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Certification and Removal: Practices and Procedures

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CERTIFICATION AND REMOVAL: PRACTICES AND PROCEDURES

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PROFESSOR OCCHIALINO: Because Professor Chemerinsky was to speak about federalism issues,[1] we chose to develop the same theme—the relationship of federal courts to state courts, federal courts and state law questions, and how federal and state courts should interact. We decided that issues governing removal of state cases to federal courts and certification of state law questions by federal courts to state courts raised important issues of federal and state interaction worthy of discussion. We will start with removal issues and then discuss certification of state law issues to state courts by federal judges.

When are cases removed from state to federal court and do federal judges look for ways to remand them, especially diversity actions rather than federal question cases? A sub-theme is a particular case in the Tenth Circuit, *Laughlin v. K-Mart Corp.*,[2] which deals with the fact that the party seeking removal based on diversity has to prove that the amount in controversy exceeds $75,000.[3] The issue arises in the four states within the Tenth Circuit in which state rules of procedure provide that the amount the plaintiff seeks in damages is not to be stated in the complaint.[4] These state procedural rules may have been designed to keep doctors, for example, from being embarrassed by headlines screaming, "Doctor sued for $20,000,000."

The bar on stating the amount sought in the complaint raises the question of how the defendant who seeks to remove can prove that the case is really a $75,000 case. I've asked Judge Parker to start with a discussion of *Laughlin* and the issues that relate to determining the amount in controversy. Judge Parker will probably remind us that he has to make sure that cases are removed properly to federal court, because federal courts are courts of limited subject matter jurisdiction. I wonder if he also will tell us that a significant percentage of all cases removed to federal court are

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1. Professor Chemerinsky made his comments during this conference in a keynote presentation, *The Federalism Revolution*, reprinted in this volume.

2. 50 F.3d 871 (10th Cir. 1995).

3. *Id.*, 50 F.3d at 873. At the time *Laughlin* was decided, 28 U.S.C. § 1332(a) required that for a federal court to have original jurisdiction in a diversity case, the amount in controversy must exceed $50,000. Subsequently, 28 U.S.C. 1332(a) was amended to require an amount in controversy exceeding $75,000.

4. OKLA. STAT. ANN. tit. 12, § 2008(A)(2) (2000) ("Every pleading demanding relief for damages in money in excess of Ten Thousand Dollars ($10,000) shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of Ten Thousand Dollars ($10,000), except in situations sounding in contract."); N.M. R. CIV. P. 1-010(B) ("Unless it is a necessary allegation of the complaint, the complaint shall not contain an allegation of damages in any specific monetary amount."); KAN. R. CIV. P. 60-208 ("Every pleading demanding relief for damages in excess of $75,000, without demanding any specific amount of money, shall set forth only that the amount sought is in excess of $75,000, except in actions sounding in contract."); COLO. R. CIV. P. 8(a) ("No dollar amount shall be stated in the prayer or demand for relief.").

diversity cases, and that he will do anything in his power to get rid of those cases, because he's got enough work to do. So, we open up with Judge Parker talking about *Laughlin* and the serious problem that it poses when he has to resolve a question concerning the amount in controversy when a party seeks to remove a diversity action from state to federal court.

JUDGE PARKER: The first thing that I would recommend is that you read *Laughlin*. It's very short, but it sets forth some significant principles and in many instances makes it quite difficult for an unsuspecting defense lawyer to properly remove the case. The case puts the burden on the defendant, when seeking to remove the case from the state court, to show affirmatively the requisite amount in dispute in the case.[5] Now this may strike you as being something that a defense lawyer is not going to want to do. I do not know many defense lawyers who want to concede that the plaintiff's case is worth more than $75,000.

It's your burden to show, on the face of your notice of removal, the underlying facts that support the contention that the plaintiff is claiming $75,000 or more.[6] In four of the states in this circuit, there is a state court pleading rule that prevents the plaintiff from stating the monetary amount of damages that will satisfy this requirement.[7] If the amount is alleged in the complaint, then you don't have the burden of proving the amount in controversy. In four states, however, you won't see the amount mentioned in the complaint. So what do you do?

