

## Tribal Pro Hac Vice ICWA Analysis

Under a federal preemption analysis, the rights and interests of the tribe to participate in ICWA proceedings far outweigh the rights and interests of a state with regard to the practice of law: The state's interest in requiring attorney representation is not as substantial as the tribal interests in participating in ICWA proceedings. The state's interest in adequate representation and compliance with procedure and protocol in general cannot compare with a tribe's interests in its children and its own future existence. Also, in the narrow context of ICWA proceedings, the state interests are not compromised.... With the applicable preemption test weighted in favor of tribal interests, the state requirement of representation by an attorney is preempted in the narrow context of these ICWA proceedings. *State ex rel. Juv. Dept. v. Shuey*, 850 P.2d 378 (Or. App. 1993); see also, *In re the Interest of Elias L.*, 767 N.W.2d 98 (Neb. 2009). Tribal child welfare workers need the protection of federal regulations to prevent charges of unauthorized practice of law and maintain the tribe's practical ability to intervene.

A preemption analysis also applies to the state requirement that tribal representatives when attorneys are bond by the rules of pro hac vice. See, e.g., *In re A.T.*, Order, No. 07JV5 (District Court Moffet County, Co, Jul 28, 2008). Under a federal preemption analysis, the rights and interests of the tribe to participate in ICWA proceedings far outweigh the rights and interests of a state with regard to the practice of law. Tribal in-house ICWA attorneys face numerous barriers in their practice, but a large one is the potential for charges of unauthorized practice of law. Because tribes intervene in cases wherever the tribal children are, tribal attorneys must often appear in states where they are not licensed. This opens tribal attorneys up to unauthorized practice of law issues both in the state where they are intervening and in their home state. While appearing pro hac vice is often offered as a solution, it has significant limitations, including the right of the state to deny the application. See Ga. Comp. R. & Regs. 4.4(d)(1).

Other barriers include cost, number of appearances, and requirements of local co-counsel. Many states have significant fees for appearing pro hac vice. Rule 404(e), SCACR (\$250 for each application in South Carolina); Mich. Ct. R. 8.126 (A)(1)(d) ("fee equal to discipline and client- 17 protection portions" of the bar member's annual dues); IBCR 227(a)(4) (\$325 fee in Idaho); Tex. Gov. Code Ann. § 82.0361(b) (\$250 for each case); Ga. Sup. Ct. R. 2, 3 (\$75 for each application plus a \$200 annual fee); Miss. Rules of App. Proc. R. 46(5)(\$200 for each application). More than one state limits the number of time an attorney can appear pro hac vice. Rule 404(f), SCACR (six times in a calendar year); Cal. R. Ct. 9.40 ("repeated appearances" cause for denial of application; Mich. Ct. R. 8.126 (A)(1)(c) (fewer than

five appearances); Miss. R. App. Pro. 46 (b)(1)(iii)(five appearances); IBCR 227(h)(2) (reciprocal to the attorney's home state number). Other states require the local co-counsel to appear at each hearing. Rule 404(i), SCACR; Ind. Admis. Disc. R. 3; IBCR 227(b)(2); Miss. R. App. Pro. 46 (b)(4), which is cost prohibitive for tribes, essentially preventing tribes from asserting their rights under the law.

Although many tribes receive federal grants for child and family services, those funds cannot be used for legal representation or for legal fees for litigation. *See, e.g.*, 25 U.S.C. § 1931(a)(8); 25 CFR §§ 89.40-41. Other federal moneys for social services are similarly restricted and cannot be used to pay for legal services for litigation. 25 U.S.C. §§ 450 *et seq.* Court rules ensure that those who appear in court receive due process and equal treatment under the law, including Indian children. Accordingly, allowing tribal representatives to appear in court improves the welfare of Indian children in Michigan custody proceedings by ensuring that tribes can meaningfully participate in Michigan child custody proceedings related to their children.