



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 20-164

For business meeting on September 25, 2020

Title

Indian Child Welfare Act (ICWA): Remote Appearance by an Indian Child's Tribe in ICWA Proceedings

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rules 5.9, 5.482, and 5.531

Recommended by

Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Suzanne N. Kingsbury, Cochair
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Agenda Item Type

Action Required

Effective Date

January 1, 2021

Date of Report

September 2, 2020

Contact

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Executive Summary

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend revising rules 5.9, 5.482, and 5.531 of the California Rules of Court to permit an Indian child's tribe to participate by telephone or other remote means in any hearing in a proceeding governed by the Indian Child Welfare Act, as required by Welfare and Institutions Code section 224.2(k).

Recommendation

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend that the Judicial Council, effective January 1, 2021:

1. Amend rule 5.9, which governs appearances by telephone in family law cases, by specifying that cases falling under the Indian Child Welfare Act are governed by rule 5.482(g);
2. Amend rule 5.482 by adding subdivision (g) regarding a tribe’s right to appear by telephone or other remote means in a case governed by the Indian Child Welfare Act; and
3. Amend rule 5.531, which governs appearances by telephone in juvenile cases, by adding a reference to Welfare and Institutions Code section 224.2(k), and adding subdivision (b)(1) requiring that standards for local procedures or protocols must allow an Indian child’s tribe to appear by telephone or other computerized remote means at no charge consistent with section 224.2(k).

The text of the amended rules is attached at pages 5–6.

Relevant Previous Council Action

The Judicial Council has acted on many occasions to implement the requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) and corresponding state law. Following the passage of Senate Bill 678 (Ducheny; Stats. 2006, ch. 838) in 2006, which wove requirements of the Indian Child Welfare Act into the provisions of California Family Code, Probate Code, and Welfare and Institutions Code, the Judicial Council enacted comprehensive rules and forms implementing SB 678.¹ In 2018 the Legislature enacted Assembly Bill 3176 (Waldron; Stats. 2018, ch. 833), which amended many provisions of the Welfare and Institutions Code to conform California law to revised federal regulations.² In 2019 the Judicial Council made substantial revisions to rules and forms to implement AB 3176.

Analysis/Rationale

California is home to more people of Indian ancestry than any other state in the nation. Currently, 109 tribes are federally recognized in California, a number second only to the number of tribes in the state of Alaska. California’s Indian population includes a large number of people affiliated with out-of-state tribes or tribes whose territories and primary headquarters are based in neighboring states, such as the Washoe, Fort Mojave, Chemehuevi, Colorado River, and Quechan tribes.³ Tribes within California are often located in remote areas, making travel to court locations burdensome. Tribal resources and staffing vary greatly, but many tribes have only one full-time staff person devoted to child welfare cases, and that individual may have active

¹ SB 678 is available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200520060SB678. The Judicial Council rules and forms proposal implementing SB 678 is available at www.courts.ca.gov/documents/102607ItemA27.pdf.

² AB 3176 is available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB3176.

³ Judicial Council of Cal., Center for Families, Children & Cts., “Native American Statistical Abstract: Population Characteristics,” *Research Update* (Mar. 2012), www.courts.ca.gov/documents/Tribal-ResearchUpdate-NAStats.pdf; California Tribal Lands, https://www3.epa.gov/region9/air/maps/ca_tribe.html.

cases in multiple counties and states. Under the federal Indian Child Welfare Act and corresponding California statutes, an Indian child's tribe has a right to participate in cases governed by ICWA, and proper implementation of and compliance with ICWA involves tribal input on a number of key issues. However, as noted in *California ICWA Compliance Task Force: Report to the California Attorney General's Bureau of Children's Justice* (2017), many tribes find it difficult to exercise their right to fully participate in ICWA cases.⁴ Of particular concern are the rights of "lower-income tribes, as they often do not have resources to retain legal counsel, travel and be present at all hearings or even pay fees associated with telephonic appearances." If the tribe's position on key ICWA issues is unknown as a case progresses, this lack of clarity can have negative consequences on the case. For instance, if the court is unaware of the tribe's position on permanency planning until after reunification services have been terminated, unnecessary conflicts and disruptions may occur during placement.

