

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR18-39

Title	Action Requested
Indian Child Welfare Act: Waiver of Certain <i>Pro Hac Vice</i> Requirements for Attorneys Representing Tribes in Indian Child Welfare Act cases	Review and submit comments by June 8, 2018
	Proposed Effective Date
	January 1, 2019
Proposed Rules, Forms, Standards, or Statutes	Contact
Amend Cal. Rules of Court, rule 9.40	Ann Gilmour, 415-865-4207 ann.gilmour@jud.ca.gov
Proposed by	
Tribal Court–State Court Forum	
Hon. Abby Abinanti, Cochair	
Hon. Dennis M. Perluss, Cochair	

Executive Summary and Origin

The Tribal Court–State Court Forum recommends amending California Rules of Court, rule 9.40, governing out-of-state counsel appearing *pro hac vice*. The amendment would exempt from two of the requirements of rule 9.40 attorneys representing an Indian tribe in a child custody proceeding governed by the Indian Child Welfare Act (25 U.S.C. §§ 1903–1963; ICWA). Under ICWA, Indian parents and custodians are entitled to appointed counsel, and Indian tribes and custodians are entitled to intervene in state court child custody proceedings governed by ICWA. The California ICWA Compliance Task Force suggested that certain *pro hac vice* requirements should be waived for out-of-state attorneys in cases governed by the Indian Child Welfare Act to improve tribal representation in ICWA cases in California courts.

Background

California has a high number of appeals related to the Indian Child Welfare Act.¹ Tribal advocates suggest that one reason for the high number of appeals is that tribes are often unable to participate fully in cases involving their children because, unlike every other party to a child welfare case, an Indian child’s tribe is not entitled to appointed counsel. Removing barriers to

¹ In 2016, California had 114 appeals related to ICWA. (Professor Kathryn E. Fort, “2016 ICWA Appellate Cases by the Numbers” *Turtle Talk* [Indigenous Law and Policy Center Blog], Michigan State University College of Law, January 4, 2017, <https://turtletalk.wordpress.com/2017/01/04/2016-icwa-appellate-cases-by-the-numbers/>.)

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

full and effective tribal participation in child welfare proceedings involving Indian children could improve ICWA compliance and reduce appeals.

Further, tribes assert that they have a federally protected right to participate in these cases and that right cannot be burdened by states' laws regulating attorneys and the practice of law.²

California's Indian population includes a large number of people affiliated with out-of-state tribes or tribes whose territories and primary headquarters are based in neighboring states, such as the Washoe, Fort Mojave, Chemehuevi, Colorado River, and Quechan tribes.³

In March of 2017, the California ICWA Compliance Task Force presented its report to California Attorney General Xavier Becerra.⁴ Among the many recommendations contained in that report is a recommendation that "California's *pro hac vice* rules should be amended to permit an out-of-state attorney who represents an Indian tribe to appear in a child custody proceeding without being required to associate with local counsel" (p. 95). Several other states have recently taken steps to waive certain *pro hac vice* requirements for attorneys representing tribes in ICWA cases.⁵ The goal is to remove barriers to tribal participation in these cases. The Tribal Court–State Court Forum and California ICWA Compliance Task Force considered that the restriction on repeated appearances could also create a barrier, particularly for tribes bordering other states.

The Proposal

The proposal would amend California Rules of Court, rule 9.40, by adding subdivision (g) to exempt an attorney representing an Indian tribe in a child custody proceeding governed by the Indian Child Welfare Act from the requirement to associate with an active member of the State Bar of California. It would further remove the restriction on multiple appearances by an attorney representing a tribe in a child custody proceeding governed by ICWA by deeming that representation to be a special circumstance. The proposal is intended to improve compliance with the requirements of the Indian Child Welfare Act, reduce appeals, and improve outcomes for

² *State ex rel. Juvenile Dep't of Lane County v. Shuey* (1993) 119 Ore.App. 185; *In re N.N.E.* (Iowa 2008) 752 N.W.2d 1.

³ Judicial Council of Cal., Center for Families, Children & Cts., "Native American Statistical Abstract: Population Characteristics" *Research Update* (Mar. 2012), www.courts.ca.gov/documents/Tribal-ResearchUpdate-NAStats.pdf and California Indian Tribal Homelands and Trust Land Map, www.water.ca.gov/tribal/docs/maps/CaliforniaIndianTribalHomelands24x30_20110719.pdf.

⁴ California ICWA Compliance Task Force, *Report to the California Attorney General's Bureau of Children's Justice* (2017), www.caltribalfamilies.org/news/ICWAComplianceTaskForceFinalReport2017.pdf/view.

⁵ See, for example, Nebraska Revised Statute 43-1504, <https://nebraskalegislature.gov/laws/statutes.php?statute=43-1504>; Oregon Uniform Trial Court Rule 3.170 www.osbar.org/docs/rulesregs/UTCR3.170.pdf; Michigan Court Rules, rule 8.126, http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2016-04_2017-05-24_FormattedOrder_AmendtOfMCR8.126.pdf; and the proposed amendment to the Washington Rules of Court, Admission for Practice Rules 8, www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=622.

Indian children and families by facilitating tribal participation in Indian child custody cases governed by the Indian Child Welfare Act.

Alternatives Considered

The Tribal Court–State Court Forum considered taking no action but determined that an amendment to the rule supports the goal of removing barriers to tribal participation in ICWA cases involving Indian children.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are anticipated.

Request for Specific Comments

In addition to comments on the proposal as a whole, the Tribal Court–State Court Forum is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

They also seek comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed amendments to Cal. Rules of Court, rule 9.40, at page 4

Rule 9.40 of the California Rules of Court would be amended, effective January 1, 2019, to read:

1 **Rule 9.40. Counsel *pro hac vice***

2

3 (a)–(f) * * *

4

5 **(g) Representation in cases governed by the Indian Child Welfare Act (25 U.S.C.**
6 **§ 1903 et seq.)**

7

8 (1) The requirement in subdivision (a) that the applicant associate with an active
9 member of the State Bar of California does not apply to an applicant seeking
10 to appear in a California court to represent an Indian tribe in a child custody
11 proceeding governed by the Indian Child Welfare Act; and

12

13 (2) The fact that an applicant is seeking to appear in a California court to
14 represent an Indian tribe in a child custody proceeding governed by the
15 Indian Child Welfare Act constitutes a special circumstance for the purposes
16 of the restriction in subdivision (b) that an application may be denied because
17 of repeated appearances.

18

19 ~~(g)~~ **(h)** * * *