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Wisconsin's Experience in Allocating Jurisdiction between State and Tribal Courts

Beth Ermatinger Hanan and William H. Levit, Jr.

Eleven federally recognized Indian tribes are located in Wisconsin. When civil disputes arise between tribal and non-tribal members, one of the first questions is which court has jurisdiction to resolve the parties' quarrel. It may be that both the state and tribal courts have jurisdiction, such that the next question is, which court should proceed? Over the past several years, the Wisconsin Supreme Court, using both its decision-making and rule-making powers, along with sustained, cooperative efforts of tribal and state court judges, has devised various rules and guidelines by which many interjurisdictional issues can be decided.

Decisions by the Wisconsin Supreme Court in *Teague v. Bad River Band of Lake Superior Chippewa Indians*[1] resulted in jurisdictional allocation protocols for the two judicial districts where the bulk of the state's Indian tribes are located. More recently, the state Supreme Court approved statutory guidelines for a less formal discretionary transfer of state court cases to tribal courts within Wisconsin.

Other states may wish to use one or both mechanisms for assigning or transferring jurisdiction between tribal and state courts. To better explain the Wisconsin experience and to help readers identify areas of possible jurisdictional overlap, this article first will describe some of the procedural background of *Teague* and of the first case to apply the *Teague* protocol. Then we discuss the more recent development of the discretionary transfer rule.

BACKGROUND OF THE TEAGUE CASES

Jerry Teague, a non-tribal member, was employed under contract as general manager of the Bad River Band's casino. After he was terminated, Teague filed suit in Ashland County Circuit Court, seeking to compel arbitration.[2] Early on, the Circuit Court determined that the Band had waived sovereign immunity. The Band asserted that Teague's employment contracts were invalid because they lacked the required tribal council and federal approval.[3]

Over a year into Teague's suit, the Band filed its own action in Bad River Tribal Court, seeking to invalidate the employment contracts and reasserting its claim that the requisite approval was lacking.[4] The Band asked the Circuit Court for a stay until the Tribal Court ruled on the tribal law challenges to the contracts and until all tribal remedies were exhausted.[5]

The Circuit Court denied a stay because the Tribal Court action would not entirely dispose of Teague's claim. The Circuit Court acknowledged that the Tribal Court could address the limited issue of actual authority before the Circuit Court resolved the rest of the case.[6] The Band then amended its Tribal Court complaint, adding that the Tribal Court should invalidate the contracts based on apparent authority.

For reasons not clear from the record, Teague's trial counsel accepted service of the amended Tribal Court complaint but did not plead responsively in Tribal Court. The Tribal Court granted the Band's motion for default judgment on the ground that the contracts were invalid.[7]

The Band sought full faith and credit in the Circuit Court for the Tribal Court default judgment, pursuant to Wis. Stat. § 806.245. But the Court declined to grant full faith and credit based on a "prior action pending" rule.[8] As the Circuit Court understood things, the Tribal Court, a court of concurrent jurisdiction, did not properly have jurisdiction over the matter because the case was filed first in state court. After an Ashland County jury found Teague's employment contracts valid, an arbitrator awarded him over $390,000 in damages. The Band appealed.[9]

The Court of Appeals (in "*Teague I*") reversed.[10] On review, the Supreme Court agreed that the "prior action pending" rule did not apply to a court of an independent sovereign. Principles of comity, however, required that the state and tribal courts confer and allocate jurisdiction between them, so as to avoid a race to judgment and the inconsistent results that had occurred. The Supreme Court remanded for a novel interjurisdictional conference.[11]

Authors' Note: A portion of this article appeared in 2006 in the *Wisconsin Lawyer* magazine. The views expressed herein are those of the authors and not of Mr. Jerry Teague, whom Ms. Hanan represented on appeal in *Teague v. Bad River Band*, nor of the Forest County Potawatomi Community, which Mr. Levit represented in the *Mohr* litigation described herein.

