



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on October 27, 2015

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| Title | Agenda Item Type |
| Family and Juvenile Law: Transfers to Tribal Court Under the Indian Child Welfare Act | Action Required |
| Rules, Forms, Standards, or Statutes Affected | Effective Date |
| Amend Cal. Rules of Court, rules 5.483 and 5.590; revise forms ICWA-060 and JV-800 | January 1, 2016 |
| Recommended by | Date of Report |
| Family and Juvenile Law Advisory Committee | July 29, 2015 |
| Hon. Jerilyn L. Borack, Cochair | Contact |
| Hon. Mark A. Juhas, Cochair | Ann Gilmour, Attorney |
| Tribal Court–State Court Forum | 415-865-4207 |
| Hon. Richard C. Blake, Cochair | ann.gilmour@jud.ca.gov |
| Hon. Dennis M. Perluss, Cochair | Jennifer Walter, Supervising Attorney |
| | 415-865-7687 |
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Executive Summary

The Family and Juvenile Law Advisory Committee (committee) and the Tribal Court–State Court Forum (forum) propose amendments to the California Rules of Court and revisions to Judicial Council forms concerning the transfer of court proceedings involving an Indian child from the jurisdiction of the state court to a tribal court. These changes are in response to provisions of Senate Bill 1460 (Stats. 2014, ch. 772) (SB 1460) and the Court of Appeal decision in *In re. M.M.* (2007) 154 Cal.App.4th 897. SB 1460 requires the state juvenile court to give the tribal court specific information and documentation when a case governed by the *Indian Child Welfare Act* is transferred. The *In re M.M.* decision implicates an objecting party’s right to appeal a decision granting a transfer to a tribal court.

Recommendation

The Family and Juvenile Law Advisory Committee and the Tribal Court–State Court Forum recommend that the Judicial Council, effective January 1, 2016:

1. Amend rule 5.483 to make use of the *Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction* (form ICWA-060) mandatory rather than optional, add a requirement that the transfer order include matters required by section 827.15 of the Welfare and Institutions Code, and, to ensure that the parties are aware of the requirements, add a subsection requiring an advisement that any party wishing to appeal an order transferring a case to tribal court must file their appeal before the transfer is finalized and that if a party does not ask for and obtain a stay of the order for transfer, the appellate court will lose jurisdiction over the appeal;
2. Amend rule 5.590 to require an advisement that an appeal of an order granting a transfer of an Indian child custody proceeding involving an Indian child to tribal court must be taken before the transfer finalizes and that if a party does not ask for and obtain a stay of the order for transfer, the appellate court will lose jurisdiction over the appeal;
3. Revise Judicial Council *Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction* (form ICWA-060) by making it mandatory rather than optional, reorganizing the form in response to comments, adding places to put the information required by Welfare and Institutions Code section 827.15, and adding an advisement concerning appellate rights as follows:

A party that intends to seek appellate review of the transfer order is advised that they must take their appeal before the transfer to tribal court is finalized. Failure to request and obtain a stay (delayed effective date) of the transfer order will result in loss of appellate jurisdiction; and

4. Revise Judicial Council *Notice of Appeal—Juvenile* (form JV-800) to refer to section 305.5 of the Welfare and Institutions Code, and add the following advisement:

You are advised that if you wish to file an appeal of the order for transfer to a tribal court, you (1) may ask the juvenile court to stay (delay the effective date of) the transfer order and (2) must file the appeal before the transfer to tribal jurisdiction is finalized. Read rule 5.483 and the advisory committee comment.

The text of the amended rules and copies of the revised forms are attached at pages 7–12.

Previous Council Action

In 2006, the Legislature enacted Senate Bill 678 (Ducheny; Stats. 2006, ch. 838), which incorporated various provisions of the federal Indian Child Welfare Act (ICWA; 25 U.S.C.

§ 1901–1963) into the California Family Code, Probate Code, and Welfare and Institutions Code. To implement SB 678, the Judicial Council adopted comprehensive ICWA rules and forms, including rule 5.483 concerning transfers to tribal court, effective January 1, 2008. This rule has been amended only once since 2008, and only for technical changes, specifically to delete statutory references.

Rule 5.590—concerning the advisement of rights to review juvenile cases governed by Welfare and Institutions Code sections 300, 601, and 602—was amended and renumbered, effective July 1, 2010. The rule was first adopted as rule 1435, effective January 1, 1990, and previously amended effective January 1, 1992–1995, and July 1, 1999. In 2007, it was amended and renumbered as rule 5.585, effective January 1, 2007.

Rationale for Recommendation

The existing rule governing transfers of cases to tribal court under the Indian Child Welfare Act, rule 5.483, contains limited information on the procedures to transfer a case to tribal court, what information must be provided to the tribal court, and the parties’ appellate rights. The current proposal provides more information in these areas in response to two developments that have occurred since the enactment of rule 5.483: (1) the requirement under SB 1460 to provide a tribal court with specific information and documentation when a case governed by the Indian Child Welfare Act is transferred and (2) the appellate jurisdictional issues addressed in the *In re M.M.* decision.

