

D R A F T
FOR APPROVAL

**UNIFORM CERTIFICATION OF QUESTIONS
OF LAW [ACT] [RULE] (199_)**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**UNIFORM CERTIFICATION OF QUESTIONS
OF LAW [ACT] [RULE] (199_)**

WITH PREFATORY NOTE AND COMMENTS

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1 **UNIFORM CERTIFICATION OF QUESTIONS**
2 **OF LAW [ACT] [RULE] (199__)**

3 **PREFATORY NOTE**

4 **Reasons for the Uniform Act/Rule**

5 Since the announcement in *Erie R. Co. v. Tompkins*, 304 U.S. 64
6 (1938), that federal courts in non-federal matters would be required to follow
7 state law rather than some general common law, the federal courts have been
8 faced with a very difficult problem. This is the ascertainment of state law when
9 there is no controlling statute or definitive appellate judicial decision on the
10 matter. In such circumstances, the federal courts have been forced to guess what
11 the state court might rule if the precise issue of law were presented to it. To
12 avoid this awkward situation the federal courts developed an abstention doctrine
13 under which the federal court refrains from acting while the litigants turn to the
14 state court to get the definitive statement of the state law. This has proved to be
15 quite unsatisfactory. See 1A Moore's Federal Practice 0.203.

16 In the search for a suitable technique to assist the federal courts in
17 ascertaining the law of the State, procedures were developed to allow those courts
18 to certify questions of law to the appropriate court.¹ The certifying federal court
19 sends to the State's highest court the question to be answered. The question is
20 considered and the answer given. There is a more rapid and orderly method for
21 handling the problem than the use of the abstention doctrine.

22 Over 35 years ago, the United States Supreme Court urged the use of the
23 certified question by the Court of Appeals for the 5th Circuit. *Clay v. Sun*
24 *Insurance Office*, 363 U.S. 207, 212 (1960). Three years later the 5th Circuit
25 expressed its approval of the certification procedure in *Green v. American*
26 *Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963). Since then, the federal court of
27 appeals of every circuit has used the certification procedure. A 1994 study by the
28 American Judicature Society of all federal circuit court appellate decisions

¹ The certified question of law has a long history in the United States and the English-speaking world. The British Law Ascertainment Act of 1859 provided for certification of questions of law within the British Empire, while the Foreign Law Ascertainment Act of 1861 made provision for certification of questions to foreign states. 9 Halsbury's Statutes of England (2d ed.) 58206. Within the federal court system, the Courts of Appeals and the Court of Claims have by statute been permitted to certify questions to the United States Supreme Court pursuant to 28 U.S.C. Secs. 1254-1255. See Moore and Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 Va. L. Rev. 1 (1949). In addition, a great number of states have provided for certified questions within their court systems.

1 published since 1990 shows the importance of the certification process to the
2 federal circuit appellate courts.²

3 That study revealed that the federal Court of Appeals for the 11th
4 Circuit granted 90% of the certification applications it received. Even the Court
5 of Appeals for the 10th Circuit, which granted the lowest percentage of such
6 applications, still granted more than a third of the certification applications
7 submitted to it (34%).

8 A similar problem confronts a state appellate court that determines that
9 the law of another State should control the resolution of a key issue of law in a
10 case pending before it but where there is no controlling statute or appellate
11 decision in that other State on that issue of law. For this reason it is also
12 desirable to allow state courts to certify questions of law to the highest court of
13 another State.

14 The Uniform Act/Rule proves a means by which federal courts and state
15 appellate courts can efficiently obtain answers to questions of law from the
16 highest court of the controlling State.³ This means that a federal court or state
17 appellate court, having determined that the law of another State controls a
18 controversy, need not guess what that law is when there is no definitive answer in
19 the law of the controlling State. Instead, the court can certify the question of law
20 to the highest court of the controlling State.

21 Finally, a combined Erie and state conflicts problem also can be handled
22 under the Act/Rule. For example, a federal court sitting in State A might decide
23 that the Erie doctrine applies so it should look to the law of State A on a
24 problem. The federal court might then decide that the court in State A, under its
25 conflicts of law rules, would look to the law of State B for the solution of the
26 legal problem. Under the Act/Rule the federal court in State A can ask the court
27 in State B what its law is on the point.

