1992

Interstate Certification of Questions of Law: A Valuable Process in Need of Reform

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Interstate certification of questions of law: a valuable process in need of reform

Although many states have adopted portions of the Uniform Certification of Questions of Law Act, state-to-state variations thwart the goals of judicial economy, uniformity, and comity among states. An improved act would create consistency and promote greater use of interstate certification.

by Ira P. Robbins

Certification is a state statutory device that allows state courts to answer questions of their own state law where no controlling precedent exists. The statute may make certification available in both federal diversity cases and in the state-to-state context.

In 1967, the National Conference of Commissioners on Uniform State Laws, with the American Bar Association, proposed the Uniform Certification of Questions of Law Act[1] ("U.L.A.") to promote uniformity and consistency in the administration of the certification process between courts. The U.L.A. long ago achieved widespread acceptance in federal diversity cases. In this context, the process resolves many of the problems associated with the *Erie* doctrine.[2]

Courts, however, utterly fail to use the certification process in the state-to-state context to alleviate many of the procedural burdens stemming from difficult and confusing choice-of-law problems. Moreover, while many states have adopted substantial portions of the U.L.A., these states have either omitted or expanded upon certain of the act's provisions, thwarting its commendable goals of uniformity and interstate certification.[3]

This article addresses the merits of certification and encourages universal enactment of an improved U.L.A. The proposed act seeks to surpass the current U.L.A. by establishing mandatory uniform legislation, thereby creating consistency among state-certification procedures. This new uniformity should further the goals of comity and expedience while simultaneously making both interstate and federal diversity certification more accessible. In part, the proposed legislation seeks to accomplish these tasks by mandating that equivalent state courts be the only ones with the power to certify and answer such questions.

The proposed act also requires consistency in the types of questions certified and answered, as well as in the time limits for responding. With newly enforced uniformity, the benefits of both interstate and federal-to-state certification will be more fully realized than under the current patchwork system.

Origins of interjurisdictional certification

Certification allows certifying courts to obtain answers to difficult, previously unaddressed questions of law, or to questions of law with no controlling precedent. These questions typically arise when courts must decide cases based on another jurisdiction's law. Specifically, the certifying court presents the question to the court best suited to answer the question, or to a

This article is adapted from Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 JOURNAL OF LEGISLATION 127-186 (1992).

1. *See* Unif. Certification of Questions of Law Act, 12 U.L.A. 52 (1967).

2. Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 49-51 (1975) (finding certification as more rapid method of solving *Erie* problems than abstention doctrine). *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (requiring federal courts in nonfederal matters to follow substantive state law); *see also* Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941) (holding that federal courts may abstain from exercising jurisdiction in cases involving state law).

3. For general discussions of certification, see Corr and Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411 (1988) (discussing arguments for and against certification and concluding with empirical study of state and federal judges); Roth, *Certified Questions from the Federal Courts: Review and Re-proposal*, 34 U. MIAMI L. REV. 1 (1979) (discussing certification in the federal-to-state context); Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629 (1951) (presenting pre-U.L.A. views on certification). *See also* Seron, CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES (1983).

higher court within the same jurisdiction. In the past, however, different jurisdictions in both the United States and Great Britain have adopted disparate forms of this procedure. The promulgation of divergent acts and rules limited the use and thwarted the development of the certification process. The current U.L.A. attempts to unify the various certification processes in order to create consistency of application irrespective of the certifying or answering court.

The concept and use of interjurisdictional certification developed relatively recently in American jurisprudence. Prior to formulation of the U.L.A., some scholarly work had been done in the area, primarily by Allan Vestal, then professor of law at the University of Iowa and one of the commissioners on uniform state laws. This early research and thinking formed the basis for many of the policies ultimately realized in the U.L.A. The contributions of Professor Vestal and other academicians to the development of the contemporary certification process cannot be underestimated.

The British experience was one of the sources for the commissioners' ideas on interjurisdictional certification and suggested methods for implementing such a system in the United States. Under both international and interstate conflict-of-laws doctrines, it often becomes necessary to discover and apply the law of a foreign jurisdiction to determine the rights of the litigants in the forum. The uniform law commissioners vigorously debated ways to rectify this problem. To support their ideas, the commissioners looked to the British Law Ascertainment Act of 1859[4] and the Foreign Law Ascertainment Act of 1861.[5]

The British Law Ascertainment Act permitted courts in one part of the British Commonwealth to remit cases for an opinion on a question of law to courts in another part of the Commonwealth. The Foreign Law Ascertainment Act allowed questions of law to be certified between British courts and courts of foreign countries, provided that each country had signed a convention governing such procedure.[6] The precepts of the U.L.A. find their basis in these acts. The conflict-of-laws provisions of both the U.L.A. and the British acts serve the same purpose: clarification of nonforum law when necessary to the resolution of a case.

