

Hon. Randall Howe, Vice-Chair
Arizona State, Tribal, and Federal Court Forum
Court of Appeals, Division 1
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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of)
)
PETITION TO AMEND RULES)
OF THE SUPREME COURT OF) Supreme Court No. R-_____
ARIZONA: RULE 39)
_____)

Pursuant to Rule 28 of the Arizona Supreme Court, Hon. Randall Howe, Arizona Court of Appeals, Division 1, as Vice-Chair of the Arizona State, Tribal, and Federal Court Forum (the “Court Forum” or “Forum”) respectfully petitions this Court to amend Rule 39, Arizona Rules of the Supreme Court as stated in Appendix A.

I. Background, Purpose and Content of the Proposed Rule Amendments.

The federal Indian Child Welfare Act (ICWA), [25 U.S.C. §§ 1901-1963](#), creates a right for tribal governments from any state to participate in Arizona child custody proceedings. However, ICWA does not provide funding to exercise that right. Additionally, as noted in a [rule petition](#) before the Washington Supreme Court on this subject:

Although many tribes receive federal grants for child and family services, those funds cannot be used for legal representation or for legal fees for litigation. See, e.g., [25 U.S.C. § 1931\(a\)\(8\)](#); [25 C.F.R. §§ 89.40-89.41](#). Other federal moneys for social services are similarly restricted and cannot be used to pay for legal services for litigation. [25 U.S.C. § 5301 et. seq.](#)

An Indian tribe from another state that seeks to exercise its rights under ICWA by intervening and participating in Arizona dependency proceedings whose employed or retained counsel is not licensed in Arizona encounters the high, and sometimes prohibitive, cost of paying the **annual** bar admission fee and additional attorney fees for Arizona associate counsel **for each ICWA appearance** in order for the tribe's attorney to appear *pro hac vice*. These requirements are a financial burden on tribal governments' rights under federal law to intervene and participate in Arizona ICWA proceedings. Petitioner contends that these requirements are excessive in the context of ICWA practice that potentially involves multiple cases in a year. The fee waiver provision of Rule 39 (c)(1)(B)(ii) does not provide a remedy for tribal governments as it addresses the inability of an individual to pay the fee based on that individual's income in the context of pro bono representation and does not provide relief from associate counsel costs.

In response to a comment filed in the administrative rule-making process for the federal ICWA regulations the Department of Interior recognized:

... [I]t may be difficult for many Tribes to participate in State court proceedings, particularly where those actions take place outside of the

Tribe's State. Section 23.133 encourages State courts to permit alternative means of participation in Indian child-custody proceedings in order to minimize burdens on Tribes and other parties. The Department agrees with the practice adopted by the State courts that permit Tribal representatives to present before the court in ICWA proceedings regardless of whether they are attorneys or attorneys licensed in that State. See e.g., [J.P.H. v. Fla. Dep't of Children & Families](#), 39 So.3d 560 (Fla. Dist. Ct. App. 2010) (per curiam); [State v. Jennifer M. \(In re Elias L.\)](#), 767 N.W.2d 98, 104 (Neb. 2009); [In re N.N.E.](#), 752 N.W.2d 1, 12 (Iowa 2008); [State ex rel. Juvenile Dep't of Lane Cty. v. Shuey](#), 850 P.2d 378 (Or. Ct. App. 1993).¹

The four state appellate courts cited above concluded that the federal and tribal interests in tribal participation in state court proceedings governed by ICWA preempted state law concerning unauthorized practice of law. Petitioner asks instead that this Court exercise its authority over the practice of law to remove excessive financial burdens on out-of-state tribes while maintaining the ability to regulate the attorneys licensed in other states who represent them in Arizona ICWA cases.

The petitioner recognizes that some Arizona juvenile court judges have adopted a practice of authorizing non-attorney tribal representatives to appear in proceedings governed by ICWA, but has not found any statutory or rule authority for this practice. If it is acceptable for an out of state tribe to designate a representative to appear in ICWA cases without fees and assistance of local counsel it should be acceptable for a tribe to designate its ICWA attorney to be that

¹ 81 FR 38778-01, 38798-38799, 2016 WL 3228279(F.R.)

representative on the same basis. Therefore, the proposed rule amendment to authorize this practice is warranted.

The proposed amendment to Arizona Supreme Court Rule 39 would eliminate the financially burdensome admission fee per case and associate counsel requirements of the current rule and would permit repeated appearances for ICWA cases. It would maintain all other requirements of the rule that enable the State Bar to ensure the competence and accountability of out-of-state counsel. The requirement to associate with Arizona counsel is an unnecessary expense considering the proposed practice limitation to ICWA cases, which are governed primarily by federal law rather than Arizona law. The frequency of appearance in ICWA cases would depend on the number of children in Arizona ICWA cases who are members or eligible for membership in a particular tribe.

