STATE OF MINNESOTA

IN SUPREME COURT

CX-89-1863

ORDER ESTABLISHING DEADLINE FOR SUBMITTING COMMENTS ON PROPOSED AMENDMENTS TO THE GENERAL RULES OF PRACTICE

The Supreme Court Advisory Committee on General Rules of Practice filed a report on September 17, 2003 recommending amendments to the General Rules of Practice. This court will consider the proposed amendments without a hearing after soliciting and reviewing comments on the report. A copy of the report is annexed to this order.

IT IS HEREBY ORDERED that any individual wishing to provide statements in support or opposition to the proposed amendments shall submit fourteen copies in writing addressed to Frederick K. Grittner, Clerk of the Appellate Courts, 25 Rev. Dr. Martin Luther King Jr. Blvd, St. Paul, Minnesota 55155, no later than Monday, November 3, 2003.

Dated: September 19, 2003

BY THE COURT:

Kathleen A. Blatz
Chief Justice

OFFICE OF
APPELLATE COURTS

SEP 19 2003

FILED

CX-89-1863
STATE OF MINNESOTA
IN SUPREME COURT

In re:

Supreme Court Advisory Committee on General Rules of Practice

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Recommendations of Minnesota Supreme Court Advisory Committee on General Rules of Practice

Final Report

September 17, 2003

Hon. Sam Hanson, Chair

Hon. G. Barry Anderson, Saint Paul
Steven J. Cahill, Moorhead
Hon. Lawrence T. Collins, Winona
Lawrence K. Dease, Saint Paul
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Reporter

Michael B. Johnson, Saint Paul
Staff Attorney

ADVISORY COMMITTEE ON GENERAL RULES OF PRACTICE

Summary of Committee Recommendations

The Court's Advisory Committee on General Rules of Practice met three times in 2003 to discuss issues relating to the operation of the rules and to continue its consideration of the questions surrounding state-court enforcement of tribal court orders and judgments.

This report contains four recommendations for amendments to the rules.

These amendments are briefly summarized:

1. The committee spent a substantial amount of time following up on the court's March 5, 2003, order requesting further consideration of the issues relating to recognition of judgments, orders, or other actions by tribal courts. The committee meeting on August 13, 2003, included a public hearing segment to receive testimony from interested persons on the recommended amendments to the rules.

2. The committee also considered two recommendations from the MSBA Pro Se Implementation Committee, co-chaired by Chief Judge Edward Toussaint of the Minnesota Court of Appeals and attorney Eric J. Magnuson of Minneapolis. Those proposed changes would provide express authorization for establishment of self-help programs for pro se litigants and create a modified joint petition procedure for certain family law matters. The advisory committee recommends that these rules be adopted as new rule 110 and as amendments to rules 320.01 and 306.01 & .02.

3. The committee also looked at issues relating to a streamlined procedure for consideration of attorneys' fee awards in default judgment matters. The committee recommends adoption of an additional subsection of rule 119 to establish guidelines for such a streamlined procedure to obviate a formal hearing on attorneys' fees in many default situations.

Other Matters

The committee is not aware of other matters that require attention at this time. The committee believes the general rules are working well.

Effective Date

The committee believes these amendments are not likely to present significant implementation issues and, accordingly, that it should be feasible to adopt them late in 2003 and have them take effect on January 1, 2004.

Respectfully submitted,

MINNESOTA SUPREME COURT
ADVISORY COMMITTEE ON
GENERAL RULES OF PRACTICE

Recommendation 1: **The Court recommends adoption of a rule on enforcement of tribal court orders and judgments.**

Introduction

During 2002, the committee considered in some detail a rule proposed by the Minnesota Tribal Court State Court Forum. That rule was intended to create a presumption that any judgment or order rendered by a tribal court of a tribe recognized by federal statute would be valid and enforceable in state court as though it had been rendered by a court of a sister state. The proposed rule essentially grafted principles of full faith and credit onto concepts of comity, resulting in mandatory application of criteria that are generally treated as highly discretionary. The committee recommended to the court that that rule not be implemented. By its order of March 5, 2003, this court accepted the committee's recommendation not to adopt the proposed rule and directed the committee to consider "rules to provide a procedural framework for the recognition and enforcement of tribal orders and judgments where there is an existing legislative basis for doing so."

The committee solicited input from all parties that had participated in the 2002 proceedings; conducted small group discussions with representatives of the State Court Tribal Court Forum and the County Attorneys' Association; and circulated drafts of a proposed rule with committee comments. The committee received written comments on the proposed rule from Randy V. Thompson, counsel for William J. Lawrence, Proper Economics Resources Management, Inc.; and various members of Minnesota Bands and Tribes; Maxine V. Eidsvig, a member of the Lower Sioux Reservation; and Hon. Andrew Small, Associate Judge, Lower Sioux Community in Minnesota Tribal Court, writing on behalf of the Minnesota Tribal Court Association. At the committee's meeting on August 13, 2003, the committee heard testimony concerning a draft of the recommended rule 10 from Randy V. Thompson; William J. Lawrence, publisher of the Native American Press/Ojibwe News; Maxine V. Eidsvig; and Hon. Margaret Treuer, Judge, Bois Forte Tribal Court and Leech Lake Band of Ojibwe Tribal Court. The committee has also forwarded proposed rule 10 to the Advisory Committees of the Rules of Criminal Procedure and Juvenile Protection and obtained their input.

The committee is of the view that there can be no one-size-fits-all procedural rule for enforcement of tribal orders and judgments as existing statutory mandates establish conflicting

measures. *Compare* the federal Violence Against Women Act, 18 U.S.C. § 2265(d) (no prior registration or filing as prerequisite for enforcement of a protection order, and no prior notice to other party as prerequisite unless notice is requested by the party protected under such order), *with* Minnesota Uniform Child Custody Jurisdiction and Enforcement Act, MINN. STAT. §§ 518D.101 *et seq.* ("shall recognize and enforce a child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of . . . chapter [518D];" not applicable to adoption or emergency medical care of child, not applicable to extent ICWA controls; establishes a voluntary registration process for custody determinations with 20-day period for contesting validity). The committee is also of the view, however, that a rule providing some direction to courts and litigants would serve a useful purpose.

The committee recommends a rule that is admittedly, in part, only hortatory in nature. Given the importance of the relationship between state and tribal courts, and the important rights that may be decided in both court systems, the committee believes this may be a circumstance where a rule that is not strictly a statement of court procedure may be appropriate. The new rule provides that state trial courts must follow the procedures created by statute and give tribal court orders and judgments effect where a statute requires it. The rule also provides some structure to the application of comity principles to those tribal court orders and judgments where there is no statutory requirement that they be enforced.

The committee was also encouraged to explore with the Minnesota Tribal Court/State Court Forum a tribal court/state court compact to assure reciprocal commitment to any new rule developed pursuant to paragraph 1 above. Due to the predominantly hortatory nature of the proposed rule, the committee felt that reciprocity was not an issue.

Specific Recommendation

A new Rule 10 should be adopted as set forth below. Because the rule is entirely new, no markings are included to show additions or deletions.

RULE 10. TRIBAL COURT ORDERS AND JUDGMENTS

Rule 10.01. When Tribal Court Orders and Judgments Must Be Given Effect

(a) **Recognition Mandated by Law.** Where mandated by state or federal statute, orders, judgments, and other judicial acts of the tribal courts of any federally recognized Indian tribe shall be recognized and enforced.

(b) **Procedure.**

(1) **Generally.** Where an applicable state or federal statute establishes a procedure for enforcement of any tribal court order or judgment, that procedure must be followed.

(2) **Violence Against Women Act; Presumption.** An order that is subject to the Violence Against Women Act, 18 U.S.C. § 2265 (2000), that appears to be issued by a court with subject matter jurisdiction and jurisdiction over the parties, and that appears not to have expired by its own terms is presumptively enforceable, and shall be honored by Minnesota courts and law enforcement and other officials so long as it remains the judgment of the issuing court and the respondent has been given notice and an opportunity to be heard or, in the case of matters properly considered ex parte, the respondent will be given notice and an opportunity to be heard within a reasonable time. The presumptive enforceability of such a tribal court order shall continue until terminated by state court order but shall not affect the burdens of proof and persuasion in any proceeding.

Rule 10.02. When Recognition of Tribal Court Orders and Judgments Is Discretionary.

(a) **Factors.** In cases other than those governed by Rule 10.01(a), the court shall enforce a tribal court order or judgment to the extent justified under the circumstances, and by consideration of the following factors or any other factors the court deems appropriate in the interests of justice:

(1) whether the party against whom the order or judgment will be used has been given notice and an opportunity to be heard or, in the case of matters properly considered ex parte, whether the respondent will be given notice and an opportunity to be heard within a reasonable time;

(2) whether the order or judgment appears valid on its face and, if possible to determine, whether it remains in effect;

(3) whether the tribal court possessed subject-matter jurisdiction and jurisdiction over the person of the parties;

(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 that afforded fair notice, the right to appear and compel attendance of witnesses, and a fair hearing before an independent magistrate;

(7) whether the order or judgment contravenes the public policy of this state;

(8) whether the order or judgment is final under the laws and procedures of the rendering court, unless the order is a non-criminal order for the protection or apprehension of an adult, juvenile or child, or another type of temporary, emergency order; and

(9) whether the tribal court reciprocally provides for recognition and implementation of orders, judgments and decrees of the courts of this state.

(b) Procedure. **The court shall hold such hearing, if any, as it deems necessary under the circumstances.**

Advisory Committee Comment—2003 Adoption

Rule 10 is a new rule intended to provide a starting point for enforcing tribal court orders and judgments where recognition is mandated by state or federal law (Rule 10.01), and to establish factors for determining the effect of these adjudications where federal or state statutory law does not do so (Rule 10.02).

The rule applies to all tribal court orders and judgments and does not distinguish between tribal courts located in Minnesota and those sitting in other states. The only limitation on the universe of determinations is that they be from tribal courts of a federally-recognized Indian tribe. These courts are defined in 25 U.S.C. § 450b(e).

Tribal court adjudications are not entitled to full faith and credit under the United States Constitution, which provides only for full faith and credit for "public acts, records, and judicial proceedings of every other state." U. S. CONST. Art IV, § 1. Where applicable full faith and credit is mandatory, a state does not exercise discretion in giving effect to the proper judgments of a sister state. *See Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943)(foreign judgment must be enforced even though action barred by limitations in the jurisdiction). Through full faith and credit, a sister state's judgment is given res judicata effect in all other states. *See, e.g., id.; Hansberry v. Lee*, 311 U.S. 32 (1940). All other orders and adjudications, including tribal court determinations that are not entitled to full faith and credit under a specific state or federal statute, are governed by the doctrine of comity. Comity is fundamentally a discretionary doctrine. There is no requirement under constitutional or statutory authority, or generally even by common law, that requires comity be given to a judgment from the court of a foreign country. *See Aetna Life Ins. Co. v.*

Tremblay, 223 U.S. 185 (1912) (no right, privilege or immunity conferred by Constitution to judgments of foreign states and nations); *Hilton v. Guyot*, 159 U.S. 113, 234 (1895).

Rule 10.02 reflects the normal presumption that courts will adhere to statutory mandates for enforcement of specific tribal court orders or judgments where such a statutory mandate applies. Statutes that do provide such mandates include:

1. Violence against Women Act, 18 U.S.C. § 2265 (2003) (full faith and credit for certain protection orders)..

2. Indian Child Welfare Act, 25 U.S.C. §§ 1911 (2003) ("full faith and credit" for certain custody determinations).

3. Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B (2003) ("shall enforce" certain child support orders and "shall not seek or make modifications . . . except in accordance with [certain limitations]").

In addition to federal law, the Minnesota Legislature has addressed enforcement of foreign money judgments. The Minnesota Uniform Foreign Country Money-Judgments Act, MINN. STAT. § 548.35 (2002), creates a procedure for filing and enforcing judgments rendered by courts other than those of sister states. Tribal court money judgments fall within the literal scope of this statute and the statutory procedures therefore may guide Minnesota courts considering money judgments. *Cf. Anderson v. Engelke*, 287 Mont. 283, 289-90, 954 P.2d 1106, 1110-11 (1998)(dictum)(statute assumed to allow enforcement by state courts outside of tribal lands, but question not decided). It is not necessary for the rule to provide additional guidance on how a money judgment is to be enforced in Minnesota. Because money judgments of tribal courts are not entitled to full faith and credit under the Constitution, the court is allowed a more expansive and discretionary role in deciding what effect they have. Rule 10.01(b)(1) is intended to facilitate that process. The Minnesota Legislature has also adopted the Uniform Child Custody Jurisdiction and Enforcement Act, MINN. STAT. §§ 518D.101 et seq. which: (1) requires recognition and enforcement of certain child custody determinations made by a tribe "under factual circumstances in substantial conformity with the jurisdictional standards of" the Act; and (2) establishes a voluntary registration process for custody determinations with a 20-day period for contesting validity. MINN. STAT. §§ 518D.104, D.305 (2002) (not applicable to adoption or emergency medical care of child; not applicable to extent ICWA controls).

The facial validity provision in Rule 10.01(b)(2) fills in a gap in state law. MINN. STAT. § 518B.01, subd. 14(e)(2002), authorizes an arrest based on probable cause of violation of tribal court order for protection; although this law includes immunity from civil suit for a peace officer acting in good faith and exercising due care, it does not address facial validity of the order. Similar laws in other jurisdictions address this issue. *See, e.g.*, 720 ILL. STAT. 5/12-30(a)(2) (2003); 22 OKLA. STAT. ANN. § 60.9 (2002); WISC. STAT. § 813.128 (2003).

Where no statutory mandate expressly applies, tribal court orders and judgments are subject to treatment under Rule 10.02(a). This rule does not dictate a single standard for determining the effect of these adjudications in state court. Instead, it identifies some of the factors a Minnesota judge may consider in determining what effect such a determination will be given. Rule 10.02(a) does not attempt to define all of the factors that may be appropriate for consideration by a court charged with determining whether a tribal-court determination should be enforced. It does enumerate many of the appropriate factors. It is possible in any given case that one or more of these factors will not apply. For example, reciprocity is not a pre-condition to enforceability generally, but may be relevant in some circumstances. Notice of the proceedings and an opportunity to be heard (or the prospect of notice and right to hearing in the case of ex parte matters) are fundamental parts of procedural fairness in state

and federal courts and are considered basic elements of due process; it is appropriate at least to consider whether the tribal court proceedings extended these rights to the litigants. The issue of whether the tribal court is "of record" may be important to the determination of what the proceedings were in that court. A useful definition of "of record" is contained in the Wisconsin statutes. WIS. STAT. § 806.245(1)(c); *see also* WIS. STAT. § 806.245(3)(sets forth requirements for determining whether a court is "of record."). The rule permits the court to inquire into whether the tribal-court proceedings offered similar protections to the parties, recognizing that tribal courts may not be required to adhere to the requirements of due process under the federal and state constitutions. Some of the considerations of the rule are drawn from the requirements of the Minnesota Uniform Enforcement of Foreign Judgments Act, MINN. STAT. §§ 548.26-.33 (2000). For example, contravention of the state's public policy is a specific factor for non-recognition of a foreign state's judgment under MINN. STAT. § 548.35, subd. 4(b)(3)(2000); it is carried forward into Rule 10.02(b)(6). Inconsistency with state public policy is a factor for non-recognition of tribal court orders under other states' rules. *See* MICH. R. CIV. P. 2.615(C)(2)(c); N.D. R. CT. 7.2(b)(4).

Rule 10.02(b) does not require that a hearing be held on the issues relating to consideration of the effect to be given to a tribal court order or judgment. In some instances, a hearing would serve no useful purpose or would be unnecessary; in others, an evidentiary hearing might be required to resolve contested questions of fact where affidavit or documentary evidence is insufficient. The committee believes the discretion to decide when an evidentiary hearing is held should rest with the trial judge.

Recommendation 2: **The Court should adopt a rule to authorize establishment of self-help programs for pro se litigants**.

Introduction

The advisory committee recommends adoption of two rules proposed by the MSBA Pro Se Implementation Committee, co-chaired by Chief Judge Edward Toussaint of the Minnesota Court of Appeals and attorney Eric J. Magnuson of Minneapolis. These two rules would facilitate access to the courts by pro se parties.

These proposals would provide guidance in the rules for self-help programs such as those now operating successfully in some urban district courts and would create a new procedure for commencement of certain marriage dissolution actions by a joint petition. This latter proposal is set forth in this committee's Recommendation 3.

Specific Recommendation

A new Rule 110 should be adopted as set forth below. Because the rule is entirely new, no markings are included to show additions or deletions.

RULE 110. SELF-HELP PROGRAMS

110.01. Authority for Self-Help Programs.

A District Court for any county may establish a Self-Help Program to facilitate access to the courts. The purpose of a Self-Help Program is to assist Self-Represented Litigants, within the bounds of this rule, to achieve fair and efficient resolution of their cases, and to minimize the delays and inefficient use of court resources that result from misuse of the court system by litigants who are not represented by lawyers. There is a compelling state interest in resolving cases efficiently and fairly, regardless the means of the parties.

110.02. Staffing.

The Self-Help Program may be staffed by lawyer and non-lawyer personnel, and volunteers under the supervision of regular personnel. Self-Help Personnel act at the direction of the district court judges to further the business of the court.