In 2007, the Court of Appeal, First Appellate District, held that once a transfer from state court to tribal court is finalized, the decision to transfer is not appealable because the California Court of Appeal has no power over the tribal court to which the case has been transferred.¹ To alert parties to this possibility, the committee and forum propose adding advisements to several forms and under several rules indicating that any appeal must be filed before the transfer is finalized and that, if a stay is not sought and received, the Court of Appeal will lose jurisdiction to consider the appeal.

The Legislature recently enacted Senate Bill 1460 (Stats. 2014, ch. 772), which amended section 305.5 of the Welfare and Institutions Code and added sections 381 and 827.15 concerning the transfer of juvenile court proceedings involving an Indian child from the jurisdiction of the local state court to a tribal court. In particular, SB 1460 sets out certain requirements concerning the contents of orders and the information that must be provided when a child’s case is transferred from a California juvenile court to a tribal court. This change brings California law into alignment with federal requirements under title IV-E of the Social Security Act designed to ensure continuity of title IV-E eligibility when a case transfers from state court to tribal court. To implement this legislation, the committee and forum propose amending rule 5.483 and revising form ICWA-060 to require the content mandated by the legislation.

¹ *In re M.M.* (2007) 154 Cal.App.4th 897.

Comments, Alternatives Considered, and Policy Implications

External Comments

This proposal was circulated for comment as part of the spring 2015 invitation to comment cycle, from April 17 to June 17, 2015, to the standard mailing list for family and juvenile law proposals. Included on the list were 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, social workers, probation officers, court-appointed special advocates, and other juvenile and family law professionals. In addition, the proposal was circulated to tribal advocates, tribal leaders, and others with a particular interest in tribal issues. Eight individuals or organizations provided comment: one agreed with the proposal, one agreed if modified, five disagreed with the proposal, and one expressed no position but included comments. A chart with the full text of the comments received and the forum's and committee's responses is attached at pages 13–26.

All of the substantive comments received on the proposal related to appellate issues. None of the commentators raised issues relating to the changes implementing SB 1460.

As originally drafted and circulated for comment, in response to the *In re M.M.* decision, the proposal would have created a reduced timeline for filing an appeal combined with an automatic stay of the finalization of an order transferring a case to tribal court to give an objecting party a defined period of time in which to appeal and request a stay. The procedure suggested in the proposal received a number of negative comments and has been substantially revised in light of those comments. In particular, the proposal no longer includes suggestions to amend rule 8.406 and adopt rule 8.418 as was proposed when the item circulated for public comment.

Two of the commentators who disagreed with the proposal and one who agreed, if modified, suggested that the shortened time frame for appeal and the unique procedure created a trap for the unwary and rather than protecting objecting parties' rights to appeal would, in practice, undermine those rights. Two of the commentators who disagreed with the proposal, the Pechanga Band of Luisenio Indians and California Indian Legal Services, objected that the automatic stay would delay permanency for Indian children, would broaden appellate rights, and was inconsistent with ICWA, California statutes implementing ICWA, and other governing law. They urged the Judicial Council to defer action on this proposal pending the Bureau of Indian Affairs (BIA) adoption of new regulations governing ICWA. While this proposal was pending, on February 25, 2015, the BIA published the new *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, which replaces and supersedes the guidelines issued in 1979.² On March 20, 2015, the BIA proposed new regulations governing ICWA.³

² The new guidelines are available at www.bia.gov/cs/groups/public/documents/text/idc1-029447.pdf.

³ The proposed regulations are available at www.bia.gov/cs/groups/public/documents/text/idc1-029629.pdf.

In response to these comments, the proposal was substantially revised to eliminate both the shortened time for appeal of an order granting a transfer of a case governed by ICWA to tribal court and the automatic stay of the finalization of such an order. Instead, the proposal now requires an advisement to the parties that any appeal of an order granting a transfer to tribal court must be taken before the transfer has been finalized and that if an objecting party fails to request and obtain a stay of the order for transfer, the appellate court will lose jurisdiction should the transfer be finalized.

Alternatives

As discussed above, the committee and forum had originally considered establishing an alternative time-frame for appeals of orders transferring cases governed by ICWA to tribal court. In light of the concerns raised by the various commentators, the committee and forum decided that the better alternative would be to provide the parties with an advisement that any appeal must be taken before finalization of the transfer.

The committee and forum are aware that the new BIA guidelines and proposed regulations contain provisions that appear to conflict with both California case law and the Welfare and Institutions Code. These provisions might require additional rule and form changes, including to sections governing transfers to tribal court (Cal. Rules of Court, rule 5.483; form ICWA-060), as well as to sections regarding content of notice, the nature and timing of inquiry and of active efforts, considerations in applying placement preferences, and a number of other areas. The committee and forum considered whether to defer action on this current proposal in light of the new guidelines and proposed regulations. However, given that several years may pass before any such changes in California statutes are finalized, the committee and forum decided that the following benefits outweighed waiting: (1) parties are entitled to information to understand how to object to a transfer and preserve their appellate rights; (2) state courts will have a clear procedure to follow when issues of transfer arise; and (3) tribal courts will receive all of the information and documentation that they are entitled to under SB 1460 as mandated by state and federal law.

