State of North Carolina
General Statutes Commission
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MEMORANDUM

To: The Chief Justice and the Associate Justices of the North Carolina Supreme Court

From: The General Statutes Commission

Re: Questions Relating to the Adoption of a Certification of Questions of Law Procedure in North Carolina (DN 05-02)

Date: December 1, 2008

Background

The General Statutes Commission opened DN 05-2 (Certification of Questions of Law) in 2005 to review whether this State should enact the Revised Uniform Certification of Questions of Law Act (Uniform Act). The docket held a lower priority until this past winter, when Commissioner Deborah Ross reported a request from the Hon. Allyson K. Duncan, U.S. Circuit Court Judge, Fourth Circuit Court of Appeals, prompted by other judges in the Fourth Circuit Court of Appeals, that North Carolina look into establishing a procedure allowing certification of questions of law to this State's courts.

The Commission had already identified potential issues about the constitutionality of all or part of the Uniform Act in its earlier reviews of it:

(1) Whether it would be proper for the General Assembly to enact the procedural sections of the Uniform Act. The Commission had already concluded that under Article IV, § 13, of the North Carolina Constitution (Constitution), which gives the Supreme Court (Court) exclusive authority to make rules of procedure and practice for the Appellate Division, the answer to this question appears to be that these provisions, if adopted, should be adopted by the Court by rule rather than enacted by the General Assembly.

(2) Whether answers to certified questions of law from other jurisdictions might be advisory opinions. Two former Supreme Court Justices have informally raised this issue with the Commission, because the Constitution does not authorize the Court to issue advisory opinions. See In re Response to Request for Advisory

Opinion, 314 N.C. 679, 335 S.E.2d 890 (1985). For the reasons set out in this memorandum, it appears to the Commission that a certification process can be crafted that avoids this issue.

(3) Whether a certification of questions of law procedure might exceed the jurisdictional provisions of Article IV, § 12. The Court has held that the General Assembly cannot expand the Court's jurisdiction beyond that set out in the Constitution. See Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976); State ex rel. Utilities Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965). Outlined below are possible alternative approaches to resolving this question.

When the Commission resumed its consideration of the issues raised in connection with the Uniform Act, it reviewed materials prepared by Eric Eisenberg, a student at the Duke University School of Law who was Judge Duncan's summer intern, and a draft law review article written by Mr. Eisenberg on the possibility of adopting a certified questions of law procedure in this State. The Commission also asked its staff to do some additional research. After reviewing the resulting information and materials, the Commission concluded that:

(1) A certification procedure can be crafted that would be controlled by the Court and would not add significantly to the Court's workload;

(2) If the Court has constitutional authority to respond to certified questions of law, it could adopt a procedure by rule, and no enactment by the General Assembly appears essential;

(3) If the Court currently lacks authority to adopt a certification procedure by rule, it appears that the Constitution would need to be amended to provide authorization; and

(4) There are respectable arguments for and against the position that the Court already has the necessary authority.

The Commission decided before proceeding any further to present a summary of the information it has gathered to the Chief Justice and to ask the Chief Justice for a response from her and her fellow justices on two issues:

(1) Whether the Chief Justice and the Associate Justices think a constitutional change would be needed to adopt a certification of questions of law procedure in this State, either by rule or by a combination of statute and rule; and

(2) Whether they would be opposed to a change in the constitution if one is needed.

Why Have a Certification of Questions of Law Procedure?

Various reasons have been urged for the adoption of certification of questions of law procedures. Avoidance of mistaken rulings by federal courts, comity, and protection of state sovereignty are generally noted; other points in favor include avoidance of the additional law suits that would be necessary to bring the question before the state's appellate courts, reduction of forum shopping, and avoidance of the greater delay and expense that would result from application of the abstention doctrine. Every other state has adopted a certification of questions of law procedure, although Missouri has held its statute unconstitutional. Reasons for adopting a certification of questions of law procedure are set out in greater detail in Eric Eisenberg, "Note: A Divine Comity: Certification (At Last) in North Carolina," 58 Duke L. J. 69, 72-81 (2008), copy attached. See also Jessica Smith, "Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina," 77 N.C. L. Rev. 2123, 2132-37 (1999).

