS COURT RULES
INTERLOCUTORY APPEALS

Kan. Sup. Ct. Rule 4.01 (1996)

Rule 4.01 INTERLOCUTORY APPEALS IN CIVIL CASES

When an appeal is sought under the provisions of K.S.A. 60-2102(b) an application for permission to take such an appeal shall be served within ten (10) days after the filing of the order from which an appeal is sought to be taken. The order may be amended to include the findings required by K.S.A. 60-2102(b) provided a motion to amend is served and filed within ten (10) days of the filing of the order, and the application for permission to take an appeal may be served within ten (10) days after filing of the amended order. The application shall be filed with the clerk of the appellate courts and docketed as a regular appeal to the court of appeals.

The application shall:

(a) state the relevant facts, including the nature and a brief history of the proceedings in the district court with all the important dates, and

(b) have annexed thereto a copy of the order from which the appeal is sought to be taken and in which the judge of the district court makes the findings required by K.S.A. 60-2102(b), and

(c) state briefly the controlling question of law which the order is believed to involve, the ground for the difference of opinion with respect thereto which is believed to be substantial, and the basis for belief that an immediate appeal may materially advance the ultimate termination of the litigation.

Any adverse party may within five (5) days after service thereof serve a response thereto. The application and response shall be submitted without oral argument. If permission to appeal is granted, the notice of appeal shall be filed in the district court within the time fixed by K.S.A. 60-2103, for taking an appeal or within ten (10) days after permission to appeal is granted, whichever is later. Within ten (10) days after such filing, a certified copy of the notice of appeal and an original and one copy of the docketing statement required by Rule 2.041 shall be filed with the clerk of the appellate courts and the appeal shall thereupon be deemed docketed. In such case no additional docket fee shall be charged and the record on appeal shall be filed under the same docket number.

KANSAS STATUTES ANNOTATED

S.A. § 60-2102 (1996)

60-2102. Invoking jurisdiction of court of appeals.

(a) As of right. Except for any order or final decision of a district magistrate judge, the appellate jurisdiction of the court of appeals may be invoked by appeal as a matter of right from:

(1) An order that discharges, vacates or modifies a provisional remedy.

(2) An order that grants, continues, modifies, refuses or dissolves an injunction, or an order that grants or refuses relief in the form of mandamus, quo warranto or habeas corpus.

(3) An order that appoints a receiver or refuses to wind up a receivership or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property, or an order involving the tax or revenue laws, the title to real estate, the constitution of this state or the constitution, laws or treaties of the United States.

(4) A final decision in any action, except in an action ıere a direct appeal to the supreme court is required by ..w. In any appeal or cross appeal from a final decision, any act or ruling from the beginning of the proceedings shall be reviewable.

(b) Other appeals. When a district judge, in making in a civil action an order not otherwise appealable under this section, is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the judge shall so state in writing in such order. The court of appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of the order under such terms and conditions as the supreme court fixes by rule. Application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or an appellate court or a judge thereof so orders.

KENTUCKY

KENTUCKY REVISED STATUTES ANNOTATED
CHAPTER 22A. COURT OF APPEALS

KRS § 22A.020 (Michie 1996)

§ 22A.020. Jurisdiction -- Appeal procedures

(1) Except as provided in Section 110 of the Constitution, an appeal may be taken as a matter of right to the Court of Appeals from any conviction, final judgment, order, or decree in any case in Circuit Court, unless such conviction, final judgment, order, or decree was rendered on an appeal from a court inferior to Circuit Court.

(2) The Court of Appeals has jurisdiction to review interlocutory orders of the Circuit Court in civil cases, but only as authorized by rules promulgated by the Supreme Court.

(3) Notwithstanding any other provisions in this section, there shall be no review by appeal or by writ of certiorari from that portion of a final judgment, order or decree of a Circuit Court dissolving a marriage.

(4) An appeal may be taken to the Court of Appeals by the state in criminal cases from an adverse decision or ruling of the Circuit Court, but only under the following conditions:

(a) Such appeal shall not suspend the proceedings in the case.

(b) Such appeal shall be taken in the manner provided by the Rules ofCriminal Procedure and the Rules of the Supreme Court, except that the record on appeal shall be transmitted by the clerk of the Circuit Court to the Attorney General; and if the Attorney General is satisfied that review by the Court of Appeals is important to the correct and uniform administration of the law, he may deliver the record to the clerk of the Court of Appeals within the time prescribed by the above-mentioned rules.

(c) When an appeal is taken pursuant to this subsection, the Court ofAppeals, if the record so warrants, may reverse the decision of the circuit court and order a new trial in any case in which a new trial would not constitute double jeopardy or otherwise violate any constitutional rights of the defendant.

(5) Any party aggrieved by the judgment of the Circuit Court in a case appealed from a court inferior thereto may petition the Court of Appeals for a writ of certiorari.

MARYLAND

ANNOTATED CODE OF MARYLAND

Maryland Rules
Title 2. Civil Procedure -- Circuit Court
Chapter 600. Judgment

Md. Rule 2-602 (1996)

Rule 2-602. JUDGMENTS NOT DISPOSING OF ENTIRE ACTION

(a) Generally. -- Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, crossclaim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:

(1) is not a final judgment;

(2) does not terminate the action as to any of the claims or any of the parties; and

(3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

(b) When Allowed. -- If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment:

(1) as to one or more but fewer than all of the claims or parties; or

(2) pursuant to Rule 2-501 (e) (3), for some but less than all of the amount requested in a claim seeking money relief only.

MASSACHUSETTS

ANNOTATED LAWS OF MASSACHUSETTS

TITLE I. COURTS AND JUDICIAL OFFICERS
CHAPTER 215. Probate Courts
APPEALS

Mass. Ann. Laws ch. 215, § 14 (1996)

§ 14. Revision of Interlocutory Judgments on Appeal.

Interlocutory judgments and decrees not appealed from shall be open to revision upon appeals from final judgments and decrees so far only as it appears to the appeals court or supreme judicial court that such final judgments and decrees are erroneously affected thereby.

ANNOTATED LAWS OF MASSACHUSETTS
RULES OF CRIMINAL PROCEDURE

ALM R. Crim. P. 15 (1997)

Rule 15. INTERLOCUTORY APPEAL

(a) RIGHT OF INTERLOCUTORY APPEAL

(1) Right of Appeal Where Pretrial Motion to Dismiss or for Appropriate Relief Granted. The Commonwealth shall have the right to appeal to the appropriate appellate court a decision by a judge granting a motion to dismiss a complaint or indictment or a motion for appropriate relief made pursuant to the provisions of subdivision (c) of Rule 13.

(2) Right of Appeal Where Motion to Suppress Evidence Determined. A defendant or the Commonwealth shall have the right and opportunity to apply to a single justice of the Supreme Judicial Court for leave to appeal an order determining a motion to suppress evidence prior to trial. If the single justice determines that the administration of justice would be facilitated, the justice may grant that leave and may hear the appeal or may report it to the full Supreme Judicial Court or to the Appeals Court.

(3) Right of Appeal where Transfer of Delinquency proceeding is Denied. The Commonwealth shall have the right to appeal to the Appeals Court a decision by a judge denying transfer of a delinquency proceeding pursuant to G. L. c. 119, § 61.

(4) Probable Cause Hearings. No interlocutory appea. or report may be taken of matters arising out of a probable cause hearing.

KANSAS STATUTES ANNOTATED

.A. § 60-2102 (1996)

60-2102. Invoking jurisdiction of court of appeals.

(a) As of right. Except for any order or final decision of a district magistrate judge, the appellate jurisdiction of the court of appeals may be invoked by appeal as a matter of right from:

(1) An order that discharges, vacates or modifies a provisional remedy.

(2) An order that grants, continues, modifies, refuses or dissolves an injunction, or an order that grants or refuses relief in the form of mandamus, quo warranto or habeas corpus.

(3) An order that appoints a receiver or refuses to wind up a receivership or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property, or an order involving the tax or revenue laws, the title to real estate, the constitution of this state or the constitution, laws or treaties of the United States.

(4) A final decision in any action, except in an action ere a direct appeal to the supreme court is required by .v. In any appeal or cross appeal from a final decision, any act or ruling from the beginning of the proceedings shall be reviewable.

(b) Other appeals. When a district judge, in making in a civil action an order not otherwise appealable under this section, is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the judge shall so state in writing in such order. The court of appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of the order under such terms and conditions as the supreme court fixes by rule. Application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or an appellate court or a judge thereof so orders.

KENTUCKY

KENTUCKY REVISED STATUTES ANNOTATED
CHAPTER 22A. COURT OF APPEALS

KRS § 22A.020 (Michie 1996)

§ 22A.020. Jurisdiction -- Appeal procedures

(1) Except as provided in Section 110 of the Constitution, an appeal may be taken as a matter of right to the Court of Appeals from any conviction, final judgment, order, or decree in any case in Circuit Court, unless such conviction, final judgment, order, or decree was rendered on an appeal from a court inferior to Circuit Court.

(2) The Court of Appeals has jurisdiction to review interlocutory orders of the Circuit Court in civil cases, but only as authorized by rules promulgated by the Supreme Court.

(3) Notwithstanding any other provisions in this section, there shall be no review by appeal or by writ of certiorari from that portion of a final judgment, order or decree of a Circuit Court dissolving a marriage.

(4) An appeal may be taken to the Court of Appeals by the state in criminal cases from an adverse decision or ruling of the Circuit Court, but only under the following conditions:

(a) Such appeal shall not suspend the proceedings in the case.

(b) Such appeal shall be taken in the manner provided by the Rules ofCriminal Procedure and the Rules of the Supreme Court, except that the record on appeal shall be transmitted by the clerk of the Circuit Court to the Attorney General; and if the Attorney General is satisfied that review by the Court of Appeals is important to the correct and uniform administration of the law, he may deliver the record to the clerk of the Court of Appeals within the time prescribed by the above-mentioned rules.

(c) When an appeal is taken pursuant to this subsection, the Court ofAppeals, if the record so warrants, may reverse the decision of the circuit court and order a new trial in any case in which a new trial would not constitute double jeopardy or otherwise violate any constitutional rights of the defendant.

(5) Any party aggrieved by the judgment of the Circuit Court in a case appealed from a court inferior thereto may petition the Court of Appeals for a writ of certiorari.

MARYLAND

ANNOTATED CODE OF MARYLAND

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Chapter 600. Judgment

Md. Rule 2-602 (1996)

Rule 2-602. JUDGMENTS NOT DISPOSING OF ENTIRE ACTION

(a) Generally. -- Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, crossclaim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:

(1) is not a final judgment;

(2) does not terminate the action as to any of the claims or any of the parties; and

(3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

(b) When Allowed. -- If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment:

(1) as to one or more but fewer than all of the claims or parties; or

(2) pursuant to Rule 2-501 (e) (3), for some but less than all of the amount requested in a claim seeking money relief only.

MASSACHUSETTS

ANNOTATED LAWS OF MASSACHUSETTS

TITLE I. COURTS AND JUDICIAL OFFICERS
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ANNOTATED LAWS OF MASSACHUSETTS
RULES OF CRIMINAL PROCEDURE

ALM R. Crim. P. 15 (1997)

Rule 15. INTERLOCUTORY APPEAL

(a) RIGHT OF INTERLOCUTORY APPEAL

(1) Right of Appeal Where Pretrial Motion to Dismiss or for Appropriate Relief Granted. The Commonwealth shall have the right to appeal to the appropriate appellate court a decision by a judge granting a motion to dismiss a complaint or indictment or a motion for appropriate relief made pursuant to the provisions of subdivision (c) of Rule 13.

(2) Right of Appeal Where Motion to Suppress Evidence Determined. A defendant or the Commonwealth shall have the right and opportunity to apply to a single justice of the Supreme Judicial Court for leave to appeal an order determining a motion to suppress evidence prior to trial. If the single justice determines that the administration of justice would be facilitated, the justice may grant that leave and may hear the appeal or may report it to the full Supreme Judicial Court or to the Appeals Court.

(3) Right of Appeal where Transfer of Delinquency proceeding is Denied. The Commonwealth shall have the right to appeal to the Appeals Court a decision by a judge denying transfer of a delinquency proceeding pursuant to G. L. c. 119, § 61.