Both British acts provide that statements of the facts, either agreed to by the parties or set forth by the court, must accompany certified questions. The acts also mandate the binding nature of opinions rendered by answering courts, although certifying courts may resubmit opinions to answering courts "on any ground whatsoever" if the former doubt the opinion's accuracy. In contrast, answering courts in the United States receive greater deference, because the U.L.A. refused to allow for remittiturs to answering courts.

Within the United States, Florida, Hawaii, Maine, and Washington had adopted interjurisdictional certification procedures prior to the promulgation of the U.L.A.[7] The commissioners patterned the U.L.A. largely on Florida Appellate Rule 4.61 (in addition to British law), as Florida had enacted the first interjurisdictional procedure in the United States.[8] Despite the existence of this certification procedure in Florida since 1945, and Professor Vestal's pioneering 1951 article describing its benefits, the four state certification statutes lay dormant until 1960, when the U.S. Supreme Court authorized their use in *Clay v. Sun Insurance Office, Ltd.*[9] Soon thereafter, the Supreme Court employed the procedure in *Aldrich v. Aldrich*[10] and *Dresner v. City of Tallahassee.*[11] In these two cases, the Court certified questions of law to the Florida Supreme Court. This action brought the certification procedure to the attention of the U.S. Court of Appeals for the Fifth Circuit, which used the Florida statute in *Green v. American Tobacco Co.*,[12] *Hopkins v. Lockheed Aircraft Corp.*,[13] and *Life Insurance Co. v. Shifflet.*[14] Maine had also used the procedure in *In re Richards*[15] and *Norton v. Benjamin*[16] prior to the adoption of the U.L.A.

Benefits of interjurisdictional certification

Proponents of the certification process praise it for promoting judicial economy, comity, ease of application, fairness to litigants, and—most importantly—for avoiding judicial guesswork.[17] Proponents also maintain that,

4. British Law Ascertainment Act, 22 & 23 Vict., 1859, ch. 63 (Eng.).

5. Foreign Law Ascertainment Act, 24 & 25 Vict., 1861, ch. II (Eng.).

6. The Act of 1861 was never used, because no such conventions were ever signed; it was finally repealed in 1976. *See* Statute Law (Repeals) Act 1973 (Colonies) Order 1976 (SI 1976 No. 54). Despite the fact that these acts apparently met with little success, the basic principles provide a useful foundation for the U.L.A. *See* Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 49 n.1 (1975).

7. FLA. STAT. §25.031 (1945) (amending FLA. APP. R. 9.150 and 4.61); HAW. REV. STAT. ch. 214, §§26-27 (1955); ME. REV. STAT. ANN. tit. 4, §57 (WEST 1964) (amended by Rule 76 B.M.R.C.P.); WASH. REV. CODE ANN. §2.60.020 (West Supp. 1975) (originally enacted at 1965 Wash. Laws, ch. 99, §1).

8. Paragraph (a) of Florida Appellate Rule 9.150, amending Rule 4.61, reads:
"Discretionary Proceedings to Review Certified Questions From Federal Courts.
(a) Applicability. Upon either its own motion or that of the party, the Supreme Court of the United States or the United States Court of Appeals may certify a question of law to the Supreme Court of Florida whenever the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida."
FLA. APP. R. 9.150(a) (1945). Florida Chief Justice Leander J. Shaw, Jr., recently commented on the success of Rule 9.150, calling it one of the "many examples of positive state/federal cooperation." Shaw, Remarks at the 1991 Eleventh Circuit Judicial Conference (May 25, 1991), at 4.

9. 363 U.S. 207 (1960) (certifying questions involving state law to Florida Supreme Court to avoid resolving constitutional issue). *See* Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 50 (1975). Hawaii's statute had not been used prior to *Clay*. Maine's and Washington's statutes were adopted after *Clay*.

10. 375 U.S. 75 (1963) (certifying four questions to Florida Supreme Court in alimony case on certiorari from West Virginia Supreme Court of Appeals).

11. 375 U.S. 136 (1963) (certifying questions to Florida Supreme Court concerning issue of Florida lower court power to review cases from state circuit court). Exactly why the Supreme Court authorized the Fifth Circuit to certify the questions in *Clay* but certified the questions itself in *Aldrich* and *Dresner* is unclear. Perhaps the Court thought that certifying the questions itself would save time for the litigants.

12. 304 F.2d 70 (5th Cir. 1962) (certifying questions to Florida Supreme Court regarding proper construction of Florida law concerning whether absolute liability applied to manufacturer or producer of cigarettes), *certified questions answered in* 154 So. 2d 169 (Fla. 1963), *cert. denied*, 377 U.S. 943 (1964).

13. 358 F.2d 347 (5th Cir. 1966) (certifying questions of state law to Florida Supreme Court in diversity case involving Florida's application of Illinois wrongful-death statute).

14. 370 F.2d 555 (5th Cir. 1967) (certifying questions to Florida Supreme Court concerning proper construction of Florida Insurance Code).

15. 253 F. Supp. 913 (D. Me. 1966) (certifying questions of state law involving bankruptcy case to Maine Supreme Judicial Court).

