PAT LEARY
ACTING DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 • *www.cdss.ca.gov*

GAVIN NEWSOM
GOVERNOR

January 16, 2019

ALL COUNTY LETTER NO. 18-140

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
ALL COUNTY CHIEF PROBATION OFFICERS
ALL TITLE IV-E AGREEMENT TRIBES
ALL ADOPTION REGIONAL OFFICES

SUBJECT: **TRIBAL ACCESS TO CHILD WELFARE CASE RECORDS**

REFERENCES: CALIFORNIA RULE OF COURT (CRC) 5.552(a); MANUAL OF POLICIES AND PROCEDURES (MPP) 31-002(c)(5), MPP 31-105; SOCIAL SECURITY ACT (TITLE IV-E) 471(a)(8), (9), TITLE IV-E 471(c); TITLE 20 UNITED STATES CODE (USC) 1232(g); TITLE 25 USC 1911(c), USC 1912, USC 3205; TITLE 42 USC 671(a)(8), (9), USC 671(c); TITLE 25 UNITED STATES CODE OF FEDERAL REGULATIONS (CFR) 23.107; TITLE 45 CFR 205.50(a)(1)(i), CFR 205.50(a)(2); VOLUME 81 FEDERAL REGISTER (FR) 38778, FR 38811; WELFARE AND INSTITUTIONS CODE (WIC) 224.4, WIC 346, WIC 827, WIC 827(a)(1)(A), (E), (F), (H), (K), (L), (M), (N), WIC 827(a)(5), WIC 827(f), WIC 10850, (a), (b), (c), (d), (f), (h)

The California Department of Social Services (CDSS) is committed to protecting the essential tribal relations and the best interests of Indian children by promoting practices in accordance with the Indian Child Welfare Act (ICWA). Collaboration and information sharing between county child welfare services (CWS) agencies and Indian tribes are crucial practices to ensure the well-being of Indian children whenever tribes intervene or participate in CWS cases. This letter provides counties with guidance regarding sharing CWS case records with Indian tribes and/or their representatives. In addition, this letter outlines specific circumstances in which counties shall exempt tribes from incurring monetary fees for receiving copies and/or transmissions of CWS case records.

BACKGROUND

California recognizes there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting children who are members or citizens of, or are eligible for membership or citizenship in and the biological children of, a federally recognized Indian tribe. Meaningful collaboration with tribes is fundamental for compliance with the ICWA. Tribes may exercise their right to participate in CWS cases and referrals both in and out of court proceedings. If the child is an Indian child as defined by the ICWA, the county should share case and referral records with the tribe's child protective representatives in order to achieve meaningful collaboration with tribes and achieve the best outcomes for Indian children. A CWS case record, as defined in the MPP 31-002(c)(5), which also includes records outlined in CRC 5.552(a), and for purposes of this letter, refers to electronic and/or written records for each child receiving child welfare services including but not limited to, the following documentation:

- Emergency Response Protocol (MPP 31-105)
- Case notes documented by the county social worker
- Assessments
- Safety plans
- Referrals made to community-based organizations, county agencies, or tribal organizations
- All documents filed in a juvenile court case (i.e., jurisdiction report, disposition report, 6-month review, etc.)
- Reports to the court by probation officers and court appointed special advocate (CASA) volunteers
- Documents made available to probation officers, CWS workers and CASA volunteers in preparation of reports to the court
- Documents relating to a child concerning whom a petition has been filed in juvenile court that are maintained in the office files of probation officers, CWS programs, and CASA volunteers
- Transcripts, records, or reports relating to matters prepared or released by the court, probation department or CWS agency
- Documents, video, or audio tapes, photographs, and exhibits admitted into evidence at juvenile court hearings

CONFIDENTIALITY

Title IV-E of the Social Security Act mandates that records related to foster care be kept confidential, subject to certain exceptions, in order for states to receive federal funding for foster care and related services to children and their families.[1] Federal regulations also require confidentiality of these records.[2]

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[1] Title IV-E § 471(a)(8) & (c) [42 USC § 671(a)(8) & (c)]
[2] 45 CFR 205.50(a)(1)(i) & (a)(2)

The WIC § 10850, in part, governs confidentiality requirements for social service records. It incorporates the federal requirements for and exceptions to confidentiality of records related to foster care into California law. Specifically, Section 10850 requires that records concerning applications for and receipt of social services be kept confidential. It provides exceptions for inspection of records directly connected to the administration of the relevant social services program and for use in investigations, prosecutions, or criminal and/or civil proceedings brought in connection to the social services program.[3] Moreover, it expressly does not prohibit the sharing of records with other public agencies to the extent sharing is necessary for the administration of federally assisted social services programs.[4] The statute vests in the CDSS the power to make rules and regulations governing the custody, use, and preservation of these confidential records, including the sharing of confidential records among various agencies.[5]

Federally recognized Indian tribes are sovereign entities and thus should be treated equally as other governmental entities. Agencies within a tribe, or officially designated by the tribe to serve the tribe, should be treated as any similar governmental agency in our federal government, another state government or a foreign government. Thus, as needed in performance of their duties, confidential information related to the provision of child welfare services, including investigations into whether abuse, neglect, or exploitation has occurred, may be shared with appropriate tribal agencies under federal and state law.[6]

ACCESS TO RECORDS

The extent to which counties provide CWS case records to tribes will vary depending on several factors which can include whether the tribe has been identified as the child's tribe or whether the tribe is requesting to be a party at the child custody proceeding, all while adhering to the requirements set forth under WIC § 827. Generally, Section 827(a) creates categories of officials, interested persons and entities who have a right to inspect juvenile case records without first obtaining a court order. In 2014, the Legislature added subdivision (f) to clarify that certain tribal representatives fall within several categories of entities entitled to inspect juvenile case records. The relevant interested persons, including those persons serving in a similar capacity for an Indian tribe, who have the right to inspect juvenile case records are:

1. Court personnel (WIC § 827(a)(1)(A) & (f));
2. Attorneys for parties, judicial or other hearing officers, probation officers, and law enforcement personnel actively participating in criminal or juvenile proceedings involving the child whose records are sought (WIC § 827(a)(1)(E) & (f));

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[3] WIC § 10850(a)
[4] WIC § 10850(d)
[5] WIC § 10850(f)
[6] 25 USC § 3205; Title IV-E, § 471(a)(8), (a)(9) & (c) [42 USC § 671(a)(8), (a)(9) & (c)]; WIC § 10850 (a), (b), (c), (d), & (h)

3. The attorney representing the petitioning agency in a dependency proceeding (WIC § 827(a)(1)(F) & (f));
4. Members of child protective agencies (WIC § 827(a)(1)(H) & (f));
5. Members of children's multidisciplinary teams, persons or agencies providing treatment or supervision of the child (WIC § 827(a)(1)(K) & (f));
6. Judicial or other hearing officers assigned to family law cases addressing custody and/or visitation, and family court mediators, persons appointed by the family court to conduct custody evaluations, investigation or assessments, and court-appointed counsel for the child, who are actively participating in the case (WIC § 827(a)(1)(L) & (f));
7. Probate investigators acting within the scope of their statutory or court-appointed duties to conduct an investigation in a probate guardianship case (WIC § 827(a)(1)(M) & (f)); and
8. Child support agencies for the purpose of establishing paternity and for establishing and enforcing child support orders (WIC § 827(a)(1)(N) & (f))

Within the categories of persons or entities entitled to inspect juvenile case records, WIC § 827(a)(5) also identifies a limited number of persons, whether they be tribal, local, state or foreign government officials, who also have the right to copies of the juvenile case records. Of the tribal persons serving in similar capacities to those listed above, only the first four categories are entitled to copies of juvenile case records. The remaining categories of persons remain permitted to inspect the case record, but must seek a court order from the state court to obtain copies of records, just as any non-tribal person not identified in Section 827(a)(5) would have to obtain a court order for copies.

When dealing with officials from the federal government, other states or foreign governments, counties typically verify the individual's right to inspect and/or receive copies of confidential information. Such verification documents the county's compliance with federal and state confidentiality requirements. Similar verification is appropriate when working with tribal representatives and should assure the county CWS agency is meeting their obligation to share information with the appropriate tribal representatives, while not creating barriers for tribes. Counties should confirm the identity and role of the tribal representative similar to that for other governmental representatives, or those serving in similar capacities. Verification can be done in a variety of ways, including but not limited to, providing a business card, official tribal email, signed affidavit under penalty of perjury, or tribal letterhead identifying the person as one of the tribal entities entitled to inspect and/or receive copies of the juvenile case file. It is important that verification is functional and accessible for tribes who are out of state or otherwise at a distance from the county.

Additionally, tribes may participate in CWS cases in various capacities, with a single individual filling multiple roles or multiple individuals in different roles. Participation may include but is not limited to the following:

- Party in a child custody proceeding via formal intervention pursuant to the ICWA (25 USC 1911(c)) and state law (WIC § 224.4)

- Provider of culturally relevant services, including but not limited to input on placement
- An interested person as authorized by the court pursuant to WIC § 346
- Member of the child & family team (CFT)
- Member of the multidisciplinary team (MDT)

Regardless of the capacity of tribal participation, access to information regarding the child, the family, and the case will be necessary for meaningful input from the tribal representatives. It is therefore essential that the county share as much information as possible as early as possible to ensure the best possible outcome for an Indian child.

Reason to Know

The ICWA creates a duty to provide notice to tribes when the party seeking foster care placement, pre-adoptive placement, termination of parental rights, and adoptive placement, knows or has reason to know, the child subject to the proceeding is an Indian child (25 USC § 1912). Proper noticing ensures that tribes have an opportunity to participate in Indian child dependency proceedings. For the purpose of verifying Indian membership or citizenship status, federal regulations require the CWS agency 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" the child's membership or citizenship status (25 CFR § 23.107). A tribe is entitled to the information necessary to conduct the appropriate records review to make the determination as to membership or citizenship status and eligibility of an Indian child.

As noted in the comments and responses to the recently implemented Bureau of Indian Affairs regulations, "While it is true that a petition may contain confidential information, providing a copy of the petition with notice to Tribes is a government-to-government exchange of information necessary for the government agencies' performance of duties. Tribes are often treated like Federal agencies for the purposes of exchange of confidential information in performance of governmental duties. See, e.g., Indian Child Protection and Family Violence Prevention Act, 25 USC 3205 (2012); Family Educational and Privacy Rights Act, 20 USC 1232(g) (2012). The substance of the petition is necessary to provide sufficient information to allow the parents, Indian custodian, and Tribes to effectively participate in the hearing."

The confidentiality laws discussed above are consistent with this observation and permit the sharing of information via notice, even where ultimately the child is determined not to be an Indian child as defined by the ICWA.[7]

EXEMPTION FROM COPYING FEES

Assessing copying fees to tribes is a barrier to both ICWA compliance and to effective government-to-government collaboration. Tribes share the same goals as local child

[7] 81 FR 38778, 38811 (June 14, 2016)

welfare agencies in achieving the best possible outcome for children who must be removed from parental custody. To work with counties to achieve these goals, tribes must have as much information as possible, to the extent permitted by law, to have meaningful participation in the decision-making and service-providing process.

A tribe in which the child is a member or citizen, or is eligible for membership or citizenship, may request and is entitled to access the juvenile case records pertaining to that child which include the records in the dependency court legal file and the CWS case record. When a tribe intervenes in a child custody proceeding, they become a party to the proceeding and are entitled to records consistent with any other party to a case. Therefore, unless the CWS agency charges other parties for copies, the CWS agency should not assess any monetary fee for the provision of records to tribes or their representatives.

Additionally, when a tribe has not intervened but is participating in the proceeding, the CDSS strongly encourages county agencies to refrain from charging tribes for copies or requiring them to bring their own copy equipment and make copies themselves. As discussed above, certain identified representatives of the tribe, in addition to the right to inspect the child's CWS case record, are also entitled to copies of the CWS case record and can do so without obtaining a court order. The county CWS agency should not charge a fee for copies of the records to tribes or their representatives who have the right to obtain copies of CWS case records, unless they charge similar fees to the equivalent county, state or foreign governmental entities.

For the tribal entities which are not entitled to copies but who obtain court orders authorizing them to receive copies, the CDSS strongly encourages the county CWS agency to provide copies of the CWS case record at no additional cost upon receipt of the court order.

If you have any questions or concerns, please email the Child Welfare Policy and Program Development Bureau at ChildProtection@dss.ca.gov or email the Office of Tribal Affairs at TribalAffairs@dss.ca.gov.

Sincerely,

Original Document Signed By:

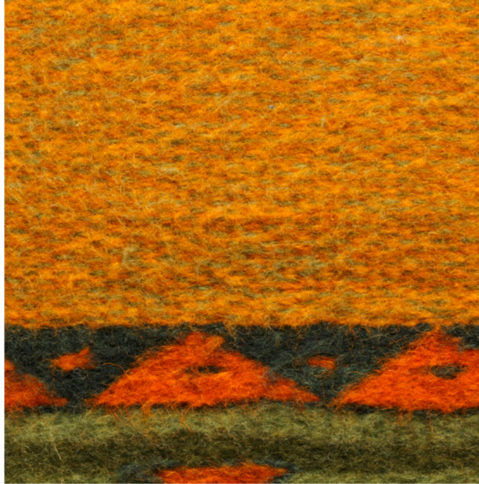
GREGORY E. ROSE
Deputy Director
Children and Family Services Division

c: County Welfare Directors Association (CWDA)

CALIFORNIA TRIBAL FAMILIES COALITION

PERFORMANCE STANDARDS

For Attorneys who Represent Tribal Governments in State ICWA Proceedings



How these Standards Were Created

The workgroup, convened by the California Tribal Families Coaltion, supported by Casey Family Programs, and coordinated by consultant Adrian (Addie) Smith met over the course of six months to draft and review these performance standards which build upon those national standards set forth by the American Bar Association for Children, Parent, and Agency Attorneys in State Child Welfare Proceedings. Members spent countless hours reviewing drafts, discussing areas of disagreement, and improving the readability of this document. Their time and expertise was invaluable.

The object of these standards is to alert attorneys who represent tribal governments to possible courses of action that may be necessary, advisable, or appropriate, thereby assisting the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.

These standards are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the standards incorporate existing standards, such as the Rules of Professional Conduct, however which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all the circumstances presented.

WORK GROUP

PRUDENCE BEIDLER CARR
Center for Children & the Law, ABA

ALEX CLEGHORN
Alaska Native Justice Center

KIMBERLY CLUFF
California Tribal Family Coalition

SHANNON DENNISON
Oregon Department of Justice

LEA ANN EASTON
Dorsay Easton, LLP

TARA FORD
Public Council

KATHRYN "KATE" E. FORT
Indian Law Clinic, MSU

MAUREEN GEARY
MPKGC

MICA LIERANDI
Tribal Legal Development Clinic, UCLA

DONALYN LORENZO-SARRACINO
New Mexico Children Youth and Families Department

MAGGIE MASSEY
Alaska Native Justice Center

DAVID MEYERS
Dependency Legal Services

ANNETTE NICKEL
Pokagon Band of Potowatami

APRIL OLSEN
Rothstein Donatelli

JACK TROPE
Casey Family Programs

JOANNE WILLIS NEWTON
Offices of,

Table of Contents

INTRODUCTION **5**

A. DEFINITIONS **6**

B. ROLE **8**

B-1 ROLE OF TRIBAL ATTORNEY: 8
B-2 BASIC OBLIGATIONS 9

C. FULFILLMENT OF OBLIGATIONS **12**

C-1 GENERAL 12
1. *Acquire and maintain a working knowledge of relevant federal, state, and tribal laws, regulations, policies, and rules, and track child welfare legal and research trends.* *12*
2. *Promote timely hearings and avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit.* *15*
3. *Protect and promote the Tribe's validity as a party and general credibility.* *16*
4. *Cooperate and communicate on a regular basis with other professionals and parties in a case, including the client.* *17*
5. *Protect and promote the Indian Child Welfare Act (ICWA) and any state Indian child protection or welfare laws in the jurisdiction.* *18*
6. *Counsel the client/agency about all legal matters related to individual cases as well as legal issues, and periodically monitor cases.* *19*
7. *Consider alternative dispute resolution, including mediation options, available in the jurisdiction and their role in the client's strategy.* *20*
8. *Advocate for the agency/client's goals and empower the client to direct the representation and make informed decisions based on thorough counsel.* *21*

C-3 COURT PREPARATION. 21
1. *Oversee the processes for receiving, processing, and responding to notice.* *21*
2. *If necessary, obtain pro hac vice counsel in the state of jurisdiction or consider hiring local counsel.* *22*
3. *Assist the Tribe with decisions and filings related to intervention or transfer to tribal jurisdiction.* *22*
4. *Independently investigate the case and/or review the Tribal Child Welfare Agency 's investigation of the case.* *23*
5. *Develop a case theory and strategy to follow at hearings and negotiations.* *24*
6. *Timely file all petitions, motions, and briefs. Research applicable legal issues and advance legal arguments when appropriate.* *24*
7. *Review the state child welfare agency case file.* *25*
8. *Obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and information from the state caseworker and providers.* *26*
9. *When needed, use formal discovery methods to obtain information.* *27*
10. *Participate in all depositions, negotiations, discovery, pretrial conferences, mediation sessions (when appropriate), and hearings.* *28*
11. *Engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available.* *28*
12. *Participate in settlement negotiations and attempt speedy resolution of the case, when appropriate.* *29*
13. *Identify, locate and prepare all witnesses.* *30*
14. *When appropriate, work with the state or county and tribal child welfare agencies to identify and prepare an ICWA Qualified Expert Witness (QEW).* *32*
15. *Check and confirm that proper notice is provided to all parties, including Indian custodians.* *33*

C-4 HEARINGS. 34
1. *Attend and prepare for all hearings.* *34*
2. *Request the opportunity to make opening and closing arguments.* *34*
3. *Prepare and make all appropriate motions and evidentiary objections.* *34*
4. *Present and cross-examine witnesses; prepare and present exhibits.* *35*

5. *In jurisdictions in which a jury trial is possible, participate in jury selection and draft jury instructions.* ... *35*
6. *Request closed proceedings (or a cleared courtroom) in appropriate cases.* ... *36*
7. *Prepare or help prepare proposed findings of fact, conclusions of law, and orders when they will be used in the court's decision.* ... *36*

C-5 POST HEARINGS/APPEALS. ... 37
1. *Review court orders to ensure accuracy and clarity, and review with client.* ... *37*
2. *Take reasonable steps to monitor compliance with the court orders and determine whether the case needs to return to court.* ... *37*
3. *Consider and discuss with the Tribe the possibility of appeal.* ... *38*
4. *If a decision is made to appeal, timely file the necessary post-hearing motions and the notice of appeal paperwork.* ... *38*
5. *If another party appeals, discuss with the Tribe whether to participate in the appeal.* ... *38*
6. *Request an expedited appellate remedy, when feasible, and file all necessary paperwork while the appeal is pending.* ... *39*
7. *Communicate the results of the appeal and its implications to the client/agency.* ... *39*

D. ETHICAL AND PRACTICE CONSIDERATIONS ... 40

D-1 ENSURE THERE IS A COMMUNICATION PROTOCOL THAT INCLUDES A CONFLICT RESOLUTION SYSTEM. ... 40
D-2 UNDERSTAND AND COMPLY WITH TRIBAL, STATE, AND FEDERAL PRIVACY AND CONFIDENTIALITY LAWS ... 40
D-3 INITIATE AND MAINTAIN POSITIVE WORKING RELATIONSHIPS WITH OTHER PROFESSIONALS IN THE CHILD WELFARE SYSTEM. ... 41

E. ADMINISTRATIVE RESPONSIBILITIES ... 43

E-1 OBLIGATIONS OF TRIBAL ATTORNEY MANAGERS. ... 43
E-2 FULFILLING TRIBAL ATTORNEY MANAGER OBLIGATIONS. ... 43
1. *Clarify attorney roles and expectations.* ... *43*
2. *Determine and set reasonable caseloads for Tribal Attorneys.* ... *44*
3. *Develop a system for the continuity of representation.* ... *45*
4. *Provide Tribal Attorneys with training and education opportunities.* ... *45*
5. *Create a brief and forms bank.* ... *47*
6. *Ensure the office has quality technical and support staff.* ... *47*
7. *Develop and follow a hiring practice focused on hiring highly qualified candidates.* ... *48*
8. *Develop and implement an attorney evaluation process.* ... *49*
9. *Advocate for competitive salaries for staff attorneys.* ... *49*
10. *Act as advisor, counselor, and trainer for the agency and leadership.* ... *49*
11. *Implement and lead agency strategy for appeals.* ... *51*
12. *Work actively with external entities to improve the child welfare system.* ... *51*

Introduction

The Indian Child Welfare Act of 1978 (ICWA) protects a tribe's right to intervene as a party in state child welfare cases. Although tribal intervention does not require representation by an attorney, as state child welfare cases become legally complex, more tribes are hiring or contracting with attorneys and new organizations are forming to provide intertribal representation in state child welfare proceedings.

The purpose of these standards is to provide guidance for quality tribal representation in child welfare cases in state courts through the country while recognizing the difference in practice across states and the unique role of representing a sovereign tribe.[1] Many Tribal Attorneys who read these standards will recognize their practice in this document. The standards are meant to improve practice, but also to be realistic and attainable. The standards were written with the help of a committee of practicing Tribal Attorneys and child welfare professionals from different tribes and stakeholder agencies across the country. With their help, the standards were written with the difficulties of day-to-day practice in mind, but also with the goal of providing guidance on best practices for representation when possible. While local adjustments may be necessary to incorporate these standards into practice, Tribal Attorneys should strive to meet the fundamental principles and spirit of the standards.

The standards are divided into the following five categories:

A. Definitions
B. Role of the Tribal Attorney, including a list of the Basic Obligations
C. Fulfilling the Obligations
D. Ethical and Practice Considerations
E. Administrative Responsibilities

Section A includes key definitions for the purpose of this document. Section B contains a list of the standards for Tribal Attorneys for quick reference. These standards are explained in more detail in the rest of the document. Within sections C, D, and E there are "black letter" standards, or requirements, written in bold. Following the black letter standards are "actions." These actions provide additional discussion on how to fulfill each standard. After the actions section is "commentary" —a discussion of why the standard is necessary and how it should be applied. In some instances, a standard did not need further explanation, so there are no actions or commentary attached. A number of the standards relate to specific sections of the Model Rules of Professional Conduct, and the Model Rules are referenced in those standards.

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[1] The drafting committee recognizes that there is often a parallel or complementary role that Tribal Attorneys play in tribal court child welfare proceedings. While this role is equally, if not more, important than the role Tribal Attorneys play in state court child welfare proceedings, these standards do not directly address practice in tribal court.

Representing a tribe is a challenging yet important job. There are many, sometimes conflicting, responsibilities. These standards are intended to help Tribal Attorneys prioritize their duties and Tribal Attorney Managers to supervise and manage offices in a manner that will benefit tribes, support their children[2] and families, and promote compliance with ICWA and the inherent sovereign authority of tribes, tribal statutes, and tribal policies.

A. Definitions

Client - There are several different models of tribal government representation. Under these models, tribal leadership, the Tribal Child Welfare Agency, or the tribal community at-large is the represented entity. For the purposes of these standards, the term “client” is used throughout to signify when the Tribal Attorney should be consulting, preparing, or collaborating with the appropriate tribal entity, as applicable, regardless of the model of representation the Tribe uses.

Child Custody Proceeding - Child Custody Proceeding is defined by ICWA. These standards use the same definition: “Child custody proceeding” includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes: a foster care placement, durable or permanent guardianship, the termination of parental rights, a pre-adoptive placement, or an adoptive placement.

Child Welfare Case - States use a variety of terms to refer to child welfare court cases, including but not limited to Child in Need of Aid (CINA), Child Abuse and Neglect (CAN), Dependency Proceedings, Dependency Neglect (DN) Cases, and Child Protection cases. Further, child welfare cases frequently turn into termination of parental rights proceedings or guardianship proceedings. In order to avoid confusion due to this range in terminology, these standards use the terms “child welfare case” or “child welfare proceeding” to refer to the legal case or cases that occur from when a petition for removal or court supervision of a child is filed to when permanency is legally attained.

Designated Tribal Representative - Depending on the attorney-client relationship and representation model, some tribes will designate one individual who is the Tribal Attorney’s point of contact. Although this individual is not the Tribal Attorney’s client, they are the individual who represents the perspective, views, and decisions of the client.

Indian - Defined by ICWA as any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43.

[2] These standards use the term “child” as a blanket term for all minors—children and youth—who may come under the jurisdiction of a child welfare system.

Indian Child - Indian child is defined by ICWA as any unmarried person who is under age eighteen and is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. State Indian child protection and welfare laws may define Indian child differently and those definition should be followed in those jurisdictions.

Indian Custodian - Indian Custodian is defined by ICWA as any Indian person who has legal custody of an Indian child under tribal law or custom, or under state law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

Indian Tribe - Indian tribe is defined by ICWA as any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43.

Indian Child's Tribe - Indian Child's Tribe is defined by ICWA as (a) the Indian Tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts. When a child is affiliated with multiple tribes, state courts should defer to those tribes to determine which Tribe will be the Indian Child's Tribe for the purpose of the child custody proceeding. Only when those tribes do not respond or cannot agree should the state court designate the Indian Child's Tribe. In both scenarios, the Tribal Attorney may need to be ready to negotiate, respond, or advocate on this issue.

Member or membership - Sometimes referred to as "citizenship" or "enrollment", this is a determination solely made by the Indian Tribe that a person is a member of, or eligible for membership or citizenship in, that Indian Tribe. It is never appropriate for a state court or state child welfare agency to make this determination.

Parent - Parent is defined by the ICWA as any biological parent of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established. Acknowledgement or establishment of paternity may occur under state or tribal standards.

State Child Welfare Agency - Some states have unified child welfare agencies, while others have county systems or even contracts with private entities who perform the functions of the state child welfare agency. These standards use the term "state child welfare agency" as representative of the entity who is removing, placing, and planning for the safety and permanency of the child and family.

State Court - Some states have unified court systems, while others have county systems. These standards use the term "state court" as representative of the court who presides over child welfare cases in that state.

Tribal Attorney or Attorney for the Tribe - Attorneys who represent tribes on any number of issues in state, tribal, or federal courts may be called the Tribal Attorney or Attorney for the Tribe. With regard to child welfare hearings, there is often a parallel or complementary role that Tribal Attorneys play in tribal court child welfare proceedings in addition to their role representing the Tribe in state court child welfare proceedings. For the purposes of these standards, the terms "Tribal Attorney" and Attorney for the Tribe refer to the individual who represents the Tribe in state child welfare proceedings. An attorney may be in-house counsel to the Tribal Child Welfare Agency, general counsel to the Tribe either as an employee or on contract, retained to specifically represent the Tribe for child welfare cases or a child welfare case, or any other unique representative relationship. Notably, the Tribe may use a different term to describe this individual.

Tribal Child Welfare Agency - Tribes handle the social work aspects of child welfare cases in numerous ways. This may include everything from an individual part-time caseworker who handles just ICWA cases to a large social services agency with dozens of employees, departments, and management and supervisory positions. These standards use the term "Tribal Child Welfare Agency" as representative of whatever entity within the Tribe responds to, monitors, and participates in the case management of state child welfare cases involving Indian children.

Tribal Child Welfare Caseworker (or Social Worker or Advocate) - This term refers to the individual from the Tribal Child Welfare Agency who provides social work or case management support on ICWA cases in state court.

Tribal Court - Tribal Court is defined by ICWA as a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of the Tribe which is vested with authority over child custody proceedings.

B. Role

B-1 Role of Tribal Attorney:

Tribal Attorneys represent the Tribe's position in state child welfare proceedings. Tribal ordinances, policies, or contracts, or even Tribal capacity, and whether or not the Tribe has a child welfare agency or ICW caseworker, may dictate the manner in which the Tribal Attorney represents the Tribe. Depending on the Tribe, this may mean that the attorney works with the Tribal social services or child welfare agency, department, or unit (including when the "department" is simply one ICW caseworker), in house counsel, or Tribal leadership. It may also

mean that the individual is tasked with representing the Tribe as "the people" or the public at large of the Tribal jurisdiction.

The drafting committee respects the sovereign authority of each Tribe to determine how it chooses to work with and be represented by its Tribal Attorney.

The Tribal Attorney, Tribal leadership, and the Tribal Child Welfare Agency should understand the Tribal Attorney's role and responsibilities, including understanding who directs the Tribal Attorney and what communications are confidential. It is essential that the Tribal Attorney, Tribal Leadership, and the Tribal Child Welfare Agency communicate clearly, understand who makes the ultimate decisions in different circumstances, and follow a standard process for conflict resolution. There will be times when decision-making roles are unclear and open communication is essential. The most important issues include safeguarding tribal interests in the care and protection of its children, ensuring that children are safe and properly placed and their needs are met, and ensuring that parents who are tribal members are treated fairly.

The Tribal Attorney may be a contract attorney, a legal aid or tribal non-profit attorney, tribal general counsel, or a Tribal Attorney hired specifically for ICWA cases. This, however, has little bearing on the role of the Tribal Attorney, although it can have practical implications.

Commentary: *It may be helpful to review or craft policies and procedures for state child welfare cases that clearly delineate the roles of the Tribal Attorney, Tribal Child Welfare Agency and Tribal leadership, provide guidance for decision making processes (i.e., when to intervene/transfer, how to decide when to support a placement or adoption, etc.) and include thoughtful conflict-resolution strategies well before conflicts between the attorney and client arise. Similarly, it may be helpful for a Tribe to identify a "designated tribal representative." This person can serve as a point of contact for the Tribal Attorney on any given case; increasing timely and effective communication.*

The standards herein apply to all Tribal Attorneys, no matter what model they use for representation. Where special considerations based on any given model of representation are necessary, they are noted throughout.

B-2 Basic Obligations

The Tribal Attorney shall:

General

- Acquire and maintain a working knowledge of all relevant federal, state, and tribal laws, regulations, policies, and rules;

- Promote timely hearings and avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit for the Tribe;
- Protect and promote the Tribe's validity as a party and general credibility; cooperate and communicate on a regular basis with other professionals and parties in a case and ensure the Tribal Child Welfare Agency, if any, is included in/is not excluded from these conversations;
- Know the laws that protect tribal interests in tribal child welfare cases, including but not limited to ICWA;
- Understand the roles of appointed professionals, like Court Appointed Special Advocates (CASAs) and *Guardians Ad Litem* (GALs).

Advice and Counsel

- Be very clear about the representation model employed and who the Tribal Attorney's client is;
- Counsel the client about all legal matters related to individual cases as well as policy issues;
- Regularly monitor cases;
- Advocate for the client's goals and empower them to make informed decisions throughout the case;
- Ensure, where appropriate, the client is invited to all case-related meetings and, when appropriate, attend those meeting with the client;
- Adhere to all state and tribal laws and ethical obligations concerning confidentiality.

Information Gathering/Informal Discovery

- Review the child welfare agency case file;
- To the extent allowed under the law, seek information informally from other parties and stakeholders that is directly related to the case;
- Obtain all necessary documents, including copies of pleadings, relevant notices filed by other parties, and information from the state caseworker and service providers.

Formal Discovery

- Request and review ongoing discovery as it is received;
- When necessary, use formal discovery methods to obtain information.

Alternative Dispute Resolution

- Be versed in alternative dispute resolution options available in the jurisdiction;
- Engage in collaborative, problem-solving lawyering by working with the client and counsel for parents, children, and/or the state on collaborative or mediated solutions whenever possible.

Court Preparation

- Assist the Tribe with decisions, filings, and internal processes related to intervention in state court and transfer of state cases to tribal court;
- If necessary, obtain *pro hac vice* counsel or local counsel in the jurisdiction;
- Independently investigate the case and/or review the Tribal Child Welfare Agency 's investigation of the case;
- Develop a case theory and strategy to follow at hearings and negotiations and adjust as necessary;
- Timely file all motions and briefs;
- Participate in all depositions, negotiations, discovery, pretrial conferences, mediation sessions (when appropriate), and hearings;
- Participate in settlement negotiations;
- Subpoena and prepare all witnesses;
- Plan for the trial in collaboration with the tribal agency/client and, when necessary, for testimony;
- When appropriate, work with the state and tribal child welfare agencies to identify and prepare a Qualified Expert Witness (QEW);
- Ensure proper notice is provided to all parties.

Hearings

- Understand the purpose and burden of proof for each type of appearance: removal, adjudication, disposition, review hearings, permanency planning hearing, termination of parental rights, guardianship, and adoption[3];
- Prepare for and attend all hearings;
- Prepare and make all appropriate motions and evidentiary objections;
- Present and cross-examine witnesses;
- Prepare and present exhibits;
- In jurisdictions in which a jury trial may occur, participate in jury selection and draft jury instructions;
- Request the opportunity to make opening and closing arguments when appropriate;
- Prepare, help prepare, or review and offer alternative language to proposed findings of fact, conclusions of law and orders when they will be used in the Court's decision.

Post Hearings/Appeals

- Review court orders to ensure accuracy and clarity, and review with the Tribe;

[3] These hearings have different names across jurisdictions. The listed names are meant to represent standard court hearings in child welfare cases across the country.

- Take reasonable steps to monitor whether the agency, parents, or Indian custodians[4] comply with court orders and to determine whether the case needs to be brought back to court;
- Consider and discuss with the Tribe the possibility of appeal, where appropriate;
- If a decision is made to appeal, timely file the necessary post-hearing motions and the notice of appeal paperwork;
- Inform other parties of their obligation to serve the Tribe with a notice of appeal;
- If others appeal, discuss with client whether or not to participate and file necessary paperwork to do so;
- Communicate the results of the appeal and its implications to the client.

Obligations of Attorney Managers

- Clarify Tribal Attorney roles and expectations;
- Determine and set reasonable caseloads for Tribal Attorneys;
- Develop a system for the continuity of representation;
- Provide Tribal Attorneys with training and education opportunities;
- Create a brief and forms bank;
- Ensure the office has quality technical and support staff;
- Develop and follow a hiring practice focused on hiring highly-qualified candidates;
- Develop and implement an attorney evaluation process;
- Advocate for competitive salaries for staff attorneys;
- Act as advisor, counselor, and trainer for the Tribe;
- Work actively with external entities to improve the child welfare system.

Commentary: *This list is not comprehensive, but includes key aspects of the Tribal Attorney's role. The Tribal Attorney has many tasks to perform.*

C. Fulfillment of Obligations

C-1 General.

1. **Acquire and maintain a working knowledge of relevant federal, state, and tribal laws, regulations, policies, and rules, and track child welfare legal and research trends.**

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[4] Throughout this document, whenever we refer to parent or parent's counsel these terms should be taken to include Indian custodian and Indian custodian's counsel.

Action: Tribal Attorneys may come to the practice with competency in the various aspects of child abuse and neglect practice, or they may need to be trained on them. The Tribal Attorney must be well-versed in the following laws, including related case law, prior to independently taking an ICWA case:

- Indian Child Welfare Act (ICWA) 25 U.S.C. §§1901-1963, the ICWA Regulations, 25 C.F.R. Part 23, and the 2016 BIA Guidelines for Implementing the Indian Child Welfare Act;
- Foundational Federal Indian Law;
- Tribal laws, regulations, policies, and procedures regarding:
    - child abuse and neglect,
    - guardianships,
    - termination of parental rights,
    - adoption and customary adoption,
    - paternity,
    - jurisdiction, and
    - full faith and credit;
- Tribal rules of professional responsibility or other relevant ethics standards;
- For the state(s) where the Tribe most commonly intervenes:
    - Laws, regulations, policies, and procedures regarding:
        - child abuse and neglect,
        - guardianships,
        - termination of parental rights,
        - adoption and customary adoption,
        - paternity,
        - Indian child welfare,
        - jurisdiction,
        - full faith and credit, and
        - tribal-state consultation;
    - Any tribal-state agreements related to child welfare cases;
    - Rules of professional responsibility or other relevant ethics standards.

The Tribal Attorney should also be familiar with the following laws, including related case law, in order to recognize when they are relevant to a case and should be prepared to research them when they are applicable:

- State rules for *pro hac vice*;
- State laws concerning privilege and confidentiality, public benefits, education, domestic violence, domestic relations/family law, delinquency, and disabilities;

- State laws regarding using immunity and the relationship of child welfare and criminal proceedings;
- State laws and rules of evidence and civil procedure;
- State and local court rules;
- State Child Welfare Agency regulations, policies, procedures, and/or memoranda;
- Tribal sovereign immunity;
- Tribal laws concerning privilege and confidentiality, public benefits, education, and disabilities;
- Relevant Federal law, including:
    - Constitutional protections for parents and children, including but not limited to substantive and procedural due process and the right to association,
    - Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355, 1356, 1357,
    - Child Abuse Prevention Treatment Act (CAPTA), 42 U.S.C. §5101,
    - Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP) 42 U.S.C. § 622 (b)(9) (1998) 42 U.S.C. § 671(a)(18) (1998), 42 U.S.C. §1996b (1998),
    - Interstate Compact on Placement of Children (ICPC),
    - Foster Care Independence Act of 1999, P.L. 106-169,
    - Individuals with Disabilities Education Act (IDEA), P.L. 91-230,
    - Family Education Rights Privacy Act (FERPA), 20 U.S.C. §1232g,
    - Health Insurance Portability and Accountability Act of 1996 (HIPPA), P. L., 104-192 §264, 42 U.S.C. § 1320d-2 (in relevant part),
    - Violence Against Women Act, Pub. L. 103–322 (1994); Public Law 117-103 (2023),
    - Americans with Disabilities Act (42 U.S.C. §§ 12101–12213) and section 504 of the Rehabilitation Act of 1973 (codified as amended at 29 U.S.C. § 794),
    - Public Health Service Act (42 U.S.C. § 290dd-2) and 42 C.F.R. part 2 (pertaining to confidentiality of individual information), and
    - Immigration laws relating to child welfare and child custody;
- International Laws:
    - The International Parental Kidnapping Crime Act of 1993 (IPKCA), Pub. L. No. 103- 173, 107 Stat. 1998 (codified as amended at 18 U.S.C § 1204) 32,
    - The Hague Convention on the International Aspects of Child Abduction, implemented by ICARA, 22 U.S.C. § 9001–9011 33,

- Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361 34,
- Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 35, a, and
- Vienna Convention on Consular Relations, art 36, April 24, 1963, 21 U.S.T. 77 (regarding foreign nationals in the United States and the rights of consular officials to assist them, implemented at ORS 419B.851(3) and 8 C.F.R. § 236.1).

Commentary: *The burden of proof is almost always on the child welfare agency; the Tribe may or may not agree with the state's position and may align itself with the agency, child, or parents in any given proceeding based on the circumstances of the case. The Tribal Attorney, in most instances, participates in child welfare, termination of parental rights, and guardianship cases in states across the country. This requires the attorney to familiarize themselves with numerous different statutory schemes. Further, although tribal law does not generally apply in state courts, it offers the Tribal Attorney a framework for the Tribe's official position on many issues related to child welfare and the treatment of children and families. Additionally, the Tribal Attorney must advise the Tribe on legality of actions and policies. To best perform these functions, the Tribal Attorney should be an expert in all relevant laws.*

In addition to understanding the law, it is necessary for Tribal Attorneys to stay up to date on changing research and how it influences policy trends. For example, in the last decade, research has highlighted the trauma and harm of removal which has informed a corresponding policy movement to promote prevention and better clarify standards of removal.

2. **Promote timely hearings and avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit.**

   Action: The Tribal Attorney must be thoroughly prepared for all hearings and prepared to move forward in a timely manner to avoid unnecessary continuance requests. The Tribal Attorney should carefully consider all circumstances when requesting or responding to a motion for a continuance. The Tribal Attorney should not request continuances unless there are extenuating circumstances, an emergency, concerns with statutory or rule compliance, or where it benefits the client's case. If continuances are necessary, the Tribal Attorney should request the continuance in writing, as far as possible in advance of the hearing, and should request the shortest delay possible, consistent with the client's interests. The attorney must notify all counsel of the request. The Tribal Attorney should object to repeated or prolonged continuance requests by other parties if the continuance would harm the client.

Commentary: *Delays in cases affect families. Appearing in court often motivates parties to comply with orders and cooperate with services. When a judge actively monitors a case, services are often put in place more quickly, visitation may be increased, and other requests or motions by the Tribe may be granted to ensure meaningful work toward reunification or other forms of permanency occur. Requesting or agreeing to case continuances should be unusual rather than routine practice, but may be necessary if, for example, information has been withheld from the Tribal Attorney, or settlement conferences have been held without the Tribal Attorney.*

3. Protect and promote the Tribe's validity as a party and general credibility.

   Action: The Tribal Attorney should work with their client to formally intervene in all appropriate cases. The Tribal Attorney should use every possible opportunity to educate the court and parties about the party status of the Tribe, the Tribe's sovereign status, the Tribe's role as *parens patriae* to the child, and, when appropriate, the tribal child welfare program and court.

   The Tribal Attorney should participate in court proceedings in a professional, knowledgeable manner. The Tribal Attorney should not file frivolous motions or appeals and should counsel their client concerning the legitimacy of its positions. The Tribal Attorney should ensure accurate testimony and correct any misstatements in the courtroom.

