Intercircuit Deference in Diversity Cases: Respect for Expertise or Judicial Ventriloquism?

Bruce D. Davis Jr.

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview
INTERCIRCUIT DEFERENCE IN DIVERSITY CASES: RESPECT FOR EXPERTISE OR JUDICIAL VENTRILOQUIST?

The stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions or the counsel of those who dwell upon the spot.

—Benjamin N. Cardozo††

Federal courts often have recognized that under certain circumstances, another legal authority is better equipped to render a decision based upon the applicable law. In these instances, courts have employed a policy of judicial deference which allows a court to adopt the decisions of an authority more knowledgeable in the particular area of the law at issue. The Supreme Court and the circuit courts of appeals, for example, have deferred to a district court's interpretation of local state law for the state in which the district court sits. Similarly, when one circuit court of appeals has

† Subsequent to the decision in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), which required a federal court to apply state law in diversity cases, id. at 78; see infra note 15 and accompanying text, Judge Frank, of the Second Circuit Court of Appeals, characterized the role of the federal courts as that of a "ventriloquist's dummy to the courts of [a] particular state," Richardson v. Commissioner, 126 F.2d 562, 567 (2d Cir. 1942).

†† Hawks v. Hamill, 288 U.S. 52, 60 (1933) (Cardozo, J.) (espousing the need for federal courts in diversity cases to follow local state law).

1 See, e.g., Takahashi v. Loomis Armored Car Serv., 625 F.2d 314, 316 (9th Cir. 1980). Deference is defined as a "yielding of judgment or preference out of respect for the position, wish, or known opinion of another." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 591 (P. Gove ed. 1976). A court that defers is necessarily influenced by the other court's position or opinion and because deference is motivated by respect, that position or opinion is viewed as a higher authority on the particular matter. It is submitted, therefore, that judicial deference can be summarized as a yielding of judgment to a higher authority.

2 See City of Burbank v. Nevada, 658 F.2d 708, 710 (9th Cir. 1981); Tomlin v. Boeing Co., 650 F.2d 1065, 1068 (9th Cir. 1981); Takahashi v. Loomis Armored Car Serv., 625 F.2d 314, 316 (9th Cir. 1980); Klingebiel v. Lockheed Aircraft Corp., 494 F.2d 345, 347 (9th Cir. 1974); see also Bernhardt v. Polygraphic Co., 350 U.S. 198, 204-05 (1956) (interpretation of
interpreted a federal statute, a sister circuit may defer to that interpretation. Several circuits, recognized as experts in a particular area of law, may also function as authoritative sources to which a sister circuit can turn for guidance. Additionally, federal courts

local law by local district court is given special weight); Steele v. General Mills, Inc., 329 U.S. 433, 439 (1947) (district court's interpretation of purely local law left undisturbed); Bazzano v. Rockwell Int'l Corp., 579 F.2d 465, 469 (8th Cir. 1978) (special weight given to a trial judge's interpretation of state law in diversity cases); Eason v. Weaver, 557 F.2d 1202, 1206 (5th Cir. 1977) (substantial weight afforded to the district court's assessment of local law); Symons v. Mueller Co., 493 F.2d 972, 977 (10th Cir. 1974) (district court's interpretation is presumed to be correct).

The Eighth Circuit Court of Appeals has been a frequent proponent of according deference to the decisions of sister circuits. E.g., National Indep. Meat Packers Ass'n v. EPA, 566 F.2d 41, 43 (8th Cir. 1977); Cosentino v. Local 28, Org. of Masters, 268 F.2d 648, 652 (8th Cir. 1959). In expounding the need for judicial deference to the statutory interpretations of sister circuits, the Eighth Circuit stated:

Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court's docket. Unless our . . . courts of appeals are thus willing to promote a cohesive network of national law, needless division and confusion will encourage further splintering and the formation of otherwise unnecessary additional tiers in the framework of our national court system.

Aldens, Inc. v. Miller, 610 F.2d 538, 541 (8th Cir. 1979), cert. denied, 446 U.S. 919 (1980). Furthermore, the Eighth Circuit has commented that "on an unsettled question of federal law, while a decision by another court of appeals is not compulsively binding upon us, we will, in the interest of judicial uniformity, accept it as persuasive and follow it, unless we are clearly convinced that it is wrong." Homan v. United States, 279 F.2d 767, 773 (8th Cir.), cert. denied, 364 U.S. 866 (1960). Such a policy of deference is not, however, limited to the Eighth Circuit. See, e.g., Federal Life Ins. Co. v. United States, 527 F.2d 1096, 1098-99 (7th Cir. 1975) (decisions of other circuits should be followed unless incorrect); Warren Bros. Co. v. Cardi Corp., 471 F.2d 1304, 1307-08 (1st Cir. 1973) (application of the reasoning of other circuits on the question presented); Andrew v. Bendix Corp., 452 F.2d 961, 963 (6th Cir. 1971) (decision of a sister circuit used for guidance), cert. denied, 406 U.S. 920 (1972).

A circuit attains a reputation as an "expert" in a particular area of the law through its "wide and varied experience in the application of the rules of law governing a certain general subject." H. BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS § 24, at 82 (1912). For example, the Second Circuit is typically viewed as an expert in securities law, while the District of Columbia Circuit has achieved expert status in communications laws. Note, Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals, 87 YALE L.J. 1219, 1239 n.138 (1978) [hereinafter cited as Note, Securing Uniformity in National Law]. Even if a circuit court of appeals cannot be deemed "expert," certain circuits are nevertheless perceived to be of a higher quality than others. Goldman, Conflict and Consensus in the United States Courts of Appeals, in AMERICAN JUDICIAL BEHAVIOR 105 (S. Brenner ed. 1973); Note, Securing Uniformity in National Law, supra, at 1239. This perception of quality is normally a result of the perceived strengths or weaknesses of the judges in the circuit, see H. BLACK, supra §§ 38-39, at 112-16; cf. Sprecher, The Development of the Doctrine of Stare Decisis and the Extent to Which it Should be Applied, 31 A.B.A. J. 501, 506 & n.69 (1945) (strong judges add to the quality of the precedent), and it is often an important factor in deciding whether to defer to the decision of the
often afford deference to the decisions of administrative agencies.\textsuperscript{5}

Regardless of the circumstances creating the potential for judicial deference, the determinative factor in deciding whether to defer is the authority of the court to which deference is being paid.\textsuperscript{6} An inquiry into the extent of a court's authority must begin with the Constitution and federal legislation, which delineate the hierarchy of the federal court system.\textsuperscript{7} A problem arises, however,

sister circuit, Goldman, supra, at 105; Note, Securing Uniformity in National Law, supra, at 1239.


It is submitted, however, that judicial reliance on the expertise of an administrative agency often may be displaced. For instance, the seven Commissioners of the FCC, who are responsible for effective application of the Communications Act, are political appointees. They come from varied backgrounds and there is no requirement that they be familiar with the communications industry prior to their appointment. E. KRAUSNOW & L. LONGLEY, THE POLITICS OF BROADCAST REGULATION 27-38 (2d ed. 1978). Much of the technical expertise necessary to render complex decisions is provided by agency staff personnel. Id. at 28-30. When the Commissioners must choose between competing policies, they often rely solely on information presented by staff members. Id. The resulting policy, viewed by a deferring court as based on the expertise of the Commission, in reality may be a product of numerous outside influences.


\textsuperscript{6} Cf. H. BLACK, supra note 4, §§ 38-39, at 112-16 (value of a prior decision as a precedent depends upon the rank of the court that rendered the decision).

\textsuperscript{7} See U.S. Const. art. III, § 1. The Constitution establishes the Supreme Court as the highest judicial authority, providing that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . ." Id. Pursuant to its power to create inferior courts, Congress enacted the Circuit Court of Appeals Act, which created an intermediate court of appeals below the Supreme Court. Circuit Court of Appeals Act, ch. 517, § 2, 26 Stat. 826 (1891) (codified as amended at 28 U.S.C. §§ 41-48 (1976)). For a discussion of the history of
when a court defers to the judgment of another court of equal or lower authority. In this situation, there is no constitutional or statutory requirement that deference be accorded the decision of the coordinate or lower judicial authority. Since deference involves a yielding of judgment to a higher authority, it is therefore suggested that the court of coordinate or lower authority in fact, is perceived by the deferring court as a "higher authority" in theory. Thus, theoretical criteria for characterizing a court as a "higher authority" must be isolated.

