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INTERLOCUTORY REVIEW OF DISCOVERY ORDERS: AN IDEA WHOSE TIME HAS COME

by Elizabeth G. Thornburg*

NO ONE cares much for either discovery disputes or for interlocutory review, and so the combination should be deadly. Indeed, courts¹ and commentators² have few good things to say about either, and the prospect of interlocutory review of discovery orders makes some people apoplectic.³ Fears about interlocutory review, however, are based primarily on theory, and few have attempted to determine whether empirical data supports their fears.⁴

This Article undertakes an empirical and analytical study of interlocutory review of discovery orders. The Article examines court systems that allow interlocutory review of discovery orders.⁵ In addition to a general review of nationwide case law, this Article describes an original empirical case study of all of the reported discovery mandamus opinions in the state of Texas from 1983 through June of 1989, and all of the discovery mandamus cases, whether reported or not, in the state's busiest intermediate appellate court from 1988 to mid-1989. Texas provides a unique source of this empirical

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1. See *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976, 1980, 104 L. Ed. 2d 548, 556 (1989) ("While it is true that the 'right not to be sued elsewhere than in Naples' is . . . positively destroyed . . . by permitting the trial to occur and reversing its outcome, that is vindication enough because the right is not sufficiently important to overcome the policies militating against interlocutory appeals.") (Scalia, J., concurring); see also *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 436 (1985) ("The possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress.")

2. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1296 (1978); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 776 (1957).

3. "In a large and complicated lawsuit . . . interlocutory review of such housekeeping matters as discovery would practically preclude termination of the litigation by settlement or trial within the normal lifespan of any of the parties, attorneys or judges." *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, 47 LAW & CONTEMP. PROBS. 13, 220 (Spring 1984) [hereinafter *Appellate Jurisdiction*]; cf. C. DICKENS, *BLEAK HOUSE* (Bantam ed. 1983).

4. R. MACCRATE, J. HOPKINS & M. ROSENBERG, *APPELLATE JUSTICE IN NEW YORK* 108 (1982) [hereinafter *MACCRATE, APPELLATE JUSTICE*] (suggesting a new study distinguishing among kinds of interlocutory orders).

5. See *Jampole v. Touchy*, 673 S.W.2d 569 (Tex. 1984). See generally Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal Is Available*, 32 SW. L.J. 1283 (1979) (mandamus availability to review discovery orders).

data because it allows interlocutory review of discovery orders, but not most other discretionary pretrial orders,⁶ thus allowing analysis of the effects of interlocutory review of discovery orders in isolation.

A study of the effect of interlocutory review of discovery orders also requires weaving together three separate strands of existing empirical research at the national level. First, studies of caseloads and case processing time at the trial and appellate levels help in assessing the impact of additional or changed review processes.⁷ Second, studies of the causes and effects of discovery disputes⁸ help in determining whether an added opportunity for review is likely to lead to an even greater number of disputes⁹ and, therefore, greater delay during the discovery process. Third, studies of the effects of delay on courts and parties provide information about the importance of any delay that interlocutory review might generate.¹⁰

The empirical data from the Texas courts and the information available about other jurisdictions have nationwide implications. With the current concern about discovery abuse, many jurisdictions are considering legislation that will greatly increase the discretion accorded the trial judge in discovery matters. Such discretion creates tremendous potential for abuse, and absent some kind of effective appeal mechanism the abuse will remain largely unreviewable. Traditional hostility to interlocutory review, however, will discourage legislators and courts from looking to interlocutory review as

6. In Texas, for example, statutory interlocutory appeals are limited to orders appointing or refusing to get rid of a receiver or trustee, certifying or refusing to certify a class in a class action, and orders granting or refusing a temporary injunction. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1989). The court's use of mandamus powers is also limited. See, e.g., Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985)(trial court's grant of new trial not proper subject of mandamus order); Tenneco, Inc. v. Salyer, 739 S.W.2d 448, 449-50 (Tex. App.—Corpus Christi 1987, orig. proc.) (mandamus unavailable to review improper venue order); Wal-Mart Stores, Inc. v. Street, 761 S.W.2d 587, 589 (Tex. App.—Fort Worth 1988, orig. proc.)(no mandamus review of discovery sanctions).

7. E.g., T. CHURCH, A. CARLSON, J. LEE & T. TAN, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978); T. CHURCH, A. CARLSON, J. LEE, T. TAN & V. MCCONNELL, PRETRIAL DELAY: A REVIEW AND BIBLIOGRAPHY (1978)[hereinafter PRETRIAL DELAY] (a history of pretrial delay); P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978) (a study of the impact of judicial controls on trial disposition times); B. MAHONEY, CHANGING TIMES IN TRIAL COURTS (1988); J. MARTIN & E. PRESCOTT, APPELLATE COURT DELAY: STRUCTURAL RESPONSES TO THE PROBLEMS OF VOLUME AND DELAY (1981)[hereinafter MARTIN & PRESCOTT]; Connolly & Smith, *The Litigant's Perspective on Delay: Waiting for the Dough*, 8 JUST. SYS. J. 66 (1983); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious & Litigious Society*, 31 UCLA L. REV. 4 (1983) [hereinafter Galanter, *Landscape*]; Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983)[hereinafter Trubek, *The Costs*].

8. E.g., J. EBERSOLE & B. BURKE, DISCOVERY PROBLEMS IN CIVIL CASES (1980); Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 219 [hereinafter Brazil, *Front Lines*]; Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 789 [hereinafter Brazil, *Lawyers' Views*].

9. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

10. E.g., Connolly & Smith, *supra* note 7, at 68-79; Trubek, *The Costs*, *supra* note 7, at 104-19.

a solution to the discretion problem, unless they realize that the traditional hostility is unfounded.

The Article concludes that interlocutory review of discovery orders is not the demon that commentators fear. Rather, such review has a positive effect. Although review has increased appellate caseloads, the increase has been an extremely small and manageable one.¹¹ Appellate review has caused minimal delays in case disposition at the trial court level, if review caused delay at all.¹² Interlocutory review has a mixed effect on the parties. A review process has the potential to favor defendants seeking delay,¹³ but the data indicates that this is not a problem to date.¹⁴ Rather, the process itself appears to operate in a neutral fashion, and both plaintiffs and defendants use it. In addition, the body of reported case law emerging from the review process has clearly favored discovery. Emerging case law has also made information previously undiscoverable available to plaintiffs and other individual litigants.¹⁵ Finally, interlocutory review has shifted power from trial judges to appellate judges,¹⁶ evening out inconsistencies in trial court rulings, and providing a body of case law on discovery that allows trial judges to operate with a more accurate understanding of the meaning of the discovery rules.¹⁷

Interlocutory review of discovery orders has resulted in a more evenhanded right to review and a more evenhanded distribution of the information relevant to the issues in civil cases. It has done so without significantly burdening either the trial or appellate courts. This Article concludes with a model for a system of discretionary interlocutory appeal that would allow other jurisdictions to include review of discovery orders in their procedural schemes in a way that would best balance the competing needs of fairness and efficiency.

I. THE THEORETICAL FRAMEWORK: BALANCING THE COSTS AND BENEFITS OF INTERLOCUTORY REVIEW

Most court systems in the United States adhere to some version of the final judgment rule: appeals are permitted only from "final decisions" of the trial courts.¹⁸ Interlocutory orders must wait until the end of the entire case before a court can review them. The original purposes behind the requirement of finality are uncertain, and the requirement may have reflected feudal record keeping needs rather than any policy favoring finality.¹⁹ Today, how-

11. See *infra* text accompanying notes 77-100.

12. See *infra* text accompanying notes 101-20.

13. See *infra* text accompanying notes 121-24.

14. See *infra* text accompanying notes 125-65.

15. See *infra* text accompanying notes 166-87.

16. See *infra* text accompanying notes 188-89.

17. See *infra* text accompanying notes 189-228.

18. See 28 U.S.C. § 1291 (1982); Note, *Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292*, 67 GEO. L.J. 1025, 1026 (1979).

19. See Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 541-44 (1932).

ever, the final judgment rule is well entrenched and is thought to be supported by a number of policy considerations.

Many of the reasons people give for opposing interlocutory review center around efficiency concerns. The final judgment rule, it is said, conserves judicial resources.²⁰ If the procedural framework permitted the parties to appeal every pretrial order entered by the trial court, the trial process would be severely disrupted.²¹ Similarly, interlocutory appeals would burden the appellate courts by: (1) increasing the sheer number of appeals; (2) forcing the appellate courts to repeatedly familiarize themselves with the same cases; (3) causing the appellate courts to view orders in isolation rather than in light of the entire proceeding below; and (4) allowing appeals from rulings that would otherwise become moot, either because the aggrieved party wins the trial on the merits, because the order is harmless error, or because the case settles before reaching the appellate courts.²² In short, some people believe that interlocutory review is inefficient because it can increase appellate workloads and cause delay at the trial court level.

Commentators also oppose interlocutory review for reasons growing out of concern for the litigants.²³ The availability of repeated appeals may allow wealthy litigants to force opponents into unfavorable settlements simply by making the cost of litigation unbearable.²⁴ Additionally, the delay caused by the repeated appeals may increase the likelihood that evidence will disappear and that witness memories will fade, thus prejudicing the party with the burden of proof.²⁵

Finally, commentators oppose interlocutory review because of its effects on the relative roles of trial and appellate courts.²⁶ Easily available review, they argue, risks destroying the morale of the trial court judges and lowering public respect for trial courts.²⁷ Further, interlocutory review deprives the system of the value of the trial judge's more direct contact with the parties and issues.²⁸ Interlocutory review also decreases finality, which is itself an important value in the judicial system.²⁹

Because of this longstanding hostility to interlocutory review, such review is hard to come by, especially in the federal courts. Judges and commenta-

20. Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351-52 (1971).

21. Cooper, *Timing As Jurisdiction: Federal Civil Appeals in Context*, 47 LAW & CONTEMP. PROBS., 157, 158 (Summer 1984); Note, *supra* note 18, at 1025.

22. *Appellate Jurisdiction*, *supra* note 3, at 220; Cooper, *supra* note 21, at 157-58; Note, *supra* note 18, at 1025-26.

23. See *infra* notes 24-25.

24. 15A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3906, at 432 (1986) [hereinafter C. WRIGHT]; Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 100, 104 (1975); Note, *supra* note 18, at 1026.

25. C. WRIGHT, *supra* note 24, at 431; Note, *supra* note 18, at 1026.

26. See *infra* notes 27-29.

27. See Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 782 (1957).

28. *Id.*; see also Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 662-63 (1971); Note, *supra* note 18, at 1027-28.

29. Cooper, *supra* note 21, at 158.

tors, reinforcing each others' views, tend to stress the dangers of immediate review.³⁰ In so doing, they also tend to view all types of interlocutory orders together in one mega-category, rather than analyzing the costs and benefits of reviewing each type of order.³¹ In deciding whether courts should permit interlocutory review in specific cases, judges and commentators tend to emphasize the needs of court administration over the needs of the litigants.³²

Whatever the basis for the fears about interlocutory review, the theories are based largely on untested assumptions. Accordingly, the time has come to test the assumptions on which the limits on interlocutory review are based. Furthermore, the time has come to examine the effect of review of discovery orders in particular, rather than review of all pretrial orders. Does interlocutory review of discovery orders cause significant delay in the appellate courts? In the trial courts? Is it used by wealthier litigants to harass and pressure their opponents? How does it affect the relative roles of the trial and appellate courts? In an attempt to answer these questions, I conducted an empirical study of interlocutory review in Texas, a jurisdiction that allows discretionary review of discovery orders. Before discussing the results of the study, this Article will describe the operation of the Texas system used as the basis for the study.

II. THE TEXAS SYSTEM: MANDAMUS REVIEW OF DISCOVERY ORDERS

A. *When the Writ Is Available*

1. *Historical Development*

A number of state³³ and, to a lesser extent, federal courts³⁴ allow occa-

30. See *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976, 1980, 104 L. Ed. 2d 548, 556 (1989); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985); *Appellate Jurisdiction*, *supra* note 3, at 351-52; *Cooper*, *supra* note 21, at 158.

31. Occasionally, commentators suggest that different types of orders should be treated differently. See MACCRATE, *APPELLATE JUSTICE*, *supra* note 4, at 108. However, commentators have not conducted an empirical or theoretical analysis of any particular kind of interlocutory order in isolation.

32. See *Appellate Jurisdiction*, *supra* note 3, at 75-77 (recommending interlocutory review of non-final orders only when there is substantial doubt about the controlling principle of law and a prospect that substantial litigation cost or judicial energies may be saved by an early decision on the matter by the court of appeals); Note, *supra* note 18, at 1039-40 (noting that present version of 28 U.S.C. § 1292 focuses on the needs of the courts rather than the parties).

33. See R. STERN, *APPELLATE PRACTICE IN THE UNITED STATES*, at 79-101 (2d ed. 1989); Christian, *Interlocutory Review in California — Practical Justice Unguided by Standards*, 47 *LAW & CONTEMP. PROBS.* 111 (Summer 1984); Clifford, *Civil Interlocutory Appellate Review in New Jersey*, 47 *LAW & CONTEMP. PROBS.* 87 (Summer 1984); Haddad, *The Common Law Writ of Certiorari in Florida*, 29 *U. FLA. L. REV.* 207, 208 (1977); Kleinschmidt, *The Final Judgment Rule in Arizona*, 47 *LAW & CONTEMP. PROBS.* 103 (Summer 1984); Korn, *Civil Jurisdiction of the New York Court of Appeals and Appellate Divisions*, 16 *BUFFALO L. REV.* 307, 310 (1967); Tuchler, *Discretionary Interlocutory Review in Missouri: Judicial Abuse of the Writ?*, 40 *MO. L. REV.* 577, 585 (1975); Wetherington, *Appellate Review of Final and Non-Final Orders in Florida Civil Cases — An Overview*, 47 *LAW & CONTEMP. PROBS.* 61 (Summer 1984); Whichard, *Appealability in North Carolina: Common Law Definition of the Statutory Substantial Right Doctrine*, 47 *LAW & CONTEMP. PROBS.* 123 (Summer 1984).

34. See *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, 47 *LAW & CONTEMP. PROBS.* 13 (Spring 1984); Note, *supra* note 18; Redish, *supra* note 24.

sional review of pretrial orders, sometimes by appeal and sometimes by the use of the extraordinary writs of mandamus, certiorari, or prohibition. Texas, however, provides a unique opportunity for studying the effects of interlocutory review of discovery orders because it allows review of discovery orders through mandamus, while severely restricting review of most other discretionary pretrial orders.³⁵ Further, the mandamus procedure is available to challenge both orders granting discovery and orders denying discovery.³⁶ The system is also noteworthy because, although it ritualistically claims to review discovery orders only for "clear abuse of discretion," it in fact uses a more rigorous standard of review.³⁷ A look at the operation of discovery mandamus, therefore, provides an opportunity to study the effect of a system of readily-available discretionary review that does more than just rubber-stamp the decisions of the trial court.

In order to understand the courts' use of mandamus to control the discretion of trial courts in discovery matters, a look at the historical development of the use of mandamus is helpful. Two doctrines had to be overcome before mandamus became an effective means of reviewing discovery orders: the requirement that the appellant have no adequate remedy at law, and the "clear abuse of discretion" standard of review.

Traditionally, Texas courts restricted the use of the writ to cases where no adequate remedy at law existed.³⁸ Texas courts, therefore, refused to use mandamus to review orders that could be assigned as error in an appeal from the final decision on the merits.³⁹ Since the appellate court can review discovery orders on appeal, at least in theory, this principle tended to preclude the use of mandamus to review discovery orders.⁴⁰ Eventually, however, the courts found that appeal provided an inadequate remedy for persons improperly ordered to produce documents, because once the documents were produced to opposing parties, the person's privilege or privacy right had been violated and a reversal on appeal could not undo the revelation.⁴¹

Next, the courts began to find an inadequate remedy on appeal even for parties denied discovery. This practice began, apparently without anyone raising the issue, in two 1977 cases in which the trial courts refused to let

35. See *supra* note 6.

36. *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984) (products liability plaintiff brought mandamus proceeding to compel judge to vacate order denying discovery requests).

