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The Uniform Certification of Questions of Law Act: A Proposal for Reform

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ARTICLES

THE UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT: A PROPOSAL FOR REFORM

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Certification is a state statutory device that allows interested state courts to answer questions of their own state law where no controlling precedent exists.¹ The statute may make certification available in both federal diversity cases² and in the state-to-state context.³ In 1967, the National Conference of Commissioners on Uniform State Laws, together with the American Bar Association, proposed the Uniform Certification of Questions of Law Act ("U.L.A." or "the Act") to promote uniformity and consistency in the administration of the certification process between courts.⁴ The U.L.A. long ago achieved widespread acceptance in federal diversity cases;⁵ in this context, the process resolves many of the problems associated with the *Erie* doctrine.⁶ On the other hand, courts utterly

1. See Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 52 (1967) (furnishing provision giving state high court power to answer certified questions that may be determinative of cause pending in certifying court).

2. 28 U.S.C. § 1332 (1988) (providing for federal subject-matter jurisdiction over suits between citizens of different states); 28 U.S.C. § 1331 (1988) (allowing for federal subject-matter jurisdiction over suits involving federal question).

3. See Unif. Certification of Questions of Law Act § 8, 12 U.L.A. 55 (1967) (providing for state-to-state certification in conflict-of-laws situations). The National Conference of Commissioners on Uniform State Laws and the American Bar Association proposed the U.L.A. See Unif. Certification of Questions of Law Act, historical note, 12 U.L.A. 49 (1975).

4. *Id.* Commissioners' prefatory note, 12 U.L.A. 49, 51 (1975).

5. See, e.g., *Life Ins. Co. v. Shifflet*, 370 F.2d 555, 556 (5th Cir. 1967) (granting certification request after Florida Supreme Court gave misrepresentation statute different interpretation from that given by federal court in prior case); *Hopkins v. Lockheed Aircraft Corp.*, 358 F.2d 347, 347 (5th Cir. 1966) (certifying question regarding whether Florida courts would apply Illinois wrongful-death statute); *Greene v. American Tobacco Co.*, 304 F.2d 70, 86 (5th Cir. 1962) (ordering certification on rehearing to determine if Florida law imposed absolute liability for breach of warranty).

6. 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).

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.⁷ Moreover, while many states have adopted substantial portions of the U.L.A.,⁸ each state either omitted or expanded upon provisions of the Act,⁹ thwarting the commendable goals of uniformity and interstate certification.¹⁰

This article addresses the merits of certification and encourages universal enactment of a new and improved U.L.A.¹¹ The proposed Act seeks to surpass the 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.¹² The proposed Act also requires consistency in the types of questions certified and answered, as well as in the time limits for responding.¹³ With newly enforced uniformity, the benefits of both interstate and federal-to-state certification — such as judicial economy, removal of guesswork by judges, and comity between states — will be more fully realized than under the current patchwork system.

Part I of the article reviews both the history of certification and the concerns that the U.L.A. sought to address. Part II presents a detailed analysis of various provisions of the U.L.A. Part III discusses enactment of the U.L.A., either by statute or by court rule. In Part IV, I address state variations in certification laws, highlighting some of the different provisions permitted and how this affects certification for those states. In Part V, I present an analysis of the actual operation of certification procedure. Part VI contains a discussion of some of the problems encountered in the enactment of a certification statute, using as illustrations the experiences of New York and Connecticut. Finally, in Part VII, I propose a revised interjurisdictional-certification statute, with provisions to encourage uniformity and ease of application, in the hope of stimulating the greater use of certification in the interstate context, in order to eliminate thorny problems of conflict of laws. The article concludes that adoption of the proposed U.L.A. will solve such problems, but only if the provisions of the U.L.A. are made mandatory.

7. Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 51 (1975).

8. See *infra* Appendix part B.

9. See *infra* notes 283-316 and accompanying text (discussing provisions of U.L.A. and how different states have adopted variations on U.L.A., including assorted standards for certification, allowing courts to certify to other states, and allowing receipt of certified questions from different sources).

10. For general discussions of certification, see John B. Corr & Ira P. 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); Larry M. 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); Allan D. Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629 (1951) (presenting pre-U.L.A. views on certification).

11. See *infra* notes 423-58 and accompanying text (detailing proposed uniform certification statute).

12. See *infra* notes 426-32 and accompanying text.

13. See *infra* notes 434-40 and accompanying text.

I. HISTORY OF THE UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT

A. Origins of Interjurisdictional Certification

The procedural device of certification allows the certifying court to obtain an answer to a difficult, previously unaddressed question of law, or to a question of law with no controlling precedent.¹⁴ These questions typically arise when a court must decide a case before it on the basis of the law of another jurisdiction. Specifically, the certifying court presents the question to the court that is best suited to answer the question, or to a higher court within the same jurisdiction.¹⁵ In the past, however, different jurisdictions in both the United States and Britain have adopted disparate forms of this procedural device.¹⁶ The promulgation of divergent acts and rules limited the use and thwarted the development of the certification process.¹⁷ 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.¹⁸

1. Intra-jurisdictional Certification

Approximately half of the states of the United States permit certification from an inferior state court to the highest court of the same state to resolve a question of law on a particular point.¹⁹ This form of *intra*jurisdictional certification, within the closed state judicial system, contrasts with the *inter*jurisdictional certification concept embodied in the U.L.A.²⁰ Generally, in state intra-jurisdictional certification, the inferior court within the jurisdiction controls the procedure by formulating the question or questions posed,²¹ determining what portions of the record must be sent to the higher court, and setting forth the relevant facts.²² The case itself remains in the certifying court, which becomes bound to follow the law presented in the answer given by the higher (answering) court.²³ Further, the higher court usually has discretion whether to answer the certified question,

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

15. See *id.* (providing for interjurisdictional certification to answer questions of law); 28 U.S.C. § 1254(3) (1988).

16. See FLA. STAT. ANN. § 25.031 (West 1945) (allowing interjurisdictional certification and amending FLA. APP. R. 9.150 and 4.61); British Law Ascertainment Act, 22 & 23 Vict., 1859, ch. 63 (Eng.) (permitting court to remit case to another court to answer question of law).

17. See *infra* note 441 and accompanying text (proposing reciprocity provision in uniform statute).

18. Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 49, 51 (1975).

19. Allan D. Vestal, *Transcript of Proceedings of Uniform State Laws*, UNIFORM CERTIFICATION OF QUESTIONS OF LAW Act 3 (Aug. 3, 1966) and (Aug. 1, 1967) [hereinafter Transcript of 1966 or Transcript of 1967]. States with an intra-jurisdictional certification procedure include Alabama, Connecticut, Florida, Georgia, Hawaii, Indiana, Iowa, Louisiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, Texas, West Virginia and Wyoming. See Appendix part B. See also Vestal, *supra* note 10, at 631.

20. Unif. Certification of Questions of Law Act § 8, 12 U.L.A. 55 (1967) (recommending certification in both the federal-to-state and the state-to-state contexts).

21. See Vestal, *supra* note 10, at 631-32 (outlining fundamental characteristics of state intra-jurisdictional certification procedure).

22. *Id.*

23. *Id.*

and acts *only* on the questions posed,²⁴ thereby leaving the ultimate ruling in the case to the lower court.²⁵

The federal system also permits a form of intrajurisdictional certification.²⁶ Both the United States Claims Court and the federal courts of appeals may certify questions of law to the United States Supreme Court.²⁷ As in the state hierarchical system, both the decision to certify and the decision to answer are discretionary.²⁸ A lower court properly invokes certification when it cannot determine the rule of law relevant to the certified question or does not wish to venture a guess, educated or otherwise.²⁹ The U.L.A. mirrors these principles in its text.³⁰ While this article examines the viability of these principles, its focus on the U.L.A. pertains more specifically to interjurisdictional certification in the state-to-state context.

2. Interjurisdictional Certification

The concept and use of interjurisdictional certification developed relatively recently in American jurisprudence.³¹ 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.³² This early research and thinking formed the basis for many of the policies ultimately realized in the U.L.A.³³ Professor Vestal's contribution to the development of the contemporary certification process, along with that of other academicians, cannot be underestimated.

The British experience provided one of the sources for their ideas on interjurisdictional certification and suggested methods for implementing such a system in the United States.³⁴ Under both international and interstate conflict-

24. *Id.*

25. *Id.*; see also Note, *Interjurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 349 n.40 (1963) (providing state statutory authority for federal interjurisdictional certification).

26. 28 U.S.C. § 1254 (1988).

27. *Id.*; Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 49 (1975).

28. 28 U.S.C. § 1254 (1988); Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 52-53 (1975).

29. Note, *supra* note 25, at 348.

30. Unif. Certification of Questions of Law Act, Commissioners' comment, 12 U.L.A. 52-53 (1967).

31. CARROLL SERON, *CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES* (1983) (publication of the Federal Judicial Center, asserting that certification did not play an important role in federal courts until 1974, when the Supreme Court held that certification may be used in diversity cases). See *Lehman Bros. v. Schein*, 416 U.S. 386 (1974) (finding that certification in federal-to-state context does not raise constitutional issue).

32. Transcript of 1966, *supra* note 19, at 1. Professor Vestal's writings prior to the adoption of the U.L.A. include: James W. Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1 (1949); Vestal, *supra* note 10. Other commentary on certification includes: Comment, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals"*, 73 YALE L.J. 850 (1964) [hereinafter Comment, *Abstention and Certification*]; Comment, *Certifying Questions to State Supreme Courts as a Remedy to the Abstention Doctrine*, 9 SAN DIEGO L. REV. 158 (1974); Note, *supra* note 25; Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960) [hereinafter Note, *Consequences of Abstention*].

33. See *infra* notes 99-258 and accompanying text (describing process and debates of Commissioners formulating U.L.A.).

34. See Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 49 n.1 (1975) (noting that certification has long history in English-speaking world).

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.³⁵ For support for their ideas, the Commissioners looked to the British Law Ascertainment Act of 1859 and the Foreign Law Ascertainment Act of 1861.³⁶ The British Law Ascertainment Act of 1859 permitted a court in one part of the British Commonwealth to remit a case for an opinion on a question of law to a court in another part of the Commonwealth.³⁷ The Foreign Law Ascertainment Act of 1861 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.³⁸ The precepts of the U.L.A. find their basis in these Acts.³⁹ The conflict-of-laws provisions of both the U.L.A. and the British Acts serve the same purpose: clarification of unclear nonforum law when necessary to the resolution of a case.⁴⁰

Both British Acts provide that a statement of the facts, either agreed to by the parties or set forth by the court, must accompany the certified question.⁴¹

35. Transcript of 1966, *supra* note 19, at 9-10, 22. The original purpose of the U.L.A. was to combat the *Erie* problem. *Id.* at 9-10; see *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (holding that federal courts must apply state substantive law to state claims in federal-court cases based on diversity jurisdiction). Many Commissioners felt that to go beyond that purpose by attempting to resolve conflict-of-laws problems would impede passage in state legislatures, thereby undermining the Act's intent. By the end of the 1966 meeting, the pertinent language of Section 1 read: "may answer questions of law certified to it by . . . a United States District Court in this state [or the highest appellate court or the intermediate appellate court of any other state]" Transcript of 1966, *supra* note 19, at 9-10 (emphasis added).

With this language the Commissioners made the adoption of state-to-state certification optional and eliminated the possibility of a federal district court of one state certifying a question to the highest court of another state. *Id.* Thus, the conflict-of-laws problems often faced in court would have no opportunity for resolution via certification. By 1967, the Commissioners decided to eliminate the "in this state" limitation appended to the federal district court power to certify, but not the constraint on interstate certification. See Transcript of 1966, *supra* note 19, at 5-10, 18-20, 26.

36. Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 49 n.1 (1975); see Comment, *Abstention and Certification*, *supra* note 32, at 867-68 n.84 (revealing that Great Britain's statute on certification, akin to Florida statute on which U.L.A. is based, has a long history, but stating that British version had met with mixed success). *But cf.* Vestal, *supra* note 10, at 644 n.79 (citing *Lord v. Caum*, 1 Drew & Sm. 24, 26 (1860), in which court applied Act of Ascertainment, as evidence of success of British statute).

37. British Law Ascertainment Act, 22 & 23, 1859, Vict., ch. 63 (Eng.) [hereinafter Act of 1859]. The provisions of this Act were extended to British territories, including Tanganyika, Kenya, and Northern Rhodesia. *Id.*

38. Foreign Law Ascertainment Act, 24 & 25 Vict., 1861, ch. II (Eng.) [hereinafter Act of 1861]. 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).

39. See *supra* notes 36-38 and accompanying text (discussing British Acts); see also Comment, *Abstention and Certification*, *supra* note 32, at 868 n.84 (noting existence of British statutes, but stating that they have met with little success); Vestal, *supra* note 10, at 643-44 (defending idea of interjurisdictional certification with example of foreign certification treaties designed to resolve conflict-of-laws problems). One British judge commented that courts would have had to guess at Scottish law, probably with little chance of success, without the Act of 1859. See Vestal, *supra* note 10, at 644 n.79 (citing *Lord v. Colvin*, 1 Drew & Sm. 24, 26 (1860)).

40. Act of 1859, at ch. 63. The text provides: "an Act to afford Facilities for the more certain Ascertainment of the Law administered in one Part of Her Majesty's Dominion when pleaded in the Courts of another Part thereof." *Id.*

41. *Id.* at ¶ 1; Act of 1861, at ¶ 1.

The Acts also mandate the binding nature of the opinion rendered by the answering court, although the certifying court may resubmit the opinion to the answering court "on any ground whatsoever" if that court doubts the accuracy of the opinion.⁴² In contrast, an answering court in the United States receives greater deference, because the U.L.A. refuses to allow for a remittitur to the answering court.⁴³

Within the United States, four states — Florida, Hawaii, Maine, and Washington — had adopted interjurisdictional certification procedures prior to the promulgation of the U.L.A.⁴⁴ 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.⁴⁵ Despite the existence of this certification procedure in Florida since 1945 and Professor Vestal's pioneering 1951 article⁴⁶ describing its benefits, the four state certification statutes lay dormant until the Supreme Court authorized their use in *Clay v. Sun Insurance Office, Ltd.*,⁴⁷ in 1960. Soon thereafter, the Supreme Court employed the procedure in *Aldrich v. Aldrich*⁴⁸ and *Dresner v. City of Tallahassee*.⁴⁹ In these two cases, the Court certified questions of law to the Florida Supreme Court.⁵⁰ This action brought the certification procedure to the attention of the United States Court of Appeals for the Fifth Circuit, which used the Florida statute in *Green v. American Tobacco Co.*,⁵¹ *Hopkins v. Lockheed Aircraft*

42. Act of 1859, at § 4; Act of 1861, at § 2. Section 4 of the Act of 1859 provides that, if an appeal to the House of Lords or to Her Majesty in Council is requested, they may choose to reject or accept the opinion as they see fit. Act of 1859, at § 4.

43. See *infra* note 206 and accompanying text (noting that, in United States, answering court may rephrase question posed). See, e.g., *Irion v. Glens Falls Ins. Co.*, 461 P.2d 199 (Mont. 1969) (allowing court to rephrase question).

44. 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).

45. 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." L. Shaw, Remarks at the 1991 Eleventh Circuit Judicial Conference (May 25, 1991), at 4.

46. Vestal, *supra* note 10.

47. 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*.

48. 375 U.S. 75 (1963) (certifying four questions to Florida Supreme Court in alimony case on certiorari from West Virginia Supreme Court of Appeals).

49. 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).

50. *Dresner*, 375 U.S. at 139; *Aldrich*, 375 U.S. at 77. 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.

51. 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 question answered* in 154 So. 2d 169 (Fla. 1963), *cert. denied*, 377 U.S. 943 (1964).

Corp.,⁵² and *Life Insurance Co. v. Shifflet*.⁵³ Maine had also utilized the procedure in *In re Richards*⁵⁴ and *Norton v. Benjamin*⁵⁵ prior to the adoption of the U.L.A.

B. Benefits of Interjurisdictional Certification

Proponents of the certification process praise the system for promoting judicial economy, comity, ease of application, fairness to the litigants, and most importantly for avoiding judicial guesswork.⁵⁶ These people also maintain that as a practical matter certification allows the relevant jurisdiction to decide its own law where no clear precedent exists to guide a foreign jurisdiction on the applicable law.⁵⁷ It is important to note, however, that these comments come from federal and state judges in the context of federal-to-state certification.⁵⁸

While federal-to-state certification addresses *Erie* problems, interstate certification too 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."⁵⁹ The certification process is necessary because it eliminates judicial guesswork, and beneficial in that it advances justice and fairness.⁶⁰ Twelve jurisdictions have incorporated a state-to-state certification provision into their certification laws.⁶¹ 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 to mold the outcome of the National Conference of Commissioners on Uniform State Laws, held in 1966 and 1967.⁶² A draft of the U.L.A., prepared by Professor

52. 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).

53. 370 F.2d 555 (5th Cir. 1967) (certifying questions to Florida Supreme Court concerning proper construction of Florida Insurance Code).

54. 253 F. Supp. 913 (D. Me. 1966) (certifying questions of state law involving bankruptcy case to Maine Supreme Judicial Court).

55. 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).

56. See generally Corr & Robbins, *supra* note 10 (discussing arguments for and against certification, based in part on empirical study of judges).

57. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); Vestal, *supra* note 10, at 640 (stating that "[t]he judicious use of certification might be of real value in supplementing the work of the high court in the establishment of a complete, well-articulated body of law for the state") (emphasis omitted); see *Independent School Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 298 (D. Minn. 1990) (denying request for certification on ground that Minnesota law was sufficiently clear on issue for federal court to satisfy *Erie* obligations although no case was precisely on point).

58. See Corr & Robbins, *supra* note 10, at 445.

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

60. 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, the 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") Abraham S. 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).

61. See *infra* note 286 (listing jurisdictions that allow interstate certification).

62. See generally Transcripts of 1966 and 1967, *supra* note 19 (discussing example set by state statutes and decision in *Clay* as basis for U.L.A.).

Vestal, was first presented and discussed in 1966.⁶³ That draft 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.⁶⁴

Chief Judge Charles Joiner of the Federal District Court 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."⁶⁵ At the time of the National Conference, a federal court, in response to the dictates of the *Erie*⁶⁶ doctrine, had two options when faced with unclear state law: it could abstain from hearing the state-law claims, or it could try to predict the applicable state law.⁶⁷ Exercising either of these possibilities meant that the court chose between failure to decide an issue before it and basing its decision on doctrine that was potentially at odds with the very law it sought to apply.

The Act attempted to address the inadequacy of these alternatives by providing the federal court 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.⁶⁸ The extent to which conflict-of-laws problems could be resolved by this process was only a secondary concern to the Commission.⁶⁹ The Commissioners expected the Act to improve federal/state relations,⁷⁰ promote uniformity in the law,⁷¹ and more expeditiously resolve litigation that presented novel legal

63. See generally Transcript of 1966, *supra* note 19 (debating initial draft of U.L.A.).

64. Transcript of 1966, *supra* note 19, at 7, 9.

65. *Id.* at 1.

66. See *supra* notes 6 & 35 (explaining that *Erie* doctrine forces federal courts in diversity-jurisdiction cases to apply state substantive law).

67. Vestal, *supra* note 10, at 644-45; Comment, *Abstention and Certification*, *supra* note 32, at 855-56.

68. See *In re Elliott*, 446 P.2d 347, 350 (Wash. 1968). Washington, which had a certification procedure prior to adoption of the U.L.A., adopted the procedure to simplify the process for obtaining decisions on questions of state law. The legislators deemed the procedure a shortcut in comparison to other available alternatives. Cf. *Dickenson v. Townside T.V. & Appliance, Inc.*, 770 F. Supp. 1122, 1132 n.8 (S.D. W. Va. 1990) (noting that the parties had requested that the federal court certify a question to the West Virginia Supreme Court of Appeals, the federal court wrote: "There, of course, . . . remains the possibility that the West Virginia Supreme Court of Appeals would refuse such certification, and this court would be left to decide the issue based on its informed 'prediction' of how that Court would have ruled had it accepted such certification.").

69. See *supra* note 35 (stating that Commissioners did not feel that one purpose of Act was to resolve conflict-of-laws problems). Commissioner Horowitz pointed out that, in conflict-of-laws situations, no state is required to follow another state's law in the way that the federal court is required to follow state law under *Erie*. Transcript of 1967, at 5-6. A state can always decide that, for public-policy reasons, its law, rather than that of another state, should be applied. *Id.*

70. Transcript of 1966, *supra* note 19. See also *White v. Edgar*, 320 A.2d 668, 674 (Me. 1974) (noting "[t]he nature and the objectives of 'certification' as a state-proffered [sic] instrumentality of cooperation, for mutual benefit, between this [state] Court and the federal judiciary"); *Jefferson v. Moran*, 479 A.2d 734, 738 (R.I. 1984) (stating that "[w]e are most appreciative of the federal district court's application of principles of comity in certifying this question to us").

