

Practical Pointers for Certifying Questions to State Courts

Article By:

Colter Paulson

Prior posts have discussed the comparative rarity of certified questions of state law in the Sixth Circuit ([here](#) and [here](#)). This post gives practical pointers to improve your odds of success with certified questions both in the Sixth Circuit and in the state courts.

The decision to ask a federal court to certify a question to a state supreme court should be made as early as possible. Many of the state and federal requirements require significant planning, as the foundation of a successful certification is often laid in the first few months. Given that a certified question can be rejected by either state or federal courts, litigants should review the requirements of both courts before moving a federal court for certification (see, e.g., Ohio S. Ct. Prac. R. 9.01; Mich. Ct. R. 7.308; Ky. R. Civ. P. 76.37; Tenn. Sup. Ct. R. 23). Below are the five chief factors that courts consider when seeking to certify a question of state law:

- **Case origin.** Plaintiffs that chose to file in federal rather than state court may find the courts skeptical, based on the idea (fair or unfair) that a case raising an important issue of state law should have stayed in state court, and to avoid forum-shopping. Defendants that removed a case to federal court may find the same problem when seeking certification.
- **State of the facts.** Certification is most appropriate where a case's factual record is fully developed enough to both allow the court to consider the question in context, and also to ensure that the question is actually necessary and dispositive to an important issue in the case. State courts usually require that all pertinent factual questions be resolved. When moving to seek certification, the best practice is to include a fair and complete summary of the pertinent facts. State courts sometimes reject certified questions because they seem based on fact patters that are too abstract, theoretical, or simply unlikely to recur.
- **Timing on certification.** Courts frown on parties that seek certification on a question only after losing on that question before the district court. Because the factual record may not be complete until later in a case, counsel should seek certification immediately as soon as the record appears to be sufficiently factually developed for the court to answer the question. This sometimes means seeking certification at the motion to dismiss stage, or at summary judgment, even if the court seems unlikely to actually certify the question until a later stage of the case.

- **The question itself.** The closer a question is to a new, unsettled, and pure legal question, the easier it will be to certify. But equally more important is whether a reasonably clear answer can be extrapolated from existing law. The Sixth Circuit will not certify a question that appears relatively straightforward under current state law. The more that a question reflects value judgments and issues of public policy, the more desirable it is to have an answer from the state court. Similarly, your chances of success increase if you can show that the question is of considerable or broad importance or application.
- **Procedural rules:** Certified questions are a procedural minefield. State courts have refused to take certified questions where the federal court's order failed to designate a moving party, where the moving party did not quickly brief the issue (even when lacking a scheduling order), where the federal court's order did not contain a recitation of the facts, where the parties did not provide the record, and for a host of other reasons—some of which seem contradictory. That's all to say litigants need to be exceedingly careful.

Following these guidelines will maximize the chances of success, though the odds are still awfully long in the Sixth Circuit as we explained earlier. If anyone has had success in inducing the state and federal courts to move faster on certification – other than providing everything the courts need in a concise and clear fashion, of course – we'd love to hear from you.

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