

## **Indian Child Welfare Act (ICWA): Judicial Best Practices, Tips and Tricks for Avoiding ICWA Inquiry Reversals December 19, 2024**

**Moderator:** Ann Gilmour, Attorney, Judicial Council of CA

**Speakers:** Hon. Shawna Schwarz, Supervising Judge of the Dependency Court, Superior Court of California, County of Santa Clara; Hon. Tari L. Cody, Associate Justice of the Court of Appeal, Second Appellate District, Division Six; Hon. Devon Lomayesva, Judge of the Superior Court of California, County of San Diego; Hon. Kimberly Merrifield, Judge of the Superior Court of California, County of Butte

**Ann Gilmour:** Hi, everyone, thank you for joining us this afternoon, and thank you for your patience. My name is Anne Gilmour. I'm an attorney with the Judicial Council of California in the Tribal/State Programs Unit. Pleased to welcome you for our panel discussion this afternoon on the Indian Child Welfare Act: Judicial Best Practices, Tips, and Tricks for Avoiding Inquiry Reversal. We have a wonderful panel for you this afternoon. We have Judge Shauna Schwartz, Supervising Judge of the Dependency Court for the Superior Court of California, County of Santa Clara. We have Justice Tony or Tari Cody, excuse me, Associate Justice for the Court of Appeal, Second, Appellate District Division 6. We have Judge Kimberly Merrifield, Judge of the Superior Court of California, County of Butte, and we hope to have joining us, she was experiencing some technical difficulties, Judge Devon Lomayesva, Judge of the Superior Court of California, County of San Diego, and until very recently, Chief judge of the Intertribal Court of Southern California. So, a couple of housekeeping matters. You will be muted throughout the presentation. We may or may not have time for questions. If you have questions as we go along, please put them in the question, and answer box at the bottom, and I will pass them along to our presenters as time permits. You will have received a link to a pre-test from my colleague, Amanda Morris, and you will receive a link to the post-test following today's presentation, and that must be completed if you want to receive educational credits. So, I'm now going to turn it over to our esteemed panelists. Thank you.

**Judge Shawna Schwarz:** I thank you. Thank you, everybody for being with us today. So, some of you may have joined in last week when I did kind of a legal update, and apparently there were lots and lots of questions after that, and Ann actually forwarded those to all of us, so we could see what you were asking. I couldn't look at them while I was doing the presentation, but I'm hoping my colleagues had a chance to review those. What we thought we would do today is, first of all, kind of talk about what the challenges are that we've seen, and then talk about some best practices, and you know I know that each judge whose courtroom you go in does things totally differently, and so it's probably no different from this situation when it comes to ICWA inquiries, and so, we just want to get a sense from from folks, what are some of the best practices? We're lucky, Justice Cody, of course, spent a lot of time in Dependency Court as a Trial Court judge, so now she's seeing it from the other side. So, I think she can also give us a really unique perspective. So, let me start first, and kind of put out there for my colleagues, you know, when you're what are the challenges, you see? You come into court, you do your best to do your ICWA inquiries of your relatives. What are some of the challenges that you've seen when you've done this, and let's start with you, Judge Merrifield.

**Judge Kimberly Merrifield:** Well, some of the challenges, obviously, you might, they might be a little reticent to answer questions about family members or about because what, how we kind of handle it, is we ask about family members, and we ask those questions for two reasons. One, to get individuals that we can follow up on ICWA. Also, it's obviously for relatives and potential relative placement, but they don't understand sometimes why we're asking. I don't want those people contacted. I don't want them asked questions. Why are you asking me about my grandparents who are deceased? You know those kinds of things. In my county, we actually, it's a smaller county, but we have three federally recognized tribes in our county that are active. In addition, too we have, I have cases of tribes that are outside the state, or even outside our county. So, just sometimes the hesitancy to cooperate with that, even though we try to explain this information, we need to to receive.

**Judge Shawna Schwarz:** Okay, and Justice Cody, how about you? Any particular challenges you've seen? Well, first, from your trial court days that you recall. I know there's been a lot of that's happened.

**Justice Tari Cody:** Not that long ago, my, my recollection is, especially at the initial hearing, when a child or children had been removed, everybody shows up in a panic mode. Relatives who want placement, who don't understand what's happening. Obviously, parents who were upset, and and it can get it can be difficult to get them to focus on what you're saying, and especially when you start out with which, according to the statute, you need to start out with at commencement of the hearing, ICWA, and they all look at you like you're speaking a different language. I mean they they don't understand why you're asking them these questions. They're not happy that they have to answer questions like that, when they want to know what's happening with the children where they're at when they're going to visit them. So, my recollection is, it was just it was hard to get them to pay attention, and to take it seriously, and so I really tried to impress upon them, this is something I have to do. Everybody has to do this. I know you're not going to necessarily understand why I'm doing this, but please be patient, and just answer the questions that we'll be asking you. That's what I recall from the initial hearing, at least

**Judge Shawna Schwarz:** And I think we have Judge Lomayesva with us, now having video issues, but she's here. Judge Lomayesva, anything you want to add about this in terms of, you know challenges you've seen, so that we can then turn to like, how do we address these? How do we fix these things? So, maybe she's having audio issues also? Okay? So, I think Judge Lomayesva will join us when she's able to. Let me ask Judge Merrifield and Judge Cody, do you feel like you got information, or do you get information in the detention report in the initial hearing report that is helpful when it comes to the the social worker inquiring of family members and parents?

**Judge Kimberly Merrifield:** I'll start. I think there's some, and you know, it really depends on also the experience of the social worker, right? Because maybe they're newer or and know they're supposed to ask these questions, but maybe forget, maybe don't get too far down the lineage, maybe, are having difficulty because they have parents that are extremely upset or emotional, and so I do get some, but I but that's why it's really important and read it and look at that, but to obviously to sort of continue and focus and and continue to get the information. So,

for the most part, they're pretty good about starting that initial conversation and trying to get as much information as they can and putting that in that initial report.

