
In re discretionary transfer of civil cases to tribal court**PETITION**

The Director of State Courts hereby petitions this court to create a rule governing the discretionary transfer of cases to tribal court, pursuant to the court's rulemaking authority under §751.12. This petition is submitted on behalf of the State-Tribal Justice Forum, a joint committee of state and tribal court representatives established by Chief Justice Abrahamson to promote and sustain communication, education and cooperation among Wisconsin tribal and state court systems.¹

Background**Wisconsin State-Tribal Justice Forum:**

In July of 2005, the U.S. Department of Justice, Bureau of Justice Assistance sponsored a national gathering in Green Bay, Wisconsin to foster tribal-federal-state court relations. This conference, titled *Walking on Common Ground: Pathways to Equal Justice*,² served as the catalyst for Wisconsin to reconvene its

¹ See *Wisconsin State-Tribal Justice Forum Mission and Membership*. Found at: <http://www.wicourts.gov/about/committees/tribal.htm>

² *Walking on Common Ground: Pathways to Equal Justice Report*, July 2005 National Gathering for Tribal-Federal-State Court Relations. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance. Found at: http://www.walkingoncommonground.org/web-content/WOCG_Report.pdf

State-Tribal Justice Forum. The re-established committee consists of five circuit court judges, five tribal judges, one tribal attorney, one legislative liaison, one district court administrator, and the director of state courts. The Wisconsin State-Tribal Justice Forum met for the first time on May 12, 2006 and established its mission to promote and sustain communication, education and cooperation among tribal and state court systems and to develop the initiatives outlined in the final report of the *Walking on Common Ground* conference.

History of Tribal Court Jurisdiction in Wisconsin:

There are eleven federally recognized tribes in Wisconsin and each has its own independent government with its own constitution, membership and land base. Some of the tribes in Wisconsin operate a formal tribal court while others have alternative dispute resolution forums.³ Tribes possess inherent sovereignty and they are a distinct and separate entity from the state. Wisconsin is one of the six states in the United States that was mandated by P.L. 280 in 1953 to transfer criminal and civil jurisdiction in Indian Country from the Federal Government to the state. The Menominee Reservation is the one exception to this mandate where federal jurisdiction still resides.⁴

³ See Wisconsin Judicare, Inc., *Indian Law Office listing and links to Wisconsin Tribal Courts*: Bad River Tribal Court, Forest County Potawatomi Community Court, Ho-Chunk Nation, Lac Courte Oreilles Tribal Court, Lac Du Flambeau Tribal Court, Menominee Tribal Court, Oneida Tribal Judicial System, Red Cliff Tribal Court, St. Croix Tribal Court, Sokaogon (Mole Lake) Tribal Court, Stockbridge-Munsee Tribal Court, found at: <http://www.judicare.org/ilo.htm>

⁴ See *Wisconsin Legislative Council, Legislator Briefing Book 2007-2008*. Chapter P: State-Tribal Relations. Found at: <http://www.legis.state.wi.us/lc>

Cooperation among state and tribal courts in Wisconsin is critical. Tribal and non-tribal citizens interact on a frequent basis and when civil disputes arise where legal action is necessary, questions of civil jurisdiction can become complex. Wis. Stat. 806.245 provides parameters for the application of full faith and credit of Indian Tribal documents including judicial orders, records and judgments. Over the last decade, the Wisconsin Supreme Court has addressed concurrent jurisdictional issues in civil cases in its *Teague v. Bad River Band of Lake Superior Chippewa Indians*⁵ decisions and laid the foundation for the establishment of jurisdictional allocation protocols in the Ninth and Tenth Judicial Districts.

In 2001, the Tenth Judicial District, led by Chief Judge Edward Brunner, developed a historical agreement for handling concurrent jurisdiction cases. Under this system, state court and tribal court judges temporarily stop actions that are filed in both courts and hold a joint hearing to determine which court should handle the case. If the judges cannot agree, a process was developed for them to follow until a jurisdictional agreement can be reached. The jurisdictional allocation protocols were signed by the four Chippewa bands (Bad River, Lac Courte Oreilles, St. Croix, and Red Cliff) and the 13 counties included in the

⁵ *Teague v. Bad River Band of Lake Superior Chippewa Indians*

Tenth Judicial District (Ashland, Barron, Bayfield, Burnett, Chippewa, Douglas, Dunn, Eau Claire, Polk, Rusk, St. Croix, Sawyer, and Washburn).⁶

In *Teague III*, the Supreme Court clarified that in cases of concurrent jurisdiction, §806.245 is not applicable and each court should stop actions, as outlined in the Tenth District protocol, and consult and decide which court is most appropriate to proceed in handling the case. In this decision, the Supreme Court also went on to list 13 principles of comity that must be applied when determining jurisdiction. These principles included the protocols previously established by the Tenth Judicial District.⁷

In conjunction with the *Walking on Common Ground* Conference in July of 2005, the Ninth Judicial District entered into a historic agreement between the state and tribal courts in the north-central area of Wisconsin. This protocol was signed by 12 counties (Florence, Forest, Iron, Langlade, Lincoln, Marathon, Menominee, Oneida, Price, Shawano, Taylor and Vilas) and five tribes (Bad River, Forest County Potawatomi, Lac du Flambeau, Sokaogon Chippewa, and Stockbridge-Munsee). Section 7 of the Ninth District Protocol sets forth verbatim the 13 comity principles outlined in *Teague III*.⁸

⁶ *The Tenth Judicial District Tribal/State Protocol for the Judicial Allocation of Jurisdiction*
Found at: <http://www.wicourts.gov/about/committees/tribal.htm>

⁷ *Teague III*. 2003 WI 118, 265 Wis. 2d 64.