16. 220 A.2d 248 (Me. 1966) (answering questions certified by federal district court regarding whether release of liability in tort action is permissible under state law).

17. *See generally* Corr and Robbins, *supra* n. 3 (discussing arguments for and against certification, based in part on empirical study of judges).

as a practical matter, certification allows jurisdictions to decide their own law where no clear precedent exists to guide foreign jurisdictions on the applicable law. These comments, however, come from federal and state judges only in the context of federal-to-state certification.

While federal-to-state certification addresses *Erie* problems, interstate certification also provides "a valuable device for securing prompt and authoritative resolution of unsettled questions of state law, especially those that seem likely to recur and to have significance beyond the interests of the parties in a particular lawsuit."[18] The interstate-certification process is necessary because it eliminates judicial guesswork and beneficial because it advances justice and fairness.[19] Twelve jurisdictions have incorporated a state-to-state certification provision into their certification laws.[20] The potential simplicity and ease of application of these laws lends credence to the use of the certification method.

The Supreme Court's decision in *Clay v. Sun Insurance,* coupled with the experience of the four states with previously enacted certification statutes, helped mold the outcome of the National Conference of Commissioners on Uniform State Laws, held in 1966 and 1967. A draft of the U.L.A. was first presented and discussed in 1966. It highlighted three major issues: (1) whether to allow for state-to-state certification; (2) which courts should be able to certify a question of law to another state's supreme court; and (3) whether the act should take the form of a statute or a rule.

The interstate-certification process eliminates judicial guesswork and advances justice and fairness.

Then Chief Judge Charles Joiner of the U.S. District Court for the Eastern District of Michigan stated the purpose of the act as follows: to establish a "procedure whereby federal and state courts can obtain at appropriate times and in an appropriate manner a resolution of a significant problem of law of a state, to help the [certifying] court resolve the problem before it."[21] At the time of the conference, federal courts, in response to the dictates of the *Erie* doctrine, had two options when faced with unclear state law: they could abstain from hearing the state-law claims, or they could try to predict the applicable state law. Exercising either of these possibilities meant that courts chose between failure to decide an issue before them and basing their decisions on doctrine that was potentially at odds with the very law they sought to apply.

The act attempted to address the inadequacy of these alternatives by providing federal courts with a third option—certification. Certification simplified and validated the procedure for determining the relevant state law while preserving the parties' right to a federal determination of the factual questions in the suit. The extent to which conflict-of-laws problems could be resolved by this process was only a secondary concern to the commission. The commissioners expected the act to improve federal-state relations, promote uniformity in the law, and more expeditiously resolve litigation that presented novel legal issues. The reported cases involving certified questions suggest that these objectives have been attained.[22] Nevertheless, only 11 states and the Commonwealth of Puerto Rico have adopted statutes that are nearly identical to the U.L.A.[23] Thus, only these jurisdictions can benefit fully from the advantages that certification brings to conflict of laws in both federal-to-state and interstate situations.

State courts without the ability to certify in the appropriate context have the same two alternatives as their federal counterparts—abstention or guesswork. The concern with these two options is the same as in the federal context. The presence and use of interstate certification provisions in state statutes and court rules would solve these problems, just as they have in the federal-to-state sphere. Nevertheless, in the 47-year history of certification in this country, no state judge has ever used these state-to-state certification procedures.

Reasons for nonuse

The nonuse of interstate certification usually stems from the various choice-of-law approaches and exceptions that allow jurisdictions to avoid applying the law of another state, even in cases in which such law seems to govern. By using escape devices and other techniques to conclude that the law of the forum should be applied, courts often engage in judicial conjecture at the expense of fairness and justice.[24] States that either manipulate choice-of-law doctrine to avoid certification or lack a certification procedure justify nonimplementation by the fear that certi-

18. Kidney v. Kolmar Labs., Inc., 808 F.2d 955, 957 (2d Cir. 1987) (stating that certification has been important tool).

19. *See, e.g.*, National Cycle, Inc. v. Savoy Reinsurance Co., 938 F.2d 61, 64 (7th Cir. 1991) ("Certification eliminates the need to expend judicial resources predicting how another court will decide a question."); Dickenson v. Townside T.V. & Appliance, Inc., 770 F. Supp. 1122, 1132 n.8 (S.D. W. Va. 1990) (stating that, without certification, court "would be left to decide the issue based on its informed 'prediction' of how [the answering court] would have ruled had it accepted such certification"); Gafni, *Certification to State Courts Stops Judicial "Guesswork"*, 10 PA. L.J. Rep. no. 48, at 3 (Dec. 21, 1987) (discussing general merits of certification process).

20. The jurisdictions are Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, North Dakota, Oklahoma, Oregon, Puerto Rico, West Virginia, and Wisconsin. A list of certification procedures in United States jurisdictions is available from *Judicature* on request.

21. *Transcript of Proceedings of Uniform State Laws, Uniform Certification of Questions of Law Act* 1 (Aug. 3, 1966) (statement of Charles Joiner).