   The Tribal Attorney should present a positive image of the Tribe at community functions and meetings. The Tribal Attorney should be respectful of the Tribe, its leadership, and its agencies in the courtroom, and in the presence of other professionals, community partners, the court, and parties in a case. The Tribal Attorney should also avoid getting involved in tribal politics, such as endorsing or appearing to endorse candidates for tribal office.

Commentary: *The role of Tribes in child welfare cases is frequently misunderstood. It is the role of the Tribal Attorney to assert the Tribe's party status and ensure the Tribe's right to be present and participate in proceedings is protected. Similarly, Tribes, their sovereign status, and their role in protecting member children and parents is frequently misunderstood. It is the role of the Tribal Attorney to educate the court on the Tribe and its government and honor the Tribe's right to protect its members and to address bias and prejudice in court proceedings.*

The Tribal Attorney's role includes supporting the Tribe in the courtroom and other forums. The Tribal Attorney should guide the client to avoid steps that will make it look bad in court and they should protect the Tribe, its staff, and the community from indignity inflicted by the judge or other attorneys. They should also safeguard and protect tribal representatives in court

proceedings by reminding the judge that the tribal representative is a represented party if the judge asks them questions directly, and preparing them when they will serve as a witness.

The Tribal Attorney may also find it necessary to educate the court on the culture of the Tribe they represent and/or the importance of the child's cultural and traditional connections (particularly when the child is placed in a non-Native home). Part of the Tribal Attorney's role may be to advocate for the child to attend cultural events, while also protecting the sanctity and confidentiality of those cultural events and the right of parents to also attend. This may require the Tribal Attorney, in conjunction with the Tribal Child Welfare Agency, to consider and promote ways to respectfully ensure the child's protection at those events in-line with cultural practices and remind all parties of the importance of cultural humility.

Further, the client might take unpopular positions regarding the Tribe's position and/or what is in the best interests of the child that may differ from other parties in a state proceeding. The Tribal Attorney should do everything in their power, without divulging confidential information, to persuasively present the Tribe's position. Tribal Attorneys should be prepared to challenge assumptions underlying the best interest analysis of other parties and the court, or other assumptions adverse to the Tribe's position.

4. **Cooperate and communicate on a regular basis with other professionals and parties in a case, including the client.**

   Action: The Tribal Attorney should have regularly scheduled opportunities to meet with caseworkers or other Tribal leadership and, as necessary, tribal staff. After intervening in a case, Tribal Attorneys should reach out to all parties to provide their contact information, discuss any scheduling considerations (e.g., time zones, days in tribal court, etc.), request discovery, and ask to be included in all case-related communication. The Tribal Attorney should communicate with other parties' attorneys, including court-appointed special advocates (CASAs), *guardians ad litem* (GALs), and children's, parents', and other intervenor's attorneys. Similarly, the Tribal Attorney should communicate with the caseworker, foster parents, and service providers, as allowed, to learn about their views of the case, parents' progress, and the children's status. The Tribal Attorney should treat everyone involved in a case with professional courtesy and should work with everyone to resolve conflict. The Tribal Attorney should be aware of collateral matters that may impact the child welfare case—such as any criminal, protection from abuse, domestic relations/custody, or administrative proceedings, to ensure that any orders or determinations from these proceedings are considered in the child welfare case proceedings.

Commentary: *The Tribal Attorney must have all the relevant information to effectively represent the client. This requires open and ongoing communication with other attorneys, the state child*

welfare agency, and service providers working with the client and family. The Tribal Attorney should present themselves in a professional manner when before the judge or meeting with other individuals involved in a case. The Tribal Attorney should share relevant information from the tribal agency with other parties in the case, when appropriate. It is also the Tribal Attorney's role to, within the bounds of confidentiality, help other parties understand the concerns, positions, and recommendations of their client and, when possible, find allies and work in partnership with other parties.

The Tribal Attorney should also consider and discuss with their client in advance how these communications will occur, how they will be shared with their client, when and how their client will be included in the communications, where they will be stored, and who will have access to this storage.

Rules of professional ethics govern contact with represented and unrepresented parties. In some states, for instance, attorneys may not speak with child welfare caseworkers without the permission of agency counsel. The Tribal Attorney must be aware of local rules on this issue and seek permission to speak with represented parties when that would further the Tribe's interests.

5. **Protect and promote the Indian Child Welfare Act (ICWA) and any state Indian child protection or welfare laws in the jurisdiction.**

   Action: The Tribal Attorney should be an expert in ICWA, the corresponding Federal Regulations, the BIA Guidelines for Implementing ICWA, and any state Indian child protection or welfare laws and policies. The Tribal Attorney should provide guidance on the law to all parties and advise the agency/client of legal strategies that assert the interests of their client in the case while also protecting the longevity of the Tribe and its families by protecting ICWA and any state laws that are specific to Indian child protection or welfare.

Commentary: *Tribal Attorneys are often seen as the ICWA experts in the courtroom—expected to both guide the court and parties in its application while simultaneously ensuring compliance. For this reason, Tribal Attorneys must be experts in ICWA and related state laws. Although it is the role of the attorney to represent the interests of their client, it is important for the Tribal Attorney to counsel clients on the immediate impacts of different advocacy strategies or legal arguments with regard to ICWA, as well as the long-term effect different advocacy strategies may have on their interests. Ensuring integrity of the process is an essential role for a Tribal Attorney.*

One important role of the Tribal Attorney is to ensure that state agencies and courts comply with their obligations under ICWA and related state laws, while also representing the needs of their client. Tribal Attorneys must protect their clients from improper attempts to shift state agency

responsibilities to tribes and tribal ICWA caseworkers. For example, although the regulations require the state to collaborate with the Tribe to provide active efforts and locate placements in line with the placement preferences whenever the Tribe is willing to engage with the state, it is ultimately the responsibility of the state to provide active efforts, not tribes. Similarly, it is the state's responsibility to find a placement within ICWA's placement preferences. Tribal Attorneys must challenge improper or inadequate actions by the state while simultaneously safeguarding against any effort to "shift the burden" for these responsibilities to tribes. It is important to work with other parties' counsel when positions align, but it is also essential to understand and explain who carries the burden in an ICWA case and to safeguard tribal resources.

C-2 Advice and Counsel.

1. **Counsel the client/agency about all legal matters related to individual cases as well as legal issues, and periodically monitor cases.**

   Action: The Tribal Attorney must spend time with tribal caseworkers and/or tribal leadership to prepare for individual cases and answer questions. The attorney should explain to the caseworker or leadership, in clear language, what is expected to happen before, during, and after each hearing. The Tribal Attorney should be available for in-person meetings, telephone calls, and, when appropriate, to periodically review and discuss (or "staff") cases. The Tribal Attorney is not the caseworker's supervisor, but rather should monitor case progress to ensure that legal barriers are removed and the pathways to the Tribe's goals are viable. The attorney should be aware of other barriers such as notice, parentage, and case plan participation (i.e., illiteracy, language barriers, transportation issues, and/or disabilities). Once identified, the attorney should work with all parties to address these accordingly. The attorney should also be available to tribal child welfare administrative staff to advise on legal concerns or general issues facing the agency from the court or community.

Commentary: *The Tribal Attorney's job extends far beyond the courtroom. The attorney should be a counselor as well as litigator. There are two important aspects of this work: 1) helping agency workers understand the legal framework that impacts their decision-making; and 2) developing communication and decision protocols so that the client knows when and how to get help around important case decision points.*

The Tribal Attorney should be available to communicate effectively with caseworkers from the Tribal Child Welfare Agency and/or leadership to prepare cases, provide advice about ongoing concerns, and provide information about legal issues. Open lines of communication between attorneys and caseworkers help ensure caseworkers get timely answers to questions and attorneys get the information they need.

In advance of the representation, the attorney and Tribal Child Welfare Agency or leadership may wish to develop a representation plan or communication and decision policy addressing which internal meetings the Tribal Attorney should routinely attend , such as: meetings to discuss the decision to intervene or transfer; when to support a termination of parental rights (TPR), adoption, or guardianship; and/or when another major change in a case is planned and when and how caseworkers can receive emergency advice.

2. **Consider alternative dispute resolution, including mediation options, available in the jurisdiction, and their role in the client's strategy.**

   Action: The Tribal Attorney should familiarize themselves with alternative dispute resolution processes available in a jurisdiction, advise their client on the benefits and challenges of alternative dispute resolution in child welfare cases, and advocate for the use of these processes at appropriate points throughout the child welfare case. Tribal Attorneys should be trained in negotiation skills and be comfortable resolving cases outside a courtroom setting.

Commentary: *Over the last few decades, alternative dispute resolution has emerged as an effective strategy for resolving child welfare cases in state systems. Studies of alternative dispute resolution demonstrate impressive settlement rates, quick resolution of problems, and high rates of case plan compliance. Mediation in child welfare cases is used across the country and many state courts refer cases to mediation for all or any portion of a matter throughout the life of a child welfare case. There are many reasons that a Tribe and Tribal Attorney may request or support mediation in state child welfare cases.*

Alternative dispute resolution infuses neutrality into situations that are fraught with conflict and power imbalances, and counters the adversarial system, which can create hostility, divisiveness, and rigidity among parties. It offers a collaborative, problem-solving approach that centers on rehabilitation and family well-being, may be more in-line with traditional values and customs, and the Tribe's child welfare philosophy and processes.

Further, the Tribe's unique situation in state child welfare cases as a government protecting the interest of its members in another government's proceeding can play an important role in suggesting mediation and advocating for compromise during the mediation itself. Tribal Attorneys should ensure that all relevant individuals and their representatives are invited to the alternative dispute resolution table, that all parties are comfortable with the designated neutral arbiter, and that the terms and protections of the mediation are clear. During the mediation, the Tribal Attorney should ensure that their client's views are represented and that their strategy is protected; this may mean requesting breaks to consult with the client or designated tribal

representative on potential compromises, or ending the mediation if an agreeable resolution is not possible.

If mediation is not available or paid for by a jurisdiction, the Tribe may wish to offer to find and pay for a neutral mediation in appropriate cases if resources allow. The Tribal Attorney should also inquire with the Tribe about whether there is a tribal resource for dispute resolution, through a tribal court or other services, and when appropriate advocate for the use of this resource.

3. **Advocate for the agency/client's goals and empower the client to direct the representation and make informed decisions based on thorough counsel.**

   Action: Tribal Attorneys must understand the client's goals and pursue them zealously. The attorney should regularly inquire as to the client's goals, including ultimate case goals and interim goals. The attorney should explain all legal aspects of the case and provide comprehensive counsel on the advantages and disadvantages of different options. At the same time, the attorney should be careful not to usurp the client's authority to decide the case goals.

Commentary: *After centuries of colonization and assimilation tactics, many tribes, tribal agency caseworkers, and tribal leaders distrust the state and county child welfare system. The Tribal Attorney should be mindful that tribes often feel misunderstood and disempowered in child welfare proceedings and should take steps to help the client express goals and concerns. The attorney should clearly explain the pending legal issues and the process and outcomes of court proceedings to the client. The attorney has the responsibility to provide expertise, and to make strategic decisions about the best ways to achieve the Tribe's goals, but the client is in charge of deciding the case goals and the attorney must act accordingly.*

C-3 Court Preparation.

1. **Oversee the processes for receiving, processing, and responding to notice.**

   Action: If necessary, the Tribal Attorney should help the Tribe create and implement a process to receive state court notices required under ICWA, process them in a timely manner, and respond to them appropriately. The Tribal Attorney should object to lack of proper notice and reject any suggestion of accepting informal notice in lieu of the notice required by ICWA. The Tribal Attorney should also engage in affirmative advocacy with states to correct problematic notice practices.

Commentary: *The federal regulations and guidelines also suggest that state child welfare agencies should perform informal outreach (email, phone, fax) to better partner with tribes in the child welfare process and ensure families receive active efforts. These measures are commendable and are encouraged, but they are* ***not a substitution*** *for formal notice of child welfare proceedings as required by law. If a state suggests that the Tribe accept these forms of notice, and it is best for the family to move forward, it is imperative that the attorney make it clear that these must be provided in addition to, but not in lieu of, ICWA's requirements.*

2. If necessary, obtain *pro hac vice* counsel in the state of jurisdiction or consider hiring local counsel.

   Action: The Tribal Attorney should, when required, follow all relevant rules and file all appropriate filings to obtain *pro hac vice* status in the state of jurisdiction.

Commentary: *Some states waive the requirement for* pro hac vice *counsel in ICWA proceedings, other states follow standard* pro hac vice *practice. The Tribal Attorney should be familiar with the state's rules and ensure that they are followed to allow for full tribal participation in relevant child welfare proceedings. If resources allow, it might be helpful to consider hiring a local attorney to navigate the local practices and build relationships with local practitioners, while the Tribal Attorney can support them on issues related to ICWA and the tribe's position.*

3. **Assist the Tribe with decisions and filings related to intervention or transfer to tribal jurisdiction.**

   Action: The Tribal Attorney should play a lead role in drafting a motion to intervene or notice of intervention or at least editing and reviewing the draft before it is filed with the court. Similarly, the attorney should review any affidavits or supporting documentation that will be filed with the motion or notice to intervene.

   Action: The Tribal Attorney should work with all relevant stakeholders and follow all relevant policies to help the Tribe determine whether to transfer a case. If the determination is made to transfer the case, the Tribal Attorney should take a lead role in drafting necessary motions for both the state and tribal court, or at least editing and reviewing the drafts before they are filed in each court. Similarly, the Tribal Attorney should review any affidavits or supporting documentation that will be filed with the motion to intervene. The Tribal Attorney should also ensure that the tribal court and agencies receive all necessary documentation.

   Notably, some states consider the Tribe to be a party to the proceeding regardless of whether they formally intervene, while others allow the Tribe to participate in

proceedings in some manner even when they have not formally intervened. Further, some states allow more than one tribe to participate in a proceeding as a party, or in an advisory (*amicus*) capacity. Finally, many states allow tribal caseworkers to participate in court proceedings as the tribal representative or advocate. The Tribal Attorney should review the laws and court rules of each jurisdiction when discussing intervention with the client.

Commentary: *Many factors play into a Tribe's decision to intervene in a state child welfare case. The attorney should counsel the agency/client about this decision and remind them of any ordinances or policies that direct or influence it. The Tribal Attorney should also ensure that the tribal court is aware of decisions to transfer and willing to accept jurisdiction, and if filings are necessary in tribal court, that those filings are made. The question of intervention and transfer may arise throughout the life of a child welfare case; the Tribal Attorney should ensure that at key decision points in the case this decision is reconsidered, and any necessary motions and notices are timely filed with the state court, and where necessary, tribal court.*

The Tribal Attorney may also wish to consider filing an "Appearance of Counsel," as some clerks' offices use that document to include the Tribe's attorney in the list of counsel in a case.

4. **Independently investigate the case and/or review the Tribal Child Welfare Agency 's investigation of the case.**

   Action: The Tribal Attorney must take all necessary steps to prepare each case. A thorough investigation is an essential element of preparation. When preparing a case, the Tribal Attorney should not rely solely on what the agency caseworker reports about the family. Rather, the Tribal Attorney should work with the tribal caseworker to contact service providers who work with the family, relatives who can discuss each parent's care of the child, the child's teacher, or other people who can clarify information relevant to the case including the parents and children.

Commentary: *Many tribes have a child welfare agency or caseworker who will independently investigate the wellbeing of the family and the actions of the state as well as provide services and support to the family. It is important to work with this individual to determine what evidence is needed or persuasive to the state court case and client's position. Where there is no tribal caseworker, the Tribal Attorney should take necessary actions, which may include hiring an investigator or performing independent outreach, to review and supplement the state's investigation and independently assess the circumstances. Jurisdictions may vary as to whether the Tribal Attorney or their representative may speak to state caseworkers without a state attorney present, or to what extent or when a release of information is necessary to speak with various service providers. These nuances should be respected but do not relieve the Tribal Attorney of the obligation to gather information on and independently assess the circumstances of the case.*

Tribal Attorneys should be comfortable with this interdisciplinary practice. Challenges can emerge between the Tribal Attorney and caseworker when integrating different professional perspectives, training, and ethics. It is important for Tribal Attorneys to help caseworkers understand their obligations to independently investigate, provide contact information for various service providers and relevant "most knowledgeable" individuals, to assist the Tribal Attorney's investigation and fact-gathering in order to best prepare the case.

Accessing information from service providers may require the execution of Releases of Information ("ROIs"). The Tribal Attorney should review, edit as needed, and sign or have client sign any necessary ROIs. If the attorney is not working with an individual or agency, the attorney is still responsible for gaining all pertinent case information to prepare the case, including an independent investigation.

5. **Develop a case theory and strategy to follow at hearings and negotiations.**

   Action: At the beginning of the case, the Tribal Attorney should try to project the future of the case and think through the steps that the caseworker and attorney will need to take to ensure the desired outcomes. The theory of the case should inform the attorney's preparation for filings, hearings, and arguments to the court throughout the case. It should also help the attorney decide what evidence to develop for hearings and the steps to take to move the case toward the Tribe's ultimate goals. It may also help the Tribe determine which parties are natural allies and how to partner with them when possible during the case.

Commentary: *Each case has its own facts, and more importantly, concerns an individual child, perhaps sibling group, and family. The Tribal Attorney should give each case their full attention. By creating a case theory and strategy, the attorney will ensure that they analyze the case thoroughly and think through its intricacies to increase the chance that the Tribe will be well represented, and the result will be the best possible outcome for the Tribe, child, and family. Further, child welfare cases often last months if not years, so it is important for the Tribal Attorney to periodically revisit their case theory and strategy to ensure that it is still relevant, accurate, and the best path forward for the Tribe, child, and family.*

6. **Timely file all petitions, motions, and briefs. Research applicable legal issues and advance legal arguments when appropriate.**

   Action: The Tribal Attorney must timely file notices, petitions, motions, requests for discovery, and responses and answers to pleadings filed by other parties. These pleadings must be thorough, accurate, and timely. When a case presents a complicated or new legal issue, the Tribal Attorney should conduct the appropriate research before appearing in court. The attorney must have a solid understanding of the relevant law and be able to present it to the judge in a compelling and persuasive way. The attorney should be

prepared to distinguish case law that appears to be unfavorable. If the judge asks for memoranda of law, the attorney will already have done the research and will be able to use it to argue the case well.

Commentary: *Actively filing notices, motions, pleadings, and briefs puts important issues before the court and builds credibility for the Tribal Attorney. In addition to filing responsive papers and discovery requests, the attorney should proactively seek court orders that benefit the client. When an issue arises, it is often appropriate to attempt to resolve it informally with other parties. When out-of-court advocacy is not successful, the Tribal Attorney should not wait to bring the issue to the court's attention if that would serve the client's goals.*

Attorneys in child welfare cases often make fact-based arguments. The most effective attorneys, however, ground their arguments in statutory, regulatory, common, and case law. These sources of law exist in each jurisdiction, as well as in federal law. Additionally, law from other jurisdictions can be used to sway a court in the client's favor—particularly when ICWA is involved. An attorney who has a firm grasp of the law, and who is willing to do legal research, will have more credibility before the court. At times, competent representation requires advancing legal arguments that are not yet accepted in the jurisdiction. Attorneys should take care to preserve issues for appellate review by making a record even if the argument is unlikely to prevail at the trial level.

Information Gathering/Informal Discovery

7. **Review the state child welfare agency case file.**

   Action: The Tribal Attorney should ask for and review the agency case file as early during the course of representation as possible. The file contains useful documents that the attorney may not yet have and will instruct the attorney on the state agency's case theory. If the agency case file is incomplete or inaccurate, the attorney should seek to correct it. The attorney must ensure that all parties are receiving updated information and should continue to read the case file periodically as needed.

Commentary: *While an independent investigation is essential, it is also important that the Tribal Attorney understands what information the state child welfare agency is relying on to further its case. This can be found in the state child welfare agency's case file. Typically, the complete state child welfare case file is not provided through the discovery process. Unless the attorney has the information the agency has, the Tribal Attorney will walk into court at a disadvantage and the state will have failed its obligation to work effectively with the Tribe as part of the requirement to provide active efforts. The state child welfare agency case file may contain a history about the family that may not have been shared and/or important reports and information about both the*

child and parent that will be necessary for the Tribe's attorney to understand for hearings as well as settlement conferences.

A tribal child welfare caseworker should have access to and review the state child welfare agency case file so that the attorney and caseworker can work as a team. The tribal caseworker's review is important because the caseworker may be better situated to identify factual inaccuracies in the file and may identify state agency decisions that should be challenged as informed by the tribal caseworker's professional judgment. Where the attorney is working with leadership, they should advise leadership on the contents of the file while respecting confidentiality rules to help them make any necessary decisions. The tribal lawyer should provide the tribal caseworker and/or leadership with clear information about state and tribal confidentiality rules governing the release of any information contained in the agency file.

In some states, the tribal child welfare agency may have access to the state's child welfare case management system, while in other states the Tribal Attorney may only be able to access this information via discovery request. The Tribal Attorney should familiarize themselves with the local practices and assist the client as necessary to access information.

8. **Obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and information from the state caseworker and providers.**

   Action: As part of the discovery phase, the Tribal Attorney should gather all relevant documentation regarding the case that might shed light on the allegations, the service plan, and the parents and family's strengths. The Tribal Attorney should work with the tribal caseworker to review the following kinds of documents:

   - social service records, especially of past cases and/or sibling cases, such as delivered service logs, contact logs or service plans/updated service plans,
   - birth certificates,
   - parentage records,
   - court reports and court records,
   - medical and dental records,
   - mental health treatment records,
   - substance abuse treatment records,
   - education records,
   - assessments/evaluations of all types, including but not limited to any risk and safety assessments, structured decision making, home assessments, home studies, relative searches, and/or placement denials, and
   - police reports.

The attorney should be sure to obtain reports and records from service providers. Discovery is not limited and may include records related to the parents, stepparents, children, relatives, and non-relative caregivers.

Commentary: *In preparing their case, the Tribal Attorney and Tribal Child Welfare Agency must try to learn as much about the family as possible. Various records may contradict or supplement the agency's account of events. Gathering documentation to verify the family's reports about what occurred before the child came into care and the progress the parents are making during the case are also necessary, in addition to reviewing the agency's reports. Informal discovery may also include phone calls and meetings to gather additional information or access necessary documents.*

Documentation may alert the attorney to issues the family is experiencing that the agency has not shared with the Tribe. The attorney may be able to work with the tribal child welfare caseworker to intercede and assist the family with service providers, agency caseworkers, and others.

To access this information, Releases of Information ("ROIs") may be required under state and federal law. The Tribal Attorney should review, edit as needed, and sign or have client sign any necessary ROIs.

Formal Discovery

9. **When needed, use formal discovery methods to obtain information.**

   Action: Tribal Attorneys should know what information is needed to prepare for the case and understand the best methods of obtaining that information. The Tribal Attorney should become familiar with the pretrial requests and actions used in the jurisdiction and use whatever tools are available to obtain necessary information. The Tribal Attorney should consider the following types of formal discovery and whether they are commonly used in the jurisdiction of the case: depositions, interrogatories (including expert interrogatories), requests for production of documents, requests for admission, and motions for mental or physical examination of a party. The attorney should file timely motions for discovery and renew these motions as needed to obtain the most recent records.

   When disclosing information would be inconsistent with the client's interests and goals, oppose discovery requests of other parties.

Commentary: *State child welfare agencies may fail to provide tribes with discovery (or the full extent of discovery) in child welfare proceedings. It is the role of the attorney to ensure that they*

and the Tribal Child Welfare Agency have complete records. Notably, the tribal agency might receive records outside of the formal discovery process and it is important to reconcile all records received, regardless of the source, to ensure a complete set of documents. Further, it is the role of the Tribal Attorney to protect the tribal client's records to the fullest extent possible. Tribal Attorneys should know about any tribal laws/policies protecting tribal records, whether a tribal citizen has access and how access is given, and whether a tribal citizen can obtain tribal records to use in a child welfare proceeding.

10. **Participate in all depositions, negotiations, discovery, pretrial conferences, mediation sessions (when appropriate), and hearings.**

Commentary*: Jurisdictions vary concerning pre-hearing activity. A great deal of information can be shared during the pretrial stage of a case which may help reduce conflict and save court time and resources. Therefore, the Tribal Attorney should be actively involved in this stage. The Tribal Attorney may need to educate parties to the case about the need to invite the Tribe and Tribal Attorney to these meetings.*

11. **Engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available.**

Action: The Tribal Attorney must advocate both in and out of court. The Tribal Attorney should regularly consult with the Tribal Child Welfare Agency and know about the social, mental health, substance abuse treatment, and other services that are available to parents and families through the Tribe so they can advocate effectively for the use of those services. The Tribal Attorney should also know about, or seek information on, other culturally appropriate services that may be offered by Native-run programs in the location of their cases.

The attorney should work closely with the tribal social service agency to make direct contact and collaborate with service providers and other witnesses who are serving the family. The attorney should also attend major case meetings where attorneys are permitted to ensure the accurate barriers to reunification are identified and that the Tribe's position on these barriers is reflected in the case plan designed for the family.

When necessary, the Tribal Attorney should seek court orders or sanctions to force the child welfare agency to provide services and/or visitation to the family. The attorney may need to ask the court to enforce previously-entered orders with which the agency did not comply within a reasonable period. The attorney should consider whether the child's representative (lawyer, GAL, or CASA) or parent's attorney might be an ally on service and visitation issues or, in jurisdictions with multidisciplinary representation, whether these individuals may be able to assist with service access. If so, the attorney should

partner with these individuals when making requests to the agency and the court and/or collaborate with them on service plan development.

Commentary: *For a family to succeed in a child welfare case, supportive services are typically necessary. For the good of the tribal family and community, it is therefore necessary that the Tribal Attorney ensure that case plans include services the Tribe believes are necessary for the family. Examples of services common to child welfare cases include:*

- *Assessments/Evaluations;*
- *Family preservation or reunification services;*
- *Medical and mental health care;*
- *Drug and alcohol treatment;*
- *Domestic violence prevention, intervention, or treatment;*
- *Anger Management and Batterer's Intervention treatment and services;*
- *Family Sex Abuse Team/Non-Offending Parenting services;*
- *Parenting education, including hands-on parent training;*
- *Education and job training;*
- *Housing;*
- *Childcare;*
- *Funds for public transportation or gas cards so the client can attend services;*
- *Access to a cellphone;*
- *Extra-curricular activities such as sports, music, theater and cultural programs or camps; and*
- *Transportation.*

A Tribal Attorney may also need to work with their client to object to court ordered services that are not culturally responsive or are not targeted to support the tribal member in reunifying with their children and to make sure service records are not creating an inaccurate picture of the family's needs (e.g., exaggerating the child's needs or making racially or culturally biased assessments of parents' behavior).

Participation outside the courtroom is key to this provision—particularly at major case meetings. A major case meeting is one in which the attorney or agency/leadership believes the attorney will be needed to provide advice, or in which a major decision on legal steps, such as a change in the child's permanency goal, will be made.

12. **Participate in settlement negotiations and attempt speedy resolution of the case, when appropriate.**

    Action: The Tribal Attorney should request and participate in settlement negotiations to promptly resolve the case, whenever appropriate, keeping in mind the effect of

continuances and delays on the family. Tribal Attorneys should be trained in negotiation skills and be comfortable resolving cases outside a courtroom setting. However, the attorney must keep the Tribe's position in mind while negotiating. The Tribal Attorney must communicate all settlement offers to their tribal client, as it is the client's decision whether to settle. The Tribal Attorney must be willing to try the case and not compromise on every point to avoid the hearing. The Tribal Attorney must also consider where stipulations may be helpful to the case strategy and progress, and advise the client accordingly.

Commentary: *Some jurisdictions require mandatory settlement conferences, while others leave them to the discretion of the parties. Settlement negotiations often result in a detailed agreement among parties of actions that must be taken by all participants. Generally, when agreements have been thoroughly discussed and negotiated, all parties feel like they had a say in the decision and are, therefore, more willing to adhere to the plan. Negotiated settlements generally happen more quickly than full hearings and therefore assist in moving the case forward within a reasonable time.*

Another advantage to settlement conferences is that all parties must participate. After this participation, attorneys are more informed about the case and are better able to perform in court. Further, contested hearings often create an adversarial atmosphere and prevent a cooperative relationship between parties. The process of working together to address misunderstandings, correct misperceptions, and devise solutions can be a powerful one for all parties that promotes case plan alignment and engagement.

As discussed above in the context of mediation, there are many reasons that a Tribe and Tribal Attorney may request or support alternative dispute resolution strategies such as settlement conferences in state child welfare cases. The Tribe's unique situation in state child welfare cases as a government protecting the interest of its members in another government's proceeding can play an important role in suggesting mediation and advocating for compromise during the mediation itself.

13. Identify, locate, and prepare all witnesses.

Action: The Tribal Attorney, in consultation with the client, should develop a witness list and subpoena witnesses well before a hearing. The attorney should not assume the agency will call a witness, even if the witness is named on the agency's witness list. The attorney should, when possible, contact the potential witnesses to determine if they can provide helpful testimony.

When appropriate, witnesses should be informed that a subpoena is on its way. The attorney should also ensure the subpoena is properly served and any applicable subpoena

deadlines have been met. The attorney should set aside time to fully prepare all witnesses in person before the hearing. The attorney should remind the witnesses about the court date.

Often a case requires multiple experts in different roles, such as experts in medicine, mental health treatment, drug and alcohol treatment, or social work. Experts may be needed for ongoing case consultation in addition to providing testimony at trial. The attorney should consider whether an opposing party is calling expert witnesses and determine whether the Tribe needs to call any experts.

When opposing counsel plans to call expert witnesses, the Tribal Attorney should interview the witnesses in advance or, depending on local practice, schedule a deposition or send interrogatories. The attorney should do whatever is necessary to learn what the opposing expert witnesses' testimony will be and about their background and qualifications.

Commentary: *Preparation is the key to successfully resolving a case, either in negotiation or trial. The attorney should plan as early as possible for the case and make arrangements accordingly. Witnesses may have direct knowledge of the allegations, information the Tribe independently discovered, or may know the family, its history, its issues, and available resources.*

When appropriate, the Tribal Attorney should consider working with other parties who share the Tribe's position when creating a witness list, issuing subpoenas, and preparing witnesses. Doctors, nurses, teachers, therapists, and other potential professional witnesses have busy schedules and need advance warning about the date and time of the hearing. If it is not possible to bring in a witness, the Tribal Attorney may want to speak with other counsel about presenting stipulated testimony.

The Tribal Attorney must evaluate whether to utilize the tribal child welfare caseworker as a witness and be prepared if another party plans to call the Tribe's caseworker. Often these professionals have insight on issues that no other professionals have; for example, tribal norms and practices in extended family involvement. However, the Tribal Attorney must be aware of the burden trial preparation may put on often overburdened tribal representatives and work around their schedules to adequately prepare.

Resource limitations may sometimes play a role in the Tribal Attorney's decisions about expert witnesses and the attorney may need to prioritize what issues are most important in deciding how to proceed in those circumstances.

Witnesses are often nervous about testifying in court; attorneys should prepare them thoroughly so they feel comfortable with the process. Preparation will generally include rehearsing the

specific questions and answers expected on direct and anticipating the questions and answers that might arise on cross-examination. Attorneys should provide written questions for those witnesses who need them. The attorney should remind the witness of the obligation to provide accurate and truthful testimony.

The attorney should follow the rules of the jurisdiction as they pertain to contacting opposing counsel's expert witnesses in advance, filing expert interrogatories, deposing witnesses, and interviewing witnesses. Preparing for witness testimony will help the Tribal Attorney predict what evidence will likely be presented against the client and whether the expert has any favorable information that might be elicited on cross-examination. The attorney will be able to discuss the issues with the Tribe, prepare a defense, and call other experts, if appropriate. Conversely, if the attorney does not talk to the opposing expert in advance, the attorney could be surprised by the evidence and unable to represent the client competently.

14. **When appropriate, work with the state or county and tribal child welfare agencies to identify and prepare an ICWA Qualified Expert Witness (QEW).**

    Action: The Tribal Attorney should assess whether the Tribe agrees with foster care placement, termination of parental rights, guardianship, or other available permanency plans. If the Tribe agrees, the attorney and tribal caseworker should work with the state to identify a QEW or to prepare a tribal member or other person with relevant expertise and experience as a QEW on behalf of the state. If the Tribe does not support the foster care placement, termination, or guardianship, the Tribe should identify its own qualified expert to present in opposition to the state's QEW. Regardless of the Tribe's position, the Tribal Attorney should notify the state of the Tribe's position as soon as possible.

Commentary: *The QEW requirement in ICWA is perhaps one of its most confusing and misunderstood requirements. These witnesses are the state's witness, but must be familiar with the prevailing social and cultural standards of the Indian child's tribe. The intention of this role is to ensure that relevant cultural information is provided to the state child welfare agency and court before a child is placed in foster care, a guardianship is established, or a parent's rights are terminated. For this reason, the state court may not issue an order for foster care, guardianship, or termination unless the court has made a finding, based on the appropriate evidentiary standard including the testimony of QEWs, that the continued custody of the child by the parent(s) or Indian custodian is likely to result in serious emotional or physical damage to the child.*

Although the QEW is the state's witness, the Tribal Attorney may need to provide advice and counsel about who may serve as a tribally-approved QEW, what qualifications they should have, and how they can or should be prepared for court.

If the Tribe's position is not aligned with the state, the state may not be interested in using the Tribe's designated QEW or the Tribe may not be willing to designate a QEW. When this occurs, the Tribal Attorney should consider challenging the state's expert's qualifications and/or offering a Tribal expert to counter the state's assertions.

If the Tribe's position is aligned with the state, the Tribe may wish to designate or provide a QEW. When this occurs, the Tribal Attorney should ensure that the state is aware of the Tribe's position and willingness to provide a QEW. The Tribe should also help prepare the expert to testify. In some instances, it may even be appropriate for the tribal child welfare caseworker to serve as the QEW. This is the case, for example, when the Tribe's position aligns with the states', the caseworker has the requisite knowledge of and expertise in tribal culture and child-rearing practices, and the Tribe does not feel that it would be a conflict for the caseworker to serve in this role. The Tribal Attorney should assist their client in determining whether the tribal caseworker is an appropriate QEW. When it is appropriate, the Tribal Attorney should assist in preparing the QEW for testimony, and should protect the legal position of the Tribe while the QEW is testifying. Notably, some tribes prefer not to provide QEWs even when their position aligns with the state. This decision should always be respected and communicated to the state.

Tribal Attorneys should familiarize themselves with any tribal policies or procedures in place for designating a QEW. If no policy or procedure exists, the Tribal Attorney may wish to work with the client to develop one.

15. **Check and confirm that proper notice is provided to all parties, including Indian custodians.**

    Action: The Tribal Attorney should review whether proper notice has been sent to parties and parents—including Indian custodians.

Commentary*: ASFA requires that foster parents and relative caretakers receive notification of all review and permanency hearings. Parties to the case—including the Tribe and any Indian custodians—must receive notice of court child custody proceedings when there is "reason to know a child is an Indian child" per ICWA. The Tribal Attorney should check and confirm that the state is providing the necessary notice and, when this has not occurred, bring it to the attention of the court. Obviously, this can be difficult, as notice is often how the Tribe and Tribal Attorney become aware of a case. If there are consistent problems with regard to notice, the Tribal Attorney may wish to build a relationship with the state to address any concerns with state policy and procedure and/or to offer to provide training on when there is "reason to know a child is an Indian child" and notice is necessary.*

Notably, some states require inquiry or notification in addition to notice in ICWA cases. The Tribal Attorney should research jurisdictional requirements and check and confirm that these additional requirements are met.

C-4 Hearings.

1. **Attend and prepare for all hearings.**

   Action: The Tribal Attorney should familiarize themselves with local court rules. The Tribal Attorney should also prepare for and attend all hearings and participate in all telephone or other conferences with the court.

Commentary: *If the Tribe is to be well-represented, the Tribal Attorney must be prepared and present in court. The Tribal Attorney must be active in all stages of the court process to protect the Tribe, its position, and the welfare if its members. In some jurisdictions, a non-attorney representative from the Tribal Child Welfare Agency regularly appears in state court on uncontested matters. In such a jurisdiction, there should be a system in place for a tribal caseworker to request legal assistance before court, and the Tribal Attorney should be available if the case becomes complicated.*

2. **Request the opportunity to make opening and closing arguments.**

   Action: When permitted by the judge, the Tribal Attorney should make opening and closing arguments to best present the Tribe's position and the Tribal Attorney's theory of the case.

Commentary: *In many child welfare proceedings, attorneys waive the opportunity to make opening statements and closing arguments. However, these arguments can help shape the way the judge views the case, and therefore can help the client. Argument may be especially critical, for example, in complicated cases when the legal issues are complex, information from expert witnesses should be highlighted for the judge, hearings take place over several days, or when there are several children and the agency is requesting different services or permanency goals for each of them. It can also be important in cases where the judge may not be familiar with ICWA, its requirements, and the unique evidentiary burden it requires. Making opening and closing arguments is particularly important if the case is being heard by a jury.*

3. **Prepare and make all appropriate motions and evidentiary objections.**

   Action: The Tribal Attorney should make appropriate motions and evidentiary objections to advance the Tribe's position during the hearing. If necessary, the Tribal Attorney

should file briefs in support of the Tribe's position on evidentiary issues. The Tribal Attorney should preserve legal issues for appeal.

Commentary: *It is essential that Tribal Attorneys understand the state's rules of evidence and all court rules and procedures. While there are many circumstances in which cases settle through alternative dispute resolution or during the pretrial phase of the case, Tribal Attorneys must be comfortable zealously trying a case in court. To do so, the attorney must be willing and able to make appropriate motions, objections, and arguments. Tribal Attorneys may also wish to familiarize themselves with state and local practice rules, as they may differ from general civil practice rules. For example, some jurisdictions permit hearsay at certain child welfare proceedings. It is important for counsel to know these nuances and use them to advocate for their client.*

4. **Present and cross-examine witnesses; prepare and present exhibits.**

   Action: The Tribal Attorney must be able to present witnesses effectively to advance the client's position. Witnesses must be prepared in advance and the attorney should know what evidence will be presented through the witnesses. The attorney must also be skilled at cross-examining opposing parties' witnesses. The attorney must know how to offer documents, photos, videos, and physical objects into evidence.

   At each hearing, the attorney should keep the case theory in mind, advocate for the application of ICWA and its elements and for appropriate services, request that the court state its expectations of all parties, and ensure that the court makes all appropriate state and ICWA findings.

Commentary: *Becoming a strong courtroom attorney takes practice and attention to detail. The attorney must be sure to learn the rules about presenting witnesses, impeaching testimony, and entering evidence. The Tribal Attorney should seek out training in trial skills and observe more experienced Tribal Attorneys to learn from them. Even if the Tribal Attorney is more seasoned, effective direct and cross-examination require careful preparation. The attorney must know the relevant records well enough to be able to impeach adverse witnesses and bring out in both direct and cross examinations any information that would support the Tribe's position. Seasoned attorneys may wish to consult with other experienced attorneys about complex cases. The Tribal Attorney must be comfortable with the skills of presenting and cross-examining witnesses. The attorney must also advise the client on how to draft effective reports and present testimony or other evidence for presentation to the court.*

5. **In jurisdictions in which a jury trial is possible, participate in jury selection and draft jury instructions.**

Commentary: *Several jurisdictions around the country afford parties in child welfare cases the right to a jury trial at the adjudicatory or termination of parental rights stages. Tribal Attorneys with cases in these jurisdictions who are not yet skilled at choosing an appropriate jury, drafting jury instructions that are favorable to the client's position, and trying the case before individuals who may not be familiar with child abuse and neglect issues should seek training or co-counsel for the trial phase of these cases to best protect the Tribe's position.*

6. **Request closed proceedings (or a cleared courtroom) in appropriate cases.**

   Action: The Tribal Attorney should be aware of local court rules regarding open and closed proceedings. They should also be aware of who is in the courtroom during a hearing and should request the courtroom be cleared of individuals not related to the case, when appropriate and allowed. The attorney should be attuned to the unique nature of the tribal community and tribal families and discuss, as appropriate, whether people outside of the case should be in the courtroom. The attorney should also be aware of whether the case is receiving media attention and follow any tribal policies related to media engagement.

Commentary: *In many courts, even if they have a "closed court" policy, attorneys, caseworkers, and witnesses on other cases listed that day may be waiting in the courtroom. For a variety of reasons, the Tribal Attorney may wish to request that the judge remove them from the courtroom. Even in an "open court" jurisdiction, there may be cases, or portions of cases, that outsiders should not be permitted to hear. Similarly, if a tribal member or client wants other community members to be present for support, the Tribal Attorney may want to request permission for those persons to be in the courtroom. The Tribal Attorney must be attuned to this issue, the unique nature of tribal communities (both urban and rural), and the unique structure of tribal families, and make requests of the judge accordingly.*

Where hearings are held via videoconference call, the attorney should familiarize themselves with local protocols and ensure their client is aware of appropriate behavior for these calls (e.g., the court asking parties to be certain no others are listening in, minimizing external noise, remaining on mute when others are speaking, etc.).

