Jean Numrich
Clerk of Circuit Court
(715) 479-3632

Michelle Livingston
Court Reporter
(715) 479-3638

VILAS COUNTY CIRCUIT COURT

330 Court Street
Eagle River, WI 54521

Neal A. Nielsen III
Chief Judge Ninth Judicial District
(715) 479-3638
FAX (715) 479-3740

Dawn Halvorson
Register in Probate
(715) 479-3642

Eric Swanson
Juv. Intake Supv.
(715) 479-3644

Kim McCallum
Judicial Assistant
(715) 479-3638

September 30, 2015

Chief Justice Patience Drake Roggensack
Associate Justices of the Wisconsin Supreme Court
Supreme Court of Wisconsin
110 East Main Street, Suite 440
Madison, WI 53703

Re: Rule Petition 07-11C
In the Matter of the Review of the Discretionary Transfer of Cases to Tribal Court

Dear Chief Justice Roggensack and Associate Justices:

On behalf of the Wisconsin State-Tribal Justice Forum, I am writing to urge the permanent adoption of WIS. STAT. § 801.54, authorizing the discretionary transfer of civil cases from circuit courts to tribal courts.

Brief History of the Statute's Adoption

WISCONSIN STAT. § 801.54 (Rule Petition 07-11) was formulated and proposed by the Wisconsin State-Tribal Justice Forum, and presented to the Court by John Voelker, then Director of State Courts. The Director serves as an *ex officio* member of the Forum.

The impetus for WIS. STAT. § 801.54 was the *Teague* decisions[1] and the subsequent so-called Teague Protocols adopted by the Ninth and Tenth Judicial Districts. The Forum recognized that

[1] ***Teague v. Bad River Band of Lake Superior Chippewa Indians***, 229 Wis. 2d 581, 559 N.W.2d 911 (Ct. App. 1999) ("Teague I"); ***Teague v. Bad River Band of Lake Superior Chippewa Indians***, 2000 WI 79, 236 Wis. 2d 384, 612 N.W.2d 709 ("Teague II"); ***Teague v. Bad River Band of Lake Superior Chippewa Indians***, 2003 WI 118, 265 Wis.2d 64, 665 N.W.2d 899 ("Teague III").

the Teague Protocols were unwieldly in many respects and required actual competing claims of jurisdiction between state courts and tribal courts before being invoked. Why couldn't there be a mechanism for the transfer of a case when the parties agreed, when one party suggested a transfer, or when a circuit court itself recognized that a particular case may be more appropriately heard in a tribal court forum?

The Supreme Court sought comment from 34 agencies and organizations potentially having an interest in the rule petition. All parties responding to the Court's request supported the rule petition, including the Committee of Chief Judges, the State Bar of Wisconsin, the Indian Law Section of the State Bar, the Indian Law Office of Wisconsin Judicare, the Wisconsin Tribal Judges Association, individual circuit court and tribal court judges, and others. No comment was received opposing the rule petition. All persons and entities who offered comment at the petition hearing on January 8, 2008 supported the petition.

Following the initial hearing, the Supreme Court sought additional comments on three issues: 1) concurrent vs. exclusive jurisdiction in state or tribal courts; 2) state or federal constitutional rights to have a case determined in circuit court rather than tribal court; and 3) how the adoption of the rule petition would impact WIS. STAT. § 806.245, which grants full faith and credit to tribal court judgments. Written submissions were received from the Forum, the Great Lakes Indian Law Center of the University of Wisconsin Law School, and the Wisconsin Department of Justice. Following these comments, the Wisconsin Joint Legislative Council's Special Committee on State-Tribal Relations submitted a memorandum containing technical comments about the original and revised drafts to the petition.

On June 24, 2008, the Supreme Court received a comment from the Village of Hobart requesting that adoption of the petition be delayed pending a further public hearing. On the following day, the Court adopted WIS. STAT. § 801.54, effective January 1, 2009, which contained a number of revisions from the original rule petition. Justices Roggensack, Prosser and Ziegler dissented from the adoption of § 801.54, and the statute's adoption provided for a review of the statute two years after its effective date.

