



Capacity Building
CENTER FOR TRIBES



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CENTER FOR COURTS

Model ICWA Judicial Curriculum

Faculty Guide and Curriculum Materials

Capacity Building Center for Courts

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The CBCC provides consultation, training, and technical assistance to Court Improvement Programs and Tribal Court Improvement Programs on legal and judicial aspects of the child welfare system, including federal law, court improvement, agency and court collaboration, permanency planning, legal representation, and other emerging child welfare issues. The CBCC is comprised of the American Bar Association Center on Children and the Law, the National Center for State Courts, and the National Council of Juvenile and Family Court Judges.

The Child Welfare Capacity Building Center for Tribes (CBCT), is also part of the Children's Bureau's Capacity Building Collaborative which is designed to improve child welfare systems and to support States and Tribes in achieving sustainable, systemic change that results in greater safety, permanency, and well-being for children, youth, and families. The CBCT addresses child welfare needs identified by Tribes, supports efforts for improved Tribal child welfare practice, and works with Tribal child welfare staff to achieve greater safety, permanency, and well-being for children and families. The CBCT also promotes the delivery of culturally appropriate services to American Indian and Alaska Native children, youth, and families.

Assistance in implementing this Curriculum is available through the Children's Bureau's Child Welfare Capacity Building Collaborative. *The content of this product does not necessarily reflect the official views of the Children's Bureau.

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Curriculum Overview

By enacting the Indian Child Welfare Act (ICWA), Congress recognized the abusive child welfare practices and cultural biases in the state court and child welfare systems which led to an alarming percentage of Indian families broken up by often unwarranted removals,¹ and which placed the viability of tribes as political and cultural communities at risk. ICWA is intended to prevent the break-up of Indian families, to protect the best interests of Indian children, and to promote the continued existence of Indian Tribes. State courts and tribes can use ICWA to meet the needs of children and tribes – to enhance sovereignty, continue cultural vitality, and protect children. Because ICWA is a 'remedial act' to remedy past atrocities against native children, families and tribes, understanding and working towards ICWA compliance is restorative justice.

It is essential for judges to develop a solid working knowledge of the requirements of ICWA, as well as an understanding of why the law is necessary, in order to achieve full compliance. Training that provides judges with the foundational knowledge needed to comply with both the letter and the spirit of ICWA is essential to help them best exercise a leadership role, on and off-the-bench, to improve outcomes for Indian children and their families. This Curriculum has been informed by the collective training experiences, strategies, and knowledge of a group of ICWA and judicial education experts. It aims to empower judges to take action to improve ICWA compliance by:

- Underscoring the critical importance of why ICWA is necessary through an understanding of tribal sovereignty, intergenerational trauma, institutional and structural racism, and implicit bias;
- Building consensus that a special focus on actions to ensure the needs of Indian children and families are met and ties to community and culture are preserved is needed;
- Synthesizing the research, information and practical tools that apply directly to judges' daily decision-making; and
- Providing empowering strategies that support judicial oversight and the leadership necessary to promote positive outcomes for Indian children and their families.

¹ Because "Indian" is a legal term of art used throughout federal statutes and treaties, "Indian" rather than Native American/Alaska Native will be used in this curriculum.

Curriculum Goals

- To provide the foundational knowledge judges need to comply with both the letter and the spirit of ICWA.
- To improve ICWA compliance across the nation through judicial education.
- To provide a training model that promotes consistent training to a standard that is broad-based, available to all states, and adaptable to the unique needs of individual jurisdictions.
- To promote an understanding of the importance of tribal children maintaining connections to family, community and culture.
- To promote an understanding of the need for engagement and collaboration with tribal partners to improve ICWA compliance.
- To provide tools and strategies that support judicial oversight and leadership to promote positive outcomes for Indian children and their families.

Curriculum Objectives

After completing the training, participants should be able to:

- Describe the role of the judge in improving outcomes for Indian children and their families.
- Explain the importance of a special focus on complying with ICWA for achieving positive safety, permanency, timeliness, and well-being outcomes.
- Understand ICWA, its historical and cultural underpinnings, goals and purpose, and how that understanding applies to bench practice, daily decision-making, and design and implementation of program, practice and policy improvements.
- Assess the effectiveness of their court's current approach to ICWA cases.
- Set improvement goals and objectives for change efforts.
- Design strategies for court intervention and other best practices to improve outcomes for Indian children and families.

Curriculum Development and Structure

This Curriculum has been informed by the collective training experiences, strategies, and knowledge of a Curriculum Development Advisory Committee comprised of national ICWA and judicial education experts. The content of the Curriculum draws heavily on materials developed and tested in numerous trainings by Advisory Committee members, as well as on technical assistance publications and other tools developed to address ICWA compliance by the Advisory Committee and partnering organizations. The wealth of information made

The Curriculum provides an opportunity to practice application of ICWA to judicial decision-making and case processing to promote positive permanency and well-being outcomes.

available to the Curriculum drafters has been summarized and adapted as a 1 day -1 ½ day training program.

The Curriculum is structured to be a guide for faculty in delivering the training content to a judge-student audience (see more about the target audience below). The Curriculum assumes that a faculty team, including a judge and tribal partner who is a content expert, would ideally deliver the training. The tribal partner may include a judge, elder, social services provider, cultural liaison, etc.

In each Curriculum Module, guidance is provided (i.e., “**FACULTY TIPS**”) about setting the appropriate tone to facilitate learning, how best to reinforce key concepts, where and how to link key concepts to the role of the judge and practice in the juvenile court system,² and how best to facilitate discussion. A template Power Point presentation is also provided and accompanying lecture and discussion material is offered in the faculty guide for each Module. The faculty guide includes options for exercises, group activities and breakout discussions. However, faculty are encouraged to supplement this content with their own expertise and experiences, as well as what they know, or have learned, about the local environment. Space is provided in the guide for faculty to add their own talking points to expand upon the Curriculum content.

Adapting the Curriculum

While the Curriculum is intended to be adapted to reflect local training needs, the Curriculum Advisory Committee believes that every Module in this Curriculum is important to a training designed to improve ICWA compliance and outcomes. If time and resource constraints do not permit a full implementation of the Curriculum (which is designed to be a 1-1 ½ day training), the Advisory Committee strongly recommends that at a minimum, any adaptation **must**

² Juvenile court, juvenile dependency court, juvenile court judge and juvenile dependency court judge are used throughout the Curriculum to refer to courts and judges that handle civil child abuse and neglect or child welfare cases. Some jurisdictions may use different terminology such as dependency court and dependency court judge, or family court and family court judge. Child abuse and neglect may also be handled as part of a general jurisdiction court where judges hear all types of civil and criminal cases.

What You Will Find in the Curriculum:

Recommended Sequence of Modules & Template Agenda

Tips for Preparing to Train, Setting the Tone, & Facilitating Discussion

Faculty Notes/ Tips on Delivering the Curriculum

Presentation Guide with Lecture Material, Recommended Group Discussion & Exercises

Template PowerPoint Presentation

Whenever Possible, Alternate Interactive Activities/Exercises to Engage Participants

Space for Faculty to Add Own Talking Points and Experiences

References, Resources Recommended Readings, & Glossary of Terms

Appendix with Handouts, Exercise Materials, & Continuous Quality Improvement Tools (Including Sample Training Needs Assessment)

include the content on the historical and cultural perspectives on ICWA included herein, as that topic is critically important to an understanding of ICWA and the need to improve compliance.

A number of states have enacted state law provisions intended to improve ICWA implementation and compliance.³ Since this Curriculum does not include all of the state law provisions that have been enacted, faculty and training organizers should modify the Curriculum to include reference to, and discussion of, any relevant state law provisions.

In order to fully engage participants in the subject matter, the Curriculum emphasizes interactive discussion and the use of exercises to illustrate concepts. Whenever possible, a variety of ways to engage participants in discussion and application of material is offered. The time allotted for each section, and overall length of the training is highly dependent on the number and type of discussion exercises and activities selected.

The CBCC recommends that CIPs or faculty take advantage of the tools available in the *Guide to Conducting Effective Training Evaluations: Recommendations, Strategies, and Tools for Dependency Court Improvement Programs*, available from the CBCC or online at www.ncjfcj.org. The Guide was developed for dependency court systems to use as they design and evaluate their training programs and provides strategies and evaluation tools to training coordinators about how to identify training needs, develop training methodologies, and access training outcomes. Prior to training, faculty or training coordinators should understand the needs and expectations of potential participants as well as their current level of knowledge, which should be measured pre and post training in order to have meaningful data to report. Examples of questions that may be included in training needs assessments related to ICWA are included in the Appendix. It may also be useful to utilize the National Council of Juvenile and Family Court Judges' ICWA Discussion Guide in the training needs assessment process.⁴

Adaptations and delivery of the curriculum should be based on identified needs within the state. It is recommended that Court Improvement Projects undertake training needs assessments related to ICWA or conduct reviews of ICWA cases and hearings to determine state-specific strengths and challenges in applying the law. Conducting these assessments prior to training will allow for application of the Continuous Quality Improvement (CQI) framework that is critical to understanding the impact of court reform efforts.

³ See the National Conference of State Legislatures' website for a resource on state statutes related to ICWA [available at <http://www.ncsl.org/research/human-services/state-statutes-related-to-indian-child-welfare.aspx>].

⁴ Available on NCJFCJ's website at <http://www.ncjfcj.org/resource-library/publications/improving-compliance-indian-child-welfare-act-guide-juvenile-and>

Target Audience

This Curriculum is primarily designed for judges who preside over child abuse and neglect or juvenile dependency cases. While judges may be new to the bench, ideally they would have already received some training in child abuse and neglect hearing best practices such as those outlined in the *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*.⁵ Some experience among the judge-students with leading and participating in collaborative systems change efforts aimed at improving the juvenile dependency court system and outcomes is also ideal. For some components of the Curriculum (e.g., goal setting and action planning activities), training organizers may also consider inviting juvenile court system stakeholders to participate in the training, as these individuals would be involved in, and critical to, the implementation of strategies to improve ICWA compliance. If multi-disciplinary stakeholders are to be included, organizers may want to adapt the training program agenda to have some sessions delivered to the judge only (i.e., the role of the judge in improving outcomes for Indian children and families). If multidisciplinary stakeholders and other system partners (including tribal partners) are not part of the training, the Curriculum has been designed so that the action-planning exercise is still relevant to the judge (e.g., judges are given the opportunity to develop personal action plans that address what they can do as judges to improve on-the-bench and off-the-bench practice and compliance with ICWA).

Faculty Requirements

Faculty delivering this Curriculum should be experienced trainers with expertise in teaching judges. It is necessary for this training to be co-taught by a tribal and non-tribal trainer in order to model collaboration and to provide the opportunity for the perspectives of each trainer to be heard. Local tribal representatives and experts should be included as part of the training (see tips for involving local tribal experts below). When using local tribal experts, it is important that they are fully engaged and are given ample opportunity to provide input about the training content and methodologies ahead of time. In order to facilitate linkages between content and practice, ideally one of the trainers should be a judge who has ICWA expertise. Faculty should also demonstrate strong interpersonal skills and be competent group discussion facilitators. Having a team of trainers also provides assistance with facilitating discussion, flip-charting, etc. Faculty will determine, guide and monitor the structure of discussions - drawing on their own knowledge and experience to enrich the delivery of key concepts. They should be adept at providing examples from their own experience of how the course material may be applied in the real world role of the judge in child abuse and neglect cases.

⁵ *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases*. National Council of Juvenile and Family Court Judges, Reno, NV, 1995; *ADOPTION AND PERMANENCY GUIDELINES: Improving Court Practice in Child Abuse & Neglect Cases*. National Council of Juvenile and Family Court Judges, Reno, NV, 2000.

Above all, faculty's role is to create an environment conducive to interactive learning and to engage participants in what might be a difficult conversation about practice issues and bias in case processing, problem-solving, critical reflection, and experimenting with new ideas and options that can be applied to their role as a judge. Faculty should be available before and after the training to address any participant questions, continue to make linkages from curriculum content to judicial practice, and to assist participants in developing action plans and strategies.

Training Methods

A variety of training methods are included in this Curriculum, including lecture, structured exercises and group discussions. Interactive activities are suggested to focus attention and maintain interest in the Curriculum content. Interactive activities also provide an opportunity for participants to get to know each other, express their ideas, and apply what they have learned in the session. Whenever possible, each Module offers options for different interactive exercises that faculty can choose from.

Curriculum Framework

The Curriculum has been designed with a building block approach to learning, with each content Module building on the knowledge, skills and applications learned in the previous section.

Module I – Invocation, Welcome, Introductions and Objectives

The goal of this Module is to set the tone for the entire training by engaging participants in a culturally appropriate, inspirational opening that not only articulates the need for the training but also encourages a learning environment of respect and humility. The Module introduces participants to faculty and to each other in a way that facilitates a comfortable learning environment conducive to open dialogue and peer-to-peer learning. In this Module, faculty and participants are introduced, training objectives and agenda are reviewed, expectations for the training are discussed, and participants are given an opportunity to indicate any special issues and concerns they wish addressed in the training. Participants are also given an opportunity to briefly describe their own court system, including any strengths or challenges they wish to share related to ICWA compliance.

Module II – Historical and Cultural Perspectives on ICWA

The goal of this Module is to provide historical context that will emphasize the importance of ICWA and describe current outcomes for Indian youth in care. Government policies and practices systematically destroyed Indian families and tribes. It was the intent of ICWA to protect Indian children, preserve Indian families and ensure that Indian children are placed where their culture is valued. Judges can follow the provisions of ICWA, but unless they shift their thinking and have a change of heart, their behavior on the bench is unlikely to evolve and the spirit of ICWA will not be fulfilled. Faculty should provide the historical background, stressing tribal sovereignty, as this is foundational to ICWA, and the long-term emotional and psychological damage suffered by Indian children placed in non-Indian homes. After reviewing the past, data on current outcomes for Indian youth in foster care will be shared. This information is meant to illustrate that the tragedies of the past and the passing of ICWA have not done enough and that full compliance with the law is necessary to improve outcomes for Indian families and tribes.

Module III –ICWA Key Components

This Module provides an overview of ICWA, its key provisions and standards. It should not be taught without first covering the materials in *Module II: Historical and Cultural Perspectives on ICWA*. The Curriculum has been designed so that it can be both the judges' first introduction to ICWA while at the same time providing judges with a comprehensive coverage of ICWA's provisions and standards in a one-day training format. This Module is complimented by *Module IV: ICWA and Best Hearing Practice* and *Module V: The Leadership Role of the Judge* which further engage judges in the material by applying what they have learned to the handling of stages of a child abuse and neglect case and to case scenarios, and in the context of the unique role of the juvenile dependency court judge.

Module IV –ICWA and Best Hearing Practice

This Module provides judges with an opportunity to apply the material covered in previous Modules in interactive exercises. These exercises allow participants to reflect on the content material and put it into practice through case scenarios, small group work and consideration of what is required at specific stages of the child abuse and neglect hearing process to comply with both the letter and spirit of ICWA.

Module V—Leadership Role of the Judge and ICWA: On- and Off-the-Bench in Meaningful Engagement and Collaboration

This Module stresses why the material in this training should be of concern to any judge by reinforcing their leadership role in ensuring compliance with ICWA and facilitating better outcomes in cases involving Indian children and their families. The judge's role as leader is discussed as requiring both on- the-bench activities (e.g., setting clear expectations for practice in the handling of cases, holding all players accountable for meeting those expectations, and exercising strong judicial oversight of case progress) and off-the-bench activities (e.g., collaboration with system and tribal partners to ensure positive outcomes for Indian children and their families). Strategies for exercising leadership are discussed, including tips for collaborating with tribal judges and leaders. Participants begin a process of strategic action planning – developing personal strategies for improving on-the-bench practice as well as engaging and collaborating with tribal judges, leaders, social services personnel and/or urban Indian organizations.

Module VI—Concluding the Training

This Module provides participants with an opportunity to ask any outstanding questions and concludes the training in a way that embraces culture and community by engaging in a Talking Circle activity. The Talking Circle activity represents many of the values associated with Indian communities, such as inclusion, empowerment, collaboration, respect and honesty. Each participant is given a chance to say what he/she would like on the topic or experience, without being judged or criticized. After concluding the Talking Circle, faculty thank the participants for their work during the training and contributions, and provide instructions for completing the training evaluation protocols before departing.

Training Materials and Logistics

Course Book:

Training organizers should develop a Course Book to provide participants during the training. Recommended for inclusion in the Course Book are:

- Training Agenda
- Participant list and contact information (if known)
- Faculty biographies
- Introduction section with overall learning objectives for the training
- Objectives and materials for each training Module, including copies of each Module's PowerPoint slides
- Copies of all discussion/exercise instructions and forms
- Copies of course assessment and evaluation materials⁶
- Resources and bibliography

Curriculum Textbooks:

There are no textbooks to accompany this Curriculum, however, the following resources, technical assistance publications and online materials may be distributed to participants to supplement training presentations or accessed by faculty to prepare for the training (additional resources and supplemental readings are also suggested at the conclusion of each Module):

- National Council of Juvenile and Family Court Judges (2003), "*Indian Child Welfare Act Checklists for Juvenile and Family Court Judges.*"
- National Council of Juvenile and Family Court Judges (2013), "Improving Compliance with the Indian Child Welfare Act: A Guide for Juvenile and Family Court Judges," *Issue Bulletin*.
- Native American Rights Fund, "*A Practical Guide to the Indian Child Welfare Act.*"

Number of Participants:

The Curriculum has been designed to accommodate a class size of 50 participants, however due to the interactive nature of the curriculum, a class size of 25 to 30 participants may be ideal.