If a case is being covered by the media, the Tribal Attorney may want to talk to their client about exploring support for media advocacy. This may require leadership approval and spokespersons may need to be vetted. In some circumstances, media advocacy may be important to the Tribe.

7. **Prepare or help prepare proposed findings of fact, conclusions of law, and orders when they will be used in the court's decision.**

Action: Proposed findings of fact, conclusions of law, and orders can be prepared before a hearing. When the judge is prepared to enter his or her ruling, the judge can use the proposed findings or amend them as appropriate.

Commentary: *The Tribal Attorney must be familiar with the requisite findings of fact and conclusions of law the court must make in each type of hearing. By preparing the proposed findings of fact and conclusions of law, the Tribal Attorney has the opportunity to frame the case and ruling for the judge. This may include ensuring that accurate orders are entered that meet ICWA's requirements, such as active efforts findings, placement preferences and evidentiary burdens. It may also result in orders that favor the Tribe, preserve appellate issues, and help the Tribal Attorney clarify desired outcomes before a hearing begins. If an opposing party prepared the order, the Tribal Attorney should review it for accuracy before the order is submitted for the judge's signature.*

C-5 Post Hearings/Appeals.

1. **Review court orders to ensure accuracy and clarity, and review with client.**

   Action: After the hearing, the Tribal Attorney and tribal caseworker should review the written order to ensure it reflects the court's verbal order. If the order is incorrect, the attorney should take whatever steps are necessary to correct it. Once the order is final, the Tribal Attorney should review the order with the client. If the tribal client is unhappy with the order, the attorney should counsel the client about any options to appeal or request rehearing on the order, but should explain that the order is in effect unless a stay or other relief is secured.

Commentary: *If the order is correct but controversial, or if the client is unhappy with it or has trouble understanding what is required, the Tribal Attorney should review it with the client and potentially engage any conflict resolution systems designed for these types of concerns.*

2. **Take reasonable steps to monitor compliance with the court orders and determine whether the case needs to return to court.**

   Action: The Tribal Attorney, along with the tribal child welfare caseworker, should monitor the parties' efforts to comply with the order and, when appropriate, request a review or show cause hearing to promote compliance.

Commentary: *If the parent is attempting to comply with the order but other parties, such as the child welfare agency, are not meeting their responsibilities, the Tribal Attorney should approach the agency's counsel to advocate on behalf of the parent, child, or family, to offer alternatives or*

offer to assist. Similarly, if a parent is failing to comply, the Tribal Attorney with the tribal child welfare caseworker should approach the parent, through parent's counsel, to remind them of the importance of compliance, offer alternatives, or offer to assist them in following the court order. If necessary, the Tribal Attorney should bring the case back to court to review the order and any party's noncompliance or take other steps to ensure that appropriate social services are available to the parent, child, or family.

3. **Consider and discuss with the Tribe the possibility of appeal.**

   Action: The Tribal Attorney should consider and discuss with the tribal client the possibility of appeal when a court's ruling is contrary to the Tribe's position or interests. The decision to appeal should be a joint one between the attorney and client and must have an appropriate legal basis.

Commentary: *When discussing the possibility of an appeal, the attorney should explain the appellate process, as well as the positive and negative effects of an appeal. This should include the impact the appeal could have on the case timeline, the child's best interests, the Tribe's goals in the case, and the protections of ICWA for the Tribe and other tribal families in the future.*

4. **If a decision is made to appeal, timely file the necessary post-hearing motions and the notice of appeal paperwork.**

   Action: The Tribal Attorney should carefully review the obligations in the state's rules of appellate procedure. The attorney should timely file all paperwork, including a notice of appeal, a request for stay of the trial court order, transcript, and case file. The appellate brief should be clear, concise, and comprehensive, and also timely filed. If arguments are scheduled, the attorney should be prepared, organized, and direct. If the Tribe retains separate appellate counsel, the Tribal Attorney should identify issues that are appropriate for appeal and work with the appellate attorney on the appeal. As the attorney who handled the trial, the Tribal Attorney may have insight beyond what the new attorney could get by reading the record.

Commentary: *Appellate skills differ from the skills most Tribal Attorneys use day-to-day. The Tribal Attorney may wish to seek guidance from an experienced appellate advocate when drafting the brief and preparing for argument. An appeal can have a great deal of impact on the family, the court, and in trial courts throughout the state.*

5. **If another party appeals, discuss with the Tribe whether to participate in the appeal.**

Action: When another party appeals, the Tribal Attorney should consider and discuss with the tribal caseworker and/or leadership whether or not to participate in the appeal. The decision to participate should be a joint one between the attorney and client and must have an appropriate legal basis.

Commentary: *When discussing the possibility of an appeal, the Tribal Attorney should explain both the positive and negative effects of bringing an appeal or participating in the appeal, and the perspective the Tribe may be able to bring, the importance of the Tribe's voice in the decision-making process, and any ICWA issues on which the Tribe may be best situated to educate the court.*

Tribes are rarely served notices of appeal by parties to state child welfare proceedings. At the conclusion of contested child welfare proceedings, the Tribal Attorney should remind parties to the case of their obligation to provide notices of appeal to the Tribe. The Tribal Attorney may wish to work with the state appellate bar to ensure that filing modalities (e.g., e-filing) and state rules of appellate procedure reflect this requirement to ensure that tribes are not overlooked and are able to participate in these important proceedings.

6. **Request an expedited appellate remedy, when feasible, and file all necessary paperwork while the appeal is pending.**

   Action: If the state court allows, the Tribal Attorney in a child welfare matter should always consider requesting an expedited appeal. In this request, the attorney should provide information about why the case should be expedited, such as any special characteristics about the family and child and why delay would harm the relationship between the parent and child, the child's relationship with the Tribe, and/or the importance of a child's connection to culture.

7. Communicate the results of the appeal and its implications to the client/agency.

   Action: The Tribal Attorney should communicate the results of the appeal and the implications to the tribal child welfare caseworker and/or leadership. If, as a result of the appeal, the Tribe needs to take action in the case, the Tribal Attorney should instruct or advise the Tribe on these actions. If, as a result of the appeal, the attorney needs to file any motions with the trial court, the attorney should do so.

D. Ethical and Practice Considerations

D-1 Ensure there is a communication protocol that includes a conflict resolution system.

> **Action:** The Tribal Attorney and Tribal Child Welfare Agency should jointly develop a communication protocol that includes a conflict resolution system to address attorney-client conflicts and conflicts among caseworkers or other decision-makers. The protocol should incorporate timeframes for resolution so as not to delay a case. The Tribal Attorney should prepare a client before court so that conflicts do not surface in front of the judge or parties.

Commentary: *A communication protocol and conflict resolution system should be in place before conflict occurs. The attorneys, caseworkers and other decision-makers should work as a team to reach the best outcomes. Key principles of the system might include: 1) the attorney and caseworker (or two caseworkers) should start with a one-on-one meeting, in person whenever possible, to try to resolve the conflict; 2) if there is no resolution, the system should delineate how each should go up their respective chains of command; and 3) the system should set out examples of issues that are legal and those that are social work decisions, understanding that most issues will need to be resolved jointly for children and families. This type of system may also be helpful for when the attorney and leadership cannot resolve a legal issue relevant to the state child welfare case, although a different system may be necessary. Tribal Attorneys should also be attentive to cases where different tribal entities disagree about how to proceed in a case and seek to resolve these conflicts internally. For example, where tribal leadership may be the Tribal Attorney's client or client representative and the Tribal Child Welfare Agency disagrees with their decision, the attorney may wish to facilitate a meeting with the Tribal Child Welfare Agency to discuss the Tribe's decision-making protocol before going into court or meeting with opposing counsel to ensure that the Tribe can present a unified position.*

D-2 Understand and comply with tribal, state, and federal privacy and confidentiality laws.

> **Action:** The Tribal Attorney must understand and comply with tribal, state, and federal privacy and confidentiality laws, including ROIs and protective orders. The Tribal Attorney should also develop protocols with the agency to help the Tribal Child Welfare Agency or leadership access confidential information from external sources when needed for the case. Such methods might include obtaining ROIs or court orders to access the necessary information.

Commentary: *Since the child welfare system directly impacts the lives of children and families, there are numerous aspects of the system that are regulated by confidentiality laws and procedures. For example, the identity of the child, parents, and reporters, as well as treatment records and HIV status of any of the parties, must all be kept confidential. Additionally, the Tribal Attorney should be aware of any HIPAA (medical records) or FERPA (education records) issues that arise. The Tribal Attorney should thoroughly understand these laws to help the agency develop procedures to access necessary information.*

D-3 Initiate and maintain positive working relationships with other professionals in the child welfare system.

Action: Due to the misunderstood role the Tribe plays in the child welfare system, the Tribal Attorney should build relationships with the professionals in the jurisdictions where they most frequently practice. These include, but are not limited to:

- Judges;
- Court staff;
- Opposing counsel;
- State child welfare agency staff and supervisors;
- Local juvenile court improvement programs;
- Child advocates, both attorney and non-attorney;
- Criminal prosecutors;
- Court Appointed Special Advocates (CASAs) or Guardians Ad Litem (GALs);
- Child advocacy centers;
- Citizen’s review panels or boards;
- Administrative offices of the court;
- Relevant department or divisions of Indian affairs;
- Multidisciplinary teams/child fatality review teams;
- Key service providers;
- Medical and mental health professionals;
- School staff; and
- Other local child-centered organizations.

Commentary: *Maintaining positive relationships with other professionals will benefit the Tribe in individual cases as well as during times of reform. When these community members believe their opinion is valued and they are an integral part of the child welfare system as a whole, they will lend their support in different ways, such as when the agency seeks legislative support or buy-in for new projects.*

Where there are multiple tribes connected to a child or family, the Tribal Attorney must reach out to the attorneys, or when not represented, the caseworkers from other tribes, to facilitate discussions to determine which multiple tribes will be "the Tribe" for the purposes of ICWA, the role of each tribe in the case, and how to coordinate on the legal issues and services for the family.

E. Administrative Responsibilities

E-1 Obligations of Tribal Attorney Managers.

1. Clarify attorney roles and expectations;
2. Determine and set reasonable caseloads for Tribal Attorneys;
3. Develop a system for the continuity of representation;
4. Provide Tribal Attorneys with periodic, scheduled training and education opportunities through a reviewed training curriculum;
5. Create a brief and forms bank;
6. Ensure the office has quality technical and support staff;
7. Develop and follow a hiring practice focused on hiring highly qualified candidates;
8. Develop and implement an attorney evaluation process;
9. Advocate for competitive salaries for Tribal Attorneys;
10. Act as advisor, counselor, and trainer for the Tribe and Tribal Child Welfare Agency; and
11. Work actively with external entities to improve the child welfare system.

Commentary: *In general, this section applies to attorneys in an organized office setting with multiple attorneys providing representation in state ICWA proceedings, either as tribal in-house counsel or a firm. It will not apply to one-attorney tribal law offices or solo practitioners with whom the Tribe has contracted.*

E-2 Fulfilling Tribal Attorney Manager obligations.

1. **Clarify attorney roles and expectations.**

   Action: The Tribal Attorney Manager, with the Tribal Child Welfare Agency administration and/or leadership, should clearly set expectations for Tribal Attorneys. This may include:

   - written job descriptions, including caseload expectations,
   - expectations for professional development/continued learning,
   - responsibilities concerning work with the caseworkers, and
   - protocols for assigning tasks and delineating timeframes.

   The Tribal Attorney Manager should ensure the Tribal Attorneys perform their required tasks and that the agency understands and performs its roles.

Commentary: *For Tribal Attorneys to provide the best possible representation, both the attorneys and Tribal Child Welfare Agency must understand their roles and responsibilities. There should be a collaborative approach. The Tribal Attorney Manager plays a key role in*

fostering this teamwork and clarifying each participant's obligations, as well as working with leadership to delineate and communicate these roles.

2. **Determine and set reasonable caseloads for Tribal Attorneys.**

 Action: A Tribal Attorney Manager should determine reasonable caseload levels for the Tribal Attorneys and then monitor the attorneys to ensure the maximum is not exceeded. Consider a caseload/workload study, review written materials about such studies, or look into caseload sizes in similar state and tribal governments to accurately determine the ideal caseload for attorneys in the office.

 Be sure to have a consistent definition of what a "case" is—a family or a child. When assessing the appropriate number of cases, remember to account for all Tribal Attorney obligations, case complexity, the time required to thoroughly prepare a case, tribal social worker case support, administrative support staff and law clerk assistance, travel time, level of experience of attorneys, and available time (excluding vacation, holidays, sick leave, training, and other non-case-related activity). If the Tribal Attorney Manager carries a caseload, the number of cases should reflect the time the individual spends on management duties.

Commentary: *High caseload is considered one of the major barriers to quality representation and a source of high attorney turnover. It is essential to decide what a reasonable caseload is in your jurisdiction and given availability of case support. How attorneys define cases and attorney obligations vary from place to place, but having a manageable caseload is crucial. National experts have found that a caseload of 40-50 active child welfare cases is reasonable, and that a caseload of over 60 child welfare cases is unmanageable from the perspective of Government Attorneys and a caseload of over 80 child welfare cases is unmanageable for parent and/or children's attorneys.*

These determinations are based on full-time child welfare caseloads carried in the same state following the same laws. Because of that, these determinations don't take into account the unique circumstances of Tribal Attorneys, including the consideration that Tribal Attorneys often carry caseloads that include non-child welfare cases, their child welfare caseloads may span numerous states all of which have unique laws and court practices, they may serve as the presenting officer in child welfare cases in tribal court in addition to their role in ICWA cases, and/or they may work at a firm or agency where they have multiple clients and various case types.

The standards drafting committee recommends that attorneys have reasonable caseloads based on:

- *The Tribal Attorney's experience;*
- *The availability and quality of supervision;*
- *The workload and complications of the cases carried;*
- *The number of states the cases carried span; and*
- *The number and complexity of non-child welfare cases carried.*

3. **Develop a system for the continuity of representation.**

    Action: The Tribal Attorney Manager should develop a case assignment system that fosters ownership and involvement in the case by the Tribal Attorney. The office can have a one-attorney: one-case (vertical representation) policy in which an attorney follows the case from initial filing through permanency and handles all aspects of the case. Alternatively, the cases may be assigned to a group of attorneys who handle all aspects of a case as a team and are all assigned to one judge or one group of caseworkers.

Commentary: *Tribal Attorneys can provide the best representation for the Tribe, and therefore get the best results for tribal families, when they know a case and are invested in its outcome. Having attorneys who are assigned to particular cases decreases delays because the attorney does not need to learn the case each time it is scheduled for court. Rather, the Tribal Attorney has the opportunity to monitor action on the case between court hearings. This system also makes it easier for the Tribal Attorney Manager to track how cases are handled. Lastly, tribal social workers and even tribal leaders may more easily track who is handling a case and support case needs if they know which attorney is responsible for a particular case.*

The standards drafting committee recommends that, whenever possible, the same attorney carry an ICWA case from intervention to permanency. In offices where the firm represents multiple tribes, the committee recommends that, whenever possible, the same attorney represents the tribe on all open child welfare cases in which the tribe has sought legal counsel. This consistency on cases and for tribal clients can help promote seamless representation, stronger attorney-client relationships, and better decision-making processes.

4. **Provide Tribal Attorneys with training and education opportunities.**

    Action: The Tribal Attorney Manager must ensure that each Tribal Attorney has the opportunity to participate in training and education programs. When a new Tribal Attorney is hired, the Tribal Attorney Manager should assess that attorney's level of experience, strengths, and readiness to handle cases. The Tribal Attorney Manager should develop and regularly update an internal training program during which the new Tribal Attorney will be paired with an experienced "attorney mentor" who will work with the new Tribal Attorney. The new Tribal Attorney should be required to:

1) observe each type of court proceeding (and mediation if available in the jurisdiction);
2) second-chair each type of proceeding;
3) try each type of case with the mentor second-chairing;
4) submit multiple written motions and responses for review by the mentor; and
5) try each type of proceeding on their own, with the mentor available to assist; before the attorney can begin handling cases alone.

Training should include general legal topics, such as evidence and trial skills, and child welfare-specific topics, such as:

- Relevant state, federal and case law, procedures, and rules;
- Tribal, county, and state agency policies and procedures;
- Available community resources;
- Pre-petition representation;
- Child Welfare diversion programs/services or alternative responses;
- ICWA;
- Trauma, Adverse Childhood Experiences (ACEs);
- Legal permanency options;
- Termination of parental rights law;
- Adoption subsidies;
- Stages of child development;
- Child-centered communication;
- Legal ethics as it relates to agency representation;
- Negotiation strategies and techniques;
- How domestic violence impacts children in the child welfare system;
- Appellate advocacy;
- Immigration law as it relates to child welfare cases;
- Education law as it relates to child welfare cases;
- State and federal benefit programs affecting children in foster care and agency funding resources (e.g., SSI, SSA, Medicaid, adoption assistance, guardianship assistance, and temporary assistance for needy families);
- Understanding mental illness;
- Use of psychotropic medication for children;
- Understanding developmental disabilities;
- Issues arising from substance abuse and available treatment for substance abuse disorders;
- Understanding the impact of out-of-home placement on children;
- Basic principles of attachment theory and limitations on the research;
- Options for presenting children’s testimony;

- Sexual abuse/Commercially Sexually Exploited Children;
- Dynamics of physical abuse and neglect;
- Sexual orientation and Gender Identity Expression;
- Transition plans and independent-living programs for teens; and
- Using and challenging expert witnesses.

Commentary: *Tribal Attorneys should be encouraged to learn as much as possible and participate in conferences and trainings to expand their understanding of developments in the child welfare field. While Tribal Attorneys are often overworked and do not have extra time to attend conferences and trainings, the knowledge they gain will be invaluable. The philosophy of the office should stress the need for ongoing learning and professional growth. The Tribal Attorney Manager should require the attorneys to attend an achievable number of hours of training that will match the training needs of the attorneys. The Tribal Attorney Manager should reach out to the state and local bar associations, tribal service providers, area law schools, local child law institutes, and national organizations to learn about available education opportunities. Further, the Tribal Attorney Manager should ensure the Tribal Attorneys have access to professional publications to stay current on the law and promising practices in child welfare.*

The standards drafting committee recommends that Tribal Attorneys be required to successfully complete a basic training on ICWA before providing representation in a state ICWA case. Tribal Attorneys should also endeavor to seek continuing education on ICWA and other relevant child welfare topics each year the Tribal Attorney continues representation of a tribe in ICWA cases.

5. **Create a brief and forms bank.**

   Action: Develop standard briefs, memoranda of law, and forms that attorneys can use so they do not "reinvent the wheel" for each new project. For example, there could be sample notices of intervention, motions to invalidate, discovery request forms, motions, notices of appeal, and even petitions. Similarly, memoranda of law and appellate briefs follow certain patterns that the attorney could copy and only have to fill in the specific facts of a case. These forms and briefs should be available digitally and in hard copy and should be maintained in a central location. Staff attorneys should be oriented to them and encouraged to add to the brief and forms bank.

Commentary: *Tribal Attorneys may wish to maintain relationships with their sister tribes in various counties and states and share templates and forms based on that jurisdiction's law and policies, since they will be practicing across numerous jurisdictions.*

6. **Ensure the office has quality technical and support staff.**

Action: The Tribal Attorney Manager should advocate for high quality technical and support staff. The Tribal Attorney must have adequate and operational equipment to do the high-level job described in these standards. Additionally, quality staff support is essential. The office should employ qualified legal assistants and administrative assistants to help the Tribal Attorney. Staffing may include having an interpreter available if counsel is not fluent in the Tribe's language. The Tribal Attorney Manager should create detailed job descriptions for these staff members to be sure they are providing necessary assistance. For instance, a qualified legal assistant can do research, interface with tribal social workers, help draft petitions, schedule and help prepare witnesses, and more.

Commentary: *The attorney must have access to a good quality office infrastructure and technology to efficiently perform work. Also, by employing qualified staff, the attorney will be free to perform tasks essential to quality representation while also having dedicated staff to perform the essential administrative and logistical matters necessary for quality representation.*

7. **Develop and follow a hiring practice focused on hiring highly qualified candidates.**

   Action: The Tribal Attorney Manager should give a great deal of attention to hiring the best attorneys possible. If possible, the Tribal Attorney Manager should form a hiring committee comprised of managing and staff Tribal Attorneys and possibly an agency representative. Desired qualities of a new Tribal Attorney should include educational and professional achievements, experience with and commitment to the tribal community and/or the child welfare field, effective interpersonal skills, writing and verbal skills, and ability to handle an often high-pressure, fast-paced litigation practice in a complex legal environment. They should also have experience and knowledge about tribal governance and sovereignty, working within tribal communities, and, whenever possible, knowledge of the specific tribal community they will serve. Advertising the position widely will help draw in a wider group of candidates. The hiring committee should set clear criteria for screening candidates before interviews and should then conduct thorough interviews and post-interview discussions to choose the candidate with the best skills and strongest commitment. Reference checks should be done before making an offer. The Tribal Attorney Manager should also create paths that develop talent through law school partnerships and clerkship programs, and internal staff development plans for legal assistants and paralegals.

Commentary: *Hiring high quality attorneys is essential to raising the level of representation and the level of services the Tribe and tribal families receive. The Tribal Attorney's job is difficult. There are many tasks to complete in a short time. Since Tribal Attorneys often move the rest of the system, strong, committed attorneys can drastically improve the system.*

8. **Develop and implement an attorney evaluation process.**

   Action: The Tribal Attorney Manager should develop an evaluation system that focuses on practice consistency, strengths, constructive criticism, improvement, and the Tribe's overall strategic plan/goals. Some factors to evaluate include: thoughtful case strategy in line with the client's goals; trial preparation and courtroom skills; ability to work collaboratively with the client and other professionals; and ability to work as a team player. During the evaluation process, the Tribal Attorney Manager should consider observing the attorney in court, reviewing the attorney's written work product, talking with colleagues, judges, and agency representatives about the attorney's performance, having the attorney fill out a self-evaluation, and meeting in person with the attorney. The evaluation should be based on information which the Tribal Attorney Manager will need to collect.

Commentary: *A reliable and thorough attorney evaluation process helps attorneys know what they should be working on, what management believes are priorities, what they are doing well, and where they need improvement. If a positive process is created and deployed, the Tribal Attorneys will feel supported in their positions and empowered to improve.*

9. **Advocate for competitive salaries for staff attorneys.**

   Action: Tribal Attorney Managers should advocate for overall compensation for the Tribal Attorneys that is competitive with other attorneys doing similar work in the jurisdiction. To recruit and retain experienced attorneys, salaries and benefits must compare favorably with similarly situated attorneys.

Commentary: *Even when resources are scarce, Tribal Attorneys deserve to be paid a competitive wage and have competitive benefits, such as healthcare, paid time off, and student loan forgiveness. They will not be able to stay in their position, nor be motivated to do their best advocacy, without reasonable compensation. High attorney turnover may decrease when attorneys are paid well and have good benefits.*

10. **Act as advisor, counselor, and trainer for the tribal child welfare agency and leadership.**

    Action: The Tribal Attorney Manager must ensure that the agency is receiving high quality representation both inside and outside the courtroom. No matter what model of representation, Tribal Attorneys should be sure agency staff and leadership are fully informed about legal matters and fully prepared for court and policy decisions. The Tribal Attorney Manager should, therefore, develop protocols concerning such issues as:

- communication, including holding regular office hours at the agency office and responding timely to agency telephone calls and emails;
- information sharing;
- conflict resolution;
- attorney-client work product and confidentiality issues; and
- dealing with media and high-profile cases.

The Tribal Attorney Manager should be sure there is a system in place for reviewing all court orders and communicating the results with the agency and/or leadership. The Tribal Attorney Manager should help prepare all federal reviews and implement any program improvement plans that result.

The Tribal Attorney Manager should ensure there is a process for agency legal training. As part of the process, the Tribal Attorney Manager could design materials, with samples, to help caseworkers prepare for court and provide testimony. Agency training could occur during formal, new hire training; at brown bag lunches; or during after-hours courses. Topics could include, for example:

- overview of ICWA;
- overview of state and federal laws;
- writing appropriate court reports and case plans;
- testifying in court;
- the trial and appellate court processes;
- the need for and steps to complete acceptable searches for an absent parent;
- interdisciplinary advocacy;
- building strong relationships with clients and tribes;
- developing appropriate relationships with other party representatives;
- local court rules and practices; and
- debriefing positive and negative case results to improve practice.

Commentary: *Regardless of whether the Tribal Attorney represents the agency or the Tribe, the caseworkers often have the information needed to put together a strong case. Therefore, the attorneys and caseworkers must meet and communicate regularly. This could involve having office hours when the caseworkers can visit and ask questions or designating an attorney to take caseworkers' telephone calls. Similarly, the better the caseworkers and agency staff understand the law and legal process, the easier it is for them and the Tribal Attorneys to do their jobs well. The Tribal Attorney Manager should be responsible for developing a system for training the agency staff as well as protocols to improve the working relationships between the agency and Tribal Attorneys.*

11. **Implement and lead agency strategy for appeals.**

    Action: The Tribal Attorney Manager should work with the agency and/or leadership to develop and implement an overall strategy for appeals. It should identify the list of issues that will be most important and appropriate to appeal. It should include an internal system for bringing potential appeals to the Tribal Attorney's and Tribal Attorney Manager's attention. The Tribal Attorney Manager should then be ready to pursue the strategy when appropriate cases arise.

Commentary: *Not every motion, ruling, or court decision must or should be appealed. However, the Tribal Attorney Manager must have a clear strategy, communicated to Tribal Attorneys, on what is appealed, both in the interests of a particular case and to advance the overall interests of the Tribe. The agency strategy on appeals must be revisited from time to time as interests, courts, and issues in child welfare evolve.*

12. **Work actively with external entities to improve the child welfare system.**

    Action: The Tribal Attorney Manager should act as a liaison between the Tribe and outside entities involved in the child welfare system. For example, the Tribal Attorney Manager should meet regularly with the court and the state court improvement program to improve issues concerning court administration. The Tribal Attorney Manager (or designee) should sit on all multidisciplinary committees charged with improving court functions or other aspects of the system. The Tribal Attorney Manager should be in regular contact with agencies, such as local behavioral health providers, hospitals, or schools, that employ people who are frequently called as witnesses and who do work with the same population of children. Doing so can build strong relationships and improve the care the children receive from all of the involved agencies.

Commentary: *The Tribal Attorney Manager should be visible in the community and provide a positive presence and association with the Tribe and Tribal Attorney's office. The Tribal Attorney Manager should understand the many issues the Tribe faces related to child welfare and help resolve some of these through work with the court and other involved entities.*

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California ICWA Compliance Task Force

Report to the
California Attorney General's
Bureau of Children's Justice
2017

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Table of Contents

Executive Summary .... **iv**

I. Task Force Creation and Process **1**

II. Introduction **3**

- A. California's Unique Native American Population 3
- B. The Passage of the Federal ICWA 4
- C. California Codifies ICWA via Senate Bill 678 and Other Laws 6
  - SB 678 Includes Non-Federally Recognized Tribes 8
- D. Compliance Remains a Problem 9

III. Failure to Fully Train Legal Counsel, State Agents, Advocates and Bench Officers Creates Systemic Barriers to ICWA Compliance **11**

- A. Legal Counsel 11
- B. Social Workers, CASAs and CAPTA Guardians 13
- C. Court and Bench Officers 14

IV. Child Welfare Agencies Fail to Provide Pre-Removal Active Efforts **18**

- A. Active Efforts to Prevent Removal 18
- B. Investigation 19
- C. Safety Plans Are Avoidance Mechanisms to Compliance 20
- D. Information Gathering and Sharing 23
- E. Guardianships Are Used to Circumvent the Law 23

V. State Courts and Child Welfare Agencies Are Not Complying with Cal-ICWA Requirements for Notice and Inquiry **25**

- A. Initial Inquiries and Follow-Ups 26
- B. Failure to Provide Complete or Accurate Information 30
- C. Notice to Incorrect Person/Address or Not to All Tribes 30
- D. Potential Membership in Multiple Tribes 31
- E. Determining Whether a Child is an "Indian Child" Instead of Deferring to the Tribe 32
- F. Voluntary adoptions, guardianships, and delinquency 33

VI. State Courts Fail to Understand and Comply with Jurisdictional Requirements **35**

- A. Extended Emergency Jurisdiction 35
- B. Non-Compliance with Pre-Removal Reporting and Documentation 36
- C. Agencies and Courts Resist Transfer to Tribal Court 37

VII. Tribal Intervention and Participation in State Court Proceedings Are Thwarted **40**

- A. Tribal Intervention and Participation in Proceedings 40
- B. Non-Party Participation or Monitoring 41
- C. The Tribe, Parent, Indian Custodian and the BIA's Right to a Continuance is Held to Conflict with the Expediency Demanded in Child Custody Proceedings 42
- D. Additional Considerations Regarding Role of Tribes 43

VIII. Active Efforts Post-Removal Are Not Provided or Reviewed by Courts **48**

- A. The Scope of Active Efforts 48

B. Active Efforts are Not Reasonable Services 49
C. Responsibility and Burden Shifting 50
D. Active Efforts – Development 51
E. Active Efforts – Implementation 52
IX. Tribes Are Denied Meaningful Access to Information and Complete Discovery 56
A. Regardless of the Statutory Requirements Disclosure to Tribal Representatives is Often Absent or Truncated 57
B. If Disclosure is Made to the Tribe, Disclosure is Not Done in a Timely Fashion to Make Disclosure Meaningful 59
X. Evidentiary Burdens, Including the Requirement for Qualified Expert Witness Testimony, Are Not Being Met 62
A. The Evidence Establishing Detriment is Not Supported by the Testimony of a "Qualified Expert" Witness 65
B. Agencies Commonly Seek a Waiver of Procedural Rights When the Waivers are Not Understood and/or Executed Properly 70
XI. Placement 72
A. Placement of Indian Children Must be Within a Specific Order of Preference 73
B. Counties Must Make Active Efforts to Locate an ICWA-Compliant Placement 75
1. The Burden to Assist Funding Necessary Repairs to Make Housing Suitable for Placement is Shifted to the Tribe 75
2. Counties Fail to Locate Placement Options for Higher Need Children (Lack of Therapeutic Homes), Which Often Results in Children Being Sent Out-of-County 76
C. Courts Must Make a Finding of Good Cause to Deviate from the Placement Preferences 78
D. Placement Approval Process 78
1. Tribes May Conduct Home Studies and Background Checks 78
E. Recommendations for Placement 79
XII. There Must Be Culturally Relevant Options for Permanence 81
A. Termination of Parental Rights 81
B. Tribal Customary Adoption 82
XIII. Interagency/Crossover Issues Are Not Fully Vetted or Managed Consistent with Minors' Best Interests 85
A. Criminal Delinquency 85
B. Education 86
C. Probate Guardianships 87
D. Commercial Sexually Exploited Children 88
XIV. Available Remedies Prove Ineffective for Cal-ICWA Non-Compliance 90
A. Statutory Remedies 90
B. Non-Statutory Remedies 92
C. Brief History of Collaborative Efforts: The Humboldt County CAPP Experience 92
XV. Task Force Recommendations 94

Executive Summary

At the time of its passage in 1978, the Indian Child Welfare Act, 25 U.S.C. §1901 et seq., (ICWA) was considered landmark civil rights legislation. When California passed what has become known as Cal-ICWA, legislation to adopt many of the protections of the federal ICWA into state law, it was again a landmark moment for the American Indian community. Unfortunately, the promise and potential of the federal ICWA and the Cal-ICWA have not been realized, as neither the letter nor the spirit of the law has been fully implemented.

In 2015, the California ICWA Compliance Task Force came together, after meetings with the Bureau of Children's Justice (BCJ), a newly created Bureau of the California Department of Justice, Office of the Attorney General, to gather narratives and data regarding the failure of ICWA implementation. The goal was that the narratives and data be used in a concerted effort to target reform at non-compliant entities within the dependency system. The intended audience for this work began as the BCJ but has grown to include many branches of state government and other stakeholders.

This Report is the culmination of the Task Force effort thus far, but it is not the end of the effort. This Report is an essential first step, an attempt to examine the issues and frame solutions. As an epicenter of ICWA cases (with more ICWA appeals than any other state), as the home of some of the most divisive and controversial cases involving the ICWA and as a state at the cutting edge of innovation and reform, California has a monumental task ahead to fulfill the promises made to Indian tribes, Indian communities and Indian families in 1978. We, as the Co-Chairs of the Task Force, believe the important work has started with the presentation of this Report but we, as tribal leaders, must ensure that the work continues with our partners in the Governor's office, the Office of the Attorney General, the Judicial Council, the California Bar Association and the California Department of Social Services.

It is essential to make clear that this Report and the Task Force itself do not state or hold as true that there has been no effort or progress in ICWA implementation over the last decades; there has been incremental progress with sincere and innovative efforts to address concerns that tribal leaders and stakeholders have brought forward.

The work of the Tribal-State Workgroup, the passage of several new statutes, and the growing use of Tribal Customary Adoption as a culturally appropriate plan are all exceptional examples of innovation. But, as we near the 40th anniversary of the ICWA, we must hold ourselves to a higher standard so we do not look back on only incremental progress, but look forward to achieve the articulated national and state policies to protect Indian children and preserve Indian tribes through compliance with this landmark legislation.

From the work of the Task Force there are specific areas of ICWA violations that emerged as the most frequent, pointing to where the system is most critically flawed: lack of funding which created an unfunded mandate of ICWA compliance for under-resourced tribes, lack of pre-removal remedial services, lack of robust active reunification efforts, failure to complete diligent inquiry and notice, resistance to tribal court jurisdiction, barriers to tribal participation in court processes, lack of competency within court systems, and deviation from or violation of placement preferences. Tribal leaders, tribal social workers and tribal attorneys disclosed instances all over the state and at all stages of cases where non-compliance with the ICWA had devastating effects on tribes and tribal families.

Tribal representatives shared many profound and deeply troubling stories on a private basis with the Task Force; however, those stories are not included here because the Native American community is effectively silenced by cultural custom. Tribes have shared that it is not appropriate to include a family's tragedy in a public document. In addition, tribes and Task Force participants feared retaliation for divulging ICWA violations and therefore requested privacy. The Task Force also vigilantly protected the confidentiality of children.

Beyond the individual instances of non-compliance, what emerged is a narrative that is no less than a denial of the civil rights that the ICWA and Cal-ICWA were meant to safeguard. Unfortunately, the civil rights violations visited upon California Indians in the dependency system are a small microcosm of a fundamental breakdown of the systems that are failing tribal families and children across the country; one need only

look at the underfunding of legal counsel for indigent tribal families, mental health crises with native youth,[1] the epidemic of sex trafficking of native girls,[2] and the federal court litigation in Pennington County, South Dakota,[3] which could be replicated in California.

As a result of the work of the Task Force, the Co-Chairs are requesting immediate action on the following issues, to be augmented by additional findings and recommendations as this process moves forward:

A) Reframe and reconsider ICWA compliance as a civil rights mandate. The California legislature has repeatedly declared there is no resource more vital to the continued existence and integrity of Indian tribes than their children, and the State has an interest in protecting Indian children in accordance with the Indian Child Welfare Act. The failure to fulfill this mandate is not simply a failure of statutory compliance, it is a systemic and ongoing civil rights violation. It is incumbent on the State to enforce its legislative mandate and require equitable compliance with ICWA, with the same resources and accountability as any other civil rights mandate.

B) Seek legislation to obtain positions and funding to address and develop a concrete action plan for investigating ICWA compliance and to consistently bring to bear the power of the Office of the Attorney General where ICWA compliance is failing.

C) Secure resources to build tracking and data systems that accurately account for tribes and tribal families, ICWA compliance and case outcomes.

[1] Anna Almendrala, *Native American Youth Suicide Rates Are at Crisis Levels*, Huffington Post (October 2, 2015) available at: http://www.huffingtonpost.com/entry/native-american-youth-suicide-rates-are-at-crisis-levels_us_560c3084e4b0768127005591 (last visited May 31, 2016).
[2] Victoria Sweet, *Trafficking in Native Communities*, Indian Country Today (May 25, 2015) available at: http://indiancountrytodaymedianetwork.com/2015/05/24/trafficking-native-communities-160475 (last visited May 31, 2016).
[3] *Oglala Sioux Tribe v. Luann Van Hunnik*, United States District Court, District of South Dakota, Western Division, Case 13-cv-05020-JLV

D) Fund authentic and robust tribal consultation consistent with Executive Order B-10-11, and utilize the information and data gathered through consultation to inform policies and processes for meeting, and exceeding, the civil rights mandate of ICWA.

It is the goal of the Task Force that this Report be a call to action for the BCJ and that it starts a conversation examining the civil rights protected by ICWA. The rights to due process, to political and cultural connections and religious freedoms, and to remain in one's community of origin are routinely under attack. To achieve the promise of the ICWA, there must be more than episodic rallying cries and well-meaning grant cycle initiatives; there must be a vigilant force that demands more than mere lip service to compliance. We thank you for joining us as we address ICWA compliance and protection of the civil rights of our most vulnerable population.

I. Task Force Creation and Process

In November 2015, the California Department of Justice, by and through the Bureau of Children's Justice (BCJ), invited the creation of the first Indian Child Welfare Act Compliance Task Force (Task Force) in California.

The Task Force operates under the direction of seven tribal co-chairs: Maryann McGovran, Treasurer, North Fork Rancheria of Mono Indians of California; Robert Smith, Chairperson, Pala Band of Mission Indians; Angelina Arroyo, Vice-Chairperson, Habematolel Pomo of Upper Lake; Mary Ann Andreas, Vice-Chairperson, Morongo Band of Mission Indians; Aaron Dixon, Secretary/Treasurer, Susanville Indian Rancheria; Barry Bernard, Chairperson, Bear River Band of Rohnerville Rancheria; and the Honorable Abby Abinanti, Chief Judge, Yurok Tribal Court. The Task Force is comprised of tribal representatives and advocates.

The purpose of the Task Force is to gather information and data to inform the BCJ of the status of compliance with California laws related to Native American children in California, and provide recommendations regarding changes necessary to decrease violations of these laws across the many state and county systems that impact tribal families in the dependency system.

The Task Force is an independent, tribally led entity. Various methods were used to gather information, including: testimony and feedback from the community of stakeholders, multiple listening sessions, surveys from tribes across the United States and many follow-up individual interviews with stakeholders to gather more specific information. Email notices of each listening session and information regarding the survey were distributed utilizing contacts listed in the Federal Register, well-known websites and blogs and a concerted effort of outreach by individual Task Force participants.

Despite efforts to gain broad participation in the process and gather a wide spectrum of input, this Report is not comprehensive. For example, the data system utilized to gather and analyze the California Child Welfare System is fundamentally flawed in many ways, e.g., it is unable to produce ICWA-specific information at many levels and the Task Force had neither the authority, time or resources to investigate individual cases brought to the Task Force's attention by and through the information gathering that was completed. Further, the condensed timeframe of the Task Force's mandate required some limitations on information gathering. However, the Report does reflect a robust cross-section of input, experiences and information, which the Co-Chairs hope sheds light on the barriers, systemic failures and possible solutions to California's ongoing failure to live up to the mandates of state laws affecting tribal families and tribal governments navigating the juvenile dependency system.

SUMMARY OF SURVEY DATA GATHERED

STAGE OF CASE WHERE MOST NON-COMPLIANCE*: Pre-removal, Active Efforts, Jurisdiction and Placement*

MOST COMMON COMPLIANCE FAILURES*: Notice and Inquiry, Active Efforts, Placement and use of Qualified Expert Witnesses*

MOST COMMON SUGGESTED SOLUTIONS*: In addition to training and collaboration, tribes seek equitable enforcement of ICWA, consistent with any other law. A lack of funding does not and cannot excuse compliance.*

II. Introduction

A. California's Unique Native American Population

Nearly one-fifth of all federally-recognized Native American tribes in the country are in California.[4] Per the 2010 Census, California is home to approximately 723,000 persons identifying as Native Americans, more than any other state.[5] This concentrated population makes it essential that state laws designed to protect Native American families, children and tribes be properly and fully implemented.

For the purposes of understanding the Indian Child Welfare Act, 25 U.S.C. §1901 et seq., (ICWA) and Cal-ICWA, the legislation known as SB 678, certain historical facts must be emphasized. First, a great many California tribes are relatively small, are located on reservations or Rancherias in remote areas, and lack significant economic opportunities or resources. Second, a large percentage of Native Americans in California is from out-of-state tribes.[6,7] The sheer distance between the courthouse venue and the location of tribal representatives, attorneys, experts and social workers often poses a significant monetary burden. Thus, both in-state and out-of-state tribes find it financially impossible to intervene in every ICWA case involving their children. ICWA applies and must be enforced regardless of tribal intervention and there must be a universal understanding that it is the Native American child that triggers ICWA. This is a critical factor which is often ignored.

