

Engendering Tribal Court/State Court Cooperation

By Judge Robert A. Blaeser with Andrea L. Martin

Minnesota tribal court and state court judges have worked for nearly ten years to foster professional relationships between the courts and develop means to address disputes arising from their concurrent jurisdictions. The Teague Protocol, adopted by courts in Wisconsin to address similar issues, offers a model for tribal court/state court relations in Minnesota.

Ten district courts, the Minnesota Court of Appeals, the Minnesota Supreme Court, and the United States District Court for the District of Minnesota -- it may surprise some Minnesota attorneys to learn that this is not an exhaustive list of courts operating within the borders of Minnesota. In addition to the aforementioned courts, there are 13 well-established tribal courts that operate within Minnesota.¹

All of the tribal courts exercise general civil jurisdiction and some of the tribes or bands also exercise misdemeanor criminal jurisdiction. On the surface, this may seem no different than the state and federal systems which operate side by side. As interactions between tribal members and nonmembers increase in our growing economy, conflicts requiring judicial resolution also increase. Problems arise in determining which system should most appropriately exercise jurisdiction over such conflicts and how orders and judgments of each system should be treated.

This article will explore how Minnesota state courts and tribal courts have sought to resolve jurisdictional disputes and will describe an alternative approach inspired by the Wisconsin Supreme Court that is known as the Teague Protocol. Both the cooperative nature and the recent success of the Teague Protocol approach in Wisconsin encourage hope that Minnesota state courts and tribal courts may find it instructive and implement its features in resolving jurisdictional disputes.

Tribal Court/State Court Forum

Minnesota state courts and tribal courts first began to seriously address the disputes arising from their concurrent jurisdictions through creation of the Tribal Court/State Court Forum in 1997. The Forum comprises a state court committee and a tribal court committee, and includes tribal court representatives and members of various levels of the Minnesota state judiciary. Although its membership has changed over the years, the Forum has for most of the past decade gathered quarterly to discuss common issues, foster professional relationships, and work on issues that cross jurisdictional boundaries.² The Tribal Court/State Court Forum meets alternatively at a tribal location and a state court location.

For about six of the past ten years, the Forum focused its research and attention on the issue of providing full faith and credit to tribal court orders and judgments.³ After reviewing how 23 other states had handled application of full faith and credit to tribal court judgments and looking at the best practices, the Forum drafted a proposed full faith and credit rule for Minnesota, which it presented by petition filed with the Minnesota Supreme Court on April 11, 2002.

Prior to the public hearing on the proposed rule, the Minnesota State Bar Association Board of Governors voted unanimously to endorse it. The Conference of Chief Judges (predecessor to the current Judicial Council), which considered the petition on June 26, 2002, amended the proposed rule to include a reference to due process but then gave it their unanimous

endorsement.⁴ Ten of Minnesota's 11 tribes agreed to provide full faith and credit to state court orders if the rule was adopted. In fact, many Minnesota tribal courts already had their own rules regarding the grant of full faith and credit to orders and judgments of other tribal, state or federal courts.

The Supreme Court requested that the Supreme Court Advisory Committee on General Rules of Practice consider the rule and make a recommendation. The advisory committee recommended that the rule not be implemented and, following a hearing in October, the Supreme Court declined to adopt the proposed rule. Instead, the Supreme Court adopted Rule 10 of the Minnesota General Rules of Practice for the District Courts on December 11, 2003.⁵

Unlike the proposed rule, Rule 10 was not a full faith and credit rule, but one based on comity. There are two parts to Rule 10 as adopted. Rule 10.01 recognizes that state or federal statutes mandate that some tribal court orders be recognized and enforced.⁶ All other tribal court orders, however, are subject to the doctrine of comity pursuant to Rule 10.02.⁷ As the advisory committee comment makes clear, under Rule 10.02(a) recognition of a tribal court order is discretionary and highly fact-specific.