71. See Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 51 (1975); see also *Union Light, Heat & Power Co. v. United States District Court*, 588 F.2d 543, 544 (6th Cir. 1978) (denying request for mandamus to postpone federal trial when Kentucky state court is hearing similar case, in part because state provided certification procedure in federal-to-state

issues.⁷² The reported cases involving certified questions suggest that these objectives have been attained.⁷³ Nevertheless, only eleven states and the Commonwealth of Puerto Rico have adopted statutes that are nearly identical to the U.L.A.⁷⁴ 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.⁷⁵ The concern with these two options remains the same as in the federal context.⁷⁶ 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.⁷⁷ Nevertheless, in the forty-six-year history of certification in this country,⁷⁸ no state judge has ever utilized these state-to-state certification procedures.⁷⁹

The nonuse of interstate certification usually stems from the various choice-of-law approaches and exceptions that allow a jurisdiction 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, the courts often engage in judicial conjecture, at the expense of fairness and justice.⁸⁰ States that either manipulate choice-of-law doctrine to avoid certification or lack such a procedure justify nonimplementation by the fear that use of certification will result in a deluge of cases flooding their court systems.

context), *cert. denied*, 443 U.S. 913 (1979). Kentucky Rule 76.37, which is almost identical to the U.L.A., was adopted so the Kentucky Supreme Court could ensure that no federal-court interpretation of Kentucky law became final before the Kentucky Supreme Court could have the opportunity to render an opinion on the same issue. KY. R. CIV. P. 76.37 (1978).

72. See generally Transcripts of 1966 and 1967, *supra* note 19, at 5 (stating that certification provides uniformity by allowing jurisdiction to be final arbiter of its own law); KAN. STAT. ANN. § 90, supplemental note (1979) (listing ability for ultimate control over own law as reason for enactment). See Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 50 (1975) (contending that certification "is a more rapid method than the use of the abstention doctrine and seems to be a much more orderly way of handling the problem [of resolving difficult state law issue]").

73. 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, 290-91 (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).

74. The states are Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, North Dakota, Oklahoma, Oregon, West Virginia, and Wisconsin. See *infra* Appendix part B (providing citations).

75. See *supra* note 67 and accompanying text (noting that these possibilities mean that court either never resolves case or bases decision on potentially erroneous interpretation of law).

76. See *supra* note 67 and accompanying text (stating that problem with abstention is failure to resolve case, and problems with guesswork are potentially erroneous interpretation of law, possible disruption of state's law, and lack of comity).

77. See *supra* note 68 and accompanying text (noting that federal courts have third option of certification to assist in resolving cases involving state law).

78. See *supra* notes 44-53 and accompanying text (discussing development of federal-to-state certification, with emphasis on Florida).

79. This conclusion is in part the result of a Lexis search of the States library, Omni file, using the search term "certif! w/seg (question law)" and a Westlaw search of the Allstates database, using the search term "opinion (certif! & "question law")".

80. See *Corr & Robbins, supra* note 10, at 432-33 (discussing complexity and manipulability of choice-of-law issues, with emphasis on doctrine of *renvoi*).

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.⁸¹ And all of those questions have been sent from the federal to the state courts.⁸² None of the forty 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 the certifying and answering courts.⁸³ The certifying court will only certify those questions of law for which no controlling precedent exists in an answering jurisdiction.⁸⁴ Furthermore, the ultimate power to accept or reject a certified question rests exclusively in the discretion of the answering court.⁸⁵ These two procedural safeguards more than protect the answering court from a surfeit of certification cases because as a practical matter that court completely controls its docket and may reject certified-question cases if the number becomes overwhelming. The answering court need not even offer a reason for declining to answer; most courts, however, do offer an explanation.⁸⁶

Many of these states argue that, as an outgrowth of inundation, response time becomes severely delayed and the actual litigation greatly slowed. Given that the number and frequency of certified questions remains small, however, the issue arises only if the docket is already overburdened. In addition, even if the number of certifications increases, as I submit it should, most courts afford preferential treatment to certified questions, often giving them priority over intrastate questions. After all, cases that have the capacity to clarify existing law, or indeed to address an issue of first impression, would have the potential to minimize other time-consuming litigation. Even if the actual certification action becomes 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, and not just quickly. Thus, as the fear of overburden from certification is

81. *Conn. U.L.A. Hearings on H.B. 6249 Before the Joint Standing Judiciary Committee*, at 364 (discussing study indicating over a three-year period only fifty answers to certified questions in the federal-to-state context) [hereinafter *Hearings on H.B. 6249*]. In the several years that New York has had a certification statute only seven certified questions were seen and two answered. *See infra* note 379 and accompanying text.

82. *Id.*

83. *See infra* notes 174-258 and accompanying text (regarding provisions of U.L.A.).

84. *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. of N.Y.*, 735 F.2d 1165, 1167-68 (9th Cir. 1984). It cannot be used by the litigants for back-door modifications of settled state law. *Id.*

85. *Unif. Certification of Questions of Law Act* § 1, 12 U.L.A. 52 (1967); *see infra* notes 108-31 and accompanying text (discussing discretionary nature of accepting or rejecting certified questions and importance of this discretion in alleviating overburdening of dockets).

86. Although it is not often the case, a state may determine that a question of state law is not involved. *See Mercantile Safe Deposit & Trust Co. v. Purifoy*, 371 A.2d 650 (Md. 1977); *Members of Jamestown School Comm. v. Schmidt*, 405 A.2d 16 (R.I. 1979). Courts frequently offer reasons — such as pending litigation in the lower state court on the same question — that a state court believed that the state question was not determinative of the case, or that there was controlling precedent on the issue when refusing to answer a certified question. *See generally* Roger J. Miner, *The Tensions of a Dual Court System and Some Prescriptions for Relief*, 51 ALB. L. REV. 151 (1987).

unfounded, the real reasons for the nonuse of interstate certification more likely are mere ignorance of the process and its benefits, and a desire to maintain control over questions of law.

The control and ignorance factors become readily apparent when one examines 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 the state court to maintain or extend control over questions of its own law (by allowing the state court to *receive* and decide the question); that is, the state court rules on issues that should be decided by reference to that state's law, rather than to federal law.⁸⁷ In the state-to-state context, however, an individual state court 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.⁸⁸ Thus, forum courts effectively maintain control over cases that are better answered by another state through various conflict-of-laws processes.⁸⁹ The states that hope to retain such control fail to appreciate that ideally, as a matter of comity, each cooperating state would not only certify questions, but also answer those from other jurisdictions.⁹⁰

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. While many of the states with certification statutes have provisions for interstate certification, some can only answer certified questions and lack the ability to propound them.⁹¹ Thus, the goal of comity in

87. See *supra* notes 62-72 and accompanying text (overviewing policies of U.L.A.).

88. Other speculations have been made concerning why state-to-state certification is unused, including forum bias and that the forum state perceives that it has greater expertise or equal knowledge to that of an answering court. See Corr & Robbins, *supra* note 10, at 431-33. Forum bias cannot be overcome by optional certification. The idea that the forum court possesses knowledge or expertise over 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.

89. 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 Ernst O. Schreiber, *The Doctrine of the Renvoi in Anglo-American Law*, 31 HARV. L. REV. 523 (1918); Stanley B. 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., R. LEFLAR, L. McDUGAL & R. FELIX, *AMERICAN CONFLICTS LAW* 143-45 (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.

90. 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, *supra* note 86, at 151-57. 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.

91. See *infra* note 309.

this area must await legislatures and courts to catch up with a new standard for uniformity.⁹²

The lack of understanding and knowledge of the purpose and merits of interstate certification presents an alternative reason for general nonuse. Legislators often remain ignorant about the possibility of interstate certification.⁹³ And when interstate-certification statutes are enacted, judges unanimously fail to utilize them.⁹⁴ This situation presumably arises from simple lack of awareness, rather than from outright rejection of certification.⁹⁵ Both the Connecticut and Minnesota statutes,⁹⁶ for example, append identical, incorrect lists of jurisdictions that possess certification statutes.⁹⁷ 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.⁹⁸ In order 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.

II. ANALYSIS OF THE UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT OF 1967

A. Power to Answer

Section 1 of the Uniform Certification of Questions of Law Act, entitled "Power to Answer,"⁹⁹ is the most complicated and important section of the Act, setting forth its substance. The remaining sections, with the exception of Section 8, simply detail the procedure for invoking and implementing the first section. Section 1 reads:

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

92. See *infra* notes 426-58 and accompanying text (proposing new U.L.A. to better enforce comity and reciprocity and hence encourage better results in cases involving interstate certification).

93. 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*, *supra* note 81. Equally importantly, legislators — lawyers and nonlawyers alike — often are unaware of the conflict-of-laws ramifications of the substantive laws that they pass.

94. See *supra* notes 34-56 and accompanying text (stating that alternatives to certification are abstention and guesswork, and that state courts still rely exclusively on both).

95. "Given the relatively small number of states that offer the process to sister-state courts, state courts' ignorance about certification is understandable." Corr & Robbins, *supra* note 10, at 431.

96. See CONN. GEN. STAT. ANN. § 51-199a (West 1987) (listing only 27 of 36 states with certification statutes); MINN. STAT. ANN. § 480.061 (West Supp. 1986) (same).

97. 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).

98. See *infra* notes 99-248 and accompanying text (highlighting inconsistencies between statutes and rules authorizing certification; inconsistencies include appropriate sending courts, different standards for accepting questions, and presence or absence of interstate certification).

99. "Power to Answer" is bracketed, thus leaving each state free to entitle this section differently. Unif. Certification of Questions of Law Act, Commissioners' comment, 12 U.L.A. 52 (1975).

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 there is no controlling precedent in the decisions of the [Supreme Court] [and the intermediate appellate courts] of this state.¹⁰⁰

1. Which Court May Answer

Section 1 permits only the highest state court to receive and respond to certified questions.¹⁰¹ The Commissioners' rejection of the alternative of allowing intermediate-level state appellate courts to respond to these questions¹⁰² sheds light on the reason that Section 1 was so structured. In 1966, the American Law Institute, in its own proposed Act, limited certification to the highest court of the answering state,¹⁰³ a move later accepted by the U.L.A. Commissioners.¹⁰⁴ The motivation for this decision stemmed from the inherent delay in certification that the Commissioners perceived would be increased by certification to an intermediate state court,¹⁰⁵ whose decisions would always be subject to appeal and reversal.¹⁰⁶ Thus, certification to intermediate courts would defeat the major purpose of the U.L.A. — to obtain a definitive answer on state law, and, in turn, to save court and litigant time by having the state law's final arbiter resolve an unclear issue.¹⁰⁷ By adopting the more limited approach, and hence avoiding the risks of appeal and reversal, the Commissioners ensured their objective.

2. Discretionary Power to Answer

The second important element of Section 1 leaves the power to answer certified questions to the answering court's discretion.¹⁰⁸ The language of the

100. Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 52 (1967). "Supreme Court" is bracketed because, in certain states (such as Maine, Massachusetts, New York, and West Virginia), the highest court is not called the supreme court. Thus, each state substitutes its equivalent court to the supreme court when promulgating the U.L.A. In Oklahoma, for example, because the Oklahoma Court of Criminal Appeals is the highest court in the state for criminal matters, while the Oklahoma Supreme Court is the highest court for civil cases, the Oklahoma certification statute provides that both courts have the power to answer. OKLA. STAT. ANN. tit. 20, §§ 1601-1611 (West Supp. 1976) (adopted July 1, 1963).

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

102. See MD. CTS. & JUD. PROC. CODE ANN. § 12-607 (1973) (allowing Maryland Court of Appeals or Court of Special Appeals to certify question of law to highest appellate court *or intermediate appellate court of any other state*). This grant of power to its courts is useless, however, since currently no states allow any but the court of last resort for civil and criminal cases to answer certified questions.

103. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 292, 294 (1968) [hereinafter ALI STUDY]; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 147 (1967).

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

105. ALI STUDY, *supra* note 103, at 294.

106. See Thompson v. Commonwealth, 652 S.W.2d 78, 79 (Ky. 1983) (opining that Kentucky Rule 76.37, which is essentially identical to the U.L.A., provides that highest court of state answers certified questions because customarily high-court precedents bind intermediate courts, and, therefore, to apply to intermediate court first and then to high court becomes duplication and waste of time and effort).

107. See *supra* note 65 and accompanying text (statement of Chief Judge Charles Joiner) (asserting that certification provides procedure for resolving "significant problem[s] of law of a state").

108. See Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 52 (1967) (stating that "[t]he [Supreme Court] may answer") (emphasis added).

statute indicates that the answering court has the power to answer or reject the certified questions.¹⁰⁹ The reasons for this discretionary power, and the guidelines under which it may be used, follow.

a. Rationale

The Commissioners decided to make the power to answer discretionary because mandatory language might have rendered the statute unconstitutional under some state constitutions.¹¹⁰ Moreover, to require an answering court to render a ruling could have impeded passage of the Act in certain states, because some legislatures may be loath to constrain their courts with mandatory jurisdiction.¹¹¹

One positive aspect of discretion is that it allows the answering state court to operate as a check on the certifying federal court to ensure that the latter meets the standards required to certify.¹¹² If the federal court failed to meet the requisites, the state court could reject the question.¹¹³ In this way, the state court could avoid answering too many certified questions. The procedure also ensures that the federal court properly consider an issue before certifying it. Thus, the Commissioners incorporated another check to avoid undue burden and to streamline the process.

Professor Vestal believed that discretion to answer was the best approach, as it prevents the problem of an answering court creating artificial reasons to avoid responding.¹¹⁴ The answering court thus controls its docket,¹¹⁵ and, if it felt that timing made a definitive answer unwise, it could postpone responding simply by declining to answer.¹¹⁶ Federal courts have exercised this power in

109. See *id.* Commissioners' comment (indicating that answering court may refuse to answer); see also *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 669 (W. Va. 1979) (holding that answering court need not respond to certified question).

110. Transcript of 1967, *supra* note 19, at 41. Of the four states having the procedure at the time of adoption of the U.L.A., only Washington used the mandatory language of "shall render." But see *In re Elliott*, 446 P.2d 347, 350 (Wash. 1968) (stating that word "shall" does not denote mandatory use; rather, statute may be applied on discretionary basis); see also *id.* at 625-26, 446 P.2d at 363 (Hale, J., dissenting) (arguing that statute is constitutional if it may be applied on discretionary basis, but disagreeing with majority that this construction must be imposed on present statute).

111. The clerks of the courts of various states indicated in numerous telephone interviews that their statutes are, of course, discretionary, that the state supreme court can do as it wishes, and that they would not tolerate being forced by another state or federal court to answer any particular question. Along the same lines, the receiving court could typically feel free to reframe the question certified. See, e.g., *Kaiser v. Memorial Blood Center, Inc.*, 938 F.2d 90, 94 n.2 (8th Cir. 1991); *Martinez v. Rodriguez*, 394 F.2d 156, 159 n.6 (5th Cir. 1968). See also *infra* notes 203-04 and accompanying text.

112. See *infra* Parts II A 3 b & II A 4 (noting that discretion allows courts control over own dockets and avoidance of questions not ripe for answer or where answer already exists).

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

114. See Vestal, *supra* note 10, at 625 (asserting that discretion avoids problems of artificial reasoning and, therefore, the possible creation of bad law).

115. *Id.* But see *supra* notes 83-97 and accompanying text (contending that the fear of deluge often articulated as the rationale for certain language in the U.L.A. and corresponding state statutes seems to be a perception without basis in fact, as no court has been seriously overburdened by the number of certified questions received).

116. Vestal, *supra* note 10, at 635. Although this portion of the article focused on intrajurisdictional certification, the same principles were applied in adopting the U.L.A. Unif. Certification of Questions of Law Act, Commissioners' comment, 12 U.L.A. 52-53 (1975); see *Jackson v. Johns-*

asbestos litigation, for example, in which the court refuses to answer the posed question on ripeness grounds or because the same issue is currently being decided at the state level.¹¹⁷

b. Substantive guidelines for determining when the state court will answer

The plain language of Section 1 of the U.L.A. commands that the standard of "no controlling precedent" must be met before a certified question will be answered.¹¹⁸ Section 1 also explicitly states that only a question that "may be determinative of the cause then pending in the certifying court" will be answered.¹¹⁹ Apart from these expressions in the Act, case law provides further insight into the guidelines that some states use when determining whether to respond to a certified question.

Generally, when several questions are certified and answering one of them disposes of the case or renders the others moot, the state court declines to answer the remaining questions.¹²⁰ Some courts fail to follow this example, however.¹²¹ The holdings of these cases support the suggestion that, due to the discretionary nature of the power to answer, state courts occasionally preserve questions for later review when policy or other reasons dictate ripeness.

Manville Sales Corp., 757 F.2d 614 (5th Cir. 1985) (per curiam) (certifying questions to Mississippi Supreme Court); *Jackson v. Johns-Manville Sales Corp.*, 469 So. 2d 99 (Miss. 1985) (declining without explanation to answer three certified questions from Fifth Circuit); see also Harry W. Swegle, *Washington Perspective*, 7 STATE CT. J. 3 (Fall 1983) (asserting that federal-court perception of need for definitive answer may differ from that of state court, and that discretion leaves ultimate decision in hands of state court). The *Jackson* case involved tort recovery for cancer allegedly caused by exposure to asbestos, and marked the first asbestos case in Mississippi. Approximately 1,700 other such cases are pending in Mississippi's state and federal courts. Further, asbestos litigation is now occurring throughout the United States. The resolution of the certified questions potentially could have had an enormous economic impact, and it could have affected a large number of people. Indeed, due to the massive amount of pending litigation, an answer by the Mississippi Supreme Court would have been both cost-effective and time-saving. One might assume that the Mississippi Supreme Court felt that the issue(s) presented were not yet ripe for adjudication. Absent the court's articulation, however, this assumption can only be speculation.

117. See *supra* note 116 (discussing Mississippi Supreme Court's refusal to answer Fifth Circuit's certified questions in asbestos case without explanation).

118. Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 52 (1967); see also *Hillsborough v. Bennett*, 173 So. 2d 688 (Fla. 1965) (finding that prerequisites of Florida Appellate Rule 4.61 must be met or certified question will be denied answer). But cf. *Thirty v. Atlantic Monthly Co.*, 445 P.2d 1012, 1017 (Wash. 1968) (answering the certified question although it was not one of first impression). The Washington court later indicated that the federal court would not have certified the question in *Thirty* had the Washington Supreme Court promulgated its rules for certification prior to that decision. *In re Elliott*, 446 P.2d 347, 358 (Wash. 1968).

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

120. See *Buskin Assoc., Inc. v. Raytheon Co.*, 473 N.E.2d 662, 671 (Mass. 1985) (declining to answer one of three questions certified by First Circuit because answer to other questions rendered particular question moot); *Baird v. Attorney Gen.*, 360 N.E.2d 288, 292 (Mass. 1977) (refusing to answer two questions certified because court viewed response to other question as dispositive); *Hiram Ricker & Sons v. Students Int'l Meditation Soc'y*, 342 A.2d 262, 269 (Me. 1975) (same), *cert. denied*, 423 U.S. 1042 (1976); *Aldrich v. Aldrich*, 127 S.E.2d 385, 388 (W. Va. 1962) (same); see also *supra* and *infra* notes 117 & 118-42 and accompanying text (discussing contents of certification order including question(s) posed and statement of facts).

121. See *In re Boyd v. First Nat'l Bank of Pryor*, 658 P.2d 470, 474 (Okla. 1983) (stating that answer to first certified question may determine issues presented, but still addressing second question to assist certifying court if first answer not determinative); *In re Beverly Hills Fire Litig.*, 672 S.W.2d 922, 924-25 (Ky. 1984) (determining that statute Sixth Circuit asked it to construe was inapplicable to case, but also holding statute unconstitutional).

A federal court that has federal-question jurisdiction may nonetheless be motivated to certify a related state-law question, in order to avoid unnecessary resolution of a federal constitutional issue. Some state courts have accepted certification in this situation if answering the question posed involved state-court construction of a state statute and, under one construction, a challenge to its constitutionality might be avoided or modified.¹²² Only a statute subject to two different interpretations permits such a certification. Similarly, if a particular feature of the state constitution is dispositive of the case, certification would be proper.¹²³ Nevertheless, if the statute in question is unambiguous or its interpretation rests upon the scope of a state constitutional provision that parallels the Federal Constitution, the certification typically will be declined.¹²⁴ In either scenario, certification is improper because the answering court must resolve the federal constitutional issue.

State courts also refuse to respond to certified questions if an answer would leave the conflict open. Such unresolved cases result when further state involvement is required, for example, or because the federal court lacks power to grant the relief sought.¹²⁵ State courts also decline to answer certified questions based on the manner in which the questions are posed,¹²⁶ or if there is no agreement on the stipulated facts.¹²⁷

c. State procedures for deciding whether to accept certifications

All of the states that allow certification provide procedural mechanisms to determine whether certified questions can be entertained. Some states place the decision of acceptance of the certified question on the regular docket for hearing

122. See *White v. Edgar*, 320 A.2d 668, 674-675 n.10 (Me. 1974) (asserting that certification is proper and noting that in past this situation was viewed as "paradigm" for abstention by federal court); see also *Abrams v. West Virginia Racing Comm'n*, 263 S.E.2d 103, 108 (W.Va. 1980) (finding that, if state court cannot answer question to avoid federal constitutional issue, then certification was inappropriate).

