REMARKS OF CHIEF JUDGE HOLLOWAY AT NINTH CIRCUIT JUDICIAL CONFERENCE MEETING OF THE COURT OF APPEALS' JUDGES AUGUST 18, 1987

Justice O'Connor, Chief Judge Browning, my fellow Judges:

It is a special privilege to be invited to your delightful Conference. Our Circuit greatly respects yours and your eminent Chief Judge. Judge Browning has been my good friend since he was my first boss in 1951 and 1952. He was then the First Assistant to Assistant Attorney General Baldridge, head of the Claims Division of the Department of Justice in Washington. Judge Browning was then an energetic, well liked supervisor of that busy Division as he is now of your important Circuit. Chief Judge Winter and I can surely attest to the special regard in which Judge Browning is held by all members of the Judicial Conference of the United States, and throughout the Federal Judiciary.

I was glad to see how relaxed you are about the Religion Clauses of the First Amendment and have gone right ahead with a schedule for a Prayer Breakfast. We are perhaps too nervous about the Establishment Clause since our tough cases on the Denver Nativity Scene and similar problems. In fact, when I'm asked for my church preference these days I have gotten used to saying "Red Brick."

As I was invited to do, I'll discuss with you a few things we are doing in the Tenth Circuit that we feel are helping tackle our caseload. We are small potatoes compared to your Circuit, with about 1,900 appeals a year; we're estimating that we'll top 2,000 cases slightly this year. We are authorized 10 Circuit Judges, but for more than three years we have had from 1 to 5 vacancies. When we had only 5 active Circuit Judges I felt as desperate as Barry Switzer did about his vacancy problem at the Orange Bowl when Brian Bosworth was sidelined by the NCAA!

First let me outline our procedure for using special panels to handle recommendations for summary dispositions in cases submitted by Staff Counsel. These are cases identified as having a likely jurisdictional

defect or as being insubstantial, due to a controlling precedent of the Supreme Court or of our Circuit.

These cases are identified early on the review of the docketing statement which is filed with our Court at the same time as the notice of appeal is filed in the District Court. From its statement of questions presented, and the attached opinion or judgment below, the Clerk's Office Appeals' Expediters identify these cases and send out a notice for typed memorandum briefs from the parties. When these have then been reviewed with the record by a Staff Attorney assigned the case, Staff Counsel write two papers for us. First, they prepare a dispositional memorandum setting out the factual background, procedural history of the case, and a neutral review of their legal research independently done. Second, they prepare a three to four page suggested Order and Judgment—a condensed recommendation for a per curiam disposition, if that is felt proper.

At this point we then have been using a new procedure for our Judges, which we like. The Judges are designated in panels—one panel every other month—to attend a "Conference Term" at Denver to confer on 80 to 90 cases recommended for summary disposition by Staff Counsel. The panel—usually two Circuit Judges and one District Judge—receives the memorandum briefs from the parties, and the dispositional memoranda from the Staff Attorney who studied the case, and frequently one panel member will be sent the entire record at this point. These materials are sent out to the panel members about two weeks before the Conference Term at Denver for intensive study.

Then the panel convenes at Denver, and this is the feature we particularly like. They meet for a private conference by the panel judges—accompanied by their elbow law clerks if they wish—to discuss the case in depth among the panel with the Staff Attorney who presents that case. This Staff Attorney has the record, if it has not been sent out earlier. This is gone over in depth, and the Staff Attorney is questioned about the record and refers to it for any information needed. The suggested Order and Judgment is also discussed in detail.

There are then several avenues that the panel Judges may pursue. First, one Judge can blow the whistle on any case and object to summary disposition because the case is too substantial for such treatment. The case then goes back immediately on track for briefing and argument. Second, the panel may decide that one Judge should take the case home for study and revision of the Order and Judgment for agreed on changes.

Third, the panel can direct the Staff Attorney to make specific revisions there at Denver. This is immediately done and after revision in the Staff Counsel's office word processors, the Order and Judgment is brought back later in that Conference Term for review and possible adoption. Fourth, the Order and Judgment may be approved as it is, or as revised, and then issued immediately.

