Promoting the development of Indian attorneys while advancing and improving the practice of Indian Law in Arizona

NABA-AZ Comment on Supreme Court Rule Petition R-20-0003

The Native American Bar Association (NABA-AZ) submits this comment in support of the Petition to Amend Rule 39 of the Supreme Court of Arizona, R-18-0013. NABA-AZ is a non-profit organization created to advance and improve the practice of Indian law and promote the professional development of its members. NABA-AZ members include Native American and non-Native American attorneys, law students, advocates and other legal professionals. NABA-AZ supports the Petition to Amend Rule 39 because the proposed rule will have a positive effect on the practice of Indian law in Arizona. NABA-AZ includes members of the Arizona Bar who represent Tribes in Indian Child Welfare Act (ICWA) proceedings and believes that the rule change will enhance the ability of Tribes to participate in child custody hearings in the State of Arizona, which serves the best interest of Indian children.

1) Phoenix has One of the Largest Urban Native American Populations in the United States

Arizona is home to 309,580 Native Americans—4.5% of Arizona's total population—and to 22 tribal communities.[1] Maricopa County is also home to the largest population of Native Americans in the country.[2] However, 5.2 million Native Americans live in the US[3] and there are 574 federally recognized tribes in the country.[4] Tribal members from across the country make Arizona home. Many tribal citizens moved to Arizona during the federal relocation program, to attend boarding school, or more recently, to attend school or work. For example, in the Phoenix area alone after relocation, there were "almost 200 Dakota Sioux, approximately 100 Minnesota Chippewas, 100 Kiowas, about 175 Creeks, 100 Choctaws, several hundred Cherokees, several hundred Pueblos, and smaller numbers of Shawnees, Blackfeet, Pawnees, Cheyennes, Iroquois, Tlingit, Yakimas and other Indians from far away states."[5]

Arizona courts hear thousands of dependency cases involving Indian children that are governed by ICWA. While specific tribal information is unavailable, a number of those cases involve Tribal children from Tribes

[1] ARIZONA COMMERCE AUTHORITY, DEMOGRAPHICS (CENSUS DATA), https://www.azcommerce.com/oeo/population/demographics-census-data/ (last visited Apr. 16, 2020). While all out-of-state Tribes are affected by the pro hac vice rules, it is important to note that there are also several Tribal communities that exist within Arizona and one or more other states. For example, the Navajo Nation exists in Arizona, Utah, and New Mexico; Quechan exists in both Arizona and California; the Zuni Pueblo exist in both Arizona and New Mexico; and the Fort Mohave exist in Arizona and California. Where one of those Tribes has attorneys that are barred in only another state, those attorneys would also be subject to the pro hac vice rules even though the Tribes exist partly within the state of Arizona.

[2] David Meek, *Maricopa County Tops List of U.S. Counties with Largest Native American Population*, THE ARIZONA REPORT (Feb. 22, 2019), https://arizonareport.com/maricopa-county-largest-native-american-population/.

[3] United States Census Bureau, *The American Indian and Alaska Native Population: 2010*, C2010BR-10 (Jan. 2012), https://www.census.gov/history/pdf/c2010br-10.pdf.

[4] Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 85 FR 5462-01, Jan. 30, 2020.

[5] Joyotpaul Chaudhuri, URBAN INDIANS OF ARIZONA: PHOENIX, TUCSON, AND FLAGSTAFF 22 (1974).

across the country without an Arizona-barred attorney. Thus, Tribes commonly find themselves with the option to intervene in Arizona ICWA proceedings because their members are residents of Arizona.

2) The Current Rule Fails to Protect Tribes' Rights Under ICWA

Tribes who have children in the Arizona court system have two choices if they wish to participate in ICWA proceedings. They must use an Arizona-based attorney, or their out-of-state attorney must follow the pro hac vice rules set forth in Arizona Supreme Court Rule 39. Rule 39 currently imposes pro hac vice costs on non-Arizona attorneys who represent Tribes and requires them to associate with local counsel. The current petition to change the rule would eliminate this burden and exempt out-of-state attorneys representing Tribes in ICWA proceedings from paying pro hac vice costs.

To promote effective implementation of and full compliance with the letter and the spirit of ICWA, the Arizona Supreme Court should approve this rule change petition. By exempting attorneys from paying pro hac vice fees and requiring association with local counsel, this rule change will remove one of the barriers that prevents Tribes from exercising their federal right of intervention in state court child custody proceedings that are subject to ICWA.

