

January 3, 2016

MEMORANDUM

TO: JUSTICE MARGARET H. CHUTICH

FROM: RITA COYLE DEMEULES

RE: **OVERVIEW: 2003 and 2011 petitions to amend court rules to recognize tribal court judgments**

Introduction Before the court is a petition filed on November 30, 2016 by the State Court/Tribal Court Forum (“the Forum”), which the court has referred to the General Rules Committee for consideration and a recommendation. Following is an overview of petitions that were before the court in 2003 and 2011 to amend the court’s rules to recognize tribal court judgments.¹

2000-2003

The Petition. Around 2000, the Forum focused on developing a proposal for recognition of tribal court orders and judgments, concluding that a rule adopted by the supreme court would assist judges and lawyers in a complicated area of the law. The Forum filed a petition on April 11, 2002, asking the court to adopt a rule of procedure for recognition of tribal court orders and judgments. Petition for Adoption of a Rule of Procedure, etc., *In re: rules of Procedure for the Recognition of Tribal Court Orders and Judgments*, No. CX-89-1863 (filed Apr. 11, 2002). The Forum’s petition proposed that Minnesota adopt a Full Faith and Credit Rule to ensure that tribal court orders and judgments were afforded the appropriate level of respect and that full faith and credit is acknowledged equally by all Minnesota district courts.

¹ The Forum arose out of a series of informal meetings in 1996 between state court judges, tribal court judges, and lawyers, held to explore possibilities for a regular exchange of information between the jurisdictions. These informal meetings led to the first formal meeting between members of the Minnesota Tribal Courts Association and members of the State Court Committee, convened on July 18, 1997 at the Prairie Island Mdewakanton Dakota Community Tribal Court. In 2002, for example, the Forum included at least one judge from each of Minnesota’s judicial districts, one appellate judge (Schumacher, J.), judges from nine tribal courts, and three lawyers. The Forum continues to meet quarterly to address issues common to the courts in both jurisdictions and to communicate regarding cross-border issues. The Judicial Council recognizes the Forum as an advisory workgroup or standing committee of the State Court Administrator.

The proposed rule “presumed” that a tribal court judgment, decree, order, warrant, subpoena, record or “other judicial act” is “valid and enforceable” and “given full faith and credit by” Minnesota state courts. *Id.* at A-1. The proposed rule applied to the tribal courts of federally recognized Indian tribes (as defined in 25 U.S.C. § 450b(e) (2012) (defining “Indian tribe” as “any Indian tribe, band, nation or other organized group or community . . . recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians”)). The proposed rule identified four circumstances that, if demonstrated, would overcome the presumption of validity and enforceability, as follows: (a) lack of personal or subject matter jurisdiction; (b) an order or judgment obtained by fraud, duress, or coercion; (c) lack of a process that afforded fair notice or hearing; *or*, (d) the order is non-final under the laws and procedures of the issuing court, unless it is a non-criminal order for protection or apprehension of a person or another type of emergency or temporary order. *Id.* at A-2.

The proposed rule provided exceptions in which federal law, rather than the rule, would govern; and exceptions for criminal orders issued by the Red Lake Band of Chippewa, the Bois Forte Band of the Minnesota Chippewa Tribe, or other Tribes or Bands “exercising criminal jurisdiction consistent with applicable federal law.” *Id.* at A-2-3. The proposed rule also preserved “cooperative practices voluntarily established among Tribal jurisdictions and” state courts for enforcement of criminal orders. *Id.* at A-3.

“The intent of the proposed rule [was] to ensure that tribal court orders are afforded the requisite respect due any other jurisdiction and that full faith and credit is acknowledged equally by all Minnesota district courts.” Pet’n at p. 6. As grounds for the proposed rule, the Forum explained that “[j]udgment enforcement is important to the people who live and go about their business on Indian reservations. It touches the lives of both non-Indian and Indian people quite directly off and on reservations.” *Id.* at p.3. Yet “confusion regarding the enforceability of an order” is not “uncommon,” creating at times “potentially dangerous situations.” *Id.* at 4 (providing examples from child protection and juvenile matters). The Forum identified other states in which full faith and credit is extended to tribal court orders and judgments by court rule (e.g., Wisconsin, Michigan) or by legislation (Oklahoma). *Id.* at p. 4; *see also* Appendix C (state-by-state survey of full faith and credit to tribal court judgments).²

The General Rules Committee On April 15, 2002, the court referred the Forum’s petition to the Advisory Committee on the General Rules of Practice for a report to the

² On July 9, 2002, the Forum filed an Amended Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgment. The Forum explained that the petition “was formally amended on May 22, 2002 to include a reciprocity element in Section A(5)” and was “subsequently amended at the Conference of Chief Judges on June 26, 2002, to include a reference to due process in Section A(3).” Amended Petition at p. 1, n.1.