110.03. Definitions.

(a) "Self-Represented Litigant" means any individual who seeks information to file, pursue, or respond to a case without the assistance of a lawyer authorized to practice before the court.

(b) "Self-Help Personnel" means lawyer and non-lawyer personnel and volunteers under the direction of paid staff in a Self-Help Program who are performing the limited role under this rule. "Self-Help Personnel" does not include lawyers who are providing legal services to only one party as part of a legal services program that may operate along side or in conjunction with a Self-Help Program.

(c) "Self-Help Program" means a program of any name established and operating under the authority of this rule.

110.04. Role of Self-Help Personnel.

(a) Required Acts. Self-Help Personnel shall

(1) Educate Self-Represented Litigants about available pro bono legal services, low cost legal services, legal aid programs, and lawyer referral services;

(2) Encourage Self-Represented Litigants to obtain legal advice;

(3) Provide information about mediation services;

(4) Provide services on an assumption that the information provided by the litigant is true; and

(5) Provide the same services and information to all parties to an action, if requested.

(b) Permitted, but Not Required, Acts. Self-Help Personnel may, but are not required to:

(1 provide forms and instructions;

(2) assist in the completion of forms;

(3) provide information about court process, practice and procedure;

(4) offer educational sessions and materials on all case types, such as sessions and materials on marriage dissolution;

(5) answer general questions about family law and other issues and how to proceed with such matters;

(6) explain options within and without the court system;

(7) assist in calculating guidelines child support based on information provided by the Self-Represented Litigant;

(8) assist with preparation of court orders under the direction of the court; and

(9) provide other services consistent with the intent of this rule and the direction of the court, including programs in partnership with other agencies and organizations.

(c) Prohibited Acts. Self-Help Personnel may not:

(1) represent litigants in court

(2) perform legal research for litigants;

(3) deny a litigant's access to the court;

(4) lead litigants to believe that they are representing them as lawyers in any capacity or induce the public to rely on them for personal legal advice;

(5) recommend one option over another option;

(6) offer legal strategy or personalized legal advice;

(7) tell a litigant anything she or he would not repeat in the presence of the opposing party;

(8) investigate facts pertaining to a litigants case, except to help the litigant obtain public records, or

(9) disclose information in violation of statute, rule, or case law.

110.05. Disclosure.

Self-Help Programs shall give conspicuous notice that:

(a) no attorney-client relationship exists between Self-Help Personnel and Self-Represented Litigants;

(b) communications with Self-Help Personnel are not privileged or confidential;

(c) Self-Help Personnel must remain neutral and may provide services to the other party; and

(d) Self-Help personnel are not responsible for the outcome of the case.

Program materials should advise litigants to consult with their own attorney if they want personalized advice or strategy, confidential conversations with an attorney, or if they want to be represented by an attorney in court.

110.06. Unauthorized Practice of Law.

The performance of services by Self-Help Personnel in accordance with this rule shall not constitute the unauthorized practice of law.

110.07. No Attorney-Client Privilege or Confidentiality.

Information given by a Self-Represented Litigant to court administration staff or Self–Help Personnel is not confidential or privileged. No attorney-client relationship exists between Self-Help Personnel and a Self-Represented Litigant.

110.08. Conflict.

Notwithstanding ethics rules that govern attorneys, certified legal interns, and other persons working under the supervision of an attorney, there is no conflict of interest when Self-Help Personnel provide services to both parties.

110.09. Access to Records.

All records made or received in connection with the official business of a Self-Help Program relating to the address, telephone number or residence of a Self-Represented Litigant are not accessible to the public or the other party.

Advisory Committee Comment—2003 Adoption

Rule 110 is a new rule adopted in 2003 on the recommendation of a pro se implementation committee to facilitate access to and use of the courts by pro se litigants. It is modeled after similar family law provisions in other jurisdictions. *See. e.g.*, CA. FAMILY CODE §§ 10000 –100015 (West 2003); FLA .FAM. L. R. P. 12.750 (West 2003); OR .REV. STAT. § 3.428 (West 2003); WASH. REV. CODE ANN. § 26.12.240 (West 2003); WASH. R. GEN. GR 27 (West 2003).

The rule defines and communicates to interested parties the role of self-help personnel. Definition of roles is important because of the potential for confusion. Rule 110.03(b) intentionally limits the definition of Self-Help

Personnel to exclude lawyers who provide services to one party, as is commonly done by legal-service-program attorneys. Because of this definition, Rule 110.07 does not limit the creation of an attorney-client relationship in such attorney-client relationships.

Recommendation 3: The Court should adopt a rule to create a modified joint petition procedure for certain family law matters.

Introduction

This rule arose from the same MSBA Pro Se Implementation Committee process described in Recommendation 2. This recommendation would create a process to allow marriage dissolution actions to be commenced by a joint petition where there are no property disputes and no children of the marriage.

Specific Recommendation

Rule 302.01 should be amended as set forth below. If this amendment is made, Rule 306.01 & .02 should also be amended to provide internal consistency in the rules.

RULE 302. COMMENCEMENT; CONTINUANCE; TIME; PARTIES

* * *

Rule 302.01. Commencement of Proceedings.

* * *

(b) Joint Petition.

(1) No summons shall be required if a joint petition is filed. Proceedings shall be deemed commenced when both parties have signed the verified petition.

(2) Where the parties to a proceeding agree on all property issues, have no children together, the wife is not pregnant, and the wife has not given birth since the date of the marriage to a child who is not a child of the husband, the parties may proceed using a joint petition, agreement, and judgment and decree for marriage dissolution without children. Form 12 appended to these rules is a sufficient form for this purpose.

(3) Upon filing of the "Joint Petition, Agreement and Judgment and Decree," and Form 11 appended to these rules, and a Notice to the Public Authority if required by Minn. Stat. § 518.551, subd. 5(a), the court administrator shall place the matter on the default calendar for approval without hearing pursuant to Minn. Stat. § 518.13, subd. 5. A Certificate of Representation and Parties and documents required by Rules 306.01and

306.02 shall not be required if the "Joint Petition, Agreement and Judgment and Decree" provided in Form 12 is used.

(4) Court Administrators in each Judicial District shall make the "Joint Petition, Agreement and Judgment and Decree for Marriage Dissolution Without Children" available to the public at a reasonable cost, as a fill-in-the-blank form.

Advisory Committee Comment—2003 Amendment

Subsection (a) is derived from Rule 1.01 of the Rules of Family Court Procedure.

Subsection (b) is derived from Second District Local Rule 1.011. Subdivisions (2), (3), and (4) are new in 2003.

Subsection (c) is derived from Second District Local Rule 1.013. See MINN. STAT. § 518.11 (1990). This is to protect the children and help avoid secret proceedings if the respondent is able to be located.

Subsections (2) and (3) of Rule 302.01(b) intended to provide a streamlined process for marriage dissolutions without children, where the parties agree on all property issues. These rule provisions essentially create a new process, commenced with a combined petition, stipulation and judgment and decree. Although intended to facilitate handling of cases by parties appearing without an attorney, it is available to represented parties as well. A new form is provided and should be made readily available to litigants. If either party to the proceedings is receiving public assistance, a Notice to Public Authority is also required. The Joint Petition, Agreement, and Judgment and Decree includes a statement regarding non-military status and a pro se waiver of right to be represented by a lawyer, thus satisfying the requirements of Rule 306.01(c). Court Administrators shall place the matter on the default calendar for final hearing without filing of Form 10 appended to the Rules. The Joint Petition, Agreement and Judgment and Decree may be used by parties represented by attorneys or parties representing themselves. The (Task Force) believes that the Joint Petition, Agreement, and Judgment and Decree procedure will reduce costs for litigants, reduce paper handling and storage expenses for the courts, and improve access to the courts. Subsections (2), (3) and (4) were recommended for adoption by the Minnesota State Bar Association's Pro Se Implementation Committee, which also drafted Form 12.

Attorneys should approach the use of a Joint Petition with care. The amendment of this rule to allow use of a joint petition does not modify the professional liability constraints on joint representation of parties with divergent interests.

As part of this amendment, Rule 306.01 is also amended for internal consistency.

RULE 306. DEFAULT

Rule 306.01. Scheduling of Final Hearing

Except when proceeding under Rule 302.01(b) by Joint Petition, Agreement and Judgment and Decree, ~~T~~to place a matter on the default calendar for final hearing or for approval without hearing pursuant to Minnesota Statutes, section 518.13, subdivision 5, the moving party

shall submit a default scheduling request substantially in the form set forth in Form 10 appended to these rules and shall comply with the following, as applicable:

(a) Without Stipulation-No Appearance. In all default proceedings where a stipulation has not been filed, an affidavit of default and of nonmilitary status of the defaulting party or a waiver by that party of any rights under the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, shall be filed with the court.

(b) Without Stipulation-Appearance. Where the defaulting party has appeared by a pleading other than an answer, or personally without a pleading, and has not affirmatively waived notice of the other party's right to a default hearing, the moving party shall notify the defaulting party in writing at least ten (10) days before the final hearing of the intent to proceed to Judgment. The notice shall state:

> You are hereby notified that an application has been made for a final hearing to be held not sooner than three (3) days from the date of this notice. You are further notified that the court will be requested to grant the relief requested in the petition at the hearing.

The default hearing will not be held until the notice has been mailed to the defaulting party at the last known address and an affidavit of service by mail has been filed.

(c) Default with Stipulation. Whenever a stipulation settling all issues has been executed by the parties, the stipulation shall be filed with an affidavit of nonmilitary status of the defaulting party or a waiver of that party's rights under the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, if not included in the stipulation.

In a stipulation where a party appears pro se, the following waiver shall be executed by that party:

> I know I have the right to be represented by a lawyer of my choice. I hereby expressly waive that right and I freely and voluntarily sign the foregoing stipulation.

Family Court Rules Advisory Committee Commentary*

This stipulation should establish that one of the parties may proceed as if by default, without further notice to or appearance by the other party.

The waiver of counsel should be prepared as an addendum following the parties' signatures on the stipulation.

*Original Advisory Committee Comment--Not kept current.

Advisory Committee Comment – 2003 Amendment

Subsections (a) and (b) of this rule are derived from existing Rule 5.01 of the Rules of Family Court Procedure. Rule 306.01 is amended in 2003 to add a new first clause. The purpose of this change is to include in the rules an express exemption of the proceedings from the requirements of the rule when the parties proceed by Joint Petition, Agreement and Judgment and Decree as allowed by new Rule 302.01(b).

Subsection (c) of this rule is derived from existing Rule 5.02 of the Rules of Family Court Procedure.

The default scheduling request required by Rule 306.01, as amended in 1992, serves the purpose of permitting the court administrator's office to schedule the case for the right type of hearing. It is not otherwise involved in the merits. The affidavit of default is a substantive document establishing entitlement to relief by default.

Rule 306.02. Preparation of Decree

Except in a proceeding under Rule 302.01(b) commenced by Joint Petition, Agreement and Judgment and Decree, or i~~I~~n a scheduled default matter, proposed findings of fact, conclusions of law, order for judgment and judgment and decree shall be submitted to the court in advance of, or at, the final hearing.

Task Force Comment – 2003 Adoption

This rule is derived from existing Rule 5.03 of the Rules of Family Court Procedure. Rule 306.02 is amended in 2003 to add a new first clause. The purpose of this change is to include in the rules an express exemption of the proceedings from the requirements of the rule when the parties proceed by Joint Petition, Agreement and Judgment and Decree as allowed by new Rule 302.01(b).

FORM 12. JOINT PETITION, AGREEMENT, AND JUDGMENT AND DECREE FOR MARRIAGE DISSOLUTION WITHOUT CHILDREN

(Gen. R. Prac. 302.01(b))

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF _____ **_____JUDICIAL DISTRICT**

In the Matter of:

CASE TYPE: DISSOLUTION WITHOUT CHILDREN

_____, Case No.: _____

Name of Husband (First, Middle, Last)

and

JOINT PETITION, AGREEMENT, AND JUDGMENT AND DECREE For Marriage Dissolution Without Children

_____,

Name of Wife (First, Middle, Last)

1. Information about Husband:

Full Name: _____

First Middle Last

Address: _____

Street Address Apt. No.

_____

City County State Zip Code

Date of Birth:_____

Month Day Year

Husband's former or other names:_____

First Middle Last

2. Information about Wife:

Full Name: _____
First Middle Last

Address: _____
Street Address Apt. No.

_____
City County State Zip Code

Date of Birth:_____
Month Day Year

Wife's former or other names:_____
First Middle Last

_____
First Middle Last

3. Husband's and Wife's social security numbers have been filed with the Court Administrator using Confidential Information Form (Form 11).

4. Children : "Child" means a living person under age 18, or under age 20 and still in high school, or a person over 18 who by reason of a physical or mental condition is incapable of self support.

a. Are there any children born to or adopted by husband and wife together?

☐ YES ☐ NO. (If you answered YES, you are using the wrong form. Use Marriage Dissolution with Children.)

b. Has wife given birth since the date of marriage to a child who is not a child of the Husband.

☐ YES ☐ NO . (If YES, you are using the wrong form. Use Marriage Dissolution with Children.)

c. Is wife pregnant? ☐ YES ☐ NO. (If YES, you are using the wrong form. Use Marriage Dissolution with Children.)

5. Our Marriage

Husband and wife were married on :_____at:_____
date city

_____
county state country

6. 180 Day Requirement

Husband has been living in Minnesota for the past six (6) months: ☐ YES ☐ NO.

Wife has been living in Minnesota for the past six (6) months: ☐ YES ☐ NO.

7. Armed Forces

Husband is a member of the armed forces: ☐ YES ☐ NO.

Wife is a member of the armed forces: ☐ YES ☐ NO.

If YES, has the member of the armed forces been stationed in Minnesota for the past six (6) months? ☐ YES ☐ NO.

8. Other Proceedings

A separate proceeding for dissolution, legal separation or annulment has already been started by husband or wife in Minnesota or another state: ☐ YES ☐ NO. If YES, the type of proceeding is: ☐ marriage dissolution ☐ legal separation ☐ annulment; the proceeding is in _____ County in the State of _____ _____ and the Court file number is _____. (If a separate proceeding has been started, you must complete the other proceeding or have it dismissed before filing this Joint Petition.)

9. Marriage Cannot be Saved

There has been an irretrievable breakdown of our marriage relationship.

10. Protection or Harassment Order

An *Order for Protection* or a *Harassment/Restraining Order* is in effect regarding Husband and Wife: ☐ YES ☐ NO. If YES, the *Order* protects: ☐ Husband ☐ Wife.

The *Order* was filed in _____ County on the date: _____,
Month Day Year

and the Court file number is _____. **A copy of the Order is attached to this Joint Petition.**

11. Name Change

☐ a. Neither person wants to change his/her name.

☐ b. ☐ Wife ☐ Husband wants to change his/her name to: (*full name, not initials*)

_____

first *middle* *last*

This name change request is made with no intent to defraud or mislead anyone:

☐ True ☐ False.

The person requesting the name change has been convicted of a felony : ☐ YES ☐ NO.

If YES:

☐ i. Notice of this request for name change has been given to the proper authority as required by Minn. Stat. § 259.13. (**IMPORTANT NOTICE**: If you are a convicted felon and you request a name change without following the requirements of Minn. Stat § 259.13, using the new last name after your divorce is a gross misdemeanor.)

☐ ii. An *Affidavit of Service of the Notice* marked Exhibit "A" has been attached to this Joint Petition.

12. Public Assistance: (Note: If either person is receiving public assistance from the State of Minnesota or applies for it after this proceeding is started, notice of this marriage dissolution action must be given to the county's collections and support office. See Minnesota Statutes Section 518.551, subd. 5)

a. Husband receives public assistance from the State of Minnesota: ☐ Yes ☐ No.

If YES, the assistance is from_____County. (check all that apply)

☐ MFIP ☐ Medical Assistance ☐ IV-E Foster Care ☐ Tribal TANF

☐ Child Care Assistance ☐ MinnesotaCare

b. Wife receives public assistance from the State of Minnesota: ☐ Yes ☐ No.

If YES, the assistance is from _____County. (check all that apply)

☐ MFIP ☐ Medical Assistance ☐ IV-E Foster Care ☐ Tribal TANF

☐ Child Care Assistance ☐ MinnesotaCare

13. Husband's Income

State Husband's gross income **per month.**

Source of Income *Amount per month before taxes*

☐ Job----------$_____

☐ Unemployment ----------$_____

☐ Social Security ----------$_____

☐ MFIP----------$_____

☐ General Assistance----------$_____

☐ Investments or Rental Income ----$_____

☐ Pension ----------$_____

☐ Other _____----------$_____

identify source

Gross Income Total ----------$_____ per month

14. Wife's Income

State Wife's gross income **per month.**

Source of Income *Amount per month before taxes*

☐ Job----------$_____

☐ Unemployment ----------$_____

☐ Social Security ----------$_____

☐ MFIP----------$_____

☐ General Assistance----------$_____

☐ Investments or Rental Income ----$_____

☐ Pension ----------$_____

☐ Other _____----------$_____

identify source

Gross Income Total----------$ _____ per month

15. Medical Insurance (Medical Insurance does not include Minnesota Care or Medical Assistance.)

a. Wife has ☐ medical ☐ dental insurance **or** ☐ no insurance.

b. Husband has ☐ medical ☐ dental insurance **or** ☐ no insurance.