At the Conference Terms we generally handle 80 to 90 cases in a two-day session and find that we can issue a large number of agreed on Orders and Judgments—70 or 75 generally. In 1986, 464 cases were submitted to these panels and 434 cases were decided by approved Orders and Judgments. We are cognizant of doubts about such procedures. However, we feel that they are both fair and useful. The cases so handled are carefully limited to ones with jurisdictional defects or controlled by established Supreme Court or Tenth Circuit precedent. We are convinced that the cases are getting thorough, and perhaps more concentrated panel study than otherwise, and fair dispositions.

The second subject I will discuss is Appellate Transcript Management Plan.

In order to standardize District Court plans, the District Courts were recently required to standardize the provisions of their Court Reporter Management Plans relating to the time for filing appellate transcripts and sanctions for late filing. The 30 day requirement in criminal cases follows the Federal Rules of Appellate Procedure and re-emphasizes our court's intention to give priority to the processing of these appeals. Sixty days in civil cases is a reasonable approach and encourages court reporters to file transcripts in civil cases within the initial period, without requesting extensions.

Under these plans, the District Courts must impose monetary sanctions for transcripts filed beyond the initial date or beyond any extension accompanied by an express waiver of sanctions. Detailed procedures for imposing sanctions allows the Court of Appeals to monitor each case.

The Management Plans provide for additional sanctions after 90 days. Court reporters are required to cease reporting activities and provide and pay for a substitute reporter whenever any transcript, in a civil or criminal case, is not completed within 90 days. This keeps a reporter from building a continuing backlog.

The Management Plans provide also for District Court Reporter Coordinators. Requiring the District Courts to designate coordinators for

this purpose improves communication between the District Courts and the Court of Appeals, and increases the ability of the Court of Appeals to effectively monitor transcript production.

The Management Plans provide that extensions for preparation of transcripts can only be granted by the Court of Appeals. Extensions do not automatically include a waiver of monetary sanctions. Waivers may be granted by the Clerk of the Court of Appeals, but only for extraordinary circumstances, and, in a number of cases, independent verification of reasons for waivers is required, as provided in our Appellate Transcript Management Plan, §§ 4(a)(b)(c). Extensions are not granted beyond 90 days.

These are the broad outlines of our Appellate Management Plan provisions which we feel are helping us in obtaining records promptly.

The third subject I would like to discuss is my favorite. This is the increasing use we are making of certification of questions of State Law to State Supreme Courts.

I have been convinced for some time that we can make more effective use of this mechanism. This last Spring I requested a Staff Committee to study the subject and make recommendations. A substantial majority of our judges favor more frequent use of certification where we find a controlling question of State Law is unsettled by State precedent and that the question is also an important issue, proper for certification.

The report of the Committee recommended that we, first, develop an early inventory of cases that are possible certification candidates. This can be started by our Appeals Expediters, Deputy Clerks in our Clerk's Office, on review of the docketing statements which I mentioned earlier. Second, this list is augmented by motions by a party for certification. The Committee did not favor our soliciting these by a statement in instructions on contents of docketing statements, fearing a large number of unmeritorious motions would be encouraged. I disagree with this position of the Committee and will recommend to our Court a change to do this. It seems to me that we should encourage the motions and consider them promptly. We can surely deal with the unmeritorious ones quickly.

Third, the Committee suggested that motions for certification which appear unmeritorious should be immediately referred to our Clerk's Committee with a suggestion or recommendation for denial. This Committee is one of two judges who handle a large number of problems

referred to it by the Clerk's Office for dispositions requiring action by judges.

Fourth, the Committee recommended that the motions for certification that are viewed favorably by the Staff be submitted then to a three-judge panel to decide whether to certify. This panel can then promptly draw up a certification order if it agrees.

We are doing these things generally on a case-by-case basis at the present time, but will be adopting procedures the Court agrees on shortly, probably along the lines of these recommendations from the Committee.