37. See *infra* text accompanying notes 46-66.

38. *State v. Sewell*, 487 S.W.2d 716, 718 (Tex. 1972) (decree enjoining hearings vacated on "clear abuse of discretion" grounds).

39. *Aycock v. Clark*, 94 Tex. 375, 376, 60 S.W. 665, 666 (1901) (mandamus action seeking to compel trial judge to enter judgment).

40. Discovery orders are reviewable on appeal from the final judgment. See *Equitable Trust Co. v. Jackson*, 129 Tex. 2, 3-4, 101 S.W.2d 552, 553 (1937) (discovery request reviewable after final judgment rendered); *Morris v. Texas Employers Ins. Ass'n*, 759 S.W.2d 14, 15 (Tex. App.—Corpus Christi 1988, writ denied) (worker's compensation case involving review of protective order on appeal).

41. *Maresca v. Marks*, 362 S.W.2d 299, 301 (Tex. 1962) (mandamus proceeding sought to prevent discovery of income tax information which was immaterial to issue at hand); *Crane v. Tunks*, 160 Tex. 182, 191-92, 328 S.W.2d 434, 440-41 (1959) (discovery of income tax returns).

plaintiffs discover crucial information.⁴² When squarely faced with the issue in 1984, the supreme court held that parties denied discovery have no adequate remedy by way of appeal,⁴³ because: (1) an appellate order, after a long delay, entitling a party to go back to the trial court and begin again is not a meaningful remedy;⁴⁴ and (2) an appellant denied discovery may have suffered real harm but be unable to demonstrate on appeal that the denial was "harmful error."⁴⁵

A second principle also discouraged the use of mandamus to review discovery orders. The appellate courts originally used mandamus solely to review the lower courts' performance of a ministerial function.⁴⁶ This power, however, soon expanded to allow review of trial court decisions that the appellate court found to be "so gross an abuse of discretion . . . as to amount to a virtual refusal . . . to act at all in contemplation of law."⁴⁷ Over the years the application of this "abuse of discretion" standard came to allow steadily increased supervision of the trial courts in their exercise of discretionary decision making.⁴⁸ Nowhere, however, has the court's use of mandamus power over lower court discretion been more available than in cases involving discovery orders.

The trend began with a case that merely ordered the trial court to exercise its discretion, when it refused to inspect allegedly privileged documents *in camera* prior to ordering their production.⁴⁹ The court later expanded the writ power, however, using mandamus to reverse a trial court's decision

42. *Allen v. Humphreys*, 559 S.W.2d 798, 801 (Tex. 1977) (production of defendant's pre-lawsuit studies of the causal connection between its actions and injuries like plaintiff's); *Barker v. Dunham*, 551 S.W.2d 41, 42 (Tex. 1977) (discovery from an employee/expert).

43. *Jampole*, 673 S.W.2d at 576 (discoverability, in products liability case against car manufacturer, of alternate fuel storage system designs known to defendant).

44. *Id.* at 576.

45. *Id.* at 576. The court found that an appeal from a final judgment could be of little use to a plaintiff denied discovery:

The trial court's action in this case effectively prevents [the plaintiff] from proving the material allegations of his lawsuit. On appeal, it is unlikely he would be able to show that the trial court's errors were harmful Because the evidence exempted from discovery would not appear in the record, the appellate courts would find it impossible to determine whether denying the discovery was harmful Moreover, [even if harm could be shown,] requiring a party to try his lawsuit, debilitated by the denial of proper discovery, only to have that lawsuit rendered a certain nullity on appeal, falls well short of a remedy by appeal that is "equally convenient, beneficial, and effective" as mandamus.

Id.

46. *See Arberry v. Beavers*, 6 Tex. 457, 467 (1851) (refusing to issue writ of mandamus to compel the chief judge of Cass County to tabulate the returns from every precinct in deciding the outcome of an election choosing the county seat).

47. *Id.* at 472; *see also King v. Guerra*, 1 S.W.2d 373, 376-77 (Tex. Civ. App.—San Antonio 1927, writ ref'd) (mandamus may be appropriate to correct an order that is purely arbitrary or without reason).

48. *See Womack v. Berry*, 156 Tex. 44, 50-51, 291 S.W.2d 677, 682-83 (1956) (finding that refusal to order separate trial amounted to clear abuse of discretion).

49. *Crane v. Tunks*, 160 Tex. 182, 187-88, 328 S.W.2d 434, 437-38 (1959) (mandamus granted because trial court ordered production of plaintiff's 1950 tax return, despite plaintiff's privacy claims, without first inspecting it to determine what portions were relevant to the suit).

about the relevance of certain documents.⁵⁰ The court soon freely used mandamus to decide various questions as to the appropriate scope of discovery.⁵¹

The Texas courts have moved from a system in which writs of mandamus were comparatively unavailable to review discovery orders to a system in which orders granting and denying discovery are immediately reviewable in the friendly neighborhood court of appeals.⁵² Further, although courts continue to recite the "clear abuse of discretion" test, they in fact provide a real review of the trial court's order.

2. *Standard of Review*

Appellate courts claim to issue writs of mandamus only when the trial court "reaches a decision so arbitrary and unreasonable that it results in a clear and prejudicial error of law."⁵³ The actual decisions of the courts, however, sometimes belie this oft-repeated statement.

Some of the courts' decisions, for example, involve a substitution of the appellate court's exercise of discretion for that of the trial court. This is particularly true when the issue is relevance or burdensomeness. Appellate courts have granted writs of mandamus based on their assessment of the relative burdens of deposition locations,⁵⁴ the burden of producing information in relation to its materiality,⁵⁵ and the parties' privacy rights in relation

50. In *Maresca v. Marks*, 362 S.W.2d 299, 300 (Tex. 1962), the district judge examined Maresca's tax returns, found them to be relevant in their entirety, and ordered production. The supreme court examined the returns, concluded that the district judge had erred, and ordered him to reverse his decision. *Id.* at 300-01.

51. In addition to these doctrinal changes expanding the availability of mandamus, a change in the jurisdiction of the appellate courts made the use of mandamus procedures less forbidding. Originally, only the supreme court had the authority to grant a writ of mandamus against a district judge. In 1983, the legislature made the authority of the appellate courts virtually coextensive with that of the supreme court, giving both courts the power to issue a writ of mandamus "agreeable to the principles of law regulating those writs" against a district judge. TEX. GOVT. CODE ANN. §§ 22.002(a), 22.221(b) (Vernon 1988). One article suggests that this change provided attorneys with a less intimidating and less costly avenue of appeal in the local intermediate appellate court, thus increasing the number of applications for writs. Ray & McKelvey, *The Mandamus Explosion*, 28 S. TEX. L. REV. 413, 415-16 (1987). The supreme court also rewrote the rules of procedure to require a party seeking mandamus relief first to present its request to the court of appeals in those cases when both courts have mandamus authority. TEX. R. APP. P. 121(a)(1) (formerly TEX. R. CIV. P. 474); Ray & McKelvey, *The Mandamus Explosion*, 28 S. TEX. L. REV. 413, 415-16 (1987).

52. For a more thorough discussion of the historical evolution of the writ of mandamus in Texas, see Novell & Sutton, *The Original Writ of Mandamus in the Supreme Court of Texas*, 1 ST. MARY'S L.J. 177, 178-79 (1969); Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 SW. L.J. 1283, 1291 (1979); Note, *The Use of Mandamus to Review Discovery Orders in Texas: An Extraordinary Remedy*, 1 REV. OF LITIG. 325, 326 (1981).

53. *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41 (Tex. 1989) (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985)).

54. *Wal-Mart Stores, Inc. v. Street*, 754 S.W.2d 153, 155 (Tex. 1988) (CEO's deposition should be taken in Arkansas rather than Texas); *Dresser Indus. v. Solito*, 668 S.W.2d 893, 895-96 (Tex. App.—Houston [14th Dist.] 1984, orig. proc.) (plaintiff must find alternative to deposing seven overseas witnesses in Houston at defendant's expense).

55. *Jampole*, 673 S.W.2d at 576 (discoverability of model years and types of cars different from plaintiff's); *Enos v. Baker*, 751 S.W.2d 946, 950 (Tex. App.—Houston [14th Dist.] 1988,

to materiality.⁵⁶ In each of these cases, the appellate court appeared to make its decision about discoverability based on its own assessment of the facts rather than deferring to the decision of the trial court.

The appellate courts have also substituted their analysis for that of the trial court in areas involving the standards used for trial court fact-finding. For example, in order to determine the starting point of work product and other discovery privileges, the court must determine when the party asserting the privilege began to act "in anticipation of the prosecution or defense of the claims made in the pending litigation."⁵⁷ This dispute involves both issues of fact and issues of the correct standard to apply in deciding those facts. In mandamus reviews of the trial courts' decisions, the courts of appeal have differed dramatically in the amount of deference given to the trial court's decision.⁵⁸

A number of discovery mandamus cases set out or interpret the rules governing the scope of discovery, particularly the scope of the various exemptions from discovery. In these cases the court's emphasis is not on the trial court's exercise of discretion. Rather, the appellate courts primarily set out and interpret various rules concerning discovery. For example, the appellate courts have used discovery mandamus cases to: (1) establish the parameters of the privilege for hospital committee documents;⁵⁹ (2) discuss the discoverability of the defendant's net worth when the plaintiff seeks punitive dam-

orig. proc.) (divorce of two lawyers, mandamus granted of trial court's order to husband to produce all active client files of his law firm and all demands made on behalf of clients, for wife to use in evaluating the value of the firm as community property).

56. See *Walsh v. Ferguson*, 712 S.W.2d 885, 886-87 (Tex. App.—Austin 1986, orig. proc.) (in child custody dispute where wife claimed that husband used drugs, mandamus granted of order directing husband to furnish blood and urine samples); *Velasco v. Haberman*, 700 S.W.2d 729, 730 (Tex. App.—Austin 1985, orig. proc.) (in a divorce case, mandamus granted of order limiting wife's attorney to five questions regarding husband's adultery at deposition of husband).

57. TEX. R. CIV. P. 166b(3).

58. See, e.g., *Flores v. Fourth Court of Appeals*, 777 S.W.2d at 42 (trial court within discretion granting discovery order); *Stringer v. Eleventh Court of Appeals*, 720 S.W.2d 801, 802 (Tex. 1986) (appellate court granted mandamus against trial court, supreme court held appellate court abused its discretion); *Foster v. Heard*, 757 S.W.2d 464, 465 (Tex. App.—Houston [1st Dist.] 1988, orig. proc.) (appellate court found abuse of discretion); *H.E. Butt Grocery Co. v. Williams*, 751 S.W.2d 554, 557 (Tex. App.—San Antonio 1988, orig. proc.) (trial court abused its discretion in discovery order); *Phelps Dodge Ref. Corp. v. Marsh*, 733 S.W.2d 359, 361 (Tex. App.—El Paso 1987, orig. proc.) (trial court correct in allowing discovery in wrongful death claim); *Texaco Ref. & Mktg., Inc. v. Sanderson*, 739 S.W.2d 493, 494 (Tex. App.—Beaumont 1987, orig. proc.) (appellate court found no abuse of discretion in trial court's denial of discovery); *Service Lloyds Ins. Co. v. Clark*, 714 S.W.2d 437, 438 (Tex. App.—Austin 1986, orig. proc.) (no abuse of trial court discretion in ordering discovery of insurance claim file).

59. *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988) (hospital documents prepared by or at the direction of hospital committee are privileged); *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 645 (Tex. 1985) (same); *Doctor's Hosp. v. West*, 765 S.W.2d 812, 814 (Tex. App.—Houston [1st Dist.] 1988, orig. proc.) (same); *Santa Rosa Medical Center v. Spears*, 709 S.W.2d 720, 723 (Tex. App.—San Antonio 1986, orig. proc.) (same).

ages;⁶⁰ (3) clarify the discoverability of photographs;⁶¹ (4) explain the conditions required to overcome a reporter's privilege;⁶² and (5) reinforce the rules governing discovery from expert witnesses.⁶³

Some cases do take a more deferential approach to the trial court, either finding the trial court's order to be within the realm of permissible decisions,⁶⁴ or merely issuing the writ in cases where the trial court failed to exercise its discretion.⁶⁵ In short, the Texas system, all by itself, demonstrates the truth of Judge Friendly's comment that "[t]here are a half dozen different definitions of 'abuse of discretion,' ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance."⁶⁶

B. *The Procedure Used to Seek Mandamus*

A party seeking mandamus relief files a motion and petition in the appellate court, along with a small deposit for costs.⁶⁷ The court may or may not request that the respondent (in discovery cases, this will be the trial judge or

60. *Lunsford v. Morris*, 746 S.W.2d 471, 472, (Tex. 1988) (defendant's ability to pay the punitive damages directly related to question of punishment and deterrence); *Miller v. O'Neill*, 775 S.W.2d 56, 58-59 (Tex. App.—Houston [1st Dist.] 1989, orig. proc.) (rejecting bifurcation to delay discovery); *Hanna v. Meurer*, 769 S.W.2d 680, 681 (Tex. App.—Austin 1989, orig. proc.) (en banc) (discovery of financial information not a *per se* invasion of privacy).

61. *Terry v. Lawrence*, 700 S.W.2d 912, 913 (Tex. 1985) (photographs not entitled to protection from discovery under TEX. R. CIV. P. 166b(3)); *Axelson, Inc. v. McIlhany*, 755 S.W.2d 170, 173 (Tex. App.—Amarillo 1988, orig. proc.) (photos not reflecting "mental impressions, opinions, or legal theories of an attorney" not within work product exemption from discovery).

62. *Channel Two Television Co. v. Dickerson*, 725 S.W.2d 470, 471-72 (Tex. App.—Houston [1st Dist.] 1987, orig. proc.) (person seeking disclosure of documents protected by reporter's privilege must show high degree of materiality and relevancy, necessity to claim, and only source of information).

63. *Lindsey v. O'Neill*, 689 S.W.2d 400, 402 (Tex. 1985) (mental impressions/opinions of experts not exempt from discovery when not acquired or developed in anticipation of litigation); *Jones & Laughlin Steel, Inc. v. Schattman*, 667 S.W.2d 352, 355 (Tex. App.—Fort Worth 1984, orig. proc.) (trial judge has discretion regarding designation of expert witnesses).

64. *Flores*, 777 S.W.2d at 41; *C-Tran Dev. Corp. v. Chambers*, 772 S.W.2d 294, 296 (Tex. App.—Houston [14th Dist.] 1989, orig. proc.) (refusing to find abuse of discretion in relevance issue); *W.W. Rodgers & Sons Produce Co. v. Johnson*, 673 S.W.2d 291, 293 (Tex. App.—Dallas 1984, orig. proc.).

65. See, e.g., *Ryals v. Canales*, 767 S.W.2d 226, 230 (Tex. App.—Dallas 1989, orig. proc.) (judge should have inspected allegedly privileged documents *in camera*); *State Farm Ins. Co. v. Salinas*, 767 S.W.2d 212, 214 (Tex. App.—Corpus Christi 1989, orig. proc.) (trial court should have heard evidence or conducted *in camera* inspection); *Goodspeed v. Street*, 747 S.W.2d 526, 529-30 (Tex. App.—Fort Worth 1988, orig. proc.) (judge who ruled without hearing testimony or examining documents ordered to hold hearing); *Shell Western E & P, Inc. v. Oliver*, 751 S.W.2d 195, 196-97 (Tex. App.—Dallas 1988, orig. proc.) (trial court should have conducted *in camera* inspection).

66. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982).

67. TEX. R. APP. P. 13, 121. The mandamus record is fairly simple, consisting of a petition, certified copies of the order complained of and other relevant documents, and authorities supporting the petition. A transcript of the proceedings in the trial court is necessary if the propriety of the order under attack depends upon facts adduced at a hearing. TEX. R. APP. P. 121. See also W. DORSANEO, 6 TEXAS LITIGATION GUIDE § 150A.51 (1989) (providing a more detailed description of the proper procedure for seeking mandamus).

the court of appeals) or the real party in interest (the party who won the discovery fight in the trial court) submit a reply.⁶⁸ The court either makes a preliminary determination that the party seeking mandamus is entitled to the relief sought and places the case on the docket or overrules the motion without opinion.⁶⁹

A party unsatisfied with the court of appeals' action in a mandamus proceeding may seek further review. The judgment of a court of appeals in an original mandamus action may not be appealed to the supreme court.⁷⁰ If the court of appeals denies the writ, however, the relator (the party seeking mandamus) may try again in the supreme court. If the court of appeals grants the writ, the party who originally won in the trial court (acting through the trial judge) may challenge the grant as an abuse of discretion in an original mandamus action brought in the supreme court.⁷¹

In summary, the Texas courts permit interlocutory review of discovery orders. The current system uses an extraordinary writ to achieve review. Thus, the grant of review is discretionary with the appellate court. Review does not, however, require the prior approval of the trial judge. Texas courts openly acknowledge the availability of mandamus review of orders granting and denying discovery. In addition, a writ of mandamus is the only existing method of obtaining interlocutory review of such orders.⁷² This Article examines this system in operation to see what effect it has on court administration, on the parties, and on the role of the courts.

III. EFFECT OF INTERLOCUTORY REVIEW OF DISCOVERY ORDERS ON COURT ADMINISTRATION

In the last decade, commentators have expressed a great deal of concern about increasing caseloads and delays at both the trial and appellate court levels.⁷³ Substantial opposition arises, therefore, to any innovation that has the potential to increase caseloads, and this opposition is not unfounded. At the appellate level, for example, the addition of numerous new appeals may have systemic costs, whether they cause slow turnaround time in all cases or result in procedures that decrease the amount of judicial attention given to each case.⁷⁴ At the trial level, an increased number of contested pretrial matters may lengthen the period of time before a case is tried or settled.⁷⁵

68. TEX. R. APP. P. 121(c).

69. *Id.*

70. *Scurry v. Friberg*, 119 Tex. 463, 463, 32 S.W.2d 637,637 (1930).

71. See *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (discretion exercised by appellate court in a mandamus proceeding is more confined than that of a trial court).

72. Texas courts have not used contempt orders as a means of achieving review of discovery rulings, nor does Texas have a discretionary appeal provision that parallels 28 U.S.C. § 1292(b) (1988).

73. See PRETRIAL DELAY, *supra* note 7; MARTIN & PRESCOTT, *supra* note 7.

74. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 554-56 (1969); Cooper, *supra* note 21, at 159.

75. Cf. Trubek, *The Costs*, *supra* note 7, at 104 (increased strategic interaction increases the amount of time spent on a case).

Existing empirical data,⁷⁶ however, does not support an argument that interlocutory review of discovery orders causes either of these problems.

A. Appellate Courts

Undoubtedly, the number of cases in the appellate courts has increased. A study by the National Center for State Courts concluded that the number of appeals nationwide had doubled between 1950 and 1975, and that in many intermediate appellate courts the number of appeals had tripled.⁷⁷ Similarly, surveys in 1985 showed that the number of appeals, in twenty-five out of the forty-two states for which figures were available, increased more than 100% between 1973 and 1983.⁷⁸

Interlocutory review of discovery orders, to the extent that it was not available before, would likely add to this caseload. Although some discovery orders were appealable with a final judgment, as a practical matter many were not appealed. First, the party aggrieved by the order may have won at trial, and therefore, would not appeal a discovery order. Second, the case may have settled before trial or appeal, so there would be no appeal of a discovery order. Third, even if the party aggrieved by the discovery order lost the case at trial and appealed, only an unusual discovery order would be dispositive enough to show the harmful error that most jurisdictions require for appellate reversal.⁷⁹ Many appellants, therefore, would not even raise the discovery points on appeal. A procedure that allows immediate review of discovery orders is likely to bring new cases to the courts of appeals.

Nevertheless availability of review would not necessarily increase appellate court delay or workload significantly. A recent study of appellate court delay concluded that caseload is not the most important factor in determining the speed at which appellate courts dispose of their cases.⁸⁰ In the appel-

76. Although growing, the body of empirical work on caseload delay has its limitations. The existence of interactive variables and insufficient data bases have made empirical studies very difficult. Luskin, *Building a Theory of Case Processing Time*, 62 JUDICATURE 114, 116 (1978). Varying conditions in different jurisdictions and the passage of time also make generalizations difficult. Daniels, *Ladders and Bushes: The Problem of Caseloads and Studying Court Activities Over Time*, 1984 AM. B. FOUND. RES. J. 751, 752 (1984). Also, ethical constraints on empirical studies make it difficult to structure experiments that can single out a limited number of variables to assess the impact of particular changes in court procedures. E. A. Lind, J.E. Shapard & J.S. Cecil, *Methods for Empirical Evaluation of Innovations in the Justice System*, in EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW, Appendix B (1981).

77. S. WASBY, T. MARVELL & A. AIKMAN, VOLUME AND DELAY IN STATE APPELLATE COURTS 13-16 (1979) (the study counted the number of opinions issued by state courts without discretionary jurisdiction).

78. T. Marvell, *Is There An Appeal from the Caseload Delay?*, 24 JUDGES J. 34, 36 (Summer 1985); Bureau of Justice Statistics Bulletin, 1973-83 Trends: The Growth of Appeals 3 (Feb. 1985).

79. This is particularly true when the discovery order denied discovery and the appellant is in the position of trying to show the appellate court that the absence of information caused a different result at trial, particularly when the absent information is not in the record. See *Morris v. Texas Employers' Ins. Ass'n*, 759 S.W.2d 14, 15 (Tex. App.—Corpus Christi 1988, writ denied) (court abused discretion in denying discovery of claim file, but denial not shown to be harmful error).

80. MARTIN & PRESCOTT, *supra* note 7, at xviii.

late courts studied, courts with larger caseloads took no longer or only slightly longer to process their cases than did courts with smaller caseloads.⁸¹ Further, courts with more filings per judge were sometimes appreciably faster than courts with relatively fewer cases per judge.⁸² The study concluded that delay or backlog in a given court is a "function of the complex interplay of volume, decision-making efficiency, and managerial style."⁸³ Possibly, therefore, a modest increase in appellate court caseload, if coupled with effective case management techniques, would cause no significant decrease in the quality or speed of appellate justice.

The available numbers confirm that review of discovery orders, where available, is a minor part of the appellate caseload. In New York, for example, where virtually every pretrial order is appealable as a matter of right, one study of 300 appellate cases found that only 9 (3%) involved discovery orders.⁸⁴ Similarly, analysts of the Arizona⁸⁵ and California⁸⁶ systems concluded that interlocutory review of pretrial orders generally has not bur-

81. *Id.*

82. *Id.* In Texas, for example, the Dallas court of appeals, with 116 new filings per judge in fiscal 1988, and the Texarkana court of appeals, with only 36 new filings per judge, each averaged 8.1 months from filing to disposition. TEXAS OFFICE OF COURT ADMINISTRATION, TEXAS JUDICIAL SYSTEM ANNUAL REPORT at 177-79 (1988) [hereinafter JUDICIAL REPORT]. The data for all the intermediate appellate courts is as follows:

<u>Filings per Judge</u> (lowest to highest)		<u>Disposition Time (Filing to Disposition)</u> (fastest to slowest)	
Texarkana	35 2/3	Eastland	6.6 months
Eastland	72 2/3	Tyler	7 months
Amarillo	77 1/2	Corpus Christi	7.2 months
Ft. Worth	79 4/7	El Paso	7.6 months
Waco	82 1/3	Beaumont	7.8 months
Corpus Christi	92 2/3	Dallas	8.1 months
San Antonio	92 6/7	Texarkana	8.1 months
Austin	92 6/7	Amarillo	8.2 months
El Paso	96 1/2	Waco	8.2 months
Beaumont	105	Houston [1st]	8.3 months
Tyler	107	Houston [14th]	8.7 months
Dallas	116	San Antonio	9.1 months
Houston[14th]	120	Ft. Worth	9.5 months
Houston [1st]	131	Austin	10 months

83. MARTIN & PRESCOTT, *supra* note 7, at.

84. Project, *The Appellate Division of the Supreme Court of New York: An Empirical Study of its Powers and Functions as an Intermediate State Court*, 47 *FORDHAM L. REV.* 929, 987, 1019 (1979) [hereinafter Project, *Appellate Division*]. In seven of the nine cases (77.8%), the discovery order was affirmed, and in two of the cases (22.2%) the order was reversed. Another review of the New York system noted that overall, appellate courts reversed or modified 36% of intermediate orders appealed, versus only 21% of final orders. MACCRATE, *APPELLATE JUSTICE*, *supra* note 4, at 89.

85. Kleinschmidt, *The Final Judgment Rule in Arizona*, 47 *LAW & CONTEMP. PROBS.* 103, 105-09 (Summer 1984). Arizona allows discretionary review of discovery rulings by a "special action" proceeding that replaced the old extraordinary writs of certiorari, mandamus, and prohibition. *Id.* at 108.

86. Christian, *Interlocutory Review in California—Practical Justice Unguided by Standards*, 47 *LAW & CONTEMP. PROBS.* 111, 111-17 (Summer 1984). While California nominally has a restricted and formal procedure for certified and interlocutory appeals, in practice pretrial orders are subject to a de facto system of interlocutory review through use of the writ of mandamus. *Id.*

dened the appellate courts.⁸⁷

In Texas, where the status of discovery orders permits a more fine-tuned empirical analysis, one can also see that interlocutory review of discovery orders has not created an important burden on the appellate courts. A 1981 study concluded that "applications for writs of mandamus to review discovery orders have not inundated the supreme court."⁸⁸ In 1979, for example, parties filed with the supreme court 933 applications for review.⁸⁹ Of these, only twenty-four (2.6%)⁹⁰ sought writs to review discovery orders.⁹¹ In 1980, parties filed 943 applications, and only twenty-three (2.4%) sought review of discovery orders.⁹² In 1981, of the 943 applications filed with the court, only seventeen (1.8%) sought writs to review discovery orders.⁹³ The numbers appear to have increased slightly. In the year ending August 31, 1989, the supreme court disposed of only fifty-one requests for mandamus involving discovery orders.⁹⁴ Only five of these cases resulted in published

87. Kleinschmidt, *supra* note 85, at 110; Christian, *supra* note 86, at 120-21.

88. Note, *supra* note 52, at 339. Until 1983, the Texas Supreme Court was the only court in the state with mandamus power over the district courts, so these statistics represent the total number of mandamus actions for all courts in the state.

89. *Id.*

90. *Id.* These percentages actually overstate the proportional time spent on discovery mandamus, because the total number of applications filed does not include motions, which also occupy a significant portion of the court's time. In fiscal 1988, for example, in addition to the 997 applications for writ of error filed, the court also had to deal with the 769 other writs and motions filed. JUDICIAL REPORT, *supra* note 82, at 152 (the motions are primarily motions for rehearing).

91. Note, *supra* note 52, at 339. These statistics are taken from the Supreme Court, Central Staff, 1979-80 Statistics, and from the 1981 Texas Supreme Court Journal. These numbers are slightly lower than those reported by the Texas Judicial System Annual Report, because the latter counts multiple motions within a single application as separate items. *Id.* at 339 n. 105. One hundred and twenty-nine of the 933 applications requested writs of mandamus, but only 24 sought writs to review discovery orders. *Id.* at 339.

92. *Id.* One hundred and sixteen of the 943 applications requested writs of mandamus. *Id.*

93. *Id.* Ninety-eight of the 943 applications sought writs of mandamus. *Id.* In 1983, the Texas Office of Court Administration (TOCA) switched from keeping calendar year statistics to keeping statistics based on a September 1 to August 31 fiscal year. Although the TOCA does not count discovery mandamus actions separately from other mandamus actions, the numbers on mandamus actions generally indicate that they have held fairly steady or increased modestly over the years, except for a large increase in fiscal year 1988.

<u>Time Period</u>	<u>Mandamus Actions Filed</u>
Jan. 1 - Dec. 31, 1977	88
Jan. 1 - Dec. 31, 1978	123
Jan. 1 - Dec. 31, 1979	137
Jan. 1 - Dec. 31, 1980	130
Jan. 1 - Dec. 31, 1981	96
Jan. 1 - Dec. 31, 1982	132
Jan. 1 - Dec. 31, 1983	142
Sep. 1, 1983 - Aug. 31, 1984	113
Sep. 1, 1984 - Aug. 31, 1985	135
Sep. 1, 1985 - Aug. 31, 1986	143
Sep. 1, 1986 - Aug. 31, 1987	141
Sep. 1, 1987 - Aug. 31, 1988	194

TEXAS OFFICE OF COURT ADMINISTRATION, ANNUAL REPORTS, 1977 - 1988.

94. Tabulation of empirical research at Texas Supreme Court (statistical data on file with

opinions.⁹⁵

Statewide numbers for mandamus cases are not available for intermediate appellate courts. A study of cases in the Dallas court of appeals for January, 1988 through June, 1989, however, shows that discovery mandamus cases are also a fairly small percentage of that court's workload.⁹⁶ In fiscal 1988, for example, litigants filed 1508 new cases, or an average of 126 cases per month, in the Dallas appellate court. Of these 126 cases per month, approximately two per month were applications for mandamus review of discovery orders. Thus, about 1.5% of the court's caseload consisted of interlocutory review of discovery orders.⁹⁷

During the eighteen month period from January, 1988 through June, 1989, the Dallas court of appeals disposed of a total of thirty-four motions for leave to file petitions for writ of mandamus raising discovery issues. Of those thirty-four cases, the court denied leave to file in twenty-two, granted leave to file but denied the writ in six, and granted the writ in six. Assuming that the cases in which leave to file is denied require comparatively less judicial time,⁹⁸ only twelve cases, or about one case every six weeks, required significant amounts of judicial attention.

The numbers, then, suggest that while the availability of interlocutory review of discovery orders added cases to the appellate docket, interlocutory review has not added a large or burdensome number of cases.⁹⁹ While trial courts enter many discovery orders, litigants take few to the courts of appeals. Many orders are correct. Even as to the arguably erroneous orders, many litigants presumably will balance an attempted interlocutory appeal against the harm endured while waiting for a final judgment, concluding that the trial court's order simply does not warrant the costs and trouble of an

author) [hereinafter Tabulation]. Since the court's overall caseload has also increased, mandamus cases remain a tiny percentage of total caseload.

95. *Id.*

96. One would expect that if any intermediate appellate court in Texas had a high number of discovery mandamus cases, it would be the Dallas court. The Dallas court of appeals has the largest caseload of any of the 14 intermediate appellate courts in Texas. In fiscal 1988, for example, 1508 new cases were filed in the Dallas court of appeals, versus 1181 in the next busiest court. The Dallas court of appeals receives approximately 19% of all cases filed in the state. JUDICIAL REPORT, *supra* note 82.

97. *Id.* (statistical data on file with author).