⁶ For more information on training evaluation instruments please see *A Guide to Conducting Effective Training Evaluations: Recommendations, Strategies and Tools for Dependency Court Improvement Programs*, National Child Welfare Resource Center on Legal and Judicial Issues, as a resource to build an evaluation of the delivery of this Curriculum (available at www.ncjfcj.org).

Room Set Up and Space Requirements:

The training room should comfortably accommodate all learners and the faculty. Two recommended set-ups for the room are either a U-shaped table arrangement or table rounds with 5-6 participants at each table. The training room should be large enough for all participants to stand in one large circle facing center and each other for the Talking Circle activity at closing. Appropriate Indian art, posters, quotes or proverbs posted on the training room walls are recommended to create a supportive learning atmosphere. Posters depicting children and families, both historical and contemporary, are appropriate. Registration materials, including the Participant Course Book and name tags should be prepared in advance, and placed on a separate table along with other Curriculum resources.

The set-up for the training room should include:

- 2 Flipcharts at the front of the room
- Table to accommodate faculty's materials and laptop at the front of the room
- Lectern (optional)
- Table to accommodate LCD projector
- Projection screen at the front of the room
- Table at the side of the room for additional training materials, supplies, handouts, etc.

Food and Breaks:

- Training organizers should plan to have food (continental breakfast, lunch and an afternoon break snack) for participants and faculty.
- Drinking water at each table round should be provided for participants and faculty.

Supplies and Equipment Needed:

- LCD projector with remote
- Laptop computer (with DVD/CD/USB)
- Laptop access to the internet (to access embedded links to videos and other materials online if needed)
- Projection screen
- External computer speakers
- 2 Flipcharts (preferably self-adhesive), flipchart markers (assorted colors), 2 easels
- 2 rolls masking tape if not using self-adhesive flipchart pads
- Extension cord
- Power strip

- Lavalier microphones (optional)
- Name badges
- Name tents
- Pens, paper for each participant

Training Materials:

- Provide faculty with the Faculty Curriculum Guide
 - Orientation to the Curriculum and expectations for faculty
 - Overview for each Module, including:
 - Learning objectives
 - Estimated time
 - Participant materials
 - Module content and faculty directions/notes
 - Power Point presentations
 - Suggested exercises, discussion items, etc.
 - Equipment and supplies needed
- Provide participants with Participant Course Book, handouts and resource materials

Additional supplies, equipment, materials identified:

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PREPARING TO CONDUCT THE TRAINING

The best trainings are no accident - they are the result of trainers spending the time necessary to get to know their training audience, needs and expectations for the training, and to become familiar with the training material. Effective trainings take practice and planning.

While immersion into the local tribal culture is likely not possible, providing an immersion element to the training (such as incorporating food, blessings, and other cultural traditions) is ideal as it helps participants to understand and to learn Tribal culture and values through experience. Implementing a cultural immersion approach to the training requires additional planning and a tribal co-trainer who is comfortable facilitating and training in a tribal format and within tribal values and beliefs. This model curriculum recommends opening the training in a culturally appropriate way, incorporating the sharing of food (as a family and Tribe would do in any social activity) with a blessing preceding eating, and closing the training with a culturally appropriate activity such as the talking circle.

Getting to Know Your Audience - The Training Needs Assessment:

Faculty should be provided in advance with a list of attendees, including their names, positions and places of employment or professional roles. If possible, faculty should obtain results of any training needs assessment that has been conducted prior to implementing the training outlined in this curriculum. Findings from a training needs assessment will help you to determine the specific needs of your training audience and how best to adapt the content of this Curriculum to your audience. It will help determine your audience's motivations for the training and whether there are any differences in their readiness to learn. You can also obtain information about existing system strengths and collaborations that facilitate the design and implementation of practices aimed at improving outcomes for Indian children and their families, as well as any system challenges that may hinder such efforts. All of this information can be used to make modifications to the training agenda such as emphasizing specific sections or critical points based on audience needs, selecting specific exercises and discussion items, and building practice examples that are tailored to what you now know about the training audience and jurisdictional strengths and challenges. Training needs assessments, if structured to obtain information about participants' gaps in knowledge and pre-existing behavioral patterns and attitudes, can also provide important baseline data that can then be compared to questions about their knowledge, behavior and attitudes post- training.

A sample ICWA-specific training needs assessment is included in the appendix to this Curriculum. But even if a formal training needs assessment is not used, faculty should build informal training needs assessment into their preparation to teach the course. Before conducting the program, for example, work with training organizers to obtain information about your target audience such as any information about baseline knowledge, behavior and practices. You should also ask for copies of existing reports or records for hard data about a jurisdiction's practices and outcomes related to ICWA compliance. If time and resources permit, you may choose to administer a brief questionnaire before participants attend the training to obtain pre-training information about knowledge, behavior and practice, system strengths and challenges, and expectations for learning (a sample questionnaire is included in the appendix).

The following are some “needs assessment” items that will help you adapt the training to your audience’s needs:

- Invite training organizers to share their thoughts on what they believe training participants will likely need from the training.
- Determine in general at what level the training will be taught (judges who are new to their role, judges with moderate experience, or very experienced judges).
- Determine training participants’ experience with collaboration, leadership and reform initiatives.
- Determine existing programs, practices or policies aimed at improving ICWA compliance, and determine system strengths that support such efforts as well as any system challenges.
- If available, obtain jurisdictional outcome data for ICWA compliance safety, permanency, timeliness and well-being data for Indian children. Refer to these data throughout the training as relevant.
- Physically observe stakeholders in the field to gain knowledge of their ICWA practices.
- Help participants identify what they don’t know with respect to complying with both the letter and spirit of ICWA, and what they need to develop greater competency in. Accomplish this by asking them to complete a brief questionnaire (see the *Training Evaluation Guide*⁷ for how trainers can gauge participant expectations for the training and determine if those expectations have been met).
- Review previous course evaluations of local ICWA trainings to determine what areas need to be emphasized and what topics require less time.

⁷ *Supra*, note 6.

- Identify barriers and constraints to conducting the training, determining which ones you can manage and which ones you need assistance with.

Additional information to obtain about training participants:

Understand Relevant State Statutes and Court Rules

This Curriculum is intended to apply to all jurisdictions because of its focus on federal law and policy. As a result, it should be adapted and tailored to the specific local jurisdiction of the training in order to be most relevant to local practice. In addition to understanding the training needs of the participants, therefore, faculty must familiarize themselves with local state statutes and court rules and policies that impact ICWA practice and compliance. This knowledge is important to not only establish credibility with the audience, but also to help you ensure that the Curriculum material is as relevant as possible to local practice.

Reach Out and Involve Local Tribal Experts⁸:

The Advisory Committee and authors who developed this Curriculum highly recommend that trainers reach out to and involve local tribal experts in the training – they are important cultural and historical informants and will be invaluable to delivering a successful training. Including tribal experts also serves as an example of collaboration between the state courts, tribal courts and tribal communities in action.

Some ways you can involve tribal experts, in addition to being co-trainers, include:

- Including an Indian foster alumni or Indian adult adoptee panel to share their experiences
- Include a tribal leader, elder, or cultural liaison to do a welcoming

⁸ For more tips on following protocol when outreaching to and involving tribal experts see http://calswec.berkeley.edu/files/uploads/pdf/CALSWEC/AIE/AIE_CET_Tips_Protocol.pdf

The following tips for involving local tribal experts are adapted from *Indian Child Welfare Act: Active Efforts and Expert Witness Trainer's Guide*, Judicial Council of California, Administrative Office of the Courts, Center for Families, Children and the Courts:

It is best to prepare and plan for including one or more tribal experts in advance with appropriate invitations. The following are suggested steps for inviting and including Tribal participation in the training.

1. Using your contacts and reference persons, identify in advance ICWA designated agents, tribal trainers, tribal judges, tribal attorneys, tribal social workers, tribal leaders, tribal elders, tribal youth, and tribal families. Ask them if you can meet with them to get their advice.
2. When you are meeting with Tribal representatives, tell them that you know they have worked for the community a long time and would like to ask for their help and advice to help non-Tribal judges better understand how to improve their practice in cases involving Indian children and their families.
3. Ask the tribal representative(s) who assisted in the planning and training to help welcome everyone, share the jurisdiction of the event - promote a role them that will help guide the conversation in a "we" manner at the front, preventing the perception of an "us vs. them."
4. For guest Tribal representatives, describe the training and ask if they would be comfortable sharing their experience and thoughts, answering a few questions, and/or leading the group in an invocation and/or a traditional closing ceremony such as the talking circle activity suggested in this Curriculum. If the Tribal expert is the co-trainer, the involvement will of course be significantly greater: collaborating in planning the training, co-leading throughout the training day; and debriefing after the event.
5. Always follow up with questions and send materials in advance to Tribal guests and training partners. It's important to be able to pronounce names, titles, and Tribal affiliations correctly for the proper introductions.
7. If honorariums are not available for guest speakers, try to provide gas mileage or other travel support and small appropriate gifts. Be sure to provide the Participant Course Book for each guest along with name tags and table assignments.

Know the Topic and Training Material:

The following are suggestions for you in preparing to conduct the training contained in this Curriculum:

- Learn the material. Know the material inside and out and make your own notes about the information so you can use the Module PowerPoint presentation as a resource, not a crutch. Preparation will ensure you can answer any questions correctly.
 - Know the content of any technical assistance publications and other readings recommended for this training.
 - Familiarize yourself with the Faculty Guide format and content.
 - Review the faculty notes and tips in each Module for any special requirements for that Module.
 - Go over the recommended readings for each Module - this will improve your content knowledge and you will be prepared to answer unexpected questions.
 - Obtain and review local data, any tribal-state ICWA agreements, relevant statutes, case law, policies, procedures, court rules and administrative orders – spend the time noting jurisdictionally specific issues/ practices in the Curriculum Modules so you will be sure to adapt the “nationally-generic” material to the specific local training site.
- Prepare additional examples drawn from your own experience that you can use to illustrate and clarify curriculum content and information during group discussions.
 - Use your experiences to illustrate points. Personalizing information with your own anecdotes or other tactics will enhance the impact of slides and handouts.
- Use your own words. The training will be more interesting for participants and you will be more confident if you know the salient points well enough to express them within your own style.

Joint Preparation with your Co-Trainer:

Just like working on any team, getting comfortable with your co-trainer takes time and energy. Neglecting to build your training team and clearly define roles can lead to power struggles and land you in difficult situations during the training. Avoid embarrassing yourselves and alienating participants by meeting (in person or via conference calls) with your co-trainer prior to the training, to establish who will do what and to divide up the Modules’ sections.

Make sure to discuss preferences for how to support one another in the training. For example, some trainers don't mind their co-trainer interjecting an example story here and there, or responding to participants' questions even when it isn't their turn to teach, while others feel offended by such behavior. There is no right or wrong; the key is to discuss how you will proceed with your co-trainer in the preparation phase and not in front of the training participants.

Work together with your co-trainer to identify or discover what issues and challenges are facing the courts in recent /visible ICWA cases and discuss strategies to address these issues and challenges and/or make space for discussions about them. Be mindful that there may be cultural differences, including regarding tone –it would be helpful to discuss and agree upon respectful cues or ways to assist each other in keeping the training on track with time. Discuss the cultural/historical module at length and achieve clarity and vision for the outcome of this module. Discuss the talking circle and beliefs about opening with a blessing or prayer and come to a consensus about what tribal values to illuminate during the training.

Some questions you should discuss with your co-trainer:

- Can we set up a schedule of conference calls before the training to prepare?
- What do you consider your strengths as a trainer/facilitator?
- What ICWA training have you observed or trained on and what stands out as especially successful and why?
- What pitfalls, stumbling blocks or challenges have you encountered when training on ICWA and what strategies have you used to overcome those issues?
- How comfortable are you with integrating Indian culture into the format of the training?
- How do you want to divide up the Modules?
- Do you mind if I interject with my own anecdotes, ideas or responses to questions while you are leading a section?
- Do you want me to keep notes and flipchart while you lead discussions and vice versa?
- How should we monitor the time?
- How should we alert each other that the allocated time for a section is running out?
- If we need to speed through a section of the Module because we are running short on time, which section should we abbreviate?
- How can I best support you?
- In each Module, which exercise options would you prefer?
- When the training is over, can we meet to debrief and give each other feedback?

[illegible]

SETTING THE RIGHT TONE

Trainers have the opportunity to set the tone for the training. Setting the right tone is important. Think about working toward the state of being you are in when you are about to host a holiday meal. You want everyone to feel acknowledged and important. You want everyone to enjoy the meal, laugh at least once, share stories, and have an epiphany. Ultimately, you want everyone to have a special time while they are there. The training is an important event – it may be the only time you have to get everyone together so you need to model openness, warmth, genuine concern, flexibility, and never lose control or let the conversation get out of hand.

This section of the Faculty Curriculum Guide covers areas that will help you establish an open and honest learning environment and engage participants early on.

Greeting:

A person's first impression of trainings can shape her or his whole experience. That is why it is important to finish setting up the training room a few minutes early and be ready to greet participants as they enter the room. It is appropriate, or ideal, to greet each person individually with a warm handshake. Introduce yourself as the faculty person; invite participants to help themselves to refreshments and to pick up their name tags and table tent cards. If appropriate, make sure they sign the participants' class list and the lists for relevant continuing education units.

Be sure to introduce participants to each other, introducing those who share jurisdiction, partners, interests, who are activists, who are educators, and let the sense of being connected begin as soon as possible. If someone from the local tribe attends, and/or they are a recognized leader, council member or hereditary leader, recognize them and thank them personally at the beginning of the training. If appropriate, ask them to make a few comments at the beginning of the training about the importance of the training and to welcome everyone.

It is the trainer/hosts' role to begin engaging each participant from the very beginning of the training – the degree to which you have engaged participants and made them feel welcome and comfortable, starting at the front door, through the official welcome/introduction to the first few modules, will factor greatly in achieving a successful outcome. See the section on facilitating discussion in this faculty orientation for some tips for engaging participants and encouraging dialogue.

Group Agreements:

Before beginning the training, set some group agreements or ground rules for the training. Group agreements establish the way participants interact with one another

during the training. You can also use the agreements to defuse or redirect difficult situations. Group agreements don't need to be extensive. You can either allow participants to come up with their own, or prepare a list of group agreements for them to consider in advance, making sure to ask participants if there is anything they would like to add to the list. This allows participants to feel that their voices are heard.

Some sample group agreements are:

- Cherish diversity
- Keep an open mind
- Everyone participates
- Be open and honest
- Be present and actively engaged
- We are all experts and we are all learners
- Assume good intentions
- Listen and process what others are saying
- It is okay to disagree - but do not be disagreeable
- All responses are valued
- Respect one another
- No side conversations
- Return from breaks on time
- Manage electronics
- This is a no cell phone zone - Turn your cell phones off or on vibrate
- Keep a sense of humor

Demonstrating your Credibility:

There are a number of steps you can take to ensure participants view you as a credible trainer. The steps are:

- Always be honest with participants. If you don't know the answer to a question, don't make one up. Commit to researching the question and getting back to the questioner.
- Make sure the audience knows you are the expert - you can do this by sharing your background and linking content to real world practice. Support the information with your own facts and experiences.
- Cite authorities that are accepted by your audience (e.g., demonstrate your knowledge of local tribal communities, tribal courts, state statutes and state court rules).
- Invite questions from the audience. Write questions that arise on a piece of flipchart paper, using that as a "parking lot" for issues. Use that list as a summary

at the end of the training - this demonstrates your concern that participants' issues were addressed and questions were answered.

- Ask participants questions about their own experience. These are invitations to share what they know and their expertise with their colleagues.
- Refer back to comments that participants have made and use their name. This reinforces participant involvement and highlights important comments made by participants. It also strengthens the interpersonal relationship between you and the participants.
- Don't apologize for any nervousness or mistakes; just keep moving through the material. Apologizing can call the audience's attention to something they didn't even notice.
- Remember, you know the material. Increase your confidence by reminding yourself that you and your co-trainer are well-prepared.
- Rehearse. After you have mastered the material, practice the presentation until you feel confident.
- Know the room, the equipment and the materials in the participants' Course Book.
- During breaks, make yourself available to answer any questions.
- Know the participants. Reach out to training organizers to learn more about the participants that will be attending the training. Obtain formal or informal needs assessment information.

Letter to Participants:

Training organizers should send a letter to participants in advance of the training advising them of the date, start time, location and parking arrangements. This is an opportunity to review the training goals and objectives with the participants, introduce the faculty, set expectations for learning, and begin to set the tone for the training event. The participant letter should not only prepare trainees for the training but also excite and motivate them for the training experience. The letter may also ask participants to bring with them any pre-training related exercises or assessments if trainers have selected a training delivery option requiring that trainees arrive with those materials completed. If you are partnering with tribal representatives or organizations, be sure to develop the letter to participants together and send it out jointly - this models collaboration.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins or other markings on the paper.

FACILITATING DISCUSSION⁹

The Curriculum relies heavily on interactive exercises and group discussion to explore training content and to afford training participants with opportunities to apply that content to their role as a judge. Trainings that are interactive are more effective than lectures because participants' involvement and experiences become part of the learning process. Actively engaged participants are more likely to recall and use the information outside of the training. However, leading an active training requires good facilitation skills. Faculty tasked with implementing this curriculum will need to hone their facilitation skills or be supported by co-trainers with expertise in group facilitation.

