Certifying Questions to the Arkansas Supreme Court: A Practical Means for Federal Courts in Clarifying Arkansas State Law

Coby W. Logan
CERTIFYING QUESTIONS TO THE ARKANSAS SUPREME COURT:
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"Our principal task, in this . . . case, is to determine what the New
York courts would think the California courts would think on an issue
about which neither has thought."†

I. INTRODUCTION

Since the United States Supreme Court declared in 1938 that "[t]here is
no federal common law [, that] the law to be applied in any case is the law
of the state[,] [a]nd [that] the law of the state shall be declared by its Legis-
lature in a statute or by its highest court in a decision," 1 federal courts have
struggled with the best method to determine how a particular state's highest
court might answer an unresolved question of state law. Until 2002, a feder-
al court attempting to predict how the Arkansas Supreme Court would an-
swer an unresolved question of state law had essentially two options. One
approach, of course, was for a federal court to make an "Erie-educated

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† This is, perhaps, one of the most famous expressions of the difficulties expe-
rienced by a federal court in determining state law which was made by the Honorable Henry
Jacob Friendly sitting on the United States Court of Appeals for the Second Circuit in the case of Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960). In that diversity
case, the decedent had died in a crash in California on a plane operated by a California Com-
pany. The decedent's widow, who resided in South Carolina, and the administrator of the
estate, who resided in New York, brought a lawsuit in the United States District Court for the
Southern District of New York. See id. The issue in the case heard by Judge Friendly was
which state's statute of limitations applied, which turned on determining which state's subs-
stantive law applied. See id.

1. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) (holding that federal courts
exercising diversity jurisdiction must apply the law of the applicable state).
guess" based on dicta and "obvious implications and inferences" in Arkansas precedent and any other available sources of Arkansas law that might help ascertain how the Arkansas Supreme Court might rule. Another option was for a federal court to simply abstain and decline supplemental jurisdiction over cases with novel or complex questions of Arkansas state law while the federal court waited for the Arkansas Supreme Court to make a determination on the issue. In 2002, however, a third option became available to federal courts when Rule 6-8 of the Supreme Court and Court of Appeals of Arkansas was adopted by the Arkansas General Assembly. This new rule authorized federal courts to certify questions of law directly to the Arkansas Supreme Court. Although many commentators have discussed the certification process and there exists an enormous amount of literature written on the subject, the topic has not yet received a notable amount of attention here in the State of Arkansas.

Although virtually every article written on this topic includes such, this article would not be complete if there were not included herein a brief history of the certification process. It is universally recognized that in 1945, the Florida Legislature passed the first statute in the nation that authorized the Florida Supreme Court to adopt rules for receiving certified questions from federal courts. The legal authority was there, but the statute was not utilized until fifteen years later when the United States Supreme Court, no less, actually used the statute for the first time. Since that time, the use of the certification process has continued to increase, not the least of which was helped when the National Conference of Commissioners on Uniform State Laws

2. Food Indus. Research & Eng'g Inc. v. Alaska, 507 F.2d 865 (9th Cir. 1974); Yoder v. Nu-Enamel Corp., 117 F.2d 488 (8th Cir. 1941).
4. ARK. R. SUP. CT. 6-8(a)(1).
and the American Bar Association established the first Uniform Certification of Questions of Law Act (UCQLA) in 1967, and subsequently the revised 1995 UCQLA.\textsuperscript{8} Almost every recently written piece of literature on certification attests that the majority of states now allow federal courts to certify questions directly to their supreme courts and reiterates the mostly favorable acceptance of the certification process, as the vast majority of commentators acknowledge "the nearly unanimous endorsement [of] certification . . . from major American legal institutions, legal scholars, and judges who have addressed the issue."\textsuperscript{9}

Although the certification process has garnered a great deal of praise and support, the certification process is not without its critics. An in-depth discussion of the pros and cons of the certification process, however, is beyond the scope of this article. Such a discussion would be an exercise in futility as the Arkansas General Assembly has already adopted Rule 6-8 of the Supreme Court and Court of Appeals of Arkansas, and whether or not it was a good idea for such a rule to be adopted is not the focus of this Article. Rather, the purpose of this Article is to raise awareness of the authority of federal courts to certify questions to the Arkansas Supreme Court and of some of the undeveloped legal issues surrounding the rule itself.

II. CERTIFICATION TO THE ARKANSAS SUPREME COURT

A. A Brief History of the Certification Process to the Arkansas Supreme Court

As mentioned above, the certification process is relatively new to the State of Arkansas. Rule 6-8 of the Supreme Court and Court of Appeals of Arkansas was adopted in 2002 pursuant to section 2(D)(3) of Amendment 80 to the Arkansas Constitution, which states the following: "The Supreme Court shall have . . . [o]riginal jurisdiction to answer questions of state law certified by a court of the United States, which may be exercised pursuant to Supreme Court rule."\textsuperscript{10} Thus, federal courts may now certify legal questions directly to the Arkansas Supreme Court for resolution. However, the certification process is permissive on both ends as the process requires (1) permission, a motion, and certification order from a federal court and (2) acceptance of the question by the Arkansas Supreme Court. Such permission and acceptance is a matter of judicial discretion with each of the judicial bodies respectively.