Implementation Requirements, Costs, and Operational Impacts

The requirements, costs, and impacts of implementing this proposal should be minimal because, even without these changes, state courts are required to notify the parties of their appellate rights and transfer these cases to tribal courts absent good cause. Existing council rules and notice forms can be used; however, they do not give the parties the information needed to comply with statutory and case law. There are no associated costs, but rather there are potential savings, which will result when cases are promptly and properly transferred from state court to tribal court.

Attachments and Links

1. Cal. Rules of Court, rules 5.483 and 5.590, at pages 7–:
2. Judicial Council forms ICWA-060 and JV-800, at pages ; –14
3. Chart of comments, at pages 15–27

4. Attachment A: *In re M.M.* (2007) 154 Cal.App.4th 897
Senate Bill 1460 (Stats. 2014, ch. 772), www.leginfo.ca.gov/pub/13-14/bill/sen/sb_1451-1500/sb_1460_bill_20140929_chaptered.html

1 **Rule 5.483. Transfer of case**

2
3 (a)–(f) * * *

4
5 **(g) Order on request to transfer**

6
7 (1) The court must issue its final order on the *Order on Petition to Transfer Case*
8 *Involving an Indian Child to Tribal Jurisdiction* (form ICWA-060).

9
10 (2) When a matter is being transferred from the jurisdiction of a juvenile court,
11 the order must include:

12
13 (A) All of the findings, orders, or modifications of orders that have been
14 made in the case;

15
16 (B) The name and address of the tribe to which jurisdiction is being
17 transferred;

18
19 (C) Directions for the agency to release the child case file to the tribe
20 having jurisdiction under section 827.15 of the Welfare and Institutions
21 Code;

22
23 (D) Directions that all papers contained in the child case file must be
24 transferred to the tribal court; and

25
26 (E) Directions that a copy of the transfer order and the findings of fact must
27 be maintained by the transferring court.

28
29 *(Subd (g) amended effective January 1, 2016.)*

30
31 **(h) Advisement when transfer order granted**

32
33 When the court grants a petition transferring a case to tribal court under Welfare
34 and Institutions Code section 305.5, Family Code section 177(a), or Probate Code
35 section 1459.5(b) and rule 5.483, the court must advise the parties orally and in
36 writing that any appeal to the order for transfer to a tribal court must be made
37 before the transfer to tribal jurisdiction is finalized and that failure to request and
38 obtain a stay of the order for transfer will result in a loss of appellate jurisdiction.

39
40 *(Subd (h) adopted effective January 1, 2016.)*

41

1 **(h)(i) Proceeding after transfer**

2
3 * * *

4
5 *(Subd (i) relettered effective January 1, 2016; adopted as subd (h).)*

6
7 *Rule 5.483 amended effective January 1, 2016; adopted effective January 1, 2008; previously*
8 *amended effective January 1, 2013.*

9
10 **Advisory Committee Comment**

11
12 Once a transfer to tribal court is finalized as provided in rule 5.483(i), the appellate court lacks
13 jurisdiction to order the case returned to state court (*In re M.M.* (2007) 154 Cal.App.4th 897).

14
15 As stated by the Court of Appeal in *In re M.M.*, the juvenile court has the discretion to stay the
16 provisions of a judgment or order awarding, changing, or affecting custody of a minor child
17 “pending review on appeal or for any other period or periods that it may deem appropriate” (Code
18 Civ. Proc., § 917.7), and the party seeking review of the transfer order should first request a stay
19 in the lower court. (See *Nuckolls v. Bank of California, Nat. Assn.* (1936) 7 Cal.2d 574, 577 [61
20 P.2d 927] [“Inasmuch as the [L]egislature has provided a method by which the trial court, in a
21 proper case, may grant the stay, the appellate courts, assuming that they have the power, should
22 not, except in some unusual emergency, exercise their power until the petitioner has first
23 presented the matter to the trial court.”].) If the juvenile court should deny the stay request, the
24 aggrieved party may then petition this court for a writ of supersedeas pending appeal. (Cal. Rules
25 of Court, rule 8.112).

26
27 Subsection (h) and this advisory committee comment are added to help ensure that an objecting
28 party does not inadvertently lose the right to appeal a transfer order.