California has a high number of appeals related to the Indian Child Welfare Act.⁵ Some of these appeals might be avoided if tribal input could be consistently obtained throughout the life of a case.

Policy implications

The proposal is required to implement statute; any policy implications arise from the statute.

Comments

The proposal circulated for public comment from April 10 through June 9, 2020, as part of the spring 2020 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, included in the monthly newsletter distributed by the Tribal Court–State Court Forum and sent to the listserv of the California Department of Social Services Office of Tribal Affairs to reach those with an interest in the Indian Child Welfare Act and tribal issues.

The proposal received eight comments, including from two superior courts, a child welfare agency, a county counsel's office, the executive committee of the Family Law Section of the California Lawyers Association, the Alliance for Children's Rights, the California Tribal

⁴ *California ICWA Compliance Task Force: Report to the California Attorney General's Bureau of Children's Justice* (2017), p. 41, www.caltribalfamilies.org/wp-content/uploads/2019/06/ICWAComplianceTaskForceFinalReport2017-1.pdf.

⁵ In 2016, California had 114 appeals related to ICWA. (Prof. Kathryn E. Fort, "2016 ICWA Appellate Cases by the Numbers," *Turtle Talk* (Indigenous Law and Policy Center blog), Michigan State University College of Law, Jan. 4, 2017, <https://turtletalk.wordpress.com/2017/01/04/2016-icwa-appellate-cases-by-the-numbers/>.)

Families Coalition, and California Indian Legal Services. Six commenters agreed with the proposal and two did not indicate whether or not they agreed.

The comments included technical and stylistic corrections as well as more substantive comments, many of which were accepted as they strengthened and clarified the proposal. All of the comments and responses to them are set out in the attached comment chart at pages 6–17. Revisions to the rules made in response to the comments include:

- Clarification that remote appearance options must ensure that tribes have access to the courtroom sufficient to allow them to fully exercise their rights, taking into account the different technological capacities of different tribes; and
- Clarification that the tribes did not need to request permission to appear remotely, but only to notify the court of their intent to appear remotely.

Alternatives considered

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee considered acting on two other comments. One suggested amending rule 3.670 governing telephonic appearances in civil matters in a similar way to the amendment to rule 5.9. Rule 3.670 would apply to probate guardianship cases involving ICWA. The forum and the committee declined to modify rule 3.670 at this time both because it was beyond the scope of the proposal as circulated for public comment, and because rule 7.1015, which governs probate guardianship proceedings involving ICWA already incorporates by reference rule 5.482. The other comment suggested developing a form by which a tribe could notify the court of its intention to appear remotely and advise the court of any capacity issues the tribe might have. While the forum and the committee agreed that such a form might be useful, it is outside the scope of this proposal as circulated for public comment.

Fiscal and Operational Impacts

No fiscal or operational impacts are anticipated. The superior courts that commented on the proposal agreed that it would likely have beneficial impact or that any negative impacts would be minimal. In any event the proposal is required to implement a statutory mandate.

Attachments and Links

1. Cal. Rules of Court, rules 5.9, 5.482, and 5.531, at pages 5–6
2. Chart of comments, at pages 7–16

Rules 5.9, 5.482, and 5.531 of the California Rules of Court are amended, effective January 1, 2021, to read:

1 **Rule 5.9. Appearance by telephone**

2
3 **(a) Application**

4
5 This rule applies to all family law cases, except for actions for child support
6 involving a local child support agency and cases governed by the Indian Child
7 Welfare Act. Rule 5.324 governs telephone appearances in governmental child
8 support cases. Rule 5.482(g) governs telephone appearances in cases governed by
9 the Indian Child Welfare Act.

