JUDICIAL COUNCIL
OF CALIFORNIA

TRIBAL COURT–STATE COURT FORUM

www.courts.ca.gov/forum.htm
forum@jud.ca.gov

TRIBAL COURT–STATE COURT FORUM

OPEN MEETING AGENDA

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1))
THIS MEETING IS BEING CONDUCTED BY ELECTRONIC MEANS
THIS MEETING IS BEING RECORDED

Date:	October 12, 2017
Time:	12:15–1:15 p.m.
Location:	Conference Call
Public Call-In Number	1-877-820-7831 and enter Listen Only Passcode: 4133250

Meeting materials will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call

II. PUBLIC COMMENT (CAL. RULES OF COURT, RULE 10.75(K)(2))

Public Comment
This meeting will be conducted by teleconference. As such, the public may only submit written comments for this meeting.

Written Comment
In accordance with California Rules of Court, rule 10.75(k)(1), written comments pertaining to any agenda item of a regularly noticed open meeting can be submitted up to one complete business day before the meeting. For this specific meeting, comments should be e-mailed to forum@jud.ca.gov or mailed or delivered to 455 Golden Gate Avenue, San Francisco, CA 94102, attention: Ann Gilmour. Only written comments received by 12:15 p.m. on October 11, 2017 will be provided to advisory body members.

III. Discussion and Possible Action Items (Items 1-7)

Item 1
Approval of Minutes for August 17, 2017 Meeting

Item 2
Cochairs Report
- Update on Status of Annual Agenda
- Forum Appointments – Welcome to Members

Item 3
Substance Abuse and Mental Health Services Administration (SAMHSA)
Tribal Training and Technical Assistance Center
Presentation on services available to tribes and accessing those services
Presenter: Seprieono Locario

Item 4
VAWEP/VOCA Grant - Planning Meeting Report Back & Upcoming Grant Year
Presenter: Lisa Chavez, Senior Analyst, Judicial Council Center for Families, Children & the Courts

Item 5
Report Back from the Information and Technology Advisory Committee
Presenter: Hon. Joseph Wiseman

Item 6
Indian Child Welfare Act Regulations, Guidelines and Task Force Report
Discussion of implementation issues.
Presenter: Ann Gilmour

Item 7
Recent and Upcoming Conferences
Presenter: Vida Castaneda

IV. Adjournment

Adjourn

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TRIBAL COURT–STATE COURT FORUM

MINUTES OF OPEN MEETING

August 17, 2017
12:15-1:15 p.m.
By Conference Call

Advisory Body Members Present: *Hon. Abby Abinanti, Co-chair, Hon. Dennis M. Perluss, Co-chair*, Hon. Leonard Edwards(Ret.), Hon. Cynthia Gomez, Hon. Lawrence C. King, Hon. Mark Radoff, Hon. David Riemenschneider, Hon. John Sugiyama, Hon. Christine Williams, Hon. Christopher Wilson, Hon. Joseph Wiseman, and Hon. Zeke Zeidler

Advisory Body Members Absent: Hon. April Attebury, Hon. Richard Blake, Hon. Hilary A. Chittick, Ms. Jacqueline Davenport, Hon. Gail Dekreon, Hon. Kimberly Gaab, Mr. Olin Jones, Hon. Mark Juhas, Hon. Susanne Kingsbury, Hon. William Kockenmeister, Hon. Patricia Lenzi, Hon. Anthony Lee, Hon. Lester Marston, Hon. Allen Sumner, Hon. Sunshine Sykes, Hon. Juan Ulloa, and Hon. Claudette White

Others Present: Ms. Carolynn Bernabe, Ms. Vida Castaneda, Ms. Charlene Depner, Ms. Audrey Fancy, Ms. Ann Gilmour, Ms. Bonnie Hough, Ms. Heather Hostler, and Ms. Delia Sharpe

OPEN MEETING

Call to Order and Roll Call
The co-chairs called the meeting to order at 12:17 p.m.

Approval of Minutes
The forum approved the June 8, 2017 meeting minutes.

DISCUSSION AND ACTION ITEMS (ITEMS 1–8)

Item 1

Cochairs Report

- *Proposed Addition of Review and Response to California ICWA Compliance Task Force Report to Annual Agenda*
  The forum proposed an amendment to its annual agenda authorizing the review of the California ICWA Compliance Task Force report published in March and and that the Forum be allowed to make recommendations on implementation where appropriate. The request to amend the Forum annual agenda is on the August 24th Executive and Planning meeting agenda.

DRAFT

- *Proposed National Tribal Court Forum Summit – Palm Springs, December 6, 2017*
  Planning is underway for the national tribal court forum summit to take place in Palm Springs on December 6, 2017. The national event will bring together teams from tribal court – state court forums from across the country with a focus on efforts to have state courts recognize and enforce tribal protective orders. The idea is to have representatives from law enforcement agencies (state and tribal) and from tribal courts, and forum participants from a number of jurisdictions dealing with these issues share their experiences to increase the rapid enforcement of tribal protective order.

Item 3
Legislative Update: AB 905
Presenter: Daniel Pone, Attorney, Judicial Council's Governmental Affairs (not available)
Justice Perluss reported on the status of AB 905, legislation sponsored by the California Law Revision Commission eliminating sunset provision on the Tribal Court Civil Money Judgment Act. The Bill passed both houses, was signed by the Governor and is now chaptered in legislation. Next steps are for the Forum to start thinking whether to expand the simpler recognition process in this legislation to tribal court judgments other than money judgments. As we think about how to proceed, Forum members are reminded that the most effective and persuasive evidence is to present to the legislators stories of problems encountered in existing procedures and how they could be avoided with the streamlined process.

Item 4
California Department of Social Services – Office of Tribal Affairs and Tribal Consultation Policy
Presenter: Heather Hostler, Bureau Chief of Office of Tribal Affairs, California Department of Social Services
Ms. Heather Hostler introduced herself and provided information about her new position as the Bureau Chief of the newly established Office of Tribal Affairs within the California Department of Social Services. One of the top priorities of the new Office of Tribal Affairs is implementing the Department's new tribal consultation, which was announced June 6, 2017. Ms. Hostler has experience working with tribes and state government. Prior to joining CDSS, she served as deputy director of the Governor's Office of Tribal Advisor, working closely with Judge Cynthia Gomez. She comes from Humboldt County, and is a Hoopa Valley Tribal Member. CDSS Director Will Lightbourne finalized the tribal policy in June. Formal announcement of the policy was sent to all tribal chairs of federally recognized tribes in California, as well as to various regional tribal chairs associations and other relevant tribal representatives and organizations. The purpose of this policy is to conduct tribal consultation on regulations affecting tribes, to support tribes and strengthen DCSS, county, and tribal relationships. The policy is "*to guide consultations between the CDSS and sovereign federally recognized Tribes in California on policies and procedures that affect Tribes and Indians in California, in recognition of statutory mandates and Federal and State Executive Directives to establish a formal government-to-government Tribal Consultation Policy (TCP).*" Ms. Hostler will provide the Forum periodic updates on tribal consultation efforts and the implementation of this policy.

Action Item: Staff to send Heather's contact information to forum members.

Item 5
California Tribal Families Coalition and California ICWA Compliance Task Force Report
Presenter: Delia M. Sharpe, Executive Director, California Tribal Families Coalition

- *Overview of California ICWA Compliance Task Force Report Findings and Recommendations. Request for forum action.*
  Ms. Delia Sharpe provided an overview of the California ICWA Compliance Task Force, its findings and recommendations, identified issues and concerns, and non-compliance with ICWA. The goal of the newly formed Coalition is to unify tribes to protect tribal children and families by improving compliance with ICWA. The chairs of the task force wanted to move forward with implementing its recommendations, and formed the Coalition to insure the recommendations would be implemented. The mission of the Coalition is to protect the health, safety and welfare of tribal families, which aligns with the Task Force recommendations.

  In 2015, after meetings with the Bureau of Children's Justice, a newly created Bureau of the California Department of Justice, the Task Force was formed and began to gather data regarding the failure of ICWA implementation and have since recommended corrective measures to address concerns that tribal leaders and stakeholders have brought forward. The goal was that the data be used to target reform on non-compliance within the dependency system. There are nine tribal leaders that make up the Coalition board across the state, which include duly elected officials from tribes.. Concerns that gave rise to the implementation of the Coalition were that the recommendations of Task Force report would not be meaningfully implemented and/or recommendations would be implemented in a vacuum by state agencies without input of tribal leaders and social workers.

  The Coalition's goal is to collaborate with state and county agencies and amend policy in rules of courts and to locate funding to develop projects. The Coalition will develop a committee to get work done, work with forum and appropriate staff with the Judicial Council to collectively implement the recommendations. The report can be found on www.caltribalfamilies.org. Forum needed formal approval to participate and is discussing how to proceed with coordination.

  Volunteer: Judge Mark Radoff volunteered to assist with the Coalition's efforts.

Item 6
Suggestions for Future Activity
Presenter: Judge Leonard Edwards, Ret.

- *Possible legislation to provide funding for attorneys for tribes in ICWA cases.*
  Judge Leonard Edwards drafted a proposal for funds to be appropriated for attorneys to represent tribes in cases involving the ICWA. There is an effort by judges on the Juvenile Court Judges of California (JCJC) for funding to be used to educate judges about ICWA. Judge Edwards explained that judges do not like reversals, especially when they feel that having tribal representation by attorneys is the best practice. Currently tribes are the only parties in ICWA cases that do not have funding for

counsel to represent them. Judge Edwards will be making a presentation on this at the JCJC meeting at Beyond the Bench in December

- *Possible request to State Bar to create an Indian law specialization.*
  The forum request Judge Edwards proposed that the State Bar create an additional category of legal specialization for Native American Law. There are many reasons why such a new category would improve the law, the legal system, and the administration of justice. Several sources are able to provide excellent training in Native American Law including the National Association of Counsel for Children (NACC). At the December's Beyond the Bench conference, JCJC will meet to identify ICWA champion judge at every county and to have a dedicated calendar for ICWA cases. A number of counties have an ICWA specialist.

  Judge Zeidler discussed some of the difficulties with ensuring complete and thorough ICWA inquiry and notice. In particular, Judge Zeidler discussed the problem of ensuring all required tribes receive notice when an individual indicates his or her historical tribal affiliation, but does not have information about the specific federally recognized tribe. The federal government has created some ICWA resources with the most recent list of agents for service of ICWA notice published in the federal register and a listing of tribes by historical affiliation. There are also resource information at the Tribal/State Programs Unit website.

  Action Item: Staff to send links to list of tribes by historical affiliation to Forum members.

Item 7
RUPRO Items
Presenter: Ann Gilmour

- *SPR17-16 Indian Child Welfare Act: Amend Rule 5.552 to Allow Indian Child's Tribe Access to Court Records Consistent with Welfare and Institutions Code Section 827*
- *SPR17-18 Family Law: Transfers of Title IV-D Child Support Cases Between State and Tribal Court*
  Ms. Ann Gilmour provided a report on the status of the proposals to amend the Rules of Court to allow tribal access to juvenile court records and the transfer of child support cases from the state court to the tribal court when there is concurrent subject matter jurisdiction. Rules were approved with no amendments by RUPRO committee and are on the consent agenda for the August 24th Executive & Planning meeting. They are expected to be approved for Judicial Council consideration at its September meeting, to be effective January 1, 2018.

Item 8
Recent and Upcoming Conferences
Presenter: Vida Castaneda

- *Legal Aid Association of California and the Judicial Council California Family Law and Self-Help Conference – July 24, 2017, Los Angeles*
  The Judicial Council provided 12 scholarships for tribal attendance. Presentation on "*Assisting and Understanding Victims Within the Native American Community,*"

included a history on Indian policies with the federal government and California, along with discussion on current barriers, services for Native American victims, jurisdiction issues, culturally appropriate responses, and how to access Tribal Services. Presented by Keely Linton, Strong Hearted Native Women's Coalition and Susan Dalati, California Indian Legal Services. Another presentation was "*Providing Effective Self-Help Services to Tribal Communities.*" This workshop provided an understanding of the challenges that Native Americans experience in accessing justice and provide strategies and best practices to help improve service to the Native American community. Presented by Stephanie Dolan, Northern California Tribal Court Coalition, April Attebury, Karuk Tribe, and Mark Skinner, Superior Court of California, Siskiyou County.

- *Native American Day – September 22, 2017, Sacramento*
  The annual Native American Day celebration will take place at the State Capitol on September 22, 2017 from 9:00am to 3:00pm. The theme this year is "*Tribal Sovereignty: Sovereigns Working Together*." This year marks the 50th anniversary of this annual event. There will be many resource tables featuring resources for Native American families statewide, and the Judicial Council Tribal/State Programs unit will be hosting a resource table with an array of brochures. There will be cultural performers, live traditional food demonstrations and much more. Please visit Facebook to view the event page under "*2017 Native American Day-State Capitol.*"

- *Beyond the Bench Planning – December 18-20, 2017, San Diego*
  Beyond the Bench: Uniting for a Better Future will take place December 19–20, 2017 at the Manchester Grand Hyatt San Diego, with pre-conference events on December 18, 2017. Judicial Council Tribal/State Programs unit has been assisting conference organizers plan three tribal related workshops. On December 19th, a workshop on "*Indian Child Welfare Act (non) Compliance in California – Current Obstacles and Finding a Path Forward*" will occur. On December 20th, two workshops will occur on "*New Federal Indian Child Welfare Act Regulations and Guidelines: Changes for California Law and Practice*" and "*Trafficking & Tribal Communities.*" Each workshop will feature a panel of experts in their respective fields to speak on these important topics, and materials will be provided electronically to participants. Forum members are encouraged to attend. For more information, please visit http://www.courts.ca.gov/34921.htm.

Item 6

Other Business

The next forum call is on October 12, 2017 at 12:15 p.m.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:13 p.m.

Pending approval by the advisory body on October 12, 2017.

DRAFT

SAMHSA
Tribal Training and Technical Assistance Center

Who We Are

The Tribal Training and Technical Assistance (TTA) Center is funded by the Substance Abuse and Mental Health Services Administration (SAMHSA). We use a culturally relevant, evidence-based, holistic approach to support Native communities in their self-determination efforts through infrastructure development and capacity building, as well as program planning and implementation.

What We Do

The Tribal TTA Center provides TTA on mental and substance use disorders, suicide prevention, and the promotion of mental health. We offer broad, focused, and intensive TTA to federally recognized tribes, other American Indian and Alaska Native (AI/AN) communities, SAMHSA tribal grantees, and organizations serving Indian Country.

Who We Serve

- Rural and urban tribal nations and organizations
- SAMHSA tribal grantees
- A select group of communities for intensive TTA
- TTA contractors who serve tribal grantees and tribal members
- Governmental and non-governmental entities

How to Request TTA

Tribal communities and SAMHSA tribal grantees can contact the Tribal TTA Center to submit TTA inquiries via:

Tribal TTA Center Webpage
www.samhsa.gov/tribal-ttac

SAMHSA Tribal Training and Technical Assistance Center
Phone: 301-257-2967
218 North Lee Street, Suite 321
Alexandria, VA 22314
Email: TA-Request@tribaltechllc.com

Following your request, you will be contacted by Tribal TTA Center staff.

AI/AN communities have the cultural knowledge, skills, and resilience to address and prevent mental and substance use disorders, prevent suicide, and promote behavioral health. Their cultural beliefs and practices provide a foundation for promoting lasting wellness, solving problems, and taking action.

Strategic Cultural Framework

The SAMHSA Tribal TTA Center is based on these principles:

Vision

Behavioral health and wellness for tribal communities begins with acknowledging the effects of historical trauma, honoring cultural values, and developing a vision of success.

Circles of Relationships

The quality and authenticity of relationships provides the critical pathway for this work to be effective and sustainable. These circles of relationships must emerge from the community and be based on the successful integration of memberships and responsibilities.

Sense of Hope

Tribal communities believe spirituality is at the core of their survival. A sense of hope includes interconnectedness (circles of relationships), sacredness of inner spirit (cultural resilience), balance (awareness), and responsibility to be lifelong learners (growth).

