# UNIFORM CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] (1995)

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*WITH PREFATORY NOTE AND COMMENTS*



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## PREFATORY NOTE

### The Problem Addressed by The Uniform Act/Rule

Since the announcement in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) that federal courts in nonfederal matters would be required to follow state law rather than some general common law, the federal courts have often been faced with the difficult problem of ascertaining state law when there is no controlling state constitutional provision, state statute or definitive state appellate judicial decision on the matter. In such circumstances, the federal courts have been forced to guess what the state court might rule if the precise issue of law were presented to it. Such speculation invited divergent answers to unsettled questions of state law from the federal courts and worked to undermine the two major purposes of the *Erie* doctrine; that is, the "discouragement of forum-shopping and the avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). Essentially the same problem confronts a state appellate court when it determines that the law of another State should control the resolution of a key issue of law in a case pending before it, but where there is no controlling constitutional provision, statute or appellate decision in that other State on that issue of law.

The federal courts sought to try to avoid the problem by developing an abstention doctrine whereby the federal courts refrained from acting while the litigants attempted to obtain from the state court a definitive statement of the state law. This proved to be quite unsatisfactory. *See* 1A *Moore's Federal Practice* ¶ 0.203.

### The History of the Use of Certification

Dissatisfaction with the use of the abstention doctrine led to efforts to find an alternative solution to the problem that also served the interests of cooperative judicial federalism. As a result, federal courts confronting issues of unsettled state law began to explore ways by which such issues could be submitted to, and answered by, the appropriate state court.[1] This process, known as "certification,"

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[1] The certified question of law has a long history in the United States and the English-speaking world. The British Law Ascertainment Act of 1859 provided for certification of questions of law within the British Empire, while the Foreign Law Ascertainment Act of 1861 made provision for certification of questions to foreign

has worked well to the extent it has been used. Among the various jurisdictions that have attempted to utilize certification, however, there are substantial differences in the procedures developed to accomplish the certification process. Where the procedures for certification have been relatively simple, and the appropriate state court has cooperated by agreeing to answer the question, certification has proven to be a more rapid and orderly method for handling the problem than the use of the abstention doctrine by the federal courts.

Over 35 years ago, the United States Supreme Court urged the use of the certified question by the Court of Appeals for the 5th Circuit, *Clay v. Sun Insurance Office*, 363 U.S. 207, 212 (1960). Three years later, the 5th Circuit expressed its approval of certification in *Green v. American Tobacco Co.*, 325 F2d 673 (5th Cir. 1963). In *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), the United States Supreme Court again endorsed the use of certification by the federal courts in cases involving doubt as to issues of state law. While the Court noted that it did not mean to suggest that certification was obligatory in such cases, it made clear its strong approval of the use of certification, stating: "It [certification] does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Brothers*, 416 U.S. at 391 (footnote omitted).

When, prior to the 1991, federal district courts took it upon themselves to decide issues of unsettled state law, a majority of the federal Courts of Appeals gave deference to those decisions when reviewing such issues on appeal. This "rule of deference" was ended by the decision of the United States Supreme Court in *Salve Regina v. Russell*, _____ U.S. _____ 111 S.Ct. 1217 (1991). Holding that the federal Courts of Appeals are required to independently review such state law issues, the Court expressly rejected the notion upon which the "rule of deference" was based; that is, that federal District Courts were better able to "intuit" answers to unsettled questions of state law than the federal Courts of Appeals. *Salve Regina College*, _____ U.S. _____, 111 S.Ct. at

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states. 9 *Halsbury's Statutes of England* (2d ed.) 58206. Within the federal court system, the Courts of Appeals and the Court of Claims have by statute been permitted to certify questions to the United States Supreme Court pursuant to 28 U.S.C. Secs. 1254-1255. *See* Moore and Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 Va. L. Rev. 1 (1940). In addition, a great number of states have provided for certified questions within their court systems. At least two state supreme courts have held that they need no express grant of jurisdiction to answer certified questions form the federal court. *Shebester v. Triple Crown Insurers*, 826 P2d 603 (Okla. 1992); *Scott v. Bank One Trust Co.*, 577 NE2d 1077 (Ohio 1991).

1225. Thus, the Court further encouraged the federal trial courts to use certification when confronted with issues of unsettled state law.