29
30
31 **Rule 5.590. Advisement of right to review in Welfare and Institutions Code section**
32 **300, 601, or 602 cases**

33
34 **(a)–(b) * * ***

35
36 **(c) Advisement requirements for appeal of order to transfer to tribal court**

37
38 When the court grants a petition transferring a case to tribal court under Welfare
39 and Institutions Code section 305.5, Family Code section 177(a), or Probate Code
40 section 1459.5(b), and rule 5.483, the court must advise the parties orally and in
41 writing, that an appeal of the order must be filed before the transfer to tribal
42 jurisdiction is finalized, and that failure to request and obtain a stay of the order for
43 transfer will result in a loss of appellate jurisdiction.

| | |
|---|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name): | 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: | CASE NUMBER: |
| ORDER ON PETITION TO TRANSFER CASE INVOLVING AN INDIAN CHILD TO TRIBAL JURISDICTION | RELATED CASES (if any): |

1. Child's name: _____ Date of birth: _____
2. a. Date of hearing: _____ Time: _____ Dept.: _____ Room: _____
 b. Persons present:

| | | |
|--|---|--|
| <input type="checkbox"/> Child | <input type="checkbox"/> Parent (name): | <input type="checkbox"/> Parent's attorney |
| <input type="checkbox"/> Child's attorney | <input type="checkbox"/> Parent (name): | <input type="checkbox"/> Parent's attorney |
| <input type="checkbox"/> Probation officer/social worker | <input type="checkbox"/> Guardian | <input type="checkbox"/> CASA |
| <input type="checkbox"/> Deputy county counsel | <input type="checkbox"/> Deputy district attorney | <input type="checkbox"/> Other: |
| <input type="checkbox"/> Tribal representative (name): | | |
3. The court has read and considered the
 - ICWA-50, *Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction*
 - Other relevant evidence (specify): _____
4. The child's tribe has informed this court that it has a tribal court or other administrative body vested with authority over child custody proceedings.
5. **THE COURT FINDS AND ORDERS** under Family Code, § 177(a); Probate Code, § 1459.5(b); Welfare and Institutions Code, § 305.5; 25 U.S.C. § 1911(a) (Exclusive Jurisdiction)
 - a. The request for transfer is granted and the following ordered:
 - (1) The child's case is ordered transferred to the jurisdiction of the tribe listed below:
 Name of tribe:
 Address:
 City, state, zip code:
 Telephone number:
 - (2) Physical custody of the child is transferred to a designated representative of the tribal court listed below:
 Name:
 Title:
 Address:
 City, state, zip code:
 Telephone number:
 - (3) The case is being transferred from a juvenile court, and all of the findings and orders or modifications of orders that have been made in the case are attached.
 - (4) The case is being transferred from a juvenile court, and the county agency is hereby directed to release its case file to the tribe under section 827.15 of the Welfare and Institutions Code.
 - (5) The case is being transferred from a juvenile court, and all originals contained in the court file must be transferred to the tribal court, a copy of the transfer order and findings of fact must be maintained by the transferring court.

| | |
|---------------|--------------|
| CHILD'S NAME: | CASE NUMBER: |
|---------------|--------------|

5. **(6)** A party that intends to seek appellate review of the transfer order is advised that the party must take an appeal before the transfer to tribal court is finalized. Failure to request and obtain a stay (delay the effective date) of the transfer order will result in loss of appellate jurisdiction.

b. The petition to transfer is denied because one of the following circumstances exist:

- (1) One or both of the child's parents opposes the transfer.
Name of opposing parent:
- (2) The child's tribe has informed this court that it does not have a tribal court or other administrative body as defined in 25 U.S.C. § 1903.
- (3) The tribal court or other administrative body of the child's tribe declines the transfer.

c. The petition to transfer is denied because good cause exists not to transfer the case.

- (1) Name of opposing party: _____ has submitted information or evidence in writing to the court and all parties.
- (2) Petitioner has had the opportunity to provide information or evidence in rebuttal.
- (3) The party opposing the transfer has established that good cause not to transfer the proceeding exists as follows:
 - (a) The evidence necessary to decide the case cannot be presented in the tribal court without undue hardship to the parties or the witnesses, and the tribal court is unable to mitigate the hardship by making arrangements to receive and consider the evidence or testimony by use of remote communication, by hearing the evidence or testimony at a location convenient to the parties or witnesses, or by use of other means permitted in the tribal court's rules of evidence or discovery.
 - (b) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition within a reasonable time after receiving notice of the proceeding. The notice complied with:
 - Family Code section 180 or
 - Probate Code section 1460.2 or
 - Welfare and Institutions Code section 224.2.*(Note: The fact that a party waited until after reunification efforts failed and reunification services were terminated is not good cause to deny transfer.)*
 - (c) The Indian child is over 12 years of age and objects to the transfer.
 - (d) The parents of the child, over five years of age, are unavailable, and the child has had little or no contact with the child's tribe or members of the child's tribe.
 - (e) Other (specify): _____
- (4) The court provided a tentative decision in writing with reasons to deny the transfer in advance of the hearing at which the order to deny was made.

6. Proof that tribe has accepted transfer is attached and jurisdiction is terminated.

7. Hearing is set for (date): _____ (time): _____ (dept.): _____
to confirm that tribe has accepted transfer and to terminate jurisdiction.

Date:

JUDICIAL OFFICER

| | |
|---|--|
| ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (Name): | 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: | |
| NOTICE OF APPEAL—JUVENILE | CASE NUMBER: |

— NOTICE —

- You or your attorney **must** fill in items 1 and 2 and sign this form at the bottom of the page. If possible, to help process your appeal, fill in items 4–6 on the reverse of this form.
- Rule 8.406 says that to appeal from an order or judgment, you must file a written notice of appeal within **60** days after rendition of the judgment or the making of the order being appealed or, in matters heard by a referee, within **60** days after the order of the referee becomes final.
- You are advised that if you wish to file an appeal of the order for transfer to a tribal court, you (1) may ask the juvenile court to stay (delay the effective date of) the transfer order and (2) must file the appeal before the transfer to tribal jurisdiction is finalized. Read rule 5.483 and the advisory committee comment.

