Certification Process Does Not Appear to Burden High Court

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Five years ago, on Jan. 1, 1998, California adopted a new Rule of Court allowing sister-state Supreme Courts, the U.S. Supreme Court and U.S. Circuit Courts of Appeals to "certify" unresolved questions of California law to the California Supreme Court.

Concern that this rule might prompt an avalanche of questions by foreign courts has proved unfounded. The only court to certify questions has been the 9th U.S. Circuit Court of Appeals, which has done so only 17 times, four times a year. The Supreme Court has granted all but six of these requests and has ruled on the requests in an average of 79 days. These figures show that the process does not appear to be a burden to the Supreme Court or to litigants.

Revisions to the certification rule took effect Jan. 1. The rule was renumbered from Rule 29.5 to Rule 29.8. The rule's language, originally derived from similar rules in other states, was modified to better reflect California practice. Thus, the Supreme Court now will "grant" (not "accept") a request and will issue a "decision" (not an "answer"), emphasizing the prohibition against advisory opinions.

The rule also was retitled from "Questions of State Law Certified by Federal Appellate Courts and Other Courts" to "Decision on Request of a Court of Another Jurisdiction." This change reflects the deletion of the requirement for "certification" under the requesting court's "official seal." Now, an ordinary court "order" suffices, without a need for added formalities.

The revised rule also eliminates the previous double-briefing requirement. Now, interested parties need not "brief" their support or opposition to a certification request. Instead, to simplify and expedite the process, they may present their positions by letter, with formal briefing occurring only on the merits of the question after certification is granted.

Evaluating whether the court will grant a certification request is informed by reviewing the requests granted to date:

- State constitutional issues. *Great Western Shows v. L.A. County*, 27 Cal.4th 853 (2002) (gun control); *Nordyke v. King*, 27 Cal.4th 875 (2002) (same); *L.A. Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352 (2002) (free speech); *Ventura Group v. Ventura Port Dist.*, 24 Cal.4th 1089 (2001); see also *Int'l Soc'y for Krishna Consciousness v. City of Los Angeles*, 2003 WL 1497226 (9th Cir. March 21, 2003) (9th Circuit intends to certify question of soliciting at LAX as free speech once parties supplement the record).
- Insurance. *Vu v. Prudential Ins.*, 26 Cal.4th 1142 (1998); *Blue Ridge Ins. v. Jacobson*, 25 Cal.4th 849 (2001).
- Employment. *Asmus v. Pacific Bell*, 23 Cal.4th 1 (2000).
- Torts. *Cadence Design Sys. v. Avant! Corp.*, 29 Cal.4th 215 (2002) (trade secrets); *Myers v. Philip Morris Cos.*, 28 Cal.4th 828 (2002) (tobacco company immunity from product liability).
- Attorney fees. *Tipton-Whittingham v. City of Los Angeles*, 316 F.3d 1058 (9th Cir. 2003) (pending as S112943) ("catalyst" theory).
- Energy regulation. *Southern Cal. Edison v. Lynch*, 307 F.3d 794 (9th Cir. 2002) (pending as S110662). (Note that *Lynch* highlights the court's flexibility in granting requests, because the court not only restated one of the questions — allowed by Rule 29.8(f)(5) — but also added a question of its own for supplemental briefing.)

These areas should continue to provide fertile ground for future certification requests. In particular, issues that can be posed as state constitutional questions are ideal candidates for certification (for example, gun control regulations or begging as free speech).

Having a timely and topical "hot" issue also helps. For instance, the question in *Tipton-Whittingham* — whether California applies the "catalyst" theory of attorney fees — recently was addressed under federal law in a 5-4 U.S. Supreme Court decision. *Buckhannon Board & Care Home v. West Va. Dep't of Health & Human Resources*, 432 U.S. 598 (2001). In fact, the state Supreme Court had a similar issue on its docket. *Graham v. Daimler Chrysler Corp.*, S112862.

Having a hot issue, however, is not necessarily enough, as demonstrated by the

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recent denial of the request in *Kremen v. Cohen*, 314 F.3d 1127 (9th Cir. 2003). There, the issue was whether the Internet domain name sex.com was property subject to conversion under state law. The 9th Circuit made clear that it certified this question out of "deference to the state court on significant state law matters," given that "regulation of the Internet under state law" was of "significant precedential and public policy importance."