Subsequent Amendment and Renewal of § 801.54

In February of 2009, the Wisconsin Department of Children and Families ("DCF") petitioned the Court to amend WIS. STAT. § 801.54 to facilitate the transfer of post-judgment child support cases by eliminating the requirements of affirmative notice and separate hearings, which would make transfer of large numbers of such cases to tribes that were prepared to initiate their own child support enforcement programs under Title IV-D of the Federal Social Security Act, 42 U.S.C. 654, et al., unduly burdensome and cost-prohibitive (several Wisconsin tribes had

previously established such programs and had actually accomplished transfer of their cases from circuit court to tribal court before the adoption of WIS. STAT. § 801.54). This amendment created subsection (2m) of § 801.54, and was approved by the Supreme Court on July 1, 2009. Justices Roggensack, Ziegler and Gableman dissented to the statute's amendment.

On October 18, 2010, the Supreme Court conducted a public hearing to review the operation of WIS. STAT. § 801.54 and to determine whether it should be continued. A number of individuals and entities provided written comments and testified at that hearing. At the ensuing open administrative conference the majority of the Court determined that § 801.54 was working as expected and approved continuation of the statute for another five years with a subsequent review. Justices Roggensack, Ziegler and Gableman again dissented to the statute's continuation.

Those five years have now come and gone, and the Supreme Court is again conducting its review of § 801.54.

WISCONSIN STAT. § 801.54 in Operation

As the Forum advised the Court at the time of WIS. STAT. § 801.54's initial review in 2010, by all evidence the statute continues to function well, and as expected. Anecdotally, § 801.54 has seen a relatively moderate amount of use outside of the child support context, and the Forum has received no reports of dissatisfaction concerning the statute's use or implementation.[2] The use of § 801.54 in the transfer of child support cases under subsection (2m) has been extraordinarily successful, which will undoubtedly be supported by the submission and testimony of DCF and others. The vast majority of other cases in which § 801.54 has been successfully utilized are family law matters. In all the years since adoption of § 801.54 in 2008, only two cases have resulted in appellate review.[3] Those cases will be discussed in the comments below.

Despite the demonstrated success of WIS. STAT. § 801.54 in practice, the Forum recognizes that the issues raised by the dissenting justices at the time of § 801.54's initial adoption, amendment and review continue to concern the Court, as evidenced by the opinions in ***Kroner v. Oneida Seven Generations Corp.***, 2012 WI 88, 342 Wis. 2d 626, 819 N.w.2d 264. The Forum will devote much of its comments to these concerns.

---

[2] The Forum has investigated whether CCAP is able to provide reliable numbers regarding the extent of the use of WIS. STAT. § 801.54. We have been advised that it is unable to do so due to inconsistent use of forms and inconsistent coding in data entry. Much of the information to this Court remains anecdotal, although DCF will be better able to quantify the child support transfers under subsection (2m), which represent the vast majority of discretionary transfers.

[3] ***Kroner v. Oneida Seven Generations Corp***., 2012 WI 88, 342 Wis.2d 626, 819 N.W.2d 264; ***Harris v. Lake of the Torches Resort & Casino & Casino*** , 2014AP1692, unpublished slip op., (Ct. App. Mar. 10, 2015).

Addressing Concerns About the Statute

A. Concurrent Jurisdiction

WISCONSIN STAT. § 801.54 has been characterized as inadequate and misleading in regard to addressing the existence of concurrent tribal court subject matter jurisdiction. That is not the case: § 801.54 itself is entirely neutral in this regard. The mere existence of a rule permitting discretionary transfer does not constitute an acknowledgement that tribal courts have concurrent jurisdiction in every case, or even in any particular case.