AGREEMENT OF HUSBAND AND WIFE

1. We have made this agreement to settle once and for all what we owe to each other and what we can expect to receive from each other. Each of us states that nothing has been held back, and that we have honestly included everything we could think of in listing our assets (everything we own and that is owed to us) and our debts (everything we owe) and that we believe the other has been open and honest in writing this agreement.
2. We will sign and exchange any papers that might be needed to complete this agreement before or after the divorce.

3. Real Estate

Real estate includes a homestead, condominium, apartment building, vacant land, contract for deed interest, remainder interest, and more.

☐ a. Husband owns no real estate by himself or with anyone else.

☐ b. Wife owns no real estate by herself or with anyone else.

☐ c. Husband and/or Wife own real estate as described on the Real Estate Attachment(s).

(Use a separate Real Estate Attachment sheet for each parcel of real estate.) All Real Estate Attachments are part of this Joint Petition, Agreement, Judgment and Decree and we agree that the real estate shall be awarded as stated on the Real Estate Attachment(s).

Check one:

☐ There is one Real Estate Attachment OR

☐ There are _____ Real Estate Attachments.

4. Non-Marital Property

Non-marital Property means: (1) anything that you or your spouse owned before the marriage; (2) a gift, bequest, devise, or inheritance made by a third party to one but not to the other spouse; (3) anything that you or your spouse got in trade or in exchange for your non-marital property; (4) anything that is an increase in the value of non-marital property (STOP: Property can be part non-marital and part marital. Defining and valuing non-marital property can be complicated. If you have any concerns or questions, you should stop here and talk to an attorney.) (5) anything you or your spouse received after the valuation date set by the Court; or (6) anything defined as non-marital property by a valid antenuptial contract (STOP: If you have an antenuptial contract, you should stop here and talk to an attorney.)

a. Husband owns non-marital property he wants awarded to him by the Court:

☐ YES ☐ NO. If YES, Husband and Wife agree that that the following property is Husband's non-marital property and shall be awarded to Husband: _____

_____

_____

The total value of Husband's non-marital property is $_____

b. Wife owns non-marital property she wants awarded to her by the Court:

☐ YES ☐ NO. If YES, Husband and Wife agree that the following property is Wife's non-marital property and shall be awarded to Wife: _____

_____

_____

The total value of Wife's non-marital property is $_____

5. Division of Marital Property

Marital Property means almost anything that you or your spouse own that you or your spouse received during the marriage, even during the times that you and your spouse were separated. This includes real estate, boats, cabins, household goods, furniture, jewelry, and other things.

See attached Asset Sheet listing all assets. The Asset Sheet is part of this Joint Petition. The Asset Sheet must be attached to the Joint Petition, even if husband and wife have no assets.

6. Division of Marital Debts

Marital Debts means debts incurred by you or your spouse during the marriage, even during the times that you and your spouse were separated. Do not include monthly expenses you pay in full each month, such as telephone and utilities.

See attached Debt Sheet listing all debts. The Debt Sheet is part of this Joint Petition. The Debt Sheet must be attached to the Joint Petition, even if wife and husband have no debts.

7. Spousal Maintenance (alimony)

No arrearages in maintenance due under any previous Order of the Court shall merge with this Judgment and Decree. This means that any past due amounts of spousal maintenance are still owed, no matter which option is checked below.

Check One

___a. Each of us forever gives up any right to spousal maintenance (alimony) that we may have and the Court is divested of jurisdiction over spousal maintenance. This means we may never ask the court to order spousal maintenance, even if our financial situations change in the future or the law on spousal maintenance changes in the future.

___b. Spousal Maintenance is reserved. Neither husband nor wife shall pay or receive spousal maintenance at this time. Either person may ask the court to order spousal maintenance in the future through the motion process, if there are facts and law that support the request.

___c. ☐ Husband ☐ Wife shall pay temporary spousal maintenance to the other party in the amount of $_____per month by the first day of the month, starting the first month after entry of the judgment for divorce and ending on _____(insert a date). Payment shall be through income withholding.

___d. ☐ Husband ☐ Wife shall pay permanent spousal maintenance to the other party in the amount of $_____per month by the first day of the month, starting the first month after entry of the judgment for divorce. Payment shall be through income withholding. Permanent spousal maintenance is needed because: _____

_____

_____

_____

_____

_____

Income Withholding:

☐ Husband's ☐ Wife's employer, trustee, or other payor of funds shall withhold this monthly amount and mail it to Minnesota Child Support Payment Center. Until income withholding starts, the person ordered to pay maintenance shall send the payments to: Support Payment Center, P.O. Box 64326, St. Paul, MN 55164-0326. Checks must be payable to Minnesota Child Support Payment Center.

8. Insurance Coverage

Husband and wife shall each provide for his or her own health and dental insurance.

Either party may be eligible to extend for a limited time, at his/her own expense, the dependent coverage available under the other party's insurance plan, pursuant to federal and state statutes.

9. Other:

We also agree to the following:

_____

_____

_____

_____

_____

_____

_____

_____

BASED UPON THE ABOVE INFORMATION, Husband and Wife request that the Court issue a final judgment and decree terminating our marriage and ordering the terms of this Agreement.

READ and SIGN the **Verification and Acknowledgments**

STATE OF MINNESOTA)
) ss.
COUNTY OF _____)
(County where documents signed)

Verification and Acknowledgments

a. I have read this document. To the best of my knowledge, information and belief the information contained in this document is well grounded in fact and is warranted by existing law.

b. I have not been determined by any Court in Minnesota or in any other State to be a frivolous litigant and I am not the subject of an *Order* precluding me from serving or filing this document.

c. I am not serving or filing this document for any improper purpose, such as to harass the other party or to cause delay or needless increase in the cost of litigation or to commit a fraud on the Court.

d. I understand that if I am not telling the truth or if I am misleading the Court or if I am serving or filing this document for an improper purpose, the Court can order me to pay money to the other party, including the reasonable expenses incurred by the other party because of the cost of serving or filing this document, Court costs, and reasonable attorney's fees.

e. **WAIVER (Rule 306.01(c)):** I know I have the right to be represented by a lawyer of my choice. I hereby expressly waive that right and I freely and voluntarily sign the foregoing stipulation.

DATE: _____/_____/_____ _____
Month Day Year Signature of Husband
(Sign <u>only</u> in presence of notary public)

(____)_____
_____ Daytime Telephone Number of Husband

Notary Seal Signed and sworn to before me on_____(date)

by _____
Notary Public

HUSBAND'S ATTORNEY

Husband is ☐ acting as his own attorney OR

☐ is represented by the following attorney:

_____ (Name)

_____ (Street Address)

_____(City ,State, Zip Code

_____(Telephone)

____ _____(Atty. Reg. #)

DATE: _____/_____/_____ _____

Month Day Year Signature of Wife

(Sign only in presence of notary public)

(____)_____

_____ Daytime Telephone Number of Wife

Notary Seal Signed and sworn to before me on____(date)

by _____

Notary Public

WIFE'S ATTORNEY

Wife is ☐ acting as her own attorney OR

☐ is represented by the following attorney:

_____ (Name)

_____ (Street Address)

_____ (City ,State, Zip Code)

_____ (Telephone)

_____ (Atty. Reg. #)

COURT ORDER

This case came before the Court without a hearing on the parties' Joint Petition for Dissolution of Marriage. The Court, having reviewed the file, makes the following Order:

1. The parties' Joint Petition and Attachments contains the necessary facts and includes an agreement on all issues before the Court. The real estate, if any, and the personal property of the parties is hereby awarded according to the division set out in their foregoing Joint Petition, which is made part of this final judgment. Debts and liabilities of the parties must be paid as provided in their foregoing Joint Petition. The parties are ordered to obey all of its provisions.
2. The marriage between the parties is dissolved and the parties are single.
3. ☐ Husband's ☐ Wife's name is changed to:

_____

first *middle* *last*

3. Each party shall execute any documents necessary to transfer real estate and personal property as awarded herein without further order of the Court. Should either party fail to execute the necessary documents, a certified copy of the Judgment and Decree shall operate to transfer title as awarded herein.
4. General Rule of Practice 125 notwithstanding, let Judgment be entered immediately.

Dated:_____ _____

Judge of District Court

The foregoing facts were found by me after due hearing and the Order thereon is recommended.

_____

Dated

_____

Referee of District Court

Judgment

I certify the above constitutes the Judgment of the Court.

_____

Court Administrator

Real Estate Attachment

Fill out a separate Attachment for each parcel of real estate

1. Real Estate belongs to :

   _____

   _____(List all owners)

2. Street Address of the real estate is:

   _____

   City_____State_____Zip Code_____

   The property is in_____County.

3. Legal Description is: (Use the full legal description from the deed. If the legal description is long, you may use an attachment. Type or print neatly.)

   _____

   _____

   _____

   _____

   _____

   _____

4. Purchase date_____(month , day, year) and purchase price:$_____

5. Mortgages or loans: (Write "NONE" if there is no mortgage)

   1st Mortgage: Amount currently owed $_____and name of lender_____

   2nd Mortgage: Amount currently owed $_____and name of lender_____

6. Current Market Value of this property: $_____

7. This property is the homestead: _____Yes _____No

Agreement of the Parties

1. All right, title, and interest of husband and wife in the real estate described above shall be awarded to:

   ☐ Husband ☐ Wife

2. Husband and Wife also agree that: (Describe any liens in favor husband or wife, or other agreements about the use, sale of, or award of the property. Attach additional pages if needed. If there are no other agreements, write "None".)

_____

_____

_____

_____

3. 3. The Mortgage(s) or Loan(s) described above shall be paid by ☐ Husband ☐ Wife starting on the following date:_____(write "NONE" if there is no mortgage or loan.)

Attachment "A"

DIVISION OF ASSETS AND VALUE

Husband's Name:_____

Wife's Name:_____

1. We agree on how to divide our assets (everything we own and that is owed to us).
2. Each person shall receive as their own all assets in their column.

Definitions: Current Fair Market Value is an estimate of the amount of money you could get if you sold the item to a stranger, such as through a newspaper advertisement. It does **not** mean what you paid for it originally, and it does **not** mean what it would cost you to replace it if you lost it. If you are still paying for an item, list it in husband's or wife's column at the *present value*.

Present value means the current fair market value minus the amount you still owe.

Who Gets the Item and What is the Value

DESCRIPTION OF ASSETS □ **If you do not have the type of property described, enter a zero in the columns for Husband and Wife.** □ **To avoid confusion at a later date, describe each item as clearly as possible. For example, include the last 4 digits of account numbers (xxx2873), names of banks, & whose name is on the title or account, if applicable**. □ **List all property owned separately or together, no matter when it was acquired, except do not list the non-marital property described at #4 of the Joint Petition.**	***Enter the current fair market value or present value of the item in the column of the person getting the item.**	
	***HUSBAND**	***WIFE**
Cash on hand:	$	$
Cash in banks/credit unions: (Name of bank, last 4 digits of account number, whose name is on the account)		
	$	$
	$	$
	$	$
	$	$
	$	$
Stocks/Bonds:		
	$	$
	$	$
	$	$
	Husband	**Wife**
Notes (money owed to you in writing):		

	$	$
	$	$
Money owed to you (not evidenced by a note):		
	$	$
	$	$
	$	$
Business interests: (Name of business, who owns it)		
	$	$
	$	$
Automobiles: (Year, Make, Model) (Reminder: Use present value if you are still paying for the items.)		
	$	$
	$	$
	$	$
	$	$
Boats:		
	$	$
	$	$
Other vehicles: (Snowmobiles, 4-Wheelers, etc.)		
	$	$
	$	$
	$	$
Retirement plans ☐ Profit Sharing or Pension: (Enter "present value". Contact plan administrator for the present value. Include name of employer/group providing the plan, and type of plan.)		
	$	$
	$	$
☐ 401(k), IRAs or other: (Enter current account balance, name of bank where funds are held, whose name is on the account.)		
	$	$
	$	$
	$	$
Furniture & furnishings:		
☐ We have already divided the furniture and furnishings in a fair manner. (Enter in each spouses' column the total value of their share of the furniture and furnishings already divided);	$	$
☐ We agree to divide the furniture and furnishings as follows: (List items not included above.)		
	$	$

600

600

	Husband	**Wife**
	$	$
	$	$
	$	$
	$	$
	$	$
	$	$
Collectibles & Jewelry:		
	$	$
	$	$
	$	$
	$	$
Life insurance: (cash surrender value) (Name of insurance company and last 4 digits of policy number.)		
	$	$
	$	$
Sporting & entertainment & electronic equipment: (TV, stereo, guns, etc.)		
	$	$
	$	$
	$	$
	$	$
	$	$
	$	$
Real Estate:		
Do Not List Here. Use Real Estate Attachment.		
Other assets:		
	$	$
	$	$
	$	$
	$	$
Total Value of Property To Each Person: (Excluding Real Estate, and any Non-Marital Property listed at Paragraph #4 of the Joint Petition.)	**Husband** **$**	**Wife** **$**

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Attachment "B"
DIVISION OF LIABILITIES/DEBTS

Husband's Name:_____
Wife's Name:_____
Date we filled out this form:_____

1. We agree on how to divide our marital debts (debts we have incurred since our marriage date, either separately or together).
2. Each person shall pay as their own the debts listed in their column, and shall not ask the other person to pay these debts/bills.
3. We have listed all marital debts we know of on this Attachment. Any debts incurred by one of us alone and not listed on this Attachment shall be paid by the person whose name is on the debt/bill.

DESCRIPTION OF DEBT(S) □ **If you do not have the type of debt described, enter a zero in the columns for Husband and Wife.** □ **To avoid confusion at a later date, describe each debt as clearly as possible. For example, state who the debt is owed to, whether husband's or wife's name is on the debt, and the last 4 digits of account numbers (xxx3094), if applicable.** □ **List all debts in husband's name alone and in wife's name alone and in both names together. Include debts incurred during the marriage and after separation. Do not include bills you pay in full each month.**	***Write the current amount owed in the column of the person who will pay it.** ***HUSBAND**	***WIFE**
Mortgages and loans on Real Estate: Do not list here. Use the Real Estate Attachment.		
Charge/credit card accounts:		
	$	$
	$	$
	$	$
	$	$
	$	$
	$	$
	$	$
	$	$
Auto loans:		
	$	$
	$	$
	$	$
Bank/credit union loans:		
	$	$
	Husband	**Wife**

	$	$
	$	$
	$	$
	$	$
	$	$
Student loans:		
	$	$
	$	$
	$	$
	$	$
Money you owe: (not evidenced by a note)		
	$	$
	$	$
	$	$
	$	$
Judgments:		
	$	$
	$	$
	$	$
Other debts:		
	$	$
	$	$
	$	$
	$	$
	$	$
Total Debts to be Paid by Each Person: (Excluding Real Estate mortgages and loans.)	**Husband** **$**	**Wife** **$**

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Instructions: Joint Petition for Dissolution of Marriage Without Children

Where Do We File?

File in the County where you or your spouse live now. To file for Marriage Dissolution (Divorce) in Minnesota, you must have lived in Minnesota for at least the past 180 days.

Who Can Use this Form?

You can use this form if you and your spouse agree on everything and there are no children. This form may not address all of your needs or concerns. Real estate, pensions, businesses, and other types of property can be handled many different ways. There may be serious negative consequences and tax implications from your decisions on how to divide your property and handle the issues in your divorce.

These forms and instructions do not explain the many legal and financial issues involved in divorce and cannot warn you of specific problem. Please see an attorney if you have questions.

Do not use this form if:

a) you and your spouse have children together, or
b) the wife has given birth to a child since the marriage date, or
c) wife is pregnant.

Filling out the forms:

- Print very neatly or the court may return your forms to you. Use black or dark blue ink.
- Answer every question completely. You must disclose all financial information so the Judge can determine if your proposed division of property and debt is "fair and equitable." Include property/debts you own separately and together. For example, if you have a car and only your name is on the title, you still must list the car.

Information you will need:

Pay stubs or tax return for you and your spouse
Medical Insurance information
Records of bank accounts and investments
Pension information
Legal description of any real estate and details about the mortgage and value of the real estate
Descriptions of vehicles, their value and monthly payment amounts and total owed
Information about credit card and other debt.

Do You Want to Change Your Name?

You and/or your spouse can ask for a legal change of name in the Joint Petition. If you want to change your name and you have been convicted of a felony, you must get the handout "Felon Name Change Instructions" and follow the steps in the handout.

Do You or Your Spouse Own Real Estate?

You must include real estate that you and your spouse own together, separately, or with other people. Use a separate real estate attachment for each parcel of real estate. Use the correct legal

description – do not guess or abbreviate. There are many ways to handle real estate and many potential problems. You should talk to an attorney if you own real estate. For example, you may want the real estate awarded to one person with a lien in favor of the other person. An attorney can help you understand the legal consequences and necessary language.

Answering the Income Questions:

Questions 13 and 14 ask for monthly gross income (before taxes and deductions).
Do not guess at income. Look at your pay stub or tax return.
If you are paid monthly, enter the amount shown on your paycheck for gross income.
If you are paid twice a month, multiply gross income by 2 to get the monthly amount.
If you are paid every two weeks, multiply gross income by 2.17 to get the monthly amount.
If you are paid every week, multiply gross income by 4.33 to get the monthly amount.

