**NAVAJO NATION DEPARTMENT OF JUSTICE**
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May 1, 2020

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RE: Comment in Support of the Petition to Amend Rule 39, R-20-0003

To the Arizona Supreme Court:

The Navajo Nation submits this comment in support of the Petition to Amend Rule 39 of the Rules of the Supreme Court of Arizona ("Rule 39"), R-20-0003 (the "Petition"). The Petition proposes to amend Rule 39 to allow out-of-state tribal attorneys to participate in Indian Child Welfare Act (ICWA) cases in limited circumstances. The Petition proposes to eliminate the financial burdens to tribal legal representation, including the need to associate with local counsel and pay the substantial *pro hac vice* fees. The Navajo Nation supports the Petition for the reasons set forth below.

**Background on the Navajo Nation**

The Navajo Nation includes over 27,000 square miles of land that extends into the states of Utah, Arizona and New Mexico, and borders Colorado, making the Navajo Nation the largest Indian reservation in the United States. The Navajo Nation is also one of the largest Indian tribes in the United States with over 310,000 enrolled members. In the 2010 census, over 130,000 Navajo members were under the age of 20.

Children occupy a special place in Navajo society that can best be described as holy or sacred. The Navajo Nation believes it has obligations to its children for their family, culture and language to be preserved. Navajo common law provides that family extends beyond the nuclear family to child's grandparents, uncles, aunts, cousins and the clan relationships and the importance of these relationships cannot be overstated. The importance of familial relationships, as well as Navajo custom and tradition must be considered in all child custody matters.

The Navajo Nation has established a Division of Social Services under the Executive Branch of the Navajo Nation. The Division includes an Indian Child Welfare Act (ICWA) Program. The primary purpose of the ICWA Program is to preserve and reunite Navajo children with their parents, next of kin, or other appropriate Navajo families, and provide ongoing case management services to children domiciled off the Navajo Nation and subject to out of home care.

The Navajo ICWA Program currently has 436 cases involving 855 children. These cases come from 26 different states, with the majority of cases concentrated in Arizona, California, Colorado, New Mexico and Utah. The Navajo Nation has 191 cases in Arizona alone. There are currently 12 social workers and case managers in the ICWA Program and only one in-house attorney to handle all the ICWA cases nationwide. The Navajo Nation must hire contract counsel to assist in out-of-state cases, at significant cost to the Navajo Nation.

**Intervention is an Absolute Right and State Rules of Practice May be Preempted by Federal Law**

Indian tribes have an absolute right to intervene and participate in child custody proceedings under federal law. *See* 25 U.S.C. § 1912(a)("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe ***shall have a right to intervene*** at any point in the proceeding.")(emphasis added). The United States Supreme Court has recognized that an Indian tribe's rights under ICWA are separate and distinct from those of the parents. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1988).

Courts outside of Arizona have held that federal law preempts a state court from denying a tribe's participation in an ICWA case, simply because they do not have local representation. In *State ex rel. Juvenile Dept. of Lane County v. Shuey*, 119 Or.App. 185 (1993)("*Shuey*"), the Tribe's motion to intervene under the ICWA denied because it was not signed by an attorney as required by Oregon law. The Court of Appeals reversed, holding that ICWA preempted the statute explaining:

> Tribal participation in state custody proceedings involving tribal children is essential to effecting the purposes of the ICWA. The state interests represented by ORS 9.160 and ORS 9.320 are outweighed by those purposes and the tribal interests that they represent. With the applicable preemption test weighted in favor of tribal interests, the state requirement of representation by an attorney is preempted in the narrow context of these ICWA proceedings.

*Id* at 191. Under a federal preemption analysis, the rights and interests of tribes to participate in ICWA proceedings to protect Indian children outweighs the interests of states in regulating the practice of law. *See also In re Interest of Elias*, 277 Neb. 1023 (Neb. 2009)(Nebraska Supreme Court held that a state statute governing unauthorized practice of law which required an Indian tribe be represented by a Nebraska licensed attorney was preempted in context of state court child custody proceedings under the federal and state Indian Child Welfare Act.). Although this issue has not been directly challenged in any reported decision in Arizona, a court in Arizona could come to a similar conclusion.[1] The proposed amendment to the *pro hac vice* rule eliminates to need for out-of-state tribes to challenge this issue.

**There is Precedent for Limited Admission Status under State Rules**

At least six (6) other states have already adopted *pro hac vice* rules for ICWA attorneys, including Michigan, MCR 8.126(B), Oregon, UTCR 3.170, Nebraska, Neb. Rev. Stat. 43-1504(3), Washington, APR 8(b)(6), California, California Rules of Court 9.40(g), and Wisconsin, SCR 10.03(4). The Nebraska rule was enacted in 2015, the Michigan and Oregon rules in 2017, the California and Washington rules in 2018, and the Wisconsin rule in 2019. Thus, some of these rules have been in effect for at least five (5) years and there has been no indication that these limited admission rules have caused any concern. The Navajo Nation recently availed itself of the *pro hac vice* rule for ICWA attorneys in the State of Oregon.