WISCONSIN STAT. § 801.54 only applies when there is concurrent jurisdiction. This is a fundamental prerequisite. Indeed, § 801.54(2) explicitly directs that "(t)he circuit court must first make a threshold determination that concurrent jurisdiction exists." As noted by the dissenters to § 801.54, this is not always an easy question, and can require particularly careful legal analysis when one of the parties to the litigation is not a tribal member. But the circuit courts in Wisconsin are routinely called upon to make difficult and sophisticated legal decisions in all manner of cases, and the great majority of those decisions are upheld on appellate review, which bespeaks the ability of the circuit courts to make them.

Whether a tribal court has adjudicative authority over nonmembers is a federal question. ***Plains Commerce Bank v. Long Family Land & Cattle Co***., 554 U.S. 316, 324 (2008). The fact that it is a federal question does not deprive a Wisconsin circuit court of the ability to make it. Indeed, in a Public Law 280 state no other forum is available to make such a determination. That simply means that the court must turn to federal law and precedent, rather than to state or tribal law. Circuit courts routinely apply federal law in many other contexts.

The Forum recognizes that generally tribes lack authority over nonmembers and that such authority is particularly limited regarding activities of nonmembers on non-Indian lands. ***Montana v. United States***, 450 U.S. 544, 565 (1981); ***Plains Commerce***, 554 U.S. at 332-333. However, ***Montana*** does recognize two important exceptions to the general rule. The first ***Montana*** exception deals with the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements. The second deals with the conduct of non-Indians on the lands within a reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or the health and welfare of the tribe. ***Id.*** Determining the applicability of either of these exceptions requires an examination of the basic facts of the case and application of those facts to the law established by ***Montana*** and its progeny, again something circuit courts are routinely called upon to do.

Montana and ***Plains Commerce*** both deal with non-Indians on non-tribal fee lands, but concurrent tribal court jurisdiction may be broader in other contexts. As the ***Montana*** court itself acknowledged, tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. ***Montana***, 450 U.S. at 565-566. ***Plains Commerce*** reaffirmed that ***Montana*** and its progeny permit tribal regulation of nonmember conduct inside the reservation when it implicates the tribe's sovereign interests. ***Plains Commerce***, 554 U.S. at 332. In ***Strate v. A-1 Contractors***, 520 U.S. 438 (1997), the Supreme Court stated it was an "unremarkable proposition" that where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts. ***Id***. at 453. ***See also, Iowa Mut. Ins. Co. v. La Plante***, 480 U.S. 9, 17-18 (1987).

In the family law context, where we have experienced the vast majority of § 801.54 transfer motions, concurrent tribal court jurisdiction is broader yet. In ***Fisher v. District Court of Sixteenth Judicial Dist. of Montana***, 424 U.S. 382, (1976) the Supreme Court determined that a tribal court had *exclusive* jurisdiction over an adoption proceeding when all the parties were tribal members residing on the reservation. The Court held that state court jurisdiction on such matters would plainly interfere with the powers of self-government conferred upon the tribe, and said state courts may not exercise jurisdiction over disputes arising out of on-reservation conduct even over matters involving non-Indians if doing so would infringe upon the right of reservation Indians to make their own laws and be ruled by them. ***Id***. at 386.

Fisher arose in a non-Public Law 280 state. Here in Wisconsin, jurisdiction may be concurrent in both the state and tribal courts because of Public Law 280's grant of civil adjudicatory authority to the state, but obviously the principles involved in ***Fisher*** would bear particular consideration in a § 801.54 transfer motion. At the very least, it should be acknowledged that consensual relations between tribal members or between a tribal member and a nonmember involving marriage or having children in common should squarely fall with the first ***Montana*** exception, and that issues concerning the custody, placement and support of those children clearly implicates the welfare of the tribe under ***Montana's*** second exception, as the tribe has important interests in determining the welfare of children who may be living on the reservation and who may be eligible for enrollment or otherwise entitled to certain privileges or benefits as descendants of tribal members. In this regard, it should also be pointed out that it is very common for a nonmember parent to be Native American, thus sharing significant cultural heritage, but actually be an enrolled member of another tribe.