BIA regulations encourage states to allow individuals representing Tribes in ICWA proceedings to appear before the court, regardless of whether those attorneys are licensed in the state.[6] Research has demonstrated that cases where the Tribe is represented in child custody proceedings are more likely to result in reunification, in a shorter time to permanency, and a shorter time for the child to return home.[7] That same research explicitly found that "a tribal representative being present early and often in the case was related to timely permanency."[8]

These benefits—to Tribes, to children, and to parents—fail to accrue where pro hac vice fees or a requirement to associate with local counsel inhibit Tribal representation. By enacting this proposed rule change, the corresponding increase in Tribal representation in ICWA proceedings would ensure that these benefits accrue in a greater number of ICWA proceedings within Arizona, specifically those proceedings that involve children who are members of or eligible for membership in Tribes who lack representation by an Arizona attorney.

3) Tribes Should be Exempt from Paying Fees

a) ICWA Creates a Federal Right for Tribes to Participate in Child Custody Proceedings

ICWA creates a federal right for Tribes to participate and intervene in certain child custody proceedings involving Tribal members. Congress enacted ICWA in 1978 to address the widespread problem of family separation that was occurring in Indian families at that time.[9] Because state agencies and state courts often played a major role in these separations, Congress determined that federal action was needed to address the ongoing crisis.[10] To ensure that the rights of Indian families, Indian children, and the Tribes themselves were protected, Congress established a right for Tribes to intervene in child custody proceedings that are governed by ICWA—foster-care placements, termination of parental rights, pre-

[6] CAPACITY BUILDING CENTER FOR COURTS, ICWA BASELINE MEASURES PROJECT FINDINGS REPORT 7 (date unknown).
[7] Id. at 17-19.
[8] Id. at 22.
[9] BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, 5 (2016).
[10] Id.

adoptive placements, or adoptive placements.[11] This federal right applies to all Tribes equally, regardless of their location or their attorneys' bar memberships. However, the current Rule 39 significantly inhibits the ability to participate in ICWA proceedings for Tribes without Arizona-barred attorneys. The BIA has observed that

> implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State. This has led to significant variation in applying ICWA's statutory terms and protections. This variation means that an Indian child and her parents in one State can receive different rights and protections under Federal law than an Indian child and her parents in another State. This disparate application of ICWA based on where the Indian child resides creates significant gaps in ICWA protections and is contrary to the uniform minimum Federal standards intended by Congress.[12]

b) States are in the Best Position to Ensure Uniform Application of ICWA's Protections

States are in the best position to address this problem. Exempting out of state attorneys involved in ICWA from paying pro hac vice fees is one way to resolve this problem short of giving tribes direct funding for these costs. While ICWA created a federal right for Tribes to intervene in certain child custody proceedings, ICWA does not provide funding for the costs associated with exercising that right. Furthermore, the Department of the Interior does not allow Tribes to use federally appropriated funds for retention of private counsel.[13] While there are exceptions to this rule, intervention in ICWA proceedings is not one of those exceptions.[14] Thus, federally appropriated funds cannot be used to retain local counsel, leaving Tribes to pay fees for local counsel out of their own Tribal funds. As noted in Section 4 below, this is especially problematic for Tribes with limited resources.

In addition to fees for retention of local counsel, Tribes without an Arizona-barred attorney are also required to pay the pro hac vice fees when exercising their federal right to intervene. In Arizona, pro hac vice applicants are required to pay the full annual cost of admission to the state bar for each unrelated matter in which the applicant applies for admission.[15] These fees can range from $345 to $705.[16] For a Tribe without an Arizona-barred attorney with dozens of cases in Arizona courts, such as the Cherokee, (see Section 4.c below) the result is several thousand dollars in pro hac vice fees. Furthermore, an applicant may be denied for repeated appearances.[17] This is especially problematic for Tribes with a large population of Tribal citizens who reside in Arizona. Thus, when it comes to ICWA proceedings in Arizona courts, Tribes without an Arizona-barred attorney are not merely at a disadvantage; the federally guaranteed right of intervention may be completely infringed by the combination of pro hac vice fees, the requirement of limited appearances, and the costs of association with local counsel.

