



Judicial Council of California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-171

For business meeting on September 19, 2023

Title

Indian Child Welfare Act (ICWA):
Discretionary Tribal Participation

Agenda Item Type

Action Required

Effective Date

January 1, 2024

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rules 5.482 and
5.530; approve form ICWA-042

Date of Report

August 24, 2023

Recommended by

Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Joyce Hinrichs, Cochair

Contact

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Family and Juvenile Law Advisory
Committee

Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Executive Summary

Although California law protects the relationship between tribes and their children beyond the scope of the Indian Child Welfare Act (ICWA) and permits tribal participation in juvenile cases in various situations where ICWA does not apply, tribal leaders and other advocates report that courts often decline to permit tribes to participate in juvenile cases if ICWA does not apply. The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend amending two rules of court and approving a form to clarify the process and set standards consistent with California statutes for the court's exercise of discretion to permit the participation of a tribe in juvenile cases involving a child affiliated with the tribe, even when there is no express statutory right to participate or intervene under ICWA and Welfare and Institutions Code section 224.4.

Recommendation

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend that the Judicial Council, effective January 1, 2024:

1. Amend California Rules of Court, rules 5.482 and 5.530 to clarify the process for tribes seeking to participate in juvenile cases where ICWA does not apply; and
2. Approve *Request for Tribal Participation* (form ICWA-042) for a tribe seeking permission to participate in a juvenile case.

The proposed amended rules and new form are attached at pages 11–13.

Relevant Previous Council Action

The federal Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) was enacted in 1978 and establishes minimum federal standards that apply in all state court proceedings involving an Indian child where the child could be involuntarily placed in the custody of a nonparent, or where the parental rights of a parent could be terminated. The Judicial Council has acted numerous times to implement and improve compliance with ICWA, including:

- 1995 amendments to former rules 1431, 1432, and 1463 to assure proper notice consistent with ICWA and adoption of former rule 1439;
- 1998 amendments to former rule 1439 and forms JV-100 and JV-110 to better identify Indian children and comply with ICWA; and
- 2000 and 2005 amendments to former rule 1439 and revisions to various juvenile and family law forms to clarify when and how notice should be given under ICWA.

In 2006, California enacted Senate Bill 678 (Stats. 2006, ch. 838) (see Link A) to substantially incorporate provisions of ICWA into the Family Code, Probate Code, and Welfare and Institutions Code. Following enactment of SB 678, the Judicial Council adopted implementing rules of court and forms.¹ In 2019, substantial revisions were made to these rules of court and forms to align with statutory changes in Assembly Bill 3176 (Waldron; Stats. 2018, ch. 833) (see Link B), as well as changes to governing federal regulations and guidelines.²

¹ Judicial Council of Cal., Advisory Com. Rep., *Family, Juvenile, and Probate Law: Enactment of the Federal Indian Child Welfare Act as California Law in the Family, Probate, and Welfare and Institutions Codes* (Sept. 12, 2007), www.courts.ca.gov/documents/102607ItemA27.pdf.

² Judicial Council of Cal., Advisory Com. Rep., *Indian Child Welfare Act (ICWA): Implementation of AB 3176 for Indian Children* (Sept. 5, 2019), <https://jcc.legistar.com/View.ashx?M=F&ID=7684873&GUID=52B4C6B1-F704-458F-BF42-EB1AA4F82000>; see updated federal regulations, www.ecfr.gov/current/title-25/chapter-I/subchapter-D/part-23, and updated federal guidelines, www.federalregister.gov/documents/2015/02/25/2015-03925/guidelines-for-state-courts-and-agencies-in-indian-child-custody-proceedings.

Analysis/Rationale

Background

ICWA provides certain legal rights to federally recognized Indian tribes with respect to child custody proceedings involving an Indian child, defined as any unmarried person who is under age 18 and is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and who is the biological child of a member of an Indian tribe. Among the rights that ICWA recognizes is the tribe's right to intervene at any time in a case involving an Indian child. When ICWA applies, but the tribe chooses not to intervene, rule 5.534(e)(2) of the California Rules of Court³ still provides the child's tribe with certain rights to participate in a case involving an Indian child.

The California Legislature has also acted to protect the relationship between Native American and Indian children⁴ and their tribes and tribal communities. In Welfare and Institutions Code section 224,⁵ the Legislature states that California is committed to

protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with [ICWA] and other applicable state and federal law, designed to prevent the child's involuntary out-of-home placement and, whenever that 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.

California law goes beyond ICWA in several relevant ways. Section 306.6⁶ authorizes the court to permit a tribe not recognized to have tribal status under federal law (also known as an "unrecognized tribe") to participate in dependency proceedings. In 2019, the Legislature amended section 16001.9 (often referred to as the "Foster Care Bill of Rights") to include protections for the cultural and political connection of all Native American and Indian children in foster care.⁷ These protections are separate and apart from the requirements of ICWA.