1. I appeal from the findings and orders of the court (specify date of order or describe order):

2. This appeal is filed by
 - a. Appellant (name):
 - b. Address:
 - c. Phone number:
 - d. Name, address, and phone number of person to be contacted (if different from appellant):

3. I request that the court appoint an attorney on appeal. I was was not represented by an appointed attorney in the superior court.

Date: _____

 TYPE OR PRINT NAME

SIGNATURE OF APPELLANT ATTORNEY

4. Items 5 through 7 on the reverse are completed not completed.

| | |
|---------------|--------------|
| CHILD'S NAME: | CASE NUMBER: |
|---------------|--------------|

5. Appellant is the

- a. child
- b. mother
- c. father
- d. guardian
- e. de facto parent
- f. county welfare department
- g. district attorney
- h. child's tribe
- i. other (state relationship to child or interest in the case):

6. This notice of appeal pertains to the following child or children (specify number of children included):

- a. Name of child: _____ Child's date of birth: _____
 - b. Name of child: _____ Child's date of birth: _____
 - c. Name of child: _____ Child's date of birth: _____
 - d. Name of child: _____ Child's date of birth: _____
- Continued in Attachment 5.

7. The order appealed from was made under Welfare and Institutions Code (check all that apply):

- a. **Section 305.5** (transfer to tribal court)
 - Granting transfer to tribal court
- b. **Section 360** (declaration of dependency) Removal of custody from parent or guardian Other orders
 - with review of section 300 jurisdictional findings
 - Dates of hearing (specify): _____
- c. **Section 366.26** (selection and implementation of permanent plan in which a petition for extraordinary writ review that substantively addressed the specific issues to be challenged was timely filed and summarily denied or otherwise not decided on the merits)
 - Termination of parental rights Appointment of guardian Planned permanent living arrangement
 - Dates of hearing (specify): _____
- d. **Section 366.28** (order designating a specific placement after termination of parental rights in which a petition for extraordinary writ review that substantively addressed the specific issues to be challenged was timely filed and summarily denied or otherwise not decided on the merits)
 - Dates of hearing (specify): _____
- e. Other appealable orders relating to dependency (specify): _____
 - Dates of hearing (specify): _____
- f. **Section 725** (declaration of wardship and other orders)
 - with review of section 601 jurisdictional findings
 - with review of section 602 jurisdictional findings
 - Dates of hearing (specify): _____
- g. Other appealable orders relating to wardship (specify): _____
 - Dates of hearing (specify): _____
- h. Other (specify): _____

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

| | Commentator | Position | Comment | Committee Response |
|----|---|----------|---|---|
| 1. | California Indian Legal Services, Delia Parr, Directing Attorney , Eureka Office (Statewide Tribal organization with offices in Bishop, Escondido, Eureka and Sacramento) | N | <p>These comments are submitted in opposition to the proposed amendments to Cal. Rules of Court 5.483, 5.590 and 8.406; the adoption of Cal. Rules of Court 8.418; and, revisions to the associated court forms. This proposal would create a delay of 12 court days in transferring a case from state court to tribal court, which is contrary to the intent of the Indian Child Welfare Act, as well as recently published federal guidelines and pending federal regulations. The proposal is not in the best interest of Indian children, was not developed in consultation with Indian tribes, lacks statutory authority and is inconsistent with existing practice.</p> <p>The ICWA was passed by Congress in 1978 to protect the best interest of Indian children. Jurisdiction over Indian child welfare matters is presumptively tribal even in PL 280 states like California, meaning that when a tribe petitions to transfer a case, it <i>must</i> be transferred absent good cause. Of great importance, recently-published federal ICWA guidelines and pending federal regulations clearly define the good cause exception and give greater deference to tribal jurisdiction. The current proposal is inconsistent with the intent and spirit of the ICWA in delaying such transfers.</p> | <p>In response to this and other comments, the proposal has been revised so that it no longer creates a 12 court day delay in finalizing a transfer to tribal court. Instead objecting parties will be advised that they must file an appeal before the transfer has finalized and that they may request a stay of the order if they intend to appeal. Instead the proposal addresses the issue by means of advisement.</p> |