28 **Need for Uniformity**

29 Since the certification of a question of law in either Erie or the state
30 conflicts situation involves more than one jurisdiction, provisions for certification
31 involve important issues of sovereignty, comity, and efficiency in the
32 relationships between individual States and between the state and federal courts.
33 It is reasonable to expect that the goal of encouraging courts to certify questions
34 of law in appropriate cases will be advanced as judges and lawyers become more
35 aware of and familiar with the certification process. To this end, uniformity of

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

³ The inclusion of certain bracketed language in Sections 1, 2, 3 and 8 of the Uniform Act/Rule would also authorize the state appellate court to certify questions of law to a tribal court or answer questions of law from a tribal court.

1 law in this area would seem to be eminently desirable in that it is likely to result
2 in the greater use of certification.

3 **Adopted by Legislature or Court**

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

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

SECTION 1. DEFINITION[S]. As used in this [Act] [Rule]:

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

[(2) "Tribe" means a Native American tribe, band, or village recognized by federal law or formally acknowledged by this State.]

Comment

This section has been added to the 1967 Act. The definition of "State" is consistent with that used in other Uniform Acts.

The Drafting Committee considered and rejected the option of including Native American tribes within the definition of "State" so that the Act does not purport to authorize tribal courts to certify or answer questions but leaves that issue to the tribal law. The Act as currently drafted would, as an option, authorize a state court to certify questions to a tribal court or answer questions from a tribal court. Tribal law determines whether the tribal court may certify question to a state court or answer a question from a state court.

The definition of "Tribe" is broad and is intended to include both Native American tribes in the technical sense of that term and other Native American governmental units that perform functions similar to a tribe. The Drafting Committee opted for a broad definition of "tribe" rejecting the option of limiting the definition to tribes listed in 25 C.F.R. Part 2 because that list did not include certain Native American governmental units that had existing court systems.

SECTION 2. POWER TO CERTIFY. The [Supreme Court] [or an

intermediate appellate court] of this State, on the motion of a party to a pending cause or its own motion, may certify a question of law to the highest court of another State [or a tribe] if:

(1) the pending cause involves a question to be decided under the law of the other State [or the tribe];

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

3 (3) the question is one for which no answer is provided by either a
4 controlling statute or appellate decision of the other State [or the tribe].

5 Comment

6 This section replaces Section 8 of the 1967 Act. The Drafting
7 Committee felt that organizing the Act so that the power to certify was set forth
8 prior to the power to answer made the order of the Act easier to follow. The
9 Drafting Committee discussed whether the power to certify should be limited to
10 the highest court of a State so as to limit the number of courts that could certify
11 and reduce the number of certified questions or to continue to keep the bracketed
12 language from the 1967 Act authorizing certification by intermediate appellate
13 courts. After discussion, the Committee opted to retain the prior language
14 recognizing that the answering court has the discretion to accept or reject a
15 certified question and can use this power to prevent being burdened by an
16 excessive number of certified questions.

17 The Drafting Committee included as an option in this section the power
18 to certify a question of tribal law to a tribal court having the power to answer
19 such questions.

20 The Drafting Committee also considered whether to include bracketed
21 language permitting certification of question of law to international courts. After
22 considerable discussion, it was decided that the concept of certification to and
23 from international courts and courts of other nations was still in the formative
24 stage and posed a number of questions and uncertainties that would be difficult to
25 address at this time. The Committee opted not to include international or foreign
26 courts at this time but noted that the issue may need to be addressed in the future.

27 The Drafting Committee amended Section 8 of the 1967 Act so that
28 certification is appropriate only when there is no controlling **statute** or appellate
29 decision of the other State rather than the term "precedent" as used in the 1967
30 Act. This was intended to make clear that a question should not be certified
31 when there is a clear answer to the question under either statutory or case law.

32 The Drafting Committee also considered whether to continue the 1967
33 Act's standard that a question may be certified if it "may be" determinative of an
34 issue in the litigation or whether the stricter standard should be adopted requiring
35 that the question "must be" or "is" determinative of the issue. The Committee
36 opted to stay with the current language of the Act due to concerns that a "must
37 be" or "is" standard would spawn satellite controversies over whether the
38 question was properly certified in light of the ultimate outcome of the underlying
39 litigation.