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[11] Id. at 4.
[12] Id. at 7.
[13] 25 C.F.R. 89.40.
[14] 25 C.F.R. 89.41.
[15] Ariz. R. Sup. Ct. 39(c)(1).
[16] State Bar of Arizona, Annual Membership Fees and Deadlines. https://www2.azbar.org/membership/feesdeadlines/ (last visited Apr. 20, 2020).
[17] Ariz. R. Sup. Ct. 39(e).

4) Pro Hac Vice Costs Limits Tribal Participation

Because the right to participate in state court proceedings subject to ICWA is a federal right guaranteed to Tribes, any barrier to Tribal participation infringes on that right. Pro hac vice fees and the requirement to associate with local counsel inhibit Tribal participation in state court child custody proceedings that are subject to ICWA, infringing on that federally guaranteed right. Where Tribes have limited resources—as many Tribes do—whether pro hac vice fees are required or waived may be the determinative factor in that Tribe's participation in state court proceedings. Furthermore, the requirement to associate with local counsel may prevent an out-of-state Tribe from participating if that Tribe is unable to secure local counsel.

a) Many Tribes Suffer from a General Lack of Resources

In general, programs that serve Tribal communities are underfunded.[18] In a 2018 report, the United States Commission on Civil Rights noted that Native American communities suffer from higher rates of poverty; inadequate educational, utility, and housing services; and higher infant mortality rates and lower life expectancies when compared to other American communities.[19] The same report noted that this underfunding is a decades-old problem, and that due to the deficit in funding of programs that serve Native American populations "Native Americans living on tribal lands do not have access to the same services and programs available to other Americans."[20] As noted above, this limited funding cannot be used to cover the costs of legal services in litigation, including participation in ICWA cases. As a result of this chronic underfunding, Tribes often must use their limited resources to fill the gaps left by the federal programs. As such, some Tribes simply may not be able to afford the pro hac vice fees to participate in every ICWA proceeding in which they would otherwise choose to intervene. Where pro hac vice fees inhibit Tribal participation, they infringe on a federally guaranteed right.

b) Lack of Knowledge About ICWA in the Legal System

In a 2013 Resolution and accompanying report, the American Bar Association encouraged state bar associations to educate the legal profession on the requirements of ICWA, noting that implementation of and compliance with ICWA has been ineffective.[21] The report specifically noted that lack of education and knowledge was one of the major barriers to effective implementation, and that many state courts and child welfare agencies failed to follow the requirements of ICWA subsequent to that lack of knowledge.[22] Caseworkers, judges, and attorneys are all individuals whose lack of a robust understanding of ICWA may result in ineffective implementation or noncompliance. As stated in the report accompanying the resolution, "[i]ncompatible laws [and] state court decisions have also presented challenges to effective ICWA implementation."[23] While pro hac vice fees and the requirement to associate with local counsel are not singled out in the report, where those requirements prevent effective implementation of and

[18] UNITED STATES COMMISSION ON CIVIL RIGHTS, BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 4 (2018).
[19] Id. at 1.
[20] Id. at 3.
[21] American Bar Association, Indian Child Welfare Act Resolution (2013). https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/indian-child-welfare-act-resolution/ (last visited Apr. 20, 2020).
[22] Id.
[23] Id.

compliance with the full spirit of ICWA, those state requirements fall into the category of challenges to effective implementation.

c) Tribal-Specific Data Shows How Tribes Are Inhibited from Participating in ICWA Proceedings: Cherokee Example

One example that demonstrates how the current rule inhibits Tribes from participating in ICWA proceedings comes from the Cherokee Nation. Currently, the Cherokee Nation has 12 dependency or foster cases involving 27 children in Arizona courts. This does not include cases involving guardianship or adoption. It is likely that there more cases in Arizona involving children of the Cherokee Nation; the 12 cases listed above only includes cases where the Nation received notice and intervened.[24] When the Cherokee Nation decides whether to intervene in a case, that decision is based in part on the ease with which they can obtain pro hac vice status and obtain local counsel. Where it is difficult to obtain pro hac vice status or local counsel, the Nation may decide not to intervene. Thus, a revision of the rule that makes it easier for Tribal attorneys to be involved is necessary to fulfill the spirit of ICWA and remove some of the barriers that inhibit Tribal involvement.