**Judge Shawna Schwarz:** Justice Cody anything to add about that?

**Justice Tari Cody:** I will say, that the county that I was in over time, and I was there for a long time over time, I thought got to be very good at putting in information on ICWA, in all reports, whether that be in an attachment, or more recently there became a second or a separate heading in the reports on ICWA. So, I felt like I was getting a lot of really good information, and it was more than boilerplate it it wasn't. It didn't look like it was cut and pasted for an earlier report, especially at the beginning in the detention reports. I have to say in my current job, sometimes some of the reports I've seen do look more like cut and paste that people, especially in the later reports where it doesn't look like for follow up, or additional people have been asked, they just cut and paste what they put what was in the earlier reports, and then put it in a subsequent report, and so I think sometimes it gets overlooked.

**Judge Shawna Schwarz:** And can I just confirm Judge Merrifield, do you? Are the parents always submitting the ICWA-020, at the detention or initial hearing?

**Judge Kimberly Merrifield:** For the most part, yes, as often as possible. I don't know if I use the word always, but definitely, always always trying to do that, for you know the ones that are there for the initial you know. Sometimes I've had to have them on the phone. Sometimes they're in the hospital. Sometimes they're out of the area, unable to get to court, and of course I just want them to participate in any way that I can, but you know I think we can always do better, and making sure we're following up on that for every subsequent hearing and double checking that we have that information, but yeah, we definitely do try to get that, and the social workers are trying to do that out in the field as well, I've noticed that as well.

**Judge Shawna Schwarz:** I feel like the ICWA-020 form, it's the jumping off point now. I mean, it's the starting point, whereas, you know, if we remember back before 2019, when the law changed, I felt like that was the be all end all it's like, oh, the form says, no heritage, we're done, and now it says the form says no heritage, but and that's the starting off point as opposed to the end point.

**Ann Gilmour:** We had a comment in the Q&A about the earlier discussion, saying, "are there ways to explain to the families the nature of the protections under the Indian Child Welfare Act to help them understand? Are there some tips or helpful ways to explain, so that people who are in this panic mode at the first hearings will be a little more forthcoming?"

**Judge Shawna Schwarz:** You know, one of the things I do is, as I say, not only to the parents, but to the relatives, there's a special law. It's a federal law that requires we determine if children have Native American, or American Indian heritage, and the way we do that is by asking the parents, and then I acknowledge that they've already been asked before, so I know the social workers have already asked you, but the law requires that when you come to court. I ask you personally. So, I I say that I must say it, you know. I'm sure any attorneys from my county who are listening are like, oh, my God! We hear her say that all the time, but that's exactly what I do

is just to give them a little bit of framework. Judge Merrifield, anything you want to add about that.

**Judge Kimberly Merrifield:** No, I would, I would agree with that, and and again, I think with, because we do have a lot of ICWA cases that it's not unusual, and I mean with obviously with parents that aren't familiar with it in our court, you know, I just again maybe not the exact same words, but explain to them this is information we're required. I explained to them, it's about Native American ancestry or American Indian ancestry, paternity questions, relative questions. These are all questions. This is information we're required to have. Please cooperate, answer them to the best of your ability, you know, just try to and say it, you know, trying to very calm explanation as to why we're asking you these questions.

**Judge Shawna Schwarz:** Oh good, Judge Lomayesva has joined us. I'm not sure how much you've heard what we've been saying. If you want to add on any, add on to that.

**Judge Kimberly Merrifield:** Oh, we can't hear you. She's having microphone issues.

**Justice Tari Cody:** Yeah, it's too bad that we can't hear her, because I'm sure she'd have a good response to your question.

**Judge Shawna Schwarz:** You're unmuted. But I think we did not hear anything. Still, how about, okay. So maybe you'll keep working on those the issues with your audio.

**Justice Tari Cody:** I think one. If you don't mind my jumping in, I think one of the things you might be able to tell the family and the parents at that first hearing, and I know when you do it remotely, that it just makes it that much harder, but maybe I know you're also trying to handle 25,000 other things at that hearing, but just emphasize that this could be a real benefit to you. If we determine you, your children or your child has Native American ancestry, so we need to find out if he or she does so, that we can see whether they qualify for these benefits.

**Judge Shawna Schwarz:** Yeah. You know, one of the things that I found is helpful, too, you know, and Justice, Cody, you certainly acknowledge we've got 25 other things to do, especially at an initial hearing, is you know, I take care of three things before I even hear from the lawyers, which is, you know, the the address form, ICWA and parentage, and I do that because once everybody starts going, it's like you're off to the races, and then you have your arguments about return, and your arguments about you don't have a prima facie, and your arguments about you know harm to the harm of removal, and and you start getting into the weeds. And so if you take care of these things up front, I think I that's probably the best opportunity to really elicit the information that we need, and I think Ann's just gonna jump on in. And when we.

**Ann Gilmour:** Yeah, you can tell me, but so we have someone, well, there's a couple of questions, but one, I think, relates specifically to a conversation you just had, which is, how do you handle it? If parents refuse to fill out the ICWA form?

**Judge Shawna Schwarz:** Okay, I will tell you. I've never had anybody refuse to fill it out. They may refuse to provide information about other relatives, but I've never had anyone refuse to fill out the form. What about the other judges who are online? Go ahead and jump in.

**Judge Kimberly Merrifield:** Yeah, I don't think I've had them refuse. I suppose if they did, I might just, and I don't like putting things off like that, because then you might forget, but it would be one of those things where we'll listen at the next hearing. I need to make sure that I have that, if you want to go over that with your attorney, you know, but it is really something I have to have, and then just make a note that it needs to get addressed, because there's a lot of you know things going on, and emotions going on, but following up, and just making sure you get. It might be one way, just trying to get them to buy in that we need that.