98. This assumption is supported by the turnaround time data. In the thirty-four cases for which time data is available, the court of appeals disposed of twenty less than a week after filing, three less than two weeks after filing, and five less than three weeks after filing. In other words, the court disposed of 82% of the discovery mandamus cases in less than three weeks, and the cases that took longer were the cases in which the court granted review. *Id.*

99. Despite the comparatively small number of discovery mandamus cases, appellate judges evidently consider the procedure to have created a problem. One Texas Supreme Court Justice wrote of the mandamus "explosion." Ray & McKelvey, *supra* note 51, at 413. Other appellate judges have complained to the State Bar Section on Appellate Practice. See Letter from Chair, Section of Appellate Practice and Advocacy, to Committee Chairs (Aug. 21, 1989) [hereinafter Letter from Chair] (copy on file with author) (noting complaints about mandamus from three court of appeals justices). Those trying to explain the burdensome nature of mandamus review mention its emergency or surprise nature. *Id.* This characterization appears to refer to the rhythm of work on mandamus cases rather than to any kind of quantitative analysis of the additional increment of work caused by mandamus review.

attempted interlocutory appeal.¹⁰⁰

B. Trial Courts

The limited data available at the trial court level indicates that delay caused by mandamus review is not a significant problem there, either. As in the case of appellate courts, well-grounded concern exists about delay. In theory, interlocutory review of discovery orders could delay the trial court during the review process itself or prolong the discovery period so that cases take longer to get to trial.¹⁰¹ While this theory is not inherently implausible, the existing empirical research tends to show that the burden would not be severe.

Studies indicate that discovery is not a major factor in pretrial delay in most cases.¹⁰² To the extent that delay exists, the discovery process is not the major cause of delay, especially in ordinary lawsuits. A number of studies concluded that in the typical lawsuit, pretrial activity is modest and relatively little discovery occurs.¹⁰³

A 1978 study of 1649 cases in state and federal trial courts found that "[r]arely did the records reveal more than five separate discovery events."¹⁰⁴ A Federal Judicial Center study found that 51.7% of the 3,114 cases studied had no discovery requests, and that another 20.6% had two or fewer requests.¹⁰⁵ In 95.1% of the cases ten or fewer discovery requests existed.¹⁰⁶ An American Bar Foundation study, based on interviews with 180 Chicago area attorneys in the summer of 1979, concluded that in smaller cases discovery plays a relatively minor role, the use of discovery tools is straightforward, and disputes are less common.¹⁰⁷ If the normal case has little discovery activity and fewer discovery disputes, the availability of interlocutory review of discovery orders is unlikely to affect either these cases or the dockets of courts handling primarily such cases.

Further, empirical studies attribute the majority of pretrial delay to factors other than the discovery process.¹⁰⁸ The Columbia Project for Effective Justice, working in the 1960s, decided after interviewing a number of trial

100. Redish, *supra* note 24, at 104 n.86.

101. *Appellate Jurisdiction*, *supra* note 3, at 220.

102. *See infra* text accompanying notes 104-20.

103. *See infra* text accompanying notes 104-07.

104. Trubek, *The Costs*, *supra* note 7, at 90. The study also found that lawyers devoted an average time of only 16.7% to discovery. *Id.* at 91. This study took a random sample (1649 cases in all) of civil cases from five federal judicial districts, including federal district courts and at least one state court in each district. *Id.* at 80-82. The study excluded cases where the initial claim was for less than \$1,000, and 37 "megacases." *Id.* at 80-81.

105. Report of the Ad Hoc Committee to Study the High Cost of Litigation to the Seventh Circuit Judicial Committee and the Bar Association of the Seventh Federal Circuit, 86 F.R.D. 267, 275 n.5 (1979) (citing CONNOLLY, JUDICIAL CONTROLS, *infra* note 106, at 29).

106. P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 28 (1978) [hereinafter CONNOLLY, JUDICIAL CONTROLS]. The data base for this study was all recorded discovery information for approximately 500 terminated cases in each of six federal district courts (3,114 cases in all) that terminated during the 1975 fiscal year. *Id.* at 27-28.

107. Brazil, *Front Lines*, *supra* note 8, at 223.

108. *See infra* text accompanying notes 109-12.

lawyers that discovery activity did not cause most individual case delay.¹⁰⁹ A recent study of trial court delay noted that improved court management techniques, especially early trial judge involvement, accelerated the discovery process, but that long delays still existed between completion of discovery and trial.¹¹⁰ An earlier Federal Judicial Center study likewise conceded that speeding up discovery would not speed up case disposition unless the court could set a quick and realistic trial date.¹¹¹ Thus, unless the mandamus process delays the trial date, as opposed to prolonging slightly the discovery period itself, the process will not contribute to increased delays in the trial court.¹¹²

Empirical data from the Texas courts supports the notion that the mandamus process does not cause major delays in case disposition.¹¹³ First, the information available indicates that even in reported cases, which are apt to take longer than cases involving no written opinion, the mandamus process caused minimal delay. Of the fifty-nine reported cases from 1983 to June of 1989 in which disposition dates are mentioned, the appellate court disposed of 41% of the mandamus petitions in less than three months from the date of the trial court order, 55% in less than four months from the date of the trial court order, and 77% in less than six months from the date of the trial court order.¹¹⁴ Courts, then, dispose of most reported mandamus cases within a time frame that would allow trial at the time prescribed by the Texas Rules of Judicial Administration: within eighteen months of the answer date for civil jury cases, and within twelve months for civil nonjury cases.¹¹⁵

109. PRETRIAL DELAY, *supra* note 7, at 27 (citing W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 217 (1968)).

110. B. MAHONEY, A. AIKMAN, P. CASEY, V. FLANGO, G. GALLAS, T. HENDERSON, J. ITO, D. STEELMAN, S. WELLER, CHANGING TIMES IN TRIAL COURTS 178 (1988) [hereinafter MAHONEY]; see also Brazil, *Front Lines*, *supra* note 8, at 223-27 (small cases with routine discovery disposed of slowly primarily because of extreme delay in availability of trial date).

111. CONNOLLY, JUDICIAL CONTROLS, *supra* note 106, at 75.

112. If delay in enforcement of a discovery order delayed settlement, then a prolonged discovery period would in and of itself delay the disposition of a case. Studies, though, indicate that the prospect of impending trial, rather than other factors, tends to precipitate settlement. Also, to the extent that completion of discovery is the event triggering a trial setting, a longer period of discovery can delay case disposition. In many jurisdictions, however, a trial setting will not, as a practical matter, be available until a time that allows generous leeway for the completion of discovery, even allowing for brief interruptions for interlocutory review of discovery orders. A jurisdiction in which firm trial dates were available at a time immediately following the amount of time needed for the speediest possible discovery would have more cause to worry about the interruptions caused by interlocutory review of discovery orders. I have seen no studies of any such jurisdiction.

113. This section of the Article discusses delay from the standpoint of the courts, and therefore looks only at the impact of delay on case processing. The next section looks at delay from a different perspective, that of the litigants. Delay is a more serious problem when viewed from the litigants' perspective, and can impact the litigants unequally. See *infra* text accompanying notes 121-24.

114. These time periods may include delay by the parties in seeking the writ, since they run from the date of the trial court order to the date of the appellate court opinion. Time data from the Dallas court of appeals, which runs from the date of filing in the court of appeals to the disposition of the case in the court of appeals, shows much shorter turnaround times.

115. TEXAS SUPREME COURT, RULES OF JUDICIAL ADMIN., Rule 6(b) (1987). In fact, Texas courts do not try many cases as quickly as these standards would indicate. In Dallas County, for example, in fiscal year 1988, the district courts disposed of 47,844 civil cases. Of

Unreported mandamus cases involve even less delay than the reported ones. Figures from the Dallas court of appeals from 1988 to mid-1989 show the following turnaround times from filing in the court of appeals until the court of appeals' ruling in the case:

<u>Time</u>	<u>Number of Cases</u>
Up to 1 week	20
2 weeks	3
3 weeks	5
1 month	0
2 months	5
3 months	0
4 months	1

Many of the dispositions within a week of filing occurred on the same day that the case was filed. If the Dallas appellate court is typical, then, the total turnaround time involved in a promptly-mandamused discovery order may be no more than a few weeks and may be as little as a day.

Also, the effect of the pendency of a mandamus proceeding in the court of appeals on the trial court remains unclear. Interlocutory review does not create an automatic stay of the trial court order under review.¹¹⁶ Even if the appellate court stays that particular order, other discovery in the case need not stop unless the disputed information is so central to the litigation as to make further discovery without it wasteful. In many cases, other proceedings in the trial court may carry on normally while the court of appeals considers the disputed order.

Even if the mandamus proceedings disrupt a particular case, the process most likely does not burden the trial court generally. During the period from January, 1988 to June, 1989, no judge subject to the jurisdiction of the Dallas court of appeals¹¹⁷ was the subject of more than four mandamus proceedings. Most had one mandamus proceeding or less pending.¹¹⁸ This modest discovery mandamus activity came at a time when those trial courts had more than 35,000 civil cases pending.¹¹⁹ During fiscal 1988, those trial

these cases, 21% had been pending for three months or less, 28% had been pending more than three months but less than six months, 26% had been pending more than six months but less than 12 months, 11% had been pending more than 12 months but less than 18 months, and 14% (6,698 cases) had been pending for more than 18 months.

Statewide, "[O]f all civil cases disposed, 28% were by non-jury trials. (Approximately 63% of these non-jury trials were in divorce cases). Of the civil cases disposed, 19.5% were family law (show cause) dispositions." Thus, the total sample includes a number of essentially uncontested cases or those in which the turnaround time is very short. JUDICIAL REPORT, *supra* note 82, at 186.

116. TEX. R. APP. P. 121(d) (allowing petitioner to request temporary relief).

117. The Dallas court of appeals handles matters originating in Collin, Dallas, Grayson, Hunt, Kaufman, Rockwall, and Van Zandt Counties. JUDICIAL REPORT, *supra* note 82, at 13.

118. The trial court judges within the jurisdiction of the Dallas court of appeals were rarely involved in mandamus actions. During the study period, 14 trial judges had one mandamus proceeding pending, six judges had two mandamus proceedings pending, two judges had three mandamus proceedings pending, and one judge had four mandamus proceedings pending. Many judges were involved in no mandamus proceedings at all.

119. JUDICIAL REPORT, *supra* note 82, at 190.

courts disposed of more than 48,000 cases.¹²⁰ Viewed in context, the discovery mandamus activity insignificantly effected overall trial court delay.

Despite theorists predictions, the availability of interlocutory review of discovery orders causes only a minor impact on court administration at the appellate and trial court levels. At the appellate level, review added a very modest number of cases that tended, in the past, not to reach the court of appeals. These cases represent a tiny percentage of the total appellate caseload. At the trial level, with current court congestion, the availability of mandamus review has an insignificant effect on pretrial delay. Although delay may occur, in that the order being reviewed may be stayed during the pendency of review, insufficient information exists to demonstrate that these delays lead to delays in case disposition. Further, other pretrial activity in the case can continue during the pendency of the mandamus proceeding. In addition, the practical impact on the trial courts as a whole is small because rarely do parties to a lawsuit seek mandamus review of a discovery order.

IV. EFFECT OF INTERLOCUTORY REVIEW OF DISCOVERY ORDERS ON THE PARTIES

While the effect of interlocutory review on the courts appears to be minor, the review process might seriously impact the litigants. The system therefore must be examined to determine its effect on the parties.

Interlocutory review of discovery orders presents many theoretical problems for litigants. The availability of review may increase the number of discovery disputes.¹²¹ In addition, wealthy litigants may use the review process to achieve delay, which tends to favor defendants, especially corporate defendants, and to harm plaintiffs, especially individual plaintiffs.¹²² In addition to delay, a wealthier litigant could use an added review procedure to increase the workload and economic pressure on a poorer litigant. The cost of the review process tends to favor wealthier litigants by increasing cost barriers to acquiring information through discovery.¹²³ Finally, the increased complexity of the discovery procedures, when interlocutory review is added to the trial court rules, tends to favor those who can afford more sophisticated, and generally more expensive, lawyers.¹²⁴

120. *Id.* at 364.

121. *Cf. Brazil, Lawyers' Views, supra* note 8, at 852 (lawyers' use of discovery disputes to achieve delay). This can be a particular problem in a big lawsuit with large institutional litigants on both sides. Such cases, however, are rare. Trubek, *The Costs, supra* note 7, at 80-81 (only 37 "megacases" out of a random sample of 1649 cases).

122. *Id.* at 853-57.

123. Brazil, *Front Lines, supra* note 8, at 225 (expense of discovery relative to case value sometimes deterred discovery); Galanter, *Landscape, supra* note 7, at 45-46 ("enlarged right of appeal . . . is a source of counters and stratagems [that] can be used effectively only by [those litigants with sufficient resources]").

124. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 98, 114-19 (1974) (repeat player advantages for those regularly involved in litigation); Graham, *The Persistence of Progressive Proceduralism*, 61 *TEX. L. REV.* 929, 939 (1983) ("increasing [procedural] complexity . . . makes it much more likely that the outcome of the case will be determined by the relative skills of the lawyers in manipulating the rules").

Existing empirical data supports some of these fears, but not all of them. First, the mere existence of a review procedure is unlikely to increase the number of discovery disputes. A study by the Federal Judicial Center sought to identify the characteristics that tended to lead to discovery disputes; the causes they discovered centered around the nature of the parties and the lawyers rather than on available discovery procedures.¹²⁵ The existence of interlocutory review, in and of itself, would not change these characteristics and, therefore, would not increase the number of discovery disputes.

The study did, however, find that certain wealth-related factors influenced the tendency of a given case to produce discovery disputes. The study found both resistance to discovery and overdiscovery greater in cases where the economic strength of the parties substantially differed.¹²⁶ The lawyers involved also possessed certain significant characteristics: lawyers who specialized in an area, particularly the defense of certain kinds of claims, tended to see themselves as specialists who knew what was supposed to be done, facing non-specialist plaintiff's lawyers who didn't. This perspective increased the tendency of the defense lawyers to resist the plaintiff's discovery requests.¹²⁷ Relative law firm size was also important. Discovery problems surfaced more often when a lawyer from a very small firm (less than ten lawyers) faced a lawyer from a large firm.¹²⁸ Since in many cases wealthier parties have greater access to these specialist or larger law firms, they will tend to engage in more discovery disputes. Finally, the study found that more discovery problems existed in cases in which lawyer access to client decision makers was limited, such as cases involving insurance companies.¹²⁹ This data supports a fear that in cases where discovery disputes frequently occur, a wealthier litigant may also be able to make strategic use of interlocutory review procedures.

One strategic use would be review brought only for purpose of delay. Studies have found a differential effect of delay on plaintiffs and defendants, as well as significant differences between plaintiffs and defendants in the deliberate use of delay. One analysis of pretrial delay concluded that "[p]arties to a lawsuit do not suffer equally from delay. In fact . . . civil . . . defendants may have considerable [advantage] to gain from protracted court processing."¹³⁰ Defendants can benefit from delay both by postponing the necessity to pay the plaintiff and by increasing the chances that the passage of time will impair the quality of evidence and make it more difficult for the plaintiff to meet her burden of proof.¹³¹ Another study also found that pretrial delay

125. J. EBERSOLE & B. BURKE, *supra* note 8, at 50-61, 69-71.

126. *Id.* at 50.

127. *Id.* at 54.

128. *Id.* at 57.