The rule identifies a number of factors a Minnesota judge may consider in determining what effect to give a tribal court order. The factors include: 1) whether the party against whom the order of judgment would operate has had notice and been given an opportunity to be heard; 2) whether the order or judgment appears facially valid and remains in effect; 3) whether the tribal court had both subject matter and personal jurisdiction; 4) whether the issuing tribal court was a court of record; 5) whether the order or judgment was obtained by fraud, duress, or coercion; 6) whether the order or judgment was obtained through a process consistent with traditional notions of due process; 7) whether the order or judgment contravenes public policy of this state; 8) whether the order or judgment is final under the law and procedure of the rendering court, as opposed to another type of protective, temporary, or emergency order; 9) whether the tribal court reciprocally provides for recognition and enforcement of state court orders; and 10) any other factors appropriate in the interest of justice.⁸

The Teague Cases

During roughly the same period of time that the Minnesota Tribal Court/State Court Forum commenced operation and pursued a full-faith and credit rule, the Wisconsin appellate courts addressed the concurrent and conflicting jurisdiction of state and tribal courts in three separate decisions in the matter of *Teague v. Bad River Band of Lake Superior Chippewa Indians*.⁹ Like Minnesota's statute, Wisconsin's statute regarding recognition of tribal orders and judgments, Wisconsin Statute §806.245, is based on comity, rather than full faith and credit.¹⁰

Jerry Teague, although not a member of the Bad River Band, was employed by Band's Bad River Casino as its general manager. Teague entered two employment contracts with the Band, one in November 1993 and another in March 1995. Following his termination in July 1995, he filed an action in Ashland County Circuit Court of Wisconsin, seeking to compel arbitration under the contracts. In response, the Band moved to dismiss on sovereign immunity grounds, which the circuit court denied.¹¹ Later, in December 1996, the Band filed a separate action in the Bad River Tribal Court seeking a declaratory judgment that the contracts were invalid and, in January 1997, the Band asked the Wisconsin circuit court to stay its proceedings according to the rule requiring the prior exhaustion of tribal remedies announced in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*.¹² While Teague's attorney accepted service of the amended tribal court complaint, he did not file a responsive pleading in tribal

court. Similarly, Teague's attorney also did not seek a stay of the tribal court proceedings or appear before the tribal court to challenge the jurisdiction. He did, however, participate in discovery, which was conducted simultaneously in both cases. On May 29, 1997, the Band moved for default judgment in tribal court, requesting that the contracts be found invalid, which the tribal court granted. Following the tribal court judgment, the Band sought full faith and credit in Wisconsin circuit court.¹³ The circuit court denied the Band's motion, relying on the "prior action pending" rule of *Syver v. Hahn*.¹⁴ Because the case was first filed in state court, the Wisconsin circuit court held that the tribal court, as a court of concurrent jurisdiction, did not properly have jurisdiction over the matter.¹⁵

In *Teague I*, the Wisconsin Court of Appeals reversed the circuit court, holding that the "prior action pending" rule of *Syver* did not render the tribal court judgment invalid.¹⁶ On review, the Wisconsin Supreme Court in *Teague II* agreed that the *Syver* rule did not apply but reversed the Court of Appeals decision and ordered the circuit court to hold a jurisdictional allocation conference with the tribal court judge.¹⁷ The Wisconsin Supreme Court envisioned that the two judges would step back in time to the point when they had first learned of the parallel actions and would then discuss the applicable comity concerns to decide which court should have exercised its jurisdiction.¹⁸ The joint meeting, dubbed a "jurisdictional allocation conference" and since then known as a "Teague Conference," is now used in Wisconsin to assign jurisdiction between state and tribal courts when the parties are identical and the courts have concurrent jurisdiction.¹⁹

Wisconsin state and tribal courts received considerable leadership from Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court in her *Teague III* concurring opinion.²⁰ Chief Justice Abrahamson stated:

Thus, this case must be governed by principles of comity, not Wis. Stat. §806.245. Comity is based on respect for the proceedings of another system of government and a spirit of cooperation. Comity endorses the principles of mutual respect between legal systems, recognizing the sovereignty and sovereign interests of each governmental system and the unique features of each legal system. It is a doctrine that recognizes, accepts, and respects differences in the process.²¹

Chief Justice Abrahamson continued:

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. Through principles of comity, federal and state governments can develop an increased understanding of tribal sovereignty, encourage deference to and support for tribal courts, and advance cooperation, communication, respect and understanding in interacting with tribal courts. Central to tribal sovereignty is the capacity for self-government through tribal justice mechanisms. Tribal Justice Systems are essential to the maintenance of the culture and identity of Indian tribes.²²

Chief Justice Abrahamson went on to offer practical guidance to the courts, setting forth 13 factors for the state and tribal courts to consider when conferring on shared jurisdiction cases.²³

