



STATE BAR OF WISCONSIN

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October 1, 2015

Clerk of the Supreme Court
Attn: Deputy Clerk-Rules
P.O. Box 1688
110 East Main Street, Suite 215
Madison, WI 53701-1688

RECEIVED
OCT 02 2015
CLERK OF SUPREME COURT
OF WISCONSIN

RE: Petition 14-02/07-11 (Transfer of Cases to Tribal Courts)

To the Honorable Justices:

The State Bar of Wisconsin Board of Governors voted unanimously on September 25, 2015, to reaffirm its previous support of rules petition 07-11 and to adopt the position of the Indian Law Section regarding this issue and petition 14-02. The Indian Law Section provided the attached detailed memorandum for the Board of Governors. We provide it to you for consideration as you deliberate the two petitions.

Leaders of the Indian Law Section are available for additional comments or questions. Please don't hesitate to contact section Chair Jordan S. Martinson or Chair-Elect Nicole Homer.

Thank you for your consideration. If you have any additional questions, please do not hesitate to contact State Bar of Wisconsin Executive Director George Brown or Public Affairs Director Lisa Roys.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Cagle'.

Ralph Cagle, President
State Bar of Wisconsin

Contact:

Jordan Martinson, Chair
jordanseanmartinson@gmail.com

Nicole Homer, Chair-Elect
nicole.homer@ho-chunk.com
(715) 284-3170

INDIAN LAW SECTION

To: Executive Committee, SBW Board of Governors
From: Jordan Martinson on behalf of the ILS Board
Date: June 19, 2015
Re: -Rule Matter 07-11C: Comprehensive Review of Wis.
Stat. § 801.54 Statement of Support
-Rule Petition 14-02: Petition to Amend/Dissolve Wisconsin
Statute § 801.54 Discretionary Transfer of Civil Actions to
Tribal Court

The Indian Law Section of the State Bar requests the State Bar of Wisconsin Board of Governors to join the Indian Law Section in support of Wis. Stat. § 801.54 governing the discretionary transfer of cases to tribal court.

Background

On July 31, 2008, the Wisconsin Supreme Court created Wis. Stat. § 801.54. See S. Ct. Order 07-11, 2008 WI 114 (iss. Jul. 31, 2008, eff. Jan. 1, 2009) (Roggensack, J., dissenting). On July 1, 2009, Wisconsin Supreme Court granted the request of the Wisconsin Department of Children and Families (WDCF) and amended Wis. Stat. § 801.54(1) to facilitate transfer of post-judgment child support cases to tribes. See S. Ct. Order 07-11A, 2009 WI 63 (Jul. 1, 2009) (Roggensack, J., dissenting). On October 18, 2010, the court conducted a public hearing as part of a scheduled review of Wis. Stat. § 801.54. The majority of the court determined that the rule was operating as expected and no action was required. See S. Ct. Order 07-11B, 2011 WI 53 (Jul. 1, 2011) (Roggensack, J., dissenting). The court voted to review the rule again in five years. *Id.*

On July 24, 2014, six individuals who are members of the Oneida Tribe of Indians of Wisconsin filed Rule Petition 14-02, asking the court to repeal Wis. Stat. § 801.54. The petitioners state broad objections to Wis. Stat. § 801.54 and assert that efforts to resolve their concerns with Oneida Tribal leadership were unsuccessful.

The court discussed Rule Petition 14-02 at an open administrative rules conference on November 17, 2014. The court noted the importance of obtaining input from other entities, including other Wisconsin tribes, before considering the request to repeal Wis. Stat. § 801.54.

In the fall of 2015, the court will conduct a public hearing on the operation of Wis. Stat. § 801.54. At that time, it will also conduct a public hearing on Rule Petition 14-02. The two rule petitions remain separate matters. However, they will be considered on the same day, at a consolidated public hearing.



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INDIAN LAW SECTION

Operation of the Rule

Members of the Indian Law Section as well as other attorneys representing tribes report positive experiences regarding the operation of Wis. Stat. § 801.54. Cooperation between tribal, county and state officials in conjunction with the 2009 amendment clarifying transfer procedure facilitated orderly transfer of hundreds of post-judgment child support cases to tribal courts. The Oneida Tribe of Wisconsin will present concerns specific to the Oneida Tribe and Rule Petition 14-02. Attached you will find a detailed history of the rule specific to transfer of cases between Brown County and the Oneida Tribe. The attached article appeared in the May 2010 edition of the Wisconsin Journal of Law.

Tribes and tribal members value the rule because it facilitates having cases heard in a forum reflecting culturally specific tribal values while applying the law in the context of tribal jurisdiction. The rule also provides a procedurally efficient and predictable framework for case transfer, eliminating the cumbersome and unpredictable process based on the *Teague v. Bad River Band, 2003 WI 118* decision. Before the rule was implemented parallel litigation in state and tribal courts created difficult questions of procedure and jurisdiction. Under *Teague*, when a state and tribal court become aware of parallel litigation in their courts, the state court judge must confer with his or her tribal counterpart and allocate jurisdiction. Currently, under § 801.54 parties or the court can simply move for the transfer and apply the criteria for determining whether a transfer is appropriate which represents a significant improvement in procedure, efficiency and consistency for the state, tribes, counties and parties involved.

Concerns of the Dissent

When the original rule and amendment were passed, Justice Roggensack authored a dissent which many in the Indian law community viewed as alarmist and unfounded. The dissent decried the fact that Wisconsin citizens would not have the benefit of the Wisconsin constitution and statutes in tribal courts. The unspoken implication was that Wisconsin tribal courts would not do substantial justice to the parties. The dissent also highlighted the federal law limitations of tribal court jurisdiction over non-members.

The fears of the dissent have not come to pass. We are not aware, anecdotally or through published cases, of problems or appeals questioning the validity or wisdom of the rule. In addition, we are not aware of any assertions of tribal court jurisdiction inconsistent with federal law. (The comments to the rule include a directive to circuit judges to “give particular weight” to the constitutional rights of the litigants and their rights to assert all available claims and defenses.)



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Conclusion

The Indian Law Section continues to support the continued existence of the rule and asks the Executive Committee and the Bar to do the same. The Bar supported the original enactment in 2008 and nothing has occurred since then to warrant a change in position.



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