This proposal addresses three specific categories of cases where ICWA may not apply, but where either the tribal group or the child may have a right to some manner of tribal participation in a juvenile case:

³ All further references to rules are to the California Rules of Court unless otherwise noted.

⁴ The term "Indian child" is used for children who meet the definition of Indian child in ICWA. The term "Native American child" is used for children who are affiliated with a tribe but do not meet the definition of Indian child.

⁵ All further unspecified statutory references are to the Welfare and Institutions Code.

⁶ Added by Sen. Bill 678, which wove many provisions of ICWA into the Welfare and Institutions Code, the Family Code, and the Probate Code.

⁷ See Assem. Bill 175 (Stats. 2019, ch. 416).

- Cases involving Indian children who are in the juvenile court because of an act that would be a crime if it were committed by an adult or as to whom ICWA does not apply for some other reason;
- Cases involving children from unrecognized tribes; and
- Children whose parents are members of tribes and are considered part of the tribal community but who do not meet the definition of Indian child, often referred to as “heritage cases.”

In each of these situations, the law recognizes a relationship between the tribe and the child notwithstanding that ICWA does not apply. Section 306.6 specifically provides the court with discretion to allow a child’s unrecognized tribe to participate in dependency proceedings. Sections 346 and 676 permit juvenile courts to allow anyone with a “direct and legitimate interest” in a case to be admitted to a juvenile court hearing. Several courts have adopted standing orders under the authority of these sections to create a presumption that tribes be permitted to participate in proceedings involving children affiliated with the tribe.⁸

The proposed rule amendments and new form would provide guidance for the exercise of that discretion and the role of a tribe when it is permitted to participate. The role set out in proposed amended rule 5.530 is consistent with section 306.6 and rule 5.534(e)(2), which addresses participation of non-intervening tribes in ICWA cases.

Delinquency cases

Indian children who are placed into foster care are entitled to all the same rights as other foster children under section 16001.9 (see Link D) and have unique protections for their cultural and political identity as Indian children. These protections apply equally whether they are placed in foster care under section 300 (the juvenile dependency code section) or under 601 or 602 (the juvenile delinquency code sections)—even though ICWA does not apply to most juvenile justice cases. Specifically, this section protects the child’s right to:

- A placement that upholds the prevailing social and cultural standards of the child’s Indian community, including but not limited to family, social, and political ties (§ 16001.9(a)(1));
- Be provided with names and contact information for representatives of the child’s Indian tribe and to communicate with these individuals privately (§ 16001.9(a)(11));

⁸ See *In the Matter of: Tribal Participation in Juvenile Dependency and Juvenile Justice Cases Not Governed by the Indian Child Welfare Act* (Super. Ct. San Diego County, Apr. 25, 2022) (order authorizing informal notice to and participation by tribes in juvenile court proceedings), www.sdcourt.ca.gov/sites/default/files/sdcourt/juvenile3/policiesproceduresandprotocols/juvsoliciesproceduresandpoliciesproceduresandprotocolsforms/order_author_tribes.pdf; Super. Ct. Inyo County, Local Rules, rule 9.1 (referencing standing orders dealing with this issue), www.inyo.courts.ca.gov/system/files?file=localrules.pdf.

- Have contact with tribal members and members of the child’s Indian community consistent with the prevailing social and cultural conditions and way of life of the Indian child’s tribe (§ 16001.9(a)(14));
- Engage in traditional Native American religious practices (§ 16001.9(a)(15));
- Have probation personnel who have received instruction on ICWA and on cultural competency and sensitivity relating to, and best practices for, providing adequate care to Indian children in out-of-home care (§ 16001.9(a)(20));
- Have recognition of the child’s political affiliation with an Indian tribe or Alaskan village, including a determination of the child’s membership or citizenship in an Indian tribe or Alaskan village; receive assistance in becoming a member of an Indian tribe or Alaskan village in which the child is eligible for membership or citizenship; receive all benefits and privileges that flow from membership or citizenship in an Indian tribe or Alaskan village; and be free from discrimination based on the child’s political affiliation with an Indian tribe or Alaskan village (§ 16001.9(a)(21));
- Have a representative of the child’s Indian tribe in attendance during hearings (§ 16001.9(a)(34)); and
- Have a case plan that includes protecting the essential tribal relations and best interests of the Indian child by assisting the child in establishing, developing, and maintaining political, cultural, and social relationships with the child’s Indian tribe and Indian community (§ 16001.9(a)(37)).

These provisions recognize a strong beneficial relationship between an Indian child and the child’s tribe including in juvenile justice cases.