\textsuperscript{8} See generally Unif. Certification of Questions of Law (Act) (Rule) 1995, 12 UCQLA 74 (1996); Cochran, supra note 5, at 167; Robbins, supra note 5, at 128.

\textsuperscript{9} Bassler & Potenza, supra note 5, at 496–504; see also Cochran, supra note 5, at 159.

\textsuperscript{10} Ark. Const. amend. 80, § 2(D)(3).
At the time of the writing of this Article, the Arkansas Supreme Court has accepted only four petitions for certification since the Arkansas General Assembly promulgated Arkansas Supreme Court Rule 6-8 in 2002. Additionally, there have been at least a few cases where federal courts declined to certify questions to the Arkansas Supreme Court.

B. Analysis of Arkansas Supreme Court Rule 6-8

1. Power to Answer

Section (a) of Arkansas Supreme Court Rule 6-8, entitled “Power to Answer,” is the most complicated and important section, setting forth the rule’s substance. The remaining sections, with the exception of Section (h), simply detail the procedures for invoking and implementing Section (a). Section (a)(1) provides:

The Supreme Court may, in its discretion, answer questions of law certified to it by order of a federal court of the United States if there are involved in any proceeding before it questions of Arkansas law 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 Supreme Court.


12. See, e.g., Mays v. Reassure Am. Life Ins. Co., United States District Court, Eastern District of Arkansas, Western Division, Case No. 4-03-CIV-00209 (Doc. 147, p. 9) (the Honorable Warren K. Urbom denied the plaintiff’s motion for certification without prejudice as being premature); Roberts-McNutt, Inc. v. Steadfast Ins. Co., United States District Court, Eastern District of Arkansas, Western Division, Case No. 4-06-CIV-00125 (Doc. 35, pp. 10-12) (the Honorable George Howard, Jr. denied the plaintiff’s motion for certification of three questions and finding that the Arkansas court decisions were not in conflict over the matters sought to be certified by the plaintiff and also finding that at least one of the issues was irrelevant to the actual proceedings before the federal court); Johnson v. City of Fort Smith, United States District Court, Western District of Arkansas, Case No. 2:05-CIV-02136 (Doc. 185, p. 3) (the Honorable Jimm Larry Hendren denied the Defendants’ motion for certification of two questions stating that the questions sought to be certified “have been addressed by previous federal courts,” choosing to rely on prior federal court interpretation of Arkansas state law rather than obtaining direction from the Arkansas Supreme Court itself).

13. ARK. R. SUP. CT. 6-8(a)(1).
a. Which Arkansas state courts may answer

Section (a) of Arkansas Supreme Court Rule 6-8 permits only the Arkansas Supreme Court to receive and respond to certified questions. The Arkansas General Assembly's rejection of an alternative rule, which would have allowed the Arkansas Court of Appeals to respond to certified questions as well, sheds light on the reason why Section (a) may have been so structured. In 1966, the American Law Institute suggested this same limitation of allowing questions to be certified only to a state's highest court, a limitation that the UCQLA Commissioners later accepted. According to one commentator, the reason for this decision was the thought by the UCQLA Commissioners that delay "would be increased by certification to an intermediate state court whose decisions would always be subject to appeal and reversal." Therefore, certification to the Arkansas Court of Appeals would defeat major purposes of the certification process of obtaining a final, definitive answer on Arkansas state law and saving federal courts and litigants time and money. By adopting the more limited approach, and thereby avoiding the risks of appeal and reversal, the Arkansas General Assembly helped to ensure that the certification process in Arkansas would achieve these goals.

b. Discretionary power of the Arkansas Supreme Court to answer

Arkansas Supreme Court Rule 6-8(a) leaves the power to answer certified questions to the Arkansas Supreme Court's discretion. The Arkansas Supreme Court must decide whether to answer the certified question within thirty days of the federal court's filing of the certification order. If the Arkansas Supreme Court takes no action within thirty days of the filing of the certification order by a federal court, the Arkansas Supreme Court is deemed to have declined to answer the question unless it has extended the

14. ARK. R. SUP. CT. 6-8(a).
15. See Robbins, supra note 5, at 140 (citing AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 292, 294 (1968) [hereinafter ALI STUDY]; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 147 (1967)).
16. See id.; UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 1, 12 UCQLA 52 (1967).
17. Robbins, supra note 5, at 140.
18. ARK. R. SUP. CT. 6-8(a).
19. ARK. R. SUP. CT. 6-8(a)(2). If the certification order is filed when the Arkansas Supreme Court is formally in recess, however, the thirty day time period will begin when the Arkansas Supreme Court returns from the recess. ARK. R. SUP. CT. 6-8(a)(4).
Further, at its discretion, the Arkansas Supreme Court may, at any time, rescind its decision to answer a certified question.\textsuperscript{21}

This discretion (1) allows the Arkansas Supreme Court to avoid answering too many certified questions and (2) gives it a mechanism that operates as a check on a certifying federal court to ensure that certified questions meet the standards the Arkansas Supreme Court wants to require for certified questions. Thus, this discretion allows the Arkansas Supreme Court to have control over its own docket, and simply by declining to answer such a certified question, the Arkansas Supreme Court may decide to postpone responding to a certified question that it is not ready to answer.