The Teague Protocol

The principles first developed in the *Teague* cases subsequently gained traction as the backbone of an agreement, the Teague Protocol, addressing cases involving shared state and tribal jurisdiction. At the “Walking on Common Ground” conference of tribal, state and federal representatives in Green Bay, Wisconsin in July 2005, Wisconsin’s 9th Judicial District and five Wisconsin tribes with property or reservations in the district signed the Teague Protocol.²⁴ The Teague Protocol adopts the 13 factors that Chief Justice Abrahamson, in her *Teague III* concurrence, indicated should be considered in determining which court shall exercise jurisdiction in a shared jurisdiction case.²⁵ The factors examine:

- 1) where the action was first filed;
- 2) the extent to which the case has proceeded in the first court;
- 3) the parties’ and courts’ expenditure of time and resources in each court;
- 4) the relative burdens on the parties including cost, access to and admissibility of evidence, and matters of process;
- 5) whether the nature of the action implicates tribal sovereignty;
- 6) whether the case requires application and/or interpretation of tribal or state law;
- 7) whether the case involves traditional or cultural matters of the tribe;
- 8) whether material events giving rise to the litigation are located on tribal or state land;
- 9) the relative institutional administrative interests of each court;
- 10) the tribal membership status of the parties;
- 11) the parties’ choice of forum or law by contract;
- 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 that is entitled to recognition.²⁶

Tribal court and state court judges who attended the 2005 “Walking on Common Ground: Pathways to Equal Justice” conference in Green Bay repeatedly stressed the importance of the process developed by the *Teague* decisions. The process of cooperation, and not the formal protocol it ultimately produced, engendered a spirit of cooperation between tribal courts and state courts in Wisconsin that has endured. Since the adoption of the protocol, tribal and state courts have been able to resolve every jurisdictional dispute themselves, without need for a third judge to break a deadlock as provided for in the protocol. The development of the Teague Protocol has brought a clearer understanding and mutual respect to both state and tribal courts and better cooperation and service to the clients of both courts.

Model for Minnesota

Currently, Minnesota is in a position similar to Wisconsin before the adoption of the Teague Protocol. Minnesota has Rule 10 based on comity, leaving the recognition of tribal court orders and judgments to the discretion of state court judges. Minnesota has an increasing need for tribal/state cooperation as tribal courts increase their jurisdiction and handle growing caseloads. Individuals and businesses served by both courts move freely and frequently from reservations to the city and back again. Because Wisconsin Statute §806.245 was not a true full faith and credit statute, much like Rule 10 of the Minnesota Rules of General Practice for the District Courts, Wisconsin needed to create the Teague Protocol to assist state and tribal judges

in their highly discretionary decisions. Now, it is time for Minnesota to adopt the Teague Protocol for its tribal and state courts as well. #

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Notes

¹ The 13 tribal courts are listed in the sidebar to this article. Twelve of those courts participated in creation of the Tribal Court/State Court Forum in Minnesota. See Amended Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments (hereinafter “Amended Petition”) at 4, In re: Rules of Procedure for the Recognition of Tribal Court Orders and Judgments (Minn. June 26, 2002). Available online at <http://maiba.org/pdf/FullFaithAndCredit102402.pdf>

² In 1999, the goals of the state court committee were described as follows: (1) To learn how tribal courts operate and generate their orders. (2) To meet and build relationships with tribal court judges to contribute to a more effective, consistent and efficient judiciary in the state of Minnesota. (3) To educate ourselves about the Indian Child Welfare Act and other federal statutes that mandate the state courts to recognize tribal court orders. (4) To jointly educate the public about the issues of full faith and credit, its impact on our communities and options to address the issue.

³ Amended Petition at C-1 to C-5 (App. C). Appendix C of the Amended Petition is a survey of the application of full faith and credit to tribal court judgments across 24 states, including Minnesota and Wisconsin. The survey details whether each state recognizes full faith and credit based on court rules, legislation, and/or case law.

⁴ Amended Petition at A-1 to A-3 (App. A). Appendix A reproduces the proposed rule as amended by the Conference of Chief Judges.

⁵ See Minn. R. Gen. Prac. 10 (2004).