A good example of what you can do is described in a very well written opinion by Judge Black of the District of New Mexico, in *Jamison v. State Farm General Insurance Co.*[8] Basically, what the defense lawyer did in *Jamison* was file a personal affidavit stating that in his experience when a plaintiff alleges multiple categories of damages—punitive damages, the right to attorney's fees, etc.—a plaintiff in that circumstance is claiming more than $75,000.[9] The affidavit, coupled with one other thing that the defense lawyer did, satisfied Judge Black. The other thing that the defense lawyer did was to ask counsel for the plaintiff to stipulate that the plaintiff was claiming less than $75,000.[10] The plaintiff's attorney, however, refused to do that. Judge Black found that the combination of those two factors was sufficient to meet the defendant's obligation to establish affirmatively that the plaintiff was claiming in excess of $75,000.[11]

If your case is remanded to state court because you do not satisfy the requirement of *Laughlin*, it's not necessarily the end of the world. The Seventh Circuit, less than a year ago, in *Benson v. SI Handling Systems, Inc.*, [12] said that nothing in 28 U.S.C. § 1446 prevents multiple removals. Thus, in the event you get sent back to state court on the basis of *Laughlin*, and while in state court it becomes apparent to you

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5. *Laughlin*, 50 F.3d at 873 ("The burden is on the party requesting removal to set forth, in the notice of removal itself, the underlying facts supporting [the] assertion that the amount in controversy exceeds $50,000.") (citation omitted).

6. *See id.*

7. *See supra* note 4.

8. No. CV 98-1004, slip op. (D.N.M. December 7, 1998).

9. *Id.* at 5-6.

10. *Id.* at 4-5.

11. *Id.* at 4-6.

12. 188 F.3d 780 (7th Cir. 1999).

from something the plaintiff has done that the plaintiff's claim exceeds $75,000, you can file another notice of removal, and you may be safely home at that point.[13] At least this is true in the Seventh Circuit. The Tenth Circuit, however, has not yet agreed to this.

This brings us to the issue of timeliness of removal. The basic rule is that you must remove a case within thirty days. Under the language of the statute, that period begins after the defendant receives an amended pleading, motion, order, or other paper from which it can first be ascertained that the plaintiff is claiming the requisite amount.[14] This may not occur, of course, in the early stages of a state court case. The Tenth Circuit addressed the applicable principles in *Huffman v. Saul Holdings Ltd. Partnership*.[15]

Huffman presented an interesting situation. The complaint was filed in Oklahoma in July of '96, and the allegations were simply that the damages exceeded $10,000.[16] At a deposition the plaintiff testified that he wanted $300,000, but the defendant did not remove the case to federal court at that point.[17] A couple of months later, the defendant received the plaintiff's expert report from an economist who analyzed the plaintiff's damages and concluded that they were roughly $2,000,000.[18] At that point, the defendant removed.[19]

The issue in *Huffman* was whether the removal was timely, and the trial court held that it was not.[20] The Tenth Circuit said that the defendant did not have to remove within thirty days after receiving the complaint because the plaintiff didn't allege damages exceeding $75,000.[21] When the plaintiff, however, testified at a deposition that he wanted $300,000, doing so put the defendant on notice about the amount of the claim.[22] This doesn't fit precisely within the language of the statute, which mentions an amended pleading, motion, order, or other paper.[23] But the court held that your notice is untimely if it is not filed within thirty days of hearing in a deposition that the amount in controversy exceeds $75,000.[24]

Next, let me review what happens in our district. I have talked to my colleagues and have determined that two of us look at the complaint in a new case assigned to us, primarily for the purpose of determining whether we have conflicts that would prevent us from being the judge in the case. Along with that, we also review for jurisdictional issues, and we sua sponte remand cases in which we lack jurisdiction because the requirements of *Laughlin* have not been met. I've done this more than

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13. *Id.*
14. 28 U.S.C. §1446(b). Section 1446(b) provides in pertinent part,
    The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial proceeding setting forth the claim for relief upon which such actions or proceeding is based....
15. 194 F.3d 1072 (10th Cir. 1999).
16. *Id.* at 1075.
17. *Id.* at 1076.
18. *Id.*
19. *Id.*
20. *Huffman*, 194 F.3d at 1079.
21. *Id.* at 1077.
22. *Id.* at 1079.
23. *See supra* note 14.
24. *Huffman*, 194 F.3d at 1080.

a dozen times. On the other hand, two of our judges have told me that they do not think of looking at the issue unless a party, in a motion to remand, raises it, or they just happen to see it. This usually occurs when they are reviewing the initial pretrial report and are studying the parties' contentions.

I will be candid with you. In some instances this somewhat informal approach to looking at whether we have subject matter jurisdiction based on *Laughlin* has resulted in inequities. I will give you an example of what I consider to be an inequity and also an example of how the problem may be corrected in a strange sort of way. The example comes from *Johnson v. Wal-Mart Stores*,[25] which I call the "Wal-Mart exception to the K-Mart case."[26] The complaints in these cases were filed in New Mexico. The notices of removal in the cases were virtually identical on the issue of the amount in controversy. Each notice of removal simply said that the defendant reasonably believed the amount being claimed exceeded the requisite statutory amount.

