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

Ira P. Robbins

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ARTICLES

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

Ira P. Robbins*

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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 cases\(^2\) 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

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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).


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).

fail to use the certification process in the state-to-state context to alleviate many of the procedural burdens stemming from difficult and confusing choice-of-law problems. Moreover, while many states have adopted substantial portions of the U.L.A., each state either omitted or expanded upon provisions of the Act, thwarting the commendable goals of uniformity and interstate certification.

This article addresses the merits of certification and encourages universal enactment of a new and improved U.L.A. 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. The proposed Act also requires consistency in the types of questions certified and answered, as well as in the time limits for responding. With newly enforced uniformity, the benefits of both interstate and federal-to-state certification — 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.

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).
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. Intrajurisdictional 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 intrajurisdictional certification, within the closed state judicial system, contrasts with the interjurisdictional certification concept embodied in the U.L.A.20 Generally, in state intrajurisdictional certification, the inferior court within the jurisdiction controls the procedure by formulating the question or questions posed, determining what portions of the record must be sent to the higher court, and setting forth the relevant facts.21 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.22 Further, the higher court usually has discretion whether to answer the certified question,

17. See infra note 441 and accompanying text (proposing reciprocity provision in uniform statute).
22. Id.
23. Id.
and acts only on the questions posed, thereby leaving the ultimate ruling in the case to the lower court. The federal system also permits a form of intrajudisdictional certification. Both the United States Claims Court and the federal courts of appeals may certify questions of law to the United States Supreme Court. As in the state hierarchical system, both the decision to certify and the decision to answer are discretionary. 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. The U.L.A. mirrors these principles in its text. 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. Prior to formulation of the U.L.A., some scholarly work had been done in the area, primarily by Allan Vestal, then Professor of Law at the University of Iowa and one of the Commissioners on Uniform State Laws. This early research and thinking formed the basis for many of the policies ultimately realized in the U.L.A. 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. Under both international and interstate conflict-
of-laws doctrines, it often becomes necessary to discover and apply the law of a foreign jurisdiction to determine the rights of the litigants in the forum. The Uniform Law Commissioners vigorously debated ways to rectify this problem.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{38} The precepts of the U.L.A. find their basis in these Acts.\textsuperscript{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.\textsuperscript{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.\textsuperscript{41}

\textsuperscript{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. \textit{Id.} at 9-10; see \textit{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. \textit{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. \textit{See Transcript of 1966, supra note 19, at 5-10, 18-20, 26.}

\textsuperscript{36} Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 49 n.1 (1975); \textit{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 \textit{v. Caum}, 1 Drew & Sm. 24, 26 (1860), in which court applied Act of Ascertainment, as evidence of success of British statute).}

\textsuperscript{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. \textit{Id.}

\textsuperscript{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. \textit{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. \textit{See Unif. Certification of Questions of Law Act, Commissioners' prefatory note, 12 U.L.A. 49 n.1 (1975).}

\textsuperscript{39} \textit{See supra} notes 36-38 and accompanying text (discussing British Acts); \textit{see also} Comment, \textit{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 \textit{v. Colvin}, 1 Drew & Sm. 24, 26 (1860)).}

\textsuperscript{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 Dominions when pleaded in the Courts of another Part thereof." \textit{Id.}

\textsuperscript{41} \textit{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 article\(^{46}\) describing its benefits, the four state certification statutes lay dormant until the Supreme Court authorized their use in \textit{Clay v. Sun Insurance Office, Ltd.},\(^{47}\) in 1960. Soon thereafter, the Supreme Court employed the procedure in \textit{Aldrich v. Aldrich}\(^{48}\) and \textit{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 \textit{Green v. American Tobacco Co.},\(^{51}\) \textit{Hopkins v. Lockheed Aircraft}
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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...
Vestal, was first presented and discussed in 1966. 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.