Footnotes

1. 2000 WI 79, 236 Wis. 2d 384, 612 N.W.2d 709 ("*Teague II*").
2. *Teague II,* 2000 WI 79, ¶ 2.
3. *Id.* at ¶ 6.
4. *Id.* at ¶ 7.
5. *Id.* at ¶ 8.
6. *Id.* at ¶ 9.
7. *Id.* at ¶ 11.
8. 6 Wis. 2d 154, 94 N.W.2d 161 (1959).
9. *Id.* at ¶ 15.
10. *Id.* at ¶ 2. The Court of Appeals decision, 229 Wis.2d 581, 593-94, 599 N.W.2d 911 (Ct. App. 1999), is referred to as *Teague I.*
11. *Id.* at ¶ 2.

The Wisconsin Supreme Court has no jurisdiction over tribal courts within this state. So the *Teague II* Court exercised its authority over the Circuit Court by ordering it to invite the Tribal Court judge to a unique meeting. As envisioned, the two judges virtually would step back in time to the point when they had first learned of the parties' parallel actions. The judges then would discuss applicable comity concerns and decide which court should have proceeded to exercise its jurisdiction and which court should have refrained. This joint meeting, dubbed a "jurisdictional allocation conference" and now known colloquially as a "*Teague* Conference," can be used to divide jurisdiction between state and tribal courts when the parties are identical and there is issue overlap.

WISCONSIN'S FIRST JURISDICTIONAL ALLOCATION CONFERENCE – COMITY IN ACTION

Comity is a doctrine of respect for the proceedings of another system of government, reflecting a spirit of cooperation. Comity recognizes the sovereignty and sovereign interests of each governmental system and its unique features, including cultural and religious values. Overall, grants of comity are discretionary, highly fact specific, and reviewable on appeal for an erroneous exercise of discretion.[12]

At the March 2001 jurisdictional allocation conference, the Band asked the Circuit Court to reopen its judgment approving the arbitration award. The parties also considered a draft proposed protocol then under discussion by a forum of state, federal and tribal judges. The draft protocol proposed particular comity factors that should be weighed at a jurisdictional allocation conference.[13]

The conference was held on the record at the Ashland County Courthouse with both judges and lawyers for each party. In extensive discussion, each judge explained his view of the proceedings that had transpired in his court.[14] The Circuit Court judge discussed the comity principles identified by the *Teague II* Court, as well as the principles set forth in the forum's draft protocol and in an alternative proposal submitted by the Wisconsin Tribal Judges Association (WTJA).[15] After almost two hours of colloquy, stalemate remained. Both courts declined to reopen their respective judgments.[16]

THE FIRST TRIBAL/STATE COURT JURISDICTIONAL ALLOCATION PROTOCOL IS APPROVED

The Band appealed again, and the Court of Appeals certified the case to the Supreme Court. While Supreme Court review was pending, Chief Judge Edward Brunner of the Tenth Judicial District[17] convened an *ad hoc* committee to develop a tribal/state protocol governing the exercise of jurisdiction between Wisconsin state courts and tribal courts within his district. The committee's final version was a meld – it retained portions of the forum's draft proposed protocol, and added other considerations identified in the WTJA draft.[18]

The protocol signed by the Tenth Judicial District and four Chippewa tribes (Bad River, Lac Courte Oreilles, St.Croix and Red Cliff) in December, 2001, was the first of its kind.

The protocol signed by the Tenth Judicial District and four Chippewa tribes (Bad River, Lac Courte Oreilles, St. Croix and Red Cliff) in December, 2001, was the first of its kind.[19] The Protocol sets forth the following factors to be considered in allocating jurisdiction:

(1) Whether there are issues which directly touch on or require interpretation of a Tribe's Constitution, By-Laws, Ordinances or Resolutions;
(2) Whether the nature of the case involves traditional or cultural matters of the Tribe;
(3) Whether the action is one in which the Tribe is a party, or where tribal sovereignty, jurisdiction, or territory is an issue in the case;
(4) The tribal membership status of the parties;
(5) Where the case arises;
(6) If the parties have by contract chosen a forum or the law to be applied in the event of a dispute;
(7) The timing of the motion to dismiss or stay, taking into account the parties' and courts' expenditures of time and resources, and compliance with any applicable provisions of either 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 the particular case.[20]

To prevent a deadlock such as the one which occurred between the two courts in *Teague*, the Tenth District Protocol provides in Section 5(c) for a mechanism to select a third judge drawn from a standing pool of four circuit court and four tribal court judges. That judge then is directed to sit with the two judges from the courts where the two actions are pending to conduct a hearing *de novo*, at the close of which the three judges are to deliberate and allocate jurisdiction on the basis of the factors listed above.