Nothing in *Johnson* indicated that it didn't fit precisely with *Laughlin*. *Laughlin* had proceeded to final disposition by summary judgment, which was appealed, before the issue of lack of subject matter jurisdiction was raised sua sponte by the Tenth Circuit on appeal.[27] Lack of subject matter jurisdiction never came up in the district court and it was not argued in the parties' appellate briefs. Keep this in mind while I describe *Johnson* to you.

Johnson was assigned to Judge Martha Vazquez.[28] She had the case for a while and Judge [Paul] Kelly,[29] who's also based in Santa Fe, tries some cases for Judge Vazquez, so he agreed to try *Johnson*. Two weeks before the trial date, Judge Kelly called me and said, "I see you have some cases set for jury selection on X date, and I realize I have a conflict and cannot try a case I had set on that date. Could you try this case of *Johnson*?"

I assumed that my two predecessors on the case had probably looked at subject matter jurisdiction, so I didn't pay any attention to it. I selected the jury, and we went to trial. The trial resulted in a $450,000 verdict in favor of the plaintiff, which was appealed.[30] On appeal, nothing was said about subject matter jurisdiction or lack thereof, because at that time jurisdiction was no longer a problem. You will see this expressed in the Tenth Circuit case, *Huffman v. Saul Holdings Ltd. Partnership*.[31] One of the statements in that case is that a mere procedural error in the timing of removal does not destroy jurisdiction in a case actually tried after a wrongful denial of remand, if subject matter jurisdiction existed at the time the district court entered judgment.[32]

So what does this tell you? You can go all the way through a case lacking subject matter jurisdiction under *Laughlin*, and the jury verdict can magically grant you

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25. No. CV 96-760, slip op. (D.N.M. February 26, 1998).
26. When referring to the "K-Mart case," Judge Parker is referring to Laughlin v. K-Mart, 50 F.3d 871 (10th Cir. 1995). For a discussion of *Laughlin*, see *supra* notes 4 and 5 and accompanying text.
27. *Laughlin*, 50 F.3d at 873.
28. District Judge, United States District Court, District of New Mexico.
29. Circuit Judge, United States Court of Appeals, Tenth Circuit.
30. Johnson v. Wal-Mart Stores, Inc., No. 98-2062 (10th Cir. November 10, 1998).
31. 194 F.3d 1072 (10th Cir. 1999).
32. *Id.* at 1079 (quoting Caterpillar Inc. v. Lewis, 519 U.S. 61, 64 (1996)).

subject matter jurisdiction when you enter judgment on the verdict. Unfortunately, there are going to be some inconsistencies if judges are not totally alert in the initial stages of these cases.

Let me mention a couple of other related issues. One of the issues is the defendant's waiver of the right to remove by participating in state court proceedings before removing. This is illustrated by the case of *Aragon v. National Home Healthcare, Inc.*[33] In this case, the complaint did not allege an amount of damages.[34] The case was filed in New Mexico state court, and early in the case the defendant exercised its right to disqualify the assigned state district court judge.[35] After it became apparent that the plaintiff was claiming an amount in excess of $75,000, the defendant removed the case to federal court, and the plaintiff moved to remand.[36]

The plaintiff's argument was that the defendant, by disqualifying the state court judge, had taken an action that waived the defendant's right to remove the case from state court.[37] I ruled to the contrary based on the Tenth Circuit case of *Akin v. Ashland Chemical Co.*[38] In *Akin*, the court of appeals held that waiver by reason of a defendant's participation in state court depends on whether the actions that it took in state court occurred before or after it became apparent to the defendant that the case was removable.[39] In *Akin*, the defendant had filed a motion for summary judgment in state court, obviously asking for a ruling from the state court judge.[40] Then the plaintiff, for the first time, made it clear that the plaintiff was claiming more than $75,000.[41] The defendant immediately removed. The Tenth Circuit Court of Appeals concluded that the removal was proper because there had been no waiver by the filing of the motion for summary judgment.[42]

I followed this holding in *Aragon*.[43] The interesting sequel to what I did in *Aragon* was this: a jury tried the case two weeks ago. I submitted two issues to the jury and the jury found in favor of the defendant on one issue and awarded only $10,000 on the other issue.

OCCHIALINO: It seems that when a butterfly flaps its wings there is a big storm five thousand miles away. As I understand it, these four states within the Tenth Circuit that bar asking for a dollar amount in the complaint are simply trying to prevent unwarranted and unfavorable publicity toward defendants. That, in turn, has triggered a problem for federal judges, who must decide whether the required $75,000 in controversy is present.