The federal District Courts and federal Courts of Appeals have been increasingly relying upon certification to ascertain uncertain state law. A 1994 American Judicature Society study of all federal circuit court appellate decisions published since 1990 showed the importance of the certification process to the federal circuit appellate courts.[2] For example, the study revealed that the federal Court of Appeals for the 11th Circuit granted 90% of the certification applications it received. By comparison, the federal Court of Appeals for the 10th Circuit, which granted the lowest percentage of such applications, nevertheless granted more than a third of the certification applications submitted to it (34%).

## Need for Uniformity

Since the certification of a question of law involves more than one jurisdiction, the development of procedures for certification raises important issues of sovereignty, comity, and efficiency in the relationships between individual States and between the state and federal courts.

As of 1994, 44 state supreme courts and the Court of Appeals for the District of Columbia were authorized by constitutional provision, statute or court rule to answer certified questions of law from other courts. Of these, 19 States and the District of Columbia adopted the earlier versions of the Uniform Certification of Question of Law Act or amended versions of them. Nevertheless, the certification process is not utilized as frequently as it could and should be. One of the main reasons for this is that there is still widespread lack of uniformity in the laws of the various jurisdictions which authorize their courts to send and answer certified questions of law to and from other courts. A leading commentator argues that inconsistency of statutory language among the States has significantly impeded the use of certification.[3]

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[2] J. Goldschmidt, "Results of A National Survey of Federal Judges and State Supreme Court Justices Regarding Certification of Questions of Law," American Judicature Society, (Nov. 1994).

[3] Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 JOURNAL OF LEGISLATION 127, 183 (1992). *See also*, Ira P. Robbins, *Interstate Certification of Questions of Law: A Valuable Process in Need of Reform*, 76 JUDICATURE 125 (1992); John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VANDERBILT LAW REVIEW 411 (1988).

The Uniform Act/Rule provides a relatively simple and efficient means by which federal courts and state appellate courts can efficiently obtain answers to questions of law from the highest court of the controlling State.[4] Where adopted, it would allow a federal court or state appellate court, having determined that the law of another State controls a controversy, to avoid guessing what that law is when there is no definitive answer in the law of the controlling State. Instead, the court would simply certify the question of law to the highest court of the controlling State.

A combined *Erie* and state conflicts problem can also be handled under the Uniform Act/Rule. For example, a federal court sitting in State A might decide that the *Erie* doctrine applies so it should look to the law of State A on a problem. The federal court might then decide that the court in State A, under its conflicts of law rules, would look to the law of State B for the solution of the legal problem. Under the Uniform Act/Rule, the federal court in State A can ask the court in State B to answer the unsettled issue of its law on the point.

It is reasonable to expect that the goal of encouraging courts to certify questions of law in appropriate cases will be advanced as judges and lawyers become more aware of and familiar with the certification process. To this end, uniformity of law in this area is highly desirable in that it is likely to result in the greater use of certification.

## Adopted by Legislature or Court

The Conference has promulgated the Uniform Act/Rule for certified questions in a form which can be enacted by a legislature or adopted by a court as a rule. In some jurisdictions, action by the highest court will suffice with no legislative action required.

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[4] The inclusion of certain bracketed language in sections 1, 2, and 3 of the Uniform Act/Rule would also authorize the state appellate court to certify questions of law to a tribal court or answer questions of law from a tribal court. In addition, bracketed language in Sections 2 and 3 would, if included in the Act or Rule, authorize certifications to, and answers to questions from, appropriate courts in the jurisdictions of Mexico and Canada.

# UNIFORM CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] (199__)

**SECTION 1. DEFINITION[S].** In this [Act] [Rule]:

(1) "State means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

[(2) "Tribe" means a tribe, band, or village of native Americans which is recognized by federal law or formally acknowledged by a State.]

**Comment**

A section containing definitions was not part of the 1967 Act. The definition of "State" is consistent with that used in other Uniform Acts.

The section affords States the option of authorizing a state court to certify questions to a tribal court or answer questions from a tribal court. However, it does not purport to authorize tribal courts to certify or answer questions. Tribal law determines whether the tribal court may certify question to a state court or answer a question from a state court. A Tribe can adopt this Act as enabling legislation by simply replacing references to "this State" with "this Tribe" and by substituting the name of its highest court for the "Supreme Court" in Sections 2 and 3.