(4) Probable Cause Hearings. No interlocutory appeal or report may be taken of matters arising out of a probable cause hearing.

(b) PROCEDURAL REQUIREMENTS

(1) Time for Filing Appeal. An appeal under divisions (a)(1) and (a)(3) shall be taken by filing a notice of appeal in the trial court within thirty days of the date of the order being appealed. An application for leave to appeal under subdivision (a) (2) shall be made by filing within ten days of the issuance of notice of the order being appealed, or such additional time as either the trial judge or the single justice of the Supreme Judicial Court shall order, (a) a notice of appeal in the trial court, and (b) an application to the single justice of the Supreme Judicial Court for leave to appeal.

(2) Record. The record for an interlocutory appeal shall be defined and assembled pursuant to Massachusetts Rule of Appellate Procedure 8. The judge shall make all findings of fact relevant to the appeal or the application for leave to appeal within the period specified in subdivision (b)(1) for filing the notice of appeal.

(c) DETERMINATION OF MOTIONS. Any motion the determination of which may be appealed pursuant to this rule shall be decided by the judge before the defendant is placed in jeopardy under established rules of law.

(d) COSTS UPON APPEAL. If an appeal or application therefor is taken by the Commonwealth, the appellate court, upon the written motion of the defendant supported by affidavit, shall determine and approve the payment to the defendant of his or her costs of appeal together with reasonable attorney's fees to be paid on the order of the trial court upon the entry of the rescript or the denial of the application.

(e) STAY OF THE PROCEEDINGS. If the trial court issues an order which is subject to the interlocutory procedures herein, the trial of the case shall be stayed and the defendant shall not be placed in jeopardy until interlocutory review has been waived or the period specified in subdivision (b) (1) for instituting interlocutory procedures has expired. If an appeal is taken or an application for leave to appeal is granted, the trial shall be stayed pending the entry of a rescript from or an order of the appellate court. If an appeal or application therefor is taken by the Commonwealth, the defendant may be released on personal recognizance during the pendency of the appeal.

RULES OF CIVIL PROCEDURE
VII. JUDGMENT

ALM Rules Civ. P. 54 (1997)

Rule 54. *JUDGMENTS: COSTS*

(a) Definition; Form. The terms "judgment" and "final judgment" include a decree and mean the act of the trial court finally adjudicating the rights of the parties affected by the judgment, including:

(1) judgments entered under Rule 50(b) and Rule 52(a) and (b);

(2) judgments entered under Rule 58 upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, or upon a special verdict under Rule 49(a) or a general verdict accompanied by answers to interrogatories under Rule 49(b).

A judgment shall not contain a recital of pleadings, the report of a master or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

MINNESOTA

MINNESOTA STATUTES 1996
CHAPTER 480A COURT OF APPEALS

Minn. Stat. § 480A.06 (1996)

480A.06 Jurisdiction

Subdivision 1. Final decisions. The court of appeals has jurisdiction of appeals from all final decisions of the trial courts, other than the conciliation courts, of the state of Minnesota, except that it shall not have jurisdiction of appeals in legislative or statewide election contests or criminal appeals in cases in which the defendant has been convicted of murder in the first degree.

Subd. 2. Interlocutory decisions. The court of appeals shall have jurisdiction of interlocutory appeals and other matters as may be prescribed in the rules of appellate procedure.

Subd. 3. Certiorari review. The court of appeals shall have jurisdiction to issue writs of certiorari to all agencies, public corporations and public officials, except the tax court and the workers' compensation court of appeals. The court of appeals shall have jurisdiction to review decisions of the commissioner of economic security, pursuant to section 268.105.

Subd. 4. Administrative review. The court of appeals shall have jurisdiction to review on the record the validity of administrative rules, as provided in sections 14.44 and 14.45, and the decisions of administrative agencies in contested cases, as provided in sections 14.63 to 14.69.

Subd. 5. Ancillary jurisdiction. The court of appeals shall have jurisdiction to issue all writs and orders necessary in aid of its jurisdiction with respect to cases pending before it and for the enforcement of its judgments or orders.

MISSISSIPPI

MISSISSIPPI COURT RULES

RULES OF APPELLATE PROCEDURE
APPEALS FROM TRIAL COURTS

M.R.A.P. 5 (1997)

RULE 5. INTERLOCUTORY APPEAL BY PERMISSION

(a) Petition for Permission to Appeal. An appeal from an interlocutory order may be sought if the order grants or denies certification by the trial court that a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:

(1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or

(2) Protect a party from substantial and irreparable injury; or

(3) Resolve an issue of general importance in the administration of justice.

Appeal from such an order may be sought by filing a petition for permission to appeal with the clerk of the Supreme Court within 14 days after the entry of such order in the trial court with proof of service on all other parties to the action in the trial court. An order may be amended to include the prescribed certification or denial at any time, and permission to appeal may be sought within 14 days after entry of the order as amended.

(b) Content of Petition; Answer. The petition shall contain a statement of the facts necessary to an understanding of the question of law determined by the order of the trial court; a statement of the question itself; and a statement of the reasons why the certification required by Rule 5(a) properly was made or should have been made. The petition shall include or have annexed a copy of the order from which appeal is sought and of any related findings of fact, conclusions of law or opinion. Within 14 days after service of the petition an adverse party may file an answer in opposition with the clerk of the Supreme Court, with proof of service on all other parties to the action in the trial court. The petition and answer shall be submitted without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. Four (4) copies of the petition and answer, if any, shall be filed with the original, but the Court may require that additional copies be furnished. The provisions of Rule 27 concerning motions shall govern the filing and

consideration of the petition and answer, except that no petition or answer, including its supporting brief, shall exceed 15 pages in length.

(d) Grant of Permission; Prepayment of Costs; Filing of Record. If permission to appeal is granted by the Supreme Court, the appellant shall pay the docket fee as required by Rule 3(e) within 14 days after entry of the order granting permission to appeal, and the record on appeal shall be transmitted and filed and the appeal docketed in accordance with Rules 10, 11, and 13. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of entry of the order granting permission to appeal. A notice of appeal need not be filed. The Court may in its discretion expedite the appeal and give it preference over ordinary civil cases.

(e) Effect on Trial Court Proceedings. The petition for appeal shall not stay proceedings in the trial court unless the trial judge or the Supreme Court shall so order.

Comment

This rule is a composite of Fed. R. App. P. 5, 28 U.S.C. 1292(b) and American Bar Ass'n. Standards Relating to Appellate Courts 3.12 (1977). See also, Ala. R. App. P. 5; Comment, 88 Harv. L. Rev. 607 (1975). It provides for interlocutory appeal from either Circuit or Chancery Courts. See Sonford Products Corp. v. Freels, 495 So. 2d 468, 471 (Miss. 1986); Kilgore v. Barnes, 490 So. 2d 894, 896 (Miss. 1986); Southern Farm Bureau Cas. Ins. v. Holland, 469 So. 2d 55, 62-64 (Miss. 1985) (Anderson, J., concurring). It applies to both civil and criminal cases. Cf. State v. Caldwell, 492 So. 2d 575, 576-577 (Miss. 1986) (remedial writ granted where constitutional rights violated prior to criminal trial).

The rule contemplates that either the trial court will grant an interlocutory appeal subject to appellate review of that decision, Atwell Transfer Co. v. Johnson, 239 Miss. 719, 726-27, 124 So. 2d 861, 864 (1960), or the Supreme Court will grant the appeal itself. The rule is unlike federal practice in which both courts must agree before an interlocutory appeal will be heard under 28 U.S.C. 1292(b).

The standards for granting interlocutory appeal are based on existing law. Appeal will not be permitted except to resolve a question of law, and this includes the application of law to fact. There must be a substantial basis for a difference of opinion with the trial court. See Fed. R. App. P. 5(b); 28 U.S.C. 1292(b). A question of law need not control the entire case, but must be sufficiently important to the litigation to merit interlocutory appeal. In this latter respect, the rule departs from the standards set forth in 1292(b) and adopts the language followed by other state courts. See, e.g., Ill. Sup. Ct. R. 308.

Rule 5(a)(1) begins with the federal requirement that interlocutory review will be permitted when such review will "materially advance the termination of the litigation." See Fed. R. App. P. 5(b); 28 U.S.C. 1292(b). It adds the requirement of the now-repealed Miss. Code Ann. 11-51-7 (Supp. 1986) that the appellant must show that the appeal may avoid expense as well as delay.

Rule 5(a)(2) permits interlocutory appeal where review will protect a party from substantial and irreparable injury. This category would permit interlocutory review of rulings on injunctions and receivership matters allowed as of right under 28 U.S.C. 1292(a)(1). It would continue present state practice of interlocutory review of chancery orders requiring money to be paid or the possession of property changed, but only if compliance with such an order threatened the opposite party with irreparable injury.

Rule 5(a)(3) provides the Court with flexible authority to grant interlocutory review in situations in which the pertinent interest is the administration of justice. The interest "is that of the proper administration of justice generally--for example, when an order involves a question of procedure that would likely become moot by the time final judgment was entered but should be authoritatively resolved for the purposes of future guidance of courts below." American Bar Ass'n, Standards Relating to Appellate Courts 3.12, at 29. See also Wisc. Stat. Ann. 809.50(c) (1986). By permitting review to resolve conflicts among trial courts in such cases, the rule promotes uniformity and fairness to litigants.

Rule 5(c) contemplates that the petition and answer will be treated as motions and so must be supported by a brief. In order to expedite judicial consideration, however, the total length of a petition and brief are limited to 15 pages, and a similar restriction applies to the answer and its supporting brief. This limitation does not include pages in exhibits required to be annexed to the petition.

Rule 5 review is separate from the interlocutory review available by certification under M.R.C.P. 54(b) when a final judgment is entered as to fewer than all parties or claims, and that available under Rule 9 governing release in criminal cases.

MONTANA

MONTANA CODE ANNOTATED

TITLE 25 CIVIL PROCEDURE
RULES OF APPELLATE PROCEDURE
PART I APPLICABILITY OF RULES

Mont. Code Anno., Ch. 21, Rule 1 (1995)

Rule 1 Scope of rules -- from what judgment or order an appeal may be taken.

(a) These rules govern procedure in appeals in civil and criminal casesto the supreme court of Montana from Montana district courts and original proceedings in the supreme court of Montana. The party applying for original relief is known as the petitioner and the adverse party as the defendant. The party appealing is known as the appellant, and the adverse party as the respondent.

(b) In civil cases a party aggrieved may appeal from a judgment or order, except when expressly made final by law, in the following cases:

(1) From a final judgment entered in an action or special proceeding commenced in a district court, or brought into a district court from another court or administrative body.

(2) From an order granting a new trial; or refusing to permit an action to be maintained as a class action; or granting or dissolving an injunction; or refusing to grant or dissolve an injunction; or dissolving or refusing to dissolve an attachment; from an order changing or refusing to change the place of trial when the county designated in the complaint is not the proper county; from an order appointing or refusing to appoint a receiver, or giving directions with respect to a receivership, or refusing to vacate an order appointing or affecting a receiver; from an order directing the delivery, transfer, or surrender of property; from any special order made after final judgment; and from such interlocutory judgments or orders, in actions for partition as determine the rights and interests of the respective parties and direct partition to be made. In any of the cases mentioned in this subdivision the supreme court, or a justice thereof, may stay all proceedings under the order appealed from, on such conditions as may seem proper.

(3) From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, or administrator, or guardian; or refusing, allowing, directing the distribution or partition of any estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser setting apart a homestead.

(c) All questions raised on an order overruling a motion for a new trial or on an order changing or refusing to change the place of trial under R.C.M.

1947, section 93-2906, subdivision 4 thereof or subsection (2) or (3) of section 25-2-201, Montana Code Annotated, may be raised and reviewed on an appeal from the judgment.

(d) Appeals may be taken in criminal cases as provided in sections 46-20-103 and 46-20-104, Montana Code Annotated.

MONTANA CODE ANNOTATED
PROCEDURE FOLLOWING AWARD

Mont. Code Anno., § 27-5-324 (1995)

27-5-324 Appeals.