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

| | Commentator | Position | Comment | Committee Response |
|--|-------------|----------|--|--------------------|
| | | | <p>The proposal will have detrimental consequences, including at times leaving Indian children in “stranger care” pending the transfer of physical custody from state court to tribal court. For example, in one recent CILS case, a newborn was detained at birth by a county child welfare agency. The child’s Indian tribe had been following the mother and planned to detain at birth, but since the hospital called the county at birth and not the tribe, the county detained before the tribe had a chance. The tribe had determined that placement with the maternal grandparents, who had been with the baby in the hospital since birth, was appropriate. However, one of the grandparents had a criminal conviction that would not allow county placement without an exemption. The tribe therefore sought a transfer to tribal court, which fortunately was granted. If the proposed amended Rules of Court were in place, however, this could have meant an unnecessary delay of as much three weeks during which the baby would either remain in the hospital or be placed in stranger care. This situation is likely to occur time and again under the proposed rule, since hospital staff as mandated reporters contact counties at birth, not tribes. This avoidable situation of putting Indian children in stranger care will not be limited to newborns, though. It could potentially occur anytime a</p> | |

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

| | Commentator | Position | Comment | Committee Response |
|--|-------------|----------|---|--------------------|
| | | | <p>child is detained by a state agency and a tribe is seeking jurisdiction, since counties and tribes are often at odds over appropriate placements.</p> <p>The proposal would broaden appellate rights against transfers to tribal court beyond what is allowed by statute. When a statute contemplates a particular appeal process for a certain proceeding, it usually directs the creation of a Rule of Court on point. The current statutes regarding transfers to tribal court do no such thing. And although the proposal is ostensibly linked to recently-passed SB 1460, that bill does not actually include any mention of appeals from transfer orders. At present, parties opposing a transfer to tribal court must request a stay of the proceedings and/or immediately file a writ of supersedeas. (See <i>In re M.M.</i> (2007) 154 Cal.App.4th 897.) Even if there were statutory authority to alter the current process, the clarified federal guidelines regarding transfers to tribal court make any additional time to decide whether to oppose a transfer unnecessary.</p> <p>The proposal is in conflict with existing practice. Existing practice in this area is consistent with transfers between counties – an order transferring custody is issued upon receipt of confirmation that a tribal court has accepted</p> | |

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| | | | <p>jurisdiction, which is in line with the ICWA and is in the best interest of Indian children.</p> <p>There is tremendous positive movement around the ICWA currently. It is our overall position that the Judicial Council should take no action in this area pending the promulgation of new federal regulations. This matter is not time sensitive, as it is in response to a 2007 appellate decision. The proposed amendments have not been necessary in the past eight years, and it is unclear why they are being proposed now, since again they have no backing in the recent legislation.</p> <p>When the federal regulations are finalized, state legislation will likely be needed. That legislative update may look much like SB 678 in 2006, which codified the ICWA into state law. This is an issue that would properly be addressed at that time, in order to avoid piecemeal fixes that confuse both parties and courts.</p> <p>In closing, we are deeply troubled that there was no collaboration or consultation with tribes in the development of this proposal. Also of great concern, it will have the practical effect of encouraging appeals of transfers to tribal court. It is difficult to view this as anything other than</p> | <p>The proposal was circulated for comment to a Listserve of tribal leaders, tribal court judges and tribal advocates. All comments received have been considered and in response to those comments, revisions have been made to address</p> |

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| | | | <p>an affront to the presumptive jurisdiction of tribal courts, which both the U.S. Supreme Court and California appellate courts have long recognized. (<i>Mississippi Band of Choctaw Indians v. Holyfield</i> (1989) 490 U.S. 30, 36; <i>In re M.M., supra</i>; <i>In re Jack C., III</i> (2011) 192 Cal.App.4th 967, 982.)</p> | <p>the concerns raised.</p> |
| 2. | <p>The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM)</p> | <p>N</p> | <p>The Executive Committee of the Family Law Section of the State Bar (FLEXCOM) does not agree with this proposal.</p> <p>FLEXCOM believes that the proposed Rule 8.448 would impair appellate rights, particularly those of indigent litigants. The proposed rule requires litigants who oppose a transfer order to the tribal court to file a request to stay and a writ of supersedeas within seven court days after the order becomes final. This is an unrealistic timeline. Trial counsel in dependency proceedings are usually appointed, and trial counsel almost never represents the same litigants in the appeals process. Drafting a writ of supersedeas, however, requires the expertise of an appellate counsel. Most litigants are unable to obtain appellate counsel within seven court days, let alone file a notice of appeal and a writ of supersedeas.</p> <p>Even assuming that a litigant is able to obtain counsel, the requirement for a request to stay</p> | <p>In response to this and other similar comments, the proposal has been revised to remove the unique time frame for appeal, and the other unique features such as request for a stay and writ of supersedeas. Instead, the proposal now requires the court granting an order for transfer to provide the parties with an advisement regarding the potential loss of appellate jurisdiction if a transfer to tribal court is finalized before an appeal is taken.</p> |

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| | | | <p>and a writ of supersedeas to be simultaneously filed with seven court days of the transfer order is onerous on litigants. To begin with, a writ of supersedeas is a complex legal document that often requires time to prepare. California Rules of Court, rule 8.824 governs the requirements for the filing of a writ of supersedeas. Under Rule 8.824 (a)(3), the petition for a writ of supersedeas must explain the necessity for the writ and include a memorandum. In addition, a complete trial record, which is usually filed with a writ, is typically not obtainable within seven court days, as proposed by Rule 8.406. Although Rule 8.824 does allow the filing of a writ of supersedeas even if the record has not been filed with the reviewing court, the petition must then include a number of documents as required by Rule 8.824 (a)(4). Thus, it would be a near impossibility for a litigant to have sufficient time within seven court days to be able to file a writ of supersedeas along with a request for stay.</p> <p>Finally, the Bureau of Indian Affairs published Guidelines for State courts and Agencies in Child Custody Proceedings in February of this year, which may require further changes on the state level. There is also pending federal litigation challenging the constitutionality of</p> | |