Within the limited context of diversity jurisdiction, this Note will examine the factors that qualify one court of appeals as a higher authority, worthy of deference by another, on unsettled questions of state law. In this respect, the implications of the recent case of Factors Etc., Inc. v. Pro Arts, Inc., will be discussed. In light of the Factors decision, the Note proposes a series of inquiries to be considered by a court in determining whether to defer to the decision of a coordinate authority. A number of hypothetical problem areas are examined using these inquiries in an effort to determine their effectiveness in guiding the court to a correct decision. Finally, the Note applies the suggested inquiries to the Fac-
tors case and concludes that the Second Circuit's deference to a prior decision of the Sixth Circuit was unwarranted.

THE ROLE OF THE FEDERAL COURTS IN DIVERSITY CASES

The task of determining the proper law to be applied in diversity cases has long been of significant concern to the federal courts. While the federal judiciary typically has been required to apply state law in diversity actions,11 "state law" as initially interpreted included only state statutory authority.12 Thus, in the absence of an applicable state statute, federal courts decided issues of state law without reference to the decisional law of the state.13

In Erie R.R. v. Tompkins,14 the Supreme Court reacted against the disparity of this "general law" emanating from the federal bench on a case-by-case basis, and determined that the law to be applied in diversity cases is the state law as declared by statute


12 Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842). In Swift, the Supreme Court determined that the decisions of state courts were "at most, only evidence of what the laws are; and [were] not of themselves laws." Id. at 18. The Court reasoned that the "laws" of the states, within the meaning of the Rules of Decision Act, see supra note 11, were the rules and enactments promulgated by the state legislature. 41 U.S. (16 Pet.) at 18. As such, the Court concluded that while the decisions of the state courts will be considered by the federal courts, they are not controlling. Id. at 19. Therefore, in the absence of a controlling state statute, the federal courts were free to fashion their own opinion of the true result. Id.; C. Wright, supra note 11, § 54, at 249-50.

13 The federal courts' approach of rendering case-by-case decisions regarding state law, without reference to existing state decisional law, led to the creation of a federal general common law. Cf. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (in overturning doctrine of Swift v. Tyson, the Supreme Court stated that "[t]here is no federal general common law"). While the Swift doctrine was intended to create uniformity in substantive law throughout the country, it "did not achieve complete or even near uniformity." 1A J. Moore, Moore's Federal Practice ¶ 0.303, at 3035 (2d ed. 1982).

or by the decisional law of the state’s highest court.15 Erie sought to ensure that the “outcome of the litigation in the federal court [would] be substantially the same... as it would be if tried in a state court.”16 The Erie decision, however, failed to provide a method by which the federal judiciary could determine the proper state law to apply in the absence of definitive state pronouncements.17

Faced with this dilemma, some federal courts attempted to avoid the problem by abstaining from the exercise of properly invoked diversity jurisdiction.18 This practice was invalidated by the

---

15 Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). Discontented with the doctrine of Swift v. Tyson and the forum shopping resulting from the disparity in “general law,” 304 U.S. at 74-75, the Supreme Court, in Erie, seized the opportunity to render Swift “as dead as that Court can kill a legal doctrine,” Shulman, The Demise of Swift v. Tyson, 47 YALE L.J. 1336, 1337 (1938); see also 1A J. Moore, supra note 13, ¶ 0.304 (Erie overruled Swift v. Tyson and its progeny).

Subsequently, Supreme Court cases have expanded the Erie rule to include decisions of intermediate state appellate courts. See, e.g., Stoner v. New York Life Ins. Co., 311 U.S. 464, 467 (1940); West v. AT&T, 311 U.S. 223, 236-37 (1940). The Supreme Court has gone so far as to require that, absent a dispositive decision by the highest state court or intermediate state appellate courts, the federal court in a diversity case is obligated to follow the decision of a state trial court. Fidelity Union Trust Co. v. Field, 311 U.S. 169, 177-79 (1940); see infra notes 73-74 and accompanying text. The requirement that federal courts follow decisions of state courts has led one federal judge to comment that “[judges] must act as a hollow sounding board, wooden indeed, for any state judge who cares to express himself.” Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins, 55 YALE L.J. 267, 290-91 (1946).


17 Stimson, Swift v. Tyson—What Remains? What is (State) Law?, 24 CORNELL L.Q. 54, 64 (1938). Since Erie, the problem of ascertaining and applying nonexistent state law has presented a formidable obstacle to federal courts seeking to achieve the uniformity of law mandated by Erie. See 1A J. Moore, supra note 13, ¶ 0.307[1], at 3077; Note, The Ascertainment of State Law in a Federal Diversity Case, 40 IND. L.J. 541, 541-42 (1965).

18 See, e.g., Meredith v. City of Winter Haven, 134 F.2d 202, 207-08 (5th Cir.), rev’d, 320 U.S. 228 (1943); Morin v. City of Stuart, 111 F.2d 773, 775 (5th Cir. 1940). Historically, the federal courts have recognized that there are situations where a federal court may decline to exercise properly invoked jurisdiction. C. Wright, supra note 11, at 218. The cases that have advocated this type of action fall under the collective doctrine of abstention. However, there are actually four factual situations in which the abstention doctrine can be applied. Id. The federal courts may abstain (1) to sidestep a federal constitutional question if a decision can be rendered on questions of state law; (2) to allow a state to handle its own affairs thereby avoiding any federal-state conflict; (3) to allow the state to settle undecided questions of state law; (4) to ease the heavy burden of cases on the federal court docket. Id.; see 1A J. Moore, supra note 13, ¶ 0.203[1]-[4]. Use of the abstention doctrine to allow the
Supreme Court's subsequent statement that in the absence of exceptional circumstances warranting abstention, a federal court has a duty to decide a diversity case properly before it, regardless of the difficulty involved in determining the applicable state law. In exercising this duty, however, federal courts initially based diversity decisions upon their independent evaluations of the merits of the case. In response, the Supreme Court provided additional state to settle undecided questions of state law is the rationale frequently invoked by federal courts seeking to avoid having to resolve such novel questions. See C. Wright, supra note 11, § 52, at 224-25; Note, Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism, 111 U. Pa. L. Rev. 344, 345 (1963) [hereinafter cited as Note, Inter-Jurisdictional Certification].

19 Meredith v. Winter Haven, 320 U.S. 228, 234 (1943). In Meredith, the Court stated: [D]iversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience . . . . In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred . . . it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.

Id. (citations omitted). Subsequent to Meredith, the Supreme Court succinctly stated, "[t]he problem of ascertaining the state law may often be difficult. But that is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it." Williams v. Green Bay & W.R.R., 326 U.S. 549, 553 (1946). But see Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27-29 (1959); Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 483-84 (1940). In Thibodaux, the Supreme Court reinstated the district court's decision to abstain from deciding the case until after the Supreme Court of Louisiana had had an opportunity to authoritatively decide a novel question of statutory interpretation. 360 U.S. at 30-31. In sanctioning the district court's abstention, the Supreme Court made a point of distinguishing the case from Meredith. Id. at 27 n.2. The Court noted that in Thibodaux the district court merely stayed disposition of a retained case until that state judiciary resolved the issue, while in Meredith the lower court sought to surrender altogether jurisdiction to the state court. Id. More recently, however, the Supreme Court has interpreted Thibodaux as sanctioning abstention only in cases that present "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976).

Although Thompson was decided prior to Meredith, the Meredith Court cited Thompson with apparent approval, 320 U.S. at 236, and yet the sole reason for ordering abstention in Thompson was the presence of a difficult question of undecided state law, 309 U.S. at 483-84. Because of the subsequent decision in Meredith, the application of Thompson generally has been restricted to bankruptcy cases. 1A J. Moons, supra note 13, ¶ 0.203[3], at 2134. Despite the Supreme Court's demonstrated distaste for abstention, several federal courts have continued to avoid the problems of deciding novel questions of state law. See, e.g., United Servs. Life Ins. Co. v. Delany, 328 F.2d 483, 484-85 (5th Cir.), cert. denied, 377 U.S. 935 (1964); Commerce Oil Refining Corp. v. Miner, 303 F.2d 125, 128 (1st Cir. 1962).

20 E.g., Daily v. Parker, 152 F.2d 174, 177 (7th Cir. 1945) (in the absence of state law, a federal court is "free to take the course which sound judgment demands"); Wigginton v. Order of United Commercial Travelers of Am., 126 F.2d 659, 662 (7th Cir. 1942) (without guidance from the state, federal courts are "bound to declare the law of the case"). But see Cooper v. American Airlines, Inc., 149 F.2d 355, 359 (2d Cir. 1945).
guidance for the federal judiciary by advancing the "prediction" method, which demands nothing less than a valid ascertainment of how the state court would decide the identical issue. Although the prediction method provides some guidance to the federal courts, it fails to delineate the procedures to be followed in making an accurate prediction. Given the lack of a systematic course of inquiry, the entire process of predicting unsettled questions of state law continues to be a "hazardous occupation."
Court of Appeals in *Factors Etc., Inc. v. Pro Arts, Inc.* In entering this "phantom-law wonderland" the court chose a unique approach to the prediction method of determining the appropriate state law by deferring to a prior prediction rendered by a sister circuit.