\textbf{c. Arkansas Supreme Court standards for acceptance of certification}

The Arkansas Supreme Court has provided some guidance as to when it will accept certification of a question of Arkansas law. The Arkansas Supreme Court has stated that it will accept a certified question only if (1) the issues certified are truly contested by the parties and are presented on a factual record; (2) all facts material to the question of law to be determined are undisputed; (3) an answer to the certified question will be dispositive of the issue and res judicata between the parties; and (4) there are special and important reasons, including, but not limited to, any of the following: (a) the question of law is one of first impression and is of such substantial public importance as to require a prompt and definitive resolution by the Arkansas Supreme Court; (b) there is no precedential guidance from Arkansas courts of the question of law; (c) the question of law is one with respect to which there are conflicting decisions in other courts; or (d) the question of law concerns an unsettled issue of constitutionality or construction of an Arkansas state statute.\textsuperscript{22}

This list is not exhaustive, and other pertinent considerations by the Arkansas Supreme Court may involve the interests of justice, judicial economy, or any of the several considerations also conducted by the federal courts.\textsuperscript{23}

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\item \textsuperscript{20} ARK. R. SUP. CT. 6-8(a)(3).
\item \textsuperscript{21} ARK. R. SUP. CT. 6-8(a)(5).
\item \textsuperscript{22} See ARK. R. SUP. CT. 6-8; Longview Prod. Co. v. Dubberly, 352 Ark. 207, 99 S.W.3d 427 (2003).
\item \textsuperscript{23} See, e.g., Shipley II, 356 Ark. at 221, 148 S.W.3d at 746 ("After a review of the certifying court's thorough analysis and explanation for the need for this court to answer the questions of law presently pending in that court, we accept certification of the four \[ \] questions . . . ."); Crenshaw II, 360 Ark. at 88, 199 S.W.3d at 679-80 ("After a review of the certifying court's thorough analysis and explanation for the need for this court to answer the questions of law presently pending in that court, we accept certification of the \[ \] question."); Grayson v. Ross, No. 06-946, 2006 WL 2627545, at *1 (Sept. 14, 2006) ("After a review of
d. Which courts may certify questions to the Arkansas Supreme Court

Arkansas Supreme Court Rule 6-8(a) specifies which courts have the power to certify questions of law to the Arkansas Supreme Court. Rule 6-8(a) permits "a federal court of the United States" to certify questions to the Arkansas Supreme Court.\(^{24}\) This language clearly allows all levels of the federal court system including the United States Supreme Court, any court of appeals of the United States, and any United States district court, to certify questions to the Arkansas Supreme Court.\(^{25}\)

e. Time limit within which federal courts must certify questions to the Arkansas Supreme Court

There does not appear to be any time limit on when federal courts must certify questions to the Arkansas Supreme Court. The relatively few cases that the Arkansas Supreme Court has certified have come from various district courts of the United States federal judiciary,\(^{26}\) as well as the Eighth Circuit Court of Appeals.\(^{27}\) There even appears to be authority from other jurisdictions for granting certification after a federal court has decided a case.\(^{28}\)

\(^{24}\) ARK. R. SUP. CT. 6-8(a)(1).

\(^{25}\) Presumably the Arkansas General Assembly, as well as other states who have passed certification rules and/or statutes with similar language, has engaged in the same debate as the Uniform Law Commissioners on the important issue of allowing federal district courts to certify questions. See Robbins, supra note 5, at 144. Those who are opposed to giving district courts this power argue that by permitting only federal appellate courts to certify, no argument or delay over the statement of facts (as required under Arkansas Supreme Court Rule 6-8(c)(2)) would occur if the answering court simply used the record sent up on appeal. See id. It is further argued that such a full factual record may also prevent criticism from being made that answering courts are merely issuing advisory opinions. See id. Those in favor of allowing federal district courts to certify questions contend that "without such power, an appeal, in effect, becomes mandatory to resolve the litigation properly, as any outcome attained without certainty of the appropriate law remains sheer conjecture, and thus creates automatic grounds for appeal." Id. at 145 (citing Transcript of 1966, supra note 5, at 19). Furthermore, it is argued that including district courts saves time and money by resolving cases as early as possible. See id.

\(^{26}\) See Longview, 352 Ark. at 207, 99 S.W.3d at 427; Shipley, 356 Ark. at 220, 148 S.W.3d at 746; and Crenshaw, 360 Ark. at 87, 199 S.W.3d at 679.

\(^{27}\) See Grayson, No. 06-946, 2006 WL 2627545, at *1.