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[4] 81 Fed. Reg. 26826 (May 4, 2016) (110 of 566 tribes).
[5] Tina Norris, Paula L. Vines, and Elizabeth M. Hoeffel, U.S. Census Bureau*, The American Indian and Alaska Native Population: 2010 (C2010BR-10)*, Table 2 (January 2012), available at http://tinyurl.com/7h6apt8.
[6] Stella Ogunwole, *We the People: American Indians and Alaska Natives in the United States*, U.S. Census Bureau (February 2006) http://www.census.gov/prod/2006pubs/censr-28.pdf (last visited May 31, 2016), and U.S. Census Bureau, *Census 2000 PHC-T-18: American Indian and Alaska Native Tribes in California: 2000* (June 2004) http://www.census.gov/population/www/cen2000/briefs/phc-t18/tables/tab019.pdf (last visited May 31, 2016).
[7] When termination and assimilation were regarded as appropriate federal policies during the 1950s and 1960s, many Indian families were moved to California via a "voluntary" program, ostensibly for their financial benefit. (See Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416, "The ACCIP Historical Overview Report: The Special Circumstances of California Indians," p. 15 (September 1997).) The Urban Indian Relocation Program transported thousands away from reservations to designated relocation cities, such as Los Angeles, San Francisco, Oakland and San Jose. In an ironic twist, the program was headed by Dillon S. Myer, who had previously overseen the program under which Japanese-Americans were moved to internment camps during World War II.

While legislatures have recognized the importance of compliance with the ICWA and of protecting children's rights as Native Americans,[8] in practice the entity most concerned with seeing that these laws are followed – the tribe – is frequently precluded from participation. As is evident from numerous California appellate decisions year after year,[9] without some other enforcement mechanism or incentive for compliance, the ICWA and the complementary state laws discussed herein may be little more than paper tigers.

> *All statutory references are to California state law unless otherwise noted. References to "§" are to the California Welfare and Institutions Code. References to "Rule" are to the California Rules of Court.*

B. The Passage of the Federal ICWA

Congressional hearings in the mid-1970s revealed a pattern of wholesale public and private removal of Native American children from their homes, undermining Native American families and threatening the survival of Native American tribes and tribal cultures.[10] At the national level, studies in the years leading up to the passage of the ICWA found that:

- Native American children were approximately six to seven times as likely as non-native children to be placed in foster care or adoptive homes;[11] and,

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[8] Welf. & Inst. Code §224. All statutory references are to California state law except where noted.

[9] In 2016, there were 175 ICWA cases appealed. California again took the lead with 114 cases; 10 cases were reported. The second highest count is Michigan with 13 cases, 2 reported. Turtle Talk also tracked California cases by appellate district: 37 in the 4th Appellate District, 33 in the 2nd, 24 in the 1st, 9 in the 5th, 6 in the 3rd, and 3 in the 6th. https://turtletalk.wordpress.com/2017/01/04/2016-icwa-appellate-cases-by-the-numbers/ There were 201 ICWA cases in 2015; 35 of them were reported. As usual, California has the most cases, with 156 (146 unreported). The next highest state was Michigan, with 7 cases (3 unreported). https://turtletalk.wordpress.com/2016/01/06/2015-icwa-appellate-cases-by-the-numbers/ (last visited March 6, 2017)).

[10] *Indian Child Welfare Program: Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs* (1974) 93rd Cong., 2d Sess. 3 (statement of William Byler) (http://narf.org/icwa/federal/lh/hear040874/, last visited May 15, 2012).

[11] Sherwin Broadhead et al., *Report on Federal, State, and Tribal Jurisdiction: Final Report to the American Indian Policy Review Commission* 81-85 (U.S. Gov't Printing Office 1976).

- Approximately 25%-35% of all Native American children were removed from their homes and placed in foster care or adoptive homes, or institutions such as boarding schools.[12]

In California, specifically:

- Native American children were more than eight times as likely as non-native children to be placed in adoptive homes;
- Over 90% of California Native American children subject to adoption were placed in non-native homes; and,
- One of every 124 Indian children in California was in a foster care home, compared to a rate of 1 in 367 for non-Indian children.[13]

Congress determined that Native American children who are placed for adoption into non-native homes frequently encounter problems in adjusting to cultural environments much different from their own.[14] Such problems include being stereotyped into social and cultural identities which they know little about, and a corresponding lack of acceptance into non-Native American society.[15] Due in large part to states' failures to recognize the different cultural standards of Native American tribes and the tribal relations of Native American people, Congress concluded that the Native American child welfare crisis was of massive proportions and that Native American families faced vastly greater risks of involuntary separation than are typical for our society as a whole.[16] These involuntary separations created social chaos within tribal communities. The emotional problems embedded in Native American children hampered their ability as adults to positively contribute to tribal communities and left families in extended mourning mode, which significantly impaired their ability to meet their tribal citizenship responsibilities.

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[12] H.R. Rep. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531.
[13] Sherwin Broadhead et al., *Report on Federal, State, and Tribal Jurisdiction: Final Report to the American Indian Policy Review Commission* 81-82 (U.S. Gov't Printing Office 1976).
[14] See H.R. Rep. No. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531-7532.
[15] Dr. Joseph Westermeyer, *Cross-Racial Foster Home Placement Among Native American Psychiatric Patients*, 69 Journal of the Nat'l Medical Assoc. 231, 231-232 (1977); *Indian Child Welfare Program: Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs,* 93rd Cong., 2d Sess. 46-50 (1974) (testimony of Dr. Westermeyer).
[16] See H.R. Rep. No. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531-7532.

Congress passed the ICWA to remedy the above.[17] The ICWA is meant to fulfill an important aspect of the federal government's trust responsibility to tribes by protecting the significant political, cultural and social bonds between Native American children and their tribes. In doing so, the ICWA ultimately is civil rights legislation which protects the interests of Native American children and the existence of Native American tribes and families.[18],[19] Because the ICWA serves Native American children as well as parents, Indian custodians and Native American tribes, the ICWA must be applied regardless of whether a child's tribe is involved in the case.

Further, what was not accomplished by Congress and still plagues the system today is the lack of funding for the mandates of the ICWA. Fulfilling the promise of ICWA requires resources, but ICWA remains an "unfunded mandate" and the cost is borne by tribes and Native American families.

C. California Codifies ICWA via Senate Bill 678 and Other Laws

In 2006, Senate Bill 678 (referred to herein as the Cal-ICWA) was passed with the aim of harmonizing federal legislation and intent with state law.[20] Before it took effect, the ICWA had inconsistently been applied through Rules of Court, case law and the BIA Guidelines, but had not been codified for implementation on a state level. Cal-ICWA remains the most comprehensive ICWA-related legislation adopted by any state. The final legislation was the culmination of efforts by State Senator Denise Moreno Ducheny, its sponsor, on behalf of the Pala Band of Mission Indians, California Indian Legal Services and a host of others.

Cal-ICWA codified the federal ICWA's requirements into California Welfare & Institutions code, Probate code and Family code. This legislation specifically declared that a Native American child's best interests are served by protecting and encouraging a

[17] 25 U.S.C. §1901.
[18] 25 U.S.C. §1902.
[19] See, The Department of the Interior, Bureau of Indian Affairs adopted final regulations for implementation of the ICWA, which were published June 14, 2016, effective December 12, 2016. 81 Fed. Reg. 38778; codified at 25 CFR Part 23; www.indianaffairs.gov/cs/groups/public/documents/text/idc1-034238.pdf; ("ICWA Regulations"); the Bureau of Indian Affairs also published Guidelines for Implementing the Indian Child Welfare Act on December 13, 2016. 81 Fed. Reg. 96476 (December 30, 2016). www.indianaffairs.gov/cs/groups/public/documents/text/idc2-056831.pdf ("BIA Guidelines").
[20] Ducheny, Denise M., Senate Daily Journal for the 2005-2006 Regular Session, pp. 5606–5607 (August 31, 2006).

connection to his or her tribal community.[21] In addition, this legislation built upon the ICWA's foundation by creating further safeguards, such as:

(1) Clarifying that the ICWA applies to probate guardianships and conservatorships;[22,23]

(2) Imposing an ongoing and affirmative duty to inquire whether a child in a child-custody proceeding may be a Native American child;[24]

(3) Requiring documentation of the active efforts made to place a Native American child within the ICWA's order of preference;[25]

(4) If no preferred placement is available, requiring active efforts to place a Native American 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;"[26]

(5) Requiring expert witness testimony to be live, rather than by declaration, unless all parties agree otherwise;[27]

(6) Prohibiting the party seeking foster care placement or termination of parental rights from using its own employee as the required expert witness;[28]

(7) Providing that a tribe wait until reunification services have been terminated before requesting a transfer to tribal court does not constitute good cause to deny such a request;[29]

(8) Requiring that available tribal resources be used when making active efforts to keep the Native American family intact;[30]

(9) Requiring that available tribal resources be used when trying to meet the ICWA's placement preferences;[31]

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[21] Welf. & Inst. Code §224(a)(2).
[22] Prob. Code §1459.5.
[23] Prior to SB 678, a question existed whether a non-social services petitioner could circumvent the ICWA by filing for guardianship or conservatorship letters for an Indian child while not following state or federal law requiring active efforts be made to prevent the breakup of the family.
[24] Welf. & Inst. Code §224.3(a).
[25] Welf. & Inst. Code §361.31(k).
[26] Welf. & Inst. Code §361.31(i).
[27] Welf. & Inst. Code §224.6(e).
[28] Welf. & Inst. Code §224.6(a).
[29] Welf. & Inst. Code §305.5(c)(2)(B).
[30] Welf. & Inst. Code §361.7(b).
[31] Welf. & Inst. Code §361.31(g).

(10) Acknowledging that the Interstate Compact on the Placement of Children does not apply to any placement sending or bringing a Native American child into another state pursuant to a transfer to tribal court under 25 U.S.C. §1911;[32] and, Applying sanctions of $10,000 for the first offense and $20,000 for the second if a person knowingly and willfully falsifies or conceals a material fact concerning whether a child is an Indian child or the parent is an Indian. [33]

SB 678 Includes Non-Federally Recognized Tribes

Non-federally recognized tribes ("N-FR tribes") are disadvantaged when ICWA is triggered in a child custody proceeding. Many N-FR tribes have organized as non-profits or are state-recognized tribes. Often, individuals who are affiliated with a N-FR tribe or are a member of a N-FR tribe reside on or near the reservation of a federally recognized tribe or within that federally recognized tribe's service area. Indians from N-FR tribes may therefore be eligible for services and programs from those federally recognized tribes and their affiliated programs. In addition, N-FR tribes may receive federal funding as a non-profit or state-recognized tribe, which may include funding for housing, employment and education. See United States Government Accountability Office, Report to the Honorable Dan Boren, House of Representatives; Indian Issues: Federal Funding for Non-Federally Recognized Tribes. April 2012.

To address and ease the impact of child custody proceedings on N-FR tribes, SB 678 embraced the spirit and intent of the ICWA with the inclusion of Indian children from non-federally recognized tribes by adding Section 306.6 to the Welfare & Institutions Code. With the court's discretion, this section allows a non-federally recognized tribe to:

1. *be present at a hearing*
2. *address the court*
3. *request & receive notice of the hearings*
4. *request to examine court documents relating to the proceeding*
5. *present information to the court that is relevant*
6. *submit written reports and recommendations to the court*
7. *perform other duties & responsibilities as requested or approved by the court*

While the ICWA and Cal-ICWA apply only to those tribes that meet the federal definition set forth in 25 U.S.C. §1903(8), the State of California made clear that Sec. 306.6 is "intended to assist the court in making decisions that are in the best interest of the child." This includes allowing the tribe to inform the court regarding placement options within the family and tribal community and provide information regarding services and programs that serve the parents and child as Indians. By including Sec. 306.6 in Cal-ICWA, the Legislature extended the state and federal interest to protect the best interests of Indian children to all Indian children in California.

Indian children from non-federally recognized tribes suffer similar hardships to other children, and counties must work to place these Indian children in their tribal communities and with tribal relatives. Counties must also work to provide culturally appropriate services and programs to Indian children and parents.

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[32] Fam. Code §7907.3.

[33] Fam. Code §8620(g); see also Welf. & Inst. Code §224.2(e).

In addition to the Cal-ICWA, the California Legislature passed AB 1325 in 2009 to allow dependent tribal children in need of a long-term placement plan to be adopted without the necessary precursor of termination of parental rights. California's Tribal Customary Adoption bill has been utilized in California courts by both California and non-California tribes to have a culturally consistent permanency option for tribal children. As discussed below, Tribal Customary Adoption is, however, unfortunately still underutilized, despite being found to be the most culturally appropriate permanency option for many tribal children.[34]

D. Compliance Remains a Problem

Despite ICWA's federal mandate, and despite the Cal-ICWA's passage in 2006, systemic problems with compliance persist. Tribal attorneys and representatives experience frequent resistance and dismissiveness from child welfare agencies,[35] county attorneys and even courts when appearing in dependency cases. Procedural requirements designed to protect the connection between Indian children and their tribes[36] are too often viewed as requiring onerous paperwork, contributing to additional delays and creating impediments to permanence. The perception that Indian tribes, parents and children receive unnecessary special treatment persists—even though such treatment is entirely congruent with federal law recognizing the unique political status of tribes—and continues to be an underlying theme of many cases. The protections provided through the statutes are also part of the federal government's trust responsibility to tribes and Indian persons.[37]

The lack of ICWA-specific competence standards and training exacerbates this problem. Absence of true understanding of the ICWA's purpose leads to perfunctory compliance or complete violations of the law. For example, a recent report describes the right to legal counsel for children and families as "on the brink" because of budget cuts

[34] *In re H.R.* (2012) 208 Cal.App.4th 751,759.
[35] For purposes of this report, County Child Welfare Agencies are referred to as "the Agency" and "the County" interchangeably.
[36] Welf. & Inst. Code §224; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 37.
[37] 25 U.S.C. §1901.

and rising caseloads.[38] As the population that is repeatedly documented as the most disproportionally represented in the child welfare system - coupled with a system in collapse to provide adequate legal counsel - tribal families and tribes are forced to pick up where the system falls short.[39] Added to the diminishing ability of appointed counsel to represent their clients is the reality that ICWA cases take additional competencies, training and resources. These two factors combined means that it is a near impossibility that the civil rights promised by the ICWA and Cal-ICWA can be protected.

This Report documents that almost 40 years after ICWA's passage, compliance with basic, fundamental aspects of the law (e.g., efforts to prevent the need for removal, notice and inquiry, providing appropriate reunification services, and meeting the placement preferences) remain a significant concern. The problem is further compounded by the fact that there is no reliable way to assess compliance on a systemic basis. There is no readily available data on how many cases the ICWA is or ought to be applied in. The data that does exist is not up to date and is not accurate. Counties routinely fail to keep required records, such as documentation of active efforts to meet the placement preferences[40] -- characterized by the Supreme Court as the ICWA's "most important substantive requirement."[41] As demonstrated in this Report, the lack of meaningful and accurate data is a systemic failure tied to a lack of training, resources and competency.[42]

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[38] American Civil Liberties Union of California, *System on the Brink: How Crushing Caseloads in the California Dependency Courts Undermine the Right to Counsel, Violate the Law and Put Children and Families as Risk*, May 26, 2015.
[39] See, Child Welfare Information Gateway, https://www.childwelfare.gov/pubs/issue-briefs/racial-disproportionality/; racial disproportionality index for American Indian/Alaska Native children increased from 1.5 in 2000 to 2.7 in 2014. Page 3; "Race or ethnicity may be incorrectly assumed by whomever is recording the data. For example, a caseworker may assume a child is not American Indian even though the child may be a Tribal member or is eligible for Tribal membership. This would affect the count of American Indian children involved with child welfare and could affect the services, supports, and jurisdiction of the case." Page 5.
[40] 25 U.S.C. §1915(e); Welf. & Inst. Code §361.31(k).
[41] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36.
[42]See, 81 Fed. Reg. 90524 (December 14, 2016) Adoption and Foster Care Analysis and Reporting System (AFCARS) Final Rule. Incorporation of data elements related to the Indian Child Welfare Act (ICWA) are mandatory by 2020. https://federalregister.gov/d/2016-29366

III. Failure to Fully Train Legal Counsel, State Agents, Advocates and Bench Officers Creates Systemic Barriers to ICWA Compliance

Tribal representatives identified an imbalance in training, competence and resources devoted to dependency case participants in relation to Cal-ICWA cases. The absence of training, continuing education, special certification and cultural sensitivity directly impacts the enforcement of the Cal-ICWA. The Task Force's research represents a small sample of the ICWA cases statewide, but a lack of ICWA-specific training appeared across the board, which is a systemic problem.

ISSUES:

1) Rules of Court failed to include CAL-ICWA-related issues and failed to consult with tribes, tribal social workers or tribal attorneys regarding establishing the Rules for competency.

2) Substantive areas of dependency training are incomplete because they fail to account for ICWA cultural competency and the heightened ICWA standards.

3) New social workers are not adequately familiar with ICWA issues when they first handle a case. Seasoned social workers suffer from a lack of ICWA training.

4) Rural tribal communities need to be included in the training process for social workers and CASA volunteers.

A. Legal Counsel

California Rules of Court, rule 5.660 compels each Superior Court to adopt a local rule regarding the representation of parties in dependency proceedings. The Rules direct each county to adopt a local rule on representation of parties in dependency cases *after* consultation with a variety of constituents (i.e., county counsel, district attorneys, public defenders and county welfare departments), but omit including any consultation with tribes, tribal social workers or tribal attorneys.

On its face, the rule is well-intentioned and designed to assure that legal counsel is qualified—but does not apply equally to all participants in dependency cases. More importantly, Rule 5.660 does not include any training, expertise, course work or verification that the participants are versant in

ICWA, Cal-ICWA or cultural issues. The gap, however, is that the rule does not apply to county attorneys or retained attorneys, but has on occasion been used to thwart tribal attorneys from appearing in cases.

Aside from the disparity of application in the competency rule, the substantive areas of expertise only include attorney training on: (i) dependency law, statutes and cases; (ii) information on child development, abuse and neglect, substance abuse, domestic violence, family reunification and preservation, and reasonable efforts; and (iii) instruction on cultural sensitivity and best practices for lesbian, gay, bisexual and transgender youth in out-of-home placement. The rule requires a recertification and eight hours of continuing education related to these areas every three (3) years.

RECOMMENDATIONS:

1) Revise the Rules of Court to effectively mandate ICWA competency for legal counsel, social workers, CASAs, bench officers and others. Expand the Rule to require specific substantive, procedural and cultural components of the ICWA and CAL ICWA.

2) Hold attorneys to the appropriate standards for compliance with ***all*** *laws including ICWA and Cal-ICWA.*

3) New and seasoned social workers should receive both on the job and non-adversarial training regarding ICWA compliance.

4) Establish a Tribal/Cal-ICWA CASA program with funding for recruitment, training and support for CASA volunteers.

(continued)

A rule that omits the ICWA and Cal-ICWA in a dependency training dilutes the effectiveness and competency of the entire process, and must be addressed through a statewide rule of court or statute. Non-compliant parties should be identified, to assist in ensuring compliance, to tribal attorneys and representatives. Ultimately the process will improve if the same level of training for generic dependency issues is afforded to ICWA issues.

The rule should be expanded to include all parties and social workers who appear in dependency cases, including county counsel and private attorneys. In addition, the rule should *specifically* include and incorporate training in substantive, procedural and cultural components of the ICWA and Cal-ICWA.

Notably, the rule includes training on *reasonable efforts*, but is silent on the higher ICWA standard of *active* efforts. Cultural sensitivity training, already required specifically for LGBT children, should be expanded to include specific training for Indian children.

***RECOMMENDATIONS** (cont.):*

5) Reduce the rotation of social workers in the different phases of dependency.

6) Consult with tribes regarding appointment/assignment of bench officers.

7) Legislatively mandate training for new judicial officers and seasoned bench officers on tribal child welfare, ICWA and CAL-ICWA.

8) Delays in holding hearings and filing reports should trigger sanctions against the agency and or their counsel.

9) Bench officers must not allow the social service workers to submit generic, conclusory findings of compliance with CAL-ICWA.

B. Social Workers, CASAs and CAPTA Guardians

County social workers, CASAs and CAPTA guardians are not adequately trained in Cal-ICWA requirements or cultural competency. New social workers are not adequately familiar with ICWA issues when they first handle a case. Seasoned social workers also suffer from a lack of ongoing CAL-ICWA training and are often the most challenging to work with, given their number of years in the system. In addition, the rotation of case workers in the different phases of dependency was identified as problematic for tribes and tribal representatives, especially in large counties where case assignments are not vertically integrated through the different procedural phases. Tribes are forced to reorient as cases are moved from a *Detention Worker* to a *Placement Worker*, then to a *Case Plan Worker*, and sometimes to various assignments of *Permanency Workers*. To further complicate these cases, counties use various and different labels for each phase of a case, which compounds and frustrates the process for tribes. The fragmentation of assignments means that the newly assigned social workers are not familiar with the tribe or the culture, and often the Cal-ICWA, leaving tribes to start over several times in one case.

Although All County Letters (ACLs), which interpret state and federal law for the county staff, address CAL-ICWA policies and procedures, this is not an adequate

substitute for training on an ongoing basis. The CDSS has issued ACLs on Changes in State Law, SB 678 (ACL 8-02); ICWA Adoption Forms, Process and Standards (ACL 8-02); Implementation of Tribal Customary Adoption (TCA) (ACL 10-47); and the Requirement of use of Expert Witnesses (ACIN 1-40-10), to name a few, but has overlooked continued training of the line social workers in non-adversarial situations. This lack of training applies to agency section managers, supervisors and directors.

Cultural competency, particularly when it comes to placements, services and being knowledgeable about the specific tribes that have children in the system, is a must for social workers, CASAs (Court Appointed Special Advocates) and CAPTA (Child Abuse Prevention and Termination Act) guardians. The size of California and the diversity of jurisdictions create a regional challenge, particularly for rural communities, and those tribes need to be part of the training process for social workers. The Task Force could find no corresponding training requirements on the Cal-ICWA for CASAs or CAPTA Guardians. Though in some instances the CASA and CAPTA GAL (Guardian ad Litem) may be the same person, the GAL could also be the social worker or minor's counsel, which lends to a confusing overlay of roles, but more importantly invites a discrepancy of training or competency when it comes to Cal-ICWA issues. The increasing roles of CASAs, CAPTAs and caregivers who are granted educational and other rights compels the State to ensure that these stakeholders are properly trained in the full spectrum of ICWA issues. Courts afford great weight to CASAs and others who speak for young children, and to the extent that the representative is ignorant of a tribe's legal and cultural stature, it adversely affects the minor and the tribe, and often contributes to the negative view of Cal-ICWA, the tribe and almost always the Native American parents and/or Indian custodian.

C. Court and Bench Officers

California Rules of Court, rule 5.40(d) delineates training and orientation established by the Presiding Judge of the Juvenile Court to include educational rights, disability accommodation and minimum continuing education requirements for counsel and participants, but does not include Cal-ICWA-related issues. The absence of any

tribal or Cal-ICWA training component in a state with 110 federally recognized tribes almost guarantees that some stakeholders in the system will not view the Cal-ICWA as equally important as other training areas.

California legislatively mandated training for judicial officers regarding domestic violence in recognition of the necessity for education on this particular topic, both because of the importance and the specificity of the issues.[43] Legislatively mandated training - for both new judicial officers and periodically for all bench officers - on tribal child welfare and Cal-ICWA is similarly necessary, as other methodologies such as non-mandated training have not resulted in a decrease in Cal-ICWA appeals nor appear to have increased systemic competency.

A separate issue, and one that is not unique to ICWA cases, is the institutional acceptance of delays in child welfare cases. The Welfare and Institutions Code requires cases to be heard within a strict and short timeframe. A detention hearing must occur within 48 hours of a child being taken into custody,[44] with jurisdiction being heard 15 days thereafter (if the child is detained) or 30 days (if child is not detained).[45] Disposition, which is the linchpin of a dependency case—because it is where the court decides whether to return a child home (family maintenance), or place out of home (family reunification, with a formal case plan) — can only be decided *after* a court takes jurisdiction. The dispositional hearing must also occur within strict time parameters: (i) 10 days if a child is detained;[46] and (ii) no later than 30 days if the child is not detained.[47] In non-reunification cases, a continuance cannot exceed 30 days.[48]

Notice to federally recognized Indian tribes must also be factored into each case, and requires 10 days' notice to the tribe and/or Bureau of Indian Affairs and, if

[43] Gov. Code §68555; 2014 Rule of Court 10.464.
[44] Welf. & Inst. Code §313(a); Rule of Court 5.670(b).
[45] Welf. & Inst. Code §334; Rule of Court 5.670(f).
[46] Welf. & Inst. Code §358; Rule of Court 5.686(a).
[47] Welf. & Inst. Code §358; Rule of Court 5.686(a).
[48] Rule of Court 5.686(b).

requested by a tribe, parent or Indian custodian, a 20-day continuance must be granted after notice is received.[49]

The now-common practice of combining Jurisdiction and Disposition into one hearing, which is contrary to the statutory time scheme, coupled with late or defective notice to tribes, has cultivated systemically sanctioned delays. The logistical difficulties of agency or counsel noticing tribes does not alleviate the public policy requirement of hearing dependency and ICWA cases within the specified and accelerated timetables. In addition, the common practice of filing late reports, and not serving tribes or their representatives with all documents and discovery, is an abuse of process that was identified by the Task Force respondents. The willful disobedience or interference with orders of the Juvenile Court or judge constitutes contempt, and is punishable under §213 in the same manner as regular civil courts under CCP §1218. The Dependency Court's inherent authority to sanction counsel and parties extends to failures to provide discovery and disclosure to tribal attorneys, tribal representatives and Indian tribes.[50]

The delays in holding hearings and filing reports, coupled with delays in providing notice, discovery and disclosure to tribes—despite amendments to §827, and despite tribes being relegated to second-tier parties—is something that can and should trigger sanctions against the agency and/or their counsel. Acquiescence by the court raises a question of collective competence because the court should not condone parties' unfamiliarity with or, worse, disregard of the rules.

Finally, bench officers must not allow social service workers to submit generic, conclusory findings of compliance with Cal-ICWA. Where a finding of good cause to deviate from placement preferences, by way of example, is required, then the court should specify in exacting detail—on the record—what the good cause is, and not allow unsupported findings. Much of the problem identified by Task Force participants stemmed from juvenile courts broad-brushing findings that appear, on paper, to comply with the Cal-ICWA, but in practice exclude tribal input and compliance.

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[49] Rule of Court 5.482.
[50] Rules of Court 5.486(j) and (k).

To be clear, not every case involves social workers, legal counsel or judges who are not well-versed in the Cal-ICWA, but the prevalence of untrained participants and the perception by tribes that they must force compliance—especially where tribes do not have lawyers or have not formally intervened—demonstrates that a training and certification component is sorely needed for all counsel and social workers.

Task Force Participants ~

"It appears as though many appointed attorneys and bench officers have a very limited understanding of ICWA, which leads to contentious relationships with tribes and a bare minimum effort at following the law. Thus, training is needed to ensure cases don't become adversarial and lead to more trials and conflicts for Indian families."

Regarding Orange County*: "Training for the court, attorneys and social workers on ICWA and the importance of ICWA compliant placement."*

Regarding Nevada County*: "The court and parties need to be trained on ICWA and forced to comply."*

Regarding Sacramento County*: "Training and clarification on ICWA and the specific requirements of the placement and active efforts. Training on the new guidelines would greatly improve understanding."*

IV. Child Welfare Agencies Fail to Provide Pre-Removal Active Efforts

A. Active Efforts to Prevent Removal

Absent exigent circumstances, active efforts must be provided to an Indian family prior to removing an Indian child.[51] Active efforts are to be assessed on a case-by-case basis and must take into account the "prevailing social and cultural values, conditions, and way of life of the Indian child's tribe."[52] Referrals to and utilization of "available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies and individual Indian caregiver service providers" would be demonstrative evidence.[53] Given the widespread lack of understanding in California of what "active efforts" means and what is required,[54] it is the rare situation when an Indian family has received active efforts before a child welfare agency initiates a removal of an Indian child.[55]

ISSUES:

1) Failure of child welfare agencies to reach out to tribal service providers to secure active efforts for Indian families and children due to specific service contract providers.

2) Failure of child welfare services to file timely reports and serve tribes and their representatives with documents and discovery.

3) Tribal recommendations regarding services are not being honored.

4) Gearing culturally relevant pre-removal services to both the parent and the Indian child.

The goal of pre-removal active efforts is to identify and address the issues impacting the family, which may put an Indian child at risk for removal. Despite the number of Indian Health Services clinics and hospitals in California, as well as tribal organizations providing a myriad of services and tribes with social service programs, child welfare agencies often do not connect and reach out to these

[51] See Welf. & Inst. Code § 361.7(a); Cal. Rules of Ct. 5.484 (c).
[52] See Welf. & Inst. Code §361.7(b).
[53] *Id.*
[54] Counties specifically named as not providing adequate pre-removal services or not disclosing information to tribes regarding pre-removal issues were: Kings, Riverside, Sacramento, Sonoma, San Diego, Napa and Humboldt.
[55] See, ICWA Regulations defining "active efforts" codified at 25 CFR Part 23.2. This provides a higher standard of protection to the parents or Indian custodian and is therefore the applicable standard.

service providers to secure active efforts for Indian families and children because agencies contract with specific service providers to refer parents to prior to removing a child. In addition, whether a matter of ignorance, distrust or a combination of both, social workers all too often reject tribal recommendations regarding the type of services to be provided or service providers to be accessed, in favor of the county's standard case plan and contracted providers. This not only frustrates the relationship between tribes and child welfare agencies, but rejection of these services is in violation of federal and state law and a disservice to Indian children, youth and families. An additional concern at this stage is that services and referrals are almost always geared to the parent, with diminished consideration of services targeted to the Indian child.

ISSUES (cont.):

5) Child welfare investigations are not handled properly.

6) Safety plans are not utilized consistently or properly.

7) Protective custody warrants are not shared with Tribes.

8) PEPS are executed in violation of ICWA and CAL-ICWA.

9) Lack of cross-reporting between the county and tribe. Refusal by the county to provide a copy of protective custody warrants to tribal representatives.

B. Investigation

When a report is made to a child welfare agency, the agency is required to investigate. Tribes report that some child welfare agencies fail to investigate at all when the report comes from an Indian reservation. In those situations, the tribe is told to address the issue or that a worker will be in touch, but there is no follow-through.[56] In the event a child welfare agency does enter an Indian reservation to investigate, the tribe is routinely not notified and not included, even though the investigation is on tribal land. This is true for off-reservation investigations as well. Tribes in California have concurrent jurisdiction over child welfare matters regardless of whether the child is on or off reservation.[57] The counties and State must recognize and respect that jurisdiction. Tribal involvement at the investigation stage is critical for family preservation, active

[56] This specific issue was reported by Tribal Representatives on cases in Lake and Mendocino counties, but other Tribal Representatives agreed that they had this experience in other counties as well.
[57] *Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038, 1064.

efforts and CAL-ICWA compliant placement. Some investigations are not conducted within the statutory timeframes and are not fully or competently completed. In addition, and this is evidenced in the social workers' delivered service logs, there is a failure to adequately document the Indian child's tribes, tribal representatives, extended family and identification of the reasons for the investigation. Poor documentation results in a failure to fulfill the agency's duty of inquiry.

C. Safety Plans Are Avoidance Mechanisms to Compliance

A component of service plans is often a safety plan that allows a child to remain in the home with a parent(s) or caregiver(s) when there has been an abuse or neglect referral and an investigation. A safety plan is one method to eliminate conditions or circumstances that could lead to removal, and is a measure of "reasonable efforts." The use of safety plans varies from county to county; however, they appear to be used with regularity to circumvent the minimum federal standards of ICWA. Tribes have seen safety plans used in lieu of a petition, for example, when a child welfare agency receives a referral to investigate an allegation of child abuse/neglect and a TDM (Team Decision Making) is called.

A typical scenario described by Listening Session participants was: A relative is present who agrees to care for the child. A safety plan is created between the relative and the child welfare agency regarding the child's safety and how to keep the child safe from harm. The parent is told to address the issue posing the risk to the child and the child is placed with the relative. This is a violation of state and federal law.

The common refrains in Indian Country are: Who creates the plan, is it in writing, and who gets a copy? Tribes may ask for a copy of the safety plan, but it is not provided, there is no transparency and counties often refuse to release the plans during discovery. This begs the question: Are the plans in writing and are they enforceable? What if the parent fully complies with the plan but the child isn't returned or a petition is filed? Enforcement of the plan is usually detaining the child and filing a petition. However, safety plans differ from voluntary family maintenance and/or temporary removals. Normally, there are statutory timeframes for voluntary family maintenance

and temporary removals. However, in many counties, safety plans are open-ended and have no timeframes.[58] Further, tribal representatives disclosed that, more often than not, the process of using safety plans turns into simply a period of time in which the agency gathers damning information about a parent that is later used as evidence against a parent or caregiver, sometimes to justify bypass under §361.5.

Safety plans are also developed on the spot in the home and there is no tribal input and no active efforts to support the Indian child and family. This is true when a TDM is used and the tribe has not been invited/informed. Safety plans are meant to be used between parents and a child welfare agency. They are sometimes only offered to one parent. Safety plans deprive the parent(s) and/or Indian custodian of reunification services, the right to his/her child upon demand and pre-removal active efforts. They also fail to comply with the requirement for a judicial certification.[59] Use of safety plans circumvents a parent's right to reunify with his/her child and a parent's right to active efforts. [See discussion below on PEPS.] While a safety plan may be used to keep a child out of the child welfare system, it may also be used as a tool to skirt the law.

RECOMMENDATIONS:

1) Consent to foster care placement should be certified by the presiding judge that all aspects were full explained and fully understood.

2) 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.

A similar tactic, veiled as a voluntary placement, is protective emergency placement services (PEPS) or informal supervision (IS). Commonly used in Sacramento County, PEPS are done without court intervention or the filing of a petition. These "voluntary placements" are of an indefinite duration. In addition, they are in violation of ICWA and Cal-ICWA. When a parent or Indian custodian voluntarily consents to a foster care placement, such consent "shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied

[58] Kings, Sonoma and Marin Counties specifically reported this issue.
[59] 25 U.S.C. §1913; Welf & Inst. Code §16507.4

by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail, and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood."[60] This consent may be withdrawn at any time and "upon such withdrawal, the child shall be returned to the parent or Indian custodian."[61] The use of PEPS is in violation of the state and federal law.[62]

Task Force Participants ~

"A relative was given the child under a safety plan, the parents could not have the child returned and the social worker referred the parents to the family law court to address custody issues." (Sonoma County)

"The Tribe asked for a copy of the safety plan to support the family and it was not provided based on 'confidentiality requirements.'"

"My report of suspected child abuse was classified as a 'community report' and was not recognized as being from the Tribe, resulting in a slower response."

"Kings County Human Services Agency fail[ed] to notify and work with the Tribe to develop a plan prior to removal."

[60] 25 U.S.C. §1913(a).
[61] §1913(b) Welf. & Inst. Code §16507.4, See also, 25 U.S.C. §1922.
[62] See also, Sacramento County Annual SIP Progress Report 2014, p. 4: "Sacramento County uses Protective Emergency Placements Services (PEPS) placement, which are voluntary placements, primarily utilized in Emergency Response and Informal Supervision Programs. These placements are counted as an entry into placement, therefore, when they end they are also counted as a reunification." It is unknown if Sacramento County is following Welf. & Inst. Code §361.31(k) and keeping a record of these placements in perpetuity or whether any of these placements are ICWA compliant. PEPS are in violation of Welf. & Inst. Code §16507.4.

D. Information Gathering and Sharing

Several common issues were identified during the Listening Sessions where tribal representatives reported not being informed when the County became aware of families in need, either on or off the reservation, even when said families were identified as being tribally affiliated. This issue was often combined with failures to cross report between counties and inter-county agencies, such as CPS and the school district. Further, there were many issues reported relating to Agencies not sharing information necessary for tribes to safely place children in homes, such as access to home studies and criminal histories.

In addition, tribal representatives reported not being contacted in advance or even soon after protective custody warrants were deemed necessary. Temporary custody/removal of a child by a peace officer aside, Welfare and Institutions Code §309(a) requires a social worker who has temporarily removed a child to immediately release the child to the parent, guardian or responsible relative unless one of five conditions exist. These conditions include: if the child has no parent, guardian or responsible relative or they are unable to care for the child; "continued detention of the child is a matter of immediate and urgent necessity" to protect the child and the child cannot be reasonably protected in the home; substantial evidence that the parent, guardian or responsible relative is flight risk; the child left the placement ordered by the juvenile court; or the parent/other relative with lawful custody voluntarily surrendered custody under Health & Safety Code §1255.7 and has not reclaimed the child in 14 days." Tribes reported multiple issues related to detentions without warrants and a refusal to provide a copy of protective custody warrants to tribal representatives.

E. Guardianships Are Used to Circumvent the Law

Probate Code §1513(c) requires the Probate Court to refer a guardianship case to CPS/Social Services whenever it is alleged that a parent is unfit. Further, if dependency proceedings are initiated, the guardianship proceedings must be stayed in accordance with §304. "If the investigation finds that any party to the proposed guardianship alleges the minor's parent is unfit, as defined by §300 of the Welfare and

Institutions Code, the case shall be referred to the county agency designated to investigate potential dependencies. Guardianship proceedings shall not be completed until the investigation required by §§328 and [is] completed and a report is provided to the court in which the guardianship proceeding is pending."[63] If a dependency proceeding is not initiated, the probate court shall retain jurisdiction to hear the guardianship matter.

Listening Session participants reported being told that the family could avoid removal by CPS if it secured a probate guardianship. Unfortunately, while sometimes this recommendation may have been provided with good intentions, there are problems with utilizing probate guardianships in these circumstances. First, probate courts are even less familiar with Cal-ICWA than dependency courts. Also, there is no system for appointing counsel for parents[64] in probate court and parties seeking guardianship are often referred to courthouse-based self-help centers which have little or no training with Cal-ICWA. Therefore, parents, Indian custodians, children and tribes are deprived of their rights under ICWA and Cal-ICWA, and the agency is quietly, with no ramifications to the agency, relieved of its obligations.

Many Listening Session participants reported that families were told to go get a guardianship or the child would be detained, but they had no way of pursuing a guardianship petition and then were accused of not being protective of the child or being uncooperative.

[63] *In re Guardianship of Christian G.* (2011) 195 Cal.App.4th 581, 595.
[64] Probate Code §1460.2 provides for court-appointed counsel to parents and Indian custodians. Courts are unaccustomed to appointing attorneys for parents, let alone Indian custodians in these cases.

V. State Courts and Child Welfare Agencies Are Not Complying with Cal-ICWA Requirements for Notice and Inquiry

Cal-ICWA, like its federal counterpart, requires tribes be noticed of proceedings involving Indian children.[65] Notice is one of the ICWA's most fundamental requirements, as "failure to give proper notice… forecloses participation by the tribe."[66] Failure to notice keeps the party most invested in ICWA compliance out of the picture, and decreases the chances that the stated goals of the ICWA and the Cal-ICWA will be met.

ISSUES:

1) Inadequate notice and inquiry where a child may be an Indian child.

2) ICWA 030 is a Judicial Council form signed under penalty of perjury by the petitioner. Many courts are ordering parents to complete the form, which incorrectly places the burden on them.

3) Counties attempting to make determinations regarding tribal membership.

4) Failure to provide notice in non-dependency ICWA cases.

The notice requirement is as old as the ICWA itself, yet inexplicably continues to be a problem in case after case. Prior to the enactment of the Cal-ICWA, failure to provide proper notice was described by one court as a "virtual epidemic."[67] Even after the notice provisions of the Cal-ICWA were enacted,[68] another court stated that the failure of adequate notice "remains disturbingly high."[69] And notice cases continue to clog the system to this day. The California Dependency Online Guide[70] annual review for 2015 reports that:

> "In reviewing the case law from 2015, it is significant that ICWA compliance continues to be an active appellate issue. In the last six months of 2015, ICWA cases accounted for roughly 30% of all juvenile dependency appeals. Approximately 85% of those appeals were related to inquiry and

[65] 25 U.S.C. §1912; Welf. & Inst. Code § 224.2.
[66] *In re Robert A.* (2007) 147 Cal.App.4th 982, 987.
[67] *In re I.G.* (2005) 133 Cal.App.4th 1246, 1254-1255 (listing 11 published appellate cases requiring reversal between 2003 and 2005, and noting the existence of 72 unpublished cases <u>in 2005 alone</u> which required reversal in whole or in part due to ICWA notice violations).
[68] Welf. & Inst. Code §224.2.
[69] *Justin L. v. Superior Court* (2008) 165 Cal.App.4th 1406, 1410.
[70] Judicial Council of California, *California Dependency Online Guide*, available at: www.courts.ca.gov/dependencyonlineguide.

notice, with 70% resulting in remand for ICWA noticing, and in some instances, reversal of findings and orders in addition to the order to comply with ICWA inquiry and notice requirements."