(1) An appeal may be taken from:

(a) an order denying an application to compel arbitration made under 27-5-115;

(b) an order granting an application to stay arbitration made under 27-5-115(2);

(c) an order confirming or denying confirmation of an award;

(d) an order modifying or correcting an award;

(e) an order vacating an award without directing a rehearing; or

(f) a judgment entered pursuant to the provisions of this chapter.

(2) The appeal must be taken in the manner and to the same extent as from orders or judgments in a civil action in district court.

NEVADA

`/ADA REVISED STATUTES ANNOTATED

rKOCEDURE IN CRIMINAL CASES
APPEALS: WHEN ALLOWED, HOW TAKEN AND EFFECT THEREOF
Nev. Rev. Stat. Ann. § 177.015 (1995)

§ 177.015. Appeals to district and supreme court

The party aggrieved in a criminal action may appeal only as follows:

1. Whether that party is the state or the defendant:

(a) To the district court of the county from a final judgment of thejustice's court.

(b) To the supreme court from an order of the district court granting amotion to dismiss, a motion for acquittal or a motion in arrest of judgment, or granting or refusing a new trial.

2. The state may, upon good cause shown, appeal to the supreme court froma pretrial order of the district court granting or denying a motion to suppress evidence made pursuant to NRS 174.125. Notice of the appeal ~~ist be filed with the clerk of the district court within 2 cial days and with the clerk of the supreme court .hin 5 judicial days after the ruling by the district court. The clerk of the district court shall notify counsel for the defendant or, in the case of a defendant without counsel, the defendant within 2 judicial days after the filing of the notice of appeal. The supreme court may establish such procedures as it determines proper in requiring the appellant to make a preliminary showing of the propriety of the appeal and whether there may be a miscarriage of justice if the appeal is not entertained. If the supreme court entertains the appeal, or if it otherwise appears necessary, it may enter an order staying the trial for such time as may be required.

3. The defendant only may appeal from a final judgment or verdict in acriminal case.

4. Except as otherwise provided in subsection 3 of NRS 174.035, thedefendant in a criminal case shall not appeal a final judgment or verdict resulting from a plea of guilty or nolo contendere that the defendant entered into voluntarily and with a full understanding of the nature of the charge and the consequences of the plea, unless the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings. The supreme ~urt may establish procedures to require the defendant make a preliminary showing of the propriety of the ppeal.

NEW HAMPSHIRE

NEW HAMPSHIRE COURT RULES ANNOTATED

RULES OF SUPREME COURT OF NEW HAMPSHIRE
PROCEDURAL RULES

N.H. Sup. Ct. 8

RULE 8. INTERLOCUTORY APPEAL FROM RULING

(1) The supreme court may, in its discretion, decline to accept an interlocutory appeal, or any question raised therein, from a lower court order or ruling. The interlocutory appeal statement shall contain (a) a statement of the facts necessary to an understanding of the controlling question of law as determined by the order or ruling of the lower court; (b) a statement of the question itself; (c) a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an interlocutory appeal may materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice; and (d) the signature of the lower court transferring the question.

(2) The interlocutory appeal statement shall have annexed to it a copy of the order or ruling from which interlocutory appeal is sought, a copy of any findings of fact and rulings of law relating to the order or ruling, and a copy of the pertinent text of the constitutions, statutes, ordinances, rules, regulations, insurance policies, contracts, or other documents involved in the case. If a copy of the pertinent text of the constitutions, statutes and other documents aggregates more than 5 pages, it shall instead be filed as a separate appendix, including a table of contents referring to numbered pages, and only 8 copies shall be filed. Note: Also see rule 26(5).

(3) The moving party shall file the original and 15 copies of the interlocutory appeal statement, accompanied by the required filing fee, within 10 days from the date on the lower court's written notice to the parties that the lower court has signed the interlocutory appeal statement.

(4) The supreme court's refusal to accept an interlocutory appeal shall be without prejudice to any challenge to the lower court's order or ruling in a subsequent appeal pursuant to rule 7.

NEW JERSEY

NEW JERSEY STATUTES

SURROGATE'S COURTS
CHAPTER VII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS
RULE 4:69. ACTIONS IN LIEU OF PREROGATIVE WRITS

N.J. Court Rules, 1969 R. 4:69-7 (1996)

4:69-7. Interlocutory Appeals

If a final decision or action of an agency or officer is reviewable by a trial division of the Superior Court pursuant to R. 4:69, an application may be made by an aggrieved party to such Court for leave to appeal an interlocutory order of such agency or officer in the manner prescribed by R. 3:24, insofar as applicable. Notice of the application shall be given by the party appealing to all other parties in interest.

NEW MEXICO

NEW MEXICO STATUTES ANNOTATED

CHAPTER 39. JUDGMENTS, COSTS, APPEALS
ARTICLE 3. APPEALS

N.M. Stat. Ann. § 39-3-3 (1996)

§ 39-3-3. Appeals from district court in criminal cases

A. By the defendant. In any criminal proceeding in district court an appeal may be taken by the defendant to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts:

(1) within thirty days from the entry of any final judgment;

(2) within ten days after entry of an order denying relief on a petitionto review conditions of release pursuant to the Rules of Criminal Procedure; or

(3) by filing an application for an order allowing an appeal in theappropriate appellate court within ten days after entry of an interlocutory order or decision in which the district court, in its discretion, makes a finding in the order or decision that the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such order or decision may materially advance the ultimate termination of the litigation.

B. By the state. In any criminal proceeding in district court an appeal may be taken by the state to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts:

(1) within thirty days from a decision, judgment or order dismissing acomplaint, indictment or information as to any one or more counts;

(2) within ten days from a decision or order of a district courtsuppressing or excluding evidence or requiring the return of seized property, if the district attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

C. No appeal shall be taken by the state when the double jeopardy clause of the United States constitution or the constitution of the state of New Mexico prohibits further prosecution.

NEW MEXICO STATUTES ANNOTATED
CHAPTER 39. JUDGMENTS, COSTS, APPEALS
ARTICLE 3. APPEALS

N.M. Stat. Ann. § 39-3-4 (1996)

§ 39-3-4. Interlocutory order appeals from district court

A. In any civil action or special statutory proceeding in the district court, when the district judge makes an interlocutory order or decision which does not practically dispose of the merits of the action and he believes the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation, he shall so state in writing in the order or decision.

B. The supreme court or court of appeals has jurisdiction over an appeal from such an interlocutory order or decision, as appellate jurisdiction may be vested in these courts. Within ten days after entry of the order or decision, any party aggrieved may file with the clerk of the supreme court or court of appeals an application for an order allowing an appeal, accompanied by a copy of the interlocutory order or decision. If an application has not been acted upon within twenty days, it shall be

deemed denied.

C. Application under this section for an order allowing appeal does not stay proceedings in the district court unless so ordered by the district judge or a judge or justice of the court to which application is made.

NEW MEXICO RULES ANNOTATED
RULES OF APPELLATE PROCEDURE
ARTICLE 2. Appeals from District Court

N.M. R.A.P. 12-203 (1996)

12-203. Interlocutory appeals.

A. Application for interlocutory appeal. An appeal from an interlocutory order containing the statement prescribed by NMSA 1978, § 39-3-3(A)(3) or § 39-3-4(A) is initiated by filing an application for interlocutory appeal with the appellate court clerk within ten (10) days after the entry of such order in the district court. Copies of the application shall be served by the applicant on all persons who are required to be served with a notice of appeal pursuant to Rule 12-202. The three (3) day mailing period set forth in Rule 12-308 does not apply to the time limits set by this subsection.

B. Content of application. The application shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial ground exists for a difference of opinion on the question and why an immediate appeal may materially advance the ultimate termination of the litigation. The statement of reasons shall contain case references, where available, and shall contain a summary of the applicant's arguments. The application shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. The application may have annexed thereto any other documentary matters of record that will assist the appellate court in exercising its discretion. The docket fee shall accompany the application but no docketing statement is required.

C. Form of papers; number of copies. An application for interlocutory appeal shall conform to the requirements of Rules 12-305 and 12-306.

D. Response. Any other party may file a response, with attachments, if any, with the appellate court clerk within ten (10) days after service of the application and shall serve a copy on the appellant. The appellate court may deny the application prior to the filing of a response. The appellate court may set a hearing on the application.

E. Grant of application; assignment. If an application for interlocutory appeal is granted, the case may be assigned to a calendar and the appellate court clerk shall give notice of the assignment in accordance with Rule 12-210. The district court clerk shall transmit a copy of the record proper upon receipt of the notice of calendar assignment. The granting of an application shall automatically stay the proceedings in the district court unless otherwise ordered by the appellate court.

NEW MEXICO RULES ANNOTATED

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS
ARTICLE 7. Judgment

N.M. Dist. Ct. R.C.P. 1-054 (1996)

1-054. Judgments; costs.

A. Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not contain a recital of pleadings, the report of a master or the record of prior proceedings.

B. Judgment issued sixty (60) days after submission. All cases requiring a judgment to be rendered as defined in Paragraph A of this rule shall be decided within sixty (60) days after submission.

(1) If the court fails to comply with this paragraph, the court shall file and send to the supreme court a written memorandum explaining the reason(s) for noncompliance at thirty (30) day intervals beginning sixty (60) days from the date the case was submitted for decision.

(2) The court shall maintain a written docket of all cases under advisement and record the decision status of all cases under this paragraph. The docket shall be available for public inspection.

C. Judgment upon multiple claims or involving multiple parties.

(1) Except as provided in Subparagraph (2) of this paragraph, when more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims shall not terminate the action as to any of the claims and the order or other form of decision is subject

to revision at any time before the entry of judgment adjudicating all the claims.

(2) When multiple parties are involved, judgment may be entered adjudicating all issues as to one or more, but fewer than all parties. Such judgment shall be a final one unless the court, in its discretion, expressly provides otherwise and a provision to that effect is contained in the judgment. If such provision is made, then the judgment shall not terminate the action as to such party and shall be subject to revision at any time before the entry of judgment adjudicating all claims and the rights and liabilities of all the parties.

NEW YORK

NEW YORK CONSOLIDATED LAW SERVICES

CIVIL PRACTICE LAW AND RULES
ARTICLE 55. APPEALS GENERALLY

NY CLS CPLR § 5501 (1996)

§ 5501. Scope of review

(a) Generally, from final judgment. An appeal from a final judgment brings up for review:

1. any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on the appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken;

2. any order denying a new trial or hearing which has not previously been reviewed by the court to which the appeal is taken;

3. any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected;

4. any remark made by the judge to which the appellant objected; and

5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.

(b) Court of appeals. The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered. On an appeal pursuant to subdivision (d) of section fifty-six hundred one, or subparagraph (ii) of paragraph one of subdivision (a) of section fifty-six hundred two, or subparagraph (ii) of paragraph two of subdivision (b) of section fifty-six hundred two, only the non-final determination of the appellate division shall be reviewed.

(c) Appellate division. The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

(d) Appellate term. The appellate term shall review questions of law and questions of fact.

CIVIL PRACTICE LAW AND RULES
APPEALS TO THE COURT OF APPEALS

NY CLS CPLR § 5602 (1996)

§ 5602. Appeals to the court of appeals by permission

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by that appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. Such appeal may be taken:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims [fig 1] , an administrative agency or an arbitration,

(i) from an order of the appellate division which finally determines theaction and which is not appealable as of right, or

(ii) from a final judgment of such court [fig 2] , final determination ofsuch agency or final arbitration award where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment [fig 3] , determination or award and the final judgment [fig 4] , determination or award is not appealable as of right pursuant to subdivision (d) of section 5601 of this article; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency.

(i) from an order of the appellate division which finally determines theaction, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of suchagency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming thegranting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

Form 1 Notice of Motion to Appellate Division for Permission to Appeal to
Court of Appeals or to Reargue Appeal

[Caption]

PLEASE TAKE NOTICE, that upon the annexed affirmation of [-----] , Esq. dated [-----] , 19 [--] and upon the Decision and Order of this Court dated [----] , 19 [--] which was entered in the above-entitled appeal and filed with the Clerk of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department on [-----] , 19 [--] , the undersigned will move this Court, at the Courthouse located at [-----] Avenue, [----] , New York, on the [-----] day of [-----] , 19 [--] at 9:30 in the forenoon or as soon thereafter as counsel can be heard to reargue the above-entitled appeal; or in the alternative, for an order pursuant to CPLR 5602 for permission to appeal the aforesaid Decision and Order of this Court to the Court of Appeals; and, granting such other and further relief as the Court deems just and proper.