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| | | | <p>these guidelines. Given the uncertainty regarding the federal rules, this proposal should be deferred with the possibility that further changes may be required.</p> <p>In light of the foregoing, FLEXCOM does not support these proposed rules.</p> | |
| 3. | Hon. Raymond J. Ikola Associate Justice California Court of Appeal, Fourth Appellate District, Division Three | N | <p>I am concerned that this proposal attempts to accomplish much too much in an effort to avoid the result of <i>In re M.M.</i>, a case now some eight years old, and involving a relatively rare event. In particular, the seven day time limit for filing the notice of appeal is a trap for the unwary, despite the new requirement that the court advise the parties of the shortened time. Despite best intentions, the advisement may be missed, or the parties may not remember it. For decades, California lawyers have been accustomed to a 60-day appeal period for both civil and criminal appeals. The proposed shortened appeal period will be an aberration. Under this proposal, a lawyer is just as likely to miss the shortened appeal period, resulting in a loss of appellate jurisdiction, as to miss the opportunity to request a stay from the trial court. This proposal attempts too much and will replace one problem with another. We should not attempt to lawyer a case by rule.</p> | <p>In response to this comment, the proposal has been revised to delete the seven day time limit for filing a notice of appeal and instead to require an advisement to the parties that any appeal of an order granting transfer must be filed before the transfer is finalized and that the parties may request a stay of the transfer order if they intend to file an appeal. The advisement also refers the parties to rule 5.483 and the advisory committee comment for more information. Also, the rule has been revised to clarify that failure to request and obtain a stay of the order will result in a loss of appellate jurisdiction.</p> |
| 4. | Orange County Bar Association, | A | No substantive comments. | No response required. |

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| | Ashleigh Aitken, President | | | |
| 5. | Pechanga Band of Luisenio Indians, Hon. Mark Macarro, Chairman (Riverside County) | N | <p>These comments are submitted on behalf of the Pechanga Band of Luisenio Indians, a federally-recognized and sovereign Indian nation, in opposition to the proposed amendments to Cal. Rules of Court 5.483, 5.590 and 8.406; the adoption of Cal. Rules of Court 8.418; and revisions to the associated court forms. This proposal creates a delay of 12 court days in transferring a case from state court to tribal court, which is contrary to the intent of the Indian Child Welfare Act, as well as recently published federal guidelines and pending federal regulations. The proposal is not in the best interest of Indian children, was not developed in consultation with Indian tribes, lacks statutory authority and is inconsistent with existing practice.</p> <p>The ICWA was passed by Congress in 1978 to protect the best interest of Indian children. Jurisdiction over Indian child welfare matters is presumptively tribal even in PL 280 states like California, meaning that when a tribe petitions to transfer a case, it must be transferred absent good cause. The current proposal is inconsistent with the intent and spirit of the ICWA in delaying such transfers. The proposal will have detrimental consequences, including at</p> | In response to this comment and others, the proposal has been revised to eliminate the 12 court day stay on completing a transfer to tribal court. See response to comments of California Indian Legal Services above |

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| | | | <p>times leaving Indian children in "stranger care" pending the transfer of physical custody from state court to tribal court.</p> <p>The proposal would broaden appellate rights around transfers to tribal court beyond what is allowed by statute. Although the proposal is ostensibly linked to recently-passed SB 1460, that bill does not actually include any mention of appeals from transfer orders. The proposal creates appellate rights that do not currently exist. At present, a party must simply request a stay of the proceedings and/or immediately file a writ of supersedeas. (See <i>In re M.M.</i> (2007) 154 Cal.App.4th 897.)</p> <p>The proposal is in conflict with existing practice. Existing practice in this area is consistent with transfers between counties -- an order transferring custody is issued upon receipt of confirmation that a tribal court has accepted jurisdiction, which is in line with the ICWA and is in the best interest of Indian children.</p> <p>There is tremendous positive movement around the ICWA currently. It is our overall position that the Judicial Council should take no action in this area pending the promulgation of new federal regulations.</p> | |