123. *White*, 320 A.2d at 684; *Abrams*, 263 S.E.2d at 107; accord *In re Beverly Hills*, 672 S.W.2d at 922, 923 (Ky. 1984) (accepting certified question involving interpretation of state statute to determine whether it violated unique provision of Kentucky Constitution).

124. *Abrams*, 263 S.E.2d at 108 (declining to answer question involving interpretation of West Virginia equal protection and due process clauses); accord *White*, 320 A.2d at 684 n.7. But cf. *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 334 N.W.2d 290, 294 (Iowa 1983) (answering questions involving whether a state statute violates equal protection and uniform taxation provisions of Iowa Constitution).

125. *Jefferson v. Moran*, 479 A.2d 734, 736-38 (R.I. 1984) (refusing to answer certified questions because, regardless of answer, federal district court lacked jurisdiction to afford petitioner relief under *Pennhurst St. School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding that federal court cannot award injunctive relief against state officials on basis of state law)); see also *Greene v. Massey*, 384 So. 2d 24 (Fla. 1980) (declining to answer question regarding reversal of criminal conviction for sake of justice, since response would not be determinative of cause). In *Berkshire Cablevision, Inc. v. Burke*, 488 A.2d 676, 679 (R.I. 1985), however, the Rhode Island Supreme Court chose to answer the question because the answer "will provide a resolution of the state-law issue before the First Circuit, necessitating neither federal injunctive relief on that ground nor further involvement by our state courts. . . . [Furthermore, the issues are of substantial public importance], and their resolution should not be further delayed absent extraordinary justification." *Id.*

126. See *infra* notes 203-04 and accompanying text (noting that receiving court may modify question posed by certifying court).

127. See *infra* notes 215-16 and accompanying text (noting that answering court may not find facts).

by the full bench.¹²⁸ In other states, certifications receive preferential treatment over the regular docket when scheduled for hearing by the full bench.¹²⁹ In North Dakota, for example, the clerk routinely schedules the certified question for the next case conference and immediately distributes it to the justices, who meet in conference to decide whether to accept the certification.¹³⁰ In Oklahoma, however, the clerk presents the certification to one judge, who decides whether to answer the question(s) certified and who then presents his or her decision to the full bench for approval.¹³¹

3. *Certifying Courts*

a. *Which courts can certify*

The next element of Section 1 enumerates the courts that have the power to certify questions of law to another jurisdiction's highest court. The Act permits the following courts to certify: the Supreme Court of the United States,¹³² any court of appeals of the United States, any United States district court,¹³³ "[or the highest appellate court or the intermediate court of any other state]."

In 1966, the Uniform Law Commissioners debated the important issue of allowing federal district courts to certify.¹³⁴ Those who were opposed to giving district courts this power argued that permitting only federal appellate courts to certify would ensure that the factfinding function remained in its proper forum, the federal courts.¹³⁵ No argument or delay over the statement of facts¹³⁶ would occur if the answering court simply used the record sent up on appeal.¹³⁷ Such a full factual record also allays the criticism aimed at certification that answering courts merely issue advisory opinions.¹³⁸ The Commissioners also believed that state legislatures would be less likely to approve certification from fear of demands

128. Telephone interview with Clerk of Court of Massachusetts (June 17, 1985); Telephone interview with M. Graves, Clerk of Court of Wisconsin (June 17, 1985).

129. Telephone interview with M. Quinlin, Assistant Clerk of Court of Kansas (July 16, 1985); Telephone interview with J. Scott, Clerk of Court of Kentucky (June 17, 1985).

130. Telephone interview with Luella Dunn, Clerk of Court of North Dakota (July 12, 1985).

131. Telephone interview with Jim Patterson, Clerk of Court of Supreme Court of Oklahoma (July 12, 1985). Apparently, if the judge accepts certification and the case is ultimately decided, the accepting judge writes the opinion and that answer is returned to the certifying court in the form of a memorandum opinion. *Id.*

132. See *Elkins v. Moreno*, 435 U.S. 647 (1978) (ordering question of state law to be certified); *Aldrich v. Aldrich*, 375 U.S. 75 (1963) (same). In addition, the Court has remanded cases suggesting certification. See, e.g., *Mills v. Rogers*, 457 U.S. 291 (1982); *Miree v. DeKalb County*, 433 U.S. 25 (1977); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Lehman Bros. v. Schein*, 416 U.S. 386 (1974); *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960).

133. See *supra* notes 32-43 (discussing modification of language by Commissioners); see also Unif. Certification of Questions of Law Act § 1, Commissioners' comment, 12 U.L.A. 52-53 (1967) (incorporating three-judge district courts into district-court language of U.L.A.).

134. See Transcript of 1966, *supra* note 19, at 9.

135. See Comment, *Abstention and Certification*, *supra* note 32, at 869 (noting that existence of factual record lends credence to argument that court is merely assisting in resolution of controversy).

136. A statement of facts is required by the Act. See Unif. Certification of Questions of Law Act § 3(2), 12 U.L.A. 53 (1967).

137. *Id.*

138. See Comment, *Abstention and Certification*, *supra* note 32, at 870 (asserting that highest state court can be expected to prefer questions accompanied by a full factual record to abstractions akin to advisory opinions).

on workload, given the already burgeoning caseloads of most state courts, if federal district courts were allowed to certify.¹³⁹ Professor Vestal further argued that appellate-court cases perhaps have more significance than ones terminating in the district court, and, therefore, deserved greater attention from state courts.¹⁴⁰

Those in favor of including this provision contended that district courts could readily determine the clarity of another jurisdiction's law, and were probably better suited to do so, because trial judges face such issues more regularly than appellate courts do.¹⁴¹ Furthermore, without such power, an appeal, in effect, becomes mandatory to resolve the instant litigation properly, as any outcome attained without certainty of the appropriate law remains sheer conjecture, and thus creates automatic grounds for appeal.¹⁴² Moreover, proponents argued, including the district courts would save time and money, both major concerns in the certification debate, by resolving cases as early in the process as possible.¹⁴³

The Commissioners also discussed whether to allow for interstate certification.¹⁴⁴ On this issue, Professor Vestal argued that the Act presented an opportunity to not only solve *Erie* federal-diversity problems, but also to provide a procedural vehicle to settle frequent conflict-of-laws problems.¹⁴⁵ The Commissioners ultimately failed to agree with the dissenters, however, asserting that state legislatures would be reluctant to approve an Act mandating such a plan.¹⁴⁶ The Commissioners compromised, by making the adoption of interstate-certification language throughout the Act highly recommended, but optional.¹⁴⁷ Therefore, the portion of Section 1 (as well as the entire Sections 8 and 9) allowing the highest and intermediate appellate courts of a state to certify to another jurisdiction appears in brackets, to denote its nonmandatory nature.¹⁴⁸

b. The nature and scope of the power to certify

Under the U.L.A., a state high court's power to answer questions of law certified by another court vests courts of other jurisdictions with the inherent power to certify questions to that court.¹⁴⁹ This power is discretionary,¹⁵⁰ and the

139. Transcript of 1966, *supra* note 19, at 18-19.

140. *Id.* at 19; see also Comment, *Abstention and Certification*, *supra* note 32, at 870 (stating that restricting district court's right to certify may result in inherent selectivity among cases).

141. Transcript of 1966, *supra* note 19, at 19.

142. *Id.* at 8.

143. *Id.* at 18-19.

144. *Id.* at 8.

145. *Id.*

146. See *supra* notes 80-98 and accompanying text (discussing fears by legislators that interstate certification would cause overburdened dockets and lack of reciprocity).

147. Transcript of 1967, *supra* note 19, at 14. One Commissioner suggested eliminating the state intermediate court only. He suggested that there might be a mechanism within the state by which a state trial judge could ask a higher court judge whether certification was appropriate. *Id.* at 21.

148. *Id.* Commissioner Davies strongly opposed this bracketing. He argued that each bracket makes a state face and worry about an issue; the fewer decisions imposed on a state, he thought, the more likely the passage. Further, elimination of brackets produces greater uniformity in legislation adopted by the states. He later argued that only the state language in Section 1 should be bracketed, and not in Sections 8 and 9, because the policies behind Section 1 and Sections 8 and 9 are different. Section 1's brackets protect the home court, while Sections 8 and 9 allow the court to go to other state courts if it needs to. The majority of Commissioners felt, however, that there shouldn't be a privilege to certify if that same court wouldn't accept questions certified to it.

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

150. See *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) (stating in dictum that use of certification procedure is in federal court's discretion).

U.L.A. Commissioners declined to offer a test or other guidelines for when a court should certify a question to another jurisdiction.¹⁵¹ Thus, the factors that guide the exercise of this discretion determine, to a certain degree, the usefulness of certification in ameliorating the problems created by the *Erie* doctrine in the context of federal-to-state certification, and conflict-of-laws problems in the state-to-state setting.

Through interpretation of Florida's certification statute and appellate rule,¹⁵² the United States Court of Appeals for the Fifth Circuit has led the way in defining the factors for deciding whether to certify a question of law. Many other states¹⁵³ adhere to the factors for determining the appropriateness of certification enumerated by Fifth Circuit Judge Homer Thornberry in *Florida ex rel. Shevin v. Exxon Corp.*¹⁵⁴ Judge Thornberry set forth the following criteria: (1) the closeness of the question to settled law in the state;¹⁵⁵ (2) the existence of sufficient sources to allow a principled rather than conjectural decision;¹⁵⁶ (3) the degree to which comity considerations are relevant, as determined by state and public policy and the importance of the issue to the state;¹⁵⁷ (4) the delay and cost to the litigants;¹⁵⁸ and (5) the ability of the certifying court to frame the

151. Transcript of 1967, *supra* note 19, at 41.

152. FLA. STAT. ANN. § 25.031 (West 1945); FLA. APP. R. 9.150.

153. See, e.g., *Hatfield v. Bishop Clarkson Memorial Hosp.*, 701 F.2d 1266, 1268 (8th Cir. 1983) (applying these factors to Nebraska certification statute); *Watts v. Des Moines Register & Tribune Co.*, 525 F. Supp. 1311, 1324 (S.D. Iowa 1981) (applying these factors to Iowa certification statute and declining to certify because an answer would not be determinative of case and because question raises de novo interpretation of state judicial law rather than statutory construction, thus giving less reason to certify); *American Fidelity Bank & Trust Co. v. Heimann*, 683 F.2d 999, 1002 (6th Cir. 1982) (citing *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir.), *cert. denied*, 425 U.S. 930 (1976); see *infra* notes 154-60 and accompanying text, and denying appellants' certification motion because statute had not been judicially interpreted and no legislative history existed). In *American Fidelity Bank & Trust Co.*, the Kentucky Court of Appeals used the plain language of the statute to guide its interpretation, despite the parties' contentions that the statute was subject to different interpretations. *Id.* But see Response for Appellee in Opposition to Appellant's Motion for an Order Certifying Questions of Law at 6, *St. Paul Structural Steel Co. v. ABI Contracting, Inc.*, 364 N.W.2d 83 (N.D. 1985) (arguing successfully that North Dakota Supreme Court should not certify question to Minnesota Supreme Court based on factors articulated in *Florida ex rel. Shevin*).

154. 526 F.2d 266, 274-75 (5th Cir.), *cert. denied*, 425 U.S. 930 (1976). Judge Thornberry may have relied on the factors found in the ALI STUDY, *supra* note 103, at 294-96. Indeed, the factors the ALI lists — that the states have an established procedure, that the certification request meets the test that the statute employs, and that there be no undue delay and prejudice to the parties — are similar to those adopted in *Shevin*.

155. *Shevin*, 526 F.2d at 274-75.

156. *Id.*

157. *Id.* at 275; see also Wade H. McCree, *Foreword*, 23 WAYNE L. REV. 255, 270 (1977) (maintaining that cases involving issues of state constitutional construction are more sensitive than those involving mere statutory construction and should, therefore, more likely be certified). But cf. Comment, *Abstention and Certification*, *supra* note 32, at 867 (arguing that unconstrued state statute and unconstrued state constitutional provision are equally deserving of certification). See also *Nardone v. Reynolds*, 508 F.2d 660, 663 (5th Cir. 1975) (certifying question regarding applicability of statute of limitations in medical-malpractice case and justifying on ground that matter was of "gravest public policy" and likely to recur frequently).

158. *Shevin*, 526 F.2d at 275. Delay is often cited as the reason for a refusal to certify. See, e.g., *American Fidelity Bank & Trust Co.*, 683 F.2d at 1002 (noting inevitable delay of certification as one reason to retain decision in statutory-construction case); *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65, 68 (7th Cir. 1981) (holding that certification late in proceedings needlessly prolongs suit at parties' expense); *Scuncio Motors, Inc. v. Subaru*, 555 F. Supp. 1121, 1124 n.2 (D.R.I. 1982) (stating that time constraints inherent in preliminary injunction preclude certification), *aff'd*, 715 F.2d 10 (1st

issue in a manner that will produce a helpful response on the part of the state court.¹⁵⁹ Judge Thornberry suggested that the certifying court integrate these elements into a balancing approach, considering the significance of the question along with the benefits and costs of certification.¹⁶⁰

The language of the U.L.A. reveals additional reasons for determining the appropriateness of certification.¹⁶¹ The first such criterion arises because no power to certify exists unless the proposed answering state court is authorized to answer.¹⁶² Therefore, another factor in the decision to certify requires that an established procedure for responding to certified questions be in place in the intended answering jurisdiction. The U.L.A. provides two other express criteria: first, Section 1 requires that the certified question "may be determinative of the cause then pending in the certifying court";¹⁶³ second, it must "appear to the certifying court" that "no controlling precedent" for the certified questions exists "in the decisions of the [Supreme Court] [and the intermediate appellate courts] of th[e] state."¹⁶⁴ Without meeting these criteria, a court lacks the choice to certify.

4. *Type of Questions Certifiable*

According to the U.L.A., the certifying court may certify "questions of law"¹⁶⁵ "if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending."¹⁶⁶ The broadest interpretation of this language regards certification as appropriate in all circumstances, short of superfluous state-court effort. Therefore, the answer to the certified question may or may not be required to resolve the dispute in the certifying court.¹⁶⁷

Cir. 1983); Response for Appellee in Opposition to Appellant's Motion for an Order Certifying Questions of Law at 8, *St. Paul Structural Steel Co. v. ABI Contracting, Inc.*, 364 N.W.2d 83 (N.D. 1985) (citing delay as reason for denying appellant's motion).

159. *Shevin*, 526 F.2d at 275.

160. *Id.* at 274-76.

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

162. See Transcript of 1967, *supra* note 19, at 41 (stating that court cannot certify unless proposed answering court is authorized to respond, because courts lack inherent power to answer certified questions).

163. Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 52 (1967). See *infra* Part II A 4 (discussing this language and determining that it does not require that answer absolutely resolve cause, but merely that it appears reasonable that resolution will occur when applying answer to facts). Questions have not been certified if this test is not met. See *Brewer v. Memphis Publishing Co.*, 626 F.2d 1236, 1242 (5th Cir. 1980) (holding that no certification will occur when cause merely "might" be resolved due to tentative nature of issue), *cert. denied*, 452 U.S. 962 (1981).

164. Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 52 (1967). See *infra* Part II A 5 (describing this standard as insurance that law is not already settled, to avoid waste of judicial and litigant resources).

165. The phrase "questions of law" is considered more fully in Part II C 1 of this article, since Section 3 (Contents of Certification Order) also employs this language. See *infra* notes 196-218 and accompanying text (considering phrase "question of law" under auspices of U.L.A. § 3, which should not contain issues of fact).

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

167. Cf. *Independent School Dist. No. 197 v. W.R. Grace*, 752 F. Supp. 286, 298 (D. Minn. 1990) (finding sufficient Minnesota case law articulating appropriate test for determining constitutionality of special laws). The court in *Grace* noted that a certification decision "rests in the sound discretion of the federal court" under the may-be-determinative standard. *Id.*

This approach contrasts with the more generally accepted view, that the "may be determinative" language suggests that one answer the responding court gives will terminate the case, while another will not.¹⁶⁸ This interpretation, still fairly broad, creates obstacles in states whose constitutions forbid the rendering of advisory opinions.¹⁶⁹ It also suggests that certification may not be invoked until the proceedings advance sufficiently for the certifying court to determine whether the certified questions, if answered in a particular way, would terminate the case. Such later-stage certification allows the state court to consider the certified questions in light of the resolution of the issues that led to the questions' formulation. It also ensures that resolving the state-law question is necessary to the resolution of the federal-court case.¹⁷⁰

The interpretation of the "may be determinative" language may be given a more limited construction. Wyoming, for example, strictly interprets this phrase to mean that the question cannot be answered unless any of the possible responses disposes of the case.¹⁷¹ This interpretation severely limits the utility of certification by apparently making certification available only in diversity cases. In federal-question-jurisdiction cases, the federal court would be certifying a question of state law in the hope of avoiding a federal constitutional issue.¹⁷² In that situation, one answer resolves the federal-court dispute whereas an alternative response does not terminate the case; it merely returns the case for resolution of the federal constitutional issue.¹⁷³ In addition, this strict interpretation seems paradoxical, in that it requires that the state law be unclear (thus not susceptible to divination by the federal court), but at the same time requires the certifying court to judge whether the answer will dispose of the case. The task of deciding if the answer resolves the case is not easy when the court judging that issue does not know how the law is to be interpreted and applied.

5. *The Standard for Certification — "No Controlling Precedent in the Decisions of the [Supreme Court] [and the Intermediate Appellate Courts] of this State"*

Section 1 of the U.L.A. requires the absence of "controlling precedent in the decisions of the [Supreme Court] [and the intermediate appellate courts] of

168. ALI STUDY, *supra* note 103, at 295. *Accord* Pan Am. Computer Corp. v. Data General Corp., 652 F.2d 215 (1st Cir. 1981) (finding that Puerto Rico's highest court adopts this interpretation); *White v. Edgar*, 320 A.2d 668, 677 (Me. 1974) (adopting same interpretation); *Hiram Ricker & Sons v. Students Int'l Mediation Soc'y*, 342 A.2d 262, 264 (Me. 1975) (approving interpretation in *White*), *cert. denied*, 423 U.S. 1042 (1976). *But cf.* *Berkshire Cablevision, Inc. v. Burke*, 488 A.2d 676, 679 (R.I. 1985) (answering question only because answer provided resolution of state-law issue before First Circuit, necessitating neither federal injunctive relief nor further involvement of state courts and thereby suggesting that cause must be terminated by answer).

169. *See In re Richards*, 223 A.2d 827 (Me. 1966) (holding that Maine will not answer unless issue is last to be decided in case then pending in federal court).

170. *See* Comment, *Abstention and Certification*, *supra* note 32, at 869-70 (providing arguments for allowing only appellate courts to certify).

171. *In re Certified Question*, 549 P.2d 1310, 1311 (Wyo. 1976).

172. *See supra* notes 122-24 and accompanying text (explaining idea of certifying state-law question to avoid reaching constitutional issue).

173. *See id.* (noting that certain answers to certified questions still require resolution of constitutional issue).

[the answering] state," for a question to be certified.¹⁷⁴ The U.L.A. Commissioners discussed the meaning of "controlling precedent" before adopting that language.¹⁷⁵ Some suggested that use of the word "controlling" would bind the certifying courts to follow dated decisions of the potential answering state, even if all other jurisdictions rejected that formulation.¹⁷⁶ These Commissioners proposed other language to ensure that this type of situation remained certifiable.¹⁷⁷ The full Commission, however, decided to retain the original language.

Another suggestion advanced the language "controlling precedents in reported decisions of the state,"¹⁷⁸ to parallel the rule that binds federal courts to all reported decisions (including those of the trial court) of the state in which they sit. Nonetheless, the plain language of the statute indicates that, if the statute or law at issue in a case is clear, certification would be inappropriate.¹⁷⁹

Certification is also proper when conflicting authority exists within the state.¹⁸⁰ Courts in states that have certification procedures similar to the U.L.A. generally recognize that the procedure attempts to resolve ambiguities or unanswered questions concerning state law.¹⁸¹ Arguably, absent an opinion on point in the highest court of the state, the law on that issue remains unresolved. The next step for the federal court requires examination of intermediate-appellate-court opinions, following them if applicable.¹⁸² Assuming either conflicting opin-

174. Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 52 (1967). The bracketed language indicates that appropriate variations may be adopted. Unif. Certification of Questions of Law Act, Commissioners' comment, 12 U.L.A. 52-53 (1975).

175. Transcript of 1967, *supra* note 19, at 34.

176. *Id.* at 34-35.

177. *Id.* at 35. *But cf.* King v. Order of United Commercial Travelers of America, 333 U.S. 153, 160 (1948) (holding that, if state decision is of questionable precedential value, federal court need not consider it controlling).