The Commission notes in this respect that a federal court in this State that rules on a question of state law for which there is no precedent in the State's own courts will be effectively making law in this State, because lawyers will tend to rely on that ruling until the issue is decided by the North Carolina Court of Appeals or Supreme Court. Whether this result is desirable as a policy matter is debatable. There is also an issue of fairness to litigants. The losing side in the federal case will not have the opportunity to seek review of the correctness of the federal court's ruling by the only court that can definitively settle the issue, unlike litigants in the State's courts. Litigants in federal courts are not necessarily there by choice, as, for example, when an action started in State court is removed.

Interest is not limited to the Fourth Circuit. The docket was opened as the result of a letter from Raleigh attorney Jerome Hartzell, and Hugh Stevens, Everett, Gaskins, Hancock & Stevens, LLP, has written urging adoption of a certification of questions of law procedure. Others have also informally expressed their interest.

Effect on the Court's Workload

As an initial matter, it should be noted that all state certification of questions of law procedures are discretionary. A court is never required to answer a question of law certified by another court under any of them.

The Commission received a report from the Fourth Circuit Clerk of Court's office on the number of times that Court has certified a question of law in recent years. Information from the Fourth Circuit is reflected in the following table:

Year	4th Circuit - number of times questions certified to other courts
2007	1 - to Md. Ct. of Appeals

2006	none
2005	3 - 1 to Md. Ct. of Appeals, 1 to Va. Supreme Ct., 1 to S.C. Supreme Ct.
2004	4 - 3 to W.Va. Supreme Ct., 1 to Ky. Supreme Ct.

The Commission also received reports from the offices of the Clerks of Court of the Maryland Court of Appeals and the Supreme Courts of South Carolina, and Virginia on the number of times certified questions from other courts were docketed in those courts. In Maryland, the Court of Appeals docketed two certifications in the 2003-2004 term, two in the 2004-2005 term, three in the 2005-2006 term, and two in the 2006-2007 term. In South Carolina, there were three in 2003, eight in 2004, four in 2005, three in 2006, and two in 2007. The Clerk's office in South Carolina had no readily available breakdown, but the deputy clerk who provided the information reported that these were "mostly" from the federal district courts in South Carolina. In Virginia, between 2003 and 2007, certified questions from other courts were docketed a total of seven times, all from federal courts.

West Virginia has an intra-state certification process and does not separate the two types of certifications in its reports. Its Supreme Court received 17 "petitions" in 2003 with 86% accepted, 30 in 2004 with 69% accepted, and 19 or 20 in 2005 with 60% accepted. The West Virginia Clerk of the Supreme Court estimated that about 20% were from federal courts; the others were from the intra-state procedure.

The other state high courts in the Fourth Circuit seem to docket around two to four certified questions a year from other jurisdictions. Some states are more restrictive than those in this Circuit in the courts from which they will accept certified questions. For example, eight states currently accept certified questions only from federal appellate courts or from federal appellate courts and the high courts of other states. Two other states are even more restrictive (see enclosed Chart on Constitutional Authority for Interjurisdictional Certifications of Questions of Law and its companion report). During the period 2003 to 2007, the Fourth Circuit certified questions to West Virginia three times, twice to Maryland, and once each to South Carolina, and Virginia. Certification requests to these courts from other federal circuit courts of appeal and other states appear to be rare. It appears reasonable to conclude that the Court could limit its additional workload to a similar rate of one to three answers to certified questions over a four-year period by restricting in some fashion the courts from which it will accept certified questions.

Responses to Certified Questions/Advisory Opinions

State courts that have addressed this issue generally conclude that responses to certified questions under the proper standards are not advisory opinions. As summarized by the California Supreme Court,

> [O]ur sister-state high courts overwhelmingly have rejected contentions that in answering a certified question a court issues an improper advisory opinion. The

> weight of authority holds that a high court's answer to a certified question is *not* an improper advisory opinion so long as (i) a court addresses only issues that are truly contested by the parties and are presented on a factual record; and (ii) the court's opinion on the certified question will be dispositive of the issue, and res judicata between the parties.