PrettyPaint, I. (2008) Miracle survivors: A grounded theory on educational persistence for tribal college students. Minneapolis, MN: University of Minnesota

Substance Abuse and Mental Health Services Administration
SAMHSA
www.samhsa.gov • 1-877-SAMHSA-7 (1-877-726-4727)

How We Deliver Training and Technical Assistance (TTA)

- National and regional trainings
- Gathering of Native Americans/Gathering of Alaska Natives
- Learning communities
- Assistance with Tribal Action Plans
- Intensive community engagement
- Onsite and virtual technical assistance
- Production and dissemination of resources

Collaborative Partnerships

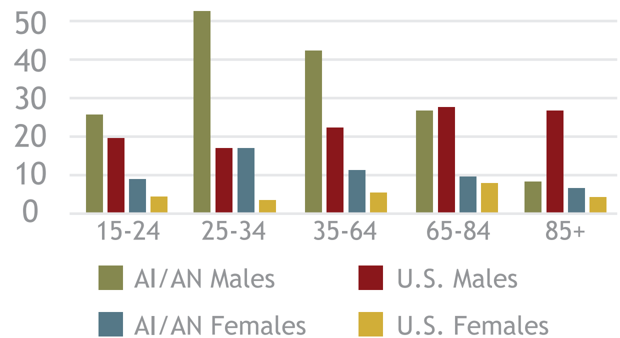
The Tribal TTA Center partners with other TTA providers and federal agencies servicing AI/AN tribes and communities to maximize resources and efforts in Indian Country that promote mental health and support the prevention of suicide and substance abuse. Some of these partners are:

- Collaborative for the Application of Prevention Technologies (CAPT)
- Fetal Alcohol Spectrum Disorders Center for Excellence
- Office of Indian Alcohol and Substance Abuse (OIASA)
- SAMHSA Regional Administrators
- Suicide Prevention Resource Center (SPRC)

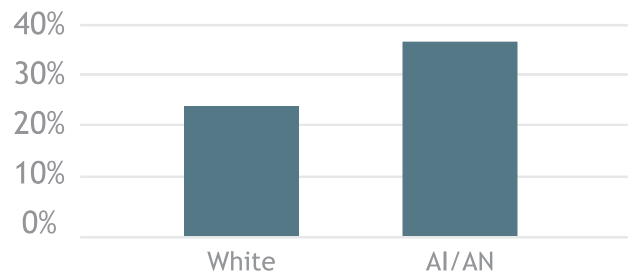
Need for Services

Suicide rates of AI/AN populations are higher than any other group in the United States. The National Survey on Drug Use and Health reports that AI/AN populations drink less overall than the national average, but the rate of binge drinking is higher. Alcohol abuse, and particularly binge drinking, has been shown to contribute to higher rates of suicide.

Suicide Deaths: Rates per 100,000 (by age group)



Percent of Suicide Decedents Who Had a Blood Alcohol Content ≥ 0.08



Data Source: Research Society on Alcoholism (2013)

The Path Ahead

- Provide TTA to federally recognized tribes, other AI/AN communities, SAMHSA tribal grantees, and organizations serving Indian Country.
- Work collaboratively with governmental and non-governmental entities to leverage resources and address a variety of issues affecting tribal communities, families, and youth.
- Work with SAMHSA tribal grantees and other TTA contracts that serve tribal grantees and tribal members.
- Assist tribal communities in mobilizing, planning, and implementing community-based and culturally tailored evidence-based interventions.
- Increase protective factors linked to the healthy and safe development of AI/AN children, families, and communities.

VIOLENCE AGAINST WOMEN EDUCATION PROJECT (VAWEP) PLANNING COMMITTEE MEETING AND VICTIMS OF CRIME ACT (VOCA) PLANNING MEETING

Tuesday, August 29, 2017
10:00 a.m. – 4:00p.m.
Milton Marks Conference Center,
San Diego Room

Judicial Council of California
Center for Families, Children & the Courts
455 Golden Gate Avenue
San Francisco, California 94556
(415) 865-7459

Agenda

10:00 – 10:15 a.m. **Welcome, Opening Remarks, and Introductions**

Hon. Jerilyn L. Borack, Co-Chair, VAWEP and VOCA Planning Committee and Judge of the Superior Court of California, County of Sacramento

Hon. Mark A. Juhas, Co-Chair, VAWEP and VOCA Planning Committee and Judge of the Superior Court of California, County of Los Angeles

10:15 – 10:25 a.m. **Grant Objectives (VAWEP and VOCA)**

Ms. Lisa Chavez, Senior Analyst, Judicial Council Center for Families, Children & the Courts

10:25 – 10:45 a.m. **Update on Grant-Funded Education**

- **Judicial Officer Education**
  Ms. Khanh Nguyen, Attorney, Judicial Council Center for Judicial Education and Research

- **Multidisciplinary Education**
  Ms. Bonnie Hough, Principal Managing Attorney, Judicial Council Center for Families, Children & the Courts

- **Family Court Services (FCS) Education**
  Ms. Nadine Blaschak-Brown, Senior Analyst, Judicial Council Center for Families, Children & the Courts

10:45 - 10:55 a.m. **Update on Grant-Funded Projects**
Ms. Lisa Chavez, Senior Analyst, Judicial Council Center for Families, Children & the Courts

10:55 - 11:20 p.m. **Discussion on Law, Policy, and Education**

California Partnership to End Domestic Violence (CPEDV)
Ms. Krista Niemczyk, Public Policy Manager

California Coalition Against Sexual Assault Coalition (CALCASA)
Ms. Kristina Solberg, Public Policy Associate

Law Enforcement Education
Mr. Allen Benitez, Senior Consultant, California Commission on Peace Officer Standards and Training (POST)

11:20 – 12:30 p.m. **Working Lunch:**

Updates from Tribal Programs and Tribal Court-State Court Forum
Hon. Christine Williams, Chief Judge, Shingle Springs Band of Miwok Indians Tribal Court

Ms. Vida Castaneda, Senior Analyst, Judicial Council Center for Families, Children & the Courts

Ms. Ann Gilmour, Attorney, Judicial Council Center for Families, Children & the Courts

Ms. Lynda Smallenberger, Executive Director, Kene Me-Wu Family Healing Center, American Indian Domestic Violence/Sexual Assault Program

12:30 – 1:30 p.m. **Brainstorming (concurrent sessions)**

Attendees will pick one of the following sessions to attend:

- Human Trafficking *(San Diego-C)*
- Technology-related issues in domestic violence, stalking, sexual assault, and human trafficking cases *(San Diego-A)*
- Immigration issues for victims in state courts *(San Diego-B)*

- How to work with SRLs in civil domestic violence, sexual assault, and stalking cases *(Santa Barbara room)*

- Increasing court and community collaboration to improve responses for victims *(Monterey room)*

1:30 - 1:45 p.m. **Break**

1:45 - 2:45 p.m. **Brainstorming (concurrent sessions)**
Attendees will pick one of the following sessions to attend:

- Human Trafficking *(San Diego-C)*

- Technology-related issues in domestic violence, stalking, sexual assault, and human trafficking cases *(San Diego-A)*

- Immigration issues for victims in state courts *(San Diego-B)*

- How to work with SRLs in civil domestic violence, sexual assault, and stalking cases *(Santa Barbara room)*

- Increasing court and community collaboration to improve responses for victims *(Monterey room)*

2:45 - 3:10 p.m. **Report Back**

- Facilitators of each session report back on ideas from brainstorming sessions.

3:10 - 3:50 p.m. **Developing a Culturally Responsive Curriculum**

Ms. Orchid Pusey, Asian Women's Shelter

3:50 - 4:00 p.m. **Wrap-up and Adjourn**

Hon. Jerilyn L. Borack and Hon. Mark A. Juhas

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Center for Families, Children & the Courts

455 Golden Gate Avenue
San Francisco, CA 94102-3688
Tel 415-865-4200
TDD 415-865-4272
Fax 415-865-4205
www.courts.ca.gov

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FACT SHEET March 2017

Violence Against Women Education Project

Domestic violence, sexual assault, stalking, dating violence, and human trafficking are critical issues facing family, criminal, and juvenile courts in California. The Violence Against Women Education Project (VAWEP) is an initiative designed to provide tribal and state courts with information, equipment, technical assistance, educational materials, and programs on the role of the courts in responding to cases involving these issues. VAWEP is a project of the Center for Families, Children & the Courts (CFCC) of the Judicial and Court Operations Service Division, for the Judicial Council of California. The project is being implemented in collaboration with the Office of Education/Center for Judiciary Education and Research (CJER) and is funded by the California Governor's Office of Emergency Services (Cal OES) with resources from the federal Violence Against Women Services*Training*Officers*Prosecutors (STOP) Formula Grant Program. The project's planning committee is composed of a tribal court judge, state judicial officers, prosecutors, defense attorneys, attorneys with expertise in the field of domestic violence, victim advocates, and other subject matter experts. The planning committee guides the project staff in identifying key areas of focus and developing appropriate educational programming.

Project Goals

The goals of VAWEP are to:

- Identify primary educational and informational needs of the courts on domestic violence, sexual assault, stalking, dating violence, and human trafficking issues;
- Initiate new judicial branch educational programming pertaining to domestic violence, sexual assault, stalking, dating violence, and human trafficking, including the delivery of regional training events and the enhancement of existing programming;
- Develop distance learning opportunities for judicial officers and court staff relating to court procedure and policy in the areas of domestic violence, sexual assault, stalking, dating violence, and human trafficking;

- Develop and compile useful information for the courts on domestic violence, sexual assault, stalking, dating violence, and human trafficking issues that relates specifically to California state and tribal law and federal Indian Law;
- Institutionalize inclusion of domestic violence, sexual assault, stalking, dating violence, and human trafficking issues in all relevant judicial branch education curricula, programs, and publications;
- Create incentives to increase attendance and participation in judicial branch education relating to domestic violence, sexual assault, stalking, dating violence, and human trafficking;
- Increase communication among state and tribal courts about best practices in domestic violence, sexual assault, stalking, dating violence, and human trafficking cases;
- Provide jurisdiction-specific technical assistance on domestic violence, sexual assault, stalking, dating violence, and human trafficking issues of greatest importance to local courts;
- Create educational tools that aid in the administration of justice for self-represented litigants in domestic violence cases;
- Purchase computer or audio visual equipment for court-specific domestic violence-related projects; and
- Support efforts to enhance access to and improve the administration of justice for Native American victims of domestic violence, sexual assault, stalking, dating violence, and human trafficking.

Judicial Education on Domestic Violence

The Judicial Council adopted rule 10.464 of the California Rules of Courts to provide education on domestic violence for state court judges, commissioners, and referees. The rule:

- Requires participation in appropriate education on domestic violence issues by each judicial officer who hears matters in criminal, family, juvenile delinquency, juvenile dependency, or probate court, and in addition, for those with primary assignments in these areas, participation in periodic updates; and

- Requires inclusion of domestic violence issues in courses at the Judicial College and in primary assignment courses for both new and experienced judicial officers.

The VAWEP project provides statewide programs, local programs, and distance-learning opportunities so that judges, commissioners, and referees have diverse ways to fulfill the requirement of the rule. The project also provides educational programming for various court staff including but not limited to mediators, evaluators, and court clerks.

The VAWEP's planning committee supports the new rule and encourages domestic violence training. The planning committee will review prior trainings and identify further training needs. The Judicial Council's advisory committee, the Tribal Court-State Court Forum (forum), makes recommendations to the project's planning committee about content on federal Indian law and its impact on state courts. To promote the collaboration between the projects's planning committee and the forum, a tribal judge, who is a forum member, serves as liaison between the two groups.

Educational Events and Technical Assistance

Primary Assignment Orientation Courses, Criminal Assignment Courses, and other Related Events

The VAWEP project develops, staffs, and sponsors a series of in-depth courses on domestic violence, sexual assault, stalking, dating violence, and human trafficking issues that are integrated into CJER's regular programs.

Primary Assignment Orientation Courses

The Judicial Council offers week-long Primary Assignment Orientation (PAO) programs in family law, juvenile law, criminal law, and probate designed for judicial officers new to the relevant assignment. The PAO courses are designed to satisfy the content-based requirements of rule 10.462(c)(1)(B) of the California Rules of Court applicable to new judges and subordinate judicial officers. The courses also satisfy the expectations and requirements of rule 10.462(c)(4) applicable to experienced judges and subordinate judicial officers new to, or returning to, an assignment. The VAWEP project has developed components on domestic violence issues for each of these programs. Generally the Family Law PAO includes components on the effects of domestic violence on children and an overview of domestic violence law. The Criminal Law PAO includes a segment on criminal procedure in domestic violence cases. The Juvenile Law PAO includes a course on the effects of domestic violence on children in dependency and delinquency proceedings. The Probate Law PAO offers a

segment on civil protective orders for elderly adults experiencing domestic violence. The following orientation courses are offered during this grant cycle:

November 2016	Juvenile Law (Delinquency) PAO, San Francisco
January 2017	Criminal Law PAO, San Francisco Family Law PAO, San Francisco Juvenile Law PAO (Dependency), San Francisco
March 2017	Family Law PAO, Sacramento Criminal Law PAO, Sacramento Juvenile Law PAO (Delinquency), Sacramento
June 2017	Juvenile Law PAO (Dependency), Sacramento Criminal Law PAO, Sacramento
September 2017	Criminal Law PAO, Sacramento

Continuing Judicial Education: Experience Assignment Courses

CJER develops and implements programming designed to satisfy the content-based expectations of California Rules of Court, rule 10.462(c)(4) for experienced judges returning to a criminal assignment and to others seeking hours-based continuing education under rule 10.452(d). The following courses are offered during this grant cycle:

March 2017	*Handling Sexual Assault Cases*, Sacramento Sexual assault cases require the judge to be familiar with a unique body of substantive and procedural law that is not necessarily applicable in other criminal cases. The judge must also be aware and understand the dynamics of sexual assault cases, the needs of the victim and specially mandated accommodations, and myths and misconceptions about sexual assault victims and offenders. This two-day course emphasized these key issues and guided the judge through managing a sexual assault trial from arraignment to sentencing and post-sentencing procedures.
March 2017	*Immigration Issues in Domestic Violence Cases*, Sacramento Issues of immigration increasingly affect judicial decision making, the nature of the information presented to the court, and the safety issues in family, juvenile, and criminal law matters

that contain allegations of domestic violence. This one and on-half day course provided a broad overview of the elements of immigration law that may affect decisions in these cases and an understanding of the challenges facing victims of domestic violence as a result of the immigration concerns and status of the parties.

June 2017 — *Handling Cases Involving Abuse in Later Life*, San Francisco
This is a 2.5-day course emphasizing the unique and complex issues when handling cases involving abuse in later life, where elderly victims may be more vulnerable to domestic violence, sexual assault or stalking, due to perpetrators' abusive tactics that exploit elderly victims' perceived frailty, cognitive decline, or mental illness. In this course, judicial officers will explore the myths and misconceptions about victims and perpetrators, the interpersonal dynamics between victims and perpetrators, and perpetrators' use of abusive tactics and the impact on victims; identify the needs of the victim; and discuss opportunities and ethical considerations for court leadership in the community in promoting victim safety and perpetrator accountability.

September 2017 — *Ethics and Self-Represented Litigants in Domestic Violence Cases*, Sacramento
This 1.5-day course focused on general judicial ethics issues that arise in domestic violence cases such as disqualification, disclosure, ex parte communication, and community outreach, as well as application of the canons of ethics in the context of the increasing numbers of self-represented litigants that judicial officers are seeing in domestic violence cases. The course provided an opportunity to demonstrate and practice demeanor and communications skills during a videotaping and feedback session. A workshop on the nuts and bolts of California restraining order law preceded the course.

September 2017 — *Human Trafficking*, Sacramento
This is a two-day course focuses on how trafficking victims appear in juvenile and criminal courts as dependents, delinquents, defendants, and witnesses. This course covered how individuals become victims of commercial sexual exploitation, and the unique dynamics, characteristics, and risk factors of this

population. The course addressed the legal definitions of human trafficking, and the many cross-over issues that must be grappled with when trafficking victims appear before juvenile or criminal court judges.

Judicial Institutes

VAWEP courses are included as part of the Family Law Institute, Cow County Judges Institute, Judicial College, and Criminal Law Institute. These institute trainings and educational events provide information specific to target audiences.