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." At the time of the National Conference, a federal court, in response to the dictates of the Erie 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. 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. The extent to which conflict-of-laws problems could be resolved by this process was only a secondary concern to the Commission. The Commissioners expected the Act to improve federal/state relations, promote uniformity in the law, and more expeditiously resolve litigation that presented novel legal

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. Dickinson 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-proferred [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. The reported cases involving certified questions suggest that these objectives have been attained. Nevertheless, only eleven states and the Commonwealth of Puerto Rico have adopted statutes that are nearly identical to the U.L.A. Thus, only these jurisdictions can benefit fully from the advantages that certification brings to conflict of laws in both federal-to-state and interstate situations.

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

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. 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]").


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")".

Upon closer scrutiny, however, this justification appears to have little weight. In the nearly half-century history of the interjurisdictional-certification process, only a handful of questions have ever been certified. And all of those questions have been sent from the federal to the state courts. 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. The certifying court will only certify those questions of law for which no controlling precedent exists in an answering jurisdiction. Furthermore, the ultimate power to accept or reject a certified question rests exclusively in the discretion of the answering court. 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.

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

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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

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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. McDouGal & 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).
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).
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.'1 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).

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 ON UNIFORM STATE LAWS, HANDBOOK 147 (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")
statute indicates that the answering court has the power to answer or reject the certified questions. 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. 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.

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. If the federal court failed to meet the requisites, the state court could reject the question. 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. The answering court thus controls its docket, and, if it felt that timing made a definitive answer unwise, it could postpone responding simply by declining to answer. 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).


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.\(^\text{117}\)

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.\(^\text{118}\) 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.\(^\text{119}\) 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.\(^\text{120}\) Some courts fail to follow this example, however.\(^\text{121}\) 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.

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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.

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

See *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).

See *Buskin Assoc., Inc. v. Raytheon Co.*, 473 N.E.2d 662, 671 (Mass. 1985) (declaring 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).

*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. 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. 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. 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. State courts also decline to answer certified questions based on the manner in which the questions are posed, or if there is no agreement on the stipulated facts.

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

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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).


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. In other states, certifications receive preferential treatment over the regular docket when scheduled for hearing by the full bench. 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. 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.

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, any court of appeals of the United States, any United States district court, "[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. 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. No argument or delay over the statement of facts would occur if the answering court simply used the record sent up on appeal. Such a full factual record also allays the criticism aimed at certification that answering courts merely issue advisory opinions. 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.
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).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{143}

The Commissioners also discussed whether to allow for interstate certification.\textsuperscript{144} On this issue, Professor Vestal argued that the Act presented an opportunity to not only solve \textit{Erie} federal-diversity problems, but also to provide a procedural vehicle to settle frequent conflict-of-laws problems.\textsuperscript{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.\textsuperscript{146} The Commissioners compromised, by making the adoption of interstate-certification language throughout the Act highly recommended, but optional.\textsuperscript{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.\textsuperscript{148}

\textbf{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.\textsuperscript{149} This power is discretionary,\textsuperscript{150} and the
U.L.A. Commissioners declined to offer a test or other guidelines for when a court should certify a question to another jurisdiction.\textsuperscript{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 \textit{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,\textsuperscript{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 states\textsuperscript{153} adhere to the factors for determining the appropriateness of certification enumerated by Fifth Circuit Judge Homer Thornberry in \textit{Florida ex rel. Shevin v. Exxon Corp.}\textsuperscript{154} Judge Thornberry set forth the following criteria: (1) the closeness of the question to settled law in the state;\textsuperscript{155} (2) the existence of sufficient sources to allow a principled rather than conjectural decision;\textsuperscript{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;\textsuperscript{157} (4) the delay and cost to the litigants;\textsuperscript{158} and (5) the ability of the certifying court to frame the

\textsuperscript{151} Transcript of 1967, supra note 19, at 41.

\textsuperscript{152} FLA. STAT. ANN. § 25.031 (West 1945); FLA. APP. R. 9.150.

\textsuperscript{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 \textit{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. \textit{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. A.B.I 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 \textit{Florida ex rel. Shevin}).

\textsuperscript{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 \textit{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 \textit{Shevin}.

