

*ETHICS AND
LAWYERING FOR
TRIBES ON ICWA
AND OTHER
MATTERS*

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Colorado Court Rules Colorado Rules of Professional Conduct

Preamble

Preamble

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.



Colorado Court Rules Colorado Rules of Professional Conduct

Preamble (continued)

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.



Colorado Court Rules Colorado Rules of Professional Conduct

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RPC 1.1



Colorado Court Rules Colorado Rules of Professional Conduct

RPC 1.1 (continued)

COMMENT

Legal knowledge and skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.



**Colorado Court Rules
Colorado Rules of
Professional Conduct**

RPC 1.1 (continued)

COMMENT

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).



Colorado Court Rules Colorado Rules of Professional Conduct

RPC 1.1 (continued)

COMMENT

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and changes in communications and other relevant technologies, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject. See Comments [18] and [19] to Rule 1.6.

- Ex: Revisions to ICWA BIA Guidelines, Colorado recent passage of HB19-1232

Competency

ICWA Best Practices

- Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 et seq (1978)
 - 25 U.S.C. § 1914 - If 25 U.S.C. § 1911, 1912 and 1913 are not met - may be grounds to vacate
- Indian Child Welfare Act Proceedings Administrative Rules, 25 C.F.R. 23 (2016)
- Historical Context
- State Law - Colorado, HB19-1232: Aligning Indian Child Welfare Act Requirements Concerning the alignment of compliance with the federal "Indian Child Welfare Act"
- Court Cases (Federal, State, Tribal)
 - *Brackeen v. Bernhard* (5th Circuit)
 - *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013)
 - Federal Indian Law precedent generally
- Laws of the Tribe related to Child Welfare
 - Placement preferences?
- Traditions/Customs of the Tribe related to Child Welfare
- Indian Child Welfare Act; Designated Tribal Agents for Service of Notice, 84 Fed. Reg. 20387 – 20423 (May 9, 2019)
- International Law? UNDRIP

Competency

HB19-1232

Aligning Indian Child Welfare Act Requirements

Concerning the alignment of compliance with the federal "Indian Child Welfare Act".

SESSION: 2019 Regular Session

SUBJECT: Children & Domestic Matters

BILL SUMMARY

Child custody - Indian child - Align requirements with federal Indian Child Welfare Act. In 2016, the bureau of Indian affairs in the United States department of the interior published updated guidelines for implementing the federal "Indian Child Welfare Act". The act updates the current statute to align the compliance requirements with federal law.

(Note: This summary applies to this bill as enacted.)

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Representative
Marc Catlin



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Senator
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COMMITTEES

Competency

Adoptive Couple v. Baby Girl

- Case involving non-Native couple seeking to adopt Cherokee child
- Child placed for adoption by biological mother
- Father is Cherokee and objected to the adoption
- South Carolina Family Court transferred custody to Father
- U.S. Supreme Court reversed South Carolina Supreme Court decision
- Held: ICWA active effort provisions and heightened burden of proof for termination did not apply in this particular case

Competency

Brackeen v. Bernhard (5th Circuit)

- Decision issued on August 9, 2019
- Case represents facial challenges to the ICWA and statutory and constitutional challenges to the 2016 Administrative Rules
- Plaintiffs = Texas, Indiana, Louisiana, 7 individuals seeking to adopt Indian children
- Defendants = USA, Federal Agencies, Federal Officials
- 5 Tribes intervened



Competency

Brackeen v. Bernhard (5th Circuit)

- District Court rules that provisions of the ICWA & the 2016 Administrative Rules violated equal protection, the Tenth Amendment, the nondelegation doctrine and the APA.
- Brackeens, at time initial complaint filed, sought to adopt an “Indian child” (Dad is Cherokee/Mom is Navajo) pursuant to the ICWA. January 2018 adopted child. Brackeens now seeking to adopt sister. February 2, 2019, the Texas State court granted Brackeens’ motion to declare the ICWA inapplicable as a violation of the Texas constitution, but “conscientiously refrain[ed]” from ruling on the Brackeens’ claims under the U.S. Constitution.