178. Professor Vestal maintained that, after the Supreme Court ruling in *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 178 (1940) (finding that federal courts are bound by intermediate state-court decisions), trial-court decisions were not controlling on federal courts. Transcript of 1967, *supra* note 19, at 33-35. Others disagreed. If federal courts are bound by reported trial-court decisions, then the U.L.A. statutory limitation of being bound only to decisions of the highest and intermediate courts of the state would necessarily have to be widened to accommodate the Supreme Court's ruling in *Fidelity Union* that a federal court must follow the law of a state even though it has not been expounded by the highest state court. *Id.*; see *Fidelity Union*, 311 U.S. at 177.

179. See *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 669 (W. Va. 1979) (finding it apparent that, where state law is clear, no need for certification arises); *Trail Builders Supply Co. v. Reagan*, 409 F.2d 1059 (5th Cir. 1969) (holding that, if there are no decisions *on point*, *Erie*-bound court may certify issue to state supreme court); *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prod., Inc.*, 296 S.E.2d 697, 699 (Ga. 1982) (stating that when answering certified questions it is necessary to consider implications for other fact situations, but that it is similarly necessary to resist answering more than is asked).

180. *Mason v. American Emory Wheel Works*, 241 F.2d 906 (1st Cir.), *cert. denied*, 355 U.S. 815 (1957).

181. See *Alvarez v. Carpenter*, 477 P.2d 792 (Colo. 1970) (discussing difference between first appearance of statutory language and actual meaning); *Irion v. Glens Falls Ins. Co.*, 461 P.2d 199 (Mont. 1969) (stating that only precedent on point supports divergent results in current case); *In re Elliott*, 446 P.2d 347, 355 (Wash. 1968) (finding that reason for certification is to provide authoritative answer, exactly what case at bar required); *Norton v. Benjamin*, 220 A.2d 248, 253 (Me. 1966) (noting that question certified was same as one addressed in earlier federal district-court case, so Maine Supreme Judicial Court must clear up confusion); see also *O'Brien v. Tri-State Oil Tool Indus., Inc.*, 566 F. Supp. 1119, 1122 (1983) (declining to certify because action lacks "ambiguity" of controlling law necessary to invoke certification).

182. See *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 468 (1940) (finding federal courts bound by state intermediate appellate-court decisions absent indication that highest court would decide issue differently).

ions or a total lack of rulings, the issue of law may be considered unresolved and certification the logical resolution.

It appears that federal courts, both before and after the advent of certification, have gone beyond the above two steps by deciding cases based upon secondary authorities and recent trends in other jurisdictions.¹⁸³ Under the U.L.A., federal courts should choose to certify the question rather than to rely on this somewhat attenuated authority, but this decision normally depends on other factors considered by the certifying court.¹⁸⁴ For example, comity is one of the factors that should guide the exercise of the court's discretion to certify, but in the same factual setting a comity argument often can support a decision either for or against certification.¹⁸⁵

Furthermore, with language as manipulable as that in Section 1, the certifying and receiving courts can avoid or minimize the effectiveness of the certification procedure. Since disputes often arise over whether the law in question is clear or merely difficult to ascertain,¹⁸⁶ a federal court has a convenient way of either avoiding or employing certification.¹⁸⁷ It is necessary to clarify the certification standard, however, for certification to be a useful device.

B. Method of Invoking

During the Commission's 1967 proceedings, lengthy debates occurred over the inclusion of Section 2 of the U.L.A.¹⁸⁸ That section allows the certifying court to issue a request for a certification order upon a motion from the court or any party in the case.¹⁸⁹ Commissioner Davies argued that Section 8 of the

183. 1A Pt. 2 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE*, ¶ 0.307[2] (1991) (containing citations).

184. See *supra* notes 150-64 and accompanying text (discussing guidelines for when to certify, including existence of sources, relevant comity considerations, and delay and cost to litigants).

185. But see Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717, 733-34 (1969) (arguing that states should not be offended by federal-court guesses at rule of law and that federal opinions might benefit state courts on undecided issues).

186. See, e.g., *Miller v. N.R.M. Petroleum Corp.*, 570 F. Supp. 28, 30-31 (N.D. W.Va. 1983) (declining to certify, although no decision on point existed in state high court's decisions, and relying on expressions of legislature to decide case); *Guillard v. Niagara Machine & Tool Works*, 488 F.2d 20 (8th Cir. 1973) (remanding case for certification determination based on Minnesota Supreme Court statement of willingness to change indemnity rule).

187. See *Smith v. Gray Concrete Pipe Co.*, 297 A.2d 721 (Md. 1972) (answering questions certified from Virginia federal district court, despite finding two cases directly on point).

188. Transcript of 1967, *supra* note 19, at 46-52.

189. Unif. Certification of Questions of Law Act § 2, 12 U.L.A. 53 (1967). Section 2 (Method of Invoking) provides that "[t]his [Act] [Rule] may be invoked by an order of any of the courts referred to in Section 1 upon the court's own motion or upon the motion of any party to the cause." *Id.*

Interestingly, a reading of certification cases indicates that state and federal courts often decline to certify a question of law when the request is made by party motion. This result may occur because the court is in the best position to determine whether the foreign jurisdiction's law is unclear, and often, when a party seeks certification, the certifying court feels that the law is sufficiently settled, and therefore that certification is inappropriate. See, e.g., *In re Hartman Paving, Inc.*, 745 F.2d 307 (4th Cir. 1984); *American Fidelity Bank & Trust Co. v. Heimann*, 683 F.2d 999 (6th Cir. 1982); *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65 (7th Cir. 1981); *Miller v. N.R.M. Petroleum Corp.*, 570 F. Supp. 28 (N.D. W. Va. 1983); *O'Brien v. Tri-State Tool Indus., Inc.*, 566 F. Supp. 1119 (S.D. W. Va. 1983); *Watts v. Des Moines Register & Tribune Co.*, 525 F. Supp. 1311 (S.D. Iowa 1981); *Irwin v. Calhoun*, 522 F. Supp. 576 (D. Mass. 1981); *St. Paul Structural Steel Co. v. ABI Contracting, Inc.*, 364 N.W.2d 83 (N.D. 1985); *Smith v. Gray Concrete Pipe Co.*, 297 A.2d 721 (Md. 1972). But see, e.g., *Krashes v. White*, 341 A.2d 798, 799 (Md. 1975) (answering certified questions that federal court sent on motion of appellants).

U.L.A. made sense because it allowed the certifying state to decide how to certify, whereas Section 2 purported to instruct the certifying courts of a different state how to act. He argued that a different state's legislature might call for a different method for that court to invoke certification.¹⁹⁰

Professor Vestal responded that Section 2 simply indicated that a court could certify either upon its own motion or at the suggestion of one of the litigants, not that these must be the sole means for certification.¹⁹¹ He also argued for the imposition of limitations on granting litigants' requests for certification.¹⁹² For example, a litigant who has invoked federal-diversity jurisdiction ordinarily should not be permitted to request certification,¹⁹³ due to the unfairness of allowing a party a federal determination of the facts and a state determination of the law.¹⁹⁴ This limitation applies equally to the defendant who removes the case from state court or to the plaintiff who chooses to initiate suit in federal court. The restriction seems particularly pertinent in removal cases, where the plaintiff, who wants the whole case heard in the state court, now faces the delay of certification despite initially choosing the proper forum. However, the restricted access to federal courts caused by this limitation on certification motions goes against some of the basic notions of allowing open federal forums.¹⁹⁵

C. Contents of Certification Order

1. Questions of Law to Be Answered

Section 3¹⁹⁶ of the U.L.A. directs that the certification order set forth the questions of law¹⁹⁷ to be answered. The meaning of the phrase "questions of law to be answered" has not been judicially construed,¹⁹⁸ but presumably the Com-

190. Transcript of 1967, *supra* note 19 at 46.

191. *Id.* at 49.

192. *Id.*

193. See ALI STUDY, *supra* note 103, at 296. The Commission deemed Professor Vestal's arguments more persuasive and included Section 2 in the U.L.A. Unif. Certification of Questions of Law Act § 2, 12 U.L.A. 53 (1967). Professor Vestal's position fails to account for circumstances in which new or unanticipated issues arise in a case, making certification advisable but still unavailable to a party. Perhaps leaving both parties free to move for certification and forcing the judge to make the decision provides a sounder rule.

194. But see Comment, *Abstention and Certification*, *supra* note 32, at 869 (asserting that one purpose of limiting certification to appellate courts is to allow plaintiff federal factfinding forum in diversity cases).

195. Federal-court jurisdiction allows a party the choice of an arguably more impartial forum than a state court that is susceptible to bias toward its citizens or government. In addition, federal courts often possess expertise in areas of litigation that state courts lack. Finally, often overburdened state-court dockets cause extensive delays in resolution of cases.

196. Unif. Certification of Questions of Law Act § 3, 12 U.L.A. 53 (1967). Section 3 reads: "A certification order shall set forth (1) the questions of law to be answered; and (2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose." *Id.*

197. The Commissioners kept the plural "questions" at the suggestion of the Committee on Style, which indicated that the plural was proper. See Transcript of 1967, *supra* note 19, at 45.

198. But see *Smith v. Gray Concrete Pipe Co.*, 297 A.2d 721, 725 (Md. 1972) (finding that Maryland Legislature intended that all open questions certified be answered). It seems, however, that most answering courts answer only the questions that are necessary to dispose of the case. See *supra* notes 168 & 189; *infra* note 203.

missioners intended that only questions of law be certified.¹⁹⁹ The ambiguity of the phrase "questions of law," however, provides substantial opportunity for parties or for courts opposing certification to argue against its use, based on the type of question asked.²⁰⁰ It also allows courts to certify or answer questions inappropriately.²⁰¹ The lack of uniformity in the case law suggests that whether certified questions are answered depends on a policy decision by the receiving court, rather than on U.L.A.-imposed restrictions. For instance, when more than one question of law is certified, the answering court generally responds to a question only if the answer to the preceding question was not dispositive of the case.²⁰²

Initially, either the parties or the certifying court frames the certified questions.²⁰³ Most often, the parties agree to a set of questions subject to court approval with or without modification.²⁰⁴ If the parties are unable to agree, then the court frames the questions.²⁰⁵ The receiving court retains the power to alter the language of the question,²⁰⁶ although some courts have declined to answer questions based on poor phraseology. These courts take the position that, unless the certification order specifically allows the answering court to modify the language, it cannot do so.²⁰⁷

199. See *Baird v. Attorney Gen.*, 360 N.E.2d 288, 302 (Mass. 1977) (finding that certification statute only contemplates that questions of law be certified, yet providing comments on law to cooperate in decisionmaking), *aff'd*, 443 U.S. 622 (1979). But see *Payton v. Abbott Labs.*, 437 N.E.2d 171 (Mass. 1982) (answering certified questions that are factual in nature).

200. See Response for Appellee in Opposition to Appellant's Motion for an Order Certifying Questions of Law at 9-11, *St. Paul Structural Steel Co. v. ABI Contracting, Inc.*, 364 N.W.2d 83 (N.D. 1985) (arguing successfully against certification on several grounds, including that question involved was factual in nature).

201. See *Payton*, 437 N.E.2d at 188-89 (responding to certified question involving issues of liability for *in utero* injury caused by drug).

202. See *Bushkin Assoc. v. Raytheon Co.*, 473 N.E.2d 662, 672 (Mass. 1985) (answering only two of three questions certified because answers to earlier questions resolved case, thus making answer to final question irrelevant); *Miree v. United States*, 249 S.E.2d 573, 580 (Ga. 1978) (same). See also *Hiram Ricker & Sons v. Students Int'l Mediation Soc'y*, 342 A.2d 262, 269 (Me. 1975), *cert. denied*, 423 U.S. 1042 (1976); *Krashes v. White*, 341 A.2d 798, 802 (Md. 1975) (declining to respond to certain questions though parties urged court to answer); *Aldrich v. Aldrich*, 127 S.E.2d 385, 388 (W. Va. 1962). But cf. *In re Boyd v. First Nat'l Bank of Pryor*, 658 P.2d 470, 474 (Okla. 1983) (stating that "[w]hile our answer to the first certified question may be determinative . . . we nevertheless address the issues presented by the second question, for assistance to the certifying court"); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 334 N.W.2d 290 (Iowa 1983) (answering certified question based on briefs that expanded scope of question).

203. In two states, Rhode Island and Massachusetts, the cases indicate that the court alone frames the questions. *Murray v. Norberg*, 423 F. Supp. 795 (D.R.I. 1976); *Bose Corp. v. Consumers Union*, 384 F. Supp. 600 (D. Mass. 1974).

204. *Nardone v. Reynolds*, 508 F.2d 660, 664 n.7 (5th Cir. 1975).

205. *Id.*; *Allen v. Estate of Carman*, 446 F.2d 1276, 1277 (5th Cir. 1971).

206. See *Kaiser v. Memorial Blood Center, Inc.*, 938 F.2d 90, 94 n.2 (8th Cir. 1991); *Martinez v. Rodriguez*, 394 F.2d 156 (5th Cir. 1968) (holding for first time that the receiving court was not bound by language of question but was free to reformulate it after analysis of record); *Walters v. Inexco Oil Co.*, 440 So. 2d 268, 272 (Miss. 1983) (reformulating question for greater clarity); *Certification from Lenhardt v. Ford Motor Co.*, 683 P.2d 1097, 1098 (Wash. 1984) (altering question to focus more clearly on issues that court believed must be resolved); see also *Barnes v. Atlantic & Pac. Life Ins. Co.*, 530 F.2d 98 (5th Cir. 1976) (changing language of questions received to consider other issues).

207. See, e.g., *Jones v. Harris*, 460 So. 2d 120, 122 (Miss. 1984) (declining to answer certified question because, given the way it was phrased, court would have to assume that its state statute was unconstitutional, which was contrary to state policy); *Krashes v. White*, 341 A.2d 798, 802-03

The receiving court's ability to reshape or add to the issues posed by the certified question furthers the goals of certification. By definition, the receiving court is best situated to frame the question for precedential value and to control the development of its internal laws. In addition, if a state court takes offense at a poorly framed question and declines to answer, it may miss an opportunity to settle its own law on a particular point.

2. *Statement of Facts*²⁰⁸

The certification order should also present a statement of the relevant facts.²⁰⁹ The order may include exhibits, excerpts from the record, summaries of the facts found by the court, and any other document that would assist the answering court.²¹⁰ The language of the U.L.A. mandates including a statement of facts.²¹¹ This provision attempts to avoid violations of some state constitutions, which prohibit their courts from answering abstract questions, by showing the presence of an actual controversy to be resolved.²¹²

If the trial court certifies the question(s), the parties compose a joint statement of facts to be sent to the answering court.²¹³ If the court of appeals certifies the question(s), however, the statement consists of the trial court's finding of facts. The time entailed in gathering the necessary facts may often delay the certification process. It is important, however, because many receiving courts simply will not answer the questions presented in the absence of resolved or stipulated facts.²¹⁴ Certification procedures generally prohibit the answering court from engaging in factfinding.²¹⁵ If the answering court perceives an inadequacy in the certifying

(Md. 1975) (stating that, because federal court did not provide for reformulation or rearrangement of questions, court could not specifically answer second and third questions). *Accord In re Certified Question*, 359 N.W.2d 513 (Mich. 1984).

208. See *supra* note 196 (providing text of Section 3).

209. Unif. Certification of Questions of Law Act § 3, 12 U.L.A. 53 (1967).

210. See Commissioners' comment, 12 U.L.A. 53 (1975). Professor Vestal agreed to have the comment state that portions of the record could be included. Transcript of 1967, *supra* note 19, at 32.

211. See Unif. Certification of Questions of Law Act § 3, 12 U.L.A. 53 (1967) (stating explicitly that "[the] order shall set forth" a statement of facts).

212. See Transcript of 1967, *supra* note 19, at 32. Professor Vestal stated that this language would ensure that the certifying court provides the answering court with a complete background of the case as it developed, in order to avoid this danger. *Id.* This requirement presupposes that the proceedings must be substantially advanced before certification is authorized.

213. Letter from James Fullin, Executive Secretary, Wisconsin Judicial Council, to Victoria Doran (June 24, 1985) (stating that some jurisdictions are concerned that certified questions should be permitted only upon facts stipulated by parties or factual findings by trial court); see *Nardone v. Reynolds*, 508 F.2d 660, 663 n.7 (5th Cir. 1975) (requiring parties to submit joint statement of facts); *Coastal Petroleum Co. v. Secretary of Army*, 489 F.2d 777, 780 (5th Cir. 1973) (same), *cert. denied*, 419 U.S. 842 (1974); *Miree v. United States*, 249 S.E.2d 573 (Ga. 1978) (same).

214. See *White v. Edgar*, 320 A.2d 668, 674-77 & n.10 (Me. 1974) (agreeing to respond only after material facts had been either agreed to or resolved); see also *Sydenstricker v. Unipunch Prod., Inc.*, 288 S.E.2d 511, 514 (W. Va. 1982) (answering certified question but stating that, because court was presented with only conclusory facts, it could not pass on the evidentiary sufficiency of claim). Certification never asks a court to pass on the evidentiary sufficiency of a claim, so the *Sydenstricker* court answered a question that it could have declined on the ground of conclusory facts. It may have chosen to answer in this way indirectly to alert the certifying court to the fact that the party may lack a claim. See *In re Richards*, 223 A.2d 827 (Me. 1966) (holding that facts necessary to resolve dispute had not been found, thus declining to answer; suggesting that the Maine court might not respond to a certified question from a federal district court until that court had developed its findings of facts).

215. See *Food Fair Stores, Inc. v. Joy*, 389 A.2d 874, 882 n.7 (Md. 1978) (stating that court's

court's statement, then the proper procedure is for the answering court to remand to the certifying court to ascertain more facts.²¹⁶ This process preserves the original court's status as factfinder.

Another difference arises among state certification procedures over the inclusion of a statement of facts with a certified question. Seven states do not specifically provide in their statute or rule that a statement of facts be included in the certification order.²¹⁷ Two of those states, however — Indiana and Mississippi — always include the statement in certification cases anyway.²¹⁸

D. Preparation of Certification Order

Section 4 of the U.L.A. sets forth the procedure to be followed once the contents of the certification order have been agreed to by the parties or prepared by the court.²¹⁹ This process entails a formal request from the certifying court to the receiving (*i.e.*, answering) court.²²⁰ The receiving court may request other portions of the record if it finds them necessary to dispose of the certified question properly.²²¹

E. Costs of Certification

Section 5²²² calls for an equal division of the costs between the parties unless otherwise ordered by the certifying court.²²³ The standard fee ranges from \$50 to \$100.²²⁴

function was not to evaluate or to weigh evidence, but to accept statement of facts submitted by certifying court); *see also Coastal Petroleum*, 489 F.2d at 780 (same). *But cf.* *Trail Builders Supply Co. v. Reagan*, 235 So. 2d 482, 485 (Fla. 1970) (adding fact from record not included in certificate of appellate judge).

216. *See Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963).

217. The states are Colorado, Georgia, Hawaii, Indiana, Mississippi, New Mexico, Idaho. *See* Appendix part B.

218. *See, e.g., Barnes v. A.H. Robbins Co.*, 476 N.E.2d 84 (Ind. 1985); *Metropolitan Life Ins. Co. v. Tallent*, 445 N.E.2d 990 (Ind. 1983); *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981); *Gabhart v. Gabhart*, 370 N.E.2d 345 (Ind. 1977); *Sidle v. Majors*, 341 N.E.2d 763 (Ind. 1976); *Wecker v. Kilmer*, 294 N.E.2d 132 (Ind. 1973); *Government Employees Ins. Co. v. Brown*, 446 So. 2d 1002 (Miss. 1984); *Jones v. Harris*, 460 So. 2d 120 (Miss. 1984); *Nelson v. James*, 435 So. 2d 1189 (Miss. 1983); *Deville Furniture Co. v. Jesco, Inc.* 423 So. 2d 1337 (Miss. 1982); *Anderson v. Jackson Mun. Airport Auth.*, 419 So. 2d 1010 (Miss. 1982); *First Nat'l Bank v. Drummond*, 419 So. 2d 154 (Miss. 1982).

219. Unif. Certification of Questions of Law Act § 4, 12 U.L.A. 54 (1967). Section 4 reads:

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

Id.

220. Transcript of 1966, *supra* note 19, at 7.

221. Unif. Certification of Questions of Law Act § 4, 12 U.L.A. 54 (1967).

222. Unif. Certification of Questions of Law Act § 5, 12 U.L.A. 54 (1967). Section 5 reads: "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." *Id.*

223. The Maryland Court of Appeals, which acts pursuant to a statute similar to the U.L.A., appears not only to have divided costs equally, but also to have assessed costs to one party in some cases. Whether the Maryland court acted pursuant to direction from the certifying court is unclear. *See Toll v. Moreno*, 397 A.2d 1009, 1019 (Md. 1979) (assessing cost only to appellant without explanation); *Walko Corp. v. Burger Chef Systems, Inc.*, 378 A.2d 1100, 1104 (Md. 1977) (same).