Court. The Committee held three meetings at which members of the public addressed the committee, as well as representatives of the Forum. Written materials were also submitted to the committee. On August 22, 2002, the Committee filed its report and recommendation with the court. *In re Supreme Court Advisory Committee on General Rules of Practice, Final Report*, No. CX-89-1863 (filed Aug. 22, 2002). The Committee concluded that the Forum had “made a prima facie case of a need to address the issue of enforcement of tribal court orders and judgments in state court, but the proposed rule is fundamentally substantive in nature.” Final Rep. at p. 7. Thus, the Committee recommended that the court not adopt the proposed rule. *Id.*

More specifically, the Committee concluded that “it is not appropriate to address the question of the authority of . . . tribal court decisions by means of a rule at this time,” but instead, recognition of those orders and judgments “should be left to consideration on a case-by-case basis or for consideration by the legislative branch to the extent the issues [presented are] properly legislative.” *Id.* at 3. Among other points, the Committee concluded that the proposed rule:

- “blend[ed]” the doctrine of full faith and credit, as defined in Article IV of the United States Constitution, and the “inherently flexible doctrine” of comity, resulting in “aspects” of the otherwise discretionary nature of comity deemed “presumptively mandatory,” *id.* at p.4;
- stood alongside existing federal and state legislation regarding enforcement of tribal court orders and judgments, which “militates against adoption of the rule,” *id.* at 5;
- was not supported by the “collection of anecdotal evidence about tribal court proceedings generally.” *Id.* at 5.

The Committee considered alternatives adopted in other states, such as recognition limited to “courts of record,” recognition “not greater than those of courts of sister states,” shifting the burden to the party seeking enforcement, permitting the state court to consider the extent of due process afforded by the tribal court, or allowing the state court to decline to enforce a tribal court order or judgment that contravenes state public policy. *Id.* at p. 6. None of these alternatives, the Committee concluded, changed the “main issue,” i.e. “the substantive nature” of the proposed rule.” *Id.* at p. 7.

The Court On August 28, 2002, the court opened a public comment period on the Forum’s petition, scheduling a hearing for October 29, 2002. *Order for Hearing to Consider Petition for Adoption of a Rule of Procedure for the Recognition of Tribal Court Orders and Judgments*, No. CX-89-1863 (Minn. filed Aug. 28, 2002). Comments received and the position taken are listed below.³

³ Written comments are sometimes submitted separately from requests to speak at a public hearing, but I have not found an order that identifies those who spoke at the hearing.

Bridget C. Gernander, Project Specialist, Implementation Committee on Multicultural Diversity and Racial Fairness	Support	Written
Sheldon Wolfchild Producer/Spokesman for the “New Buffalo” Elders	Oppose	Written/oral
Eileen J. Strejc, President Minnesota American Indian Bar Association	Support	Written
Sondra Erickson, State Representative District 17A (Kanabec, Mille Lacs, Morrison Counties) Minnesota House of Representatives	Oppose	Written
Heidi A. Drobnick, Executive Director Indian Child Welfare Law Center	Support	Written
Christopher Manydeeds, Executive Director Anishinabe Legal Services	Support	Written
David Tellinghuisen, Chairman Mille Lacs County Board of Commissioners	Oppose	Written
Citizens for Lawful Government	Oppose (?)	Written/oral
Mark H. Gardner, Co-Chair Minnesota State Bar Association Committee on Court Rules	Oppose	Written/oral
Maxine V. Eidsvig	Oppose	Written/oral ⁴
John P. Kingrey, Executive Director; Earl Maus, Cass County Attorney, The Minnesota County Attorneys Association	Oppose	Written/oral
Larry Podany, Executive Director Minnesota Sheriffs’ Association	Oppose	Written
B.J. Jones, Director Northern Plains Indian Law Center	Support	Written
Kevin K. Washburn, Associate Professor University of Minnesota Law School	Support	Written/oral & post-hearing supplement ⁵
Wayland Campbell, Director, Child Support Enforcement Division, Minnesota Department of Human Services	Support	Written

This list identifies speakers only if the request to speak was included with the written comments. Absence of “support” or “oppose” in the middle column indicates that the requestor’s position was not clear or the written materials were not located.