Family Law Institute (April 2017)

The Family Law Institute is held in conjunction with the Family Law Education Program (FLEP) to provide an opportunity for judicial officers and family court services mediators and evaluators, and court clerks to jointly attend courses. The workshops presented this year include:

Welcome and Plenary: Cultural Competency in Domestic Violence
This presentation will address the definition of cultural competency and its importance in domestic violence cases. Speakers with expertise in providing services to traditionally underserved populations will identify cultural challenges for the victims they serve.

Safely Mediating: Screening, Separate Sessions, and Safety Planning in Domestic Violence Child Custody Mediation Cases
This session will provide participants with the opportunity to consider the complexity of intimate partner violence cases and how the mediation process can be used to enhance safety and accountability for participants. The course will focus on practical approaches to developing agreements and parenting plans when parties are meeting in separate sessions and provide attendees with the chance to exchange thoughts on some of the challenges and opportunities when working on these cases.

Overcoming Distrust in Family Mediation: Historical and Cultural Considerations
Over the years, a number of state and national studies have found a low level of public trust and confidence in the courts and justice system in general, particularly among some racial and ethnic groups. In child custody mediation, people bring their histories, experiences, biases and beliefs into the process, which shapes their responses and willingness to agree. This session will identify and explore 1) the cause of the distrust from a cultural and historical perspective; 2) common signs when distrust is an issue during a mediation session; and 3) techniques, strategies and approaches for

increasing the level of trust in the mediation and family law process. Participants will be encouraged to share successful practices in working with distrustful individuals and families.

Immigration Issues and Child Custody Recommendations: Improving Safety, Access, and Fairness in Cases Involving Domestic Violence
As our country grapples with policies related to immigration, domestic violence victims/survivors accessing the court system may be overwhelmed with fear and anxiety about safety and stability. In this course, presenters will discuss the courts obligation to ensure access to all litigants and how concerns raised by families with potential immigration issues can be addressed.

Current Issues in Child Custody and Domestic Violence Cases: Family Code Section
New appellate court cases and research about the effects of domestic violence on children are continuing to reshape the policy landscape in the complex area where child custody and domestic violence intersect. This course will focus on the current statutory and rule framework for handling family law child custody cases where domestic violence is alleged or has been found to have been perpetrated. The course will provide information for both judicial officers and child custody mediators/recommending counselors/evaluators.

On the Ground: Current Challenges for Domestic Violence Victims
A panel of domestic violence experts will discuss current challenges their clients face in leaving abusive relationships and accessing the court. Attendees and panelists will work together to identify culturally specific strategies to help domestic violence victims effectively access the court system.

Beyond Kale and Pedicures: What Works to Manage Compassion Fatigue and Secondary Trauma
The publication of Charles Figley's pioneering book Compassion Fatigue, which explores the potentially negative impact of trauma exposure on helping professionals as released in 1995. Since then, the field of Compassion Fatigue and Secondary Trauma has grown exponentially, and new research has emerged suggesting effective ways for therapists and other helping professionals to sustain and protect themselves. New findings suggest that in order to reduce compassion fatigue and secondary trauma, we need to adopt a multi-pronged approach—self-care, hot baths, and company picnics are simply not enough. Although helping professionals cannot be expected to fix an entire system, they do remain responsible for their own well-being—it is an ethical responsibility for themselves, their clients, and the community in which

they live. This presentation will explore where we are at, and what has been found to work, for organizations, professionals, and for us as individual helpers.

Cow County Judges Institute (June 2017)

The Cow County Judges Institute provides an opportunity to present courses to rural judges in an environment that allows for discussion of substantive and procedural law and their unique features in a rural setting. A series of workshops for this audience is presented at the institute.

> *The Effects of Domestic Violence on Children and Crafting Parenting Plans and Orders in Cases Involving Domestic Violence*. The pre-institute offering focused on the current research on the effects of domestic violence on children and the relevance of that information for judges hearing criminal, juvenile, probate, and family law cases.

> *Restraining Order Basics.* This course reviewed the basic requirements for the different types of restraining orders, pointed out places where the Court has an affirmative duty and discussed the nuances of criminal restraining orders.

> *Family Law and Domestic Violence (Roundtable).* This topic was one of three roundtable discussions allowing judicial officers to share experiences, promising practices and potential problems with changes in legislation.

Judicial College (July 2017)

The B. E. Witkin Judicial College of California is a nationally recognized program providing comprehensive education for all new superior court judges, commissioners, and referees, includes a fundamental course on domestic violence. The course provides background information on domestic violence and is mandatory for all program participants as required by Government Code section 68555. A description of the course follows:

> *Domestic Violence: What Everyone New to the Bench Should Know*. By the time any judge completes five years on the bench, he or she will have presided over several cases involving domestic violence issues. Many judges will have handled dozens of these cases; some daily, some weekly, some yearly. This course explored the complexities confronting judicial officers handling domestic violence cases and promotes an understanding of victim and perpetrator dynamics, recanting witnesses, effects of domestic violence on children, and ways to assess risks of dangerousness and lethality. Judges acquired knowledge of the varying legal standards and technical requirements

in different case types, including criminal law, family law, juvenile law and occasionally other proceedings. Faculty presented information and conducted interactive discussions to better prepare the judicial officer new to the bench for these difficult and important cases.

Criminal Law Institute (September 2017)

The Criminal Law Institute is designed to meet the needs of both judges and judicial officers new to a criminal law assignment, and those with greater experience. A series of workshops for this audience will be presented at the institute.

Domestic Violence Safety Partnership Program (Ongoing 2016-2017)

Under the auspices of the Domestic Violence Safety Partnership (DVSP) project, VAWEP provided targeted, local technical assistance to applicant courts that have identified a need for training. DVSP distributes a self-assessment tool that enumerates required procedures, recommended practices, and provides training and technical assistance based on the issues identified. Previously, courts have requested specific information needs, which can range from understanding warning signs for lethality in domestic violence cases to improving communication between the many types of courts that may be involved in a particular case.

The project provides experts whose specialties vary based on the need of the specific court. This assistance is accomplished by delivering a substantive expert to speak to the issues at hand, providing speakers at trainings with expertise in issues related to violence against women, or facilitating a peer-mentoring meeting in which courts come together to learn about individual best practices. Recipients of this assistance are asked to evaluate what they have received. Assistance can also include purchasing audio visual and technological equipment that courts may use to enhance the administration of justice in domestic violence and related cases.

Local Training and Distance Learning

In 2010 CJER launched an initiative to enhance the ability of local courts to provide high-quality judicial education for bench officers. This initiative allowed courts to locally host judicial education classes simply by selecting the course from the online course catalog. The courses range in duration from 1.5 to 3 hours. Local education minimizes time away from the bench and eliminates most travel expenses. The catalog currently contains twenty-one domestic violence related courses, including the following titles:

- Handling Elder Abuse Issues
- Domestic Violence Restraining Orders in Elder Abuse Cases

- Adjudication of Stalking Cases
- Stalking in Cyberspace: What a Judge Needs to Know
- Domestic Violence and Ethics
- Domestic Violence and Fairness Issues
- Evaluating the Effects of Domestic Violence on Children
- Immigration Issues in Criminal Domestic Violence Cases
- Restraining Orders in Multiple Court Settings
- Assessing Dangerousness in Criminal Domestic Violence Cases
- Criminal Domestic Violence Cases
- Domestic Violence and Custody—Assessing the Risk
- Domestic Violence Issues in Family Law Cases
- Use of Technology in Domestic Violence Cases
- Domestic Violence Issues in Juvenile Cases
- Ethics and Self-Represented Litigants in Domestic Violence Cases
- Handling Sexual Assault Cases
- Reasonable Efforts in Dependency Cases Involving Domestic Violence
- Stalking Cases and Court Security

Curriculum Development and Publications

The VAWEP project distributes the following curricula, publications, and other resource materials:

Review and update Existing Bench Guides, Publications and Other Resources (Ongoing)

The project reviews the various bench guides and determines if updates are required during the grant period.

Annual Report and Fact Sheet

Project staff develops an updated annual report and this fact sheet to highlight key efforts the project has and will undertake this year. These documents are distributed to provide project information to judicial branch professionals and the public. As educational tools, they focus on suggested practices and innovative approaches.

Tribal/State Activities

The Judicial Council shares educational resources between the state judicial branch and the tribal justice systems and incorporates content on federal Indian law and its impact on state courts into judicial education institutes, multi-disciplinary symposia, distance learning, and other educational materials. The educational resources and programs for tribal/state projects relate specifically to domestic violence sexual assault, stalking, dating violence, and human trafficking.

Educational Programs

Modeled after the DVSP, the S.T.E.P.S. (**S**tate/**T**ribal **E**ducation, **P**artnerships, and **S**ervices) to Justice – Domestic Violence provides local educational and technical assistance to tribal courts and state courts on issues relating to domestic violence and tribal communities. At the request of judges, this project can tailor an educational event to meet local educational needs or provide technical assistance in response to locally identified and targeted needs. Examples of local educational assistance include identifying faculty and facilitators, paying faculty or facilitator expenses, developing educational materials and curriculum for court-sponsored events, planning or otherwise assisting with other cross-court educational opportunities, such as judge-to-judge or court-to-court informational exchanges, cross-site visits, or cross-court educational exchanges. Examples of local technical assistance include sharing state judicial branch resources, such as statewide forms, the statewide domestic violence order database (California Courts Protective Order Registry), the extensive judicial resources on the Court Extranet and CJER Online, access to all state judicial branch educational opportunities, consultation on court operations, and access to information about grant opportunities as well as partnerships expressed in letters of support for tribal court grant applications.

State and Tribal Court Toolkit **(Ongoing)**

The project developed a toolkit to both encourage and assist court administrators (tribal, state and federal) to learn about each other's justice systems through visits and the sharing of knowledge, expertise, and resources on a number of topics, including court operations relating to cases involving domestic violence, sexual assault, stalking teen dating violence, and human trafficking.

Develop Bench Card/Educational Tools (Ongoing)

The project developed a judicial resource in the form of a judicial script, fact sheet, bench card or similar tool for new judicial officers in domestic violence assignment

who have tribal lands/and or tribal courts within their jurisdiction. The tool will alert the court to issues to be aware of concerning federal Indian law.

Resource Fairs at Statewide or National Event **(Ongoing)**

In response to the Native American Communities Justice Project's research report at page 13 describing how "access to the courts is effectively blocked by a lack of understanding about what courts can and should do to address family violence…", the project will continue to share information at statewide and national events.

Local Tribal-State Agreements to Improve Recognition of Tribal Protective Orders **(Ongoing)**

The project promoted innovative procedures developed by tribal and state courts that improve recognition and enforcement of tribal protective orders. The project showcased these innovative procedures on the Judicial Council Innovation Knowledge Center, an online resource center featuring numerous initiatives which have been implemented statewide. This year the project created a short film, which includes the Attorney General Xavier Becerra expressing the importance of enforcement of tribal protective orders.

Educational Workshop on Domestic Violence at Forum Meeting **(Month Year)**

The project developed a workshop to explore challenges to establishing and sustaining local tribal/county law enforcement partnerships. During the workshop, participants identified strategies to establish and sustain law enforcement collaborations and suggested educational recommendations.

Jurisdictional Tools for Law Enforcement and Judges **(Ongoing)**

Existing state and tribal laws are insufficient to guide the handling of all interactions between state and tribal authorities and their agents. For example, law on service of process leaves gaps and unanswered questions in a way that balances the tribe's sovereignty with the state's responsibility and interest in enforcing criminal law. There are other situations where state and tribal authorities complement one another, by providing stand by and back up at calls for services, or when one detains a suspect for the other. Likewise, state and tribal courts may more effectively handle matters when they work collaboratively, whether on issues of enforcement of domestic violence restraining/protection orders or holding an offender accountable. The project brought together law enforcement and judges to develop jurisdictional tools for these audiences.

Further Information

For additional information about VAWEP activities, please contact:

Center for Families, Children & the Courts
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102-3688
Phone: 415-865-7739

Project Staff

Ms. Bonnie Rose Hough
Project Manager
Managing Attorney
Phone: 415-865-7668
E-mail: bonnie.hough@jud.ca.gov

Ms. Lisa Chavez
Senior Analyst
Phone: 916-643-7021
E-mail: lisa.chavez@jud.ca.gov

Planning Committee Roster

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California Coalition Against Sexual Assault (CALCASA)

Ms. Ellen Yin-Wycoff
Associate Director
California Coalition Against Sexual Assault (CALCASA)

Mr. Rick Layon
Attorney
Layon and Holck, San Diego

Ms. Kathy Moore
Executive Director
California Partnership to End Domestic Violence

Ms. Nancy O'Malley
District Attorney
Alameda County

Ms. Lynda Smallenberger
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Dep. Roena Spiller
Sheriff's Office
San Mateo County

Mr. Mark Varela
Chief Probation Officer
Ventura County Probation Agency

Mr. Martin Vranicar, Jr.
Assistant Chief Executive Officer
California District Attorneys Association

This project sets aside funds to provide local educational and technical assistance to tribal and state courts on issues relating to domestic violence.

What is the extent of the problem of domestic violence?

Domestic violence is a particularly troubling issue in Native American communities.

- 39% of American Indian women report some form of intimate partner violence in their lifetimes, higher than the rate reported by any other race or ethnic group.
- American Indian victims of intimate and family violence are more likely than victims of other racial groups to be seriously injured and require hospital care.
- Among American Indian victims of violence, 75% of intimate victimizations and 25% of family victimizations involve an offender of a different race.

For detailed statistics and citations, www.courts.ca.gov/documents/Tribal-NAmericanStatsAbstract.pdf.

What type of local educational assistance is offered?

- ***Faculty***- Identify faculty or pay for travel or other faculty costs.
- ***Facilitator*** - Obtain a facilitator for a training or meeting, which brings together tribal and non-tribal representatives.
- ***Educational Materials***- Gather, copy, or develop educational materials.
- ***Educational Curriculum-*** Use or tailor our curriculum (i.e., P.L. 280, tribal advocates, Comings and Goings etc.).
- ***Train-the-Trainers***- Train local experts.
- ***Educational Training or Workshop***-Develop a program—brown bag, workshop, or full-day training.
- ***Judge-to-Judge or Court-to-Court-*** Structured opportunities for connecting tribal and state court judges or court administrators so that they can learn from each other (e.g., court observations, participation in justice system meetings, sharing information on court operations and procedures).
- ***Cross-Court Educational Exchange-*** Convene an educational exchange to learn about each other's courts, share resources, identify local court concerns, and implement local and statewide solutions.
- ***Coordinated Court-Community Responses***
- Assistance with tribal/state/county engagement (e.g., help with engaging participation at a domestic violence coordinating council, task force, or other system meeting).

What type of technical assistance is available to support tribal capacity-building?

- ***Judicial Council Forms***–Accessing state judicial branch forms so that they may be used as a basis for creating tribal court forms.
- ***California Courts Protective Order Registry***-Accessing this registry and receiving training on how to use it. Through this dedicated online database, state courts and tribal courts can view each other's protective orders. The courts that have access are better able to protect the public, particularly victims of domestic violence, and avoid issuing redundant or conflicting orders. Learn more at www.courts.ca.gov/15574.htm.
- ***Registering Tribal Protective Orders***- Assistance developing a local protocol or rule to implement California Rules of Court, rule 5.386, which requires state courts, at the request of a tribal court, to adopt a written procedure or local rule permitting the fax or electronic filing of any tribal court protective order that is entitled to be registered under Family Code section 6404. Learn more about the new rule at www.courts.ca.gov/documents/SPR11-53.pdf.
- ***On-Line Resources***
  Court Extranet: This website contains information relevant to all levels of judicial branch personnel and includes resources designed to meet education, facilities, financial, human resources, legal, special court projects, technology, and other informational needs. It also offers both current news and archived resources.
  CJER Online: This website contains educational and other resources for state court judges and tribal court judges. It offers a calendar listing judicial institutes.
  Dependency Online Guide This website contains dependency-related case law, legal materials, articles and other resources.
- ***Attendance at Judicial Institutes***- All state judicial branch educational programs are open to tribal court judges and offer continuing legal educational credit. There may be limited funding for scholarships to pay for travel expenses.
- ***Security***- Consultation on court security.
- ***Human Resources***- Consultation on court human resource questions.
- ***Letters of Support for Domestic Violence Grant Applications.***

What if I do not see the type of local educational or technical assistance my court needs?