⁶ Minn. R. Gen. Prac. 10.01 (2004). Among the statutes that mandate recognition and enforcement of tribal court judgments are the federal Violence Against Women Act of 2000, 18 U.S.C. §2265 (2006); Indian Child Welfare Act, 25 U.S.C. §1911(d) (2000); Full Faith and Credit for Child Support Orders Act, 28 U.S.C. §1738B(a) (2005); and The Uniform Child Custody Jurisdiction and Enforcement Act, Minn. Stat. §§518D.101–317 (2006).

⁷ Minn. R. Gen. Prac. 10.02 cmt. (2004).

⁸ Minn. R. Gen. Prac. 10.02 (2004).

⁹ *Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians*, 599 N.W.2d 911 (Wis. App. 1999) [hereinafter *Teague I*], *rev'd*, 612 N.W.2d 709 (Wis. 2000) [hereinafter *Teague II*], *appeal after remand*, 665 N.W.2d 899 (Wis. 2003) [hereinafter *Teague III*].

¹⁰ *Teague II*, 612 N.W.2d at 718.

¹¹ *Teague I*, 599 N.W.2d at 913.

¹² 471 U.S. 845, 856–57 (1985).

¹³ *Teague II*, 612 N.W.2d at 713. For a detailed discussion of the *Teague* case and opinions, see Beth Ermatinger Hanan & William H. Levit Jr., “Surveying the Boundaries: State and Tribal Court Jurisdiction,” *Wisconsin Lawyer*, June 2006.

¹⁴ *Teague II*, 612 N.W.2d at 713, (citing *Syver v. Hahn*, 94 N.W.2d 161 (Wis. 1959)).

¹⁵ *Id.*

¹⁶ *Teague I*, 599 N.W.2d 911, 916–17 (Wis. App. 1999)], *rev’d on other grounds*, 612 N.W.2d 709 (Wis. 2000).

¹⁷ *Teague II*, 612 N.W.2d at 719–21.

¹⁸ *See Id.*

¹⁹ *See* Ermatinger Hanan & Levit, *supra* note 13, at 58–60.

²⁰ *See Teague III*, 665 N.W.2d 899, 914–20 (Wis. 2003) (Abrahamson, C.J., concurring).

²¹ *Id.* at 916–17.

²² *Id.* at 917 (internal quotations and citations omitted).

²³ *Id.* at 917–18.

²⁴ Tony Anderson, “State, Tribal Courts Sign Jurisdictional Agreement,” *Wis. L. J.*, Aug. 3, 2005, online at <http://www.wislawjournal.com/archive/2005/0803/tribal.html>. Signatory tribes to the agreement included the Bad River Band of the Lake Superior Chippewa Indians, the Forest County Potawatomi Community, Lac du Flambeau Band of Lake Superior Chippewa Indians, Sokaogon Chippewa Community (Mole Lake), and the Stockbridge-Munsee Band of the Mohicans.

²⁵ *See* Tribal/State Protocol for the Judicial Allocation of Jurisdiction Between the Bad River Band of Lake Superior Chippewa Indians, Forest County Potawatomi Community, Ho Chunk Nation, Lac du Flambeau Band of Lake Superior Indians, Sokaogon Chippewa Community (Mole Lake), Stockbridge-Munsee Band of the Mohicans, and the 9th Judicial District of Wisconsin (on file with author) [hereinafter “Tribal/State Protocol”].

²⁶ Anderson, *supra* note 24; Tribal/State Protocol, *supra* note 25. In 2001, The 10th Judicial District of Wisconsin and four Chippewa tribes of Northern Wisconsin entered an agreement which considered similar factors. *Teague Protocol: Tribal/State Protocol for the Allocation of Jurisdiction Between the Four Chippewa Tribes of Northern Wisconsin and the 10th Judicial District of Wisconsin* (Dec. 7, 2001), online at <http://www.walkingoncommonground.org/web-data/Components/resources/Teague%20Protocol.pdf>.

SIDEBAR

Tribal Courts in Minnesota

1854 Treaty Court

Bois Forte Tribal Court

Fond du Lac Band of Chippewa Tribal Court

Grand Portage Tribal Court

Leech Lake Band of Ojibwe Tribal Court

Lower Sioux Community in Minnesota Tribal Court

Mille Lacs Band of Ojibwe Court of Central Jurisdiction

Minnesota Chippewa Tribe Tribal Court

Prairie Island Mdewakanton Dakota Community Tribal Court

Red Lake Nation Tribal Court

Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community

Upper Sioux Community Tribal Court

White Earth Band of Chippewa Tribal Court