



## JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688

[www.courts.ca.gov](http://www.courts.ca.gov)

---

# REPORT TO THE JUDICIAL COUNCIL

*Item No.: 20-166*

For business meeting on: September 25, 2020

---

**Title**

Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child

**Rules, Forms, Standards, or Statutes Affected**

Amend Cal. Rules of Court, rule 5.514;  
adopt form ICWA-101

**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 3, 2020

**Contact**

Ann Gilmour, Attorney, 415-865-4207

[ann.gilmour@jud.ca.gov](mailto:ann.gilmour@jud.ca.gov)

---

### Executive Summary

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend amending rule 5.514 of the California Rules of Court and adopting a new mandatory form ICWA-101 to be used to have a judge witness the consent of an Indian parent or custodian to the temporary custodial placement of an Indian child in accordance with section 1913 of title 25 of the United States Code, 25 Code of Federal Regulations parts 23.125–23.127, and Welfare and Institutions Code section 16507.4(b)(3).

### 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 5.514 of the California Rules of Court to require juvenile courts to adopt as part of the court's juvenile intake procedures, procedures having a judge witness the consent of a parent or Indian custodian to the temporary custodial placement of an Indian child; and
2. Adopt a new mandatory form, *Agreement of Parent or Indian Custodian to Temporary Custody of Indian Child* (form ICWA-101) to be used to have a judge witness the consent of an Indian parent or custodian to the temporary custodial placement of an Indian child in accordance with section 1913 of title 25 of the United States Code, 25 Code of Federal Regulations parts 23.125–23.127, and Welfare and Institutions Code section 16507.4(b)(3).

The text of the amended rule 5.514 and the new form ICWA-101 is attached at pages 7–10.

### **Relevant Previous Council Action**

The Judicial Council has acted on many occasions to implement the requirements of the Indian Child Welfare Act and corresponding state law. In 2005, the Judicial Council enacted rules and forms concerning the voluntary adoption of an Indian child implementing SB 947 (Ducheny; Stats. 2003, ch. 469).<sup>1</sup> The *Parent of Indian Child Agrees to End Parental Rights* (form ADOPT-225) was amended as part of that proposal. Following the passage of SB 678 in 2006, which wove requirements of the Indian Child Welfare Act into the provisions of the California Family, Probate, and Welfare and Institutions Codes, the Judicial Council enacted comprehensive rules and forms implementing SB 678.<sup>2</sup> In 2018, the Legislature enacted AB 3176, which amended many provisions of the Welfare and Institutions Code to conform California law to revised federal regulations.<sup>3</sup> In 2019, the Judicial Council made substantial revisions to rules and forms to implement AB 3176.

### **Analysis/Rationale**

The Indian Child Welfare Act (ICWA) establishes requirements for the validity of a parent or Indian custodian's consent to the foster care placement of or termination of parental rights to an Indian child.<sup>4</sup> Prior to the enactment of comprehensive federal ICWA regulations in 2016, the law had been interpreted to mean that no actual "foster care placement" was being made for the purposes of ICWA until the court made an order granting care and custody of the child to someone other than the child's parent or Indian custodian. In a dependency case, this was determined to be the dispositional hearing. Thus, the voluntary consent provisions of ICWA had only been implemented in relation to the termination of parental rights in the *Parent of Indian Child Agrees to End Parental Rights* (form ADOPT-225). In 2018, the California Legislature

---

<sup>1</sup> The rules and forms implementing this legislation are available at <https://www.courts.ca.gov/documents/1004ItemA23.pdf>.

<sup>2</sup> SB 678 is available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=200520060SB678](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200520060SB678). The Judicial Council Rules and Forms Proposal implementing SB 678 is available at <https://www.courts.ca.gov/documents/102607ItemA27.pdf>.

<sup>3</sup> AB 3176 is available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180AB3176](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB3176).

<sup>4</sup> Set out in 25 U.S.C. § 1913.

adopted Assembly Bill 3176,<sup>5</sup> which amended various provisions of the Welfare and Institutions Code to align California law with the requirements of the federal ICWA regulations. AB 3176 included various revisions to section 16507.4(b)(3) of the Welfare and Institutions Code governing voluntary out-of-home placements of a minor who has not been adjudicated by the juvenile court. In particular, AB 3176 confirmed that out-of-home placements under section 16507.4(b)(3) must comply with the consent requirements of ICWA whenever an Indian child is involved.

Due to the legal developments discussed above, there is a need to create a process and form for a judge to witness the consent of the parent or Indian custodian of an Indian child to the child's temporary custodial placement in accordance with the requirements of ICWA and corresponding state law as amended.

Tribal advocates have indicated that the lack of a form to document the consent of a parent or Indian custodian to the temporary custodial placement of an Indian child is also a problem in the context of voluntary guardianships under the California Probate Code. Tribal advocates have been asked to draft forms that meet the ICWA requirements but are uncomfortable doing so as they are not always familiar with California law. A form that could be used across all case types governed by ICWA would be useful to litigants and the courts.

The proposal would (1) amend rule 5.514(b) of the California Rules of Court, which requires courts to establish intake procedures in juvenile cases. The amendment would require that these procedures include a process for a judge to witness the consent of an Indian parent or custodian consistent with the requirements of ICWA; and (2) the adoption of a new form, *Agreement of Parent or Indian Custodian to Temporary Custody of Indian Child* (form ICWA-101).

### **Policy implications**

The proposal implements federal and corresponding state law requiring consents to voluntary placements of an Indian child be witnessed by a judge. However, it is not something that juvenile courts have generally been doing and courts will have to develop new procedures to implement these requirements. The forum and committee considered whether detailed procedures should be set out in the rule itself, or whether local courts should be able to develop their own detailed procedures within the guidelines set out in the statutes and the rule. Based on feedback from commenters, including several local courts, the forum and committee concluded that local courts should have flexibility in developing detailed procedures that meet their local needs and conditions.

The forum determined that consistent with the requirements of Welfare and Institutions Code sections 361.31(g) of the Welfare and Institutions Code, which requires any person involved in the placement of an Indian child to use the services of the Indian child's tribe in securing a

---

<sup>5</sup> [Assem. Bill 3176 \(Waldron\); Stats. 2018, ch. 833.](#)

placement for the child, the tribe should be served with a copy of the consent form executed by the parent or Indian custodian.

## **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, distributed through the monthly newsletter distributed by the Tribal Court–State Court Forum, and sent to the California Department of Social Services Office of Tribal Affairs listserve to reach those with an interest in the Indian Child Welfare Act and tribal issues.