That the 9th Circuit's request was not unanimous, however, may have prompted the court's denial. Judge Alex Kozinski dissented from the certification order, painting certification as unnecessary because the question was not difficult and the answer was "obvious" in light of California Supreme Court precedent. In his opinion, "[c]ertification is justified only when the state supreme court has provided no authoritative guidance, other courts are in serious disarray and the question cries out for a definitive ruling." Kremen, he argued, did not meet this criteria.

He also noted that no party or amici sought certification; indeed, Kremen urged the court not to certify. This was the first time that the court reviewed a dissent from a certification request, and it seems safe to assume that such dissents make the granting of a request less likely.

Other unsuccessful requests have involved insurance for damage to state-owned groundwater (*KF Dairies v. Firemen's Fund*, 179 F.3d 1226 (9th Cir. 1999)); the burden of proof for civil tax fraud (*In re Renovizors*, 236 F.3d 518 (9th Cir. 2001)); the elements of intentional interference with prospective economic advantage (*Marin Tug & Barge v. Westport Petrol.*, 238 F.3d 1159 (9th Cir. 2001)); the finality of an order summarily denying a habeas corpus petition (*Bunney v. Mitchell*, 249 F.3d 1188 (9th Cir. 2001)); and attorney fees under the Fair Employment and Housing Act (*Friery v. LAUSD*, 300 F.3d 1120 (9th Cir. 2002)).

Although the reason for these denials is unknowable, possible explanations exist. In *Bunney*, for instance, the question was whether denial of habeas corpus relief was final immediately or after 30 days. In denying certification, the court noted that the rules dealing with habeas finality were in the process of revision. Presumably, with the question being handled administratively, the court had little incentive to take the case.

Ironically, after the denial, the 9th Circuit decided that 30 days were necessary for finality (Bunney v. Mitchell, 262 F.3d 973 (9th Cir. 2001)), but the revised Rule of Court made finality immediate (Rule 29.4(2)(C)).

The court may have denied the question in *Marin Tug* because the issue presented too narrow a factual application. This forced the 9th Circuit to resolve a conflict between conflicting Court of Appeal opinions on its own, which it did by adopting a position espoused in two Court of Appeal opinions and in a concurring opinion by Justice Stanley Mosk.

In *KF Dairies*, the 9th Circuit premised its request on a "potential conflict" between Court of Appeal decisions directly on point and a more general Supreme Court rule. Perhaps, since the 9th Circuit did not frame the issue as a true conflict, the state Supreme Court saw no reason to grant the request, or it viewed the "potential conflict" as nonexistent or insignificant.

A successful certification request, of course, requires convincing the 9th Circuit to order certification. In addition to Kozinski's views on this issue in *Kremen*, another recent discussion of certification appeared in *Commonwealth Utilities Corp. v. Goltens Trading*, 313 F.3d 541 (9th Cir. 2002) (declining to certify a question to the Supreme Court of the Northern Marianas).

In *Goltens*, the 9th Circuit re-emphasized its discretion in certifying questions and reiterated that certification of even a novel question of law will be denied without clear proof that the answer to the question will matter. In particular, if the plaintiff fails to offer evidence to support its claims, the court will not bother certifying a question. Thus, parties seeking certification should make sure the record contains evidence of a viable case to justify invoking the certification process.

Successfully seeking certification requires overcoming two hurdles. First, the 9th Circuit must be persuaded to order certification. Kozinski's dissent in *Kremen* underscores both the court's duty to certify questions "sparingly and sensibly" and the point that having a difficult legal question is not enough.

Practitioners seeking certification not only should pose the issue as a novel one but also should point to some demonstrable conflict or complete lack of guidance under state law. Practitioners opposing certification should contradict such showings, explain how the 9th Circuit can resolve the issue without outside help and highlight the added costs and delay of certification.

In overcoming the second hurdle — persuading the state Supreme Court to grant the request — practitioners should emphasize the special importance of the issue to state jurisprudence, which justifies a decision from the court. Framing the issue as one involving the state constitution or matters of significant statewide concern is particularly useful.

Those opposing the request should downplay the importance of the question and may wish to analogize the issue to one of the six instances where requests were denied.

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