Please take notice that pursuant to CPLR 2214(b), answering affidavits, if any, are required to be served upon the undersigned at least seven (7) days before the return date of the motion.

Dated: [-----] , New York

Form 2 Affirmation in Support of Motion to Appellate Division for Permission to Appeal
to Court of Appeals or to Reargue Appeal

[caption]

[----] , under penalty of perjury, affirms as follows:

1. I am counsel for Respondent-Appellant [----] Bank in the above entitled appeal. I submit this affirmation in support of [-----] 's motion to reargue the above-stated appeal; or, in the alternative, for an order granting leave to appeal the Decision and Order of this Court dated [----] , 19 [--] (the "Order") to the Court of Appeals pursuant to CPLR 5602. A copy of the Order is annexed as Exhibit A, hereto.

BACKGROUND

2. This is an appeal from a default judgment entered against [----] Bank by the Supreme Court for [----] County in an action brought by the Attorney General to enforce payment of a letter of credit. The pleadings served by the Attorney General failed to plead that the letter of credit was duly presented to [----] for payment. It has also undisputed that the letter of credit was never duly presented to [-----] for payment at any time before the letter of credit expired. Since an allegation of "due presentment" is a necessary element of the cause of action asserted by the Attorney General, the pleadings on their face demonstrate that the Attorney General was not

entitled, as a matter of law, to the relief requested in the pleadings and therefore was not entitled to the relief awarded to him by the Supreme Court for [----] County. In any event, the Supreme Court for [----] County should not have entered judgment for a sum certain against [-----] because the Attorney General never adduced any proof of damages as he was required to do under CPLR 3215(e).

3. The first of two motions which are the basis of this appeal was brought on brought by [----] in the Supreme Court for [----] County by order to show cause dated [----], 19 [--]. This first motion was brought after the Attorney General served notice of settlement of the judgment appealed from, but before the judgment was signed by the Court or entered by the Clerk. That motion, while it did not expressly state that it was based on any particular statute, sought various forms of relief including among others:

(a) staying entry of judgment against defendant [-----], and if judgment has already been entered by the Court why that judgment should not be vacated.

The original motion also sought summary judgment in favor of [----] because "the undisputed facts indicate that no one ever presented the letter of Credit to [----] in 'strict compliance' with its terms at any time before the Letter of Credit expired." The original motion, therefore, argued that a default should not be taken against [----] because the Attorney General had failed to plead or prove a prima facie case.

4. Thus, although [-----] cited no specific statutory authority for the relief requested in that first motion, [-----] timely raised the substance of the argument that the Attorney General failed to comply with the elements of CPLR 3215(e).

5. Nevertheless, on [----], 19 [--], the Supreme Court for [----] County denied [----] 's motion which it characterized as a motion for "relief from default." On [----], 19 [--], the Supreme Court for [-----] County signed the form of order and judgment submitted by the Attorney General which was entered by the Clerk of the Court the same day.

6. On [-----], 19 [--], [----] again moved by order to show cause. This second motion sought time "to renew and reargue" the original motion to vacate the judgment, and for summary judgment. In this second motion, [----] specifically argued that even if the Court were to find liability based on default, which it should not have done based on the defective nature of the pleadings, the Court still should not have entered a judgment against [----] for a sum certain because the Attorney General failed to adduce any proof of damages which he was required to do by CPLR 3215(e). On [-----], 19 [--], the Supreme Court for [----] County again denied [----] 's motion and adhered to its prior decision in all respects. [-----] appealed.

7. On [----], 19 [--], this Court affirmed the decision of the Supreme Court for [-----] County stating in relevant part that:

[-----] National Bank's assertion that the petitioner failed to comply with the proof and notice requirements of CPLR 3225(f) was not raised in the trial court and is therefore unpreserved for appellate review. (see, Lichtman v. Grossbard, 73 N.Y.2d 792, Mastronardi v. Mitchell, 109 A.D.2d 825).

(Emphasis added)

Neither of the two cases relied upon by the Court for its decision directly involves CPLR 3215.

[----] 'S ARGUMENT WAS PRESERVED
AS A MATTER OF LAW

8. It appears from this Court Order of [-----], 19 [--] that this Court concluded that [-----] 's appeal was based on the Attorney General's failure to follow procedural requirements necessary for the entry of a default judgment under CPLR 3215. This, however, is incorrect. [-----] 's appeal is explicitly based on the Attorney General's failure to comply with the substantive requirements of CPLR 3215(e) which is not even mentioned in the Court's Order of [----], 19 [--].

9. A default judgment which was entered without having satisfied the substantive elements of CPLR 3215(e) must be vacated. See accompanying Memorandum of Law.

10. The Supreme Court for [-----] County also erred in entering a judgment against [-----] because the Attorney General failed to adduce any proof of damages as he was also required to do under the substantive requirements of CPLR 3215(e).

11. Even if it is assumed arguendo that [-----] failed to timely object to the entry of judgment against it - a contention which it vigorously denies, the Court should still have reversed the judgment of the Court below because the error made in the Court below was apparent from the face of the pleadings.

12. Here, the error of the Supreme Court for [----] County was fundamental and will result in a judgment which cannot be supported by the pleadings. Accordingly, this Court should reverse the decision of the Supreme Court for [----] county and enter judgment in [-----] 's favor.

13. Given the remedial nature of CPLR 3215(e) and the

timeliness of [——] 's two original motions before the Supreme Court for [——] County, [——] believes a substantial argument can be made that [——] satisfied whatever burden it may have had to preserve its right to appeal based on the Attorney General's failure to satisfy the substantive requirement of CPLR 3215(e). However, even if this Court concludes the argument was raised for the first time on this appeal, the Court should still grant [——] 's motion and reverse the decision of the Supreme Court for [——] County.

IN THE ALTERNATIVE, THIS COURT SHOULD GRANT

[——] LEAVE TO APPEAL TO THE COURT OF APPEALS

14. Even if this Court should decide to adhere to its original decision on the appeal, the Court should grant [——] leave to appeal to the Court of Appeals. This Court's [——] , 19 [--] Decision and Order raises three issues which are appropriate for consideration by the Court of Appeals including: (i) what proof must a plaintiff submit to the court before it is entitled to the entry of a default judgment; (ii) what conduct, if any, is required by a defaulting defendant to preserve its right of appeal under CPLR 3215; and if affirmative conduct is required, was [——] 's conduct sufficient under the circumstances to meet that burden.

WHEREFORE, the Court should reverse the decision of the Supreme Court for [——] County and enter summary judgment in favor of Respondent-Appellant National Bank; or, in the alternative, grant the motion of Respondent-Appellant [——] Bank for leave to appeal this Court's Decision and Order of [——] , 19 [--] to the Court of Appeals.

Dated: [——] , New York
[——] , 19 [--]

FORM 8
Motion for Leave to Appeal Directly to Court of Appeals After Affirmance of

Interlocutory Judgment of Special Term by Appellate Division

[Nature of paper and
index no., if assigned]

[Title of Court of Appeals and cause]

PLEASE TAKE NOTICE that on the record of appeal herein in the Appellate Division from the interlocutory judgment of the Supreme Court, [——] County, dated [——] , 19 [--] , filed in the office of the clerk of the said county on [——] , 19 [--] , setting aside as against the plaintiff certain transfers made to the defendant [——] , the said interlocutory judgment, the order of the Appellate Division, [——] Judicial Department, entered [——] , 19 [--] , affirming said interlocutory judgment, the judgment of affirmance entered thereon in the office of the said county clerk on [——] , 19 [--] , the order of said Appellate Division dated [——] , 19 [--] , denying the defendant [——] leave to appeal to this court from said interlocutory judgment, the stipulation herein dated [——] , 19 [--] , plaintiff's notice of motion for final judgment, dated [——] , 19 [--] , the said final judgment dated [——] , 19 [--] , and entered in the office of the said county clerk, [——] , 19 [--] , and the opinions filed herein by the special term on making and by the Appellate Division on affirming said interlocutory judgment and on the annexed affidavit of [——] , sworn to [——] , 19 [--] , and the annexed brief of the defendant [——] submitted herewith, and on all the proceedings heretofore had herein, the undersigned will move in the Court of Appeals of the State of New York at Court of Appeals Hall, Albany, New York, on the [——] day of [——] , 19 [--] , at the opening of the court on that day, or as soon thereafter as counsel can be heard,

For an order pursuant to section 5602 of the Civil Practice Law and Rules granting leave to the defendant [——] to appeal directly from said final judgment of the special term to the Court of Appeals for the purpose of bringing up for review only said determination of the Appellate Division affirming said interlocutory judgment.

And for such other and further relief as may seem just and proper.

NORTH CAROLINA

GENERAL STATUTES OF NORTH CAROLINA

CHAPTER 7A. JUDICIAL DEPARTMENT
SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE
ARTICLE 5. JURISDICTION

N.C. Gen. Stat. § 7A-27 (1996)

§ 7A-27. Appeals of right from the courts of the trial divisions

(a) Appeal lies of right directly to the Supreme Court in all cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death.

(b) From any final judgment of a superior court, other than the one described in subsection (a) of this section, or one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, appeal lies of right to the Court of Appeals.

(c) From any final judgment of a district court in a civil action appeal lies of right directly to the Court of Appeals.

(d) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which

(1) Affects a substantial right, or

(2) In effect determines the action and prevents a judgment from whichappeal might be taken, or

(3) Discontinues the action, or

(4) Grants or refuses a new trial, appeal lies of right directly to theCourt of Appeals.

(e) From any other order or judgment of the superior court from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals.

NORTH DAKOTA

NORTH DAKOTA CENTURY CODE
TITLE 28. JUDICIAL PROCEDURE, CIVIL
CHAPTER 28-27. APPEALS TO SUPREME COURT

N.D. Cent. Code, § 28-27-02 (1995)

§ 28-27-02. What orders reviewable

The following orders when made by the court may be carried to the supreme court:

1. An order affecting a substantial right made in any action, when suchorder in effect determines the action and prevents a judgment from which an appeal might be taken;

2. A final order affecting a substantial right made in special proceedingsor upon a summary application in an action after judgment;

3. An order which grants, refuses, continues, or modifies a provisionalremedy, or grants, refuses, modifies, or dissolves an injunction or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of section 35-22-04, or which sets aside or dismisses a writ of attachment for irregularity;

4. An order which grants or refuses a new trial or which sustains ademurrer;

5. An order which involves the merits of an action or some part thereof;

6. An order for judgment on application therefor on account of thefrivolousness of a demurrer, answer, or reply; or

7. An order made by the district court or judge thereof without notice isnot appealable, but an order made by the district court after a hearing is had upon notice which vacates or refuses to set aside an order previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice.

NORTH DAKOTA COURT RULES ANNOTATED

RULES OF CIVIL PROCEDURE
VII--JUDGMENT

N.D.R. Civ. P. Rule 54 (1996)

RULE 54--JUDGMENT--COSTS

(a) Definition -- Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment may not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims or involving multiple parties. If more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or if multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon the express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of that determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties does not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

OHIO

PAGE'S OHIO REVISED CODE ANNOTATED;

OHIO RULES OF CIVIL PROCEDURE
TITLE VII: JUDGMENT

OH Civ. R. 54. (Anderson 1997)

RULE 54. Judgment; costs

(A) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies as provided in section 2505.02 of the Revised Code. A judgment shall not contain a recital of pleadings, the magistrate's decision in a referred matter, or the record of prior proceedings.

(B) Judgment upon multiple claims or involving multiple parties. When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

OKLAHOMA

OKLAHOMA STATUTES

CHAPTER 15. APPEAL AND ERROR

12 Okl. St. § 952 (1996)

§ 952. Jurisdiction of Supreme Court

(a) The Supreme Court may reverse, vacate or modify judgments of the district court for errors appearing on the record, and in the reversal of such judgment may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof.