129. *Id.* at 59-60. Out of 124 reported Texas discovery mandamus cases, 21 involved insurance companies as named parties to the litigation and 38 more apparently involved litigants protected by insurance. Often, these disputes centered around the discoverability of the insurance company's investigative files. Almost half (47.6%) of the reported discovery mandamus cases involved insurance companies. *Id.*

130. PRETRIAL DELAY, *supra* note 7, at 12.

131. *Id.* at 12-13.

had a greater negative effect on plaintiffs than on defendants.¹³² Plaintiffs tended to suffer financially during the pendency of a lawsuit, while defendants did not.¹³³ Further, increased delay tended to increase stress in plaintiffs but not in defendants.¹³⁴

Perhaps because of this unequal effect of delay, researchers have found that defense lawyers have a greater tendency to use the discovery process for tactical purposes. Brazil's study of 176 Chicago area attorneys found that "defense counsel are more likely than plaintiffs' lawyers to use discovery tools for purposes of delay."¹³⁵ Brazil found a parallel difference between lawyers who tended to represent individuals and those who tended to represent corporate clients. Lawyers who devoted most of their time to representing individuals reported that delay had motivated their use of discovery in approximately 26% of their cases in the five years preceding the survey, while lawyers who devoted most of their time to corporate clients reported that delay motivated their use of discovery 46% of the time.¹³⁶ To the extent that interlocutory review of discovery orders can bring about delay, then, one may expect defendants and institutional litigants to use review to achieve delay.

In addition to delay, wealthier litigants can benefit from increased costs generated by discovery disputes. One lawyer interviewed in the Brazil study noted that "discovery gives incredible leverage to parties and firms with big resources" and said that he would "use this power to penalize opponents" whenever he could.¹³⁷ When interlocutory review increases costs,¹³⁸ wealthier litigants can use it to deter their opponents from effective discovery. The more attorney time needed to acquire information through discovery, the more expensive the information becomes. Thus, not surprisingly, the Civil Litigation Research Project found that when defendants' lawyers force plaintiffs' attorneys to spend an above average amount of time on discovery, the ratio of recovery to fees decreases, and the plaintiff receives less benefit from the litigation.¹³⁹

Interlocutory review can also benefit wealthier litigants, or at least litigants with better lawyers, to the extent that it introduces greater complexity into the lawsuit. "As the process becomes more complex, increasingly it can be used effectively only by players who can deploy the resources to play on the requisite scale."¹⁴⁰ Increasing complexity, then, has not only dollar cost, but also a cost in accuracy of outcome when the parties have lawyers of unequal abilities. Procedural complexity can mean that the relative skills of the lawyers rather than the merits of the case will determine the case's out-

132. Connolly & Smith, *supra* note 7, at 276-77.

133. *Id.*

134. *Id.* at 277.

135. Brazil, *Lawyers' Views*, *supra* note 8, at 853.

136. Brazil, *Front Lines*, *supra* note 8, at 232.

137. Brazil, *Lawyers' Views*, *supra* note 8, at 857.

138. Trubek, *The Costs*, *supra* note 7, at 112-19.

139. *Id.* at 114-16.

140. Galanter, *Landscape*, *supra* note 7, at 45-46.

come.¹⁴¹ If wealthier litigants have more resources to hire lawyers from the more prestigious segments of the legal community (and if these more expensive and prestigious lawyers are better able to cope with complex legal issues), these wealthier litigants will have a comparative advantage in an interlocutory review process.¹⁴²

The theory and information available about discovery, then, can lead us to fear that an interlocutory review process would benefit wealthier litigants.¹⁴³ The Texas data, which focuses specifically on interlocutory review of discovery orders, indicates that the process provides no significant advantages or disadvantages.¹⁴⁴ Since no data shows the comparative wealth of the parties in most cases, no direct analysis of the effect of wealth is available. I have, therefore, used two factors as surrogates for a wealth-based analysis. First, I compared the effects of the mandamus process on plaintiffs and defendants. Second, I compared the effects of the mandamus process on individuals and on institutional litigants, especially in cases where the party on one side of a lawsuit is an individual and the party on the other side is an institution. For purposes of this Article, the term "institutional litigant" includes business organizations such as corporations as well as government entities. Also, those who are nominally individuals but who are, in fact, represented by insurance companies count as institutional litigants.

First, as noted above, the data which I have examined indicates that delay has not caused a significant problem in most discovery mandamus cases. In the Dallas court of appeals, the court disposed of all of the mandamus proceedings within four months of filing, and disposed of 82% within three weeks. Even looking at reported mandamus cases, which are apt to take the longest, the court disposed of forty-one of the fifty-six cases for which time data is available within six months of the date of the trial court order. Of the fifteen cases that took at least six months to resolve, seven cases went to both the court of appeals and the supreme court, thus lengthening the time required for disposition.

A review of the substance of the discovery disputes involved in the reported and unreported cases reveal few, if any, that could be considered friv-

141. Graham, *supra* note 124, at 939.

142. Galanter, *supra* note 124, at 114-19.

143. See *supra* text accompanying notes 121-42.

144. While an interlocutory review process provides one more forum for a discovery dispute, it does not itself create the opportunity for a dispute. Thus, those who suggest decreasing the volume of mandamus cases by changing the scope of discovery or eliminating certain privileges are more likely to be successful than those who suggest tinkering with certification procedures or sanctions. In reported cases in Texas, for example, the subject matter of the disputes leading to discovery mandamus was as follows:

<u>Basis of Dispute</u>	<u>Number of Cases</u>
Privilege	74
Relevance/Burdensomeness	27
Non-Privilege Privacy	18
Other	11

Eliminating certain discovery exemptions, such as ordinary work product, would dramatically decrease the volume of discovery disputes arising out of these exemptions and, therefore, the volume of interlocutory review.

olous. No clear pattern emerges from the cases that either side uses mandamus solely to delay the litigation.

Insofar as the unsuccessful use of mandamus by a party who lost in the trial court may indicate that the party used mandamus for harassment or delay, the numbers show a somewhat greater tendency on the part of defendants and institutional litigants to use mandamus and lose. In reported cases, defendants lost in the trial court, sought mandamus, and lost in thirty-six cases. Plaintiffs, on the other hand, lost in the trial court, sought mandamus, and lost in only fourteen cases. Viewed from a perspective of individual versus institutional litigants, institutional litigants lost in the trial court, sought mandamus, and lost in twenty-five cases, while individuals did the same in only ten cases. The Dallas court of appeals statistics are somewhat more equal. Defendants lost in the trial court and unsuccessfully sought mandamus sixteen times, while plaintiffs did so eleven times. Institutional litigants lost in the trial court and unsuccessfully sought mandamus eight times, while individual litigants did so six times.

Second, the actual costs involved in a discovery mandamus proceeding tend to be small in most cases. The filing fee is only fifty dollars in the court of appeals.¹⁴⁵ The cost of the record also tends to be small, since the court of appeals often needs only copies of the relevant discovery documents and court order. Even where the court of appeals requires a transcript of a hearing, the transcript is apt to be short and inexpensive as compared to a normal appellate record. The cost of briefing can also be comparatively low. The parties will already have done much of the research needed for the mandamus review in connection with the primary discovery dispute in the trial court. Further, mandamus briefs are not subject to many of the technical rules governing formal appellate briefs.¹⁴⁶ Finally, courts dispose of many mandamus cases on the relator's motion alone shortly after filing, so the party opposing mandamus incurs no additional costs for research or briefing.

Third, while mandamus procedures introduce a new level of complexity into the litigation process, no evidence suggests that the process tends to favor one side or the other. The procedures themselves are not particularly complicated,¹⁴⁷ and the resulting case law is available in neatly packaged continuing education programs throughout the state to lawyers from all areas of practice and at all levels of competence.¹⁴⁸

Nor do the cases reflect a pattern of one-sided defendant success. If anything, the process results in more plaintiff victories. For example, out of 124

145. TEX. R. APP. P. 13 (c), 121 (a)(5).

146. Compare TEX. R. APP. P. 121(a)(2) (requiring "a brief of authorities and argument") with TEX. R. APP. P. 74, 131, 136 (requisites of briefs in normal appeals).

147. See *supra* text accompanying notes 67-72.

148. E.g., STATE BAR OF TEXAS, DISCOVERY (1990); Dorsaneo, *Discovery Developments: Scope, Privileges and Presentation of Objections*, SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW, ADVANCED CIVIL TRIAL SHORT COURSE B-1 through B-56 (1989); Orsinger, *Successful Mandamus Approaches in Discovery*, in STATE BAR OF TEXAS, ADVANCED EVIDENCE AND DISCOVERY L-1 through L-45 (1988); Keltner, *Mandamus*, STATE BAR OF TEXAS, ADVANCED CIVIL TRIAL COURSE F-1 through F-31 (1989).

reported cases¹⁴⁹ from 1983 through mid-1989, the plaintiffs gained improved results in thirty-five of the cases while defendants received improved results in thirty-two cases.¹⁵⁰ The even-handedness of the results also appears when the statistics are broken down to show who won in the trial court.¹⁵¹

<u>Won in Trial Court</u>	<u>Used Mandamus</u>	<u>Won in Ct.App.</u>	<u>Number Wins</u>
Plaintiff	Defendant	Defendant	32
Plaintiff	Defendant	Plaintiff	36
Defendant	Plaintiff	Plaintiff	35
Defendant	Plaintiff	Defendant	14

Defendants won in fifty-six cases while plaintiffs won in seventy-one cases.

If, instead of comparing plaintiffs and defendants, one looks at cases involving individual parties litigating against institutional parties, the pattern is similar:

<u>Won in Trial Court</u>	<u>Used Mandamus</u>	<u>Won in Ct.App.</u>	<u>Number Wins</u>
Individual	Institution	Institution	21
Individual	Institution	Individual	25
Institution	Individual	Individual	28
Institution	Individual	Institution	10

The institutions, then, won in thirty-one cases, while the individuals won in fifty-three cases.¹⁵²

Reported and unreported cases from the Dallas court of appeals are somewhat more pro-defendant. For example, out of thirty-four cases, plaintiffs did better in one case, defendants did better in six cases, and the court of appeals' sustained the trial court in twenty-seven cases. Of the twenty-seven cases in which the court of appeals upheld the trial court ruling, plaintiffs sought mandamus in twelve cases and defendants in twenty-two. The breakdowns, including trial court success data, also parallel reported cases:

<u>Won in Trial Court</u>	<u>Used Mandamus</u>	<u>Won in Ct.App.</u>	<u>Number Wins</u>
Plaintiff	Defendant	Defendant	6
Plaintiff	Defendant	Plaintiff	16
Defendant	Plaintiff	Plaintiff	1
Defendant	Plaintiff	Defendant	11

149. In this and all subsequent statistics regarding outcomes in reported cases in the appellate courts, I have used the following counting conventions:

1. When both a court of appeals and the Supreme Court of Texas issued opinions in the same case, I have counted only the supreme court opinion.
2. In family law cases that do not specify otherwise, I have counted the wife as the plaintiff.
3. Cases involving more than one party seeking mandamus on different grounds are counted as separate cases.

150. In 48 of the cases, the appellate court upheld trial court's decision, and in these cases the plaintiff sought mandamus on 15 occasions while the defendant sought mandamus on 33 occasions. The appellate court sent 16 other cases back to the trial court to handle miscellaneous procedural problems.

151. The following chart omits seven cases that involved third parties rather than conflicts between plaintiffs and defendants.

152. There were also 13 cases in which individuals sued individuals, and 24 cases in which institutions sued institutions.

The plaintiff, in short, won in seventeen cases and the defendant won in seventeen cases. When the data is analyzed along individual/institutional lines the results are similar:

<u>Won in Trial Court</u>	<u>Used Mandamus</u>	<u>Won in Ct.App.</u>	<u>Number Wins</u>
Individual	Institution	Institution	3
Individual	Institution	Individual	8
Institution	Individual	Individual	1
Institution	Individual	Institution	6

To summarize, individuals won in nine cases and institutional litigants won in nine cases.¹⁵³

Although plaintiffs have a greater tendency to win mandamus cases on the merits, the data shows that defendants tend to use the mandamus process somewhat more often. In reported cases,¹⁵⁴ plaintiffs sought mandamus in forty-nine cases and while defendants sought mandamus in sixty-eight cases. In the Dallas court of appeals, plaintiffs sought mandamus in twelve cases and defendants sought mandamus in twenty-two cases. In reported cases, individual litigants sought mandamus in fifty-one cases and institutional litigants sought mandamus in seventy cases. Furthermore, in the Dallas court of appeals, individual litigants sought mandamus in fifteen cases and institutional litigants sought mandamus in eighteen cases. Defendants and institutional litigants, therefore, have a slightly greater tendency to seek mandamus.

Perhaps this indicates that defendants and institutional litigants analyze "success" in mandamus cases in a way that does not equate success with a favorable decision on the merits. When the mandamus process causes desirable delay, defendants may consider the process alone successful so long as it does not result in an order allowing greater discovery by the plaintiff or increased fees and costs merely to reaffirm a defendant victory in the trial court. Viewed from this perspective, defendants may regard themselves as successful in sixty-eight of the reported mandamus cases, while they see plaintiffs as successful in only forty-nine of the cases.¹⁵⁵ If additional fees and costs are considered an insignificant burden compared to the advantage of delay, defendants may regard themselves as successful in eighty-two of the cases, while they see plaintiffs as successful in only thirty-five of the cases.¹⁵⁶ From this "success equals delay" perspective, institutions may regard themselves as having succeeded in forty-six cases versus thirty-eight successes for individuals. If the value of delay outweighs costs, institutions may perceive themselves as having succeeded in fifty-six cases with individuals succeeding in only twenty-eight cases. This kind of analysis puts a heavy emphasis on the value of very modest delays.¹⁵⁷ The success equals delay perspective

153. There were eight cases in which individuals sued individuals and seven cases in which institutions sued institutions.

154. These numbers exclude cases involving third parties.

155. See *supra* chart following note 151 in text.

156. *Id.*

157. For a discussion on the length of the delays involved, see *supra* notes 113-17 and accompanying text.

may, however, explain the tendency of defendants to use the mandamus process despite their tendency to lose on the merits and create pro-plaintiff case law. On the other hand, defendants or their lawyers may have incorrectly analyzed their ability to succeed on the merits.

In examining the effect of mandamus on the parties, one other phenomenon is noteworthy: the vast majority of the reported cases involve the plaintiff's discovery from the defendant, or an individual litigant's discovery from an institution, and not vice versa. For example, litigants disputed plaintiff's discovery from defendant in ninety-eight reported cases, while only sixteen cases involved defendant's discovery from plaintiff.¹⁵⁸ Similarly, litigants disputed an individual's discovery from an institution in sixty-six reported cases, while only thirteen cases involved an institution's discovery from an individual.¹⁵⁹ In reported and unreported cases in the supreme court in fiscal 1989, the parties disputed plaintiff's discovery from defendants in twenty-seven cases, but disputed defendant's discovery from plaintiff in eighteen cases.¹⁶⁰

Assuming that plaintiffs and individuals are the parties with the least resources and the least power outside the judicial system, these numbers reflect controversies concerning the extent to which the judicial system will even the odds by transferring information from the more powerful parties to the less powerful parties. Those with established power in society tend, in many cases, to appear in court as defendants.¹⁶¹ With the existing burden of proof most often on plaintiffs, defendants can increase their chances of winning by keeping their adversaries from getting evidence. Defendants are also less likely to find themselves in a position of having to extract evidence from opponents to prove any affirmative defenses.¹⁶² When interlocutory review results in greater information being available to plaintiffs, then, that review may benefit plaintiffs not only in the discovery process itself, but also in the outcome of the litigation.

The results of the cases indicate that overall, courts have acted to uphold or increase the transfer of information. Out of 117 reported cases in which the appellate court found the trial court's order to be reviewable by mandamus,¹⁶³ the appellate court concluded that in thirty-three cases the trial

158. Discovery from non-parties was in dispute in thirteen cases.

159. An individual's discovery from another individual was in dispute in 14 cases, while an institution's discovery from another institution was in dispute in 24 cases. Cumulatively speaking, discovery from an institution was at issue in 90 cases, while discovery from an individual was at issue in only 27 cases.

160. See Tabulation, *supra* note 94.

161. 23 C.A. WRIGHT & K.W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5422, at 674 (1980) [hereinafter WRIGHT & GRAHAM].