Unrecognized tribes

Section 306.6 (see Link E) permits the court to allow an unrecognized tribe from which a child is descended to participate in a dependency proceeding. In addition, section 16001.9, as amended in 2019, provides protection of certain rights of all children in foster care that may be particularly important to those children who identify as Native American, and will apply even if their tribe is not federally recognized. These include the right to:

- Receive adequate clothing, grooming, and hygiene products that respect the child’s culture and ethnicity (§ 16001.9(a)(3));
- Be placed with a relative or nonrelative extended family member if an appropriate and willing individual is available (§ 16001.9(a)(5));
- Attend religious services, activities, and ceremonies of the child’s choice, including but not limited to engaging in traditional Native American religious practices (§ 16001.9(a)(15)); and

- Participate in extracurricular, cultural, racial, ethnic, personal enrichment, and social activities (§ 16001.9(a)(16)).

Section 306.6 states:

(d) This section is intended to assist the court in making decisions that are in the best interest of the child by permitting a tribe in the circumstances set out in subdivision (a) to inform the court and parties to the proceeding about placement options for the child within the child's extended family or the tribal community, services and programs available to the child and the child's parents as Indians, and other unique interests the child or the child's parents may have as Indians. This section shall not be construed to make [ICWA], or any state law implementing [ICWA], applicable to the proceedings, or to limit the court's discretion to permit other interested persons to participate in these or any other proceedings.

(e) The court shall, on a case-by-case basis, make a determination if this section is applicable and may request information from the tribe, or the entity claiming to be a tribe, from which the child is descended for the purposes of making this determination, if the child would otherwise be an Indian child pursuant to subdivision (a).

Heritage cases

Sometimes a child's parents are members of a tribe, but the child is not a member or eligible for membership. This can be because the tribe's membership rolls are closed, or because the child does not meet one or more of the tribe's specific membership criteria. These children may still live on tribal lands, be eligible for tribal services, and be considered members of the tribal community. Under section 16001.9, these children have the same rights as described above for children from unrecognized tribes to maintain their cultural and political connections to the tribe.

Protection of these rights is furthered by the participation of the tribe with which the child and family are affiliated, notwithstanding that the child does not meet the definition of Indian child under ICWA. Sections 346 and 676 permit the judicial officer presiding over a case to admit to a hearing such persons as are deemed to have a direct and legitimate interest in the case or work of the court. As discussed above, several courts have adopted local standing orders creating a presumption that tribes have a direct and legitimate interest in cases involving their children.

Allowing tribal participation in non-ICWA cases

This proposal responds to a concern identified by tribal advocates and leaders that courts often will not allow a tribe to participate in a juvenile case if ICWA does not apply. It advances the judicial branch's goal of access to justice by protecting the rights of Native American and Indian children and their tribes to maintain cultural and political connections. This proposal would provide guidance and ensure consistency in accordance with the statutes discussed above, in

cases falling within the three categories where ICWA does not mandate, but state laws allow tribal participation in a juvenile case.

Tribes, particularly unrecognized tribes, often have limited resources. They may participate in court via a tribal representative rather than an attorney. It can be challenging for tribal advocates to draft requests for orders without additional guidance. This proposal would create a process and provide a form for tribes to use when they want to participate in actions involving their children when ICWA does not apply. It provides presumptions that are consistent with state policies in furthering tribal participation.

Rule 5.482

Rule 5.482, which currently implements section 204.4 governing tribal intervention in cases where ICWA mandates apply, would be amended by adding subdivision (d)(2). The new subdivision would direct parties to rule 5.530(g) in situations where the tribe does not have a right of intervention because ICWA does not apply, but the court has discretion to allow the tribe to participate in a juvenile proceeding.

Rule 5.530

Rule 5.530, which governs who may be present at a juvenile hearing, would be amended to add subdivision (g) governing discretionary tribal participation in the three situations discussed above where ICWA does not mandate, but where state laws allow tribal participation. Each of the three case types is set forth in a separate paragraph (subdivision (g)(1)–(3)) because each relies on different sections of the Welfare and Institutions Code that provide slightly different protections to Native American and Indian children and their tribes. Each of those paragraphs establishes a presumption that a child’s tribe should be permitted to participate. A fourth paragraph (subdivision (g)(4)) lists, for tribes whose request to participate has been granted, the actions they may take to participate in the proceedings. This list mirrors the extent of participation that the Legislature has established in section 306.6 for unrecognized tribes and that the council has provided in rule 5.534(e)(2) for tribes that choose not to intervene in ICWA cases.

Request for Tribal Participation (form ICWA-042)

New, optional form ICWA-042 may be used by tribes to make a request to participate in a case.

Policy implications

Proposed amended rule 5.530 would create a presumption that a tribe should be permitted to participate in a proceeding where the court has discretion to permit such participation absent a finding by the court that the tribe’s participation would not assist the court in making decisions that are in the best interest of the child.