(b) The Supreme Court may reverse, vacate or modify any of the following orders of the district court, or a judge thereof:

1. A final order;

2. An order that discharges, vacates or modifies or refuses to vacate or modify a provisional remedy which affects the substantial rights of a party; or grants, refuses, vacates, modifies or refuses to vacate or modify an injunction; grants or refuses a new trial; or vacates or refuses to vacate a final judgment;

3. Any other order, which affects a substantial part of the merits of the controversy when the trial judge certifies that an immediate appeal may materially advance the ultimate termination of the litigation; provided, however, that the Supreme Court, in its discretion, may refuse to hear the appeal. If the Supreme

Court assumes jurisdiction of the appeal, it shall indicate in its order whether the action in the trial court shall be stayed or shall continue.

The failure of a party to appeal from an order that is appealable under either subdivision 2 or 3 of subsection (b) of this section shall not preclude him from asserting error in the order after the judgment or final order is rendered.

OKLAHOMA SUPREME COURT RULES REVIEW OF CERTIFIED INTERLOCUTORY ORDERS PURSUANT TO 12 O.S.1991 § 952, SUBDIV. (B)3

12 Ok. St. S Ct. R 1.50 (1997)

RULE 1.50 DEFINITION OF CERTIFIED INTERLOCUTORY ORDER

Any interlocutory order not appealable by right under the statutes, which order affects a substantial part of the merits of the controversy, may be brought for review to this Court in compliance with the rules in this Part when the trial judge or the judge's successor has certified that an immediate appeal from that order may materially advance the ultimate termination of the litigation. In the exercise of its statutory discretion this Court may refuse to review a certified interlocutory order. 12 O.S.Supp.1991 § 952, Subdiv. (b)(3).

No certified interlocutory order shall be considered if taken from an order overruling a motion for summary judgment. See Rule 1.40 for the application of other rules to review of a certified interlocutory order.

OKLAHOMA SUPREME COURT REVIEW OF CERTIFIED INTERLOCUTORY ORDERS PURSUANT TO 12 O.S.1991 § 952, SUBDIV. (B)3

12 Ok. St. S Ct. R 1.51 (1997)

RULE 1.51 COMMENCEMENT OF PROCEEDING AND ENTRY OF APPEARANCE

(a) Commencement.

Time for the commencement of a proceeding to review a certified interlocutory order shall begin to run from the date the trial court certifies in writing that an immediate review may materially advance the ultimate termination of the litigation. A proceeding to review a certified interlocutory order shall be commenced by filing a petition for certiorari within 30 days of the date such order is certified for review. This time limit cannot be extended either by the trial court or by this Court. A petition for certiorari to review a certified interlocutory order will be deemed filed when mailed in compliance with Rule 1.4. See Rule 1.4(e).

(b) Motion for New Trial.

The filing of a motion for new trial, reconsideration, re-examination, rehearing, or to vacate the interlocutory order shall not operate to extend the time to appeal from such order.

(c) Petition, Entry of Appearance, and Costs.

A proceeding for review of a certified interlocutory order shall be regarded as commenced when the petition and entry of appearance are filed and costs are deposited as set out in Rule 1.23. The respondent shall file an entry of appearance in conformity with Rule 1.25.

OREGON

OREGON REVISED STATUTES

TITLE 2. PROCEDURE IN CIVIL PROCEEDINGS CHAPTER 19. APPEALS

ORS § 19.015 (1995)

19.015. Appealability of order stating existence of controlling question of law in class action.

When a district or circuit court judge, in making in a class action under ORCP 32 an order not otherwise appealable, is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the judge shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order to the Court of Appeals if application is made to the court within 10 days after the entry of the order. Application for such an appeal shall not stay proceedings in the district or circuit court unless the district or circuit court judge or the Court of Appeals or a judge thereof shall so order.

SUPREME COURT and COURT OF APPEALS of the STATE OF OREGON

OREGON RULES OF APPELLATE PROCEDURE 10. SPECIAL COURT OF APPEALS RULES

ORAP 10.05

Rule 10.05. APPLICATION FOR INTERLOCUTORY APPEAL IN CLASS ACTION

The practice and procedure governing applications to appeal from certain court orders involving questions of law under ORS 19.015 shall be as follows:

(1) An application to file an interlocutory appeal under ORS 19.015 shall be entitled "Appellant's Application for Interlocutory Appeal Pursuant to ORS 19.015." The applicant shall be entitled "Appellant" and the opposing party "Respondent." The application shall be accompanied by the appellant's filing fee.

(2) The application shall consist of:

(a) A statement not exceeding 3 pages formally applying for leave to file notice of appeal and informing the court of the nature of the cause or causes of action involved, the specific order desired to be appealed and its effect on the litigation, and the controlling question of law pertinent to the application.

(b) A memorandum not exceeding 10 pages explaining why the application should be allowed, accompanied by a copy of any exhibits necessary to the explanation.

(c) A notice of appeal in the form provided in Rule 2.05.

(3) An applicant shall file with the Administrator the original and 5 copies of the application and all accompanying papers, together with proof of service on all other parties to the case and the trial court judge.

(4) The opposing party shall be allowed 14 days within which to file an answer, which shall be entitled, "Respondent's Memorandum in Response to Application for Interlocutory Appeal Pursuant to ORS 19.015." The answering memorandum shall not exceed 10 pages and shall be accompanied by only the exhibits necessary to support the explanation why the application should not be allowed.

(5) The respondent shall file with the Administrator the original and 5 copies of the answering memorandum and all accompanying papers, together with proof of service on all other parties to the case and the trial court judge. The answering memorandum shall be accompanied by the respondent's appearance fee.

(6) If the respondent seeks to appeal from an order under ORS 19.015 independently of the appellant, the respondent shall accompany the answering memorandum with an application in the form required by this rule and an appellant's filing fee. If the respondent seeks to cross-appeal from the same order that the appellant seeks to appeal only if the court allows the appellant's application, respondent shall tender a notice of cross- appeal but need not comply with subsections (2) and (3) and (5) of this rule.

(7) An applicant shall be allowed 7 days within which to file a reply, consisting of no more than 7 pages, which shall be entitled "Appellant's Reply to Memorandum in Response to Application for Interlocutory Appeal Pursuant to ORS 19.015." The applicant shall file the reply and 5 copies together with proof of service on all other parties to the case and the trial court judge.

(8) If the Court of Appeals allows an application under ORS 19.015, the notice of appeal and notice of cross-appeal are deemed filed as of the date of the order allowing the application. The appeal shall then proceed in accordance with the statutes and rules governing civil appeals.

PENNSYLVANIA STATUTES

JUDICIARY AND JUDICIAL PROCEDURE
APPELLATE COURTS

42 Pa.C.S. § 702 (1996)

[Pa.C.S.] § 702. Interlocutory orders

(A) APPEALS AUTHORIZED BY LAW.-- An appeal authorized by law from an interlocutory order in a matter shall be taken to the appellate court having jurisdiction of final orders in such matter.

(B) INTERLOCUTORY APPEALS BY PERMISSION.-- When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

(C) SUPERSEDEAS.-- Except as otherwise prescribed by general rules, a petition for permission to appeal under this section shall not stay the proceedings before the lower court or other government unit, unless the lower court or other government unit or the appellate court or a judge thereof shall so order.

PENNSYLVANIA STATUTES
PRELIMINARY PROVISIONS

42 Pa.C.S. § 5105 (1996)

Pa.C.S.] § 5105. Right to appellate review

(A) GENERAL RULE.-- There is a right of appeal under this subsection from the final order (including an order defined as a final order by general rule) of every:

(1) Court or district justice of this Commonwealth to the court having jurisdiction of such appeals.

(2) Government unit which is an administrative agency within the meaning of section 9 of Article V of the Constitution of Pennsylvania to the court having jurisdiction of such appeals. An order is appealable under this paragraph notwithstanding the fact that it is not appealable under Chapter 7 of Title 2 (relating to judicial review).

(3) Appointive judicial officer to the court by whic such officer was appointed.

(B) SUCCESSIVE APPEALS.-- Except as otherwise provided in this subsection, the rights conferred by subsection (a) are cumulative, so that a litigant may as a matter of right cause a final order of any tribunal in any matter which itself constitutes an appeal to such tribunal, to be further reviewed by the court having jurisdiction of appeals from such tribunal. Except as provided in section 723 (relating to appeals from the Commonwealth Court) there shall be no right of appeal from the Superior Court or the Commonwealth Court to the Supreme Court under this section or otherwise.

(C) INTERLOCUTORY APPEALS.-- There shall be a right of appeal from such interlocutory orders of tribunals and other government units as may be specified by law. The governing authority shall be responsible for a continuous review of the operation of section 702(b) (relating to interlocutory appeals by permission) and shall from time to time establish by general rule rights to appeal from such classes of interlocutory orders, if any, from which appeals are regularly permitted pursuant to section 702(b).

(D) SCOPE OF APPEAL.--

(1) Except as otherwise provided in this subsection an appeal under this section shall extend to the whole record, with like effect as upon an appeal from a judgment entered upon the verdict of a jury in an action at law and the scope of review of the order shall not be limited as on broad or narrow certiorari.

(2) An order which is appealable by reason of subsection (a)(2), but which would not be appealable under Chapter 7 of Title 2 or under any other corresponding provision of law, shall not be reversed or modified on appeal unless the appellant would be entitled to equivalent relief upon an action in the nature of equity, replevin, mandamus or quo warranto or for declaratory judgment or for a writ of certiorari or prohibition or otherwise objecting to such order.

(3) Nothing in this subsection shall supersede any general rule or rule of court or any unsuspended statute authorizing or requiring an appellate court to receive additional evidence or to hear the appeal de novo.

(4) Except as otherwise prescribed by general rule and section 1123(a.1) (relating to jurisdiction and venue an appeal from a final order of the minor judicia shall be de novo under procedures established by general rule.

(E) SUPERSEDEAS.-- An appeal shall operate as a supersedeas to the extent and upon the conditions provided or prescribed by law. Unless a supersedeas is entered no appeal from an order concerning the validity of a will or other instrument or the right to the possession of or to administer any real or personal property shall suspend the powers or prejudice the acts of the appointive judicial officer, personal representative or other person acting thereunder.

(F) EFFECT OF REVERSAL OR MODIFICATION. --The reversal or modification of any order of a court or any determination of any other government unit in a matter in which the court or government unit has jurisdiction of the sale, mortgage, exchange or conveyance of real or personal property shall not impair or divest any estate or interest acquired thereunder by a person not a party to the appeal.

PENNSYLVANIA STATUTES

CHAPTER 55. LIMITATION OF TIME
SUBCHAPTER D. APPEALS

42 Pa.C.S. § 5574 (1996)

[Pa.C.S.] § 5574. Effect of application for amendment to qualify for interlocutory appeal

If an application is made to a tribunal within 30 days after the entry of an interlocutory order not appealable as a matter of right for an amendment of such order to set forth expressly the statement specified in section 702(b) (relating to interlocutory appeals by permission), the time for filing a petition for permission to appeal from such order shall run from the entry of the order denying the amendment or amending the order, as the case may be.

PENNSYLVANIA RULES OF COURT

RULES OF APPELLATE PROCEDURE
PRELIMINARY PROVISIONS
CHAPTER 3. ORDERS FROM WHICH APPEALS MAY BE TAKEN
INTERLOCUTORY APPEALS

Pa. R.A.P. 311 (1996)

Rule 311. Interlocutory Appeals as of Right

(a) GENERAL RULE. Except as otherwise prescribed by general rule, an appeal may be taken as of right from:

(1) Affecting judgments. An order refusing to open, vacate or strike off a judgment. If orders opening, vacating, or striking off a judgment are sought in the alternative, no appeal may be filed until the court has disposed of each claim for relief.

(2) Attachments, etc. An order confirming, modifying or dissolving or refusing to confirm, modify or dissolve an attachment, custodianship, receivership or similar matter affecting the possession or control of property, except for attachments pursuant to Sections 3323(f) and 3505(a) of the Divorce Code, 23 Pa.C.S. §@ 3323(f) and 3505(a).

(3) Change of criminal venue or venire. An order changing venue or venire in a criminal proceeding.