Eleven comments were received. None of the commenters opposed the proposal. Ten commenters agreed with the proposal, and one (representing two tribal organizations) did not indicate whether they agreed. The commenters included four superior courts, two child welfare departments, two county counsel’s offices, a bar association, and the two tribal organizations. All commenters agreed that the proposal should move forward. There were a number of technical and stylistic corrections, and suggested revisions and amendments to both the proposed rule and form. All of the comments and proposed responses are included in the attached comment chart.

Several revisions were made in response to comments that helped to clarify and strengthen the proposal:

- The draft rule was modified to include a 72-hour time limit for having the matter brought before a judge and to specify that the court should retain the original of the document with a copy to the agency;
- The form was revised to clarify that it should not be signed until after the judge had fully explained the consequences to the parent or Indian custodian;
- The form was revised to include contact information for the social worker or other individual whom a parent or Indian custodian would contact to request return of the child;
- The form was revised to address the placement preferences of the Indian Child Welfare Act;
- The form was revised to change the language of “membership” to “enrollment”; and
- The form was revised to clarify the judicial certification language.

As part of the invitation to comment, the forum and committee sought comments on several specific questions. Those questions and the responses are discussed below:

- **In the context of a juvenile case, would the completed form be retained in the agency file or by the court? Should that be clarified in the rule?**

Of the six commenters who responded to this question, five indicated that both the court and the agency should retain a copy of the document. Two commenters felt the original should be retained by the court. One felt the original should be retained by the agency. All six felt that the issue should be clarified in the rule.

- **If the form is retained by the court, would it be discoverable under rule 10.500?**

Of the five commenters who responded to this question, all five indicated that the form would not be discoverable on the basis that it would be subject to confidentiality under Welfare and Institutions Code section 827 and therefore exempt under rule 10.550(f)(5) and also as an adjudicative record as defined by rule 10.500(c)(1).

- **How can the judge certify (as required by federal law) that the form is fully understood by the parent or Indian custodian? Does an attorney need to be appointed for the parent?**

Of the five commenters who responded to this question, four felt that appointment of an attorney was not required if the judge fully explained the consequences, the party indicated they understood, and there was no reason for the judge not to believe the party understood. One commenter suggested that an attorney should be appointed for the limited purpose of advising on this point and that the attorney should be required to sign the form.

- **The federal law states that the judge's certification include that the document was "executed in writing and recorded before a judge." Is the term "recorded" appropriate in the California context, or is it sufficient that the form be executed before the judge?**

Of the five commenters that answered this question, all felt it was sufficient that the form be explained by the judge to the party and signed before the judge.

- **Should the specific procedures of the process for taking the consent be set out in detail in the rule, or should each court retain discretion to establish its own process?**

Of the five commenters who responded to this question, four responded that the court should retain discretion to establish its own process. One felt that further explanation in the rule would be helpful.

### **Alternatives considered**

The forum and committee considered establishing a rule that would set out the detailed procedures to be followed to take the consent, rather than allowing local courts flexibility to establish their own procedures, but in the end decided that local courts should be able to craft procedures consistent with local conditions.

## **Fiscal and Operational Impacts**

Several superior court commenters indicated that the proposal would increase workload and have implementation requirements such as revising processes, procedures, and docket codes as well as training for judicial officers and staff; however, they indicated that these would be minimal.

## **Attachments and Links**

1. Cal. Rules of Court, rules 5.514, at page 7
2. Form ICWA-101, at pages 8–10
3. Chart of comments, at pages 11–40

Rule 5.514 of the California Rules of Court is amended, effective January 1, 2021, to read:

**Rule 5.514. Intake; guidelines**

**(a)** \* \* \*

**(b) Purpose of intake program**

The intake program must be designed to:

(1)–(2) \* \* \*

(3) Establish a process for a judge to witness the consent of the parent or Indian custodian to a placement of an Indian child under section 16507.4(b) before a judge in accordance with section 16507.4(b)(3) that ensures the placement is consistent with the federal Indian Child Welfare Act and corresponding state law and all of the rights and protections of the Indian parent are respected, using *Agreement of Parent or Indian Custodian to Temporary Custody of Indian Child* (form ICWA-101). This process must ensure that the witnessing of the consent is scheduled within 72 hours of the request having been made. The original completed *Agreement of Parent or Indian Custodian to Temporary Custody of Indian Child* (form ICWA-101) must be retained by the court with a copy to the agency; and

~~(34)~~ \* \* \*

**(c)** \* \* \*

**(d)** \* \* \*

**(e)** \* \* \*

(This form must be signed after the judge has explained the terms and conditions of the consent as set out in items 6 and 7. A copy of this form shall be provided to the child's tribe in accordance with sections 224.2(e)(3), (f), and 361.31(g) of the Welfare and Institutions Code.)

**DRAFT**  
**Not approved by**  
**the Judicial Council**

**1** I want the child to be temporarily placed in the custody of  
(Name(s) print or type):

- a. \_\_\_\_\_  
b. \_\_\_\_\_

Their relationship to Indian child (check all that apply):

- ☐ Related to child (specify): \_\_\_\_\_  
☐ Member of child's tribe ☐ Parent(s)  
☐ None of the above

**2** The placement in **1** complies with the placement preference requirements of the Indian Child Welfare Act and section 361.1 of the Welfare and Institutions Code because: (please check one):

- a. The placement meets the placement preference requirements of the Indian Child Welfare Act because the placement is with:
- ☐ A member of the child's extended family;
  - ☐ A foster home licensed, approved, or specified by the child's tribe;
  - ☐ An Indian foster home;
  - ☐ Follows the order of preference established by the child's tribe; OR
- b. By clear and convincing evidence there is good cause to deviate from the placement preferences based on:
- ☐ The request of one or both of the Indian child's parents who attest that they have reviewed the placement options, if any, that comply with the order of preference;
  - ☐ By request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
  - ☐ The presence of a sibling attachment that can be maintained only through a particular placement;
  - ☐ The extraordinary physical, mental, or emotional needs of the Indian child; or
  - ☐ The unavailability of a suitable placement within the preferences; a diligent search was conducted. (If using this option, evidence of the diligent search must be contained in the record.)

Fill in court name and street address:

**Superior Court of California, County of**

Court fills in case number when form is filed.

**Case Number:**

**3** Indian child (name): \_\_\_\_\_

Date of birth: \_\_\_\_\_ Age: \_\_\_\_\_

Child's tribe(s): \_\_\_\_\_

Membership: \_\_\_\_\_

☐ Check here if you do not know the membership number.

**4** Your name: \_\_\_\_\_

☐ Parent ☐ Indian Custodian (Check only one. Each must fill out a separate form.)