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| | | | <p>This matter is not time sensitive, as it is in response to a 2007 appellate decision. The proposed amendments have not been necessary in the past eight years, and it is unclear why they are being proposed now, since again they have no backing in the recent legislation. In closing, we are deeply troubled that there was no collaboration or consultation with tribes in the development of this proposal. Also of great concern, it will have the practical effect of encouraging appeals of transfers to tribal court. It is difficult to view this as anything other than an affront to the presumptive jurisdiction of tribal courts, which both the U.S. Supreme Court and California appellate courts have long recognized. (<i>Mississippi Band of Choctaw Indians v. Holyfield</i> (1989) 490 U.S. 30, 36; <i>In re M.M., supra</i>; <i>In re Jack C., III</i> (2011) 192 Cal.App.4th 967, 982.)</p> | <p>See response to the comments of California Indian Legal Services above.</p> |
| 6. | <p>Santa Clara County Office of the County Counsel Julie Fulmer McKellar, Lead Deputy County Counsel</p> | A | <p>We would agree with those proposing to defer SPR15-27 in light of the BIA's recently published "Guidelines for State Courts and Agencies in Indian Child Custody Proceedings" to prevent multiple modifications to forms and rules of court in successive years.</p> | <p>The forum and committee considered this option but concluded that because finalization of the regulations and a California legislative response may take several years, the immediate need to ensure compliance with federal law and protect parties appellate rights justifies moving forward with the proposal at this time.</p> |
| 7. | <p>Superior Court of Orange County Blanca Escobedo</p> | NI | <p>Does the proposal appropriately address the stated purpose?</p> | |

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| | Principal Administrative Analyst Family Law & Juvenile Court | | <p>The proposal’s stated purpose is clear for juvenile court. However, we request clarification/impact of <i>In re M.M.</i> to family court.</p> <p>Is it necessary to address the appellate issues discussed in the <i>In re M.M.</i> decision through an amendment to the rules and forms?</p> <p>We recommend expanding on the impact of <i>In re M.M.</i> as it applies to appellate rules and forms.</p> <p>Is the time for filing an appeal of an order for transfer to tribal court appropriate?</p> <p>We are concerned about the appeal time being too short. It may not allow counsel/party enough time to file an appeal. We also need clarification on the appeal time period. CRC reflects <i>7 court days after service of the copy of order</i> and the JV-800 notice reflects <i>within 7 court days or before the transfer to tribal court is finalized</i>. To minimize confusion, we recommend using similar language on the rule of court and notice. Also, should courts add the standard five days to allow for mailing in addition to the seven court days, for a total of twelve days?</p> | <p>Rule 5.483 applies to family court cases governed by the Indian Child Welfare Act.</p> <p>No reply necessary in light of the revisions being made to the proposal.</p> <p>In response to this and other comments, the proposal has been revised. The proposal no longer shortens the time for appeal. Instead an advisement has been added in several places, including the JV-800 to alert the parties to the requirement to file an appeal before the transfer to tribal court is finalized, and the need to request a stay to ensure the appellate court does not lose jurisdiction.</p> |

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| | | | <p>Should this proposal proceed at this time or should it be deferred in light of the new <i>Bureau of Indian Affairs Indian Child Welfare Act Guidelines for State Courts and Agencies in Indian Child Custody Proceedings</i> and the possibility that further changes may be required?</p> <p>We recommend deferring this proposal to align with other changes introduced by the Bureau of Indian Affairs Indian Child Welfare Act Guidelines for State Courts and Agencies in Indian Child Custody Proceedings.</p> <p>We recommend the following changes to the proposed forms:</p> <ul style="list-style-type: none"> • Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction (ICWA-060) <ul style="list-style-type: none"> ○ We recommend making this a mandatory form. ○ Item 5(e) should also reflect or electronic copies for courts that maintain electronic records. ○ Item 6 is related to item 5(a), so we recommend moving it right after item 5(a). This will avoid the advisement from being missed. | <p>Consideration was given to deferring the proposal, however, the proposal implements legislation and is not inconsistent with the new BIA Guidelines nor proposed regulations.</p> <p>The proposal makes this form mandatory.</p> <p>Not all tribal courts may have the capacity to accept electronically transferred documents.</p> <p>The form has been reorganized in line with this comment.</p> |

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| | | | <ul style="list-style-type: none"> ○ Recommend adding verbiage to clarify item #8 applies to juvenile court. ● Notice of Appeal – Juvenile (JV-800) Last bullet in the Notice box should reflect, “....appeal within 7 court days <i>from the date the order is made</i> or before...” | <p>Item 8 applies to any court in which the case governed by the Indian Child Welfare Act arises – juvenile, family or probate.</p> <p>This proposal has now been revised so that there is no longer a 7 day appeal time.</p> |
| 8. | Superior Court of San Diego County Mike Roddy, Executive Officer | AM | <p>This proposal would delay the effective date of an order transferring jurisdiction to a tribal court and would significantly shorten the time to appeal from such an order. Juvenile appeals and writs are governed by CRC 8.400 - 8.474. The time to file an appeal is set by a rule of court, not by a statute. Therefore, a new rule of court shortening the time to file an appeal would be appropriate.</p> <p>The proposed new rule (8.418) says 7 court days after service of a copy of the order being appealed, the ICWA-060 says 7 court days after the date of this order, and the JV-800 just says within 7 court days. They need to be consistent. The two forms also introduce ambiguity by citing the 60-day rule, which must be clarified and/or corrected as well.</p> | <p>The proposal had been revised to no longer shorten the time for appeal of an order granting transfer to tribal court.</p> <p>The proposal has been revised and no longer includes these provisions</p> |