- ***Any assistance focusing on tribal-state-county collaboration***- At the request of judges, Tribal/State Project staff will tailor an educational event to meet local educational needs or provide technical

assistance in response to locally identified and targeted needs.

How to learn about local tribal courts and state courts

To learn if there's a tribal court in your county, please visit the California Tribal Courts Directory (*www.courts.ca.gov/14400.htm*) or the tribal jurisdictions map (*http://g.co/maps/cvdq8*).

To learn about the local state court in your county, please visit Find My Court http://www.courts.ca.gov/find-my-court.htm.

What steps can judges take to improve safety for Native victims?

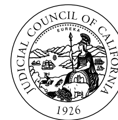
- Directly communicate with each other and identify issues of mutual concern.
- Invite each other to observe court proceedings.
- Invite each other to participate in justice system meetings or work with each other's justice partners.
- Learn about each other's courts and procedures.
- Jointly conduct local or regional trainings.
- Understand the unique historical trauma responses of Native Americans.

Where can I find more information?

The Tribal/State Programs Unit of the Judicial Council's Center for Families, Children & the Courts, assists the state judicial branch with the development of policies, positions, and programs to promote the highest quality of justice and service for California's Native American communities in all case types. The unit also implements tribal-state programs that improve the administration of justice in all proceedings in which the authority to exercise jurisdiction by the state judicial branch and the tribal justice systems overlaps. To learn more about the Tribal/State Programs Unit or for assistance, call Ann Gilmour at 415-865-4207 or visit *www.courts.ca.gov/programs-tribal.htm.*

This project is supported with funds from the Office on Violence Against Women, U.S. Department of Justice that are administered through the Governor's Office of Emergency Services (Cal OES).

www.courts.ca.gov/programs-tribal.htm



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S.T.E.P.S. to Justice- Domestic Violence

State/**T**ribal **E**ducation, **P**artnerships, and **S**ervices—Information for Tribal Court and State Court Judges

June 2017

JUDICIAL COUNCIL OF CALIFORNIA
OPERATIONS AND PROGRAMS DIVISION

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date
September 11, 2017

To
Tribal Court–State Court Forum
Family and Juvenile Law Advisory Committee
Probate and Mental Health Advisory Committee

From
Ann Gilmour, Attorney
Center for Families, Children & the Courts

Subject
Implementation of New Federal ICWA Regulations and Guidelines

Action Requested
Please Review

Deadline
N/A

Contact
Ann Gilmour, Attorney
415-865-4207 phone
415-865-7217 fax
ann.gilmour@jud.ca.gov

Effective December 12, 2016 the federal government enacted regulations implementing the Indian Child Welfare Act (ICWA) (19 USC §§1901-1963). These regulations are found at 25 CFR §§23.1–23.144.[1] In December 2016, the Bureau of Indian Affairs also issued new Guidelines for state courts concerning ICWA. (Guidelines for Implementing the Indian Child Welfare Act, December 2016)[2] There are some areas where current California law, rules and practice do not conform to the new federal regulations and guidelines. Staff seeks guidance from the Tribal Court–State Court Forum, the Family and Juvenile Law Advisory Committee and the Probate and Mental Health Advisory Committee on what steps to recommend the Judicial Council take to implement the new federal ICWA regulations and guidelines in California. Although ICWA most often arises in dependency cases, its requirements also apply in family law

[1] Available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&r=PART&n=25y1.0.1.4.13

[2] Available at https://www.bia.gov/cs/groups/public/documents/text/idc2-056831.pdf

and probate guardianship proceedings if they involve an Indian child and may result in the involuntary removal of the child from the custody of the child's parent or Indian custodian, or if they may result in the termination of parental rights.

This is the first time that the federal government has issued comprehensive ICWA regulations. Previously there had only been "Guidelines" for state courts that were advisory, not mandatory, although California courts had always held that the guidelines were entitled to great weight. Unlike the guidelines, the new regulations are binding on state courts as the minimum federal standard that must be followed. Where, however, state law sets a standard that is more protective of the rights of Indian children, parents or tribes, that higher standard must be applied. 25 CFR §23.106 confirms section 1921 of the Act itself that, where applicable state or other federal law provides a higher standard of protection, the higher standard shall apply.

This memorandum discusses the differences between California law and the new federal regulations and guidelines and suggests revisions to statute and rules of court that may be required to implement the new regulations and guidelines.

The memo is organized by priority, with highest priority given to those areas where there is an actual conflict between the new federal regulations and state law, rules and practice; next those areas where there is some inconsistency; then those areas where there might be confusion that could benefit from clarification; and finally those areas where the new regulations are consistent with state law. Within those priority areas, the discussion is organized by topic area that reflects the various ICWA considerations throughout a proceeding:

- definitions;
- application;
- emergency proceedings;
- jurisdiction;
- intervention;
- full faith and credit;
- inquiry;
- notice;
- transfer;
- qualified expert witness;
- active efforts;
- placement preferences;
- voluntary vs. involuntary proceedings;
- record keeping and reporting; and

- petition for return/improper removal.

Priority level 1 – actual conflict
This section discusses those areas where there is an actual conflict or inconsistency between the requirements of California law and the requirements of the new federal regulations. These include definitions, emergency proceedings or removals, jurisdiction, transfer, and voluntary vs. involuntary proceedings.

Definitions
References: Welfare and Institutions Code §224.1[3]; Cal. Rules of Court, rules 5.2, 5.502; 25 USC §1903; 25 CFR §23.2; Guidelines L.1 – L.22

California law contains a number of definitions that generally incorporate by reference the definitions in ICWA. The regulations include new definitions that are not contained in ICWA itself, and are therefore not contained in state law.

Of particular importance are the definitions of "proceeding" and "voluntary" contained in the new regulations. The way in which these concepts are addressed in the regulations and guidelines differs from current California law and practice. These issues are discussed in more detail in the information sheets contained in Appendix A.

Staff recommend revising §224.1 to either simply refer to the definitions contained in ICWA and the regulations or include these definitions that are found in the new regulations but are not contained in state law:

- Add definitions of "active efforts"; "continued custody"; "custody"; "domicile"; "Emergency proceeding"; "hearing"; "Indian foster home"; "Involuntary proceeding"; "reservation"; "status offenses"; "upon demand"; and "voluntary proceeding," all of which are defined in regulation 23.2;
- Revise the definition of "Indian custodian" to conform to the regulation and in particular add the following: "An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or state law";
- Revise the definition of "extended family member" to conform to the regulation by adding "stepparent";
- Consider revising subdivision (d) (Indian child custody proceeding) to conform to the definition in regulation 23.2 or simply referring to the regulation. The important

[3] All further code references are to the Welfare and Institutions Code unless otherwise noted.

distinction is the regulation's clarification that each phase or stage (i.e. foster care placement; termination of parental rights…) is a separate "proceeding" and that there can be several "proceedings" within a single case and multiple hearings within a "proceeding";

- Consider deleting subdivision (e) and referencing definition of "Indian child's Tribe" in regulation 23.2 and the procedure set out in regulation 23.109; and
- Consider revising the definition of "proceeding" in rule 5.2(b). Currently the definition states that it is "…a court hearing." This is inconsistent with the definition in the new regulations.

Determining that ICWA does not apply
References: §224.3(d)(3); 25 CFR §23.107(b)(2)

Consider whether WIC §224.3(d)(3), which authorizes a court to make a determination that ICWA does not apply when no determinative response has been received 60 days after notice, needs to be revised in light of requirement in regulation §23.107(b)(2) that a court treat a child as an Indian child until it is determined on the record that the child does not meet the definition of "Indian child" in this part, and the requirement to inquire at each "proceeding";

Emergency Proceedings
References: §305.5(f); 25 USC §1922; 25 CFR §§23.2 & 23.113; Guidelines C.1-C.9

California law contains very little guidance on when ICWA's emergency authority can be used, whether there are any limits on it, and how it relates to the other protections and requirements of ICWA and the normal progression of a case through the California dependency system.

In practice, if there is sufficient basis to detain a child from the parent under California law, this is treated as sufficient to support emergency jurisdiction under ICWA. Because a child's Indian status is normally unclear at detention, ICWA requirements other than inquiry and notice are not generally applied. Generally in California the practice is not to apply most substantive ICWA requirements (qualified expert witness testimony; active efforts finding; placement preferences, etc.) until disposition, which can often be 60 days or more after a child is detained.
The new regulations address emergency proceedings in a number of ways that both limit the use of this power and clarify requirements when the emergency removal authority is used.

If there is reason to know that a case involves an Indian child, an emergency removal from the child's parents or Indian custodian can only be made to prevent imminent physical damage or harm to the child. Further, the regulations require certain evidence be provided to the court with

a petition for emergency removal and state that such removal cannot last more than 30 days absent special findings.

The regulations state that an emergency removal can be ended by: 1) initiating a proceeding subject to the provisions of ICWA; 2) transferring the child to the jurisdiction of a tribe; or 3) restoring the child to the parent or Indian custodian. (25 CFR §23.113)

There are differing opinions as to whether requirement 1) initiating a proceeding subject to the provisions of ICWA is satisfied when a petition is filed that would eventually lead to an ICWA compliance hearing (including finding of active efforts and qualified expert witness testimony) even if that hearing does not occur for 60 days or more.

Specific recommendations:

- Consider adding a provision to the statute or rules setting out the evidence and findings that must be made at a hearing authorizing the emergency removal or detention of an Indian child;
- Consider adding a provision regarding timely review when a party contends that the emergency that initially justified detention has ended;
- Consider adding a provision that emergency detentions or removals may not last longer than 30 days without there being a fully ICWA compliant hearing;
- Consider adding a rule of court to set out the procedural and evidentiary requirements of emergency proceedings involving an Indian child; and
- In addition, or as an alternative, consider revising Cal. Rules of Court, rule 5.482 (a) with regard to exempting the detention hearing from the notice and other timing requirements of ICWA.

Jurisdiction

References: §305.5 (a) & (b); 25 USC §1911 (a); 25 CFR §23.110; Guidelines F.1 & F.2

California law provides that, if a child who is under the exclusive jurisdiction of a tribe is removed from his/her parents, the tribe must be given notice of the removal no later than the next working day and, if the tribe determines that the child is an Indian child, the proceeding must be transferred to the tribe within 24 hours after such determination.

The federal regulations, on the other hand, require the state court to dismiss any child custody proceedings when the tribe has exclusive jurisdiction. The regulations also require the state court to provide the tribe with information and documentation concerning the case in a timely way.

The practical issue for California is how to develop a scheme that complies with the federal jurisdictional requirements, particularly the tight time line to evaluate a child's Indian and jurisdictional status, without potentially leaving children in danger. In practice, it is often difficult to determine whether a child is an Indian child affiliated with a tribe that exercises exclusive jurisdiction within 24 hours of removal.

Specific recommendations:

- Consider revising §305.5 to conform to the regulations;
- Consider adopting a rule of court or a new provision to clarify the procedures and time frame for communicating with a tribe about jurisdiction, dismissing the action and providing the tribe with the information and documentation required by the regulations; and
- Consider amending Cal. Rules of Court, rule 5.483 concerning Transfers of Cases to tribal court to delete subdivision (a) because federal law states that, in cases where the child is under the exclusive jurisdiction of the tribe, the case must be dismissed, rather than being transferred to tribal court and that information about the case must be expeditiously relayed to the tribal court.

Transfer
References: §§305.5 (b), (c) and (g), 381 and 827.15; Cal Rules of Court, Rule 5.483; 25 USC §1911(b); 25 CFR §§23.115 – 23.119; Guidelines F.3-F.6.

California law (305.5(c)(2)(B)) specifically authorizes the court to look at whether the proceeding is at an advanced stage in making the determination whether there is good cause to transfer. However, California law does not currently have a definition of "proceeding."

The new regulations specify that various stages of what would be one case are separate "proceedings" for ICWA purposes and the right to seek a transfer to tribal court attaches afresh with each "proceeding." The court may not consider whether there was a prior proceeding involving the child, in which no request to transfer to the tribal court was filed. In essence, this means that the court may not consider, as part of its "good cause" analysis, the fact that no parties sought transfer to tribal court during the "foster care placement" (i.e. reunification) stage of a case once the case moves to the "termination of parental rights" (i.e. permanency) stage of a case.

The regulations also restrict what may be considered good cause not to transfer. Some of these factors are already in California law, but some are not. The court may not consider whether the

transfer would affect the child's placement, or the child's prior cultural connections with the tribe or its reservation.

The regulations also require the state court to promptly communicate with the tribal court when a petition to transfer is filed and seek the tribal court's position on whether it will accept or decline the transfer.

Specific recommendations:

- Consider revising §305.5 to ensure that the transfer provisions are consistent with the new regulations and specifically:
    - the requirement to dismiss rather than transfer a proceeding when it is determined that a child is under the exclusive jurisdiction of a tribal court and to expeditiously provide information to the tribal court about the proceeding;
    - the factors that may and may not be considered when making a determination regarding whether good cause exists not to transfer; and
- Consider amending Cal. Rules of Court, rule 5.483 and, in particular, removing subdivision (a) and amending subdivision (d)(2), which addresses discretionary good cause to deny a request to transfer to tribal court to ensure that the factors that may and may not be considered are consistent with federal regulations and also to ensure that the evidentiary and procedural requirements are consistent with federal requirements.

Voluntary / Involuntary Proceedings
References: §§224.1(d) and 16507.4(b)(3); Family Code §§7660.5, 8606.5; 8619.5, 8620; Probate Code §1500.1; 25 USC §1913; 25 CFR §§23.2 (definitions of involuntary proceeding and voluntary proceeding and upon demand), 23.124-23.129; Guidelines I.1-I.7

California law mirrors the language found in the ICWA in terms of requirements for voluntary foster care or adoptive placements and regarding withdrawal of consent. California law does not contain the level of detail and specificity found in the new regulations.

The new regulations clarify that no foster care or adoptive placement of an Indian child can be considered voluntary if there was threat of removal of the child by a state court or agency. It has been reported that in some counties parents may be asked to consent to their children being placed out of home or relatives may be asked to get a probate guardianship under threat that the children will be removed from the home and a dependency petition filed if the parents and family do not agree. Under the new federal regulations, these cases cannot be considered voluntary and all ICWA requirements would apply. California law also does not contain a clear procedure for

withdrawal of consent to a foster care or adoptive placement and for return of the child to parental custody upon demand.

Specific recommendations:

- Consider revising relevant provisions of the Welfare and Institutions Code; Family and Code and Probate Code that deal with consent to placement or adoption of an Indian child to clarify requirements of consent and withdrawal of consent and return to parental custody; and
- Consider adopting forms consistent with the samples issued by the Bureau of Indian Affairs available at https://bia.gov/cs/groups/xois/documents/document/idc2-060068.pdf and https://bia.gov/cs/groups/xois/documents/document/idc2-060069.pdf

Priority level 2 – possible inconsistency

This section describes areas where there is a possible inconsistency between California law and practice and the requirements of the new federal regulations. These areas include application, inquiry, notice, qualified expert witness testimony, active efforts, and placement preferences.

Application

References: §224.1(d); Cal. Rules of Court, rule 5.480; 25 CFR §§23.103, 23.104

California law excludes "voluntary" proceedings from application of any ICWA requirements. The new federal ICWA regulations clarify that a number of requirements including those set out in Regulations 23.107-110, 23.115-23.119 apply to voluntary proceedings. Specifically, both §224.1(d) and rule 5.480, suggest that there are no ICWA obligations in various instances where the new federal regulations impose an obligation to inquire, verify a child's status with the tribe and make a determination about where jurisdiction lies.

Specific Recommendations:

- Consider revising §224.1(d) to clarify obligations with respect to voluntary proceedings; and
- Consider revising Rule 5.480 to clarify obligations with respect to voluntary proceedings.

Inquiry

References: §224.3; Cal. Rules of Court, rule 5.481(a); 25 CFR §23.107; Guideline B.1

California's affirmative and continuing duty to inquire whenever a petition has or **may be** filed arguably sets a higher standard of inquiry than required by the new regulations and Guidelines.

Under the new federal regulations (§23.107) the duty is on the court to

> … ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. This inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform he court if they subsequently receive information that provides reason to know the child is an Indian child.