If you are self-employed, or you work only part of the year, or your earnings vary, divide your yearly income by 12 to reach an average monthly income figure and write on the petition that you are averaging your income.

Modifying the Joint Petition

You may make changes to the Joint Petition to fit your situation, but do not omit any paragraphs. It is recommended that you consult with an attorney before making any changes to the Joint Petition.

What to Do After Completing the Forms

Sign and Notarize: Both wife and husband must sign the "Joint Petition, Agreement, and Judgment and Decree". It is not necessary for both spouses to sign the document at the same time, but both signatures must be notarized. You may go to a notary public, or to the courthouse. A deputy court administrator can notarize your signature at the courthouse. Picture identification will be required.

File:

1. The completed "Joint Petition, Agreement, and Judgment and Decree", the Asset Sheet, and the Debt Sheet. If there is real estate, also file the Real Estate Attachment(s).
2. "Form 11: Confidential Information" with names and social security numbers.

Pay: The District Court filing fee.

Wait: You are not divorced until the Judge signs the Decree and the Court Administrator "enters" the Decree. Wait to receive a letter from the Court telling you that you are divorced. You will not attend a court hearing unless the Judge decides a hearing is necessary.

If you have real estate, there are additional steps required to transfer the title, including filing the "Joint Petition, Agreement, and Judgment and Decree" and all Attachments in the Real Estate Records, after the Decree is signed by the Judge and entered by the Court Administrator. In the alternative, you can file a Summary Real Estate Disposition Judgment and avoid putting all of your asset and debt information into the Real Estate Records. For more information about the Summary Real Estate Disposition Judgment, see Minnesota Statutes §518.191.

Questions?

If you have questions about the Joint Petition , you probably need to ask an attorney or accountant. Court staff can give you limited help with procedures. Only an attorney can give you legal advice.

Recommendation 4: **The Court should amend Rule 119 to establish a streamlined procedure to obviate a formal hearing in many default situations.**

Introduction

The committee considered a standing order adopted in the Fourth Judicial District effective on August 1, 2003, regarding the application for "attorneys' fees related to default judgments requested pursuant to the Minnesota Rules of Civil Procedure, Rule 55.01(a)." Without reaching the question of whether this standing order violates Minn. R. Civ. P. 83, the committee concluded that the provision addresses an important issue. After consideration of the rule's potential usefulness throughout the state, the committee believes that a modified rule allows a fair and efficient means of determining attorneys' fees in default matters.

Specific Recommendation

Rule 119 should be amended to add a new subsection 119.05 as set forth below. Because the rule is entirely new, no markings are included to show additions or deletions.

RULE 119. APPLICATIONS FOR ATTORNEYS' FEES

* * *

Rule 119.05. Attorneys' Fees in Default Proceedings.

(a) A party proceeding by default and seeking an award of attorneys' fees that has established a basis for the award under applicable law may obtain approval of the fees administratively without a motion hearing, provided that:

(1) the fees requested do not exceed fifteen percent (15%) of the principal balance owing as requested in that party's pleadings, up to a maximum of $3,000.00. Such a party may seek a minimum of $250.00; and

(2) the requesting party's pleading includes a claim for attorneys' fees in an amount greater than or equal to the amount sought upon default; and

(3) the defaulting party, after default has occurred, has been provided notice of the right to request a hearing under section (c) of this rule and a form for making such a request substantially similar to Form 119.05.

(b) A party may request a formal hearing and seek fees in excess of the amount described herein if that party provides the court with evidence relevant to the amount of attorneys' fees requested as established by the factors a court considers when determining the reasonableness of the attorneys' fees.

(c) A defaulting party may request a hearing and further judicial review of the attorneys' fees requested by completing a "Request for Hearing" provided by the plaintiff substantially similar to Form 119.05. A party may serve the form, at any time after a default has occurred, provided that the defaulting party is given at least twenty (20) days notice before the request for judgment is made. A defaulting party must serve the Request for Hearing upon the requesting party or its counsel within twenty (20) days of its receipt. Upon timely receipt of a Request for Hearing the party seeking fees shall request a judicial assignment and have the hearing scheduled.

(d) Rule 119.05 does not apply to contested cases, ancillary proceedings (*e.g.*, motions to compel or show cause) or proceedings subsequent to the entry of judgment.

Advisory Committee Comment—2003 Adoption

Rule 119.05 is a new rule to establish a streamlined procedure for considering attorneys' fees on matters that will be heard by default. The rule does not apply to situations other than default judgments, such as motions to compel discovery, motions to show cause, sanctions matters, or attorneys' fees in contested matters. This subsection is modeled on a rule adopted by the Fourth Judicial District and implemented as a local standing order. A simpler procedure for defaults is appropriate and will serve to conserve judicial resources, and it is appropriate to have a uniform rule throughout Minnesota.

New Form 119.05 is intended to provide useful information to the defaulting party and some care has gone into its drafting. Although use of the form is not required, the requirement that any notice conform "substantially" to the form should be heeded. The committee has attempted to use language that fairly advises the defaulting party of the procedure under Rule 119.05 without threatening consequences or confusing the defaulting party on the effect of either contesting or not contesting the fee award. The rule requires that notice be given after the defendant has defaulted. Notice given earlier is not effective to comply with the rule, as such notice is likely to confuse the recipient as to the differing procedures and timing for response to the Summons and responding to the request for fees.

The rule does not affect the amounts that may be recovered for attorneys' fees; it allows either side to obtain a hearing on the request for fees; the rule supplies an efficient mechanism for the numerous default matters where a full hearing is not required. Similarly, the rule does not remove the requirement that a party seeking fees file a motion; it simply provides a mechanism for resolution of some motions without formal hearings.

FORM 119.05 NOTICE AND REQUEST FOR HEARING TO DETERMINE ATTORNEYS' FEES AWARD

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

_____ (Plaintiff)

vs.

NOTICE AND REQUEST FOR HEARING TO DETERMINE ATTORNEYS' FEES AWARD

_____ (Defendant(s)) Court File No.:_____

TO: _____, JUDGMENT DEBTOR:
(Provide Name)

The above-named plaintiff is seeking an award of attorneys' fees in addition to the principal, interest and court costs in this case. If you do not contest the fee award by completing this form and returning it to the plaintiff's attorney within twenty (20) days, the court will award fees in the amount of $_____, calculated as fifteen percent (15%) of the principal balance owing as requested in the Complaint up to a maximum of $3,000.00 but not less than $250.00. If you contest the reasonableness of the fees, the plaintiff may seek an award of fees in excess of the previous amount, and the Court may award an amount larger or smaller than the amount stated here.

You must return this form to the plaintiff's within twenty (20) days of its receipt. Failure to timely return the form may result in judgment for the requested fees being granted.

NOTE: This form is not a substitute for an Answer to the Complaint and will not preclude the entry of judgment for the principal claim. This form is limited solely to requesting a judicial review of the attorneys' fees requested by the plaintiff. Please contact legal counsel for advice related to serving an Answer to the Complaint.

REQUEST FOR COURT HEARING

I request a hearing to determine the reasonableness of the attorneys' fees requested by the plaintiff.

_____
(Defendant(s))

Return this form to:

_____
(Plaintiff's Attorney)

(Address)

Hennepin County **Law Library**

C-2451 Government Center
300 S. Sixth St.
Minneapolis, MN 55487
612-348-3023
Fax: 612-348-4230

October 31, 2003

Frederick K. Grittner
Clerk of the Appellate Courts
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Re: **Comment on Proposed Amendments to the General Rules of Practice**

Dear Mr. Grittner:

I recommend the following addition (in boldface type) to proposed Rule 110:04(a):

110.04. Role of Self-Help Personnel.
(a) Required Acts. Self-Help Personnel shall
(2) Inform Self-Represented Litigants about the availability of legal resources in public law libraries located throughout the state;

(proposed items 2-5 would be renumbered 3-6)

Referral to law library resources should be a required act because citizens have a right to be made aware of the resources available in their communities that enable them to educate themselves about court procedures, primary sources of the law, and secondary sources that are available to explain the law. Meaningful access to justice includes access to legal information.

In Hennepin County, the Self-Help Center staff regularly refers users to the Hennepin County Law Library for assistance in locating statutes, cases, court rules, and sample pleadings. The Center includes on its web site references to the Law Library's collection and online web resources. Public law libraries throughout the state contain self-help materials that help explain the law in non-legal language in such areas as landlord/tenant, employment, and family law.

The Hennepin County Law Library has seen a dramatic increase in usage by self-represented litigants in the past ten years. Over half of our approximately 200 daily visitors are non-lawyers. Many of these users volunteer that they have been referred to the Law Library by our District Court's Self-Help Center.

I urge you to include the above reference to law library resources in the new rules.

Thank you for your consideration.

Sincerely yours,

Anne W. Grande
Director

Minnesota Association of Law Libraries

A Chapter of the American Association of Law Libraries

October 31, 2003

Vicente E. Garces
President, Minnesota Association of Law Libraries

University of Minnesota Law Library
229 19th Avenue South
Minneapolis, MN 55455

Frederick K. Grittner
Clerk of the Appellate Courts
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Dear Mr. Grittner, members of the Supreme Court Advisory Committee on General Rules of Practice, and Justices of the Minnesota Supreme Court:

On behalf of the Minnesota Association of Law Libraries, I respectfully suggest that proposed Rule 110.04 (a)(1) be revised so that the Minnesota State Law Library and local public law libraries are included among the services and programs that Self-Help Personnel are required to educate Self-Represented Litigants about. To accomplish this I suggest the text of Rule 110.04 (a)(1) be revised to read as follows:

> (1) Educate Self-Represented Litigants about available pro bono legal services, low cost services, legal aid programs, lawyer referral services, and resources available at the Minnesota State Law Library and local public law libraries.

The services and resources available from the State Law Library and other public law libraries provide an important avenue to many self-represented litigants and other lay-persons in accessing the law and justice in Minnesota. For self-represented litigants that, for whatever reason, are unable to avail themselves of the services and resources provided by legal aid programs or lawyer referral services, public law libraries are a critical resource. Even self-represented litigants that eventually obtain legal advice or representation, can benefit from being aware that resources are available at public law libraries to help them better understand their legal situation. For these reasons our association urges you to include the State and public law libraries among the services and resources that self-represented litigants are educated about under Proposed Rule 110.04.

Sincerely,

Vicente E. Garces
President, Minnesota Association of Law Libraries

CX-89-1863
STATE OF MINNESOTA
IN SUPREME COURT

In re:

Supreme Court Advisory Committee on General Rules of Practice

---

OBJECTIONS TO FINAL REPORT TO AMEND RULE 119

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RULE 119 OF THE MINNESOTA RULES OF GENERAL PRACTICE SHOULD NOT BE AMENDED AS PROPOSED

For the reasons set forth more fully below, LASM objects to the proposed amendment on two general grounds:

1. The proposed amendment constitutes a new substantive standard for a certain category of attorney's fees and departs from the well-established standard of the courts awarding a "fair and reasonable fee." Furthermore, it shifts the burden from an attorney--who currently must demonstrate by a motion and supporting affidavit that the requested fee is fair and reasonable-- to the debtor who under the proposed rule would have to demonstrate that it is unreasonable although they will have little if any information upon which to base their claim. This new standard benefits creditors at the unreasonable expense of debtors, particularly low-income and disadvantaged debtors.
2. The proposed "notice" is not adequate to inform debtors under the standards required for due process of the law. The form also discourages debtors from contesting the reasonableness of the fees.

LASM requests that the Supreme Court reject the proposed amendment. However, at a minimum, LASM urges the Court to delay adoption of the amendment to the Rule and to take adequate time to assess thoroughly the proposed amendment's reasonableness and the impact it will have on low-income and otherwise disadvantaged debtors.

I. BACKGROUND

LASM is a nonprofit organization which provides civil legal services to low-income persons in Hennepin County. The substantive areas of LASM's legal services include housing, government

benefits, immigration, family, tax and consumer law. LASM also includes the Disability Law Center which represents disabled individuals throughout the state of Minnesota. Through its services in these areas, LASM has considerable experience with the barriers facing low-income and other vulnerable persons in understanding and accessing the court system.

II. THE PROPOSED RULE 119.05 CONSTITUTES A NEW SUBSTANTIVE STANDARD WHICH WILL HARM LOW-INCOME AND OTHER DISADVANTAGED DEBTORS

The proposed amendment to Rule 119 is not a procedural amendment. The amendment sets forth a new substantive standard and would constitute a significant shift in policy by the Minnesota Supreme Court from evaluating whether an attorney's fee is "fair and reasonable" to assuming the reasonableness of a 15 percent contingency fee. Under the current rule, the burden is on the Attorney to demonstrate that the requested fee is reasonable by filing an affidavit to accompany his or her motion for attorneys fees. The affidavit provides the court with a basis to determine the reasonableness of the requested fee. The required affidavit also provides the party against whom the fee would be awarded sufficient information to determine whether an objection to the requested fee is warranted. Rule 119 was "... intended to create a standard procedure only; it neither expands nor limits the entitlement to recovery of attorneys' fees in any case." Rule 119 Advisory Court Comment---1997 Amendment. The proposed Rule 119.05 expands an entitlement of attorneys fees in a default proceeding from a minimum of $250 to a presumptive 15% (up to $3000) regardless of the time spent on the case or the relative difficulty involved in obtaining the default judgement.

The Minnesota Supreme Court has consistently required the lower courts to arrive "at a fair and reasonable fee." *See, e.g., Agri Credit Corp. v. Liedman*, 337 N.W.2d 384, 386 (Minn. 1983) (quoting *Obraske v. Woody*, 294 Minn. 105, 109-110, 199 N.W.2d 429, 432 (1972)).

The courts have applied this standard in:

1. default collection cases (*see Agri Credit Corp.*, 337 N.W.2d 384);

2. actions by law firms to recover a fee from clients (*see Kittler and Hedelson v. Sheehan Properties, Inc.*, 203 N.W.2d 835 (1973)); and

3. allocating attorney's fees between law firms after attorneys leave the firm and take the client with them (*In re L-Tryptophan cases*, 518 N.W.2d 616 (Minn. App. 1994)).

In determining a "fair and reasonable fee," the courts generally evaluate:

1. the time and labor required;
2. the responsibility assumed;
3. the magnitude of the principal amount;
4. the results obtained;
5. the fees customarily charged for similar services;
6. the experience, character, reputation, and ability of counsel;
7. the fee arrangement;
8. the circumstances under which the services were rendered;
9. the nature and difficulty of the proposition involved;
10. the doubtful solvency of the client and the apparent difficulties of collection;
11. the anticipation of future services; and
12. the preclusion of other employment.

In re L-Tryptophan cases, 518 N.W.2d at 621 (quoting *Kittler and Hedelson*, 203 N.W.2d at 839).

The proposed amendment represents a dramatic shift from the standard of reasonableness and fairness. The amendment would impose a flat percentage fee not based on the amount of work required, the difficulty of the matter, or any other factor relating to reasonableness. The cases affected by the amendment are default judgments in routine collection cases, which typically utilize form pleadings. At a minimum, the Court should carefully scrutinize whether a flat contingency fee is "fair and reasonable" -- bearing in mind that this is not like other contingency fee agreements where a party can agree with their attorney to pay a fee out of the principal amount recovered on their behalf. The court should also scrutinize whether the proposed 15 percent fee is a "fair and

reasonable" amount.

The imposition of a flat 15 percent fee is particularly unfair to low-income and other vulnerable individuals. Such debtors have no participation in drafting agreements either (1) between the debtor and the creditor or (2) between the creditor and its collections agent. These debtors also have no bargaining power. The proposed amendment exacerbates the power disparity between creditors and low-income individuals. It unfairly and inappropriately assumes that 15 percent is a reasonable attorney's fee regardless of the circumstances of an individual matter.

There are additional problems with the proposed amendment. Assuming a debtor understands that under the terms of a contract they could be held responsible for 'reasonable attorneys fees", there is no basis to assume that debtors will understand that the court would interpret this to be a fee based on a percentage of the outstanding debt, or that the court will be asked to approve a fee of up to $3000 in a default proceeding. Under existing law, it is fundamental that the reasonable value of attorney fees is a question of fact to be determined by the district court. *Amerman v. Lakeland Dev. Corp.*, 203 N.W.2d 400, 400-01 (1973) The proposed amendment to Rule 119 would change this principle in default proceedings.

LASM fully appreciates the courts' desire to streamline processes and increase efficiency. The courts invest expense and time reviewing attorney's fee requests and have a genuine need for financial resources, particularly in these difficult economic times. However, there are two potential problems with the proposed solution.

The proposed amendment will not necessarily result in more efficiency for the courts because *pro se* debtors will have the opportunity to request a hearing and may do so. More importantly, the Court should evaluate whether the anticipated benefit in increased efficiency merits the cost in

fairness to disadvantaged litigants. The proposed amendment will confuse low-income debtors who do not understand the hearing procedure which they have the burden to trigger, and it will cost them money they cannot afford. LASM submits that the courts should not trade fairness for efficiency in these circumstances.