10
11 **(b)–(d) * * ***

12
13
14 **Rule 5.482. Proceedings after notice**

15
16 **(a)–(f) * * ***

17
18 **(g) Tribal appearance by telephone or other remote means**

19
20 In any proceeding governed by the Indian Child Welfare Act involving an Indian
21 child, the child’s tribe may, on notification to the court, appear at any hearing,
22 including the detention hearing, by telephone or other computerized remote means.
23 The method of appearance may be determined by the court consistent with court
24 capacity and contractual obligations, and taking into account the capacity of the
25 tribe, as long as a method of effective remote appearance and participation
26 sufficient to allow the tribe to fully exercise its rights is provided. No fee may be
27 charged to the tribe for such telephonic or other remote appearance.

28
29
30 **Rule 5.531. Appearance by telephone (§§ 224.2(k), 388; Pen. Code, § 2625)**

31
32 **(a) * * ***

33
34 **(b) Standards for local procedures or protocols**

35
36 Local procedures or protocols must be developed to ensure the fairness and
37 confidentiality of any proceeding in which a party is permitted by statute, rule of
38 court, or judicial discretion to appear by telephone. These procedures or protocols
39 must, at a minimum:
40

1 (1) Allow an Indian child’s tribe to appear by telephone or other computerized
2 remote means at no charge in accordance with rule 5.482(g). The method of
3 appearance may be determined by the court consistent with court capacity
4 and contractual obligations, and taking account of the capacity of the tribe,
5 as long as a method of effective remote appearance and participation
6 sufficient to allow the tribe to fully exercise its rights is provided;

7
8 ~~(1)(2)~~ * * *

9
10 ~~(2)-(9)(3)-(10)~~ * * *

11
12 (c) * * *

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Indian Child Welfare Act (ICWA): Remote Appearance by an Indian Child’s Tribe in ICWA Proceedings (Amend Cal. Rules of Court, rules 5.9, 5.482, and 5.531)

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

	Commenter	Position	Comment	Committee Response
1.	Alliance for Children’s Rights By Kristin Power, Government Relations Director	A	<p>Since its passage, the Indian Child Welfare Act (ICWA) has provided important rights and protections to Indian families. While progress has been made, major concerns persist regarding ICWA compliance and how ICWA proceedings are conducted.</p> <p>In 2015, the California ICWA Compliance Task Force was formed to examine compliance issues and provide recommendations to strengthen understanding and compliance of the ICWA. The Task Force report documented the barriers to participation tribes experience in these cases due to geographic distance between the location of the tribe and the location of the state court case.</p> <p>By requiring the Judicial Council to establish a rule of court that authorizes the use of telephonic or other remote access by an Indian child’s tribe in proceedings where ICWA apply, legislation passed in 2019 ensures that Indian tribes can fully participate in ICWA cases preventing resource issues from negatively impacting Indian tribes’ participation in ICWA proceedings.</p> <p>We believe the proposed amendments reflect the intent of the legislation and appropriately address the stated purpose of ensuring remote access. We appreciate the proposed amendments provide for use of various remote communications modalities which provides flexibility for the courts and tribes and allows for innovations in technology in future years.</p>	No response required.

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	Commenter	Position	Comment	Committee Response
2.	<p>California Tribal Families Coalition By Delia M. Sharpe, Executive Director</p> <p>California Indian Legal Services By Dorothy Alther, Executive Director</p>	NI	<p>The proposal should apply across all cases where ICWA applies, including probate and family law cases. To this end, we recommend that the approach used in proposed Rule 5.9, also be used to amend Rule 3.670 regarding probate matters.</p> <p>The language in proposed Rules 5.482(g) and 5.531(b)(1) should be amended to clarify that remote appearance options must ensure access to the courtroom sufficient to allow Tribes to fully exercise their rights as parties. This language is important, as it cannot be a one size fits all approach. For instance, video conferencing may not work for some tribes that lack adequate telecommunication structures which could hinder their participation.</p> <p>Proposed Rule 5.482(g) includes the phrase “on request.” This phrase will cause confusion unless a process is identified regarding where and how the request is made. Further, the tribe, pursuant to AB 686 has a right to appear remotely, which should not require approval. In addition to being contrary to legislative intent, requiring court approval creates a barrier to tribal appearances at detention hearings because there is no prior hearing at which to request such access. Therefore, we recommend “on request” be amended to state “upon notification.” We further recommend that the Judicial Council develop a form tribes may use to notify courts of their wish to appear remotely, and that the form and the Rule specify that Tribes may “appear at</p>	<p>Amendment to rule 3.670 is outside the scope of this proposal as circulated for public comment, and within the purview of other advisory committees. The comment will be referred to the appropriate committees for consideration.</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 Forum and Committee considered this suggestion but decided that such a form should circulate for public comment. The form will be developed as a separate proposal during a later Invitation to Comment cycle.</p>