Unlike California law, this regulation does not require an agency or other party to affirmatively seek out information about the child's Indian status prior to an appearance in court.

The Guidelines, however, do state that because identifying Indian children early is key to ICWA compliance:

> It is, therefore, critically important that there be inquiry into that threshold issue by courts, Stage agencies, and participants to the proceedings as soon as possible." (Guidelines page 10)

California law calling for early inquiry appears set to a higher standard than federal law. This higher standard is permitted under both state and federal law and arguably, helps achieve the policy goal of early identification of Indian children, and avoids delays that might arise with later identification.

Inquiry at each "proceeding"

Unlike California law, the regulations and guidelines require inquiry at the start of each "proceeding." As defined in the regulations, "proceeding" is distinct from either a hearing or a case. ICWA and the regulations define distinct proceedings including "emergency," "foster care placement," "termination of parental rights," "preadoptive placement" and "adoptive placement." (25 CFR §23.2 definition of "Child-custody proceeding".) As a result, even if a determination had been made that ICWA did not apply while the parents were in reunification, the issue would need to be revisited when the case moves from reunification to permanency, pre-adoptive placement and adoptive placement.

Staff recommend clarifying the inquiry requirements in state law to conform to these requirements in the regulations.

Reason to know
What gives the court "reason to know"? The wording in the California statute is broader than the wording in the regulations:

WIC 224.3 (b)	Regulation §23.107(c)
(1) A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe.	(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
(2) The residence or domicile of the child, the child's parents, or Indian custodian is in a predominantly Indian community.	(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
(3) The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service	(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
	(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;
	(5) The court is informed that the child is or has been a ward of a Tribal court; or
	(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe

The language in the California statute which triggers ICWA application when there is information "suggesting" the child is an Indian child seems broader than that in the federal

regulation which triggers ICWA application when there is information "indicating" that the child is an Indian child. Because California law sets a higher standard, this is acceptable under both state and federal law.

Verification / Further Inquiry
Under California law, "reason to know" triggers a duty to conduct further inquiry and to send formal ICWA notice to the tribes that the child may be affiliated with. (WIC 224.3 (c) & (d)). Under the new regulations "reason to know" triggers an obligation to "…use due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership) (regulation §23.107(b)(1)). Regulation §23.111 which governs notice also says it is triggered by "reason to know," but in the overall scheme of the regulations it seems that the goal is to have early direct contacts with the tribe outside of the formal notice process. If that process of "verification" yields a negative answer to the child's status, then notice may not be required.

The guidelines expand on the "verification" requirements including a requirement to "… ask the child, parents, and potentially extended family which Tribe(s) they have an affiliation with and obtain genealogical information from the family, and contact the Tribe(s) with that information." This is very similar to and consistent with the "further inquiry" requirement under California law, but the regulations and guidelines imply that this information can be transmitted to the tribe by some means other than formal ICWA notice in order to verify the child's status. Similarly, Guideline B.7 seems to indicate while all the information about family history that would normally be contained in formal ICWA notice should be transmitted to the tribe, it can be done in a less formal way than notice.

The challenge with formal ICWA notice is that it must be sent by registered or certified mail, return receipt requested and this is both costly to the party sending the notice AND is an inefficient and ineffective way of communicating with the tribes to get a timely response as to the child's status.

Specific Recommendations:
- Consider adding a provision specifying that inquiry is required at each "proceeding";
- Consider revising WIC §224.3 (b) to conform the circumstances that may give rise to a "reason to know" to those set out in regulation §23.107(c);
- Consider adding a provision on the requirements of "verification";
- Consider revising to only require formal written notice when the issue of the child's status has not been resolved by "verification" with the tribe(s) or where a tribe has

confirmed the child's status, or the child's status can be determined in accordance with regulation §23.107(c)(6); and

- Consider amending Cal. Rules of Court, rule 5.481(a) to
    - add a requirement consistent with 25 CFR §23.107(a) that at an initial hearing the court ask each participant on the record whether the participant knows or has reason to know that the child is an Indian child and instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child;
    - add a requirement that the entity with inquiry responsibility work with each tribe where the child may be a member or eligible for membership to verify the child's status whenever there is reason to know that the child is an Indian child; and
    - add a requirement consistent with 25 CFR §23.107(b) that, if there is reason to know the child is an Indian child, the court require evidence that the agency or other party has used due diligence to identify and work with all tribes to verify the child's tribal status; and
    - add a requirement consistent with 25 CFR §23.107(b)(2) that where there is reason to know that the child is an Indian child the court must treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an Indian child.

Notice
References: §224.2; Cal. Rules of Court, rule 5.481 (b); 25 USC §1912 (a); 25 CFR §§23.11 and 23.111; Guidelines D.1 – D.7

Generally the form and content of notice is consistent with the notice requirements set out in §§23.11 and 23.111 of the regulations.

The regulations appear to require formal notice in a smaller subset of cases than California statute as interpreted by the courts of appeal require. California practice is to require formal ICWA notice whenever there is "reason to know" under California law, which has been interpreted as requiring only a suggestion of Indian ancestry. The new regulations seem to require that, consistent with California law, inquiry take place in all cases. When there is a suggestion of Indian ancestry the regulations require steps to "verify" the child's status (see regulation 23.107(b)(1)) take place based on suggestion of tribal affiliation, but that formal notice is only required when the inquiry and process of "verification" establish that the child is a member or eligible for membership in a tribe and the biological child of a member.

Staff recommend consideration of the following specific revisions:

- Consider revising §224.2(3) to conform to 25 CFR or regulation §23.11 (a) which only requires notice in involuntary proceedings "… where the identity and location of the child's parent or Indian custodian or Tribe is known..." But note that §23.111 (b)(1) says that notice must be sent to "Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member).";
- Consider revising §224.2(a)(3) to remove the requirement to serve notice on Secretary of Interior except when seeking assistance in locating a child's tribe or parents as set out in regulation §23.11 (c) & (d);
- Consider revising §224.2(a)(5)(C) consistent with regulation §23.111(d)(3) to include information about "direct lineal ancestors" if known;
- Consider revising §224.2(a)(5)(D) consistent with regulation §23.111(d)(5) to include information on the date, time, and location of a hearing if one has been scheduled;
- Consider revising §224.2(a)(5)(G) to include name and address of petitioner and petitioners attorney as required by regulation §23.111(d)(6);
- Consider revising §224.2(b) to require formal ICWA notice only for each "proceeding" in accordance with regulation §23.2 definition of "Child-custody proceeding" rather than for each hearing;
- Consider whether §224.2(d) which excepts the detention hearing from the notice and timeline provisions, should be limited to those cases that qualify as "emergency proceedings" under regulation §23.113;
- Consider whether rule 5.481(b) should be amended to follow 25 CFR §23.11 in only requiring notice to a tribe when "…the identity and location of the child's parent or Indian custodian or Tribe is known…" or whether 25 CFR §23.111 requires notice to multiple tribes where the child may be a member; and
- Consider whether rule 5.481(b) should be amended to specify that notice need only be sent once for each "proceeding" and specify the hearing types for which notice need be sent. (i.e. initial hearing, disposition, 361.26).

Qualified Expert Witness Testimony
References: §224.6; Cal. Rules of Court, rule 5.484(a); 25 USC §1913 (e) & (f); 25 CFR §23.122; Guideline G.2

California law says that an employee of the person or agency recommending the order may not serve as a qualified expert witness (QEW). The regulations (§23.122) say that it cannot be the social worker on the child's case. In this regard, California law sets a higher standard.

§224.6(e) states that a declaration or affidavit can only be presented in lieu of live testimony if the parties stipulate in writing and the court finds the stipulation is made knowingly, intelligently

and voluntarily. The regulations and Guidelines do not address this issue. Consistent with ICWA itself, the regulations and guidelines refer to "testimony" of QEW.

Guideline G.2 further clarifies that the person is intended to have expertise beyond that of the normal social worker qualifications and should have specific knowledge of the prevailing social and cultural standards of the child's specific tribe. This is something suggested by §224.6 (b)(2), but not consistently applied in California. Further the guidelines recommend that the QEW be someone familiar with the particular child and observe interactions between the parent and child if possible. This is not a requirement addressed in California law.

Specific Recommendations:

- Consider revising §224.6 to include reference to the need to have specific knowledge of the child's particular tribe, familiarity with the specific child, and observe interactions between the child and parents;
- Consider whether §224.6 (e) sets a lower standard than that set out in the federal law and if so, whether this lower standard is authorized by federal law; and
- Consider amending Cal. Rules of Court, rule 5.484(a) and 5.485(a)(2) to ensure that the qualified expert witness testimony requirement is consistent with the federal regulations.

Active Efforts
References: §361.7; 25 USC §1912(d); 25 CFR §§23.2 & 23.120; Guidelines E.1 – E.6

California law contains no definition of active efforts beyond stating that active efforts must be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that they must utilize the available resources of the Indian child's extended family, tribe or other service providers.

California case law continues to hold that active efforts are equivalent to reasonable efforts. Further California law does not say when active efforts must begin, and case law has held that requirement to show active efforts does not apply at the detention hearing.

The regulations contain a definition of active efforts (which we may want to consider adding to the definition section in WIC §224.1). In addition the Guidelines contain a number of provisions regarding active efforts, including specifying that the agency may need to take an active role in connecting the parent or Indian custodian with resources, and that the court must conclude that "…active efforts were provided and were unsuccessful prior to ordering an involuntary foster-care placement or TPR." The guideline specifies that this requirement must be met at a detention

hearing and not wait until the jurisdiction or disposition hearing. This is inconsistent with California practice. The guidelines also expand on the documentation requirements.

Staff recommends:

- That a definition of active efforts be added to §224.1;
- Consider at what hearings an active effort finding must be made;
- Revise §361.7 to specify what documentation is required to show active efforts; and
- Consider amending Cal. Rules of Court Rule 5.484(c) and 5.484(a) consistent with the federal regulations.

Placement Preferences
References: §§361.31, 361.4, 10553.12, 11388; Cal. Rules of Court, rule 5.484(b); 25 USC §1915; 25 CFR §§23.129-23.132; Guidelines H1-H5.

The placement preferences themselves have not changed. The regulations and guidelines have, however, clarified and refined a number of matters. Among the significant issues in the regulations are:

- clarifying that the preferences must be analyzed each time there is a change in placement (25 CFR §23.131(a));
- clarifying that each category of placement must be considered (without being skipped), in order. The preferences are in the order of most preferred to least preferred;
- limiting what can be considered by the court when determining whether there is "good cause" to deviate from the placement preferences (25 CFR §23.132);
- requiring that a determination that there is good cause to deviate from the placement preferences must be made on the record (25 CFR §23.132); and
- requiring that proof that a diligent search was conducted before prior to authorizing a deviation from the placement preferences on the basis that a preferred placement was not available. (25 CFR §23.132(c)(5))

Specific recommendations:

- Consider revising WIC 361.31 to align with the requirements of the new federal regulations; and
- Consider amending Cal. Rules of Court, rule 5.482(e) to:
  - require that evidence of a diligent effort to comply with the placement preferences be provided for each placement and require that a record of each change in placement be maintained;

- revise the factors that may and may not be considered in determining whether there is good cause to deviate from the placement preferences.

Priority level 3 – Possible confusion
This section discusses areas where the differences between California law and the requirements of the federal regulations are possible to reconcile, but there may be confusion. These areas include intervention, record keeping and reporting, and petition to return and improper removal.

Intervention
References: §224.4; Cal. Rules of Court, rule 5.482(e); 25 USC §1911(c)

Neither the new federal regulations nor the guidelines make an explicit changes with respect to intervention. However, the issue of intervention is impacted by the new definition of child custody proceeding (25 CFR §23.2), which clarifies that for ICWA purposes, as discussed above under "Definitions," there can be several distinct "proceedings" within a case, and that various ICWA rights and requirements, including the right to intervene, attach at each "proceeding".

Specific recommendations:

Consider revising §224.4 and Cal. Rules of Court, rule 5.482(e).

Record Keeping and Reporting[4]
References: §361.31(k); 25 USC §§1917, 1951; 25 CFR §§23.138-23.141; Guidelines J.1-J.4.

In order to ensure that Indian children do not lose their connection to their tribe even if they are adopted, the ICWA requires that state courts making foster care or adoptive placements of Indian children or entering a final decree or order of adoption with respect to an Indian child provide the Secretary of the Interior with copies of all such orders and other information. Although the requirement is repeated in WIC §361.31(k), there is currently no mechanism to ensure that this requirement is being met.

25 CFR §§23.138-141 and Guidelines J.1-J.4 further refine and clarify the record keeping and transmission requirements and specifically require the state to designate a repository for these

[4] Note that the issue of record keeping and reporting is also impacted by the new federal AFCARS (Adoption and Foster Car Analysis and Reporting System) published in the Federal Register on April 7, 2016 and now incorporated into 45 CFR Part 1355.

records and notify the BIA where within the court system or the state these records are maintained.

Specific recommendations:

- Define and codify a procedure for maintenance of, and access to, the required records and information in conformity with the regulations; and
- Revise rule 5.487 to ensure that records of both foster care placement and finalized adoptions are maintained consistent with the requirements of the federal regulations.

Petition to return/ Improper Removal
§305.5 (e); Cal. Rules of Court, rule 5.486 25 USC §§1913(d), 1916, 1920; 25 CFR §§23.114, 23.136-23.137; guideline K.1-K.3

The ICWA requires a state court to decline jurisdiction over a child custody matter if an Indian child has been improperly removed from parental custody or improperly retained from the parents' custody after a temporary relinquishment of custody unless the child would be subject to substantial and immediate danger if returned to the parent.

This provision is repeated in California statute, but the meaning is not further spelled out and what constitutes "improper removal" is not defined.

In addition, federal law states that a final decree of adoption may be vacated within two years if it is determined that the parent's consent to such adoption was obtained through fraud or duress.

Specific recommendations:

- Consider revising §305.5(e) to clarify the requirements for improper removal, invalidation and return to parental custody; and
- Consider revising rule 5.486 consistent with any revisions to §305.5(e)

Priority level 4 – Consistency
This section includes areas where California law is entirely consistent with the new federal regulations.

Full Faith and Credit
References: §224.5; 25 USC §1911(d)

No changes required. Not addressed in regulations or guidelines.

Appendix A – Topical Issue Discussion

JURISDICTION

The Indian Child Welfare Act sets out a scheme in which tribes may have exclusive jurisdiction over child welfare proceedings involving their children, or may also have concurrent jurisdiction with state courts:
25 U.S.C. § 1911 (a) provides as follows:

(a) Exclusive jurisdiction

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence of domicile of the child.

The Ninth Circuit has held that Public Law 280 (28 U.S.C. § 1360) is an existing Federal law otherwise vesting California generally with concurrent jurisdiction over child welfare proceedings within the meaning of 1911 (a).[5] Accordingly, the general rule is that California has concurrent jurisdiction over child custody proceedings involving California Indian children even when they are resident or domiciled on reservation. There can be several exceptions, however: 1) the Washoe Tribe of California and Nevada, which has tribal reservation lands in Alpine County, has successfully petitioned to reassume exclusive jurisdiction over their child custody proceedings under 25 U.S.C. § 1918. This means that the California state courts have no jurisdiction over child custody proceedings (other than emergency proceedings) involving a Washoe child who resides or is domiciled on the tribe's lands; 2) children may be temporarily located in California, but still be domiciled or reside on the lands of a tribe outside of California which has exclusive jurisdiction over child custody proceedings. In this case the California state court would have no jurisdiction over child custody proceedings (other than emergency proceedings) involving that child; 3) whether they live in our out of state or on or off reservation, Indian children may already be subject to the jurisdiction of a tribal court. In this case the California state court would have no jurisdiction over child custody proceedings (other than emergency proceedings) involving the child.