Back in Madison, and mindful of the Tenth District's Protocol, a majority of the Supreme Court ("*Teague III*") reversed the Circuit Court's refusal to reopen the lower court judgment. The Court refrained from focusing its decision on a race to the courthouse, or on formal constitutional provisions.

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12. *Teague III*, at ¶ 69.
13. *See Teague III*, at ¶¶ 5, 92.
14. *See Teague III*, at ¶ 91 (Wilcox, J., dissenting).
15. *See Teague III*, at ¶¶ 5, 92.
16. 2003 WI 118.
17. Judge Brunner is now on the Wisconsin Court of Appeals, District III, but remains involved with a group of Wisconsin tribal and state court judges that meets to promote understanding and cooperation between those courts.
18. *See Teague III*, at ¶ 5.
19. *Historic State Court-Tribal Court Agreement to be Signed at Bad River Reservation*, http://www.wicourts.gov/news/archives/2001tribal120401.htm.
20. *See id.*

> **[T]he twelve counties of the Ninth Judicial District and five Indian bands with reservations or property within the district signed their own tribal/state protocol on the judicial allocation of jurisdiction.**

Instead, *Teague III* clarified that when state and tribal courts exercise concurrent jurisdiction over the parties and subject matter, and each court knows of the other's proceedings, the full faith and credit statute is not yet applicable.[21] Instead, each court should stop its proceedings, consult with the other, and as a matter of comity decide which court should proceed.[22]

The *Teague III* Court further instructed that when comity principles are applied in this circumstance, the application is weighted toward the Tribal Court:[23] "In the context of state-tribal relations, principles of comity must be applied with an understanding that the federal government is, and the state courts should be, fostering tribal self-government and tribal self-determination."[24] This instruction applies even when the tribal entity has waived a claim of sovereignty in the state court. It is an instruction that forces litigants and state courts to recognize that judicial qualifications are determined by the appointing sovereign, and not by other governments.

The *Teague III* majority then listed a host of factors from various sources, including the Tenth District's Protocol, noting that the weight given each would vary from case to case:

1. Where the action was first filed and the extent to which the case has proceeded in the first court;
2. The parties' and courts' expenditures of time and resources in each court and the extent to which the parties have complied with any applicable provisions of either court's scheduling orders;
3. The relative burdens on the parties, including cost, access to and admissibility of evidence and matters of process, practice, and procedure, including whether the action will be decided most expeditiously in tribal or state court;
4. Whether the nature of the action implicates tribal sovereignty, including but not limited to, the following:
   a. The subject matter of the litigation.
   b. The identities and potential immunities of the parties.
5. Whether the issues in the case require application and interpretation of a tribe's law or state law;
6. Whether the case involves traditional or cultural maters of the tribe;
7. Whether the location of material events giving rise to the litigation is on tribal or state land;
8. The relative institutional or administrative interests of each court;
9. The tribal membership status of the parties;
10. The parties' contractual forum selection;
11. The parties' contractual choice of the law to be applied;
12. Whether each court has jurisdiction over the dispute and the parties and has determined its own jurisdiction;
13. Whether either jurisdiction has entered a final judgment that conflicts with another judgment entitled to recognition.[25]

With the decision in *Teague III*, that case came to an end, but its legacy continues.