The *Factors* case involved Elvis Presley and his assignment of the right to exploit his name and likeness for commercial purposes to Boxcar Enterprises, Inc., a Tennessee corporation formed by Presley. After the singer's death, Boxcar granted Factors Etc., Inc. an exclusive license to use Presley's name and likeness in connection with the manufacture and sale of merchandise. Subsequently, Pro Arts, Inc. published a memorial poster of Presley without permission and offered it for retail sale. Seeking to enjoin the manufacture, sale and distribution of the posters, Factors successfully brought suit in the federal district court for the Southern District of New York. Three years after the initial decision in the case, the Second Circuit was asked to decide whether a descendible right of publicity existed under Tennessee law. In the absence of

---

25 Stool v. J.C. Penney Co., 404 F.2d 562, 563 (5th Cir. 1968).
26 652 F.2d at 279. The exact terms of the assignment from "the king of rock and roll" to Boxcar were not clear. Id. at 279 n.2; Estate of Presley v. Russen, 513 F. Supp. 1339, 1346-47 (D.N.J. 1981).
27 652 F.2d at 279. The licensing arrangement was entered into 2 days after Presley's death. Id. The license specifically provided for quality control by Boxcar of the merchandise manufactured and sold by Factors. 513 F. Supp. at 1347.
28 652 F.2d at 279. The poster displayed a photograph of Elvis and the dates 1945-1977. Id. The copyright to the photograph previously had been purchased by Pro Arts from a newspaper photographer. Id.
29 Factors Etc., Inc. v. Pro Arts, Inc., 444 F. Supp. 288, 289 (S.D.N.Y. 1977), aff'd, 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979). The district court granted the temporary injunction which prohibited Pro Arts from "manufacturing, distributing, selling or by any other means profiting from souvenir merchandise bearing the name or likeness of the late Elvis Presley until the merits of the case [were] determined." 444 F. Supp. at 292. The Second Circuit subsequently affirmed the issuance of the injunction and remanded the case to the district court for further proceedings. 579 F.2d at 222.
30 Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir.), cert. denied, 440 U.S. 908 (1979). In affirming the lower court's issuance of the temporary injunction, the Second Circuit necessarily determined that, under Tennessee law, Elvis Presley's right of publicity survived his death. 579 F.2d at 220-22. The court remanded the case to the district court for further proceedings pursuant to Factor's request for a permanent injunction against Pro Arts. Id. at 222. On remand, the district court agreed that Boxcar Enterprises, Inc. possessed a valid and transferrable right of publicity which survived Presley's death. *Factors Etc., Inc.*, 496 F. Supp. at 1104. Concluding that Pro Arts had no authorization from Boxcar or Factors to manufacture and sell the poster of Presley, the district court permanently enjoined Pro Arts. *Id.* Pro Arts subsequently appealed to the Second Circuit. See Factors
any dispositive Tennessee decision, the circuit court was required to predict the Tennessee court's future resolution of the question. The court sought the guidance of the Sixth Circuit, which previously had decided the descendibility issue in *Memphis Development Foundation v. Factors Etc., Inc.* There, the Sixth Circuit determined that under Tennessee law Presley's right of publicity did not survive his death.

Conceding that its approach to the problem was original, the Second Circuit deferred as a matter of stare decisis to the Sixth Circuit's prior determination of Tennessee law and concluded that no descendible right of publicity existed. Judge Newman, writing for the Second Circuit panel, noted that the need to mini-

---


31 See Factors Etc., Inc., 652 F.2d at 282; supra notes 21-23 and accompanying text.


33 Memphis Dev. Found., 616 F.2d at 960. Memphis Development, like Factors, also concerned the manufacture and distribution of Elvis Presley memorabilia. In this case, the Memphis Development Foundation, a nonprofit Tennessee corporation, commissioned an artist to design and cast a bronze statue of Presley. Memphis Dev. Found. v. Factors Etc., Inc., 441 F. Supp. 1323, 1324 (W.D. Tenn. 1977). The statue was to be erected in Memphis, Tennessee, Presley's home town. Id. To offset the cost of the project, the Foundation sought private contributions and, in an effort to encourage these contributions, offered an 8-inch pewter replica of the statue to anyone contributing over $25. Id. The Foundation brought suit to enjoin Factors' alleged interference with its solicitation of contributions, as well as its distribution of the pewter statues. Id. at 1325. Maintaining that it owned the exclusive right to manufacture and sell Presley memorabilia, Factors moved for a preliminary injunction against the further distribution of the replicas by the Foundation. Id. at 1324-25. The district court found that under Tennessee law there is a descendible right of publicity and that Factors held exclusive control of this right pursuant to its agreement with Boxcar Enterprises. Id. at 1329-31. On this basis, the court granted the defendant's preliminary injunction enjoining the Foundation's further distribution of the statues. Id. at 1331. On appeal, the Sixth Circuit, relying on "certain moral presuppositions concerning death, privacy, inheritability and economic opportunity," concluded that under Tennessee law there was no descendible right of publicity, 616 F.2d at 958, and reversed the earlier district court ruling, id. at 960. For a discussion of *Memphis Development*, see infra notes 106-19 and accompanying text.

34 Factors Etc., Inc., 652 F.2d at 281. The court was "surprised" to find little mention in appellate courts' opinions of intercircuit judicial deference. Id. The court noted that circuit courts frequently deferred to a district court's interpretation of state law, and that the Supreme Court has, in the past, deferred to the circuit court's determination of state law. Id. The court, however, was unable to find a case concerning the propriety of a circuit deferring to a sister circuit's interpretation of state law for a state within that circuit. Id.

35 Id. at 283 & n.8.

36 Id. at 283.

37 The majority consisted of Judge Newman of the Second Circuit, and Judge Carter of the District Court for the Southern District of New York, who was sitting by designation. Judge Mansfield filed a dissenting opinion.
mize deviation by federal courts from the normal course of state law development justified the court's policy of intercircuit judicial deference. The court concluded that any decision contrary to the Sixth Circuit's determination would introduce needless confusion into the law by engendering uncertainty as to the applicable principles of Tennessee law. While implicitly recognizing that only the "'pertinent court of appeals'" interpretation of state law would be entitled to deference, the majority emphasized that such an interpretation would not automatically be binding upon the federal courts of all other circuits. Judge Newman reasoned that where the pertinent court of appeals has rendered its prediction of undeclared state law, the other circuit courts of appeals should defer to that prediction, "perhaps always, and at least in all situations except the rare instance where it can be said with conviction that the pertinent court of appeals has disregarded clear signals emanating from the state's highest court pointing toward a different rule." Finding no such evidence in the Sixth Circuit's decision, the Second Circuit accepted the Memphis Development decision as "controlling authority" on Tennessee law.

In a vigorous dissent, Judge Mansfield maintained that blind deference to a decision with which the court disagrees is unwar-

---

38 652 F.2d at 282. The court concluded that a policy that recognizes a sister circuit's interpretation of the law of a state within its territory as an authoritative exposition of that law will serve the dual purpose of promoting the orderly development of state law and ensuring fairness to persons subject to state law requirements. Id.

39 Id. at 282-83. Judge Newman posed the following question: if the Second Circuit ignored the Sixth Circuit decision and determined that the law of Tennessee recognizes a descendible right of publicity, what standard of conduct would guide Tennessee residents wishing to know whether their right of publicity was transferrable to their estate or heirs upon death? Id. The court noted that if the Tennessee Supreme Court subsequently rendered a decision contrary to the Sixth Circuit's determination, the state court decision would represent controlling authority on the applicable state standard. Id. at 282.

40 See id. at 282. The Second Circuit referred to the circuit court that encompasses the state whose law is to be interpreted as the "pertinent court of appeals." Id.

41 Id. The opinion in Factors Etc., Inc. v. Pro Arts, Inc. deals almost entirely with the deference owed to a circuit court of appeals that encompasses the state whose law is to be interpreted. Id. at 282-83.

42 Id. at 283. The court reasoned that if the pertinent court's decision had been superseded by a subsequent enactment of the state legislature or a ruling by the state court, another federal circuit court would not be required to defer to the decision of the pertinent court of appeals. Id. Further, if the circuit court was persuaded that the pertinent court had overlooked an apposite prior state decision, it would not be required to defer. Id.