Los Angeles Alliance for Survival v. City of Los Angeles, 22 Cal. 4th 352, 362, 93 Cal. Rptr. 2d 1, 5, 993 P.2d 334, 339-40 (2000). The reasoning appears to be as follows: there is (or should be) an actual, justiciable controversy in the certifying court, part of which the litigants transfer to the answering court and litigate there through the certification procedure. The answering court's response is therefore part of the law of the case and binding between the parties because the referring court is bound to apply it. If the certifying court is a federal court, it is bound by Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938), to apply the law of a state as stated by the state's appellate courts, so the answer can determine the result in the federal court. The result would be the same if the certifying court was another state or tribal court applying the law of the answering state. The Maine Supreme Court analogized the procedure to a declaratory judgment, which was at one time attacked on similar grounds. See In re Richards, 223 A.2d 827 (Me. 1966). The issue is discussed more fully in Eric Eisenberg, "Note: A Divine Comity: Certification (At Last) in North Carolina," 58 Duke L. J. 69, 83-85 (2008), copy attached. For a conflicting view, see Melson v. Prime Ins. Syndicate, Inc. (In re Certified Question), 472 Mich. 1225, 692 N.W.2d 687 (2005), Weaver, J., concurring (in decision not to answer); for a response to Weaver's view, see the dissent in that case by Markman, J.

Court's Authority to Adopt Certification of Questions of Law Procedure By Rule

As noted initially, under this State's case law, if the Court does not already have jurisdiction or other authority under the Constitution to respond to certified questions of law, the General Assembly cannot expand it by statute. The Constitution would need to be amended.

The Commission reviewed two sections of the Constitution in particular. Article IV, § 1, vests the judicial power of this State in a court for the trial of impeachments (the Senate) and a General Court of Justice. Article IV, § 12, specifies that the Court has jurisdiction to "review upon appeal any decision of the courts below, upon any matter of law or legal inference." The section also authorizes the Court to issue "any remedial writs necessary to give it general supervision and control over the proceedings of the other courts" and gives the Court jurisdiction to review appeals from the Utilities Commission.

The Commission began with the question of whether a certification procedure could be adopted consistent with the jurisdictional provisions in Article IV, § 12, or whether the references to "appeal" and "courts below" in the first part of Article IV, § 12 (1), and the qualifying phrase "of the other courts" in the part dealing with remedial writs would prevent the Court from answering certified questions of law under the authority of that section. The

Commission also questioned whether authority could be found under some other provision, e.g. Article IV, § 1, or whether Article IV, § 12, acts as a limit on authority found elsewhere.

To see whether other states would provide any guidance, the Commission's staff reviewed the jurisdictional provisions of other state's constitutions looking for provisions similar to Article IV, § 12, without success (see enclosed Chart on Constitutional Authority for Interjurisdictional Certifications of Questions of Law and its companion report). The research did disclose that nine states have constitutional provisions that expressly confer jurisdiction to answer certified questions of law from other (designated) courts. Of the remaining states, it is often not clear what the constitutional authority was for their certification of questions of law procedure, yet 21 of them have adopted a certification procedure entirely by rule. These rules appear to be largely unchallenged. Authority may simply be assumed. The Idaho Supreme Court in 1983 quoted the Washington Supreme Court as having said (in 1968) that "'[s]o patent is the power of a court to render an opinion in response to a certified question that New Hampshire has adopted the practice by court rule, not waiting for an expression of legislative approval of the idea. . . . It is within the inherent power of the court as the judicial body authorized by the constitution to render decisions reflecting the law of this state.'" Sunshine Mining Co. v. Allendale Mutual Ins. Co. 105 Idaho 133, 136, 666 P.2d 1144, 1147 (1983) (copy attached).

The Commission then reviewed possible arguments that the Court already has authority to adopt a certification procedure by rule. Of those reviewed, the Commission, with some dissent, is of the opinion that the best approach is that adopted by Ohio in Scott v. Bank One Trust Co., 62 Ohio St. 3d 39, 577 N.E.2d 1077 (1991) (copy attached). Ohio's procedure, adopted by rule, was challenged in that case as being beyond the jurisdiction of the Ohio Supreme Court as set out in Ohio's constitution.

The Ohio Supreme Court, however, concluded that it was not exercising jurisdiction when it answered a certified question of law. Its prior case law defined jurisdiction as the power to hear and determine a cause. In a case involving a certified question of law, the original court still makes the final determination and issues the final order in the case. As a result, the court reasoned, answering a certified question was not an exercise of jurisdiction.