A SECOND TRIBAL/STATE COURT JURISDICTIONAL ALLOCATION PROTOCOL IS DEVELOPED

On July 28, 2005, the twelve counties of the Ninth Judicial District and five Indian bands with reservations or property within the district signed their own tribal/state protocol on the judicial allocation of jurisdiction. The signatory tribes are the Bad River Band, Forest County Potawatomi Community, Lac du Flambeau Band, Sokaogon Chippewa Community (Mole Lake) and Stockbridge-Munsee Band. The Ninth District Protocol applies where there is concurrent jurisdiction in both state and tribal court and provides for dismissal by either court if it determines it lacks jurisdiction.[26]

Section 7 of the Ninth District Protocol enumerates the same 13 factors identified in *Teague III* and provides that these factors "shall be considered in determining which court shall exercise jurisdiction." The tie-breaking procedure is the same as in the Tenth District Protocol.[27]

Notably, the Ninth District Protocol does not apply to one tribe with a presence in that district, based on a federal distinction. Public Law 280 (28 U.S.C. section 1360) gives Wisconsin courts civil jurisdiction over matters involving Indians which arise in Indian country. The Menominee are a non-P.L. 280 tribe – Wisconsin's only such tribe – and as a result, an assertion of jurisdiction by a Wisconsin court over a claim arising in Indian country and brought by a non-Indian against a Menominee tribal member would infringe that tribe's sovereignty. Because of its status as a non-P.L. 280 tribe, the Menominee Tribe did not sign the Ninth District Protocol.

21. *Teague III*, at ¶ 58.
22. *Id.*
23. *Id.*, at ¶ 79:

    The principles of comity applicable to state court-tribal court relations are built upon the goal of fostering tribal self-government through recognition of tribal justice mechanisms. Consequently, the significance of the plaintiff's choice of a forum and the application and interpretation of state law are outweighed by the fact that the litigation involves tribal sovereignty and the interpretation of tribal law, and that the material events occurred on tribal land. Even where a circuit court had conducted significant proceedings before the tribal court even began to hear the case is outweighed by the tribal court's institutional interest in determining the validity of contracts made with the tribe.

    Id.
24. *Id.*, at ¶ 70.
25. *Id.,* at ¶ 71 and n.38.
26. Copies of the Ninth District Protocol may be obtained from the District Court Administrator, Susan Byrns, (715) 842-3872, 2100 Stewart Avenue, Suite 310, Wausau, WI 54401.
27. *Id.*

THE SECOND JURISDICTIONAL ALLOCATION CONFERENCE IS HELD IN THE MOHR LITIGATION

In January, 2005, a *Teague* Conference was held in a case arising out of a 2003 consultant contract the Forest County Potawatomi Community's ("FCPC") Executive Council, but not its General Council, entered into with James B. Mohr. "All actions of the Executive Council are subject to review and rescission by the General Council."[28] The four-year contract was to pay Mohr, a recently retired state court judge, a substantial sum for assisting the tribe with the development of its tribal court system, a juvenile justice action plan and other related programs. The contract contained a sovereign immunity waiver and provided for arbitration in the event of a dispute. The immunity waiver, however, was not implemented in accordance with FCPC tribal law, which requires that the General Council approve any waiver of the tribe's sovereign immunity.

In January 2004, the tribe's General Council rejected the Mohr consultant contract. Efforts to reach a settlement were unavailing and on April 21, 2004, Mohr's counsel gave notice of his intent to proceed with arbitration.

On May 6, 2004, the tribe commenced an action in FCPC Tribal Court against Mr. Mohr,[29] seeking to enjoin him from commencing or pursuing arbitration and ultimately to declare the contract void. Days later, Mohr began his own action in Oneida County Circuit Court against the tribe,[30] in an effort to compel arbitration and challenge the Tribal Court's jurisdiction to adjudicate the dispute. At the same time Mohr filed a motion for a conditional stay pending an "inter-jurisdictional consultation." Counsel for the tribe and Mohr agreed to take no further action in their respective lawsuits to permit the consultation to take place.