43 Id.

44 Id.
ranted.\textsuperscript{45} Noting that the reasoning of \textit{Memphis Development} was "inconsistent with that of nearly every other case which has considered the issue,"\textsuperscript{46} the dissent argued that the Sixth Circuit made no attempt to use the methodology generally employed by the Tennessee courts in deciding a case of first impression.\textsuperscript{47} Thus, the dissent opined that the Sixth Circuit's decision was not entitled to deference.\textsuperscript{48} Emphasizing that the "[s]oundness [of the decision] must not be sacrificed on the altar of consistency,"\textsuperscript{49} the dissent concluded that the Second Circuit should decide the case on the merits rather than retreat behind "unsupportable deferential niceties."\textsuperscript{50}

Although the Factors approach provides a means of maximizing intercircuit uniformity in interpretation of state law, the procedure suffers from a number of disadvantages. While the Factors court clearly did not intend to promote the uniformity of "bad" state law among the circuits, its practice of blind deference\textsuperscript{51} might

\textsuperscript{45} Id. at 284 (Mansfield, J., dissenting). The dissent contended that since a circuit court typically does not defer to the decision of a sister circuit with which it disagrees, deference was not warranted. \textit{Id.} (Mansfield, J., dissenting).

\textsuperscript{46} Id. (Mansfield, J., dissenting). Judge Mansfield presented a comprehensive list of cases upholding the validity of a descendible right of publicity as well as several articles espousing the virtues of such a position. \textit{Id.} at 284 nn.1-2 (Mansfield, J., dissenting).

\textsuperscript{47} Id. at 285-86 (Mansfield, J., dissenting).

\textsuperscript{48} Id. at 286 (Mansfield, J., dissenting).

\textsuperscript{49} Id. (Mansfield, J., dissenting).

\textsuperscript{50} Id. (Mansfield, J., dissenting). The dissent maintained:

\begin{quote}
In the unusual situation . . . where an initial court of appeals diversity declaration is in no way derived from the law or practice of the state and interprets no existing state law, . . . [the court] should feel free to reach a different result if sound reasons recommend it, regardless of the unpersuasive views of the sister circuit from which the initial declaration emanated.
\end{quote}

\textit{Id.} (Mansfield, J., dissenting).

\textsuperscript{51} The Factors majority suggested only two instances in which the decision of the pertinent court of appeals would not be binding. First, where a state court subsequently rules contrary to the federal court's decision, the federal decision is of no precedential value and subsequent federal courts must follow the state court decision. \textit{Id.} at 283; see 1A J. Moore, supra note 13, \textit{\$} 0.307[3], at 3100-01. Second, when the pertinent court has disregarded clear signals emanating from the state's highest court, the reviewing court should not defer. 652 F.2d at 283. It is suggested, however, that this situation rarely will occur in actual practice. If the highest state court has given a clear indication of its views on the matter before the federal court, it is doubtful that these signals would escape the attentive eyes of counsel and therefore unlikely that they would go unheeded by the circuit court.

Thus, it is submitted that the Second Circuit offered only one realistic situation in which deference would not be required—a subsequent pronouncement by the state legal authorities that is contrary to the pertinent court's determination. The Second Circuit's policy more correctly may be classified as nearly blind deference and, as Judge Mansfield noted in his dissent, the use of this policy to promote consistency in the law may require the
well serve such an end. Moreover, a vicarious prediction of state law by a reviewing court, based upon deference to a prior inaccurate prediction of a sister circuit, runs afoul of the *Erie* mandate. It is submitted, therefore, that it is incumbent upon the deferring circuit to examine closely the accuracy of a sister circuit’s prediction to ensure that it merits deference. In this context, “accuracy” does not mean that the prior decision comports with the reviewing court’s resolution of the issue, but rather that it represents an appropriate prediction of state law. It is necessary, therefore, to identify the critical elements of an accurate prediction.

**A Framework for Intercircuit Deference: Proposed Inquiries**

The four inquiries proposed below are designed to establish a set of standards by which a reviewing court can measure the accuracy of the pertinent court’s prediction of state law prior to adopting that prediction as its own.

(1) *The opportunity available to the reviewing court to certify the unanswered question of state law to the highest court of the state*

Several states currently provide a statutory procedure by which a federal court may certify an unanswered question of state law to the highest court of the state. A byproduct of the abstention doctrine, the certification procedure allows a federal court to refer a difficult question of law to another court which is a higher authority on the matter or has some particular expertise in dealing with matters of that nature. Note, *Inter-Jurisdictional Certification*, supra note 18, at 349 n.40. Interjurisdictional certification occurs when the certifying court and answering court are members of two separate judicial systems. Normally, the latter form of certification arises when a federal court certifies a difficult question of state law to the highest court in that particular state. *Id.* at 348.

Typically, those states which provide for interjurisdictional certification do so through their constitution, statutes or court rules. 1A J. Moore, *supra* note 13, § 0.203[5], at 2142. However, a state court can only provide for certification through adoption of court rules if the state constitution permits it to do so. Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A. L. Rev. 888, 897 n.71 (1971). For instance, the
to elicit an authoritative answer to a particular question from the state court. The necessity for judicial deference is thus eliminated. Likewise, where the pertinent court of appeals has failed to take advantage of the certification procedure, the reviewing court may do so, again obviating the need for deference. It is

jurisdiction of the New York Court of Appeals is constitutionally defined, and therefore it could not adopt a court rule providing for certification. Id. Furthermore, several states limit the extent of certification to the federal courts of appeals and the Supreme Court, while others permit a variety of outside courts to certify questions. IA J. Moore, supra note 13, ¶ 0.203[5], at 2142-43; see, e.g., Minn. Stat. Ann. § 480.061(1) (West Supp. 1981) (an example of a state certification statute). A federal court usually certifies a question by filing a certification order with the highest state court. IA J. Moore, supra note 13, ¶ 0.203. This order contains the question of law to be answered and a statement of all the relevant facts pertaining to the question certified. See, e.g., id. ¶ 0.203[5], at 2142-43.

The purpose of the certification procedure is threefold. First, by certifying a difficult question of unanswered state law, the federal court is able to achieve several of the objectives of abstention without the resulting problems created by that doctrine. Note, Inter-Jurisdictional Certification, supra note 18, at 362; see supra notes 18-19. Second, certification provides for a more "cooperative judicial federalism" because deference to a state court allows that court to make an independent determination of the state law issue. Note, Inter-Jurisdictional Certification, supra note 18, at 350; see Mattis, supra note 54, at 724-25. Finally, the procedure allows federal courts to obtain an authoritative exposition of state law without the inherent inaccuracies present in the Erie-Nolan prediction formula. See Mattis, supra note 54, at 723-24; supra note 21.

Because of its ability to achieve these purposes, certification has received the approval of the federal judiciary, including the Supreme Court. See Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960) (in enacting a certification procedure the Florida legislature exhibited "rare foresight"). On several occasions the Supreme Court itself has used the certification procedure to clarify unsettled questions of state law. See, e.g., Aldrich v. Aldrich, 375 U.S. 249, 251-52 (1963) (per curiam); Dresner v. City of Tallahassee, 375 U.S. 136, 136-39 (1963) (per curiam). The Supreme Court also has directed circuit courts of appeals to certify a question of state law to the state court. See, e.g., Lehman Bros. v. Schein, 416 U.S. 386, 390-92 (1974) (case remanded to the Second Circuit with instructions to reconsider whether certification should be used); Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960). In addition, several circuit courts of appeals have embraced the concept of certification. See, e.g., D'Ambra v. United States, 518 F.2d 275, 277 (1st Cir. 1975); Guillard v. Niagara Mach. & Tool Works, 488 F.2d 20, 24-25 (6th Cir. 1973). But see Farmer v. Travelers Indem. Co., 539 F.2d 552, 553 (5th Cir. 1976) (circuit court refused to certify where there was adequate state law to render a decision). District courts also have had occasion to employ the innovative certification procedure. See, e.g., Bose Corp. v. Consumers Union, Inc., 384 F. Supp. 600, 603-04 (D. Mass. 1974); Imel v. United States, 375 F. Supp. 1102, 1116 (D. Colo. 1973), aff'd, 523 F.2d 853 (10th Cir. 1975). But see Foe v. Vanderhoof, 389 F. Supp. 947, 957-58 (D. Colo. 1975).

A federal court that certifies a question to the highest state court need not speculate as to what the state law might be. The state court can provide an authoritative answer which must be followed by the certifying court as well as all federal courts subsequently presented with the issue. Lillich & Mundy, supra note 55, at 906-08; see Mattis, supra note 54, at 723-24.

The Supreme Court has indicated that when there is an unsettled question of state law before a federal court and certification is available, the federal court is not required to
therefore submitted that an inquiry into the availability of a certification procedure should be the threshold inquiry pursued by a reviewing court. Once a certification has removed the need for judicial deference, the remaining inquiries proposed below become unnecessary.