Types of questions certifiable and the standards for certification by federal courts

Under Arkansas Supreme Court Rule 6-8, the Arkansas Supreme Court's power to answer questions certified by federal courts vests the federal courts with the inherent power to certify questions to the Arkansas Supreme Court. This inherent power of the federal courts is discretionary, and, as noted by one commentator, the UCQLA Commissioners have not provided any guidance on tests or other guidelines for when a federal court should certify a question to a state court such as the Arkansas Supreme Court. 29

The United States Court of Appeals for the Fifth Circuit, when it has been required to interpret the State of Florida's certification statute or rule, has provided much guidance to many other federal courts in identifying factors for deciding whether or not to certify a question of law to a state court. 30 Many federal courts have used factors identified by the Honorable Homer Thornberry of the United States Courts of Appeals for the Fifth Circuit. 31 In Florida ex rel. Shevin v. Exxon Corp., 32 Judge Thornberry set forth the following criteria: (1) the closeness of the question to settled law in the state; (2) the existence of sufficient sources to allow a principled rather than conjectural decision; (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; (4) the delay and cost to the litigants; and (5) the ability of the certifying court to frame the issue in a manner that will produce a helpful response on the part of the state court. 33 Judge Thornberry suggested that the certifying court use a balancing approach with these factors and consider the significance of the question along with the benefits and costs of certification. 34 Also, in making their decision of whether or not to certify a question to a state court, many federal courts cite a number of reasons that track the elements required under the UCQLA. 35

1987) ("Once a question is submitted for decision in the district court, the parties should be bound by the outcome unless other grounds for reversal are present. Only in limited circumstances should certification be granted after a case has been decided.").

29. See Robbins, supra note 5, at 145–46.
30. Id. at 146.
31. See id.
33. Id.
34. Id. at 274–76.
35. See generally Yonover, supra note 5, at 319.
g. Types of questions certifiable

Arkansas Supreme Court Rule 6-8(a) provides that a certifying court may certify "questions of law . . . if there are involved in any proceeding before it questions of Arkansas law which may be determinative of the cause then pending in the certifying court."36 Thus, the Arkansas Supreme Court will accept and answer only "questions of law" that federal courts certify to it.

The broadest interpretation of the "may be determinative" language suggests that certification to the Arkansas Supreme Court is appropriate in virtually all circumstances, short of requiring superfluous effort by the Arkansas Supreme Court.37 As no Arkansas Supreme Court decision has yet addressed this issue, the Arkansas Supreme Court's answer to a certified question may or may not be required to resolve the dispute before a certifying court.

The generally accepted view in most jurisdictions is that the "may be determinative" language means that an answer from a responding particular state court will terminate the case in one lawsuit, whereas another answer from the same responding state court will not terminate the case in another lawsuit.38 One commentator notes, however, that this interpretation may create concern in regard to states whose constitutions do not allow that state's courts to render advisory opinions.39 This interpretation also poses the problem that the certification process may not become available until the lawsuit has proceeded to the point that a certifying court is able to determine whether or not certified questions would, in fact, terminate a particular case.40 Despite the fact that this interpretation would negate some of the goal of the certification process to resolve issues as quickly as possible in litigation, some commentators contend that such late-stage certification (1) allows a state court to consider the certified question at a point in the litigation where the issues surrounding the certified question are more fully developed and (2) helps to make sure that resolving the state law question is a necessary step in resolving the federal court case.41 This appears to be the approach taken by the Arkansas Supreme Court, and thus it seems that answers to questions certified to the Arkansas Supreme Court must only be dispositive of the issue presented and not dispositive of the entire federal case.42

36. ARK. R. SUP. CT. 6-8(a)(1).
37. See Robbins, supra note 5, at 147.
38. See id. at 148.
39. See id.
40. See id.
41. Id. at 148.
In contrast, the interpretation of the "may be determinative" language may be more limited. For example, the Wyoming Supreme Court strictly interprets that phrase in such a way that it will not answer a certified question unless its response will dispose of the entire federal lawsuit for which the question has been certified to the court. As one commentator points out, this strict interpretation may limit the usefulness of the certification process by essentially making the certification process available only in diversity cases. This is because in federal question jurisdiction cases, a federal court would be certifying a question of state law to avoid a federal constitutional issue. In such a federal question jurisdiction case, one answer would resolve the federal dispute in its entirety, whereas an alternative answer would not terminate the federal case in its entirety but would instead return the case for resolution of the federal constitutional issue. Further, it is argued that this strict interpretation is also paradoxical because it requires the state law to be unclear while requiring the certifying court to judge whether the answer will dispose of the case.

h. The standard for certification

Another important element of Arkansas Supreme Court Rule 6-8(a) is the requirement that there be "no controlling precedent in the decisions of the Supreme Court" for a question to be certified. The meaning of "controlling precedent" has been debated among commentators and jurisdictions that have adopted similar language. In their debates on the issue, some UCQULA Commissioners argued that the word "controlling" might be construed as binding a certifying court to follow previous, perhaps even outdated, decisions of the answering state, contending that the plain language of a rule or statute that uses this language indicates that, if the state law at issue in a case is clear, certification would be inappropriate.