The definition of "Tribe" is broad and is intended to include both Native American tribes in the technical sense of that term and other Native American governmental units that perform functions similar to a tribe. The option of limiting the definition of "tribes" to those listed in 25 C.F.R. Part 2 was rejected because that list does not include certain Native American governmental units that have existing court systems.

**SECTION 2. POWER TO CERTIFY.** The [Supreme Court] [or an intermediate appellate court] of this State, on the motion of a party to pending litigation or its own motion, may certify a question of law to the highest court of another State [or of a tribe] [or of Canada, a Canadian province or territory, Mexico, or a Mexican state] if:

(1) the pending litigation involves a question to be decided under the law of the other jurisdiction;

(2) the answer to the question may be determinative of an issue in the pending litigation; and

(3) the question is one for which an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.

**Comment**

This section replaces Section 8 of the 1967 Act. This revision organizes the Act so that the Power to Certify is set forth prior to the Power to Answer which makes the order of the Act easier to follow. Although limiting the power to certify to the highest court of a State would reduce the number of courts that could certify and correspondingly reduce the number of certified questions, the bracketed language from the 1967 Act authorizing certification by intermediate appellate courts is retained. The receiving court has the discretion to accept or reject a certified question and can use this power to avoid being burdened by an excessive number of certified questions.

As noted in the Comment to Section 1, this section affords States the option of permitting certification of a question of tribal law to a tribal court having the power to answer such questions.

Also included as an option is the bracketed language in this section and in Section 3 permitting certification to and from Canada, a Canadian province or territory, Mexico or a Mexican state. Because the concept of certification to and from international tribunals and courts of other nations still presents numerous uncertainties, this section does not include such other tribunals and courts at this time. Obviously, the enacting State is free to include any other courts it may choose.

The provisions of Section 8 of the 1967 Act have been revised to make it clear that certification is appropriate only when there is no "controlling constitutional provision, statute or appellate decision" in the receiving State. This language replaces the term "controlling precedents" as used in the 1967 Act.

The 1967 Act's standard that a question may be certified if it "may be determinative of the cause" was revised to require that it "may be determinative of an issue in the pending litigation." A stricter standard requiring that the question "must be" or "is" determinative of the issue or the cause was rejected due to concerns that a "must be" or "is" standard would spawn satellite controversies over whether the question was properly certified in light of the ultimate outcome of the underlying litigation.

**SECTION 3. POWER TO ANSWER.** The [Supreme Court] of this State may answer a question of law certified to it by a court of the United States or by [an appellate] [the highest] court of another State [or of a tribe] [or of Canada, a Canadian province or territory, Mexico, or a Mexican state], if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State.

**Comment**

This section replaces Section 1 of the 1967 Act. Revisions were made to this section to make it consistent with the "Power to Certify" section. The existence of a controlling constitutional provision, statute or appellate decision in the receiving State is a barrier to answering a certified question.

This section has been revised to replace the previous list of federal courts with the term "a court of the United States." This is intended to permit a court in a State adopting the section to answer questions certified by any United States court including bankruptcy courts. Ultimately, the receiving court retains the power to accept or reject a certified question so that it can control its docket even though the number of courts from whom it may receive a certified question has been expanded.

In dealing with the phrase "[an appellate] [the highest] court of another State . . ." appearing in this section, an adopting jurisdiction should select one or the other of the bracketed alternatives. This Act seeks to promote the widest possible use of the certification process in order to promote judicial economy and the proper application of a particular jurisdiction's law in a foreign forum. For this reason, it is suggested that the first alternative be adopted. The term "appellate court" here contemplates any appellate court that has the ability to issue an officially published opinion with precedential effect in a jurisdiction; the term would not include, for example, a general trial court that has appellate jurisdiction from a limited trial court but whose rulings are not officially reported as precedent.

In view of the discretion vested by the Act in the receiving court to accept or reject questions, a reciprocity requirement is not included in the Act. However, in determining whether to accept a certified question, the receiving court may consider among other factors, whether the highest appellate court of the State from which the certification order is issued has authority to answer a certified question of law from an appellate court of the receiving State under essentially similar provisions.

**SECTION 4. POWER TO REFORMULATE QUESTION.** The [Supreme Court] of this State may reformulate a question of law certified to it.