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Competency

Brackeen v. Bernhard (5th Circuit)

ICWA

2016 Administrative Rules

Historical Context

State Law (Texas)

Proper Notice

Federal Indian Law

- Trust Responsibility
- Plenary Power Doctrine
- Political Classification (rational basis) vs. Racial Classification (strict scrutiny)
- Inherent Sovereignty



ICWA Practice in Tribal Court

Rule 8.5. Disciplinary Authority; Choice of Law

Colorado Court Rules

Colorado Rules of Professional Conduct

Maintaining the Integrity of the Profession

(a) A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.



ICWA Practice in Tribal Court (continued)

- Tribal courts generally have their own tribal court bar admission requirements.
- A tribe may require that you fulfill its bar requirements (i.e. sit for exam, pay bar dues, complete bar application) before entering an appearance in a case.
 - Ex: Navajo Nation Bar Association
- Tribes may have adopted professional rules of conduct.
 - Ex: Mashpee Wampanoag Tribal Court
- The client may not have a Tribal Court



Competence

“At the heart of cultural literacy in respect to indigenous peoples is an understanding of indigenous knowledge. Familiarity with the indigenous legal tradition, as an aspect of that knowledge, is important to lawyers involved in the representation of indigenous peoples and indigenous nations. . . .”

“We are autochthonous, a term used in describing people who live by being chthonic, that is by living in or in close harmony to the earth. Our legal tradition can be described as autochthonous legal tradition. The chthonic legal tradition rejects formality in the expression of law and is characterized by the oral tradition.”

Christine Zuni Cruz, *Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples*, 82 N.D. L. Rev. 863, 871, 892 (2006) (citations omitted).



State Pro Hac Vice & ICWA

- A number of states have loosened pro hac vice requirements for attorneys licensed in other jurisdictions to represent in ICWA cases.
 - Ex: Washington State
- There are a number of efforts in other states to loosen pro hac vice requirements in ICWA cases or to make it easier for advocates to appear in ICWA cases.
 - Ex: California

State Pro Hac Vice & ICWA

APR 8 COVER SHEET

Suggested Amendment to WASHINGTON STATE COURT RULES: ADMISSION FOR PRACTICE RULES

Amend APR 8: Limited Admissions

Submitted by Kristy Healing

A. Name of Proponent: Kristy Healing, Commissioner, Washington State Supreme Court Commission on Children

B. Spokesperson: Kristy Healing

C. Purpose: APR 8 governs when lawyers admitted to practice law in other states or United States territories may appear to practice law in Washington State. While the current law addresses various exceptions for indigent representation, it does not address the unique circumstance of a tribal attorney appearing as a matter of right under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963, under federal law.

ICWA sets minimum standards for the treatment of Indian children in state child custody proceedings and gives tribes the right to intervene and participate in any state child custody proceeding involving an Indian child from that tribe. Washington amended the Washington Indian Child Welfare Act in 2011 to ensure state law provides the same rights of participation and intervention as federal law, Ch. 13.38 RCW. Because tribes intervene in cases wherever the tribal children are, tribal attorneys are forced to appear in court, even if they are not licensed. While APR 8 is offered as a solution, it has significant limitations, including the right of the state to require a tribal attorney to be licensed. In addition, the high cost and requirements of local cocounsel can make appearing in a timely manner for a child welfare matter, time is of the essence. To protect Indian children's tribal interests, tribes and their attorneys should be able to appear as a matter of right and be protected from unauthorized practice of law charges.

Although many tribes receive federal grants for child and family services, those funds cannot be used for legal representation. See, e.g., 25 U.S.C. § 1931(a)(8); 25 C.F.R. §§

89.40-89.41. Other federal moneys for social services are similarly restricted and cannot be used to pay for legal representation. See, e.g., 25 U.S.C. §§ 450 to 458ddd-2. This court rule amendment provides a solution to these funding restrictions. The Washington State Supreme Court has ruled that all parties who appear in court, including Indian children, receive due process and equal treatment under the law. According to the Washington State Supreme Court, the welfare of Indian children in ICWA custody proceedings by ensuring that tribes can meaningfully participate in those proceedings related to their children.