States that have similar language to that of Arkansas Supreme Court Rule 6-8(a), however, generally recognize that the certification procedure is an attempt to resolve ambiguities or unanswered questions concerning state law, and thus certification is also proper when there is merely conflicting

43. See Robbins, supra note 5, at 147 (citing In re Certified Questions, 549 P.2d 1310, 1311 (Wyo. 1976)).
44. See id.
45. Id.
46. Id.
47. See id.
48. ARK. R. SUP. CT. 6-8(a)(1).
49. See generally Robbins, supra note 5, at 149–50.
50. See id. at 149 (citing Transcript of 1967, supra note 5, at 34).
authority within a state.\textsuperscript{51} Therefore, the generally recognized approach, assuming either a total lack of rulings or conflicting opinions, is that the issue of law may be considered unresolved and certification may be considered appropriate.\textsuperscript{52} Some commentators and other jurisdictions further argue that, absent an opinion on point from the highest court of a state, a federal court's second step is to examine intermediate appellate court opinions of that state, and after the examination of those appellate opinions, a federal court must follow any applicable opinions before certifying a question to a state court.\textsuperscript{53}

It should be noted that some federal courts have gone beyond the two steps discussed above "by deciding cases based upon secondary authorities and recent trends in other jurisdictions."\textsuperscript{54} The UCQLA is intended to encourage federal courts to certify the question rather than to rely on authority that may be construed as arguably too attenuated, but it is recognized that this decision should normally depend on other factors that a certifying court may need to consider in light of the case before it.\textsuperscript{55}

\textbf{i. Clarification needed from the Arkansas Supreme Court}

With language as capable of manipulation as that contained in Arkansas Supreme Court Rule 6-8(a), a certifying court, as well as the Arkansas Supreme Court, can avoid or minimize the effectiveness of the certification procedure. Because it is foreseeable that disputes might arise over whether any particular law in question is clear or difficult to ascertain, a federal court or the Arkansas Supreme Court has a convenient way of either avoiding or employing certification. Nonetheless, commentators have suggested that there is a need for the clarification of the certification standard in order for certification to be a useful device when language similar to Arkansas Supreme Court Rule 6-8 is employed.\textsuperscript{56}

\textbf{2. \textit{Method of Invoking}}

Section (b) of Arkansas Supreme Court Rule 6-8, entitled "Method of Invoking," sets forth the procedures for invoking Section (a).\textsuperscript{57} Section (b) provides: "This rule may be invoked upon motion of a federal court of the United States or upon motion of any party to the cause pending before the

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\textsuperscript{51} See generally id.
\textsuperscript{52} See generally id. at 149–50.
\textsuperscript{53} See generally id.
\textsuperscript{54} See id. at 150.
\textsuperscript{55} See generally Robbins, supra note 5, at 150.
\textsuperscript{56} See, e.g., id. at 150.
\textsuperscript{57} ARK. R. SUP. CT. 6-8(b).
A plain reading of this provision seems to allow the certifying court to issue a request for a certification order upon a motion from either the court itself or any party in the case before it.

Some commentators, however, argue for, and other jurisdictions have enacted, limitations on granting litigants requests for certification. For example, some argue that a litigant who invokes federal diversity jurisdiction should be precluded from requesting certification due to what may be, depending upon the circumstances of any particular case, the unfairness of allowing a party to receive both a federal court determination of the facts and a state court determination of the law in the same case. Some commentators suggest further that a limitation also should be applied to defendants who remove a case from state to federal court, as well as to a plaintiff who chooses to initiate suit in federal court. However, other commentators note that these positions do not take into account cases in which unanticipated issues arise where the certification process would be the best way to proceed but may be unavailable to a particular litigant because of the litigant’s party status in that particular case.

3. Contents of Certification Order

If a federal court decides to submit a question to the Arkansas Supreme Court, the federal court must prepare a “Motion to Certify a Question of Law” and a “Certification Order,” which the certifying judge signs and the clerk for the applicable federal court forwards to the Clerk of the Arkansas Supreme Court. Section (c) of Arkansas Supreme Court Rule 6-8, entitled “Contents of Certification Order,” sets forth the specific details that must be included in a certification order that a federal court issues. The certification order must contain: (a) the question of law to be answered; (b) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose; (c) a statement acknowledging that the Arkansas Supreme Court, acting as the receiving court, may reformulate the question; and (d) the names and addresses of counsel of record and parties appearing without counsel.

58. Ark. R. Sup. Ct. 6-8(b).
59. See Robbins, supra note 5, at 151 (citing Transcript of 1967, supra note 5, at 46).
60. See generally id (citations omitted).
61. See generally id.
62. Id. at n.193.
63. Ark. R. Sup. Ct. 6-8(d).
64. Ark. R. Sup. Ct. 6-8(c).
65. Ark. R. Sup. Ct. 6-8(c)(1)(A).
67. Ark. R. Sup. Ct. 6-8(c)(1)(C).
68. Ark. R. Sup. Ct. 6-8(c)(1)(D).
a. The question of law to be answered

Arkansas Supreme Court Rule 6-8(c)(1)(A) directs that a certification order set forth the question or questions of law that the Arkansas Supreme Court is to answer.69 Arkansas Supreme Court Rule 6-8(c)(1)(A) does not specify who is required to frame the certified questions. Thus, at least initially, it seems that either the parties or the certifying court may frame the certified question to the Arkansas Supreme Court.70 Presumably, the parties will agree to a question subject to court approval with or without modification. If the parties are unable to agree, then the only other entity available to formulate the questions is the certifying court, which must then frame such questions.