Leading vs. Directing Discussions:

As faculty, one of your roles is to direct and facilitate participant discussions. In exercising this role, you should focus on drawing ideas out of the participants, rather than dominating with your ideas and experiences. Sharing your own experiences is important, but be careful not to dominate the discussion.

The following are tips to facilitate rather than to direct discussions:

- Be respectful of the participants. Demonstrate this respect by calling them by their names and listening actively.
- Be enthusiastic about the topic and the training program.
- Ask and encourage questions and idea sharing.
- Be clear and direct. Give examples and avoid passive voice.
- Keep your own contributions during group discussions brief. Let participants respond to questions and to one another first.
- Use silence to give participants time to think about an answer or response to a question before you respond. Count to ten – if you don't get any responses from the participants rephrase the question and count to ten again.
- Encourage the participation of people who have been quiet. One way to do this is to state the participant's name first and ask the participant an opinion with no correct answer or to share an example from their own experience.

Be careful not to shut down a person who gives an incorrect response. This may freeze the discussion as others will not want to risk responding for fear of being shut down. To minimize the potential for embarrassment, acknowledge the effort in the response and then redirect the question to the entire group. For example, you might say, "Interesting ... I can see how you might come up with that idea ... but that's not exactly what I'm looking for ... who else has a different thought?"

⁹ See for example: Krueger and Casey (2000); and Shuman (2005).

Answering Questions:

As a trainer, one of the most common questions you will ask your audience is, “Does anyone have any questions?” If, in response, you are asked questions you think the group can answer, redirect them to the group to encourage active learning.

The following tips may be helpful in answering questions from training participants:

- You’re asked a question that you can’t answer. Don’t be defensive or try to fake it. Just say you don’t know the answer and ask to get back to the person later.
- You’re asked an extensive question. Break the question down into smaller parts and keep your answer as concise as possible without omitting key details.
- You’re asked a question you already answered. Reframe your answer – if the individual still doesn’t understand, but the rest of the group looks distracted or bored, ask to talk about it in more detail at a break or after the training.
- You’re asked a question that you think is stupid. Be patient and respectful in framing your answer.
- You’re asked a controversial question. These are good questions as it means participants are thinking critically. Take your time in answering and don’t be pressured into saying anything you don’t mean.
- You’re asked a provocative or hostile question. Stay calm. Rise above it by sticking to the curriculum content and re-focusing the participant on the issues at hand.
- You are asked a question with a very specific complicated fact pattern that appears to be personal to the participant. Answer the question in a way that is generally applicable to the rest of the group. Offer to meet with the participant at a break or after the training to discuss his or her situation in more detail. Be mindful of the rules regarding the giving of legal advice however.
- You’re asked a question that you don’t immediately understand. Take a few moments to collect your thoughts before trying to answer. Stay engaged with the participants by repeating the question back to the participant, asking for clarification, or asking the participant to repeat the question because you’re not sure you heard it correctly.
- You’re asked a question that requires a “yes” or “no” answer. Instead of giving a one word answer, try to add some detail to let the questioner know that you don’t think the question is inconsequential.

Active Listening Skills:

Active listening skills are essential for discussion facilitation. Active listening builds understanding and consensus in a group because it responds to content and feelings in a way that enhances mutual understanding. Active listening skills are: encouraging, paraphrasing, clarifying, reflecting, summarizing and tracking, validating, and stacking.

Encouraging – Encouraging creates a space for people to participate without putting any one individual on the spot. Encouraging is especially helpful at the beginning of a discussion, while participants are warming up to the conversation. As faculty, you also convey interest in the discussion through encouragement. When using encouragement, don't agree or disagree. Use neutral words and vary your voice intonations. Some examples of encouragement techniques are:

- Who else has an idea?
- Can you tell me more?
- Does anyone have a personal experience you are willing to share that relates to this issue?
- Is this discussion raising questions for anyone?
- If the group is stiff - faculty can prompt the group with a question and mimic a talking circle by asking everyone to take a moment to share their thoughts.

Paraphrasing – Paraphrasing is a fundamental active listening skill. Paraphrasing assures individuals that they are being listened to and that they are understood. When paraphrasing, be sure to use your own words to say what you think the speaker said. If the speaker's statement is long, summarize it. Some examples of paraphrasing techniques are:

- It sounds to me you are saying ...
- This is what I am hearing you say ...
- Let me see if I understand ...

Clarifying – Clarifying is a way of giving individuals the support they need to refine their ideas. It can be used to better understand what was said, to get more information, and to help the speaker see other points of view. Clarifying is particularly helpful when someone is having difficulty expressing an idea or when someone thinks she is being clear but the thought is actually vague or confusing to listeners. In order to decide whether or not an idea needs to be clarified, ask yourself, "Do I think I understand the core of what she is trying to say." If the answer is no, attempt to clarify. Some examples of clarifying techniques are:

- Can you say more about that?
- What do you mean by ... ?
- Can you give me an example of what you mean?

Reflecting – Reflecting is the act of telling someone your interpretation of the basic feelings she expressed while speaking. Reflecting allows you to show the participants that you understand how they feel. It also allows participants to evaluate their own feelings after hearing them expressed by someone else. Some examples of reflecting techniques are:

- You sound very excited about ...
- You seem frustrated about ...
- I'm hearing a sense of ...

Summarizing and Tracking – Summarizing is the work that facilitators do to review the progress of the discussion, pull together the important facts and ideas, and establish the basis for further discussion. Summarizing should not be saved solely for the end of the discussion. It should be used periodically throughout the discussion to ensure that participants understand what is being discussed and the direction the discussion is moving. Tracking is a form of summarizing used when several lines of thoughts exist within the same discussion. Tracking lets people see that several elements of the topic are being discussed at once, and that all elements are valid. Tracking also helps maintain the clarity of exactly what is being discussed. Some examples of summarizing and tracking techniques are:

- In this discussion we first heard that Then we agreed that And finally we decided
- It sounds like there are three conversations going on right now ... I want to make sure I'm tracking them correctly ... It sounds like one conversation is about ... Another is about ... And a third is about ... Am I getting it right?

Validating – Validating acknowledges the worthiness of another person. Validation demonstrates that you value the participant's ideas, opinions, and feelings; as a result the participant is likely to remain engaged in the training. Some examples of validating techniques are:

- I really appreciate your contribution/ idea/ opinion
- I really value your participation
- I am excited by the interest you are expressing

Stacking – Stacking is a procedure for helping people take turns when several people want to speak at once. Stacking lets participants know that they will have a turn to speak and frees-up the facilitator to listen instead of constantly trying to remember who has spoken and who is waiting to speak. If you have a co-trainer, one of you may lead the discussion while the other helps “stack” the individuals who have a contribution to make. While stacking is not technically an active listening technique, it helps both the facilitator and participants maintain active listening. Some examples of stacking techniques are:

- Judge Thomas you're first, followed by Judge Smith and then Judge West. [When Judge Thomas finishes, then say "Who was second, was it you Judge Smith? Go ahead ..."]
- After the last person in the "stack" has spoken, ask "Did I miss anyone? Does anyone else have something to add?"

If you are able to, write down the names in the order that they raise their hand so you will not overlook anyone.

Handling Difficult Group Interactions:

Regardless of your skill as a facilitator and the amount of preparation you put into the training, you will inevitably face some difficult group interactions.

The following are some tips for handling difficult group interactions:

- **Aggressive or Defensive Posture.** It can be the case when there are tribal and non-tribal participants that one group takes an aggressive/defensive or "we" vs "them" posture. At these times, the trainer/facilitator can remind participants that they are there to improve outcomes and that underlying their participation is the acknowledgement that this needs to be done together.
- **Discussion Dominators.** If someone is doing a lot of talking it may prevent others from contributing their thoughts which limits their active learning. Wait for a pause in the dominating person's speaking and respectfully acknowledge his contribution. You can say something like, "I really appreciate your comments." Then, make direct eye contact with other participants and ask something like, "I'm very interested in hearing how other people feel about this issue ..." or "Let's hear from others on this issue as well."
- **No Response.** Even the most stimulating discussion topics can fall flat with a group that simply stares at you blankly. In this kind of situation, it is helpful to understand why participants are not responding.
 - Did you ask a question that was difficult for the participants to understand? If so, rephrase the question.
 - Are people feeling uncomfortable about talking? This can happen at the beginning of training and is less likely to occur when the facilitator is able to set a comfortable tone and put people at ease. If no one responds to a discussion item, and you aren't sure why, it's okay to wait it out. Be silent and give people time to think. Often someone will speak up because they find the silence uncomfortable.

- Are people tired of talking about the topic? In this case, it may be important to ask if there is anything else that the group would like to share ... if not, then say that you can move on.
- Are participants bored of discussions and need more stimulating activities to get them thinking? Even though this curriculum offers options for discussion and exercises, be sure to strike a balance between the discussion items you select and other interactive activities (don't load up on one at the expense of the other). Be prepared to be flexible – you may need to drop the discussion you planned and implement an exercise instead if you feel the participants are dragging. Review each Module for options for transforming discussions into exercises.
- **Off-Topic Discussions.** When the group begins to talk about issues not relevant to the topic you might take advantage of a pause and say, “thank you for that interesting idea . . . perhaps we can discuss it during the lunch break or at the end of the training session . . . but in order to stay on schedule and focused on our specific goals today, with your consent, I'd like to move on.”
- **Side Conversations.** One of the best ways to handle a situation in which some people are having a private discussion is to address it before the training begins, when you set the ground rules. Stress that it's very important not to have side conversations because it interferes with individuals' full participation in the group discussion. Don't stop the side conversation abruptly. Unless a side conversation is so distracting that it absolutely cannot be ignored, do not interrupt a speaker in order to ask others to quiet down; this may make the speaker lose his train of thought and can disrupt the flow of the discussion. Instead, wait until the speaker has finished and respond to the person first. Then, you might respectfully remind people of the ground rules and ask that people finish their conversations and rejoin the larger group discussion.
- **Skipping Ahead.** When a participant skips ahead, providing information relevant to topics you have not covered, you can use probes to return them to the topic at hand. You don't want to interrupt the participant; instead, let him finish his thought and remain an active listener. Acknowledge that what he said was an interesting point and that you would love to hear more once the group moves to that topic. Once you get to that topic, acknowledge that relevant information has already been shared, paraphrasing with the participant had said. Ask the participant if there is anything else he would like to add to the topic and then ask for group feedback on his points. Make sure that all group members have an opportunity to explore the issue more fully, if need be.

- **Interpersonal Conflict.** If two or more participants in the group begin arguing with each other in an unproductive manner, you must confront the situation before it spirals out of control. You can try to defuse the situation with humor, or give the participants an easy way out of the argument by reframing what they are saying and moving on. If this doesn't work, direct the whole group to the group agreements. . If the conflict continues, address the problem directly, asking for any underlying reasons that might be fueling the conflict. Finally, if that doesn't work, respectfully ask the individuals to table their discussion and to speak with them at a break.
- **Rambling Discussion.** In order to get through the whole training agenda, some discussions may need to be curtailed, even if they are productive and interesting. When a discussion has gone on for too long, you can jump in when someone takes a breath and comment on the quality of the discussion, but add that it is time to move on. Summarize the key points and offer to resume the discussion later if there is time.
- **Respectfully Interrupting an Elder.** While it is never respectful to interrupt an elder, you can plan ahead and prepare the elder ahead of time to be aware of the time available for speaking and to ask for permission to give non-verbal cues to help let them know it is time to wrap up. Be aware of the tone of your voice and body language and ensure it is respectful and patient. If it is absolutely necessary to interrupt, do not abruptly interrupt, but wait for a natural pause to jump in and thank them for their insights and guidance before redirecting. It may be that this conversation needs to continue, if need be, ask if it can be continued at lunch or at another time. Regardless of the specific time management strategy you use, such as providing a 5 minute or 3 minute time reminder to the speaker, the most important key to being respectful is to talk with and mutually agree on the strategy ahead of time so it is respectful. It is also critical to listen to what the elder is saying. There are times when the content of what the elder is saying will be more important than getting behind a few minutes.

[illegible]

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MODULE I:

Welcome, Introductions & Objectives

MODULE I: WELCOME, INTRODUCTIONS AND OBJECTIVES

Module Overview:

This Module sets the tone for the entire training by engaging participants in a culturally appropriate, inspirational opening that not only articulates the need for the training but also encourages a learning environment of respect and cultural humility. The Module also introduces participants to the faculty and to each other in a way that facilitates a comfortable learning environment conducive to open dialogue and peer-to-peer learning, and familiarizes participants with the Curriculum objectives. Specifically, in this Module faculty and participants are welcomed via a culturally relevant opening, are introduced to each other, review training objectives, the agenda and expectations for the training, and are given an opportunity to indicate any special issues and concerns they wish addressed in the training.

Module Objectives:

- To welcome participants in a culturally appropriate way;
- To set a tone of respect and cultural humility;
- To learn more about participants through introductions;
- To encourage active participation in the training;
- To review curriculum learning objectives and training agenda; and
- To provide an opportunity for participants to express any special concerns or training needs.

Presentation Outline

- Welcome
 - Culturally appropriate welcome/ invocation
- Faculty and Participant Introductions
 - Introductions; Participant expectations for the training
- Learning Objectives and Agenda Review
 - Learning objectives; Agenda; Housekeeping items

Activities and Exercises

- Introductory Discussion: Participants share relevant experiences and expectations for the training
- Ice-Breaker
- VIDEO: *Bringing our Children Home*

Approximate Time for Module: 30-45 minutes depending on size of group and introductory exercise(s) selected

Faculty Tips/ Notes – Preparing for the Module and Additional or Alternate Activities and Exercises:

1. **THE WELCOME:** In order for the training to set the right tone, a customary welcome or invocation should be arranged in advance. This can include inviting local tribal judges, members of tribal government, elders or cultural liaisons. Ideally, someone from a local tribe will be available. An opening may include a song, prayer, or a few statements by a tribal member. The inclusion of traditional ceremony will signal to participants that this is a different kind of training and may evoke creativity, awareness, humility, and respect.

An example of an opening or welcome with a cultural immersion format: Ask everyone to stand in a circle. **Some framing of the value of having a tribal opening can convey that for generations tribal people have begun important meetings with a way that allows their ancestors to be present, and to honor the prayers that have been said for our justice system and tribes to work together.**

By inviting a tribal representative, ideally a leader or person in authority, you are demonstrating that you acknowledge and value their leadership. It also engages them in the training and can open the door to beginning or improving relationships. The protocol when inviting a tribal guest to share an invocation or welcome is to honor them with a gift. The gift is not a token but a symbol of appreciation. Typically it would be of significance and value, reflecting the area from which it comes and the person. For example, one of the gifts used by some members of the Curriculum's Advisory Committee in trainings has been a baby's Pendleton blanket, which is symbolic of the lives of the children and families that person touches. Other gifts might be something from the land or local area such as local honey or a gift basket of local wares. For more information on tribal protocol refer to Tribal Star's Tips for Following Protocol available at:

http://theacademy.sdsu.edu/TribalSTAR/resources/Resource_List.htm

While participants are registering, entering the room and getting settled, display the "Welcome" slide [SLIDE 2] included in the template Power Point materials for this Module. This slide should be modified to include tribal art if desired (see comment below), the title and date of the training, sponsors and partners for the training, and names of faculty conducting the training.

2. The Power Point slides for this Module, as well as for the entire Curriculum, have been designed as templates whose look can be modified by the faculty. For local trainings, you may wish, for example, to insert images or art from local tribes into the

template PowerPoint. Check with the local tribal ICWA worker or cultural coordinator about what art and photos may be appropriate to use. You may also want to include the tribal logo. For regional trainings, be sure to include images that are appropriate to regional indigenous peoples (e.g., Pacific Northwest Indian images and art for training in the Pacific Northwest, Southwestern Indian images and art for training in the Southwest, etc.).

3. Because individual preferences exist with respect to PowerPoint animations, the Template PowerPoint slides do not include animation. While preparing and familiarizing yourself with the presentations in this Curriculum, you should add appropriate animations to slides to suit your presentational style.
4. During introduction of participants, in addition to name, professional role, and years of experience, you may want to ask: where are you from? What community (ies) do you belong to? What is your background or heritage? What languages do you speak?

In addition to, or instead of the focused discussion about participant expectations outlined in the Module presentation section, Faculty may wish to include an **ICE BREAKER ACTIVITY** as part of participant introductions. Some sample ice-breaker activities are provided below.

- a) **ICE BREAKER: “3 COMMON AND 1 UNIQUE:”** Divide the large group into small groups of 3-4 people (or, people seated at each table round may constitute a group). The objective is to uncover 3 things all members of the small group have in common (other than the obvious things such as they are all judges). In addition to 3 things all members have in common, ask groups to discover one thing that is unique to *each* person in the group. Let participants’ select one member of each group to be the “scribe” and to report back.

Give the Following or Similar Instructions: “For the next 5-10 minutes we are going to ask you to look for 3 things each of you has in common with the other members of your small group (except the obvious things such as you are all judges, live in the same town, you’re all human, you’re all the same gender, etc.). In addition to 3 things in common, find 1 unique thing for each member in your group. Have someone at your table be your scribe - the scribe will write down what you discover. For the unique part, you don’t have to be the only person in the world who has that trait, just the only person in your group. When you are finished we will ask each group member to introduce themselves to the larger group (give your name, jurisdiction, and how long you have been a juvenile court judge hearing child abuse and neglect cases). Then, your group’s scribe will

report on your group's similarities and individual uniqueness. Are there any questions?"