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[5] *Doe v. Mann* (2005) 415 F. 3d 1038

The jurisdictional aspects of ICWA have been incorporated into California law in section 305.5 of the Welfare and Institutions Code which provides in relevant part:

> **WIC § 305.5. Removal of Indian child from custody of parents by state or local authority; transfer of proceedings to tribal court**
>
> (a) If an Indian child, who is a ward of a tribal court or resides or is domiciled within a reservation of an Indian tribe that has exclusive jurisdiction over child custody proceedings as recognized in Section 1911 of Title 25 of the United States Code or reassumed exclusive jurisdiction over Indian child custody proceedings pursuant to Section 1918 of Title 25 of the United States Code, has been removed by a state or local authority from the custody of his or her parents or Indian custodian, the state or local authority shall provide notice of the removal to the tribe no later than the next working day following the removal and shall provide all relevant documentation to the tribe regarding the removal and the child's identity. If the tribe determines that the child is an Indian child, the state or local authority shall transfer the child custody proceeding to the tribe within 24 hours after receipt of written notice from the tribe of that determination.

The new regulations clarify that in the situation where a tribe is found to have exclusive jurisdiction, the state court is required to dismiss any child custody proceedings. Whereas California law talks about "transferring a proceeding" to the tribal court, the new regulations, specify that state court proceedings must be dismissed if a tribe has exclusive jurisdiction.

> **§ 23.110 When must a State court dismiss an action?**
>
> Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and § 23.113 (emergency proceedings), the following limitations on a State court's jurisdiction apply:
>
> (a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.
> (b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding,

> and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

As noted above, there are special jurisdictional considerations in the case of an emergency proceeding. Section 1922 of ICWA states:

> Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

However, the use of emergency jurisdiction is limited to situations where it is necessary to prevent "…imminent physical damage or harm to the child." It is questionable whether are situations, which might be deemed under state law to justify removal, would fall within this emergency jurisdiction (for further discussion of the requirements for "emergency removal" see the issue sheet on this subject).

The practical issue for California is how to develop a scheme that complies with the federal jurisdictional requirements, particularly the tight time line to evaluate a child's Indian and jurisdictional status, without potentially leaving children in danger. In practice, it is often difficult to determine whether a child is an Indian child affiliated with a tribe that exercises exclusive jurisdiction within 24 hours of removal.

VOLUNTARY vs. INVOLUNTARY

ICWA has always made a distinction between "voluntary" and "involuntary" proceedings, but the line between what is voluntary and what is involuntary has not always been clear.
In defining what is considered a "foster care placement" for ICWA purposes 25 USC 1903 (1)(i) states that it applies to any foster care placement "…where the parent or Indian custodian cannot have the child returned upon demand…" 25 USC 1912 requires notice in "…any involuntary proceeding in a State court…"

25 USC 1913 sets out requirements for obtaining valid consent to either the foster care placement or termination of parental rights regarding an Indian child, in particular stipulating that for a foster care placement to be considered voluntary the parent or Indian custodian must be entitled to withdraw that consent at any time and have the child returned.
WIC 224.1 makes a similar distinction in terms of applying ICWA requirements and provides that "Indian child custody proceeding" does not include a voluntary foster care or guardianship placement if the parent or Indian custodian retains the right to have the child returned upon demand.

What this means in practice in California cases is not entirely clear and there is anecdotal evidence that at least in some courts and counties the practice was not to apply ICWA requirements and protections in child welfare or probate guardianship cases where parents had been persuaded in some way to consent, but in practice the parents could not have the child returned simply by making a request to have the child returned. In child welfare or probate guardianship cases, it is reported that if parents asked to have the children returned, their request was often denied and the proceeding was converted from a voluntary to an involuntary proceeding.[6]

The new regulations contain a number of provisions designed to clarify what is voluntary and what is involuntary and ensure that ICWA protections and requirements apply to all proceedings which are not truly voluntary.

The definitions found in 25 CFR 23.2 contain the following:

> *Involuntary proceeding* means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.
> *Upon demand* means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.
> *Voluntary proceeding* means a child custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will,

[6] See Preliminary Final-California ICWA Compliance Task Force Report to the Bureau of Children's Justice, 2016 at page 20-23. Available at https://turtletalk.files.wordpress.com/2016/06/prelim-final-ca-icwa-tf-report-6-10-2016.pdf

> without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.

These provisions then limit the ability of a child welfare agency to tell a family that someone needs to go get a guardianship or the child will be removed or otherwise pressure parents to surrender custody of a child without full ICWA compliance.

PROCEEDING

ICWA applies to "child custody proceeding[s]" which are defined as (25 USC 1903(1)):

> (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
> (ii) ''termination of parental rights'' which shall mean any action resulting in the termination of the parent-child relationship;
> (iii) ''preadoptive placement'' which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and (iv) ''adoptive placement'' which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

In California, mapping the term "proceeding" onto a child welfare case has posed questions of interpretation. Typically, a petition initiates a proceeding and procedurally, the case advances from initial hearing through permanency, culminating in reunification, or if the parents fail to reunify, then an alternative permanent plan. Is this whole case one "proceeding" from an ICWA standpoint? If not, where is the line between each "proceeding" for ICWA purposes? Is each hearing within the case a "proceeding"?

SB 678 did not entirely resolve the issue. Instead, it provided that some ICWA requirements (such as WIC 224.2 governing noticing) applied at each "hearing" within a case, and implicitly suggested that some rights (such as WIC 305.5 governing transfer to tribal court) were continuous throughout the entire case. Section 305.5 (c)(2)(B) provides with respect to what will constitute good cause not to transfer to tribal court that:

> The **proceeding** was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition within a reasonable time after receiving notice of the proceeding, provided the notice complied with Section 224.2. It shall not, in and of itself, be considered an unreasonable delay for a party to wait until reunification efforts

> have failed and reunification services have been terminated before filing a petition to transfer. (emphasis added)

The new regulations contain definitions that clarify the distinction between "proceeding" and "hearing".

Regulation 23.2 defines "hearing" as "…a judicial session held for the purpose of deciding issues of fact, of law, or both." The definition of "child custody proceeding" recites the four types of proceedings contained in the act itself, but then goes on to state:

> (2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings…

Under the new regulations, there can be multiple "proceedings" within one child welfare case. The challenge in California is determining the dividing line between these "proceedings". At what point do we move between a "foster care placement" proceeding and to a "termination of parental rights" proceeding or a "preadoptive placement" or "adoptive placement" proceeding? In practice, California treats the dividing line between a "foster care placement and "termination of parental rights" proceeding as the hearing at which reunification services are terminated and a 366.26 hearing is set. This is the hearing at which courts typically require qualified expert witness testimony to be presented (in addition to requiring it at the dispositional hearing).

EMERGENCY REMOVALS

ICWA has always had special considerations with respect to emergency removals. 25 USC 1922 states:

> Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

This was reflected in California law in WIC 305.5 (f):

> (f) Nothing in this section shall be construed to prevent the emergency removal of an Indian child who is a ward of a tribal court or resides or is domiciled within a reservation of an Indian tribe, but is temporarily located off the reservation, from a parent or Indian custodian or the emergency placement of the child in a foster home or institution in order to prevent imminent physical damage or harm to the child. The state or local authority shall ensure that the emergency removal or placement terminates immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate an Indian child custody proceeding, transfer the child to the jurisdiction of the Indian child's tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Very little further guidance was given on when this emergency authority could be used, whether there were any limits on it and how it relates to the other protections and requirements of ICWA and the normal progression of a case through the California dependency system.
In practice, it was assumed that if there was sufficient basis to detain a child from the parent, this qualified as an “emergency” under ICWA. The normal assumption and practice was that because a child’s Indian status is normally unclear at detention, ICWA requirements other than inquiry and notice did not apply. Generally in California the practice is not to apply most substantive ICWA requirements (qualified expert witness testimony; active efforts finding; placement preferences, etc.) until disposition which can often be 60 days or more after a child is detained.
The new regulations address emergency proceedings in a number of ways that both limit the use of this power and clarify requirements when the emergency removal authority is used.
A definition of “emergency proceeding” has been added to section 23.2 as follows:

> *Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

New regulation 23.113 sets the following standards and requirements for emergency removals:

> **§ 23.113 What are the standards for emergency proceedings involving an Indian child?**
>
> (a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.
>
> (b) The State court must:
>
> (1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;
>
> (2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and

(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.
(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.
(c) An emergency proceeding can be terminated by one or more of the following actions:
(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;
(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or
(3) Restoring the child to the parent or Indian custodian.
(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:
(1) The name, age, and last known address of the Indian child;
(2) The name and address of the child's parents and Indian custodians, if any;
(3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;
(4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see *www.bia.gov*);
(5) The residence and the domicile of the Indian child;
(6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;
(7) The Tribal affiliation of the child and of the parents or Indian custodians;
(8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;
(9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and
(10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:
(1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and
(3) It has not been possible to initiate a ''child-custody proceeding'' as defined in § 23.2

ICWA inquiry must be done in all cases at an early stage, and in all cases at least prior to the filing of the petition. If that inquiry reveals reason to know that the child may be an Indian child, any removal must either:

1) Meet the new evidentiary and procedural requirements of regulation 23.113; or

2) Comply with ICWA requirements including those that require a finding of active efforts and the testimony of a Qualified Expert Witness BEFORE removal and placement in temporary foster care.

So California law and practice may need to be modified to comply with the new requirements of the regulations. In particular:

- The evidence and findings made at a hearing authorizing the emergency removal or detention of an Indian child will need to be revised;

- Consideration will need to be given to the requirement that the court timely review all claims that the emergency which initially justified detention has ended. How will we procedurally comply with this requirement in California?;

- Making sure that emergency detentions or removals do not last longer than 30 days without there being a fully ICWA compliant hearing.

ACTIVE EFFORTS

California has gone back and forth on whether "active efforts" require something more or different than "reasonable efforts".
In SB 678, the legislature addressed this in WIC 361.7 (b):
(b) What constitutes active efforts shall be assessed on a case-by-case basis. The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. Active efforts shall utilize the available resources of the Indian child's extended family, tribe,

tribal and other Indian social service agencies, and individual Indian caregiver service providers.

This seems to make a clear distinction between "active efforts" and what is required in other cases at a minimum require that services be culturally relevant, and utilize tribal resources.

Notwithstanding SB 678, some California case law has continued to hold that there is no significant difference between "active efforts" and "reasonable services". (*C.F. v. Superior Court* (2014), 230 Cal. App. 4th 227 at 238).

New Regulations again address "active efforts" and appear to affirm that they require something different (if not explicitly more than) the reasonable efforts required in non-ICWA cases.

Definitions in 25 CFR § 23.2 include the following definition of "Active Efforts":

Active Efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe.

Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
(9) Monitoring progress and participation in services;
(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
(11) Providing post-reunification services and monitoring.

QUALIFIED EXPERT WITNESS

The final regulations discuss Qualified Expert Witness (QEW) in several places. Consistent with ICWA itself, regulation 23.121 discusses QEW as part of the court's evidentiary requirements as follows:

§ 23.121 What are the applicable standards of evidence?
(a) The court must not order a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The regulations then go on to give some guidance on who can serve as a QEW as follows:

§ 23.122 Who may serve as a qualified expert witness?
(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be

designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.
(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.
(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

The regulations are not inconsistent with the requirements of California law, but they are different in some respects. Further, the new regulations fail to address some of the matters that have caused continuing disagreement within California concerning the requirements of QEW testimony.
WIC 224.6 was based upon the 1979 ICWA Guidelines and states:

§ 224.6. Testimony of qualified expert witnesses; qualifications; participation at hearings; written reports and recommendations

(a) When testimony of a "qualified expert witness" is required in an Indian child custody proceeding, a "qualified expert witness" may include, but is not limited to, a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, tribal historian, or tribal elder, provided the individual is not an employee of the person or agency recommending foster care placement or termination of parental rights.
(b) In considering whether to involuntarily place an Indian child in foster care or to terminate the parental rights of the parent of an Indian child, the court shall:

(1) Require that a qualified expert witness testify regarding whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
(2) Consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices.

(c) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
(2) Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(3) A professional person having substantial education and experience in the area of his or her specialty.

(d) The court or any party may request the assistance of the Indian child's tribe or Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

(e) The court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony only if the parties have so stipulated in writing and the court is satisfied the stipulation is made knowingly, intelligently, and voluntarily.

Cal. Rules of Court, rule 5.484 (a)(1) and 5.485 (a)(2) incorporate the requirements of WIC 224.6

Issues

Notable differences in the requirements include that the new regulations do not contain the list of the kinds of individuals and qualifications that the court would be looking for in a qualified expert witness. The regulations only prohibit the social worker normally assigned the case from serving as the QEW, not any employee of the agency, and the regulations do not contain the limitation on acceptance of affidavit evidence in lieu of live testimony.

Arguably, all of these differences between the California law and regulations set a “higher standard” of protection in state law and are consistent.

Disappointingly, the new regulations do not give additional guidance on a number of issues that have arisen in California including:

- Whose witness is the QEW? Is the QEW a “partisan” witness for the party seeking the foster care or termination of parental rights or is the QEW intended to be more of an impartial advisor to the court?

- What sort of investigation should we expect from the QEW? Is it sufficient for a QEW to simply read the social worker’s court reports or should the QEW do independent investigation on the case, meet with parents and other parties, talk to the tribe and draw their own conclusions?

- At what point in the case is the QEW testimony required? ICWA says that it is required before a foster care placement and before termination of parental rights. In California, this has been interpreted to mean at disposition and at the 366.21(f) hearing at which reunification services are terminated. Is this correct? The new regulations suggest that QEW testimony may be required at detention unless there are emergency circumstances which justify dispensing with such testimony.

- Do or should the requirements of the Code of Civil Procedure governing expert witnesses (CCP 2034.210-2034.310) which require providing reports in advance apply to these cases?

PLACEMENT PREFERENCES

ICWA (25 U.S.C. 1915) sets out preferences for the placement of Indian children both for adoptive placement and for foster care or pre-adoptive placement as follows:

> **§ 1915. Placement of Indian children**
> **(a) Adoptive placements; preferences**
> In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.
> **(b) Foster care or preadoptive placements; criteria; preferences**
> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—
> (i) a member of the Indian child's extended family;
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.
> **(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences**
> In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided that where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.
> **(d) Social and cultural standards applicable**

> The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

These requirements were more or less incorporated directly into California law by SB 678 that added section 361.31 to the WIC as follows:

> **§ 361.31. Placement of children with Indian ancestry; considerations; priority of placement in adoptions; record of foster care**
> (a) In any case in which an Indian child is removed from the physical custody of his or her parents or Indian custodian pursuant to Section 361, the child's placement shall comply with this section.
> (b) Any foster care or guardianship placement of an Indian child, or any emergency removal of a child who is known to be, or there is reason to know that the child is, an Indian child shall be in the least restrictive setting which most approximates a family situation and in which the child's special needs, if any, may be met. The child shall also be placed within reasonable proximity to the child's home, taking into account any special needs of the child. Preference shall be given to the child's placement with one of the following, in descending priority order:
> (1) A member of the child's extended family, as defined in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).
> (2) A foster home licensed, approved, or specified by the child's tribe.
> (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority.
> (4) An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.
> (c) In any adoptive placement of an Indian child, preference shall be given to a placement with one of the following, in descending priority order:
> (1) A member of the child's extended family, as defined in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).
> (2) Other members of the child's tribe.
> (3) Another Indian family.
> (d) Notwithstanding the placement preferences listed in subdivisions (b) and (c), if a different order of placement preference is established by the child's tribe, the court or agency effecting the placement shall follow the order of preference established by the tribe, so long as the placement is the least restrictive setting appropriate to the particular needs of the child as provided in subdivision (b).

> (e) Where appropriate, the placement preference of the Indian child, when of sufficient age, or parent shall be considered. In applying the preferences, a consenting parent's request for anonymity shall also be given weight by the court or agency effecting the placement.
> (f) The prevailing social and cultural standards of the Indian community in which the parent or extended family members of an Indian child reside, or with which the parent or extended family members maintain social and cultural ties, or the prevailing social and cultural standards of the Indian child's tribe shall be applied in meeting the placement preferences under this section. A determination of the applicable prevailing social and cultural standards may be confirmed by the Indian child's tribe or by the testimony or other documented support of a qualified expert witness, as defined in subdivision (c) of Section 224.6, who is knowledgeable regarding the social and cultural standards of the Indian child's tribe.
> (g) Any person or court involved in the placement of an Indian child shall use the services of the Indian child's tribe, whenever available through the tribe, in seeking to secure placement within the order of placement preference established in this section and in the supervision of the placement.
> (h) The court may determine that good cause exists not to follow placement preferences applicable under subdivision (b), (c), or (d) in accordance with subdivision (e).
> (i) When no preferred placement under subdivision (b), (c), or (d) is available, active efforts shall be made to place the child with a family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe.
> (j) The burden of establishing the existence of good cause not to follow placement preferences applicable under subdivision (b), (c), or (d) shall be on the party requesting that the preferences not be followed.
> (k) A record of each foster care placement or adoptive placement of an Indian child shall be maintained in perpetuity by the State Department of Social Services. The record shall document the active efforts to comply with the applicable order of preference specified in this section.