(4) Injunctions. An order granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions, except for injunctions pursuant to Sections 3323(f) and 3505(a) of the Divorce Code, 23 Pa.C.S. §@ 3323(f) and 3505(a). A decree nisi granting or denying an injunction is not appealable as of right under this rule, unless the decree nisi (i) grants an injunction effective upon the entry of a decree nisi or (ii) dissolves a previously granted preliminary injunction effective upon the entry of a decree nisi.

(5) Peremptory Judgment in Mandamus. An order granting peremptory judgment in mandamus.

(6) New trials. An order in a civil action or proceeding awarding a new trial, or an order in a criminal proceeding awarding a new trial where the defendant claims that the proper disposition of the matter would be an absolute discharge or where the Commonwealth claims that the lower court committed an error of law.

(7) Partition. An order directing partition.

(8) Other cases. An order which is made appealable by statute or general rule.

(b) ORDER SUSTAINING VENUE OR PERSONAL OR IN REM JURISDICTION. An appeal may be taken as of right from an order in a civil action or proceeding sustaining the venue of the matter or jurisdiction over the person or over real or personal property if:

(1) the plaintiff, petitioner or other party benefiting from the order files of record within ten days after the entry of the order an election that the order shall be deemed final; or

(2) the court states in the order that a substantial issue of venue or jurisdiction is presented.

(c) CHANGES OF VENUE, ETC. An appeal may be taken as of right from an order in a civil action or

proceeding changing venue, transferring the matter to another court of coordinate jurisdiction, or declining to proceed in the matter on the basis of forum non conveniens or analogous principles.

(d) COMMONWEALTH APPEALS IN CRIMINAL CASES. In a criminal case, under the circumstances provided by law, the Commonwealth may take an appeal as of right from an order that does not end the entire case but where the Commonwealth asserts that the order will terminate or substantially handicap the prosecution.

(e) ORDERS OVERRULING PRELIMINARY OBJECTIONS IN EMINENT DOMAIN CASES. An appeal may be taken as of right from an order overruling preliminary objections to a declaration of taking and an order overruling preliminary objections to a petition for appointment of a board of viewers.

(f) ADMINISTRATIVE REMAND. An appeal may be taken as of right from: (1) an order of a common pleas court or government unit remanding a matter to an administrative agency or hearing officer for execution of the adjudication of the reviewing tribunal in a manner that does not require the exercise of administrative discretion; or (2) an order of a common pleas court or government unit remanding a matter to an administrative agency or hearing officer that decides an issue which would ultimately evade appellate review if an immediate appeal is not allowed.

(g) WAIVER OF OBJECTIONS.

(1) Where an interlocutory order is immediately appealable under this rule, failure to appeal:

(i) Under Subdivisions (a), (b)(2) or (f) of this rule shall not constitute a waiver of the objection to the order and the objection may be raised on any subsequent appeal in the matter from a determination on the merits.

(ii) Under Subdivision (b)(1) or (c) of this rule shall constitute a waiver of all objections to jurisdiction over the person or over the property involved or to venue, etc. and the question of jurisdiction or venue shall not be considered on any subsequent appellate review of the matter.

(iii) Under Subdivision (e) of this rule shall constitute a waiver of all objections to such orders and any objection may not be raised on any subsequent appeal in the matter from a determination on the merits.

(2) Where no election that an interlocutory order shall be deemed final is filed under Subdivision (b)(1) of this rule, the objection may be raised on any subsequent appeal in the matter from a determination on the merits.

(h) FURTHER PROCEEDINGS IN LOWER COURT. Rule 1701(a) (effect of appeal generally) shall not be applicable to a matter in which an interlocutory order appealed under Subdivisions (a)(2) or (a)(4) of this rule

Note: Authority-This rule implements 42 Pa.C.S. § 5105(c) (interlocutory appeals), which provides:

(c) Interlocutory appeals. There shall be a right of appeal from such interlocutory orders of tribunals and other government units as may be specified by law. The governing authority shall be responsible for a continuous review of the operation of section 702(b) (relating to interlocutory appeals by permission) and shall from time to time establish by general rule rights to appeal from such classes of interlocutory orders, if any, from which appeals are regularly allowed pursuant to section 702(b).

The appeal rights under this rule, and under Rule 312 (interlocutory appeals by permission), Rule 313 (collateral orders), Rule 341 (final orders generally), and Rule 342 (final distribution orders), are cumulative; and no inference shall be drawn from the fact that two or more rules may be applicable to an appeal from a given order.

PENNSYLVANIA RULES OF COURT

RULES OF APPELLATE PROCEDURE
INTERLOCUTORY APPEALS

Pa. R.A.P. 312 (1996)

Rule 312. Interlocutory Appeals by Permission

An appeal from an interlocutory order may be taken by permission pursuant to Chapter 13 (interlocutory appeals by permission).

PENNSYLVANIA RULES OF COURT
RULES OF APPELLATE PROCEDURE
CHAPTER 3. ORDERS FROM WHICH APPEALS MAY BE TAKEN
INTERLOCUTORY APPEALS

Pa. R.A.P. 313 (1996)

Rule 313. Collateral Orders

(a) GENERAL RULE. An appeal may be taken as of right from a collateral order of an administrative agency or lower court.

(b) DEFINITION. A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied

review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

PENNSYLVANIA RULES OF COURT
LES OF APPELLATE PROCEDURE
CHAPTER 13. INTERLOCUTORY APPEALS BY PERMISSION

Pa. R.A.P. 1311 (1996)

Rule 1311. Interlocutory Appeals by Permission

(a) GENERAL RULE. An appeal may be taken by permission under 42 Pa.C.S. § 702(b) (interlocutory appeals by permission) from any interlocutory order of a lower court or other governmental unit. See Rule 312 (interlocutory appeals by permission).

(b) PETITION FOR PERMISSION TO APPEAL. Permission to appeal from an interlocutory order containing the statement prescribed by 42 Pa.C.S. § 702(b) may be sought by filing a petition for permission to appeal with the prothonotary of the appellate court within 30 days after entry of such order in the lower court or other government unit with proof of service on all other parties to the matter in the lower court or other government unit and on the government unit or clerk of the lower court, who shall file the petition of record in such lower court. An application for an amendment of an interlocutory order to set forth expressly the statement specified in 42 Pa.C.S. § 702(b) shall be filed with the lower court or other government unit within 30 days after the entry of such interlocutory order and permission to appeal may be sought within 30 days after entry of the order as amended. The trial court must act on the application within 30 days. If the petition for permission to appeal is transmitted to the prothonotary of the appellate court by means of first class mail, the petition shall be deemed received by the prothonotary for the purposes of Rule 121(a) (filing) on the date deposited in the United States mail, as shown on a U.S. Postal Service Form 3817 certificate of mailing. The certificate of mailing shall show the docket number of the matter in the lower court or other government unit and shall be either enclosed with the petition or separately mailed to the prothonotary. Upon actual receipt of the petition for permission to appeal the prothonotary of the appellate court shall immediately stamp it with the date of actual receipt. That date, or the date of earlier deposit in the United States mail as prescribed in this subdivision, shall constitute the date when permission to appeal was sought, which date shall be shown on the docket. The prothonotary of the appellate court shall immediately note the appellate docket number assignment upon the petition for permission to appeal and give written notice of the docket number assignment in person or by first class mail to the government unit or clerk of the lower court, to the petitioner and to the other persons named in the proof of service accompanying the petition.

(c) FEE. The petitioner upon filing the petition for permission to appeal shall pay any fee therefor prescribed by Chapter 27 (fees and costs in appellate courts and on appeal).

(d) ENTRY OF APPEARANCE. Upon the filing of the petition for permission to appeal the prothonotary of the appellate court shall note on the record as counsel for the petitioner the name of his counsel, if any, set forth in or endorsed upon the petition for permission to appeal, and, as counsel for other parties, counsel, if any, named in the proof of service. The prothonotary shall upon praecipe of any such counsel for other parties, filed at any time within 30 days after filing of the petition, strike off or correct the record of appearance. Thereafter an entry of appearance may be withdrawn only by leave of court.

CODE OF LAWS OF SOUTH CAROLINA

TITLE 14. COURTS
CHAPTER 3. Supreme Court
ARTICLE 3. Jurisdiction, Duties and Procedure

S.C. Code Ann. § 14-3-330 (1996)

§ 14-3-330. Appellate jurisdiction in law cases.

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

TENNESSEE COURT RULES

TENNESSEE RULES OF APPELLATE PROCEDURE
C. APPEAL BY PERMISSION

Tenn. App. Proc. Rule 9 (1997)

Rule 9. Interlocutory Appeal by Permission from the Trial Court.

(a) Application for Permission to Appeal; Grounds. -- Except as provided in Rule 10, an appeal by permission may be taken from an interlocutory order of a trial court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals only upon application and in the discretion of the trial and appellate court. In determining 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 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. Failure to seek or obtain interlocutory review shall not limit the scope of review upon an appeal as of right from entry of the final judgment.

(b) Procedure in the Trial Court. -- The party seeking an appeal must file and serve a motion requesting such relief within 30 days after the date of entry of the order appealed from. When the trial court is of the opinion that an order, not appealable as of right, is nonetheless appealable, the trial court shall state in writing the reasons for its opinion. The trial court's statement of reasons shall specify: (1) the legal criteria making the order appealable, as provided in subdivision (a) of this rule; (2) the factors leading the trial court to the opinion those criteria are satisfied; and (3) any other factors leading the trial court to exercise its discretion in favor of permitting an appeal. The appellate court may thereupon in its discretion allow an appeal from the order.

(c) How Sought in Appellate Court. -- The appeal is

sought by filing an application for permission to appeal with the clerk of the appellate court within 10 days after the date of entry of the order in the trial court or the making of the prescribed statement by the trial court, whichever is later. A sufficient number of copies shall be filed to provide the clerk and each judge of the appellate court with one copy. The application shall be served on all other parties in the manner provided in Rule 20 for the service of papers.

(d) Content of Application; Answer. -- The application shall contain: (1) a statement of the facts necessary to an understanding of why an appeal by permission lies and (2) a statement of the reasons supporting an immediate appeal. A statement of reasons is sufficient if it simply incorporates by reference the trial court's reasons for its opinion that an appeal lies. The application shall be accompanied by copies of: (1) the order appealed from, (2) the trial court's statement of reasons, and (3) the other parts of the record necessary for determination of the application for permission to appeal. Within 7 days after service of the application, any other party may file an answer in opposition, with copies in the number required for the application, together with any additional parts of the record such party desires to have considered by the appellate court. The answer shall be served on all other parties in the manner provided in Rule 20 for the service of papers. The application and answer shall be submitted without oral argument unless otherwise ordered.

(e) Grant of Permission; Cost Bond; Filing the Record. -- If permission to appeal is granted, the appellant shall file a bond for costs as required by Rule 6 within 10 days after entry of the order granting permission to appeal, and the record shall be transmitted and filed in accordance with Rules 25 and 26. The time fixed for preparation of the record shall run from the date of entry of the order granting permission to appeal. The appeal shall be docketed in accordance with Rule 5(c) upon entry of the order granting permission to appeal.

(f) Effect on Trial Court Proceedings. -- The application for permission to appeal or the grant thereof shall not stay proceedings in the trial court unless the trial court or the appellate court or a judge thereof shall so order.

(g) Appeal in Criminal Actions. -- Permission to appeal under this rule may be sought by the state and defendant in criminal actions.

TENNESSEE COURT RULES

TENNESSEE RULES OF APPELLATE PROCEDURE
C. APPEAL BY PERMISSION

Tenn. App. Proc. Rule 10 (1997)

Rule 10. Extraordinary Appeal by Permission on Original Application in the Appellate Court.

(a) Original Application for Extraordinary Appeal; Grounds. -- An extraordinary appeal may be sought on application and in the discretion of the appellate court alone of interlocutory orders of a lower court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals: (1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in these rules. The appellate court may issue whatever order is necessary to implement review under this rule.

(b) How Sought. -- An extraordinary appeal is sought by filing an application for an extraordinary appeal with the clerk of the appellate court. A sufficient number of copies shall be filed to provide the clerk and each judge of the appellate court with one copy. Unless necessity requires otherwise, the application shall be served on all other parties in the manner provided in Rule 20 for the service of papers. The appeal shall be docketed in accordance with Rule 5(c) upon the filing of the application with the clerk of the appellate court.

