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Certification of Legal Questions to State Courts

Many states allow federal courts that are faced with a significant but unsettled question of state law to certify the question to the state's highest court. While certification empowers state courts to provide an authoritative ruling on key state law issues, thereby upholding principles of comity and increasing efficiency in the judicial process, it is not appropriate or advantageous in every case. Practical Law asked *Wystan Ackerman* of *Robinson & Cole LLP* to explain the certification process and highlight practical considerations for parties seeking to obtain or prevent certification.



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What is certification, and in what context does it most often arise?

As the US Supreme Court explained, certification "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." Through the certification procedure, "a federal court may save time, energy, and resources and hel[p] build a cooperative judicial federalism." (*Arizonans for Official English v. Arizona*, 520 U.S. 43, 76-77 (1997) (internal citation and quotations omitted).)

Many (though not all) state courts have the authority under a state constitutional provision, statute, or court rule to accept,

in their discretion, a proposed certified question of state law from a federal court (or, in some cases, a state court in another jurisdiction or a tribal court), and to issue a decision on the certified question.

Each jurisdiction has its own rules on whether the state's highest court may accept certified questions, and from which courts it may do so. For example:

- The Florida Supreme Court may accept a certified question from the US Supreme Court or a federal circuit court of appeals but not a federal district court (§ 25.031, Fla. Stat.).
- The New York Court of Appeals may accept a certified question from the US Supreme Court, a federal circuit court of appeals, or the highest court of another state (22 NYCRR § 500.27(a)).
- The Massachusetts Supreme Judicial Court and Ohio Supreme Court may accept certified questions from any federal court, including a federal district court (MA R S CT Rule 1:03; OH S CT Rule 9.01(A)).
- The Missouri Supreme Court lacks the authority to accept any certified questions (*Grantham v. Mo. Dep't of Corr.*, 1990 WL 602159, at *1 (Mo. July 13, 1990); see *Washington v. Countrywide Home Loans, Inc.*, 747 F.3d 955, 958 n.2 (8th Cir. 2014)).

Certification most commonly arises in diversity jurisdiction cases involving important, unresolved questions of state law. Rather than attempt to predict how the state supreme court might decide an issue, a federal court certifies the question to the state supreme court for a definitive ruling. Under the Uniform Certification of Questions of Law Act, adopted in some jurisdictions (including Connecticut, Minnesota, and Montana, among others), a state supreme court may answer a question of law certified to it if the answer may be determinative of an issue in the pending litigation in the certifying court and there is no controlling state statute, constitutional provision, or appellate decision.

What is the procedure for certification?

A court may certify a question of state law to a state supreme court either *sua sponte* or on a party's motion. The certification procedure is governed by the statute or court rule that permits the state supreme court to answer a certified question.

Typically, the process is as follows:

- After deciding to certify a question to the state supreme court, the certifying court issues a certification order that:
 - identifies the specific question of law to be answered;
 - provides a statement of the relevant facts; and
 - identifies the counsel of record.
- The clerk of the certifying court forwards the certification order to the clerk of the state supreme court, sometimes with relevant portions of the record.

- The state supreme court decides, in its discretion, whether to accept the certified question. In some jurisdictions, the rules provide for preliminary briefing by the parties regarding the question presented and why the court should or should not accept the proposed certified question (for example, OH S CT Rule R. 9.05). In other jurisdictions, the state supreme court simply reviews the certification order and any record forwarded by the certifying court, and decides whether to accept the certified question (for example, 22 NYCRR § 500.27(d)).
- If the state supreme court accepts the certified question, the rules of that court govern briefing and oral argument.

What are the main advantages of certification?

Generally, a party seeks certification because it perceives a strategic advantage in having the question answered by the state supreme court instead of the federal court. For example, the nature of the question presented, together with the perceived ideologies of the state supreme court judges compared to the relevant federal court, might weigh in favor of seeking certification. Other advantages of certification include the following:

- **The state supreme court can clarify, modify, or overrule its prior decisions.** The state supreme court has the authority to make substantial changes in state law. By contrast, federal courts do not have the authority to overrule or modify a state supreme court's precedent, even if it is outdated and contrary to the strong weight of authority nationwide.
- **The state supreme court might be more willing to develop the law on the issue.** Federal courts may certify because they are reluctant to predict the answer to unsettled questions of state law. Moreover, if the question presented is novel, certification might be preferable because federal courts usually decline to create new state law on the grounds that only the state courts can properly do so.
- **Certification can offer greater efficiency.** Where a case presents a prominent issue that is being raised in numerous cases, and the issue is likely to eventually reach the state supreme court regardless of the outcome in the federal courts, having the question decided sooner through certification may provide cost savings across numerous cases (although it is typically more costly for the individual suit in which the question is certified). The state supreme court may be reluctant to answer this type of question, however, until it is more thoroughly developed in the intermediate state appellate courts or in other jurisdictions.
- **The party seeking certification might have more control over the outcome.** By requesting certification in a case that involves an important recurring issue, a party can place itself in the driver's seat when the issue is briefed and argued in the state supreme court. By contrast, if another litigant in a different case takes the same issue to the state supreme court, the party

would have no control over the briefing and argument, although it could seek to participate as an *amicus curiae*.

- **The party seeking certification might be able to avoid application of another judge's unfavorable ruling.** If a district judge in another case has already decided the question against the client's position, it might be advisable to seek certification because the judge in the client's case might be more willing to certify the question than to disagree with a colleague's decision.

When might it be more advantageous to have a question decided by a federal court or to delay seeking certification?

In some cases, there might be a strategic advantage to having the central question of law decided by a federal court or delay seeking certification, for example, where:

- **The issue is high-profile and politically charged.** In these cases, there might be a perceived benefit to having the issue decided by federal judges with life tenure instead of state supreme court justices who, in some jurisdictions, are elected.
- **The state supreme court is perceived to have views that are less favorable to a client's position on the issue.** It may be preferable to the client's position that the law develop more extensively in federal courts and lower state courts before reaching the state supreme court.
- **The issue is likely to reach the state supreme court and favorable decisions issued in federal court, or in pending cases in other jurisdictions, might enhance the chances of success in the state supreme court.** However, counsel should keep in mind that a federal court might be less willing to certify a question after it has been decided by another federal judge in the district (in a jurisdiction that permits certification by a federal district court). Moreover, a motion to certify a question that essentially seeks reconsideration of a previous ruling by the same judge might also be viewed with disfavor unless the judge is clearly uncertain whether they reached the right result. A better approach might be to file a dispositive motion and seek certification as alternative relief. Additionally, in some cases, it might be preferable to develop the facts more fully in the district court before seeking certification. When considering whether to delay or refrain from seeking certification, counsel should note that once an issue is decided by a federal court of appeals, that decision may bind a future panel of the same circuit, which may not have discretion to certify a question absent a change in state appellate law that casts doubt on the prior federal appellate decision.

What types of questions are most and least appropriate for certification?

Certification rules typically provide that a question is appropriate for certification only if it is determinative or dispositive of an issue or the case, and there is no

controlling decision by the state supreme court (for example, 22 NYCRR § 500.27(a); MA R S CT Rule 1:03). Accordingly, any question a party seeks to certify typically should be central to the case. If there is another independently dispositive ground for deciding the case that is fact intensive or otherwise not well-suited to certification, that can make certification less appropriate.

The types of questions that might be well-suited for certification include those that involve:

- Recurring issues in multiple cases, or issues presented by a class action or other complex case, and on which there is a split of authority in the lower courts (especially at the intermediate appellate level) or in other jurisdictions.
- A pure question of law that is not particularly fact-dependent.
- A novel issue, although some state supreme courts might choose to decline to decide a question that has not been sufficiently developed in the lower courts.

The types of questions that might not be appropriate for certification (although some state supreme courts have accepted these types of questions) include those that are:

- Unique to a particular case and not recurring.
- Focused more on the application of law to the facts instead of the determination of a legal standard.
- Not central to the case, particularly in jurisdictions that require that the certified question be dispositive of an issue in the case.
- Previously decided by federal courts of appeals without certification.
- Analogous to issues in a case already decided by the state's highest court or in other cases that allow the federal court to make a reasonably confident prediction about the answer to the question under state law.

What standard do federal courts typically apply when considering an application to certify a question to a state court?

In addition to considering the requirements under the state supreme court's certification rules (such as whether the question is determinative of an issue in the case and whether any controlling precedent exists), the federal court might evaluate:

- How close the question is (that is, how difficult it is to decide between the competing viewpoints).
- Whether there is a split of authority on the question and the extent thereof (such as whether appellate courts have disagreed on the issue as opposed to only trial courts, and whether there is a clear weight of authority).
- The existence or absence of relevant state supreme court and appellate authority that can aid the federal court in predicting the answer under state law.
- Whether certification is warranted based on principles of comity between the state and federal systems (including whether state public policy or a state government agency is involved).