\textsuperscript{155} \textit{Shevin}, 526 F.2d at 274-75.

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} \textit{Id.} at 275; see also Wade H. McCree, \textit{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). \textit{But cf.} Comment, \textit{Abstention and Certification, supra} note 32, at 867 (arguing that unconstrued state statute and unconstrued state constitutional provision are equally deserving of certification). \textit{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).

\textsuperscript{158} \textit{Shevin}, 526 F.2d at 275. Delay is often cited as the reason for a refusal to certify. \textit{See, e.g.}, \textit{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), \textit{aff'd}, 715 F.2d 10 (1st
issue in a manner that will produce a helpful response on the part of the state court. 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.

The language of the U.L.A. reveals additional reasons for determining the appropriateness of certification. The first such criterion arises because no power to certify exists unless the proposed answering state court is authorized to answer. 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"; 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 the state." 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" if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending. 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.

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159. Shevin, 526 F.2d at 275.
160. Id. at 274-76.
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).
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.\footnote{168} This interpretation, still
fairly broad, creates obstacles in states whose constitutions forbid the rendering
of advisory opinions.\footnote{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' formuation. It also ensures that resolving the state-law question is necessary to
the resolution of the federal-court case.\footnote{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.\footnote{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.\footnote{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.\footnote{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

\footnote{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),
(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).

\footnote{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).

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

\footnote{171. In re Certified Question, 549 P.2d 1310, 1311 (Wy. 1976).

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

\footnote{173. See id. (noting that certain answers to certified questions still require resolution of consti-
tutional issue).}
[the answering] state,"' for a question to be certified.\textsuperscript{174} The U.L.A. Commissioners discussed the meaning of "controlling precedent" before adopting that language.\textsuperscript{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.\textsuperscript{176} These Commissioners proposed other language to ensure that this type of situation remained certifiable.\textsuperscript{177} The full Commission, however, decided to retain the original language.

Another suggestion advanced the language "controlling precedents in reported decisions of the state,"\textsuperscript{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.\textsuperscript{179}

Certification is also proper when conflicting authority exists within the state.\textsuperscript{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.\textsuperscript{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.\textsuperscript{182} Assuming either conflicting opin-

\begin{itemize}
\item \textsuperscript{175} Transcript of 1967, supra note 19, at 34.
\item \textsuperscript{176} Id. at 34-35.
\item \textsuperscript{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).
\item \textsuperscript{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 \textit{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. \textit{Id.; see Fidelity Union, 311 U.S. at 177.}
\item \textsuperscript{179} See Morningsstar 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 \textit{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).
\item \textsuperscript{180} Mason v. American Emory Wheel Works, 241 F.2d 906 (1st Cir.), \textit{cert. denied}, 355 U.S. 815 (1957).
\item \textsuperscript{181} \textit{See} Almirez 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 F.2d 199 (Mont. 1969) (stating that only precedent on point supports divergent results in current case); \textit{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).
\item \textsuperscript{182} \textit{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. 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. 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.

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, a federal court has a convenient way of either avoiding or employing certification. 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. 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. Commissioner Davies argued that Section 8 of the

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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).
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.”

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.  

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. He also argued for the imposition of limitations on granting litigants' requests for certification. For example, a litigant who has invoked federal-diversity jurisdiction ordinarily should not be permitted to request certification, due to the unfairness of allowing a party a federal determination of the facts and a state determination of the law. 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.

C. Contents of Certification Order

1. Questions of Law to Be Answered

Section 3 of the U.L.A. directs that the certification order set forth the questions of law to be answered. The meaning of the phrase "questions of law to be answered" has not been judicially construed, but presumably the Commission 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 46.

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. 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. It also allows courts to certify or answer questions
inappropriately. 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.

Initially, either the parties or the certifying court frames the certified ques-
tions. Most often, the parties agree to a set of questions subject to court
approval with or without modification. If the parties are unable to agree, then
the court frames the questions. The receiving court retains the power to alter
the language of the question, 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.

statute only contemplates that questions of law be certified, yet providing comments on law to
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); Mire 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.
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,

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 reframe 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
Certification of Questions of Law

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

The certification order should also present a statement of the relevant facts. 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. The language of the U.L.A. mandates including a statement of facts. 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.