The committees believe that this presumption is consistent with the intent of the Legislature in enacting sections 224, 306.6, and 16001.9. In section 224, the Legislature expressly stated California’s commitment to protecting an Indian child’s tribal relations and best interest through efforts to prevent the child’s involuntary removal from the home and, where out-of-home

placement is necessary, by prioritizing a placement that reflects the values of the child's tribal culture and is best able to assist the child in developing and maintaining ties with the child's tribe and tribal community. As noted above, California law goes beyond ICWA in several relevant ways. Section 306.6 authorizes an unrecognized tribe to participate in dependency proceedings. In 2019 the Legislature amended section 16001.9 to include protections for the cultural and political connection of all Native American and Indian children in foster care.⁹ These protections are separate and apart from the requirements of ICWA.

As discussed above, tribal leaders and representatives report that when ICWA does not apply to a case, courts often deny tribal requests to participate, possibly unaware of the state provisions. This is not consistent with the protections for the legal relationships set out in California law.

Comments

The proposal circulated for public comment from March 31 through May 12, 2023, as part of the spring 2023 invitation-to-comment cycle. It was sent to the standard mailing list for family and juvenile law proposals that includes appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks, attorneys, family law facilitators and self-help center staff, legal services attorneys, social workers, probation officers, Court Appointed Special Advocate (CASA) programs, and other juvenile and family law professionals. It was also sent to tribal leaders, tribal advocates, and tribal attorneys and distributed through the California Department of Social Services Office of Tribal Affairs list serve to reach those with an interest in the Indian Child Welfare Act and tribal issues.

Six comments were received. None of the comments opposed the proposal. Four did not take a position; one approved if amended; and one approved of the proposal as circulated.

The Superior Court for the County of San Diego approved if amended. The amendments suggested by the court to clarify that the provisions apply only in juvenile cases and other minor language changes were adopted. The Orange County Bar Association approved the proposal. California Indian Legal Services suggested minor revisions to the form that were adopted.

As circulated for comment, the substantive provisions of the proposal were in Title 5 (Family and Juvenile Rules), Division 2 (Rules Applicable in Family and Juvenile Proceedings), Chapter Two (Indian Child Welfare Act) of the rules, at rule 5.482(d) (which currently addresses the right of tribal intervention in cases in which ICWA applies) with a cross reference in rule 5.530 (which addresses who may be present and participate in juvenile court proceedings). Several commenters, including the Alliance for Children's Rights, the California Tribal Families Coalition, and the Sacramento County Counsel's Office, expressed concern that the substance of the rule would be better placed in rule 5.530, rather than as a subdivision of rule 5.482. Commenters were concerned that placement within rule 5.482 might cause confusion because that rule governs cases where ICWA applies and applies to cases arising under the Family Code

⁹ See Assem. Bill 175 (Stats. 2019, ch. 416).

and Probate Code as well as to cases arising under the Welfare and Institutions Code. (Rule 5.530 is in Division 3 (Juvenile Rules) of Title 5, which applies only to cases in juvenile court.) The committees agreed that because the content of the new rule applies only to juvenile cases where ICWA does not apply and recognizes the discretion of the juvenile court to permit a tribe to participate, rather than a right of tribal intervention, placement within the ICWA rules could create confusion.

The main substantive change made in response to the comments was to move the provisions governing discretionary tribal participation from rule 5.482(d) to the newly created subdivision (g) of rule 5.530. Rule 5.482 was revised to add a cross-reference to rule 5.530(g), as suggested by the Alliance for Children's Rights.

As circulated for comment, the form would have required signature under penalty of perjury. The committees noted in the Invitation to Comment that the statute did not require a signature under penalty of perjury, and they were considering removing the requirement. No comments were received on this issue. The committees decided to remove the requirement.

The full text of all comments and the committees' responses are in the chart attached at pages 14–24.

Alternatives considered

The committees considered taking no action, considering whether educational resources or job aids would be sufficient to address the issues raised by tribal leaders and advocates. Given the complexity of the legal issues and the importance of the interests and rights of tribal children and tribes that are at stake, the committees decided that rules and a new form were the best way to protect those rights and interests and bring consistency to the exercise of discretion across courts.

Fiscal and Operational Impacts

The committees do not anticipate fiscal or operational impacts beyond the updating of systems to reflect the new form and some training on the new process and form. By providing greater clarity and creating a process and a form, the committees believe that this proposal will ultimately reduce contested motions.