22. *See, e.g.*, Bushkin Assoc., Inc. v. Raytheon Co., 473 N.E.2d 662, 663 (Mass. 1985) (answering questions from First Circuit regarding choice-of-law issue of whether to apply Massachusetts or New York law); Baird v. Attorney Gen., 360 N.E.2d 288, 290-291 (Mass. 1977) (responding to question regarding construction of parental-notification statute to assist determination of statute's constitutionality); Hiram Ricker & Sons v. Students Int'l Mediation Soc'y, 342 A.2d 262 (Me. 1975) (construing licensing statute to answer certified question in diversity action involving Maine and California residents), *cert. denied,* 423 U.S. 1042 (1976).

23. *See supra* n. 20 (listing jurisdictions).

24. *See* Corr and Robbins, *supra* n. 3, at 432-433 (discussing complexity and manipulability of choice-of-law issues, with emphasis on doctrine of renvoi).

fication will result in a deluge of cases flooding their court systems.

Upon closer scrutiny, however, this justification appears to have little weight. In the nearly half-century history of the interjurisdictional-certification process, only a handful of questions have ever been certified. And all of these questions have been sent from the federal to the state courts. None of the 40 jurisdictions with certification procedures has reported being overburdened by the number of certified questions, despite the prevalent fear of inundation.

In addition, a number of procedural devices built into certification statutes decreases the possibility of hardship by permitting self-policing by both certifying and answering courts. Certifying courts will only certify those questions of law for which no controlling precedent exists in answering jurisdictions.[25] Furthermore, the ultimate power to accept or reject certified questions rests exclusively with answering courts.[26] These two procedural safeguards more than adequately protect answering courts from a surfeit of certification cases because, as a practical matter, these courts completely control their dockets and may reject certified-question cases if the number becomes overwhelming. Answering courts need not even offer an explanation, although most courts do offer a reason for declining to answer.

Many of the states that do not employ certification procedures argue that, as an outgrowth of inundation, response time would become severely delayed and actual litigation greatly slowed. Yet given that the number and frequency of certified questions remains small, the issue arises only when dockets are already overburdened. In addition, even if the number of certifications increases, most courts give preferential treatment to certified questions, often assigning them priority over intrastate questions. After all, cases that have the capacity to clarify existing law or to address an issue of first impression would potentially minimize other time-consuming litigation. Even if certification actions become somewhat slowed during the process, this seems a small price for correct resolution of the matter. Courts should be placing a premium on deciding cases well, not just quickly. Thus, as the fear of overburden from certification is unfounded, the real reasons for the nonuse of interstate certification more likely are mere ignorance of the process and its benefits, and a desire for jurisdictions to maintain control over questions of law.

These factors become readily apparent upon examination of the reasons for the limited use of certification in the federal-to-state context and its rejection or lack of use in the state-to-state context. In the federal-diversity setting, certification encourages state courts to maintain or extend control over questions of their own law (by allowing state courts to *receive* and decide questions). That is, state courts rule on issues that should be decided by reference to their state's law, rather than to federal law. In the state-to-state context, however, state courts may view the act of *sending* a certified question to another state as a surrender of control. Indeed, the total lack of interstate-certification cases supports this hypothesis.[27] Thus, forum courts effectively maintain control over cases that are better answered by another state through various conflict-of-laws processes.[28] The states that hope to retain such control fail to appreciate that, ideally, as a matter of comity, each co-operating state would not only certify questions, but also answer those from other jurisdictions.[29]

It remains true that interstate certification has not been employed, even in states providing for it by statute. Perhaps the fact that not all states have such statutes deters those that do from using the process, as states tend not to extend privileges without expecting reciprocity. Although many of the states with certification statutes have provisions for interstate certification, some only have the power to answer certified questions and not the power to propound them. Thus, the goal of comity in this area must await legislatures and courts to enact new statutes and rules.

The lack of understanding and knowledge of the purposes and merits of interstate certification presents another reason for general nonuse. Legislators often remain ignorant about the possibility of interstate certification.[30] And when interstate certification statutes are enacted, judges unanimously fail to use them. This situation presumably arises from simple lack of awareness, rather than from outright rejection of certification. Both the Connecticut and Minnesota statutes, for example, append identical, incorrect lists of jurisdictions that possess

25. Unif. Certification of Questions of Law Act §1, 12 U.L.A. 52 (1967). Certification is not appropriate where there are controlling state decisions. Gould v. Mutual Life Ins. Co., 735 F.2d 1165, 1167-1168 (9th Cir. 1984). It cannot be used by the litigants for back-door modifications of settled state law. *Id.*

26. Unif. Certification of Questions of Law Act §1, 12 U.L.A. 52 (1967).

27. Other speculations have been made concerning why state-to-state certification is unused, including forum bias and that the forum state prescribes that it has greater expertise or equal knowledge to that of an answering court. *See* Corr and Robbins, *supra* n. 3, at 431-433. Forum bias cannot be overcome by optional certification. The idea that the forum court possesses greater knowledge or expertise than the answering court defies logic. The answering court applies and interprets its state law regularly, while the forum court faces relatively unfamiliar territory when expounding the law of another jurisdiction.