**Judge Shawna Schwarz:** You know, and the one thing I've done when I have, for example, youth who refuse to fill out a TLP is we're in the courtroom. I say, okay, I'm going to pass the case until that's done, and because I usually have plenty of other cases to do to give them an opportunity to go talk to their attorney about why they want to go ahead and fill that out. A little heavy handed, but.

**Justice Tari Cody:** I guess the other thing you could do. it depends on why they're not filling out the form, but you also could just answer, ask the questions on the record, because, if there are interested parties that have come to the hearing, relatives sitting in the back of the courtroom, that you're going to have to ask, anyway, you can ask questions. Ask those questions on the record, and sometimes I would just use the 020 form as a script. Asking questions of everybody who was there at the hearing. Now, obviously, if they don't want to fill out the 020 form, they may not raise their hand when they're supposed to be answering a question, but at least you've made your record.

**Judge Shawna Schwarz:** Do you have you have the relatives fill out the 020 also, or did you?

**Justice Tari Cody:** No, but but, I would use that as a starting point, when I start asking questions of everybody in the courtroom, and rather than ask everybody individually a question, I would pose questions in a yes or no way, so that if there was a yes, answer everybody, raise your hand, and then I would go to them and get the information I needed.

**Judge Shawna Schwarz:** And I think one of the things you're going to hear from Justice Cody, who, you know, used to be Judge Cody, did this on a daily basis, and then it's now Justice Cody, and probably sees it on a daily basis on the appellate level, is about making a record, and if a parent is refusing to fill out the form, make sure it's clear on the record that the you know the parent is refusing to fill out the form, or, you know, refusing to provide information, whatever. So, make sure you've got that record protected. you know, one of the okay. So, we've kind of talked about one of the tips, I would say, is, you know, handling ICWA upfront before, because people forget, and I certainly have have been guilty of that once you start delving into the substantive issues. Also, I think, and I can't remember which of my colleagues here mentioned that you know, it's emotional. People get emotional. So, sometimes handling, you know, I mean, if you say no, I'm taking your kid away, today I'm detaining your kid, and you've got somebody who's in tears. That's not the best time to be asking questions about the Indian Child Welfare Act. So, I find usually asking upfront is much more helpful, and I don't know. Judge

Lomayesva if you have audio yet and want to give us want to give that. No, okay. So, obviously, we've got challenges in gathering information at our first hearing, but that's not the only challenge we have. You know one of the things I will tell you that I have a hard time with, is the law requires that we ask every participant at their first appearance, and that means you have to have a way of knowing if it's somebody's first appearance. How do you know? Do you have a way to keep track? Judge Merrifield or Judge Cody? Did you have a way, or do you rely on your attorneys to tell you somebody's making their first appearance? Any hints about that?

**Justice Tari Cody:** I tried to come up with a way. It was pretty ineffective. Just creating a table of who showed up and names, and there's just too many other things I had to do.

**Judge Shawna Schwarz:** A table on paper.

**Justice Tari Cody:** Yes, I would just staple it to the inside of the when we had paper files.

**Judge Shawna Schwarz:** Right, but now we don't have paper files.

**Justice Tari Cody:** No, so.

**Judge Shawna Schwarz:** I don't think our case management systems that are used throughout the state were created with dependency in mind, so they don't have a whole section just on ICWA.

**Justice Tari Cody:** So, I just I you can never ask too many times. So, if you want to err on the side of caution.

**Justice Tari Cody:** Even if somebody has come to a hearing before, and you forgot, you can always ask. Did I already ask you these questions? Were you here before? And you know that there's no reason why, if you can't remember and they can't remember, ask them again.

**Judge Shawna Schwarz:** Judge Merrifield.

**Judge Kimberly Merrifield:** Yeah, I would. I mean, I would agree with that, because a lot of times they do. You know they do. The grandparents show up a little bit later, and I do know. So, as I indicated, we we do a pretty significant relative question, and when, in the beginning, in addition to asking about relatives taking down their names, their relationship, and their phone numbers, and a staff member from children's services will call them afterwards and ask them about ICWA, and do a table as to who they are, and and if they didn't answer, you know they keep a they write, didn't answer wrong number, you know, but if they did, and what their answers were, and so just when they when they show up, though, you know, still asking those questions, I don't necessarily go back through all the reports or the tables that they've attached to see if they've been asked yet. It's just a good idea to ask them, and and anybody I mean, like sometimes, you know, dad doesn't show up, but his parents do, or his sister does, or even his girlfriend, and it's like, do you know, if he has any Native American ancestry, or even non-related extended family members? I've done that before. There was a, you know, child who had a guardian who wasn't related, but a good friend. Hey, do you know, I mean, you just ask just anybody that shows up. Do you have any knowledge or idea of it? It's it's possible you never know.

**Judge Shawna Schwarz:** Well, and of course, the code says we have to inquire of all participants, which is not defined. So, I'm with you. I asked a football coach the other day. You know, this conversation, though, presupposes that we know exactly who's in our courtroom, so do you have a method to keep track of who actually is walking through the door for each case and what their relationship is?

**Judge Kimberly Merrifield:** I, I ask every single person who comes in. Who they are, what their name is, and what their relationship to the child is. Yes.