Attachments and Links

1. Cal. Rules of Court, rules 5.482 and 5.530, at pages 11–12
2. Form ICWA-042, at page 13
3. Chart of comments, at pages 14–24
4. Link A: Sen. Bill 678 (Stats. 2006, ch. 838),
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200520060SB678
5. Link B: Assem. Bill 3176 (Stats. 2018, ch. 833),
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB3176
6. Link C: Assem. Bill 175 (Stats. 2019, ch. 416),
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB175

7. Link D: Welf. & Inst. Code, § 16001.9,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC§ionNum=16001.9
8. Link E: Welf. & Inst. Code, § 306.6,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC§ionNum=306.6

Rules 5.482 and 5.530 of the California Rules of Court are amended, effective January 1, 2024, to read:

Rule 5.482. Proceedings after notice

~~(a)–(c)~~ * * *

(d) Intervention

(1) The Indian child’s tribe and Indian custodian are entitled to intervene, orally or in writing, at any point in the proceedings. The tribe may, but is not required to, file with the court ~~the~~ *Notice of Designation of Tribal Representative in a Court Proceeding Involving an Indian Child* (form ICWA-040) to give notice of its intent to intervene.

(2) A tribe that is not entitled to intervene may request permission to participate in the proceedings in accordance with rule 5.530(g).

~~(e)–(g)~~ * * *

Rule 5.530. Persons present

~~(a)–(f)~~ * * *

(g) Discretionary tribal participation (§§ 224, 306.6, 346, 676, 827, 16001.9)

(1) The tribe of a child may request to participate in a case, using *Request for Tribal Participation* (form ICWA-042). The court should exercise its discretion as follows:

(A) In a proceeding involving an Indian child, the child’s tribe may request permission to participate in the proceedings under section 346 or 676. Consistent with sections 224 and 16001.9, there is a presumption that the tribe has a direct and legitimate interest in the proceedings under section 346 or 676 and the request should be approved absent a finding by the court that the tribe’s participation would not assist the court in making decisions that are in the best interest of the child.

(B) In a proceeding involving a child described by section 306.6, the tribe from which the child is descended may request permission to participate in the proceedings. Consistent with sections 224 and 16001.9, the request should be approved absent a finding by the court that the tribe’s participation would not assist the court in making decisions that are in the best interest of the child.

1
2 (C) When a child does not meet the definition of an Indian child but either
3 of the child's parents is a member of a tribe and the tribe wishes to
4 participate in juvenile proceedings involving the child, the parent's
5 tribe may request permission to participate in the proceedings under
6 section 346 or 676. Consistent with sections 224 and 16001.9, there is a
7 presumption that the tribe has a direct and legitimate interest in the
8 proceedings under section 346 or 676 and the request should be
9 approved absent a finding by the court that the tribe's participation
10 would not assist the court in making decisions that are in the best
11 interest of the child.
12

13 (2) Upon approval of a request, the court must instruct the tribe as to the
14 confidentiality of the proceedings and, although the tribe does not become a
15 party unless the court orders otherwise, the tribe is authorized to:
16

17 (A) Be present at the hearing;
18

19 (B) Address the court;
20

21 (C) Request and receive notices of hearings;
22

23 (D) Request to examine court documents relating to the proceeding
24 consistent with section 827;
25

26 (E) Present information to the court that is relevant to the proceeding;
27

28 (F) Submit written reports and recommendations to the court; and
29

30 (G) Perform other duties and responsibilities as requested or
31 approved by the court.
32

ATTORNEY OR PARTY WITHOUT ATTORNEY NAME: FIRM NAME: STREET ADDRESS: CITY: TELEPHONE NO.: EMAIL ADDRESS: ATTORNEY FOR (name):	STATE BAR NUMBER: STATE: ZIP CODE: FAX NO.:	FOR COURT USE ONLY DRAFT Not approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
CHILD'S NAME:		
REQUEST FOR TRIBAL PARTICIPATION		
		CASE NUMBER: RELATED CASES (if any):

TO ALL PARTIES:

- The (name of tribe): ☐ is a federally recognized tribe (25 U.S.C. § 1903(8)) ☐ is a tribe not recognized to have tribal status under federal law. (Welfare and Institutions Code section 306.6.)
- The above named child or children are (select one):
 - ☐ Members of the tribe;
 - ☐ Eligible for membership in the tribe and the biological children of a member; or
 - ☐ Otherwise affiliated with the tribe and considered members of the tribal community.
- The tribe is (select one):
 - ☐ requesting to participate in the proceedings involving an Indian child but to which the Indian Child Welfare Act (ICWA) (25 U.S.C. section 1901 et seq.) does not apply. (Welfare and Institutions Code sections 346 and 676.)
 - ☐ requesting to participate in the proceedings involving a child who would otherwise be an Indian child but for the status of the child's tribe. (Welfare and Institutions Code section 306.6.)
 - ☐ requesting to participate in the proceedings involving a child who is affiliated with the tribe but who does not meet the definition of an Indian child. (Welfare and Institutions Code sections 346 and 676.)
- The tribe requests that notice of all proceedings be sent to:
 Name:
 Title:
 Address:
 City: State: Zip Code:
 Telephone: Fax: Email:
- ☐ Check here and attach *Attachment to Judicial Council Form* (form MC-025) to provide more information to support the request for tribal participation.