Your address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Your tribe(s): \_\_\_\_\_ Membership #: \_\_\_\_\_

☐ Check here if you do not know the membership number.





Case Number:

Name of Parent or Indian custodian: \_\_\_\_\_

Your lawyer (if you have one): (Name, address, phone number, and State Bar number):  
\_\_\_\_\_  
\_\_\_\_\_

- ⑤ The proposed placement ☐ will ☐ will not be eligible for Aid to Families with Dependent Children.
- ⑥ I am the person in ④ and I say:
- a. That I am presently unable to care for the child and prefer that the child be placed with the person(s) listed in ①.
  - b. I agree to the temporary custody of my child by the person(s) listed in ①.
  - c. No one has threatened me, including the threat of removing the child from my custody, or made promises to me to get me to sign this form.
  - d. I understand that I can change my mind and that, if I do, the child will be returned to me by contacting \_\_\_\_\_ (insert name of social worker of other individual to contact) at \_\_\_\_\_ (insert contact information).
  - e. I do not give up any of my rights under the Indian Child Welfare Act by signing this form.
  - f. My child was at least 10 days old when I signed this form.
- ⑦ At the time of signing this form, neither I nor the child live or are domiciled on an Indian reservation of a tribe that exercises exclusive jurisdiction over child custody proceedings.

Date: \_\_\_\_\_

\_\_\_\_\_  
Type or print your name

▶ \_\_\_\_\_  
Signature of parent or Indian custodian

Name of Parent or Indian custodian: \_\_\_\_\_

**Judge's Certification**

I, Judge \_\_\_\_\_

Superior Court of California, County of \_\_\_\_\_, certify:

- It has been at least 10 days since the child's birth;
- I fully explained the terms and consequences of consenting and entering into this agreement in detail;
- If this is a voluntary out-of-home placement pursuant to section 16507.4 of the Welfare and Institutions Code, I have reviewed the written agreement between the county welfare department and the parent or Indian custodian and the SOC-155C form if any and fully explained the terms and consequences of those to the parent or Indian custodian, and they were fully understood by the parent or Indian custodian;
- I have explained to the parent or Indian custodian that they may withdraw their consent for any reason and at any time by contacting the person identified in ⑥d. above;
- I have reviewed how the placement meets the placement preference requirements of the Indian Child Welfare Act and section 361.31 of the Welfare and Institutions Code and ☐ the placement meets the placement preferences or ☐ there is good cause to deviate from the placement preferences.
- After the terms and consequences as set out above were fully explained in detail to the parent or Indian custodian in English or after they were interpreted into a language that they understood, the terms and consequences were fully understood by the parent or Indian custodian and the document was executed and recorded before me.

Certified:

\_\_\_\_\_  
*Print or type name of Judge (or Judicial Officer)*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Judge (or Judicial Officer)*

**SPR 20-29****Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child** (Amend rule 5.514 and Adopt form ICWA-101)

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	California Tribal Families Coalition, by Delia M. Sharpe, Executive Director and California Indian Legal Services, By Dorothy Alther, Executive Director	NI	<p>This letter is in response to the Judicial Council of California's invitation for comments to the proposed amendment to Rule 5.514 and the proposed adoption of form ICWA-101.</p> <p>California Tribal Families Coalition is a statewide organization governed by a thirteen-member Board of Directors comprised of duly elected tribal officials, with a membership of 36 federally recognized Indian tribes located across the state, as well as the Southern, Central and Northern California Tribal Chairman's Associations. The mission of CTFC is to promote and protect the health, safety and welfare of tribal children and families, which are inherent tribal governmental functions and at the core of tribal sovereignty and tribal governance.</p> <p>Founded in 1967, California Indian Legal Services (CILS) is the oldest public interest Indian rights law firm in the country, promoting the fundamental rights of California tribes and Indians through litigation, legislative and administrative advocacy, community development, and other strategies for systemic change. CILS provides a full range of legal representation to California Indian tribes and Indian organizations, advocates for the rights of California Indians at the local, state, and national levels, and provides direct services and community education to low-income Indian individuals on issues related to federal Indian law.</p>	No response required.

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>Comments: Rule 5.514</p> <p>We strongly recommend that, in addition to the proposed Rule 5.514 requiring the establishment of a local process, there be a companion ICWA Rule adopted. The companion ICWA Rule should provide guidance regarding what the certification must include.</p> <p>We recommend the companion ICWA Rule require a judge taking the consent of an Indian parent ask questions sufficient to establish that the voluntary custody is in fact voluntary, and not the result of duress, etc. The Rule should further require the judge to carefully explain the consequences of the consent, ensuring the parent fully understands, in English or translated into a language the parent does understand. Only after the parent has appeared before the judge and the terms and conditions of the consent have been fully explained, should the parent be asked to complete the certification (the ICWA- 101 form). The form should be executed before the judge. This order of events is important to ensure this well-meaning rule and form are not inadvertently used to remove Indian children from their parents, such as occurs through “safety plans” and the use of the CDSS SOC-155C form.</p> <p>An additional form will need to be developed to allow the local process developed pursuant to Rule 5.514 to be initiated. This may be a form titled, “Request for Judicial Certification,” and would be limited to information necessary to get the matter before the court and would be filed</p>	<p>In lieu of a separate rule the proposal was amended to include this in the judicial certification requirements</p> <p>The form has been revised to include these issues in those addressed by the judge during the certification.</p> <p>The form has been revised to include these issues in those addressed by the judge during the certification.</p> <p>Language has been added to the form stating that it should not be signed until after the judge has explained the consequences to the parents.</p> <p>The forum and committee considered this comment but determined that local courts could</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

