

STATE OF WISCONSIN
IN THE SUPREME COURT

FILED
JUL 17 2018
CLERK OF SUPREME COURT
OF WISCONSIN

**In the Matter of the Petition to Amend
Supreme Court Rule 10.03(4),
Regarding Pro hac Vice Admission
for Nonresident Counsel Appearing
in Matters Involving the Indian Child Welfare Act.**

**PETITION 18-____
Memorandum in Support
of Petition**

Attorney Starlyn R. Tourtillott and Attorney Danica J. Zawieja, counsel for the Menominee Indian Tribe of Wisconsin, submit this memorandum in support of their administrative rule petition. The petition asks the court to amend SCR 10.03(4) to create an exemption from the pro hac vice rule that will apply to nonresident attorneys who appear in Wisconsin courts in cases brought pursuant to the federal Indian Child Welfare Act, 25 U.S.C. § 1911 *et seq.* (ICWA), codified in Wisconsin as the Wisconsin Indian Child Welfare Act (WICWA).

As the court is aware, we initially submitted this proposal in connection with rule petition 17-09, in which the Wisconsin Access to Justice Commission asked the court to amend the pro hac vice and raise the fee to provide additional funding for the Commission.

Several organizations wrote in support of our proposal. The court received comments in support of this proposal from: Nicole M. Homer, Ho-Chunk Nation Department of Justice; Sarah Stahelin, Tribal Attorney, Leech Lake Band of Ojibwe; Kathryn E. Fort, Director, Indian Law Clinic, Michigan State University; Angelica Ramirez, Assistant General Counsel, St. Croix Chippewa Indians of Wisconsin; Amanda L. WhiteEagle, Attorney General, Ho-Chunk Nation; and Eugene L. White-Fish, President, Wisconsin Tribal Judges Association. Ultimately, however, the court voted to deny the fee increase and thus denied the rule petition.

We respectfully request the court add the comments already received pertaining to the proposal to the file created for this new rule petition.

As the court is aware, no individual other than an enrolled active member of the state bar may practice law in this state. The so-called "pro hac vice" rule provides that a court or judge in this state may allow a nonresident counsel to appear and participate in a particular action or proceeding in association with an active member of the State Bar of Wisconsin who appears and participates in the action or proceeding. A nonresident lawyer seeking admission pro hac vice must associate with an active member of the State Bar of Wisconsin, provide certain information (listed in Appendix A to the rule), and pay a nonrefundable fee of \$250 for each application for admission pro hac vice.

These requirements are burdensome as applied to nonresident counsel who must appear in Wisconsin courts on ICWA/WICWA cases. As you know, ICWA seeks to protect the best interests of Indian children and families by establishing minimum standards for removal and requiring

placements that reflect the values of the Indian child's culture. ICWA is codified in Wisconsin. See Wis. Stat. s. 938.028(1).

ICWA establishes certain requirements pertaining to removal and placement of Indian children in foster, guardianship, or adoptive homes, and allows the child's tribe to intervene in the case.¹ When ICWA applies, the child's tribe and family may weigh in on decisions affecting the services and placements for the Indian child. A tribe, parent, or Indian custodian can also petition to transfer jurisdiction of the case to the child's tribal court.

The most precious resource for Tribes and their very existence as a Tribal Nation is its children. ICWA is a federal statute and WICWA has codified the ICWA requirements. Both ICWA/WICWA have national implications on Tribes and practitioners. Thus, a federal preemption analysis is appropriate. Under a federal preemption analysis, the State of Wisconsin's interest with regard to the practice of law cannot outweigh the rights of a Tribe's interests in its children, its very existence as a Tribal Nation through those children, and its supreme right and interest to participate in ICWA proceedings. See, E.g., *In re A.T.*, Order, No. 07JV5 (district Court Moffet County, Co, Jul 28, 2008). In other words, if a child is a member or eligible for membership in a Tribe located within another state, that Tribe has a right to notice and intervention in the case. As a result, Tribes often send ICWA representatives to Wisconsin courts to participate in the case.