Date: _____

(TYPE OR PRINT NAME)


(SIGNATURE)

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Indian Child Welfare Act (ICWA): Discretionary Tribal Participation (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	Alliance for Children's Rights Kristin Power, Vice President, Policy and Advocacy	N/I	<p>Does the proposal adequately address the stated purpose?</p> <p>As currently drafted, the proposal does not adequately address its stated purpose. The proposal states the purpose is to “provide guidance and ensure consistency” in discretionary tribal participation in three instances. However, because of where the new language is proposed within the California Rules of Court, the new language may create confusion and inconsistency for tribes who have a federal and state statutory right to formally intervene in cases governed by ICWA. The proposed rule would add language to Rule 5.482(d), in Chapter 2 of the Rules of Court, and provides guidance in instances when ICWA applies. However, the proposed language primarily provides guidance for instances when ICWA does not apply. We recommend the language be placed elsewhere in the Rules of Court so as not to cause confusion with intervention rules. For example, the proposed language drafted as 5.482(d)(2) may better fit directly in Rule 5.530 because that rule pertains to all persons present for juvenile court proceedings.</p> <p>We propose that if Judicial Council is going to adopt this request, which is to move proposed rule 5.482(d)(2) to fit under Rule 5.530, language should be added to Rule 5.482(d) that refers those not familiar with ICWA who happen to land in this section, to also review</p>	<p>The committees agree and have moved the substance of the proposal to rule 5.530 as recommended.</p> <p>The proposal was revised in response to this comment.</p>

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Indian Child Welfare Act (ICWA): Discretionary Tribal Participation (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			Rule 5.530 for guidance to promote clarity and transparency. Recommended Language: Rule 5.482 (d)(2) A tribe that is not entitled to intervene that seeks court authorization to participate in proceedings may request permission to participate in the proceedings in accordance with Rule 5.530. We further recommend, regardless of the status of the drafted 5.482(d)(2) language, that the proposed language “When the Indian Child Welfare Act applies, Tt” in 5.482(d)(1), is not included. We think this is unnecessarily limiting language and could have unintended consequences in practice.	The proposal was revised in response to this comment. The proposal was revised in response to this comment. The proposal was revised in response to this comment.
2.	California Indian Legal Services Hannah Reed, Staff Attorney This should be comment #2	N/I	For the ICWA-042 Form: - Paragraph 1 should add a code reference to the box “federally recognized tribe” – e.g., “is a federally recognized tribe pursuant to the definition in 25 U.S.C. 1903(8).” - I think there should be a Paragraph 5 allowing the Tribe to attach an addendum for other information, like some other Judicial Council forms do.	The form was revised in response to this comment. The form was revised in response to this comment.
3.	California Tribal Families Coalition Michelle Castagne, Co-Executive Director	N/I	Request for Specific Comments <i>1. Does the proposal adequately address the stated purpose?</i> As currently drafted, the proposal does not adequately address its stated purpose. The proposal states the purpose is to “provide guidance and ensure consistency” in tribal	

SPR23-32**Indian Child Welfare Act (ICWA): Discretionary Tribal Participation** (Amend Cal. Rules of Court, rules 5.482 and 5.530; approve form ICWA-042)

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	Commenter	Position	Comment	Committee Response
			<p>intervention in juvenile court proceedings and discretionary tribal participation in three specific instances. However, because of where the new language is proposed within the California Rules of Court, the new language may create confusion and inconsistency for tribes who have a federal and state statutory right to formally intervene in cases governed by the Indian Child Welfare Act (ICWA). The proposed rule would add language to Rule 5.482(d) which is in Chapter 2 of the Rules of Court and provides guidance in instances when ICWA applies. However, the proposed language primarily provides guidance for instances when ICWA does not apply. If the proposed language moves forward, we recommend it be placed elsewhere in the Rules of Court so as not to cause confusion with rules governing tribal intervention. For example, the proposed language drafted as 5.482(d)(2) may better fit directly in Rule 5.530 because that rule pertains to all persons present for juvenile court proceedings.</p> <p>We further recommend, regardless of the status of the drafted 5.482(d)(2) language, the proposed language “When the Indian Child Welfare Act applies, Tt” in 5.482(d)(1), does not move forward. This is unnecessary limiting language.</p> <p>Overall, CTFC member tribes have not yet reached consensus on the substance of the amendments proposed in 5.482(d)(2). So, we ask the Tribal Court-State Court Forum and</p>	<p>The proposal was revised in response to this comment.</p> <p>The proposal was revised in response to this comment.</p> <p>The committees considered this request but determined that it was important to move forward with this proposal. Should the commenter</p>