WISCONSIN STAT. § 801.54 is also criticized on the basis that the tribe's burden of proof to establish one of the ***Montana*** exceptions (***Plains Commerce***, 554 U.S. at 330) is impermissibly relieved when the circuit court transfers a case on its own motion. That is also not the case. Regardless of whether the motion is made by a party or the court itself, § 801.54 requires notice

and a hearing on the record. The circuit court must still make the threshold determination that concurrent jurisdiction exists, which of necessity would require examination of the ***Montana*** exceptions if one of the parties is not a tribal member. The court must be satisfied that the burden of proof has been met in this regard before proceeding to examine the relevant factors bearing on its discretion to grant or deny transfer. It is important that a circuit court has the ability to raise this issue on its own motion, because in the great majority of cases the litigants will be *pro se* and unaware of the possibility of transfer to a forum that may be more acceptable and more convenient. It is nonetheless obviously incumbent upon the circuit court to satisfy itself that the burden is met.

B. Rights of the Litigants

Whether the rights of litigants are undermined by WIS. STAT. § 801.54 is of significant concern to this Court, and appropriately so. The Forum believes that § 801.54 respects the rights of litigants when dealing with a determination of jurisdiction between the courts of two sovereigns.

Public Law 280 specifically granted to the courts of Wisconsin civil adjudicatory jurisdiction to hear private disputes between Indians or involving an Indian party.[4] Thus, in almost all civil cases (unless one party is a tribe and issues of sovereign immunity apply), the broad subject matter jurisdiction conferred on Wisconsin's circuit courts will apply. However, there was nothing in Public Law 280 which terminated or gave away the inherent and ongoing jurisdictional powers of the tribes as domestic dependent sovereigns. They retained the right to govern their own affairs and to establish courts to adjudicate disputes between tribal members and between the tribe or a tribal member and a nonmember if the ***Montana*** exceptions apply. ***Teague II*** specifically recognizes the tribes' status as separate sovereigns and acknowledges the powers of tribal courts. ***Teague v. Bad River Bad of Lake Superior Chippewa Indians***, 2000 WI 79, ¶¶21-26, 236 Wis.2d 384, 612 N.W2d 709

Teague II recognized that when concurrent jurisdiction did exist between the courts of separate sovereigns that principles of comity required those courts to confer and to consider a number of identified factors in order to allocate jurisdiction between them. This is not because each of the courts will afford identical rights and procedures, but because it is important that ultimately the interests of one sovereign or the other yield to produce a final judgment that will be respected by both.

[4] When Public Law 280 was enacted in 1953, civil adjudicatory authority was granted to the states because after many decades of federal control, few tribes even had their own courts. Much has changed. Now, all eleven of Wisconsin's federally recognized tribes have their own tribal courts, and all of those courts have provisions for appellate review of their decisions.

As previously noted, WIS. STAT. § 801.54 incorporates all the comity factors found in ***Teague II***. Those factors are found in § 801.54(2)(a-k), and, properly applied, will respect the rights of the litigants. It would be completely anomalous to think that applying a Teague Protocol in a hotly contested jurisdictional dispute could properly result in a transfer to tribal court, but that the exercise of discretion using the same factors under § 801.54 could preclude the very same result. Indeed, § 801.54 actually provides a much more detailed road map for circuit courts to follow in actually promoting the principles of ***Teague II***.

Four factors ultimately protect the interests of the litigants: first, the proper exercise of discretion by a circuit court judge after careful and full consideration of the factors set out in the § 801.54 [5]; second, the right of direct appeal of an order to transfer to tribal court; third, the fact that the circuit court retains jurisdiction over the matter for five years from the date of transfer and can order the case returned if circumstances warrant, and fourth, the unquestioned ability and desire of tribal court judges to achieve real justice for the parties who appear before them.

Importantly, we must remember that WIS. STAT. § 801.54 was not only designed to provide a means of avoiding the cost and conflict of a Teague-type case, but without it there is *no* mechanism for transfer, even when both parties are tribal members, and even when the parties agree, which has proven to be the case in the overwhelming number of cases employing § 801.54.