In addition, it is important to note that this amendment to the Washington court rules is not unprecedented. Both Michigan and Oregon have adopted waivers for pro hac vice requirements for attorneys participating in ICWA cases. Michigan's amended civil rule, MICHIGAN CIVIL RULES 3.170, goes into effect September 1, 2017. Oregon's amended civil rule, OR. UNIFORM TRIAL CT. R. 3.170, goes into effect September 1, 2017. Nebraska has codified this in their state law at Neb. Rev. Stat. § 43-1504(3) ("The Indian child's tribe or tribes

State Pro Hac Vice & ICWA

8/14/2019

Pro Hac Vice

Exception for Military Lawyers. The fee and associated counsel are not required for a lawyer who is a full-time active duty military officer serving in the office of a Staff Judge Advocate of the United States Army, Air Force, Navy, Marines, or Coast Guard, a Naval Legal Service Office or a Trial Service Office, located in the State of Washington, and who is not receiving any compensation from clients in addition to the military pay to which they are already entitled. On the pro hac vice cover sheet, you need complete only sections one and three.

Exception for Indian Child Welfare Cases (effective Sept. 1, 2018). The fee and associated counsel are not required for a lawyer who represents an Indian child's tribe in a child custody proceeding under the Indian Child Welfare Act. Please refer to APR 8(b)(6) for all the requirements to qualify for this exception. Lawyers seeking pro hac vice under this exception need only submit to the WSBA the pro hac vice coversheet and complete only sections one and three.

State Pro Hac Vice & ICWA

NEWS > POLITICS

Proposed law would make it easier for Native Americans to argue their side in child custody cases

Tribal representatives could appear in court by phone or electronically.



Proposed law would make it easier for Native Americans to argue their side in child custody cases

By **SANDRA EMERSON** | semerson@scng.com |

PUBLISHED: April 9, 2019 at 3:35 pm | UPDATED: April 9, 2019 at 3:36 pm

California lawmakers are considering a proposal to make it easier for Native American tribes to make their arguments in child custody cases.

Technically, the proposed legislation, AB 686, would let lawyers or other representatives of Native American tribes appear by phone or electronically in cases involving the possible removal of Native American children from their families and tribes.

Such hearings are held as part of the [Indian Child Welfare Act](#), a federal law enacted in 1978 to stem the systemic removal of tribal children from their families and cultures — a practice that at one time touched as many as one in three Native American children.

But the problem AB 686 aims to fix is as much about geography as culture. Often, the hearings that determine where Indian children are placed are held hundreds of miles from tribal lands, making it difficult for all sides to be well represented in court. And without tribal presence during those proceedings, judges are denied information that might make their decision more compliant with the federal law, according to a statement from the Juvenile Court Judges of California to the Judiciary Committee, which passed the bill April 2.



State Pro Hac Vice & ICWA

- Colorado has not loosened but some Colorado courts have allowed for social workers to appear on behalf of tribes in ICWA cases.
 - Ex: Osage Nation case
 - See TurtleTalk at: <https://turtletalk.blog/tag/pro-hac-/>
-

Tribes as Client



COMPETENCY



SOVEREIGN
NATIONS



TRIBAL
CONSTITUTIONS,
CODES,
ORDINANCES, AND
RESOLUTIONS



TRIBAL COURT
DECISIONS



TRADITIONAL LAW



RULES &
REGULATIONS



POLICIES

“In fact, many of the challenges faced by tribal lawyers in daily practice may not be addressed by the Rules. . . tribes have multivalent goals and interrelated constituencies that may transcend a model based on corporate clients. As a practical matter, for example, the attorney may report to the tribe’s executive or legislative branch, but sometimes individual tribal members may believe that the tribal attorney should represent them . . . In some tribes, subgroups of tribal members may claim to represent the tribe in some capacity; indeed, the government recognized by the United States may operate alongside a traditional leadership structure in which clan mothers, village leaders, or religious priests have a role in decision making.”

Kristin A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 *Fordham L. Rev.* 3085, 3093-94 (2013).

Tribes as Client