A second problem created by the amendment is the potential disincentive it creates for the parties to resolve problems out of court. Under existing law, a creditor can begin garnishment proceedings if debtor has been served with a summons and complaint and more than 40 days have expired without the debtor serving an answer. No court filing or hearing is required. One of the underlying purposes of this is to encourage settlement of these matters without incurring the additional expenses that result from filing the case and without court involvement. Attorneys still recover their fees for their collection efforts, however it is pursuant to the agreement they negotiate with their client, the creditor. Permitting attorneys to recover a fixed 15 percent contingency fee in default proceedings will create a disincentive to negotiate a settlement with the debtor-- one that may result in the debt being paid, but without the imposition of additional costs and attorneys fees.

The Minnesota courts have long required a demonstration of fairness and reasonableness in attorney's fees requests. This Court should reject the proposed amendment which changes this standard to the particular detriment of low-income and other vulnerable debtors.

III. THE PROPOSED NOTICE DOES NOT ADEQUATELY INFORM THE DEBTOR

Adequate notice is essential to due process of law:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.

Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 98 S. Ct. 1554 (1978). Because

the procedure in the proposed amendment does not provide adequate notice, particularly for low-income and other vulnerable debtors, the Court should reject it.

The committee improved the form that accompanies the proposed rule to address some of our due process concerns. However, the procedure still fails to provide adequate notice. The Request contains numerous legalistic terms and will not be readily understood by low-income and other disadvantaged debtors. The Request also confuses debtors about when to seek legal counsel--it instructs them to seek that counsel for advice related to serving an Answer, but does not suggest they seek counsel for advice related to the requested attorneys fees. Moreover, without requiring an affidavit from the attorney requesting the fees, the debtor is unable to determine whether they have a reasonable basis to object.

Rather than establishing a procedure that will provide an opportunity to be heard, the Request discourages individuals from requesting a hearing to contest the fees or seeking advice by instructing them that in doing so, the plaintiff may seek a fee in excess of the "previous amount", and that the court may award a larger amount. A debtor should not be penalized for asking the court to review a request for fees in situations where the requesting attorney has provided no information about the amount of work or his or here hourly rate to support the request. Assuming that attorneys that can support a request for higher fees will do so under the existing provisions of Rule 119, if the court adopts the proposed amendment, it should prohibit a request for increased fees if a debtor chooses to ask the court to review the request.

While the form also states that the court may award a smaller amount, Low-income persons are highly unlikely to seek counsel to determine their chances of successfully challenging the requested fee because they cannot afford it. Even those who qualify for LASM's services--generally

the poorest and most vulnerable--may not receive assistance due to LASM's limited resources. As such, these debtors will not understand "the pendency of the action" and will not receive "an opportunity to present their objections" as required by due process of law. *Memphis Light*, 98 S. Ct. at 1562.

IV. CONCLUSION

For all of the foregoing reasons, LASM respectfully requests that the Court reject the proposed Rule 119.05. At a minimum, LASM urges the Court to study the impact of the proposed amendment on low-income and other disadvantaged debtors and to remedy the adverse effects described above in detail.

LAW OFFICES OF THE LEGAL AID SOCIETY OF MINNEAPOLIS

Dated: October 22, 2003

BY _____

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Telephone: (612) 746-3601

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Dakota COUNTY
DAKOTA COUNTY LAW LIBRARY
DAKOTA COUNTY JUDICIAL CENTER • 1560 Highway 55 Hastings, MN 55033-2351
651.438.8080
Fax 651.438.8098
E-mail: lawlib@co.dakota.mn.us

October 29, 2003

Statement Regarding Proposed Amendments to the General Rules of Practice and Adoption of Rule 110 Relating to Self-help Programs

I am submitting this statement to request adding language to Section 110.04 of the proposed amendment to the General Rules of Practice relating to self-help programs. Specifically, this change adds law libraries to "Required Acts" (110.04(a) (1) to educate self-represented litigants about services that can help them use court resources more efficiently. I would request that law libraries be added to the list of legal information providers listed so that the section would state: "110.04(a) Required Acts. Self-Help Personnel shall (1) Educate Self-Represented Litigants about available pro bono legal services, low cost legal services, legal aid programs, lawyer referral services, AND LAW LIBRARIES".

Here in Dakota County, district court staff regularly refers court users to the law library for information. Lay citizens comprise 70% of law library clientele, and this includes many self-represented litigants. On a daily basis, persons call upon the law library for help with motion papers, family court procedures, statute and case references, definitions, as well as resource materials for non-attorneys. Our law library services individuals who need information about emergency ex parte motions as well as those who wish to file an appeal with the appellate court. In our more suburban/rural area, the law library is one of the only public areas where numerous resources (including statutes, court rules and case law) are available for court users.

Through effective collaboration, the Dakota County Law Library has also taken on self-help service operations by providing needed resources as well as offering administrative support for volunteer attorney sessions. By collaborating with district court, the county bar association, Legal Assistance of Dakota County, our law library has helped create a model that would undoubtedly facilitate implementation of other self-help programs in less populated areas.

Law libraries have resources available to assist a growing population of self-represented litigants. Many law libraries contribute to improved efficiency of the courts by providing vital information resources at all levels and in multiple formats. Proposed Rule 110.04 should be changed to include law libraries in the list of providers that help educate self-represented litigants and facilitate their access to justice.

Respectfully submitted,

Sara Galligan

Sara Galligan
Dakota County Law Library Manager

WASHINGTON COUNTY

LAW LIBRARY

GOVERNMENT CENTER

14949 62ND STREET NORTH • P. O. BOX 6 • STILLWATER, MINNESOTA 55082-0006
(651) 430-6330 • www.washcolaw.lib.mn.us

Frederick K. Grittner
Clerk of the Appellate Courts
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

October 29, 2003

Dear Mr. Grittner, members of the Supreme Court Advisory Committee on General Rules of Practice, and Justices of the Minnesota Supreme Court:

I am writing in support of Barbara Golden's suggested addition to proposed Rule 110.04(b) of the General Rules of Practice, to include a specific reference to law libraries in the new rule.

The Washington County Law Library is one of the 85 county law libraries that works with and is assisted by the State Law Library to provide legal resources and information assistance. Like the State Law Library, we have seen an increase over the past ten years in use of our facility by lay patrons. Our holdings now include a collection of materials geared to assist self-representing patrons, and we routinely provide on-the-spot training in legal research.

In addition, in October 2002, the Law Library assumed responsibility for the Court Self Service Center (SSC). Designed by Washington County Court Administration and opened on July 1, 2002, this "Self-Help" program provides a place for pro se litigants to go for assistance in finding paperwork, information on procedure, and referrals for additional assistance. Many of the court forms developed and approved by the Conference of Chief Judges are available to the public in the SSC, with access to other forms from the State Court's website being facilitated through Internet access available in the Law Library. The SSC served more than 2000 requests in its first year of operation, despite being open and staffed only 20 hours per week. It is now open from 8 to 4:30 Monday through Friday, and continues to be staffed 20 hours per week.

The Washington County Law Library is not the only county law library involved in assisting lay patrons. To my knowledge, the county law libraries in Anoka, Dakota, Goodhue, Itasca, Hennepin, Rice, St. Louis, Scott, Sherburne, Stearns and Wright are all involved in efforts to assist self-represented patrons. A specific reference to law libraries in the proposed new rule would increase the visibility and use of these resources by those for whom they are intended.

For these reasons, I support Barbara Golden's suggested addition to Rule 110.04(b).

Sincerely,

Judith A. Flader

Judith A. Flader
Washington County Law Librarian

Cc: Washington County Law Library Board of Trustees

Minnesota State Law Library
FIRST RUNG ON THE LADDER OF JUSTICE

Barbara L. Golden
State Law Librarian
651-297-2084
barb.golden@courts.state.mn.us

Frederick K. Grittner
Clerk of the Appellate Courts
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

October 29, 2003

Dear Mr. Grittner, members of the Supreme Court Advisory Committee on General Rules of Practice, and Justices of the Minnesota Supreme Court:

I have read with interest the proposed Rule 110 of General Rules of Practice. I respectfully suggest the following addition to Rule 110.04(b):

inform Self-Represented Litigants of the availability of legal resources in law libraries, including the Minnesota State Law Library and county law libraries located throughout the State.

The Court's goals of access to justice and public trust and confidence are goals shared by public law librarians in Minnesota. Many public law libraries have seen a noticeable increase in lay patron use over the past ten years. Here at the State Law Library we have purchased self-help legal materials and provide training to non-attorney patrons in how to perform legal research.

In addition, the Minnesota State Law Library advises and assists 85 county law libraries located in or near almost every courthouse in the state. These libraries are open to the public by law (Minnesota Statute 134A.02) and are a hidden treasure in many courthouses. The development of Self-Help programs in district courts offers a wonderful opportunity to increase the visibility and use of county law libraries. I urge you to include a specific reference to law libraries in these new rules.

Sincerely,

Barbara L. Golden

Barbara L. Golden
State Law Librarian

STATE OF MINNESOTA

IN SUPREME COURT

CX-89-1863

In re: Supreme Court Advisory Committee on General Rules of Practice

---

COMMENT OF THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY ON PROPOSED RULE 110, GENERAL RULES OF PRACTICE FOR THE DISTRICT COURTS

The Director of the Office of Lawyers Professional Responsibility (Director's Office) submits the following comments regarding proposed Rule 110, Minnesota General Rules of Practice for the District Courts.

The Director's Office applauds the Committee's efforts to assist *pro se* parties and minimize the delays and inefficient use of limited court resources. The Director's Office generally supports the Committee's recommendations but is concerned that the Committee's definitional "lumping together" of court personnel and volunteers may create an undesirable and unnecessary double standard for conflicts of interest and confidentiality issues relating to *pro bono* assistance by lawyers.

Proposed Rule 110's treatment of "lawyer personnel" appears appropriate under the circumstances. Even though lawyers employed by the courts may be licensed to practice law, they are prohibited from engaging in the practice of law by State Court Personnel policies. *See e.g.*, Judicial Branch Personnel Policy regarding practice of law by employees. Moreover, there is far less potential that advice or assistance rendered by a state court employee will be unreasonably construed by the public as traditional legal representation or advice.[1]

---

[1] There is also less risk or opportunity that court employed lawyers will improperly use information obtained from Self-Help Programs for the benefit of another since court employed lawyers do not have other clients who could benefit through use of the information.

The same cannot be said however, if volunteer lawyers participate in the Self-Help Program. Proposed Rule 110.03 defines Self-Help Personnel as lawyer and non-lawyer personnel and "volunteers" under the direction of paid staff. Although not entirely clear, "volunteer" within the definition of Rule 110.03(b) presumably includes lawyers. To the extent these volunteer lawyers are either engaged in the practice of law or have the ability to engage in the practice of law, the provisions of Rule 110.07 which disclaim client confidentiality and an attorney-client relationship are overbroad, unnecessary and inconsistent with the ethical regulations associated with *pro bono* services in other similar programs.

The Court has before it an MSBA petition seeking amendments to the Minnesota Rules of Professional Conduct. Among these amendments is proposed Rule 6.5 regulating conflicts relating to *pro bono* limited legal services programs. The proposed rule provides:

> **RULE 6.5: PRO BONO LIMITED LEGAL SERVICES PROGRAMS**
>
> (a) A lawyer who, under the auspices of a program offering pro bono legal services, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
>
> (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
>
> (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
>
> (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Proposed Rule 6.5 permits and facilitates lawyer participation in *pro bono* programs by directly addressing the critical ethical issues that can dissuade lawyers from *pro bono* participation (i.e., conflicts of interest and confidentiality). Rule 6.5 was

adopted by the American Bar Association after lengthy study and is now being recommended by the MSBA after undertaking its own independent consideration of the subject.

Under Rule 6.5 *pro bono* or volunteer lawyers are subjected to the conflict of interest rules when the lawyer knows that consulting with the *pro bono* client involves a conflict of interest. In short, it properly requires lawyers to avoid consultations and communications where the lawyer knows his or her involvement will create a conflict. In contrast, Rule 110 imperfectly deals with conflicts through its oversimplifying statement that no attorney-client relationship arises out of Self-Help assistance. Rule 110.08 erroneously assumes that the only conflict of interest associated with Self-Help Programs is counseling opposing parties in a single Self-Help case. Rule 110 fails to recognize that because of obligations to existing clients, volunteer lawyers must ethically decline to assist Self-Help clients with known conflicting interests.

Rule 110's treatment of confidentiality is also unwise as applied to volunteer lawyers. Rule 6.5 recognizes that a limited duty of confidentiality is necessary even in *pro bono* programs. The Comment to Proposed Rule 6.5 states:

> Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c) [client confidentiality provisions] are applicable to the limited [pro bono] representation.

The disparate treatment of confidentiality obligations between the Limited Legal Services and Self-Help programs is puzzling. Under Rule 110.08 there are no restrictions against a Self-Help volunteer lawyer using information gained in the program for the lawyer's own benefit or for the benefit of another client. The ability of a lawyer to use information obtained during a consultation about a legal matter for the lawyer's own purposes or to benefit another client flies in the face of existing ethical precepts and could erode public confidence in the legal profession. Use of information gained in Self-Help Programs will undermine the bar's *pro bono* efforts. Rule 110's

disclaimer of confidentiality makes little sense for volunteer lawyers who are otherwise engaged in the practice of law and appears unnecessary in light of how this issue is addressed in Rule 6.5.

The Committee's approach to Self-Help Program volunteer lawyers appears to be that they are not practicing law because Rule 110 states that their assistance is not the practice of law. The reality, however, is that the assistance provided by volunteer lawyers in Self-Help Programs is unlikely to be substantively or qualitatively different than the advice given to clients in Limited Legal Services Programs. Lawyers participating in Self-Help Programs, who are not court employees, should be required to comply with the conflict of interest and confidentiality restrictions of Rule 6.5.

Dated: November 3, 2003.

Respectfully submitted,

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PROFESSIONAL RESPONSIBILITY
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FACSIMILE 651-287-0005

Writer's Direct Dial:
651-287-0002
Facsimile 651-287-0005

November 3, 2003

VIA PERSONAL MESSENGER

Frederick Grittner
Clerk of the Appellate Courts
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, Minnesota 55155

RE: Proposed Amendments to the General Rules of Practice:
Rule on Enforcement of Tribal Court Orders and Judgments

Dear Mr. Grittner and Justices of the Supreme Court:

I am writing to comment on the proposed Amendment to the General Rules of Practice proposed by the General Rules Committee on September 17, 2003. By this Court's Order of September 19, 2003, Chief Justice Kathleen A. Blatz set a comment period ending November 3, 2003. I am counsel for William J. Lawrence, a Red Lake Band member and publisher of the *Ojibway News/Native American Press.*

Procedural Background

On May 5, 2003 the Supreme Court entered its Order denying the Petition by the Minnesota Tribal Court/State Court Forum for Adoption of a Rule or Procedure for the Recognition of Tribal Court Orders and Judgments. The Supreme Court Advisory Committee on the General Rules of Practice had considered the Rule and made a recommendation against adoption on August 19, 2002. At a hearing before this Court on October 29, 2002, the Court heard from both proponents and opponents of the proposed Rule.

The Court in its Order dated March 5, 2003 established two principles for the further work of the Advisory Committee:

1. Consider a Rule to provide a procedural framework for the recognition of Tribal Court Orders where there was "an existing legislative basis for doing so."

2. The Advisory Committee was encouraged to explore with the Minnesota Tribal Courts/State Court Forum a compact to assure reciprocal commitment to any new Rule.

We believe that when the Court reviews the proposal from the Advisory Committee, the Court will recognize that both provisions of its March 5, 2003 Order were not carried out.

1. The proposed Rule goes beyond those circumstances where there is "an existing legislative basis" for recognizing and enforcing Tribal Court Orders, and includes a "comity" Rule that while an improvement, remains akin to the Rule rejected last year by the Court.

2. No agreement was reached to assure reciprocal commitment, even though the first part of the proposed Rule requires mandatory enforcement under certain circumstances.

Objections to the Proposed Rule

The objections to this proposed Rule are both procedural and substantive.

A. Procedural.

Not only does the proposed Rule fail to follow the March 5, 2003 Order of this Court, but the entire process has been procedurally flawed from the beginning. The Supreme Court began its initial involvement with Justice Gardebring, continued with the involvement of Justice Schumacher of the Court of Appeals, plus the participation of various District Court Judges. Together, they have spent years participating in the State Court/Tribal Court Forum. In all of those years, that Forum has never reached out to Tribal members, never investigated conditions on reservations with regard to the operation of Tribal Courts, has never done a systematic study of Tribal Courts even in Minnesota, has not looked at whether these Tribal Courts have a constitutional basis, and has not made any effort to determine whether or not they are truly independent. The Tribal members who testified before the Supreme Court one year ago offered information on how Tribal Courts were not truly independent, lacked a constitutional basis, operated as a branch of the political arm of tribal government, and did not dispense justice that comports with the requirements of due process and equal protection. The question is why, after years of investment by the Supreme Court, the Court of Appeals, and numerous District Court Judges, we do not have information that is more than anecdotal. Instead, the State Court/Tribal Court Forum, from the beginning, dealt only with the persons who control and benefit from Tribal Courts, including Tribal Court Judges and Tribal Court attorneys.