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			any hearing, <i>including the detention hearing</i> , by telephone... without cost.” Additionally, we strongly encourage the Rules 5.482(g) and 5.531(b)(1) to directly contact tribes for the, at least, the detention hearings given the timing issues involved. Courts that understand and appreciate the importance of having the tribe present are already engaging in this process, which should be replicated statewide.	
3.	The Executive Committee of the Family Law Section of the California Lawyers Association (FLEXCOM) By Saul Bercovitch, Director of Governmental Affairs	A	FLEXCOM agrees with this proposal.	No response required.
4.	Los Angeles County Department of Child and Family Services, and County Counsel By O. Raquel Ramirez, Senior Deputy County Counsel	A	Barbara Hitchcock, CSA I Training, with DCFS had the following comments to Proposed CRC Revision SPR 20-31 This is a great proposal. 1) In this day of telework and teleconferencing, it makes no sense that Tribes should be prohibited from participating in an Indian Child’s Hearing. The establishment of a Conference call number for each courtroom should not be an issue. 2) It would also be amazing if each courtroom be given a large monitor on one of the walls and each hearing be a zoom or go to meeting opportunity for the Tribe, Indian Parent and Indian Child. This will allow the parties to see each other and begin building relationships and trust in the Tribe's involvement.	No response required.

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	Commenter	Position	Comment	Committee Response
			<p>3) See SR20-29 for recommendations about training, implementation and record keeping of forms.</p> <p>The County Counsel Trial Team in Dept. 421 provided the following comments to Proposed CRC Revision SPR 20-31: In addition to the court already waiving court call fees, the court should provide equipment in the courtroom to allow for easy video/listening access to all participants.</p> <p>Per County Counsel O. Raquel Ramirez: I attended the Zoom LASC "COVID-19 Q&A Presentation with LASC Court Leadership," wherein the presenters indicated that they are in the process of implementing remote participation for all LA county court cases. I would hope that remote tribal participation in dependency proceedings would be one of the priorities. Tribes already had been participating in dependency proceedings via the Court Call process, which was not always seamless due to the lack of infrastructure and cumbersome process of the tribes having to submit fee waiver requests to pay for the service before each hearing. The trial county counsel in Dept. 421 facilitated the fee waiver process, but at times the emergency nature of dependency hearings was not conducive to setting up a Court Call.</p>	
5.	Orange County Bar Association By Scott B. Garner, President	A	Does the Proposal Appropriately address the Stated Purpose? Yes.	No Response required.

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	Commenter	Position	Comment	Committee Response
6.	Superior Court of California County of Orange family Law Division By Vivian Tran, Administrative Analyst	NI	<p>Cal. Rules of Court, proposed amended rule 5.9 No comments.</p> <p>Cal. Rules of Court, proposed amended rule 5.482 No comments.</p> <p>Cal. Rules of Court, proposed amended rule 5.531 No comments.</p> <p>Comments on the proposal as a whole: The proposal appears clear as stated and addresses requirements for telephonic/remote appearance for an Indian Child’s Tribe in an ICWA proceeding.</p> <p>Does the proposal appropriately address the stated purpose? Yes, the proposal appropriately addresses the stated purpose.</p> <p>Would the proposal provide cost savings? If so, please quantify. Yes, it will provide cost savings to the court. Orange County Superior Court - Family Law Division has already established Court Call in most of their courtrooms or they have some other means of providing remote telephonic appearances. Without the need to install and provide more technology, this will indeed save the court time and money.</p>	No response required. The committee and the forum appreciate the comments on specific questions.