b. The facts relevant to the question

The certification order should also present a statement of the relevant facts.71 The statement of facts must be sufficient to show fully the nature of the controversy out of which the question arose.72 According to the commentary of the UCQLA Commissioners, “[t]his 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.”73

Arkansas Supreme Court Rule 6-8 does not specify, or otherwise limit, who is to prepare the statement of facts. Thus, a plain reading of Arkansas Supreme Court Rule 6-8 indicates that it is likely proper for a federal court to require the parties to compose a joint statement of facts to be sent to the Arkansas Supreme Court. If the litigants cannot agree upon a statement of the facts, however, the certifying court must determine the relevant facts and state them as part of its certification order.74 In contrast, however, if a court of appeals of the United States certifies the question, the statement of facts should consist of the trial court’s finding of facts.75

69. ARK. R. SUP. CT. 6-8(c)(1)(A).
70. In at least two other states, Rhode Island and Massachusetts, cases indicate that the certifying court alone may frame the questions. See Robbins, supra note 5, at 152 (citing Murray v. Norberg, 423 F. Supp. 795 (D. R.I. 1976); Bose Corp. v. Consumers Union, 384 F. Supp. 600 (D. Mass. 1974)).
71. ARK. R. SUP. CT. 6-8(c)(1)(B).
72. Id.
73. See Robbins, supra note 5, at 153 (citing Transcript of 1967, supra note 5, at 32).
74. ARK. R. SUP. CT. 6-8(c)(2).
75. See id.; see also Grayson II, No. 06-946, 2006 WL 2627545, at *1 (Sept. 14, 2006).
c. Power to reformulate the certified question

Arkansas Supreme Court Rule 6-8(c)(1)(C) specifies that the Arkansas Supreme Court retains the power to alter and reformulate the language of the certified question. Commentators suggest that the ability of a state court, such as the Arkansas Supreme Court, to reformulate or add to the issues of questions that are certified to it furthers the goals of the certification process. As stated by one commentator, "[b]y definition, the receiving court is best situated to frame the question for precedential value and to control the development of its internal laws."  

4. Finalizing and Submission of the Certification Order

Section (d) of Arkansas Supreme Court Rule 6-8, entitled "Preparation of Certification Order," sets forth the procedure to be followed once the parties have agreed to or the court has prepared the contents of the certification order. The certifying court is to finalize the certification order, and the judge presiding at the hearing is to sign it. The clerk of the certifying court then forwards the order to the clerk of the Arkansas Supreme Court under the certifying court’s official seal. The Arkansas Supreme Court may request other portions of the record if it finds them necessary to properly dispose of the certified question. The Arkansas Supreme Court may in fact require the certifying court to file the original or copies of all or any portion of the record before it.

5. Costs of Certification

Section (e) of Arkansas Supreme Court Rule 6-8, entitled "Costs of Certification," dictates that fees and costs of certification are the same as in any other civil appeal docketed before the Arkansas Supreme Court. The rule further specifies that the fees and costs of certification to the Arkansas Supreme Court are to be equally divided between the litigants unless the certifying court orders otherwise in its certification order. The fee for civil appeals to the Arkansas Supreme Court, and thus the cost of certifying ques-

76. ARK. R. SUP. CT. 6-8(c)(1)(C).
77. Robbins, supra note 5, at 153.
78. Id.
79. ARK. R. SUP. CT. 6-8(d).
80. Id.
81. Id.
82. Id.
83. Id.
84. ARK. R. SUP. CT. 6-8(e).
85. Id.
tions to the Arkansas Supreme Court, was increased by the Arkansas General Assembly in its most recent session from $100 to $150 plus costs. 86

6. Briefs and Opinions

Section (f) of Arkansas Supreme Court Rule 6-8, entitled “Briefs and Argument,” provides the Arkansas Supreme Court rules governing the briefs filed and arguments heard before the Arkansas Supreme Court. 88 One potential problem is that an attorney may find himself or herself with a request for argument in the State of Arkansas when he or she is not a member of the Arkansas Bar. Whether the Arkansas Supreme Court would allow such an attorney to appear in the case rests within the discretion of the Arkansas Supreme Court. 89 The attorney may remedy this problem, however, by either petitioning to argue the case pro hac vice or by employing local counsel. 90

7. The Arkansas Supreme Court Opinion

Section (g) of Arkansas Supreme Court Rule 6-8, entitled “Opinion,” states that the Arkansas Supreme Court must write an opinion stating the law governing the question certified to it and that the Arkansas Supreme Court clerk must send copies of the opinion to the certifying court and to the litigants. 91 The Arkansas Supreme Court is among the majority of state courts that treat these opinions as formal and report them in their state reporters just like ordinarily decided cases. 92 Thus, an answer by the Arkansas Supreme Court to a certified question becomes binding precedent 93 and