Judge Parker has illustrated some of the ways that defense lawyers are able to demonstrate that more than $75,000 is in controversy. To sum up, while still in state court, the defendant can ask the plaintiff in discovery whether the plaintiff wishes

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33. No. CV 99-628, slip op. (D.N.M. August 2, 1999).
34. *Id.* at 2.
35. *Id.* at 1.
36. *Id.* at 2.
37. *Id.* at 2-3.
38. 156 F.3d 1030, 1036 (10th Cir. 1998).
39. *Id.* at 1036.
40. *Id.*
41. *Id.*
42. *Id.*
43. No. CV 99-628, slip op. at 5 (D.N.M. August 2, 1999).

to recover more than $75,000. Some plaintiffs, however, might respond, "I don't know. That's for my lawyer to answer and I can't resolve that." A defendant's request for admission or an interrogatory also might prove that $75,000 is in controversy.

If pre-removal discovery fails, defendant might remove, and when the plaintiff petitions for remand, defendant might say to the plaintiff, as Judge Black suggested, "We'd be happy to join in the remand if you will agree that you will not ask for, nor will you accept more than $75,000 after the case is remanded."[44] That certainly puts a tough choice to the plaintiff. These are some of the things being used to resolve this technical problem.

Judge Parker has also noted other problems that arise. He checks, sua sponte, certain matters. He checks to see that the remand was timely. A party must seek to remand within thirty days after the party discovers that it has the right to remand and within a year after the case has been filed.

So, there are four or five things that might compel a federal judge to remand a removed case to the state court. Audience members, what has been your experience, either as judges or lawyers, with any of these issues?

HONORABLE LORENZO F. GARCIA:[45] Yes, this is actually addressed to Justice McKinnon. In New Mexico, the problem regarding the amount in controversy has manifested because of the requirement that the complaint not contain an allegation of damages in any specific monetary amount. One, is the supreme court cognizant of the problem, and two, why hasn't the court moved to modify the pleading rules to eliminate that requirement? It just seems like it's a matter that is easily addressed by supreme court rules, perhaps in New Mexico and the other three states that have this particular problem.

OCCHIALINO: The question is, Justice McKinnon, the New Mexico Supreme Court writes the New Mexico Rules of Civil Procedure; you must have known this was a problem, why doesn't the court solve it?

JUSTICE MCKINNON: I will tell you this: I didn't know about *Laughlin* until the three of us met to decide what we were going to talk about at this seminar. Admittedly I have not been practicing law in the traditional way in the last couple of years, but I certainly think Judge Garcia has a very practical solution to it, and I think that the rule should be deleted, in my opinion.

OCCHIALINO: I expect that the rules committee will deal with this issue sometime soon. It also comes up in a related way in New Mexico. The Second Judicial District Court mandates court-annexed arbitration for cases under $25,000.[46] The same problem of determining the amount in controversy arises in this context, and the courts are compelling parties to enter a stipulation. Perhaps judges could do the same when the issue arises in the removal context.

GARCIA: I have one other follow-up question. There is a related problem on this removal issue dealing with the suggested approach by Judge Parker. That is when a defendant in the notice of removal says, "The basis of removal for an amount in

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44. *See supra* notes 8-11 and accompanying text.
45. Magistrate Judge, United States District Court, District of New Mexico.
46. N.M. L.R. 2-603 § II.

excess of $75,000 comes from a settlement offer, perhaps, by a plaintiff." But we've seen decisions, or seen proceedings, where a plaintiff will make a settlement offer in excess of $75,000. Then the case is removed and the plaintiff will object to the removal saying that the information to support removal has to be obtained on the notice of removal itself. Since a settlement proposal isn't made on the notice of removal, it should be remanded. It puts a defendant in a very difficult position on how to prove the case is worth more than $75,000, if you don't want to disclose the settlement discussions.

PARKER: In the *Aragon* case the defendant attached a copy of the settlement offer to its response to the plaintiff's motion to remand. Mind you, this is a case that was tried by the jury resulting in a $10,000 verdict. The settlement demand was $1,084,000, so that was enough to satisfy the $75,000-or-more requirement.

If there is some reason not to attach to your notice of removal a written settlement offer, or if the offer had been made, say, orally and not in writing, a defendant's counsel can simply represent in a notice of removal that a settlement demand in excess of $75,000 had been presented by the plaintiff. That probably would suffice; I think it would satisfy me anyway.

OCCHIALINO: Are there any defense lawyers in the audience who have struggled with this issue?

AUDIENCE MEMBER: Is the Seventh Circuit the only circuit that has a rule that allows a second notice of removal, supposedly with new data?

PARKER: Well, I'm not sure about that. A Tenth Circuit case has been read, technically, to permit that. The case is *O'Bryan v. Chandler*.[47] There was language in *O'Bryan* that led Judge Easterbrook of the Seventh Circuit, less than a year ago, to say that the Tenth Circuit has indicated that a litigant may try to remove more than once.[48] I don't know if that's a direct quote or not.

AUDIENCE MEMBER: I think there's a problem that comes up when the plaintiff's lawyer changes his mind about the amount in controversy as he approaches trial following remand.