The certification concept has had an interesting history. The first State Statute authorizing a State Supreme Court to respond to questions certified from Federal Courts was passed in 1945 by the Florida Legislature.[1] The Statute remained dormant however until 1960 when the United States Supreme Court in *Clay v. Sun Insurance Co.*, 363 U.S. 207 (1960), commended the Florida Legislature for its "rare foresight" in enacting the statute. *Id.* at 211. The Supreme Court vacated the Fifth Circuit's judgment, based on a constitutional ruling made after passing over a difficult, unsettled issue of Florida law. The Court remanded with a clear indication that the State law question be certified to the Florida Supreme Court.

Since then, 24 states and the Commonwealth of Puerto Rico have adopted certification procedures.[2] In your Circuit, Arizona, Oregon and Washington have adopted the Uniform Certification of Questions of Law Act.[3] Alaska, Hawaii, Idaho and Montana have adopted Court Rules allowing the State Supreme Court to answer questions certified by Federal Courts.[4]

1. Florida's statute as originally written only allowed the federal courts of appeals and the Supreme Court to certify state law questions to its Supreme Court. *See* Fla. Stat. Ann. § 25.031 (1961). Today, some states' rules allow federal district courts to do so as well. *See, e.g.*, Wyo. Stat. §§ 1-193.1 to 1-193.4, do so. The rationale for restricting the right to certify state law questions to federal appellate courts is that it reduces the number of potential cases and avoids problems of premature certification. Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. REV. 888, 913 n.l (1971).

2. *See* Note, *Certification Statutes: Engineering a Solution to Pullman Abstention Delay*, 59 NOTRE DAME L. REV. 1339, 1341 n.12 (1984) (listing state statutes and court rules authorizing certification).

3. *See* A.R.S. §§ 12-1861 to 12-1867; O.R.S. 28.200 to 28.255; West's R.C.W.A. 2.60.010 to 2.60.900.

4. *See* Alas. App. R. 407(a); Haw. R. App. Proc., Rule 13(a); Idaho App. R. 12.1; Mont. S. Ct. R., Rule 6; Cox v. Lee Enterprises, 723 P.2d 238 (Mont. S. Ct. 1986).

In our Circuit, all six states have either rules or statutes allowing response to such questions.[5] Justice Marian Opala of our Supreme Court in Oklahoma tells me that their Court deems it a compliment to be asked to answer such questions, that they have never denied such a request, and that they give priority to such certifications.

I feel that success of the mechanism depends on three points. First, there should be a realization that there are different types of cases in which certification may be desirable. Not only have we and other courts made certifications in diversity cases, but also we recently certified a question in an appeal in a federal estate tax refund suit, turning on Kansas Law. There are diversity cases, tax cases and Federal Torts Claims Act cases which can present questions for certification. The tort claims cases of course are ones where the statute incorporates the State law and frequently the controlling issue is an important, unsettled question of State Tort Law policy.

Second, success of the process depends on care in selecting cases for certification and in stating the questions for certification clearly, and identifying a controlling issue that can be submitted. In certification orders I have prepared, I referred to the important unsettled State policy underlying the certification, which makes the process highly desirable in my opinion.

Third, it is important that there be an intelligence system among the courts about certifications that have been made. This should alert all the Circuit Judges and the District Judges in the State whose law is controlling, and we do this by advising them that a certification of a particular question has been made. This enables our Court of Appeals' panels to hold cases for disposition in accordance with the rulings made by the state courts, and the federal trial judges can likewise hold cases and use the responses in disposition of their cases.

The Supreme Court favored the certification procedure in 1960 in *Clay v. Sun Insurance Co*., 363 U.S. 207 (1960) and in 1974 in *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), a diversity case involving a difficult and undecided State law issue on liability for the use of confidential information by a corporate officer. And in 1982 in *Zant v. Stephens*, 456 U.S. 410 (1982), the Supreme Court used the certification

5. *See* Colo. App. R. 21.1; Kan. Stat. Ann. §§ 60-3201 to 60-3212; N.M. R. App. Proc., Rule 12-607; Okla. Stat. Ann. tit. 20, §§ 1601 to 1613; Utah S. Ct. R. 41; Wyo. R. App. Proc., R. 11.01 to 11.07.

procedure in a death penalty case. The Court certified an issue of interpretation of the Georgia death penalty statute before final decision of the case.