Facilitation Notes: Check in with the groups at 5 minutes to see how many need more time to complete the activity. Allow a maximum of 15 minutes for groups to complete the exercise. When groups are done, or 15 minutes have passed, ask each group to introduce themselves (give their name, where they are from, and how long they have been a juvenile court judge hearing child abuse and neglect cases). After introductions, ask the scribe for each group to report back to the larger group the results of the group exercise. Allow 15 minutes for the report back.

Debrief this ice-breaker by noting that *“every person we meet has something in common with us and has something new to offer us .“ This is great information to have as we look for ways to overcome any challenges face to improving ICWA compliance and outcomes.*”

- b) ICE-BREAKER: LITTLE KNOWN FACTS.** Materials: This ice-breaker requires obtaining some little known trivia or facts about each participant ahead of the training (e.g., provide a questionnaire with the training invite letter that asks participants to share a “little known fact” about themselves (e.g., a first job, biggest talent, unusual hobby, most proud accomplishment, etc.). Ask them not to share their responses with anyone prior to the training. Create a flipchart sheet prior to the training with each participant fact placed in a square on a grid. Time: 15 minutes.

Facilitation Notes: *If participants are somewhat familiar with each other*, the object of this ice-breaker is to see if participants can match the “facts” to the correct owners. Faculty should also include some facts about themselves on the flipchart. You can offer a prize to the first participant who is able to correctly identify all of the names (or the first to get three names correct). *If participants are not familiar with each other*, the object of this ice-breaker is to identify which facts are true about participants and which facts are false. Faculty can prepare the flipchart with some false facts. You can offer a prize to the first participant who is able to correctly identify all of the true facts about participants (or to identify the facts that are false). Debrief this exercise by noting that 1) people have done more unusual things than they think and that these life experiences will help them in having new experiences and facing new challenges (such as those that may emerge in systems change efforts); and 2) the people who do know each other usually discover something new about the other person -- this brings home the point that even with people you know there may be untapped

resources, skills, abilities, perspectives and ideas that can be applied to a problem.

5. As part of this introduction to the training, faculty should include a review of any “housekeeping items,” such as the location of the restrooms, expectations around the use of technology during the training (e.g., cell phones), comfort of the room and/or sound and visuals to ensure accessibility. This is also the place to establish the group agreements for the training (see Faculty Orientation to the Curriculum).
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MODULE I PRESENTATION

Total Time: 30-45 minutes [time allotment depends on welcome activity and introductory exercise or activity selected]

SLIDE 2: WELCOME

SLIDE 3: Faculty and Participant Introductions

Briefly introduce yourself as faculty and any other training facilitators. After those introductions, provide participants with an opportunity to introduce themselves to you and to each other. The **FOCUSED DISCUSSION** option (*“Let’s Hear about You and Your Goals”*), which is presented here, leads participants through a discussion about any personal experiences, knowledge, local practices and personal goals for the training that they would like to share with faculty and the larger group.

FACULTY TIP: An Ice-Breaker activity can be used in addition to, or instead of, the focused discussion. See the Faculty Tips/ Notes section of this Module for examples of possible ice-breaker activities. If an ice-breaker is used in addition to the focused discussion, we recommend that the ice-breaker activity is completed before moving on to the focused discussion outlined below. In addition, the PowerPoint slide template provided should be modified to add a slide introducing the ice-breaker activity.

DISCUSSION ACTIVITY: Participant Introductions - FOCUSED DISCUSSION

“LET’S HEAR ABOUT YOU AND YOUR GOALS FOR THE TRAINING” - “Before we discuss the training agenda in more detail, let’s take some time to learn more about you and what you hope to learn from this training ...” [Allow 10-15 minutes for this discussion and de-brief].

- What relevant experiences or knowledge do you want to share with the group?
 - Where are you from and how long have you been a judge?
 - Do you hear child abuse and neglect cases only or do you carry a mixed caseload?

- What do you want to know or learn?
 - What knowledge, skills or abilities do you hope to obtain from this training?
 - What is the most important “take away” from this training?
 - What are your most burning questions?
 - What challenges about implementing and complying with ICWA do you want this training to address?

Facilitation Notes: This discussion allows participants to share their relevant experiences and knowledge base with the faculty and the larger group, as well as their expectations for the training. Flip chart the responses you receive related to learning goals. After participants have shared their experiences, knowledge, expertise and training expectations, summarize the major themes for the larger group. With respect to expectations or learning goals, faculty should revisit these after presenting the learning objectives for the course in the next section.

Additional notes for focused discussion:

[illegible]

SLIDE 4: Training Purpose

Thirty-five years after the Indian Child Welfare Act (ICWA) was passed, judges around the country continue to struggle with its implementation. However, many judicial leaders, judicial educators and child welfare professionals are giving renewed attention and commitment to the provisions of the Act. **In fact, ICWA contains what many consider to be the gold standard of child welfare practice generally – not just for Indian children. Many of the provisions, such as diligent search for relatives, are now incorporated in present-day federal and state statutory law.**

This training will cover the provisions of ICWA, but it will go further. The complicated and emotional/painful history of the U.S. relationship with tribes gave rise to an Act intended to heal the past and create a better future for tribes and families. It is necessary to review and acknowledge this history in order to build a foundation for compliance with ICWA. The training is intended to initiate that reflection, understanding, and commitment.

Disproportionality of Indian children in child welfare is still a problem and is getting worse in many states. Across the United States, Indian children are overrepresented in foster care at a rate of 2.4 times their rate in the general population. While not all states show disproportionality, 21 states do have some overrepresentation. Twenty-four percent of the states that have overrepresentation have a disproportionality index of greater than 4.1; meaning that Indian children are in foster care at a rate 4 times higher than their representation in the general population.

FACULTY TIP: Faculty may show disproportionality findings for the specific training jurisdiction when making the point above. The National Council of Juvenile and Family Court Judges Technical Assistance Bulletin, “Disproportionality Rates for Children of Color in Foster Care” may be used as a resource (available at www.ncjfcj.org).

It is time for judicial leadership and vision from the bench to fulfill ICWA’s promise. Since no child enters or leaves the child welfare system without a judge’s order, it is imperative for judges to not only have a solid working knowledge of the Indian Child Welfare Act, but also to have an understanding of why we have the Indian Child Welfare Act. It is extremely important to learn from the past in order to build a very different future working with Indian children, families, and tribes (Vision from the Bench to Fulfill the ICWA Promise, available at <http://www.ncjfcj.org/vision-bench-fulfill-icwa-promise>)

SLIDE 5: The philosophical approach to this ICWA judicial curriculum is different

It is intended to:

- Build and support judicial leaders
- Equip judicial leaders in a continual process of *ensuring justice for Indian children, families, and tribes in child welfare cases*.
- Assist judges to identify areas in which knowledge can be strengthened to ultimately ensure the children and families are provided with the full enforcement in spirit and letter of ICWA.

SLIDE 6: Learning Objectives

1. Participants will recognize the historical, philosophical, and legal basis for the Indian Child Welfare Act
 - a. Participants will recognize the historical trauma experienced by Indian people and the continuing impact on Indian parents and tribal families, and the associated implications for handling child abuse and neglect cases for Indian families and the continuing impact on Indian parents and tribal families.
 - b. Participants will recognize the issues of disproportionality and disparities experienced by Indian children and their respective families within the child welfare system today.
2. Participants will understand the role of the judge in ensuring positive outcomes for Indian children and their respective families within the child welfare system
3. Participants will be able to apply the following basic provisions of ICWA:
 - Inquiry and Investigation of Tribal Membership and American Indian Ancestry
 - Noticing of Tribes
 - Active Efforts
 - Use of Expert Witnesses
 - Adoption and Foster Care Placement Requirements

FACULTY TIP: Stress for the judges that they need to know about ICWA – Many judges believe that because they don't have any reservations or tribes in their jurisdiction they don't have to worry about ICWA. But they DO have Indian children on their caseload. ICWA is important even in states without federally recognized tribes within their boundaries and in states with relatively low numbers of Indian people. You may share that data from the latest U.S. Census, for example, show that 78% of all Indian people live in urban settings, not on tribal land, and that the population of tribal people living off tribal lands is growing. Regardless of the make-up of its population, it is the state court's responsibility to follow the ICWA. Commitment and partnerships from all involved in child welfare are necessary to achieve full ICWA compliance.

SLIDE 7:

4. Participants will value the critical nature of identifying Indian children during the initial stages of the child welfare process and the ongoing duty to inquire throughout the case
5. Participants will value engaging and working with tribes and tribal representatives as resources for decision-making throughout the life of a case when serving Indian children
6. Participants will value Indian children's connection to their tribe and community including membership in their tribe
7. Participants will understand their role in promoting equity and fairness by ensuring ICWA is followed

FACULTY TIP: Revisit the flip charts of participant expectations for the course generated during participant introductions, noting which of those training expectations will be met by the course - if there are some training expectations that won't be met, discuss with the participants why they may be outside the scope of the training and offer to follow-up with them after the training if appropriate. For some expectations that are outside the scope of the training, faculty may want to consider with the group ways to adjust the training in order to ensure that a specific issue or concern is addressed. At the very end of the training, the flip charts can be revisited to ensure that all expectations have been met, questions answered and concerns addressed.

SLIDE 8: Training Agenda and Housekeeping Items

Review the training agenda with participants (***“Let’s look at the overall plan for this training.”***). You may refer participants to their copy of the agenda in the participant Course Book for this review, or modify the PowerPoint slides provided to project the agenda to participants.

Stress that the training includes a combination of lectures, video, case scenarios for application of learning, and interactive exercises/discussions. Emphasize the expectation that participants will actively share their knowledge, experience, ideas, and engage in critical self-reflection and proactive thinking. This is also an opportunity to cover some housekeeping items such as explaining the contents of the participant Course Book, setting forth the schedule for breaks and lunch, and providing directions to the restrooms.

SLIDE 9: Group Agreements

This is a good opportunity to get a few things straight from the onset and to establish group agreements or ground rules for the training, particularly for the interactive exercises and discussions (see the Faculty Orientation to the Curriculum for more about group agreements).

Here are a few group agreements for this training experience:

- Cherish diversity
- Be open and honest
- No question is a bad question – questions are encouraged (faculty should state their policy about questions here, letting participants know they are free to ask questions when they wish or if you would rather they hold their questions until you let them know it’s time to take questions)
- It is okay to disagree - but do not be disagreeable
- All responses are valued
- Respect one another
- This is a no cell phone zone (please turn your phones off or put them on vibrate . . . if you must

Take a call, please leave the room and return as soon as you can).

SLIDE 10: Concluding the Module

VIDEO -Bringing Our Children Home

FACULTY TIP: You may also invite the group to clarify any jargon you use or ask them for the appropriate local jargon - for example, the terms “dependency” and “child protection” may be used interchangeably throughout the training to refer to child abuse and neglect cases. “Preliminary Protective Hearing” will be used to connote the initial hearing in a child abuse and neglect case (other terms may be Shelter Care Hearing, Removal Hearing, etc.). Let participants know that they can ask for clarification of any jargon terms as they arise. A Glossary of terms is provided for faculty.

This is also a good time to mention that the group will be asked to complete questionnaires and evaluation instruments, none of which is intended for attribution by either faculty or

[Approx. 20 minutes for entire video]

Conclude this Module by playing the *Bringing Our Children Home* video.

This video resulted from a collaboration between the Mississippi Courts, Child Welfare Agency, the Mississippi Band of Choctaw Indians, and various National Resource Centers – specifically, the video was developed by the Mississippi Administrative Office of Courts, Court Improvement Program in consultation with the National Resource Center on Legal and Judicial Issues and the National Resource Center for Tribes as an ICWA educational resource for judges, courts, child welfare, and judicial educators.

The video establishes an important foundation and context for this training – **It includes powerful messages from adults who were removed from their homes as children and perspectives of tribal and state judges from around the country – it demonstrates why ICWA exists and why compliance with ICWA is so critical.**

FACULTY TIP: This is a good place to involve your local tribal training partners/elders or representatives in a culturally appropriate response/activity as a means of properly and respectfully processing the information in the video and the emotions that it raises for the group.

SLIDE 11: Reflections from Video and Questions

The video is very impactful and emotional and needs to be processed with participants – don't just show the video and ask participants if there are any questions – reflection is necessary to make it meaningful and to deal with the emotions exposed. To assist with reflection, invite participants to discuss their reactions to the video and what they learned from it. What thoughts did they have while watching the video? What did they learn from the conversation?

In transitioning to the next Module, thank participants again for attending the training, stressing that you are excited for the opportunity to engage them in the training material, learning from them and their experiences, and exploring tools and strategies to improve ICWA compliance and improved outcomes for Indian children and families.

Concluding/Summary remarks:

FACULTY TIP: After faculty has facilitated reflection on the video, draw participant's attention to the Judges Journal (see Materials list), if provided. This resource allows participants to record reflections, make notes about areas for further exploration, make meaning of what they are learning, and process their thoughts. Faculty should note that they will not be asking judges to share their reflections unless they choose to; this is intended as a personal resource.

FACULTY TIP: The Tribal STAR Judge's Journal is an excellent resource to provide judges at the beginning of training. It may be helpful for them in recording reflections and make meaning of what they are learning. Contact Tribal STAR for copies: <http://theacademy.sdsu.edu/TribalSTAR/aboutus/staffcontacts.htm>

References, Additional Resources and Supplemental Readings – Welcome, Introductions and Learning Objectives

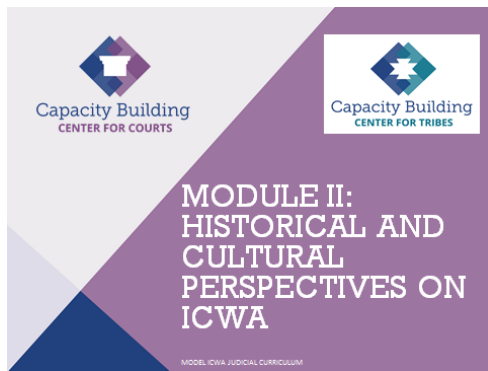
References:

Jackson, G. (2012). *Vision from the Bench to Fulfill the ICWA Promise*, Available at <http://news.nasje.org/2012/01/18/vision-from-the-bench-to-fulfill-the-icwa-promise/>

Mississippi Administrative Office of the Courts, Court Improvement Program. (2013). *Bringing Our Children Home: Introduction to the Indian Child Welfare Act Video*. Mad Genius, Inc.: Ridgeland, MS. Available at: http://courts.ms.gov/trialcourts/youthcourt/youthcourt_ycvideos.html

Summers, A., Wood, S. and Donovan, J. (2013). *Disproportionality Rates for Children of Color in Foster Care*. National Council of Juvenile and Family Court Judges, Reno, NV.

Tribal Star's Tips for Following Protocol available at:
http://theacademy.sdsu.edu/TribalSTAR/resources/Resource_List.htm



MODULE II: HISTORICAL AND CULTURAL PERSPECTIVES ON ICWA

Module Overview

The goal of this Module is to provide historical context that will emphasize the importance of ICWA and describe current outcomes for Indian youth in care. Many government policies and practices systematically destroyed Indian families and tribes; some intentionally, and some with the aim of assimilating tribal people, or in the misguided spirit of helping. It was the intent of ICWA to intervene by protecting Indian children, preserving Indian families and tribes and ensuring that Indian children are placed where their culture can be expressed. Judges must follow the provisions of ICWA, but to get them to do so it may be necessary to assist them in shifting their thinking so that their behavior on the bench will evolve and the spirit of ICWA will be fulfilled. In this Module, faculty provide the historical background, stressing tribal sovereignty as this is foundational to ICWA. After reviewing the past, data on current outcomes for Indian youth in foster care are shared. This information is meant to illustrate the passing of ICWA has not done enough to address the tragedies of the past and that full compliance with the law is necessary to change outcomes for Indian families and tribes.

Participants should develop a new frame of reference to help them understand the past and the intent of ICWA. The justice system played a significant role in promulgating policies that deprived Indians of citizenship, due process rights, land, and the ability to care for their families (see Echo-Hawk, 2010). Indians did not even become citizens until 1924 and many states did not allow them to vote until much later.¹⁰ *“American Law has often worked against Indians, legitimizing the appropriation of their property and the decline of their political, human, and cultural rights as indigenous peoples at the hands of the government”* (Echo-Hawk, 2010, p. 3). Indians have not fared well in “the Courts of the Conqueror,” a name given to the court system by Chief Justice John Marshall. A

¹⁰ Prior to the 1924 Indian Citizenship Act Indians were only allowed citizenship through marriage, military service, or treaties and statutes with the federal government. Even following the Act, many western states created false legal barriers to deny Indians the right to vote (National Resource Center on Organizational Improvement, n.d.).

select number of federal laws affecting Indian people and tribes will be presented in this Module in order to further the understanding of the relationship between the court system and tribes; a relationship that has resulted in many tribes and Indians not viewing the justice system as fair and impartial. Many believe that ICWA compliance is a move toward restorative justice.

Module Objectives

- To identify government policies and practices that have purposefully undermined Indian people and families;
- To understand the historical and philosophical bases for the Indian Child Welfare Act;
- To understand that ICWA is intended to protect the long term best interests of Indian children by maintaining the integrity of the Tribal family, the extended family and the child's Tribal relationship;
- To adopt the perspective that ICWA enhances the likelihood that a child's best interest will be served;
- To critically analyze data related to Indian youth in foster care; and
- To reflect on how the past has shaped current and future generations.