(2) The extent to which the pertinent court of appeals followed the same procedures employed by the state courts in deciding questions of first impression

When deciding a novel question of state law, state courts typically follow an established series of procedures developed through case law. Many states, for example, look to the law of a sister state for guidance. If the sister state previously has decided the novel question presented, or an analogous one, the state court may "borrow" the foreign law and apply it to the pending case. Some certify the question. Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974). The decision on whether to certify a question to a state court "rests in the sound discretion of the federal court." Id. The Fifth Circuit Court of Appeals has endeavored to define the factors it considers when exercising its discretion on whether to certify. Florida v. Exxon Corp., 526 F.2d 266, 274-75 (5th Cir.), cert. denied, 429 U.S. 829 (1976). In Florida v. Exxon Corp., the court stated:

The most important [factors] are the closeness of the question and the existence of sufficient sources of state law—statutes, judicial decisions, attorney general's opinions—to allow a principled rather than conjectural conclusion. But also to be considered is the degree to which considerations of comity are relevant in light of the particular issue and case to be decided. And we must also take into account practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.

526 F.2d at 274-75 (citations omitted).

Despite the advantages of the certification procedure, some concern exists regarding the judicial economy of employing the process. See Mattis, supra note 54, at 725-27. But see Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) (certification saves time, energy and resources); Note, Inter-Jurisdictional Certification, supra note 18, at 348 & n.49 (certification enables the litigants to save time and expenses).

See First Nat'l Life Ins. Co. v. Fidelity & Deposit Co., 525 F.2d 966, 968 (5th Cir. 1976); A. Frantz, How Courts Decide 84 (1968); C. Wright, supra note 11, at 271; Note, supra note 17, at 553.

A. Frantz, supra note 59, at 84-85; 1A J. Moore, supra note 13, ¶ 0.309[2], at 3121-22; Note, supra note 17, at 553; Comment, The Problem Facing Federal Courts Where State Precedents Are Lacking, 24 Tex. L. Rev. 361, 363 (1946).

Delaware practice illustrates the concept of "borrowing" the law of a sister state. When confronted with a case of first impression, the Delaware courts typically look to the law of New York and Massachusetts. See Wilmington Trust Co. v. Mutual Life Ins. Co., 76 F. Supp. 560, 565 (D. Del. 1948), aff'd, 177 F.2d 404 (3d Cir. 1949), cert. denied, 339 U.S. 931 (1950). The fact that Delaware pays particular attention to Massachusetts law and respects the law of New York apparently was so well known that the district court considered it part of its "legal notice." 76 F. Supp. at 565. Delaware also looks to the law of New Jersey
states have particular sister states to which they regularly turn for guidance.\textsuperscript{62} Therefore, in rendering a prediction of state law, it is desirable for a federal court to consider decisions of relevant sister states on the particular question of law.\textsuperscript{63} In addition, state courts frequently refer to authoritative legal sources—apposite federal decisions,\textsuperscript{64} analogous federal and state decisions,\textsuperscript{65} restatements of the law,\textsuperscript{66} books, treatises\textsuperscript{67} and law review articles\textsuperscript{68}—for assistance when faced with a question of first impression. See, e.g., Insurance Co. of N. Am. v. Waterhouse, 424 A.2d 675, 681-82 (Del. Super. Ct. 1980); Martin v. Ryder Truck Rental, Inc., 353 A.2d 581, 586 (Del. 1976).

\textsuperscript{62} See Yost v. Morrow, 282 F.2d 826, 828 n.3 (9th Cir. 1959). In Yost, Idaho conflict of laws rules controlled the action. However, there were no Idaho conflict of laws cases dealing with the particular cause of action presented to the federal court. Id. The court, therefore, assumed that “an Idaho Court would look to the decisions of its sister state, Oregon.” Id. Accordingly, the court applied Oregon conflict of laws principles. Id. at 828.

\textsuperscript{63} See Burgert v. Tietjens, 499 F.2d 1, 8 (10th Cir. 1974) (federal judge may look to laws of other states in predicting state law); Schein v. Chasen, 478 F.2d 817, 821 (2d Cir. 1973) (federal court may turn to the law of other jurisdictions to guide its prediction), vacated, 416 U.S. 386 (1974); Cole v. Cardoza, 441 F.2d 1337, 1343 (6th Cir. 1971) (where there was no dispositive Michigan Supreme Court decision, it became incumbent upon the federal court to make a prediction on the basis of state law and the law of other states); Note, supra note 17, at 553-54 (if the state “customarily relied heavily on the law of a particular sister state . . . the federal court should also rely heavily on [this source] of law”).

\textsuperscript{64} Hartford v. Gibbons & Reed Co., 617 F.2d 567, 569 (10th Cir. 1980); Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co., 440 F.2d 36, 40 (10th Cir.) (quoting 1 W. BARRON & A. HOLZOFF, FEDERAL PRACTICE AND PROCEDURE § 8, at 40 (C. Wright ed. 1961)), cert. denied, 404 U.S. 857 (1971); 1A J. MOORE, supra note 13, ¶ 0.309[2], at 3122.

\textsuperscript{65} See Hartford v. Gibbons & Reed Co., 617 F.2d 567, 569 (10th Cir. 1980) (federal court may consider other decisions of the state); Warren Bros. Co. v. Cardi Corp., 471 F.2d 1304, 1307 (1st Cir. 1973) (federal court used analogous federal decisions to aid in interpretation of a state statute); Stentor Elec. Mfg. Co. v. Klaxon Co., 125 F.2d 820, 824 (3d Cir. 1942) (court used the state court's approach to a similar problem); Comment, supra note 60, at 363 (“federal court will take into consideration . . . analogous decisions of the highest state court upon the assumption that a state court would do likewise”). Analogous decisions on a question of law provide a valuable source of material to courts seeking an answer to an undecided question of state law. A. FRANTZ, supra note 59, at 88. Moreover, “the use of [analogous decisions] has been most instrumental in the growth and development of the law in its efforts to keep itself abreast of changing conditions . . . .” Id. at 89.

\textsuperscript{66} Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 285 (3d Cir. 1980); Garrison v. Jervis B. Webb Co., 583 F.2d 258, 262 n.6 (6th Cir. 1978). Characterized as a “veritable quarry of common law material put in a modern setting,” the various Restatements have made a profound imprint on the common law. See A. FRANTZ, supra note 59, at 93. As such, the Restatements provide the federal courts with considerable evidence of the law of the state. Wendt v. Lillo, 182 F. Supp. 56, 60 (N.D. Iowa 1960), But see Gates v. P.F. Collier, Inc., 378 F.2d 888, 893 (9th Cir. 1967) (“it cannot be said that the Restatement represents the prevailing rules or the weight of authority. It has been rather completely discredited . . . .”), cert. denied, 389 U.S. 1038 (1968). The weight that a federal court attaches to the views of the Restatements necessarily depends upon the weight afforded this source by the courts of the particular state. Note, supra note 17, at 553. One federal court, seeking to determine the weight attached to Restatements by the state court,
tance in deciding questions of first impression. A federal court seeking guidance in predicting the applicable state law should turn to these sources, as well as the ideological approach to the law taken by the state court. 68

Failure by the pertinent court of appeals to ascertain and follow the appropriate state court procedures may result in an inaccurate prediction of state law that is not worthy of deference. 70 It is

undertook an accounting of the number of cases in which the state court had cited to the Restatements. Stentor Elec. Mfg. Co. v. Klaxon Co., 125 F.2d 820, 824 (3d Cir. 1942). Observing that on 68 occasions the state court had cited the Restatements and that 14 of these were to the Restatement of the Conflict of Laws, the federal court concluded that the state would have adhered to the Restatement. 67

67 Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 285 (3d Cir. 1980) (citing "scholarly treatises"); Cardozo, Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility, 55 Nw. U.L. Rev. 419, 427 (1960). Books and treatises may prove particularly helpful to a federal court groping for state law because the authors often anticipate potential legal problems and provide suggested answers. A. Frantz, supra note 59, at 92. Furthermore, these treatises often present the divergent views of several jurisdictions as well as the author's preference for a particular view. Id. at 93. Thus, the federal courts should consult these legal sources prior to rendering their prediction of state law. See Jones & Laughlin Steel Corp., 262 F.2d at 285; A. Frantz, supra note 59, at 92.

68 Wendt v. Lillo, 182 F. Supp. 56, 60 (N.D. Iowa 1960); McIntyre v. Kansas City Coca Cola Bottling Co., 85 F. Supp. 708, 713 (W.D. Mo. 1949), appeal dismissed, 184 F.2d 671 (1950); C. Wright, supra note 11, § 59, at 270-71. One author has suggested that before a court makes use of a decision of a court from another state, it should determine whether the decision has been commented on in a law review, and if it has, whether it has been appreciated or has been deprecated A. Frantz, supra note 59, at 92-93.