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	Commenter	Position	Comment	Committee Response
			<p>What would the implementation requirements be for courts, for example: training staff (positions and hours), revising procedures and process (describe), changing docket codes in case management system, or modifying case management systems: The requirements for implementation will be minimal as Orange County Superior Court – Family Law Division has already established training on Court Call / telephonic appearances. No new training will be needed if the proposal is approved as represented here. There is only one procedure that will need to be modified for the Family Law Division – the Indian Child Welfare Act (ICWA) Requirements Procedure. There is no anticipation of changes needed to the case management systems either. Communication with Court Call personnel will need to be established.</p> <p>Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation: Yes, 3 months is sufficient time for implementation.</p> <p>How well would this proposal work in courts of different size: This proposal should work for courts of all sizes as there is no requirement to supply specific</p>	

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	Commenter	Position	Comment	Committee Response
			<p>technology. Allowing flexibility can allow the process to fit the needs of the courts within their current capacity.</p>	
7.	<p>Superior Court of California, County of Orange Juvenile Law Division By Linda Contreras, Administrative Analyst I</p>	A	<p>The proposal does address all the requirements made in Assembly Bill 686 for establishing telephonic/remote appearances for an Indian Child’s Tribe in an ICWA proceeding. The proposal is well thought out. There is an ease in implementation of its requirements as it allows for flexibility for each individual court. These requirements can be accomplished through already established means, for telephonic appearances, set up by the different courts. Saves each court time, costs and the hardship of having to implement new technology or hardware. Also, the amended language used in the three rules is easy to understand and to apply.</p> <p>Does the proposal appropriately address the stated purpose? Yes, the proposal appropriately addresses the stated purpose. There should be a means for an Indian Child’s Tribe to appear remotely in ICWA proceedings (in any case type) with no cost to the tribe or to the court.</p> <p>Would the proposal provide cost savings? If so, please quantify. Yes, it will provide cost savings to the court. Orange County Superior Court - Family Law Division has already established Court Call in</p>	<p>No response required. The committee and the forum appreciate the comments on specific questions.</p>

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	Commenter	Position	Comment	Committee Response
			<p>most of their courtrooms or they have some other means of providing remote telephonic appearances. Without the need to install and provide more technology, this will indeed save the court time and money.</p> <p>What would the implementation requirements be for courts, for example: training staff (positions and hours), revising procedures and process (describe), changing docket codes in case management system, or modifying case management systems:</p> <p>Minimal training would most likely be required in Orange County Juvenile for courtroom clerks. A procedure for telephonic appearance would need to be created or the process would need to be added to the current Indian Child Welfare Act (ICWA) Requirements procedure. The Odyssey case management system may require a new event code created to capture telephonic/remote appearances or adding a new macro for use in a minute order.</p> <p>The requirements for implementation will be minimal as Orange County Superior Court – Family Law Division has already established training on Court Call / telephonic appearances. Both Juvenile and Family Law departments have been managing remote hearings in response to COVID 19, which include WebEx and TEAMS options. No new training will be needed if the proposal is approved as</p>	

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	Commenter	Position	Comment	Committee Response
			<p>represented here. There is only one procedure that will need to be modified for the Family Law Division – the Indian Child Welfare Act (ICWA) Requirements Procedure. There is no anticipation of changes needed to the case management systems either. Communication with Court Call personnel will need to be established.</p> <p>Would three (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 size: This proposal should work for courts of all sizes as there is no requirement to supply specific technology. Allowing flexibility can allow the process to fit the needs of the courts within their current capacity.</p>	
8.	<p>Superior Court of California, County of San Diego By Mike Roddy Executive Officer</p>	A	<p>Does the proposal appropriately address the stated purpose? Yes.</p> <p>Would the proposal provide cost savings? If so, please quantify. Probably not, but it is required by law.</p> <p>What would the implementation requirements be for courts?</p>	<p>No response required. The committee and the forum appreciate the comments on specific questions.</p>

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	Commenter	Position	Comment	Committee Response
			<p>Deciding what method of remote appearance is best suited for our court and the parties involved, and installing or updating whatever technology is needed to implement the procedure.</p> <p>Would 4 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? Probably quite well, given the greater need for all courts to utilize remote appearance technology in this post-COVID-19 era.</p>	