162. *Id.* Even when an institutional litigant appears as a plaintiff suing an individual defendant as, for example, when a corporation sues an individual on a debt, the institutional litigant tends to already have the information needed to prove its case. Contrast this with the situation of an individual injured by a defective product who needs to discover extensive information about the way in which the product was designed, manufactured, and distributed in order to prove her case.

163. There were also seven cases that the courts held to be unreviewable for various procedural reasons.

court had mistakenly denied discovery, and in thirty-six cases the trial court had correctly granted discovery.¹⁶⁴ In contrast, there were only twenty-seven cases in which the appellate court concluded that the trial court had mistakenly granted discovery, and twelve cases in which the trial court had correctly denied discovery.¹⁶⁵ Plaintiffs ended up with greater discovery than the trial court had granted, or discovery equal to that granted by the trial court, in fifty-nine cases, and with less discovery than the trial court had granted in twenty cases. Defendants, on the other hand, ended up with greater or equal discovery in ten cases, and with less discovery in seven cases. These numbers do not reflect a system which unduly favors defendants.

The won/lost records in individual mandamus cases show a tendency of the results to favor the plaintiffs. In addition, the reported case law resulting from interlocutory review of discovery orders benefits plaintiffs generally.¹⁶⁶ Before the advent of discovery mandamus, Texas had very few reported cases regarding discovery issues, and the operation of the discovery process was within the almost completely unfettered discretion of the trial judge.¹⁶⁷ The resulting atmosphere was very hostile to discovery. Young attorneys were advised that they could safely throw away opposing counsel's first discovery requests.

Older reported cases concerning sanctions reflect the lengths to which parties had to go to secure discovery. In one case, for example, the court ordered a party to produce documents on October third.¹⁶⁸ He produced some but not all of the documents on October thirteenth. On November third, opposing counsel served interrogatories seeking to discover whether the unproduced documents were within the party's possession, custody, or control. The party failed to answer these interrogatories, so opposing counsel moved for dismissal and obtained, on December fourteenth, a court order to compel answers within ten days.¹⁶⁹ The party still did not answer, and the court held a hearing on January eighth. At this hearing, the court ordered the party to answer the interrogatories by January fifteenth, and the party did so.¹⁷⁰ The party did not, however, produce the remaining documents. On

164. Of these 36 cases, 31 granted discovery to plaintiff and five granted discovery to defendant.

165. Of these 12 cases, 10 denied discovery sought by plaintiffs and two denied discovery sought by defendants. There were also 9 cases in which the appellate court sent the matter back to the trial court for further proceedings, holding that the trial court had ruled with inadequate information.

166. I am certainly aware that such case law is not the inevitable result of an interlocutory review process. See Tuchler, *Discretionary Interlocutory Review in Missouri: Judicial Abuse of the Writ?*, 40 MO. L. REV. 577, 615 (1975). However, the possibility that pro-discovery case law will result from a review process must be considered in analyzing its effect on the parties. Since the process itself appears to be largely neutral, it may indeed be the nature of the resulting case law rather than the existence *vel non* of interlocutory review that determines who is hurt or helped by the review process.

167. *Id.* at 613.

168. *Bottinelli v. Robinson*, 594 S.W.2d 112, 114 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

169. *Id.*

170. *Id.*

March ninth, the trial court held a hearing on opposing counsel's second motion to dismiss, and again declined to dismiss the suit. Instead, the court ordered the party to produce the documents by March twenty-third.¹⁷¹ Again, the party produced some but not all of the documents and the court finally imposed discovery sanctions approximately six months after the first court-ordered discovery.¹⁷²

The cases generated by the mandamus process changed the old system in a number of ways. First, the cases broadened the scope of discovery relevance. Second, the cases upheld individual privileges while narrowing institutional privileges. In doing so, the cases also stressed the need for *in camera* inspection, shifting power to the trial judge and away from the institutional defendant claiming the privilege.¹⁷³ Third, the cases created procedures making the claiming of privilege much more burdensome. Fourth, the cases put teeth into the discovery deadlines, thus combatting resistance-type discovery abuse.

As in the federal system, the Texas Rules of Civil Procedure define relevance so as to permit discovery of information that "appears reasonably calculated to lead to the discovery of admissible evidence."¹⁷⁴ In applying this test, the courts have balanced the probative value of the information sought and the burden on the party seeking discovery against the burden on the party from whom discovery is sought.¹⁷⁵ In doing this balancing, the discovery mandamus cases tend to give very little weight to the burden on defendants of producing voluminous information.¹⁷⁶ The cases also give little weight to defendants' desire for confidentiality, limiting protective orders to disclosure of current information to competitors and encouraging discovery

171. *Id.* at 115.

172. *Id.* at 117-18; see also *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242-43 (Tex. 1985) (party ignored numerous deposition notices before sanctions granted); *Jarrett v. Warhola*, 695 S.W.2d 8, 10 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd) (party repeatedly failed to respond in a timely manner to discovery requests, but numerous motions for compliance were required before court orders were entered, and two court orders were defied before court ordered sanctions).

173. See *Peeples v. Fourth Court of Appeals*, 701 S.W.2d 635, 637 (Tex. 1985) (trial court should determine whether *in camera* inspection is necessary). As Professor Graham has noted:

[i]n a society with egalitarian pretensions, the creation and justification of a privilege to refuse to respond to a judicial inquiry is essentially a political question; i.e., it is an allocation of power as between the various components of the society. At one level it involves the power of the judge against the power of the witness, and this allocation can have ramifications in terms of the power relationships of the litigants who depend upon the court for the enforcement of their rights.

WRIGHT & GRAHAM, *supra* note 161, at 673-74 (footnotes omitted).

174. TEX. R. CIV. P. 166b(2)(a).

175. *Independent Insulating Glass/Southwest, Inc. v. Street*, 722 S.W.2d 798, 803 (Tex. App.—Fort Worth 1987, orig. proc.).

176. See, e.g., *Jampole v. Touchy*, 673 S.W.2d 569 (Tex. 1984) (allowing discovery of all impact tests for 1967-79 on a variety of General Motors passenger cars in a case involving a 1976 Vega hatchback); *General Motors Corp. v. Lawrence*, 651 S.W.2d 732 (Tex. 1983) (allowing discovery of test results relating to in-cab gas tanks with protruding cab filler necks from 1949 to 1972, regardless of direction of impact, in a suit concerning a 1966 Chevrolet chassis cab truck).

sharing among plaintiffs' lawyers.¹⁷⁷

The mandamus-generated cases also changed privilege law in a way that favors individuals. One commentator distinguishes between those privileges, such as marital privileges, that protect interpersonal relationships or personal privacy, and those privileges, such as the attorney-client privilege or the party communications privilege, that institutions typically assert.¹⁷⁸ The law emerging from mandamus cases in Texas protects individual privileges while limiting those of institutions. For example, cases arising out of interlocutory review drastically narrowed the scope of work product, party communication, and expert witness privileges.¹⁷⁹ The cases also shortened the duration of work product protection by holding that protection ends when the lawsuit ends.¹⁸⁰

In cases involving individually-held privileges, on the other hand, the courts have provided more protection. For example, the supreme court rejected defendants' arguments that any plaintiff request for damages for emotional distress should subject the plaintiff to a court-ordered psychiatric examination.¹⁸¹ The courts have resisted ordering physical examinations over an individual's objection without very strong showings of good cause.¹⁸²

177. See *Garcia v. Peebles*, 734 S.W.2d 343 (Tex. 1987).

178. WRIGHT & GRAHAM, *supra* note 161, at 687. Professor Graham also notes that in most states the allocation of exemptions tends to follow the distribution of political power. Therefore, powerful institutions such as churches, government, corporations, and professions that primarily serve a monied clientele (doctors, lawyers, psychiatrists) are given privileges to preserve their secrets and those of their clients. Professions and institutions that serve analogous functions for working class people are denied such protection. For example, compare the treatment privilege law would afford to communications with tax lawyers to identical communications to a tax preparer from H&R Block. *Id.* at 675.

179. See cases cited *supra* note 58 and accompanying text. Under earlier Texas law, any communications made or information learned in the course of investigating a claim was privileged and undiscoverable. See *Ex parte Hanlon*, 406 S.W.2d 204 (Tex. 1966) (claims manager discovered the name of hit-and-run driver during course of investigation; investigative privilege prevented disclosure of name).

180. *Dewitt & Rearick, Inc. v. Ferguson*, 699 S.W.2d 692, 694 (Tex. App.—El Paso 1985, orig. proc.). Work product protection may end even earlier than completion of the action. See *Insurance Co. of North America v. Downey*, 765 S.W.2d 555, 557-58 (Tex. App.—Houston [14th Dist.] 1989, orig. proc.) (severance of bad faith claim from contract claim made work product discoverable in bad faith claim). For defendants involved in multiple related lawsuits, this may mean that a Texas plaintiff can discover all non-privileged work product, including material such as trial notebooks, data bases, and litigation support systems from related but closed cases. Because the Texas courts encourage discovery sharing among plaintiffs' lawyers, they may then be able to share information with other plaintiffs' lawyers in other related cases. See *Garcia v. Peebles*, 734 S.W.2d 343 (Tex. 1987).

181. *Coates v. Whittington*, 758 S.W.2d 749, 751-53 (Tex. 1988). A court of appeals has also ruled that when a physical or psychiatric examination is appropriate, the court may choose a neutral physician rather than the physician desired by defendants. *Employers Mut. Casualty Co. v. Street*, 702 S.W.2d 779, 780 (Tex. App.—Fort Worth 1986), *reh'g denied*, 707 S.W.2d 277 (Tex. App.—Fort Worth 1986, orig. proc.).

182. See *Manuel v. Spector*, 712 S.W.2d 219, 223 (Tex. App.—San Antonio 1986, orig. proc.) (overturning court-ordered blood test of child's grandmother in paternity case); *Walsh v. Ferguson*, 712 S.W.2d 885, 887 (Tex. App.—Austin 1986, orig. proc.) (overturning court-ordered blood and urine tests in child custody case). In part, these cases are more solicitous of individual privacy because they involve physical or mental examinations, and the discovering party must show good cause rather than simple relevance in order to justify discovery. TEX.

Even where privileges exist, the mandamus cases have made claiming the privilege more burdensome. The appellate courts put the burden on a party asserting a privilege to specifically plead the privilege, request a hearing, and then produce evidence at the hearing to substantiate the privilege claim.¹⁸³ Failure to follow these procedures resulted in a waiver of the privilege.¹⁸⁴

The discovery cases also made the assertion of privilege more difficult, and made the time deadlines in the discovery rules a reality, by finding that late responses waived the privilege.¹⁸⁵ Courts have thereby severely circumscribed a party's ability to prolong the discovery process by simply ignoring deadlines. Statistics indicate that defendants more often than plaintiffs commit this kind of discovery abuse.¹⁸⁶ Cases requiring enforcement of the deadlines will, therefore, tend more often to benefit the plaintiffs.

In summary, interlocutory review does have an effect on the parties to the litigation, but its effect depends more on the actual outcome of the cases and the resulting case law than it does on the existence of the process itself. The Texas experience shows a procedure which is relatively neutral: (1) review is available of both denials and grants of discovery; (2) the review procedure takes relatively little time; (3) the review procedure is relatively inexpensive; and (4) the review procedure introduces few new procedural complications into the litigation. A different state with a different history of discovery in the trial courts, or a different attitude toward discovery in the appellate courts, might well produce a system that benefits defendants or institutional litigants. From an outcome perspective, the Texas experience is fairly even-handed, but overall it has tended to benefit plaintiffs and individual litigants, both in the outcome of specific cases, and in the generation of pro-discovery case law.¹⁸⁷

V. EFFECT OF INTERLOCUTORY REVIEW OF DISCOVERY ORDERS ON THE ROLE OF THE COURTS

In section III, this Article examined the effect of interlocutory review on

R. Civ. P. 167a(a); *cf.* Kentucky Fried Chicken Nat'l Management Co. v. Tennant, 782 S.W.2d 318, 321 (Tex. App.—Houston [14th Dist.] 1989, orig. proc.) (plaintiffs' psychiatric records discoverable because relevant to their damage claims).

183. *Peeples v. Fourth Court of Appeals*, 701 S.W.2d 635, 637 (Tex. 1985) (procedures to preserve privilege required). These requirements have since been incorporated into the discovery rules, but the objecting party no longer has the burden of requesting a hearing. TEX. R. Civ. P. 166b(4).

184. Thus, for example, in *Weisel Enter., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986), the court held that a summary listing of documents under the heading "Attorney-Client/Attorney Work-Product" constituted no evidence that any particular document was privileged. Rather than remand the case to the trial court to hear more evidence on the privilege issue, the court held that the privilege had been waived. *Id.* at 58-59.

185. *Villarreal v. Dominguez*, 745 S.W.2d 570, 571 (Tex. App.—Corpus Christi 1988, orig. proc.) (defendant city waived privilege as to police reports by failing to timely assert privilege); *Independent Insulating Glass/Southwest Inc. v. Street*, 722 S.W.2d 798, 802 (Tex. App.—Fort Worth 1987, orig. proc.) (failure of manufacturer to file objections regarding discovery requests waived rights to protective orders).

186. *J. EBERSOLE & B. BURKE*, *supra* note 8, at 45-46.

187. *Cooper*, *supra* note 21, at 159-63. A jurisdiction can adopt a neutral system by following the model set out *infra* in the text accompanying notes 229-47.

court administration, particularly on factors such as caseloads and case processing time. This section addresses a different problem: the effect of interlocutory review on the relationship between trial and appellate courts. Appellate courts' ability to review the decisions of the trial courts, whether while the case is pending or following a final decision in the case, is a question of the allocation of power within the judicial system.¹⁸⁸ When a single trial judge can render a decision that is effectively final, judicial power is concentrated at the trial level.¹⁸⁹ When, on the other hand, the law empowers appellate courts to review the trial judge's decision, the judicial power shifts to the appellate courts.¹⁹⁰ Since appellate courts tend to act in panels of more than one judge, the shift to appellate review also tends to diffuse the decisionmaking power from a single decisionmaker to multiple decisionmakers. Increased availability of interlocutory review, therefore, would result in a shift in judicial power from trial to appellate judges. Commentators disagree about whether such a shift is desirable.

Some oppose any trend toward greater appellate review, finding that its costs outweigh its benefits.¹⁹¹ Those opposed to increased review identify the costs as: (1) increased caseloads in the appellate courts; (2) increased expense and delay for the litigants;¹⁹² (3) decreased public confidence in trial judges and decreased morale among trial judges; (4) loss of the advantage of the trial court's direct involvement with the parties; and (5) decreased deference to finality as a value in the judicial system.¹⁹³

Professor Wright fears that increased availability of review impairs the confidence of litigants and the public in the decisions of the trial courts.¹⁹⁴ The existence of review, after all, sends a signal to litigants and to society as a whole that we do not fully trust the decisions of the trial court. Others, however, note that appellate affirmation actually enhances the trial court's authority and credibility.¹⁹⁵ To the extent that appellate courts reverse trial court decisions, if the decisions were in fact incorrect,¹⁹⁶ then the system balances competing values. Many maintain that deference to the feelings

188. See Friendly, *supra* note 66, at 755-56.

189. Resnik, *Tiers*, 57 S. CAL. L. REV. 840, 860 (1984).

190. *Id.* at 865.

191. Resnik contends that the legitimacy of a system in which a single judge renders a final decision must rest on one (or more) of five assumptions: (1) trial judges tend to render "correct" or acceptable decisions, so that additional decisionmaking is unnecessary; (2) additional decisionmaking would not significantly improve the quality of the first decisions, so that the costs of increasing the number of decisionmakers outweigh its benefits; (3) procedures in the trial courts are sufficient to express society's concern about individuals and their disputes; (4) increasing the number of decisionmakers does not provide a better process by which to value individuals and their disputes; or (5) individuals and their disputes are not worth valuing more. *Id.* at 860.