In addition, many states provide waivers of *pro hac vice* licensing requirements for military lawyer spouses. Since military servicemen and women constantly relocate, waivers of *pro hac vice* licensing requirements allow military lawyer spouses to relocate with their families and still practice law in new states. In June of 2017, Ohio became the 25th state to waive *pro hac vice* licensing requirements for military lawyer spouses. *See* Military Spouse J.D. Network, https://www.msjdn.org/2017/06/ohio-adopts-milspouse-licensing/.

**The Scope of the Rule is Limited and Will Not Adversely Affect the Profession**

The proposed amendment to Rule 39 is limited in scope and directly tailored to the need for tribal legal representation in ICWA cases. The proposed rule would eliminate the need for an out of state attorney to associate with local counsel and pay *pro hac vice* fees, but only in the

[1] The Navajo Nation is aware of at least one case where the Maricopa County Superior Court refused to accept a motion to intervene under the ICWA filed by an out-of-state tribal attorney. The problem in challenging these decisions is that the dependency case continues while the legal challenge is made and the tribe may not participate. The tribe is then forced to hire local counsel anyway, both to intervene and challenge the denial of the tribe's participation. This comes at a significant financial burden.

following circumstances: 1) the attorney seeks to appear for the limited purpose of participating in ICWA proceedings; 2) the attorney represents an Indian tribe; and 3) the Indian tribe has submitted a pleading to the court seeking to intervene and confirming eligibility for membership. Thus, the proposed rule eliminates the financial burdens for a tribe to participate in ICWA cases by removing the significant fees (currently $490 per case) and the need to hire local counsel (also a significant financial burden).

The Arizona courts already permit out of state social workers for tribes to participate in ICWA proceedings. Allowing tribal attorneys to participate in this limited capacity under the proposed rule will only increase the adequacy of representation and level of participation by out of state tribes in ICWA cases. Further, the attorneys would still be subject to the Arizona ethical rules and the supervision of the Court. Allowing the proposed rule change will not adversely affect the profession and could improve the level of representation in ICWA cases.

**Impact of the Rule Amendment on the Navajo Nation**

If passed, the *pro hac vice* ICWA rule will have a direct and indirect impact on the Navajo Nation and its ICWA cases. As noted above, the Navajo Nation has 436 cases in 26 states. The the adoption of a *pro hac vice* ICWA rule in Arizona makes it more likely that other states will follow suit and adopt similar rules. It is beneficial to both tribes and states and the overall well-being of a case for tribes to have adequate legal representation at all stages of an ICWA case. The Navajo Nation, like many tribes, does not have the resources to hire local counsel for all 26 states in which it has cases. Thus, the Navajo Nation is forced to participate in a foreign case without legal representation or it must hire local counsel, at a substantial financial burden. More recently, the Nation has been able to utilize *pro hac vice* ICWA rules in other states.

The proposed amendment will also assist the Navajo Nation directly. As noted above, the Navajo Nation is the largest Indian reservation in the United States, and it spans three (3) states and borders another. The Navajo Nation ICWA Program is primarily represented by the Navajo Nation Department of Justice (NNDOJ) in state courts. All NNDOJ attorneys must be licensed on the Navajo Nation and one state jurisdiction. Generally, this means NNDOJ attorneys are licensed in the neighboring states, Arizona, New Mexico, or Utah. The current NNDOJ attorney assigned to ICWA cases is licensed in New Mexico. Other NNDOJ attorneys assist with ICWA cases as needed. Thus, at times, the NNDOJ attorney assigned to an ICWA case may not be licensed in Arizona. The rule would allow the NNDOJ to assign the most experienced and knowledgeable attorney to an ICWA case in Arizona and seek *pro hac vice* admission, if needed.

This proposed rule is also consistent with the Navajo Nation's values to preserve and reunite Navajo children with their parents, next of kin, or other appropriate Navajo families and provide ongoing case management services to children domiciled off the Navajo Nation and subject to out of home care.

**Summary of Recommendation**

Tribes should not be prevented from participating in ICWA cases, solely because their in-house attorneys are not licensed in the State of Arizona. Many tribes, like the Navajo Nation, have ICWA cases in multiple states across the country. Requiring tribal legal counsel to become licensed in each jurisdiction or hire local counsel is cost prohibitive and for tribes with less resources, it effectively prevents them from participating at all. This is contrary to the intent and goals of ICWA.

The proposed rule only eliminates the financial burdens for out-of-state tribal attorneys to participate in ICWA cases. The rule is properly limited in scope and will not adversely affect the legal profession and in fact, could improve overall legal representation in ICWA cases. Further, the proposed rule is consistent with the ICWA which provides an absolute right for a tribe to intervene in any state court proceeding. It also eliminates the need for any federal preemption analysis if a tribe is denied the right to participate through their tribal attorneys.

For all these reasons, the Navajo Nation supports the petition to amend Rule 39 to allow an exception for Indian Child Welfare Act cases.

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Navajo Nation

Cc: Honorable Randall Howe, Vice Chair
Arizona State, Tribal and Federal Court Forum