88. Ark. R. Sup. Ct. 6-8(e).
90. See McKenzie, 358 Ark. at 346-47, 189 S.W.3d at 443.
91. Ark. R. Sup. Ct. 6-8(g).
93. See generally Robbins, supra note 5, at 155 (citing Transcript of 1966, supra note 5, at 7).
"serves as res judicata regarding the parties, thus ensuring more equitable judicial decisions and distinguishing the response to certified questions from an advisory opinion."\textsuperscript{94}

III. ARKANSAS SUPREME COURT AND COURT OF APPEALS POWER TO CERTIFY

Although a thorough discussion of the power of the Arkansas Supreme Court and the Arkansas Court of Appeals for interstate certification is beyond the scope of this article,\textsuperscript{95} it will be noted that the final provision (h) under Arkansas Supreme Court Rule 6-8 provides for interstate certification by the Arkansas Supreme Court and the Arkansas Court of Appeals.\textsuperscript{96} This provision empowers the Arkansas Supreme Court and the Arkansas Court of Appeals to certify a question of law to the highest court of another state if it appears that the question of law may be determinative of the cause pending and that there are no controlling precedents in the decisions of the highest court of the receiving state.\textsuperscript{97}

Furthermore, the Arkansas General Assembly provided that the procedures used for certification from the Arkansas Supreme Court and the Arkansas Court of Appeals to another state are to be those procedures provided in the laws of the receiving state.\textsuperscript{98} As of the date of the writing of this article, however, there has been no guidance from the Arkansas Supreme Court nor the Arkansas General Assembly on the issue of what will occur if the procedures set forth in Arkansas Supreme Court Rule 6-8(h) are in conflict with the procedures for certification provided in the laws of the receiving state.

IV. LENGTH OF DELAY CAUSED BY THE CERTIFICATION PROCESS

The certification process is not a quick process, but it is much less time consuming than the alternative of abstention by a federal court. Nonetheless, the additional time that the certification process may entail is a concern to both litigants and courts contemplating whether or not to certify a question to the Arkansas Supreme Court.

\textsuperscript{94} See generally id. (citations omitted).
\textsuperscript{95} As noted above, though the scope of this Article is limited to the question of interjurisdictional certification from federal courts to the Arkansas Supreme Court, similar issues are present when a state court must apply the law of a foreign state. For a discussion of certification in this context, see generally id.
\textsuperscript{96} ARK. R. SUP. CT. 6-8(h).
\textsuperscript{97} id.
\textsuperscript{98} Id.
As discussed above, the Arkansas Supreme Court treats certification as an appeal. Thus, delay is inherent in the process. The process of certification requires appellate brief writing, an *amicus curiae* brief from the Arkansas Attorney General, and, possibly, abstracting and oral arguments.

There are numerous estimates as to the length of delay that the certification process causes. One federal judicial study reported that the time required for a state court to answer a certified question is approximately six to seven months. Other commentators concluded in their estimates that the certification process generally causes delays of longer than one year with an average being about fifteen months. These time estimates are in addition to the time spent by the federal court in deciding whether a case should be certified, which itself may generate the need for additional briefings and court appearances if the parties object. As demonstrated in the following discussion, Arkansas is on par with the lower estimates of time delay discussed above.

In *Longview Production Co. v. Dubberly*, as indicated above, the parties settled the dispute, and the Honorable Thomas Eaton Stagg, Jr., Senior United States District Judge for the Western District of Louisiana, withdrew the certified question and asked the Arkansas Supreme Court for voluntary dismissal of the matter before the Arkansas Supreme Court issued an answer to the certified question. Thus, it is unclear how long the actual process would have taken for the certifying court and the Arkansas Supreme Court to complete the Arkansas Supreme Court's first encounter with the certification process. The certified question in *Longview*, however, was not answered within the approximately nine months it took between the certifying court's Certification Order of February 11, 2003, and the Arkansas Supreme Court's order approving dismissal on November 17, 2003.

In *Shipley, Inc. v. Long*, acting sue sponte and upon his own motion and “Memorandum Opinion and Certification Order” of February 4, 2004, the Honorable Garnett Thomas Eisele, United States District Judge for the Eastern District of Arkansas, moved for the Arkansas Supreme Court to answer four questions of law. On February 19, 2004, the Arkansas Supreme Court issued its per curiam acceptance of the certification of the four

101. See generally Yonover, supra note 5, at 332–34.
102. See generally id. at 333–34 (citing SERON, supra note 5, at 15, 39).
103. See id. (citing Mattis, supra note 5, at 726).
104. See id. (citing Shapiro, supra note 5, at 326–27).
105. See generally id.
The Arkansas Supreme Court acceptance was filed in the United States District Court on February 26, 2004. On October 21, 2004, the Arkansas Supreme Court issued its opinion answering the four certified questions. The Arkansas Supreme Court opinion answering the four certified questions was filed in the United States District Court on November 12, 2004. On November 16, 2004, the United States District Court filed its Memorandum Opinion and Final Order and Declaratory Judgment in the Shipley case. Thus, the certification process in the Shipley case took a little longer than nine months.