Although the WIC provision appears to be consistent with the requirements of ICWA, a number of challenges have arisen in putting the placement preferences into practice in California. Often when children are first detained, their Indian status and tribal affiliation, if any, is not known, and as a result, it is not possible to ensure that the child’s initial placement complies with the ICWA placement preferences. Many of these issues could be avoided if child welfare agencies did early ICWA inquiry and outreach to tribes at first contact with a family. In addition in most areas of

California there are few native foster homes available and even fewer that will meet the preferences for a specific tribe.

In addition, many Indian children and families in California are affiliated with out of state tribes. In most cases, these tribes will not want to interfere or hinder a parent's opportunity to reunify with a child and may, therefore, agree to a temporary foster care placement outside of the placement preferences while parents are seeking to reunify, but may still want to ensure that if parents do not reunify, any permanent placement is consistent with the ICWA placement preferences. This may mean the tribe wants a change in the child's placement at the stage the case moves to permanency planning. (The tribe may also seek a transfer to tribal court at this stage for the same reasons. The issues around that are discussed in the topic sheet concerning transfers to tribal court..)

This desire to see the child placed permanently in an Indian home can sometimes conflict with child welfare's desire that the child remain in a stable placement if the child has been doing well and is perceived to be bonded and attached to the "temporary" caregivers. If the "temporary" caregivers want to adopt, there can be a conflict between the goals of stability for the child and the goals of ICWA that Indian child maintain their tribal connections and be permanently placed in Indian homes.

The new BIA Regulations do offer some guidance in this area:

> **§ 23.129 When do the placement preferences apply?**
> (a) In any preadoptive, adoptive, or foster-care placement of an Indian child, the placement preferences specified in § 23.130 and § 23.131 apply.
> (b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.
> (c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under § 23.132 exists to not apply those placement preferences.
> **§ 23.130 What placement preferences apply in adoptive placements?**
> (a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with:
> (1) A member of the Indian child's extended family;
> (2) Other members of the Indian child's Tribe; or
> (3) Other Indian families.

(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.
(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

§ 23.131 What placement preferences apply in foster-care or preadoptive placements?

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in fostercare or preadoptive placements, the child must be placed in the least restrictive setting that:
(1) Most approximates a family, taking into consideration sibling attachment;
(2) Allows the Indian child's special needs (if any) to be met; and
(3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.
(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:
(1) A member of the Indian child's extended family;
(2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;
(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.
(c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.
(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

§ 23.132 How is a determination of ''good cause'' to depart from the placement preferences made?

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.
(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is ''good cause'' to depart from the placement preferences.

> (c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:
> (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
> (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
> (3) The presence of a sibling attachment that can be maintained only through a particular placement;
> (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
> (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.
> (d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.
> (e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA

The main change that the new Regulations represent for California, is the restrictions on what can be considered "good cause" for the purposes of deviating from the placement preferences set out in 23.123 subsections (d) and (e).

In addition, however, the issue of application of placement preferences must be looked at in relation to the definition of "proceeding" and "hearing" found in section 23.2. Regulation 23.2 defines "hearing" as "…a judicial session held for the purpose of deciding issues of fact, of law, or both." The definition of "child custody proceeding" recites the four types of proceeding contained in the act itself, but then goes on to state:

> (2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these

> four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings…

So clearly, for ICWA purposes there can be multiple "proceedings" within one child welfare case. The challenge in California is determining the dividing line between these "proceedings". At what point do we move between a "foster care placement" proceeding and move to a "termination of parental rights" proceeding or a "preadoptive placement" or "adoptive placement" proceeding?

What this seems to mean is that the "placement preference" analysis must begin afresh when the posture of a case changes and we are looking at an "adoptive placement" instead of a "foster care placement". In fact, this view of the placement preference analysis having to be made separately at the different stages of the case is consistent with the Second District Court of Appeal's holding in the first *In re Alexandria P.* (228 Cal.APP. 4th 1322 (2014)) case. There, the tribe had agreed to a foster care placement with a non-Indian family while the Indian father attempted to reunify with his daughter. However, the tribe advised the court and parties that should reunification fail, they wanted the child placed permanently with a family the tribe had identified.
When reunification efforts failed, the tribe with the support of the child welfare agency and the child's attorney, sought to transfer placement to the family that the tribe had identified. The defacto parents fought the transfer and argued *inter alia* that the tribe had forfeited the right to argue for application of the placement preferences at the adoptive placement phase of the case by having consented to the non-ICWA compliant foster care placement:

> …we are not persuaded that Congress or the California Legislature intended to require tribes to make an election at the time of foster care placement that would prevent a change in placement for adoption, especially when the foster family is informed that they are not being considered as an adoptive placement because of the ICWA's requirements. Section 1903(1) provides separate definitions for "foster care placement" and "adoptive placement." The ICWA's placement preferences are distinct for each type of placement, and different considerations apply for foster care and adoptive placements. (See §§ 1915(a) [adoptive placement preferences], 1915(b) [foster care placement preferences].) The P.s and amici curiae argue that once an Indian child is placed in foster care under section 1915(b), the only way for a court to consider adoptive placement preferences under section 1915(a) is if the child is "removed" from the foster placement under section 1916(b).
>
> This argument is unsupported by case law and, in fact, runs counter to the many published cases where a tribe or Indian parent initially consents to foster care placement that does not comply with the ICWA's placement preferences, and later asserts adoptive placement preferences, usually after reunification efforts have failed. (See, e.g., *Santos*

> *Y., supra, 92 Cal.App.4th 1274*, 112 Cal.Rptr.2d 692 [tribe supported placement with foster parents for two years, until it found a suitable individual qualified as a preferred adoptive placement]; *Native Village of Tununak v. State, Dept. of Health & Social Services, Office of Children's Services(Alaska 2013) 303 P.3d 431, 434* (*Tununak*) [parties stipulated to a foster placement that departed from the ICWA's placement preferences while a search for preferred placements continued].) (pp 1346-1347)

So, it seems clear now as a result of the new Regulations and the *Alexandria P.* case that the placement preference analysis must be done independently at the adoptive placement phase of the case.

TRANSFER TO TRIBAL COURT

The new Regulations address transfers to tribal court as follows:

> **§ 23.115 How are petitions for transfer of a proceeding made?**
> (a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of parental-rights proceeding to the jurisdiction of the child's Tribe.
> (b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.
> **§ 23.116 What happens after a petition for transfer is made?**
> Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.
> **§ 23.117 What are the criteria for ruling on transfer petitions?**
> Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:
> (a) Either parent objects to such transfer;
> (b) The Tribal court declines the transfer; or
> (c) Good cause exists for denying the transfer.
> **§ 23.118 How is a determination of ''good cause'' to deny transfer made?**
> (a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child custody proceeding.
> (b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court must not consider:
(1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
(2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
(3) Whether transfer could affect the placement of the child;
(4) The Indian child's cultural connections with the Tribe or its reservation; or
(5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.
(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

§ 23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.
(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

WIC 305.5 (c) is the primary provision of California law governing transfers to tribal court. It states:

(c)(1) If a petition to transfer proceedings as described in subdivision (b) is filed, the court shall find good cause to deny the petition if one or more of the following circumstances are shown to exist:
(A) One or both of the child's parents object to the transfer.
(B) The child's tribe does not have a "tribal court" as defined in Section 1910 of Title 25 of the United States Code.
(C) The tribal court of the child's tribe declines the transfer.
(2) Good cause not to transfer the proceeding may exist if:
(A) The evidence necessary to decide the case cannot be presented in the tribal court without undue hardship to the parties or the witnesses, and the tribal court is unable to mitigate the hardship by making arrangements to receive and consider the evidence or testimony by use of remote communication, by hearing the evidence or testimony at a location convenient to the parties or witnesses, or by use of other means permitted in the tribal court's rules of evidence or discovery.
(B) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition within a reasonable time after

receiving notice of the proceeding, provided the notice complied with Section 224.2. It shall not, in and of itself, be considered an unreasonable delay for a party to wait until reunification efforts have failed and reunification services have been terminated before filing a petition to transfer.
(C) The Indian child is over 12 years of age and objects to the transfer.
(D) The parents of the child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.
(3) Socioeconomic conditions and the perceived adequacy of tribal social services or judicial systems may not be considered in a determination that good cause exists.
(4) The burden of establishing good cause to the contrary shall be on the party opposing the transfer. If the court believes, or any party asserts, that good cause to the contrary exists, the reasons for that belief or assertion shall be stated in writing and made available to all parties who are petitioning for the transfer, and the petitioner shall have the opportunity to provide information or evidence in rebuttal of the belief or assertion. (5) Nothing in this section or Section 1911 or 1918 of Title 25 of the United States Code shall be construed as requiring a tribe to petition the Secretary of the Interior to reassume exclusive jurisdiction pursuant to Section 1918 of Title 25 of the United States Code prior to exercising jurisdiction over a proceeding transferred under subdivision (b).

One of the clearest inconsistencies between the new federal regulations and existing California law here is the consideration of the stage of the "proceeding". California law (WIC 305.5(c)(2)(B) specifically authorizes the court to look at whether the proceeding is at an advanced state in making the determination of whether or not there is good cause to transfer. The new federal regulations, in contrast, specifically reiterates that the "foster care placement" and " termination of parental rights" stages of the case are separate "proceedings" for ICWA purposes and the right to seek a transfer to tribal court attaches afresh with each "proceeding". The court may not consider whether there was a prior proceeding involving the child in which no transfer the tribal court was filed. In essence this means that the court may not consider, as part of its "good cause" analysis the fact that no parties sought transfer to tribal court during the "foster care placement" (i.e. reunification) stage of a case once the case moves to the "termination of parental rights" (i.e. permanency) stage of a case. Nor may the court consider whether the transfer might result in a change in the child's placement.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date
August 30, 2017

Action Requested
Please Review

To
Tribal Court – State Court Forum
Family and Juvenile Law Advisory Committee
Probate and Mental Health Advisory Committee

Deadline
N/A

Contact
Ann Gilmour, Attorney, CFCC
415-865-4207 phone
ann.gilmour@jud.ca.gov

From
Ann Gilmour

Subject
California ICWA Compliance Task Force Report Recommendations

The Executive and Planning Committee recently approved an amendment adding review of the recommendations in the California ICWA Compliance Task Force Report (task force report) and making recommendations for implementation as appropriate to the Tribal Court – State Court Forum (forum) annual agenda. This memo discusses the task force report recommendations that are under court purview and possible options for implementation. Staff seeks direction.

Background

On March 21, 2017, the California ICWA Compliance Task Force published its report to the California Attorney General's Bureau of Children's Justice.[1] The report sets out a number of

[1] That report is available here: https://turtletalk.files.wordpress.com/2017/03/icwa-compliance-task-force-final-report-2017.pdf

areas in which the Task Force states that California is failing to comply with the requirements of the Indian Child Welfare Act. There are 20 formal recommendations beginning on page 94. A number of the issues raised throughout the report, as well as some of the formal recommendations, relate to and are within the purview of the Judicial Branch. This memo discusses those issues and recommendations and sets out some options available to address the issues and recommendations.

Formal Recommendations

Recommendation 1: Remediation of Tribal Inequity in California Courts

The injustice inherent in tribes not being fairly included in state court can only be overcome by ensuring: (1) tribal access to records, (2) appointment of counsel for tribes, (3) waiver of pro hac vice for out-of-state attorneys, and (3) tribal participation.

Tribal Access to Records: Despite the amendments to §827 designating tribes, tribal representatives and tribal attorneys as "parties," the practice of denying routine paperwork, pleadings and minutes to tribes remains. The costs of preventing access to court filings and discovery should be enforced by the Court, but if, after notice, an agency or county counsel continue to deny production, then monetary sanctions should be mandatory and awardable to the tribe. Further, the tribe, as a unique sovereign, should be exempted from additional fees for copying files to tribal attorneys and representatives under relevant government codes.

Appointment of Counsel or Resources to Retain Counsel: Welfare & Institutions Code §317 provides for appointment of legal counsel for parents or Indian custodians, and guardians who cannot afford counsel. It also compels appointment of counsel for children in every case. De facto parents may be appointed counsel under California Rules of Court, rule 5.534(e)(2). The agency is always represented by one or more counsel.

The absence of a corresponding provision for appointment of counsel for tribes is a significant breach of the mandates of due process. The multitude of errors in ICWA cases is a cost on the entire system, and could be minimized if tribes were afforded the same right to counsel consistent with other parties.
For tribes with resources to retain their own legal counsel, tribal attorneys could substitute into a case, as is done in other proceedings.

We specifically recommend the development of a four-year pilot project that would:

1. Obtain funding necessary for the provision of free legal counsel to tribes in dependency cases where the ICWA applies in at least two pilot counties. Management of the pilot project, including designation, supervision and training of court appointed counsel should be done by an organization governed by California tribal leaders with a focus on tribal children and families.

2. Require the Judicial Council to convene a working group comprised of all relevant persons, including tribal representatives and tribal advocates, state court judges, and Judicial Council staff that would provide a report to the Legislative Counsel within 12 months regarding the efficacy of the project.

3. Assess available funding sources for court appointed counsel in ICWA cases.

Waiver of Pro Hac Vice for Out-of-State Tribal Attorneys: 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. The out-of-state attorney would be required to file an affidavit by the Indian child's tribe, asserting the tribe's intent to intervene and participate in the state court proceeding and affirming the child's membership or eligibility of membership pursuant to tribal law.

Right of Tribes to Participate: In many cases and counties, tribes are not allowed in the courtroom or allowed at counsel table or permitted to meaningfully participate. Legislation should be sought authorizing designated tribal representatives (nonattorneys) to represent tribes. Only the court determines who may be allowed into a courtroom, not social workers or bailiffs. Amendment of relevant Rules of Court and regulations of intergovernmental agreements to secure and enforce tribal participation could alleviate this problem.

Discussion of Recommendation 1

Tribal Access to Records

The Judicial Council sponsored legislation that added subsection (f) to section 827 of the California Welfare and Institutions Code, addressing tribal access to court records. There is

pending rule proposal to amend rule 5.552 of the Rules of Court to clarify, effective January 1, 2018, tribal rights to access juvenile court records.[2]

Are there other actions that could be taken regarding implementation of this recommendation?

The issue of sanctions for non-production of records by county counsel is likely one that would need legislative action, as would the issue of tribes being treated as governmental entities for the purpose of being exempted from copying fees.

Appointment of Counsel or Resources to Retain Counsel for Tribes in ICWA cases

The Judicial Council has partnered with the California Department of Social Services and a tribe to seek grant funding for a pilot project to provided appointed counsel to tribes in ICWA cases. Unfortunately that grant application was not successful. The Judicial Council would likely be willing to work on a pilot project as outlined in the recommendation.

Waiver of Pro Hac Vice for Out-of-State Tribal Attorneys

The forum annual agenda includes working on a proposal to amend rule 9.40 of the California Rules of Court to waive certain requirements for attorneys representing tribes in ICWA cases. We expect that proposal to move forward in the next RUPRO cycle with an effective date, if approved, of January 1, 2019.[3]

Right of Tribes to Participate

The forum and committees could consider including this issue in amendments to rules and revisions to forms. Are there other actions that could be taken to implement this recommendation?

Recommendation 6: Judicial Competency

> The Judicial Council should amend California Rules of Court 10.462 to include ICWA training for bench officers that is sufficient and ongoing to preside over ICWA cases and how they are different from other child custody proceedings.[4]

[2] That proposal can be found here: http://www.courts.ca.gov/documents/SPR17-16.pdf

[3] Rule 9.40 can be found here: http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_40

[4] Rule 10.462 can be found here: http://www.courts.ca.gov/cms/rules/index.cfm?title=ten&linkid=rule10_462

Discussion of Recommendation 6

Rule 10.462 (c)(1)(B) requires each judicial officer to take an orientation course in his or her primary assignment within one year. Although not specified in the rule itself, the primary assignment orientation for juvenile does include ICWA content.