224. Telephone interviews with Clerks of Court, *supra* notes 128-31.

F. Briefs and Arguments

Section 6²²⁵ provides that local rules and statutes govern the briefs filed and arguments heard before the answering court. Generally, any briefs or arguments must relate to the question of law presented in the certificate.²²⁶

G. Opinion

Section 7 states that the answering court shall write an opinion regarding the law to be applied to the certified question, and that the clerk of the answering court shall send copies of the opinion to the certifying court and to the parties.²²⁷ Experience shows that answering courts treat these as formal opinions and report them in their state reporters, much like ordinarily decided cases.²²⁸ Thus, the opinion becomes binding precedent.²²⁹ It serves as *res judicata* regarding the parties, thus ensuring more equitable judicial decisions²³⁰ and distinguishing the response to certified questions from an advisory opinion.²³¹

Most certifying courts phrase their questions to allow and encourage a simple affirmative or negative response; nonetheless the answering court usually offers an explanation with its response.²³² Although the language of the U.L.A. supplies no discretion to reformulate or add to the certified questions, federal courts

225. Unif. Certification of Questions of Law Act § 6, 12 U.L.A. 54 (1967). Section 6 reads: "Proceedings in the [Supreme Court] shall be those provided in [local rules or statutes governing briefs and arguments]." *Id.*

226. See, e.g., *Toll*, 397 A.2d at 1015 (excluding defendant's arguments falling outside scope of question presented). *But cf.* *Smith v. Gray Concrete Pipe Co.*, 297 A.2d 721, 725-26 (Md. 1972) (assuming arguendo that defendant's argument fell within scope of question certified); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 334 N.W.2d 290, 294 (Iowa 1983) (responding to matters raised outside of certificate). One potential problem is that a lawyer may find himself or herself with a request for argument in a state of which he or she is not a member of the Bar. Whether the lawyer would be allowed to appear in the case rests within the discretion of the answering court or in accord with local rule or statute. This problem can be remedied either by the attorney petitioning to argue the case *pro hac vice*, or by employing local counsel.

227. Unif. Certification of Questions of Law Act § 7, 12 U.L.A. 55 (1967). Section 7 reads: "The written opinion of the Supreme Court *stating the law governing the questions certified* shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties." *Id.* (emphasis added). One wonders whether the emphasized language limits the receiving court's ability to reshape or reformulate the issues presented in the certificate. Receiving courts have taken the liberty of reframing certified questions, and some certifying courts explicitly allow the receiving court to do so in its certificate to the receiving court. See *supra* notes 203-07 and accompanying text (stating that answering courts reframe questions after an analysis of the record or to clarify poor phraseology).

228. Transcript of 1966, *supra* note 19, at 7.

229. See *id.* (stating that opinion becomes part of common law of state); see also *Wolner v. Mahaska Indus., Inc.*, 325 N.W.2d 39, 41 (Minn. 1982) (holding its decisions on certified questions to be binding precedent applicable in all future cases involving same legal issue, until overruled); *In re Elliott*, 446 P.2d 347, 354 (Wash. 1968) (same). *But cf.* *Miree v. United States*, 249 S.E.2d 573, 577 (Ga. 1978) (pointing to weakness of certification because court is not deciding particular controversy or appeal from lower court in jurisdiction; thus, precedent is not necessarily binding on certifying court either in result or in application).

230. Letter from Jack Davies, Minnesota State Senator, to Victoria Doran (July 11, 1985). Minnesota made one minor change from the U.L.A. When adopting its statute, it added in its Section 7 that the opinion shall be *res judicata* regarding the parties. This, says Davies, made explicit what was implicit in the U.L.A. and was added to ensure more just judicial decisions. *Id.*

231. *In re Richards*, 223 A.2d 827 (Me. 1966).

232. See *United States v. 19.7 Acres of Land*, 692 P.2d 809, 811 (Wash. 1984) (stating that short answer is negative, but feeling necessity to explain in order to place answer in perspective, as case was one of first impression).

often explicitly allow responding state courts to answer presented questions as a "comprehensive whole or in subordinate or even contingent parts."²³³ The ability to reshape the issues encompassed in the certified questions is important to the goals of the certification process, because it allows state courts to retain control over the direction and development of their own law.

H. Power to Certify

Section 8²³⁴ provides for interstate certification. It empowers the enacting state to certify a question of another state's law, arising in a conflict-of-laws case, to the highest court of that other state for a response.²³⁵ The discussion of the meaning of Section 1 applies equally to Section 8.²³⁶ The Commissioners employed language identical to that in Section 1 for courts to determine certifiable issues and the appropriateness of certification.²³⁷

This provision sparked a major discussion at the 1966 National Conference of Commissioners on Uniform State Laws.²³⁸ Opponents of interstate certification felt that including the provision would further impede passage of the entire U.L.A. in state legislatures.²³⁹ They maintained that inconsistent results might occur,²⁴⁰ and that the costs (in terms of both time and money for the litigants and congested dockets for the courts) would be dramatically greater than those involved in federal-to-state certification.²⁴¹ These dissidents also argued that intermediate-appellate-court certification would further clog dockets, so they should not be allowed to certify.²⁴²

233. *Martinez v. Rodriguez*, 394 F.2d 156, 159 n.6 (5th Cir. 1968); *see also* *Meckert v. Transamerican Ins. Co.*, 742 F.2d 505 (9th Cir. 1984) (giving Idaho court discretion to reframe issues).

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

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.

Id.

235. Unif. Certification of Questions of Law Act § 8, Commissioners' comment, 12 U.L.A. 55 (1975). Section 8 is the reciprocal provision to the bracketed provision of Section 1. *See supra* note 99 and accompanying text (noting that bracketed portions of Section 1 allow option to answer certified questions from state courts).

236. *See supra* notes 99-187 and accompanying text (discussing Section 1 power-to-answer provisions and standards).

237. Compare text accompanying *supra* note 100 (providing text of Section 1) with *supra* note 234 (providing text of Section 8).

238. Transcript of 1966, *supra* note 19, at 8.

239. Transcript of 1967, *supra* note 19, at 5. To allay this fear, the Commission agreed to bracket the relevant portion of Section 1 and all of Sections 8 and 9. *Id.*

240. *Id.* The comment was made that lawyers from one state would be briefing and possibly arguing in another state, in which they would have no familiarity with the state law, particularly with the lower level court decisions. *Id.*

241. *Id.* The likelihood of the necessity of hiring in-state counsel increases, and can be both complicated and costly. *Id.*

242. *See supra* note 103 and accompanying text (discussing Commissioners' decision to accept ALI recommendation that certification should be limited to highest court of state and that certification from intermediate appellate courts should be in discretion of enacting states). The decision to include the intermediate appellate courts makes this the reciprocal provision of the bracketed language of Section 1.

While federal-court power to certify stems from the inherent powers possessed by federal courts, the highest and intermediate-appellate state courts must adopt Section 8 or its equivalent in order to participate in interstate certification.²⁴³ Specifically, most state courts derive jurisdiction directly from their constitutions. Thus, they lack the inherent powers of federal courts.²⁴⁴ However, some state constitutions may permit certification of questions of law to another state without enactment of this U.L.A. section,²⁴⁵ because those state constitutions do not restrict giving opinions to other courts.

The ambiguity of the Section 8 language poses great problems in interstate certification, especially when further compounded by court use of the *renvoi* doctrine.²⁴⁶ At a minimum, a three-tiered inquiry must occur to determine the appropriateness of certification in an interstate situation. The first element requires that the conflict-of-laws rules of the certifying state refer that state court to the law of another state. Otherwise, no issue for certification exists. Second, the U.L.A. allows certification only if the answering state's law is unclear and the answer to the certified question may be determinative of the cause of action.²⁴⁷ Third, the certifying state may be referred to an answering state that employs the *renvoi* doctrine, at least for some purposes, thus potentially referring the question back to the law of the certifying state, or to the law of yet another state.

The delays inherent in this process, particularly in *renvoi* situations, might be seen to outweigh the advantages of certification, thus accounting for the absence of interstate-certification cases. Because certification requires unclear state law, it would be difficult for the certifying judge to know whether the answer to the question posed will be determinative of the cause. Indeed, the law must be unclear for proper certification, and when a possibility of reference to the law of a third jurisdiction exists — which conceivably could warrant a second certification — the difficulties increase. Presumably, most judges would choose to avoid the mire of interstate certification by simply deciding the case with either the forum's law or a guess as to the other jurisdiction's undecided law.

The arguments presented in the foregoing paragraph are speculative only, for instances of *renvoi* are relatively rare, particularly when it comes to invoking the law of a third jurisdiction. More importantly, intelligent use of interstate certification can serve to *eliminate*, rather than *exacerbate*, problems in the use of the *renvoi* doctrine. Instead of having the forum court try to predict what the foreign court would do had the case been filed in that jurisdiction, there can be

243. Telephone interview with John McCabe, Legislative Director and Legal Counsel, National Conference of Commissioners on Uniform State Laws (June 21, 1985).

244. See *infra* notes 263-82 and accompanying text (discussing methods of enactment of certification procedures and constitutional challenges thereto).

245. *Id.*

246. *Renvoi* deals with whether, when one state is referred by its choice-of-law process to the law of another state, the referral is to the internal, or dispositive, law of the state only or instead to the whole law, which includes the choice-of-law process of that state. See Comment, *supra* note 89.

247. Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 52 (1967). This is a confusing standard in and of itself. See *supra* Part II A 2 b (discussing guidelines for when state court will answer and concluding that various states treat the "may be determinative" language as setting different standards).

a determinative ruling from the foreign court itself. The metaphysics of renvoi disappear and an actual ruling from the foreign court is obtained.²⁴⁸

I. Procedure for State Certification

Section 9²⁴⁹ of the U.L.A. calls for the interstate-certification procedure to be determined by the laws of the receiving state. This section, as with Section 8, is bracketed, to denote optional, but encouraged adoption.

J. Boilerplate

The remaining sections²⁵⁰ of the U.L.A. outline standard provisions of most uniform laws, although one of the elements in each of the sections constituted a major topic of discussion at the 1966 Conference. Each section contains the bracketed terms "[Act] [Rule]" to accommodate the differences among the states' practices governing appellate procedure.²⁵¹ In some states, statutes control court procedure, while in others the rulemaking power of the highest state court governs appellate procedure.²⁵² The Commissioners decided to put both terms in brackets to show recognition of this situation and to allow the individual states to choose accordingly.²⁵³

Sections 10 through 13 of the U.L.A. are self-explanatory. Section 10²⁵⁴ provides a severability clause so that, if a court finds one portion of the Act invalid, the rest remains in force. Section 11 is important because it dictates that the Act as a whole should be construed to make uniform the law of the states that enact it.²⁵⁵ One of the primary goals of the *Erie* doctrine was to harmonize the decisionmaking in federal and state courts, in order to discourage forum shopping. Interstate choice of law similarly seeks to promote uniformity.²⁵⁶

248. See Corr & Robbins, *supra* note 10, at 431-33.

249. Unif. Certification of Questions of Law Act § 9, 12 U.L.A. 56 (1967). Section 9 reads: "The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state." *Id.*

250. *Id.* §§ 10-13.

Section 10 [Severability].

If any provision of this [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] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] [Rule] are severable.

Section 11 [Construction].

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

Section 12 [Short Title].

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

Section 13 [Time of Taking Effect].

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

Id.

251. Transcript of 1966, *supra* note 19, at 9.

252. See *infra* notes 263-82 and accompanying text (describing two possible methods of enactment of certification procedure).

253. Transcript of 1966, *supra* note 19, at 9.

254. See *supra* note 250 (providing text of Section 10).

255. See *supra* note 250 (providing text of Section 11).

256. See Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 51 (1975) (stating that "[c]ertification involves . . . the relationship between states. Therefore, it would seem to be eminently desirable that uniformity be achieved in this area").

Section 12 states how the Act should be cited.²⁵⁷ Section 13, which specifies the date of enactment, was added at the conclusion of the 1967 Conference at the suggestion of one of the Commissioners.²⁵⁸

III. METHOD OF ENACTMENT

Prior to the enactment of the U.L.A., some commentators suggested that state enabling acts might provide the basis for a certification procedure.²⁵⁹ Others suggested that the procedure could be initiated by congressional action.²⁶⁰ In this situation, however, Congress would probably be unable to compel state action, particularly if the state argued that to do so would violate its constitution.²⁶¹ Thus, the Commissioners realized that state action offered the best means of implementing a certification procedure.²⁶²

A. Statute

In states adopting the certification procedure by statute, the first certification case generally arises as a constitutional challenge to the statute based on an asserted lack of legislative power to confer such jurisdiction on the courts.²⁶³ These cases challenge the constitutionality of certification because it calls for the rendering of advisory opinions, violating the case-or-controversy requirement.²⁶⁴ However, state courts usually discuss the constitutionality of the statute even if not directly challenged.²⁶⁵

Thus far, the statutes challenged have been upheld, with one notable exception,²⁶⁶ perhaps due to the general principle that statutes, wherever possible, should

257. See *supra* note 250 (providing text of Section 12).

258. Transcript of 1967, *supra* note 19, at 56.

259. See Note, *Consequences of Abstention*, *supra* note 32, at 1369.

260. Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 214 (1957); ALI STUDY, *supra* note 103.

261. Note, *supra* note 25, at 357-58.

262. As noted earlier, due to the rules governing appellate procedure in some states, some state legislatures can implement a procedure by statute, while other states require a court rule. See *supra* notes 251-53 and accompanying text (describing differences between states on issue of what body may enact such a procedure).

263. *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961); *In re Elliott*, 446 P.2d 347, 354-58 (Wash. 1968).

264. See, e.g., *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 742-43 (Fla. 1961) (stating that "in the absence of a constitutional provision expressly or by necessary implication limiting the jurisdiction of the [Florida] Supreme Court to those matters expressly conferred upon it . . . [or] expressly conferring upon another court jurisdiction to exercise the judicial power [with respect to certification] . . . such power may be granted to this court."); *In re Elliott*, 446 P.2d 347, 354-58 (Wash. 1968) (dealing extensively with issue of whether such statute could impose upon court duty to render advisory opinions).

265. See, e.g., *Miree v. United States*, 249 S.E.2d 573, 578 (1978) (noting that "[w]e do not decide here whether or not Code Ann. § 24-3902 is constitutional, but merely note that in adopting that Act, which was approved by the Governor, both other branches of state government have called upon this court to serve in such instances"); *Spencer v. Aetna Life & Cas. Ins. Co.*, 611 P.2d 149, 151 (Kan. 1980) (stating that "[t]his question arises from an actual case and controversy and although presented as a question of law, it neither violates the [state constitutional] case and controversy requirement nor the separation of powers doctrine on advisory opinions").

266. See *Jones Truck Lines, Inc. v. Transport Ins. Co.*, No. 72650, (Mo. July 13, 1990) (finding no constitutional jurisdiction permitting court to respond to certified question under state statute and thus declining to answer question from United States Court of Appeals for the Third Circuit).

be construed as in keeping with the state constitution.²⁶⁷ Typically, in those states requiring statutory action, the constitutions do not prohibit the legislature from conferring additional jurisdictional power upon the appellate courts.²⁶⁸ After enactment, the court often supplements the statute with a court rule specifying the mechanics of the certification procedure.²⁶⁹

B. Court Rule

Many states have adopted the U.L.A. or its equivalent by court rule alone.²⁷⁰ Generally, the appropriate court learns of the U.L.A. from the state's law-revision commission, the permanent rules advisory committee,²⁷¹ or the state-federal judicial council,²⁷² which then sponsors adoption of the certification procedure by the court. Other states have state uniform-laws commissions that urge passage of uniform acts within the state.²⁷³

Nevertheless, adoption by court rule does not preclude the inevitable constitutional challenge to the U.L.A.²⁷⁴ While most states have upheld the constitutionality of their court rules, Utah held its rule unconstitutional.²⁷⁵ The Utah Supreme Court found the certification rule unconstitutional under Article 8 of the Utah Constitution, which provides in pertinent part that "in other cases the [Utah] Supreme Court shall have appellate jurisdiction *only*."²⁷⁶ In the absence of the word "only," enlargement of appellate jurisdiction by court rule or statute could be construed.²⁷⁷ Its presence, however, combined with the fact that certification was not among the writs over which the court has original jurisdiction,²⁷⁸

267. See *Sun Ins. Office*, 133 So. 2d at 742-43 (finding that legislature has constitutional power to broaden court jurisdiction); *In re Elliott*, 446 P.2d at 352 (same). Cf. *Miree*, 249 S.E.2d at 578 (stating that, since both other branches of government called upon courts to act on certified questions, courts will accept responsibility).

268. Memorandum of New York Law Revision Commission Relating to Certification of Questions of Law to the Court of Appeals, Leg. Doc. (1985) No. 65[B], at 9. States that have adopted certification procedure by statute include Arizona, Hawaii, Kansas, Maryland, Minnesota, New Mexico, Oklahoma, Oregon, Washington, West Virginia, and Wisconsin. See *infra* Appendix part B.

269. These states include Colorado, Florida, Georgia, Indiana, Iowa, Louisiana, Maine, New Hampshire, and Wyoming. See *infra* Appendix part B.

270. These states include Colorado, Kentucky, Massachusetts, Michigan, Mississippi, Montana, North Dakota, and Rhode Island. See *infra* Appendix part B. The Commonwealth of Puerto Rico also falls into this category. *Id.*

271. See Letter from Joel Selig, Professor of Law, University of Wyoming, to Victoria Doran (June 12, 1985).

272. Letter from James Fullin, Executive Secretary, Wisconsin Judicial Council, to Victoria Doran (June 24, 1985).

273. *Id.*

274. See, e.g., *Sunshine Mining Co. v. Allendale Mutual Ins. Co.*, 666 P.2d 1144, 1147 (Idaho 1983) (holding — over a vigorous dissent — that court possesses inherent power to decide Idaho law); *In re Richards*, 223 A.2d 827, 832 (Me. 1966) (concluding that ability to receive and answer certified questions was more than an advisory function); *Irion v. Glens Falls Ins. Co.*, 461 P.2d 199, 203 (Mont. 1969) (summarily affirming authority to answer certified questions and appropriateness in this context).

275. *Holden v. N.L. Indus., Inc.*, 629 P.2d 428, 432 (Utah 1981).

276. UTAH CONST. art. VIII, § 4 (emphasis added); see also FLORIDA CONST. art. V, §§ 3-4.

277. *Holden*, 629 P.2d at 430.

278. The writs over which the court has original jurisdiction are mandamus, certiorari, prohibition, quo warranto, and habeas corpus. UTAH CONST. art. VIII, § 4. This is in contrast to the Colorado Constitution. Its certification procedure, COLO. APP. R. 21.1, was upheld as an exercise of original jurisdiction stated in COLO. CONST. art. VI, § 3 as the "power to issue writs . . . and such other original and remedial writs as may be provided by rule of court with authority to hear and determine the same." *Id.*

caused the Utah Supreme Court to hold the court rule violative of Article 8.²⁷⁹

Prior to 1973, the Alabama Constitution echoed Utah's Constitution in granting its supreme court "appellate jurisdiction only." A 1973 amendment, however, specifically authorized the high court to answer "questions of state law certified by a court of the United States."²⁸⁰ Upon receipt of this jurisdictional grant, the court promulgated the certification procedure by rule.²⁸¹ New York also faced a similar constitutional barrier to certification and amended its constitution before adopting a procedure.²⁸²

IV. IMPORTANT PATTERNS — STATE VARIATIONS OF THE UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT

A. Overview

All forty jurisdictions that have adopted some form of certification procedure grant the power to answer certified questions only to the state's highest court having jurisdiction over the question.²⁸³ In all of these jurisdictions, the power to answer is discretionary,²⁸⁴ as is the power to certify questions.²⁸⁵

Twelve jurisdictions have adopted statutes that are almost identical to the U.L.A.²⁸⁶ Only these jurisdictions possess both the power to answer and the power to certify questions of law to other states.²⁸⁷ Several other jurisdictions have the power to answer questions from appellate courts of another state, but not to certify such questions.²⁸⁸

279. *Holden*, 629 P.2d at 431.

280. ALA. CONST. art. VI, amend. 328.

281. ALA. R. APP. P. 18.

282. See *infra* Part VI A (discussing New York experience in bringing about certification procedure).

283. See *infra* Appendix part B.

284. See WASH. REV. CODE § 2.60.020 (1989). The language of the Washington statute states that the court "shall render its opinion." *Id.* The Washington Supreme Court has ruled that this power is discretionary. *In re Elliott*, 446 P.2d 347, 353 (Wash. 1968).

285. See *supra* notes 108-48 and accompanying text (stating that U.L.A. makes these powers discretionary to promote individual state autonomy and allow states to control their courts and laws).

286. These jurisdictions are Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, North Dakota, Oklahoma, Oregon, West Virginia, Wisconsin, and Puerto Rico. See *infra* Appendix part B. Of these twelve jurisdictions, Kentucky, Massachusetts, Puerto Rico, and Wisconsin vary from the U.L.A. in that they will not accept certifications from the intermediate appellate court of another state. Interestingly, however, both Kentucky and Wisconsin allow both their highest and intermediate appellate courts to certify questions of law to other states. KY. R. CIV. P. 76.37 (1978); WIS. STAT. ANN. § 821.08 (West Supp. 1989). Massachusetts and Puerto Rico are consistent in that they allow only their highest appellate court to certify questions, and they will not accept certifications from an intermediate appellate court of another state. MASS. SUP. JUD. CT. R. 1:03 (1988); P.R. SUP. CT. R. 27 (1988). West Virginia joins them, allowing only its Supreme Court of Appeals to certify questions to other states, but West Virginia accepts certified questions from both the highest and the intermediate appellate courts of other states. W. VA. CODE § 51-1A-1 (1981).