Presentation Outline

- The Historical Context
 - Laws and values affecting Indians and tribes
 - Boarding school era
 - Adoption era
 - Current outcomes

Activities and Exercises

- Discussion dyads and/or large group discussion
- Video

Approximate Time for Module: 1.5 hours [There are optional presentations, discussions and videos that faculty will want to consider including. If included, time will need to be adjusted accordingly and could extend the Module to 2 hours].

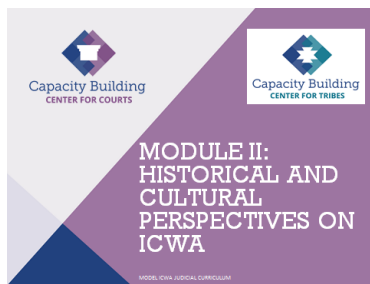
Faculty Tips/ Notes – Preparing for the Module and Additional or Alternate Activities and Exercises

1. There are several resources faculty can review to prepare for this module. These include:
 - Background and Need for ICWA. Articles available at http://www.nrc4tribes.org/need_for_icwa.cfm. Also available at this website is a video apology from Kevin Gover the former Assistant Secretary, Indian Affairs. This video will remind viewers that the effects of these policies and institutions persist to the present day. If faculty chooses to show the video, it may be best to start it at the 2 minute 20 second mark. This will make the video approximately 10 minutes.
 - Tribal STAR's website has several resources to review: http://theacademy.sdsu.edu/TribalSTAR/resources/Resource_List.htm#ICWA
 - *A Century of Genocide in the Americas: The residential school experience*. Video (17 minutes) Available at <http://vimeo.com/36847324>
 - Native American Rights Fund's Legislative History of the Indian Child Welfare Act of 1978, available at <http://www.narf.org/icwa/federal/lh.htm>.
 - Epigenetics is a complex and emerging field. If faculty wishes to go into more detail on this subject they may want to review multiple sources. One suggested source is an article published in *Pediatrics*, The Life Effects of Early Childhood Adversity and Toxic Stress, available at <http://pediatrics.aappublications.org/content/early/2011/12/21/peds.2011-2663.abstract>
2. In preparing for local trainings, **faculty should reach out to local tribal representatives who can serve as cultural informants** (providing relevant historical information about the treatment and outcomes of local tribes), and who will also serve as co-faculty for this and other modules. Local examples of policies or practices aimed at annihilating or forcefully removing Indian tribes will help participants feel more connected to the material. What is included below is a national overview, but Indians across the country suffered in different ways and it is critical that this be highlighted (e.g. how Indian people were used as forced labor to build missions throughout California). See the Orientation to the Curriculum for tips and strategies for involving local tribal representatives in the training.
3. To the extent that it is available, faculty should obtain local data about the Indian population, child welfare statistics and outcomes to supplement the data section. If a state has information on their compliance with the ICWA, that should be highlighted here and discussed in further detail in Modules III and IV.

4. **The information contained in this Module can affect people in different ways. For many, it may be emotionally and intellectually challenging. Faculty should reiterate that the training is not intended to place blame, but rather to present a new framework from which to move forward with renewed commitment to improving outcomes for Indian children.** Be sure to allow sufficient time for participants to share their reactions to the material – **you may need to be flexible with the agenda in order to ensure participants' reactions are processed in a respectful and culturally appropriate manner.** Work with local tribal experts, elders and other representatives to determine the best way to process reflections on material and the emotions raised. It may be necessary to let participants know that if the material has become difficult or emotional for them, they should feel free to step out and take any time they need before rejoining the training or offer to meet with participants following the segment.

Alternate, Optional or Supplemental Activities and Exercises

1. **Beginning Large Group Discussion:** Ask participants to name historic events involving Indians (ask them to name the first things that come to mind). Most of the events mentioned will be wars, tragedies, and policies aimed at breaking up Indian families and tribes – point out for participants the historical events that led to the need for ICWA.
2. Showing portions of the **video**, *In the White Man's Image* or segments from *500 Nations*, or any other relevant videos may be useful in breaking up the lecture portion of this Module. Again, be sure to allow sufficient time for participants to share their reactions to the material – **you may need to be flexible with the agenda in order to ensure participants' reactions are processed in a respectful and culturally appropriate manner.** Involve tribal representatives or elders who are participating in the training to determine the most culturally appropriate way to debrief the materials in the video and any emotions raised.
3. **Optional Alternative activity** that could be used in the beginning, middle or end of the presentation would require at least 20 minutes and begins by asking participants to write the names of 2 important children in their lives on 2 different pieces of paper. Fold these pieces so the name can't be seen, and ask the person to each participant's left to take one of the pieces of paper. Then ask participants to see which child was taken and which child is left. Ask participants to imagine that the child sent to the person on their left will be gone from their community and family for 5-7 years and raised in a culture and community other than yours. Ask, "how would you explain this to the remaining child, how would you integrate the child that was sent away back into your culture and community?" This exercise will highlight the consequences of the Indian Boarding School Movement and the Removal Era.
4. **Optional Alternative Closing:** In order to close with a positive and uplifting message, faculty can review significant contributions of Indians to American society. Portions of a PowerPoint presentation developed by Tribal STAR are included at the end of this Module as an example.



MODULE II PRESENTATION

Total Time: 1.5 hours [time dependent on discussion exercises and activities selected]

We are going to begin our discussion with a brief presentation of data, which we will return to after providing an overview of the history of the U.S. government's actions that attempted to assimilate Indian children as well as systematically destroy Indian families and tribes. **This overview is critical to understanding the need for ICWA.** Combined with information on current data and outcomes, it is clear that the legacy of U.S. policies have continued to have a lasting impact on Indian children, families, and communities, and that renewed attention to implementing ICWA is necessary.

SLIDE 2: The Picture Today

Disproportionality is defined as: the levels at which groups of children are present in the child welfare system at higher or lower percent ages or rates than in the general population. An index of 1.0 reflects no disproportionality. An index of greater than 1.0 reflects overrepresentation. An index of less than 1.0 reflects underrepresentation. The Indian disproportionality rate has increased in the last 10 years from 1.5 to 2.4 (NCJFCJ, 2015). States with a disproportionality index of 2.0 or higher in 2013 include: Alaska (2.6), California (2.1), Idaho (5.1), Iowa (5.2), Minnesota (14.8), Montana (3.7), Nebraska (8.8), New Hampshire (3.1), North Carolina (2.0), North Dakota (3.3), Oregon (3.5), South Dakota (3.6), Utah (3.1), Washington (4.5), and Wisconsin (4.8) (NCJFCJ, 2015).

FACULTY TIP: Present local data about disproportionality if available in addition to national level statistics. Faculty should note that **the national data on disproportionality come from the Adoption and Foster Care Analysis and Reporting System (AFCARS)**. AFCARS collects case level information on all children in foster care for whom the title IV-E agency has responsibility for placement, care or supervision and on children who are adopted under the auspices of the public child welfare agency. These numbers may include children removed by tribal court orders in states with tribal-state Title-IV agreements.

FACULTY TIP: Faculty may experience push back about the data presented, such as questions about data quality and reliability. To respond, note the general lack of available quality court-based data about disproportionality and that data from AFCARS and other child welfare agency data are the best quality data we currently have available. The important point is that the data, even if not as precise as we would wish, serves to shed light on the issue, demonstrates that disproportionality exists, and can be used as baseline from which to make and measure improvements.

These rates are evidence that more needs to be done to meet the needs of Indian children and families who come into contact with the child welfare system. In the experience of the authors, researchers, and others in the field, ICWA is not being consistently implemented or complied with and this may be a primary reason for the current outcomes. The current picture is a result of an important and very personal history for many Indian families and communities.

Additional faculty notes on disproportionality data:

SLIDE 3: Overview of Historical Eras

In this overview, we'll be covering ...

- Values and laws affecting Indians and Tribes
- Government to Government Relations
- Boarding School Era 1870s-1950s
- Adoption Era 1958-1970s
- Courts Before ICWA
- Historical and Intergenerational trauma
 - Dr. Maria Yellow Horse Braveheart (1999) conceptualized **historical trauma** as “a constellation of characteristics associated with massive cumulative group trauma across generations.” A phenomenon labelled **intergenerational trauma** (or historic trauma, collective trauma, transgenerational grief, historic grief) has been seen in the descendants of survivors of trauma, and has been defined as: “A collective complex trauma inflicted on a group of people who share a specific group identity or affiliation—ethnicity, nationality, and religious affiliation. It is the legacy of numerous traumatic events a community experiences over generations and encompasses the psychological and social responses to such events” (Evans-Campbell, 2008, p.320).

SLIDE 4: Removal, Assimilation, & Genocide

- The Royal Proclamation of 1763
- Manifest Destiny
- Indian Wars and Massacres
- Role of Religion
- Removal, Trail of Tears
- Dawes Allotment Act
- Treaties, Termination
- Less than fully human

FACULTY TIP: Faculty should note here that a goal of this Curriculum is to provide participants with a new understanding of history, one that may not have been provided, or may have been glossed over in traditional academic settings.

Prior to colonization many tribes lived in organized societies with sophisticated systems of government. Women and children were held in high regard and violence against women and children was not tolerated.¹¹ The child-rearing practices of the colonists often included corporal punishment, which was not typically used in Indian families. Storytelling was a more common form of redirection, rather than physical punishment (Jones & Richardson, 1997). Historical accounts recorded that European colonists were “impressed by the fondness and good care taken of Indian children by their mothers (Illick, 2002, p. 8).

FACULTY TIP: Much more can be said about the differences between colonists’ and Indians’ child-rearing practices and societies. Faculty may want to do further research and include a “compare and contrast” activity in which participants are given a list of practices or description of societies and have to note which they think were practices used by European colonists and which were used by Indians.

The Royal Proclamation of 1763 declared that the American colonists could not acquire land and that the laws of “Indian Country” prevailed everywhere west of the Appalachian Mountains. The colonists, including prominent politicians such as George Washington, Thomas Jefferson, James Madison, and John Adams, revolted over this Proclamation because it prevented their further accumulation of land-based wealth, and it has been cited as one of many reasons for the American Revolution. The colonist’s bloody pursuit of land continued for generations (Jaeger, 2007).

The **concept of manifest destiny** is taught in most grade schools, often as a noble cause in the American spirit. Indians were considered savages by most during this period and seen as impeding forward progress for many settlers in pursuing this destiny. Genocide ensued in areas settled by White Americans moving west (Jaeger, 2007).

Wars were waged against Indian people. Wounded Knee is one of the most well-known massacres; however, there were many others as settlers moved west to find gold, other minerals, and new opportunities. The “gold rush” in California and other western states brought tremendous violence to Native people and their land. Indians were traded as slaves in order to avoid the high cost of labor and maximize profits.¹² Women and children were not spared in these massacres or in the slave trade. In a Congressional investigation years after the Sand Creek Massacre in Colorado, a soldier

¹¹Evans-Campbell, T. (2008).

¹² See <http://www.newsreview.com/chico/shameful-past/content?oid=10848205> and the book by Michael Magliari referenced in the article for more information.

who participated in the killing was asked why they killed children. He responded saying that General Chivington, who was in charge, told them "Nits make lice" (Brown, 2001).

The **spread of religion** was a central aim of many of the policies that were sanctioned by the federal government. Some religions, such as the Church of Jesus Christ of Latter Day Saints (the "Mormons"), the Roman Catholic Church, and other Christian religious groups were heavily involved in foster care, specifically targeting Indian children with an aim of converting Indian families to primarily White religious practices.¹³

FACULTY TIP: This is a specific area where faculty should research and incorporate examples from the local area or region. Faculty should know their audience –as this will help when covering items that may be met with resistance. The discussion of religious groups' involvement in removals and the boarding school movement is one of these areas.

Additional faculty notes:

¹³ Tompkins, J. (n.d.) *Basics of the Federal Indian Child Welfare Act and Interface with the Colorado Children's Code*.

SLIDE 5: Removal

Removal continued into the 19th century with the **Removal Act of 1830** developed by President Andrew Jackson. In addressing Congress about the goals of this new Act, President Jackson stated that it would, “...perhaps cause them gradually, under the protection of the Government and through the influence of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community.” Before forcing them to walk to Oklahoma on the “Trail of Tears,” Indians from Georgia, Tennessee, and Alabama were rounded up and moved to forts across the South as part of the Removal Act. Between 2,000 and 6,000 of the 16,542 Indians that began the journey died along the way. This was an effective form of ethnic cleansing.¹⁴

The **Dawes Allotment Act of 1887** was another attempt to acquire land occupied by Indian tribes and stimulate assimilation into White culture by separating Indians from tribes. Land reserved for Indians often wasn’t suitable for agriculture, making it difficult to support traditional ways of life or provide for their families.

FACULTY TIP: Make the link that policies such as the Dawes Act created conditions that would later be used as rationalization for removals.

In order to stop the violence or because of false promises made, some tribes entered into treaties with the Federal government. These treaties were often forced upon tribes with promises of food, shelter, or goods and services, or through the decimation of homes and communities. Many treaties that may have benefitted tribes in some way went unratified and unfulfilled. Some tribes that gained Federal recognition through a treaty or other agreement lost that recognition during the Termination Era (1953-1968), in which over 100 tribes lost federal recognition and their land base.¹⁵

¹⁴ See Prucha, Great Father, p. 241 note 58; Ehle, Trail of Tears, pp. 390–92; Russel Thornton, "Demography of the Trail of Tears" in Anderson, *Trail of Tears*, pp. 75–93; Carter (III), S. (1976). *Cherokee sunset: A nation betrayed: a narrative of travail and triumph, persecution and exile*. New York: Doubleday, p. 232; & Curtis, N. C. (1996). *Black Heritage Sites*. United States: ALA Editions. p. 543.

¹⁵ Fixico, D.L. (1986). *Termination and Relocation: Federal Indian Policy, 1945-1960*. University of New Mexico Press; Philip, K.R. (1999). *Termination Revisited: American Indians on the Trail to Self-determination, 1933-1953*. University of Nebraska Press; Ulrich, R. (2010). *American Indian Nations from Termination to Restoration, 1953-2006*. University of Nebraska Press.

SLIDE 6: The Courts' Role

The justice system supported and sometimes made possible the atrocities described above.

Indians were not looked on or valued as humans. The Supreme Court used the following language and descriptions to describe Indians when ruling in favor of the Federal government:

Inferior Ignorant

Savages Heathens

Uncivilized An ignorant and dependent race (See Echo-Hawk, 2010)

SLIDE 7: Complicated Relationships, Conflicting Concepts

Tribes are sovereign nations, giving them a government to government relationship with the United States. The United States also has what is known as a “trust relationship with the federal government.” This **trust relationship** requires the U.S. to protect tribal rights, lands, assets, and resources and is a result of the treaty-making era’s broken promises to tribes. However, the U.S. Congress has what is known as **Plenary Power** over tribes.

When this power was confirmed in 1903 in the decision *Lone Wolf v. Hitchcock* the Supreme Court stated that plenary power would be restrained “by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race” (Echo-Hawk, 2010, p. 21). This means that Congress can pass legislation affecting tribes and Indians. This power allows Congress to limit tribal jurisdiction, terminate or grant federal recognition, and supply, or withhold, funding to tribal communities, among other things. The precedent set by these seemingly conflicting concepts and inflammatory past decisions are used by the Supreme Court in making decisions regarding tribes today.

“Indian tribes are *sovereign entities whose existences predate the ratification of the U. S. Constitution*. The Supreme Court long ago recognized tribes as ‘domestic dependent nations’ with a unique relationship to the federal government.” (Jones, Tildon and Gaines-Stoner, 2008).

The **Indian Self-Determination and Education Act of 1975** ushered in a continuing period of renewed tribal sovereignty and respect from the Federal government. Tribes were given the ability to administer education and welfare programs. Subsequent amendments to the law have generally strengthened tribes’ ability to provide for their

communities.¹⁶ This Act served to change the official policy of the United States and it paved the way for ICWA to be enacted by causing a shift in attitude toward tribal self-determination-“something essential to the correct application of ICWA and understanding of tribal-federal government relations.”¹⁷

The Indian Child Welfare Act is, in part, a response to hundreds of years of political and social policy that resulted in the decimation of the American Indian people and their culture. Repeated efforts and policies of forced cultural assimilation, displacement, and the unwarranted removal of Indian children from their families by states, prompted Congress to enact legislation that would establish minimum federal standards for the removal of Indian children from their families and also recognizes tribal jurisdictions over matters of child custody and families. In this next section, we'll be reviewing the political and social policy that led Congress to enact legislation to redress the wrongs committed against Indian children and their families.

SLIDE 8: Assimilation and Institutionalization: Boarding School Era 1870s-1950s

In 1879 the Carlisle Indian School in Pennsylvania, patterned after the military school model, was opened. The goals were to civilize Indian children and assimilate Indians to mainstream America. Children were often removed while parents were working or gathering food and some families were coerced into sending their children by the provision of rations, or food supplies. Indian parents were forced to make choices of survival. Early approved curricula prohibited teaching of reading and writing; making the “schools” more like labor camps training students to be domestic staff or farmers. Children often did not return home for several years; there were high mortality rates (although reporting was limited some reports are as high as 50%) and rampant abuse. Indian children were prohibited from speaking their native language, wearing their traditional clothing, and practicing their religion.