If the trial court certifies the question(s), the parties compose a joint statement of facts to be sent to the answering court. 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. Certification procedures generally prohibit the answering court from engaging in factfinding.

(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).


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.


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 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

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


“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.


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) (assigning 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 6 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.

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. Experience shows that answering courts treat these as formal opinions and report them in their state reporters, much like ordinarily decided cases. Thus, the opinion becomes binding precedent. It serves as res judicata regarding the parties, thus ensuring more equitable judicial decisions and distinguishing the response to certified questions from an advisory opinion.

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. Although the language of the U.L.A. supplies no discretion to reformulate or add to the certified questions, federal courts


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 argument 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." 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 8 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. The discussion of
the meaning of Section 1 applies equally to Section 8. The Commissioners
employed language identical to that in Section 1 for courts to determine certifiable
issues and the appropriateness of certification.

This provision sparked a major discussion at the 1966 National Conference
of Commissioners on Uniform State Laws. Opponents of interstate certification
felt that including the provision would further impede passage of the entire
U.L.A. in state legislatures. They maintained that inconsistent results might
occur, 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. These dissidents also argued that
intermediate-appellate-court certification would further clog dockets, so they
should not be allowed to certify.

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

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.

235. Id.
236. See supra notes 99-187 and accompanying text (discussing Section 1 power-to-answer provi-
sions 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. Specifically, most state courts derive jurisdiction directly from their constitutions. Thus, they lack the inherent powers of federal courts. However, some state constitutions may permit certification of questions of law to another state without enactment of this U.L.A. section, 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. 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. 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

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

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. Others suggested that the procedure could be initiated by congressional action. 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. Thus, the Commissioners realized that state action offered the best means of implementing a certification procedure.

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. These cases challenge the constitutionality of certification because it calls for the rendering of advisory opinions, violating the case-or-controversy requirement. However, state courts usually discuss the constitutionality of the statute even if not directly challenged. Thus far, the statutes challenged have been upheld, with one notable exception, 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.
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. Typically, in those states requiring statutory action, the constitutions do not prohibit the legislature from conferring additional jurisdictional power upon the appellate courts. After enactment, the court often supplements the statute with a court rule specifying the mechanics of the certification procedure.

B. Court Rule

Many states have adopted the U.L.A. or its equivalent by court rule alone. Generally, the appropriate court learns of the U.L.A. from the state's law-revision commission, the permanent rules advisory committee, or the state-federal judicial council, 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.

Nevertheless, adoption by court rule does not preclude the inevitable constitutional challenge to the U.L.A. While most states have upheld the constitutionality of their court rules, Utah held its rule unconstitutional. 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." In the absence of the word "only," enlargement of appellate jurisdiction by court rule or statute could be construed. Its presence, however, combined with the fact that certification was not among the writs over which the court has original jurisdiction.

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).


276. Utah Const. art. VIII, § 4 (emphasis added); see also Florida Const. art. V, §§ 3-4.


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.\textsuperscript{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."\textsuperscript{280} Upon receipt of this jurisdictional grant, the court promulgated the certification procedure by rule.\textsuperscript{281} New York also faced a similar constitutional barrier to certification and amended its constitution before adopting a procedure.\textsuperscript{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.\textsuperscript{283} In all of these jurisdictions, the power to answer is discretionary,\textsuperscript{284} as is the power to certify questions.\textsuperscript{285}

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

\begin{footnotes}
\footnote{279. Holden, 629 P.2d at 431.}
\footnote{280. ALA. CONST. art. VI, amend. 328.}
\footnote{281. ALA. R. APP. P. 18.}
\footnote{282. See infra Part VI A (discussing New York experience in bringing about certification procedure).}
\footnote{283. See infra Appendix part B.}
\footnote{284. See Wash. Rev. Codes § 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).}
\footnote{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).}
\footnote{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).}
\footnote{287. All jurisdictions have the power to answer certified questions from various levels of federal courts.}
\footnote{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).}
\end{footnotes}
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, thus eliminating the federal district court as a certifying court. Seventeen states will not allow certified questions from any state court.