OCCHIALINO: The question is, can you remove a second time because you have new data? What happens when the plaintiff initially says, "I'm taking under $75,000 in this case," but as trial gets closer plaintiff decides that more than $75,000 is, in fact, in controversy and so states? Can the defendant then remove a second time?

AUDIENCE MEMBER: Well, you may run into the one-year problem.[49]

PARKER: I have not personally experienced it; Judge Vazquez said that she had. She had a case in which there was a formal written stipulation by the parties in federal court that the plaintiff was claiming less than $75,000, so she remanded on the basis of that stipulation. She recently discovered that in state court the plaintiff has now asserted that it had the right to claim in excess of $75,000 and she's in a quandary about it. Her thinking was more along the lines of disciplinary action.

AUDIENCE MEMBER: Isn't there a judicial estoppel issue there?

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47. 496 F.2d 403 (10th Cir. 1974).

48. *Benson*, 188 F.3d at 783.

49. 28 U.S.C. § 1446 (1998) states in part, "[A] case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than one year after commencement of the action."

PARKER: Well, that would be an issue that a state court judge would address, I suppose, because the case is back in state court.

AUDIENCE MEMBER: I have another question. Judge Parker, I noted in looking at the remand orders that you talked about sua sponte reviews of notices of removal. Do you make those because of the *Laughlin* decision? Is that why you look at them that way?

PARKER: That's exactly why I do it.

AUDIENCE MEMBER: And, in looking at *Laughlin*, it seems to me that *Laughlin* really writes more into the code requirement for remand than is there, as far as the defendant's obligation to make an assertion that will at least allow the case to be removed and await, if you will, a petition for a motion to remand.[50]

PARKER: The problem, if you read *Laughlin* carefully, is that the requisite amount has to be established at the time of removal. And basically *Laughlin* says you cannot bootstrap yourself into jurisdiction by later presenting information to the federal court that it's clear the plaintiff is now claiming more than $75,000. That's the problem as I read *Laughlin* on that issue. I'll be perfectly candid with you; I don't like the case.

AUDIENCE MEMBER: But you still feel that *Laughlin* really requires you to make the sua sponte review without waiting for a plaintiff to move for a remand?

PARKER: Yes, I do because I may not have subject matter jurisdiction at that point.

OCCHIALINO: I asked Judge Parker the same question before this meeting, and he pointed out that if the district court judge doesn't look at the amount in controversy question in light of *Laughlin*, the court of appeals will. The case might have been tried and then there may be a remand because there was no subject matter jurisdiction to begin with. As Judge Parker suggested, whether he likes the opinion or not, he doesn't want to have it go all the way through trial only to find that there is an appellate reversal and a remand because of lack of subject matter jurisdiction.

AUDIENCE MEMBER: It sounds like *Wal-Mart* takes a somewhat different view.[51]

PARKER: Well, it's a little confusing. Assume that the *Wal-Mart* case had gone to trial, but no monetary amount had ever been established, and there was an appeal by the plaintiff. What would have resulted is probably not much different from *Laughlin*, which was a final disposition by a summary judgment.[52]

AUDIENCE MEMBER: Correct. And in the instance you're talking about, there still could be a showing that the plaintiff had asked for more than $75,000, though he got nothing. Presumably that would do no good so far as the problem of removal, just as it did no good in *Laughlin*.

PARKER: If you read *Laughlin* literally, I think that's a good point.

OCCHIALINO: Judge Parker suggests that *Laughlin* may be a bit hyper-technical, but it, of course, is binding unless it is overruled.

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50. *Laughlin v. K-Mart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (holding that "[b]oth the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice").

51. See *supra* notes 25-32 and accompanying text for a discussion of *Wal-Mart*.

52. *Laughlin*, 50 F.3d at 872.

In the meantime, Judge Garcia suggests that perhaps New Mexico and the other three states that prohibit requesting a specific dollar amount of damages in the complaint[53] should consider a change in their current rules. The change would accommodate getting early and correct answers to the question regarding how much is in controversy while still fulfilling the apparent purpose of the rule to prevent unwarranted publicity through extravagant demands in the complaint.

Perhaps we should move on to the second issue. This deals with certification of state law questions from the federal court to the state supreme court. This problem of having federal judges determine state law arises from the *Erie* case.[54] *Erie* said that federal courts in diversity actions must apply state substantive law.[55]

My law students often ask, "If the state law is not perfectly clear, what does the federal judge do?" I answer, "They make an '*Erie* educated-guess.'" And the students laugh, and say, "Guess? It's not a guess. It's a very sophisticated analysis, professor."