287. All jurisdictions have the power to answer certified questions from various levels of federal courts.

288. See ALA. R. APP. P. 18 (employing language allowing certification from "a court of the United States," thus permitting the assumption that this would include state appellate courts); MICH. GEN. CT. R. 797.2 (employing language allowing certification from "a federal court or state appellate court"); N.Y. RULES OF COURT § 500.17 (N.Y. Ct. App.) (McKinney rev. ed. 1986) (expressly allowing other states to certify to New York, but providing no language for New York courts to certify questions to other states).

B. Power to Answer

1. Prohibitions on Accepting Certification from Particular Courts

The most common variation from Section 1 of the U.L.A. involves the limitations that states place on the courts from which they will accept certified questions. Eight states allow certified questions only from federal appellate courts,²⁸⁹ thus eliminating the federal district court as a certifying court. Seventeen states will not allow certified questions from any state court.²⁹⁰

The fear of inundation appears to prompt states to deny acceptance of certified questions from federal district courts.²⁹¹ This seems to be a perception without basis in fact,²⁹² however, for as yet no state that has implemented a certification procedure has been unduly burdened by it.²⁹³ Other states may hesitate because they feel that their courts will be violating state constitutional prohibitions against issuing advisory opinions unless they answer a question based on the fully developed facts of an appellate-level case.²⁹⁴ Further, some commentators believe that restricting the right of federal district courts to certify guarantees that only truly important cases will be eligible for certification, since the losing party must have been willing to pursue an appeal before obtaining certification.²⁹⁵

Finally, some experts believe that allowing federal district courts to certify questions of law encourages forum shopping in states that do not have intrastate certification statutes.²⁹⁶ Litigants without the option of certification in a state trial court might have an incentive to take cases into federal court,²⁹⁷ thus engendering state answers to questions of law without following the prescribed path through the state-court system.

In contrast, some courts interpret their certification statute or rule in a sufficiently broad manner so as to accept certified questions from courts that are not explicitly noted in their authorizing statute or rule. For example, Massachusetts and Rhode Island have accepted certified questions from United States

289. These states are Florida, Georgia, Hawaii, Indiana, Louisiana, Mississippi, New York, and Wisconsin. See *infra* Appendix part B.

290. These states are Arizona, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maine, Mississippi, Montana, New Hampshire, New Mexico, New York, Rhode Island, and Wyoming. See *infra* Appendix part B.

291. See Comment, *Abstention and Certification*, *supra* note 32, at 870 (asserting that to allow federal district courts to certify may overburden state courts).

292. See *supra* notes 83-98 and accompanying text (stating that deluge is not a real problem because certification is not often used and because courts give such questions priority).

293. See generally Corr & Robbins, *supra* note 10, at 447-58.

294. ALI STUDY, *supra* note 103, at 294.

295. Comment, *Abstention and Certification*, *supra* note 32, at 870. See also Letter from Thomas Shriner, Esq. to Marilyn Graves, Clerk of Wisconsin Supreme Court (Apr. 19, 1982). This has serious consequences, however, since costs and delay to litigants would be greater. Further, no guarantee exists that only important matters will be appealed. Some parties may choose not to pursue an appeal for reasons having no relation to the importance of the issues. Others may try to entangle the opposition with the delay of appeal raising issues having little or no merit.

296. See Comment, *Abstention and Certification*, *supra* note 32, at 870.

297. *Id.*

bankruptcy courts.²⁹⁸ As discussed earlier, important reasons exist for allowing federal district-court certification to state courts.²⁹⁹

2. *Type of Question Certifiable — Question(s) (or Propositions) of Law that “Is [Are] Determinative” vs. “May Be Determinative”*

Seven states employ the following variation of U.L.A. Section 1: “question[s] [or propositions] of law which [is] [are] determinative of the [cause] [case].”³⁰⁰ Obviously, a state that uses the “is determinative” phrase would accept fewer certified questions than a state that uses the “may be determinative” language. Any situation in which the court doubts the determinative effect of its decision becomes ripe for refusal to answer. Nevertheless, the Florida Supreme Court has answered certified questions in cases that evidently necessitated further resolution of legal issues in the federal court.³⁰¹ On the other hand, perhaps this variation in language only reflects one alternative attempt to express the requisite that the answer to the state-law question must resolve the factual dispute in the federal court. Such a reason for the phraseology would render the difference in language meaningless. When strictly construed, however, the more obligatory language may inhibit federal-court certification.³⁰²

3. *The Standard — “No Controlling Precedent” vs. “No Clear Controlling Precedent” in the Highest and/or Intermediate Appellate Courts*

Seven jurisdictions use the “no clear controlling precedent” language,³⁰³ while the others use the U.L.A. language of “no controlling precedent.”³⁰⁴

298. See *Colonial Tavern, Inc. v. Boston Licensing Bd.*, 425 N.E.2d 284 (Mass. 1981); *In re Shepard Co.*, 342 A.2d 918 (R.I. 1975). *But cf. In re Hartman Paving, Inc.*, 745 F.2d 307 (4th Cir. 1984) (denying plaintiff's motion for certification presented to bankruptcy judge on ground that West Virginia lacked precedent on point).

299. See *supra* notes 134-43 and accompanying text (stating that such certification is important to resolve major issues early in litigation, to avoid loss of decision when party fails to appeal, and to provide uniformity and fair judicial decisions).

300. Compare Alabama, Florida, Georgia, Indiana, Louisiana, Mississippi, New Mexico (see *infra* Appendix part B) with Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 52 (1967) (stating that question of law is certifiable if it “may be determinative of the cause”). See also IDAHO APP. R. 12.1 (stating that for question of law to be certifiable it must be “a controlling question of law in the pending action in the U.S. court as to which there is no controlling precedent”); MONT. R. APP. R. 44(a) (using standard that question is certifiable if “controlling question of Montana law as to which there is substantial ground for difference of opinion” is at issue).

The difference between “question(s) of law” versus “question(s) or proposition(s) of law” has not been judicially construed, nor is any difference readily apparent.

301. See *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960) (stating that certified questions and hence proceeding before it do not concern resolution of constitutionality of statute). *But cf. Greene v. Massey*, 384 So. 2d 24, 27-28 (Fla. 1980) (withholding answer to United States Court of Appeals regarding criminal reversal “in the interests of justice,” since its response would not be determinative of cause). The decision in *Greene* may suggest that, when the state court wishes to avoid an answer, it will choose to interpret the language in a strict manner. *Id.*

302. See *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1242 n.5 (5th Cir. 1980) (declining to certify question to Mississippi because of that state's more restrictive “is determinative” language in case where state-law issue “might” or “might not” be dispositive) (emphasis in original), *cert. denied*, 452 U.S. 962 (1981).

303. The states are Alabama, Florida, Georgia, Indiana, Maine, Louisiana, and Mississippi. See Appendix part B. The only difference between this list and that of the states employing the “is determinative” language is the substitution of Maine for New Mexico. See *supra* note 300 (listing jurisdictions using “is determinative” language).

304. Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 52 (1967). *But see* HAW. REV. STAT. § 602-5(2) (1985) (not stating standard); P.R. SUP. CT. R. 27 (1988) (“no clear precedents”).

Further, seventeen jurisdictions require only that this equivalent standard be applied to the decisions of the highest court of the state, rather than to decisions of the highest and intermediate appellate courts of the state.³⁰⁵

On the whole, the "no clear controlling precedent" language appears to be much broader than the U.L.A.'s "no controlling precedent" term, thus allowing a greater number of certified questions. The language seems to go well beyond authorizing certification of undecided state-law questions, because the law can be well-settled despite the absence of "clear controlling precedents." Moreover, confining the standard to the decisions of the highest state court goes against the rule that binds federal courts by the intermediate appellate-court decisions of the state in which they sit.³⁰⁶

In addition, one commentator has argued that certification "should be used only in situations of genuine perplexity concerning state law; it must not become a substitute for conscientious and independent federal adjudication."³⁰⁷ The criticism is that the broader language may encourage federal courts to certify, rather than to deal with difficult questions of law. While it is not clear that this possibility would actually occur in practice,³⁰⁸ the potential could be eliminated by amending these statutes and rules to conform with the U.L.A.

C. Power to Certify

Half of the jurisdictions that permit certification lack a provision authorizing their courts to certify questions of law to the court of another state.³⁰⁹ This presents a serious problem to the resolution of conflict-of-laws issues by any means other than judicial speculation when faced with unclear law in the applicable state.³¹⁰ No legislative history explicitly suggests why these states chose to forego the opportunity to handle choice-of-law problems through certification. The U.L.A. decision to make adoption of Sections 8 and 9, as well as the applicable bracketed language in Section 1, optional may account for some of the nonuse.³¹¹ Indeed, because many people consider the U.L.A. to be a mechanism to combat the *Erie* problem,³¹² perhaps these states envision certification

305. The jurisdictions are Alabama, Colorado, Florida, Georgia, Indiana, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, North Dakota, Oklahoma, Puerto Rico, Rhode Island, West Virginia, and Wyoming. See *infra* Appendix part B.

306. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940). The federal court may even be bound by the reported trial-court decisions in this context. *Id.* at 178-79.

307. Note, *Consequences of Abstention*, *supra* note 32, at 1368.

308. A reading of the case law in these states does not reveal any practical impact on the states' use of the procedure. States having the narrower U.L.A. language appear to have received a similar amount of certified questions as those states having the broader "no clear controlling precedents" standard.

309. These states are Alabama, Arizona, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maine, Michigan, Montana, Mississippi, New Hampshire, New Mexico, New York, Rhode Island, Washington, and Wyoming. See *infra* Appendix part B. Three of these states — Alabama, Michigan, and New York — do have the power to receive questions from state courts, but they do not have the power to pose them. Why these states made this choice is unclear.

310. See *supra* notes 56-60 and accompanying text (noting conflict-of-laws problems and fact that certification assists in resolving them, such that when certification is unavailable, courts must guess as to the applicable law).

311. See *supra* notes 144-48 and accompanying text (discussing optional nature of these sections and reasons Commissioners decided to allow option).

312. See *supra* notes 59-73 and accompanying text (discussing *Erie* problems and how Commissioners sought to remedy them through enactment of U.L.A.).

as an accommodation only to federal courts, rather than to other states as well.

At the time of adoption of the U.L.A., the Commissioners encountered resistance to the idea of certification. This attitude stemmed from suspicion of the process and some strange perceptions in state legislatures.³¹³ While the Act gives states the opportunity to preserve their own lawmaking powers, the general viewpoint among the states seems to be one of abdicating power, and of federal encroachment.³¹⁴ States fear that somehow certification might weaken their role or abrogate their constitutional responsibilities.³¹⁵ Ironically, the Act intends just the opposite.³¹⁶

V. ACTUAL OPERATION OF CERTIFICATION PROCEDURE

Twenty-six of the forty jurisdictions that have adopted a certification procedure have done so since 1975.³¹⁷ The number of certified questions is also on the rise.³¹⁸ Support for the procedure has increased in the past decade.³¹⁹ 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.³²⁰

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 due to continued misperceptions and unwarranted fears.³²¹

313. See *infra* notes 390-417 and accompanying text (describing enactment of certification procedure in Connecticut and perception by legislature that state would lose control over cases before its courts and be faced with deluge of new cases).

314. Telephone interview with John McCabe, Legislative Director and Legal Counsel, National Conference of Commissioners on Uniform State Laws (June 21, 1985).

315. *Id.*

316. *Id.* (responding to assertion that U.L.A. actually provides states more power, Mr. McCabe stated that "[w]hat's obvious isn't as obvious as it always ought to be").

317. 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. See *infra* Appendix part B.

318. See Corr & Robbins *supra* note 10, at 420 (surveying judges with questionnaire on various certification issues and reporting that judges currently are experiencing rise in number of certified questions).

319. Swegle, *supra* note 116, at 5; SERON, *supra* note 31, at 2.

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

321. Telephone interview with John McCabe, Legislative Director and Legal Counsel, National Conference of Commissioners on Uniform State Laws (June 21, 1985).

Even with this increase in support for certification, no reported case has utilized interstate certification to resolve a conflict-of-laws situation. This total absence perhaps should not be surprising, given that only twelve states possess interstate certification power,³²² and because a state court must address several threshold issues before being able to find an appropriate case for certification. A court wishing to certify, for example, must initially determine that the suit in question poses a real conflict-of-laws question.³²³ Then the court must ensure that the issues presented meet the standard required for certification.³²⁴ 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.³²⁵

Moreover, the uncertainty surrounding predictions of "determinativeness," as required by the U.L.A.,³²⁶ 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.³²⁷

The achievement of these ends will not be an easy task. Problems on both procedural and substantive levels are encountered when a state contemplates adoption of a certification statute. The enactment process itself poses numerous obstacles, including constitutional issues. The experiences of New York and Connecticut illustrate these problems.

VI. ENACTING STATE CERTIFICATION: THE EXPERIENCES OF NEW YORK AND CONNECTICUT

A. New York: The Process of Enacting a State Certification Statute

The idea for a certification procedure in New York was first brought to the attention of Assemblyman Edward Griffith in early 1982 by his legislative assistant, John Halloran, who was a law student at Albany Law School.³²⁸

322. See *supra* note 286. Conversations with various clerks of court indicate that most of them remain unaware that their states could accept or certify questions from another state.

323. See *supra* notes 56-60 and accompanying text (stating elements for existence of conflict-of-laws situation and that such element must be met to give rise to need for interstate certification).

324. See *supra* notes 118-27 & 165-87 and accompanying text (setting forth standard for certification under U.L.A. Section 1 to require no controlling precedent in the answering jurisdiction and that answer to questions may be determinative of cause in certifying court).

325. See *supra* notes 56-60 and accompanying text (describing difficulties with choice-of-law situations and stating that these problems provide impetus for judges to apply their own law because of convenience and belief that it is superior).

326. See *supra* notes 165-73 and accompanying text (relating "may be determinative" standard for certification and stating that such standard offers limited guidance).

327. See *supra* notes 31-60 & 234-48 and accompanying text (discussing advantages of interstate certification as being authoritative resolution of legal questions, comity, and reduction of judicial guesswork).

328. Telephone interview with Terrence O'Neill, Counsel to Assemblyman Edward Griffith (June 21, 1984). Accord Telephone interview with Jay Cox O'Brien, Assistant Director, New York Law Revision Commission (June 11, 1985) (stating that the bill had been introduced by Mr. Griffith's office before the Law Revision Commission had become involved in assisting in its passage.)

Halloran's conflict-of-laws class raised the certification issue; he proposed that the Assemblyman submit a bill in the New York State Legislature to allow for a certification statute, coupled with court-made rules.³²⁹ The bill's stated purposes — reducing *Erie* problems, encouraging comity, and allowing individual states to control development of their own laws — echoed those that prompted the Uniform Commissioners to adopt the U.L.A.³³⁰

1. History of A5453, the 1985 Bill that Called for a Constitutional Amendment to Allow for Certification of Questions of Law in New York

On March 2, 1982, Assemblyman Griffith first introduced Assembly Bill 10676 — the predecessor to A5453 — in the New York Assembly.³³¹ The bill soon caught the attention of New York's Law Revision Commission, and Assemblyman Griffith agreed to allow the Commission to assume sponsorship and drafting responsibilities.³³²

But Joseph Bellacosa, then Clerk of the New York Court of Appeals, the state's highest court, quickly registered the Court of Appeals' opposition to the bill.³³³ He stressed that enactment of a certification procedure in New York required a constitutional amendment to Article VI, Section 3 of the New York State Constitution.³³⁴ That section provides, in relevant part, that the jurisdiction of the Court of Appeals "shall be limited to the review of questions of law" in certain enumerated cases.³³⁵ No portion of the section encompassed the power to answer a question of law certified to the New York Court of Appeals from another court. The New York Legislature "does not possess inherent power to

329. Telephone interview with Terrence O'Neill, Counsel to Assemblyman Edward Griffith (June 21, 1984).

330. See *supra* Part I (detailing purposes behind U.L.A.).

331. Telephone interview with Terrence O'Neill, Counsel to Assemblyman Edward Griffith (June 21, 1984). Assembly Bill 10676 read:

Rulemaking power of the court of appeals with respect to matters before certain federal courts. The court of appeals may adopt and from time to time amend a rule to permit the court of appeals to answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, the Court of Appeals of the District of Columbia, or a three judge district court of the United States, when requested by the certifying court if there are no, involved in any proceeding before it, questions of law of the State of New York which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the court of appeals of New York.

A10676 (1984).

332. Telephone interview with Terrence O'Neill, Counsel to Assemblyman Edward Griffith (June 21, 1984); Telephone interview with Jay Cox O'Brien, Assistant Director, New York Law Revision Commission (June 11, 1985). The involvement of the Law Revision Commission (L.R.C.) marked the reopening of a study of certification by a L.R.C. research consultant, completed in 1966. See Richard B. Lillich, *Federal Courts: State Legislation Relating to Abstention When Points of Local Law Must Be Decided* (1966) (favoring adoption of certification procedure, but resulting in no action). See also Memorandum of L.R.C. Relating to Certification of Questions of Law to the Court of Appeals for 1984 and 1985 Legislatures, at 2 [hereinafter Law Revision Commission Memorandum].

333. Letter from Joseph Bellacosa, Clerk, New York Court of Appeals, to John Halloran (Mar. 2, 1982).

334. *Id.* A constitutional amendment in New York requires that the amendment pass two separately elected legislatures and that it be presented to and passed by the general electorate in the first general election following the amendment's second passage by the legislature. N.Y. CONST. art. V, § 2 (1985) (amending scope of power of state judiciary).

335. N.Y. CONST. art. VI, § 3 (1962).

expand the Court [of Appeals' jurisdictional] powers,³³⁶ and the powers of the court stem entirely from New York's Constitution.³³⁷ Thus, for the court to obtain the expanded jurisdiction for certification required a constitutional amendment.³³⁸

The Law Revision Commission amended A10676 in accordance with Clerk Bellacosa's suggestion.³³⁹ The amendment to the bill simply called for a constitutional amendment to Section 3, rather than for a statutory change to the Judiciary Law or a textual alteration of the bill.³⁴⁰

After the decision in March 1982 to amend the constitution, the legislature solicited comments from interested groups.³⁴¹ In April 1982, Sol Wachtler, Judge of the New York Court of Appeals and Chairman of the New York State-Federal Judicial Council, expressed the Court of Appeals' unanimous support for passage of the certification bill.³⁴² Research fails to disclose why the Court of Appeals underwent this change of heart.³⁴³

After the arrival of the new legislature, elected in November 1982, the Judiciary Committee in 1983 reported Assembly Bill 2229 on certification.³⁴⁴ The text of A2229³⁴⁵ differed from that of A10676(b) in two significant respects.

336. *Id.*

337. *Id.*

338. See, e.g., Law Revision Commission Memorandum, *supra* note 332, at 9-10; HENRY COHEN & ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* 7-8 (1952).

339. Memorandum in Support of Legislation for Bill Number 10676-b [hereinafter Memorandum, Bill 10676-b]; see also Letter from John Halloran to Joseph Bellacosa, Clerk, New York Court of Appeals (Apr. 29, 1982).

340. Memorandum, Bill 10676-b, *supra* note 339.

341. Comments received either disapproved or offered no position. See New York County Lawyers' Association's Report on Proposed Legislation Allowing the Court of Appeals to Answer Questions of Law Certified to it by Specified Federal Courts (Sept. 1983); Report Re: Certification of Questions of Law to the New York Court of Appeals, Democratic Study Group [hereinafter Democratic Study Group Report].

342. Letter from Sol Wachtler, Judge, New York Court of Appeals, to Gordon Howe, II, Assistant Counsel to Senate Majority Leader (Apr. 27, 1984); see also Law Revision Commission Memorandum, *supra* note 332, at 12.

343. See *supra* note 333 and accompanying text (stating opposition by New York Court of Appeals to certification).

344. See Democratic Study Group Report, *supra* note 341; Letter from Ian Clements to Victoria Doran (July 18, 1985). The legislative history of certification in New York may be traced as follows:

1983

5/31: Assembly concurs with Senate amendment, A8860 repassed. A2229 (same resolution) as A8860 was reported from Judiciary Committee; passed Assembly; died in Senate Judiciary Committee.

1984

1/24: S7316 (Douglas Barclay Sponsor) introduced.

2/7 : A8860 (Griffith) introduced.

4/30: A8860 passed.

5/29: S7316 passed.

1985

3/5 : S3620 (John Dunne Sponsor) and A5453 (Griffith) introduced 4/30 S3620 passed.

6/17: A5453 passed.

Id.

