April 16, 2020

SUBMITTED ELECTRONICALLY ONLY

Hon. Randall Howe, Vice-Chair
Arizona State, Tribal, and Federal Court Forum
Court of Appeals, Division 1
1501 West Washington Street
Phoenix, Arizona 85007
TribalCourtForum@courts.az.gov

Re: Gila River Indian Community's Comments on the proposed amendment to Arizona Supreme Court Rule 39, "Temporary Authorization to Practice Law"

Dear Judge Howe,

The Gila River Indian Community (the "Community") is pleased to submit its comments generally supporting the proposed amendment to Arizona Supreme Court Rule 39, "Temporary Authorization to Practice Law," which adds an exception to certain *pro hac vice* requirements for child custody cases subject to the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*

I. ABOUT THE GILA RIVER INDIAN COMMUNITY AND THE INDIAN CHILD WELFARE ACT

The Community is a federally-recognized Indian tribe composed of the Akimel O'Otham (Pima) and Pee-Posh (Maricopa) peoples. The total enrollment of the Community is approximately 22,862 members. The Community occupies the Gila River Indian Reservation (the "Reservation"), located in southern Arizona, and encompasses over 372,000 acres of land in Pinal and Maricopa counties. The Community is both an urban and rural Community, and shares a border with the Arizona cities of Phoenix, Coolidge, Casa Grande, Gilbert, Maricopa and Queen Creek.

The Community's close proximity to several Arizona state courts (including those in Pinal, Maricopa and Pima Counties) allows our tribal attorneys and Tribal Social Services case managers to be actively involved in child dependency cases when Indian children are enrolled or eligible for enrollment with our Community. Currently, the Community is involved in approximately 26 ICWA cases within the State of Arizona and approximately 11 out-of-state ICWA cases, although those numbers fluctuate and have been much higher in the past. The Community intervenes in every ICWA case in which our children and families are involved, whether in Arizona or other states. As a Community, we take great pride in becoming involved in state dependency cases as early as possible so that we may assist with identifying ICWA-compliant placements,

establishing communication and relationships with all parties involved, and work with state agencies to support the best interests of our children.

The Community considers that one of the primary purposes of 25 U.S.C. § 1911(c), which permits Indian tribes to intervene in state child custody proceedings involving their children, is that it gives Indian tribes a voice in state court proceedings where, historically, tribes have been left behind. Although the Community is advantaged by its close proximity to Arizona courts, it has also appeared and intervened in ICWA cases involving its children in Alabama, California, Colorado, Idaho, Illinois, Iowa, Minnesota, Missouri, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, Oregon, Texas, Utah, Washington and Wisconsin. Likewise, because of the size and diversity of the Phoenix metropolitan area, Indian children from many out-of-state Indian tribes are involved in child custody proceedings in Arizona. Generally, state courts welcome tribal attorneys in ICWA cases because of the specialized knowledge they bring to the proceedings.

The proposed amendment to Rule 39 facilitates the federal statutory right of Indian tribes to intervene in cases to which ICWA applies. As noted, *infra*, in-house attorneys for Indian tribes who are not state-licensed may appear in state court proceedings in any state because the federal right of an Indian tribe to intervene in cases to which ICWA applies preempts state regulation of attorney licensing.

The Community has not experienced any issues with its attorneys appearing in *any* state court in an ICWA case, with one notable exception. Recently, a complaint was made to attorney disciplinary authorities in the State of Ohio by a client of the Goldwater Institute, alleging that a Community attorney who appeared as an ICWA representative in a case in Ohio was engaged in the unauthorized practice of law. Sadly, in that same case, *pro hac vice* admission rules were used as a sword by another party to attempt to gain an advantage in the litigation. An effective way to curb these frivolous complaints and abusive litigation practices is through doing what the amendment to Rule 39 does—recognizing that non-licensed attorneys may appear in state court without going through regular, and often cumbersome, *pro hac vice* processes.