- The importance of the question and whether it is recurring.
- Whether the question is of public interest.
- Whether the party seeking certification chose a federal forum and whether any party opposing certification has a right to a federal forum.
- The delay and costs involved in certification, and the state supreme court's caseload.

(See, for example, *U.S. Bank, N.A. v. White Horse Estates Homeowners Ass'n*, 987 F.3d 858, 867 (9th Cir. 2021); *Valls v. Allstate Ins. Co.*, 919 F.3d 739, 743 (2d Cir. 2019); *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007); *Escareno v. Noltina Crucible & Refractory Corp.*, 139 F.3d 1456, 1461 (11th Cir. 1998); *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-75 & n.29 (5th Cir. 1976).)

How can an attorney best position a case or question to obtain or to prevent certification?

A party seeking certification usually should move for certification fairly early in the case. However, as mentioned above, in some instances, the party will first need to develop a sufficient factual record. Given that certification usually requires an agreed-on set of facts pertinent to the question to be certified, the party seeking certification should try to either:

- Develop the pertinent facts through targeted discovery.
- Agree with the opposing party on a stipulation of facts, where feasible.

A party seeking certification will also want to focus the case on a pure question of law that is of broad application and does not require application to a complex or disputed set of facts.

On the other hand, a party seeking to prevent certification may want to:

- Focus on developing potential factual disputes.
- Present the question proposed to be certified as one involving state law that can be determined easily and encourage the federal court to decide the issue itself.
- Highlight unique aspects of the case, such as alternative grounds for decision or atypical facts that make the case a poor vehicle for an appellate ruling that would have broad application.
- Explain the delay and costs that certification will likely entail.
- Emphasize the party's right to a federal forum.
- Alert the court to any pending circuit court or state appellate court case that involves the same question, making certification unnecessary (although this potentially could result in a stay).

What are the key similarities and differences between litigating a certified question in state supreme court and an ordinary appeal?

A certified question proceeds in accordance with the state supreme court's rules. Usually there is full briefing and, in

most state supreme courts, oral argument. Which party is the "appellant" and which is the "appellee" might be unclear or governed by the relevant certification rule.

Further, given that a certified question often has broader applicability than a run-of-the-mill appeal, the involvement of *amici curiae* is more common and can be important (for more on *amicus* briefs and key considerations when enlisting the aid of an *amicus*, search [Amicus Briefs: What Are They and When Should a Company File One?](#) and [Expert Q&A on Best Practices for Amicus Briefing on Practical Law](#)).

Appellate strategy on a certified question does not typically differ much from a standard appeal in which the same type of legal question is presented (for information and practical tips on navigating the appellate process, search [Effective Appellate Advocacy](#) on Practical Law). The state supreme court does not have the authority to decide any issues beyond the certified question, although it usually has the authority to reformulate the certified question if it deems it appropriate to do so or decide that the question was improvidently accepted and return the case to the certifying court without answering the question (although this rarely occurs).

In some instances, a party opposing certification might attempt subtly to convince the state supreme court that it should not have accepted the certified question because there is an inadequate factual record, there are disputes of fact pertinent to the question, or the question is unclear or too abstract. In response, the party that sought certification may try to demonstrate that the factual issues raised by the opposing party are immaterial to the certified question or may suggest reformulation of the certified question if appropriate and permitted by the applicable rules.

How should a party that received an unfavorable answer to a certified question from the state supreme court proceed when the case returns to federal court?

The appropriate steps depend heavily on the circumstances of the case and the nature of the certified question and decision, for example:

- If a party prevails on a case-dispositive issue, this presumably will bring the federal court case to an end and the parties can stipulate to a judgment.
- If the answer to the certified question requires the federal court to further apply the answer to the facts, this will require motion practice.
- If there are other issues that remain to be decided, the parties might need to propose to the federal court a schedule and structure for the remaining proceedings.

Additionally, depending on the circumstances, settlement discussions might be appropriate following the state supreme court's decision (for a collection of resources providing guidance on settling a lawsuit, search [Settling a Lawsuit Toolkit](#) on Practical Law). 