We have used the statute in our Court too little, perhaps, but I do feel we have done so in some most useful cases. For example, one paradigm case for certification, I felt, was a recent one certified to the Supreme Court of Wyoming.[6] Before argument of the appeal one of the panel members called me to suggest that certification might be explored. We did so by requesting memoranda from the parties, who both opposed certification. However, this was a case where the federal district court had dismissed a diversity complaint for failure to state a claim, holding that the non-managerial fractional working interest in an oil and gas lease involved was not a security under the Wyoming Securities Law. This is an important issue of state policy and it was one with legislative history and background materials pointing both ways. There was no ruling by the Wyoming Supreme Court. We therefore rejected the objections of the parties and certified the controlling question.

I realize there are substantial criticisms of the certification procedure. In 1970, Professor Wright catalogued in his Federal Courts Handbook, some of the criticisms as follows:

> Quite aside from the expense and delay this procedure causes, the constitutional difficulty in many states in giving what is inevitably no more than an advisory opinion, and the unsatisfactory experience courts in general have had with certified questions, necessarily abstract and divorced from a concrete factual setting, suggest that certification is an undesirable innovation if it will lead to abrogation of the *Meredith* doctrine. If a federal court must defer to the state court whenever a state issue in a case is difficult, the federal judiciary will no longer be able to function as a court.[7]

I disagree with these objections to certification. First, the answers given by the state courts are not advisory opinions. They arise from real controversies and are not divorced from concrete factual settings. The

6. Shepperd & Edwards v. Boettcher & Co., No. 85-2235, unpublished order (10th Cir., May 12, 1987).

7. C. WRIGHT, LAW OF FEDERAL COURTS § 52 (2d ed. 1970).

Uniform Certification Act requires a determination by the certifying Federal Court that there are questions before the Court that "may be determinative" in the case. This is provided for in your rule for certification of the Supreme Court of Hawaii.

Moreover, the expense and delay point is overstated. Certifications can be made and any briefs already prepared for the Court of Appeals, can be submitted to the state courts, along with the records. Hopefully the certification will be made before argument and thus delay and expense are minimized. The cases that are held by the federal trial courts or Courts of Appeals can then be promptly disposed of after receipt of the responses, in accordance with the state court ruling.

Furthermore, the certification process, properly used, will not violate the teaching of *Meredith v. Winter Haven*, 320 U.S. 228 (1943), as applied by the Supreme Court itself and interpreted for us. *Meredith* involved a dismissal by the Court of Appeals, which remitted the parties entirely to litigation in the state courts. *Meredith* held that refusal to decide an issue of state law because it is difficult and uncertain, and declining to exercise federal jurisdiction for this reason, was error and a frustration of the diversity statute. The criticism is not applicable of course to other types of cases I have mentioned—tax cases and Federal Tort Claims Act suits, which do not involve the policy of the diversity statute. However in diversity cases themselves, the Supreme Court has in *Clay v. Sun Insurance Co.*, and *Lehman Brothers v. Schein*, long after *Meredith*, favored the certification process.

It should be noted that in this procedure of certification, the federal court *retains* jurisdiction of the case, and then after receiving the ruling from the state court goes forward with further federal proceedings needed to dispose of the case. The federal court may still do necessary fact-finding and make necessary discretionary rulings. These are the areas where any perceived unfairness to nonresidents, implicating policies of the diversity statute, would seem more likely, if such unfairness were to exist at all. Thus the certification procedure does not involve limitation of the use of the federal forum except for ruling on the pure questions of unsettled law from the State Supreme Courts. I submit this process is not a violation of the principles of the diversity statute or its policies, and that it can be reasonably harmonized with them.

I am persuaded by the conclusions of your former Circuit Justice. In *Lehman Bros. v. Schein*, Justice Douglas, speaking for the Court, concluded that certification does "in the long run save energy and

resources and helps build a cooperative judicial federalism." 416 U.S. at 391.