Finally, as noted by this Court in ***Kroner***, Wisconsin already permits the transfer of cases to other jurisdictions under WIS. STAT. § 801.63, presumably even to the courts of a foreign nation, where procedures will differ and where neither the U.S. Constitution nor the Wisconsin Constitution may apply. Section 801.63 requires a circuit court to determine that the transfer should be effected as a "matter of substantial justice." The Forum submits that proper application of WIS. STAT. § 801.54 could not result in anything less.

The *Kroner* and *Harris* Decisions

As noted previously, in the nearly seven years that § 801.54 has been in effect only two cases involving that statute have received appellate review: ***Kroner***, 2012 WI 88, 342 Wis.2d 626, 819 N.W.2d 264, and ***Harris v. Lake of the Torches Resort & Casino***, 2014AP1692, unpublished slip op. (Ct. App. March 10, 2015). ***Kroner***, of course, was decided by this Court. ***Harris*** is an

[5] As Justice Prosser noted in *Kroner*, "[the Rule] appears to be working well and without difficulty in most cases. It is the uncommon case in which a litigant files suit in circuit court, because he or she prefers not to be in tribal court, that creates controversy and produces substantive problems." *Kroner v. Oneida Seven Generations Corp*., 2012 WI 88, ¶ 48; 342 Wis.29 626, 654 (2012). It goes without saying that any circuit judge contemplating transfer in such a case, in light of this Court's admonitions in *Kroner*, will exercise great caution.

unpublished per curiam decision from the District III Court of Appeals and therefore has limited precedential value, but because it may be consulted by judges or attorneys doing legal research, several aspects of that case bear consideration in the context of this review.

A. ***Kroner***

John Kroner was employed as the CEO of Oneida Seven Generations Corp., a tribally chartered corporation and wholly tribally-owned entity under the direction of the Oneida Business Committee, the business arm of the Oneida Tribe of Wisconsin (hereinafter "the Tribe"). Kroner's employment was terminated and he brought suit in Brown County Circuit Court alleging breach of contract and wrongful termination. As noted by the Court of Appeals decision in *Kroner,*[6] the Tribe moved to dismiss based on a claim of sovereign immunity and also moved to dismiss for failure to state a claim. The sovereign immunity motion was *never decided* by the circuit court. Following a hearing on the motion to dismiss for failure to state a claim, the circuit judge suggested that the matter should potentially be heard by the Oneida Tribal Judicial System. The tribal court indicated it would accept transfer if made under WIS. STAT. § 801.54, and the Tribe then moved for discretionary transfer in Brown County. Following hearing on the motion, the circuit court ordered the case to be transferred to tribal court. After an unsuccessful motion to reconsider, Kroner appealed.

The circuit court's order to transfer was ultimately reversed by this Court. WISCONSIN STAT. § 801.54 was not in effect when ***Kroner*** was filed, but became effective prior to the circuit court's transfer order. Three justices determined that the circuit court failed to adequately address the required factors contained in the Rule and further failed to adequately address the issue of § 801.54's retroactive application, and ordered remand. Four justices determined that § 801.54 could not be applied retroactively and ordered that the case remain in circuit court and be remanded for further proceedings in that forum.

Much of the opinions in ***Kroner*** contain a review of § 801.54's history and creation, and a restatement of the criticisms of § 801.54 addressed by the dissenting justices at the time of its adoption, amendment and initial review. The Forum has previously addressed those matters in this memorandum (retroactive application of § 801.54, of course, is an issue that will no longer concern us).

The ***Kroner*** decision does, however, provide valuable guidance to the circuit courts by emphasizing in a precedential decision the necessity of making the important threshold determination of concurrent jurisdiction, the necessity of carefully considering *all* of the required factors related to discretionary transfer, and the necessity of making a specific finding on the record as to each. It also contains reference to the seminal case of ***Montana***, and other cases

[6] ***Kroner v. Oneida Seven Generation Corp***., 2010AP2533, unpublished slip op. (Ct. App. June 1, 2011).

such as ***Plains Commerce Bank***, which provide a valuable starting point for a circuit court's determination on these issues.