**Justice Tari Cody:** Same thing.

**Judge Kimberly Merrifield:** Yes.

**Judge Shawna Schwarz:** So, we have, and I will give credit where credit is due, you know, we used to have a board that people signed in on, and then covid hit, and we were remote, and one of our children's attorneys said, hey, can we create a google sheet? And so, we have an online method where people circle when they're ready, and there's a section in there for them to add the names and relationships of the people coming into court, and it's so incredibly helpful. Andrew Kane, from Lacey is the one who spearheaded it, and it's one of the reasons it's amazing is I can see it, and I have the relationships, but also the clerks can cut and paste that information directly into the minute order. So, we're not doing the whole what's your name? Spell it. Wait! Did you say that as z or t, and we're happy to share this with anybody, and basically all of the attorneys have links to this sheet, and so they, and and we have a culture. Thank you. Folks in Santa Clara County, a culture of everybody, kind of cooperating and participating to provide that information, so that we know who's sitting in the back of the courtroom. And of course, when we call the case, you know, we mentioned the name out loud on the record, and make sure that that person is there, and that some other extraneous person has not walked in from Drug Court downstairs into our Dependency Court, but knowing who's in the courtroom, of course, is kind of the first step here. So, yeah, and having a culture where everybody is willing to do that, you know, and the other thing I will say, when it comes to knowing if it's somebody's first appearance or not. Just the other day I had one of the attorneys in the courtroom, say, your honor, I believe you know the paternal aunt is making her first appearance. Did you want to ask her about the Indian Child Welfare Act? And I'm like, oh, thank you for letting me know, and everybody sort of having this perspective that we're all in this together. And I mean, I don't know about you other judges, but I'm okay with the lawyers, making sure I don't make a mistake. I mean, I really appreciate kind of those reminders. Your honor don't forget! I'm like, oh, yeah. So, that's always helpful, too.

**Judge Kimberly Merrifield:** Oh, I agree, I think it's the record belongs to all of us, okay.

**Judge Shawna Schwarz:** Yeah

**Justice Tari Cody:** And I, I would add, your JA.

**Judge Shawna Schwarz:** You would add, what oh.

**Justice Tari Cody:** Yeah, hey, your judicial assistant can say, “your honor, we better do, ICWA, you know”, and and count on them to also remind you.

**Judge Shawna Schwarz:** So, when you say your JA, your judicial assistant, I have a clerk. Is that who you're referring to?

**Justice Tari Cody:** Yes, yes, clerk.

**Judge Shawna Schwarz:** Because my clerk does not know the substantive law when it comes to that sort of thing, and I can't imagine my clerk ever making that reminder, but I guess it depends on your court, and how your court is set up, but that's an interesting point, so I certainly count on the attorneys to remind me, so that I don't forget these things. Okay, other tips that you all have about kind of things we can do to make sure that we're doing it right. Some of the questions that came from the last.

**Judge Kimberly Merrifield:** Yeah, so don't just ask in the beginning. So, their cases can move, and in different ways. So, for instance, I am, and this is unfortunately happened, seems like recently, so you you might have sent children home under a family maintenance, and then I've had to remove again, for whatever reason under 387, a protective custody warrant, or there's been another detention from law enforcement, and you're back and you removed. I think you ask again, and I did that just yesterday. Hey, is there any? Do you have any new information in relationship to any Native American ancestry since we last asked you those questions, and I think it's the safest thing to do, and again, especially in a county of mine where there are tribes I don't know, and so I do that. I make a regular to continue to ask, especially if the posture of the case has changed. So, just kind of always keeping that in mind, because you never know if there's been new information received. I mean most of the time, probably 99% of the time, it's they say, no, I don't have any new information, but you just never know.

**Judge Shawna Schwarz:** You know, that's an excellent point, and I think sometimes we get tripped up. If if there's no removal, in the first place, right? It's an initial hearing, you know, we're not as worried about the Indian Child Welfare Act. Our practice is to do it anyway, because if there is a removal later on, it's so easy to forget. I think the other thing that we get tripped up by, is that parents who who join the process later in the game. So, we do our initially, our inquiries way in the beginning, and then we've got some dad joining us at 6 months, and that slips through the cracks, and then I think the other thing that I don't think all of us, and I will be the first one to admit that I have kind of screwed this up very recently. No matter if you've done everything right through the entire case, when you get to the .26, you have to do it again right? And we just, I mean, was it? I can't remember Dezi C. or Kenneth D., one of those two basically said, you know, you've you've got to ask again at the .26 hearing. You've got to make your record, and it's got to be not an implicit record, right? It's got to be explicit to put out there again before the before you go forward on the .26 hearing, and I think sometimes those things just get, they slip through the cracks a little bit.

**Justice Tari Cody:** One thing you could do to protect your record, and also protect yourself, is and the code requires this, but I think sometimes people forget is when you ask, and you get answers every time you ask, follow up with, if you subsequently receive information that's different than what you told. I'm asking you to tell me, or a social worker, and that way, you



know, if you do forget. To to ask again, at least you've made it clear, you've told them. Please tell me if you have different information. In the future, and so that might be something you can rely upon if you forget to do it, at the .26.

**Judge Shawna Schwarz:** Ann and I'm going to come to you in just a minute, but I want to make a point, and and ask, you know, certainly. Judge Merrifield, you say you ask at every single hearing, and I'll say I you know I'm not asking all the time at the 6-month review.

**Judge Kimberly Merrifield:** Not every single hearing, but any, you know, when it there's been a subsequent significant change in posture of the case, for sure.

**Judge Shawna Schwarz:** Okay, because the point I was gonna make is, I don't know about you, but my calendars are crazy busy these days, and you know I'm trying not to go too fast, but I feel like I don't always have the time to do as thorough of an inquiry as as I think is contemplated by the law. So I was, gonna ask if you had any input about that or any suggestions, but it sounds like you, you're balancing that, too.