The Cal-ICWA is clear in requiring notice to be sent prior to every hearing in which the court, a social worker or a probation officer knows or has reason to know that an Indian child is involved.[71] Both the Cal-ICWA and related Rules lay out what information is to be provided in each notice, to whom notice must be provided, and the proper inquiries necessary to determine if a child is or may be an Indian child.[72,73]

The California Rules of Court are also clear that the duty of inquiry is an affirmative and continuing duty, meaning that it violates the Cal-ICWA to rely on the parents to notify the tribe or alert the social services agency that they may have Indian ancestry, or to ask the parents once at the inception of the case without also contacting the extended family and Bureau of Indian Affairs.[74]

How then does notice continue to be such a prevalent issue, squandering such a disproportionate share of judicial resources? There are a variety of ways in which the law is still violated. Tribal representatives explained that they often saw failures to make adequate initial inquiries, to follow up on potential Indian ancestry or alternative sources of information, to provide complete or accurate information to tribes, to provide information to the correct person or address at the tribe, or to contact all of the tribes where a child may possibly be a member or eligible for membership.[75] Further, all too frequently, the agency or Court takes it upon itself to determine whether the child is an "Indian child" as defined, rather than defer to the tribe as the law explicitly provides.[76]

A. Initial Inquiries and Follow-Ups

The threshold question at the start of any child custody proceeding is simply whether there is any reason to believe that the child may be an Indian child. If there is,

[71] Welf. & Inst. Code §224.2(a), (b).
[72] Welf. & Inst. Code §224.2; Rule of Court 5.481 (emphasis added).
[73] ICWA Regulations, 25 CFR Part 23.111; The BIA Guidelines are also instructive on this latter point, at §B.
[74] Welf. & Inst. Code §224.3; Rule of Court 5.481.
[75] Tribal representatives identified inquiry as being nonexistent in Madera County.
[76] Welf. & Inst. Code §224.3(e)(1).

further inquiry is required.[77] The duty of inquiry belongs to the court, court-connected investigator and party seeking the foster-care placement, guardianship, conservatorship, custody placement under Family Code §3041, declaration freeing a child from the custody or control of one or both parents, termination of parental rights, or adoption of the child, which includes the county child welfare agency, probation department, licensed adoption agency, adoption service provider, investigator, petitioner, appointed guardian or conservator, and appointed fiduciary.[78] The statute does not restrict this inquiry to be made solely of the parents,[79,80,81] but the applicable CRC could be interpreted to do so,[82] and to the extent that it has been so interpreted, it should be amended. Welfare and Institutions Code §224.3 lists many persons, entities and other sources who or which might provide information on a child's potential status as an Indian,[83,84] and considering the statutory requirement that inquiry be affirmative and ongoing, this suggests a duty to make reasonable attempts to contact and investigate those persons, entities and sources at the outset. Section 224.3 also states that "reason to know" is not limited to information from those persons, entities and

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[77] Rule of Court 5.481(a)(4).

[78] Rule of Court 5.481(a).

[79] Welf. & Inst. Code §224.3.

[80] It is reported that the parents are frequently the only persons asked, and unfortunately the courts have at times affirmed this approach. (*In re E.H.* (2006) 141 Cal.App.4th 1330 [parent failed to respond affirmatively to court's repeated inquiries when asked about child's possible Indian heritage; incumbent on parent to disclose the child's Indian ancestry or to object to the social worker's reports].

[81] However, other courts have recognized that even a parent's silence on the issue and/or murky information does not waive the juvenile court's affirmative duty to inquire. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414; *In re Samuel P.* (2002) 99 Cal.App.4th 1259; *In re Gabriel G.* (2012) 206 Cal.App.4th 1160.)

[82] Rule of Court 5.481.

[83] Welf. & Inst. Code §224.3(b) states: "The circumstances that may provide reason to know the child is an Indian child…"include, but are not limited to, the following:

> (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.
>
> (2) The residence or domicile of the child, the child's parents or Indian custodian is in a predominantly Indian community.
>
> (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.

[84] ICWA Regulations, 25 CFR Part 23.107. BIA Guidelines are again instructive, stating that: "State courts must 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 must be done on the record. At §B.1.

sources, reinforcing the view that initial inquiry should not be made only to the parents. Since notice to tribes "must contain enough identifying information to be meaningful," the party providing notice has a duty to inquire about and obtain, if possible, "all of the information about a child's family history as required under regulations promulgated to enforce [the] ICWA."[85]

The 2016 ICWA Regulations and BIA Guidelines recommend that the court ask each participant in the case (including the guardian ad litem and the agency representative) to certify *on the record* whether they have discovered or know of any information that suggests or indicates the child is an Indian child.[86]

In requiring this certification, the court may require the agency to provide:

> (i) Genograms or ancestry charts for both parents,
> (ii) The addresses for the domicile and residence of the child, his or her parents or the Indian custodian and whether either parent or Indian custodian is domiciled on or a resident of an Indian reservation or in a predominantly Indian community.[87]

When parents are the sole target of the initial inquiry, it should be understood that there are a variety of reasons why relying on the parents does not necessarily protect the child's best interests, or the rights of the tribe. Parents may simply not have that information, or may possess only vague or ambiguous information.[88]

The parents or Indian custodian may be fearful to self-identify, and social workers are ill-equipped to overcome that by explaining the rights a parent or Indian custodian has under the law. Parents may even wish to avoid the tribe's participation or assumption of jurisdiction.[89]

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[85] *In re Robert A.* (2007) 147 Cal.App.4th 982, 987 (internal citations omitted).
[86] ICW Regulations, 25 CFR Part 23.107. BIA Guidelines at §B.1.
[87] ICWA Regulations, 25 CFR Part 23.108. BIA Guidelines, at §B.7
[88] *In re L.S.* (2014) 230 Cal.App.4th 1183 (parents claimed various Indian heritages, including "Blackfoot" (located in Canada); agency erred in not sending notice to "Blackfeet" (located in Montana)).
[89] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30 (mother gave birth to twins at hospital 150 miles from reservation in express attempt to avoid tribal jurisdiction).

Task Force Participants~

"The Tribe was not notified of a removal at birth, but we were notified at the 366 termination of parental status and move to adopt by the non-native foster family. We intervened at that point. The impact on the Tribe is firstly finding out the child was in the system for 18 months from birth."

"The case was in San Francisco, which is typically known to do a pretty good job…Mother filled out the ICWA-020 form, naming two tribes…the names of her grandfather and great-grandfather. Instead of doing additional inquiry…the court determined ICWA didn't apply [because of an old sibling case]….The Court of Appeal was very clear" and overturned the trial court's determination.

RECOMMENDATIONS:

1) Amend the Rules of Court to support more robust inquiry and notice and include sanctions and penalties for failing to comply.

2) Each party should be required to certify on the record whether they have discovered or know information that indicates the child is an Indian child.

3) Remove reliance on the parents to supply information relevant to inquiry; insist on due diligence of the social worker.

(continued)

Even when the extended family is contacted and reports possible Indian ancestry, the reports are too-often disregarded as being remote or insignificant. Welfare and Institutions Code §224.3(b) includes as a reason that a child may be an Indian child: "one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." This provision neither limits the generations from which relevant information may be obtained nor creates a general "remoteness" exception to ICWA notice requirements.[90] "The notice requirement

[90] *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1387, n. 9.

RECOMMENDATIONS (cont.):

4) Require accurate and complete notice to enable the tribe to determine whether the minor is an Indian child.

5) Require notice to all tribes with which the child may have Indian ancestry.

6) Require notice for voluntary adoption proceedings, probate guardianships and delinquency proceedings.

7) Create a single point of contact within the agency for noticing so training regarding noticing tribes can be concentrated.

8) Create a regional (non-county) clearinghouse to track notices going out and, where counties continually fail, to take over noticing.

applies even if the Indian status of the child is uncertain. The showing required to trigger the statutory notice provisions is minimal.[91] A hint may suffice for this minimal showing."[92]

B. Failure to Provide Complete or Accurate Information

The Cal-ICWA requires that notice include various details regarding the family and a copy of the child's birth certificate, if it is available.[93] Notices must be fully and accurately filled out to enable the tribe to determine whether the minor is an Indian child. Many of the challenges relating to ICWA notice relate to deficiencies in this regard, which include misspellings and/or incomplete names;[94] incomplete identifying information; [95] and/or notice sent for some but not all siblings. Courts have recognized notice is meaningless if the information in it is insufficient to allow for a determination of membership or eligibility.[96]

C. Notice to Incorrect Person/Address or Not to All Tribes

Notice is to be sent to the Tribal Chairperson unless the tribe designates another agent.[97] The BIA maintains a list of persons for each federally-recognized tribe who are

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[91] Welf. & Inst. Code §224.3(b).
[92] *In re D. C.* (2015) 243 Cal.App.4th 41, 61, citing *In re Miguel E.* (2004) 120 Cal.App.4th 521, 549 (emphasis added).
[93] Welf. & Inst. Code §224.2(a)(5)(E).
[94] *In re Louis S.* (2004) 117 Cal.App.4th 622 (notice contained misspelled and incomplete names, relevant information in the wrong part of the form, and did not include available birth dates).
[95] *In re Christian P.* (2012) 208 Cal.App.4th 437 (social services agency initially did not provide any information regarding mother's grandparents, nor did it provide the locations of mother's or the children's births, and where it failed to provide any further information, despite its being available, after receiving a letter requesting more information from the Navajo Nation); *In re S.E.* (2013) 217 Cal.App.4th 612.
[96] *In re Louis S., supra; In re S.M.* (2004) 118 Cal.App.4th 1108.
[97] Welf. & Inst. Code §224.2(a)(2); Rule of Court 5.481(b)(4).

authorized to accept ICWA service.[98] Notice is also to be sent to the BIA in all cases subject to the ICWA.[99] This provision, however, is separate and distinct from the requirements for rendering *substituted service*. Substituted service on the BIA occurs if the identity or location of the Indian parents, Indian custodians or tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to believe the child is an Indian child -- notice of the proceeding *must* be sent to the appropriate BIA Regional Director and Secretary of the Interior.[100] This is intended to allow the BIA to use its special expertise with Indian tribes to assist in determining whether the child may be an Indian child. After receiving notice, the BIA has 15 days to notify the parents or custodian and the tribe of the pending action and to send a copy of the notice to the state court.[101]

Several difficulties have emerged regarding this process. First, if the BIA cannot determine whether the child is an Indian child or cannot locate the parents or Indian custodian within the 15-day period, it must notify the state court "prior to the initiation of the proceedings" how much additional time it will need.[102] The challenge, however, is that juvenile proceedings are subject to a statutorily mandated timeline. Second, to be effective, notice to the BIA should contain as much information as possible about the child's Indian ancestry.[103] However, as discussed above, notice is often not accurate or complete.

D. Potential Membership in Multiple Tribes

Notice must be sent to all tribes in which the child may be a member or eligible for membership until the court makes a determination as to which tribe is the child's tribe.[104] If more than one tribe claims the child as a member (or the child is not a member but is eligible for membership in more than one tribe), the state court may

[98] 25 C.F.R. §23.12.
[99] 25 C.F.R. §23.11(a).
[100] 25 U.S.C. §1912(a); 80 Fed. Reg. 10146, 10154 at §B.6(e); 25 C.F.R. §23.11(a); Welf. & Inst. Code §224.2(a)(4); Rule of Court 5.481(b).)
[101] 25 C.F.R. §23.11(f).
[102] 25 C.F.R. §23.11(f).
[103] 25 C.F.R. §23.11(b).
[104] ICWA Regulations, 25 CFR Part 23.109. BIA Guidelines, at §B.5; Welf. & Inst. Code §224.2(a)(3), (b); Rule of Court 5.482(d)(2); Rule of Court 5.481(b)(1).

select the tribe that has “the more significant contacts” with the child.[105] It is reported that often notice is not sent to all of the tribes through which a child may have Indian ancestry. This is particularly common in California, especially where there are multiple tribes on Rancherias in one geographical region. For example, there are three federally recognized Cherokee tribes on the BIA’s contact list; there are more than 15 Pomo tribes on the same list.[106]

E. Determining Whether a Child is an “Indian Child” Instead of Deferring to the Tribe

A common mistake by agencies, county counsels, court-appointed attorneys and the courts themselves is to conflate the issues of: (a) whether ICWA applies and (b) whether notice is required under the ICWA. In a recently published opinion, the court reiterated that the relevant question is not whether the evidence currently supports a finding that a minor is Indian; it is whether the evidence triggers the notice requirement so that the tribe itself can make that determination.[107]

This conflation stems in part from ignorance of child welfare agencies and county counsels as to their roles and responsibilities. They often believe it is their role/responsibility to determine if a child is a member or eligible for membership and thus if the ICWA applies. As Task Force respondents shared, too often social workers or county counsel want to make enrollment or eligibility decisions as soon as possible, not understanding that tribal eligibility and membership are only within the tribe’s purview. The courts cannot make these determinations either. Every Indian tribe establishes and is knowledgeable of its specific eligibility requirements. The United States Supreme Court has held that “a tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”[108] The tribe has the definitive and final word on whether a child is

[105] 25 U.S.C. §1903(5)(b); Welf. & Inst. Code §224.1(e)(2).
[106] 81 Fed. Reg. 26826 (May 4, 2016).
[107] *In re D.C.* (2015) 243 Cal.App.4th 41, 63.
[108] *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1468-1469 (definition of Indian child does not automatically exclude grandchildren by adoption of an ancestor with Indian blood).

or is not a member or is or is not eligible for membership.[109] The tribe's determination is conclusive on the state court.[110]

Often there is a fixation on the issue of enrollment. It is important to remember that while enrollment is a common evidentiary means of establishing Indian status, it is not the only means, nor is it determinative.[111] In fact, Cal-ICWA expressly states that "(i)nformation that the child is not enrolled or eligible for enrollment in the tribe is not determinative of the child's membership status unless the tribe also confirms in writing that enrollment is a prerequisite for membership under tribal law or custom."[112] Enrollment is not required to be considered a member of many tribes, since some tribes do not have written rolls. As noted above, the tribe's determination is conclusive.

F. Voluntary adoptions, guardianships, and delinquency

Notice is required in voluntary adoption proceedings,[113] probate guardianships[114] and delinquency proceedings in which the child is either in foster care or at risk of entering foster care.[115,116] Probate guardianships were an area of concern raised by Task Force respondents. Despite a recent First District Court of Appeal decision holding that the ICWA's requirements, including that of notice, do indeed apply in probate guardianship proceedings,[117] it is reported that the same trial court involved in that case, as well as courts in nearby counties, continues to disregard the ICWA's applicability.

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[109] *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49.
[110] Welf. & Inst. Code §224.3(e)(1); *In re D.N.* (2013) 218 Cal.App.4th 1246.
[111] *In re Jack C* (2011) 192 Cal.App.4th 967.
[112] Welf. & Inst. Code §224.3(e)(1).
[113] 25 U.S.C. §1913; Family Code §180; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30; *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404.
[114] Probate Code §1460.2.
[115] Welf. & Inst. Code §727.4; Rule of Court 5.480(2).
[116] See also, 25 U.S.C. §1913 (judicial certification required for voluntary placements and termination of parental rights).
[117] *Guardianship of D.W.* (2013) 221 Cal.App.4th 242. (In this case, the trial court incorrectly assigned appellant, the party objecting to the guardianship, the responsibility of providing notice to the possible Indian tribes. By the time of the contested hearing on the guardianship petition, appellant had a letter from the Karuk Tribe, indicating that the minor was potentially affiliated with the tribe and that the matter was currently under investigation. Rather than waiting for the results of that investigation for at least 60 days, as required by Rule of Court 7.1015(c)(9), the court proceeded with the guardianship proceeding as if the minor was not an Indian child, granted the guardianship petition, and placed the minor in the guardian's care. On appeal, the guardianship order was reversed. The trial court's failure to apply the ICWA and the appropriate state law and Rules of Court is a familiar scenario throughout California).

Delinquency was also an issue raised by respondents. While a recent California Supreme Court case limited the general application of the ICWA to delinquency proceedings,[118] notice is still useful to tribes, because they often can offer services or the assistance of elder tribal mentors to youth who are wards of the court.[119] And the Act can and does apply to status offenders (such as truancy or possession of alcohol) or probation violations for minors (which are not in and of themselves a criminal act). Without notice, a tribe cannot provide services or placements for the small subset of delinquent minors who are covered by the ICWA.

[118] *In re W.B.* (2012) 55 Cal.4th 30.
[119] The Advisory Committee Comment for Rule of Court 5.481 (governing notice and inquiry) provides insight into this issue, available at: www.courts.ca.gov/5807.htm.

VI. State Courts Fail to Understand and Comply with Jurisdictional Requirements

A. Extended Emergency Jurisdiction

Under Welfare and Institutions Code §305.5(f), an agency can take temporary "emergency jurisdiction" over or make an emergency detention of an Indian Child, and the requirements of the Cal-ICWA do not need to be satisfied prior to such exercise of emergency jurisdiction if doing so is necessary to prevent eminent harm to the Indian child. However, the agency must return the Indian child to tribal jurisdiction or parental custody or initiate an Indian Child Custody proceeding immediately. Unfortunately, tribal representatives identified situations of extended "emergency custody" without notice or other Cal-ICWA compliance. Such emergency detention, though designed to be temporary, can continue well beyond the short term, and become a de facto, permanent placement. Even though removing an Indian child from his/her parent or Indian custodian's care will, for all practical purposes, look the same, if it is labeled as *detention* or *continued detention*, agencies have argued that it is not a *placement* and the ICWA procedural protections do not apply. Simply put, when a *detention* extends past the time for jurisdiction, and in extreme cases exceeds the 60-day requirement for disposition under §361, it is contrary to law and circumvents the ICWA.

ISSUES:

1) Emergency jurisdiction used to thwart ICWA compliance.

2) Available information is not shared pre-removal.

3) Agencies and courts resist transfers to tribal court.

This practice of extended emergency detentions was reported by tribal representatives during the Listening Sessions as widespread, and runs afoul of the clear intent of the Cal-ICWA. Emergency jurisdiction is, and should be treated as, a mechanism to neutralize any dangerous conditions in a minor's home and to identify as suitable a non-offending parent or relative, as required by §§305.5(f) and 306(b). Once

the danger is removed or alleviated, the child must be returned.[120]

Unfortunately, the practice of delaying adjudications and other required hearings has not resulted in greater specificity in identifying Indian children; the delay does not result in greater due diligence and better notice to tribes. Instead, the prolonged delays have created bonding issues and conflicts with placement preferences that are, to an extent, preventable. Were the courts to rigorously enforce the statutory time constraints, either by reinstating custody to Indian parents, imposing monetary sanctions on offending agencies, or outright dismissing cases, then the time limits would be perceived as they were intended—to be mandatory. The ICWA Regulations provide that a court must immediately terminate 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."[121] An emergency proceeding should last no more than 30 days, unless the court returns the child, transfers the proceeding to tribal court, or initiates a child-custody proceeding.[122] Because of the Regulations and Guidelines' recent applicability, we must advocate for compliance with the Regulations to ensure Indian children are returned to their parents.

B. Non-Compliance with Pre-Removal Reporting and Documentation

Not every case is presented to an agency as a clean slate. Many times, the agency has had prior contacts with the Indian parents or Indian custodian, and such history is often included in a narrative supporting detention.

Tribal representatives identified a lack of communication, coordination and sharing of documents as a pre-removal compliance problem. The agency must, at some point, prove that Active Efforts were made to prevent the removal of an Indian child, and the documentation of such will be based on the pre-removal and pre-jurisdictional conduct of the social workers or peace officers involved.

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[120] See discussion on PEPS, above.

[121] ICWA Regulations, 25 CFR Part 23.113. In addition, a petition for an emergency removal/placement must comply with 25 CFR Part 23.113(d) and include all the information outlined in (d)(1)-(10).

[122] ICWA Regulations, 25 CFR Part 23.113(e).

When tribal social service agencies and their representatives, or Indian parents or Indian custodians are precluded from receiving or verifying pre-removal/pre-jurisdictional documentation, the predicates of the ICWA are not being met, and ultimately lead to compliance violations.

C. Agencies and Courts Resist Transfer to Tribal Court

The Cal-ICWA provides the right to transfer an Indian child's case to tribal court.[123] Most, but not all, dependency cases arise where the state and tribe share concurrent jurisdiction, and where the tribe can compel a transfer to tribal court (or tribal jurisdiction, for tribes that do not have courts). The statutory language is compulsory, so that a state court must transfer a case to tribal court, absent a narrow set of circumstances. The narrow circumstances are where one parent objects, where the tribe refuses to accept transfer, or if actual *good cause* exists not to transfer.

"Good cause" is not simply a preference for one forum over another, but rather a requirement that the state court identify—on the record—the specific facts or circumstances that necessitate depriving the tribal court presiding over a child custody and welfare case of one of its members. Factors that include perceptions or grievances over the adequacy of tribal court's procedures or infrastructure are specifically prohibited as good cause factors.[124]

The overwhelming input from tribal representatives identified a reluctance of certain agencies and courts to allow transfer to tribal court. In the instances when there was support for transfer, it was largely to transfer costs to the tribe, or to remove a case from the county's responsibility.

Transfer to tribal court is also sometimes complicated by the fact that tribes often wait to seek transfer until the state court process has reached the permanency determination stage. This means that the most meaningful assessment of transfer merits will be made only after a county has offered, and the parent(s) failed, its efforts to reunify the family, or successfully completed a service plan. Simply put, the tribe's

[123] Welf. & Inst. Code §305.5 and 25 U.S.C. §1911(b).
[124] Rule of Court 5.483.

RECOMMENDATIONS:

1) Courts should rigorously enforce statutory time constraints in emergency removal situations through all means available.

2) Increase awareness and confidence in tribal courts by increasing collaboration between the two types of courts.

3) Replicate the concurrent jurisdiction model developed in some California counties.

4) Include tribal courts and tribal jurisdictions in the decision-making process before placements become permanent or termination of parental rights is contemplated. Create sanctions in the event of a "prohibited" opposition to transfer to tribal court.

5) Look at the 241.1 system of early determination of "best" jurisdiction as a model.

transfer requests are going to be made at the end of a case, when the local options have failed; such "delay" is treated as objectionable, despite there being statutory authority supporting a tribe's right to delay.[125]

Nevertheless, California tribes have experienced a myriad of obstacles from counties when attempting to transfer cases to tribal court, including:

(i) Late and continuing objections or appeals;
(ii) Reluctance to share information or documentation with the tribal court or tribal social services;
(iii) Limited funding for tribal social service agencies, and roadblocks to sharing IV-E funds;
(iv) Treating tribal courts as if they were county courts, and projecting analogous procedural requirements on tribal courts that do not apply;
(v) Refusing to afford full faith and credit or comity to tribal court orders;
(vi) Using tribal court transfers as a dumping ground for problem cases or to dispose of ICWA cases in general.

The shared responsibility of jurisdiction and sovereignty is not diminished when a county juvenile court accedes to a tribe's involvement and transfer of a dependency case. Unfortunately, the choice put to many tribal representatives is to accept a case for transfer with incomplete information and limited

[125] Welf. & Inst. Code §305.5(c)(2)(B); Rule of Court 5.483(d)(2).

funding, oftentimes at the front end of a case when little is known, or at the back end when rebuilding the parent-child relationship is challenging, and tethered to the county's failed plan of reunification.

A better approach, and one more in line with the ICWA, would be for counties to acknowledge, early on, the importance of tribal courts and tribal jurisdictions, and to include them in the decision-making processes before placements become permanent, and before termination of parental rights is even contemplated. One model that has united two seemingly disparate systems is the §241.1 protocol for dual jurisdiction youths straddling between the dependency and delinquency systems. Under the §241.1 process, before a court could take jurisdiction over a dual status minor, the county probation and social services departments were required to meet, confer and follow a county-approved written protocol to determine which system would best serve the minor's needs. This arose from a period when children could not be both a dependent and a delinquent minor; they could only be one, a §300 or a §600 ward.

In the Indian law context, the Rules of Court could compel counties to adopt a similar protocol whenever an Indian child is identified. Instead of waiting for notice to be effected and tribes to intervene or identify placements, when an Indian child comes into the dependency system, the county would be obligated to meet and confer with its tribal counterpart, and adopt a joint case plan—as a prerequisite for maintaining jurisdiction. This would fast-forward the process, encourage collaboration and, most importantly, involve the tribes at a much earlier stage than the current paper chase affords. It would also place a premium on county social services reaching out to tribes in a fashion akin to TDMs, thereby vesting the parties and reducing contests and appeals. A county-tribal §241.1 protocol model would be based on existing law, and a structure that could bring the sides together in a way that courts and litigation cannot.

Task Force Participants~

"The Agencies only agree to transfer cases to Tribal Court when they want to dump a problematic case."

"Kern County routinely asks tribes to transfer ICWA cases to Tribal Court."

VII. Tribal Intervention and Participation in State Court Proceedings Are Thwarted

A. Tribal Intervention and Participation in Proceedings

ISSUES:

1) Tribal intervention is frequently misunderstood and such misunderstanding may result in ICWA violations.

2) Tribes are being denied their right to participate in court. Tribal participation as a non-party is questioned or Tribal representation by a non-attorney advocate is prohibited.

3) Opposition from parties and the court when the tribe exercises the right to a continuance as provided in CAL-ICWA.

4) Court and agency failure to provide resources to allow tribes to participate remotely in court proceedings denies tribes the ability to participate and exercise their rights under the Cal-ICWA.

5) Recognition of and equal protection for Indian custodians.

A tribe's standing to participate and intervene in dependency is recognized by both the federal and state laws.[126] Those laws and rules are uniform, and allow a tribe to intervene *at any stage* of a proceeding, meaning that there is no temporal limitation or ability to time bar a tribe's participation, and tribes may intervene as a matter of right. Again, there is no discretion to deny intervention.

It bears repeating that the only practical limitation on a tribe's right to participate or intervene is notice. When a tribe is not identified, or is not properly noticed, as is frequently the case, the tribe cannot intervene if it is unaware of a proceeding. The state-approved judicial form for intervention, ICWA-040, includes a list of rights that a tribe retains, whether it intervenes or not: (i) to receive notice of hearings; (ii) to be present at hearings; (iii) to address the court; (iv) to examine all court documents relating to the case; (v) to submit written reports and recommendations to the court; (vi) to request transfer of the case to tribal court; and (vii) to intervene at any point in the case.

The mechanics for intervention are somewhat relaxed, and do not require a tribe to "formally intervene" in writing. California Rules of Court, rule 5.482(e) recognizes that intervention can be made

[126] 25 U.S.C. §1911(c); Welf. & Inst. Code §224.4, and Rule of Court 5.482(e).

orally, or even without using the permissive state form.[127]

B. Non-Party Participation or Monitoring

A tribe may choose not to formally intervene to become a party to a case, but instead seek the court's permission to simply "monitor" or participate in the proceedings as a non-participating party. Such non-party participation may include receiving notice of and attending hearings, addressing the court, examining documents, submitting written reports and recommendations, and performing other activities requested or approved by the court.[128]

If the tribe of the Indian child does not intervene as a party, the court *may* permit an individual affiliated with the tribe or, if requested by the tribe, a representative of a program operated by another tribe or Indian organization to: be present at the hearing, address the court, receive notice of hearings, examine all court documents relating to the dependency case, submit written reports and recommendations to the court, and perform other duties and responsibilities as requested or approved by the court.[129]

Whether due to ignorance or indifference or both, this right to participate as a non-participating party is not being recognized by many courts. The denial of this right especially negatively impacts lower-income tribes, as they often do not have resources to retain legal counsel, travel and be present at all hearings or even pay fees associated with telephonic appearances and therefore feel compelled to engage as a non-participating party.

The law does not allow a county or court to disregard the ICWA when a tribe does not intervene, though some county attorneys have advanced this interpretation, and it is an identified compliance problem by Task Force participants. ICWA is triggered by the Indian child in the courtroom, not whether the Indian child's tribe is present or intervenes. Task Force participants expressed concern that if the tribe is not present, there is no watchdog for compliance.

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[127] ICWA-040.
[128] Rule of Court 5.534(i)(2).
[129] 25 U.S.C. §§1911, 1931-1934; Rule of Court 5.534(i).

C. The Tribe, Parent, Indian Custodian and the BIA's Right to a Continuance is Held to Conflict with the Expediency Demanded in Child Custody Proceedings

Cal-ICWA provides that:

> No proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the Bureau of Indian Affairs, except for the detention hearing, provided that notice of the detention hearing shall be given as soon as possible after the filing of the petition initiating the proceeding and proof of the notice is filed with the court within 10 days after the filing of the petition. With the exception of the detention hearing, the parent, Indian custodian, or the tribe shall, upon request, be granted up to 20 additional days to prepare for that proceeding. Nothing herein shall be construed as limiting the rights of the parent, Indian custodian, or tribe to more than 10 days' notice when a lengthier notice period is required by statute.[130]

Although this is a legally mandated right of parents, tribes and Indian custodians, as a practical matter, tribes often face opposition from the court, agency and other parties when trying to exercise this right.

Embedded in the juvenile dependency scheme is the need for expediency and avoiding delay of permanence for the child. Continuances are disfavored and the courts contend that they should be difficult to obtain.[131] For that reason, there are a number of systemic barriers to causing delay in a proceeding. All continuances are governed by §352, which permits a continuance, *but* the delay must be shown not to be contrary to the child's best interest.[132] Additionally, the statute requires written notice of the motion with supporting documents to be filed and served on all parties at least two court days before the hearing unless the court finds good cause for hearing the request orally.[133]

The courts and agencies have no fear of ignoring this provision, as tribes are left with little recourse for the violation. As illustrated above in the Notice section, to the extent that this issue has even reached appellate review, the courts have held the violation as a non-jurisdictional and/or harmless error.

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[130] Welf. & Inst. Code §224.2(d); See also, ICWA Regulations, 25 CFR Part 23.112; BIA Guidelines, at §D.7.
[131] See *In re the David H.* (2008) 165 Cal.App.4th 1626; *Jeff M. v. Superior Court* (1997); 56 Cal.App.4th 1238, 1242.
[132] Rule of Court 5.550.
[133] Rule of Court 5.550(a)(4); Welf. & Inst. Code §352(a); See Fam. Code §§7668, 7871.

D. Additional Considerations Regarding Role of Tribes

As noted above, nothing in the ICWA or Cal-ICWA authorizes a county to limit the ICWA's application to cases where a tribe intervenes. The laws that apply pre-removal and after notice is given when a child is known to be an Indian child (or reason to know), apply independently of whether the tribe intervenes: (i) proof of active efforts; (ii) compliance with placement preferences; (iii) court-appointed counsel; (iv) removal based on detriment, established by a qualified expert witness; (v) consultations with tribes; (vi) mandatory transfer if requested; (vii) elevated burden of proof; (viii) consideration of tribal customary adoption; and (ix) restrictions on terminating parental rights. Even if a tribe never intervenes in a case that has an identified Indian child, the county is obligated to follow the ICWA and Cal-ICWA.

Many tribes attempt to serve as an additional resource for counties, offering culturally sensitive counseling, education opportunities and funding, and health-care services that may not be available through the county. Tribes that participate on a non-adversarial basis still encounter resistance, and complain that they are shut out of the process and discouraged from filing their own reports, case plans or case updates. It cannot be overemphasized that tribal social workers and non-attorney representatives are uniquely positioned to assess tribal services and tribal placements, and advance the common goal of securing safe and culturally appropriate homes for Indian children. This "gap" goes unaddressed because of the pervasive inability of tribes to secure counsel and the "system's" belief that no other party bears the burden of ensuring compliance with the ICWA. To the extent that non-intervening tribes have been relegated to a lesser role, such practices are inapposite to the objectives of the ICWA, and are a compliance violation.

An additional subset of participation issues arises when tribes or their representatives are not allowed to participate in hearings because they are not lawyers. Setting aside the cost and indigence of some tribes that does not allow them to retain private counsel, the intervention rules do not require a tribe to have a lawyer. Still, the

practice of limiting participation of *Pro-Per tribes* remains widespread.[134] Many times tribes are not permitted to address the court, sit at counsel table or examine witnesses. However, even allowing for such practices should not "buy" the notion that non-lawyers performing such professionally skill-based tasks have secured compliance with the ICWA.

The obvious fix would be for juvenile courts to appoint legal counsel for tribes since, as it currently stands, tribes are almost always the only party with no option for appointed counsel in dependency cases.

A separate but related issue is allowing tribal representatives to participate and appear telephonically. Not all dependency cases scheduled are resolved when calendared, and for tribes that are remote, out of state or have travel difficulties, the cost to participate in person is prohibitive—especially if a case is continued. CRC 3.670 implements CCP §367.5 and promotes remote access to courts in all civil cases, including dependency cases. The rule sets up a fee structure that is imposed, largely by a single contract provider, but does not make any special accommodations for tribes in ICWA cases. One recommendation for improving access to courts and participation in routine and uncontested hearings would be for the courts to specifically waive fees for tribal representatives in dependency/ICWA cases. This serves multiple purposes, including demonstrating active efforts by the agency, but also eliminating the disenfranchisement of remote and resource-poor tribes. Some counties have implemented this on a local basis, and a few tribal representatives noted such fee waivers as helpful to their participation in their comments to the Task Force. Improving remote, telephonic and/or Skype access would be a substantial step forward.

Los Angeles County has consolidated all its ICWA cases into one department and court, and while it is not without problems, the idea was to streamline the handling of cases and issues. Currently, the 2nd District Court of Appeal has the second highest

[134] Nearly all tribal representatives shared the common experience of being denied a seat at counsel table, being turned away by court clerks and bailiffs, and shunned by attorneys and department representatives.

number of ICWA appeals in the state. In theory, the Los Angeles County ICWA Unit and ICWA Court were to be the model for the State in ICWA compliance, thus reducing appeals on ICWA issues. Obviously, this is not the case. While replicating this model in other counties might generate more positive results, providing uniform and equal access to the courts is imperative. Use of telephonic appearances is routinely used in other courts and in some dependency courts. However, the excessive time that tribal representatives and tribal attorneys are on hold can exceed two or more hours. This feels punitive to some and offensive to many.

The ICWA extends its protection to Indian custodians as well as Indian parents, and all the protections afforded to parents apply to an Indian custodian, including court appointed counsel. An Indian custodian is akin to an informal guardianship, and is defined in 25 U.S.C. §1911(6) (and is codified in Cal-ICWA) as any Indian person who has legal custody of an Indian child under tribal law or custom or State law, *or* to whom temporary physical custody has been transferred by the parent. No specific type of writing is required to establish an Indian Custodian and, once created, the state court cannot remove custody from the custodian without following the ICWA, including sustaining allegations against the custodian. This is not commonly understood, and receiving equal protection for Indian custodians has been identified as a

RECOMMENDATIONS:

1) Amend the Foster Care Bill of Rights to include the rights of Indian children.

2) Mandatory and meaningful inclusion of tribes, parents, Indian custodians, tribal service providers and Indian children, if of age, in the new 2016 TDMs.

3) All care providers must receive meaningful training on providing foster care to an Indian child, to include facilitating the Indian child's engagement with extended family and participation in tribal events.

4) Require juvenile courts to appoint legal counsel for tribes.

5) Courts should waive fees for tribal representatives appearing remotely in ICWA/dependency cases to improve participation in routine and uncontested hearings.

(continued)

RECOMMENDATIONS: (cont.)

6) Consolidate all ICWA cases into one department at the courthouse or improve remote access to encourage Tribal participation.

7) Use a §241.1-type protocol for identified ICWA cases to allow for a tribe's participation at an earlier stage.

8) Include tribes, parents, Indian custodians, extended family members and tribal service providers in the TDM.

compliance issue in California.

By contrast, the judicially created *de facto parent* is often "granted" greater rights than Indian custodians. A de facto parent can be a non-family member who has been granted foster care placement of an Indian child, but who is not a member of the child's tribe or even related to the child. Nevertheless, California law allows de facto parents to participate and be heard in cases on placement and other case plan issues, and they can have legal counsel appointed at no cost. The knee-jerk reaction to elevate a de facto parent above the Indian custodian is contrary to the law and simply flies in the face of the legislative findings of both Congress and the California Legislature.

Dependency cases are intended to be less adversarial than other court cases and, for that reason, allow a broad spectrum of participants. However, when foster parents or CASAs or non-tribal service providers can address the court and submit recommendations or written statements, but tribal entities or extended relatives cannot, then the integrity of ICWA enforcement is called into question. The manner and breadth of non-tribal participants in dependency cases has been identified as a hindrance and obstacle by tribal representatives who are not afforded the same rights.

By way of recommendation, the use of a §241.1 protocol model for cases identified as ICWA cases would alleviate participation issues at a much earlier stage and give the court a document to rely upon in assessing Cal-ICWA compliance. Effective in 2016, the state adopted legislation to require a form of TDMs for every case before disposition, which could be expanded to include definitive tribal roles and participation, so that tribal concerns and ICWA compliance are addressed at a much earlier stage than at the Court of Appeal. However, to be meaningful, the 2016 version

of TDM must include tribes, parents, Indian custodians, extended family and tribal service providers. They cannot be held in isolation.

Finally, §16001.9 establishes, as state policy, the Foster Care Bill of Rights. While the application of the Cal-ICWA and the obligation to maintain political and cultural ties, tribal placements, enrollment assistance and to assert equivalent rights as non-Indian foster youth can be cobbled together by combining parts of the Foster Care Bill of Rights—nothing in that section specifically requires the agency to recognize an Indian foster child's rights, from the child's perspective. Whether by oversight or intention, this section needs to be amended to clearly and unequivocally recognize an Indian foster child's right to maintain tribal culture and political ties. The Indian child's rights should be expressly recognized.

VIII. Active Efforts Post-Removal Are Not Provided or Reviewed by Courts

A. The Scope of Active Efforts

> ***ISSUES:***
>
> *1) Active efforts after removal are rarely evidenced in the record or provided to the family.*
>
> *2) Tribal services should be viewed as supplemental to compelled services provided by the agency.*
>
> *3) Counties and courts continue to struggle with the requirement and production of evidence, and the record is sometimes non-existent, yet courts make the active efforts finding.*
>
> *4) Identifying and defining active efforts in some counties is an overwhelming task.*
>
> *5) Case plans are mostly boilerplate with little if any consultation with tribes.*

Any party petitioning a State court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that "active efforts [were] made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts [were] unsuccessful."[135]

A finding that active efforts were made must be supported by clear and convincing evidence.[136]

The challenge is that there is no definition for "active efforts;" the Cal-ICWA states that "active efforts shall be assessed on a case-by-case basis… 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... [and] 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."[137]

The ICWA Regulations and BIA Guidelines confirm that "(a)ctive efforts are affirmative, active, thorough, and timely efforts intended primarily to

[135] 25 U.S.C. §§ 1912(f); ICWA Regulations, 25 CFR Part 23.120; BIA Guidelines, at §E; Welf. & Inst. Code §361.7; Rule of Court 5.484(c).
[136] *In re Michael G.* (1998) 63 Cal.App.4th 700.
[137] Welf. & Inst. Code §361.7(b); Rule of Court 5.484(c)(1)-(2).

maintain or reunite an Indian child with his or her family .[138] The Regulations and Guidelines further provide illustrative examples of "active efforts."[139]

Even with the 2016 ICWA Regulations, the problem of what constitutes "active efforts" remains a fiercely contested issue.[140] The issue of "active efforts" remains the subject of the most ICWA-related appellate disputes, after notice.

B. Active Efforts are Not Reasonable Services

In some counties, the view persists that active efforts are equivalent to the reasonable services provided in non-ICWA cases. This traces back to a pre-SB 678 case where the court remarked that active efforts and reasonable services are "essentially in differentiable" due to the importance that reunification services have in the dependency system as a whole.[141]

At that time, pre-Cal-ICWA, the law did not specify that active efforts shall utilize the available resources of the Indian child's extended family, tribe, tribal and other

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138 42 U.S.C. §671(a)(15); ICWA Regulations, 25 CFR Part 23.2..

139 ICWA Regulations, 25 CFR Part 23.2 provides: 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. See also, BIA Guidelines *at §E*.

140 See *In re A.L.* (2015) – Cal.App.4th – (filed 12/21/15; pub. 12/31/15 – whereby the court held that the new BIA Guidelines (now ineffective) are consistent with California statutes and Rules of Court, but that the Guidelines are not binding authority and upheld reasonable efforts to assist the parents in areas where compliance proved difficult.)

141 *In re Michael G.* (1998) 63 Cal.App.4th 700.

Indian social service agencies, and individual Indian caregiver service providers, nor did it include application of the tribe's social and cultural standards. Back then, those were advisory actions, but they are now required by Cal-ICWA.[142] Today, taking the position that there is no difference between the two standards overlooks that fact, as well as the fact that even when reasonable services may be bypassed,[143] active efforts may not be.[144]

Had it wished to declare that active efforts and reasonable efforts/services are identical, Congress had the opportunity to do so approximately 20 years after the ICWA was enacted. When the section of Title IV-E of the Social Security Act requiring reasonable services[145] was revisited by the Adoption and Safe Families Act, however, Congress chose not to do so. Since "[w]e assume that Congress is aware of existing law when it passes legislation,"[146] logic dictates that Congress intended the two standards to remain differentiable. The recently published ICWA Regulations also distinguish the two standards.[147] Taken as a whole, Cal-ICWA, ICWA, California Rules of Court and the ICWA Regulations all recognize and emphasize that active efforts are <u>not</u> the same as reasonable efforts and, thus, courts in California must make two distinct findings based upon credible evidence in a child welfare case involving an Indian child: reasonable efforts <u>and</u> active efforts.