28. Renvoi arises when the choice-of-law process of the forum jurisdiction refers the court to the choice-of-law rule of the foreign jurisdiction. *See generally* Schreiber, *The Doctrine of the Renvoi in Anglo-American Law*, 31 HARV. L. REV. 523 (1918); Stein, *Choice of Law and the Doctrine of Renvoi*, 17 MCGILL L.J. 581 (1971); Comment, *Renvoi and the Modern Approaches to Choice-of-Law*, 30 AM. U. L. REV. 1049 (1981). Often the doctrine of renvoi as well as unfavorable law can be avoided by employing such escape devices as characterization of the issue. Simply put, if a forum court determines that the case before it is a torts case rather than a contracts case (when in fact there are elements of both tort and contract involved) it may be able to apply its own law if it uses the place-of-the-injury rule for torts instead of the place-of-making rule for contracts.

Although the courts have many alternatives in the choice-of-law arena, often a state relies on the law of the forum. *See, e.g.*, Leflar, McDougal and Felix, AMERICAN CONFLICTS LAW 143-145 (4th ed. 1986). Another malleable tool is for the state court to find that the application of another state's law would violate the public policy of the forum. *Id.*; *see also* Comment, *supra*, at 1051.

29. When discussing balance-of-power issues, comity usually arises in the federal-state context involving diversity-of-citizenship cases and issues involving federal-question jurisdiction. Miner, *The Tensions of a Dual Court System and Some Prescriptions for Relief*, 51 ALB. L. REV. 151, 151-157 (1987). In the federal-to-state certification context, certification is a tool for administering comity. In the state-to-state context, however, the system is not self-administering because there is no doctrine like *Erie* to mandate compliance. State courts are more likely to want to *answer* questions than to *send* them, because they perceive it as surrendering control to the answering court.

30. Connecticut, for example, in its extensive legislative history of certification, makes no mention of interstate certification. The complete lack of discussion suggests ignorance. *See Hearings on H.B. 6249 Before the Joint Standing Subcommittee* (1985). Equally important, legislators—lawyers and nonlawyers alike—often are unaware of the conflict-of-laws ramifications of the substantive laws that they pass.

certification statutes.[31] This lack of information is symptomatic of the general level of ignorance and confusion.

The inconsistent use of federal-to-state certification and the nonuse of interstate certification is not surprising when the certification system, which relies on interaction with other jurisdictions, is replete with inconsistencies concerning the jurisdictions with which the process can be employed. To correct the misuse and lack of use of certification, statutes need to be consistent across jurisdictions. The Uniform Certification of Questions of Law Act attempted to bring that about. It has not succeeded, however, primarily because states either have failed to adopt the U.L.A. or have adopted dissimilar versions of key U.L.A. provisions.

Actual operation of certification procedures

Of the 40 jurisdictions that have adopted certification procedures, 26 have done so since 1975.[32] The number of certified questions is also on the rise. Support for certification has increased in the past decade. In February 1983, for example, the American Bar Association's Special Committee on Coordination of Federal Judicial Improvements resolved to:

> (a) [urge] each state to adopt a procedure whereby the highest court of the state may answer a question of state law certified from an Article III court of the United States, when the answer will be controlling in an action in the certifying court and cannot in the opinion of the certifying court be satisfactorily determined in light of state authorities; [and]
>
> (b) [urge] the Commissioners on Uniform State Laws to review the U.L.A. in light of the experience since 1967 to determine whether revisions are appropriate.[33]

Declarations like this one—as well, perhaps, as renewed attention by the commissioners on uniform state laws—may provide the incentive for the remaining jurisdictions lacking certification to adopt the procedure. It would be unfortunate if jurisdictions refrained from adopting good certification procedures—or, indeed, any certification procedure at all—simply because of continued misperceptions and unwarranted fears.

Even with this increase in support for certification, no reported case has used interstate certification to resolve a conflict-of-laws situation. This total absence perhaps should not be surprising, given that only 12 jurisdictions possess interstate-certification power,[34] and because state courts must address several threshold issues before being able to find appropriate cases for certification. Courts wishing to certify, for example, must initially determine that the suit in question poses a real conflict-of-laws question. Then they must ensure that the issues presented meet the standard required for certification. Faced with amorphous choice-of-law rules, and, hence, difficult and time-consuming analysis, judges may feel justified in using forum law (or that of a third jurisdiction) when no law exists in the proper jurisdiction.

Moreover, the uncertainty surrounding predictions of "determinativeness," as required by Section 8 of the U.L.A.,[35] offers another motivation, based on ease of application, for judges to "predict" another state's law or to use the law of their own jurisdiction. On the other hand, if the "may be determinative" language of Section 8 receives a universally liberal construction, potential certifying courts may incline toward interstate certification because they would no longer feel hampered by trying to make impossible predictions about determinativeness. The adoption and use of interstate certification would increase and would dramatically impact the uniform development of the law, as well as comity among the states.