Time is of the essence in these cases—Tribal in-house ICWA/WICWA attorneys face numerous barriers in their practice, but a significant 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 in the states where they are intervening and in their home state. While appearing *pro hac vice* is often offered as a solution, barriers include cost, number of appearances, and requirements of attaining local co-counsel. Many states have significant fees for appearing *pro hac vice*. 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.

Under this proposal, the nonresident attorney would not be required to associate with an active member of the state bar of Wisconsin and would not be required to submit the form contained in Appendix A. We consider this request similar to the exemption that currently exists for nonresident military counsel who appear and participate in actions or proceeding representing military personnel. See SCR 10.03(4)(c). Nonresident military counsel are not required to associate with an active member of the state bar and are not subject to the required application and fee otherwise required by the rule. *Id.* This exemption was created with the understanding that such matters are highly specialized and there is no particular merit to requiring nonresident counsel in these matters to arrange and associate with local counsel. The highly specialized nature of ICWA/WICWA law is similar and there is no particular need to associate with local counsel in

¹ ICWA does not apply to custody disputes between parents or family members (such as in divorce proceedings), juvenile delinquency proceedings based on crimes that would be criminal even if the child was an adult (e.g., theft), or to cases under tribal court jurisdiction.

these matters. We note that the State Bar of Wisconsin supports our proposal as proffered in Petition 17-09 and anticipate the State Bar's support with this petition as well.

Moreover, the proposed exemption is consistent with Wisconsin's declared policy regarding ICWA. Wis. Stat. s. 938.028(3)(a) provides that, "[i]t is the policy of this state for courts and agencies responsible for juvenile welfare to cooperate fully with Indian tribes in order to ensure that the federal Indian Child Welfare Act is enforced in this state."

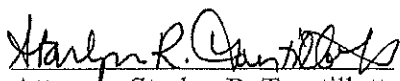
The proposed amendment would require courts to admit counsel pro hac vice. We acknowledge that, traditionally, the decision whether to admit nonresident counsel pro hac vice has been entrusted to the discretion of the court in which the nonresident lawyer seeks to appear. Filppula-McArthur v. Halloin, 2001 WI 8, 241, Wis. 2d 110, 622N.W.2d 436. Pro hac vice has always been considered a privilege, not a right. Jensen v. Wisconsin Patients Compensation Fund, 2001 WI 9, 241 Wis. 2d 142, 621 N.W.2d 902 (citing In re Pierce, 189 Wis. 441, 450, 207 N.W. 966 (1926)). However, the factual basis and legal underpinnings of Wisconsin's pro hoc vice rules have always been based on notions of privilege but ICWA/WICWA intervention is not a privilege but rather a right. As such, representation for that intervening right should be treated differently from Wisconsin's pantheon of pro hoc vice cases. The representation should be treated in the same manner as the right it relates to and not as a privilege. Therefore, as the federal ICWA preempts local bar rules on notice of intervention and rights to intervene by the Tribal Nation, this petition mandates the admission.

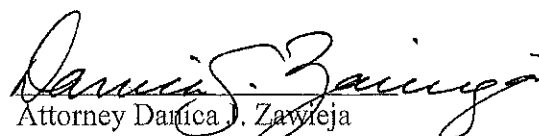
Other states have recently amended their rules in this manner. In the Spring of 2017, Oregon, Michigan, and Utah each amended their pro hac vice rules to permit waivers for attorneys in ICWA cases. See Or. Uniform Tr. Ct. R. 3.170; Mich. Ct. R. 8.126; and UTCR 3.17. In Nebraska, comparable protections are provided by statute. Neb. Rev. Stat. § 43-1504(3) (declaring that "[t]he Indian child's tribe or tribes and their counsel are not required to associate with local counsel or pay a fee to appear pro hac vice in a child custody proceeding under the Nebraska Indian Child Welfare Act").

This proposal would be used only by nonresident counsel who need to appear in Wisconsin courts on ICWA cases and would have no appreciable fiscal impact on the courts or the recipients of the pro hac vices fees. We note that the Wisconsin Access to Justice Commission supported our proposal. Creating this exemption would significantly improve and facilitate access to the courts for nonresident counsel who appear in matters affecting Indian children.

Respectfully submitted,

this 17th day of July, 2018.


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