345. The text of A2229, which was the same as A8860, read in relevant part:

The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of

First, A2229 omitted the language allowing the New York Court of Appeals to answer questions of law certified to it from the District of Columbia Court of Appeals or a three-judge district court of the United States.³⁴⁶ Instead, the new bill allowed the New York Court of Appeals to answer questions of law certified to it from "an appellate court of another state."³⁴⁷ Second, A2229 changed the standard for accepting certification from one in which the certifying court sought controlling precedent only in the New York Court of Appeals, to one in which the certifying court looked for controlling precedent in the decisions of any court of New York.³⁴⁸

Although A2229 died in the Senate Judiciary Committee in 1983, the Assembly passed the same resolution in early 1984, prior to the election changing legislatures.³⁴⁹ Almost simultaneously with that passage by the committee, Judge Wachtler suggested that the language of the bill regarding answering questions of law be altered from "appellate court[s] of another state" to "an appellate court of last resort of another state."³⁵⁰ On May 29, 1984, the Senate passed S7316, which incorporated Judge Wachtler's suggestion; two days later, the Assembly repassed A8860 to conform to the Senate version.³⁵¹

The initiative thus passed the 1982 legislature. The constitutional amendment could not yet be presented for voter approval, however, because the New York Constitution still required repassage of the bill by a separately elected legislature.³⁵² Using the requisite identical language, the initiative obtained the approval of the 1984 legislature in June 1985.³⁵³ Thereafter, the certification procedure appeared on the November 1985 ballot and the voters ratified it on November 4, 1985.³⁵⁴

2. *Judicial Establishment of the New York Certification Procedure*

The New York Constitution permits amendments to it to detail the requirements for utilization of the new provision.³⁵⁵ Instead of following this path with the certification procedure, however, the Assembly followed the recommendation

another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.

Id.

346. Compare A10676(b) with A2229.

347. *Id.*

348. Compare A10676(b) ("there is no controlling precedent in the decisions of the court of appeals of New York") with A2229 ("are not controlled by precedent in the decisions of the courts of New York").

349. See *supra* note 344 (providing legislative history).

350. Letter from Sol Wachtler, Judge, New York Court of Appeals, to Gordon Howe, II, Assistant Counsel to Senate Majority Leader (Apr. 27, 1984).

351. See *supra* note 344 (providing legislative history of certification statute).

352. N.Y. CONST. art. V, § 2 (1985) (requiring constitutional amendments to be passed by two separately elected legislatures before submission for voter approval).

353. See *supra* note 344 (providing legislative history).

354. The Secretary of State received the amendment to coordinate it for the ballot. Those consulted in Assemblyman Griffith's office and at the New York Law Revision Commission were confident that the amendment would be approved by the voters, since constitutional amendments usually are accepted. Telephone interview with Terrence O'Neill, Counsel to Assemblyman Edward Griffith (June 21, 1984); Telephone interview with Jay Cox O'Brien, Assistant Director, New York Law Revision Commission (June 11, 1985).

355. N.Y. CONST. art. V, § 2 (1985).

of the Law Revision Commission³⁵⁶ and, in the constitutional amendment, authorized the Court of Appeals "to set forth the mechanics and provisions for regulating the invocation of the certification procedure."³⁵⁷ The Commission recommended this process at the behest of the Court of Appeals, which requested the power to establish its own rules regarding the selection of certified questions.³⁵⁸

Following passage of the constitutional amendment, the Court of Appeals exercised its rulemaking power and promulgated Rule 500.17 of the New York Rules of Court.³⁵⁹ The rule reflects the same "procedural" provisions of the Uniform Certification of Questions of Law Act.³⁶⁰

B. A Comparison of New York's Certification Procedure and the Uniform Certification of Questions of Law Act

The substantive elements of New York's certification procedure both parallel and deviate from the corresponding elements of the U.L.A. Specifically, New York's power-to-answer provision follows the power-to-answer section of the U.L.A. Rule 500.17(a) also tracks the other sections of the Act. Importantly, however, the New York rule omits the equivalent of U.L.A. Section 8, on the power to certify. The two certification procedures also differ on the standard used for determining whether certification is appropriate and which courts can certify to the Court of Appeals. The following sections discuss these differences.

1. New York Standard for Certification

The language of the relevant New York standard reads: "questions of New York law certified to [the Court of Appeals] . . . which are not controlled by precedent in the decisions of the courts of New York."³⁶¹ The Assembly presumably chose this language to ensure that resort to certification occurred only in situations that raised genuinely perplexing questions of New York law.³⁶² Further, the Law Revision Commission had stated that this language appeared in the U.L.A.³⁶³ In actuality, however, the language of the U.L.A. was a bit different: "no controlling precedent in the decisions of the [Supreme Court] [and the intermediate appellate courts] of this state."³⁶⁴

A comparison of the New York statute and the U.L.A. indicates that New York's standard may allow the Court of Appeals greater flexibility to reject cases certified to it,³⁶⁵ for it may be read to include the decisions of New York trial

356. Law Revision Commission Memorandum, *supra* note 332, at 10.

357. A2229, *supra* note 345 (identical text to A8860).

358. Law Revision Commission Memorandum, *supra* note 332, at 10.

359. N.Y. RULES OF COURT § 500.17 (N.Y. Ct. App.) (McKinney rev. ed. 1986).

360. Compare *id.* (setting forth procedure and standards for certification to New York courts) with Unif. Certification of Questions of Law Act § 4, 12 U.L.A. 54 (1967) (outlining proposed procedure and standards for certification).

361. S3620, 1985-1986 Regular Session (1985). Originally, the proposed statutory language more closely followed that of the U.L.A., reading: "not controlled by precedent in the decisions of the Court of Appeals of New York." A10676 (1984). Legislative records provide no reason for this change in language.

362. Law Revision Commission Memorandum, *supra* note 332, at 10.

363. *Id.* at 11.

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

365. See *supra* note 139 and accompanying text (explaining that Commission was concerned that enacting states would be fearful of overburdened dockets).

courts, as well as appellate courts. Beyond the language difference, a review of the short history of the New York statute discloses that the Court of Appeals rejected more than half of the questions it received, no doubt indicating the intention to retain flexibility in accepting or rejecting certified questions.³⁶⁶ In at least one instance the court refused to answer a question certified by the United States Court of Appeals for the Second Circuit because the same issue was simultaneously before a New York trial court, and would soon be subject to appeal.³⁶⁷

The New York Court of Appeals also adopted the strict certification standard requiring that "determinative questions of New York law [be] involved,"³⁶⁸ in another departure from the more liberal U.L.A. language that the "law of this state . . . may be determinative."³⁶⁹ These two instances of cautious language in the New York procedure appear to serve a duplicative purpose, since the state also adopted that portion of U.L.A. Section 1 that allows the answering court full discretion to accept, modify, or reject certified questions of law.³⁷⁰ The fact that New York adopted the narrower certification standard may indicate that the court and legislature believed that the restrictive language not only would temper the type of questions certified, but also would restrict the number of questions that will actually be sent. Out of concern for its caseload, the Court of Appeals may have implemented this stricter standard because it did not want to expend the time needed even to reject certified questions.

The stringent New York standard compels certifying courts to look at reported New York trial-court decisions, in addition to those of various appellate courts in New York, before deciding whether to certify. This difference in language was intentional, and in practice affects the acceptance and rejection rates of certified questions.³⁷¹ Therefore, certifying courts must review all New York court decisions and, to be able to certify, must demonstrate that there is either an absence of precedent, or a conflict among decisions, in the New York courts.³⁷²

2. Certifying Courts

Another aspect of the New York procedure that narrows the U.L.A. stems from the allowance of only federal appellate courts and the state courts of last

366. The court has accepted only two certified questions. *Loengard v. Santa Fe Indus., Inc.*, 507 N.E.2d 315 (N.Y. 1987); *Kidney v. Kolmar Labs., Inc.*, 502 N.E.2d 168 (N.Y. 1986), *submitted after certification*, 808 F.2d 955 (2d Cir. 1987).

367. *Rufino v. United States*, 506 N.E.2d 910 (N.Y. 1987).

368. N.Y. RULES OF COURT § 500.17(a) (N.Y. Ct. App.) (McKinney rev. ed. 1986).

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

370. *Id.*; see *supra* notes 99-127 and accompanying text (setting forth Section 1 of U.L.A. and discussing power to answer, reject, and modify certified questions under this provision as reaction to fear by states of overburdened dockets).

371. Telephone interview with Terrence O'Neill, Counsel to Assemblyman Edward Griffith (June 21, 1984); Telephone interview with Jay Cox O'Brien, Assistant Director, New York Law Revision Commission (June 11, 1985). Professor Vestal maintained that, based on United States Supreme Court decisions, in no event would reported trial-court decisions be binding on a federal court in an *Erie* case. Transcript of 1967, *supra* note 19, at 49. If this were the case, then New York's language would have no practical difference; however, other Commissioners disagreed with Professor Vestal's interpretation of the Supreme Court's precedent on this issue. See *id.* at 49-50.

372. Telephone interview with Terrence O'Neill, Counsel to Assemblyman Edward Griffith (June 21, 1984); Telephone interview with Jay Cox O'Brien, Assistant Director, New York Law Revision Commission (June 11, 1985).

resort to certify questions of law to the New York Court of Appeals.³⁷³ The U.L.A. also permits certification from federal district courts and intermediate appellate courts of certifying states.³⁷⁴ The New York Law Revision Commission echoed the standard fear-of-deluge rationale for rejecting the idea of certification from those courts.³⁷⁵ Conventional wisdom states that questions of New York law arise in federal courts more often than those of probably any other state.³⁷⁶ Further, a movement recently arose within the New York Court of Appeals to restrict rather than to expand its jurisdiction, and thereby reduce its already overwhelming caseload.³⁷⁷ The narrower language of the New York certification statute potentially deters the burdening of the Court of Appeals with federal-court certifications. Judging from the number of questions received, however, imminent inundation seems unlikely.³⁷⁸ Since 1985, when New York enacted its law, the federal courts have sent approximately half a dozen certified questions to the New York Court of Appeals.³⁷⁹

However, the original language of bill A10676 — the first interjurisdictional-certification bill — allowed for three-judge district courts to certify questions.³⁸⁰ The bill rationalized this approach by noting that these district courts include at least one federal appellate judge who may be unfamiliar with state law or at least less familiar with it than a federal district judge (who is usually a member of the bar of the state in which the court sits).³⁸¹ In addition, these three-judge

373. N.Y. RULES OF COURT § 500.17 (N.Y. Ct. App.) (McKinney rev. ed. 1986).

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

375. Law Revision Commission Memorandum, *supra* note 332, at 11; *see also* Lillich, *supra* note 332, at 17.

376. Law Revision Commission Memorandum, *supra* note 332, at 11; *see also* Lillich, *supra* note 332, at 17. Although New York may have the potential to receive more certified questions than many other states due to sheer volume, the numbers are by no means geometric in proportion. New York, like most other states that have enacted a certification statute modeled after the U.L.A., has failed to note that the number of questions received turns not on the size or importance of the jurisdiction, but instead on the number of issues of a particular state's law for which there exists no controlling precedent and for which the issue is in some degree related to or determinative of the case. Assuming *arguendo* that New York would have more unanswered issues of law due to the size and volume of law decided by the state, it does not follow that the number of issues left undecided in one state would be significantly greater than that of any other state. In fact, the contrary may be true. New York's litigation docket may lead to the answering of *more* questions than in smaller states and, therefore, controlling precedent may exist for more issues.

377. Telephone interview with Jay Cox O'Brien, Assistant Director, New York Law Revision Commission (June 5, 1985).

378. Miner, *supra* note 86, at 156-58 (asserting that federal-court deference to state courts required the balancing of a number of factors).

The scale is "heavily weighted in favor" of the federal court's exercise of jurisdiction. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983). In addition, the federal courts have expressed a desire to make diversity discretionary; more limited application of diversity jurisdiction could substantially limit the number of cases in which certified questions are necessary. *See, e.g.,* Carl McGowan, *The View from an Inferior Court*, 19 SAN DIEGO L. REV. 659, 665-66 (1982). The federal courts could be empowered to abstain in diversity cases if workable state remedies exist. *See* National Legal Center for the Public Interest, *Abolition of Diversity Jurisdiction: An Idea Whose Time Has Come?*, xiii n.2 (1983). Modifications to or limitations on diversity jurisdiction would obviously limit the number of certified questions sent, because in many instances the state and not the federal court would be the forum. *See, e.g.,* 28 U.S.C. § 1332(a) (1988) (increasing jurisdictional amount in diversity cases from \$10,000 to \$50,000).

379. Telephone interview with Kenneth Roe, Clerk, New York Court of Appeals (Feb. 1989).

380. Bill No. A10676-b (1982).

381. Memorandum, Bill 10676-b, *supra* note 339, at 2.

district courts possess rather limited jurisdiction, so a lower number of potential certified issues would arise.³⁸² Why New York eliminated this three-judge district court provision remains unknown, although perhaps it was necessary to acquire the support of the Court of Appeals.

Furthermore, at first bill 10676 refused to allow for any state courts to certify questions.³⁸³ The Assembly then changed this provision to allow "appellate courts of another state" to certify, but retreated from that broad language to the final version permitting just the "appellate court of last resort" of the state to certify.³⁸⁴ Again, the fear of deluge reared its baseless head.³⁸⁵

3. *Absence of Provision Allowing the New York Court of Appeals to Certify to Other States*

The amendment to the New York Constitution allowing certification failed to authorize the New York courts to certify questions to other states, and thus requires a future amendment to provide the state with the full powers of certification. This omission may have resulted from an oversight.³⁸⁶ But New York became the third state³⁸⁷ that has chosen to receive questions of law from other states but not to certify them.³⁸⁸ Thus, the New York courts must continue to guess at the law of another state when called upon to apply that unsettled law in a given factual setting.³⁸⁹

C. Connecticut and the Dilemmas Facing an Enacting State

Previous sections of this article have reviewed the basic foundation of the U.L.A. and the ensuing state-modified versions. The New York experience indicated a cumbersome process of enactment, required by that state's constitution. Another highly important aspect of the certification dilemma stems from the problems and concerns faced by states enacting such procedures. An examination of the certification debate in Connecticut evinces the two most prevalent fears of enacting states: inundation and delay. (Of course, adopting jurisdictions

382. *Id.*

383. Bill No. A10676-b (1982).

384. See *supra* notes 331 & 344 (tracking this change, but noting no reason for it in legislative history).

385. Law Revision Commission Memorandum, *supra* note 332, at 11. But see Telephone interview with Terrence O'Neill, Counsel to Assemblyman Edward Griffith (June 21, 1984) (stating that bill was altered "to ensure that the Court of Appeals be reserved for only weighty and important matters"); Telephone interview with Jay Cox O'Brien, Assistant Director, New York Law Revision Commission (June 11, 1985) (stating that egotism of Court of Appeals, not wanting to bother with lower courts of other states, may have influenced the decision).

386. Telephone interview with Terrence O'Neill, Counsel to Assemblyman Edward Griffith (June 21, 1984); Telephone interview with Jay Cox O'Brien, Assistant Director, New York Law Revision Commission (June 11, 1985). Mr. O'Brien stated that the L.R.C. had not been asked by anyone to include such a provision, and that the Lillich study, which provided the basis for the committee's research, focused on federal-to-state certification and Florida Appellate Rule 4.61 (having no interstate-certification power). *Id.* But cf. Telephone interview with Joseph Bellacosa, Clerk, New York Court of Appeals (Aug. 15, 1985) (suggesting that state probably did not want to bother with certifying questions and preferred to decide issues itself).

387. The other states are Alabama and Michigan. See *supra* note 309.

388. See *supra* note 288 and accompanying text (noting which states lack power to certify).

389. See *supra* notes 234-48 and accompanying text (stating that danger of lack of power to certify is forced judicial guesswork, in addition to lack of comity and inability of states to control development of own law).

do discuss other concerns, such as administrative costs, judicial economy, and worry about the weight given to an answering court's opinion.³⁹⁰)

Connecticut represents the general anxiety of all state legislators when confronted with the question of adopting certification procedures.³⁹¹ Extensive legislative history in that state documents those issues that caused some legislators to be opposed to the enactment of the Uniform Certification of Questions of Law Act.³⁹² Ultimately, a version of the U.L.A. was enacted in 1985 allowing federal, but not state, courts to certify questions of law to the Connecticut Supreme Court.³⁹³

The Connecticut legislators who opposed the U.L.A. raised five concerns about the certification process — two substantive and three procedural. The procedural questions, discussed later, involved whether the opinion given was advisory, how much respect the certifying court would accord the answering court's opinion, and which state's laws would govern the procedure of the action. The substantive concerns stemmed from fears of inundation and delay.

The legislature's primary substantive concern dealt with the possibility of an undue burden on the Connecticut Supreme Court from an inordinate number of questions certified by federal courts.³⁹⁴ Connecticut, like its certification-statute-enacting predecessors,³⁹⁵ worried about the U.L.A. overtaking its already congested Supreme Court docket, thus thwarting that court's ability to carry out its normal duties.³⁹⁶ Federal Judges Jon O. Newman, of the United States Court of Appeals for the Second Circuit, and T.F. Gilroy Daly, of the United States District Court for the District of Connecticut, rebutted these opponents of certification. Judge Newman testified in state judiciary-committee hearings as a proponent of the U.L.A.,³⁹⁷ stating that the fear of a flood of litigation was not justified, for two reasons. First, the U.L.A. nowhere requires that the answering court respond to certified questions.³⁹⁸ Indeed, the Act leaves responding courts free to decline any question submitted, thereby retaining control over their dockets.³⁹⁹ Second, Judge Newman noted that the experience of states with a certification procedure already in place reveals only a small quantity of certified questions.⁴⁰⁰ Judge Newman's assessment proved correct; since Connecticut en-

390. See *supra* notes 283-316 and accompanying text (outlining different types of statutes enacted in various states and concerns raised during course of enactment).

391. *Id.*

392. CONN. GEN. STAT. ANN. § 51-199a (West 1985) (Uniform Certification of Questions of Law Act) [hereinafter Connecticut U.L.A.].

393. Connecticut U.L.A. § 51-199a(b).

394. See *Hearings on H.B. 6249*, *supra* note 81, at 368.

395. See *supra* notes 83-98 and accompanying text (discussing states' fear of deluge prior to enactment of certification statutes, but concluding that such fear was groundless).

396. *Hearings on H.B. 6249*, *supra* note 81, at 370.

397. *Id.* at 363-64, 370.

398. *Id.* at 363. See generally Unif. Certification of Questions of Law Act §§ 1-13, 12 U.L.A. 52-56 (1967) (failing to require answering courts to respond to certified questions and providing several avenues to avoid responding, including requirement of no controlling precedent and requirement that opinion issued to certified question must be determinative of action).

399. *Hearings on H.B. 6249*, *supra* note 81, at 363.

400. *Id.* at 364.

acted its certification statute it has received only a handful of certified questions.⁴⁰¹

The second substantive issue raised by the legislators emanated from the belief that certification leads to unreasonable delay in case resolution,⁴⁰² mirroring other states' concerns prior to U.L.A. passage.⁴⁰³ Judge Newman explained that case history disproves this notion.⁴⁰⁴ He reported that, on average, only three months elapsed from time of receipt, to time of answer, and then to final disposition of the federal portion of the lawsuit.⁴⁰⁵ Judge Newman also informed the committee that the Supreme Court likely would handle certified matters expeditiously in the interest of comity and because of the low number of requests.⁴⁰⁶ Judge Daly also testified on this issue, stating his belief that certification rarely caused undue delays or significant financial or administrative burdens on litigants.⁴⁰⁷ Research has disclosed no reports of delays due to certification in the years since enactment of the U.L.A. in Connecticut.⁴⁰⁸

The three procedural concerns that were raised in committee were treated rather expeditiously. The first related to the potentially advisory nature of the opinion answering the certified question, and, therefore, its constitutionality,⁴⁰⁹ again echoing a concern of other enacting states.⁴¹⁰ Judge Newman demonstrated the nonadvisory nature of the procedure by noting the requirement that certification occur only during a real lawsuit between real parties.⁴¹¹

Connecticut legislators also considered the procedural matter of the binding nature of the answer on the certifying court,⁴¹² an outgrowth of the advisory-opinion debate. Judge Newman assured the legislators of the obligation of federal courts to accept Connecticut Supreme Court rulings on certified questions, just as on reported opinions.⁴¹³ Indeed, the answer serves as binding precedent and is *res judicata* regarding the parties, thus distinguishing the answer to a certified question from a mere advisory opinion.⁴¹⁴

Finally, the legislators were uneasy about the possibility of the answering court losing control over the procedure once the case reached it.⁴¹⁵ One legislator

401. I have done a Lexis search of the States Library, Connecticut file, using the search term "certif! w/seg (question law)" and a Westlaw search of the Connecticut cases database using as a search term "opinion (certif! & \"question law\")".

402. *Hearings on H.B. 6249, supra* note 81, at 364.

403. *See generally supra* notes 83-98 and accompanying text (discussing belief that certification delays case resolution due to time involved in awaiting answering court's response and potential for further proceedings in answering court).

404. *Hearings on H.B. 6249, supra* note 81, at 363, 368.

405. *Id.*

406. *Id.* at 370.

407. *Id.* at 372.