II. ICWA PREEMPTS STATE ATTORNEY LICENSING RULES

The Community supports the proposed amendment because of the Community's belief that a statewide rule will best facilitate the federal statutory right of Indian tribes to appear in state child custody proceedings involving their children. Appellate courts in other states which have addressed the issue uniformly hold that an Indian tribe participating in a child custody proceeding under ICWA is not required to appear through a state-licensed attorney.[1]

[1] *In re Elias L.*, 767 N.W.2d 98 (Neb. 2009); *In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008); *J.P.H. v. Fla. Dept. of Children & Families*, 39 So.3d 560 (Fla.App. 2010); *State ex rel. Juv. Dept. of Lane County v. Shuey*, 850 P.2d 378 (Ore.App. 1993).

In *Shuey,* the Court of Appeals of Oregon held that the state interest in representation by an attorney is preempted by the context of ICWA proceedings. The Confederated Tribes of the Grande Ronde appealed the denial of a motion to intervene in state court ICWA proceeding.[2] The trial court denied the motion because it was not signed by an attorney. Relying on Supreme Court precedent, the Court of Appeals reasoned that "[w]hen a state law 'interferes with or is incompatible with federal and tribal interests,' the Supreme Court requires balancing state and tribal interests."[3] Applying this standard, the Court of Appeals held that the state law requiring attorney representation was preempted by ICWA because "[t]ribal participation in state custody proceedings involving tribal children is essential to effecting the purposes of the ICWA."[4]

Although the individual who signed the motion in *Shuey* was not licensed as an attorney in any state, the rationale of *Shuey* clearly applies to an in-house tribal attorney. Noting that the Grand Ronde usually appeared through its Director of Social Services, the court approved because "[t]hat necessarily requires familiarity with the procedural and substantive requirements of the ICWA, and with the procedures and organizations of other social service agencies."[5] In-house tribal attorneys are intimately familiar with the procedural requirements of ICWA and most have handled ICWA matters in many states. No state interest is infringed by permitting in-house tribal counsel to appear and participate "in the narrow context of these ICWA proceedings."[6]

The sound reasoning of *Shuey* has been followed by two state supreme courts—in Nebraska and Iowa—and an intermediate appellate court in Florida. The Supreme Court of Nebraska held that the requirement that an Indian tribe be represented by a Nebraska-licensed attorney pursuant to the state law governing unauthorized practice of law was preempted by ICWA.[7] Using the same balancing test as *Shuey,* the court in *Elias L.* held that ICWA specifically authorized representation in Nebraska ICWA cases by persons who were not Nebraska licensed attorneys, noting that "an employee of an organization can engage in certain acts that would normally constitute the practice of law if done for the sole benefit of the organization."[8] Again noting the narrow context of ICWA proceedings, the court held that the State's interests are not necessarily compromised by allowing the tribe to be represented by a non-lawyer.[9]

Finally, in *J.P.H.,* the District Court of Appeal in Florida held, in

[2] 850 P.2d at 379.
[3] *Id.* (quoting *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983)).
[4] *Id.* at 381.
[5] *Id.*
[6] *Id.*
[7] *In re Elias L., supra.*
[8] 767 N.W.2d at 102 (citations omitted).
[9] *Id.* at 103. *See, also, In re N.N.E., supra* (same holding and also following *Shuey).*

consolidated cases under ICWA, that the trial court erred when it denied the tribe's petition to intervene because the tribe was not represented by a Florida attorney.[10] Citing *Elias L.*, *N.N.E.* and *Shuey*, the court held that the tribe had a clear right to intervene and "is not required to be represented by a member of the state bar, since prohibitions on the unauthorized practice of law interfere with and are thus preempted in the narrow context of state court proceedings subject to the Indian Child Welfare Act."[11]

Every reported appellate case on this issue holds that the right of an Indian tribe to intervene in an ICWA case outweighs the state interest in regulation of attorney admissions. And these cases were correctly decided. Any *pro hac vice* rule adopted in Arizona should reflect that its purpose is to facilitate the Indian tribe's statutory right to intervene and participate and should impose minimal burdens and requirements on tribal attorneys.