The question this Court needs to ask is why a comity rule is being proposed to recognize Tribal Court Orders and Judgments where the individual litigant subject to a Tribal Court Order, generally without resources, and battling such formidable obstacles as Tribal Court judicial and sovereign immunity, and evidentiary rules, may have to try to prove what the Tribal Court/State Court Forum did not determine on its own after years of meetings: which Tribal Courts are truly independent and dispense impartial justice, and which are simply arms of the political branches

of tribal government. It isn't the personalities involved in Tribal Court, most of whom are wonderful, sincere persons, but a system that was inherently flawed from the beginning. The Court has no idea, because no study has been done, of how Tribal constitutions were established by the Bureau of Indian Affairs, following the 1934 Indian Reorganization Act, that were designed to administer federal government programs. The Constitution of the Minnesota Chippewa Tribe, for example, which governs the workings of most of Minnesota Chippewa Bands, has no provision for an independent judiciary at all. The highest elective body in a Band government is called the Reservation Business Committee! These are constitutions designed to carry out the will of the federal government, and when the federal government turned affairs over to Tribal governments, the members were saddled with defective constitutional structures.

The average litigant will not have the resources, knowledge, background and experience to develop this information. The State Court/Tribal Court Forum was designed to make everyone "feel good" about doing something for Tribal governments, while never asking the question of what was in the best interests of the Indian people. Every Tribal member in Minnesota is also a citizen of the State of Minnesota. Procedurally, why hasn't this Court looked into the matters and asked the tough questions before adopting a procedural Rule. It was very clear by the March 5, 2003 Order of this Court that it had no intention of doing so, that it viewed that the legislative branch was better suited for this endeavor. Procedurally, it appears that the access gained by Tribal Court Judges and attorneys through the State Court/Tribal Court Forum has worked an insiders' game so that a comity rule is proposed with numerous defects, contrary to the March 5, 2003 Order, and without ever asking or obtaining answers to the tough questions.

Rule 10.02 should be rejected until those questions are answered and a fully developed comity standard is established.

B. <u>Substantive Problems.</u>

<u>Rule 10.01</u>.

Although the Rule is described as "predominately hortatory" in the Introduction by the Advisory Committee, Rule 10.01 is mandatory when there is a federal or state statute that requires recognition and enforcement. Accordingly, there is little justification for not securing a reciprocity commitment from the Tribal Courts as required by Paragraph 2 of the March 5, 2003 Order.

Rule 10.01(b)(2) requires "notice and an opportunity to be heard within a reasonable time." The Rule should provide a stated number of days for the individual to be heard if it is an *ex parte* Order. The Court has established precise timetables in other circumstances where important individual liberties are at issue. Because such an order might have deprived an individual of contact with their child or access to their home, the time table to be heard should be very short, and certainly within 5 days.

Rule 10.02.

Rule 10.02 suffers a number of problems that were brought before this Court on October 29, 2002 and which led this Court to seek a rule only where there was a legislative basis for recognition. Some of the issues that are not addressed by the Rule are the following:

(1) **Burden of Proof.** As discussed above, the State Court/Tribal Court Forum has been meeting for years and still has not done a systematic investigation of the Tribal Courts in Minnesota, much less elsewhere in the United States where there are 550 federally recognized tribes. Any comity standard must put the burden of proof on the party seeking enforcement of the Tribal Court Order, particularly because it is a system that operates outside the confines of the State and Federal Constitutions. The proposed Rule doesn't state who bears the burden of proof, although Rule 10.02(a) states that "the Court shall enforce" a Tribal Court Order. Arguably this could create some form of burden on the party opposing the Order to demonstrate that it shouldn't be enforced.

Rule 10.02(a) should make the following change if it is going to be adopted:

> "In cases other than those governed by Rule 10.01(a), the Court ~~shall~~ **may** enforce a Tribal Court Order or Judgment..."

Since the Introduction by the Advisory Committee describes the Rule as "predominately hortatory", and the Advisory Committee Comments describe this as fundamentally discretionary, the word "shall" should not appear in Rule 10.02(a). It is confusing and contrary to the Advisory Committee Comments and the introductory recommendations.

(2) **Constitutional Basis.** Nowhere does this Rule address whether or not the Tribal Court has a constitutional basis in the Tribe's Constitution. This is critical to an independent judiciary. One of the factors should be that the court should not recognize a Tribal Court Order from a court operating without an express constitutional basis. The Tribal Courts are seeking recognition and validity from this Rule. The Supreme Court owes it to tribal members, and non-members who could be subjected to Tribal Court procedures, to require Tribal Courts to be independent and constitutionally grounded before it will grant recognition. In the 21st Century there is no reason or need to saddle the Indian people with lesser standards than we would require from any other court in the United States.

The Fifth Circuit Court of Appeals has held that a constitutional provision was necessary in order to have a valid tribal court. *Comstock Oil & Gas Inc. v. Alabama Coushatta Indian Tribes of Texas,* 261 F.3d 567 (5th Cir. 2001), *cert. denied* 122 S.Ct. 1438 (2002).

(3) **No Assurance of Independence.** As discussed above, the State Court/Tribal Court Forum has not done any investigation of the courts in Minnesota, much less the 550 across the United States, so that we have any sense of which courts are independent and which are not.

While there are likely tribal courts that are truly independent, free from political influence, and able to render judgments that comply with the requirements of due process and equal protection, there is no information in which courts those are. Putting the burden of proof on the litigant, when this Court has had the resources to have a Committee operating for a number of years without coming up with any answers, is inappropriate.

(4) **Specific Comments on Rule 10.01.**

(1) See my comment regarding changing "shall enforce" to "may enforce" in Rule 10.02(a).

(2) Add provisions regarding burden of proof, requirement of an express constitutional basis for the Tribal Court judiciary, and a requirement that there be some demonstration of the court's independence.

C. Advisory Committee Comments.

Without any stated reason or analysis, the Rule proposes a comity recognition of Tribal Court Orders across the United States, even though virtually every state that has provided some basis for recognizing Tribal Court Orders has limited it to the Orders of that state. Let's walk before we run with this Rule. The Comments should reflect only a first step.

In the fourth paragraph of the Advisory Committee Comments, it begins "Rule 10.02 reflects a normal presumption that courts will adhere to statutory mandates..." Presumably this is a reference to Rule **10.01**.

In the fifth full paragraph, the Comments state that the Minnesota Uniform Foreign Country Money-Judgments Act, Minn. Stat. §548.35 (2002) creates a procedure for filing and enforcing judgments rendered by courts other than those of sister states. There is not a single court that has applied and enforced the Uniform Enforcement of Foreign Judgments Act to a Tribal Court Order. We have an Advisory Committee Comment that states that a Tribal Court judgment "falls within the literal scope of this statute." This is absolutely wrong. The effort to claim that "tribal court money judgments fall within the ambit of this statute and its procedures" is an effort to extend substantive law, in a way never intended by the legislature, under a procedural guise. Let us begin with some very basic facts. Tribes are not "foreign states". Tribes are certainly not "foreign countries" referenced in the title to the statute. This has never been the policy of the United States. Chief Justice John Marshall, in the famous Marshall Trilogy of cases[1] described tribes as "domestic dependent nations" with no external powers of sovereignty. *Cherokee Nation*, 30 U.S. 17. More recently, the United States Supreme Court has

[1] The Marshall Trilogy is comprised of the three landmark opinions of Chief Justice John Marshall, *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

even retreated from that formulation, stating that the "platonic notions of sovereignty" that guided Chief Justice John Marshall have "lost their independent sway over time." *County of Yakima v. Confederated Tribes*, 502 U.S. 251,257 (1992). In 1886 the United States Supreme Court stated that "In [*Cherokee Nation v. Georgia*] it was held that these tribes were neither states or nations. . ." *U.S. v. Kagama*, 118 U. S. 375,382 (1886). Does this Court truly intend by this Rule to enter the political fray of whether or not tribes are "foreign" or "states"? Tribes are "domestic" not "foreign." Furthermore, tribes do not possess sufficient sovereignty to be "states" or "countries." The governmental powers retained by tribes are internal only. Both factors clearly place tribes outside of the intended legislative purpose of the "Uniform Foreign Country Money Judgment Act." Reservations are ordinarily part of the territory of the state, i.e. not "foreign." *Hicks*, 353 U.S. 361-62.

> "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States or of the States of the Union. There exist within the broad domain of sovereignty but these two." *U.S. v. Kagama*, 118 U.S. at 379.

Also in the fifth paragraph of the Comments, there is a reference to Rule 10.01(b)(1). Presumably that is a reference to Rule 10.02(b), but for reasons stated earlier, the entire section regarding the Uniform Foreign Country Money-Judgments Act should be removed from the Comments.

In Paragraph 7 of the Comments, the Advisory Committee makes a chilling statement when it directs the District Court to "at least ...consider whether the Tribal Court proceedings extended these [due process] rights to the litigants." The Comment should be that the Court shall assure that the litigants had due process rights, not that the Court might consider it.

Further, in that same Paragraph 7 of the Comments, while there is a reference to the fact that Tribal Courts may not be required to adhere to the requirements of due process under the Federal and State Constitutions, they are bound by the Indian Civil Rights Act, and are bound to provide due process and equal protection. There is simply no excuse for not extending full due process and equal protection rights to any Tribal Court Order that is seeking enforcement in the state court.

The last paragraph of the Comments states that Rule 10.02(b) does not require that a hearing be held. The Court should mandate a hearing on the issues of Tribal Court enforcement. Again, litigants faced with Tribal Court Orders are often over matched in many ways: financially, available legal talent, resources, and procedurally. Requiring a hearing where the proponent of the Order is required to prove independent justice and due process were behind the Order would go a long way to evening the playing field.

D. Public Law 280 Concerns.

There is a serious issue of whether this proposed rule violates Public Law 280, (67 Stat. 588 (1953), codified at 18 U.S.C. §1162, 25 U.S.C. §§1321-26, and 28 U.S.C. §1316) which grants the State of Minnesota complete criminal and extensive civil jurisdiction over all reservations (except Red Lake). Minnesota should not adopt a rule that contravenes her own jurisdiction and the federal policy contained in Public Law 280, because **this would be a substantive law change dressed up as a procedural rule.** The way to limit this concern is to follow the March 5, 2003 directive of this Court and adopt a procedural rule when there is an existing legislative basis for recognizing the tribal court order.

Serious questions remain over the size and existence of many Minnesota Ojibwe reservations after the 8th Circuit's decision in Gaffey. In any event, those lands are part of the territory of Minnesota under *Hicks,* 353 U.S. 361-62 ("ordinarily. . . a reservation is considered part of the territory of the state") and subject to state jurisdiction both generally and under Public Law 280. Unless the tribal court order is between members of the band or tribe issuing the order, **original jurisdiction is in state court.**

F. Other Materials.

This Committee needs to recognize that tribal governments often use tribal "sovereignty" as both a shield and a sword, forcing their political opponents to litigate in tribal court where the opponent often has no chance of a fair hearing and outcome, and where the tribal government will prevail. Minnesota's courts should withhold the recognition of tribal court orders and judgments to force a reform of those systems. Justice to the Indian people will come only when outside entities refuse to recognize inherently unfair tribal court government systems. *See,* William J. Lawrence, "In Defense of Indian Rights," Beyond the Color Line, edited by Thernstrom. (Copy attached).

G. Adding the History of the Proposed Rule to the Comments.

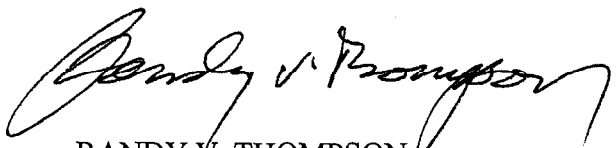
The Comments do not explain the procedural history that led to this proposed Rule. The Comments should explain what was first proposed and rejected, and what this Court ordered on March 5, 2003. Without an explanation of the history of the Rule, the District Court Judges being asked to enforce a Tribal Court Order will lack the necessary history to understand the Court's concerns and perspective.

CONCLUSION

I am one of the few attorneys who have experience and expertise in Indian law, but who do not work on a regular basis on behalf of Tribal governments. I am contacted almost daily by individuals who have been wronged by Tribal Court judicial systems, because they were on the wrong side of the political equation. Whether it is Indian people who have been long denied

their legitimate right to membership in the Mdwekaton Dakota Tribe, whether it is an individual banished *ex parte* from her home, whether it is an individual who has been jailed for contempt because he has been a whistle blower as to financial abuses by tribal government, or whether it is a parent who fears the loss of their child because they are not a member of the Tribe, the problems are difficult and persistent. This Court should reject Rule 10.02 and hold a hearing and invite Tribal members, by reaching out to those members and holding hearings near reservations so that you can hear from the people affected by this Court's proposed Rule. This is work that the State Court/Tribal Court Forum should have been doing, and has not done. Instead, the Forum has become an advocacy group for the Tribal government agendas. To not even hold a hearing on this proposed Rule by the Supreme Court, when the Advisory Committee has not followed this Court's directive in its March 5, 2003 Order, is troubling. There is no question that the Indian people are among the most impoverished people in our society, and are frequently denied their rights. Unfortunately, it is all too often Tribal government that is the oppressor. The desire to do something for the Indian people should begin from an understanding that this Court should investigate the allegations raised in this letter, and raised in previous hearings and testimony. The Court should adopt a procedural Rule that will protect the Indian people and deny legitimacy and validation to Tribal Courts until they are truly constitutionally based and independent. This is not an indictment of all Tribal Courts or the concept of Tribal Courts generally. It is an indictment of failed U.S. policies and current Tribal governments that have denied reform so that their courts remain subject to the political pressures of Tribal governments.

Very truly yours,



RANDY V. THOMPSON

RVT:ljm

Enclosures

BEYOND THE LINE

New Perspectives on Race and Ethnicity in America

Abigail Thernstrom and Stephan Thernstrom

In Defense of Indian Rights

WILLIAM J. LAWRENCE

WHAT SHOULD AMERICA'S policies toward American Indians be as we enter the new millennium? Should Indian tribes be viewed as "sovereign nations," "domestic dependent nations," wards of the federal government, or membership organizations similar to culturally based nonprofit corporations? Should Indians be viewed as full Americans with the same rights and responsibilities as every other American? Or should Indians and tribes attempt to maintain a "separate but equal" status in American life, and should a separate status continue indefinitely?

In fact, today, Indian people are *citizens* of the United States, *citizens* of the state in which they reside, and, in some cases, *members* of a tribe representing some aspect of their genealogical heritage. Tribal membership should not affect the citizenship rights of Indian people, but it often does. And the status of tribal governments, in some cases, even affects the citizenship rights of non-Indian citizens who come in contact with a tribal government.

As of the 1990 U.S. census, there were 1,959,234 people who identified themselves as Indian, 60 percent of whom are enrolled members of one of

the 557 federally recognized tribes, bands, or communities.[1] But many, if not most, people who identify themselves as "Indian" are actually only one-quarter or less Indian, with the balance of their family lineage being of some other racial combination. In fact, many people who consider themselves Indians are of a primarily non-Indian heritage and ethnicity.

The percentage of Indian people living on reservations has been in continuous decline in recent decades. Currently, less than 20 percent (437,431) of the Indian population live on reservations. And 46 percent (370,738) of the total number of people living on reservations are non-Indians.[2] On the nine most populous Indian reservations in the country other than the Navajo, less than 20 percent of the population is Indian. Most Indian reservations are populated primarily by non-Indian families, many of whom were invited to homestead on reservation land in the late 1800s during the "allotment era," when the federal intent was to abolish the system of Indian reservations and merge Indian people and land into surrounding communities. And many reservation families include both Indian and non-Indian family members, resulting in children who have some Indian genealogy but may not have a blood-quantum high enough to qualify for tribal membership, generally considered to be one-quarter.

In light of these facts, what should current and future policies be regarding Indian people, tribes, and reservations? At some point, the federal government must reassess its policy of maintaining so-called "Indian reservations" and treating Americans who have an Indian heritage or identity as a separate class of citizens. Should that occur when Indians are 10 percent, 5 percent, or 2 percent of the reservation population? How long should the federal government maintain a Bureau of Indian Affairs (BIA), Indian Health Service, and other programs solely for citizens with some Indian genealogy? This nation is rapidly approaching a time when there will hardly be any Indians left on reservations, and those Indians who remain there will hardly be Indian.

History: Where We've Been

In the U.S. Constitution, no governmental powers are set aside for, granted to, or recognized as existing for Indian tribes. In fact, no plan was laid out in the Constitution for how to deal with Indian tribes at all, although the United States considered tribes to be under its dominion. Nowhere in the U.S. Constitution, or in any treaty or in any federal statute, are Indian tribes recognized as sovereign. The Supreme Court confirmed this in 1886 when it stated: "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States or of the States of the Union. There exist within the broad domain of sovereignty but these two."[3]

The first American treaty with Indians was signed in 1778 with the Delaware Indians. The last was signed with the Nez Perce in 1868. Over a span of approximately 100 years, nearly 400 treaties were negotiated between dozens of Indian tribes and the U.S. government, most during the westward expansion of the mid-1800s. Nearly a third were treaties of peace. The rest were treaties ceding Indian land to the U.S. government and establishing reservations.[4] During this period, the United States paid more than $800 million for the lands it purchased from tribes.[5]

Treaties were *not* solemn promises to preserve in perpetuity historic tribal lifestyles, lands, or cultures, as is often claimed today. In fact, plans for assimilating Indian people into mainstream American life were spelled out in most treaties, often requiring that treaty payments be used for construction of schools, homes, programs to train Indian adults in agriculture, and promises to aid the transition from a subsistence lifestyle to active citizenship. Rather than being an indication that tribes were sovereign, many treaties specifically noted the lack of tribal sovereignty, and through treaties, many individual Indians and even entire tribes became U.S. citizens.[6] In 1871, Congress ended all treaty making with tribes and stated that the federal government would instead govern Indians by federal policy, acts of Congress, and presidential orders.