But sometimes state supreme courts disagree, or state legislators seem to disagree with the notion that federal judges are good "guessers" of uncertain state law. Thus, to prevent *Erie* guesses and the discrepancy that might exist in state law as applied in state and federal courts as a result of "*Erie* educated-guesses," several states, including every state within the Tenth Circuit, have passed statutes or drafted appellate rules that allow both the court of appeals judges and the district court judges and appellate judges in the Tenth Circuit to ask the supreme court of the state to advise on what the existing state law is, at least when there is doubt as to the applicable state law.[56] So, I ultimately tell the students, there really are two ways to determine state law in federal court. The first is to guess and the second is to ask the state supreme court.

For lawyers, there are many tactical considerations that go into this issue. Some may want a liberal or conservative federal judge to guess because the guess is likely to be more favorable to their position than a ruling of the state supreme court, which might have a different judicial philosophy.

But our two judges here, one a federal judge and the other a state judge, can tell us about their thinking, rather than the tactical ploys of the parties, on whether they want to guess or certify the question, and what factors state judges consider in deciding whether to accept a certification request from a federal judge. Justice McKinnon has served on the Supreme Court of New Mexico. He has had occasion to deal with this issue and to talk with his colleagues about their views on the same issue. Earlier, I asked Justice McKinnon what criteria he would use when asked by a federal judge for a ruling on state law. I expected a long and sophisticated answer listing multiple factors, but that's not the response I got. Justice McKinnon?

MCKINNON: I think that if a federal judge takes the time to try to properly certify the question on state law where we have no controlling law, as a matter of courtesy, I'm going to grant that request. If a federal circuit court of appeals, or the

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53. *See supra* note 4.

54. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

55. *Id.* at 78.

56. COLO. APP. RULE 21.2; KAN. STAT. ANN. § 60-3201 to 3212; N.M. STAT. ANN. § 39-7-1 to 39-7-13 (1978); NMRA 12-1607; OKLA. STAT. ANN. 20, § 1601-11; UTAH R. OF APP. P. 41; WYO. R. OF APP. P. 41.

Federal District Court of New Mexico, says that they want an answer to a question, I think we have an obligation, a professional obligation, to give them one to the best of our ability. I think the majority of the court believes that.

If you get a question that's difficult to understand, the rule does provide that we're in a position to reformulate. Even that causes me a little bit of concern, because we are saying that this dummy circuit court doesn't know how to phrase the question properly. But if we do think it implicates some other issues, we can do that.

Having said all this, it's interesting to look at what the Supreme Court of New Mexico, at least, has been doing since say, 1993. We've granted a grand total of seven requests from the federal courts: six from the Federal District Court of New Mexico, and one from the Tenth Circuit Court of Appeals. So, assuming that the question is intelligible, and they generally are, I think you can safely say that the New Mexico Supreme Court is willing to accept.

OCCHIALINO: Only thirty percent of the requests by counsel to certify a question to a state court have been honored by the Tenth Circuit Court of Appeals; seventy percent of the time they turn down the request to certify. These are figures from 1990 through 1994, the best that we could get, and that's the highest rate of refusals by a circuit court in the United States. Some refuse only about fifteen percent of the time.[57] Between 1990 and 1994 there were 284 requests from district courts and all the circuit courts in the United States, to state courts, and of these requests, there were only seven refusals to accept the certification. So when Justice McKinnon says, "If they ask, we will answer," it seems to be the pattern throughout the United States.

But Justice McKinnon suggests, as well, that maybe federal judges don't want to ask because they don't want to wait thirteen months for an answer. So we should ask Judge Parker what kind of criteria he uses in making the determination whether to certify. And I hope that he'll also tell us whether he certifies, sua sponte, or waits until a party makes a request.

PARKER: In the two cases that I have certified, I felt that the issues were issues of significant state policy. They involved the New Mexico Medical Malpractice Act, which governs cases for malpractice brought against physicians practicing in New Mexico.[58] The issue in the original case, *Wilschinsky v. Medina*,[59] was whether a physician who negligently treats a patient has a legal duty to a non-patient injured as a result of that treatment. The facts are quite simple: a patient went to a doctor who gave the patient an injection for medical purposes.[60] The doctor says he warned the patient not to drive, whereas the patient claimed the doctor did not.[61] The patient left the doctor's office, drove a half a block, and ran over a pedestrian. The pedestrian sued the doctor.[62] The case was certified. The Supreme Court of New

57. Chart prepared by Daniel A. McKinnon, Ted Occhialino, & James A. Parker, Frequency of Certification by U.S. Circuit Courts, 1990-94 (July 1, 2000) (on file with the University of New Mexico Law Review).

58. *See* N.M. STAT. ANN. §§ 41-5-1 to 41-5-28 (1978).

59. 108 N.M. 511, 512, 775 P.2d 713, 714 (1989).

60. *See id.* at 516, 775 P.2d at 714.

