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October 1, 2015

Clerk of Supreme Court
ATTN: Deputy Clerk-Rules
PO Box 1688
Madison, WI 53701-1688
**VIA E-MAIL (clerk@wicourts.gov)**
**and U.S. MAIL**

RE: Written Comment on Petition 7-11C

Dear Supreme Court Justices:

I write to comment on Petition 7-11C, the comprehensive review of Wis. Stat. § 801.54. I am a practicing attorney in Wisconsin with over 20 years of experience working in, around and for Indian tribes and Indian tribal courts. I write as a private citizen and these views are my own and do not necessarily reflect the views of my clients.

By way of background, I have held nearly every role one could hold as an attorney in the tribal court system: counsel for private citizens, counsel for tribes both as plaintiff and defendants, tribal prosecutor, guardian ad litem for minor children, advisor to tribal judges, and pro tem trial and appellate judge. I have provided dozens of trainings to state and tribal judges, lay advocates, and attorneys about a wide variety of topics. I have also written about tribal court systems and the topics of allocating jurisdiction and full faith and credit between state and tribal courts. *See The Wisconsin Way Forward with Comity: A Legal Term for Respect*, 47 Tulsa L. Rev. 659 (2011), and *Full Faith and Credit and Cooperation Between State and Tribal Courts: Catching Up to the Law*, Journal of Court Innovation, Vol. 2, Number 2 (Fall 2009).

**EXPERIENCE WITH THE RULE**

Perhaps the most remarkable thing about the rule is that there has been very little drama while thousands of cases have been transferred from state to tribal court. Rather, my experience has been that people involved in transfers have everyday concerns like most litigants. A few tribal members want their cases kept in state court because of privacy concerns; some non-Indians are happy to have their cases in tribal court because they will

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have better remedies vis-à-vis a tribal member. Many people are indifferent. They simply see courts as dispute resolution delivery services without making abstract distinctions; the distinctions they make are practical ones like remedies, distance from home, and missed time from work. Some non-Indians are pleasantly surprised when they learn that many tribal judges bring a brand of justice to the case which often emphasizes finding solutions rather than resolutions.

It doesn't appear that anything significant has happened in the last five years that weighs against the rule. In two appellate decisions involving Wis. Stat. § 801.54, the rule essentially worked as intended. In ***Kroner v. Oneida Seven Generations***, 2012 WI 88, 342 Wis.2d 626, 819 N.W.2d 264, the state trial judge transferred the case to tribal court; that decision was reversed by this Court and the case was then returned to state court on remand. A majority of the justices ruled the statute was not retroactive and therefore it could not be applied to the case which was filed before the rule was enacted. In ***Harris v. Lake of the Torches Resort and Casino***, 2014AP1692, unpublished slip op., (Ct. App. Mar. 10, 2015), the case was originally filed in state court and then transferred to tribal court under Wis. Stat. § 801.54. After a delay in the tribal court, the state court invoked its retained jurisdiction under Wis. Stat. § 801.54(3) and re-asserted active jurisdiction over the case. The rest of the litigation in state court involved applying the doctrine of sovereign immunity to the Tribe's motion to dismiss.

**PRACTICAL AND INSTITUTIONAL CONSIDERATIONS**

As a practical matter, the rule is working as intended and there are now settled expectations of thousands of individuals whose cases have been transferred. The large majority of those cases are IV-D family cases. Many legal issues would potentially arise if the rule is simply revoked. Decided over ten years ago, ***Teague v. Bad River Band of Lake Superior Chippewa Indians***, 2003 WI 118, 265 Wis.2d 64, 665 N.W.2d 899, is still good law. Therefore, all of the IV-D cases where a tribe or the State of Wisconsin is a real party in interest could be subject to parallel filings and jurisdictional conferences as required under ***Teague***. Due to the large number of cases, this would be unwieldy and impractical. In addition, it potentially would confuse litigants and be disruptive to the main goal of those cases: providing clear guidance on the rights and responsibilities of the parents towards their children, mainly custody, placement and support. From a practical point of view, there is no support for revoking or significantly modifying the rule.

Furthermore, as a practical matter, the rule is a useful tool for trial court judges. The state judges who were involved with the original petition dealt with the pre-rule uncertainty in various ways. Some judges didn't believe there was legal authority to transfer in the absence of a statute; others only transferred by stipulation; others simply made the transfer on different grounds; others dismissed the case and told the parties they were free to re-file in tribal court. The current rule at least imposes some rules and order on situations where previously each trial judge was left to his or her own choices. Is it practical to go back to less certainty and less guidance?

Finally, revoking or undermining the rule would potentially diminish the Court's reputation as a national leader on these issues. Over the last 20 years, in the State of Wisconsin and nationwide there has been ongoing dialogue and collaborative efforts between state and tribal judges. During and after the ***Teague*** case, cooperation between state and tribal judges accelerated. The ***Teague*** Protocols were enacted in the Ninth and Tenth Administrative Districts. State and tribal judges got to know each other better and continued to work together.

In 2009, when it enacted the rule, the Court joined and fostered the growing and improving state-tribal judicial relations in Wisconsin. This phenomenon is the result of many factors not the least of which is the continuing and growing recognition of Indian tribes' right to self-governance and tribal courts' capacity to dispense justice appropriately in their jurisdictions. The tone has been set by the highest court in Wisconsin.

That tone has been noticed in other jurisdictions. Over the past decade the Wisconsin judiciary's progress in this area has been recognized by tribal and state courts around the country. For example, at a recent tri-state conference in Minnesota, two Michigan Supreme Court justices presented on a panel where they described their recent efforts to re-make Michigan's rules more in the image of Wisconsin's with respect to tribal court full faith and credit and case transfers.

There is a certain inevitability to what has happened and is happening between state and tribal judges. Whether the rule exists or not, tribal judges and state judges will continue to confront issues of allocation of jurisdiction, administration of justice and application of comity. The Wisconsin Supreme Court should continue to provide guidance to state judges so that the Court is fulfilling its role as leader of the judiciary. See Wisc. Const., ART. VII, Sec. 3(1).

**CONCLUSION**

I respectfully recommend the rule be maintained in its current form. The rule has worked as intended and provides guidance to state court judges on issues that will continue to arise. It would be impractical to revoke or undermine the rule after so many cases have already been transferred. It would also likely diminish the Court's reputation as a national leader on this issue.

Sincerely,

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