Great Indian leaders in history, such as Chief Joseph of the Nez Perce, Sitting Bull and Crazy Horse of the Sioux, Geronimo of the Apache, and many others, are remembered for their steadfast resistance to being placed on Indian reservations and becoming wards of the federal government. Chief Joseph expressed a common view of his time when he said in 1879:

> Treat all men alike. Give them all the same law. Give them all an even chance to live and grow. All men were made by the same Great Spirit Chief. They are all brothers. The mother Earth is the Mother of all people, and people should have equal rights upon it. We only ask an even chance to live as other men live.[7]

In 1887, the federal government too decided that attempting to keep Indian tribes separate from the rest of American civilization was not a good idea. The Board of Indian Commissioners wrote in its recommendations to Congress:

> No good reason can be given for not placing . . . [Indians] under the same government as other people of the States . . . where they live. No distinction ought to be made between Indians and other races with respect to rights or duties. No peculiar and expensive machinery of justice is needed. The provisions of law in the several States . . . are ample both for civil and criminal procedure, and the places of punishment for offenses are as good for Indians as for white men.[8]

These words resonate even more today, 135 years after the Civil War resulted in the end of black slavery and 35 years after the civil rights movement ended a separate status for black Americans. Yet America still maintains race-based tribal courts, tribal laws, tribal sovereign immunity, and a policy of tribal "self-governance," cutting off reservation Indians and non-Indians from equal justice under law.

In 1887, Congress passed the Dawes Act, also called the General Allotment Act, with the idea that Indians would fare better living as full citizens and individual members of society rather than as members of tribes. Under the Dawes Act, reservation lands held by the federal government were divided into parcels for individual Indian families after they were deemed

"competent" to handle their own affairs. The stated intent was to merge Indians into American society and to give them the means, through land ownership, of being self-sufficient members of the larger community. When all reservation land had been allotted or sold, the plan was then to abolish the BIA and thus eliminate federal bureaucratic control over Indian life.[9]

The "allotment era" lasted approximately fifty years, during which time tribal land holdings fell from 138 million acres in 1887 to 48 million acres in 1934.[10] Many Indians lost title to their property because their land was arid or untillable or because they were for other reasons unable to make a living for themselves or pay taxes. But allotment also allowed many individual Indians to own land, support themselves through farming, become U.S. citizens, and be active members of the larger community instead of relying on federal handouts for survival.

In 1924, the Indian Citizenship Act extended national and state citizenship to all Indians born within the territorial limits of the United States who were not already citizens and granted them the right to vote. This Act should have made Indians equal to all other citizens of the United States, with the same Constitutional protections, rights, and responsibilities. But the federal government has continued to treat Indians separately from other citizens, especially if they live on reservations.

In 1933, John Collier became commissioner of the BIA under President Franklin D. Roosevelt. Collier initiated a new federal Indian policy called the "Indian New Deal," which became law as the 1934 Wheeler-Howard Act, also known as the Indian Reorganization Act. Collier admired Chinese communism, which he saw as a model for society. He wanted to implement these communist ideals on American Indian reservations, including communal ownership of property and central control of economic, political, and cultural activities.[11] Many of these key aspects of the Indian Reorganization Act are still in effect on reservations today.

The Indian Reorganization Act moved away from assimilation, again made Indians wards of the federal government, and provided for placing previously allotted land back into federal trust, with the federal govern-

ment, not Indian people, holding the title. The law also provided a means through which tribes that did not have a reservation could gain federal recognition and reestablish reservation lands. Under the Indian Reorganization Act, reservations expanded an estimated 7.6 million acres between 1933 and 1950,[12] and BIA authority, programs, and staff were also expanded. Today, there are approximately 53 million acres of land in federal trust status for Indian tribes.[13]

After World War II, President Dwight D. Eisenhower established a "termination policy" in which the "trust responsibility" of the federal government to maintain Indian tribes would be terminated. The resolution that put this policy into effect stated: "It is the policy of Congress as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States."[14] Full integration was once again the stated federal policy toward Indians.

Under the termination policy, tribes could continue to exist as they chose, but federal supervision of Indian lands, resources, and tribal affairs would end, and the BIA and Indian reservations would eventually cease to exist.[15] In 1953, there were 179 federally recognized tribes.[16] By 1970, when the termination policy unofficially ended, almost 100 tribes, with an approximate total tribal membership of only 13,000 (less than 2 percent of the total Indian population), had their relationship to the federal government terminated.[17] Few tribal members were actually affected by the termination policy, owing largely to resistance in Congress to implement it.

The federal Indian Claims Commission, which existed from 1946 to 1977, paid $880 million to a number of tribes as compensation for instances in which tribes had not received fair compensation for lands they sold to the United States in the nineteenth century. Tribes made over 500 claims before the Indian Claims Commission and won awards in 60 percent of them. Most were property rights claims.[18]

Modern Times: Lack of Accountability in Tribal Governments

The idea that Indian tribes should "govern themselves" as they wish has romantic appeal, but, in practice, tribal sovereignty and self-governance have created many problems.

"The accumulation of all powers—legislative, executive, and judiciary—in the same hands, may justly be pronounced the very definition of tyranny," wrote James Madison, a founding father of the U.S. Constitution.[19] Today, the biggest exploiters and abusers of Indian people are tribal governments, in part because there is no guaranteed or enforceable separation of powers in tribal governments. Many of the largest and best-known American Indian tribes have rampant, continuous, and on-going problems with corruption, abuse, violence, or discord. There is a lack of oversight and controls in tribal governments. Most tribes do not give their members audited financial statements of tribal funds or casino funds, which on many reservations may represent tens or even hundreds of thousands of dollars per tribal member. It is literally impossible for tribal members to find out where all the money is going.

The underlying problem is that true democracy does not exist on Indian reservations. Tribal elections are often not free and fair elections, and typically they are not monitored by any third party. And true democracy includes more than just the presence of an election process. Democracy is also defined by limiting the power of the government by such things as the rule of law, separation of powers, checks on the power of each branch of government, equality under the law, impartial courts, *due process*, and protection of the basic liberties of speech, assembly, press, and property.[20] None of these exist on most Indian reservations.

Tribal chief executives and tribal councils possess near-dictatorial control over tribal members. Not only do they control the tribal court, police, and flow of money, but they also control which tribal members get homes, jobs, and health care services, and under the Indian Child Welfare Act,

they can claim more control over children who are enrolled members than the children's own family, especially non-Indian family members. If they live on a reservation, Indian people who speak up run the risk of losing their homes, jobs, health care, and other services, making internal government reform even more difficult.

Some try to justify tribal government abuses and denial of civil rights by arguing that tribal members "consent" to being governed by the tribe and therefore willingly give up some of their inherent rights of citizenship. But if asked, the vast majority of tribal members never consented to any such thing.

Unfortunately, many Indian people who remain on the reservation either do not see themselves as having much choice, owing to personal addictions, depression, poverty, and despair, or because they are themselves benefiting from the unaccountable tribal system. Most of those who are in between these two extremes have left the reservation.

With many tribes claiming expanded jurisdiction and regulatory authority, including zoning, licensing, and taxing authority within long-extinguished former reservation boundaries, many non-Indians, too, are finding themselves subject to unaccountable tribal governments, without their consent and without a right to vote in tribal government elections.

The issue of consent might be relevant if tribes were simply membership organizations like any other religious, cultural, or community group, in which it can be assumed that if you don't want to be part of the group, you don't join. But the federal policy of the past thirty years, as described by the American Indian Policy Review Commission, has been to expand tribes from being membership organizations to being literal governments sanctioned by the United States, with actual legal authority over people who may or may not have given their consent to being governed. This expanding authority of tribal governments is dangerous to the rights and freedoms of Indian people.

Congressman Lloyd Meeds (D-Washington), wrote in his dissent attached to the American Indian Policy Review Commission's Final Report in 1977:

> The blunt fact of the matter is that American Indian tribes are not a third set of governments in the American federal system. They are not sovereigns. . . . It is clear that nothing in the United States Constitution guarantees to Indian tribes sovereignty or prerogatives of any sort. . . . To the extent tribal Indians exercise powers of self-government in these United States, they do so because Congress permits it. . . . American Indian tribal governments have only those powers granted them by the Congress.[21]

In spite of the American Indian Policy Review Commission's Final Report in 1977 laying out increased tribal "self-determination," "sovereignty," and "self-governance" as solutions to problems plaguing Indian reservations, in spite of the 1988 National Indian Gaming Regulatory Act, and in spite of the thirty-year push for increased tribal governmental power, the statistics show that life is getting worse for Indian people on reservations. Many news stories of late have documented shocking rates of murder, suicide, and violent assault, exceeding even that of the nation's core cities.[22] Claims of tribal sovereign immunity present additional problems. There are numerous cases of tribal casino patrons being injured or abused, businesses contracting with tribal casinos not getting paid for their services, and tribal casino workers being harassed and threatened, with no legal recourse. Any other business can be held accountable for such misdeeds in a state or federal court. But by claiming tribal sovereign immunity, tribal casinos have become the only businesses in the entire world that can totally avoid legal responsibility and liability within the United States.[23]

Many articles describe in detail the problems of trying to get anything resembling a fair hearing in tribal courts, which are not guaranteed to be separate from the tribal administration, where judges may not know anything about the law, where decisions are likely not documented, where *due process* is typically nonexistent, and where cases frequently don't even get a hearing because of claims of tribal sovereign immunity.[24] Yet many well-intentioned advocates for Indian causes mistakenly believe that increased tribal government rights is the same as protecting the rights of Indian people. Nothing could be further from the truth. Past civil rights movements provide lessons for the present. The late Hubert H. Humphrey,

former U.S. senator, vice president, and presidential candidate, said in his famous civil rights speech fifty years ago at the 1948 Democratic National Convention: "There are those who say this issue of civil rights is an infringement on states rights. The time has arrived for the Democratic Party to get out of the shadow of state's rights and walk forthrightly into the bright sunshine of human rights."[25] Replace the word *state* with the word *tribe*, and you get a statement many Indians and non-Indians wish they would hear from their leaders today: "There are those who say this issue of civil rights is an infringement of *tribal* rights. The time has arrived to get out of the shadow of *tribal* rights and walk forthrightly into the bright sunshine of human rights."

The U.S. Supreme Court has in recent years expressed concern about the lack of controls on tribal sovereign immunity, including in May 1998 in its ruling in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies.* Even as they upheld tribal sovereign immunity, the majority wrote:

> Though the doctrine of tribal [sovereign] immunity is settled law and controls this case, we note that it developed almost by accident. . . . [The 1919 precedent-setting case of] *Turner* . . . is but a slender reed for supporting the principle of tribal sovereign immunity. . . . Later cases, albeit with little analysis, reiterated the doctrine. . . . There are reasons to doubt the wisdom of perpetuating the doctrine. [W]e defer to the role Congress may wish to exercise in this important judgment.[26]

In this 6-3 decision, the minority was adamant about the need for limiting tribal sovereign immunity:

> Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? [The Court] . . . does not even arguably present a legitimate basis for concluding that the Indian tribes retained or, indeed, ever had any sovereign immunity for off-reservation commercial conduct. . . . [This] rule is unjust. . . . Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.[27]

Through *Kiowa*, the U.S. Supreme Court has in effect sent an open letter

to Congress asking them to correct the legal quagmire, confusion, and rank injustice of tribal sovereign immunity.

Minnesota Appeals Court Judge R. A. (Jim) Randall, in his eloquent and thoughtful dissent in *Sylvia Cohen v. Little Six, Inc. (Mystic Lake Casino)*, outlined the way Indian people are being wronged by current federal Indian policies and Indian laws, which give power to tribal governments at the expense of Indian people:

> Why here, are we tolerating segregating out the American Indians by race and allowing them to maintain a parallel court system and further, subjecting non-Indians to it? . . . The American Indian will never be fully integrated into this state, nor into this country, until we recognize this dual citizenship for what it really is, a pancake makeup coverup of *Plessy* which allowed separate but equal treatment. [*Plessy*, 163 U.S. at 551, 16 S. Ct at 1143 (holding that "equal but separate accommodations for the white and colored races" for railroad passengers was constitutional).] . . .
>
> We should have learned by now that this duality in America is so intrinsically evil, so intrinsically wrong, so intrinsically doomed for failure, that we must grit our teeth and work through it. . . .
>
> All bona fide residents of Minnesota, of all races and colors, enjoy identical opportunities for self-determination and self-governance. . . . Why is there this need to single out a class of people by race and give them a double dose of self-determination, and self-governance? . . . Are American Indians entitled to more self-determination than Minnesota gives to its other residents? . . . How can a state give more than it possesses? If this is deemed a federal issue, how does the federal government give more than it possesses? . . . Does that make Indians separate but equal? I suggest that *Brown v. Board of Education* will tell us this is a bad idea, a vicious and humiliating idea. Do we label Indians separate but more equal? . . . Do we label Indians separate but less equal? . . .
>
> [T]his issue, is about the future of the United States, and the future of the American Indian. This case is about whether we accept the American Indian as a full U.S. citizen, as a real American, or whether we will continue to sanctify tiny enclaves within a state and tell the individual Indian that if he or she stays there and does not come out and live with the rest of us, we will bless them with the gift of "sovereignty." . . .
>
> For some reason, we continue to insist that American Indians can be the

> last holdout, a race that is not entitled to be brought into the fold, can be left to shift for themselves as long as, from time to time, we pat them on the head like little children and call them sovereign. Sovereignty is just one more indignity, one more outright lie, that we continue to foist on American citizens, the American Indian.[28]

Conclusion: Preserving Our Cultural Past and Future

The nineteenth century view of "assimilation" envisioned that people would be accepted into mainstream American life only if they looked and acted like white Christians. That is quite different from the modern view of "integration," in which people are allowed into mainstream culture even as they maintain their own cultural traditions and identity within racial, ethnic, or religious groups.

The U.S. Constitution provides the greatest opportunity in the world for groups of people to preserve their cultures, religions, and identities, through its protections of speech, assembly, press, and religion. Ironically, the only place Indian people are *not* guaranteed these rights is on an Indian reservation. By denying Indian citizens basic civil rights, tribal governments' claims to sovereign immunity have done more to destroy tribal culture than to preserve it.

Preserving and living one's culture is one's own business. There are many unique groups within the United States, all preserving their own beliefs and cultures as they wish, and our government bends over backwards to protect their right to be different, whether it's the Amish, Mormons, Italians, Moonies, Pagans, Irish, Baptists, Roman Catholics, Greeks, Hassidic Jews, Nation of Islam, Swedes, or any manner of extremist, fundamentalist, traditionalist, or nonconformist. As Americans, we have the right to identify with a group and maintain a unique culture, to greater or lesser degrees, as we wish. Why would Indians and tribes be entitled to anything different?

As Judge Randall wrote in his dissent in *Cohen*:

> There is nothing that Indian people are entitled to as human beings that cannot be afforded them through the normal process of accepting them as brother and sister citizens. . . .
>
> The truly important goals of protecting Indian culture, Indian spirituality, self-determination, their freedom, and their way of life can be done within the same framework and the same system, by which we treat all other Minnesotans of all colors. The real issue is, do we have the will?"[29]

It is time to end the Noble Savage Mentality that keeps tribes in the ambiguous, inconsistent, and untenable position of being simultaneously wards of the federal government, domestic dependent nations, and supposedly sovereign nations. Indian people, whether tribal members or not, should be recognized as full U.S. citizens with all the rights, responsibilities, and protections thereof, nothing more and nothing less.

Notes

Julie Shortridge, managing editor of the *Native American Press/Ojibwe News*, contributed to this essay.

1. Bureau of the Census, U.S. Dept. of Commerce, *American Indian and Alaska Native Areas: 1990* (1991).
2. Ibid.
3. U.S. Supreme Court, *U.S. v. Kagama*, 118 U.S., at 375 (1886).
4. Vine Deloria Jr., *Custer Died for Your Sins* (New York: Macmillan, 1969), p. 32.
5. Francis P. Prucha, *American Indian Treaties: A History of a Political Anomaly* (Los Angeles: University of California Press, 1994), p. 153.
6. Charles Kappler, ed., *Indian Treaties 1778–1883* (New York: Interland Publishing, 1972), Wyandot Treaty of 1855, art. 1, p. 677.
7. Helen Addison Howard and Dan L. McGrath, *War Chief Joseph* (Lincoln: University of Nebraska Press, 1941), pp. 298–99.
8. *Board of Indian Commissioners: Annual Report*, 1887.
9. *Commission of Indian Affairs: Annual Report*, 1890.
10. *Editorial Research Reports*, April 15, 1977.
11. John Collier, *From Every Zenith* (Denver: Sage Books, 1963).
12. J. P. Kinney, *A Continent Lost—A Civilization Won: Indian Land Tenure in America* (Baltimore: Johns Hopkins Press, 1937), p. 351.

13. "Federal Lands: Information on the Acreage, Management, and Use of Federal and Other Lands," *Letter Report* (GAO-RCED-96-104, 1996).