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			Family and Juvenile Law Advisory Committee to allow more time for stakeholder feedback and tribal consultation before amending the Rules of Court. As the Invitation to Comment states, the proposed rule concerns complex legal issues and important interests and rights of tribes are at stake. We ask the Forum and Committee to instead reconsider creating the alternatives listed in the Invitation to Comment including educational resources and job aids as an important first step to address the issues raised by tribal leaders and advocates that this rule aims to address.	eventually develop suggestions for different rules, the advisory committee will consider them in the future, as time and resources allow. The committees will consider creating educational resources and job aids in addition to the rule and form.
4.	Orange County Bar Association, Michael A. Gregg, President	A	While the proposed additions to the Rule of Court address the stated purpose, the presumption regarding the tribe's interest seems to have weak statutory underpinnings and would be better addressed by the Legislature than via a change to the Rules of Court.	The committees considered whether there was sufficient statutory authority to support the proposed rules and determined that the proposed rules were not inconsistent with statute.
5.	Sacramento County Counsel's Office Katherine Covert, Supervising Deputy County Counsel	N/I	Question: Does the proposal appropriately address the stated purpose? The proposals generally address the state purpose of providing discretionary tribal participation in dependency proceedings. However, there are some areas that could be clarified to provide the juvenile court participants clarity in its application. Rule 5.482: Proceedings after notice As to subsection (d) Intervention and tribal participation, overall: The subsections of rule 5.482 could be further broken down between intervention in subsection (d) and tribal	In light of this and other comments, the proposal was revised to clarify the difference between intervention as of right in situations where ICWA applies and discretionary participation when

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			<p>participation in subsection (e), which would require other subsequent subsections to be re-identified. Or subsection (d) could be divided into (d)(1) for intervention and (d)(2) for participation. Such a division would provide greater clarity to distinguish between intervention consistent with and pursuant to ICWA being applicable and participation when ICWA does not apply, but there is a tribe that would like to participate in the proceedings and the court has determined it is in the child's best interest.</p> <p>As to (d)(2)(A): A further clarification could be made in the currently written proposed section of (d)(2)(A). The proposed language is: "(A) In cases involving an Indian child..." On page two, at footnote one, discussing the background for this proposed rule of court, the footnote states that, "The term "Indian child" is used for children who meet the definition of Indian child in ICWA. The term Native American child is used for children who are affiliated with a tribe but do not meet the definition of Indian child." Applying this distinction to (d)(2)(A) would change the proposed wording to, "(A) In cases involving a Native American child," since this specific subsection is for tribal participation due to ICWA not being applicable.</p> <p>As to subsections (d)(2)(A), (B), and (C): In subsections (d)(2)(A), (B), and (C), the proposed language indicates that tribal</p>	<p>ICWA does not apply, by moving the substance of the rule governing discretionary tribal participation to the new subdivision (g) of rule 5.530.</p> <p>Contrary to the commenter's suggestion that this subsection is not intended to apply to children who meet the definition of Indian child, this specific subsection is intended to address cases involving an Indian child but to which ICWA does not apply for instance, because the proceedings are based upon an act which would be considered a crime if committed by an adult. In these situations where an Indian child is involved in a juvenile justice case to which ICWA does not apply, the unique rights of the Indian child under Welf. & Inst. Code 16001.9 still apply.</p>

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			<p>participation for non-Indian child cases is “Consistent with sections 224 and 16001.9 of the Welfare and Institutions Code...” It would be more accurate to indicate that the “principles embodied” (or similar language) in 224 and 16001.9 are being applied to tribal participation when an Indian child is not involved. This is so because section 224 applies to an “Indian child” and an “Indian tribe,” as defined per section 224.1. Similarly, the subsections of WIC section 16001.9 cited in the proposed rule apply to “Indian tribes” and “Indian children” as defined in WIC section 224.1.</p> <p>Additionally, these subsections create a presumption that tribal participation outweighs a child’s best interests, which is not found in the law. Juvenile court law (commencing at WIC section 202) is primarily focused on the child’s best interest, therefore, having the court affirmatively and independently make a finding that it is in the child’s best interest for the tribe to participate would be consistent with California law. The court should then make findings that: 1) the tribe has an interest in participating and 2) that it is in the child’s best interest for the tribe to participate.</p> <p>As to subsection (d)(2)(D): Additional clarifications could be made in (d)(2)(D) regarding the specifics of tribal participation. The introductory sentence of (D) could be clarified by stating, “(D) Upon approval of a</p>	<p>The committees considered this comment but did not believe the revision was necessary.</p> <p>Section 16001.9 applies to all Native American children as well as to those meeting the definition of Indian child under ICWA, although the rights afforded are slightly different.</p> <p>This comment misreads the proposal. The proposal does not create a presumption that participation outweighs the child’s best interest. The rule specifically states that the request should be approved “...absent a finding by the court that the tribe’s participation would not assist the court in making decisions that are in the best interest of the child.” Therefore, if the court finds that tribal participation is not in the child’s best interest, the court can deny the request to participate.</p> <p>The committees considered this comment but did not feel the change was necessary.</p>