(c) Content of Application. -- The application shall contain: (1) a statement of the facts necessary to an understanding of why an extraordinary appeal lies, (2) a statement of the reasons supporting an extraordinary appeal, and (3) the relief sought. The application shall be accompanied by copies of any order or opinion or parts of the record necessary for determination of the application. The application may also be supported by affidavits or other relevant documents.

(d) Subsequent Procedure. -- If the appellate court is of the opinion that an extraordinary appeal should not be granted, it shall deny the application. Otherwise, the appellate court shall order that an answer to the application be filed by the other parties within the time fixed by the order. The order shall be served on all other parties and if the application has not previously been served shall have attached thereto a copy of the application. The appellate court shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument, if oral argument is granted.

(e) Appeal in Criminal Actions. -- Permission to appeal under this rule may be sought by the state and defendant in criminal actions.

TEXAS

TEXAS RULES OF COURT
TEXAS RULES OF APPELLATE PROCEDURE
SECTION FOUR. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS

TX RAP Rule 43 (1997)

RULE 43. ORDERS PENDING INTERLOCUTORY APPEAL IN CIVIL CASES.

(a) EFFECT OF APPEAL. No order denying interlocutory relief shall be suspended or superseded by an appeal therefrom. The pendency of an appeal from an order authorizing a cause to proceed as a class action suspends such order and also suspends trial on the merits in such cases. Otherwise, the pendency of an appeal from an order granting interlocutory relief does not suspend the order appealed from unless supersedeas is granted in accordance with subdivision (b) or unless the appellant is entitled to supersede the judgment without security by giving notice of appeal.

(b) SECURITY. Except as provided in paragraph (a) the trial court may permit interlocutory orders to be suspended pending an appeal therefrom by filing security pursuant to Rule 47. Denial of such suspension may be reviewed for abuse of discretion on motion by the appellate court.

(c) TEMPORARY ORDERS OF APPELLATE COURT. On perfection of an appeal from an interlocutory order, the appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties until disposition of the appeal and may require such security as it deems appropriate, but it shall not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or other orders pursuant to Rules 47 or 49.

(d) FURTHER PROCEEDINGS IN TRIAL COURT. Pending an appeal from an interlocutory order, the trial court retains jurisdiction of the cause and may issue further orders, including dissolution of the order appealed from, but the court shall make no order granting substantially the same relief as that granted by the order appealed from, or any order contrary to the temporary orders of the appellate court, or any order that would interfere with or impair the effectiveness of any relief sought or granted on appeal. The trial court may proceed with a trial on the merits, except as provided in subdivision (a).

(e) ENFORCEMENT OF TEMPORARY ORDERS. Pending an appeal from an interlocutory order, the order may be enforced only by the appellate court in which the appeal is pending, except that the appellate court may refer any enforcement proceeding to the trial court with instructions to hear evidence and grant such relief a may be appropriate. The appellate court may als instruct the trial court to make findings and report them with his recommendations to the appellate court.

(f) REVIEW ON FURTHER ORDERS. When an appeal is pending from an interlocutory order, any further appealable interlocutory order of the trial court concerning the same subject-matter and any interlocutory order that would interfere with or impair the effectiveness of the relief sought or granted on appeal may be brought before the appellate court for review on motion, either on the original record or with a supplement thereto.

(g) MANDATE. The order of the appellate court on appeal from an interlocutory order takes effect when the mandate is issued. The court may issue the mandate immediately on announcing its decision if the circumstances require, or it may delay the mandate until final disposition of the appeal. All further proceedings in the trial court shall conform to the mandate. If the appellate court modifies its decision after issuing a mandate, a new mandate shall be issued accordingly.

(h) REHEARING. The appellate court may either deny the right to file a motion for rehearing or shorten the time for filing, and in that event a motion fo rehearing shall not be a prerequisite to any review available in the Supreme Court.

UTAH

UTAH COURT RULES ANNOTATED

UTAH RULES OF CIVIL PROCEDURE
PART VII. JUDGMENT.

URCP Rule 54 (1997)

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the

claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

UTAH COURT RULES ANNOTATED

UTAH RULES OF APPELLATE PROCEDURE
TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS.

Utah R. App. P. Rule 5 (1997)

Rule 5. Discretionary appeals from interlocutory orders.

(a) Petition for permission to arom an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action. A timely appeal from an order certified under Rule 54(b), Utah Rules of Civil Procedure, that the appellate court determines is not final may, in the discretion of the appellate court, be considered by the appellate court as a petition for permission to appeal an interlocutory order. The appellate court may direct the appellant to file a petition that conforms to the requirements of paragraph (c) of this rule.

(b) Fees and copies of petition. For a petition presented to the Supreme Court, the petitioner shall file with the Clerk of the Supreme Court an original and five copies of the petition, together with the fee required by statute. For a petition presented to the Court of Appeals, the petitioner shall file with the Clerk of the Court of Appeals an original and four copies of the petition, together with the fee required by statute. The petitioner shall serve the petition on the opposing party and notice of the filing of the petition on the trial court. If an order is issued authorizing the appeal, the clerk of the appellate court shall immediately give notice of the order by mail to the respective parties and shall transmit a certified copy of the order, together with a copy of the petition and filing fee, to the trial court where the petition and order shall be filed in lieu of a notice of appeal.

(c) Content of petition.

(1) The petition shall contain

(A) A concise statement of facts material to a consideration of the issue presented and the order sought to be reviewed;

(B) The issue presented expressed in the terms and circumstances of the case but without unnecessary detail, and a demonstration that the issue was preserved in the trial court. Petitioner must state the applicable standard of appellate review and cite supporting authority;

(C) A statement of the reasons why an immediate interlocutory appeal should be permitted, including a concise analysis of the statutes, rules or cases believed to be determinative of the issue stated; and

(D) A statement of the reason why the appeal may materially advance the termination of the litigation.

(2) If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the phrase "Subject to assignment to the Court of Appeals" shall appear immediately under the title of the document, i.e. Petition for Permission to Appeal. Appellant may then set forth in the petition a concise statement why the Supreme Court should decide the case in light of the relevant factors listed in Rule 9(c)(7).

(3) The petitioner shall attach a copy of the order of the trial court from which an appeal is sought and any related findings of fact and conclusions of law and opinion.

(d) Answer. Within 10 days after service of the petition, any other party may file an answer in opposition or concurrence. If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the answer may contain a concise response to the petitioner's contentions under Rule 5(c)(5). An original and five copies of the answer shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals. The respondent shall serve the answer on the petitioner. The petition and any answer shall be submitted without oral argument unless otherwise ordered.

(e) Grant of permission. An appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice. The order permitting the appeal may set forth the particular issue or point of law which will be considered and may be on such terms, including the filing of a bond for costs and damages, as the appellate court may determine. The clerk of the appellate court shall immediately give the parties and trial court notice by mail of any order

granting or denying the petition. If the petition is granted, the appeal shall be deemed to have been filed and docketed by the granting of the petition. All proceedings subsequent to the granting of the petition shall be as, and within the time required, for appeals from final judgments except that no docketing statement shall be filed under Rule 9 unless the court otherwise orders.

UTAH COURT RULES ANNOTATED

UTAH RULES OF APPELLATE PROCEDURE
FORMS

Utah R. App. P. Form 2 (1997)

Form 2 Petition for Interlocutory Appeal

Attorney Name
Address
Phone Number
Bar Number

IN THE UTAH [SUPREME COURT] [COURT OF APPEALS]

A.B., Plaintiff and [Petitioner] [Respondent] vs. C.D., Defendant and [Respondent] [Petitioner])

PETITION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDER

Trial Court No.

(1) (name) [, through counsel, (name),] petitions the Utah [Supreme Court] [Court of Appeals] to permit an appeal from the interlocutory order of the Honorable (name) entered in this matter on (date).

(2) A copy of the order sought to be reviewed [and findings of fact, conclusions of law, and opinion of the trial court] [is] [are] attached.

(3) STATEMENT OF FACTS: (Provide a statement of the facts necessary to an understanding of the question(s) of law determined by the order sought to be reviewed.)

(4) QUESTIONS OF LAW: (Provide a statement of the question(s) of law determined by the order sought to be reviewed.)

(5) ISSUE RAISED IN TRIAL COURT: (Provide a demonstration that each question was properly presented to the trial court judge.)

(6) IMMEDIATE APPEAL NECESSARY: (Provide a statement of the reasons why an immediate appeal of the question(s) of law should be permitted.)

(7) ADVANCE TERMINATION OF LITIGATIO
(provide a statement of the reasons why the appeal wi
materially advance the termination of the litigation.)

(signature)
Attorney of Record [2]

References
Utah R. App. P. 3(c); 3(d); 5(a); 5(c); 40(a)

VERMONT

VERMONT STATUTES ANNOTATED

TITLE TWELVE. COURT PROCEDURE
PART 6. PROCEEDINGS AFTER VERDICT OR JUDGMENT
CHAPTER 102. APPELLATE PROCEDURE

12 V.S.A. § 2386 (1996)

§ 2386. Passing causes before final judgment

(a) Before final judgment in civil actions or proceedings in the county courts, the probate courts, or the district court, on appeal to the supreme court for the determination of questions of law may be taken in such manner and under such conditions as the supreme court may by rule provide.

(b) In its discretion and before final judgment a county court or the district court may permit an appeal to be taken by the respondent or the state in a criminal cause to the supreme court for determination of questions of law. The supreme court shall hear and determine the questions and render final judgment thereon or remand the proceedings as justice and the state of the cause may require.

RULES OF APPELLATE PROCEDURE II. APPEALS FROM JUDGMENTS AND ORDERS OF THE SUPERIOR AND DISTRICT COURTS

V.R.A.P. 5 (1997)
RULE 5. APPEALS BEFORE FINAL JUDGMENT

(a) Appeal on Report by Agreement. The Presiding Judge of a superior court or the judge of the District Court may, where all the parties appearing agree, report any civil or criminal action to the Supreme Court before entry of final judgment, if the judge is of the opinion that any question of law is involved of sufficient importance or doubt to justify the same, provided that the disposition thereof in a civil action would in at least one alternative finally dispose of the action, and in a criminal action would in one alternative result in final judgment for the defendant. The order of report, which shall contain a statement of the question or questions of law sought to be reviewed, shall be signed by the judge and shall be filed and served and a copy thereof, together with the entry fee if any, mailed to the clerk of the Supreme Court in the manner provided for the notice of appeal in Rule 3. The record shall thereupon be transmitted and the action entered, heard, and determined in the Supreme Court as provided by these rules for other appeals, the plaintiff in a civil action or the state in a criminal action being treated as the appellant. If the decision upon report in a criminal action is in favor of the state, the Supreme Court shall not order entry of judgment of conviction but shall remand the action for further proceedings not inconsistent with its decision.

(b) Appeal of Interlocutory Orders by Permission.

(1) Motion for Permission To Appeal. Upon motion of any party in a civil action or of the defendant in a criminal action, the Presiding Judge of a superior court or the judge of the District Court shall permit an appeal to be taken from any interlocutory order or ruling if the judge finds that the order or ruling 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 termination of the litigation. Upon motion of the state in a misdemeanor action, the judge upon such findings shall permit an appeal to be taken by the state from a pretrial ruling on a question of law. Upon motion of the state in a felony action, the judge shall permit an appeal to be taken by the state from a pretrial ruling:

(A) Granting a motion to suppress evidence;

(B) Granting a motion to have confessions declared inadmissible; or

(C) Granting or refusing to grant other relief where the effect is to impede seriously, although not to foreclose completely, continuation of the prosecution; if the prosecuting attorney certifies that the appeal is not taken for purpose of delay and that the evidence suppressed or declared inadmissible is substantial proof of a fact material in the proceeding or the relief to be sought on appeal is necessary to avoid seriously impeding such proceeding.

The motion shall be made within 10 days after the entry of the order or ruling appealed from except that a motion made by the state in a criminal action shall be made within seven days after the decision, judgment or order appealed from. The appeal shall be limited to questions of law. The order permitting or denying appeal shall contain a statement of the grounds upon which appeal has been permitted or denied.