On July 25, 2004, a reserve judge sitting in Oneida County Circuit Court sent a letter to the Chief Judge of the FCPC Tribal Court, adopting the parties' suggestion that a *Teague* Conference be held after two rounds of briefing. Counsel agreed that both actions should be stayed in the interim. They also advised the judges that, unlike the protocol adopted by the Tenth Judicial District, in the event there was a deadlock at their *Teague* Conference, the parties would then confer as to how it should be resolved.

The *Teague* Conference for the FCPC-Mohr cases was held January 25, 2005, in a Wisconsin circuit court courthouse. After oral argument, the proceedings were adjourned to permit the two judges to deliberate. After deliberations the proceedings resumed on the record. First the Tribal judge and then the Circuit Court judge delivered his ruling. Both agreed that jurisdiction should be allocated to the FCPC Tribal Court, although they reached their conclusions in a somewhat different way. Judge Butterfield, as a judge of a tribal court of a sovereign Indian nation who was not bound by decisions of the Wisconsin Supreme Court, used the nine factors set forth in the August 3, 2004, draft protocol for the Ninth District, which had been approved by the state court judges but had not yet been acted upon by the tribal courts in that district. The nine factors listed in the draft protocol are the same as those in the Tenth District's Protocol. Judge Williams of the Circuit Court, on the other hand, applied *Teague III*'s 13 factors. He then entered a stay of any further proceedings in his court.

[T]he state and tribal courts with the most overlapping activity... developed a very good relationship, and ...the judges often give each other a phone call to resolve where the litigation best belongs.

The interesting dynamic underlying the FCPC-Mohr *Teague* Conference was that it was convened in recognition of and reinforced by principles of comity. The FCPC-Mohr conference also was guided by the policy articulated by both the United States Supreme Court and the Wisconsin Supreme Court that promoting tribal justice systems is essential to foster tribal self-government and self-determination. Had the Circuit Court action been permitted to proceed, it would have divested the Tribal Court of the right to interpret tribal laws and the right to adjudicate challenges to its jurisdiction, both critical elements of the right of tribal self-government. Under the federal exhaustion of tribal remedies doctrine established by the United States Supreme Court in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*,[31] the Tribal Court must be allowed to address questions of its own jurisdiction and fully and finally adjudicate a dispute before a party can challenge the existence of tribal jurisdiction as a federal question in district court. As the *Teague III* court held, "general principles of comity, including principles of abstention, must be used to resolve" conflicts between state and tribal courts.[32]

WISCONSIN'S NEW RULE ON DISCRETIONARY TRANSFERS FROM STATE COURT TO TRIBAL COURT

The FCPC-Mohr case is the first known use of a *Teague* Conference. Court staff believe that the protocols developed in the Ninth and Tenth Districts have been used successfully by courts and parties, but infrequently. Instead, it seemed that as time went on, tribal and state courts have been using informal approaches to resolve jurisdictional differences. As Judge Brunner reports, the state and tribal courts with the most overlapping activity have, over time, developed a very good relationship, and in situations where both sides feel jurisdiction may be questionable, the judges often give each other a phone call to resolve where the litigation best belongs.[33] Several state court judges have held court in tribal courtrooms.[34]

Aware of this evolution, on July 24, 2007, the Wisconsin

28. Const. of Forest County Potawatomi Community, Wisconsin, art. V, §II.
29. Case No. 04-CV-27.
30. Case No. 04-CV-152.
31. 471 U.S. 845 (1985).
32. *Teague III*, at ¶ 66.
33. Telephone Interview with Judge Edward Brunner, Wisconsin Court of Appeals (June 2, 2009).
34. *Id.*

Director of State Courts submitted a Petition on behalf of the State-Tribal Justice Forum[35] seeking promulgation of a rule governing discretionary transfer of state court cases to tribal court. The Petition noted that the State-Tribal Justice Forum had learned of a number of situations in which courts were transferring cases in an exercise of discretion as the interests of justice require. Given the large number of pro se tribal court litigants, particularly in family law matters, the Forum advocated a user-friendly, discretionary transfer mechanism that could be used when there is concurrent jurisdiction.

The purpose of this rule is to enable circuit courts to transfer civil actions to tribal courts in Wisconsin as efficiently as possible where appropriate.