III. COMMENTS ON THE PROPOSED AMENDMENT TO RULE 39

The proposed amendment to Rule 39 recognizes an exception to the regular *pro hac vice* requirements for cases to which ICWA applies, so long as: (1) the non-member attorney appears for the limited purpose of participating in a child custody proceeding, as defined in 25 U.S.C. § 1903, under ICWA; (2) the non-member represents a federally-recognized Indian tribe; and (3) the Indian tribe has moved to intervene and participate in the state court child custody proceeding. Upon a motion in the court in which the matter is proceeding, an Indian tribe's attorney may be admitted *pro hac vice* and participate.

The Community supports adoption of the proposed amendment, which seeks to follow the purpose and spirit of ICWA, to ensure consistency and ICWA compliance across all Arizona courts in child custody proceedings. In enacting ICWA, Congress specifically found that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[12] Therefore, the participation of Indian tribes is imperative to ensure the proper application of cultural and traditional standards to the case and to the benefit of the children and families involved.

ICWA's purpose is to protect the best interests of Indian children and to promote stability and security for tribal communities and families by establishing minimum federal standards for the removal of Indian children from their families and the placement of such children in homes or institutions which will reflect the unique values of the Indian tribe. The proposed rule also makes sense in light of the law and recent Arizona policy in ICWA cases. The Community understands that several Arizona juvenile courts have begun

[10] 39 So.2d at 560.
[11] *Id.* (citations omitted).
[12] 25 U.S.C. § 1901(5).

discussions about implementing specialized ICWA courts, recognizing the need for consistency with these specialized proceedings.

Providing a *pro hac vice* exception for tribal attorneys in ICWA cases will lessen the financial and practical burdens on Indian tribes in appearing and participating in ICWA cases. Any *pro hac vice* rule permitting tribal attorneys to participate in ICWA cases must consider that many Indian tribes have limited resources. High *pro hac vice* fees and requirements to associate or appear with local counsel are significant burdens on an Indian tribe's right to intervene and participate in ICWA cases. The time it takes to comply with such requirements works to the detriment of Indian children and families, as most state court dependency or abuse/neglect proceedings are subject to strict case deadlines. And, as noted, some parties may use this situation to attempt to exclude Indian tribes from participating in cases involving their children. To protect Indian children's best interests, Indian tribes, through their attorneys and representatives, must be able to intervene quickly as a matter of right, and be protected from frivolous unauthorized practice of law allegations.

Finally, early tribal participation increases the likelihood of compliance with ICWA.[13] In the Community's experience, there are several reasons why early tribal participation in ICWA cases increases compliance with ICWA and produces better outcomes: (1) tribal attorneys and representatives are often more knowledgeable about ICWA than state agencies, particularly regarding determination of Community-specific standards or ICWA preferences; (2) Indian tribes have better access to locate tribal family placement options or other tribal-specific ICWA compliant placement options; and (3) Indian tribes can offer immediate knowledge or access to culturally appropriate services. The proposed rule is necessary because reducing costs and procedural steps for out-of-state tribes appearing in Arizona courts is beneficial for all agencies and parties involved and, most importantly, for the children involved in these hard cases.

On behalf of the Gila River Indian Community, I thank you for the opportunity to comment on this proposed amendment to Rule 39. We very much support the adoption of this proposed amendment and appreciate the hearing of our comments. As a Community and partner in ICWA cases, we support the adoption of rules that support and further ICWA's purpose of protecting the rights of Indian children, families and tribes.

Respectfully,

Stephen Roe Lewis, Governor
Gila River Indian Community

[13] *ICWA Baseline Measures Project Finding Report*, Capacity Building Center for Courts, Children's Bureau (2017).