If the motion is denied, the moving party may within 10 days after the entry of the order of denial, file the motion in the Supreme Court, together with a statement setting forth the question of law asserted to be controlling, the facts necessary to an understanding of the question, and the reasonrlocutory appeal should be permitted. Copies of the motion and statement shall be served upon all other parties. The order from which an appeal is sought, and the order of denial, shall be filed and served with the motion or as soon thereafter as is practicable. Within 5 days after service of the motion, an adverse party may file and serve an answer in opposition to the motion. The matter shall be determined upon the motion and answer without oral argument unless the Court otherwise orders.

For purposes of this rule, a pretrial ruling in a case tried by jury shall be a ruling made before the impaneling of the jury.

(2) Proceedings on Appeal. The order permitting appeal shall be filed and served and a copy thereof, together with the docket entries and entry fee if any, mailed to the clerk of the Supreme Court in the manner provided for notice of appeal in Rule 3. The record shall thereupon be transmitted and the action entered, heard, and determined in the Supreme Court as provided by these rules for other appeals.

(3) Motion To Dismiss in the Supreme Court. At any time after the docketing of the appeal, the appellee may move to dismiss the appeal on the grounds that permission to appeal was improvidently granted. The motion shall contain a statement of the facts necessary to an understanding of the question of law found controlling by the superior or District Court and a statement of the reasons why an interlocutory appeal should not have been permitted on such question. The Supreme Court may order immediate hearing of the motion or may defer hearing until the time set for oral argument on the appeal. If at any time, upon such motion

or upon its own motion, the Supreme Court finds that no controlling question of law as to which there is substantial ground for difference of opinion has been presented or that a decision on such question would not materially advance the termination of the litigation, it may dismiss the appeal.

VERMONT COURT RULES ANNOTATED

RULES OF APPELLATE PROCEDURE II. APPEALS FROM JUDGMENTS AND ORDERS OF THE SUPERIOR AND DISTRICT COURTS

V.R.A.P. 5.1 (1997)

RULE 5.1. APPEALS OF COLLATERAL FINAL ORDERS

(a) Motion for Permission to Appeal. Upon a motion of any party in a civil or criminal action, a superior judge or a judge of the district court may permit an appeal to be taken from any interlocutory order or ruling if the judge finds that the order or ruling conclusively determines a disputed question, resolves an important issue completely separate from the merits of the action, and will be effectively unreviewable on appeal from a final judgment. Any decision by the trial judge, or subsequently by the Supreme Court, to allow such an appeal does not divest the trial court of jurisdiction of the remainder of the action.

The motion shall be made within 10 days after the entry of the order or ruling appealed from. The order permitting or denying appeal shall contain a statement of the grounds upon which appeal has been permitted or denied and shall also order whether or not the proceedings shall be stayed, and upon what conditions.

If the trial judge denies the motion for interlocutory appeal, or denies a stay pending the taking of such an appeal, the judge shall allow adequate opportunity for the moving party to contact a single justice of the Supreme Court for a stay, which contact may be by telephone from the courthouse or in some other manner ordered by the judge.

If the motion is denied, the moving party may within 10 days after the entry of the order of denial file the motion in the Supreme Court, together with a statement setting forth the questions of law and facts necessary to an understanding of the motion, and the reasons why an interlocutory appeal should be allowed or a stay granted. Copies of the motion and statement shall be served upon all other parties. The order from which an appeal is sought, and the order of denial, shall be filed and served with the motion or as soon thereafter as is practicable. Within 5 days after service of the motion, an adverse party may file and serve an answer in opposition to the motion. The matter shall be determined upon the motion and answer without oral argument unless the Court otherwise orders.

(b) Proceedings on Appeal. The order permitting appeal and ruling upon a stay shall be filed and served and a copy thereof, together with the docket entries and entry fee if any, mailed to the clerk of the Supreme Court in the manner provided for notice of appeal in Rule 3. The record shall thereupon be transmitted and the action entered, heard and determined in the Supreme Court as provided by the rules for other appeals.

(c) Motion by Appellee in the Supreme Court. At any time after the docketing of the appeal, the appellee may move to dismiss the appeal on the grounds that permission to appeal was improvidently granted, or may move to vacate or modify the stay. The motion shall contain a statement of the law and facts necessary for ruling on the motion. The Supreme Court may order immediate hearing of the motion or may defer hearing until the time set for oral argument on the appeal. If at any time, upon such motion or upon its own motion, the Supreme Court finds that the matter is not appealable or that the stay should be vacated or modified, it may dismiss the appeal, modify or vacate the stay, or take such other action as it deems appropriate.

VERMONT COURT RULES ANNOTATED

RULES OF APPELLATE PROCEDURE II. APPEALS FROM JUDGMENTS AND ORDERS OF THE SUPERIOR AND DISTRICT COURTS

V.R.A.P. 5.1 (1997)

RULE 5.1. APPEALS OF COLLATERAL FINAL ORDERS

(a) Motion for Permission to Appeal. Upon a motion of any party in a civil or criminal action, a superior judge or a judge of the district court may permit an appeal to be taken from any interlocutory order or ruling if the judge finds that the order or ruling conclusively determines a disputed question, resolves an important issue completely separate from the merits of the action, and will be effectively unreviewable on appeal from a final judgment. Any decision by the trial judge, or subsequently by the Supreme Court, to allow such an appeal does not divest the trial court of jurisdiction of the remainder of the action.

The motion shall be made within 10 days after the entry of the order or ruling appealed from. The order

permitting or denying appeal shall contain a statement of the grounds upon which appeal has been permitted or denied and shall also order whether or not the proceedings shall be stayed, and upon what conditions.

If the trial judge denies the motion for interlocutory appeal, or denies a stay pending the taking of such an appeal, the judge shall allow adequate opportunity for the moving party to contact a single justice of the Supreme Court for a stay, which contact may be by telephone from the courthouse or in some other manner ordered by the judge.

If the motion is denied, the moving party may within 10 days after the entry of the order of denial file the motion in the Supreme Court, together with a statement setting forth the questions of law and facts necessary to an understanding of the motion, and the reasons why an interlocutory appeal should be allowed or a stay granted. Copies of the motion and statement shall be served upon all other parties. The order from which an appeal is sought, and the order of denial, shall be filed and served with the motion or as soon thereafter as is practicable. Within 5 days after service of the motion, an adverse party may file and serve an answer in opposition to the motion. The matter shall be determined upon the motion and answer without oral argument unless the Court otherwise orders.

(b) Proceedings on Appeal. The order permitting appeal and ruling upon a stay shall be filed and served and a copy thereof, together with the docket entries and entry fee if any, mailed to the clerk of the Supreme Court in the manner provided for notice of appeal in Rule 3. The record shall thereupon be transmitted and the action entered, heard and determined in the Supreme Court as provided by the rules for other appeals.

(c) Motion by Appellee in the Supreme Court. At any time after the docketing of the appeal, the appellee may move to dismiss the appeal on the grounds that permission to appeal was improvidently granted, or may move to vacate or modify the stay. The motion shall contain a statement of the law and facts necessary for ruling on the motion. The Supreme Court may order immediate hearing of the motion or may defer hearing until the time set for oral argument on the appeal. If at any time, upon such motion or upon its own motion, the Supreme Court finds that the matter is not appealable or that the stay should be vacated or modified, it may dismiss the appeal, modify or vacate the stay, or take such other action as it deems appropriate.

WASHINGTON RULES OF COURT ANNOTATED

Wash. CR 54 (1997)

Rule 54 Judgments and costs.

(a) Definitions.

(1) Judgment.

A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.

(2) Order.

Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.

Comment by the Court

Paragraph (1) combines RCW 4.56.010 and FRCP 54(a) and supersedes RCW 4.56.010.

(b) Judgment upon multiple claims or involving multiple parties.

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

WISCONSIN

WISCONSIN STATUTES

Wis. Stat. § 809.50 (1995-1996)

809.50 Rule (Appeal from judgment or order not appealable as of right).

(1) A person shall seek leave of the court to appeal a judgment or order not appealable as of right under s. 808.03 (1) by filing within 10 days of the entry of the judgment or order a petition and supporting memorandum, if any. The petition and memorandum combined may not exceed 35 pages if a monospaced font is used or 8,000 words if a proportional serif font is used. The petition shall contain:

(a) A statement of the issues presented by the controversy;

(b) A statement of the facts necessary to an understanding of the issues;

(c) A statement showing that review of the judgment or order immediately rather than on an appeal from the final judgment in the case or proceeding 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; and

(d) A copy of the judgment or order sought to be reviewed.

(2) An opposing party in the trial court shall file a response with supporting memorandum, if any, within 10 days of the service of the petition. The response and memorandum combined may not exceed 35 pages if a monospaced font is used or 8,000 words if a proportional serif font is used. Costs and fees may be awarded against any party in a petition for leave to appeal proceeding.

(3) If the court grants leave to appeal, the procedures for appeals from final judgments are applicable to further proceedings in the appeal, except that the entry of the order granting leave to appeal has the effect of the filing of the notice of appeal.

(4) A person filing a petition under this section shall append to the petition a statement identifying whether the petition is produced with a monospaced font or with a proportional serif font. If produced with a proportional serif font, the person shall set forth the word count of the petition.

NOTES:

Judicial Council Committee's Note, 1978: Section 808.03 (1) makes only final judgments and final orders appealable as of right. All other judgments and orders are appealable only in the discretion of the court. This section provides the procedure for asking the court to permit the appeal of a nonfinal order. The issue of whether the court should hear the appeal is presented to the court by petition with both parties given the opportunity of submitting memoranda on the question. The standards on which nonfinal judgments or orders should be reviewed immediately are set forth in s. 808.03 (2) and are taken from the American Bar Association's Standards of Judicial Administration, Standards Relating to Appellate Courts, s. 3.12 (b). [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (1) (c) is amended to conform with 808.03 (2) (b), which sets out the standards created by the Wisconsin Legislature for appeals to the Court of Appeals by permission. A drafting error in the original preparation of chapter 809 replaced the word "or" found in 808.03 (2) (b) with the word "and", which results in a party having to show in a petition to the Court of Appeals for the court to assume discretionary jurisdiction that granting such a petition will protect a party from both substantial "and" irreparable injury rather than meeting just one of the 2 criteria, as was the intention of the Wisconsin Legislature. [Re Order effective Jan. 1, 1980]

/YOMING COURT RULES ANNOTATED
Wyoming Rules of Civil Procedure
W.R.C.P., Rule 54 (1996)

Rule 54. Judgment; costs.

(a) Definition; form. -- A judgment is the final determination of the rights of the parties in action. "Judgment" as used in these rules includes a decree. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. A court's decision letter or opinion letter, made or entered in writing, is not a judgment.

(b) Judgment upon multiple claims or involving multiple parties. -- When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

WYOMING COURT RULES ANNOTATED
Wyoming Rules of Appellate Procedure
Rule 13. THE PETITION FOR A WRIT OF REVIEW

W.R.A.P., Rule 13.01 (1996)

Rule 13.01. Generally.

(a) All applications to the supreme court for interlocutory or extraordinary relief from orders of the district courts, including such applications as are established by statute, may be made as petitions for a writ of review. Granting of a petition is within the discretion of the supreme court.

(b) All applications to a district court for interlocutory or extraordinary relief from orders of administrative agencies and the municipal, justice of the peace, and county courts, including such applications as are established by statute, may be made as petitions for a writ of review. Granting of a petition is within the discretion of the district court.

(c) The petitioner for a writ of review shall specifically state the nature of review desired and the relief sought.

NOTES:
Comments. -- This rule represents a major departure from the former rules. It encompasses former Rule 13, but it also provides for interlocutory appeals. It does reflect the practice of the Supreme Court with respect to Writs of Certiorari, but specific procedures are provided for accomplishing the petition. The discretion is vested in the reviewing court as distinguished from the certification procedure in which the discretion of the trial court is addressed initially.

Remedy for violation of constitutional rights. -- Final judgments or orders of a district court entered upon petitions filed pursuant to chapter 14 of title 7, which provides a remedy for the violation of constitutional rights, will be considered in the Supreme Court only if in the form required by this rule. Such petitions may be accompanied by a request that counsel be appointed. Smizer v. State, 763 P.2d 1254 (Wyo. 1988).