Commenter	Position	Comment	Committee Response
		<p>by the Agency in a juvenile dependency matter Or the Petitioner in a probate guardianship matter.</p> <p>ICWA-101</p> <p>1. The form should be amended to include the contact information of the county social worker or other person whom the parent would contact in order to demand return of his/her child.</p> <p>2. #2 should add “WIC 361.31” at the end of the sentence and strike “the placement preference.”</p> <p>3. #2 We recommend adding a list of placement preferences. If deviating from the preferences, create a space for “good cause to deviate.”</p> <p>a. The following is a sample of the proposed language: “The placement meets the placement preference requirements of the Indian child Welfare Act because the child will be placed with: ___ A member of the child’s extended family; A foster home licensed, approved, or specified by the child’s tribe; ___ An Indian foster home; ___. These placement preferences may be amended by the child’s Indian tribe.</p> <p>b. OR: The placement does not meet preference requirements of the Indian child welfare act and: ___ The court orders additional efforts be made to locate an appropriate temporary caregiver; ___ By clear and convincing evidence there is good cause to deviate from ICWA placement preferences based on the request of one or both of the Indian child’s parents who attest that they have reviewed the placement options, if any, that comply with the order preference; by request of the child, if the child is of sufficient</p>	<p>develop forms if necessary consistent with their local processes.</p> <p>The form was revised in response to this comment.</p> <p>The form was revised in response to this comment</p> <p>The form was revised in response to this comment.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>age and capacity to understand the decision that is being made; the presence of a sibling attachment that can be maintained only through a particular placement; The extraordinary physical, mental or emotional needs of the Indian Child; The unavailability of a suitable placement after determination by the court that a diligent search was conducted.</p> <p>4. #3 should add information about notice to the child's tribe.</p> <p>5. #3 "enrollment" should be amended to read "Membership number."</p> <p>6. #3 The check box should be amended to delete the word "enrollment" and replace with "membership." This creates consistency with ICWA, which requires membership not enrollment.</p> <p>7. The form should be amended to add a box that voluntary placements may be eligible for "Aid to Families with Dependent Children."</p> <p>8. The Judge's Certification must comply with WIC 16507.4 and should read:</p> <p>a. It has been at least 10 days after the child's birth.</p> <p>b. I fully explained the terms and consequences of the consent in detail in English and they were fully understood by the parent, or they were interpreted into a language that the parent understood, including the following:</p> <p>i. A parent of an Indian child may withdraw his or her consent to a voluntary foster care placement or voluntary termination of parental rights or relinquishment for any reason at any time and the child shall be returned to the parent.</p>	<p>The form was revised in response to this comment.</p> <p>The form was revised in response to this comment.</p> <p>The form was revised in response to this comment.</p> <p>The form was revised in response to this comment.</p> <p>The form was revised in response to this comment.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			c. The placement complies with preferences set forth in Section 361.31. d. The parent, after the terms and consequences of the consent were explained and I found them to be fully understood, executed the consent before me.	The form was revised d in response to this comment.  The form was revised in response to this comment.
2.	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.
3.	Los Angeles Department of Child and Family Services, and County Counsel	A	I agree that a process and form should be established in all courts that hear ICWA cases to ensure ICWA is complied with when it comes to voluntary placement of children or termination of parental rights of an Indian Child. Request for Specific Comments on Page 3 has several questions requesting feedback- 1) The one thing that is not so clear is: who completes the proposed form- The Parent, Indian Custodian, Court Clerk, Parents' Attorney. I suppose this would fall under "comments from the courts" as to how this will be determined by each court as they determine their policies and procedures regarding their implementation plan developed by the various courts in the country. 2) The question of "Who should support the parent/ Indian Custodian to ensure the Voluntary Temporary Custody is understood by	No response required  This would depend on the case type and local protocol.

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

Commenter	Position	Comment	Committee Response
		<p>the parent/Indian Custodian?” It seems to me that this would be the role of the CSW at the time the child is taken into temporary protective custody; Parents Attorney/Parents Dependency Investigator at the beginning of Detention hearing, and the Judge during the hearing.</p> <p>3) As for the implementation of this new form, and the other 2 forms, I suspect the training could be done in 3 hours by one of the Judges for Judicial staff, by County Counsel for County Counsel, LADL for LADL, CLC for CLC, and DCFS Staff, etc.</p> <p>4) I suspect for a large county like LA County, it could take a minimum of 6 months before this process would be completely ready for Dependency court, most likely longer for Juvenile Court.</p> <p>5) This proposal will most definitely work better in small counties. LA County will most likely struggle with this new proposal as it does with ICWA as a whole. I anticipate possibly more Appeals.</p> <p>6) One additional suggestion regarding the form itself, I suggest that the language (Print or Type) be added to the top of the document above line # 1. And again at the Line “I, Judge_____” should be printed/typed.</p> <p>7) Yes, the form should be kept in the Court File and the DCFS CSW ICWA Folder.</p>	<p>The form was revised in response to this comment.</p>



**SPR 20-29****Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child** (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
				The proposal was revised in response to this comment.
4.	Orange County Bar Association By Scott B. Garner, President	A	<p>Does the proposal appropriately address the stated purpose? <i>Yes.</i></p> <p>Does the proposed form cover all of the topics that should be covered? <i>Yes.</i></p> <p>In the context of a juvenile case, would the completed form be retained in the agency file or by the court? <i>Files should be kept by both.</i></p> <p>Should this be clarified in the rule itself? <i>Yes.</i></p> <p>If the form is retained by the court, would it be discoverable under rule 10.500? <i>It should be subject to W.I.C. section 827 confidentiality, which is covered by rule 10.550(f)(5).</i></p> <p>How can the judge certify (as required by federal law) that the form is fully understood by the parent or Indian custodian? Does an attorney need to be appointed for the parent? <i>The court can make this determination as it makes other determinations of self-represented parties. Appointment of an attorney is not necessary and would impose an undue burden of time and money on the system.</i></p> <p>The federal law states that the judge's certification include that the document was "executed in writing and recorded before a judge." Is the term "recorded" appropriate in the California context, or is it sufficient that the form be executed before the judge? <i>The term executed seems to sufficiently comply with ICWA regulations.</i></p>	<p>No response required.</p> <p>No response required.</p> <p>The rule was revised in response to this comment.</p> <p>No response required.</p> <p>No response required.</p> <p>No response required.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			Should the specific procedures of the process for taking the consent be set out in detail in the rule, or should each court retain discretion to establish its own process? <i>Given the great variety of Superior Courts in California, each court should be able to retain discretion to establish its own process.</i>	No response required.
5.	Sacramento County Counsel's Office By Christopher S. Costa, Deputy County Counsel	A	<p><b><i>Question 1: Does the proposal appropriately address the stated purpose?</i></b></p> <p>-Overall, yes, the proposal addresses the stated purpose. However, the following areas should be included or clarified, as applicable, to provide juvenile court participants additional practical guidance.</p> <p><b>(1) Addressing Departing from Placement Preferences.</b> Welfare and Institutions Code (WIC) Section 16507.4(b)(3)(D) indicates that the [voluntary] placement must comply with preferences set forth in Section 361.31. However, WIC sections 16507.4 and 361.31 do not provide specific guidance as to how a judge should proceed if the placement preferences are not met at the time of the voluntary proceeding. The December 2016 – Guidelines for Implementing the [ICWA], at part I, section I.2, explain that placement preferences apply to both voluntary and involuntary placements, and that the judge may consider as a basis for good cause to depart from the placement preferences, under certain circumstances, the request of one or both parents. Proposed Rule 5.514(b) should specify, consistent with WIC section 361.31(h)-(j), that, if the parent or Indian custodian asserts that</p>	<p>The proposal was revised in response to this comment.</p> <p>The form was revised in response to this comment.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