The fear of inundation appears to prompt states to deny acceptance of certified questions from federal district courts. This seems to be a perception without basis in fact, however, for as yet no state that has implemented a certification procedure has been unduly burdened by it. 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. 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.

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. Litigants without the option of certification in a state trial court might have an incentive to take cases into federal court, 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. As discussed earlier, important reasons exist for allowing federal district-court certification to state courts.

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]." 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. 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.

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, while the others use the U.L.A. language of "no controlling precedent."
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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{311} Indeed, because many people consider the U.L.A. to be a mechanism to combat the \textit{Erie} problem,\textsuperscript{312} perhaps these states envision certification

\textsuperscript{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. \textit{See infra} Appendix part B.

\textsuperscript{306} \textit{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. \textit{Id.} at 178-79.

\textsuperscript{307} \textit{Note, Consequences of Abstention, supra} note 32, at 1368.

\textsuperscript{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.

\textsuperscript{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. \textit{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.

\textsuperscript{310} \textit{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).

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

\textsuperscript{312} \textit{See supra} notes 59-73 and accompanying text (discussing \textit{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. (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”).
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).
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,\(^{22}\) 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.\(^{23}\) Then the court must ensure that the issues presented meet the standard required for certification.\(^{24}\) 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.\(^{25}\)

Moreover, the uncertainty surrounding predictions of “determinativeness,” as required by the U.L.A.,\(^{26}\) 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.\(^{27}\)

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.\(^{28}\)
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. 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.

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. 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.

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. 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. 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. 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

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


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.


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," and the powers of the court stem entirely from New York's Constitution. Thus, for the court to obtain the expanded jurisdiction for certification required a constitutional amendment.

The Law Revision Commission amended A10676 in accordance with Clerk Bellacosa's suggestion. 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.

After the decision in March 1982 to amend the constitution, the legislature solicited comments from interested groups. 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. Research fails to disclose why the Court of Appeals underwent this change of heart.

After the arrival of the new legislature, elected in November 1982, the Judiciary Committee in 1983 reported Assembly Bill 2229 on certification. The text of A2229 differed from that of A10676(b) in two significant respects.

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336. Id.
337. Id.
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).
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).
of the Law Revision Commission\(^{356}\) 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

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357. A2229, supra note 345 (identical text to A8860).
358. Law Revision Commission Memorandum, supra note 332, at 10.
362. Law Revision Commission Memorandum, supra note 332, at 10.
363. Id. at 11.
365. See supra note 139 and accompanying text (explaining that Commission was concerned that enacting states would be fearful of overburdened dockets).
Certification of Questions of Law

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. 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.

The New York Court of Appeals also adopted the strict certification standard requiring that “determinative questions of New York law [be] involved,” in another departure from the more liberal U.L.A. language that the “law of this state . . . may be determinative.” 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. 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. 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.

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

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


\(375\) 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.


\(378\) 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.\textsuperscript{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.\textsuperscript{380} 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.\textsuperscript{384} Again, the fear of deluge reared its baseless head.\textsuperscript{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.\textsuperscript{386} But New York became the third state\textsuperscript{387} that has chosen to receive questions of law from other states but not to certify them.\textsuperscript{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.\textsuperscript{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

\textsuperscript{382} Id.
\textsuperscript{383} Bill No. A10676-b (1982).
\textsuperscript{384} See supra notes 331 & 344 (tracking this change, but noting no reason for it in legislative history).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{387} The other states are Alabama and Michigan. See supra note 309.
\textsuperscript{388} See supra note 288 and accompanying text (noting which states lack power to certify).
\textsuperscript{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.  

Connecticut represents the general anxiety of all state legislators when confronted with the question of adopting certification procedures. 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. 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.