192. For a discussion on the lack of empirical support for these assertions, see *supra* notes 76-119 and accompanying text. This section of the article will discuss the remaining problems raised by judicial review.

193. See Wright, *supra* note 27, at 779-82; Carrington, *supra* note 74, at 554; MACCRATE, APPELLATE JUSTICE, *supra* note 4, at 87; Rosenberg, *supra* note 28, at 662.

194. Wright, *supra* note 27, at 779-81.

195. See *infra* notes 209-10.

196. See *infra* notes 216-18 and accompanying text for a discussion of the "correctness" of appellate decisions.

and authority of the trial court does not justify allowing erroneous rulings to stand.¹⁹⁷ Further, the desire to enhance the power and prestige of trial courts cannot alone explain why appellate courts should review some trial court decisions and not others.¹⁹⁸

A second objection to appellate review concerns the loss of the trial court's superior ability to make certain decisions based on its day-to-day involvement in the case and live contacts with the lawyers and litigants.¹⁹⁹ Unquestionably, aspects of pretrial and trial procedure require a decision based on live testimony and informal contact with the lawyers not found in a written record. These requirements, however, provide an argument for adjusting the standard of review rather than for eliminating it entirely.

The empirical data indicates that the Texas courts have, perhaps unconsciously, developed a shifting standard of review that allows the trial court greater deference in areas in which the trial judge's greater access to the parties provides an advantage. First, mandamus is generally not available to review the very discretionary area of discovery sanctions.²⁰⁰ Second, appellate courts will not grant mandamus when the parties dispute the relevant and controlling facts.²⁰¹ Thus, the appellate court tends not to second guess the judge's fact-finding if the trial court applied the correct standard. Third, the appellate courts usually give greater deference to trial court rulings on relevance issues.²⁰² However, when the trial court has primarily interpreted a legal rule, and done so incorrectly, the courts of appeals show very little deference to the trial court's discretion.²⁰³

The trial judge's immediate involvement in the case may give the judge a personal investment in the dispute and its outcome so that the judge can no longer be completely impartial, thus providing a reason for making review available.²⁰⁴ The trial judges' immediate involvement in the case, then, is a

197. Redish, *supra* note 24, at 105-06; Note, *supra* note 18, at 1052.

198. *Cf.* Rosenberg, *supra* note 28, at 662 ("Conferring near-finality on trial court orders by restrictive review practices dampens the possibility of . . . abuse. But . . . , the reason is non-selective. It fails to offer criteria indicating which lower court rulings are shielded by discretion and which are not . . .").

199. *Id.* at 662-63.

200. *See, e.g.*, Street v. Second Court of Appeals, 715 S.W.2d 638, 639 (Tex. 1986) (mandamus relief for discovery sanctions inappropriate since the sanctioned party has adequate relief through appeal); Wal-Mart Stores, Inc. v. Street, 761 S.W.2d 587, 589 (Tex. App.—Fort Worth 1988, orig. proc.) (mandamus request for discovery sanctions denied since Wal-Mart had adequate remedy through appeal); Central Freight Line, Inc. v. White, 731 S.W.2d 121, 122 (Tex. App.—Houston [14th Dist.] 1987, orig. proc.) (no mandamus granted since appeal is the adequate remedy for discovery sanctions).

201. Jessen Assoc., Inc. v. Bullock, 531 S.W.2d 593, 602 (Tex. 1975); Norvell & Sutton, *supra* note 52, at 179-80.

202. *See* C-Tran Dev. Corp. v. Chambers, 772 S.W.2d 294, 296 (Tex. App.—Houston [14th Dist.] 1989, orig. proc.) (refusing to find trial judge abused discretion in relevancy determination).

203. *See* Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988) (defendant's net worth discoverable in punitive damages case).

204. Carrington, *supra* note 74, at 551. As Carrington aptly noted,

Vanity and pride of opinion are additional obstacles; even very sensitive, intelligent, and self-disciplined judges must be troubled at times by their own involvements of ego. By providing supervision, we keep the various decision

reason to limit review, but is also a reason to make review available.

A third reason for limiting appellate review derives from the value our legal system places on finality. At some point in time, the court must resolve a dispute so that the litigants can go on to other matters. As a value, finality reflects "a desire to limit the time between the eruption of a dispute, its resolution, and the implementation of a solution."²⁰⁵ Finality of judicial decisions fulfills our psychological need for repose, furthers our political desire to end government intervention in people's lives as soon as possible, and promotes the judicial system's need for stability.²⁰⁶

The goal of finality, however, competes with the goal of revisionism. Society may prefer to allow review to correct error, to give some decisions more meaning by having them made repeatedly and by more prestigious decision makers, or to give litigants a sense of being fully and fairly heard.²⁰⁷ The need for speedy final decisions, then, must be balanced against other values.

Another set of factors supports the use of appellate review. The availability of appellate review may: (1) create greater consistency in decisionmaking; (2) allow decisions to be made at a level with greater comparative ability or resources; and (3) provide a greater number of correct decisions.

In transferring power from a single decisionmaker (the trial judge) to multiple decisionmakers (the appellate judges), the judicial system allows for greater consistency and greater accountability. Individual judges with busy dockets have a limited amount of time to confer with their colleagues and agree to adopt uniform approaches to certain issues. Thus, particularly with respect to decisions that are within the trial court's discretion,²⁰⁸ litigants may receive widely divergent rulings from different judges, even in the same geographical location. Appellate review, and especially appellate review that results in reported opinions, can help to remedy this situation. If the appellate court is consistent, it can fix disparities and inequities produced by the trial courts²⁰⁹ and promote consistency among the trial level decisionmakers.²¹⁰

makers operating within an institutional framework. Remoteness of the reviewer from the firing line of trial can assure greater objectivity for the institutional process.

Id.

205. Resnik, *supra* note 189, at 854-55. So defined, finality may actually be a re-statement of the concerns already discussed. The desire for finality is, in part, an objection to delay, to procedures that add to the courts' caseloads, and to procedures that second-guess the original decision makers. *See id.* at 855.

206. *Id.* at 855.

207. *Id.*

208. Professor Rosenberg defines this trial-court level discretion as a "decision-liberating choice." Rosenberg, *supra* note 28, at 638.

209. Resnik, *supra* note 189, at 866. It is also possible, of course, that appellate review merely moves the problems of inconsistency and bias into a higher tier of decisionmaking. *Id.* The collegial nature of appellate decisionmaking and the visibility of their decisions may help to alleviate this problem. *See infra* text accompanying notes 210-12.

210. Friendly, *supra* note 66, at 758. The existence of Texas Supreme Court cases on various discovery issues, and of rule amendments enacted in response to those cases, has allowed greater consistency in the interpretation and enforcement of the discovery rules. Splits in authority, however, have occurred at the court of appeals level. *Compare* National Union Fire

Second, appellate judges have certain advantages not shared by most trial level judges that may make their decisions preferable in at least certain cases. For example, in many court systems appellate judges are more carefully selected, better paid, and possess greater job security than do trial judges.²¹¹ These advantages tend to attract more qualified potential judges to the appellate rather than the trial bench. Also, appellate judges tend to have more time for research and deliberation than do their colleagues in the trial courts. Appellate judges may have superior support services, such as bright recent law school graduates serving as law clerks, or better libraries.²¹²

The very nature of appellate decisionmaking makes it preferable in certain cases. The use of multiple judges to make appellate decisions produces a collective decision that may be better than that produced by any single judge.²¹³ Appellate decisionmaking also brings a broader base of values into operation, reducing the tendency of judicial decisions to reflect individual biases.²¹⁴ In addition, the issues involved are often more focused at the appellate level than they were in the trial court. Because of this, the briefs at the appellate level tend to identify more clearly the issue involved and may, in many cases, be better written and researched than those briefs (if any) presented to the trial judge.²¹⁵

A third factor supporting the use of appellate review is a feeling, probably unverifiable,²¹⁶ that appellate judges are correct more often than trial judges.

Ins. Co. v. Hoffman, 746 S.W.2d 305, 309 (Tex. App.—Dallas 1988, orig. proc.) (party may preserve privilege claim by objecting and requesting hearing within a reasonable time) *with National Union Fire Ins. Co. v. Hunter*, 741 S.W.2d 592, 595 (Tex. App.—Corpus Christi 1987, orig. proc.) (party wishing to preserve privilege claim must file motion specifically pleading exemption relied on). Even such splits, however, can lead eventually to consistency. For example, the supreme court has recently adopted an amendment to the discovery rules clarifying that either an objection or a motion for protective order is sufficient to preserve the party's right to assert an objection to discovery, unless the objection or motion is set for hearing. TEX. R. CIV. P. 166b(4).

211. As of September 1, 1988, the annual state salary paid to a justice of the supreme court was \$80,371. The base salary for justices of the courts of appeals was \$72,334. The Texas Government Code authorizes the counties in each court of appeals district to pay each justice a sum not to exceed \$15,000 per year for judicial and administrative services rendered in addition to the base state salary, but the total salary must be at least \$1,000 less than the state salary paid to a justice of the supreme court. See TEX. GOV'T. CODE ANN. § 51.602 (Vernon 1988); TEX. REV. CIV. STAT. ANN. art. 6813b, § 3 (Vernon Supp. 1989). The base salary of district judges was \$57,258. Various sections of the Government Code authorize the counties to supplement this salary, but the total salary of the district judges is limited to \$1,000 less than the combined yearly salary from state and county sources received by justices of the courts of appeals in whose district the district court is located. JUDICIAL REPORT, *supra* note 82, at 96-101.

212. Appellate courts in Texas have access to briefing attorneys, hired for a period of one year, and staff attorneys who generally serve the court for longer periods of time. The trial court judges, however, do not have law clerks of any kind.

213. Friendly, *supra* note 66, at 757.

214. Carrington, *supra* note 74, at 551. Of course, if the appellate judges as a group possess certain biases, appellate review will not eliminate those biases.

215. In Texas courts, motions are not often briefed at the trial level. It is more common for attorneys to appear at motion hearings bearing xerox copies of the relevant cases (sometimes with the most favorable language highlighted for the benefit of the trial judge). In mandamus proceedings, on the other hand, the rules require the petition to be accompanied by "authorities" supporting the petition. TEX. R. APP. P. 121(a)(2)(E).

216. Wright, *supra* note 27, at 782 ("There is no way to know for sure whether trial courts

Many of the factors discussed above support this feeling: appellate courts are in a position to be correct more often, and appellate courts render decisions made by greater numbers of generally more qualified decisionmakers with greater leisure and resources to make a decision.

The very existence of appellate review also supports the feeling of correctness. The system is set up on an assumption that the decisions of trial courts will sometimes need correcting, and that the decisions of the appellate courts are the ones that win in the event of a conflict between the two.²¹⁷ As Supreme Court Justice Jackson remarked, “[w]e are not final because we are infallible, but we are infallible only because we are final.”²¹⁸ Whether or not appellate decisions are correct in some Platonic sense, then, our system assumes them to be more correct than the decisions of trial courts.

In summary, the extent to which we want to allow review generally depends on whether the costs of review, namely decreasing confidence in trial courts, losing the advantage of trial judge immediacy, and delaying finality, are outweighed by the advantages of review, namely diffusion of power, consistency, and better resources to produce correct decisions. In addition, several characteristics of discovery disputes in particular make interlocutory appellate review desirable.

First, pretrial rather than trial activity has become the center of gravity in civil litigation.²¹⁹ This shift has implications for the continued vitality of the final judgment rule. Since the majority of cases settle prior to trial, pretrial decisions become effectively unreviewable if we insist on waiting until the end of trial and final judgment before allowing review. Therefore, certain kinds of pretrial orders should be subject to interlocutory review.

At the same time that activity has shifted to pretrial activity, trial judges have acquired greater and greater discretion in their rulings in discovery matters, both in traditional judicial functions and in the new judicial role of case manager.²²⁰ A great number of trial court decisions revolve around flexible concepts such as whether information is “reasonably calculated to lead to the discovery of admissible evidence”²²¹ or whether the relevance of the requested information outweighs the burden of discovery requests. Absent appellate review at a meaningful time, this exercise of discretion is effectively unreviewable. These very discretionary decisions, however, specially require review. These decisions represent the kind of decisions most apt to vary from judge to judge, and the kind most susceptible to an individual

or appellate courts are more often right.”); see also Resnik, *supra* note 189, at 855 (error correction is a problematic reason for revisionism).

217. “Finality sometimes yields to revisionism simply because we prefer decisions authored by revising judges over those issued by a first judge, and the revising judge gets his or her authority by outranking the others.” Resnik, *supra* note 189, at 856.

218. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

219. Galanter, *Landscape*, *supra* note 7, at 45.

220. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1255-58 (1980); see Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 411 (1982)[hereinafter *Managerial Judges*].

221. For example, discovery must be “reasonably” calculated to lead to admissible evidence. FED. R. CIV. P. 26(c); TEX. R. CIV. P. 166b(2)(a).

judge's biases. At least one commentator has speculated that such discretionary decisions should be made by the appellate courts.²²²

In a system where trial court decisions are unreported and have no precedential value, the creation of a body of reported appellate case law regarding discovery has substantial value. Case law on discovery promotes uniform interpretation of the discovery rules and, in time, decreases the opportunity for individual judge's biases to shape discovery outcomes. Reported decisions develop clear rules, where rules are possible, and narrow the range of judicial discretion in other areas simply by providing numerous cases finding that the trial court did or did not abuse its discretion.²²³ Such case law can be particularly helpful in a jurisdiction that has recently amended its discovery rules.²²⁴ Over time, the existence of discovery case law may even clarify the rules sufficiently so as to decrease the number of disputes in the trial court.

Appellate courts have two roles. They must settle disputes fairly in individual cases, and they must provide incentives and disincentives for various types of behavior by creating, and making public, consistent rules of law.²²⁵ These roles sometimes conflict with each other. In the context of reviewing discovery orders, however, the appellate courts serve both functions by providing corrected results in individual cases and by creating a body of cases that will guide the trial courts.

The data indicates that interlocutory review of discovery orders has not disrupted the comparative roles of the trial and appellate courts in the way Professor Wright feared. As noted above, review has not been an important source of court congestion or delay. Nor has the existence of review decreased the prestige or authority of the trial judges, who yearly make thousands of decisions not subjected to interlocutory review.²²⁶ Also, the speed with which the appellate courts handle mandamus cases minimizes the effect of the review process on finality.²²⁷ In some ways, interlocutory review actually contributes to finality when it promotes settlements or eliminates discovery issues as grounds for an ultimate appeal.

Interlocutory review of discovery orders shifts power from trial courts to appellate courts. Such a shift is appropriate, and its benefits far outweigh its costs. Appellate courts can accomplish interlocutory review without sub-

222. The commentator noted, "Is it, perhaps, time to think seriously about our widespread use of single judges to decide issues which involve so much discretion? Again, should there not be more open recognition of the fact that the wider discretions are more appropriately exercised by higher decisionmakers?" Atiyah, *supra* note 220, at 1271; see Friendly, *supra* note 66, at 755.

223. In this sense, a standard of review more stringent than "abuse of discretion" would be preferable, or at least an abuse of discretion standard that allowed a narrower range of acceptable decisions. Apparently, the Texas courts have evolved just such a system of review, although they have not clearly articulated what that standard of review is.

224. Cooper, *supra* note 21, at 162. The Texas legislature amended the discovery portions of the Texas Rules of Civil Procedure in 1984 and 1988.

225. Atiyah, *supra* note 220, at 1249-50.

226. In Dallas County, for example, trial judges participated in a minimal number of cases involving mandamus review. See *supra* note 118.