**Judge Kimberly Merrifield:** Yeah, I'm balancing it as to where it's at, but I also think another good tip, which I don't always do, but I think I'm definitely going to start doing, and I think you talked about like, if you are at a .26, or you know you're heading that way, that you double check. We should all be looking through our file and making sure we've addressed the Indian Child Welfare Act, you know, especially if there was, you know, have we ruled it out? Did did there was there indication that there was tribes? Did the notices go out? You know, and I think we've talked about or heard about that. Sometimes people do, you know, hearings just to deal with the Indian Child Welfare Act, and I know our county does that sometimes if if we've gotten to disposition, but we've sent out all the notices. We didn't get all of the responses back. The the county will sometimes file motions to rule it out, and they will list everything that all of the notices that went out the dates. They went out, you know, and asked me to rule on it. There was a motion on that today that on two cases that I ruled on. So, you know, just making sure it has been addressed, so it does not slip by, especially when you know you're heading down. That looks like that path.

**Justice Tari Cody:** And making sure the record shows that you've addressed it, which is what I think you're saying, and coming back to the record. I found in my current assignment, not infrequently, what is in the report, is not the same thing that's in the minute order, and it's not the same thing that's on the transcript. The report, it happens, and they might all be different. They might be conflicting, and I I know that I, as a practice didn't always look at the minute orders that were prepared out of my hearings, but it certainly is something I know other judges do in other types of cases. So, it is a possibility that you could check your minute orders to make sure that they reflect what in fact, happened at the hearing. Sometimes the social workers report will say that a finding's already been made that hasn't been, and then it carries through to later reports, and everybody forgets about it. I've seen that so, and it really ends up falling on the judge. Whoever's sitting on the bench to clean it up and make sure that you, in fact, have addressed it, and the record reflects accurately that you did.

**Judge Shawna Schwarz:** So, you know Justice Cody, let me ask you something, because I posed this question to some of the appellate judicial attorneys. So, folks who are listening, these

are the attorneys who work for the Appellate Court justices, and they said, yes, please do this. So, I've gotten into the practice, you know, and I here, we are at a hearing, and I say to county council, what ICWA finding are you asking me to make today? And they make the record of why I'm making that finding, and then, I say, I'm inclined to make that finding today. Counsel, do you have any concern with that finding or anything you want to add, and then go around the table to each of the attorneys, and they all say, no, no, and I've had appellate judicial attorneys tell me, yes, that's great when you do that, to have that on the record. Does that matter to you? Do you think?

**Justice Tari Cody:** Well, I don't think it matters what parents counsel says to a certain extent, I mean, I think, Dezi C. made clear, it's not. It's not parents, it's not parents' counsel's job now. Of course they shouldn't be misleading you, but I don't know how much you can rely upon if they don't answer, for example, but I certainly would ask county counsel, but I don't know that the record that that's gonna save you. If it hasn't been done properly, but it will, I think, give you more peace of mind if you have somebody on your side trying to make sure that you have a record reflecting that you've addressed the ICWA inquiry properly.

**Judge Shawna Schwarz:** Okay, okay, good to know. Ann has popped back on, and that makes me think there's another question.

**Ann Gilmour:** Yes, I have a couple of questions, actually, but I did want to ask this question about the role of minors and parents attorneys, and do they have a role in ensuring ICWA inquiry? And what can the court expect of them?

**Judge Shawna Schwarz:** Well, if you look at H.A. v. Superior Court, which was a 2024 case out of the, I think, 3rd District. They laid it all out for the role that all of us have, and according to that case, they do have a role, and so I like that case, I think it's great. You know, saying who has what responsibility, but I think it does make clear that we all have a responsibility here, so I believe they do. I don't know what my colleagues think, and I don't know Justice Cody, if you're allowed to comment on other appellate cases, whether you agree or not. But

**Justice Tari Cody:** I just think you have to be careful after just I think you need to be careful if you're going to rely on parents and parents counsel too much. Clearly, they're officers of the court, and they have a role not to mislead you, but but they're not obligated to gather that information from their clients. As far as I can tell, it's really up to the court and the social worker, or the agency.

**Judge Shawna Schwarz:** So, you think Dezi C. kind of put the kibosh on H.A. v. Superior Court.

**Justice Tari Cody:** You know, I don't know for sure, and maybe shouldn't comment on it, but it just seems to me that Dezi C., really did emphasize that it's not the role of parents, and therefore they're counsel to make sure ICWA inquiry is done properly.

**Judge Shawna Schwarz:** But it is their role. Don't you think? Oh, go ahead, Judge. It sounds like you've got audio now.

**Judge Devon Lomayesva:** No, please finish your thought, and then I'll come back to me. Now that I can hear you. Thank you so much.

**Judge Shawna Schwarz:** Sure. Well, I just feel like well, obviously, I agree what Dezi said. It does seem like the the parents and children's counsel have an obligation to you know, provide whatever information they do have, and certainly not hide information. And I and I would ask them, too, if if they see that I have made an obvious error that I would want them to to point that out and to let me know. So yeah.

**Justice Tari Cody:** Certainly, would want that, yeah, and like, like your court when I was in dependency, we really were a team. So, nobody was going to mislead me, and we would talk it, or we would hold team meetings, and we would discuss these issues and what I was expecting and what I was hoping I would get from them. I just, I'm just not satisfied after Dezi C. that they're obligated to do much more.

**Judge Shawna Schwarz:** Much more than what. So, what do you think they are?

**Justice Tari Cody:** Respond respond accurately or properly to your questions.

**Judge Shawna Schwarz:** Okay.

**Justice Tari Cody:** I don't know that they have to volunteer information. I mean, you can ask them directly on the record. Do you have any? If they say no or refuse to answer, you've made your record. But I don't know that you can say go out in the hallway and interview your client. Let me know what they say about ICWA. That might be pushing it a little bit far.