In his Petition, the Director of State Courts made reference to research conducted by the State-Tribal Justice Forum on how other states handle the concurrent civil jurisdiction. In particular, the Forum, as well as the Petition, cited § 10.02 of Rule 10 of the Minnesota General Rules of Practice for District Courts. Title I, Section 10.02 outlines the factors to be considered when recognition of Tribal Court orders and judgments is discretionary. The comment to Rule 10 provides that when there is no applicable statute, recognition of Tribal Court orders and judgments is governed by principles of comity.[36] The Petition also cited State of Washington Court Rule 82.5(b) on concurrent Tribal and Superior Court jurisdiction. That rule authorizes a superior court to transfer an action to a Tribal Court in the interests of justice, taking into account "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 the remedy available in such Indian tribal court."

The rule proposed by the Petition was adopted by the Wisconsin Supreme Court on July 31, 2008, and became effective January 1, 2009.[37] Unlike the *Teague* Protocol, which requires dual filings in both state and tribal courts, the new WIS. STAT. § 801.54[38] gives a circuit court, after notice and a hearing on the record, the discretion to transfer an action to tribal court when there is concurrent jurisdiction and when transfer is warranted after consideration of all relevant factors, including the following:

(a) Whether issues involve interpretation of tribal laws.
(b) Whether the action involves traditional or cultural matters of the tribe.
(c) Whether a tribe is a party, or tribal sovereignty, jurisdiction or territory is involved.
(d) The tribal membership status of the parties.
(e) Where the claim arose.
(f) Whether the parties have by contract chosen the forum or law to be applied.
(g) The timing of any motion to transfer, taking into account the expenditure of time and resources by the parties and the court and compliance with any scheduling orders.
(h) The court in which the dispute can be decided most expeditiously.
(i) The institutional and administrative interest of both courts.
(j) The relative burdens on the parties, including cost, access to and admissibility of evidence and where the action can be heard and resolved most promptly.
(k) Any other factors having a substantial bearing on the selection of a convenient, reasonable and fair place of trial.

As can be seen, these 11 factors are strikingly similar to the 13 points enumerated by the *Teague III* majority. Upon a discretionary transfer to tribal court, further proceedings in state court are stayed for up to five years, subject to modification on motion and notice to the parties as the interests of justice may require. A discretionary transfer to tribal court may be appealed as a matter of right.

The following comment to WIS. STAT. § 801.54, although not adopted, may be consulted for guidance in interpreting it:

> The purpose of this rule is to enable circuit courts to transfer civil actions to tribal courts in Wisconsin as efficiently as possible where appropriate. In considering the factors under sub. (2), the circuit court shall give particular weight to the constitutional rights of the litigants and their rights to assert all available claims and defenses.[39]

DISCRETIONARY TRANSFER RULE IS AMENDED

After consideration at several open administrative conferences, the Wisconsin Supreme Court on July 31, 2009, adopted an amendment to § 801.54, effective as of that date, that permits a circuit court on its own motion or that of any party, to transfer a post-judgment child support, custody or placement provision of an action in which the state is the real party in interest to a tribal court located in Wisconsin which is receiving Federal funding to operate child support programs. Once the circuit court has made an explicit finding of concurrent jurisdiction, transfer will occur unless a party timely objects or establishes good cause to prevent transfer. If there is a timely objection, the court must hold a hearing on the record to consider § 801.54(2) factors.[40] Permitting such transfers in child support cases is consistent with the practice in a number of other states.[41]