C. Responsibility and Burden Shifting

When a child is removed from his or her parent(s), the agency has a responsibility to provide reunification services.[148] Where a tribe has available services of its own, making use of those services is part of the agency's duty of active efforts at preventing the breakup of the Indian family.[149] Tribal services are an appropriate way to help meet the higher active efforts burden, but they do not supplant the agency's

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142 Welf. & Inst. Code §361.7(b).
143 Welf. & Inst. Code §361.5.
144 Welf. & Inst. Code §361.7(a).
145 42 U.S.C. §671(a)(15)(A).
146 *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19, 32.
147 See, ICWA Regulations, 81 Fed. Reg. 38791 "ICWA, however, requires "active efforts" prior to foster-care placement of or termination of parental rights to an Indian child, regardless of whether the agency is receiving federal funding".
148 Welf. & Inst. Code §361.5.
149 Welf. & Inst. Code §361.7(b).

responsibility for reunification services. A common issue identified by tribes, however, is that where tribes do offer tribal services, agencies tend to rely on those services in lieu of providing their own or assume credit for locating and assisting a parent in obtaining those services when the agency in fact did nothing. This is especially true when a tribe intervenes in a case – as though the tribe's status as a party creates a tribal obligation to provide services when there is no statutory basis for such an obligation. Whenever possible, tribes are generally happy to provide supplemental services, but not to have those services substituted for what the agency is already compelled to provide. As mentioned elsewhere in this report, tribes do not have access to the same funding streams as the counties for such services. Reliance on tribal services to the exclusion of other services creates strain not just between the tribe and county agency, but also between the tribe and the family, as the tribe essentially becomes responsible for the family's progress.

D. Active Efforts – Development

There are problems with the reverse of the above as well – when, rather than rely on tribal services to the exclusion of its own, an agency fails to adequately work with tribes to access such supplemental services. This can include a failure to solicit input from the tribe on the case plan, and a failure to consider the cultural appropriateness of county services (e.g., sending parents to a religion-based recovery center different from their own beliefs). This can also include skepticism of any services the tribe does offer, and a corresponding failure to access such services. A case in point is the use of tribal health services to administer drug tests. Many tribes offer federally funded Indian Health Service clinics with the ability to perform drug testing. Having access to a local clinic can make a huge difference to a parent subject to random drug testing who lives in a rural area, who would otherwise have to appear at a county/contract clinic to test. Transportation to and from such clinics can be a major barrier for indigent parents, causing them often to miss out on employment, educational or child visitation-related duties as a result. However, having drug testing performed at local tribal clinics seems at times to be viewed with suspicion by county agencies, even though tribes have as much of an interest in verifying that parents test clean as those agencies do.

E. Active Efforts – Implementation

Numerous issues also exist when it comes to implementing an active efforts plan to prevent the breakup of the family. Reunification services and active efforts are commonly oriented primarily at the parents,[150] but there are a wide range of other services, often overlooked, which may be necessary to keep or bring the family back together, and which are without question in a child's best interest. Services to the child are paramount among these. Some of these have already been discussed elsewhere in this report – they include services to preserve the child's connection to the tribe (transportation, supervision of visitation, etc.), and services to keep the child in a stable placement while reunification is pending (counseling, addressing educational needs, remedial repairs to a home, etc.). If reunification ultimately fails, providing these services to a child will also assist the child in achieving permanency.

In addition to strengthening the connection to their tribe and their culture, membership protects and secures the Indian child's political rights and opens a variety of tribal benefits to a child, which may include health care, educational assistance, per capita shares of tribal gaming or other revenues,[151] housing assistance, hunting and fishing rights, other land use rights, and so on. Agencies fail to assist parents and

> *A glaring example of limiting and possibly denying access to the courts is the public parking system at the Sacramento County Superior Court, William R. Ridgeway Family Relations Courthouse, 3341 Power Inn Road. The location makes public transit a poor option; the parking lot outside the courthouse is owned by the City of Sacramento and has limited spaces and parking meter machines to purchase parking time, and has fines of more than $60.*

[150] Indian custodians are also entitled to these, but it was reported that many counties do not have a clear understanding of this obligation, nor of Indian custodianship in general. While the ICWA defines the term "Indian custodian" as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child" (25 U.S.C. §1903(6)), there is little guidance in the ICWA or state law.

[151] Often these are placed into a trust or designated account, which is held until (and accumulates until) the minor reaches the age of majority, graduates from high school, or otherwise meets the criteria established by their tribe for accessing the funds.

children by delaying or refusing to share the child's birth certificate and Social Security card, blocking the process of enrollment for that child.

It requires little imagination to see how any number of these benefits have the potential to strengthen the family and therefore come within the scope of active efforts to provide remedial and rehabilitative services to prevent the breakup of the family.[152] Once a child is under the custody and control of a social services agency, that agency is frequently best positioned to provide the necessary documentation for confirming membership. Logically, then, assisting the child with membership is itself part of the duty to make active efforts, which is affirmed in the Rules of Court.[153]

A corollary to assisting with tribal membership is establishing parentage. Tribes almost always require birth certificates connecting the child to an already-enrolled member, and frequently will require DNA confirmation of the child's father. Yet these steps too are often not taken, even though the agency is well suited to assist with establishing paternity.

Other aspects of active efforts reported as problems in tribal listening sessions include

RECOMMENDATIONS:

1) Enact legislation which requires all case plans to include tribal input in the development of each plan which considers cultural appropriateness of county services. Failure to include the tribe should result in sanctions, payable to the tribe.

2) Mandate counties to contract with Indian health clinics and service providers, and develop MOU/MOA with Tribal TANF programs.

3) Courts must read into the record evidence of tribal participation in the case plan, the service providers and the services provided to the parent(s) and child(ren).

4) County agencies should solicit the input of the tribe regarding the cultural appropriateness of the case plan.

(continued)

[152] 25 U.S.C. §1912(d); Welf. & Inst. Code §361.7.
[153] Rule of Court 5.484(c)(2).

the facilitation of the child's participation in tribal events, transportation, supervision for visitation, funding to support additional placement options (e.g., remedial house repairs to make a home safe for the child), and access to foster care/relative caregiver funding.

> ***RECOMMENDATIONS: (cont.)***
>
> *5) County agencies must assist the child with obtaining and maintaining tribal membership.*
>
> *6) Improve county planning and resource allocation to impact underserved, remote locations.*

Another element of a legally sufficient Active Efforts reunification plan is provision of resources to serve rural communities. Many Indian communities are located well off the beaten path, and transportation can be a considerable burden on both the agency and the parents. Agencies need to decentralize service providers in such a way as to actually benefit rural communities, which are often both economically depressed and disproportionately over-represented in the child welfare system. There are a number of counties which have recently received funding ostensibly for that exact purpose. However, it has been reported that rather than truly decentralize services, some counties have simply moved services to other nearby population hubs. Making them available in more remote locations would mean their impact would be substantially increased considering the higher caseloads in those areas and the otherwise higher burdens (often unmet) involved in providing adequate and appropriate services in those areas.

Another issue identified by tribes regarding successfully providing Active Efforts is the effect of losing or reassigning social workers mid-case. County social service agencies often have high turnover rates. These are likely further pronounced by expecting social workers to overcome the above obstacles when working with Indian clients. Better planning and resource allocation by counties could go a long way to making success more possible, and thus decreasing staff loss or movement attributable, through no fault of their own, to not being miracle workers. The trend in recent years of transferring cases to different units/social workers at the various stages of a case (jurisdiction/disposition) was touted as efficiency/proficiency building, but

instead has promoted a lessening of “bonding” between clients and workers. This is not helpful to a client base that is strongly responsive to relationship-building interventions.

IX. Tribes Are Denied Meaningful Access to Information and Complete Discovery

California law provides that parties to a dependency proceeding involving an Indian child, including the child's parents, the child, the child's Indian custodian and the child's tribe have the right to examine all reports or other documents filed with the court in the proceeding. The Legislature has made it clear that a tribe's right to access the juvenile case file with no court order is required for such disclosure.[154]

ISSUES:

1) Agencies routinely violate statutory provisions requiring complete/continuing disclosure of information to tribes.

2) Tribes face difficulties accessing case records and having timely access to meaningfully review the documents and prepare responses before hearings.

3) Full disclosure, early and often, to tribal representatives is essential for tribes to fully realize their rights under Cal-ICWA.

The ICWA Regulations and BIA Guidelines provide that "each party to an emergency proceeding or a foster-care placement or termination-of-parental-rights proceeding under State law involving an Indian child of his or her right to *timely* examination of all reports or other documents filed with the court and all files upon which any decision with respect to such action may be based."[155]

Subject to the right of a party to show privilege or other good cause not to disclose specific material or information, the California Rules of Court require that its pre-hearing discovery rules must be liberally construed in favor of informal disclosures. The Rules of Court provide that the agency must disclose any evidence or information within petitioner's possession or control favorable to the child, parent or guardian. Once the petition is filed, the agency must promptly deliver or make accessible for inspection and copying the police, arrest and crime reports relating to the pending matter. Where

[154] See, Welf. & Inst. Code §827(f); Rule of Court 5.552(c).
[155] ICWA Regulations, 25 CFR Part 23.134; BIA Guidelines, at §J.5.

privileged information is being omitted, the notice of the omission must be given simultaneously.[156]

When requested, the agency must, subject to the rules regarding protective orders and excision, upon timely request, disclose substantial categories of information.[157,158]

The duty to disclose is continuing. If, after compliance with the rules or with court orders, a party discovers additional material or information subject to disclosure, the party must promptly notify the child and parent or guardian, or their counsel, of the existence of the additional matter.[159]

Compliance with these provisions is central and critical to a tribe's participation in the child custody proceeding. "Access to the caseworker's notes may be crucial in cross-examining him or her on potential cultural bias, inappropriate conclusions about Indian people, or ICWA requirements."[160]

A. Regardless of the Statutory Requirements, Disclosure to Tribal Representatives is Often Absent or Truncated

Despite state law, Rules of Court and best practice, tribal representatives consistently report difficulties with, or even complete inability to access case records. Most frequently, tribes are facing opposition to the disclosure based on confidentiality grounds.

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[156] Rules of Court 5.546 (b), (c).
[157] Rules of Court 5.546 (d).
[158] (1)Probation reports prepared in connection with the pending matter relating to the child, parent or guardian;(2)Records of statements, admissions or conversations by the child, parent or guardian; (3)Records of statements, admissions or conversations by any alleged co-participant; (4)Names and addresses of witnesses interviewed by an investigating authority in connection with the pending matter; (5)Records of statements or conversations of witnesses or other persons interviewed by an investigating authority in connection with the pending matter; (6)Reports or statements of experts made regarding the pending matter, including results of physical or mental examinations and results of scientific tests, experiments or comparisons; (7)Photographs or physical evidence relating to the pending matter; and (8)Records of prior felony convictions of the witnesses each party intends to call. The parent or guardian must also, after timely request, disclose to petitioner relevant material and information within the parent's or guardian's possession or control.
[159] Rule of Court 5.546 (k).
[160] CEB, California Juvenile Dependency Practice §9.38.

Further, even when tribal representatives get access to necessary information, there are sometimes limitations imposed on the type of records they can access. Welfare and Institutions Code §827(e) provides:

> "for purposes of this section, a 'juvenile case file' means a petition filed in any juvenile court proceeding, reports of the probation officer, and all other documents filed in that case or made available to the probation officer in making his or her report, or to the judge, referee, or other hearing officer, and thereafter retained by the probation officer, judge, referee, or other hearing officer."[161]

Courts have inherent discretionary authority to order whatever discovery is believed to be appropriate. Welfare and Institutions Code §827 specifically states that "(t)his paragraph shall not be construed to limit the ability of the juvenile court to carry out its duties in conducting juvenile court proceedings.[162] The juvenile court has the inherent power to develop rules of procedure and, thus, while discovery procedures generally available in civil proceedings are not available to minors in juvenile court, that court has the same degree of discretion as a court in a criminal case to permit discovery between the parties.[163]

If any party refuses to permit disclosure of information or inspection of materials, the court could and should support the requesting party's motion for an order requiring timely disclosure of the information or materials.[164] The court still can provide whatever safeguards are needed, including but not limited to protective orders, excision and/or in camera review.[165]

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[161] Rule of Court 5.552(a) is more expansive in its definitions.
[162] Welf. & Inst. Code §827(a)(3)(A); See also, *Joe Z. v. Superior Court*, 3 Cal. 3d 797 (1970).)
[163] Welf. & Inst. Code §827(b)(1) also provides a catchall provision: "While the Legislature reaffirms its belief that juvenile court records, in general, should be confidential, it is the intent of the Legislature in enacting this subdivision to provide for a limited exception to juvenile court record confidentiality to promote more effective communication among juvenile courts, family courts, law enforcement agencies, and schools to ensure the rehabilitation of juvenile criminal offenders as well as to lessen the potential for drug use, violence, other forms of delinquency, and child abuse."
[164] Rule of Court 5.546(f).
[165] See Rule of Court 5.546(g); Welf. & Inst. Code §827(a)(3).

Rather than be the source of enforcement for these rights, courts instead often defer the issue and decision to the agency and other parties. Tribal representatives reported that judges have asked the parties whether there is an objection to the production, for the tribe, of the court records. Any refusal, or even hesitance, by the court to require the disclosure of records to a tribe only affirms the agency's non-

Task Force Participants~

"The tribe had intervened and been heavily involved in the case. However, the tribe was not sent a copy of the court report in regards to the permanency hearing and therefore was unable to review the report prior to entering court."
"Kern County routinely asks tribes to transfer ICWA cases to Tribal Court."

"We can't formulate our position without case information/Notice."

"Judge placed hurdle after hurdle in front of Tribes, including barring us from information, limiting our participation without local counsel, etc."

"The parties in this County [Nevada] do not communicate with the tribe and involve them as a party. Multiple times after intervention, the tribe was not called for hearings and has not been invited to any staffing or case planning."

compliance with the Cal-ICWA and Rules of Court. This non-compliance affects all other areas of Cal-ICWA compliance, such as limiting tribes' participation in case staffing, case planning and updated access to case documents.

B. If Disclosure is Made to the Tribe, Disclosure is Not Done in a Timely Fashion to Make Disclosure Meaningful

For various reasons (see Notice and Competence discussion above), tribes often receive information regarding hearings late. For review hearings, the social worker is required to file the hearing report with the court and provide copies to all counsel *at least* 10 calendar days before the hearing.[166,167]

[166] Social worker failure to provide timely reports is endemic in the child welfare system. It is a hardship and of great concern for tribal representatives to receive reports/discovery the day of a hearing because tribal representatives usually

Tribes report, however, that if they even are given the court reports, it is often at or immediately before a court proceeding. This means that tribal representatives do not have an opportunity to meaningfully review documents and/or prepare responses. This is particularly problematic in that the reports often make representations such as the fact that "active efforts" were provided to the family," an assertion that often requires extensive documentation to rebut.

> ***RECOMMENDATIONS:***
>
> *1) Parties, especially agencies, should be subject to sanctions for not providing timely discovery and information to tribes.*
>
> *2) Process and protocols, using the Rules of Court, MOUs and MOAs, should be established that set absolute deadlines for distribution of reports to tribes and automatic continuances where such deadlines are violated.*
>
> *3) Social workers who carry substantial ICWA cases should have reduced caseloads so that reports, information and discovery are produced and provided to parties within the statutory timeframes.*

Tribal representatives report that Agencies often do not contact the tribes, do not meet with tribal representatives to develop safety plans, nor solicit input in the case plan provided to the court. Tribal representatives report that they are often not included in Team Decision Meetings (TDMs), which often are meetings at which crucial safety plans, placements plans and other pivotal decisions are discussed and made. Tribal representatives report they are not consulted in the selection of the Indian Expert Witness and are denied access to the criminal background checks needed to assess the protection of the Native families. Tribal representatives report that when they reach out to agencies, they often do not get a response, and if and when there is a response, it is often to inform the tribe that the information is shielded from disclosure to the tribe - in direct violation of California statute and the Rules of Court.

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meet with tribal councils and tribal leadership for guidance and authority. Often, courts simply proceed with the hearing even in the face of late reports, which does not allow the tribes to fully participate, if they can participate at all.

[167] Welf. & Inst. Code §366.21(c); Rules of Court 5.708(a) & (c).

Unfortunately, tribal representatives report they are only aware that they have not been provided the discovery they are entitled to until the information is at issue, at which point the tribe's ability to respond has already been impacted. Most concerning to tribes are the reports of children who were subjected to harm and/or risk due to the lack of agency oversight and timely intercession. However, by the time this information is received, the harm has been done and/or the issues are deemed moot by the court. Social workers who carry substantial ICWA cases should have reduced caseloads so that reports, information and discovery can be produced and provided to parties within the statutory timeframes.

A process and protocol is needed to enable tribes to receive full, accurate and timely information so that meaningful outcomes can be achieved in furtherance of ICWA mandates. MOUs and MOAs have and could assist with removals and coordination with tribes to minimize the issues with removal, placement and services toward the reduction of trauma on Indian children and families.

X. Evidentiary Burdens, Including the Requirement for Qualified Expert Witness Testimony, Are Not Being Met

ICWA provides a higher burden of proof than that required in cases involving non-Indian children. There are two different burdens of proof.

> ***ISSUES:***
>
> *1) Counties fail to understand when the ICWA heightened standards apply.*
>
> *2) The clear and convincing evidentiary standard for foster care placement and the beyond-a-reasonable-doubt standard for termination of parental rights are often mixed up and/or used interchangeably.*
>
> *3) Agencies often do not seek input or consider the recommendation of the tribe for experts.*
>
> *4) Experts often have minimal to no connection to the Indian child's tribe.*

To remove an Indian child and place him or her in a foster care placement, there must be a showing by clear and convincing evidence, including testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[168]

The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, supported by the testimony of one or more qualified expert witnesses that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child harm the child.[169]

The ICWA Regulations define the terms "custody," "continued custody," and "upon demand, among other terms."[170] California has incorporated ICWA's requirements for active efforts and expert witness testimony into state law and Rules of

[168] 25 USC §1912 (e); ICWA Regulations, 25 CFR Part 23.121; BIA Guidelines, at §G.1; Rule of Court 5.484(a); Welf. & Inst. §361(c)(6); compare to grounds for removal in non-Indian child cases, Welf. & Inst. Code §361(c)(1)-(5).

[169] 25 USC §1912(f); ICWA Regulations, 25 CFR Part 23.121; BIA Guidelines, at §G.1; Welf. & Inst. Code §366.26(c)(2)(B); See Rule of Court 5.484(a).

[170] ICWA Regulations, 25 CFR Part 23.2; BIA Guidelines, at §L.

Court addressing involuntary foster care placements, guardianships, custody awards to a non-parent when a parent objects, conservatorships and terminations of parental rights.[171] However, the ICWA Regulations define "active efforts" and since ICWA has protections greater than those in Cal-ICWA, ICWA must be applied over any state law.[172]

Tribes report several problems in this area. As discussed above, for various reasons (i.e., lack of competence and understanding of when ICWA applies), counties fail to understand when the heightened standards apply. The heightened requirements apply whether or not the tribe intervenes in the case.[173] The standards apply to either parent, whether the parent is Indian or non-Indian.[174] Moreover, the two distinct burdens of proof are often mixed up and/or used interchangeably. Tribes report that, in practice, it appears the agency and court are simply checking off the box without ensuring that the adequate and proper evidentiary foundation is provided.

Pursuant to the ICWA Regulations, "evidence must show a causal relationship between the *particular conditions* in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to *the particular child* who is the subject of the proceeding. Evidence that shows only the existence of community or family poverty or isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse or nonconforming social behavior *does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt* that continued custody is likely to result in serious emotional or physical damage to the child."[175]

Similarly, California Rules of Court, Rule 5.484(a)(3) provides that:

> "Failure to meet non-Indian family and child-rearing community standards, or the existence of other behavior or conditions that meet the removal standards of Welfare and Institutions Code §361, will not support an order

[171] Fam. Code §§ 177(a), 3041(e), and 7892.5; Prob. Code §1459.5; Welf. & Inst. §§224.6(b), 361(d), 361.7, 366.26(c)(2)(B); Rule of Court 5.484(a).
[172] 25 U.S.C. §1921; ICWA Regulations, 25 CFR Part 23.2.
[173] *In re H.G.*, (2015) 234 Cal.App.4th 906.
[174] *In re Riva M.* (1991) 235 CA3d 403, 411 n6.
[175] ICWA Regulations, 25 CFR Part 23.121; BIA Guidelines, at §G.1.

for placement absent the finding that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage."

ICWA does not identify the particular California hearing at which the determination of beyond a reasonable doubt must be made because ICWA is a federal law. The courts have held, though, that based on the family-protective policies underlying the ICWA, it is reasonable to assume that the determination must be made when, or within a reasonable time before, the termination of parental rights decision is made.[176] State courts have held that this does not mean, however, that the determination must be made simultaneously with the termination decision at the §366.26 hearing. Instead, it makes sense for the court to make the determination at the final review hearing when the court decides on a permanent plan.

Moreover, the court need not then repeat this determination at the section §366.26 hearing, absent a showing by the parent of changed circumstances or that the period between the two hearings was substantially longer than 120 days.[177] Courts have even upheld a finding made substantially outside the 120-day statutory period.[178]

The problem with this approach is, however, that for a variety of reasons, the tribe might not be involved in the case until the §366.26 hearing. By that time, though, these critical findings have already been made by the court, and the tribe has no recourse for any non-compliance because the time for appellate review has likely already passed.[179] In the event the tribe and/or parties believe by the time of the §366.26 hearing that the parent has made enough progress that the burden cannot be met, the court can require the issue be brought by way of a §388 petition.[180] The burden then rests on the requesting party, rather than on the agency.

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[176] *In re Matthew Z.* (2000) 80 Cal.App.4th 545, 552.
[177] *Id.* at 553–555.
[178] See *In re Barbara R.* (2006) 137 Cal.App.4th 941, 949 (an 11-month period between the referral and permanency hearings was substantially longer than the 120-day statutory period. However, reversal is not automatic, the burden remains on the parent to show the finding was stale).
[179] Rule of Court 8.104 (a notice of appeal must be filed within 60-days of the order).
[180] *In re Matthew Z.* (2000) 80 Cal.App.4th 545, 552.

A. The Evidence Establishing Detriment is Not Supported by the Testimony of a "Qualified Expert" Witness

To meet its burden, when seeking an order for foster care placement or termination of parental rights, the petitioner must present the testimony of one or more "qualified experts," demonstrating that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[181]

Several concerns have been raised regarding who and how the experts are obtained. First, agencies often do not seek input or consider the recommendation of the tribe for experts. California law dictates that the expert witness shall not be an employee of the agency recommending foster care placement or termination of parental rights.[182] However, in practice, agencies in large part remain limited to those expert witnesses with whom the county has a contract. Many counties may use a social worker from a neighboring county or contract with individuals. In both instances, it is rare that the individual will have any knowledge of the Indian child's tribe or tribal child-rearing practices. The limited choice of an expert might also be influenced by the control and relationship that the agency has with that person. Consequently, the experts are perceived often as "hired guns" of the agency, rather than neutral arms of the court.

Second, expense is not supposed to be factor in deciding whether to use an expert at a hearing (as the court or any party may request assistance from the BIA or the child's tribe in finding qualified individuals to provide testimony). However, funding is often a significant consideration.

Third, many times the "experts" end up going against the tribe's recommendation. This often wrongly occurs as to ICWA placement and active efforts requirements. The court does not intercede by enforcing ICWA and requiring compliance with those mandates.

Last, experts have demonstrated minimal to no connection to the Indian child's tribe. Often, the "experts" have a mere academic understanding of Native Americans

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[181] 25 USC §§1912(e)-(f); Welf. & Inst. Code §224.6(c); Rule of Court 5.484(a)(1).
[182] Welf. & Inst. Code §224.6(6).

who generally reside in California. Tribes also report that the experts are often unprepared. The experts often have not been in communication with the agency that retained them and are often not knowledgeable of the issues and/or particular facts of the case. This is compounded by the fact that they have not reached out to the tribe to discuss the case, resulting in a poorly prepared witness and thus a poor record. Tribes without counsel are ill-prepared to remedy this, or to create a record establishing this failure, and even tribal attorneys cannot "fix" a broken record, particularly in light of the fact that it is not a tribe's burden to produce the witness. Yet courts seem to overlook and even outright excuse the deficiencies.

The tribe's recourse is to then retain its own competing expert, which many tribes lack the resources to do. However, when the tribe has its own recognized expert witnesses, those persons are often not given credence or considered to have credibility. Instead, the agency and court give more weight to the opinions of those persons with only academic knowledge.

The ICWA itself does not establish precise qualifications for an expert witness. However, the ICWA Regulations provide who may serve as a qualified expert witness: "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."[183]

Additionally, California law provides a list of non-exclusive examples of persons who may qualify as expert witnesses. 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.[184]

The Welfare and Institutions Code provides a list of persons who "most likely" meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

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[183] ICWA Regulations, 25 CFR Part 23.122. See, BIA Guidelines, at §G.2.
[184] Welf. & Inst. Code §224.6.

(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 child-rearing 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 child-rearing practices within the Indian child's tribe.

(3) A professional person having substantial education and experience in the area of his or her specialty.[185]

California case law holds that "ICWA does not require a person who is qualified to testify as an expert on Indian culture to conduct an independent investigation of the causes of the dependency or the recommendations relating to the permanent plan. Nothing in the Commentary or the specific guideline states that an Indian expert is required to conduct an independent investigation to evaluate the case and reach a conclusion that is qualitatively more reliable than the social services agency's social worker or the tribe's social worker."[186]

The court continued that "the purpose of the Indian expert's testimony is to offer a cultural perspective on a parent's conduct with his or her child, to prevent the unwarranted interference with the parent-child relationship due to cultural bias. The Indian expert's testimony is directed to the question of 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, and not because the family did not conform to a decision-maker's stereotype of what a proper family should be."[187] Both state and federal law require the expert witness to testify on the question of 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.[188]

California courts must consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and

[185] Welf. & Inst. Code §224.6(c).
[186] *In re M.B.* (2010) 182 Cal.App.4th 1496.
[187] *Ibid.*, n. 5.
[188] 25 U.S.C. §1912(e), (f); Welf. & Inst. Code §§224.6(b)(1), 361.7(c).

child-rearing practices.[189] However, courts have lessened the impact of this provision. Courts have disregarded deficiencies in the investigation, even disregarding the complete lack of an expert in a case, by holding that "such cultural perspective is not required where the parental behavior at issue does not need to be placed in a cultural context to find a risk of serious harm."[190]

The arguments against the requirement of a qualified expert witness with special knowledge of the Indian child's tribe are often based on the presentation of behavioral deficiencies (such as personality disorders, poor judgment, neglectful living circumstances, poor understanding and awareness, high child abuse potential, or limited parenting skills) as personality or functional problems that have nothing to do with cultural heritage. Similarly, a parent's lack of motivation toward remedial/rehabilitative services and/or negative perception of such services may be identified as problems unrelated to cultural bias. This ignores the fact, however, that "[s]pecific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm."[191]

It cannot be definitively said that characteristics such as personality disorder, poor judgment, neglectful living circumstances, lack of motivation, etc., have nothing to do with cultural heritage. Indeed, these conclusions are often largely driven by the cultural heritage of both the evaluator and the client.[192]

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[189] Welf. & Inst. Code §§224.6(b)(2).
[190] See *In re M.B.* (2010) 182 Cal.App.4th 1496, 1503-1505 (where father's prior conviction for molestation of minor, and mother's subsequent exposure of child to father despite risk of sexual abuse).
[191] *In re Brandon T.* (2008) 164 Cal.App.4th 1400 at p. 1414, referencing former BIA Guidelines, 44 Fed. Reg. 67584 (Nov. 26, 1979), 67593 at §D.4, Commentary; Sen. Com. on Judiciary, com. on Sen. Bill No. 678 (2005-2006 Reg. Sess.) Aug. 23, 2005, pp. 11-12.
[192] See McGoldrick, *Ethnicity and Family Therapy* (6th ed. 1986), 6. ("Problems (whether physical or mental) can be neither diagnosed nor treated without understanding the frame of reference of the person seeking help as well as that of the helper."). See Sue, *Counseling the Culturally Diverse* (1981), 27-28 (Relative to appellant's noted disinterest in insight and unreceptiveness to counseling referrals) "Racial or ethnic factors may act as impediments to counseling. Misunderstandings that arise from cultural variations in communication may lead to alienation and/or inability to develop trust and rapport. . . . This may result in early termination of therapy." Minorities, including Native Americans, have been documented to terminate counseling after only one session at a rate of 50% as compared to a 30% rate for Anglos. "Counselors who believe that having clients obtain insight into their personality dynamics and who value verbal, emotional, and behavioral expressiveness as goals in counseling are transmitting their own cultural values. This generic characteristic of counseling is not only antagonistic to lower-class values, but also to different cultural ones." *Id.* at 38.

This approach also ignores the compelling reasons for the court to ensure that an expert witness does possess knowledge or experience specific to the Indian child's tribe. Foremost is the fact that an Indian child's connection to his or her tribal community and culture is a relationship which the ICWA was intended to protect, and which the State of California has firmly declared its own commitment to protecting.[193,194] The ICWA Regulations, BIA Guidelines and the Cal-ICWA provide that the court or any party <u>may</u> 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.[195] Additionally, use of an expert witness familiar with the Indian child's tribe can provide the court with valuable knowledge about the workings of the tribe, and what present or future losses the child may sustain if parental rights are terminated. An expert witness with knowledge or experience specific to the Indian child's tribe also enables the court to satisfy the requirement of considering evidence of "the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and childrearing practices," which is mandatory in addition to the testimony of an expert witness.[196] Unfamiliarity with culture and community standards can result in misdiagnosis and tragic losses of Indian children from their Indian families and tribes.[197]

Where there is a written stipulation entered knowingly, intelligently and voluntarily, the court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony.[198] For the reasons discussed throughout this Report, given the lack of competency in ICWA and the protections it intends to afford the parties, it is questionable whether the stipulation and/or waiver is, in reality, being entered "knowingly, intelligently and voluntarily." Moreover, such unquestionable acceptance of

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[193] 25 U.S.C. §§1901, 1902; Fam. Code §175(a), (b); Prob. Code §1459(a), (b); Welf. & Inst. Code §224(a), (b)
[194] See *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 37 quoting House Report, at 23, U.S. Code Cong. & Admin. News 1978, at 7546 ("The ICWA thus, in the words of the House Report accompanying it, 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society'").
[195] ICWA Regulations, 25 CFR Part 23.122(b); BIA Guidelines, at §G.2; Welf. & Inst. Code §224.6(d).
[196] Welf. & Inst. Code §224.6(b)(2); Rule of Court 5.484(a).
[197] Jewelle Gibbs, *Children of Color: Psychological Interventions with Culturally Diverse Youth*, 61 (2003) (Studies of American Indian children during diagnostic interviews have identified behaviors that may negatively affect assessment outcome: nonassertive, non-spontaneous and soft-spoken verbal interaction; limited eye contact; discomfort and decreased performance on timed tasks; and selective performance of only those skills that contribute to the betterment of the group).
[198] Welf. & Inst. Code §224.6(e).

the expert's opinion reduces any sense of oversight on what amounts to one of the most critical findings in the case.

After the passage of the Cal-ICWA, CDSS and the Judicial Council posted a list of individuals who considered themselves qualified to serve as expert witnesses, the belief being that these lists would be used to determine whom counties could contract with as an expert. The problem is that the list does not ensure cultural competence for every tribe, nor were these lists vetted by the tribes in California.

B. Agencies Commonly Seek a Waiver of Procedural Rights When the Waivers are Not Understood and/or Executed Properly

For a variety of reasons, namely cost, agencies commonly seek a waiver of the ICWA expert requirement. Since the expert witness requirement is not constitutionally compelled, the requirement can be waived expressly or by failure to object at the trial court level. This is <u>different</u> from the parties entering into a written stipulation agreeing to use the expert witness declaration in lieu of live testimony. A stipulation or failure to object constitutes a waiver only if the court is satisfied that the party has been fully advised of the requirements of the ICWA, and has knowingly, intelligently and voluntarily waived them.[199] However, counsel for the families is not often competent in the ICWA mandates or intent; therefore, waivers can be commonplace and critical rights are lost. For example, a stipulation to give up or waive an expert's live testimony can only be made in writing under §224.6(e), yet the common practice is to take oral waivers.

RECOMMENDATIONS:

1) The heightened evidentiary standard of beyond a reasonable doubt should be met at a reasonable time before parental rights are terminated. If the standard is not met at the §366.26 hearing, then the court can require the issue be brought by way of a §388 petition.

[199] Welf. & Inst. Code §361(c)(6)(A); Rule of Court 5.484(a)(2).

A tribe's rights are independent of the rights of other parties. A parent or Indian custodian cannot waive the tribe's rights.[200] However, as illustrated above (see Notice discussion), courts often allow the rights of tribes to be jeopardized by the conduct of parents. Whether or not the parties stipulate to the expert witness' declaration, the evidentiary requirements remain.
Therefore, even the declaration must be able to withstand scrutiny. Too often, reports are lodged with the court and the parties stipulate on the record, not in writing, and the court does not reject the oral stipulations, or make inquiry whether the party has had sufficient legal advice to make a knowing and intelligent waiver, as required by law.

Failing to object to the failure to produce the expert or meet the demands of the statute by the parents and the Indian child will result in a waiver. However, as noted, this cannot be used to bind the tribe to a waiver. Neither the ICWA nor any current California law provides for a waiver of the active efforts requirement.[201]

RECOMMENDATIONS (cont.):

3) Courts must be vigilant that one party is not waiving the rights of another party, namely the tribe.

4) Courts must recognize that an expert witness must actually render an opinion, not simply rubber-stamp the agency's report and recommendations.

5) The BCJ must examine how the expert witness lists and contracts are created.

6) A collaborative approach with tribes must be utilized to ensure the experts will provide appropriate and legally sufficient testimony.

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[200] *In re Nikki R.* (2003) 106 Cal.App.4th 844, 849; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 253; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36.

[201] See *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 708 (whereby former California Rules of Court, rule 1439 provided conditions for a waiver of the active efforts requirement; that rule (renumbered to 5.664 effective January 1, 2007) was repealed effective January 1, 2008).

XI. Placement

Indian children in child custody proceedings must be placed within a mandatory order of preference for placements, absent good cause to the contrary, to protect the best interests of the Indian child and the child's tribe by ensuring a culturally appropriate placement.[202] According to the U.S. Supreme Court, these placement preferences are "[t]he most important substantive requirement imposed on state courts" by the ICWA.[203]

Cal-ICWA codified these placement preferences into state law.[204] It declared that California has an interest in "protecting the essential tribal relations and best

Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association, testified before Congress as follows:

"Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships."

"One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child-rearing. Many of the individuals who decide the fate of our children are, at best, ignorant of our cultural values and, at worst, contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child."

Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978)

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[202] 25 U.S.C. §1915.
[203] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36.
[204] Welf. & Inst. Code §361.31.

interest of an Indian child by… placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community."[205] Cal-ICWA made it clear that adhering to the ICWA's placement mandate, encouraging and protecting an Indian child's tribal membership and connection to his or her tribe, is in the best interest of that child.[206]

Existing law mandates that Indian children should be placed in Indian homes whenever possible. However, achieving this mandate remains elusive in many counties. Primary issues of contention related to placement include failure to place Indian children within the specified order of preference, failure to make active efforts to locate an ICWA-compliant placement, failure to obtain a court-ordered good cause finding prior to deviating from the statutory scheme, and delays and confusion within the placement approval process.

A. Placement of Indian Children Must be Within a Specific Order of Preference

Cal-ICWA sets forth two separate orders of placement preference – one for adoptive placements and one for pre-adoptive and similar placements (foster care, guardianship, etc.).

ISSUES:

1) Counties fail to document active efforts to locate ICWA-compliant homes.

2) Courts fail to make appropriate good cause findings if an Indian child is placed outside of the placement preferences.

Placement preferences for adoptive placements in descending order of priority are:

(1) A child's "extended family member."[207]

(2) A member of the child's tribe.

(3) Another Indian family.[208]

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[205] Fam. Code §175(a); Prob. Code §1459(a); Welf. & Inst. Code §§ 224(a).
[206] *Ibid.*
[207] As that term is defined by the tribe, or in the absence of a tribal definition, the ICWA's default definition – not as defined by state law (e.g., not by default including de facto parents).
[208] 25 U.S.C. §1915(a); Welf. & Inst. Code §361.31(c).

For pre-adoptive and similar placements (foster care and guardianship), the placement must be in the "least restrictive setting" appropriate to the particular needs of the child. "Least restrictive setting" is that 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.[209] Preference must be given in the following descending order of priority:

(1) A child's "extended family member" (per a tribal or federal definition rather than a state definition).

(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 approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

An "Indian organization" is defined as any group, association, partnership, corporation or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.[210]

ISSUES (cont.):

3) Delays and confusion caused by failure to follow the preferences.

4) Agencies fail or refuse to address harm to Indian children where TPR is part of the permanent plan.

5) TCA is the best permanency option for many Indian children where adoption is the plan; however Agencies are failing to fully utilize TCA.

6) Agencies and Courts continue to be inconsistent and unclear regarding implementing TCA, resulting in confusion and delay; standard tools such as ACLs and standard training have not been successful in increasing competency.

Counties are also required to take into consideration the social and cultural standards of the Indian child's tribe. "The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural

[209] 25 U.S.C. §1915(b).
[210] 25 U.S.C. §1903(7).

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."[211]

B. Counties Must Make Active Efforts to Locate an ICWA-Compliant Placement

California law provides that counties must make active efforts to place within Cal-ICWA's placement preferences and maintain documentation of these efforts.[212] It has frequently been reported that counties shift the burden of locating ICWA-compliant foster homes to tribes. The typical scenario includes a child being removed and an emergency call from the county to the tribal social worker asking if there are any tribal homes available and, if there are none, the tribal social worker is told to contact the county if one is located.

State law requires the county to document its efforts to seek ICWA-compliant placements, but in practice this documentation only exists in the form of any emails or telephonic notes the county social worker may keep. It has been reported that this information is not contained in the Delivered Service Logs and, when it has been requested through discovery, no formal documentation has been provided (only a list of places contacted with dates).

1. The Burden to Assist Funding Necessary Repairs to Make Housing Suitable for Placement is Shifted to the Tribe

In some situations, a home is suitable for the placement of a child, but there may be repairs needed to ensure child safety. Counties routinely pay for these repairs. However, in the case of an Indian child, when a relative or other ICWA-compliant placement is available but the home needs some repairs, counties generally look to tribes to pay the bills associated with these repairs. Common repairs include childproofing for fireplaces, railing for decks or repair of fences. Tribes argue that updating a home to be child-safe falls within the counties' obligation to make active efforts to locate an ICWA-compliant placement. However, counties disagree and look to

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211 25 U.S.C. §1915(d).
212 Welf. & Inst. Code §361.31(k).

tribes to pay. Covering these costs is not an option for all tribes, since most California tribes still lack significant financial resources of their own, and do not have access to the same considerable funding streams that agencies do. When counties refuse to assist with these improvements and refuse to place with the tribe's alternative home, which has been tribally approved (without county licensing requirements as approved under Cal-ICWA), the Indian child suffers and is usually placed in a non-ICWA compliant home.

The significance of the counties' failure here cannot be overstated. By refusing to pay for repairs or refusing to place in a tribally approved home, the Indian child suffers by being in multiple unnecessary placements.

2. Counties Fail to Locate Placement Options for Higher Need Children (Lack of Therapeutic Homes), Which Often Results in Children Being Sent Out-of-County

Tribal children have been placed in out-of-county group homes that do not meet their needs, as documented in court-ordered psychological evaluations because other placement options do not exist. Reports were received that these out-of-county placements have been made by the county without first contracting with appropriate service providers, and as a result of sending children far from home into a setting that cannot meet their needs, these same minors become the subjects of delinquency proceedings. To compound matters, it has been reported that, through the §241.1 process, the recommendation has been that wardship is the most appropriate action even where it is obvious that the dependency system set the youth up for failure by not adequately addressing documented needs. Statistically speaking, these minors then

RECOMMENDATIONS:

1) As part of active efforts, counties should and must reach out to tribes and Indian families to secure tribal placements for Indian children.

2) County funding used to make an ICWA-compliant placement child-safe.

3) When there is a shortage of ICWA-compliant placements, counties should work with the tribal community to train county foster homes to be sensitive to unique cultural issues concerning the care of an Indian child.

(continued)

become much more likely to be incarcerated as adults.

Having adequate placements is a statewide problem, not limited to tribal member children. More and more advocates are being forced to use the education system to effectuate appropriate placements out-of-state, since appropriate in-state placements do not exist. This is particularly true for native children though, since there are few, if any, culturally appropriate group homes in California for high-needs youth. This problem will be highlighted in coming years with the implementation of Continuum of Care, which will phase out congregate care.

Where counties cannot locate an ICWA-compliant placement, they must place with a family who will maintain the connection with the tribe and family.[213] We received reports that placements continue to occur with foster parents who are unwilling to render the services, supports or care to support reunification and the child's participation in tribal cultural and ceremonial events. Where there are shortages of ICWA-compliant placements, counties should work with the tribal community to train county foster homes to be sensitive to the unique cultural issues involved with caring for an Indian child.