**Judge Shawna Schwarz:** Okay, Judge Lomayesva, and I'm sorry, am I pronouncing your last name, right?

**Judge Devon Lomayesva:** Yes, Lomayesva, perfect.

**Judge Shawna Schwarz:** Lomayesva, okay.

**Judge Devon Lomayesva:** And my apologies for missing a lot of the questions, but I think just you know, I have not been a practitioner of dependency matters on the Superior Court Bench. However, I think to provide some context from a tribal perspective in practicing, in Dependency Court, and as a Tribal Court Judge that had a number of dependency matters transferred into Tribal Court, I think there's a couple of things that lead up to, you know, kind of this higher level of what we're talking about here is, you know, inquiries and documenting the record, but kind of everything before that, you know, and what I can't emphasize enough is the training, and unfortunately, a lot of this falls on the agency because they're the they have the interaction, and there's many, many ways that counties can increase the likelihood that native people are going to, in fact, say that they are native people, and you know every county is situated differently, as you know we know not every county has federally recognized tribes, but but you do still probably have a native person that's subject to ICWA in your county, even if they're not from a California tribe. So, you know, every county could potentially have native people, as we know, and I think that the counties that have been, I don't know if most successful

is the word, but they had the best rapport with tribes are those that take efforts at the beginning before there's cases to understand the tribes in their area, to understand tribes generally. I've seen so many successful models with local tribes, with MOUs with the county, the judges that take the time to do webinars, such as as this to to have the training because it takes a little bit of learning about history. It takes a little bit of learning about the legal history to I think, to have to not forget this inquiry, whether it's a checklist or whatever works for you as a judge. I know there's, I'm finding there's so many resources within the Superior Court, and checklists are great, so you don't forget to make those inquiries. And and just another thing about native people generally, you know, it's it's sometimes how you ask the question, and just as an example. with some efforts that when I was in my Tribal Court Judge position, with here in the Superior Court in San Diego, we developed a partnership, and in that partnership realized that the probation department could probably do a little bit better of a job in inquiring into native ancestry, and it was more than just saying, are you an Indian person? It takes more than that. Do you live on a reservation? Do you live near a reservation? Do you receive Indian health services? And you know, when you're in a position where your children are potentially being taken away or are being taken away, you know, some questions are not going to be answered for many, many reasons, and that could be that they don't want the tribe involved because fear of reprisal, fear of embarrassment in their own community. Fear of, well, I'm going to have another entity that's going to be watching me. So, it's not just because they don't want to say that they're Native American, and so I think we have to think broader, and there has to be a goal to truly understand tribes' perspective. In order to make this inquiry perfect, because, as we've heard here, you know, it's not completely clear what the obligations are of all the attorneys or the judges, other than consistently asking every single time, and every time a new relative comes on board, and sometimes that doesn't seem that it's it's happening. So just some perspective from the tribal point, and I hope that you know, as as we work along with tribes, that that will be more of an open door to familiarize, you know, the Superior Court bench and the tribes, and and for parents to realize that tribes are not here to take children away. Tribes are here to be a partner. They're entitled to be here as a partner and can offer additional resources, and I think sometimes when that it's put that way, that the tribe can help with resources. They help with every part of the family, not just the Indian part of the family. If it happens to be a family where there's only, you know one native parent, you know, most tribal social services programs are there to help the family stay together, and things like that being communicated early on, I think could avoid a lot of the things that we're talking about now. Thank you for the time.

**Judge Shawna Schwarz:** Thank you. Okay, you know, let me let me throw out kind of what I think is I mean not an uncommon situation and kind of get everyone's input on that, and that is, there you are in court. You ask Mom and Dad, mom, and dad, and you know, mom says, yes, I have, and she lists some tribe that she believes she's related to, and there's grandma in the back of the room, and you ask her, and she's like no, I don't know where she got that from. I mean, what do you do with that? Do you say grandma's the the final kind of has to say, or you know, do you say, social worker, go out and keep asking people? I mean, I feel like now, with further inquiry, that they should keep asking, but it's always interesting to me when you have a parent that has a particular perspective, and nobody else in the family has that same information.

**Judge Kimberly Merrifield:** So anytime what we do anytime, whether someone disagrees or agrees, anytime someone says I, yes, I think it's this or that. There's always a follow up

question. Well, where did you get that information? Who did? Who told you that? Where did you receive that? And normally, you know, then they say, well, my dad said this, or my grandmother, or you know, and so always always asking the follow up question. and then if somebody disagreed with it, which I think has happened, but sometimes it's usually it is. It is that right? So, it might be yeah, my dad's, you know, told me this, and maybe dad, and you know the parents, parents are divorced, and me, you know, and mom saying, oh, that's not I mean you can't, you can't rely on that. So, I think you still, you know, continue the tree and continue the inquiries, and and we do do the we don't just ask. We start out if you have any Native American ancestry, but we do ask that. Have you ever received tribal benefits? Have you ever lived on a reservation? Has anyone in your family ever done that? Because again, we have reservations here that people live on, but we we ask that we ask multiple questions about you know heritage, and I think that's important to do as well about asking any of benefits, but we always ask anytime. Anyone says, yeah, I think I'm Cherokee, you know, cause or something like that. We say, where did you get that information? Why do you believe that?

**Judge Shawna Schwarz:** So, what are you doing about the DNA tests that show they're 3%, native?

**Judge Kimberly Merrifield:** Yeah, the the 23 and me. Yes, we've heard that, too. We just go, okay. I mean, what tribe with that? And I think you have to send out the I think you send out, you know, and we just ask all the family members because you fill out that you know the form, the 030, that sends out all the information. You just get as many of the the tree that you can. I mean, we ask about grandparents, even if they're deceased. Where did they live? I mean, we ask that we try to fill out that form as as much as possible that gets sent out. So.

**Judge Shawna Schwarz:** Now I thought I read I mean, there's certainly a case on point, but I thought I also read an article once that was saying that the tribes are not necessarily interested in a DNA test that, says somebody, is 1.4% native. If there's no other information about the actual heritage or kind of the cultural connections. Judge Lomayesva said, can you comment on that?