¹⁶ President Gerald Ford (January 4, 1975). Statement on the Signing of the Indian Self-Determination and Education Assistance Act. Retrieved from <http://www.presidency.ucsb.edu/ws/index.php?pid=4739>.

¹⁷ Smith, A. (personal communication, March 13, 2014).

SLIDES 9 & 10:

"Kill the Indian save the man."- Colonel Richard Pratt, Founder of the Carlisle Indian School. This statement was official federal policy.

SLIDE 11:

Removal and separation of families took many forms. In 1899 the Hiawatha Asylum for Insane Indians was created in South Dakota. This was considered by developers to be another method for "social change" and advancement in the treatment of Indians (Hiawatha Diary, 2007). As with the boarding schools, conditions were abysmal and patient's behavior was controlled through the use of violence or painful restraints. According to historical records, many of the Indians taken there were not insane, but rather had been labeled as "problem Indians" and who were referred by federal agents working on reservations. These "problem Indians" were labeled as such because of their resistance to poor treatment or other conditions on the reservation. Children were sent to Hiawatha, often without parental consent (Hiawatha Diary, 2007).

FACULTY TIP: Faculty may wish to show a video here depicting the Boarding School Era and its lasting impacts (e.g., appropriate segments from 500 Nations Video listed in the references section). Be sure to allow time for reflection after showing the video (see the Faculty Tips/ Notes outlined at the beginning of this Module about the importance of reflection time).

Another disturbing practice with a direct impact on Indian families was the sterilization of Indian women. In the early 1970's, an estimated 100,000 to 150,000 low-income individuals were sterilized under federally funded programs. A disproportionate number of these were Native American women (42% compared to 24% of African American women) (DeFine, 1997). In 1975, Senator James Abourezk of South Dakota commissioned a General Accounting Office (GAO) report to investigate Indian Health Services' use of sterilization. The GAO report's methodology has been questioned and there was speculation that the number was much greater, however, investigators did find that 3,400 women had been sterilized. Regarding this finding, Senator Abourezk stated, "given the small American Indian population, the 3,400 Indian sterilization figure [out of 55,000 Indian women of childbearing age] would be compared to sterilizing 452,000 non-Indian women" (DeFine, 1997) Sterilization was often done through misrepresentation of the impacts or without patients knowing as was the case with two 15 year old girls whose tubes were tied during appendectomies (Lawrence, 2000).

Recap the Boarding School Era and transition to the Adoption Era

“Healing has to take place among our people, causes of social problems, self-destruction, violence; anger and poverty are rooted in historical trauma, the holocaust of history. The White people don’t get it and many Indian people don’t get it that dealing with loss of culture, tradition and language, constant oppression and discrimination is the historical pain and anger carried from one generation to the next.” – Chairwoman Erma Vizenor, White Earth Tribal nation

Additional faculty notes:

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins or other markings on the paper.

SLIDE 12 & 13: Adoption Era 1958-1967

- The **Indian Adoption Project** was administered by the Child Welfare League of America, Children's Bureau and funded by the Bureau of Indian Affairs (BIA). States were paid by the BIA to remove Indian children from their homes alleging neglect
- At this time, **matching of parents and children based on race was still the predominant practice**. Matching involves "substitut[ing] one family for another so carefully, systematically, and completely that the old family was replaced, rendered invisible and unnecessary." (University of Oregon Adoption History Project). Adoption of Indian children was an exception to the predominant practice of race matching, however the philosophy of complete substitution of family was maintained.
- The goal of this project was to provide adoptive placement for Indian children whose parents were deemed unable to provide a "suitable" home.
- Approximately 395 children were removed as part of the Adoption Project and another 650 were removed through a project modeled after the Adoption Project. The legacy of these practices continued for many more years, resulting in many more removals.
- A 1976 study by the Association on American Indian Affairs found that in certain states 25 to 35% of all Indian children were being placed in out-of-home care. Eighty-five percent of those children were being placed in non-Indian homes or institutions. (Unger, 1977, p.1).

Additional faculty notes:

SLIDE 14: The Adoption Era

In 2001, the Director of the Child Welfare League of America formally apologized for the practices that were perpetrated against tribes during the adoption era.

SLIDE 15: Courts before ICWA

- Cultural biases regarding child rearing practices were used as justification for removal
 - Congress attributed many unwarranted removals and limited placement options to bias. Examples include unequal assessment of risk from alcohol abuse (Indian children were more likely than non-Indian to be removed from situations in which parents abused alcohol); bias against grandparents or fictive kin caring for children; relying on middle-class standards to assess potential foster families; ignoring the important role of tribal and cultural connections.
- Vague complaints about “general neglect” and “social deprivation” were the reasons cited for removal in 99% of cases in South Dakota
- Testimony from anyone besides the state’s case worker was rare
- Parents were coerced into voluntary agreements or relinquishments
- Attorneys were not provided for parents or children
- The burden was on the Indian family to prove they could provide for their children (Blanchard, 1977 in Unger, Ed.)

FACULTY TIP: The history piece of this presentation can be difficult for some to hear. Faculty should take an open, non-blaming approach; acknowledging personal growth in understanding where appropriate. It’s also important to communicate the middle ground – that in some instances it might have been true neglect –but it cannot be denied that there were pervasive, discriminatory policies and practices aimed at Indian children and their families. Make the link that policies such as the Dawes Act created conditions that would later be used as rationalization for removals.

SLIDE 16: Historic & Intergenerational Trauma

This section will discuss three layers of trauma caused by removal: individual, historical, and intergenerational

- Long term effects of out of home placement
- Split Feathers Syndrome
- Historic and Intergenerational trauma

The **Congressional Record for ICWA** cites researchers who identified the long term effects of Indian children being placed outside of their communities. The record states, “If an Indian child is placed in a non-Indian home while he is still a baby, problems may arise in later years, particularly during adolescence.” Dr. Westermeyer testified that the adolescents and adults he had seen in his practice had been “*raised with a white cultural and social identity*”; then, ‘*during adolescence they found that society was not to grant them the white identity that they had,*’ The problem was compounded by the lack of an Indian peer group and family to support the Indian children in this identity crisis.”¹⁸ Out of home placement affects both the individual and the community. The cumulative effects of years of removal create the conditions under which historical trauma is manifested. Today, this trauma can be triggered when children are removed from their families and communities.

“**Split Feathers**” refers to adult Indians who were removed from their families and tribes as children. Carol Locust conducted a small but powerful study of 20 Indian adoptees. She wrote, “The Split Feathers” themselves have identified the following factors as major contributors to the development of the syndrome, in order of their importance:

1. the loss of Indian identity
2. the loss of family, culture, heritage, language, spiritual beliefs, tribal affiliation and tribal ceremonial experiences
3. the experience of growing up being different
4. the experience of discrimination from the dominant culture
5. a cognitive difference in the way Indian children receive, process, integrate and apply new information—in short, a difference in learning style” (Locust, 1998)

The line of research cited in the Congressional Record has grown since 1977 and has gained a lot of attention for explaining current conditions of groups of people who themselves have experienced trauma, or whose ancestors have experienced trauma. Dr. Maria Yellow Horse Braveheart conceptualized **historical trauma** as “a constellation of characteristics associated with massive cumulative group trauma across generations.”¹⁹

Historical trauma or **intergenerational trauma** (or collective trauma, trans-generational grief, historic grief) has been seen in the descendants of survivors of trauma, and has been defined as: “A collective complex trauma inflicted on a group of people who share a specific group identity or affiliation —ethnicity, nationality, and religious affiliation. It is the legacy of numerous traumatic events a community experiences over generations

¹⁸ Congressional Record, 1977, p. 21044.

¹⁹ More information is available at <http://www.historicaltrauma.com/>

and encompasses the psychological and social responses to such events” (Evans-Campbell, 2008, p.320).

Intergenerational trauma accounts for how the boarding school experience has had traumatic effects in the lives of children and grandchildren of Indian survivors of boarding schools. The effects on individuals of trauma coupled with ongoing oppression can result in maladaptive parenting that can cause challenges for children in terms of coping, navigating complex cultural circumstances, or building self-reliance.

The first generation of children raised without the loving care of their parents were forever deprived of the lessons of how to be loving parents to their own children (Witko, 2006). Indian people have talked about the loss of language, values and morals, and traditional ceremonies but perhaps the greatest loss was that of how to be a loving, nurturing parent. Indian parents who had lived in the boarding schools during their developmental years learned that it was acceptable to beat a child for the slightest mistake. They learned that they were somehow “less than,” born of sin, and that shame and guilt was the vehicle to teach children what was acceptable (Witko, 2006).

Hundreds of years of policies and practices aimed at dissolving Indian families and tribes have left juvenile court judges with the responsibility to follow ICWA and develop relationships with tribal judges and communities so that this legacy will not continue. This portion of our discussion is intended to provide a context or framework – in this case the historical, political and social context shaping the treatment of Indian children and families in this country – to help understand current realities. The policies discussed above have had a lasting impact on Indian families and communities today, as we will see in the next section covering current outcomes for Indian children in the foster care system.

Marc Mannes, Ph.D., of the Children's Bureau, provided historical context in his presentation at the 1992 second annual Indian Child Welfare Conference: *"After all, it was the anguish and anger over the placement of American Indian children with families outside of their culture, acts that came to be understood as a form cultural genocide that secured the passage of the ICWA."*

Additional faculty notes on historical overview:

SLIDE 17: Outcomes for Indian Children in Foster Care:

Indian children in the United States experience a variety of challenges. American Indians and Alaska Natives live in poverty at higher rates than all other races (U.S. Census Bureau). They experience a variety of disparities from health (Urban Indian Health Institute, 2010) to education (National Center for Education Statistic, 2008). And one of the most alarming things is that they are represented in the foster care system at higher rates compared to their representation in the general population.

SLIDE 18: Introduction

The 2012 U.S. Census's American Community Survey 1-Year Estimates of American Indians and Alaska Natives

- 2.5+ million American Indian and Alaska Natives, which accounts for 0.8% of total population
- Children under 18 make up 28% of this population (722,413)
- 55,096 of Indian Grandparents were responsible for their own grandchildren under 18 years
- 29% of Indian population's income was below the poverty level in the last 12 months (723,169)
- 35% of those living below poverty were under 18 years old

SLIDES 19-21: Outcomes for Indian Children in Foster Care: What do the data say?

- Indian children are more likely to be confirmed as victims of neglect, but less likely to be confirmed as victims of abuse when compared to all other children (Pew Charitable Trusts and National Indian Child Welfare Association)
- Indian children experience child abuse and neglect at a rate of 12.4 per 1000 children (U.S. Health and Human Services, 2013)

Faculty should emphasize that at several decision-making points Indian children are more likely to face removal.

- Personal testimony²⁰ and testimony provided at hearings on ICWA confirm that placing Indian children in non-Indian homes can dissolve their cultural ties
- Racial and cultural bias by child protection workers may influence the increased risk for Indian children (Carter, 2009; Carter, 2010)
- Predictors of Indian children being placed in out-of-home care are caregivers having an alcohol problem, caregivers having mental health issues, and caregivers having an inability to pay for basic needs even though Indian families are no more likely to suffer from these problems than White families (Carter et al, 2009)
- Indian women are more likely to experience intimate partner violence and sexual violence at higher rates than women of other races (Futures Without Violence)

²⁰ ²⁰ See, *Our Experiences, Our Perspectives* available at <http://www.ncjfcj.org/our-work/icwa-compliance>. This video includes the personal stories of Indian children adopted into non-Indian homes.

SLIDE 22: Outcomes for Indian Children in Foster Care: What does this mean?

Children placed in foster care not only experience the trauma of being removed from their home, but a variety of other problems associated with out-of-home placement. These issues may be exacerbated when children are also removed from their culture.

Children in foster care are at increased risk for lower well-being measures (Casey Family Programs) such as:

- Negative health outcomes and increased risk for chronic diseases (asthma, heart disease, cancer, etc.)
- Increased rates of teen pregnancy, sexually transmitted infections (STIs) and HIV (National Campaign to Prevent Teen and Unplanned Pregnancy, 2009)
- Serious emotional problems and other mental health issues
- Increase risk for suicide
- Decreased educational attainment
- Higher rates of unemployment
- Increased likelihood of incarceration
- Increased rates of poverty

With children of color overrepresented in the foster care system, these negative consequences need to be kept in mind when deciding to place the child in foster care.

SLIDE 23: Outcomes for Indian Children in Foster Care: Summary

Data are from Casey Family Programs and Child Welfare Outcomes Report to Congress (2009-2012)

- Indian children are in foster care at higher rates than White children, varying from state to state.
- Indian families may experience bias in the system from entry to exit.
- Alcohol and mental health issues may predict entry into care for Indian children.
- Removing Indian children from their homes can cut their cultural and traditional connections.
- Foster youth of all races experience a whole of host of issues from negative health outcomes to incarceration.

Additional faculty notes about Outcomes:

SLIDE 24: Positive Outcomes from a Tribal Perspective

The strength and vitality of tribal communities is dependent on the well-being of their children. Judges should get to know the tribes in their area and the tribes whose children come before them frequently. Focusing on well-being of tribal children and communities can be a common goal.

SLIDE 25: Concluding the Module – Module Summary

The goals of ICWA can only be realized through a collaborative effort among judges, tribes, social services, attorneys, and advocates. Judges have a role both in the court and outside the court to ensure the provisions of ICWA are met in a broader effort to keep Indian children safe.

FACULTY TIP: Emphasize the number of children placed in foster care for neglect, now and in the past. You may want to return to this when discussing the higher burden of proof in ICWA cases and the more stringent standard for removal—"no foster care placement in the absence of...clear and convincing evidence...that continued custody is likely to result in serious emotional or physical damage to the child."

Additional faculty notes to close the Module:

OPTIONAL CLOSING:

SLIDE 27: Contributions of Indians to American Society

Indian people have a rich and extensive cultural history; one that has shaped the development of American society in great ways.

FACULTY TIP: This is a very brief list of Indian's contributions to American society that could be expanded with inclusions from the PowerPoint developed by Tribal Star, available at: <http://theacademy.sdsu.edu/TribalSTAR/>

FACULTY TIP: Faculty may wish to supplement this material with examples of accomplishments of contemporary Native Americans.

Government: most tribal communities operated as democracies. The U.S. Constitution was directly influenced by the Great Law of Peace of the Six Nations Confederacy of the Iroquois League. Concepts borrowed include, the idea that freedom is a natural right, that government should operate by a system of checks and balances, and that there should be separation of powers within the government (Minnesota Department of Education, n.d.).

Medicine and Science: Plants used by Indians in healing became the basis for Western medicines such as petroleum jelly, Novocaine, syrup of ipecac, quinine, astringents and aspirin (Minnesota Department of Education). Holistic healing has had a resurgence of popularity in recent years. Today, practitioners often rely on the methods of Indian healers in treating patients. Indian cultures believe that all things are interconnected. As such, tribal people developed methods for tracking and managing the earth's cycles. The first calendars were invented by tribes of what is now Mexico. This connection to the land also helped them prosper in agricultural and preservation pursuits.

Military: Choctaw and Navajo speakers were used as code talkers during WWI and WWII. This tradition extends before WWII and continues today. As of March 2012, the Pentagon reports 22,248 active-duty Native military members and there are over 156,000 Native veterans in the U.S. In 2010, "the military population was 1.7 percent Native, making it the highest per-capita commitment of any ethnic population to defend the United States" (Lemay, 2012). For veterans of early wars, military service provided a pathway to citizenship.

Art and Culture: Indian baskets, blankets, dance, food, and games have impacted cultures around the world. Indians developed strains of cotton that created an economic boom for the industry and they also invented instruments for weaving fabric into garments and blankets.

OPTIONAL DISCUSSION ACTIVITY: DISCUSSION DYADS

Ask participants to sit facing one other person in the room. Ask that they be knee to knee. Designate half of the people as “As,” who will speak first while “Bs” listen. Give the “A” group one minute to reflect on what they have just learned while the “Bs” listen without commenting. Switch and allow the “Bs” to go. Ask if anyone wants to share their own reflection, not that of their partner.

Additional faculty notes to facilitate/ de-brief discussion:

[illegible]

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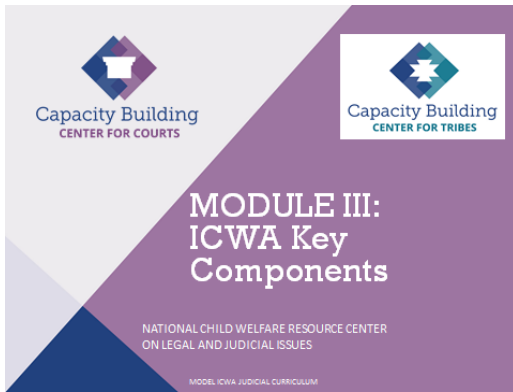
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MODULE III:

ICWA KEY COMPONENTS

MODULE III: ICWA KEY COMPONENTS

Module Overview

This Module provides an overview of ICWA, its key provisions and standards. It should not be taught without first covering the materials in *Module II: Historical and Cultural Perspectives on ICWA*. This Module has been designed so that it can be both the judges' first introduction to the ICWA while at the same time providing judges with a comprehensive coverage of ICWA's provisions and standards. This Module is complimented by *Module IV: ICWA and Best Hearing Practice* and *Module V: ICWA and the Leadership Role of the Judge both On and Off the Bench* which further engage judges in the material by applying what they have learned to the handling of stages of a child abuse and neglect case and to case scenarios in the context of the unique role of the juvenile dependency court judge.