RECOMMENDATIONS: (cont.)

4) Grant tribes access to criminal background information and CWS/CMS information.

5) CDSS should work with tribes to fund training on the exemption process.

6) Counties must document active efforts to meet the ICWA placement requirements for every Indian child. If no placement is available, the report must provide the court with explanations for the unavailability and document active efforts to find an ICWA-compliant placement. Without specific good cause findings, the court must sanction the agency for failing to provide this information.

7) CDSS should work with tribes to develop culturally based therapeutic foster homes, tribally based group homes and transitional living facilities, especially in those counties in which there is a disparate number of native kids in foster care.

[213] Welf. & Inst. Code §361.31(i).

C. Courts Must Make a Finding of Good Cause to Deviate from the Placement Preferences

Where an agency cannot locate or is unwilling to use an ICWA-compliant placement, the agency must seek a good cause finding to deviate from the placement preferences prior to making the placement.[214] The typical discretion that is afforded to social workers is limited in this circumstance, since the good cause determination can only be made by a court. Additionally, the burden of proof is on the party seeking to deviate from the placement preferences.[215]

Counties fail to document this requirement and fail to bring it to the court's attention. Courts can unintentionally condone, and possibly encourage, this practice by not issuing sanctions or other available remedies to a situation that is a win-win for the agency – they place where they want to and then argue it is in the best interest of the child to remain there or suffer from attachment issues. The 2016 ICWA Regulations, BIA Guidelines and case law hold that bonding that occurs due to placements of Indian children in violation of ICWA should not be considered.[216]

D. Placement Approval Process

1. Tribes May Conduct Home Studies and Background Checks

Cal-ICWA provides that a foster home licensed, approved or specified by the child's tribe is within the placement preferences. Tribes can and do tribally approve homes for Indian children on a regular basis. CDSS issued ACL 14-10 (January 31, 2014), which provides:

> In accordance with the Indian Child Welfare Act (ICWA) at 25 U.S.C. §1915, a federally recognized Indian tribe is authorized to approve or license a home for foster care or adoptive purposes according to the tribe's own licensing standards. The home is not required to obtain a state or county license. The tribe is able to approve or license the home according to its own socially and culturally appropriate standards pursuant to ICWA at 25 U.S.C. §1931. This section provides that a TAH is the equivalent of a licensed or approved foster home.

[214] Welf. & Inst. Code §361.31.
[215] ICWA Regulations, 25 CFR Part 23.132(e); BIA Guidelines, at §H.5.
[216] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30; *In re Desiree F.* (2000) 83 Cal.App.4th 460.

Even with Cal-ICWA and the ACL, agencies are reluctant to place Indian children in tribally approved homes (TAHs). Counties exhibit a lack of trust and confidence in TAHs and do not trust a tribe's assessment. Counties insist on imposing their standards rather than accept a "tribally approved home" designation. Some counties insist on approving a placement in addition to the Indian child's tribe. Counties' failures to recognize and accept TAHs lead to multiple placements for Indian children.

TAHs are approved based upon a tribe's social and cultural standards, but these approved homes must still clear a criminal background check. This compounds the placement issue because counties do not share this information with the Indian child's tribe. Access to criminal background information and CWS/CMS information is essential for tribes to make informed decisions. Even with the passage of SB 1460 and AB 430, where approved tribes can conduct their own criminal background checks and grant exemptions, many tribes do not have, but need, this clearance and information. It is imperative for CDSS to work with tribes in utilizing these new options, which should include funding training for tribes on how to obtain the necessary clearances, and what is required for the exemption process.

E. Recommendations for Placement

Counties must document, in delivered service logs and in their reports to the court, specifically the active efforts made to meet the applicable placement preferences for an Indian child. For example, if an Indian child is placed in an Indian home licensed by the county, the report to the court should explain why no extended family placement or tribally specified placement was possible. The same is true if an Indian child is placed in an Indian-approved institution (the lowest preferred placement). The report should explain why none of the three higher preferred placement types were possible. If the Indian child cannot be placed in any ICWA-compliant placement, the report must provide the court with explanations for the unavailability of each type of preferred placement and the active efforts to find an ICWA-compliant placement. With an ICWA-compliant placement, a good cause finding is required from the court to finalize the placement. Too often, the court is unaware that a good cause finding is required, because the report does not state the Indian child is not in an ICWA-compliant home.

Again, the report must demonstrate the good cause necessary to deviate from the preferred placement preferences. Failure to properly document this issue and the requisite good cause must be grounds for sanctions against the agency.

XII. There Must Be Culturally Relevant Options for Permanence

A. Termination of Parental Rights

Welfare and Institutions Code §366.26 lists conventional adoption, termination of parental rights (TPR), as the most preferred permanency option for dependents. However, there are several exceptions which are applicable in Indian child custody proceedings, but are often omitted from consideration. The most common exception is where there is a compelling reason for determining that termination of parental rights would not be in the best interest of an Indian child.[217]

> ***ISSUES:***
>
> *1) TPR is not in the best interest of the Indian child because of the loss of tribal membership, adoptive placement's failure to maintain contact between the tribe and child, and loss of inheritance rights to trust property.*
>
> *2) TCA is the best permanency option for many Indian children where adoption is the plan. However, Agencies are failing to fully utilize TCA.*

There are several consequences in which TPR can be adverse to an Indian child's best interest. The most serious consequence is loss of tribal membership, in tribes where the severance of the legal relationship between parent and child means that the child can no longer trace lineage to an enrolled member and thereby fails to qualify for membership, or any of the myriad benefits that may come with membership.

Another consequence is the Indian child's adoptive parent(s) often fail to maintain contact between the tribe and child.

A third consequence is that the American Indian Probate Reform Act of 2004 generally severs the rights of adopted-out children to inherit trust property from their biological parents, and from their extended family as well, unless the child and family

[217] Welf. & Inst. Code §366.26(c)(1)(B)(vi).

maintain a “family relationship” after adoption.[218] In addition to trust property itself, there are valuable benefits which can arise from the ownership of trust property – for example, hunting and fishing or other use rights, or membership in class action settlements like the recent *Cobell v. Jewell* litigation, which resulted in a $3.4-billion settlement in 2009 to compensate trust property owners for years of mismanagement of their trust assets by the Department of the Interior.[219]

RECOMMENDATION:

1) The tribe must be the sole entity to determine the terms of the TCA order and none of the parties need to consent to its terms and the juvenile court does not have the discretion to alter or edit the TCAO.

Another statutory exception to conventional adoption includes where a child has a fit and willing relative who is willing to be a child’s permanent placement via guardianship, but is unwilling to adopt.[220] This is not uncommon in tribal extended families -- there may be family willing to take the child permanently, but not via adoption, as the concept of severing the parent-child relationship is not accepted in many tribal cultures.[221]

Despite these consequences and exceptions, cases still arise where conventional adoption is assumed to be the permanent plan, and placement is made early on to that end, without adequate consideration of the Indian child’s best interest, tribal input or investigating alternatives to conventional adoption.

B. Tribal Customary Adoption

Tribal Customary Adoption (TCA) was codified in California as a permanency option for Indian children in 2010. TCA is unique in that it does not terminate parental rights, but has the same degree of permanency as conventional adoption. It provides that the Indian child’s tribe executes a TCA order which may include provisions for

[218] 25 U.S.C. §2206(j)(2)(B)(iii).
[219] *Cobell v. Jewell* (formerly *Cobell v. Salazar*), U.S. District Court for the District of Columbia, case no. 1:96CV01285-JR, settlement filed on December 7, 2009.
[220] Welf. & Inst. Code §§366.26(c)(1)(A), (c)(1)(B)(iv).
[221] Assem. Bill No. 1325 (2009-2010 Reg. Sess.); 2009 Cal. Stats., ch. 287.

continued contact between the child and tribe and the child and the biological parents. The First District now considers it the default permanency option for Indian children,[222] and the Third District has acknowledged that it is the only option which can ensure that a connection will be maintained between child and tribe.[223]

TCA provides an Indian child with "the same stability and permanence of traditional adoption without terminating parental rights."[224] It is no less permanent than a conventional adoption and, like a conventional adoption, "gives the child the best chance at [a full] emotional commitment from a responsible caretaker" as compared to guardianship or foster care.[225] Tribal customary adoptive parents have all of the rights, privileges and duties of any other adoptive parents.[226] And a TCA allows a tribe to protect a child's inheritance rights.[227]

Perhaps because it is a relatively new option, there were numerous issues reported regarding TCA. Despite its advantages over conventional adoption, the latter is still viewed as the go-to option. Because TCA requires the tribe to issue the TCA order according to tribal law and custom, TCA must be selected by the tribe as a desired permanent plan. Despite a regulatory obligation to consult with tribes on TCA as an option in every case moving towards permanency,[228] and despite a statutory requirement to address TCA as an option every time an assessment is ordered pursuant to §§361.5, 366.21, 366.22, 366.25, or 366.26,[229] TCA is often not actually considered or treated as the superior choice for Indian children, unless the tribe formally intervenes in a case and advances TCA.

One of the main misperceptions of TCA is the process required to complete the Tribal Customary Adoption Order (TCAO) and finalize the TACO. According to the statute: 1) a tribe identifies TCA as an appropriate permanent plan before or at the initial

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[222] *In re H.R.* (2012) 208 Cal.App.4th 751.
[223] *In re A.M.* (2013) 215 Cal.App.4th 339.
[224] *In re H.R., supra* at 763.
[225] *Id.* at 759, citing *In re Celine R.* (2003) 31 Cal.4th 45, 53; see also, *id.* at 763 (with TCA, "an Indian child's interest in stability and permanence no longer provides a counterbalance to the child's interest in maintaining his or her tribal connection").
[226] Welf. & Inst. Code §366.24(c)(13).
[227] Welf. & Inst. Code §366.24(c)(10).
[228] CDSS All County Letter No. 10-47 (2010), p. 8.
[229] Welf. & Inst. Code §366.24(b).

§366.26 selection and implementation hearing; 2) the court orders a continuance of the initial §366.26 hearing for up to 120 days to allow for the home study, criminal background check and for the tribe to prepare and file with the court a TCA order (the court has the discretion to grant an additional 60 days to this continuance);[230] 3) the tribe files the TCA order 20 or more days in advance of the continued §366.26 hearing;[231] the court conducts the continued §366.26 hearing, and affords full faith and credit to the TCAO, unless the order fails to qualify for full faith and credit; 4) the adoptive placement agreement and the adoption assistance agreement are signed, the petition for adoption is filed and the adoption finalized (unless a further period of court supervision is necessary).

TCA is commonly misconstrued. Some of the most common errors are that the terms of the TCA order are negotiable, or must be agreed to by all parties, or that the juvenile court has ultimate control over which terms are or are not included in the order. None of these is accurate. The tribe is the sole entity to determine the terms of the TCA order, although it does so after having given the child, birth parents or Indian custodian and the adoptive parents the opportunity to present evidence to the tribe regarding the TCA and the child's best interest.[232] Unless the order does not qualify for full faith and credit, the juvenile court's function is simply to receive and review the order prior to entering it. None of the parties need to consent to its terms,[233] and the juvenile court does not have the discretion to alter or edit the TCAO.

All County Letter 10-47 was intended to act as TCA's implementing regulations until actual regulations were published.[234] TCA has been an available permanency option for Indian children for more than five years. Now is the time to enact final regulations, taking into account the breadth of experience of tribes and tribal legal counsel in the development of those regulations.

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230 The tribe prepares the TCA order after the child, parents, Indian custodian (if any), and the adoptive parents have an opportunity to present evidence to the tribe regarding the TCA and the child's best interest. (Welf. & Inst. Code §366.24(c)(7).) (emphasis added.)

231 The statute clearly states that the TCA order should be filed prior to the continued §366.26 hearing, not the initial hearing.

232 Welf. & Inst. Code §366.24(c)(7).

233 See, e.g., Welf. & Inst. Code § 366.24(c)(11) (parent's/Indian custodian's consent not required).

234 CDSS All County Letter No. 10-47 (2010), pp. 1-2.

XIII. Interagency/Crossover Issues Are Not Fully Vetted or Managed Consistent with Minors' Best Interests

A. Criminal Delinquency

The intention of Cal-ICWA was to apply ICWA to delinquency cases; the original thought behind including §600 minors under ICWA's protections stemmed from Probation and the Courts using IV-E funds for placement of delinquent minors, which triggered reunification plans that necessarily implicated the ICWA. However, the California Supreme Court case In re W.B. ruled that ICWA does not apply to delinquency cases where the "placement [is] based upon an act which, if committed by an adult, would be deemed a crime," and for conduct that is not in and of itself criminal.235 By limiting ICWA to §601 minors (status offenders) and PVCs (breaking a promise to the court via probation terms), the Act's application to crossover populations was artificially constrained. This is extremely problematic, since tribes are not able to provide input on culturally appropriate rehabilitation options. California has effectively segregated §600 minors, so that the Act applies to §601 cases, but not §602s.

ISSUES:

1) Tribes are foreclosed from participating in many delinquency cases, despite the reality that many of the Indian children in the delinquency cases are former, current or future dependents. This is extremely problematic since tribes are not able to provide input on culturally appropriate rehabilitation options.

2) School districts do not cooperate or consult with tribal school systems despite receiving funding to serve tribal children.

3.) The probate court is poorly suited to handle Cal-ICWA probate petitions. However, many families and tribes are urged to utilize the probate court in lieu of a dependency case.

In several counties, dependent youth often end up in the delinquency system. The required §241.1 reports often jointly recommend that the child would best be served

[235] 25 U.S.C. §1903 (1)(iv)

by the delinquency system. There were no counties identified that permitted tribes to participate in the §241.1 process, even where the tribe had intervened as a party in the dependency case. This transition of systems deprives the tribe of the ability to be a party to the proceedings. As such, tribes are not provided with records related to the §602 proceeding. So tribes do not have the information necessary to offer services to the child or family.

RECOMMENDATIONS:

1) Allow tribes to review records relating to a §602 proceeding in order for the tribe to provide services to the child or family.

2) Continual efforts by the school district so that tribes can work directly with the schools to prevent missing the neediest families.

3) Ensure that probate guardianships are not used to circumvent ICWA compliance.

4) Treat ICWA cases similarly to CSEC case plans which allow for greater creative planning.

Once wardship is supervised under the §600 system, unlike Dependency, the parents generally do not receive services (unless it is part of a punitive component directed toward the minor). When a minor successfully completes his or her terms and conditions of probation, he or she is released to parents who have not received services, and who may not have demonstrated an ability to address the underlying conditions that led to supervision in the first place. This increases the likelihood that the child will reoffend, or possibly need removal under the Dependency system, thus perpetuating the cycle.

The Active Efforts, Placement Preferences and Culturally Sensitive Case Plans that are now divorced from the §600 system deprive Indian families of a vital transitional resource, even when the cause of their delinquent behavior is identical to conditions that justify §300 remedial plans.

B. Education

Many tribes in California have developed education departments or have prioritized education within their social services departments. Broad efforts include entering into agreements with local districts to: share information with the tribe, so that

tribes can track attendance and grades in order to intervene early where necessary; recognizing and rewarding perfect-attendance or high GPA; assist parents/educational rights holders with requests for additional services through student study team meetings, 504 plans or Individual Education Plans; and work to ensure coordination of services across providers (tribe, county social services departments, county mental health, schools).

It is encouraging that some school districts are working with tribes to provide the necessary information. Others that have not been so accommodating cite confidentiality concerns. In these situations, tribes offer to work directly with families to gain access to the information. Working more directly with families is a much more resource-intensive approach that misses some of the neediest families and creates difficulty with ongoing tracking.

Some tribes have become quite concerned with their students' education records. Specifically, some districts engage in silent suspensions – children are sent home for behavioral issues without them being counted as suspensions or expulsions. Additionally, records are not complete, making it difficult to evaluate the student's progress or need for individualized services.

C. Probate Guardianships

Guardianships over minors in California are codified in the California Probate Code. When a minor's guardian is nominated through a decedent's Will, it is a fundamentally different scenario from when a family member or another person asks the court to remove custody from a parent and appoint someone else as a guardian. When a parent is involuntarily deprived of custody and control of their child the *same* Cal-ICWA requirements that apply for *removal where the child cannot be returned upon demand* apply to guardianships. For that reason, Probate Code §1459 specifically defines Probate Guardianships as Indian Child Custody Proceedings, thereby invoking the Cal-ICWA's protections.

Many instances have been cited where guardianship petitions were filed in cases involving tribal children. While it is nearly impossible to discern from the filed papers

alone if the motivation was to circumvent a dependency and protections of Cal-ICWA in a dependency case, the practice of filing for temporary and/or permanent guardianships has become so widespread that one clear inference is petitioners are attempting to disenfranchise tribes from participating.

Fortunately, the code is clear in its application of the Cal-ICWA to Probate Guardianships. However, since probate judges are not always versed in dependency or ICWA law, there remains the potential for abuse, particularly if grandparents or other relatives have been coached into filing Probate Guardianships to avoid the procedural safeguards found in the Cal-ICWA.

Another issue identified as problematic is where probate guardianships are not subject to the same checks and balances as dependency guardianships, including case plans, periodic inspections and background checks.[236] This streamlined procedure, while seemingly well-intentioned, deprives Indian children and their tribes of the basic protections found in the state and federal ICWA, ICWA Regulations and the BIA Guidelines.

D. Commercial Sexually Exploited Children

California recently created a new category of dependent children under §300(b)(2) for victims of sexual exploitation. Since these minors are technically not delinquents and not dependents, but instead are being victimized, the law struggled with how to supervise or punish these youths. The solution, which is barely over a year old, is to impose a plan of supervision over CSEC minors under §300 in a way that mirrors dependent minor case plans. However, unlike delinquents, who receive consequences for their improper actions, CSEC minors call out for a different type of supervision—one that does not attribute wrongdoing to the non-offending parents, but which tries to alleviate the cultivating conditions with services.

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[236] However, not all counties provide this level of checks and balances. Often, the dependency court will retain jurisdiction, but the court will dismiss the dependency and relieve court-appointed counsel once the dependency guardianship has issued. This is true whether the dependency guardianship issues at the disposition hearing or it is the permanent plan for the Indian child.

Like CSEC minors, tribal youth and Indian children are a different population that calls for creative thinking that does not punish the minors for their status. In the same way that CSEC case plans seek to remedy conditions and restore equilibrium, the ICWA should be viewed similarly. Section 300(b)(2) is codified as if it were a §300 case, but all indications are to the contrary. This amendment shows that the state can differentiate minor populations and not treat them all with the same remedies. As with CSEC minors, Indian children are victimized by being estranged from their culture and relying upon a system that will not recognize that dissonance.

XIV. Available Remedies Prove Ineffective for Cal-ICWA Non-Compliance

Current remedies available to tribes, parents, Indian custodians and Indian children to increase or secure compliance with the Cal-ICWA are limited. There are legal and non-legal remedies available, none of which have proven effective in securing compliance with Cal-ICWA on a statewide basis.

A. Statutory Remedies

At present, the available enforcement mechanisms to ensure consistent, continued implementation of the Cal-ICWA and complementary state law are inadequate. The Cal-ICWA provides parties with the right to continuances, which tribes request when Cal-ICWA is not being complied, but it comes at the cost of the expediency that is statutorily required. For example, where a tribe is not provided reports in advance of a hearing, the Tribal Representative can request a continuance. However, Tribal Representatives report that they are often pressured into going forward with a hearing without having time or resources to fully consider case-related documents.

> ***ISSUE:***
>
> *Statutory remedies such as continuance, invalidation and standard appellate remedies are inadequate.*

Invalidation is a state and federal remedy for violations of Cal-ICWA and ICWA.[237] If successful, the case is returned to the procedural posture at which the violation occurred or is dismissed. However, practically speaking, this requires a Motion to Invalidate and a hearing on that motion, which results in more continuances and delays, a lack of permanency for the child as well as significant legal fees for the moving parties and a backlog of the court system. Often, the violations are significant, but the result of an invalidation motion would be to return the child to a parent who is ill-prepared to have the child. In theory, invalidation is a useful tool, but it presents more as a legal fiction.

[237] 25 U.S.C. §1914 (if §§1911, 1912, or 1913 are violated). Welf. & Inst. Code §224(e), and Rule of Court 5.486.

Tribes, as well as other parties, always have standard appellate remedies available such as writs and appeals; however, for tribes with few resources or in cases where placement and concomitant bonding are primary issues, these appellate remedies do not address the tribes' immediate needs.

B. Non-Statutory Remedies

Tribes have "remedies" that have been utilized in the past with minimal long-term impact. For example, tribes and tribal groups have engaged in training efforts with counties in an effort to increase knowledge of ICWA compliance within county agencies. Tribes have also engaged in county-by-county workgroups, roundtables, alliances and other collaborative efforts, some of which have increased cooperation between tribal representatives and county representatives; however, given the resources necessary to initiate and sustain such efforts, the results are not sufficient. There are recent training efforts that hold promise for systemic change, such as the California Social Work Training Center's ICWA Core 3.0 training, which will be the most comprehensive training for social workers to date. However, training of social workers is only one step to creating systems that can sustain Cal-ICWA compliance long term.

Tribal-County Memoranda of Understanding or Agreements have been an effective tool for some tribes. Requiring agencies to negotiate MOUs with tribes where there have been particularly damaging statutory violations might help create a methodology for parties to improve future cooperation and compliance. However, the enforcement of MOUs also is a problem.

C. A Brief History of Collaborative Efforts: The Humboldt County CAPP Experience

Tribal-State collaboration is needed to solve issues of ICWA noncompliance. Unfortunately, collaboration has not always led to positive results because of the failure of state partners to uphold their promises. Humboldt County tribes shared their experience with the California Partners for Permanency process, which unfortunately was an overwhelmingly negative experience. Initially, tribes were hesitant to participate in CAPP, due to a long history of the county's failure to address concerns raised by

tribes or to implement tribal recommendations to enhance Cal-ICWA compliance. The CAPP process promised to be different. Although some relationships were built during the CAPP project, continued county failures to address tribal concerns strained new relationships.

In the fall of 2012, all eight Humboldt County Tribes signed a letter to the County expressing frustration with CAPP and providing specific recommendations for improvement including: (1) conduct the institutional analysis CAPP required; (2) develop an ICWA unit at the agency; and (3) reduce social workers' caseloads for those workers handling ICWA cases. In the fall of 2015, the institutional analysis was initiated, but there has been no action on the remaining recommendations.

Also in the fall of 2015, several Humboldt County tribes (Bear River, Wiyot, Trinidad, Yurok and Hoopa) contacted CDSS leadership controlling the CAPP project to express disappointment and alarm at not only the lack of improvement in the county system, but the marked decrease in functionality of the county system. This included not just a failure to provide active efforts, but a failure to provide basic reasonable efforts to families as well.

RECOMMENDATIONS:

1) Continual efforts to engage tribes and tribal groups in training efforts with counties to increase ICWA compliance.

2) Utilizing Tribal-County MOUs or MOAs to effectively negotiate for a methodology which will improve future cooperation and compliance.

Further troubling about the CAPP project is that tribes have consistently requested additional county services be provided in what is called the "east area," a rural isolated area in and around Weitchpec where there is no cell phone reception, limited internet service and many homes do not have electricity.[238] This area has very few local services available, even though it has a disproportionally high number of families receiving county services – residents are largely expected to travel to Eureka to receive services. The drive from Weitchpec to Eureka is three hours and relies on roads

[238] See Yurok Press Release January 22, 2016.

being clear. There is a bus option, but it runs only once in very early morning hours and once again in the evening. In January 2016, the Yurok Tribe declared a State of Emergency after seven tribal members committed suicide in this region alone in an 18-month span.

The CAPP project was fraught with issues at its inception and has been a target of tribal distrust and disappointment for the life of the project. The state failed to consult with tribes on a project earmarked to target Indian children and families, and this failure trickled down to the implementing counties. As far as the Task Force can discern, the CAPP project has produced little, if anything, of value. In fact, it has demonstrated that collaboration is of limited use without enforcement tools.

XV. Task Force Recommendations

To rectify the systemic violations of ICWA documented in this report, the Task Force proposes the following as remedies for consideration. These remedies are in addition to the identified list of immediate action items provided in the Executive Summary.

RECOMMENDATIONS FOR ICWA COMPLIANCE IN CALIFORNIA

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.[239]

[239] See, Michigan Proposed Rule 8.126 and Oregon Proposed Rule 3.170 waiving pro hac vice requirements for tribal ICWA attorneys.

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 (non-attorneys) 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.

Recommendation 2: CDSS Must Exercise Oversight Authority

The California Department of Social Services (CDSS) must exercise its oversight authority and ensure ICWA compliance in each of its 58 political subdivisions to include investigations on ICWA compliance and annual public compliance reports. Investigations must use an investigation tool developed in consultation with tribes.

Recommendation 3: CDSS Office of Native American Affairs

CDSS must create an Office of Native American Affairs (ONAA) that answers directly to the Director of the California Department of Social Services. The ONAA will develop and maintain either cooperative or collaborative relationships with California's Indian tribes, Indian citizens and tribal organizations to promote the health, safety and welfare of California's Indian citizens. Formation of the ONAA shall be done in consultation between California tribes and CDSS to develop the staffing and purpose of the office.

Recommendation 4: Legislatively Mandated Workgroups

Indian tribes should be named as invited participants in any legislation which convenes a mandatory workgroup that pertains to children and families.

Recommendation 5: **Foster Care Bill of Rights Amendment**

There should be a legislative amendment to the foster care bill of rights that unequivocally codifies ICWA enforcement and application as a tribal foster care child's rights.

Recommendation 6: **Judicial Competency and Appointment/Assignment**

The Judicial Council should amend California Rule 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.

The Governor and the Commission on Judicial Nominees Evaluation of the State Bar of California should consult tribes regarding appointment and assignment of bench officers.

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.

Recommendation 8: **CDSS Tribal Consultation Policy**

CDSS must complete a Tribal Consultation Policy in accordance with Executive Order B-10-11.

Recommendation 9: **Tribal Title IV-E Unit within CDSS**

It is recommended that a unit be developed within CDSS for the development and implementation of Title IV-E for tribes. This unit must include a coordinator who has decision-making power sufficient to assign and enforce tasks/deliverables and deadlines. This unit must issue a public report on a biannual basis.

Recommendation 10: Data Collection

The current data system utilized by the California Department of Social Services and California counties (CWS/CMS) to track child welfare cases contains inadequate data and system functionality regarding ICWA-eligible children. While the majority of the problem is likely a result of inadequate inquiry regarding children's tribal affiliations, overall the system fails to include data sets essential to tracking ICWA compliance. The new AFCARS regulations require ICWA specific data sets.[240] This lack of data makes it much more difficult for tribes to guide policy and budget allocation processes to ensure compliance with Cal-ICWA.[241] One step that must be taken is the addition of a drop-down, mandatory field to enter tribal affiliation when known. Next, UC Berkeley Social Welfare's Center for Social Services Research, which maintains the California Child Welfare Indicators Project (CCWIP), should create a whole data set specifically for American Indian Dependents, to provide for data collection outside of that which is collected via agency reporting.

Further, every county and the State are required to complete reporting to support and justify their annual funding allocations (e.g. CFSPs, APSRs). Unfortunately, these reports often misrepresent the level of collaboration and consultation occurring with the tribes. A forensic review of represented ICWA compliance as stated in these reports should be completed and discrepancies should be addressed. Counties with high compliance ratings would be eligible for additional state funding.

Recommendation 11: Proportional Distribution of Federal Funding to Tribes, as Occurs in Other States

CDSS receives federal funding as part of the social services funding budget process. A portion of these funds must be allocated to tribes or ICWA-related programs to fill in gaps where compliance efforts are under-resourced, resulting in non-compliance with the mandates of ICWA, as is done in other states.

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[240] See, 81 Fed. Reg. 90524 (December 14, 2016) Adoption and Foster Care Analysis and Reporting System (AFCARS) Final Rule. Incorporation of data elements related to the Indian Child Welfare Act (ICWA) are mandatory by 2020. https://federalregister.gov/d/2016-29366

[241] See, the California CFSP, page 72-73 http://childsworld.ca.gov/res/TitleIV-B/CFSP_2015-2019.pdf

Recommendation 12: Prioritize Implementation of Legislation

CDSS must prioritize implementation of legislation, including drafting and publishing ACLs and regulations (1460/TCA). These delays result in a lack of Cal-ICWA compliance. For example, revisions to CDSS Division 31 regulations took 10 years to complete after the passage of Cal-ICWA in 2006. TCA regulations have not yet been drafted, six years since its enactment. These delays cause confusion with county child welfare agencies. CDSS has oversight authority and must assume a stronger role in implementation.

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.

Recommendation 14: Development of Culturally-Based Placement for High-Need Youth

Funding and technical assistance should be provided by CDSS to tribes to develop culturally based therapeutic foster homes, tribally based group homes and transitional living facilities, especially in those counties in which there is a disparate number of native children in foster care.

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.

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 cases.

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.

Recommendation 18: Ombudsman – ICWA Training

The director and staff of the Office of the Ombudsman must complete and certify they have received competent and ongoing training on ICWA.

Recommendation 19: Contract with Culturally Appropriate Service Providers

To ensure compliance, counties should contract directly with and pay for Indian Health Services, hospitals, clinics and treatment programs, tribal service providers, Indian organizations, and tribes for culturally appropriate services and directly pay the providers for such services.

Recommendation 20: ICWA Units in Agencies

Each county child welfare agency should designate personnel to develop expertise and relationships with tribes, tribal social workers and county social workers for the development of ICWA units.

Conclusion

The promise of the ICWA and Cal-ICWA is attainable. California has seen progress over the last decade, moving from wholesale ignorance of the statutes to a tentative embrace in some courts and, in some cases, truly innovative work to ensure that the interests of Indian families and tribes are protected. This report has highlighted issues that are most troubling and framed solutions with proposed actions that can be taken to improve ICWA compliance both in the short and long term. For example, the issue of competency in ICWA was a repeating theme throughout the data gathered and narratives shared. Thus, several of the proposed remedies, such as adopting Rules of Court regarding minimum standards for appointed counsel and advanced training resources for Bench Officers, address competency. The remedies presented are a start, but by no means an end, to the issues presented; the systemic denial of civil rights that ICWA provides is a symptom of the fundamental breakdown of the systems that are failing tribal families and children across the country.

We look forward to working with the BCJ to develop a concrete action plan for investigating, analyzing, pursuing and rectifying the ICWA failures of the last 40 years.

JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION

CENTER FOR FAMILIES, CHILDREN & THE COURTS

California Probate Code Provisions Implementing the Indian Child Welfare Act[1]

§1449 **Indian child custody proceedings; definitions; membership in more than one tribe**

(a) As used in this division, unless the context otherwise requires, the terms "Indian," "Indian child," "Indian child's tribe," "Indian custodian," "Indian tribe," "reservation," and "tribal court" shall be defined as provided in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(b) When used in connection with an Indian child custody proceeding, the terms "extended family member" and "parent" shall be defined as provided in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(c) "Indian child custody proceeding" means a "child custody proceeding" within the meaning of Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), including a voluntary or involuntary proceeding that may result in an Indian child's temporary or long-term foster care or guardianship placement if the parent or Indian custodian cannot have the child returned upon demand, termination of parental rights or adoptive placement.

(d) When an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe, the court shall make a determination, in writing together with the reasons for it, as to which tribe is the Indian child's tribe for purposes of the Indian child custody proceeding. The court shall make that determination as follows:
(1) If the Indian child is or becomes a member of only one tribe, that tribe shall be designated as the Indian child's tribe, even though the child is eligible for membership in another tribe.
(2) If an Indian child is or becomes a member of more than one tribe, or is not a member of any tribe but is eligible for membership in more than one tribe, the tribe with which the child has the more significant contacts shall be designated as the Indian child's tribe. In determining which tribe the child has the more significant contacts with, the court shall consider, among other things, the following factors:
(A) The length of residence on or near the reservation of each tribe and frequency of contact with each tribe.
(B) The child's participation in activities of each tribe.
(C) The child's fluency in the language of each tribe.
(D) Whether there has been a previous adjudication with respect to the child by a court of one of the tribes.
(E) The residence on or near one of the tribes' reservations by the child parents, Indian custodian, or extended family members.

[1] Current as of January 1, 2019

(F) Tribal membership of custodial parent or Indian custodian.
(G) Interest asserted by each tribe in response to the notice specified in Section 1460.2.
(H) The child's self-identification.
(3) If an Indian child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe under paragraph (2), actions taken based on the court's determination prior to the child's becoming a tribal member shall continue to be valid.

§1459. Legislative findings and declarations; children of Indian ancestry

(a) The Legislature finds and declares the following:
(1) There is no resource that is more vital to the continued existence and integrity of recognized Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe. The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and other applicable law, designed to prevent the child's involuntary out-of-home placement and, whenever such placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community.
(2) It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether or not the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled.

(b) In all Indian child custody proceedings, as defined in the federal Indian Child Welfare Act, the court shall consider all of the findings contained in subdivision (a), strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act, and seek to protect the best interest of the child. Whenever an Indian child is removed from a foster care home or institution, guardianship, or adoptive placement for the purpose of further foster care, guardianship, or adoptive placement, placement of the child shall be in accordance with the Indian Child Welfare Act.

(c) A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings.

(d) In any case in which this code or other applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or the Indian child's tribe, than the rights provided under the Indian Child Welfare Act, the court shall apply the higher state or federal standard.

(e) Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care or guardianship placement or termination of parental rights if the action violated Sections 1911, 1912, and 1913 of the Indian Child Welfare Act.

§<u>1459.5.</u> Application of federal law to proceedings involving children of Indian ancestry

(a) The Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) shall apply to the following guardianship or conservatorship proceedings under this division when the proposed ward or conservatee is an Indian child:
(1) In any case in which the petition is a petition for guardianship of the person and the proposed guardian is not the natural parent or Indian custodian of the proposed ward, unless the proposed guardian has been nominated by the natural parents pursuant to Section 1500 and the parents retain the right to have custody of the child returned to them upon demand.
(2) To a proceeding to have an Indian child declared free from the custody and control of one or both parents brought in a guardianship proceeding.
(3) In any case in which the petition is a petition for conservatorship of the person of a minor whose marriage has been dissolved, the proposed conservator is seeking physical custody of the minor, the proposed conservator is not the natural parent or Indian custodian of the proposed conservatee and the natural parent or Indian custodian does not retain the right to have custody of the child returned to them upon demand.
(b) When the Indian Child Welfare Act applies to a proceeding under this division, the court shall apply Sections 224.3 to 224.6, inclusive, and Sections 305.5, 361.31, and 361.7 of the Welfare and Institutions Code, and the following rules from the California Rules of Court, as they read on January 1, 2005:
(1) Paragraph (7) of subdivision (b) of Rule 1410.
(2) Subdivision (i) of Rule 1412.

(c) In the provisions cited in subdivision (b), references to social workers, probation officers, county welfare department, or probation department shall be construed as meaning the party seeking a foster care placement, guardianship, or adoption.

<u>§1460.2.</u> Proposed ward or conservatee may be a child of Indian ancestry; notice to interested parties; requirements; time; proof

(a) If the court or petitioner knows or has reason to know that the proposed ward or conservatee may be an Indian child, notice shall comply with subdivision (b) in any case in which the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) applies, as specified in Section 1459.5.

(b) Any notice sent under this section shall be sent to the minor's parent or legal guardian, Indian custodian, if any, and the Indian child's tribe, and shall comply with all of the following requirements:
(1) Notice shall be sent by registered or certified mail with return receipt requested. Additional notice by first-class mail is recommended, but not required.
(2) Notice to the tribe shall be to the tribal chairperson, unless the tribe has designated another agent for service.
(3) Notice shall be sent to all tribes of which the child may be a member or eligible for membership until the court makes a determination as to which tribe is the Indian child's tribe in accordance with subdivision (d) of Section 1449, after which notice need only be sent to the tribe determined to be the Indian child's tribe.
(4) Notice, to the extent required by federal law, shall be sent to the Secretary of the Interior's designated agent, the Sacramento Area Director, Bureau of Indian Affairs. If the identity or location of the Indian child's tribe is known, a copy of the notice shall also be sent directly to the Secretary of the

Interior, unless the Secretary of the Interior has waived the notice in writing and the person responsible for giving notice under this section has filed proof of the waiver with the court.
(5) The notice shall include all of the following information:
(A) The name, birthdate, and birthplace of the Indian child, if known.
(B) The name of any Indian tribe in which the child is a member or may be eligible for membership, if known.
(C) All names known of the Indian child's biological parents, grandparents and great-grandparents or Indian custodians, including maiden, married, and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.
(D) A copy of the petition.
(E) A copy of the child's birth certificate, if available.
(F) The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.
(G) A statement of the following:
(i) The absolute right of the child's parents, Indian custodians, and tribe to intervene in the proceeding.
(ii) The right of the child's parents, Indian custodians, and tribe to petition the court to transfer the proceeding to the tribal court of the Indian child's tribe, absent objection by either parent and subject to declination by the tribal court.
(iii) The right of the child's parents, Indian custodians, and tribe to, upon request, be granted up to an additional 20 days from the receipt of the notice to prepare for the proceeding.
(iv) The potential legal consequences of the proceedings on the future custodial rights of the child's parents or Indian custodians.
(v) That if the parents or Indian custodians are unable to afford counsel, counsel shall be appointed to represent the parents or Indian custodians pursuant to Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).
(vi) That the information contained in the notice, petition, pleading, and other court documents is confidential, so any person or entity notified shall maintain the confidentiality of the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's rights under the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(c) Notice shall be sent whenever it is known or there is reason to know that an Indian child is involved, and for every hearing thereafter, including, but not limited to, the hearing at which a final adoption order is to be granted. After a tribe acknowledges that the child is a member or eligible for membership in the tribe, or after the Indian child's tribe intervenes in a proceeding, the information set out in subparagraphs (C), (D), (E), and (G) of paragraph (5) of subdivision (b) need not be included with the notice.

(d) Proof of the notice, including copies of notices sent and all return receipts and responses received, shall be filed with the court in advance of the hearing except as permitted under subdivision (e).

(e) No proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe or the Bureau of Indian Affairs. The parent, Indian custodian, or the tribe shall, upon request, be granted up to 20 additional days to prepare for the proceeding. Nothing herein shall be construed as limiting the rights of the parent, Indian custodian, or tribe to 10 days' notice when a lengthier notice period is required by statute.

(f) With respect to giving notice to Indian tribes, a party shall be subject to court sanctions if that person knowingly and willfully falsifies or conceals a material fact concerning whether the child is an Indian child, or counsels a party to do so.

(g) The inclusion of contact information of any adult or child that would otherwise be required to be included in the notification pursuant to this section, shall not be required if that person is at risk of harm as a result of domestic violence, child abuse, sexual abuse, or stalking

§1474. Matters involving children of Indian ancestry

If an Indian custodian or biological parent of an Indian child lacks the financial ability to retain counsel and requests the appointment of counsel in proceedings described in Section 1459.5, the provisions of subsection (b) of Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and Section 23.13 of Title 25 of the Code of Federal Regulations are applicable.

§1500.1. Consent by Indian child's parent; requirements

(a) Notwithstanding any other section in this part, and in accordance with Section 1913 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), consent to nomination of a guardian of the person or of a guardian of the person and the estate given by an Indian child's parent is not valid unless both of the following occur:
(1) The consent is executed in writing at least 10 days after the child's birth and recorded before a judge.
(2) The judge certifies that the terms and consequences of the consent were fully explained in detail in English and were fully understood by the parent or that they were interpreted into a language that the parent understood.

(b) The parent of an Indian child may withdraw his or her consent to guardianship for any reason at any time prior to the issuance of letters of guardianship and the child shall be returned to the parent.

§1510. Petition for appointment; contents

(a) A relative or other person on behalf of the minor, or the minor if 12 years of age or older, may file a petition for the appointment of a guardian of the minor. A relative may file a petition for the appointment of a guardian under this section regardless of the relative's immigration status.

(b) The petition shall request that a guardian of the person or estate of the minor, or both, be appointed, shall specify the name and address of the proposed guardian and the name and date of birth of the proposed ward, and shall state that the appointment is necessary or convenient.

(c) The petition shall set forth, so far as is known to the petitioner, the names and addresses of all of the following:
(1) The parents of the proposed ward.
(2) The person having legal custody of the proposed ward and, if that person does not have the care of the proposed ward, the person having the care of the proposed ward.
(3) The relatives of the proposed ward within the second degree.
(4) In the case of a guardianship of the estate, the spouse of the proposed ward.

(5) Any person nominated as guardian for the proposed ward under Section 1500 or 1501.
(6) In the case of a guardianship of the person involving an Indian child, any Indian custodian and the Indian child's tribe.