Proposal for a new U.L.A.

The lack of use of the U.L.A. stems from ignorance regarding the values of certification (particularly with respect to solving difficult conflict-of-laws questions), the act's optional language on interstate certification, and the variation and inconsistency among the states that permit the process. By its very nature the certification process demands interaction between courts, and thus fails without uniformity. To promote the use of certification, provisions must be efficient and easily applied. Courts need to feel a sense of comity, which stems only from confidence that other jurisdictions with whom they interact operate under the same strictures. Consequently, the current multiprocedure approach of disjointed processes following the U.L.A. theme and variations discourages the use of certification.

The remainder of this article, therefore, proposes uniform legislation designed to overcome these deficiencies and thereby advance the use of certification. The proposal mandates all provisions and, to be of greatest value, should be adopted in the form presented on page 130.

Method of enactment

States enact certification processes either by statute or court rule. States that require a statute may adopt this proposed language as a uniform entity. Some states require that the state constitution be amended to expand the jurisidiction of the state's highest appellate court, thereby including certification within its powers. State constitutions also could be amended to permit the highest appellate court to enact its own rules, thus allowing that court to incorporate this proposed

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31. *See* CONN. GEN. STAT. ANN. §51-199a (West 1987) (listing only 27 jurisdictions with certification procedures); MINN. STAT. ANN. §480.061 (West Supp. 1986) (same). More recent codifications continue the error. *See* CONN. GEN. STAT. ANN. §51-199(a) (West Supp. 1989); MINN. STAT. ANN. §480.061 (West Supp. 1989).

32. The jurisdictions are Alabama, Arizona, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Iowa, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Mexico, New York, Oklahoma, Oregon, South Carolina, South Dakota, Texas, West Virginia, and Wyoming. A list of certification procedures in United States jurisdictions is available from *Judicature* on request.

33. Report with Recommendations, American Bar Association Report to the House of Delegates Special Committee on Coordination of Federal Judicial Improvements (Feb. 1983).

34. *See supra* n. 20 (listing jurisdictions). Conversations with various clerks of court indicate that most of them remain unaware that their states could accept or certify questions from courts of another state.

35. Section 8 of the U.L.A. provides:

"The [Supreme Court] [or the intermediate appellate courts] of this state, on [its] [their] own motion or the motion of any party, may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state."

Unif. Certification of Questions of Law Act §8, 12 U.L.A. 55 (1967).

language into its already-existing rules. No matter which vehicle states choose, they may enact certification.

Power to answer

The U.L.A. permits not only state high courts to receive and respond to certified questions, but also provides discretion for use of this power by intermediate appellate courts. This power-to-answer provision requires modification to prohibit intermediate appellate courts from answering certified questions of state law. Allowing these intermediate courts to answer promotes inefficiency, because high courts maintain appellate jurisdiction to reverse any determination on appeal. Appeals to higher courts create unjustified delay in the certification process. Moreover, the highest court in the state, as the final arbiter of state law, is best equipped to address questions of first impression.

The absolute power to answer by the highest state court affords exclusive discretion to answering courts to receive and respond to certified questions. The provision allows self-policing and protects answering courts from inundation, irrelevant questions, and answering matters that are outside of their jurisdiction or currently pending in lower courts. Of utmost importance, answering courts need not provide artificial reasons to avoid responding.

Which courts may certify

The U.L.A. makes certification available to the U.S. Supreme Court, circuit courts of appeals, and U.S. district courts.[36] The commissioners intended that this language be obligatory on states adopting the U.L.A. Often, however, statutes that implement the U.L.A. restrict certain federal courts' ability to certify. In addition, the commissioners left the language pertaining to state-court certification power in the enacting states' discretion.

All federal courts and the highest state appellate courts should be able to certify questions to answering courts. Thus, the proposed uniform statute obliges states to enact their certification statutes to permit all of the abovementioned courts to certify. This proposed language eliminates discretion in statutes and rules in the implementation of certification procedures. It furthers the goals of comity and reduction of judicial conjecture and, significantly, retains appropriate state courts as final arbiters and controllers of their own laws.

This proposed provision, in conjunction with the power-to-answer provision, removes the concern of an appeal in both the state-to-state and federal-to-state context. Only the highest state court may prepare or answer certified questions, eliminating the possibility of appeal present when a lower state court poses or answers a question. On the federal-to-state level, the answer of the state's highest court binds all federal courts, and thus cannot be overturned even if an appeal occurs in the federal case.

This proposal gives district courts certification power, as they hear the bulk of diversity cases. In the federal context, district courts are most attuned to which questions need to be certified to resolve consistently arising questions of state law. These courts possess equal capabilities with the federal appellate courts to ascertain the clarity of state laws. Thus, state statutes and rules prohibiting federal district courts from sending certified questions are unjustified and unwise.