61. *See id.*

62. *See id.* at 512, 775 P.2d at 714.

Mexico ruled that under those circumstances, a physician could have liability to a non-patient for negligent treatment of a patient who then injures a third party.

The more recent case, and this is the last one in which the New Mexico Supreme Court has issued an opinion on certification, was *Lester v. Hall*.[63] This case raised the question of how far the duty of a physician extends. In this case, a physician prescribed lithium to a patient and was supposedly monitoring the levels of lithium.[64] The doctor had last seen the patient some five days before an automobile accident in which the third person, who ended up suing the doctor, was injured. In that case, the supreme court said that its language in *Wilschinsky* was limited to the narrow circumstances of that case, and that the duty of a doctor did not extend to a factual situation where there was a longer time period.[65]

In *Wilschinsky*, I discussed certification with the lawyers and requested their input in framing the issue and the statement of facts. They submitted differing positions and I used them both to formulate the issues—there were three to be certified—and the statement of facts.

In several instances there have been requests for certification that I have denied, primarily because they were on issues that were not necessarily dispositive of the case. There were other claims and I felt that certifying just one of many issues would unduly delay the case. This normally comes up where there are both federal question issues and state law issues, and the parties want a state law issue certified, but it seems to me that the federal question issues are the dominant issues of the case. I don't certify those, even when they involve interesting state law issues.

I asked my colleagues, at the request of Professor Occhialino and Justice McKinnon, about their approaches to certification. I will now relate some anecdotes. Those of you from New Mexico know Judge [Leroy] Hansen.[66] Judge Hansen, one of my colleagues, had a conversation with Justice [Gene] Franchini,[67] in which he pointed out to Justice Franchini that he did not certify issues to the New Mexico Supreme Court because, when he perceived a question that might appropriately be submitted for certification, there was only one of two ways it could go. It could go the liberal route; it could go the conservative route. And he just proceeds on the assumption that he has to decide it on the basis of the liberal route because that's the attitude of the New Mexico Supreme Court. Justice Franchini did not disagree with that. Judge Hansen, I would note, is not the most liberal judge in the United States.

Justice Franchini also had a conversation with Judge [Bruce] Black,[68] another one of my colleagues, when Judge Black first came on the bench, in which they were talking about certification. Now, Judge Black came to our federal district court bench from the New Mexico Court of Appeals. That's the intermediate court of appeals in our system. They were talking about this, and Judge Black told Justice Franchini that he thought he probably would be certifying a lot of issues because he had been on the intermediate court of appeals. He felt it was appropriate for the

63. 126 N.M. 404, 970 P.2d 590 (1998).
64. *See id.* at 405, 970 P.2d at 591.
65. *See id.* at 406-07, 409, 970 P.2d at 592-93, 595.
66. District Judge, United States District Court, District of New Mexico.
67. Justice, Supreme Court of New Mexico.
68. District Judge, United States District Court, District of New Mexico.

supreme court to address unsettled questions of state law. Justice Franchini responded that Judge Black should not dare certify those questions, because Judge Black had been an outstanding court of appeals judge who probably knew more about New Mexico law than the members of the New Mexico Supreme Court.

I think that the federal district court judges in the District of New Mexico probably will take the approach that, if it seems to be an issue of significant state law policy, it should be certified. If it is simply a question that's been unanswered by state court decisions, but does not involve a very weighty state policy issue, we probably would go ahead and decide it ourselves.

Judge Black and I each made a mistake in predicting state law in a couple of cases. About the same time, we each had a case involving insurance coverage. The operative language in the insurance policies was "accidental injury," and the facts were similar. Each case involved an intentional drive-by shooting. The plaintiffs were making claims under their homeowners' insurance policies and were arguing that the shootings were accidental injuries. Both Judge Black and I felt that an intentional shooting could not be an accidental injury and we granted summary judgments. The plaintiffs in both cases appealed to the Tenth Circuit. Interestingly, about the same time, there was a third case coming up through the state court system, not on the precise issues that we had before us, but involving the language of "accidental injury." Basically the state supreme court ruled that an intentional shooting of someone could be considered an accidental injury.[69]

After that ruling came out, while our cases were pending before the Tenth Circuit, obviously they were remanded for us to take another look at them. So we guessed wrong there. Those were issues that we could have certified to the New Mexico Supreme Court. It didn't seem to be a matter of great state policy importance. Nevertheless, it was, I guess, a question that we could have certified and gotten right from the beginning.

MCKINNON: The rules have changed, and therefore the laws have changed. It used to be that the question had to be just what would determine the outcome of the case. Now it simply talks in terms of being dispositive of the issue. Nevertheless, I think that it must have public importance, so I think there is some consideration of what that rule seems to be doing.