227. See *supra* text accompanying notes 113-17.

stantial loss of prestige in the trial court. Interlocutory review also allows appellate review that existed in theory but not in reality when only final trial court orders could be reviewed. In the discretionary world of discovery orders, appellate review is particularly well-suited to even out trial court inconsistencies. Interlocutory review also serves to correct trial court errors in the application of generally non-discretionary principles such as privilege rules at a time when correction can be meaningful.²²⁸

VI. WHAT MAKES THE SYSTEM WORK: A MODEL FOR INTERLOCUTORY REVIEW OF DISCOVERY ORDERS

Interlocutory review of discovery orders, accomplished through a discretionary review system, is not the demon that some fear it to be. Empirical data indicates that such review creates minimal increases in trial and appellate court delay, and provides the opportunity for the courts of appeals to impose some consistency on the trial courts' approach to discovery rulings. Although interlocutory review, in theory, allows the use of review for harassment and delay,²²⁹ the delay in fact has been minimal. Further, the case law resulting from the review process outweighs any tendency of review to benefit defendants or wealthy litigants generally.

Mandamus is not the only available model of interlocutory review of discovery orders. Certain features of this system, however, are necessary in order to provide the optimal balance of efficiency and fairness. An interlocutory review system must have six important features to avoid problems of court congestion and manipulation by wealthy litigants.

First, the system of interlocutory review should be relatively speedy, inexpensive, and procedurally straightforward. One of the dangers of interlocutory review is wealthy litigants' use of the process to increase costs and delay. A system that disposes of cases quickly and cheaply will not encourage such behavior. Disincentives to use of review for delay purposes will help both the litigants and the courts; the litigants will avoid the delay and the courts will experience a smaller caseload. Further, a procedurally simple review system avoids giving undue advantages to litigants with access to more sophisticated and (usually) more expensive lawyers. A review system that works fairly must minimize procedural obstacles that can skew out-

228. *Cf. Managerial Judges*, *supra* note 220, at 433 (Congress should amend Title 28 to allow some sort of appellate review of judges' management decisions).

229. It may be possible in any jurisdiction to structure the rules so as to discourage frivolous use of interlocutory review. A number of commentators have suggested that some sort of penalty should attach to frivolous motions or that the losing party in a mandamus action should pay its opponent's costs, including attorney's fees. Such provisions, however, will be subject to the same kind of problems that have arisen in assessing discovery sanctions generally and in Rule 11 disputes in the federal courts. The sanction problem could be particularly severe where, as here, the operative standard of review is a moving target. It is also important not to create such a disincentive to seeking review that poorer litigants will be unable to take the risk of pursuing legitimate interlocutory review. A sanction for clearly frivolous interlocutory proceedings, however, might at least deter those cases where the law is clearly against the party seeking review.

comes based on relative attorney competence rather than on the merits of the issues before the appellate court.

Second, interlocutory review must allow review of both orders granting discovery and orders denying discovery. A writ system that is used primarily to allow review of orders granting discovery over claims of privilege is not sufficient.²³⁰ Systems in which parties secure review of discovery orders through a refusal to comply with a discovery order, resulting in a contempt order from the trial court that parties can appeal immediately, are also inadequate.²³¹ Systems of review available only for grants of discovery over privilege claims favor privilege holders over the party seeking discovery: the former can obtain interlocutory review but the latter cannot. Under current law, privilege holders in civil litigation tend to be institutions rather than individuals, and tend to be among the more wealthy and powerful segments of society.²³² A review system that gives priority (that is, immediate review) to the complaints of privilege holders, but which consigns the complaints of parties seeking discovery until after final judgment, gives an advantage to those wealthy institutional litigants. They have the power to achieve more favorable results during the pretrial process; their opponents must wait. The decision to allow interlocutory review of one kind of order but not the other is a procedural choice, but one which has serious political implications.

Using contempt of court as a vehicle for achieving review has other drawbacks as well. The confused state of existing case law makes it unclear whether a civil contempt order against a party is immediately appealable.²³³ A party in contempt also runs the risk of receiving a penalty that will be found to be criminal rather than civil contempt; this would invoke the principle that appeals of criminal contempt orders review only the court's power to enter the order and not the underlying order itself.²³⁴ Even if review is available, a party choosing contempt as a vehicle for review puts itself in some jeopardy:

Resort to [contempt] would be feasible only when the party or lawyer risking punishment could count on leniency because the purpose was to

230. See Haddad, *The Common Law Writ of Certiorari in Florida*, 29 U. FLA. L. REV. 207, 224 (1977) (many cases granting certiorari to review interlocutory orders granting discovery, but certiorari from an order denying discovery more likely to be denied); Wetherington, *Appellate Review of Final and Non-Final Orders in Florida Civil Cases — An Overview*, 47 LAW & CONTEMP. PROBS. 61, 82, 84 (Summer 1984).

231. Parties seeking discovery do not have the contempt route available to them. While a person can be held in contempt for refusing to obey a discovery order, a court denying discovery has provided no order to disobey. Contempt-driven systems, then, allow review only of orders granting discovery.

232. See *supra* text accompanying notes 178-80.

233. The general rule for non-discovery matters is that a civil contempt order entered against a party, as opposed to a non-party, cannot be appealed until the end of the lawsuit. While the general rule would allow interlocutory review in discovery cases, the courts are not uniform in this approach. See *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083, 1087 (7th Cir. 1982).

234. See *Dobbs, Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 241-43 (1971); *Moskovitz, Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 780 (1943). See also *United States v. United Mine Workers of America*, 330 U.S. 258, 291-94 (1947); *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1356 (5th Cir. 1978).

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. . . . 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.²³⁵

The potentially gigantic size of the contempt sanction also makes this kind of review more available to wealthy litigants than to poorer ones.

The existence of the contempt model of review creates a one-sided review process available only to those resisting discovery. It provides that review, however, at a price that discourages its use. The litigant balances the utility and cost of immediate appeal from that litigant's perspective, rather than the trial or appellate court from the perspective of both parties and the judicial system.

A third critical feature of a manageable interlocutory review system is the discretionary nature of the review. Appellate courts should retain the option of summarily denying relief without a written opinion and without an extensive review of the merits. This system allows review to exist and it reduces the burdens on the appellate courts. States in which a party unhappy with a pretrial order can secure review of right have found a greater problem of congestion and delay.²³⁶ States with discretionary procedures, on the other hand, have achieved a better balance of access and burden.²³⁷

A fourth and related feature needed for an effective system of interlocutory review is the use of single-tier discretion. In some systems, notably in the federal courts, interlocutory review is usually unavailable unless both the

235. R. Stern, *supra* note 33, at 100-01; see also Redish, *supra* note 24, at 123 ("Such a Draconian practice exacts a high price from a party or non-party witness wishing to challenge a discovery order."). But see *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083, 1088 (7th Cir. 1982) (Posner, J.) ("Confining the right to appellate review of discovery orders to cases where the party against whom the order was directed cared enough to incur a sanction for contempt is a crude but serviceable method of identifying really burdensome discovery orders, and waiving the finality rule only for them.")

236. Korn, *Civil Jurisdiction of the New York Court of Appeals and Appellate Divisions*, 16 BUFFALO L. REV. 307, 330 (1967). Efforts to limit the availability of review in New York failed because of "widespread opposition among members of the bar." See also Project, *Appellate Division*, *supra* note 84, at 930; MACCRATE, APPELLATE JUSTICE, *supra* note 4, at 87. Further, a survey of appellate division justices revealed that 19 of the 34 justices favored the continuation of appeals as of right. *Id.*

237. Christian, *supra* note 86, at 120 ("[A]lthough mandamus is said not to be available as a substitute for an appeal, the recent decisions have allowed extraordinary relief even where the offending orders are directly appealable. This development is anomalous in theory, but appears to be healthy; it promotes substantial justice when, in the discretion of the appellate court, immediate intervention is a practical necessity. Because the remedy is discretionary on the part of appellate courts having strong motives to avoid unnecessarily increasing their caseloads, the remedy will be used sparingly."); Clifford, *Civil Interlocutory Appellate Review in New Jersey*, 47 LAW & CONTEMP. PROBS. 87, 100 (Summer 1984) (interlocutory appeals allowed "in the interest of justice" at the discretion of the appellate court); Kleinschmidt, *supra* note 85, at 110 (review by "special action procedure" that replaced the writs of certiorari, mandamus, and prohibition).

trial and appellate courts agree to immediate review. The federal discretionary review statute, for example, provides for interlocutory review of orders certified by the district judge as involving a controlling question of law about which there is substantial ground for difference of opinion, the immediate resolution of which will materially advance the ultimate disposition of the litigation.²³⁸ Under this system, either the district court or the court of appeals may deny review. District courts have almost absolute discretion in denying section 1292(b) certifications.²³⁹

A system that confines the exercise of discretion to the appellate court has several advantages. First, it is simpler. Second, it avoids the duplication of effort inherent in having two courts make a preliminary determination concerning whether an order should be appealable. Third, a single-tier system avoids requiring the trial court to try to be objective about the wisdom of its own order. Although the two-tier system is designed to cut down on the number of appealable orders, systems using a one-tier discretionary appeal have not experienced a flood of unwarranted applications.²⁴⁰

A fifth crucial feature for a system of interlocutory review is a standard of review with teeth. The value of interlocutory review declines as the standard of review is restricted and the probability of reversal is diminished, so that the review procedure becomes a source of expense and delay but not of relief.²⁴¹ If the appellate court will change few orders, the costs to the courts and parties of allowing review quickly begin to outweigh the benefits.

A more rigorous standard of review is also necessary in order to achieve the benefits review can provide in adding uniformity and predictability to the judicial system. Although discovery is traditionally within the discretion of the trial court,²⁴² the exercise of that discretion should be fairly consistent from court to court so that outcomes do not ride too heavily on the vagaries of case assignment. A court of appeals that must defer to the trial court in all but the most outrageous cases cannot effectively encourage such consistency. A court of appeals using a less deferential standard of review can,

238. 28 U.S.C. § 1292(b) (Supp. 1987). Section 1292 also has substantive weaknesses. First, it considers only efficiency; issues of hardship or injustice are not relevant to a district judge's determination of appealability. Second, case law has limited § 1292 to "extraordinary" cases, so that courts seldom grant requests for appeal under this section. *See Robbins Co. v. Laurence Mfg. Co.*, 482 F.2d 426, 429 (9th Cir. 1973) (appeal from order denying motion for summary judgment); *cf. Gellhorn & Larsen, Interlocutory Appeal Procedures in Administrative Hearings*, 70 MICH. L. REV. 109, 137 (1971) (trial judges certify interlocutory ruling in only one-tenth of one percent of all cases; § 1292(b) thus mere "crack in the otherwise impenetrable wall insulating trial court procedures for appellate review").

239. *D'Ippolito v. Cities Service Co.*, 374 F.2d 643, 649 (2d Cir. 1967) (mandamus never appropriate to compel district judge to certify appeal under § 1292(b)).

240. R. STERN, *supra* note 33, at 89 (all four of the arguments encompassed in paragraph in text are noted in Stern).

241. Cooper, *supra* note 21, at 159.

242. *Cf. Tuchler, Discretionary Interlocutory Review in Missouri: Judicial Abuse of the Writ?*, 40 MO. L. REV. 577, 579 (1975) ("When a trial judge has discretion in the administration of procedural rules, the exercise of discretion may be the result of the most improper motives and have nothing to do with his attitude concerning the proper conduct of trial, but this decision normally stands if it is of a type generally considered within the range of allowable discretion").

through case law and through decisions in individual cases, create guidelines for discovery and correct deviations from those guidelines.

Finally, interlocutory review should be a one-track procedure. A party wanting interlocutory review of a discovery order should seek relief through a single recognized avenue of discretionary review. Contrast this with other systems, where multiple, overlapping and conflicting routes of review are available. In the federal courts, for example, a party seeking interlocutory review must sort through the statutory morass of certification under section 1292, certification under Rule 54(b) of the Federal Rules of Civil Procedure, and applications for writ of mandamus.²⁴³ A party seeking interlocutory review must also contend with the court-made exceptions to the final judgment rule: the collateral order doctrine,²⁴⁴ the hardship exception,²⁴⁵ the death knell doctrine,²⁴⁶ and the use of a contempt order to allow immediate review.²⁴⁷ The existence of multiple avenues of review encourages litigants to seek review under a variety of rules, increasing costs to the litigants and workload for the appellate courts. The complexity such a system generates also tends to favor those able to afford sophisticated lawyers who can cope with the tangled options, and who know how to circumvent the final judgment rule.

VII. CONCLUSION

Interlocutory review of discovery orders is not as bad as the commentators feared, but is it good? No empirical data is available to determine whether or in what way interlocutory review affects trial outcomes or settlement agreements. Some things, however, can be said. Interlocutory review of discovery orders would add a modest number of cases to appellate caseloads at a time when the trend is to contract the jurisdiction of appellate courts. The benefits of interlocutory review, however, outweigh this small increase in workload. Interlocutory review provides (1) increased dissemination of information relevant to litigation; (2) more even dissemination of relevant information between plaintiffs and defendants; (3) greater protection for genuinely privileged information; and (4) more accurate use of the discovery rules. Without interlocutory review, litigants seldom possess an effective way to modify a discovery order that erroneously denies or grants discovery. While this kind of practical finality of trial court orders may foster efficiency, it also promotes unfairness to a party aggrieved by a discovery

243. The federal courts occasionally use writs of mandamus to correct discovery orders. See *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). The federal courts, however, tend to limit mandamus to instances of significant erroneous practice that the appellate court finds likely to recur. Redish, *supra* note 24, at 114.

244. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949).

245. *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 204-05 (1848).

246. *United States v. Wood*, 295 F.2d 772, 776-78 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962). *But see* *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-76 (1978) (rejecting death knell doctrine in context of denial of class certification).

247. In the words of one commentator, "there are occasions when inelegance in the legal system works, but this is definitely not one of those occasions." Rosenberg, *infra* note 248, at 172.

order. Unquestionably, courts must concern themselves about efficiency and delay. However, "courts are about something more fundamental than saving money or operating smoothly and speedily. While expeditiousness is surely a goal to be pursued by the courts, few would argue that it is the only goal."²⁴⁸

Interlocutory review of discovery orders is beneficial. It can particularly help in jurisdictions where the appellate judges possess significantly superior qualifications and tenure than the trial judges. It will be less disruptive to the appellate courts in jurisdictions where the appellate courts are adequately staffed with judges and support staff and use efficient court management techniques.²⁴⁹ Interlocutory review can also particularly help in providing guidance to trial courts in areas where the law is uncertain as, for example, where a jurisdiction has recently amended the discovery rules.²⁵⁰

All things considered, apoplexy²⁵¹ is not in order. Interlocutory review of discovery orders has not created significant burdens or delays in either the trial or appellate courts. While defendants and institutional litigants have a tendency to use review more, they win it less. Further, interlocutory review allows the appellate courts to circumscribe the scope of trial court discretion in discovery matters in a way that should make the rulings on discovery issues more uniform throughout the jurisdiction. Interlocutory review of discovery orders is not a procedure from hell but a match made in heaven.

248. MAHONEY, *supra* note 9, at 206, (quoting T. Church, *From the Editor*, 12, No. 1, 6 (1987)); see also Rosenberg, *Court Congestion: Status, Causes, and Remedies*, in H.W. JONES (ed.), *THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* (1965) ("Slow justice is bad, but speedy injustice is not an admissible substitute").

249. Appellate courts may be able to utilize support personnel, such as staff attorneys with longer tenure than one-year law clerks, to become expert in original proceedings and in the law governing discovery disputes. They may also develop streamlined procedures for handling interlocutory review issues. This combination of clear procedures and accumulated expertise may help decrease the burden that the appellate courts feel because of what they perceive as the "emergency" nature of mandamus practice.

250. Cooper, *supra* note 21, at 163 ("Important procedural innovations may warrant special patterns of review during the early years").

251. See *supra* text accompanying note 3.