Commenter	Position	Comment	Committee Response
		<p>good cause exists not to follow the placement preferences, said assertion (and the attestation that the parent or Indian custodian has reviewed placement options that may meet preferences) shall be provided orally on the record or provided in writing (via the ICWA-101 in Section 5). Correspondingly, the proposed ICWA-101 should include, in the Judge's Certification section, an option for a finding that good cause to deviate from placement preferences exists, as required by WIC section 361.31(j).</p> <p>Without the guidance identified above, practitioners may question whether departing from placement preferences is allowed under WIC section 16507.4 and, if so, how to document compliance with placement preferences in voluntary proceedings, if a deviation is requested, under the ICWA and California law.</p> <p><b>(2) Addressing the California Department of Social Services (CDSS) SOC 155C form.</b> WIC section 16507.4(b)(2) indicates that, for voluntary placements, there must be a written agreement between the parent and county on a CDSS form that shall be used by <i>all</i> counties. CDSS currently has a required SOC 155C (Voluntary Placement Agreement Parent/Agency (Indian Child)) form that includes a "Certification" section in the bottom right hand corner for the judge to sign. Proposed Rule 5.514(b) should, in light of WIC section 16507.4(b)(2) and the current SOC 155C form (that requires a judge's signature),</p>	<p>The form was revised ed in response to this comment.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>address that the ICWA-101 is required in addition to any written agreement required by CDSS/WIC section 16507.4(b)(2). This also will remind practitioners that the “terms and consequences” the judge is certifying are within the written agreement.</p> <p>Given that the SOC 155C has not been updated since approximately January 2000, and it currently requests signature from a judge, it would benefit practitioners (and avoid confusion) if the SOC 155C form was updated to no longer require a judge’s signature/certification. Or, alternatively, if the SOC 155C form was replaced (in light of the ICWA-101) by the standard SOC 155 form – a form that more thoroughly lists the rights and responsibilities of the parent/guardian, child, and agency.</p> <p><b>(3) Addressing Timelines for the Judge’s Certification.</b> WIC section 16507.4 pertains to voluntary placement agreements (up to six months) and the agency’s option to offer informal services, via WIC section 301, in lieu of the agency filing a petition (on a substantiated referral). Under the newly proposed WIC section 16507.4 process, if the agency determines informal supervision and voluntary placement (for up to six months) of an Indian child will be effective and the parent(s) agree, it will take some period of time prior to schedule for the judge to certify the ICWA-101. The longer the period of time, the more difficult this process will be for the family and for the child welfare agency (i.e. depending on the</p>	<p>The rule was modified in response to this comment.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>nature of the referral, this may lead to more exigent removals during the interim waiting period).</p> <p>In practice, child welfare agencies oftentimes – to prevent removal – have to safety plan and provide temporary out of home care solutions at the early stages of the investigation prior to determining whether the allegation is substantiated and whether formal/informal services should be provided. Under WIC section 16501(b), respite care is a child welfare service, which may be provided to the child’s parents or guardians, that generally does not exceed 72 hours, but, in order to preserve the placement, may be provided for up to 14 days in any one month. Respite care is an option for families in crisis and is a child abuse and neglect prevention strategy available under California and Federal law. See WIC sections 16501(b), 16501.01(c)(1)-(4), ACIN I-50-16, ACIN I-51-16, 42 USC 5116h(3).</p> <p>The proposed rule should include a 72 hour timeframe for the agency/judge to schedule a voluntary proceeding to ensure that the Indian child/family does not exceed the initial timeframe for respite care services and to ensure that the voluntary proceeding is quickly addressed to avoid difficulties for the agency and family.</p> <p><b><i>Question 2: Does the proposed form cover all of the topics that should be covered?</i></b></p> <p>-Please see response (1) to question 1 above.</p> <p>The proposed ICWA-101 should include, in the Judge’s Certification section, an option for a</p>	<p>The form was revised in response to this comment.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>finding that good cause to deviate from placement preferences exists, as required by WIC section 361.31(j).</p> <p><b><i>Question 3: In the context of a juvenile case, would the completed form be retained in the agency file or by the court? Should this be clarified in the rule itself?</i></b></p> <p>-WIC section 361.31(m) and CDSS MPP Section 31-075.3 indicate that records of foster placement must be maintained by the State Department of Social Services in perpetuity. Given the county welfare agency's obligation to enter and maintain ICWA related information in certain statewide databases, it seems more fitting for the county welfare agency – that is responsible to provide information to the State Social Services Department and/or the Bureau of Indian Affairs – to retain the original ICWA-101. It would be helpful guidance to include, in the proposed rule of court, a provision identifying that the county will maintain the original ICWA-101 and the certifying court will maintain a copy for its records.</p> <p><b><i>Question 4: If the form is retained by the court, would it be discoverable under rule 10.500?</i></b></p> <p>-No. The ICWA-101 would still be part of the “juvenile case file” as defined under WIC section 827(e) and Rule 5.552(a), and subject to disclosure/discovery only under the criteria of those authorities.</p> <p><b><i>Question 5: How can the judge certify (as required by federal law) that the form is fully understood by the parent or Indian custodian?</i></b></p>	<p>The proposal was revised in response to this comment.</p> <p>No response required.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p><b><i>Does an attorney need to be appointed for the parent?</i></b></p> <p>-The December 2016 – Guidelines for Implementing the [ICWA], at part I, section I.6 indicate that, prior to accepting consent, the court must explain to the parent or Indian custodian “[t]he terms and consequences of the consent <i>in detail</i>”. The judge can certify that the form is fully understood by confirming with the parent on the record that the parent or Indian custodian has been informed of and agrees to the terms of the SOC 155C/written agreement with the agency (including the right to withdraw consent, etc.).</p> <p>-Given that the certification is a prerequisite for the child welfare agency to provide certain services (here, informal supervision services per WIC sections 301 and 16507.4), and substantive due process rights are not affected – since the parent or Indian custodian has the right to withdraw consent at any time – appointment of counsel seems unnecessary.</p> <p><b><i>Question 6: The federal law states that the judge’s certification include that the document was “executed in writing and recorded before a judge.” Is the term “recorded” appropriate in the California context, or is it sufficient that the form be executed before the judge?</i></b></p> <p>-Yes. It appears the word “execute” is written in the federal law to denote that the consent is not legally effective unless it is acknowledged in writing. And, the term “record”, in the context of the federal law, is used to show that the written instrument must be furnished as</p>	<p>No response required.</p> <p>No response required.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>evidence to the judge. I think the use of both terms is helpful since it leaves the option for the ICWA-101 to be signed by the parent prior to the voluntary proceeding.</p> <p><b><i>Question 7: Should the specific procedures of the process for taking the consent be set out in detail in the rule, or should each court retain discretion to establish its own process?</i></b></p> <p>-Generally, I think the court should retain discretion to establish its own process – particularly regarding the logistics of filing documents and having the proceeding set. However, as indicated in the above responses to questions 1-6, there are certain fundamental steps that should be included. For example, I believe practitioners, without further guidance from the proposed rule, will not know: whether there needs to be a finding to depart from placement preferences; whether the child welfare agency has an obligation to maintain the record in perpetuity to satisfy WIC section 361.31(m) and the CDSS regulations; or, what the appropriate timeframe is for scheduling the proceeding.</p>	No response required.
6.	San Diego Child Welfare Services By Karla Morales, Policy Analyst	A	[No further comment provided]	No response required.
7.	Superior Court of California, County of Los Angeles by Bryan Borys, Assistant Court Executive Officer	A	<p>Does the proposal appropriately address the stated purpose? Answer: Yes</p> <p>Does the proposed form cover all of the topics that should be covered? Answer: Yes</p> <p>In the context of a juvenile case, would the completed form be retained in the agency file or by the court?</p>	<p>No response required.</p> <p>No response required.</p>



## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>Should this be clarified in the rule itself? Answer: The completed form should be retained by the court; this should be clarified in the rule.</p> <p>•If the form is retained by the court, would it be discoverable under rule 10.500? Answer: No; it is adjudicative information.</p> <p>How can the judge certify (as required by federal law) that the form is fully understood by the parent or Indian custodian? Does an attorney need to be appointed for the parent? Answer: An attorney should be appointed for the parent unless the judicial officer determined that the parent was able to represent himself/herself.</p> <p>The federal law states that the judge's certification include that the document was "executed in writing and recorded before a judge." Is the term "recorded" appropriate in the California context, or is it sufficient that the form be executed before the judge? Answer: It is sufficient that the form be executed before a judicial officer.</p> <p>Should the specific procedures of the process for taking the consent be set out in detail in the rule, or should each court retain discretion to establish its own process? Answer: The specific procedures of the process for taking the consent should be at the discretion of each court to establish its own process.</p> <p>Would the proposal provide cost savings? If so, please quantify. Answer: No. It will increase workload.</p> <p>What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of</p>	<p>The proposal was revised in response to this comment.</p> <p>No response required.</p> <p>No response required.</p> <p>No response required.</p> <p>No response required.</p>

**SPR 20-29****Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child** (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Answer: Training for judicial officers and staff. Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Answer: Yes.	No response required.  No response required.
8.	Superior Court of California, County of Orange Family Law Division By Vivan Tran, Administrative Analyst	A	Amend rule 5.514(b) No comments. New Form – Parent or Custodian of Indian Child Agrees to Temporary Custody ICWA-101 •Page 2 of ICWA-101 – Consider renaming the section from “Judge’s Certification” to “Judicial Officer’s Certification” in the event a Commissioner is presiding over the case. Also, add “Commissioner” to the “I, Judge/Commissioner...” section.  Comments on the proposal as a whole: This is a welcomed proposal to ensure that the Indian parent or custodian can consent to temporary out-of-home placement of the child without giving up his/her rights under ICWA. It enables the court to ensure that these rights are fully understood by the parent/Indian Custodian.  Does the proposal appropriately address the state purpose? Yes.  Does the proposed form cover all of the topics that should be covered?	No response required.  The proposal was not modified in response to this comment. 25 U.S.C. section 1913 establishes the requirements for valid consent to the placement of an Indian child. It states “... such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction...” therefore it should be a Judge rather than a commissioner.  No response required.  No response required.

**SPR 20-29****Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child** (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>Yes, the proposed form is mirrored after the ADOPT 225 form that we have had available in Family Law adoption cases for many years. As it is laid out in the proposal, this new form can be used for all case types in which ICWA applies.</p> <p>In the context of a juvenile case, would the completed form be retained in the agency file or by the court? Should this be clarified in the rule itself?</p> <p>The filed document should be retained in the court file and a conformed copy kept with the agency file. This document should be treated as any other filed document in the court record.</p> <p>If the form is retained by the court, would it be discoverable under rule 10.500?</p> <p>If this completed form is retained in a court file, the same rules of confidentiality that apply to Juvenile cases - Welfare and Institution code § 827 and rule 5.552 - would not also apply to this form.</p> <p>How can the judge certify (as required by federal law) that the form is fully understood by the parent or Indian custodian? Does an attorney need to be appointed for the parent? It would have to be upon inquiry of the parent or Indian custodian that the court would have to determine if they understand. If they do not fully understand the court could appoint an attorney if one would not normally be appointed. Could an addition to the form be a</p>	<p>No response required.</p> <p>The proposal was revised in response to this comment.</p> <p>No response required.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>line for the parent/Indian custodian to initial their understanding after the judicial officer goes through Item #5 a-f on the form? Might this also be a type of certification that the party understands his or her rights?</p> <p>The federal law states that the judge's certification include that the document was "executed in writing and recorded before a judge." Is the term "recorded" appropriate in the California context, or is it sufficient that the forms be executed before the judge?</p> <p>It should be sufficient that the form be executed before a judge. It can be "recorded" in the minute order that the form was executed in writing and in front of the judicial officer and that is was filed into the case.</p> <p>Should the specific procedures of the process for taking the consent be set out in detail in the rule, or should each court retain discretion to establish its own process?</p> <p>Possibly add to the form ICWA-101 "This form should be completed in front of a judge/commissioner." If there needs to be more interpretation as to certification and recording of this form or how this form is retained, then a specific procedure would need to be detailed in the rule.</p> <p>Would the proposal provide cost savings? If so, please quantify.</p> <p>No, I do not see a cost savings currently.</p>	<p>No response required.</p> <p>The form was revised in response to this comment.</p> <p>No response required.</p>