Rather, the court concluded, its power to answer a certified question came from the U.S. Constitution and Ohio's existence in a federal system. Ohio's constitution allowed it to exercise its sovereignty as far as the U.S. Constitution and laws permitted. Federal law recognized that sovereignty by making Ohio law applicable in federal courts. Ohio had both the power and the responsibility to protect its sovereignty. To the extent that federal courts are incorrect in anticipating how Ohio's courts will rule, Ohio's sovereignty is diminished. Certification ensures that federal courts will properly apply Ohio law. The courts were the appropriate branch of Ohio's government to answer certified questions.

Under this view, the answer to a certified question that met the proper standards would be more than an advisory opinion because of its binding effect on the sending court, but it would not

be an exercise of jurisdiction over the parties in the cause as contemplated by Article IV, § 12, of the North Carolina Constitution. The sending court's judgment would cause the answer to be the law of the case and binding on the parties.

Ohio's example has been followed by Oklahoma, see Shebster v. Triple Crown Insurers, 826 P.2d 603 (Okla. 1992), and, in pertinent part, Tennessee, see Haley v. University of Tennessee-Knoxville, 188 S.W.2d 518 (Tenn. 2006). In Haley, the Tennessee Supreme Court held that it was not exercising jurisdiction in answering a certified question, but it found its authority in Article VI, § 1, of the Tennessee Constitution, vesting the judicial power of the state in its courts

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As already noted, Article IV, § 1, of the North Carolina Constitution vests the judicial power of this State in a court for the trial of impeachments and a General Court of Justice. The Supreme Court has appellate and supervisory authority over the other courts. The exercise of jurisdiction under Article IV, § 12, is one aspect of its judicial power, but the Court's judicial power extends beyond that. It also includes, e.g., the Court's constitutionally granted rulemaking power, see N.C. Constitution, Art. IV, § 12 (2007), and various inherent powers, see, e.g., In re Alamance County Court Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991) (discussion of inherent power); Beard v. The North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987) (inherent power to deal with attorneys). Answering a certified question is an exercise of judicial power, see, e.g., Sun Ins. Office, Ltd., v. Clay, 133 So.2d 735 (Fla. 1961), that is most appropriately exercised by the Supreme Court under the structure of this State's court system.

The Ohio Supreme Court's example may not be universally convincing. Although, as noted, Oklahoma and Tennessee have followed Ohio's reasoning, several other states regard answering certified questions of law as an exercise of jurisdiction (although there does not appear to be agreement whether it is original jurisdiction or a form of appellate jurisdiction) (see enclosed Chart on Constitutional Authority for Interjurisdictional Certifications of Questions of Law and its companion report). If the Chief Justice and the Associate Justices think the answering of certified questions of law would be an exercise of jurisdiction, there are additional arguments to consider.

Eric Eisenberg in his law review article ably sets out arguments that the Court has jurisdiction to entertain certified questions of law. See Eric Eisenberg, "Note: A Divine Comity: Certification (At Last) in North Carolina," 58 Duke L. J. 69, 91-97 (2008). A copy of his article is attached.

In addition, the Idaho Supreme Court in Sunshine Mining Co. v. Allendale Mutual Ins. Co., 105 Idaho 133, 666 P.2d 1144 (1983) (copy attached), held that it had inherent power under the clause of the Idaho constitution vesting judicial power in the courts to adopt its rule establishing a certification of questions of law procedure. At least as applied to that issue, the court considered the jurisdictional provisions of its constitution as limiting rather than granting its jurisdiction. It distinguished an earlier opinion to the effect that its legislature could not

extend its appellate jurisdiction to include direct reviews of its utilities commission (comparable to State ex rel. Utilities Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965)). Please note that the jurisdictional provisions in the Idaho constitution relating to its Supreme Court are more similar to those in the North Carolina Constitution than are those of most states.

Conclusion

If the Chief Justice and the Associate Justices conclude that the Court has the authority under the North Carolina Constitution to adopt a certification of questions of law rule, there is no need for legislative action and hence no need for further action by the Commission. In that event, the Commission will be happy to share its files with the Court. Conversely, if the Chief Justice and the Associate Justices believe that a constitutional amendment would be necessary, the Commission has the authority to recommend one to the General Assembly and will happy to work with the members of the Court in that endeavor.