⁴ Ms. Eidsvig’s request to speak was apparently not granted. She therefore submitted a written copy of her prepared remarks after the hearing.

⁵ Chief Justice Blatz invited supplemental written submissions at the hearing, so some speakers and other commenters submitted post-hearing materials.

Brian Melendez, Attorney Faegre & Benson	Support	Written & post-hearing supplement
Robert Pendleton, Scott Adolphson, Lower Sioux Members		Written
Randy V. Thompson, Attorney for Native American Press/Ojibwe News, William Lawrence, & Proper Economic Resource Management, Inc.		Oral
William Lawrence		Oral
Clara Niiska The Native American Press/Ojibwe News	Oppose	Written/oral & post-hearing supplement
Andrew M. Small, Associate Judge, Prairie Island Mdewakanton Dakota Community Tribal Court/Lower Sioux Community in Minnesota Tribal Court, on behalf of Minnesota Tribal Court/State Court Forum (by George Soule)	Support	Oral & post- hearing submission
Kevin E. Shephard, CPE	Oppose	Written/oral
Jeremy Lane, Executive Director Mid-Minnesota Legal Assistance	Support	Written
Hon. J. Thomas Mott, Chair Conference of Chief Judges	Support	Written
Hon. Robert A. Blaeser, Judge Fourth Judicial District	Support	Written (post- hearing supplement)
Hon. Robert D. Walker, Judge Fifth Judicial District	Support	Written (post- hearing supplement)
Vanya S. Hogen Faegre Benson	Support	Written (post- hearing submission)

On March 5, 2003, the court filed its order regarding the petition. *In re Hearing on Proposed Amendments to the Minnesota General Rules of Practice for the District Courts*, No. CX-89-1863, Order (Minn. filed Mar. 5, 2003). The court stated that it was “not prepared to adopt the proposed rule,” though it acknowledged “a need for a better procedural framework to facilitate the recognition and enforcement of tribal orders and judgments where there is an existing legislative basis for doing so.” *Id.* Thus, the court directed the Committee to “consider rules to provide a procedural framework for the recognition and enforcement of tribal court orders and judgments where there is an existing legislative basis for doing so, after receiving input from all interested parties.” *Id.* The court also “encouraged” the Committee “to explore” with the Forum a compact that would “assure reciprocal commitment to any new rule” that might be adopted. *Id.*

The Committee Following the court’s March 2003 Order, the committee held several meetings to consider recommended amendments to the rules. The Committee also “conducted small group discussions with representatives of the [Forum] and the County Attorneys’ Association; and circulated drafts of a proposed rule with committee comments.” *In re Supreme Court Advisory Committee on General Rules of Practice*, Final Report at 3 (filed Sept. 17, 2003). On August 13, 2003, the Committee held a hearing at which public comments were taken.

The Committee concluded “that there can be no one-size-fits-all procedural rule for enforcement of tribal orders and judgments” because existing federal and state statutes “establish conflicting measures.” *Id.* at 3-4. Yet, recognizing that “a rule providing some direction to courts and litigants would serve a useful purpose,” the Committee recommended adoption of “a rule that is not strictly a statement of court procedure” in order to “provide[] some structure to the application of comity principles . . . where there is no statutory requirement” to enforce tribal court orders and judgments.” *Id.* at 4.⁶

The Committee’s recommended rule established two grounds for enforcement of tribal court orders and judgments: recognition mandated by law, and discretionary recognition. *Id.* at 5. The Committee’s comment explained that new Rule 10 was “intended to provide a starting point for enforcing tribal court orders and judgments where recognition is mandated by state or federal law” and to provide “factors for determining” enforcement where federal or state law does not require enforcement. Nine factors were listed for consideration of discretionary enforcement, along with “any other factors the court deems appropriate in the interests of justice.” *Id.*

The Court The court opened a public written-comment-only period on September 19, 2003. *Order Establishing Deadline for Submitting Comments on Proposed Amendments to the General Rules of Practice*, No. CX-89-1863 (Minn. filed Sept. 19, 2003). Comments received and the position taken are listed below.