OCCHIALINO: One question that I wondered about was, would a judge want to certify a question at the request of a party who had chosen the federal court? The party who chooses federal court seems to be aiming for an *Erie* guess rather than a resolution of a state law issue by a state court judge. But then, the party in seeking certification is saying, "I'm here your Honor, but I don't want you to decide this case even though I chose to be in the federal courts. I really want the state supreme court to resolve it." If I were a federal judge, I'd say, "Well you chose the federal courts buddy, and you got me."

But apparently, Judge Parker doesn't feel that way. He doesn't think that there's a bias against the person who chooses federal court and then asks for a certification to go to the state court; is that correct, Judge?

PARKER: That's correct; I look at the issue.

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69. Britt v. Phoenix Indem. Ins. Co., 120 N.M. 813, 816, 907 P.2d 994, 997 (1995).

OCCHIALINO: What is the experience of the practicing lawyers? Have you thought about certification and not bothered to use it, because we don't see it very often?

AUDIENCE MEMBER: I've had mixed experiences. On occasion the request has been granted; on occasion it's been denied. In general when I'm in federal court, I'm usually pretty accurate because I know I have a district judge who has good law clerks to help advise him, and there's going to be a well-researched decision. So I think that's a factor when you're in federal court, you know that you have the better, often better federal resources than the state district courts do, and you're going to get a better initial decision, whether it gets certified or not.

OCCHIALINO: I see. What factors do other lawyers take into account when they're trying to decide whether to request a certification?

AUDIENCE MEMBER: The statute in Oklahoma specifically authorizes the supreme court to rephrase the issue.[70] I don't know that it's peculiar to us or not.

OCCHIALINO: New Mexico does as well, and most of them do.[71]

AUDIENCE MEMBER: And they aren't shy about reformulating the questions. It's not uncommon to see results that go far beyond the question certified. That's something that you have to factor into the equation—the question.

OCCHIALINO: I had a research assistant determine how many state supreme court opinions mention that they were writing an opinion in response to a certified federal question. The statistics were surprising. Oklahoma had had seventy supreme court opinions. During the same period of time, Kansas had thirty-seven, New Mexico twenty-one, and Utah three. What's happening? Why is it that there are such a huge number of certification requests to the Oklahoma Supreme Court and so few in some of the other state supreme courts? Do any of you have any suggested answers?

AUDIENCE MEMBER: I just have a question out of curiosity. Justice, I noticed that the New Mexico statute is similar to the Oklahoma statute in allowing a certification-like question from a tribe. Have you ever received any?

OCCHIALINO: I can answer that. We've done a survey and there have been none to date. I should point out to you that New Mexico has had a certification statute for quite a time, but we only recently adopted the Uniform Act.[72] The New Mexico version allows tribal courts to certify state law questions to the state supreme court.

The Uniform Act comes in two versions. A state can either include tribal courts among those who might ask a state supreme court for an answer, or it can exclude tribal courts. New Mexico chose to include them. If the Supreme Court of the Navajo Nation had a question of state law, it would be able to certify to the New Mexico Supreme Court in the same fashion as the federal court can. As an aside and perhaps as a concluding point, in the New Mexico federal district court, Judge Vazquez has recently ruled that in a Federal Tort Claims Act case, in which a government employee acting on the reservation commits alleged malpractice, the

70. OKLA. STAT. ANN. 20, § 1601 to 1613 (1991); N.M. STAT. ANN. § 39-7-1 to -13 (1978).
71. N.M. STAT. ANN. § 39-7-1 to -13 (1978).
72. N.M. STAT. ANN. § 39-7-1 to -13 (1978).

Federal Tort Claims Act applies. The Act states that the law of the place where the action took place shall control.[73] Judge Vasquez has construed the law of the place to mean the law of the Navajo Nation, and that means that in certain Federal Tort Claims Act cases, questions concerning the law of Indian governments will need to be resolved. This can prove to be difficult for federal judges, particularly when tribal law is orally preserved rather than written.

I understand that the Navajo Nation is considering drafting a certification provision that would allow the federal judges in New Mexico, and apparently the state judges as well, to certify questions to the Navajo Nation. We have taken into account in our New Mexico state certification procedure the needs of the Navajo Nation and other Indian tribal courts, and they are considering reciprocating with their own certification process. There may be fewer guesses and more correct results as a result, and that's what everyone wants.

A terrible thing happens when you get a discrepancy between the federal court's "*Erie* educated guesses" and what turns out to be the different state law eventually. It means that there were two systems of justice for that period of time, and that's precisely what *Erie* was designed to prevent. Certification is the best solution, although it's not always the quickest answer. If supreme court justices agreed to put these cases on the fast track, perhaps the federal judges would be more willing to certify more questions.

73. Cheromiah v. United States, 55 F.Supp.2d 1295, 1302 (D.N.M. 1999).