36. In 1990, the uniform law commissioners added to this list the United States Court of International Trade, the Judicial Panel on Multidistrict Litigation, the United States Claims Court, the United States Court of Military Appeals, and the United States Tax Court. *See* Unif. Certification of Questions of Law Act, 12 U.L.A. 20 (Supp. 1991).

Summary of an improved Uniform Certification of Questions of Law Act

§1. Power to Certify

The [Supreme Court[1]], on its own motion or the motion of any party to the cause, may order certification of questions of law to the highest court of any other state, when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state that may be determinative of the cause then pending in the certifying court and for which there are no controlling precedents in the decisions of the highest court of the receiving state.

§2. Power to Answer

(a) The [Supreme Court] may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, the United States Court of International Trade, the Judicial Panel on Multidistrict Litigation, the United States Claims Court, the United States Court of Military Appeals, the United States Tax Court, or the highest appellate court of any other state or the District of Columbia.

(b) The [Supreme Court], when sent a question by a certifying court, may answer those questions of law that may be determinative of the cause before the certifying court.

§3. Reciprocity Requirement

This jurisdiction, having the power to certify, is empowered to accept certified questions from all jurisdictions having the power to certify.

§4. Preference

The [Supreme Court] shall respond to certified questions as soon as practicable, comporting with notions of comity and fairness.

§ 5. Contents of Certification Order

A certification order shall set forth: (1) the question(s) of law to be answered; and (2) a statement of all facts relevant to the question(s) certified and showing fully the nature of the controversy in which the question(s) arose. If the parties cannot agree upon a joint statement of facts, the certifying court must make this determination.

§6. Preparation of Certification Order

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and

1. This term is bracketed, for the jurisdiction to substitute the title of its highest appellate court.

Reciprocity requirement

In conjunction with the power to answer and the power to certify, this proposal mandates a reciprocity requirement. All of the jurisdictions that accept certified questions must also be empowered to certify them. The reciprocity requirement seeks to attain uniformity and to assure all participating states of like treatment. This equality breeds confidence in the identity of their powers and responsibilities, thus making them more amenable to certifying questions when necessary. The tenets of comity and trust must be exercised through reciprocity for the successful use of the certification process. Uniform reciprocity assures states that some balance will be achieved by discouraging courts from using only one of the powers of certification for fear of inundation, delay, or loss of control. The heart of certification rests on the interactive process, requiring participating jurisdictions both to answer and to certify.

When state courts may answer

State courts should respond to certified questions when issues concerning their law may be determinative of the case. The "may be determinative" language set forth in Section 1 of the U.L.A.[37] comports with the notions of uniformity and ease of application of the proposed language. Many jurisdictions, however, adopted statutes containing the too restrictive "must be determinative" standard. This more stringent test leads to counterproductive battles concerning which questions should be answered. The answering and certifying courts then become bogged down in procedural, rather than substantive, determinations. The "must be determinative" language shackles certifying courts, placing procedural locks on certification when the process requires openness to function properly.

The more permissive "may be determinative" language allows both certifying and answering courts to reach the crux of substantive issues quickly. The removal of artificial procedural barriers allows answering courts full discretion to self-police. Thus, the "may be determinative" language promotes forthright judicial decisions—certification's ultimate goal.

No controlling precedent

Some states have set forth a "no clear controlling precedent" standard, instead of a more liberal "no controlling precedent" standard. The more restrictive "no clear controlling" language leads to the same empty procedural problems as presented in the "must be determinative"/"may be determinative" dichotomy. Jurisdictions that employ the "no clear controlling" language use it to limit the number of questions sent and to avoid answering certified questions. No discernible difference exists between the "no clear controlling" and the "no controlling" standards, except for the manner in which courts interpret them for their own purposes. As a practical matter, however, because statutes always receive varying judicial intepretations, the proposed statute mandates the broader language to avoid tortured analyses and unnecessary distinctions. (Under the new statute, for example, courts faced with conflicting authority

37. Section 1 of the U.L.A. provides:
"The [Supreme Court] may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court [or the highest appellate court or the intermediate appellate court of any other state], when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and to which it appears to the certifying court that there is no controlling precedent in the decisions of the [Supreme Court] [and the intermediate appellate courts] of this state."
Unif. Certification of Questions of Law Act §1, 12 U.L.A. 52 (1967).

forwarded to the [Supreme Court] by the clerk of the certifying court under its official seal. The [Supreme Court] may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the [Supreme Court], the record or portion thereof may be necessary in answering the questions.

§7. Costs of Certification

Fees and costs shall be the same as in [civil appeals] docketed before the [Supreme Court] and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

§8. Procedures for Certification

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

§9. Opinion

The written opinion of the [Supreme Court] stating the law governing the question(s) certified shall be sent by the clerk under the seal of the [Supreme Court] to the certifying court and to the parties.

§10. Power to Amend the Question

The receiving court shall have the ability to reshape or reformulate the issues presented in the certificate. Certifying courts will explicitly allow the receiving court to do so in the certificate.