However, an important issue in ***Kroner*** was not addressed. The concern in that case was whether John Kroner could be made subject to the jurisdiction of the tribal court, and how that may affect *his* rights as a litigant. No consideration was given to the rights of the Tribe, which never had its motion to dismiss on grounds of sovereign immunity heard or decided. The emphasis on determining concurrent jurisdiction focused on whether the *tribal* court had such jurisdiction and did not address the issue of whether the *circuit* court did.

There is no question that Brown County Circuit Court had subject matter jurisdiction in the broad sense. The matter involved claims of breach of contract and wrongful discharge, matters commonly resolved by our state courts. In addition, Public Law 280 clearly confers civil adjudicatory jurisdiction upon a circuit court in cases involving at least one Indian party. And there was no question of personal jurisdiction in the case, or of venue. But a claim of tribal sovereign immunity implicates *subject matter* jurisdiction, which is also referred to in Wisconsin as a circuit court's competence to act. ***E.F.W. v. St. Stephen's Indian High School***, 264 F.3d 1257, 1302 (10th Cir. 2001).

Although the record on appeal (at least as can be discerned from the decisions of the Court of Appeals and this Court) contains no information upon which to determine the claim of sovereign immunity, it seems unlikely that either the organizing documents of Oneida Seven Generations Corp., or its employment contract with Mr. Kroner would contain a valid waiver of sovereign immunity, an issue that all tribes pay keen attention to. The circuit court may well have lacked competence to hear Mr. Kroner's lawsuit in the first place.

Since ***Worcester v. Georgia***, 31 U.S. 515 (1832), our courts have consistently held that Indian tribes are distinct, independent political communities that possess the common law immunity from suit traditionally enjoyed by sovereign powers. ***Puyallup Tribe v. Washington Department of Game***, 433 U.S. 165 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary power of the United States Congress, but, without congressional authorization, the Indian nations are exempt from suit. ***Santa Clara Pueblo v. Martinez***, 436 U.S. 49 (1978).

Case law makes clear that sovereign immunity can not be waived by a tribal attorney or any other tribal official absent an act of Congress or the delegation of that authority by formal action of the duly elected tribal council. ***United States v. U.S. Fidelity Co.***, 309 U.S. 406 (1940). A waiver of sovereign immunity can not be implied by conduct but must be unequivocally expressed. ***Santa Clara Pueblo***, 436 U.S. at 58; ***Calvello v. Yankton Sioux Tribe***, 584 N.W.2d

108 (S.D. 1998).. A "clear waiver" is required. ***Oklahoma Tax Comm. v. Citizen Band Potawatomi Tribe of Oklahoma***, 498 U.S. 505, 509 (1991).

Therefore, the fact that the Tribe may have proceeded in Brown County Circuit Court without insisting that its sovereign immunity motion be determined has no bearing on whether the circuit court did in fact have competence to proceed. When a court acts in excess of its jurisdiction or competence, its judgments are void and may be challenged at any time. ***Kohler Company v. ILHR***, 81 Wis.29 11, 259 N.W.2d 695 (1987).

B. *Harris*

For the most part, ***Harris*** does not directly implicate the operation of WIS. STAT. § 801.54, but it is illustrative of the importance of determining initial competence of the circuit court before looking at concurrent jurisdiction in the tribal court. Benjamin Harris was a non-tribal member employed in the casino's kitchen operation. He suffered a severe hand injury in an industrial mixer accident and sought compensation from the tribe. Frustrated in his attempts, he sued in Vilas County Circuit Court. The tribe filed a special appearance requesting an allocation of jurisdiction between the circuit court and the Lac du Flambeau Tribal Court under ***Teague***.[7] It then filed a motion for discretionary transfer under § 801.54, and before that motion was heard filed an answer to Harris' complaint. Both the motion and answer raised the issue of sovereign immunity. The circuit court acknowledged that the tribe had not waived its claim of sovereign immunity but granted the tribe's motion to transfer under § 801.54 after making findings as to the *tribal court's* concurrent jurisdiction. Following a rather tortured history (which is not relevant to our present discussion), the case was returned to circuit court and a judgment was rendered on behalf of Mr. Harris. The tribe brought a motion for reconsideration, again specifically raising the issue of sovereign immunity. That motion was granted, the judgment was vacated, and the case was dismissed. The dismissal was upheld by the court of appeals.