408. A search of the Westlaw and Lexis Connecticut databases revealed no mention of reported delays in litigation involving questions certified to the Connecticut Supreme Court.

409. *Hearings on H.B. 6249, supra* note 81, at 367-68.

410. *See supra* notes 168-69 (noting Maine Supreme Judicial Court's view on possible advisory nature of certification and its conclusion that Maine will not answer certified question unless answer will be determinative of case).

411. *Hearings on H.B. 6249, supra* note 81, at 366. Representative Michael Ryback raised this concern again on the House floor, but never seriously challenged the Bill.

412. *Id.* at 368.

413. *Id.* at 367.

414. *See supra* notes 229-31 and accompanying text (relating binding nature of opinion answering certified question).

415. *Hearings on H.B. 6249, supra* note 81, at 373-74.

responded that such proceedings must be determined and controlled by the Connecticut Supreme Court, pursuant to the Connecticut rules of procedure.⁴¹⁶ This view carried the day, with the legislature following the example of other states that have enacted the U.L.A., by allowing the answering court to control procedures.⁴¹⁷ Thus, Connecticut entered the age of certification, with some variations from the U.L.A.

As illustrated by the examples of New York and Connecticut, enacting a certification procedure requires strict attention both to the individual state's constitution and to the concerns of state officials, including both legislators and judges. Fortunately, most state adoptions of certification have met with little resistance in the final analysis, but obtaining the goal of a certification procedure still takes time. State legislatures, like state courts, also face crowded schedules with many pressing issues to consider. Certification should certainly be a major concern of these individuals, however, because the ability to certify and answer questions greatly aids the state's ability to control and monitor the laws that those legislators work so hard to enact.

VII. PROPOSAL FOR A NEW UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT

Establishing the U.L.A. aided greatly in promoting enactment of certification statutes and court rules in forty jurisdictions,⁴¹⁸ twelve of which also adopted interstate-certification provisions.⁴¹⁹ Still, the certification procedure suffers from gross underutilization, particularly in the interstate context.⁴²⁰ The question, then, now becomes: Why this failure to employ certification more extensively?

As this article attempts to demonstrate, the lack of use stems from ignorance regarding the values of certification (particularly with respect to solving difficult conflict-of-laws questions), the U.L.A.'s optional language on interstate certification,⁴²¹ and the variation and inconsistency among the states that permit the process.⁴²² By its very nature the certification process demands interaction between courts, and thus fails without uniformity. In order to promote the use of certification, provisions must be efficient and easily applied. Courts need to feel a sense of comity, which only stems from confidence that other jurisdictions with whom they interact operate under the same strictures. Consequently, the current

416. Uniform Certification of Questions of Law Act, 1985 Conn. Gen. Assembly Proceedings (daily ed. Apr. 18, 1985), at 2935 (statement of Rep. Frankel).

417. See *supra* notes 202-06 and accompanying text (noting that answering courts control process once question reaches them). See also CONN. GEN. STAT. ANN. § 51-199a(g) (1985). The House approved the Uniform Certification of Questions of Law Act, via House Bill No. 6249, on April 18, 1985, by a vote of 136-9. Six days later, the Senate, without discussion, passed House Bill 6249, and the Bill took effect on October 1, 1985.

418. See *infra* Appendix part B.

419. See *supra* note 286 (listing jurisdictions that allow interstate certification).

420. See *supra* note 79 and accompanying text (stating that no instances of interstate certification have been reported in the history of the procedure).

421. See *supra* notes 144-48 & 234-48 and accompanying text (noting that the U.L.A. brackets language on interstate certification, making its adoption by states optional in order to encourage enactment by state legislatures in the face of fears of deluge and delay).

422. See *supra* notes 283-316 and accompanying text (describing variations among state statutes, including different standards for accepting certification and permissibility of interstate certification).

multi-procedure approach of disjointed processes following the U.L.A. theme and variations discourages the use of certification.

In the remainder of this article, therefore, I propose 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 at the conclusion of this article. The language suggested in the discussion section presents examples to advance the conceptual relationship of the final provisions of the certification proposal.

A. Method of Enactment

States enact a certification process either by statute or court rule.⁴²³ States that require a statute may adopt this proposed language as a uniform entity.⁴²⁴ Some states require that the state constitution be amended in order to expand the jurisdiction of the state's highest appellate court, thereby including certification within its powers.⁴²⁵ The state constitution could also be amended to permit the highest state appellate court to enact its own rules, thus allowing that court to incorporate this proposed language into its already-existing rules. No matter which vehicle the state chooses, it may enact certification.

B. Power to Answer

The U.L.A. permits not only the highest court of a state to receive and respond to certified questions, but also provides discretion for use of this power by intermediate appellate courts.⁴²⁶ This power-to-answer provision requires modification to prohibit intermediate state appellate courts from answering certified questions of state law. Allowing these intermediate courts to answer promotes inefficiency, because the highest court maintains appellate jurisdiction to reverse any determination on appeal.⁴²⁷ An appeal to the higher state appeals court creates unjustified delay in the certification process.⁴²⁸ Moreover, the highest court in the state, as the final arbiter of state law, is best equipped to address questions of first impression.⁴²⁹

The absolute power to answer by the highest state court affords exclusive discretion to the answering court to receive and respond to a certified question.⁴³⁰ The provision allows self-policing and protects an answering court from inundation, irrelevant questions, and answering matters outside its jurisdiction or

423. See *supra* notes 259-82 and accompanying text (outlining two methods of adopting certification).

424. See *supra* notes 390-417 and accompanying text (discussing adoption of certification statute in Connecticut).

425. See *supra* notes 328-60 and accompanying text (describing New York experience amending constitution to provide court jurisdiction over certified questions).

426. Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 52 (1967); see *supra* notes 40-54 and accompanying text (discussing Section 1 of the U.L.A.).

427. See *supra* notes 80-98 and accompanying text (discussing problems with U.L.A., specifically when questions are answered by intermediate appellate courts).

428. *Id.*

429. *Id.*

430. See *supra* notes 85-86 and accompanying text (noting that certification to lower courts inhibits final determinations of law and that availability of such a forum allows certifying courts to choose where to certify questions).

currently pending in lower state courts.⁴³¹ Of utmost importance, the answering court need not provide artificial reasons to avoid responding.⁴³²

Recommended provision:

The [Supreme Court⁴³³] 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 of any other state or the District of Columbia.

C. Which Courts May Certify

The U.L.A. makes certification available to the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court.⁴³⁴ The Commissioners intended that this language be obligatory on states adopting the U.L.A.⁴³⁵ Often, however, statutes that implement the U.L.A. restrict certain federal courts' ability to certify.⁴³⁶ In addition, the Commissioners left the language pertaining to state-court certification power in the enacting states' discretion.⁴³⁷

All federal courts and the highest state appellate courts should be able to certify questions to an answering court. Thus, the proposed uniform statute obliges states to enact their certification statutes to permit all of the above-mentioned 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 the appropriate state court as the final arbiter and controller of its own law.

Recommended provision:

A question of law may be certified by an order of 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 of any state or the District of Columbia, upon the court's own motion or upon the motion of any party to the cause.

This section, in conjunction with the previous one, removes the concern of an appeal in both the state-to-state and the federal-to-state context. Only the

431. See *supra* notes 108-31 and accompanying text (noting discretion permitted to answering courts under U.L.A. and advantages that such discretion provides).

432. See *supra* notes 112-17 and accompanying text (discussing merits of absolute discretion resting with answering court).

433. This term is bracketed, for the jurisdiction to substitute the title of its highest appellate court. See *supra* note 100.

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

435. *Id.* The Commissioners denoted optional language with brackets. *Id.* Commissioners' comment, 12 U.L.A. 52-53 (1975).

436. Illinois only allows certification from the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit, presumably to prevent deluge. ILL. ANN. STAT. ch. 110A, para. 20 (Smith-Hurd 1983). Delaware only allows certification from the United States District Court for the District of Delaware. DEL. SUP. CT. R. 41 (1987). Delaware is the most cautious in delegating which jurisdiction may certify to its court, probably believing that only the Delaware federal district court is in a position to recognize and formulate certified questions to the Delaware Supreme Court. One must wonder, however, why such recognition was not also given to the United States Court of Appeals for the Third Circuit.

437. Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 52 (1967). Bracketed language indicates permissive suggestions in the U.L.A. See *supra* notes 128-31 and accompanying text.

highest state court may prepare or answer certified questions, eliminating the possibility of appeal present if a lower state court poses or answers a question.⁴³⁸ 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.⁴³⁹

This proposal gives the district courts certification power, as they hear the bulk of the diversity cases. In the federal context, the 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.⁴⁴⁰ Thus, state statutes and rules disallowing federal district courts to send certified questions are unjustified and unwise.

D. 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 questions. 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 utilization of the certification process. Uniform reciprocity assures a state that some balance will be achieved by discouraging courts from only utilizing one of the powers of certification for fear of inundation, delay, or loss of control.⁴⁴¹ The heart of certification rests on the interactive process, requiring participating jurisdictions to both answer and certify.

Recommended provision:

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

E. When the State Court May Answer

The state court should respond to a certified question when the issue concerning its law may be determinative of the case. The "may be determinative" language set forth in Section 1⁴⁴² comports with the notions of uniformity and ease of application of the proposed language.⁴⁴³ Many jurisdictions, however, adopted statutes containing the too restrictive "must be determinative" stan-

438. See *supra* notes 80-86 and accompanying text (noting that all intermediate-court decisions are subject to appeal, such that any time an intermediate court answers certified question, that answer is subject to change on appeal).

439. See *supra* notes 228-31 and accompanying text (stating that state-court decisions of law bind federal courts sitting in diversity).

440. See *supra* note 436 (noting that Delaware allows only its federal district court to send certified questions to the Delaware Supreme Court).

441. See Corr & Robbins, *supra* note 10, at 434-44 (discussing issues of control and forum bias).

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

443. See *supra* notes 165-73 and accompanying text (describing "may be determinative" standard as one requiring merely that the state court's answer potentially resolve the case).

dard.⁴⁴⁴ 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 the certifying court, placing procedural locks on certification of the question when the process requires openness in order to function properly.

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

Recommended provision:

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.

F. No Controlling Precedent

Some states have set forth a “no clear controlling” precedent standard, instead of a more liberal “no controlling” standard.⁴⁴⁵ 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 both to limit the number of questions sent and to avoid answering certified questions.⁴⁴⁶ 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 interpretations, the proposed statute mandates the broader language to avoid tortured analyses and unnecessary distinctions. (Under the new statute, for example, a court that is faced with conflicting authority in state law could certify, because by definition the issue would meet both the “no controlling” and “clear controlling” precedent tests.)

Recommended provision:

This power to certify applies to questions of law that may be determinative of the cause then pending in the certifying court and for which there is no controlling precedent in the receiving jurisdiction.

G. Preferential Treatment for Certified Questions

Certified questions should have a preferred status on the answering court’s docket, to encourage prompt response and to assure an answer as soon as

444. See *supra* notes 300-02 and accompanying text (noting that certain states adopted stricter standard, which purportedly could be used to stop flow of certified questions).

445. See *supra* notes 303-08 and accompanying text (discussing difference between two standards in that no clear controlling precedent mandates that certifying court must not find any case that assists in decision).

446. See *supra* notes 180-87 and accompanying text (relating this standard as means of avoiding certification by simply holding that question presented fails this test).

practicable. Such a statutory directive remedies the problem of delay.⁴⁴⁷ The provision must not mandate preferential treatment of certified questions, however, to maintain discretion on the part of the answering court.⁴⁴⁸

Broad language allows the answering court to control its docket, yet is forceful enough to induce the 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 is a good compromise, leaving each court free to determine its own schedule. If a court fails to respond within a reasonable time, other courts may apply appropriate pressure, noting their dissatisfaction.

Recommended provision:

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

H. Method of Invoking Certification

Under this proposal, a court would invoke certification upon its own motion or that of the litigants when the court deems it necessary. The certifying judge would ultimately control whether the question will be certified and sent. This method ensures that certification will be employed only when the certifying court believes that it is important to do so.

Recommended provision:

A question of law may be certified by an order of any of the courts referred to in Section 1 upon the court's own motion or upon the successful motion of any party to the cause.

I. Contents of Certification Order

The discussion above with respect to the content of a certification order applies equally for the proposed statutory language.⁴⁴⁹ The proposed statute includes subsection 3 to clarify who controls the statement of facts sent to the answering court. This addition avoids delay in sending the question to the answering court by making the certifying court the master of the schedule.

Recommended provision:

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.

447. Delay in answering is one of the more prominent concerns of the opponents of the certification process. See *Hearings on H.B. 6649*, *supra* note 81, at 363, 368 (noting that, in debate over certification in Connecticut Legislature, major concern was delay).

448. Miner, *supra* note 86, at 155-58 (noting tensions between state- and federal-court systems in diversity cases).

449. See *supra* notes 196-218 and accompanying text (relating that current method allows the certifying court to determine need for certification and to control fact statement sent to answering court).

J. 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 a certification order,⁴⁵⁰ the costs of certification,⁴⁵¹ briefs and arguments,⁴⁵² and opinion,⁴⁵³ aptly delineate effective language for my legislative proposal. Sections 10 through 13 provide standard provisions for most uniform laws and thus require no alteration.⁴⁵⁴ The U.L.A. analysis previously detailed articulates the validity of this language.⁴⁵⁵

K. Interstate Certification — Power to Certify

Many existing certification statutes relegate interstate certification to optional or nonexistent status. My proposal emphasizes the importance of certification in the interstate context by mandating its adoption. It is imperative for states to enact and utilize interstate certification, in order 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.⁴⁵⁶ In addition, interstate certification can promote judicial economy and timely responses.⁴⁵⁷

When a state court employs various devices to determine another state's law, the resulting decision 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 an outside court lacks the requisite knowledge or insight required to assess the possible ramifications or impact of the decision. Certification in this context can produce honest judicial opinions.⁴⁵⁸ 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* or common conflict-of-laws escape devices is tantamount to judicial conjecture.

Recommended provision:

The [Supreme Court], 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

450. Unif. Certification of Questions of Law Act § 4, 12 U.L.A. 54 (1967).

451. *Id.* § 5, 12 U.L.A. 54.

452. *Id.* § 6, 12 U.L.A. 54.

453. *Id.* § 7, 12 U.L.A. 55.

454. *Id.* §§ 10-13, 12 U.L.A. 56.

455. See *supra* notes 219-33 & 250-58 and accompanying text (discussing relevant provisions of U.L.A.).

456. See *supra* notes 65-79 and accompanying text (explaining that federal-to-state certification eliminates *Erie* problems because federal courts sitting in diversity no longer need to guess at unclear state law).

457. See *supra* notes 56-60 and accompanying text (noting that interstate certification promotes economy by giving definitive answers to unclear issues and promotes timely responses by bringing comity into play).

458. See Robert A. 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).

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.

VIII. CONCLUSION

By adopting the U.L.A., the Uniform Law Commissioners sought primarily to provide a new and better alternative to solve the problems associated with the *Erie* doctrine. Unfortunately, the Act's efficiency has been undermined both by the failure of many states to adopt the Act or an equivalent procedure, and 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 U.L.A.-like certification procedures 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 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 U.L.A. itself 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 importantly, the elimination of judicial guesswork.

APPENDIX**A. Summary of Recommended Provisions⁴⁵⁹****§ 1. Power to Certify**

The [Supreme Court], 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 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.

459. In addition to summarizing the recommended provisions, I have also integrated satisfactory unaltered provisions of the U.L.A. Moreover, I have included in proposed Section 2 (Power to Answer) several courts that were added to the U.L.A.'s power-to-answer provision in a 1990 amendment. See Unif. Certification of Questions of Law Act § 1, 12 U.L.A. 20 (Supp. 1991). This was the only change made by the 1990 amendment.

§ 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 _____.

B. Certification Procedures in United States Jurisdictions

1. **Alabama:** ALA. JUDICIAL ART. § 6.02(b)(3) (1982) (ALA. CONST. art. VI, § 140(b)(3));¹ ALA. R. APP. P. 18.
2. **Arizona:** ARIZ. REV. STAT. ANN. §§ 12-1861 to 12-1867 (Cum. Supp. 1988) (enacted by 1984 Ariz. Sess. Laws 111, § 1).
3. **Colorado:** COLO. APP. R. 21.1 (amended by COLO. APP. R. 11.01 (1975)) (COLO. REV. STAT., vol. 78).
4. **Connecticut:** CONN. GEN. STAT. ANN. § 51-199a (West Supp. 1989) (enacted by 1985 Conn. Pub. Acts 85-111, §§ 1-9).
5. **Delaware:** DEL. SUP. CT. R. 41 (amended 1987).
6. **District of Columbia:** D.C. CODE § 11-723 (1981).
7. **Florida:** FLA. STAT. ANN. § 25.031 (West 1988); FLA. APP. R. 9.150 (amending Rules 9.510 and 4.61); FLA. CONST. art. V, § 3(b)(6).
8. **Georgia:** GA. CODE ANN. § 15-2-9 (1985) (enacted by GA. CODE § 24-3902); GA. APP. R. 42.
9. **Hawaii:** HAW. REV. STAT. § 602-5(2) (1985) (amending HAW. REV. STAT. § 602-5 (1968)) (enacted by 1955 Haw. Rev. Sess. Laws ch. 214, §§ 26, 27, as amended by 1965 Haw. Rev. Sess. Act 8).
10. **Idaho:** IDAHO APP. R. 12.1.

11. **Illinois:** ILL. ANN. STAT. ch. 110, para. 20 (Smith-Hurd 1983).
12. **Indiana:** IND. CODE, § 33-2-4-1 (Burns 1985) (enacted by 1971 Ind. Acts 426); IND. APP. R. 15(N) (1976) (amending Rule 15(O)).
13. **Iowa:** IOWA CODE ANN. §§ 684A.1 to 684A.11 (West 1987) (enacted by 1979 Iowa Acts 294); IOWA R. APP. P. 451-61.
14. **Kansas:** KAN. STAT. ANN. §§ 60-3201 to 60-3212 (1987) (enacted by 1979 Kan. Sess. Laws 181).
15. **Kentucky:** KY. R. CIV. P. 76.37 (1978).
16. **Louisiana:** LA. REV. STAT. ANN. § 13:72.1 (West 1983) (enacted by 1972 La. Acts 84); LA. SUP. CT. R. 12.
17. **Maine:** ME. REV. STAT., tit. 4, § 57 (1989) (amending, tit. 4, § 57 (1964)); ME. R. CIV. P. 76B.
18. **Maryland:** MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601 to 12-609 (1984).
19. **Massachusetts:** MASS. SUP. JUD. CT. R. 1:03 (amending MASS. SUP. JUD. CT. R. 3:21).
20. **Michigan:** MICH. GEN. CT. R. 797-2 (1976).
21. **Minnesota:** MINN. STAT. ANN. § 480.061 (West Supp. 1989).
22. **Mississippi:** MISS. SUP. CT. R. 20.
23. **Missouri:** MO. CODE ANN. § 477.004 (West Supp. 1990); *see Jones Truck Lines, Inc. v. Transport Ins. Co.*, No. 72650 (finding lack of constitutional jurisdiction for supreme court to answer certified questions).
24. **Montana:** MONT. R. APP. P. 44; *see also Irion v. Glens Falls Ins. Co.*, 461 P.2d 199 (Mont. 1969).
25. **Nevada:** NEV. REV. STAT. § 2.120 (1987); NEV. R. APP. P. 5.
26. **New Hampshire:** N.H. REV. STAT. ANN. § 490 (1968); N.H. SUP. CT. R. 34 (amending Rule 20 (1972) (amending Rule 21 (1968))).
27. **New Mexico:** N.M. STAT. ANN. § 34-2-8 (1978).
28. **New York:** N.Y. RULES OF COURT § 500.17 (N.Y. Ct. App.) (McKinney rev. ed. 1986).
29. **North Dakota:** N.D. R. APP. P. 47.
30. **Oklahoma:** OKLA. STAT. ANN. tit. 20, §§ 1601-1612 (West Supp. 1989).
31. **Oregon:** OR. REV. STAT. §§ 28.200 to 28.255 (1983).
32. **Puerto Rico:** P.R. SUP. CT. R. (1988).
33. **Rhode Island:** R.I. SUP. CT. R. 6 (1974).
34. **South Carolina:** S.C. SUP. CT. R. 46 (1982).
35. **South Dakota:** S.D. CODIFIED LAWS ANN. §§ 15-24A-1 to 15-24A-11 (1984).
36. **Texas:** TEX. CONST. art. 5, § 3-c (1985) (proposed Acts 1985, 69th Leg., S.J.R. No. 10; approved by referendum 1985); TEX. R. APP. P. 110-114.
37. **Washington:** WASH. REV. CODE § 2.60 (1989) (enacted by 1965 Wash. Laws, ch. 99, § 1).
38. **West Virginia:** W. VA. CODE §§ 51-1A-1 to 15-1A-12 (1981).
39. **Wisconsin:** WIS. STAT. ANN. §§ 821.01 to 821.12 (West Supp. 1989).
40. **Wyoming:** WYO. STAT. § 1-13-106 (1977); WYO. R. APP. P. 11.01-11.07.