5) Solutions: What Other States Have Done

Many states have passed similar pro hac vice rule exceptions for out-of-state attorneys who seek to appear in state courts to represent an Indian Tribe in ICWA proceedings. These rules and exceptions, and the key provisions thereof, are provided below. These examples demonstrate that other jurisdictions recognize the right to participate may be limited by burdensome pro hac vice fees and processes.

a) Washington, APR 8

The state of Washington passed a pro hac vice rule similar to the proposed Arizona rule. In Washington, any attorney who is admitted to and in good standing of the bar in any state or territory of the United States may participate in ICWA cases. The attorney is not required to pay pro hac vice fees or associate with local counsel where the attorney "seeks to appear for the limited purpose of participating in a 'child custody proceeding'" pursuant to ICWA, the attorney represents an Indian Tribe that has asserted its intent to intervene in the state court proceedings, and the attorney has provided written notice of their appearance to the Washington State Bar.

b) Nebraska, NRS § 43-1504

Nebraska has also passed a similar rule. Nebraska's state analog to ICWA provides that where an Indian Tribe exercises their right to intervene in a state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, legal counsel for that Tribe is not required to associate with local counsel or pay pro hac vice fees.

c) Oregon, UTCR 3.170

Oregon's Uniform Trial Court Rules also provide that an attorney who seeks to appear in state court in a child custody proceeding pursuant to ICWA is not required to pay pro hac vice fees or associate with local counsel, where that attorney represents an Indian Tribe that has declared their intent to intervene in the

[24] If the Nation chose not to intervene, or did not receive notice, those cases are not included in the 12 cases listed above.

state court proceedings. Furthermore, the attorney is not required to associate with local counsel or pay pro hac vice fees if the attorney represents the child's parents or Indian custodian, rather than the child's tribe.

d) Michigan, MCR 8.126

Michigan, similar to Nebraska, has passed a rule governing attorney appearances in proceedings under the state analog to ICWA. In Michigan, an attorney who represents an Indian Tribe that seeks to intervene in state court proceedings need not pay pro hac vice fees or associate with local counsel, and is not limited in the number of appearances that the attorney can make in a given year. Michigan's analog to ICWA governs foster care placements and termination of parental rights, as does ICWA, but also includes guardianship proceedings. The attorney must be eligible to practice law and in good standing in a jurisdiction.

e) California, Rules of Court 9.40(g)

In California, out-of-state attorneys who seek to appear in a state court proceeding governed by ICWA are not required to associate with local counsel. Furthermore, an attorney who seeks to appear in state court to represent an Indian Tribe in a proceeding governed by ICWA may not have their pro hac vice application denied on the basis of repeated appearances.

f) Wisconsin, SCR 10.03

The Rules of the Wisconsin Supreme Court provide that a state court may permit an out-of-state attorney to appear in a child custody proceeding pursuant to ICWA without associating with local counsel or paying pro hac vice fees.

g) Minnesota, Rules of Juvenile Protection Procedure 3.06; Adoption Rule 3.09

In Minnesota District Courts, the rule governing pro hac vice appearances, which requires that out-of-state attorneys associate with local counsel, does not apply to attorneys who represent Indian Tribes in either juvenile protection or adoption matters.

6) Conclusion

ICWA is a federal statute that established a federally guaranteed right for Tribes to intervene in certain child custody proceedings. While ICWA established this right, it provides no funding for Tribes to exercise that right. Where Tribes are prevented from exercising that right by burdensome fees or requirements, those fees and requirements infringe on that federally guaranteed right. While some Tribes that do not employ an Arizona-barred attorney may seldom find themselves in Arizona courts for ICWA proceedings, other similarly situated Tribes may find themselves in Arizona courts often. For any Tribe without an Arizona-barred attorney, pro hac vice fees, the requirement to associate with local counsel, and the rule of limited appearances may inhibit, and thus infringe on, the exercise of their rights under ICWA.

A growing number of states have remedied this problem by creating a limited exception to their pro hac vice rules which allows attorneys who are representing a Tribe that is intervening in an ICWA proceeding to appear without paying pro hac vice fees, without associating with local counsel, and without limiting the number of appearances in state courts that attorney can make. This is not a broad exception to the current rule; it is narrowly tailored to improve states' compliance with the letter and spirit of ICWA.

Without the rule change, Arizona may not be fully compliant. Because states are in the best position to remedy this problem, it is incumbent upon the Supreme Court to approve this rule change.