35. The Forum is a joint committee of representatives of state and tribal courts established by the Chief Justice of the Wisconsin Supreme Court to promote communication and cooperation among Wisconsin's state and tribal court systems.
36. *See* Minnesota General Rules of Practice for the District Courts tit. 1, § 10.02, Tribal Courts and Judgments, http://www.courts.state.mn.us/Documents/0/Public/Rules/GRP_Tit_I_3-12-09.pdf.
37. Sup. Ct. Order No. 07-11-2008 WI 114, issued July 31, 2008, eff. January 1, 2009.
38. WIS. STAT. § 801.54(2)(a)-(k) (West Supp. 2008).
39. WIS. STAT. § 801.54 cmt. (2008).
40. *See* WIS. STAT. § 801.54(2m) (2008); Sup. Ct. Order 7-11A, 2009 WI 63 (issued July 31, 2009, eff. July 31, 2009).
41. *See, e.g.,* Alaska (ALASKA STAT. § 47.10) (eff. Oct. 15, 2004); California (Cal. Rules of Court 5.483) (eff. Jan. 1, 2008); Colorado (COLO. REV. STAT. § 19-1-126) (eff. May 30, 2002); Iowa

CONCLUSIONS

Although we are not aware of any post-Mohr formal *Teague* Conferences, we understand that the principles of comity identified in *Teague III* have been significant in facilitating discussions and cooperation between state and tribal court judges faced with duplicative litigation. In the short time since Wis. Stat. § 801.54 took effect, there is no data on the frequency of its usage. We anticipate that § 801.54 transfers will be made when it makes sense to do so. Such transfers can be done without the formality of a *Teague* Conference, which, in any event, cannot bind a tribal court. Section § 801.54(2m), the 2009 amendment, was adopted at the behest of the Oneida Indian Nation, which had added a child support enforcement agency to its judicial system.[42] This amendment will facilitate transfer of post-judgment child support, custody and placement matters of which it has been estimated there may be more than 4,000 statewide.[43]

In the future, parties and courts in the Ninth and Tenth Judicial Districts have at their disposal formal and informal mechanisms to avoid the race-to-judgment problems presented in *Teague*. If non-child support parallel actions should arise involving the non-signatory Menominee Tribe, or with tribes located in other judicial districts such as the Ho-Chunk Nation or Oneida Indian Nation, the parties and judges or judicial officers may convene a *Teague* Conference on an *ad hoc*, voluntary basis, not unlike what occurred in *Mohr*, but they also are free to use the discretionary transfer rule of Wis. Stat. § 801.54. Absent a controlling protocol with a tie-breaking mechanism, there remains some risk of a deadlock between the two judges, as occurred in *Teague*. But the federal tribal exhaustion doctrine, as formulated by the United States Supreme Court and recognized by the Wisconsin Supreme Court in its *Teague* decisions, makes deference to proceeding in tribal court more likely. Likewise, the development of the discretionary transfer rule itself reflects that the fruit of sustained communication and cooperation between state and tribal court judges can yield not only formal protocols, but a more collegial, cooperative relationship that facilitates informal means of deciding to transfer a case from one court's sovereign jurisdiction to another. In short, the informal, cooperative process has become more useful than the protocol. This is progress.

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(IOWA CODE § 232B.5) (adopted 2003); Michigan (Mich. Court Rule 3.980) (eff. May 1, 2003); Minnesota (MINN. STAT. § 260.771) (eff. July 1, 2007); Nebraska (NEB. REV. STAT. § 43-1504) (adopted 1985); New York (N.Y. Ch. 55 CONS. LAWS Art. 2 § 39) (eff. Dec. 21, 2005); Oklahoma (10 OKLA. STATS. Ch. 1B § 40.4) (eff. Sept. 1, 1994); Oregon (34 OR. REV. STAT. 419C.058) (adopted 2003); South Dakota (S.D. CODIFIED LAWS § 26-7A-15.1) (adopted 2005); Washington (WASH. REV. CODE §§ 26.10.034, 13.34.070, 13.32A.152 and 26.33.040) (all eff. June 10, 2004).

42. Recently available federal funds have encouraged a number of tribal courts to develop their own child support enforcement agencies, which tend to pursue enforcement more effectively than over-burdened state courts are able. *See* Telephone Interview (June 2, 2009), *supra* note 33.

43. Telephone interview with A. John Voelker, Wisconsin Director of State Courts (May 26, 2009); D. Ziemer, *Cases Can Transfer to Tribal Court*, WIS. L.J, May 11, 2009.

AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

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