RULE 5. CERTIFICATION OF QUESTIONS OF LAW

(a) Power to Answer. The Supreme Court may in its discretion answer questions of law certified to it by the Supreme Court of the United States, a United States court of appeals for any circuit, a United States district or bankruptcy court, the highest appellate court of any state, territory, or the District of Columbia, or the highest court of a federally recognized Indian tribe. Such answer may be furnished, when requested by the certifying court, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Appeals of this state. Certification ordinarily will not be accepted if facts material to the question of law certified are in dispute.

(b) Method of Invoking. This Rule may be invoked by an order of any of the courts referred to in Rule 5(a) upon the court's own motion or upon the motion of any party to the cause.

(c) Contents of Certification Order. A certification order must set forth:

(1) The questions of law to be answered;

(2) A statement of all facts relevant to the questions certified, identifying any facts that are in dispute;

(3) The nature of the controversy in which the questions arose;

(4) A designation of the party or parties who will be the appellant(s) and the party or parties who will be the respondent(s) in the Supreme Court;

(5) The names and addresses of counsel for the appellant and respondent;

(6) A brief statement explaining how the certified question of law may be determinative of the cause then pending in the certifying court;

(7) A brief statement setting forth relevant decisions, if any, of the Supreme Court and the Court of Appeals and the reasons why such decisions are not controlling; and

(8) Any other matters that the certifying court deems relevant to a determination of the questions certified.

(d) Preparation of Certification Order. The certification order must be prepared by the certifying court and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions. The Supreme Court may in its discretion restate any question of law certified or may request from the certifying court additional clarification with respect to any question certified or with respect to any facts.

(e) Costs of Certification. Fees and costs are the same as in civil appeals docketed before the Supreme Court and are to be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

(f) Docketing in Supreme Court. Upon receiving the certification order, the clerk of the Supreme Court will docket the case and notify the clerk of the certifying court, the certifying judge, and the parties that the case has been docketed in the Supreme Court.

(g) Briefs and Argument.

(1) The Supreme Court will consider whether to accept a question certified to it without oral or written argument from the parties unless otherwise directed by the Supreme Court.

(2) If the Supreme Court accepts certification of a question of law, the parties must brief the certified question of law unless the court orders otherwise. The clerk of the Supreme Court will notify the parties of the court's decision to accept certification and set a briefing schedule. Briefs and any appendices must be in the form provided in Rules 28, 30, and 32.

(3) If the Supreme Court decides to hear oral argument on the certified question of law, Rule 34 will govern the proceedings.

(h) Opinion. The written opinion of the Supreme Court stating the law governing the questions certified will be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties, and has the same preclusive effect as a judgment under Rule 36.

REVIEWING NOTE

The proposed amendments to the language in subdivision (a) make clear that whether to answer a certified question of law is discretionary; and add "the highest appellate court of any state, territory, or the District of Columbia" and "the highest court of a federally recognized Indian tribe" as certifying courts. Subdivision (a) is amended to provide generally that certification will not be accepted if material facts are in dispute, but leaves open the option for certification when the matter is important. The Commission also recommends an official note be included with this Rule to assist the certifying court with the meaning of the phrase "may be determinative of the cause then pending" in subdivision (a)—i.e., that the phrase has the meaning set forth in *Volvo Cars of North America, Inc. v. Ricci*, 122 Nev. 746, 137 P.3d 1161 (2006).

Subdivision (c)(2) requires any disputed facts to be identified in the certification order. Subdivision (c)(6) and (7) are new provisions and specify additional information to be included in the certification order. These proposed amendments are intended to guide certifying courts as to what to include in

their certification orders and to assist the Supreme Court in determining whether to accept certification.

The amendment to subdivision (d) omits the requirement that the certification order be "signed by the judge presiding at the hearing" because there is not always a hearing or a single judge signing the order. Language was also added to give the court discretion to restate the certified question of law or request clarification with respect to any question certified or to any facts.

In subdivision (h), the language providing that the written opinion will be "res judicata as to the parties" is amended to say that it will have "the same preclusive effect as a judgment under Rule 36." This amendment recognizes that "res judicata" is archaic language and that claim or issue preclusion is more accurate, and is intended to ensure that the written opinion is binding on the parties in this case.