69 The necessity of following the state court’s ideological approach to the law is a function of a federal court’s role as another state court in a diversity action. Under such a role, the federal court is required to apply that law which a state court would apply if the matter were before it. See supra notes 15-22 and accompanying text. Within the confines of this requirement, it is incumbent upon the federal court to decide the case with the requisite degree of conservatism or liberalism displayed by the state courts. See Note, supra note 17, at 554. It is this requirement that prompted the federal district court in Massachusetts, faced with a case of first impression, to conclude that in the Massachusetts Supreme Judicial Court, “[t]he emphasis is on precedent and adherence to the older ways, not on creating new causes of action or encouraging the use of novel judicial remedies that have sprung up in less conservative communities.” Pomerantz v. Clark, 101 F. Supp. 341, 346 (D. Mass. 1951).

The Fourth Circuit Court of Appeals used a similar approach in McClung v. Ford Motor Co., 472 F.2d 240, 240 (4th Cir.), cert. denied, 412 U.S. 940 (1973). There, the court reasoned that because the West Virginia Supreme Court had adopted a restrictive approach to the allowance of damages in analogous situations, it was unlikely that it would adopt a more liberal approach if it were deciding the case before the federal court. Id.

70 See Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 285 (3d Cir. 1980) (in order to render an accurate prediction, the federal court should examine all relevant sources of the appropriate state law). Professor Moore has concluded that “the method for ascertaining state law becomes a vital element in the effectuation of the Erie policy of uniformity” and that a significant departure from state court procedures, by a
therefore incumbent upon the reviewing court to assure itself that its sister circuit complied with state procedures. It must be borne in mind, however, that any requirement that the reviewing court concur with the substantive aspects of the sister circuit’s decision would undercut entirely the concept of judicial deference.\textsuperscript{71}

(3) Whether the pertinent court of appeals has disregarded clear signals emanating from the legal authorities of the state pointing toward a different rule

Creation of state law is not reserved to the state legislature or the highest state court. Typically, the foundation for the future development of state law is formed in the lower courts. Therefore, to assist federal courts in predicting answers to novel state law questions, this inquiry proposes the mandatory consideration of clear signals emanating not only from the highest state court,\textsuperscript{72} but also from the lower courts of the state. There exists, however, some disagreement as to the binding effect of lower state court decisions on a federal court exercising diversity jurisdiction.\textsuperscript{73} Nevertheless, it is...
recognized that a lower state court decision, by a judge well versed in the procedures and practices of the state's highest court, provides a persuasive indicium of the applicable state law. Hence, it is submitted that lower state court decisions should be afforded great weight by federal courts, and failure to so weigh them may detract from the validity of a federal court's prediction of state law.

Similarly, state court decisions on analogous questions of law

236-37 (1940); Field v. Fidelity Union Trust Co., 311 U.S. 169, 177-78 (1940). In West, the Court stated:

Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. 311 U.S. at 237 (citations omitted).

The Fidelity Union case went even further when it declared that in the absence of decisions by the state's highest court or intermediate courts, a federal court is required to follow the decisions of a nisi prius state court. 311 U.S. at 178-89; see C. Wright, supra note 11, § 58, at 287-88. This strict requirement that federal courts adhere to the rulings of state trial and intermediate courts has been characterized as "the excesses of 311 U.S." Friendly, In Praise of Erie—and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 400 (1964). Subsequently, the Court began to soften its strict mandate. In King v. Order of United Commercial Travelers of Am., 333 U.S. 153 (1948), the Court determined that because a federal court in a diversity case is in effect only another court of the state, it is not required to adhere to state court decisions which would not be binding on any other state court. Id. at 161. However, the Court was quick to note that its decision was not intended to "promulgate[s] a general rule that federal courts need never abide by determinations of state law by state trial courts." Id. at 162. It recognized that the rule of Fidelity Union may still be applicable in other situations. Id.

The case of Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) provides a concise exposition on the effect of lower state court decisions. The court stated that "while the decrees of 'lower state courts' should be 'attributed some weight . . . the decision [is] not controlling . . .' where the highest court of the State has not spoken on the point. . . . Thus, under some conditions, federal authority may not be found even by an intermediate state appellate court ruling." Id. (quoting King v. Order of United Commercial Travelers of Am., 333 U.S. 153, 160-61 (1948) and citing West v. AT&T, 311 U.S. 237 (1940); see Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1167 (3d Cir. 1981).

There exist today certain situations in which a federal court is not required to follow the decisions of lower state courts. Under the proper circumstances, a federal court is free to consider all the data which the highest court would consider if the novel question of state law were before it. C. Wright, supra note 11, § 58, at 269. This view appears to comport with the preferences of the legal commentators. See, e.g., id.; Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 510 (1954). Apparently, the Court's attempt to remedy the confusion as to lower state court decisions that followed Erie and Fidelity Union has met with some degree of success. See Garris v. Schwartz, 551 F.2d 156, 158 (7th Cir. 1977); National Sur. Corp. v. Midland Bank, 551 F.2d 21, 29-30 (3d Cir. 1977) ("an intermediate appellate court holding is presumptive evidence, rather than an absolute pronouncement, of state law"); Estate of Salter v. Commissioner, 545 F.2d 494, 497 (5th Cir. 1977); Kincaid Cotton Co. v. Kesey Bros., 504 F.2d 976, 978 (5th Cir. 1974).
often provide a strong indication of the state court’s probable reso-

lution of the question in issue.\textsuperscript{76} State court dicta also may indicate
the court’s predilection toward a particular rule of law.\textsuperscript{76} Such
dicta is typically not binding on a federal court, but it is persuasive
authority which should be considered by the court in reaching its
decision.\textsuperscript{77}

Since a valid prediction of state law requires an examination
of all relevant data produced by the judicial bodies of the state, a
prediction by a federal court that ignores potentially enlightening
information provided by the state may be misleading and not des-
erving of deference. This third inquiry should therefore be satis-
fied prior to affording deference to a sister circuit’s decision.

\textbf{(4) The pertinent court of appeals’ level of expertise and fa-
miliarity with the law of the state in question}

While the expertise of the members of a circuit court of ap-
ppeals panel is not and cannot be the dispositive factor in determin-
ing whether to defer, it can nevertheless play an important role in
the decision.\textsuperscript{78} Typically, it is the perceived expertise of a judicial
authority that qualifies it as a “higher authority” on the law of the
relevant state. While courts at times may attribute great impor-
tance to the perceived expertise of a legal authority,\textsuperscript{79} this percep-

\textsuperscript{76} See Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 285
(3d Cir. 1980) (to make an accurate prediction of the applicable state law, the federal court
should examine related decisions of the state courts).

\textsuperscript{77} See A. Frantz, supra note 59, at 89.

\textsuperscript{78} City of Aurora v. Bechtel Corp., 598 F.2d 382, 386 (10th Cir. 1979); Estate of Gold-
stein v. Commissioner, 475 F.2d 818, 816 (10th Cir. 1973); Priest v. American Smelting &
Ref. Co., 409 F.2d 1229, 1232 n.6 (9th Cir. 1969); Mooney Aircraft, Inc. v. Donnelly, 402 F.2d
400, 405 (5th Cir. 1968); see Note, supra note 17, at 553 (if state court would recognize its
own considered dicta then the federal court should also recognize it). At least one federal
judge was not pleased with the practice of using state court dicta to predict the undecided
state law. Chief Judge Parker of the Fourth Circuit Court of Appeals commented:

‘\[T\]he most vehement invoking of [Erie] generally occurs in cases to which it is not
applicable at all, in cases where there are no state decisions directly in point on
the question involved but tortuous reasoning from dicta or cases not in point is
relied upon to support propositions that the courts of the state have never decided
and no court in any state is ever likely to decide.

Parker, Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits, 35

\textsuperscript{79} See Tardan v. Chevron Oil Co., 463 F.2d 651, 652 (5th Cir. 1972) (expertise of the
judge should not be the sole reason for deferring, but may be an appropriate consideration
where the state law is unclear and ambiguous).

\textsuperscript{79} See supra notes 4-5 and accompanying text.
tion may not be fully justified. It therefore is important to define the attributes that serve to characterize a particular court as expert, and thus deserving of deference. It is submitted that through application of the criteria outlined below, a reviewing court can assess the relative expertise of the pertinent court of appeals in the area of state law at issue.

The Supreme Court and the circuit courts of appeals have, on occasion, adhered to the interpretation of state law rendered by the district court sitting in that state. It is suggested that an examination of the reasons advanced by these courts for their decisions to defer will assist in defining the factors that serve to distinguish a particular judge or court as an "expert."

In deferring to a district court, the Supreme Court apparently places primary emphasis upon the legal training and experience of the district judge. For example, the Court has followed the district court's interpretation of state law when the judge was “trained” in the law of the state, a member of the state's bar, a practitioner in the state prior to appointment to the bench, or a judge of long standing in the state who is "familiar with the intricacies and trends of local law and practice." To this list the courts of appeals have added a judge's residence in the state whose law he must interpret.