Randy V. Thompson, Nolan MacGregor, Thompson & Leighton	Oppose
Earl Maus, Minnesota County Attorneys Association & the Minnesota County Attorneys Association Indian Law Committee	Support (w/proposed edits)
The American Indian Law Student Associations, University of Minnesota Law School, Hamline University Law School, William Mitchell Law School	Support
Tribal Court/State Court Forum	Support (w/proposed modifications)

⁶ There was no recommendation regarding reciprocal commitment to the new rule because the proposed rule was “predominantly hortatory.” *Id.* at 4.

Minnesota American Indian Bar Association	Support (with support for the Forum's proposed modifications)
---	---

On December 11, 2003, the court filed its order, largely adopting the Committee's proposed Rule 10, making minor changes in the structure of new Rule 10.02 (addressing discretionary enforcement of tribal court orders and judgments). Rule 10 of the General Rules of Practice was effective January 1, 2004. The rule has not been amended since its adoption (although an amendment was made to the Advisory Committee comment in 2006 to address Minn. Stat. § 518B.01, subd. 19a (2006) (requiring enforcement of certain foreign or tribal court orders for protection)).

2011

On March 2, 2011, the Forum wrote to Chief Justice Gildea, presenting a proposal to revise Rule 10 of the General Rules of Practice, and asking that the proposed revision be referred to the Committee, notwithstanding the court-imposed moratorium on work by the Rules Committees.⁷ The Forum asked for an exception to the moratorium because “tribal court activity is increasing significantly, the resulting decisions are of importance in the legal landscape, and recognition of” those decisions is necessary. In addition, given increasing federal laws requiring recognition of tribal court orders and judgments, the Forum noted that “[g]eneral state acceptance of tribal court decisions on the basis of reciprocity is appropriate.” The Forum also noted that the greater recognition extended to tribal court decisions by other states and the increasing professionalism and independence of tribal courts supported an exception to the moratorium.

The Forum's 2011 proposal for Rule 10 began with an abstention provision. “In matters where concurrent jurisdiction exists in state court and the courts of any federally recognized Indian tribe, the state court may abstain from exercising its jurisdiction after consideration” of several factors. *Proposed Revision to Rule 10, Rules of General Practice, Abstention and Recognition of Tribal Court Orders*. Next, the proposal identified circumstances when recognition of tribal court decisions is “mandated by law.” *Id.* The proposal included a separate reciprocity provision (“the courts of this state shall recognize and enforce the decisions of tribal courts . . . that similarly recognize and enforce the decisions of courts of this state”), and provisions for discretionary recognition of tribal court decisions. *Id.*

⁷ Due to budget constraints, the court suspended work by rules committees for calendar year 2010, and in January 2011, extended the moratorium for calendar year 2011.

On March 10, 2011, Chief Justice Gildea referred the Forum's proposal to Committee chair Judge Kathryn Messerich and Justice Stras, liaison justice to the Committee, for consideration of whether to make a request for an exception to the moratorium.⁸ On December 6, 2011, Judge Messerich notified the Forum that she had concluded that the proposal would not have a critical impact when weighed against the likely time and effort to review and study the proposed change. After reviewing the background set forth above from 2002-2003 and the adoption of Rule 10, Judge Messerich concluded that "substantial committee time" would be needed to obtain input from various constituencies and conduct research regarding the Forum's proposed abstention factors and reciprocity requirement, among other issues. Judge Messerich noted that recognition of tribal decisions is an important issue and, therefore, sought a continued dialogue "about how best to accomplish the Forum's goals within the constraints of the moratorium exception process."

The court's meeting minutes do not reflect consideration of an exception request from the Committee regarding the Forum's 2011 proposal, or post-moratorium action by the court on the proposal. I also have not found the proposal referenced in Committee reports filed after 2011. I therefore conclude that no further action was taken with respect to the Forum's 2011 proposal.

2016

On November 30, 2016, the Forum filed a petition to amend Rule 10 of the General Rules of Practice. The court decided to refer the petition to the Committee for consideration and a recommendation.

⁸ The process required the committee chair to support a request for an exception by providing a description of (1) the issue that is of critical importance, (2) the reason why the issue requires committee action in 2011, (3) the impact on the branch if the issue is not addressed in 2011, and (4) the estimated time needed for the committee to complete work on the proposed request.