**Comment**

This section is new and authorizes the receiving court to "reformulate" the certified question. Requiring a question to be answered precisely as it is certified imposes a counterproductive rigidity that could decrease the utility of the answer received. Permitting the receiving court to amend the certified question freely may also adversely affect the utility of the answer and result in the issuance of an advisory opinion. The term "reformulate" is intended to connote a retention of the specific terms and concepts of the question while allowing some flexibility in restating the question in light of the justiciable controversy pending before the certifying court.

**SECTION 5. CERTIFICATION ORDER; RECORD.** The court certifying a question of law to the [Supreme Court] of this State shall issue a certification order and forward it to the [Supreme Court] of this State. Before responding to a certified question, the [Supreme Court] of this State may require the certifying court to deliver all or part of its record to the [Supreme Court] of this State.

**Comment**

This section replaces Section 4 of the 1967 Act. The title of the section has been amended to indicate that the section deals not only with the issuance of the order but also with the handling of the record. The first sentence is deliberately less specific so as to accommodate different procedures that may exist in the courts of the various States.

**SECTION 6. CONTENTS OF CERTIFICATION ORDER.**

(a) A certification order must contain:

(1) the question of law to be answered;

(2) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose;

(3) a statement acknowledging that the [Supreme Court] of this State, acting as the receiving court, may reformulate the question; and

(4) the names and addresses of counsel of record and parties appearing without counsel.

(b) If the parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order.

**Comment**

This section replaces Section 3 of the 1967 Act. It makes three changes. First, it provides that the order must expressly permit the receiving court to reformulate the question certified to it. Second, the new section requires that the certification order state the names and addresses of counsel of record and of unrepresented parties. This is intended for the convenience of the receiving court. Third, it requires the parties to attempt to agree on a statement of facts to be included in the certification order and requires the certifying court to determine the relevant facts and state them if the parties cannot agree.

This section applies to certification orders being issued to an adopting jurisdiction. Under the second sentence of Section 8 of this Act, the contents required in a certification order being sent by an adopting jurisdiction to another jurisdiction are governed by the rules and statutes of that receiving forum.

**SECTION 7. NOTICE; RESPONSE.** The [Supreme Court] of this State, acting as a receiving court, shall notify the certifying court of acceptance or rejection of the question and, in accordance with notions of comity and fairness, respond to an accepted certified question as soon as practicable.

**Comment**

This section is new and is intended to promote communication between the receiving and certifying court and to urge the receiving court to afford priority to answering certified questions of law consistent with notions of comity and fairness. The receiving court, may, but is not obligated to, advise the certifying court of the reasons for a rejection.

**SECTION 8. PROCEDURES.** After the [Supreme Court] of this State has accepted a certified question, proceedings are governed by [the rules and statutes governing briefs, arguments, and other appellate procedures]. Procedures for certification from this State to a receiving court are those provided in the rules and statutes of the receiving forum.

**Comment**

This section replaces Sections 6 and 9 of the 1967 Act.

**SECTION 9. OPINION.** The [Supreme Court] of this State shall state in a written opinion the law answering the certified question and send a copy of the opinion to the certifying court, counsel of record, and parties appearing without counsel.

**Comment**

This section is substantively the same as Section 7 of the 1967 Act. The Act contemplates an officially published opinion which will have precedential effect in the receiving State.

**SECTION 10. COST OF CERTIFICATION.** Fees and costs are the same as in [civil appeals] docketed before the [Supreme Court] of this State and must be equally divided between the parties unless otherwise ordered by the certifying court.

**Comment**

This section is substantively unchanged from Section 5 of the 1967 Act.

**SECTION 11. SEVERABILITY.** If any provision of this [Act] [Rule] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] [Rule] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] [Rule] are severable.

**Comment**

This section is substantively the same as Section 10 of the 1967 Act.

**SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** This [Act] [Rule] shall be applied and construed to effectuate its general purpose to make uniform law with respect to the subject of the [Act] [Rule] among States [enacting] [adopting] it.

**Comment**

This section is substantively the same as Section 11 of the 1967 Act.

**SECTION 13. SHORT TITLE.** This [Act] [Rule] may be cited as the Uniform Certification of Questions of Law [Act] [Rule] (1995).

**Comment**

This section is substantively the same as Section 12 of the 1967 Act.

**SECTION 14. EFFECTIVE DATE.** This [Act] [Rule] takes effect on _____.

**Comment**

This section is substantively the same as Section 13 of the 1967 Act.