⁸ *Tribal/State Protocol, Ninth Judicial District*
Found at: <http://www.wicourts.gov/about/committees/tribal.htm>

Other States:

In its development of this proposal, the State-Tribal Justice Forum researched protocols and rules of other states in handling issues of state-tribal concurrent jurisdiction cases in civil matters. Under its *General Rules of Practice*, Minnesota developed *Rule 10* on Tribal Court Orders. Section 10.02 of this Rule outlines factors to be considered when recognition of tribal court orders and judgments is discretionary. The “comments” of MN *Rule 10* state:

***Discretionary Enforcement: Comity.** Where no statutory mandate expressly applies, tribal court orders and judgments are subject to the doctrine of comity. Rule 10.02(a) does not create any new or additional powers but only begins to describe in one convenient place the principles that apply to recognition of orders and judgments by comity.⁹*

The State of Washington’s *Court Rule 82.5* provides tribal court guidance on (a) exclusive jurisdiction, (b) concurrent jurisdiction, and (c) enforcement of Indian Tribal Court Orders. Part (b) of this rule states:

(b) Indian Tribal Court; Concurrent Jurisdiction. Where an action is brought in the superior court of any county of this state, and where, under the Laws of the United States, concurrent jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal court of a federally recognized Indian tribe, the superior court may, if the interests of justice require, cause such action to be transferred to the appropriate Indian tribal court. In making such determination, the superior court shall consider, among other things, the nature of the action, the interests and identities of the parties, the convenience of the parties and witnesses, whether state or tribal law will apply to the matter in controversy, and

⁹ *Minnesota General Rules of Practice for District Courts*. Title I. Rules Applicable to All Court Proceedings. *Rule 10. Tribal Court Orders and Judgments*. Found at: <http://www.courts.state.mn.us/?page=511#generalRules>

*the remedy available in such Indian tribal court.*¹⁰

Proposed Rule:

This proposal outlines standards to be considered in the allocation of jurisdiction among state and tribal courts. It will allow Wisconsin state courts the ability to transfer civil cases of concurrent jurisdiction to tribal courts when deemed appropriate through the application of the enumerated standards. The Teague Protocol requires that cases be filed in both state and tribal courts. That requires tribal and state litigants to pay filing fees, fill out proper suit papers, and make arrangements for suit in two courts. A majority of cases in tribal courts are pro se. This proposal strives to streamline the process by allowing tribal litigants to request transfer from state court using the outlined standards. State court judges then have the ability to make a discretionary decision and either transfer the case or refuse to do so based on these same standards. Motion and order forms could be developed to assist in the process.

As tribal courts continue to expand court jurisdiction and assist the state courts in resolving disputes, many new cases as well as many cases from the past can be handled in tribal courts. Tribal litigants can have cases back in tribal court where they are most appropriately heard and where previously there may not have been a court to hear the dispute.

¹⁰ Washington Courts. Rule 82.5. Tribal Court Jurisdiction. Found at: http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CR&ruleid=supcr82.5

The Teague Protocol has been used infrequently in the past. The State-Tribal Justice Forum has received notice of a number of situations in which Tribal and State Courts are transferring cases in a discretionary manner as justice requires. When considering the potential number of pro se litigants, especially in family matters, a user-friendly discretionary transfer mechanism is strongly supported by all of the State-Tribal Justice Forum in an effort to provide guidance and to let judges know they have the discretion to do so when concurrent jurisdiction exists. The Forum submits this proposal to clarify this option.

This proposal has been reviewed by Wisconsin Tribal Judges Association, the Committee of Chief Judges, the Wisconsin Joint Legislative Council's Special Committee on State-Tribal Relations, and the Wisconsin State Bar's Indian Law Section.

Accordingly, the director requests additions in the statute as proposed.

§801.54 Discretionary transfer of civil cases to tribal court

should read as follows:

(1) Purpose.

The purpose is to effectively and efficiently allocate judicial resources. In situations where a circuit court and a tribal court have concurrent jurisdiction, this provision authorizes the circuit court, in its discretion, to transfer a case to the appropriate tribal court. This rule does not apply to any case in which controlling law grants exclusive jurisdiction to either the circuit court or the tribal court.

(2) Discretionary Transfer.

(a) When an action is brought in the circuit court of any county of this state, and when, under the laws of the United States the tribal court of a federally

recognized tribe has concurrent jurisdiction of the matter in controversy, the circuit court may, on its own motion or the motion of any party and after notice and hearing, cause such action to be transferred to the appropriate Indian tribal court. In making such determination the circuit court shall consider:

1. Whether issues in the action require interpretation of the tribe's constitution, by-laws, ordinances or resolutions;
2. Whether the action involves traditional or cultural matters of the tribe;
3. Whether the action is one in which the tribe is a party, or whether tribal sovereignty, jurisdiction, or territory is an issue in the action;
4. The tribal membership status of the parties;
5. Where the cause of action arises;
6. Whether the parties have by contract chosen a forum or the law to be applied in the event of a dispute;
7. The timing of any motion to transfer jurisdiction, taking into account the parties' and court's expenditure of time and resources, and compliance with any applicable provisions of the circuit court's scheduling orders;
8. The court in which the action can be decided most expeditiously;
9. Such other factors as may be appropriate in a particular case.

(b) In the event a tribal court declines to accept a transfer of jurisdiction under this rule, within 60 days of transfer, jurisdiction shall remain with the circuit court.

(3) Powers, Rights and Obligations Unaffected

Nothing in this rule is intended to alter, diminish, or expand the jurisdiction of the circuit courts or any tribal court, the sovereignty of the state or any federally recognized tribe, or the rights or obligations of parties under state, tribal, or federal law.

Respectfully submitted this ___ day of _____, 2007.

A. John Voelker
Director of State Courts