SECTION 3. POWER TO ANSWER. The [Supreme Court] may answer a question of law certified to it by a court of the United States or by [an appellate] [or the supreme] court of another State [or a tribe], if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling statute or appellate decision of this State.

Comment

This section replaces Section 2 of the 1967 Act. Revisions were made to this section to make it consistent with Section 2 so that a question may not be answered if there is a controlling statute or appellate decision in the answering State. This change both includes the concept of a controlling statute as a reason to decline to answer and makes a controlling decision by any state appellate court a barrier to answering a certified question.

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

The Drafting Committee discussed whether a reciprocity requirement should be added to this section so that a court of State A may answer questions posed by a court of State B only if the highest court of State B is authorized to answer questions from the courts of State A. The Committee recognizing the discretion vested in the Act in the answering court to accept or reject questions opted not to include a reciprocity requirement. In determining whether to accept a certified question, the receiving court may consider whether the highest appellate court of the State from which the certification order is issued has authority to answer a certified question of law from an appellate court of the receiving State under essentially similar provisions.

SECTION 4. CONTENTS OF CERTIFICATION ORDER.

(a) A certification order must contain:

(1) the question of law to be answered;

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

(3) that the receiving court may reformulate the question; and

1 (4) the names and addresses of counsel of record and unrepresented
2 parties.

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

6 Comment

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

15 **SECTION 5. CERTIFICATION ORDER; RECORD.** The court certifying
16 a question shall issue the certification order and shall forward it to the designated
17 receiving court. The receiving court, either before or after accepting a certified
18 question, may require the certifying court to deliver its record, or any portion of
19 the record, to the receiving court.

20 Comment

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

26 **SECTION 6. PREFERENCE.** The [Supreme Court] of this State, acting as
27 the receiving court, shall notify the certifying court of acceptance or rejection of
28 the question; and in accordance with notions of comity and fairness, it shall
29 respond to an accepted certified question as soon as practicable.

30 Comment

This section is new and is intended to indicate that the receiving court should afford priority to answering certified questions of law consistent with notions of comity and fairness.

SECTION 7. PROCEDURES. Proceedings in the [Supreme Court] of this State are governed by the [rules or statutes governing briefs, arguments, and other appellate procedures]. Proceedings in the receiving court are governed by the rules or statutes of the receiving State [or tribe].

Comment

This section replaces Sections 6 and 9 of the 1967 Act. The new section is intended to clarify that the procedures of the receiving court should govern all proceedings in that court after a certified question is accepted.

SECTION 8. POWER TO AMEND QUESTION. The [Supreme Court] of this State may reformulate a question certified to it.

Comment

This section is new and authorizes the receiving court to reformulate the question certified to it. The Drafting Committee rejected the concept of requiring a question to be answered precisely as it is certified as imposing a counterproductive rigidity that would decrease the utility of the answer received. The Drafting Committee also rejected permitting the receiving court to amend the certified question freely as that may also adversely affect the utility of the answer and permit the receiving court to issue an advisory opinion. The Committee settled on the term "reformulate" which connotes a retention of the specific terms and concepts of the question while allowing some flexibility in restating the question.

SECTION 9. OPINION. The [Supreme Court] of this State shall state in a written opinion the law answering the certified question and send a copy of the opinion to the certifying court and to counsel of record and unrepresented parties.

Comment

This section is substantively the same as Section 7 of the 1967 Act.

SECTION 10. COST OF CERTIFICATION. Fees and costs are the same as in [civil appeals] docketed before the [Supreme Court] of this State and shall

1 be equally divided between the parties unless otherwise ordered by the certifying
2 court in its order of certification.

3 Comment

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

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

10 Comment

11 This section is substantively identical to Section 10 of the 1967 Act.

12 **SECTION 12. CONSTRUCTION.** This [Act] [Rule] shall be construed to
13 effectuate its general purpose to make uniform the law of those jurisdictions that
14 enact it.

15 Comment

16 This section is substantively identical to Section 11 of the 1967 Act.

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

19 Comment

20 This section is identical to Section 12 of the 1967 Act.

21 **SECTION 14. EFFECTIVE DATE.** This [Act] [Rule] shall take effect on

22 _____ .

23 Comment

24 This section is identical to Section 14 of the 1967 Act.