**Judge Devon Lomayesva:** Sure. I think if you go to these sites, which many of us have just out of curiosity to see kind of what's there. Most of them, or there's only a few, they do specifically state that, you know. If your DNA test indicates that you have Native American ancestry, that that's not, you know, something that could be used as definitive proof that you're connected with a federally recognized tribe or or any tribe, for that matter, and tribes have seen an influx of enrollment inquiries since these tests have become available, and honestly, there's no tribe you can't. It doesn't make sense. You can't do DNA to say I'm from the Iipay nation of Santa Isabel. It doesn't exist, and so it's created many, many problems for people that now identify as Native American, based on a DNA test which it's impossible to connect someone to a tribe in that manner. So, most tribes, you know, they require much, much more than that for enrollment, including family trees for the most part, and, as you all know, tribes have the absolute right to determine their own enrollment. Some tribes do require DNA, but they require DNA with a parent to ensure that there's that blood relationship. So that's very different use of DNA than the DNA we see in these ancestry tests.

**Judge Shawna Schwarz:** So, you know, let me ask you this those of us who are, you know, doing dependency on a day-to-day basis, and we're doing these inquiries. Is there ever a time at the initial hearing where you hear from the parents, and they say, no, no, and you say department, don't even ask the extended relatives, like we're done today.

**Judge Kimberly Merrifield:** No.

**Judge Shawna Schwarz:** And even if both parents say I'm from mainland China, my whole family is from mainland China. I mean, is it a good use of time to say, keep asking relatives at that point?

**Judge Kimberly Merrifield:** I think you still have to keep asking. I think you just don't know. I think the law requires. I I would keep asking you just don't know.

**Judge Shawna Schwarz:** And I, we probably can't have Justice Cody weigh in on that given her position, but I'll tell you, I mean I have, I have said no, we're, I've said you know what I don't think there, there's no reason to believe I think, based on what I know. There's no reason to know, I'm not ordering any further inquiry, but, department, I know you're gonna do whatever you do. So, I know.

**Judge Kimberly Merrifield:** I think I think that's an individual. I I'm not necessarily saying what you're saying is wrong, either. I think it's a.

**Judge Shawna Schwarz:** Interesting. Okay, well, I well, I I will just say I've done it a number of times. So maybe the 6th district is going to have that issue. Come up and let us know if I'm if I'm right or wrong on that. Ann, you have something to add or...

**Ann Gilmour:** Well, I have some questions. Practice questions that people are struggling with, so I thought I'd pass them along, get thoughts. One is about the ongoing information in the reports and the comment that was made earlier, that, you see records that are just copy and paste from earlier reports, and so the question was, would you, would the courts rather have the entire history of ICWA be in each ICWA inquiry be in each report, or should they only be updating ICWA information that occurred during that report porting period. Thoughts.

**Judge Shawna Schwarz:** That's an excellent question. You know, I I think what might be helpful is having the whole history, but then a preface, you know, from the such, and such report, this is what we knew, and then here's what we know today, because, frankly, now that we're paperless, I mean, it's harder to go back and find the exact information you need in a report. I mean, it's possible, but it's a little cumbersome. So, I think, having the information, but making clear, this is from the Jurisdiction Disposition report, and this is from what we knew at the 6-month review, and this, now we're at the 12-month review, and here's here's the additional information we know. I mean, I think, for me it would make it easier to sort of see historically kind of where we are, but that you know.

**Judge Kimberly Merrifield:** Yeah, I would agree, and maybe highlight or bold, what if there's new information? But the new stuff is, you have the old stuff there, so it's all in one spot. Then you don't have to jump back three reports.

**Judge Shawna Schwarz:** Just helpful. Yeah.

**Ann Gilmour:** And I will say I've been done some court observation, where I observed some a judicial officer going through the report that was submitted by the agency and saying you mentioned this relative here and I has that ICWA inquiry been done of that relative? How how realistic do you think that is in your courtrooms to be able to have that level of attention?

**Judge Shawna Schwarz:** I don't think it's realistic. I mean, I'm I just, I don't have that kind of time on the record for every single case. Yeah, and I'm aware of the case law now that says like, oh, my gosh, you're already asking. You know the department's asking them about placement. How come, they talked to this relative over here in Wisconsin about placement and the facts underlying the petition, but didn't even ask about ICWA. I'd probably miss that I, yeah.

**Justice Tari Cody:** I don't know that all agencies do this now, but the agency that I worked with before they literally created a table where they had the names of the the relative. I can't remember what all the columns were, but so that if it was brought forward into later reports, you could see who was asked. So, if you had that table and you suddenly run across a name that I realize it's not always realistic for the judge to see that, but you might. You might read a report and see under some discussion unrelated to ICWA, a name you don't really recognize, and you can flip back. Well, I don't know how you do that on electronic records, but somehow flip back to the ICWA table and say, wait a minute. They're not on here. Yeah, I certainly think it would make it easier.

**Judge Shawna Schwarz:** And I would just say, Justice Cody, I'm very detailed, and I pay a lot of close attention to my reports, but I am probably not going to notice that the name of this one person is not in the table that lists 23 other people. I'm and I I can't think that I would have time.

**Justice Tari Cody:** You might.

**Judge Shawna Schwarz:** To look at that, I'm just, I don't know, Judge Merrifield.

**Judge Kimberly Merrifield:** Yeah, I mean, I think it's best practice to do that, and yeah, I mean, it just depends on how well you get to know the families, too. Sometimes, I mean, you know, as we know some, we get to know some better than others, but I'm trying to definitely pay attention to a lot of that, because, especially with relative placements and getting to know whether they've been asked, I mean, that's been an issue that's been coming up, too. So.