In Crenshaw v. Eudora School District, the Honorable James Leon Holmes, United States District Judge for the Eastern District of Arkansas, acting su sponte, issued an order proposing to certify a question to the Arkansas Supreme Court on October 22, 2004. On November 8, 2004, the plaintiffs filed their response to the court's request for comment on certification. On November 9, 2004, the defendant filed its response to the court's request for comment on certification. On November 29, 2004, the United States District Court issued its Certification Order and moved the Arkansas Supreme Court to answer one certified question. On December 9, 2004, the Arkansas Supreme Court issued its per curiam order accepting the certified question. The per curiam order was filed with the district court on December 13, 2004. On May 12, 2005, the Arkansas Supreme Court issued its opinion in response to the certified question. The Arkansas Supreme Court's answer was filed with the district court on June 6, 2005. On July 18, 2006, the district court issued an Order of Dismissal after the parties advised the court that they had reached a settlement in the matter. Despite when the case actually ended, the certification process in Crenshaw took just a few days short of a full nine months.

108. Shipley II, 356 Ark. at 221.
109. Shipley III, No. 4:03-CIV-00481 (Doc. 33).
110. Shipley IV, 359 Ark. at 208.
111. Shipley III, No. 4:03-CIV-00481 (Doc. 34).
112. Shipley III, No. 4:03-CIV-00481 (Doc. 35).
113. Shipley III, No. 4:03-CIV-00481 (Doc. 36).
114. No. 5:03-CIV-00330 ("Crenshaw I").
119. Crenshaw I, No. 5:03-CIV-00330 (Doc. 22).
120. See id.
121. Crenshaw I, No. 5:03-CIV-00330 (Doc. 23).
122. See id.
123. Crenshaw I, No. 5:03-CIV-00330 (Doc. 43).
In *Grayson v. Ross*, the Honorable Morris Sheppard Arnold, the Honorable Clarence Arlen Beam, and the Honorable William Jay Riley, for the Eighth Circuit Court of Appeals, acting sua sponte, issued a Certification Order directing the Clerk for the Eighth Circuit Court of Appeals to certify a question to the Arkansas Supreme Court on July 19, 2006, and moved for the Arkansas Supreme Court to answer one certified question. On August 23, 2006, the Eighth Circuit Clerk’s Office filed a Judge Order requesting that the clerk certify the question of law to the Arkansas Supreme Court. On August 25, 2006, the Arkansas Supreme Court received and docketed the Certification Order from the Eighth Circuit Court. On September 14, 2006, the Arkansas Supreme Court issued its per curiam order accepting the certified question. The per curiam order was filed with the Eighth Circuit on September 18, 2006. On March 15, 2007, the Arkansas Supreme Court issued its answer to the certified question. The Arkansas Supreme Court’s answer was filed with the Eighth Circuit Court of Appeals on April 5, 2007.

V. CONCLUSION

The certification process allowed under Arkansas Supreme Court Rule 6-8 is neither simple nor inexpensive, but it will most likely be less complicated and expensive than other alternatives available to a federal court and litigants involved in federal court litigation when a question of unclear Arkansas state law presents itself. Certification is treated as an appeal.

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125. Grayson v. Ross, 454 F.3d 802, 812 (8th Cir. 2006).
129. Certification Order, Grayson v. Ross, No. 04-CIV-3577 (8th Cir. 2006).
132. Grayson v. Ross, 483 F.3d 887 (8th Cir. 2007).
before the Arkansas Supreme Court and are equally divided between the parties unless otherwise ordered by the certifying court in its certification order.134 Furthermore, certification requires appellate brief writing, an amicus curiae brief from the Arkansas Attorney General, and, possibly, abstracting and oral arguments.135

It is easy to understand how the law can be slow to change, especially as to the procedural mechanisms by which courts manage the litigation process. However, the certification process that is now allowed under Arkansas Supreme Court Rule 6-8 (1) provides a practical and efficient method by which federal courts can discern the state laws of Arkansas when they are faced with an unclear question of Arkansas state law and (2) allows the Arkansas Supreme Court the opportunity to decide important and significant matters of Arkansas state law.

As discussed above, the certification process has enjoyed much praise, and its use has been highly encouraged. “The United States Supreme Court . . . [has] praised widespread, liberal use of certification as a [sign] of respect for state court comity” and the duty of state courts to determine their own state law.136 Nevertheless, like any other process, the certification process presents the possibility for abuse and requires vigilant and careful analysis by both federal courts seeking to certify questions and the Arkansas Supreme Court in deciding whether or not to accept such questions. Therefore, the use of the certification procedure should be neither encouraged nor discouraged, but rather should be considered carefully and granted only when the process serves the jurisprudence for the State of Arkansas, the certifying federal court, the litigants, and the overall judicial process.

In any event, the use of the certification process to the Arkansas Supreme Court will, undoubtedly, only increase as the Arkansas Supreme Court and federal courts that encounter questions of Arkansas state law become more familiar with the procedure. Therefore, it is important for Arkansas practitioners to realize that this procedure is available and educate themselves about the process, as they may find themselves in a position to exercise the benefits of certification if any of their cases so warrant.

134. Ark. R. Sup. Ct. 6-8(e).
135. See Ark. R. Sup. Ct. 6-8; Longview, 352 Ark. at 211–12, 99 S.W.3d at 430.
136. See Cochran, supra note 5, at 220–21.