**SPR 20-29****Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child** (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>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 management systems?</p> <p>Training will be minimal for the FL adoptions courtroom and case processing staff, judicial officers, legal research and self-help staff. The Indian Child Welfare Act (ICWA) Requirement Procedures will need an update. There will need to be new event codes and macros added to the Odyssey Case Management systems.</p> <p>Would 3 months form Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?</p> <p>Yes, 3 months would be sufficient time for implementation.</p> <p>How well would this proposal work in court of different sizes?</p> <p>This proposal should work in courts of all sizes.</p>	<p>No response required.</p> <p>No response required.</p> <p>No response required.</p>
9.	<p>Superior Court of California, County of Orange</p> <p>Family Law and Juvenile Court</p> <p>By Linda Contreras, Administrative Analyst I</p>	A	<p><b>New Form – <i>Parent or Custodian of Indian Child Agrees to Temporary Custody</i> ICWA-101</b></p> <p>Page 2 of ICWA-101 – Consider renaming the section from “Judge’s Certification” to “Judicial Officer’s Certification” in the event a commissioner is presiding over the case. Also, consider removing the “I, Judge” section since there is a signature line. If you need the “I,</p>	<p>ICWA mandates that the consent be taken by a judge.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>Judge section, then consider adding “Commissioner” to the “I, Judge/Commissioner...” section.</p> <p>This is a welcomed proposal to ensure that the Indian parent or custodian can consent to temporary out-of-home placement of the child without giving up his/her rights under ICWA. It enables the court to ensure that these rights are fully understood by the parent/Indian Custodian.</p> <p><b><i>Does the proposal appropriately address the state purpose?</i></b></p> <p>Yes, the proposal appropriately states the purpose.</p> <p><b><i>Does the proposed form cover all of the topics that should be covered?</i></b></p> <p>Yes, the proposed form is mirrored after the ADOPT 225 form that we have had available in Family Law adoption cases for many years. As it is laid out in the proposal, this new form can be used for all case types in which ICWA applies.</p> <p><b><i>In the context of a juvenile case, would the completed form be retained in the agency file or by the court? Should this be clarified in the rule itself?</i></b></p> <p>The filed document should be retained in the court file and a conformed copy kept with the agency file. This document should be treated as any other filed document in the court record. Since this will be a mandatory Judicial Council form and there will be a judicial officer’s signature and a file stamp on the completed</p>	<p>No response required.</p> <p>No response required.</p> <p>The proposal has been revised to clarify where the form should be retained.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>form, this completed form would have to be retained by the court.</p> <p><i>If the form is retained by the court, would it be discoverable under rule 10.500?</i></p> <p>It does not apply because Rule 10.500 applies to public access to judicial administrative records. Rule 10.500(b) (1) This rule applies to public access to judicial administrative records, including records of budget and management information relating to the administration of the courts. (2) This rule does not apply to, modify or otherwise affect existing law regarding public access to adjudicative records.</p> <p><i>How can the judge certify (as required by federal law) that the form is fully understood by the parent or Indian custodian? Does an attorney need to be appointed for the parent?</i></p> <p>An attorney should be appointed to the parent who is signing the form. A Judge should not be advising rules and then certifying that they understand those advisements without an attorney to circumvent the issue.</p> <p><i>The federal law states that the judge's certification include that the document was "executed in writing and recorded before a judge." Is the term "recorded" appropriate in the California context, or is it sufficient that the forms be executed before the judge?</i></p>	<p>No response required.</p> <p>The committee declined to require that an attorney be appointed.</p> <p>No response required.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			Once it has been “Executed in writing before a judge” and given to the clerk to file, it would be recorded. It should be sufficient.	
			<i>Should the specific procedures of the process for taking the consent be set out in detail in the rule, or should each court retain discretion to establish its own process?</i> Possibly add to the form ICWA-101 “This form should be completed in front of a judge/commissioner.” Each court should retain discretion to establish its own process.	The form was revised.
			<i>Would the proposal provide cost savings? If so, please quantify.</i> No.	No response required.
			<i>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 management systems?</i> Training for Juvenile and Family Law Judicial Officers, legal research, self-help staff, and courtroom clerks would be minimal with forms and appointed counsel. Procedures would need to be created or updated. The Odyssey case management system would need to be updated to capture that the form was completed and	No response required.



**SPR 20-29****Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child** (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>signed before a judge/commissioner and an event code to capture the filing of the ICWA-101 and findings of this amended rule.</p> <p><i>Would 3 months form Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?</i></p> <p>Yes.</p> <p><i>How well would this proposal work in court of different sizes?</i></p> <p>This proposal should work in courts of all sizes with the proper training and procedures.</p>	No response required.
10.	<p>Superior Court of California, County of Riverside</p> <p>By Susan Ryan, Chief Deputy of Legal Services</p>	A	<p>Does the proposal appropriately address the stated purpose?</p> <p>Yes, the proposal addresses the consent requirements of ICWA and AB 3176.</p> <p>Does the proposed form cover all of the topics that should be covered?</p> <p>Yes, the form covers all topics as laid out in WIC Section 16504.4(b)(3) In the context of a juvenile case, would the completed form be retained in the agency file or by the court?</p> <p>Should this be clarified in the rule itself?</p> <p>The court would file and retain the form if there was a juvenile petition ever filed regarding the parent. If this is on a pre-file case then the department should retain the document in their files.</p> <p>If the form is retained by the court, would it be discoverable under rule 10.500?</p> <p>Since this form would more relate a child welfare issue and not judicial administration it</p>	No response required

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>would seem that rule 10.500 should not apply to these documents. Courts could even create miscellaneous juvenile case files solely for the purpose of receiving, calendaring and filling these documents if for parties that have never had a juvenile case file.</p> <p>How can the judge certify (as required by federal law) that the form is fully understood by the parent or Indian custodian? Does an attorney need to be appointed for the parent? The judge could appoint an attorney if/when needed if he/she felt that the party did not understand.</p> <p>The federal law states that the judge's certification include that the document was "executed in writing and recorded before a judge." Is the term "recorded" appropriate in the California context, or is it sufficient that the form be executed before the judge?</p> <p>Executed would mean that the form was explained and signed by the party and the judge. Does recorded mean that the form would be filed on a court case?</p> <p>Should the specific procedures of the process for taking the consent be set out in detail in the rule, or should each court retain discretion to establish it's own process?</p> <p>Since it would be new to courts to have this function for parties that may not have a juvenile case file, the rule should explain the procedures. Would the proposal provide cost savings? If so, please quantify.</p> <p>There would be no cost savings.</p>	