**Judge Shawna Schwarz:** You know, and I will say, though, that I agree having a table for the ICWA inquiry is really helpful. I mean, maybe we need a table that has the list of relatives, and then, the columns, being, you know, talked about the circumstances of the case, talked about placement, talked about ICWA, and you know I have not seen a table like that before, but I think that's what I would have to see to know that like. Oh, they talked to them about everything, but not ICWA, but otherwise it's I'm probably not gonna. I'm gonna struggle to have that sort of information, that level of detail at my fingertips.

**Judge Kimberly Merrifield:** Yeah.

**Ann Gilmour:** But maybe, as you head into a .26, hearing that you would pay particular attention to that.

**Judge Shawna Schwarz:** Yes, but, Ann, as you know, as the comments I gave the other night at the the judge's dinner, yes, I would like to think I would remember, and I think I need to put a post it on my bench. Don't forget ICWA at .26.

**Ann Gilmour:** So, we have another couple of questions, suggestions in the comments, which is it when you have parents who are not wanting to answer your questions, do you swear them in and ask them under oath?

**Judge Kimberly Merrifield:** I have not. They're not gonna fill out the 020, maybe, because you, signing that under penalty, perjury.

**Ann Gilmour:** Yeah, I I guess that, and another question. If you, if something comes back after reversal, do you ask the parents counsel if they have reviewed the new documents, re ICWA inquiry, and whether they have any objections at that point?

**Judge Shawna Schwarz:** I have not, and now that I'm hearing what Justice Cody says about her interpretation of Dezi C., I'm not sure it would make any difference.

**Justice Tari Cody:** It certainly can't hurt. It can't hurt. That's that's the way I look at it.

**Judge Shawna Schwarz:** Yeah. Hmm.

**Ann Gilmour:** A question from a social worker. Would it be helpful if a county created an ICWA attachment that summarizes all family information and ICWA inquiry and responses from forms that were returned?

**Judge Shawna Schwarz:** So, I think yes, but I think, I mean, we've talked about having it in table form. I will just tell you, having 12 pages of text describing the efforts like, then requires me to create my own table, and that's not happening. So, I think if there were, it would be great if it were statewide. If somebody created a table that everybody used. I think that would be immensely helpful. I don't know just, and I kind of see some head nods from others.

**Judge Kimberly Merrifield:** Yeah, ours is kind of a table that they attach.

**Judge Shawna Schwarz:** And I've seen it in some cases, and I don't know if maybe our department is starting to use it more often, but whenever there's a table, it's like, oh, yay, I can see. Wow! They've contacted 23 tribes or tribal entities, and I can see, you know, they emailed, they called, they, you know, in the box tells me the response which I think is really helpful.

**Justice Tari Cody:** One thing, kind of go back to where we started just to remind yourself, I remember having situations where we all realized we hadn't completed our ICWA inquiry, and so we would actually set a hearing for ICWA, but but more important than that, it it would be reflected in the way that we kept our minutes. This hearing is set for ICWA. It wasn't just a follow up hearing, so it might have might have also been set for placement and other reasons,



but it always, if it was for ICWA, it was the title of the hearing, so it reminded you. You still needed to address ICWA, and it wasn't lost in whatever else you were trying to get done.

**Judge Shawna Schwarz:** Yeah, any other questions, Ann, that you think we could?

**Ann Gilmour:** Well, I have a question about making sure the importance of inquiring with extended family, and if people have thoughts on best practices to get that inquiry with those extended family, and to get it into the record, and I think you mentioned keeping track of who's in the courtroom, and what their relationship is to the case. So.

**Judge Shawna Schwarz:** I mean, obviously, we have to ask the folks who are in court, and we rely on the department to ask those folks who are not, and I think it was Dezi C., didn't Dezi C. tell us the relatives who are reasonably available? So, that's kind of some helpful little language there, and I've started now when I say to the department, when you you know your further inquiry of reason of relatives who are reasonably available. So, we'll see if that moves the needle any.

**Ann Gilmour:** So, we have some folks who are mentioning in the chat that they have ICWA compliance and relative contact reports that are separate documents, and I will just say I would invite people to please if you have resources like that, and that includes our panelists today who've mentioned resources to send those to me, and I will. I I gather those, and we put them as resources on our website, and I also want to. We are now at 1:16. So, we're at time. I do want to let all the participants know that we are doing rules and forms this cycle around ICWA inquiry, and what should be done to assist courts in meeting their obligations and ensuring that they have their ducks in a row, so that they're not getting overturned on appeal. Those will be coming out for public comment in the spring, and I will send it to everybody who signed up for this webinar, and I would really hope that you can give us your input, because I think there's some best practices out there in different counties that would be very helpful to share with everybody else in the state, and and get some consistency and thoroughness in this, and so I I think that's really it for questions. We have some specific questions. You know, mother states that she has Cherokee ancestry from her mother and her mother and grandmother say no. Does that end the issue? I don't know whether you have thoughts on that.

**Judge Shawna Schwarz:** I wouldn't pull the plug at that point. I'm, I would want the department to go ahead and reach out to the tribe out of an abundance of caution.

**Ann Gilmour:** I agree with you, I think you have reason to believe, and you should continue. Yeah.

**Judge Shawna Schwarz:** Okay.

**Ann Gilmour:** But I I think we see people are are, you know, struggling with this issue in their practice day to day, and it's gonna continue, I think, to be an issue. And and I hope we can continue to share best practices. I want to thank our panelists for their insights today, and, as I said, I invite all of you who are on the panel today and in the audience today who have thoughts, practices that they'd like to share to please send those to me, and I'll distribute them out to everybody who was on our webinar today, and we'll have them on our on our website.

**Judge Shawna Schwarz:** Okay.

**Judge Devon Lomayesva:** Okay.

**Judge Shawna Schwarz:** Thank you all for attending, and thank you to my the other panelists for being here. Alright.

**Ann Gilmour:** Thank you. Everyone.

**Judge Kimberly Merrifield:** Bye, bye.

**Judge Devon Lomayesva:** Bye, bye.