§11. Severability

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

§12. Construction

This [Act] [Rule] shall be so construed as to effectuate its general purpose to make uniform the law of those jurisdictions that enact it.

§13. Short Title

This [Act] [Rule] may be cited as the Uniform Certification of Questions of Law [Act] [Rule].

§14. Time of Taking Effect

This [Act] [Rule] shall take effect ____.

in state law could certify, because by definition the issue would meet both the "no controlling" and "no clear controlling" precedent tests.)

Preferential treatment for certified questions

Certified questions should have preferred status on the dockets of answering courts to encourage prompt response and action. Such a statutory directive remedies the problem of delay. The provision must not mandate preferential treatment of certified questions, however, in order to maintain discretion on the part of answering courts.

Broad language allows answering courts to control their dockets, yet is forceful enough to induce answering and certifying courts to respect one another's needs reciprocally. This provision encourages courts to respond quickly so that the reverse situation will result in an equally prompt answer. Keeping in mind the magnitude of the courts' dockets and the burden on the courts, the "as soon as practicable" standard for answering is a good compromise, leaving courts free to determine their own schedules. If a court fails to respond within a reasonable time, other courts may apply appropriate pressure, noting their dissatisfaction.

Method of invoking certification

Under this proposal, courts would invoke certification upon their own motion or that of the litigants when the courts deem it necessary. Certifying judges would ultimately control whether questions will be certified and sent. This method ensures that certification will be employed only when certifying courts believe it is important to do so.

Contents of certification order

The proposed statute includes a provision to clarify who controls the statement of facts sent to answering courts. This addition avoids delay in sending questions to answering courts by giving certifying courts control of their schedule.

Unaltered U.L.A. language

The U.L.A. contains a great deal of language that fits well when incorporated into this proposal. As articulated throughout this article, the problems with the U.L.A. stem from lack of uniformity and nonrestrictive language, rather than from problems with the fundamental premises underlying the statute.

The sections of the U.L.A. concerning the preparation of certification orders, the costs of certification, briefs and arguments, and opinion, aptly delineate effective language for this legislative proposal. Other sections provide standard provisions for most uniform laws and thus require no alteration.

Interstate certification—power to certify

Many existing certification statutes relegate interstate certification to optional or nonexistent status. The proposed act emphasizes the importance of certification in the interstate context by mandating its adoption. It is imperative for states to enact and use interstate certification to maximize the rewards of the certification process. Interstate use can effectively remove judicial speculation in conflict-of-laws situations, just as federal-to-state certification can resolve *Erie* problems. In addition, interstate certification can promote judicial economy and timely responses.

When state courts employ various devices to determine another state's law, resulting decisions can be considered precedent that is binding on future litigants, even though the proper court never ruled on the issue. Thus, adversity can arise because outside courts lack the requisite knowledge or insight required to assess possible ramifications of their decisions. Certification in this context can produce honest judicial opinions.[38] When the appropriate state's highest court responds to a certified question, this process assures litigants of application of the correct statement of that state's law, whereas employing renvoi[39] or common conflict-of-laws escape devices is tantamount to judicial conjecture.

Conclusion

By adopting the U.L.A., the uniform law commissioners sought primarily to provide a better alternative to solve the problems associated with the *Erie* doctrine. Unfortunately, the act's efficiency has been undermined by the failure of many states to adopt the act or an equivalent procedure, as well as by the disparate language that some states employ in their certification statutes. Scant legislative history in adopting states and sparse judicial construction of the various statutes and rules combine to make it difficult to ascertain not only the rationale for adopting language different from the U.L.A., but also the practical implications, if any, of that language.

The act has had no great success as yet in aiding the resolution of conflict-of-laws cases. The inconsistency of statutory language among the states has rendered interjurisdictional certification almost impotent. The decision of the U.L.A. commissioners to make adoption of interstate certification optional unfortunately contributed to the failure of more than half of the states with certification procedures similar to those of the U.L.A. to provide for interstate certification. Until all states provide for such certification, however, the full panoply of benefits that certification offers remains beyond the reach of courts and litigants facing conflict-of-laws situations.

It is imperative that the revised U.L.A. proposed by this article be brought to the attention of the legislators and state officials who have the influence to make adoption of the act a reality in their jurisdictions. The uniformity of the proposal overcomes the problems that the original U.L.A. does not address. Further, the value of certification for conflict-of-laws cases must be particularly emphasized, since many states that currently have certification procedures need to be aware of the enhanced values that interstate certification can provide. The proposed certification procedure effectuates the full force of uniformity, ease of application, and, most important, the elimination of judicial guesswork. □

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38. *See* Leflar, *Honest Judicial Opinions*, 74 Nw. U. L. Rev. 721 (1979) (asserting the importance of well-articulated, honest reasons in the justification for judicial decisions, particularly in choice-of-law cases).

39. *See supra* n. 28 (discussing doctrine of renvoi).