



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

March 18, 2008

**RECEIVED**

MAR 20 2008

CLERK OF SUPREME COURT  
OF WISCONSIN

David R. Schanker  
Clerk of the Supreme Court  
16 East, State Capitol  
Madison, Wisconsin 53701-1688

Re: Proposed Tribal Court Transfer Rule (Petition 07-11)

Dear Mr. Schanker:

At your request, I have reviewed the revised draft of the proposed Supreme Court rule governing the discretionary transfer of civil cases from Wisconsin courts to tribal courts. The revised draft of the proposed rule addresses (at least in part) each of the four subject areas in which the Department of Justice (DOJ) made recommendations.

Below are the recommendations made in our February 22, 2008 letter to the Court, followed by the corresponding changes in the revised draft and comments.

**First DOJ recommendation:**

Clarify what happens to the jurisdictional status of a case under Wisconsin law after a transfer to a tribal court.

**Corresponding change in revised draft:**

In the event jurisdiction in a tribal court is successfully challenged by a party (or if the merits of the case are not resolved in the tribal court), a party may petition the circuit court to assume jurisdiction and to reopen the case in the circuit court.”

**Comment:**

This change directly addresses DOJ’s recommendation.

**Second DOJ recommendation:**

Before transferring a case to tribal court, a circuit court should assure itself: (a) that the tribal court will provide an adequate forum for the litigants to assert all of their legal claims, including claims arising under federal law, as well as Wisconsin law; and (b) that equivalent rights and procedures are available in both court systems, including constitutional rights and, in particular, the right to a jury trial.

**Corresponding changes in revised draft:**

The following pertinent items are added to the list of factors to be considered by the circuit court:

Whether each court will provide an adequate forum for the litigants to assert all state and federal legal claims

Whether each court will provide adequate protection of a litigant's rights under the Wisconsin Constitution and the Constitution of the United States

**Comment:**

These changes directly address DOJ's recommendation.

**Third DOJ recommendation:**

Clarify the procedures for appealing a transfer decision under the rule and provide for an automatic stay of a transfer to tribal court pending completion of such an appeal; and

**Corresponding change in revised draft:**

The decision of a circuit court to transfer jurisdiction is appealable

**Comment:**

This change makes it clear that a transfer decision by a circuit court is appealable. The change, however, does not address DOJ's expressed concern about possible jurisdictional problems in situations where a state appeal proceeds at the same time as the transferred case is going forward in a tribal court. We therefore reiterate our request that the rule provide an automatic stay of a transfer to tribal court pending completion of an appeal.

**Fourth DOJ recommendation:**

Amend the list of comity factors in the rule to reflect: (a) the statutory full faith and credit requirements of Wis. Stat. § 806.245; (b) the *Teague III* factors, particularly those that give greater weight to the interests of individual litigants; and (c) traditional comity principles related to due process and the fundamental fairness of judicial proceedings conducted by another sovereign.

**Corresponding changes in revised draft:**

The following pertinent items are added to the list of factors to be considered by the circuit court:

The institutional and administrative interests of each court

The relative burdens on the parties, including cost, access to and admissibility of evidence, and matters of process, practice, procedure, including where the action will be heard and decided most promptly

Whether each court has jurisdiction over the dispute

Whether the judgment of the tribal court will be entitled to full faith and credit under Wis. Stat. § 806.245

**Comment:**

These changes address DOJ's concerns about the relationship of the proposed rule to Wis. Stat. § 806.245 and most of the concerns about its relationship to the *Teague III* factors. The one area of remaining difference is that the jurisdictional factor in the revised draft still calls for consideration only of subject matter jurisdiction, whereas the corresponding factor in *Teague III* additionally calls for consideration of whether each court has jurisdiction over the parties and whether either court has determined its own jurisdiction. We recommend the rule include these *Teague III* factors as well. The revised draft also does not expressly address traditional comity principles related to due process and fundamental fairness, but those principles are arguably encompassed within the "adequate forum" provision discussed earlier.

\* \* \*

We appreciate the opportunity to comment on the latest version of the proposed rule.

Sincerely,



Raymond P. Taffora  
Deputy Attorney General

RPT: TCB: pss