(d) If the petitioner or proposed guardian is a professional fiduciary, as described in Section 2340, who is required to be licensed under the Professional Fiduciaries Act (Chapter 6 (commencing with Section 6500) of Division 3 of the Business and Professions Code), the petition shall include the following:
(1) The petitioner's or proposed guardian's proposed hourly fee schedule or another statement of his or her proposed compensation from the estate of the proposed ward for services performed as a guardian. The petitioner's or proposed guardian's provision of a proposed hourly fee schedule or another statement of his or her proposed compensation, as required by this paragraph, shall not preclude a court from later reducing the petitioner's or proposed guardian's fees or other compensation.
(2) Unless a petition for appointment of a temporary guardian that contains the statements required by this paragraph is filed together with a petition for appointment of a guardian, both of the following:
(A) A statement of the petitioner's or proposed guardian's license information.
(B) A statement explaining who engaged the petitioner or proposed guardian or how the petitioner or proposed guardian was engaged to file the petition for appointment of a guardian or to agree to accept the appointment as guardian and what prior relationship the petitioner or proposed guardian had with the proposed ward or the proposed ward's family or friends.

(e) If the proposed ward is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of State Hospitals or the State Department of Developmental Services and that fact is known to the petitioner or proposed guardian, the petition shall state that fact and name the institution.
(f) The petition shall state, so far as is known to the petitioner or proposed guardian, whether or not the proposed ward is receiving or is entitled to receive benefits from the Veterans Administration and the estimated amount of the monthly benefit payable by the Veterans Administration for the proposed ward.

(g) If the petitioner or proposed guardian has knowledge of any pending adoption, juvenile court, marriage dissolution, domestic relations, custody, or other similar proceeding affecting the proposed ward, the petition shall disclose the pending proceeding.

(h) If the petitioners or proposed guardians have accepted or intend to accept physical care or custody of the child with intent to adopt, whether formed at the time of placement or formed subsequent to placement, the petitioners or proposed guardians shall so state in the guardianship petition, whether or not an adoption petition has been filed.

(i) If the proposed ward is or becomes the subject of an adoption petition, the court shall order the guardianship petition consolidated with the adoption petition, and the consolidated case shall be heard and decided in the court in which the adoption is pending.

(j) If the proposed ward is or may be an Indian child, the petition shall state that fact.

<u>§1511.</u> Notice of hearing

(a) Except as provided in subdivisions (f) and (g), at least 15 days before the hearing on the petition for the appointment of a guardian, notice of the time and place of the hearing shall be given as provided in

subdivisions (b), (c), (d), and (e) of this section. The notice shall be accompanied by a copy of the petition. The court shall not shorten the time for giving the notice of hearing under this section.

(b) Notice shall be served in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure, or in any manner authorized by the court, on all of the following persons:
(1) The proposed ward if 12 years of age or older.
(2) Any person having legal custody of the proposed ward, or serving as guardian of the estate of the proposed ward.
(3) The parents of the proposed ward.
(4) Any person nominated as a guardian for the proposed ward under Section 1500 or 1501.

(c) Notice shall be delivered pursuant to Section 1215 to the addresses stated in the petition, or in any manner authorized by the court, to all of the following:
(1) The spouse named in the petition.
(2) The relatives named in the petition, except that if the petition is for the appointment of a guardian of the estate only the court may dispense with the giving of notice to any one or more or all of the relatives.
(3) The person having the care of the proposed ward if other than the person having legal custody of the proposed ward.

(d) If notice is required by Section 1461 or 1542 to be given to the Director of State Hospitals or the Director of Developmental Services or the Director of Social Services, notice shall be delivered pursuant to Section 1215 as required.

(e) If the petition states that the proposed ward is receiving or is entitled to receive benefits from the Veterans Administration, notice shall be delivered pursuant to Section 1215 to the office of the Veterans Administration referred to in Section 1461.5.

(f) Unless the court orders otherwise, notice shall not be given to any of the following:
(1) The parents or other relatives of a proposed ward who has been relinquished to a licensed adoption agency.
(2) The parents of a proposed ward who has been judicially declared free from their custody and control.

(g) Notice need not be given to any person if the court so orders upon a determination of either of the following:
(1) The person cannot with reasonable diligence be given the notice.
(2) The giving of the notice would be contrary to the interest of justice.

(h) Before the appointment of a guardian is made, proof shall be made to the court that each person entitled to notice under this section either:
(1) Has been given notice as required by this section.
(2) Has not been given notice as required by this section because the person cannot with reasonable diligence be given the notice or because the giving of notice to that person would be contrary to the interest of justice.

(i) If notice is required by Section 1460.2 to be given to an Indian custodian or tribe, notice shall be mailed as required.

§1513. Investigation; filing of report and recommendation concerning proposed guardianship; contents of report; confidentiality; application of section

(a) Unless waived by the court, a court investigator, probation officer, or domestic relations investigator shall make an investigation and file with the court a report and recommendation concerning each proposed guardianship of the person or guardianship of the estate. Investigations where the proposed guardian is a relative shall be made by a court investigator. Investigations where the proposed guardian is a nonrelative shall be made by the county agency designated to investigate potential dependency. The report for the guardianship of the person shall include, but need not be limited to, an investigation and discussion of all of the following:
(1) A social history of the guardian.
(2) A social history of the proposed ward, including, to the extent feasible, an assessment of any identified developmental, emotional, psychological, or educational needs of the proposed ward and the capability of the petitioner to meet those needs.
(3) The relationship of the proposed ward to the guardian, including the duration and character of the relationship, where applicable, the circumstances whereby physical custody of the proposed ward was acquired by the guardian, and a statement of the proposed ward's attitude concerning the proposed guardianship, unless the statement of the attitude is affected by the proposed ward's developmental, physical, or emotional condition.
(4) The anticipated duration of the guardianship and the plans of both natural parents and the proposed guardian for the stable and permanent home for the child. The court may waive this requirement for cases involving relative guardians.

(b) If the proposed ward is or may be described by Section 300 of the Welfare and Institutions Code, the court may refer the matter to the local child welfare services agency to initiate an investigation of the referral pursuant to Sections 328 and 329 of the Welfare and Institutions Code and to report the findings of that investigation to the court. Pending completion of the investigation, the court may take any reasonable steps it deems appropriate to protect the child's safety, including, but not limited to, appointment of a temporary guardian or issuance of a temporary restraining order. If dependency proceedings are initiated, the guardianship proceedings shall be stayed in accordance with Section 304 of the Welfare and Institutions Code. Nothing in this section shall affect the applicability of Section 16504 or 16506 of the Welfare and Institutions Code. If a dependency proceeding is not initiated, the probate court shall retain jurisdiction to hear the guardianship matter.

(c) Prior to ruling on the petition for guardianship, the court shall read and consider all reports submitted pursuant to this section, which shall be reflected in the minutes or stated on the record. Any person who reports to the court pursuant to this section may be called and examined by any party to the proceeding.

(d) All reports authorized by this section are confidential and shall only be made available to persons who have been served in the proceedings or their attorneys. The clerk of the court shall make provisions to limit access to the reports exclusively to persons entitled to receipt. The reports shall be made available to all parties entitled to receipt no less than three court days before the hearing on the guardianship petition.

(e) For the purpose of writing either report authorized by this section, the person making the investigation and report shall have access to the proposed ward's school records, probation records, and

public and private social services records, and to an oral or written summary of the proposed ward's medical records and psychological records prepared by any physician, psychologist, or psychiatrist who made or who is maintaining those records. The physician, psychologist, or psychiatrist shall be available to clarify information regarding these records pursuant to the investigator's responsibility to gather and provide information for the court.

(f) This section does not apply to guardianships resulting from a permanency plan for a dependent child pursuant to Section 366.26 of the Welfare and Institutions Code.

(g) For purposes of this section, a "relative" means a person who is a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse of any of these persons, even after the marriage has been terminated by death or dissolution.

(h) In an Indian child custody proceeding, any person making an investigation and report shall consult with the Indian child's tribe and include in the report information provided by the tribe.

§1516.5. Proceeding to have child declared free from custody and control of one or both parents

(a) A proceeding to have a child declared free from the custody and control of one or both parents may be brought in accordance with the procedures specified in Part 4 (commencing with Section 7800) of Division 12 of the Family Code within an existing guardianship proceeding, in an adoption action, or in a separate action filed for that purpose, if all of the following requirements are satisfied:
(1) One or both parents do not have the legal custody of the child.
(2) The child has been in the physical custody of the guardian for a period of not less than two years.
(3) The court finds that the child would benefit from being adopted by his or her guardian. In making this determination, the court shall consider all factors relating to the best interest of the child, including, but not limited to, the nature and extent of the relationship between all of the following:
(A) The child and the birth parent.
(B) The child and the guardian, including family members of the guardian.
(C) The child and any siblings or half siblings.

(b) The court shall appoint a court investigator or other qualified professional to investigate all factors enumerated in subdivision (a). The findings of the investigator or professional regarding those issues shall be included in the written report required pursuant to Section 7851 of the Family Code.

(c) The rights of the parent, including the rights to notice and counsel provided in Part 4 (commencing with Section 7800) of Division 12 of the Family Code, shall apply to actions brought pursuant to this section.

(d) This section does not apply to any child who is a dependent of the juvenile court or to any Indian child

Provisions of the Welfare and Institutions Code Incorporated by Reference by Probate Code 1459.5(b)[2]:

§ 224.2. Determination whether child is an Indian child; considerations; scope of inquiry; membership status

(a) The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 may be or has been filed, is or may be an Indian child. The duty to inquire begins with the initial contact, including, but not limited to, asking the party reporting child abuse or neglect whether he or she has any information that the child may be an Indian child.

(b) If a child is placed into the temporary custody of a county welfare department pursuant to Section 306 or county probation department pursuant to Section 307, the county welfare department or county probation department has a duty to inquire whether that child is an Indian child. Inquiry includes, but is not limited to, asking the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child is, or may be, an Indian child and where the child, the parents, or Indian custodian is domiciled.
(c) At the first appearance in court of each party, the court shall ask each participant present in the hearing whether the participant knows or has reason to know that the child is an Indian child. The court shall instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(d) There is reason to know a child involved in a proceeding is an Indian child under any of the following circumstances:
(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 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 on a reservation or in an Alaska Native village.
(3) Any participant in the proceeding, officer of the court, Indian tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child.
(4) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child.
(5) The court is informed that the child is or has been a ward of a tribal court.
(6) The court is informed that either parent or the child possess an identification card indicating membership or citizenship in an Indian tribe.

(e) If the court, social worker, or probation officer has reason to believe that an Indian child is involved in a proceeding, the court, social worker, or probation officer shall make further inquiry regarding the possible Indian status of the child, and shall make that inquiry as soon as practicable. Further inquiry includes, but is not limited to, all of the following:

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[2] Note that sections 224.2 and 224.3 of the Welfare and Institutions Code were renumbered by AB 3176 effective January 1, 2019, but the Probate Code was not revised to reflect this change. As enacted in SB 678 effective January 1, 2006, section 1459.5(b) of the Probate Code incorporated the "Inquiry" provisions of the Welfare and Institutions Code, but NOT the notice requirements which are contained in section 1460.2 of the Probate Code. Therefore this

(1) Interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.3.
(2) Contacting the Bureau of Indian Affairs and the State Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member, or eligible for membership in, and contacting the tribes and any other person that may reasonably be expected to have information regarding the child's membership status or eligibility.
(3) Contacting the tribe or tribes and any other person that may reasonably be expected to have information regarding the child's membership, citizenship status, or eligibility. Contact with a tribe shall, at a minimum, include telephone, facsimile, or electronic mail contact to each tribe's designated agent for receipt of notices under the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.). Contact with a tribe shall include sharing information identified by the tribe as necessary for the tribe to make a membership or eligibility determination, as well as information on the current status of the child and the case.

(f) If there is reason to know, as set forth in subdivision (d), that the child is an Indian child, the party seeking foster care placement shall provide notice in accordance with paragraph (5) of subdivision (a) of Section 224.3.

(g) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an Indian child, the court shall confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used 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 whether a biological parent is a member and the child is eligible for membership.

(h) A determination by an Indian tribe that a child is or is not a member of, or eligible for membership in, that tribe, or testimony attesting to that status by a person authorized by the tribe to provide that determination, shall be conclusive. Information that the child is not enrolled, or is not eligible for enrollment in, the tribe is not determinative of the child's membership status unless the tribe also confirms in writing that enrollment is a prerequisite for membership under tribal law or custom.

(i)(1) When there is reason to know that the child is an Indian child, the court shall treat the child as an Indian child unless and until the court determines on the record and after review of the report of due diligence as described in subdivision (g), and a review of the copies of notice, return receipts, and tribal responses required pursuant to Section 224.3, that the child does not meet the definition of an Indian child as used in Section 224.1 and the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.).
(2) If the court makes a finding that proper and adequate further inquiry and due diligence as required in this section have been conducted and there is no reason to know whether the child is an Indian child, the court may make a finding that the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.) does not apply to the proceedings, subject to reversal based on sufficiency of the evidence. The court shall reverse its determination if it subsequently receives information providing reason to believe that the child is an Indian child and order the social worker or probation officer to conduct further inquiry pursuant to Section 224.3.

(j) Notwithstanding a determination that the federal Indian Child Welfare Act of 1978 does not apply to the proceedings, if the court, social worker, or probation officer subsequently receives any information required by Section 224.3 that was not previously available or included in the notice issued under

Section 224.3, the party seeking placement shall provide the additional information to any tribes entitled to notice under Section 224.3 and to the Secretary of the Interior's designated agent.

§ 224.4. Intervention in proceedings by tribe

The Indian child's tribe and Indian custodian have the right to intervene at any point in an Indian child custody proceeding.

§ 224.5. Full faith and credit to tribal proceedings and records

In an Indian child custody proceeding, the court shall give full faith and credit to the public acts, records, judicial proceedings, and judgments of any Indian tribe applicable to the proceeding to the same extent that such entities give full faith and credit to the public acts, records, judicial proceedings, and judgments of any other entity.

§ 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” shall be qualified to 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 and shall be qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. A person may be designated by the child's tribe as qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. The individual may not be an employee of the person or agency recommending foster care placement or termination of parental rights.

(b) In considering whether to remove an Indian child from the custody of a parent or Indian custodian or to terminate the parental rights of the parent of an Indian child, the court shall do both of the following:
(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 person 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.
(2) A member or citizen 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 child-rearing practices.
(3) An 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 child-rearing practices within the Indian child's tribe.

(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.

JUDICIAL COUNCIL
OF CALIFORNIA
OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

Revised March 2015

Probate Courts

Recommended Legal Findings and Orders for the Indian Child Welfare Act (ICWA)*

I. Inquiry (at every hearing) (Prob. Code, § 1459.5(b); WIC, §§ 224.2(a)(5) and 224.3(a); Cal. Rules of Court, rules 7.1015(d)(2) and 5.481(a))[1]

A. The court finds that the petitioner, the court investigator, and the court have inquired whether the child has Indian ancestry;
B. The court finds that the *Guardianship Petition—Child Information Attachment* (form GC-210(CA)) has been completed and is in the court file;
C. The court finds that the *Indian Child Inquiry Attachment* (form ICWA-010(A)) has been completed and is in the court file; and
D. If the parents or the Indian custodian (if any) have appeared, they have been ordered to complete *Parental Notification of Indian Status* (form ICWA-020) and those documents are in the court file; or
E. If the parents or the Indian custodian (if any) have not appeared, the petitioner or court investigator has been ordered to use reasonable diligence to have them complete ICWA-020;
F. The court finds, after the petitioner, the court investigator, and the court have inquired, that there is reason to believe the child may be an Indian child; or
G. The court finds, after the petitioner, the court investigator, and the court have inquired, that there is no reason to believe the child may be an Indian child.
H. If there is reason to believe that the child is an Indian child:
1. The court finds that the petitioner, the court investigator, or the court have interviewed the parents, Indian custodian, extended family and has contacted the child's potential tribe and the Bureau of Indian Affairs (BIA) to obtain information contained in WIC, § 224.2(a)(5).
2. The court finds that the petitioner and the court have inquired whether the child may be resident or domiciled on a reserve.
3. The court finds that the petitioner and the court have inquired whether the child is the ward of a tribal court.

II. Consent (Note: If the parent or Indian custodian consents to the guardianship of an Indian child, most of the procedural and substantive provisions of ICWA do not apply. However, for consent to be valid under ICWA, it must meet ALL of the requirements set out in this provision. (25 U.S.C. § 1913(a) and (b); Prob. Code, §§ 1459(b) and (d) and 1500.1))

A. The court finds that the parent's or Indian custodian's consent to this guardianship has not been given within 10 days after the birth of the child;
B. The court finds that the parent's or Indian custodian's consent is in writing and has been recorded before a judge of the court and is accompanied by the judge's certificate that the terms and consequences of the consent have been fully explained in detail and have been fully understood by the parent or Indian custodian;
C. If the parent or Indian custodian does not understand English, the court certifies that the explanation has been interpreted into a language that the parent or Indian custodian understands; and
D. The court finds that the guardianship provides that the parent or Indian custodian may withdraw consent to the guardianship at any time and upon such withdrawal of consent, all provisions of the Indian Child Welfare Act, including inter alia 25 U.S.C. § 1913(b), shall apply.

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*All citations in this chart are to the California Probate Code, California Welfare and Institutions Code, and the California Rules of Court.
[1] Prob. Code, § 1459(b) and Cal. Rules of Court, rule 7.1015(d)(7) incorporate various provisions of WIC and juvenile rules of court into probate proceedings.,

III. Application (at any hearing) (25 U.S.C. § 1903(1) and (4); Prob. Code, § 1459.5; WIC, § 224.3; Cal. Rules of Court, rule 5.480)

A. The child has Indian ancestry, and therefore the act may apply.

B. The child is an Indian child because the court has proof of tribal membership or eligibility or the tribal determination received by the court indicates that the child is a member or is eligible for membership.

C. The child is not an Indian child because the tribal determination received by the court indicates that the child is not a member and is not eligible for membership in any tribe.

D. The court will proceed as if the act does not apply because proper notice was sent to the tribe with which the child may be affiliated or to the Bureau of Indian Affairs (BIA) and 60 days have elapsed with no determinative response from the tribe or the BIA. However:

1. If the court receives information on the child's Indian heritage, it will send the information to the tribe or the BIA.
2. If the court later receives evidence of the applicability of the act, the court will apply the act. (WIC, § 224.3(e)(3).)

IV. Tribal Representative/Intervention (at every hearing) (25 U.S.C. § 1911(c); WIC, § 224.4; Cal. Rules of Court, rule 5.482(e))

A. The *(name of tribe)* _____________ Tribe has acknowledged that the child is a member of or is eligible for membership in the tribe and will monitor the case.

B. The *(name of tribe)* _____________ Tribe has designated *(name of representative)* _____________ to be the tribe's representative.

C. The tribe's representative is entitled to the rights listed in *Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child* (form ICWA-040).

D. The (*name of tribe*) _____________ Tribe has intervened in this case and will be treated as a party to the proceedings.

V. Continuances (all hearings) (25 U.S.C. § 1912(a); Prob. Code, § 1460.2(e); Cal. Rules of Court, rule 5.482(a))

A. Upon request, this court grants the parent, the Indian custodian, or the tribe a continuance of up to 20 days to prepare for the hearing.

VI. Appointment of Counsel (at every hearing) (25 U.S.C. § 1912(b); Prob. Code, § 1474)

A. The court finds that the parent or Indian custodian appears to be indigent, and the court hereby appoints counsel to represent the parent or Indian custodian; or

B. The court finds that the parent or Indian custodian do not appear to be indigent.

VII. Notice (at every hearing) (25 U.S.C. § 1912(a); Prob. Code, § 1460.2; Cal. Rules of Court, rules 5.481(b) and 7.1015(c))

A. The court finds that notice has been provided by certified mail with return receipt requested to all tribes of which the child may be a member or eligible for membership and to the BIA.

B. Notice to the tribe was addressed to the tribal chairperson unless the tribe has designated another agent for service of ICWA notice.

C. The court finds that proof of notice has been filed with the court and includes: (a) a copy of the notices sent; (b) the return receipt; (c) copies of all correspondence received from the tribe or the BIA relevant to the minor's Indian status.

D. The court finds *either* that the identity or location of the parent or Indian custodian or tribe cannot be determined *or* that the child has Indian ancestry but is not a member of an identified tribe or eligible for membership in an identified tribe; accordingly, notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt have been filed with the court.

E. The court finds that notice has been provided by sending *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) with a copy of the child's birth certificate and a copy of the petition by registered or certified mail with return receipt requested, and additional notice by first-class mail, to the parent, the tribe, the Indian custodian, and the BIA.

VIII. Consultation with Tribe (Prob. Code, § 1513(h))

A. The person preparing the investigative report has consulted with the child's tribe and included information provided by the tribe in its report.

IX. Detriment and Standard of Proof (prior to involuntary guardianship order) (25 U.S.C. § 1912(e) and (f); WIC, §§ 361.7, 366.26(c)(2)(B); Cal. Rules of Court, rule 5.484(a))

A. The parents or Indian custodians have not consented to the appointment of guardian on item 4 of *Consent of Proposed Guardian, Nomination of*

Guardian, and Consent to Appointment of Guardian and Waiver of Notice (form GC-211); the court finds by *clear and convincing* evidence, including the testimony of one or more qualified expert witnesses, that the continued custody of the child by the parent, legal guardian, or Indian custodian is likely to result in serious emotional or physical danger to the child.

X. Active Efforts (at every hearing where the child is out of the custody of his or her parents, Indian custodians, or legal guardians (25 U.S.C. § 1912(d); WIC, § 361.7; Cal. Rules of Court, rules 5.484(c) and 5.485(a)(1))

A. If a tribe has indicated that the child would be eligible for enrollment if certain steps were followed, the court finds that the petitioner has made active efforts by taking steps to secure tribal membership. (Cal. Rules of Court, rules 5.482(c) and 5.484(c).)

B. The court finds after reviewing all evidence, that the petitioner has made active efforts to provide culturally appropriate services and rehabilitative programs designed to prevent the breakup of the Indian family.

XI. Placement Preferences (at every hearing) (25 U.S.C. § 1915; Prob. Code, 1513(h); WIC, § 361.31; Cal. Rules of Court, rule 5.484(b))

A. The court finds that the petitioner and the court investigator have consulted with the child's tribe and Indian organizations concerning the appropriate placement of the child; and *either:*

1. The court finds that the proposed guardianship complies with the placement preferences of ICWA; or
2. The court finds good cause to deviate from the placement preferences under the act on the grounds that ________________________.

XII. Jurisdiction and Transfer (at any hearing) (25 U.S.C. § 1911; WIC, § 305.5; Cal. Rules of Court, rule 5.483)

A. The court finds that the child resides or is domiciled on the reservation of the ____________________ Tribe or that the child is the ward of the ____________________ tribal court and, accordingly, the ____________________ Tribe has exclusive jurisdiction.

B. The court finds that this court and the court of the child's tribe have concurrent jurisdiction.

C. The *(specify tribe or parent or Indian custodian)* ____________________ has petitioned this court to transfer the proceedings to the tribal court, and finding no good cause not to transfer, this court transfers the case to the tribal court of *(name of tribe)* ____________________ Tribe.

D. After holding an evidentiary hearing, this court finds that the *(specify tribe or parent or Indian custodian)* ____________________ has petitioned this court to transfer the proceedings to the tribal court, and the court finds that the following reason is good cause not to transfer the case to the tribal court:

1. The child's parent objects to the transfer;
2. The child's tribe does not have a tribal court or any other administrative body as defined in section 1903 of the act; or
3. The tribal court of the child's tribe declined the transfer.

E. After holding an evidentiary hearing, this court finds that the *(specify tribe or parent or Indian custodian)* ____________________ has petitioned this court to transfer the proceedings to the tribal court, and the court finds that the following circumstances in the case constitute in the court's discretion good cause not to transfer the case to the tribal court:

1. The evidence necessary to decide the case cannot be presented in tribal court without undue hardship to the parties;
2. This proceeding is at an advanced stage, and the petitioner did not make the request within a reasonable time after receiving notice of this proceeding;
3. The child is over age 12 and objects to the transfer; or
4. The child is over age 5 and has had little or no contact with his or her tribe or members of the child's tribe, and the child's parents are not available.

Indian Child Welfare Act ("ICWA") Requirements*

Applicability (25 U.S.C. §§1901-1923, 1903(i); 25 C.F.R. §§23.2, 23.103, 23.107; Guidelines B.1 & B.2; W.I.C. §§224.1, 224.3; Fam. Code §170; Prob. Code, §§1459.5(a), 1516.5(d); Rule 5.480) ICWA applies to any state court case involving an Indian child that may result in a voluntary or involuntary foster care placement; guardianship placement; custody placement under Family Code section 3041; declaration freeing a child from the custody & control of one or both parents; termination of parental rights; or voluntary or involuntary adoptive placement including all proceedings under WIC sections 300 et seq. & 601 & 602 et seq. when the child is in foster care or at risk of entering foster care & one of the following: 1) the proceedings are based on conduct that would not be a crime if committed by an adult, 2) the court is setting a hearing to terminate parental rights, or 3) the court finds that the foster care placement is based entirely on conditions within the child's home & not even in part upon the child's criminal conduct.
Indian Child (25 U.S.C. §1903(4); 25 C.F.R. §23.2; Guideline B.1; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a) & (b)) Is an unmarried person under the age of 18 who is (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe & is a biological child of a member of an Indian tribe. Indian child may include a person over 18, but under 21, years who is a dependent of the court unless that person elects not to have ICWA apply. A determination by a tribe or the Bureau of Indian Affairs (BIA), absent a determination by the tribe to the contrary, that a child is or is not a member or eligible for membership is conclusive. The child is NOT required to be affiliated with the same tribe the parent is a member of. (25 U.S.C. §1903(4)). Enrollment is NOT required to establish membership unless the tribe confirms that enrollment is required. (WIC, §224.2(h))
Indian Custodian (25 U.S.C. §1903(6); 25 C.F.R. §23.2; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a)) Is any person who has legal custody of an Indian child under tribal law or custom or state law or to whom temporary physical care, custody, & control has been transferred by the parent.
Intervention/Invalidation (25 U.S.C. §§1911(c), 1914; Fam. Code, §§175(e), 177(a); Prob. Code, §§1459(e), 1459.5(b); WIC, §§224(e), 224.4; Rules 5.482(d) & 5.487) An Indian custodian, & Indian child's tribe have the right to intervene at any point in the proceeding. If ICWA applies, the Indian child, parent, Indian custodian, or the child's tribe may petition any court of competent jurisdiction to invalidate the proceedings for not complying with the requirements of sections 1911 (jurisdiction; transfer; intervention; full faith and credit to public acts, records, and judicial proceedings of Indian tribes), 1912 (notice, appointment of counsel, examination of reports or other documents, active efforts, qualified expert witness testimony) or 1913 (consent requirements) of ICWA.
Inquiry (25 C.F.R. §23.107(a); Fam. Code, §177(a); Prob. Code, §§1459.5(b), 1513(h); WIC, §224.2; Rules 5.481(a) & (b); 5.482(c) & 5.668(c)) In all child custody proceedings, the court & the petitioner, including a social worker, a probation officer, a licensed adoption agency or adoption service provider, or an investigator must ask the child, the parents or legal guardians, Indian custodian and extended family members as soon as possible whether there is information indicating the child is or may be an Indian child & must affirm on the petition that inquiry has been made. If that initial inquiry gives reason to believe the child is an Indian child, further inquiry regarding the possible Indian status of the child must be done as soon as practical. This further inquiry must include at a minimum interviewing the parents, Indian custodian and extended family members to gather ancestry information, contacting the California Department of Social Services (CDSS) & the BIA for assistance in identifying tribes and tribal contact information, contacting others that may reasonably be expected to have information about the child's status, and contacting tribe(s) by telephone, facsimile or email and sharing with the tribe(s) any information the tribe(s) require to make a determination about the child's status. In all child custody cases, at their first court appearance, the parent or guardian must be ordered

*Based on The Indian Child Welfare Act 25 U.S.C. §§ 1901-1963; Indian Child Welfare Act Regulations 25 C.F.R. Part 23; Guidelines for Implementing the Indian Child Welfare Act; and California statutes and rules of court.

to complete *Parental Notification of Indian Status* (form ICWA-020), & the court must ask all participants whether they have information indicating the child is or may be an Indian child & instruct them to inform the court if they subsequently receive such information.
Reason to Know the Child Is an Indian Child (25 C.F.R. §23.107(c); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.2(d); Rule 5.481(b)) The following circumstances give "reason to know" the child is an Indian child: 1. A person having an interest in the child provides information suggesting that the child is an Indian child; 2. The residence or domicile of the child, the child's parents, or an Indian custodian is on a reservation or other tribal lands or in an Alaska Native village; 3. The child is or was a ward of a tribal court; or 4. Either parent or the child possesses an I.D. card indicating membership in an Indian tribe. If there is "reason to know" the court must require the petitioner to provide evidence that the petitioner has used due diligence to identify and work with all tribes the child may be affiliated with to verify the child's status; require formal ICWA notice by registered or certified mail return receipt requested as discussed below; and must treat the child as an Indian child unless and until the court can confirm that the child is not an Indian child in accordance with WIC § 224.2(i)).
Notice (25 U.S.C. §1912(a); 25 C.F.R. §§23.11 & 23.111; Guidelines D.1-D.7; Fam. Code, §180; Prob. Code, §1460.2; WIC, §§224.3, 727.4(a)(2); Rule5.481(c)) When: For any hearing that may culminate in an order for foster care placement, including a guardianship placement, termination of parental rights or declaration freeing the child from the custody & control of one or both parents, preadoptive placement or adoptive placement. How: Party seeking foster care placement, guardianship, termination of parental rights, or order declaring the child free from the custody & control of one or both parents, must notify the parent(s), Indian custodian, & the tribe(s) there is reason to know the child is a member of or eligible for membership in, of the pending proceedings by registered or certified mail, return receipt requested as specified in Fam. Code, §180, Prob. Code, §1460.2, or WIC, §224.3. *Notice of Involuntary Child Custody Proceedings for an Indian Child* (form ICWA-030) is required to be completed & sent for all cases except excluded delinquency proceedings, for every hearing that may culminate in one of the outcomes listed above. In addition to the information included on form ICWA-030, the party must also include: 1. Information regarding the Indian child's Indian custodian including: all known names, including maiden, married, former, & aliases; current & former addresses; birthdates; places of birth & death; tribal enrollment numbers; & any other identifying information, if known. 2. A copy of the child's birth certificate if available. 3. A copy of the petition by which the proceeding was initiated. 4. The location, mailing address, & telephone number of the court & all parties notified. When a child's Indian tribe is identified, the tribe is entitled to notice of all other hearings and service of all documents in the same manner as all other parties.
Active Efforts (25 U.S.C. §1912(d); 25 C.F.R. §§23.2 & 23.120; Guidelines E.1-E.6; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§ 224.1(f), 361.7; Rule5.485(c)) The party seeking an involuntary foster care placement, guardianship, order freeing the child from the custody & control of one or both parents, or termination of parental rights must provide evidence to the court that active efforts have been made to provide remedial services & rehabilitative programs designed to prevent the breakup of the Indian family & that these efforts were unsuccessful. What constitutes active efforts is assessed on a case-by-case basis. Active efforts must be affirmative, active, thorough, & timely. If an agency is involved, active efforts must begin at first contact with the family when there is reason to know the child may be an Indian child. If an agency is involved, active efforts must include assisting the parents through the steps of a case plan & accessing or developing the resources necessary to satisfy the case plan. Active efforts must consider the prevailing social & cultural values & way of life of the Indian child's tribe. Active efforts must include the available resources of extended family members, the tribe, Indian social service agencies, & individual Indian caregivers. Active efforts must be documented in detail in the record.
Qualified Expert Witness (QEW) Testimony (25 U.S.C. §1912(e); 25 C.F.R. §§23.121 & 23.122; Guidelines G.1 & G.2; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§224.6, 361.7(c); Rule 5.485(a)) To involuntarily order foster care or adoptive placement, guardianship or terminate parental rights, when there is reason to know the child is an Indian child, the court must require testimony of a QEW regarding whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical damage. The QEW cannot be an employee of the person or agency seeking the foster care placement or termination of parental rights.

Persons most likely to meet the requirements for a QEW are: 1. A person designated by the tribe as being qualified to testify to the prevailing social and cultural standards of the tribe; 2. a member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices; 3. An expert witness having substantial experience in the delivery of child and family services to Indians, & extensive knowledge of prevailing social & cultural standards & child-rearing practices of the Indian child's tribe. The court may accept a declaration or affidavit from a QEW in lieu of testimony only if the parties stipulate in writing and the court is satisfied that the stipulation is made knowingly, intelligently, and voluntarily.
Placement Preferences (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §361.31; Rule5.485(b)) The following placement preferences & standards must be followed whenever there is reason to know the child is an Indian child and the child is removed from the physical custody of his or her parents or Indian custodian. The court must analyze the availability of placements within the preferences in descending order without skipping. Foster Care, Guardianships, & Custody to Non-parent: The court must order the least restrictive setting that most approximates a family situation within reasonable proximity to the child's home & meets the child's special needs, if any. Preference must be given in the following order: 1. a member of the child's extended family as defined in 25 U.S.C. §1903(2); 2. a foster home 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; 4. an institution approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs. Adoptive Placements: Preference must be given in the following order: 1. a member of the Indian child's extended family as defined in 25 U.S.C. §1903(2); 2. other members of the Indian child's tribe; 3. another Indian family. For both foster care and adoptive placements, the tribe, may establish a different preference order by resolution. This order of preference must be followed if it provides for the least restrictive setting.
Placement Standards & Records (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5**;** Fam. Code, §§177(a), 3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361(c)(6), 361.31, 361.7(c), 366.26(c)(2)(B); Rule5.484(b)(1)) The preferences of the child (if old enough) & the parent(s) must be considered. Placement standards must be the prevailing social & cultural standards of the child's tribe or the Indian community in which the parent or extended family member resides or extended family member maintains social & cultural ties. A determination of the applicable prevailing social & cultural standards may be confirmed by the Indian child's tribe or QEW testimony. CDSS must maintain a record of each placement of an Indian child. CDSS must also maintain evidence of efforts to comply with the placement preferences where ever the placement deviates from the preferences.
Good Cause to Deviate From the Placement Preferences (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; WIC, §361.31(h); Rule5.484(b)(2) & (3)) The court may deviate from the placement preferences list above only upon a finding of good cause. If a party asserts there is good cause to deviate from the placement preferences those reasons must be contained in the record either orally or in writing. The party requesting a different order has the burden of establishing good cause. The court may base a decision to deviate from the placement preferences on: 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 & 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 & cultural ties. A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement. 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.

Burden of Proof & Qualified Expert Witness (25 U.S.C. §1912(e), (f); 25 C.F.R. §23.121; Guideline G.1**;** Fam. Code, §§3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361.7(c), 366.26(c)(2)(B); Rule5.484(a))
The burden of proof to place a child in foster care, appoint a guardian, & award custody to a non-parent is *clear & convincing evidence,* including testimony of a qualified expert witness establishing that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The burden of proof to terminate parental rights is *beyond a reasonable doubt,* including testimony of a qualified expert witness establishing that continued custody of the child by the child's custodian is likely to result in serious emotional or physical damage to the child.

Adoption (25 U.S.C. §§1917, 1951; 25 C.F.R. §23.140; Guideline J.2; Fam. Code, §9208; Rule 5.487)
The court must provide the Secretary of the Interior a copy of the adoption order & other information needed to show: 1. the name & tribal affiliation of the Indian child; 2. the names & addresses of the biological parents; 3. the names & addresses of the adoptive parents; 4. the identity of any agency having files or information relating to such adoptive placement; 5. any confidential parent affidavits; and 6. any information relating to Tribal membership or eligibility for Tribal membership of the adopted child. At the request of an adopted Indian child over the age of 18, the court must provide information about the individual's tribal affiliation, biological parents, & other information as may be necessary to protect any rights flowing from the individual's relationship to the tribe.

Jurisdiction & Transfer (25 U.S.C. §1911(a), (b); 25 C.F.R. §23.110; Guidelines F.1-F.6; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §305.5 Rule 5.483)
<u>Exclusive Jurisdiction</u>: If an Indian child is a ward of the tribal court or resides or is domiciled on a reservation of a tribe that exercises exclusive jurisdiction, notice must be sent to the tribe by the next working day following removal. If the tribe determines that the child is under the exclusive jurisdiction of the tribe, the state court must dismiss the case & ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including the pleadings & any court record.
<u>Transfer to Tribal Jurisdiction</u>: If the above exclusive jurisdiction does not apply, the tribe, parent, or Indian custodian may petition the court to transfer the proceedings to the tribal jurisdiction. The court must transfer the proceedings unless there is good cause not to do so. Either parent may object to the transfer, or the tribe may decline the transfer of the proceedings.

Right to Counsel (25 U.S.C. §1912(b); Fam. Code, §180(b)(5)(G)(v); Prob. Code, §1474; WIC, §317(a)(2))
The parent, Indian custodian, or Indian guardian, if indigent, has the right to court-appointed counsel.

Examination of Reports & Documents (25 U.S.C. §1912(c); Fam. Code, §177(a); Prob. Code, §1459.5(b))
The parent, Indian child, Indian custodian, tribe, & their attorneys have the right to examine all court documents related to the Indian child-custody case.

Full Faith & Credit (25 U.S.C. §1911(d); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.5)
Full faith & credit to the public acts, records, & judicial proceedings of any Indian tribe is required.

Right to Additional Time (25 U.S.C. §1912 (a); 25 C.F.R. §23.112; Fam Code §180(e); Prob. Code §1460.2(e); WIC §224.2(d); Rule5.482(a))
With the exception of an emergency proceeding as defined in 25 C.F.R. §23.113 the court cannot go ahead with a hearing that meets the definition of "child custody proceeding" under ICWA until 10 days after receipt of notice by tribe(s) & BIA & must grant 20 extra days for preparation if requested.

JUDICIAL COUNCIL
OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

ICWA Information Sheet: Tribal participation in State court proceedings governed by ICWA.

Under ICWA and corresponding state law, an Indian child's tribe must receive notice of any state court proceedings governed by ICWA involving an Indian child. These proceedings include dependency proceedings, some delinquency proceedings, some family code proceedings and probate guardianship proceedings concerning an Indian child. (see 25 USC § 1903; Fam. Code §§ 170, 177, 3041, Prob. Code § 1459.5, WIC §§ 224, 224.1 CRC 5.480 & 7.1015) Federal and state law mandate and acknowledge a number of substantive and procedural rights of an Indian child's tribe in such state court proceedings, including a right to participate in various ways and an absolute right to intervene in such proceedings "at any point".

Rights if a tribe chooses not to intervene:

An Indian child's tribe is not required to formally intervene in proceedings. If the tribe acknowledges the child, all of ICWA's substantive requirements apply even if the tribe does not intervene. A non-intervening tribe must continue to receive notice of all court hearings involving the child. The tribe must be consulted with respect to the placement of the child. (CRC 5.482(g)) The tribe must be consulted with respect to case planning for both the Indian parents and the Indian child and those case plans must use the available resources of the tribe, extended family members, other Indian service agencies and individual Indian caregivers. (CRC 5.484 (c); CRC 5.690 (c); WIC § 361.7)
Whether or not the tribe intervenes, a representative of the Indian child's tribe is entitled to be present at all court proceedings involving the Indian child (CRC 5.530 (B) (7)) and may address the court, receive notice of hearings, examine all court documents relating to the dependency case, submit written reports and recommendations to the court, and perform other duties and responsibilities as requested or approved by the court. (CRC 5.534 (i))

Right of Intervention:

An Indian child's tribe may intervene, orally or in writing, at any point in the proceedings and may, but is not required to, file with the court the *Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child* (form ICWA-040) to give notice of their intent to intervene. (CRC rule 5.482 (e); WIC § 224.4; 25 USC § 1911 (c))

The juvenile court has no discretion to deny a tribe's request to intervene. (*In re Desiree F.* (2000) 99 Cal.Rptr.2d 688, 83 Cal.App.4th 460)

Rights of the Intervening Tribe:

A tribe, as an intervening party, is entitled to all rights afforded to any party in a proceeding, including the right to sit at counsel table, the right to examine witnesses, and the right to be given copies of documents. See CCP §387; see also CRC 5.482(e) and Judicial Council form ICWA-040.

Who May Appear on Behalf of the Tribe:

The tribe may choose to be represented by an attorney at the tribe's expense, but the tribe may also designate any person to represent them in court, and this representative must be given the same rights and courtesies as the attorneys involved. (CJER ICWA Bench Handbook, 2013 at page 32).

The court may not limit the tribe's ability to participate effectively in the case if the tribe chooses to be represented by a non-attorney.[1] States' laws regulating attorneys and the practice of law cannot interfere with or burden the federally protected right of the tribe to participate in the proceedings.[2]

California Rule of Court, rule 5.534 specifically addresses this issue:

> **(i) Tribal representatives (25 U.S.C. §§ 1911, 1931-1934)**
> The tribe of an Indian child is entitled to intervene as a party at any stage of a dependency proceeding concerning the Indian child.
> (1) The tribe may appear by counsel or by a representative of the tribe designated by the tribe to intervene on its behalf.

The California Rules of the Court, Rule 5.534(i)(1) permits intervention by an attorney or by a representative and makes no distinction between the rights granted to each respectively.

[1] *State v. Jennifer M.,* 277 Neb. 1023, 1024 (2009)
[2] *State ex rel Juvenile Department of Lane County v. Shuey*, 119 Ore.App. 185 (1993); *In the Interest of N.N.E.,* 752 N.W.2d 1 (2008)