Seven states with significant tribal populations have already adopted ICWA representation exceptions to their *pro hac vice* rules that are similar to the proposed amendment to Rule 39². The common characteristics of these exceptions, as stated in the chart in Appendix B, are: 1) frequency of appearance, 2) association with local counsel, 3) application fees, and 4) compliance with other attorney regulations. Petitioner agrees with the State of Washington petitioners in

² The rules of these other states may be viewed by selecting the links provided in the chart in Appendix B.

concluding, "...the proposed amendments improve the welfare of Indian children in ICWA custody proceedings by ensuring that tribes can meaningfully participate in ... child custody proceedings related to their children."

The State, Tribal, and Federal Court Forum filed a petition on this subject in January, 2018. That petition also proposed amendments to Rule 38 that are not included in this petition. Petitioner understands plans for a comprehensive review and potential rewrite of Rules 38 and 39 at that time may have been considered by the Court in denying that petition. That work on Rules 38 and 39 was completed in 2019. Also, as the chart in Appendix B indicates, the supreme courts of three additional states with significant tribal populations, California, Washington and Wisconsin, have adopted comparable rules concerning representation of Indian tribes in ICWA cases since the January 2018 petition was filed. Therefore, it is timely for the Arizona Supreme Court to consider the proposed amendments to Rule 39 currently proposed.

II. Pre-Petition Distribution and Comment.

At its September 14, 2018 meeting, the Court Forum members discussed the denial of the Forum's 2018 rule petition and formed a work group to continue working to improve the opportunity for out-of-state tribes to participate in Arizona ICWA proceedings. At its May 31, 2019 meeting the Forum reviewed the ICWA representation exceptions adopted by the supreme courts of other states and

determined that a new petition should be filed in 2020. At its September 13, 2019 meeting the Forum reviewed proposed language and decided to proceed with this petition. The Court Forum asks that this petition be distributed for comment for consideration in the Court's regular 2020 rules process.

Wherefore petitioners respectfully request that the Supreme Court amend the Rules of the Supreme Court as set forth in Appendix A.

RESPECTFULLY SUBMITTED this 8th day of January, 2020.



By /S/

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APPENDIX A
Rules of the Supreme Court of Arizona
Proposed Rule Changes

Rule 39. Temporary Authorizations to Practice Law

(a) Pro Hac Vice

(1) – (12) [No changes]

(13) Exception for Indian Child Welfare Cases. A non-member attorney is not required to associate with local counsel under this rule or pay the fees established by this rule if the applicant establishes to the satisfaction of the State Bar that:

(A) The non-member attorney seeks to appear in an Arizona court for the limited purpose of participating in a child custody proceeding as defined by 25 U.S.C. § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq.;

(B) The non-member attorney represents a federally recognized Indian tribe as defined by 25 U.S.C. § 1903(8) of the Rules of Procedure for Juvenile Court; and

(C) The Indian child's tribe has submitted a pleading to the court seeking to intervene and participate in the state court proceeding and affirming the child's membership or eligibility for membership under tribal law.

The non-member attorney shall file a motion to appear pro hac vice with the court in which the proceeding is pending and shall perform the duties required to be performed by associate counsel under this rule. Appearance in child welfare proceedings under this paragraph constitutes a special circumstance for the purposes of the restriction in paragraph (6) that a motion may be denied because of repeated appearances.

(b) – (d) [No changes]

APPENDIX B

	<u>California</u>	<u>Michigan</u>	<u>Nebraska</u>	<u>Oregon</u>	<u>Washington</u>	<u>Wisconsin</u>	<u>Minnesota</u>
Rule # & link	Rule 9.40(g)	MCR 8.126	NRS 43-1504	UTCR 3.170	APR 8(b)(6)	SCR 10.03(4)	Rule 3.06
Appearance frequency	court's discretion	exempt	exempt	none	none	court's discretion	exempt
Associate with active Counsel	exempt	exempt	exempt	exempt	exempt	exempt	exempt
Pay Application Fee	\$50	exempt	exempt	exempt	exempt	exempt	exempt
Comply w/ standard requirements	yes	yes	exempt	yes	yes	yes	exempt
Enacted	10/1/2018	9/1/2017	8/30/2015	8/1/2017	9/1/2018	2/12/2019	9/1/2019