

## **Enhancing Tribal – State Relations: The Tribal Experience in Wisconsin**

NAICJA 36<sup>th</sup> Annual Meeting and Conference  
Radisson Hotel and Conference Center  
October 27, 2005  
3:30 p.m. – 5:00 p.m.

Paul W. Stenzel  
Stenzel Law Office LLC  
P.O. Box 11696  
Shorewood, WI 53211  
414-963-9923  
<http://www.paulstenzel.com>

- In 2003 the Wisconsin Supreme Court decided Teague v. Bad River Band of Chippewa Indians, 2003 WI 118.
  - In 1995, Jerry Teague sued the Bad River Band of Chippewa Indians in state court in a dispute over the end of Mr. Teague’s employment. The Tribe filed a concurrent action in Bad River tribal court. The cases proceeded on parallel tracks. The state court refused to stay or dismiss its proceeding. The tribal and state court cases reached different judgments: the state court ruled in favor of Mr. Teague and entered judgment for nearly \$400,000; the tribal court invalidated the contract and ruled in favor of the Tribe.
  - After eight years of litigation, the Wisconsin Supreme Court held that the state trial court should have stayed its hand under the principles of comity, thereby ruling in favor of the Tribe.
  - Due to Wisconsin’s status as a Public Law 280 state, both courts properly had jurisdiction; the question was where the case should have been heard.
- The Teague Court described comity as follows:
  - Comity is based on respect for the proceedings of another system of government and a spirit of cooperation. Comity endorses the principle 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 process. The doctrine of comity “is

neither a matter of absolute obligation nor of mere courtesy and good will, but is recognition which one state allows within its territory to legislative, executive, or judicial acts of another, having due regard to duty and convenience and to rights of its own citizens.” Comity is discretionary, highly fact specific, and reviewable on appeal for erroneous exercise of discretion.

Teague v. Bad River Tribe, 2003 WI 118, ¶ 59 (cites omitted.)

- The U.S. Supreme Court described comity as follows:
  - The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticised, no satisfactory substitute has been suggested.

"Comity," in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.  
Hilton v. Guyot, 159 U.S. 113, 163 (1894).
  - The Hilton comity conditions have been paraphrased as follows:
    - (1) the foreign court actually had jurisdiction over both the subject matter and the parties;
    - (2) the decree was not obtained fraudulently;
    - (3) the decree was rendered by a system of law reasonably assuring the requisites of an impartial administration of justice — due notice and a hearing; and

- (4) the judgment did not contravene the public policy of the jurisdiction in which it is relied upon.
  - Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985).
- In the aftermath of Teague state and tribal court judges began communicating more.
    - State and tribal court judges have worked cooperatively on a protocol that addresses the cases that the litigants file both in state and tribal court.
    - Earlier Teague decision in 2000 had recommended the development of a protocol.
      - Tenth Judicial District adopted a protocol in 2001.
      - Ninth Judicial District adopted a protocol at the 2005 Walking on Common Ground Conference.
    - The Wisconsin Tribal Judges Association held a series of seminars for state and tribal judges on Public Law 280 and the Indian Child Welfare Act. State and tribal judges at all levels attended and interacted.
  - The Teague case raises many questions and issues:
    - In a PL 280 state in many cases tribal and state courts will both have jurisdiction. How should the forum / venue question be settled?
      - Need new and better laws. There is currently no mechanism under state statute for a trial court to transfer a case to tribal court (other than Indian Child Welfare cases.)
      - Change of venue?
      - Removal type authority under federal / state / tribal law?
    - In non-280 states, jurisdiction will be clearer cut but conflicts can still arise. Consider:
      - Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985)(After the wife of a deceased tribal member obtained a tribal court ruling regarding disposal of her husband’s body, sisters of the deceased obtained a conflicting state court ruling. The ensuing litigation proceeded to the South Dakota Supreme Court which eventually required the tribal court ruling to be honored).
      - Leon v. Numkena, 142 Ariz. 307, 689 P.2d 566 (1984) (“Legal tug-of-war” between husband and wife after the wife had initiated divorce in Hopi tribal court, received an unfavorable result and then filed a second action for dissolution in Arizona state court.)

- Astorga v. Wing, No. 1 CA-SA 0500153 (Ariz. App. Div. 1 08/30/2005) (State appellate court refused to require a stay in trial court where plaintiffs had filed complaint in state court to avoid missing statute of limitations deadline if tribal court ruled it did not have jurisdiction.)
- In re: Absher Children, 750 N.E.2d 188, 141 Ohio App. 3d 118 (2001) (Child custody dispute between parents in Ohio state courts and Eastern Cherokee courts. After several years of litigation, the Ohio Appellate Court ruled that the state court had jurisdiction over one child, while it did not have jurisdiction over that child's two siblings. The appellate court "strongly believe[s] that the trial court should have contacted the tribal court before deciding to exercise jurisdiction over the children pursuant to the Uniform Child Custody Jurisdiction Act" as codified under state law.)
- Why do litigants necessarily seem to view tribal or state judges as friendly or unfriendly to their case?
  - Judges are committed to justice.
  - Need more education.
  - Preferences are complicated.
- Need to continue comprehensive discussion between state and tribal justices systems.
  - Litigants, particularly in tribal court, rely on being able to have each court recognize the other's judgments.
    - Marriages
    - Name changes
    - Divorces
    - Enforcement of civil judgments
    - Res judicata
- Communities need their disputes resolved in a fair, culturally consistent and timely manner.
  - It is enough that the parties are fighting; courts do not need to be fighting as well.
  - Each litigant's case is of usually of great importance to him or her.
- Wisconsin state law has some useful tools.
  - Wis. Stat. § 806.245; recognition of tribal court judgments;
  - WisDOT and Wisconsin Bureau of Vital Records recognize tribal court orders;

- Many state court judges in Wisconsin have stopped seeing tribal court jurisdiction as an encroachment and started to see that tribal courts:
  - Are appropriate and legitimate forums for resolving reservation-based disputes;
  - Can lighten the state court docket;
  - Can be allies in the pursuit of justice;
- Central challenge to tribal courts today is to resolve disputes in a way that withstands scrutiny from the dominant legal system and at the same time is consistent with reservation / local values.
  - This issue is primarily a federal one, but it has a state court dimension as well. In a PL 280 jurisdiction, to the extent that state court judges do not feel confident with a tribal justice system that will adjudicate a dispute within some broad parameters of due process and fairness, he or she may be reluctant to transfer a case pursuant to Teague or otherwise.
  - This issue goes to the third prong of the comity analysis as described above. Judgments and orders will be recognized if “the decree was rendered by a system of law reasonably assuring the requisites of an impartial administration of justice — due notice and a hearing.” In order for a state judge to feel comfortable with the comity analysis, the judge will need some familiarity with tribal justice systems and tribal judges.
    - This standard still leaves lots of room for expression of tribal values.
- Judicial cooperation
  - Support from the top
  - Social / educational interaction
  - Realize common goal of justice
  - Transcend politics