The forum and committees could consider whether rule 10.462 should be amended to set out in more detail required ICWA education, or whether an ICWA education rule similar to rules 10.462 or 10.463 should be adopted. A concern is that additional funding will be required for increased training requirements.

Recommendation 7: ICWA Competency for Advocates, Party Representatives and Social Workers

> Revise the Rules of Court to effectively mandate ICWA competency for legal counsel, social workers, CASAs, and others. Expand the Rule to require compliance with specific substantive, procedural and cultural components of the ICWA.

Discussion of Recommendation 7

California Rules of Court, rule 5.660(d) sets minimum standards of competency for all attorneys representing a party in dependency proceedings, including a minimum of eight hours of training or education in the area of juvenile dependency. The rule does not specifically require training in ICWA.

California Rules of Court, rule 5.655(d) sets training standards for Court Appointed Special Advocate (CASA) volunteers. The topics that must be addressed in the training are set out in section 102, subdivision (d) of the Welfare and Institutions Code. Neither the rule nor the statute specifically requires ICWA training.

The forum and committee may consider whether rule 5.660(d) should be amended to set out specific ICWA requirements, and whether rule 5.655(d) should be similarly amended, or whether such an amendment to rule 5.655(d) would require an amendment to section 102, subdivision (d) of the Welfare and Institutions Code.

Recommendation 13: Sanctions

> Monetary sanctions should be paid directly to tribes for the failure of child welfare agencies and/or their legal counsel who do not follow substantive and procedural rules.

Discussion of Recommendation 13

The Welfare and Institutions Code governing juvenile court proceedings contains little explicit guidance on the court's authority to impose sanctions. Section 224.2(e) provides authority for court sanctions for a party who knowingly and willfully falsifies or conceals information concerning a child's Indian status, or who counsels a party to do so.

The juvenile court does have authority to impose sanctions under section 128.7 of the Code of Civil Procedure. (*In re Mark B*. (2007) 149 C.A.4th 61, 76, 56 C.R.3d 697) The reasoning in the *In re Mark B.* decision would appear to apply equally to sections 128.5 and 2023.030 of the Code of Civil Procedure, which authorize sanctions for frivolous actions or delaying tactics and misuse of the discovery process respectively.

Rule of Court, rule 5.546(j) authorizes a juvenile court to impose sanctions for failure to comply with discovery requirements. The authority to impose sanctions and order them paid to another party is less clearly articulated than under the rules governing proceedings in family court.

The Family Code contains a number of detailed provisions authorizing sanctions. (See Family Code §§270-275; 3667.) Section 211 of the Family Code specifically authorizes the Judicial Council to provide by rule for the practice and procedure under the code. It is less clear than the authority set out in rule 5.14 with respect to violations of the Rules of Court in family law cases. Rule 5.14 authorizes the court to award sanctions to any party or aggrieved person and pay a party's reasonable expenses, including reasonable attorney fees. The party against whom sanctions are sought or awarded must be given notice and an opportunity to be heard on the issue of sanctions.

The forum and committees may consider whether a more detailed and specific rule of court governing sanctions in juvenile cases involving ICWA is warranted and authorized by statute.

Recommendation 15: Enforce and Implement the Judicial Council Strategic Plan and Operational Plan.

> The Judicial Council adopted a Strategic Plan for California's Judicial Branch in 2006. In 2008, an Operational Plan was adopted to accomplish the goals identified in the Strategic

Plan. Of the six goals, each of which is important, two stand out for Tribes: Goal I: Access, Fairness and Diversity, and Goal IV: Quality of Justice and Service to the Public. Tribes should be a part of the discussion and implementation of these goals, as well as the others, to ensure this population is heard by our judiciary.

Discussion of Recommendation 15

The council works continuously to implement the strategic and operational plans. The council has engaged tribes and tribal representatives in a number of ways in furtherance of these goals. Specific efforts include:

- conducting a series of roundtables on Tribal issues http://www.courts.ca.gov/12526.htm;
- conducting the Native American Community Justice Project http://www.courts.ca.gov/8117.htm;
- establishing the Tribal Court/State Court Forum as an advisory body to the JCC http://www.courts.ca.gov/3065.htm;
- establishing the Tribal/State Programs Unit http://www.courts.ca.gov/programs-tribal.htm; and
- working through the forum and the Tribal/State Programs Unit on a wide variety of initiatives to improve access to justice for California's tribal communities. Examples can be found at http://www.courts.ca.gov/documents/TribalForum-Accomplishments.pdf

Recommendation 16: Consolidated Courts

The model where all ICWA cases are heard in a single department, and by a single bench officer, creates an economy of scale. It may not be feasible in all counties, particularly small counties, but it could be limited to counties which annually reach a threshold number of ICWA.

Discussion of Recommendation 16

California Rules of Court, rule 10.603 vests the presiding judge of each superior court with the authority to manage judicial assignments and calendars.

Tribal/State Court Unit could provide technical assistance and advice to courts who wish to develop such consolidated ICWA courts or calendars.

Recommendation 17: Concurrent Jurisdiction Court

> We recommend that the Judicial Council provide technical support to tribes and counties in the development of concurrent jurisdiction courts.

Discussion of Recommendation 17

The Judicial Council and Judicial Council staff have provided such support and technical assistance. Tribal/State Programs staff worked closely with the Shingle Springs Tribal Court and the El Dorado County Superior Court to develop the only concurrent jurisdiction court currently operating in California. Staff assisted in the application for grant funding and technical assistance, and the development of initial documents and agreements.

Furthering such partnerships and cooperation is part of the Forum annual agenda item 8 at page 10. A number of the collaborations promoted by Tribal/State programs are featured in the Innovation Knowledge Center [5]

In March 2017 the Judicial Council of California approved a Court Innovation grant of $1,414,209.82 over three years to the Superior Court of California, County of Humboldt for the development of a Family Dependency Drug Court in collaboration with the Yurok Tribal Court.

Staff are available to any state or tribal court to provide technical assistance in development of such concurrent or joint jurisdiction courts.

Other Issues Discussed in the Report

The report raises a number of issues and concerns that are not addressed in the formal recommendations. We set those out here for the consideration of the forum and the committees.

Consent

The report raises a concern that the ICWA requirements governing consent to foster care placement are not being universally complied with and at page 21 states that consent to foster care placement should be certified by the presiding judge that all aspects were full explained and fully understood.

[5] See http://jrn.courts.ca.gov/reference/innovation/trialcourtprograms/tribal/index.htm

Section 16507.4(b)(3) of the Welfare and Institutions Code requires such certification. If agencies are not following the law and are taking consents without the required judicial certification, then CDSS and AG as oversight agencies would have to take corrective action.

The forum and committee may consider whether to address this issue through rules and forms.

Probate Guardianships
The report discusses a number of concerns regarding probate guardianships. (See pages 21, 23-24, and 33) The report specifically recommends that:

- Guardianship proceedings should not be completed until investigation and reporting is provided to the court. No referral to probate guardianship when dependency is most appropriate. (pg. 21);
- Cease use of guardianships in contravention of Probate Code §1513(c) (pg. 23); and
- Probate guardianship courts must comply with ICWA inquiry and notice requirements. (pg. 33)

We note that these recommendations are already required by law. However, if compliance continues to be an issue, the forum and committees may wish to consider whether further guidance in terms of rules and forms may be appropriate.

Rules and Forms Issues
The report discusses a number compliance concerns and suggests these might be improved by clarifying rules and forms. Specifically the report recommends:

- Amending California Rules of Court, rule 5.481 to clarify that inquiry does not only need to be made of parents. Amend the Rules of Court to support more robust inquiry and notice and include sanctions and penalties for failing to comply. (pg. 27 & 29);
- Requiring each party to certify on the record whether they have discovered or know information that indicates the child is an Indian child. (pg. 29); and
- Clarifying the requirements to support an active efforts finding. (pg. 49)

These issues can be considered when the forum and committees are developing rules and forms proposals to address the new federal ICWA regulations and guidelines.

Delinquency
The report also discusses tribal participation in delinquency cases at pages 34, and 85 through 86 and recommends:

- Consulting with tribes in delinquency cases (pg. 34) and

- Allowing tribes to review records relating to a Welf. & Inst. Code §602 proceeding in order for the tribe to provide services to the child or family (pg. 86).

The California Supreme Court decision in *In re W.B.* (2012) 55 Cal. 4th 30, determined that, other than inquiry, substantive ICWA requirements do not apply in most delinquency cases. Rule 5.480 and 5.481 were amended effective January 1, 2013 to conform to this holding. The Advisory Committee Comment to rule 5.481 encourages tribal consultation in all delinquency cases involving Indian children.

In addition, the Tribal/State Programs developed an Information Sheet: Delinquency, Native American Identification and ICWA available here, which explains the importance of tribal consultation in delinquency matters involving Indian children, even if ICWA does not apply.

What more steps, if any, can the forum and committee take on this issue?

Tribal Participation
The report discusses the challenges that tribes face in meaningfully participating in cases involving their tribal children at pages 40-47 and recommends:

Amend rules of court to ensure that rights of non-intervening tribes are respected and ensure that rights of all tribes to be represented by non-attorneys is respected. (pg. 41)

- Revising section 352 of the Welfare and Institutions Code and California Rules of Court, rule 5.550 to ensure they do not interfere with right of parent, tribe, etc. to continuance under ICWA (pg. 42);
- Clarifying that ICWA applies regardless of whether the tribe intervenes (pg. 43);
- Clarifying the right of tribes to file reports, case plans and case plan updates (43); and
- Clarifying the right of tribe to fully participate without being represented by a lawyer (43).

The forum and committees may want to consider whether these issues can be addressed when undertaking revisions to rules and forms implementing the federal ICWA regulations and guidelines.

Please mail, fax or email completed registration form with payment (if applicable) to:

Los Angeles County Department of Mental Health
Program Support Bureau, Quality Improvement Division
Attn: Kelly Wilkerson, AI/AN UsCC Liaison
695 S. Vermont Ave., 5th Floor, Suite 500
Los Angeles, CA 90005
Fax: (213) 252-8747
Email: AIANMHConference@dmh.lacounty.gov

For additional information, please contact:

- LACDMH WET Division: (213) 251-6854
- AIANMHConference@dmh.lacounty.gov

PLEASE NOTE:

- **Registration:** There will be no on-site registrations/walk-ins.
- **Registration Fee:** Conference is free for the general public. $35 Registration Fee for County Employees and LACDMH Contracted Agency Employees.
- **Confirmation:** Only e-mail confirmations will be sent.
- **Cancellations:** Please inform us if you plan on not attending so that we may allow those on waiting lists to attend.
- **Refunds:** There will be no refunds.
- **Continuing Education*:**

Los Angeles County Department of Mental Health is approved by the American Psychological Association to sponsor continuing education for Psychologists. Los Angeles County Department of Mental Health maintains responsibility for this program and its content.

California Board of Behavioral Science for Licensed Clinical Social Workers and Marriage and Family Therapists.

California Board of Registered Nursing for Registered Nurses, Licensed Vocational Nurses and Licensed Psychiatric Technicians.

California Association of Alcoholism and Drug Abuse Counselors.
* Continuing Education will be confirmed at the conference.

Conference Presented By:

Los Angeles County
Board of Supervisors:

Hilda L. Solis
First District

Mark Ridley-Thomas
Second District

Sheila Kuehl
Third District

Janice Hahn
Fourth District

Kathryn Barger
Fifth District

Los Angeles County
Department of Mental Health
Jonathan E. Sherin, M.D., Ph.D., Director

American Indian/Alaska Native
Underserved Cultural Communities
(UsCC) Subcommittee

Funded by the Mental Health Services Act

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American Indian/Alaska Native
Mental Health Conference 2017

"Bridging the Gaps – Systems, Cultures, and Generations"

Tuesday, November 14, 2017
8:00 am – 5:00 pm

California Endowment
1000 N. Alameda St.
Los Angeles, CA 90012
MHSA Funded

About the Conference:

We invite you to join us for the American Indian/Alaska Native (AI/AN) Mental Health Conference 2017. This year's Conference will focus on bridging the gaps between systems, cultures, and generations in order to improve mental health outcomes. The AI/AN Mental Health Conferences are dedicated to building awareness of the mental health needs of the AI/AN community as well as providing training and increasing knowledge of culturally appropriate mental health interventions.

Our morning plenary speaker, Jennie Joe, Ph.D., M.P.H., Navajo, is currently a Professor Emerita in the Department of Family and Community Medicine at the University of Arizona. She taught at UCLA prior to coming to the University of Arizona, where she directed the Native American Research and Training Center and was part of the affiliated faculty for the University's American Indian Studies. She received her doctorate degree jointly from the University of California Berkeley and San Francisco. In addition to teaching, Dr. Joe has had a long career as an advocate and researcher involved in Native American Health, including studies and programs addressing health disparities, chronic diseases, disability, and health promotion. At the heart of much of her work has and continues to be a focus on culture and its impact on health, especially for Native Americans.

Our afternoon plenary speaker, J. Carlos Rivera, C.A.D.C.-II, Pomo, is the Executive Director at White Bison, Inc. located in Colorado Springs, Colorado. Carlos is an enrolled tribal member with the Sherwood Valley Band of Pomo Indians. Carlos, C.A.D.C.-II, received his degree in Chemical Dependency Studies at the American River College. He served as a substance abuse treatment provider for 10 years at the Sacramento Native American Health Center, Inc. providing services to adult men and women on parole, juvenile offenders, and other referrals from the Department of Corrections. He continues to make a difference in Native Tribal communities serving as the Executive Director for White Bison, Inc. Carlos is a former committee member for the Juvenile Justice & Delinquency State Committee for California, appointed by Governor Jerry Brown.

This year's array of topics and presenters promises to deliver a day of knowledge, skill building, cultural awareness, and networking.

Sincerely,

Belinda Smith, L.C.S.W., Oneida

Michelle Enfield, Navajo

AI/AN UsCC Conference Committee Co-Chairs

***Photo and Video Disclosure**

Los Angeles County Department of Mental Health may use/disclose photographs and audio-video recordings of attendees. They may be used in motion picture, still photography in any form, future brochures/programs, editorial, or any and all other lawful purposes.

Morning Keynote

The Quest for Cultural Appropriate Interventions: Lessons Learned from Traditional Native Practitioners

Jennie Joe, Ph.D., M.P.H., Navajo

Professor Emerita, Department of Family and Community Medicine, University of Arizona

Workshop Sessions

1. Integrating Cultural Activities Across Generations for Overall Wellness

Carrie Johnson, Ph.D., Dakota Sioux
Avril Cordova, Taos/Oglala Lakota
Eric Sanchez, J.D., M.A., Navajo

2. Native American Neighborhood Network

Cheryl McKnight, M.A., Shawnee
Dan Dickerson, D.O., M.P.H., Inupiaq
Amy Jo Kindler, B.S.W., Lakota
John Edward Kirby, Cherokee
L. Lee Nelson, M.D.
Jimi Castillo, Gabrieleno/Tongva

3. Know Your Rights

Raul Garcia, Huichol and Kumeyaay

4. Sharing Stories and Building Bridges Through Resonance

Monique Castro, M.S., M.F.T.I., Navajo

5. Native Engagement: Personal Bodies and Sexual Relations

Michelle Enfield, Navajo

6a. Morning Panel: The Many Faces of Trauma and Resilience Among Our Native Community

Facilitator: Mark Parra, M.Ed., Navajo
Panelist: Sunnie Whipple, Lakota
Panelist: Keith Vielle, Blackfeet

6b. Afternoon Panel: The Many Faces of Trauma and Resilience Among Our Native Community

Facilitator: Mark Parra, M.Ed., Navajo
Panelist: Sherry White, Ho-Chunk
Panelist: Belinda Smith, L.C.S.W., Oneida

Afternoon Keynote

Intergenerational Trauma and the Healing Forest

J. Carlos Rivera, C.A.D.C.-II, Pomo
Executive Director, White Bison, Inc.

American Indian/Alaska Native Mental Health Conference 2017

"Bridging the Gaps – Systems, Cultures, and Generations"

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Registration due by Wednesday, October 11, 2017

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☐ **Special Accommodations:**

Language Interpretation ____________