14. Ruth Packwood Scofield, *Americans Behind the Buckskin Curtain* (New York: Carlton Press, 1992), House Concurrent Resolution 108, p. 93.

15. Theodore W. Taylor, *American Indian Policy* (Mt. Airy, Md.: Lomond Publications, 1983), p.106.

16. John R. Wunder, *Retained by the People: A History of American Indians and the Bill of Rights* (New York: Oxford University Press, 1994), p. 100.

17. Congress of the United States, *American Indian Policy Review Commission: Final Report* (Washington, D.C.: U.S. Government Printing Office, 1977), p. 451.

18. Congress of the United States, *Indian Claims Commission: Final Report* (Washington, D.C.: U.S. Government Printing Office, 1977), p. 21.

19. Michael Loyd Chadwick, ed., *The Federalist* (Washington, D.C.: Global Affairs, 1987), p. 260; James Madison, paper no. 47, "Separation of Power Essential for the Preservation of Liberty."

20. Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs*, November–December, 1997.

21. Lloyd Meeds, dissent, Congress of the United States, *American Indian Policy Review Commission: Final Report.* Meeds was vice chairman of the commission.

22. Debra Weyermann, "And Then There Were None," *Harper's*, April 1998.

23. Craig Greenberg, oral testimony, U.S. Senate, Indian Affairs Committee, April 7, 1998.

24. See, e.g., Pat Doyle, "Sovereign and Immune, Tribes Often Can't be Touched in Court," *Minneapolis Star Tribune*, July 24, 1995; Alice Sherren Brommer, "Should You Become Tribally Licensed?" *Minnesota Lawyer*, November 1, 1999; Bill Lawrence, "Tribal Injustice: The Red Lake Court of Indian Offenses," *North Dakota Law Review* 48, no. 4 (summer 1972): 639–59.

25. Hubert H. Humphrey, speech on civil rights at the 1948 Democratic Convention, as reprinted in the *St. Paul Pioneer Press*, June 14, 1998.

26. U.S. Supreme Court, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, majority opinion, May 26, 1998.

27. Ibid., minority opinion, May 26, 1998.

28. Minnesota Court of Appeals, *Sylvia Cohen v. Little Six, Inc., d/b/a/ Mystic Lake Casino*, file no. C9501701, February 13, 1995, pp. D47–D62.

29. Ibid., pp. D42–D62.

THE MINNESOTA
COUNTY ATTORNEYS
ASSOCIATION

October 29, 2003

Frederick Grittner
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RE: Comments on the Proposed Rule on Enforcement of Tribal Court Orders and Judgments

Dear Mr. Grittner:

The Minnesota County Attorneys Association and the Minnesota County Attorneys Association Indian Law Committee has reviewed the proposed rule on the enforcement of tribal court orders and judgments and submits the comments below. In general, the Supreme Court General Rules Advisory Committee appears to have followed the guidance of the Supreme Court that a more narrowly drafted rule be put forth. The following comments reflect the observation of the Association:

1. Rule 10.01 (a) – delete "other judicial acts of the tribal courts." The phrase is not necessary and could lead to misinterpretation of various court decisions. For example, a letter written by the Court could potentially be misinterpreted to have the effect of an order. Finally, the term does not appear anywhere else in the proposed rule, including the Advisory Committee comment.

2. Rule 10.01 (a) – it would be helpful if the comments cite where the list of recognized tribal courts can be found. At present, the listing can be found in the Federal Register, which should be properly cited. This would benefit both the Court and parties to avoid unnecessary research.

3. Rule 10.01 (b)(2) – change the word "appears" to "has."

4. Rule 10.02 (a) – the word "shall" should be changed to "may" in the first sentence to be consistent with a discretionary rule.

5. Rule 10.02 (a) – "...consideration of the following factors or *any other factors the court deems appropriate in the interests of justice.*" Although the italicized wording is prior to

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the listing of the factors in 10.02 (a), consideration should be given to adding it to the list as "(10) any other factors the court deems appropriate" to clarify the discretion of the Court.

6. Rule 10.02 (b) – procedural rules of a hearing. The rule should establish that hearings are conducted in a fair and consistent fashion.

The Association appreciates the opportunity to submit these comments. One final matter should be raised that was included in our written comments last year. There still exists a need for education in the area of tribal court orders. It is our belief that all stakeholders could benefit through increased training.

Respectfully submitted,

Earl E. Maus

Earl Maus
Cass County Attorney
Chair, MCAA Indian Law Committee

RULE 10

TRIBAL COURT ORDERS AND JUDGMENTS

COMMENT BY

THE AMERICAN INDIAN LAW STUDENT ASSOCIATIONS OF

UNIVERSITY OF MINNESOTA LAW SCHOOL

HAMLINE UNIVERSITY LAW SCHOOL

WILLIAM MITCHELL LAW SCHOOL

The American Indian Law Student Associations in the state of Minnesota have a vested interest in the consideration of rule 10. Our associations represent the current native law students and future practitioners within the state. We urge the Supreme Court of Minnesota to adopt the proposed version of rule 10 because having a clear rule that guarantees tribal court orders will be given full faith and credit when federal or state statute requires full faith and credit will at least bring state courts into compliance with the law. The problem with the proposed version of rule 10 is that the rule goes no further than mandating compliance with existing law. This means that the immediate safety concerns of Indian people will be met by requiring state courts to give full faith and credit to Indian Child Welfare Act (ICWA) and Violence Against Women Act (VAWA) orders but it leaves all other tribal court orders in the vagaries of comity as applied within the vast discretion of the sitting judge.

The proposed rule should be accepted despite falling short of recognizing tribal courts as valid judicial bodies by ordering full faith and credit because it does address the immediate needs of Indian people in the state of Minnesota. Tribal courts and Indian people need to know with complete certainty that orders attained from tribal courts dealing with custody issues under ICWA and protective orders under VAWA will be enforced in state court. Without this guarantee tribal court orders are limited to the tribes' jurisdiction. With many tribal members living off reservation the lack of enforcement by the state has a real impact on Indian lives, resulting in some women living in fear and some children living in danger. Rule 10 gives a clear directive to state courts, bringing a level of certainty to the effectiveness of tribal court orders and a level of protection to Indian people that was already guaranteed under the law but not uniformly applied in practice.

The problem with the proposed rule is that it is only hortatory in nature. It merely codifies what was already required under federal law and does nothing to further

recognize tribal court rulings. While the factors for considering due process give practitioners a format for their arguments, the amount of discretion left in the judge's hands renders the outcome completely unpredictable. This is an unacceptable outcome, especially in light of tribes' increasing economic and governmental sophistication. For further development to be feasible, the orders of tribal judicial systems must be given full faith and credit outside of the reservation. This would comport with the federal policy of self-determination for tribes. We fail to see the rationale that would make the Supreme Court of Minnesota wary of granting tribal courts recognition through full faith and credit. The Supreme Court of the United States has stated in numerous opinions that tribal courts are competent, valid, and useful venues that fill an important role in the judicial system as courts of the third sovereign.[i] This rule does not further the discussion by educating the judiciary or the bar on the validity of tribal court orders.

The list of elements to be considered in weighing whether comity applies to a tribal court order gives too much discretionary power to the sitting judge. While the framework provided in the rule gives structure to the analysis required for comity to be applied, the framework is simply too broad. Any judge could find room within this broad structure to refuse comity to tribal court orders. This does nothing to signal to the bar or the judiciary that tribal courts are valid judicial systems that should be given comity unless a very specific complaint can be proven. Limiting the elements to be considered to jurisdiction (personal and subject matter) and due process with a presumption of validity that must be overcome by clear and convincing evidence would send this message while still protecting the legitimate interests of all parties involved in the process.

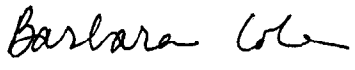
Despite its shortcomings we respectfully request that the Supreme Court of Minnesota adopt Rule 10.

Sincerely,

Dennis Puzz, Jr.
AILSA President
University of Minnesota Law School

Sara Van Norman
AILSA Vice President
University of Minnesota Law School

John Schmid
AILSA Treasurer
University of Minnesota Law School



Barbara Cole
AILSA Secretary
University of Minnesota Law School

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[i] *See Williams v. Lee*, 358 U.S. 217, 223 (1959) ("There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."). *Fisher v. Dist. Court*, 424 U.S. 382, 387 (1976) ("State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court."). *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."); *Id.* at 66 ("Nonjudicial tribal institutions have also been recognized as competent law-applying bodies."). *U.S. v. Wheeler*, 435 U.S. 313, 325 (1978) ("And in 1854 Congress expressly recognized the jurisdiction of tribal courts when it added another exception to the General Crimes Act, providing that federal courts would not try an Indian "who has been punished by the local law of the tribe." Act of Mar. 27, 1854, § 3, 10 Stat. 270. Thus, far from depriving Indian tribes of their sovereign power to punish offenses against tribal law by members of a tribe, Congress has repeatedly recognized that power and declined to disturb it."); *Id.* at 331 ("The Indian tribes are 'distinct political communities' with their own mores and laws, which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means. They have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation."); *Id.* at 332 ("Thus, tribal courts are important mechanisms for protecting significant tribal interests."); *Id.* at 332 ("Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests."); *Id.* at 332 n. 35 ("Tribal courts of all kinds, including Courts of Indian Offenses handled an estimated 70,000 cases in 1973."). *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211-212 (1978) ("We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to *anyone* tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians."). *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 468 U. S. 845, 856 (1985) ("We believe that examination should be conducted in the first instance in the tribal court itself."); *Id.* at 856 ("Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed."); *Id.* at 856-857 ("The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the tribal court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."). *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) ("Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development."); *Id.*

at 16 ("Promotion of tribal self-government and self-determination required that the Tribal Court have 'the first opportunity to evaluate the factual and legal bases for the challenge' to its jurisdiction."); *Id.* at 17 ("The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts."). *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989) ("The procedural safeguards include requirements concerning notice and appointment of counsel; parental and tribal rights of intervention and petition for invalidation of illegal proceedings; procedures governing voluntary consent to termination of parental rights; and a full faith and credit obligation in respect to tribal court decisions."); *Id.* at 52-53 ("This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children."); *Id.* at 55 (quoting *Matter of Adoption of Halloway*, 732 P.2d 962, 972) ("It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe--and perhaps the children themselves--in having them raised as part of the Choctaw community. Rather, "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy."). *Nevada v. Hicks*, 533 U.S. 353,394 (2001) ("None of 'these prior statements,' however, 'accord[s]' with the majority's conclusion that tribal authority to regulate state officers in executing process related to [an off-reservation violation of state law] is not essential to tribal self-government or internal relations."); *Id.* at 395 ("The Tribes' sovereign interests with respect to nonmember activities on its land are not extinguished simply because the nonmembers in this case are state officials enforcing state law."); *Id.* at 401 ("It requires no ' magic' to afford officials the same protection in tribal court that they would be afforded in state or federal court."); *Id.* at 401 ("I would not adopt a *per se* rule of tribal jurisdiction that fails to consider adequately the Tribes' inherent sovereign interests in activities on their land, nor would I give nonmembers freedom to act with impunity on tribal land based solely on their status as state law enforcement officials."); *Id.* at 402 ("Absent federal law to the contrary, the question whether tribal courts are courts of general jurisdiction is fundamentally one of *tribal* law."); *Id.* at 403 ("Given a tribal assertion of general subject-matter jurisdiction, we should recognize a tribe's authority to adjudicate claims arising under § 1983 unless federal law dictates otherwise."); *Id.* at 403-404 ("I see no compelling reason of federal law to deny tribal courts the authority, if they have jurisdiction over the parties, to decide claims arising under § 1983."); *Id.* at 404 ("There is really no more reason for treating the silence in § 1983 concerning tribal courts as an objection to tribal-court jurisdiction over such claims than there is for treating its silence concerning state courts as an objection to state-court jurisdiction.").

MINNESOTA TRIBAL COURT / STATE COURT FORUM

November 3, 2003

VIA MESSENGER

Mr. Frederick Grittner
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RE: Proposed Amendment to General Rules: Rule 10.01 - Tribal Court Orders and Judgments

The Minnesota Tribal Court/State Court Forum submits this statement regarding the proposed amendments to the General Rules of Practice submitted to the Court by its Advisory Committee on September 17, 2003. The representatives of the Forum had on-going communication with the Advisory Committee from May through August of this year. As we noted in our August 8, 2003 letter to the Committee through its senior legal counsel, Michael Johnson, the proposed amendments were generally helpful.

The members of the Forum have reviewed the September 17, 2003 submission to the Court, and, understanding the unlikelihood of significant change by the Court, offer the following observations which we believe enhance the solid efforts of the Advisory Committee.

The inclusion in the proposed amendments of a general procedure for the enforcement of tribal orders which are compliant with the Violence Against Women Act, 18 U.S.C. section 2265, was a much needed addition to the rules of this Court. Far too many protection orders issued by tribal courts have languished and recipients of such orders have been harmed or have lived in fear due to the unnecessary confusion that has surrounded tribally issued protection orders. However, the same unnecessary confusion exists with the enforcement of tribal child welfare orders and tribal child support orders, each of which have federal mandates recognizing their validity.

The Forum members suggest that the proposed amendment be modified to rid the process of any confusion associated with the enforcement of tribal child welfare orders and support orders. The critical need for these orders and their enforcement in foreign jurisdictions cannot be overstated. The members of the forum would suggest the following additions to Rule 10.01 (b)(1).

(A) The appropriate authorities of the state of Minnesota shall enforce according to its terms a child support order made consistent with 28 U.S.C. section 1738B by an Indian tribunal, consistent with the procedures set forth in Minnesota Statutes section 518C.508 et. seq.

(B) All public acts, records and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings shall be enforced in the Courts of this state pursuant to the Indian Child Welfare Act, 25 U.S.C. 1911 et. seq., and in accordance with the Minnesota Indian Family Preservation Act, codified in Minnesota statutes at section 260.751, et. seq.

With this more specific guidance and the state court judges' familiarity with these acts, the safety and welfare of the intended beneficiaries can be more easily secured.

In the absence of legislative mandates, as referenced in Rule 10.01, the Advisory Committee has proposed comity enforcement provisions. The nine provisions under Rule 10.02 (a) are perhaps overly cautious. See *Hilton v. Guyot,* 159 U.S. 113, 163-64 (1895). However, the introductory language in 10.02(a), Factors, includes language that is very troubling, unnecessary, and should be removed by this Court. There is no explanation in the Advisory Committee's notes for the inclusion of *to the extent justified under the circumstances,* a grossly enlarged discretion to be granted to state courts. Members of the Forum have found no other jurisdiction which uses such language. Very bluntly, this qualifier carries the tone and posture that has historically plagued states' diplomatic approaches to tribes. The efforts of the Advisory Committee and, respectfully, this Court, will remain laudable if the rule is infused, rather, with considerations of tribal sovereignty and self determination, improving tribal state relations, and providing a reliable enforcement mechanism for tribal court orders and judgments. The objectionable language undercuts each of those intentions and should simply be removed.

The Minnesota Tribal Court/State Court Forum supports the efforts of the Advisory Committee, with the noted modifications and exceptions, and we believe that the efforts have produced a good start to the improvement of judicial relations between the Minnesota judiciary and each of the eleven tribal jurisdictions located within the geographical bounds of the state of Minnesota.

Respectfully,

/S/

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/S/

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November 3, 2003

NOV 04 2003

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RE: Proposed Amendment to General Rules: Rule 10.01 - Tribal Court Orders and Judgments

Dear Mr. Grittner:

I am writing on behalf of the Minnesota American Indian Bar Association (MAIBA) in response to the Supreme Court's order of September 19, 2003 inviting comments about the General Rules Advisory Committee's proposed amendments to the General Rules regarding the recognition and enforcement of Tribal Court orders, judgments and decrees. I am able to represent that the members of MAIBA generally support the Advisory Committee's proposal with some modification and exceptions.

MAIBA has had ongoing communication with the Minnesota Tribal Court Association (MTCA) regarding enforcement and recognition of Tribal Court orders in the courts of Minnesota. We are fully aware of the efforts over the past several years to correct the deficiency in the rules that confounded efforts to insure the effective administration of justice between tribal jurisdictions and the state. What the Committee has proposed in its September 17, 2003 submission to the Court is a helpful approach to resolving otherwise avoidable difficulties in this area of recognition and enforcement.

We have been especially concerned about the difficulties we have encountered as practitioners when the lives of children and the welfare and safety of parents are in the balance. Each of us has had to approach the recognition and enforcement issues in the best way that we can, but there has been no coordination of those efforts statewide as we approach different judges in different jurisdictions. We believe the proposal by the Advisory Committee will assist both judges and lawyers in obtaining the well-intentioned relief for citizens that has sometimes escaped us.

We have reviewed the comments of the Minnesota Tribal Court/State Court Forum and very much agree with the modifications and exclusions the Forum has proposed. The Forum's proposal to add subsections (A) & (B) to 10.01(a) adds help for practitioners and additional protection for those who would request the assistance of Tribal Courts through the issuance of such orders. The criticism of the *to the extent justified under the circumstances* of 10.02(a) by the Forum is wholly justified. We strongly believe that there is no need and no justification for attempting to qualify Tribal Court actions in this manner.

The members of MAIBA wish to thank the Supreme Court for its consideration of this important addition to its General Rules of Practice and we would make ourselves available for any further consideration that the Court would request.

Respectfully,

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