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. Connecticut, like its certification-statute-enacting predecessors, worried about the U.L.A. overtaxing its already congested Supreme Court docket, thus thwarting that court’s ability to carry out its normal duties. 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., 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. Indeed, the Act leaves responding courts free to decline any question submitted, thereby retaining control over their dockets. Second, Judge Newman noted that the experience of states with a certification procedure already in place reveals only a small quantity of certified questions. 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.
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. The second substantive issue raised by the legislators emanated from the belief that certification leads to unreasonable delay in case resolution, mirroring other states' concerns prior to U.L.A. passage. Judge Newman explained that case history disproves this notion. 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. 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. Judge Daly also testified on this issue, stating his belief that certification rarely caused undue delays or significant financial or administrative burdens on litigants. Research has disclosed no reports of delays due to certification in the years since enactment of the U.L.A. in Connecticut.

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, again echoing a concern of other enacting states. Judge Newman demonstrated the nonadvisory nature of the procedure by noting the requirement that certification occur only during a real lawsuit between real parties.

Connecticut legislators also considered the procedural matter of the binding nature of the answer on the certifying court, 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. 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.

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

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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. 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).
403. See supra notes 81, at 364.
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

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.\textsuperscript{423} States that require a statute may adopt this proposed language as a uniform entity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{427} An appeal to the higher state appeals court creates unjustified delay in the certification process.\textsuperscript{428} Moreover, the highest court in the state, as the final arbiter of state law, is best equipped to address questions of first impression.\textsuperscript{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.\textsuperscript{430} The provision allows self-policing and protects an answering court from inundation, irrelevant questions, and answering matters outside its jurisdiction or

\textsuperscript{423.} See supra notes 259-82 and accompanying text (outlining two methods of adopting certification).
\textsuperscript{424.} See supra notes 390-417 and accompanying text (discussing adoption of certification statute in Connecticut).
\textsuperscript{425.} See supra notes 328-60 and accompanying text (describing New York experience amending constitution to provide court jurisdiction over certified questions).
\textsuperscript{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.).
\textsuperscript{427.} See supra notes 80-98 and accompanying text (discussing problems with U.L.A., specifically when questions are answered by intermediate appellate courts).
\textsuperscript{428.} Id.
\textsuperscript{429.} Id.
\textsuperscript{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).
current pending in lower state courts. Of utmost importance, the answering court need not provide artificial reasons to avoid responding.

Recommended provision:

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 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. The Commissioners intended that this language be obligatory on states adopting the U.L.A. Often, however, statutes that implement the U.L.A. restrict certain federal courts' ability to certify. In addition, the Commissioners left the language pertaining to state-court certification power in the enacting states' discretion.

All federal courts and the highest state appellate courts should be able to certify questions to 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.
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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{441} The heart of certification rests on the interactive process, requiring participating jurisdictions to both answer and certify.

\textit{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 1\textsuperscript{442} comports with the notions of uniformity and ease of application of the proposed language.\textsuperscript{443} Many jurisdictions, however, adopted statutes containing the too restrictive “must be determinative” stan-

\textsuperscript{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).

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

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

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

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

\textsuperscript{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).
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. 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. 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

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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.\textsuperscript{447} The provision must not mandate preferential treatment of certified questions, however, to maintain discretion on the part of the answering court.\textsuperscript{448}

Broad language allows the answering court to control its docket, yet is forceful enough to induce the answering and certifying courts to respect 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.

\textit{Recommended provision:}

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

\section*{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.

\textit{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.

\section*{I. Contents of Certification Order}

The discussion above with respect to the content of a certification order applies equally for the proposed statutory language.\textsuperscript{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.

\textit{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.

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

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

\textsuperscript{449}. See \textit{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, the costs of certification, briefs and arguments, and opinion, aptly delineate effective language for my legislative proposal. Sections 10 through 13 provide standard provisions for most uniform laws and thus require no alteration. The U.L.A. analysis previously detailed articulates the validity of this language.

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. In addition, interstate certification can promote judicial economy and timely responses.

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. 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

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.
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 Provisions

§ 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