**SPR 20-29****Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child** (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>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), change docket codes in case management systems, or modify case management systems.</p> <p>The court would need to create new procedures for clerk's office to process these forms and calendar the matter for the judge to witness and take the consent. A procedure for Courtroom staff would need to be created to handle these types of hearings. New filing codes for the form and new minute codes in the case management system for hearings and findings would be needed. Hearing codes to set hearings when an appearance is requested would also need to be created as well as JBSIS stats for these types of hearings would need to be accounted for. Staff training on the new forms and procedures would need to be completed for all juvenile courtroom and clerk's office staff. Perhaps one to two hours to review training materials would be needed.</p> <p>Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, but six months would be preferred.</p> <p>How well would this proposal work in courts of different sizes?</p> <p>The proposals should work well for courts of any size.</p>	
11.	Superior Court of California, County of San Diego	A	<b>GENERAL COMMENTS</b>	

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
	By Mike Roddy, Executive Officer		<p><b>CRC 5.514(b)(3)</b> – Change as indicated because the parent does not necessarily need to be Indian. The operative requirement is that the <i>child</i> is an Indian child. The child may still qualify as an “Indian child” even if only one parent has Native American heritage. If it is a custodian, however, it must be an “<u>Indian</u> custodian.”</p> <p>“Establish a process for a judge to witness the consent of an Indian <u>the</u> parent or <u>Indian</u> custodian to a placement of an Indian child under section 16507.4(b) before a judge in accordance with section 16507.4(b)(3) that ensures that the placement is consistent with the federal Indian Child Welfare Act and corresponding state law and that all of the rights and protections of the Indian parent are respected, using <i>Parent or <u>Indian</u> Custodian of Indian Child Agrees to Temporary Custody</i> (form ICWA-101); and”</p> <p>Query – If form ICWA-101 is intended to be used across all case types, should a similar provision be added to the Family Court rules and the Probate Court rules? Or should the form be executed before a juvenile court judge regardless of the case type?</p> <p><b>ICWA-101</b></p> <ul style="list-style-type: none"><li>- Title (top of page 1 and footers on both pages): Suggestions for clarity--</li></ul>	<p>The rule was modified in response to this comment.</p> <p>The form can be used across case types.</p> <p>The form was revised in response to this comment.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

Commenter	Position	Comment	Committee Response
		<p><u>“Agreement of Parent or Indian Custodian of Indian Child Agrees to Temporary Custody of Indian Child”</u></p> <ul style="list-style-type: none"> <li>- Footers: Shouldn’t statutory citations be in right footer rather than left footer (as in other Judicial Council forms)?</li> <li>- Item 4: Suggested for clarity -- <i>“Each <u>must</u> fills out a separate form.”</i></li> </ul> <p>Note – The instruction to <i>“skip this if you have a lawyer”</i> can be interpreted to allow the parent or Indian custodian to skip the lines for phone number, tribe, and enrollment number. Was that the intended result?</p> <ul style="list-style-type: none"> <li>- Item 5a: “with the person(s) listed in 1.”</li> <li>- Item 5d: “I understand that I can change my mind and that, <u>if I do</u>, the child will be returned to me.”</li> <li>- Item 6: “Signature of Indian parent or <u>Indian</u> custodian”</li> <li>- Judge’s Certification: Insert comma after blank line for judge’s name.</li> <li>- Second bullet point: Suggestion --</li> <li>- “I fully explained the terms and consequences <u>of the agreement</u> to the parent(s) or Indian custodian(s), including (if applicable) the terms of any written agreement under section 16507.4 of the Welfare and Institutions Code, and they had no questions I could not answer (<i>name of parent(s) or Indian custodian(s)</i>) _____</li> </ul> <p><b>ICWA-101</b>, continued</p> <ul style="list-style-type: none"> <li>- Third bullet point: Suggestion --</li> </ul>	<p>The form was revised in response to this comment.</p> <p>The form was revised in response to this comment.</p> <p>The form was revised in response to this comment.</p> <p>The form was revised in response to this comment.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<ul style="list-style-type: none"><li>- “The parent(s) or Indian custodian(s) fully understood the terms and consequences</li><li>- Fourth bullet point: Suggestion --</li></ul> <p>“The parent(s) or Indian custodian(s) speaks English or used an interpreter at the hearing.””</p> <p>Does the proposal appropriately address the stated purpose? Yes, except that it is not clear how the form can be used in family or probate matters, as the committee intends it to be used. Please see General Comments for specific comments.</p> <p>Does the proposed form cover all of the topics that should be covered?</p> <p>Yes, but it might be prudent to add an instruction that a separate form should be completed for each child if there is more than one child in the case to whom the agreement applies.</p> <p>In the context of a juvenile case, would the completed form be retained in the agency file or by the court? Should this be clarified in the rule itself?</p> <p>The original should be retained by the court, the agency should retain a copy, and whatever is decided should be stated in the rule.</p> <p>If the form is retained by the court, would it be discoverable under rule 10.500?</p> <p>No. I would argue that the completed form is properly considered an “adjudicative record” as defined in rule 10.500(c)(1) [“any writing</p>	<p>The form was revised in response to this comment.</p> <p>The proposal was revised in response to this comment.</p> <p>No response required.</p>

## SPR 20-29

### Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>prepared for or filed or used in a court proceeding [or] the judicial deliberation process”], not a “judicial administrative record” as defined in rule 10.500(c)(2) (see also examples listed in subd. (e)(2)).</p> <p>How can the judge certify (as required by federal law) that the form is fully understood by the parent or Indian custodian? Does an attorney need to be appointed for the parent? Given the legal consequences of signing this agreement and in consideration of other ICWA provisions (e.g., requiring the appointment of counsel for a parent or Indian custodian in non-voluntary proceedings), an attorney should be appointed for the parent or Indian custodian for the limited purpose of advising the client on the agreement, and the attorney should be required to sign the form (i.e., add an item 7 for the attorney’s signature).</p> <p>The federal law states that the judge’s certification include that the document was “executed in writing and recorded before a judge.” Is the term “recorded” appropriate in the California context, or is it sufficient that the form be executed before the judge? I would interpret “recorded” as the equivalent of “executed before the judge,” as opposed to any other means of recording.</p> <p>Should the specific procedures of the process for taking the consent be set out in detail in the</p>	<p>The forum and committee declined to require that an attorney be appointed given the weight of the other responses to this question.</p> <p>No response required.</p> <p>No response required because no attorney appointment is required.</p>

**SPR 20-29****Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child** (Amend rule 5.514 and Adopt form ICWA-101)

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

	Commenter	Position	Comment	Committee Response
			<p>rule, or should each court retain discretion to establish its own process?</p> <p>If the committee decides that an attorney should be appointed for the parent or Indian custodian, that requirement should be stated in the rule. Otherwise, each court should retain discretion to establish its own process.</p> <p>Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, provided final version of the form is provided to the courts at least 30 days prior to the effective date. This will give courts sufficient time to update their procedures and provide training to staff.</p>	<p>No response required.</p>