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			<p>request, a tribe becomes a participant to the proceedings and unless the court orders otherwise, the tribe is authorized to....”</p> <p>As to (D)(iv), a clarification that upon a tribe’s request to examine court documents relating to a proceeding, a court order would be necessary to for the tribe to examine the court documents so as not to violate WIC section 827(f), which applies only to a child who is a member of or who is eligible for membership in that tribe.</p> <p>As to (D)(vi), allowing the tribe to submit written reports and recommendations to the court, it would be helpful to clarify whether the tribe would be responsible for disseminating that information to all parties or whether the court would then be responsible for disseminating the written reports and/or recommendations to all parties within a specific time frame.</p> <p>Rule 5.530: Persons present As to Rule 5.530, Persons present, in the newly proposed subsection (g), it appears there is a contradiction because the proposed wording states, “When a proceeding not governed by the Indian Child Welfare Act involves an Indian child.” If an Indian child were involved, then the proceeding would be governed by the Indian Child Welfare Act. A clarification of this proposed language would be to either strike “an Indian child” or to instead use “a Native</p>	<p>The proposal was revised to clarify that all requests to examine court documents are subject to the requirements of section 827. However, it does not state that a court order is always required because under 827(f) a court order would not always be required. For example, it would not be required in a juvenile justice case involving an Indian child.</p> <p>The committees considered this comment but did not feel it was necessary to include such a requirement.</p> <p>In most juvenile justice proceedings, the Indian Child Welfare Act does not apply even if the proceedings involve an Indian child.</p>

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			<p>American child,” which is consistent with the definition of terms in footnote one, on page two, of the proposal.</p> <p>ICWA-042: Request for Tribal Participation The proposed new form, ICWA-042, Request for Tribal Participation, also generally meets with the proposed purpose of allowing tribes who have an interest in a matter to participate. In section (3) of the forms, each subsection for (a), (b), and (c) state “requesting leave to participate” and then the specific reason why the tribe is requesting permission to participate. It is confusing to state “requesting leave” and would be clear to state “requesting to participate” on each section.</p>	<p>The proposal was revised in response to this comment.</p>
6.	Superior Court of California, County of San Diego Mike Roddy, Executive Officer	AM	<ul style="list-style-type: none">• Does the proposal appropriately address the stated purpose? Yes.• Would the proposal provide cost savings? If so, please quantify. Probably. The proposal saves juvenile courts the time and effort that would be required to develop these forms on their own or to include all the new required findings and orders in their case management systems.• What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case	<p>No response required.</p> <p>No response required.</p>

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			<p>management systems? In addition to those already mentioned, courts would need to inform their judicial officers and their justice partners (child welfare agency, probation department, tribal agencies, attorney offices, CASA offices, et al.) of the amended rules of court and the new form.</p> <p>• Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.</p> <p>• How well would this proposal work in courts of different sizes? This proposal would work fine in the San Diego Superior Court (a large court). Additional comments:</p> <ul style="list-style-type: none">• Consider whether rule 5.482 should address the applicability or inapplicability of the new tribal participation provisions to the proceedings listed in rule 5.480(3), (4), (5) (proceedings under the Family Code and Probate Code).• Rule 5.482(d)(2)(D)(iv) authorizes non-party tribes to “Request to examine court documents relating to the proceeding.” Should courts require non-party tribes to file petitions for access under WIC § 827	<p>No response required.</p> <p>No response required.</p> <p>No response required.</p> <p>This concern was addressed by moving the substance of the proposal to rule 5.530 as discussed above which clarifies that the discretionary tribal participation is limited to juvenile proceedings and does not apply in Family Law or Probate proceedings.</p> <p>The proposal was revised in response to this comment to confirm that requests are subject to Welfare and Institutions Code section 827.</p>

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			<p>if and when they make such a request?</p> <ul style="list-style-type: none">• Consider whether rule 5.482(d) should include a provision requiring the court, upon approval of a request, to admonish the tribe about the confidentiality of the proceedings?• ICWA-042, item 2 – If one ICWA-042 form can be used for more than one child (“child or children”), then consider whether the blank box for “CHILD’S NAME” above the title of the form should be changed to “CHILD(REN)’S NAME(S).” Alternatively, consider instructing users to complete a separate form for each child, and change the first line to “The above named <u>child</u> or children are <u>is</u> (select one).”	<p>The proposal was revised in response to this comment.</p> <p>The committees considered this comment but declined to make this revision to maintain consistency with the other forms in the ICWA series.</p>