Module Objectives

- To review the provisions and standards required by ICWA;
- To assist juvenile and family court judges in assuring that the necessary inquiries are being made to determine as early as possible in every case whether ICWA applies and throughout every stage of the case;
- To help juvenile and family court judges ensure that the necessary parties have been notified and are present in all cases where ICWA may be applicable;
- To dispel common misunderstandings around ICWA; and
- To help judges in meeting ICWA requirements at each hearing stage.

Presentation Outline

- Learning objectives
- ICWA goals and purpose
- The provisions and standards required by ICWA
 - Applicability
 - Jurisdiction
 - Emergency removals
 - Inquiry
 - Notice
 - Transfer
 - Intervention
 - Active efforts
 - Burden of proof
 - Qualified expert witnesses
 - Best interests
 - Placement Preferences
- ASFA, Fostering Connections, and other laws with implications for ICWA
- Summary

Activities and Exercises

- Discussion Activity – sample questions to pose to judges are incorporated throughout
- Discussion Exercise – ICWA decision-trees/ flow charts

Approximate Time for Module: 2 ½ hours – 3 hours [time dependent on activities and exercises selected and inclusion of additional state/local statute and information]

Faculty Tips/ Notes –

Preparing for the Module and Additional or Alternate Activities and Exercises

1. This Module should not be taught without first covering the materials in *Module II: Historical and Cultural Perspectives on ICWA*, as that Module provides necessary context for understanding the meaning and purpose of ICWA.
2. While this Module has been developed for one day of training, it does point out the areas or topics that might be supplemented with more information if additional time is available. Use data from the local jurisdiction about compliance, as well as results from training needs assessments, to select aspects of ICWA to emphasize – especially if time is limited.
3. As with the entirety of the Curriculum, this Module is designed to be taught by a judge who is an ICWA expert with experience in this area. As such, it is expected that faculty will add examples from their professional and personal experiences to help illustrate the points and clarify the material.
4. Do not merely read the slides – participants will have copies in their handout materials. Instead, use the slides as a jumping-off point to share experiences and examples about the operation of the law. Additional text in the faculty guide is provided surrounding each slide to help facilitate points. While suggestions for discussion activities are offered, as you move through each slide on the law, you may want to ask participants “*how does this works in practice?*” in order to facilitate discussion.
5. This module references the Bureau of Indian Affairs Guidelines (BIA Guidelines, pg. 10146) for complying with ICWA. **When discussing the guidelines faculty should mention that they are going through a review process and may change. In addition, the Guidelines should only be used as a reference, and that judges should rely on the federal and any state ICWA laws, along with the unique facts of each case in making decisions.**
6. Prior to the training, faculty should familiarize themselves **with jurisdictionally specific materials in order to adapt the curriculum material to the audience**. For example, faculty should seek out and review existing judicial bench books, court rules, and state statutory requirements which cover ICWA or which have implications for ICWA practice and compliance (including tribal-state/county agreements, case law, etc.). In addition, faculty should inquire about, and obtain, any court and child welfare agency performance data that provide context for the ICWA discussion (e.g., data about the number of ICWA cases, timeliness around notice, inquiry, etc.).

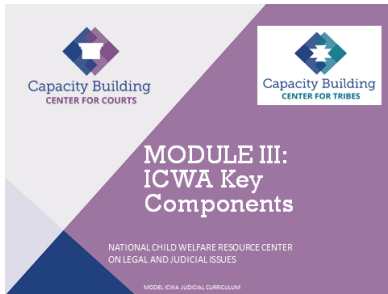
Alternate, Optional or Supplemental Activities and Exercises

7. Faculty may choose to open this Module with a **self-assessment or quiz** on the provisions and standards of ICWA for judges to gauge their pre-training level of understanding. If this option is selected, faculty should add self-assessment slides to the PowerPoint template in order to project the questions to the group.
8. The discussion activity suggested in the section on reasonable vs. active efforts engages the judges with a series of true/false statements. Alternatively (or time permitting in addition to the true/false exercise), faculty may provide examples of reasonable efforts and then ask the judges to discuss what they would need to be done to raise those efforts to “active efforts” in cases involving Indian children and families. Some examples are provided below (adapted from the *Advanced Indian Child Welfare Act (ICWA): Active Efforts and Expert Witness –Trainer’s Guide* , Judicial Council of California, Administrative Office of the Courts, Center for Children, Law and families):

“What additional efforts would you look for to make the following rise to the level of “active efforts” required for cases involving Indian children and their families?”

- Referring the family to the health center for medical, dental and mental health services (reasonable effort).
 - Arranging for appointments for the family at the Indian health center for medical, dental and mental health services (active effort).
- Finding a therapist and arranging a session that meets the needs of the family’s schedule and case plan goals (reasonable effort).
 - Finding a therapist at a local Indian agency, arranging a session that meets the needs of the family’s schedule and case plan goals and asking the family if they want the Indian agency or the tribe to provide a traditional healer (active efforts).
- Social worker inviting the family to create a case plan that is based on family needs (reasonable effort).
 - Social worker inviting the tribe/ tribe’s ICWA rep (via phone or in person) and the family to create a culturally appropriate case plan that is based on the family’s needs and Tribe’s childrearing practices/belief systems (active efforts).

9. The concluding section of the Module offers a **series of decision-trees or flowcharts** to engage the judges in a summary of each of the topical areas covered (e.g., applicability of ICWA, jurisdiction, notice, placement preferences, etc.). Alternatively, faculty may review each of the relevant flow charts at the end of each topical section (e.g., after covering the material on determining the application of ICWA, faculty could step the judges through the decision-tree on determining whether ICWA applies to a case).
 10. Additional presentational material on the ***Adoptive Couple v. Baby Girl*** case or “Baby Veronica” case (133 S. Ct. 2013) is provided at the conclusion of this Module should faculty choose to include more detail about that case.
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MODULE III PRESENTATION

Total Time: 2 ½ hours -3 hours [time allotted is dependent on exercises and activities selected]

SLIDE 2: Module Learning Objectives

- To learn about the major provisions of the law
- To understand when and how to apply the law

FACULTY TIP: Building on the material previously covered in Module II: Historical and Cultural Perspectives on ICWA, stress again for the judges why they need to know about ICWA –e.g., as previously mentioned in Module I, judges DO have Indian children on their caseloads. You may choose to repeat the following from Module I here: “ICWA is important even in states without federally-recognized tribes within their boundaries and in states with relatively low numbers of Indian people. Data from the 2010 U.S. Census, for example, show that 78% of Indian people live in urban settings, not on tribal land, and that the population of tribal people living off tribal lands is growing. Regardless of the make-up of its population, it is the state court’s responsibility to follow ICWA. Commitment and partnerships from all involved in child welfare are necessary to achieve full ICWA compliance.”

FACULTY TIP: Note for the judges that you will not only be covering the nuts and bolts of ICWA, but also using that foundation to encourage a conversation about how the state court and the tribes can use ICWA to meet the needs of children and tribes (to enhance sovereignty, continue cultural vitality, and protect children). Encourage the judges to ask questions at any point in the presentation of the ICWA material.

SLIDE 3: Indian Child Welfare Act (ICWA)

1978 P.L. 95-608

Recall from our discussion of the history and purpose of ICWA, that State courts were removing a high proportion of Indian Children from their families and tribes and placing them in non-Indian environments. There was a growing concern that these children were losing their Indian culture and heritage. From a historical perspective, the majority of federal policies directed at Indian people provided an experience that was extremely negative. In particular, both Indian tribes and child welfare professionals were critically concerned about the results of federal, state and local policies in terms of the destruction of Indian families.

Public Law 95-608, the federal Indian Child Welfare Act of 1978 (ICWA) (codified at 25 U.S.C. 1901 et. seq.) was passed to remedy the problem of disproportionately large numbers of Indian children being placed in foster care. The law recognized ***“that there is no resource ... more vital to the continued existence and integrity of Indian tribes than their children” and that there has been a failure by non-Indian agencies “to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families”*** (25 U.S.C. 1901).

SLIDE 4:

In passing the Indian Child Welfare Act, Congress stated:

“It is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operations of child and family service programs” (25 U.S.C. 1902).

SLIDE 5: ICWA's Goals/Purpose

P.L. 95-608, 25 U.S.C. §1901

- To prevent the break-up of Indian families.
- To protect the best interests of Indian children.
- To promote the continued existence of Indian tribes.
 - ICWA is about protecting Indian children AND protecting tribes

The best interests of the child include maintaining the child’s tribal connections and maintaining the tribe.

SLIDE 6:

In ICWA, Congress recognized cultural bias in the state court and social work systems, which affected Indian children and their families, and which placed the viability of tribes as political and cultural communities at risk [1978 P.L. 95-608].

The data we discussed earlier show that there is still bias in the court systems – so **ICWA is still essential to counterbalance the racism, systemic bias and cultural incompetence that exists today.**

SLIDE 7: Applicability of ICWA – Child custody proceeding involving Indian children [25 U.S.C. §§ 1901-1923, 1903(1)]

ICWA applies to an Indian child involved in child custody proceedings “***Child custody proceeding***” means:

- Foster care placement (any action to remove an Indian child from its parent or Indian custodian where the parent or Indian custodian cannot have the child returned upon demand – includes guardianship, customary adoption (adoption without TPR, because it includes any action that results in a final decree of adoption) , placement as a result of family in need of court ordered services.
- Termination of Parental Rights (any action resulting in the termination of the parent-child relationship)
- Pre-adoptive placement (temporary placement of an Indian child in a foster home or institution post-TPR but prior to or in lieu of adoptive placement)
- Adoptive placement (permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption)

SLIDE 8: When does ICWA NOT apply?

[25 U.S.C. § 1903(1)]

- ICWA does not apply to a child custody dispute between the natural parents of a child, even if the child is Indian, that arises in the course of a divorce action – in other words, ICWA does not apply to an award of custody pursuant to a divorce where one of the parents will obtain custody of the child. If custody is to be awarded to someone other than the one of the parents, ICWA will apply.
- A placement based upon an act which, if committed by an adult, would be deemed a crime (Juvenile Delinquency Cases).

ICWA expressly provides for only two exceptions to its applicability: certain juvenile criminal proceedings based on a status crime, such as underage drinking which only a minor can commit, and divorce cases [25 U.S.C. § 1903(1)], unless custody is to be awarded to someone other than one of the parents, then ICWA will apply. It should be noted, however, that although a case may start as a delinquency proceeding, ICWA may apply to subsequent child placements (i.e. foster care) based upon a determination that a return to the child's home would be inappropriate.

In summary, only two basic facts are necessary for a case to come under ICWA

- 1) The child who is the subject of a child custody proceeding is an "Indian child" as defined by the ICWA (more about that in a minute), and
- 2) The proceeding in question is a "child custody proceeding" as defined by ICWA (foster care placement, termination of parental rights, pre-adoptive and adoptive placements)

The Existing Indian Family Exception to ICWA

The Existing Indian Family Exception to ICWA is a judicially-created exception that has been used by some state courts as grounds to decline to apply the Act in custody cases where the Indian child or his or her Indian family have not had a significant social, cultural, or political relationship with the child.

It is important to note that this exception

- Is not contemplated by ICWA. The phrase "existing Indian family" is not in the Act.
- Is specifically rejected in the BIA Guidelines as a valid exception to the application of ICWA (BIA Guidelines, pg. 10151).
- Is contrary to Congressional intent that state court judicial subjective assessments be eliminated.
- Undermines ICWA's important purpose of preserving tribes as distinct entities (*Mississippi Band of Choctaw Indians v. Holyfield* recognized that preservation of tribal interests in Indian children should not be defeated by the parent's desires or concerns).
 - In ***Mississippi Choctaw Indian Band v. Holyfield* (490 U.S. 30 (1989))** – involved twins born off-reservation and voluntarily placed for adoption by their birth parents with a non-Indian family. The Choctaw tribe intervened and filed a motion to vacate the adoption decree pursuant to ICWA. Adoption was reversed by the U.S. Supreme Court three years after finalization of the adoption in Mississippi.
 - The ruling addressed the issue of "domicile" on a reservation, stating that because the parents resided on the reservation, so did the newborns, although the children had never physically been there.

- FACULTY TIP:** In *Adoptive Couple v. Baby Girl*, 570 U.S. ___, 2013 WL 3184627 (June 25, 2013) ("*Baby Girl Veronica*"), the U.S. Supreme Court was asked to adopt the Existing Indian Family Exception to ICWA and **did not do so**. Instead, it only narrowly interpreted three provisions of ICWA in private adoption cases. In *Adoptive Couple v. Baby Girl*, the Supreme Court held that 1912(d) and 1912(f) do not apply to an unwed Indian father who has not previously had physical or legal custody of his Indian child, or who has not had visitation or provided child support.
- FACULTY NOTE:** If faculty wish to cover the Supreme Court case *Adoptive Couple v. Baby Girl* (731 S.E.2d 550, 554 (S.C. 2012)) in more detail, a section on the case is included at the end of this Module.

[illegible]

SLIDE 9: Applicability of ICWA – definition of “Indian Child”

25 U.S.C. 1903(4)

- An “**Indian child**” is an unmarried person under the age of 18 who is a member of an Indian tribe or is eligible for membership and is the biological child of a member of an Indian tribe. **It should be noted that there is no set blood quantum and each Indian Tribe can set its own membership criteria** (25 U.S.C 1903(4)).

Tribal determination on membership is conclusive. Formal enrollment may be required to prove membership or eligibility. This determination depends on the Indian child’s tribal laws and practices. It is important to be aware that a tribe can change its membership criteria over time either to be more or less inconclusive of a person’s tribal ancestry.

DISCUSSION ACTIVITY: At this point, faculty may wish to pose the following question to the judges for discussion as a means of gauging their understanding.

“You are the presiding judge at a Preliminary Protective Hearing²¹ (or Shelter Care Hearing, Removal Hearing, etc.). The petition states several reasons why shelter care should be granted. The petition states “to the best of the Department’s knowledge, this case does not involve an Indian child.” At the hearing, you learn that the mother of the children spent some time living on the St. Croix Chippewa reservation in Wisconsin.”

“What questions do you need to ask?”

In debriefing this discussion, note the following **practice recommendation**: The National Council of Juvenile and Family Court Judges recommends that it is **best to treat a case as an ICWA proceeding whenever it is suspected that an Indian child as defined by ICWA is involved**. This practice avoids revisiting decisions and determinations months down the road if it is determined to be an ICWA proceeding because revisiting placement or jurisdiction decisions may impact the best interests of the Indian child and delay permanency. In addition, the BIA Guidelines state that if there is reason to believe the child is an Indian child, the child must be treated as an Indian child “unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe.” (BIA Guidelines, pg. 10152)

²¹ Although different jurisdictions may use different terminology (e.g., Shelter Care Hearing, Removal Hearing, etc.), Preliminary Protective Hearing is used herein in child abuse and neglect cases.

SLIDE 10: Applicability of ICWA – definition of “Indian Tribe”

A tribe must be a federally recognized group or community, as defined by the Bureau of Indian Affairs, as eligible for federal services provided to Indians. A list of federally recognized tribes and their designated agents for service of process in ICWA cases is published periodically in the Federal Register.

Indian Tribe:

- Any Indian tribe, band, nation or other organized group or community of *Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians.*
- Eligible tribes and villages are published annually in the Federal Register.

The best way to avoid the need to establish that a child is an Indian child for the purpose of coverage under ICWA is to have the relevant tribe declare that the child is either a member or eligible for membership in the tribe. A tribal court order accepting jurisdiction and making such a finding is entitled to full faith and credit. Such a determination is entitled to deference by the state court because of the long line of federal decisions recognizing that Indian tribes have the inherent authority to determine their own memberships and those determinations are binding on the federal and state governments (BIA Guidelines, pg. 10153). An assertion by an Indian tribe in a motion or pleading may or may not be conclusive depending on the jurisdiction. Usually, some type of public record of the Tribe is sufficient under ICWA. Such a conclusion is also entitled to full faith and credit under Section 1911(d) of ICWA.

FACULTY TIP: Faculty may wish to briefly review *Morton v. Mancari* (1974), here as it addresses “race” vs. “political status.” *Morton v. Mancari* is the 1974 case in which the Supreme Court upheld hiring preferences for Indians. The court found these preferences constitutional because it acknowledged that **“Indian” is a political affiliation rather than a racial group**. This distinction is the reason why a person with 1.2 percent Indian blood can be “Indian” while another person with 50 percent Indian blood may not be. As the *Mancari* court explained, tribal membership and blood-quantum requirements are determined by tribes (*Morton v. Mancari*, 417 U.S. 535 (1974)).

DISCUSSION ACTIVITY: At this point, faculty may wish to pose the following questions to the judges for discussion as a means of gauging their understanding ...