What is the importance of ***Harris***? It again emphasizes that jurisdiction must be determined as to *both* the circuit court and the tribal court. Circuit court competence to proceed can no more be presumed than tribal court jurisdiction. In initially examining jurisdiction, the circuit court made a mistake in finding *subject matter* jurisdiction in the factual issues in the case (i.e., a workplace injury and damages) and incorrectly looked at its ability to exercise jurisdiction over the tribe as one of *personal* jurisdiction (service of process, etc.). That error was ultimately corrected upon reconsideration, but only after considerable events had taken place. Vilas County Circuit Court never had competence to hear the matter, which means it also lacked competence to grant the tribe's initial motion to transfer under § 801.54.

[7] This is not a case in which the 9th Circuit Teague Protoccol was applicable because there was no case filed and pending in the Lac du Flambeau Tribal Court.

Improving Application of § 801.54

The Forum believes that § 801.54 has served its intended purpose well and has worked without incident or complaint in the vast majority of circumstances. It does not require substantial revision. As noted, the ***Kroner*** decision goes a long way to tell circuit judges how to approach a motion to exercise discretionary transfer. Nonetheless, a couple of things may help ensure correct application of § 801.54.

First, to address the lurking problem of correctly finding concurrent jurisdiction as noted above, it might be advisable for WIS. STAT. § 801.54 to make clear that the "threshold determination" of concurrent jurisdiction includes a determination of both the circuit court's competence and the tribal court's authority to exercise subject matter jurisdiction.

Second, it may be advisable for the Forum to encourage and assist the Civil Benchbook Committee to include a specific section on handling WIS. STAT. § 801.54 motions, which would be helpful to all judges that might have this matter before them. The Family Law Benchbook could contain the same materials or a cross-reference to the Civil Benchbook.

Third, the Wisconsin Tribal Judges Association should be encouraged to ensure that the various tribal courts' jurisdictional and procedural documents be periodically reviewed to maintain currency. Most tribal courts already post these matters on their tribal court websites, and those that have not yet should be requested to do so.

Fourth, the Forum should continue to work with the Office of Judicial Education to make education on § 801.54 and the issues involved periodically available to Wisconsin judges. Because of retirements, new judicial appointments and elections, that work is never completed.

Conclusion

WISCONSIN STAT. § 801.54 should be permanently adopted without substantial revision. It works. The Forum knows § 801.54 has been looked at by the courts of other states as a model to follow in building solid relationships between state and tribal courts, a matter that is of considerable importance to advance both federal and state policies in favor of tribal self-determination and self-government, as pointed out by this Court in ***Teague II***. As this Court noted at § 801.54's initial adoption, tribal courts play an important role in providing meaningful dispute resolution. Most of the cases transferred under the Rule involve only tribal members, often pro se litigants, who have no objection to having their matters heard in tribal court.

Because so many of these cases involve such litigants, it is important to preserve the ability of the circuit court to initiate a motion to transfer when it appears appropriate.

The substantive rights of litigants are respected by careful and appropriate use of § 801.54 consistent with the principles of ***Teague II***, and ***Kroner*** ensures that the concerns expressed by each member of this Court will be given careful consideration by the circuit courts in Wisconsin.

Respectfully Submitted,

Neal A. Nielsen III, Chair
Wisconsin State-Tribal Justice Forum

NAN:kam

cc: Julie Anne Rich, Supreme Court Commissioner
J. Denis Moran, Director of State Courts