Close scrutiny of this list reveals that in each case it is the district court judge's familiarity with state law that is the determinative factor in a higher court's decision to defer. Accordingly, it is suggested that familiarity with state law is an equally applicable criterion to be employed by a reviewing court in gauging the expertise of the panel members of the pertinent court of appeals. As the Factors court observed, it is through continued contact with state law that these judges acquaint themselves with the methods and

80 See supra note 5.
84 Gooding v. Wilson, 405 U.S. 518, 524 (1972); see C. Wright, supra note 11, § 58, at 271.
87 Stevens v. Barnard, 512 F.2d 876, 880 (10th Cir. 1975).
procedures of the state courts and the interpretations of state law.88

The expertise of the pertinent court of appeals is not, however, the only factor to be considered in the deference decision. The very subjectivity involved in measuring a court's expertise makes it undesirable to base any decision to defer solely upon this evaluation.89 Each of the other three proposed inquiries should be pursued to ensure a correct decision on the propriety of deference. Even an expert court of appeals is unlikely to render an accurate prediction of the applicable state law if it fails to follow the procedures of the state court.90 Therefore, the expertise factor functions to buttress a deference decision which already is adequately supported on the basis of careful consideration of the other inquiries.91

It is submitted that pursuit of the foregoing inquiries will serve to ensure the accuracy of the deference decision, thereby promoting the uniformity of "good" state law within the federal judicial system. Furthermore, the requisite inquiries are not, upon close inspection, unduly burdensome. Indeed, two of the proposed inquiries for judicial deference are essentially the same as those required of any federal court which independently predicts state law in a diversity case. In rendering such a prediction, a federal court necessarily ascertains the state court procedures for answering questions of first impression92 and pays particular attention to any clear signals emanating from the state's legal authorities.93 In fact, the reviewing court's task in a deference situation may be easier, in that once the procedures and signals have been identified, the court need only determine whether or not the pertinent court followed the appropriate procedures and considered the proper legal authorities.94 In contrast, a federal court making an indepen-

---

88 See Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 283 n.7 (2d Cir. 1981) (noting that one of the Sixth Circuit's panel members was a member of the Tennessee bar), cert. denied, 102 S. Ct. 1973 (1982). But see 652 F.2d at 285 (Mansfield, J., dissenting) (a mere quantitative analysis to determine familiarity is not sufficient).

89 Although the pertinent court of appeals may be the recognized expert on state law for a state within its territory, it may nevertheless neglect to follow the proper state court procedures or ignore signals emanating from the state legal authorities, in which case its expertise will not represent sufficient grounds for deference. See supra note 78 and accompanying text.

90 See supra note 89.

91 See infra text accompanying note 99.

92 See supra notes 63-70 and accompanying text.

93 See supra notes 72-76 and accompanying text.

94 See supra note 71 and accompanying text.
dent prediction has the added burden of applying the procedures and interpreting the various legal authorities.\textsuperscript{5}

Furthermore, any doubts which remain as to the burdensome nature of the proposed inquiries should be of little concern, for the accuracy of a decision should not be subrogated to the expediency of a determination. While it is desirable to maintain an expeditious system of justice, this should not be achieved at the expense of a valid prediction of state law. Hence, it is suggested that the value of the proposed inquiries in ensuring a correct decision outweighs any perceived judicial burden and thus application of the inquiries is preferable to a system of blind deference.

**POTENTIAL PROBLEMS INVOLVING JUDICIAL DEFERENCE IN DIVERSITY CASES**

The proposed inquiries cannot be embraced as a comprehensive system for deciding diversity cases unless their usefulness is retained in cases which vary circumstantially from the basic Factors model. Three hypothetical diversity situations which may require judicial deference are presented below. In each, an attempt is made to evaluate whether adherence to the proposed inquiries continues to ensure the most accurate prediction of state law.

The first problematical situation arises when the pertinent court of appeals follows the proper procedures of the state court but misapplies the law. To illustrate: a novel question of Delaware law is presented to the Court of Appeals for the Third Circuit. Delaware does not provide for certification of the question to the highest court in Delaware,\textsuperscript{9} thus, the Third Circuit must predict the applicable state law.\textsuperscript{7} In rendering its prediction the court does not ignore any clear signals emanating from the state's legal authorities. Further, the Third Circuit properly ascertains and employs the same procedures used by the Delaware courts when deciding questions of first impression. These procedures include the application of pertinent New Jersey law.\textsuperscript{9} Subsequent to the Third Circuit decision, the same question of Delaware law comes

\textsuperscript{5} The burden of applying state court procedures and interpreting legal authorities is not present under the proposed inquiries; the deferring court is precluded from examining the substance of the pertinent court's decision to ensure that it comports with its own. See \textit{supra} note 71 and accompanying text.

\textsuperscript{7} See \textit{supra} note 53.

\textsuperscript{9} See \textit{supra} notes 19-21 and accompanying text.

\textsuperscript{9} See \textit{supra} note 61.
before the Second Circuit Court of Appeals. Facing the choice of whether to defer to the Third Circuit or make an independent decision, the Second Circuit engages in the inquiries proposed above. The court concludes that although the Third Circuit properly followed the Delaware court procedures, it misapplied the law of New Jersey to the Delaware question. The Second Circuit is thus confronted with the question of whether to defer to what it believes is an incorrect decision by its sister circuit, or decide the issue based upon its own interpretation of New Jersey law.

The resolution of this problem is found in the relationship between the second and fourth proposed inquiries. The second inquiry mandates that a reviewing court limit its examination to whether the pertinent court of appeals employed the same procedures as the state court.99 In matters of interpreting the law of states within its territory, the pertinent court of appeals is the recognized expert, and the other circuits necessarily must yield to its interpretation. Through continued application, training or practice, the Third Circuit has acquired a greater familiarity with New Jersey law than have other circuit courts of appeals which deal infrequently with New Jersey law. Consequently, after assuring itself that the Third Circuit has not ignored the possibility of certification, has followed the proper state court procedures and has not failed to consider any clear signals from the Delaware legal authorities, the Second Circuit must recognize the expertise of the Third Circuit in matters of New Jersey law and defer to the Third Circuit’s decision regardless of whether or not it agrees with the decision.

The second illustration involves a pertinent court of appeals which properly follows the state court procedures but in doing so misinterprets and misapplies the law of a state within the reviewing court’s territory. For instance, the Third Circuit is called upon to decide a novel question of Delaware law. Following Delaware court procedures, the Third Circuit looks to New York and misapplies New York law. The identical question of Delaware law then presents itself to the Second Circuit, which encompasses New York. The question is whether the Second Circuit should defer to the incorrect decision of the Third Circuit or make an independent determination of the question of Delaware law based upon its own understanding of New Jersey law. This situation illustrates the one

99 See supra note 71 and accompanying text.
exception to the limitation on substantive review embodied in the second inquiry. When the pertinent court of appeals applies the law of a state within the territory of the reviewing court of appeals, then the reviewing court is the expert on that law and accordingly is permitted to review the substantive aspects of the pertinent court’s decision. This is the one situation, under the proposed inquiries, in which there is no need for judicial deference. By reviewing the substantive aspects of the pertinent court’s decision, the reviewing court acquires sufficient knowledge to allow it to render an independent decision on the issue, regardless of whether it comports with the pertinent court’s decision.

The third and most difficult hypothetical problem, which is one step removed from the basic principle of intercircuit deference, is illustrated by the following situation. Subsequent to its advocacy of judicial deference in Factors, the Second Circuit is presented with a novel question of Delaware law factually different from Factors. The Third Circuit has not yet considered the issue and because the Second Circuit is unable to certify the question to the Delaware Supreme Court, it is required to decide the case. Thereafter, the same undecided question of Delaware law presents itself to the Third Circuit. That court follows the Delaware procedures by applying the law of New Jersey, and it decides the question contrary to the decision of the Second Circuit. Following the Third Circuit’s decision, the identical question of Delaware law comes before the District Court for the Southern District of New York. The question is whether the doctrine of stare decisis requires the district court to apply the Second Circuit’s determination of the question presented or, pursuant to the principles of deference set out in Factors, to defer to the Third Circuit’s decision. The concept of stare decisis can be interpreted to sanction either resolution. If the district court concludes that Factors only intended to advocate judicial deference when the pertinent court of appeals de-

100 See id.
101 See supra notes 82-88 and accompanying text.
102 There is no requirement that a circuit court of appeals defer to the decision of a sister circuit. See supra note 8 and accompanying text. Therefore, the Second Circuit’s function, mandated by Erie and its progeny, requires it to predict the applicable state law. See supra note 71 and accompanying text. The court must follow the procedures of the state court and examine the same sources the state court would examine in deciding a question of first impression. See supra notes 63-69 and accompanying text.
103 See supra notes 18-19 and accompanying text.
104 See supra note 8.
cides the issue first, then the district court would follow the previous Second Circuit decision on the issue presented. Since in this hypothetical, in contrast to the chronology in *Factors*, the Third Circuit did not decide the issue until after the Second Circuit had spoken, the district court would be justified in adhering to the Second Circuit precedent. If, however, the district court reads *Factors* to require judicial deference whenever there is a pertinent court of appeals' decision available regardless of when it was rendered, it would foresake the prior Second Circuit opinion and defer to the Third Circuit decision. In this hypothetical, the Second Circuit was forced to make an independent determination of the applicable state law because the pertinent court of appeals had not yet considered the issue. However, once the Third Circuit subsequently decides the issue, the alternate interpretation of *Factors* mandates that the district court defer to this definitive pronouncement by the pertinent court of appeals.

Both of the solutions presented above are consistent with the concept of stare decisis and either one represents a viable alternative for a district court. It is suggested that a district court confronted with this situation employ the inquiries proposed herein to ascertain the validity of both the Second and Third Circuit decisions. Once this determination has been made, the district court should follow the more “accurate” prediction of state law. The district court’s selection of either prediction can be justified by reference to the alternate interpretations of *Factors* set out above. If the Second Circuit’s prediction is followed, the district court has read *Factors* to require deference only when the pertinent court of appeals has spoken first. By following the Third Circuit, the district court necessarily construes *Factors* as advocating deference whenever there is an existing state law prediction by the pertinent court. Finally, should the district court determine that both the Second and Third Circuit opinions represent “accurate” predictions notwithstanding their contrary conclusions, the expertise criterion necessitates that the district defer to the Third Circuit’s expertise on matters of Delaware law.

*Factors Revisited*

Analyzing the propriety of the Second Circuit’s deference to the Sixth Circuit’s decision in *Memphis Development*, in light of

---

105 Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956 (6th Cir. 1980), cert. de-
the proposed inquiries, leads to a result contrary to that reached by the Factors court. The first inquiry, requiring that the reviewing court employ the certification procedure where such an option is available, is satisfied. Since Tennessee has not established a process by which a federal court can certify unanswered questions of state law to the Tennessee Supreme Court, neither the Sixth Circuit nor the Second Circuit had this option available.

The second point of inquiry is whether the pertinent court followed the procedures and methods employed by the state courts in deciding questions of first impression. An examination of Tennessee's procedures indicates that in cases of first impression, the court typically examines state decisions on analogous questions of law, relevant decisions of other jurisdictions and various secondary legal sources, including treatises and law review articles. Close scrutiny of Memphis Development reveals that in predicting Tennessee law, the Sixth Circuit clearly failed to follow these Tennessee procedures. While the court initially pays lip-service to right-of-publicity cases emanating from other jurisdictions, they are summarily relegated to a footnote, with little analysis of their merits or faults. Such a cursory examination, it is submitted, is

106 See Memphis Dev. Found., 616 F.2d at 958; 1A J. Moore, supra note 13, ¶ 0.203[5], at 2142-43.
107 See supra notes 55-58 and accompanying text.
109 E.g., Wimberly v. American Casualty Co. (CNA), 584 S.W.2d 200, 202, 204 (Tenn. 1979); Bandy v. State, 575 S.W.2d 278, 279 (Tenn. 1979); Holmes v. Wilson, 551 S.W.2d 682, 685-86 (Tenn. 1977).
110 E.g., State v. Jones, 598 S.W.2d 209, 213 & n.2 (Tenn. 1980) (law review); Bandy v. State, 575 S.W.2d 278, 280 (Tenn. 1979) (treatise); Holmes v. Wilson, 551 S.W.2d 682, 685-87 (Tenn. 1977) (treatises); Insurance Co. of N. Am. v. Cliff Pettit Motors, Inc., 513 S.W.2d 785, 787 (Tenn. 1974), overruled on other grounds sub nom. Duncan v. State Farm Fire & Casualty Co., 587 S.W.2d 375 (Tenn. 1979).
111 616 F.2d at 958.
112 Id. at 958 n.2. The court briefly discussed the theory underlying the recent trend toward allowing a person to pass his right of publicity on to his heirs or assigns, id. at 958, and noted that recognition of a descendible right of publicity would achieve a dual purpose. First, it would encourage effort and creativity if the person knew that his heirs would benefit from the fruits of his efforts. Id. Second, it would allow the decedent and those with whom he contracts to create a valuable capital asset. Id. The court's inquiry into the advantages and disadvantages of recognizing a descendible right of publicity terminated after this cursory examination.
INTERCIRCUIT DEFERENCE

not sufficient to effect an accurate prediction of Tennessee law. Furthermore, the Sixth Circuit maintained that it had no means by which to assess the Tennessee court’s predisposition on the issue, and thus based its decision entirely upon “moral presuppositions concerning death, privacy, inheritability and economic opportunity.”

113 By its failure to ascertain and employ the applicable Tennessee procedures, the Sixth Circuit clearly did not act in accordance with its role as another state court. Thus, it is submitted that Memphis Development is not a valid prediction of the Tennessee law, and does not merit deference.

An examination of the third inquiry, which requires a court to consider clear signals emanating from the state legal authorities, also exposes several defects inherent in the Sixth Circuit decision. A signal which cannot be ignored under this inquiry is an analogous state court decision. Presently, several Tennessee decisions exist which may be considered analogous to the question of whether there is a descendible right of publicity.

114 Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d at 285 (Mansfield, J., dissenting). The dissent noted that it was perfectly clear that the Memphis Development decision was not grounded in any existent local law or methods. Id. (Mansfield, J., dissenting) The Sixth Circuit, in addition, failed to ascertain those states to which the Tennessee courts look for assistance in determining questions of first impression. Id. (Mansfield, J., dissenting) Judge Mansfield concluded that the Sixth Circuit’s familiarity with Tennessee law played no part in its decision, making the Second Circuit equally well qualified to reach an independent determination on the merits. Id. at 286. (Mansfield, J., dissenting)

115 See supra notes 65 & 70 and accompanying text.

were instrumental in supporting the Tennessee district court's conclusion that a descendible right of publicity exists under Tennessee law. Despite the lower court's reliance on these signals from the Tennessee Supreme Court, the Sixth Circuit failed to consider these decisions when deciding Memphis Development, an omission which necessarily detracts from the decision's validity as a prediction of state law. Consequently, it can be argued that the Second Circuit should not have deferred.

The final inquiry, concerning the expertise of the Sixth Circuit panel members in Tennessee law, plays a relatively insignificant role in the present evaluation of Factors and Memphis Development. Although the Sixth Circuit represents a higher authority on Tennessee law than the Second Circuit, this expertise does not obviate the need for accuracy in the pertinent court's decision. An incorrect resolution by an "expert" circuit is no more entitled to deference than an incorrect holding by a "nonexpert" circuit. Notwithstanding the Sixth Circuit's expertise, the invalidity of its decision as a prediction of Tennessee law makes it unnecessary and undesirable for the Second Circuit to defer.

From the foregoing analysis of Factors and Memphis Development, it is apparent that the Sixth Circuit neglected to adhere to its role as another state court. This failure, resulting in an inaccurate prediction of the applicable Tennessee law, would have justified the Second Circuit in foregoing judicial deference and reaching
an independent determination on the merits. Analyzed under the inquiries outlined above, the deference afforded the *Memphis Development* decision was unwarranted and the *Factors* decision was incorrect.

**Conclusion**

Faced with the difficult task of predicting the answer to an undecided question of state law, the *Factors* court made a vicarious prediction of the applicable law through the use of intercircuit judicial deference. As this Note has suggested, however, the policy of "blind deference" advocated by the Second Circuit fails to ensure the accuracy of the prediction, as required by *Erie* and its progeny. To rectify the shortcomings of such an approach, the inquiries proposed herein seek to provide a method for deferring to the theoretically higher authority of the pertinent court of appeals, while at the same time ensuring that the decision of that court represents a valid prediction of the applicable state law. In this manner, the federal judiciary will be aided in achieving the goals envisioned by *Erie* and *Factors*—uniformity of "good" law, discouragement of forum shopping, orderly development of state law and elimination of the confusion surrounding the applicable standard of state law. Perhaps most important, a reviewing court, after examining the procedural aspects of the pertinent court's decision, is able to determine independently whether to defer to that decision. The federal courts can, thus, avoid merely mimicking the pertinent court of appeals while at the same time promoting accurate predictions of state law in diversity cases.

*Bruce D. Davis, Jr.*