- ***How would you identify the tribe or tribes where a child may be a member or eligible for membership?***
 - Faculty should look for responses such as –require immediate inquiry by workers in all cases – if difficult obtaining information from the mother, put mother (in cases involving domestic violence or where sufficient information is not available to determine conclusively if domestic violence is an issue, judges should ensure that testimony will not undermine the safety of the victim or the victim’s children) and others on the stand for sworn testimony about extended family, heritage, etc.).
- ***What if more than one tribe has an interest in an Indian child?***
 - Faculty should look for responses such as – notice should be sent to both tribes, and the state social worker should let each tribe know of this so that the tribes can contact one another and come to an agreement about intervention. Of course, if they can’t, the State can determine which tribe has “significant contacts” –but tribes can usually solve this problem quickly and in the best interests of the child.
 - “significant contacts” (BIA Guidelines, pg. 10153)
 - Length of residence on or near reservation of each tribe
 - Preference of the parents
 - Membership of custodial parent or Indian custodian
 - Interests asserted by each tribe
 - Prior adjudication re: child in tribal court
 - Child’s self-identification
 - Availability of placements
 - Tribe with lesser contacts can still intervene and can still be considered as a placement preference
 - Deference should be given to tribe in which the child is a member

Debrief this discussion with the following **summary**:

- Tribes have exclusive authority to determine their own membership.
- Tribal membership is a political classification under the U.S. Constitution, not a racial one, and it is for this reason that U.S. law can treat tribal members and citizens differently than other Americans.

- Membership criteria and qualifications vary between tribes and do not remain static.
- A child who is eligible for membership in a tribe is covered by ICWA so long as one biological parent is a member of a tribe.
- Most tribal constitutions as well as some federal requirements prohibit a person from being a member of more than one tribe at the same time even though they may be eligible for membership in more than one tribe and it is eligibility that triggers ICWA.

The **recommended practice** is to immediately contact a tribe anytime there is a question about whether an Indian child is involved in a child custody proceeding to seek the tribe's determination of membership eligibility and to provide as much relevant information as possible so the tribe can make an accurate and timely determination of the membership eligibility of the child. In addition, the child welfare agency should assist the child in becoming a member of his or her tribe. Some states give the judge the authority to determine ICWA provisions even if a child is from an unrecognized tribe or terminated tribe (e.g., California SB678). See *Following the Spirit of ICWA, Judicial Council of California, Administrative Office of the Courts, Center for Families, Children and the Courts*.

Additional faculty notes on applicability of ICWA and tribal membership:

SLIDE 11: Exclusive Tribal Jurisdiction

Congress found that in exercising jurisdiction over Indian children, state courts had failed to recognize the essential tribal relations of Indian people and the social and cultural standards in tribal communities, and thus harmed tribal interests (25 U.S.C. 1901(5)). ICWA is designed to remedy this by creating presumptive jurisdiction in tribal courts (*Holyfield*, 490 U.S. 30, 36 (1989)).

ICWA establishes a dual jurisdictional scheme, tribes have exclusive jurisdiction over child custody matters when the Indian child resides or is domiciled on an Indian reservation, or when the child is a ward of the tribal court, unless another federal law provides otherwise (such as Public Law 280, more about that in a moment)(25 U.S.C. 1911(a)). Tribes also have jurisdiction over Indian children who reside or are domiciled off the reservation, but that jurisdiction is shared with the state court (25 U.S.C. 1911(b)).

The Supreme Court noted in *Mississippi Band of Choctaw Indians v. Holyfield* that the jurisdictional provisions of ICWA are at the very heart of the law (490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed 2d 29 (1989)). ICWA's jurisdictional provisions are designed to maximize the opportunity for tribal court judges, who in most cases are more knowledgeable than state court judges about traditional child-rearing practices and customs, to determine the fate of Indian children. As a result, ICWA vests tribal courts with exclusive jurisdiction over child custody proceedings “*when an Indian child resides or is domiciled within the jurisdiction of such tribe....*” (25 U.S.C. 1911(a)).

Concurrent jurisdiction exists when two sovereigns have the potential authority to adjudicate the same legal issue or matter. **ICWA, (25 U.S.C. 1911(b)) establishes concurrent but presumptively tribal jurisdiction over an Indian child who resides off a reservation** (*Holyfield*, 490 U.S. 30, 36 (1989)). ICWA requires the state court to transfer the child custody proceeding in these situations to the tribal court upon a petition of the tribe, absent good cause to the contrary or objection from the child's parent (25 U.S.C. 1911(b)). More about transfer jurisdiction later.

A state also has concurrent jurisdiction over an Indian child who resides on a reservation in a state that has been granted jurisdiction under Public Law 280, 25 U.S.C. 1911(a)).

Public Law 280 grants certain states concurrent jurisdiction over child custody proceedings in cases that otherwise would fall within the exclusive jurisdiction of the tribe. Mandatory Public Law 280 states include: Alaska (except Metlakatla criminal jurisdiction), California, Minnesota (except Red Lake and Bois Forte), Nebraska (except Winnebago and Omaha), Oregon (except Warm Springs and

partial retrocession over Umatilla), and Wisconsin (except Menominee). Certain other states known as Optional Public Law 280 States may also exert jurisdiction in child custody proceedings. Check the statutes of each state to determine if Public Law 280 jurisdiction exists.

It is important to determine whether a specific state law or tribal statute affects the jurisdiction of the Indian tribe at issue in the particular ICWA proceeding, as states and tribes have altered their jurisdictional prerogatives under ICWA in a number of ways. Tribes in Public Law 280 states are permitted under ICWA to reassume exclusive jurisdiction from the state (25 U.S.C. 1918(a)). The tribe must submit a petition to the Secretary of the Interior along with a plan about how the tribe will exercise its jurisdiction. Therefore, in Public Law 280 states, state laws and federal regulations should be checked to determine whether the tribe has reassumed its exclusive jurisdiction from the state (*Native American Rights Fund, ICWA Guide*).

SLIDE 12: EMERGENCY REMOVAL

25 U.S.C. 1922

In cases of emergency removal of a child who is a ward of a tribal court or where the state agency has reason to believe that the child comes under the jurisdiction of a tribal court, the state agency has the authority to temporarily remove an Indian child from his/her parent or Indian custodian under certain circumstances. ***Nothing in ICWA should be construed to prevent the emergency removal of a child to protect that child from danger and imminent harm.*** When an Indian child is removed in an emergency, actions should then be promptly taken to bring the case into compliance with ICWA provisions.

According to the BIA Guidelines, absent extraordinary circumstances, temporary emergency custody should not last more than 30 days without a determination by the court, supported by clear and convincing evidence, and the testimony of a qualified expert witness, that custody of the child by the parent/Indian custodian is likely to result in imminent physical damage or harm to the child or extraordinary circumstances exist (BIA Guidelines, pg. 10155). Emergency placement is not an exception to ICWA requirements. Continued temporary emergency custody does not absolve the state court from providing notice and following other aspects of ICWA. So, if adjudication is not required in a state within 30 days of removal, special procedures need to be established to protect Indian child's right to be returned home. The BIA Guidelines also specify that a tribe has the right to intervene during any period of the emergency removal (BIA Guidelines, pg. 10156).

Where an Indian child is not domiciled or living on his/her reservation or within his/her Indian community, ICWA provides for **transfer jurisdiction**. **Transfer jurisdiction effectuates a change in custody**. ICWA recognizes tribes as having concurrent jurisdiction over their children wherever they are located. This has been recognized as presumptive jurisdiction by the U.S. Supreme Court. ICWA's transfer jurisdiction provision allows a parent, Indian custodian, or the child's tribe to petition a state court for transfer jurisdiction to a tribal court. While a state court may retain jurisdiction during child custody proceedings involving an Indian child, assuming the Indian child has not already been made a ward of a tribal court, the transfer jurisdiction provision provides tribes with the authority to exercise their presumptive jurisdiction. Tribes face differing abilities to manage their own cases and transfer jurisdiction based on resources. States and counties fluctuate in whether they support tribes in this effort.

Note: ICWA does not prevent an emergency removal of an Indian child who is temporarily off the reservation. But, the Indian child must be returned home as soon as the threat of imminent harm has passed. State courts “*shall expeditiously initiate a child custody proceeding subject to the [ICWA]*” when appropriate (25 U.S.C. §1922).

SLIDE 13:

SUMMARY – WHEN DOES A STATE HAVE JURISDICTION?

A state court has jurisdiction over child custody proceedings involving an Indian child:

- (1) Where the child is domiciled or resides off an Indian reservation, is not a ward of the tribal court, and the tribe or parent does not request transfer (25 U.S.C. 1911(b));
- (2) Where the state has been granted jurisdiction on the reservation under Public Law 280;
- (3) Through a tribal-state agreement in which the tribe allocates jurisdiction to the state (25 U.S.C. 1919(a)); and
- (4) Through limited emergency jurisdiction where a reservation-resident Indian child is temporarily off the reservation and the state has removed the child in an emergency situation to prevent imminent physical damage or harm to the child (25 U.S.C. 1922). This emergency jurisdiction terminates when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

SLIDE 14: SUMMARY – WHEN DOES A TRIBE HAVE JURISDICTION?

A tribe has jurisdiction over child custody proceedings involving an Indian child:

- (1) Where the child is domiciled or resides on an Indian reservation (25 U.S.C. 1911(a));
- (2) When the child is a ward of the tribal court, regardless of the child's domicile or residence (25 U.S.C. 1911(a); and
- (3) Concurrent jurisdiction where the child is domiciled or resides off an Indian reservation and is not a ward of the tribe's court (25 U.S.C. 1911(b)).

A tribe that became subject to state jurisdiction under Public Law 280 may reassume exclusive jurisdiction over Indian child custody proceedings by submitting an application to the Secretary of the Interior with a plan as to how the tribe will exercise its jurisdiction (25 U.S.C. 1918).

Additional faculty notes on jurisdiction:

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins or other markings on the paper.

SLIDE 15: ICWA REQUIREMENTS

There are numerous procedural requirements that a court must follow to comport with ICWA. These procedures were enacted to ensure maximum involvement from the Indian child's tribe as well as to secure the sanctity of the Indian family by ensuring that the removal of an Indian child from his or her family would be done pursuant to stringent requirements.

Now that we've covered when ICWA applies and jurisdictional issues, let's turn our attention to the each of the following ICWA requirements, including:

- Inquiry and Notice
- Transfer
- Intervention
- Right to Counsel
- Active efforts
- Evidentiary burdens
- Qualified expert witness
- Placement preferences

To implement ICWA, many states have adopted state laws and guidelines that are even more stringent than the federal law. In those cases the state law or regulation would apply. Other states, in response to ICWA, have amended their child abuse and neglect statutes to conform to ICWA, resulting in a higher standard of process and proof required in non-Indian cases as well. All provisions of Title IV-E of the Social Security Act apply to ICWA cases, even though ICWA itself does not incorporate these provisions. These include the requirement of "reasonable efforts" to prevent removal of children as well as various criteria related to a periodic review of each foster child's case (42 U.S.C. 671 (a)(3)(15)). ICWA should be construed together with the provisions of Title IV-E and not as an alternative scheme for Indian children only (Jones, 1995).

SLIDE 16: INQUIRY

Early identification of a child's Indian status is critical to avoiding removal, placement, and other dispositional decisions that must later be reversed and which may add to the unintended impact the proceeding has on the child. Therefore, in every action that meets the ICWA definition of a "child custody proceeding," the court should ensure that the petitioner has made an affirmative allegation that the child is, may be, or is not an Indian child. Where information received in court raises the prospect that the child may be an Indian child, ensure that complete and accurate notice is immediately provided to the parent, the Indian custodian, the child's tribe (if known), any tribe with which the child may be affiliated, and the BIA.

ICWA notice serves two purposes. First, it notifies the parent, Indian custodian, and the child's tribe of the nature of the proceeding, where it is taking place, and important rights such as the right to counsel, the right to intervene, and the right to a continuance. The second and equally important function is to give the tribe or tribes and the BIA, who receive the notice, information about the family that helps to identify the child as an Indian child. ICWA grants tribes an unqualified right to intervene in child custody proceedings (25 U.S.C. 1911 (c)) as well as the right to request a transfer to tribal court (25 U.S.C. 1911 (b)). The exercise of that right is of course, contingent upon a tribe receiving timely and adequate notice of proceedings.

In **every case**, the child welfare worker (or social worker), probation officer, petitioner and the court **must inquire if the child is Indian**. This applies to child custody proceedings, pre-adoptive and adoptive placements, and state court proceedings for foster care placement or termination of parental rights. The history of government intervention into the lives of Indians has created mistrust between tribes, individuals, and the government. Parties may not always reveal their Indian heritage out of fear this will be used against them. Judges have a responsibility to explain why this information is critical to their case and how it will be used. Often, parents and family members may not reveal their heritage to social workers, but will when asked by a judge.

The inquiry about whether an Indian child is involved should be made at intake of a report of abuse or neglect or as soon as possible thereafter, and in every case.

Additional faculty notes about inquiry:

SLIDE 17: NOTICE

25 U.S.C. 1912

The party seeking the foster care placement of or termination of parental rights to, an Indian child shall notify by registered mail, return receipt requested²²:

- The parent(s) or Indian Custodian AND
- The Indian child's tribe or tribes if more than one is identified (notice is sent to the tribe's designated agents)

About

- The pending proceedings AND
- The right to intervene

At a minimum, 1912(a) of ICWA requires notice in any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved and the foster care placement of the child, or the termination of parental rights to the child is sought. Notice must be given even if doubts remain whether the child is an Indian child – often only with input of an Indian tribe will a state court be able to determine whether a child is Indian under the act. Failure to give notice cannot be justified by a later determination that the child in question is not Indian.²³

At a minimum, at the commencement of the action the parents or Indian custodian, if any, of an Indian child, and the Indian child's tribe must be given notice (25 U.S.C. 1912(a)). While ICWA says parent or Indian custodian, the Bureau of Indian Affairs (BIA) Guidelines point out the desirability and in most cases the need, to **give notice to both parents and custodians. In addition, the Fostering Connections Act added the requirement that notice be provided to adult relatives.** While Fostering Connections does not specify which definition of relative should be used, it would be consistent with the intent of ICWA to provide notice to “relatives” as defined by the child's tribe.²⁴

²² The BIA Guidelines say that registered mail, return receipt requested is the minimum notice requirement, and while other forms of notice may be used they may not be used in lieu of this method (BIA Guidelines, pg. 10148, 10154).

²³ See *In re Dependency of Colnar*, 757 P.2d 534 (Wash. App. 1988); *Matter of Baby Boy Doe*, 849 P.2d 925 (Idaho 1993); *In re Kahlen W.*, 285 Cal. Rptr. 507 (Cal. App. 5 Dist. 1991)). California seems to permit notice deficiencies if it turns out that later inquiry reveals that the child would not have met the “Indian child standard.” The problem with this practice is that often times Tribes are able to enroll parents and children once they receive notice of ICWA proceedings to ensure ICWA coverage and if no notice is provided Tribes lose the ability to do this.

²⁴ Section 103 of the Fostering Connections Act, Notification of Relatives requires that “within 30 days after removal of a child from the custody of the parent or parents of the child, the State shall exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives of the child (including any other adult relatives suggested by the parents)...” 42 U.S.C. 671(a)(29).

If there is reason to believe that the child is Indian, but the **identity of the parent, Indian custodian or tribe is not ascertained, notices must be sent to the Department of the Interior, Bureau of Indian Affairs (BIA)** (25 U.S.C. 1912(a); BIA Guidelines, pg., 10154). **Proof of notice** – court files should contain copies of all notices sent; original registered/ certified mail receipts as well as delivery receipts; and copies of all responses received from the tribe(s) or BIA.

FACULTY TIP: In addition to the requirements of ICWA, faculty may look to relevant state law for additional service of process procedures.

Notice must be given to each tribe in which the child is a member or is eligible for membership (25 U.S.C. 1912(a)). The BIA is required to publish annually in the Federal Register a list of tribal entities recognized as eligible to receive services from the BIA. The list is provided at the BIA's website, which also has addresses for federally recognized tribes and a listing of designated tribal agents. If the website is not accessible, then BIA's central office in Washington, D.C. should be contacted. The regulations require that copies of these notices be sent to the Secretary and the appropriate Area Director (25 C.F.R. 23.11(a) (2007)).

Voluntary placements that do not prohibit the child's parent or Indian custodian from regaining custody upon demand are not covered by ICWA, but it is best practice to for agencies and State courts to still ask whether a child is an Indian child and provide the tribe with notice (BIA Guidelines, pg. 10152, 10157). Voluntary placements in which there is parental consent to foster care or the parent seeks to permanently terminate his or her rights or place the child in a preadoptive or adoptive placement are covered by ICWA (BIA Guidelines, pg. 10152). Indian tribes and extended family members have substantial rights under ICWA even in voluntary proceedings. If notice is not provided you run the risk that a tribe will learn about the proceeding at a later date and object at that time, perhaps arguing that the child was a resident of or domiciled on the reservation or is a ward of the tribal court and that jurisdiction was exclusively in the tribal court. Providing notice to a tribe in voluntary situations will also allow the tribe to identify if there are good tribal or family placements available for a child and will lessen the risk of a child being transferred to a new placement after an extended time in an initial placement - an event that can be difficult for all concerned. **For these reasons, several states have enacted more stringent requirements and require notice be given to tribes in both voluntary and involuntary Indian child custody proceedings.**²⁵

²⁵ See for example, IOWA CODE 232B.5 (8) (2003); MINN. STAT. 260.761(3)(1999).

SLIDE 18: NOTICE TIMELINES

25 U.S.C. 1912(a)

While 1912(a) does not specify a time for service of notice, it does require notice of a pending child custody proceeding, where the court knows or has reason to know that an Indian child is involved (25 U.S.C. 1912(a)). Except where the court is exercising emergency jurisdiction pursuant to 25 U.S.C. 1922, it is important that no foster care placement or termination of parental rights proceeding be held sooner than 10 days from the date of receipt of the notice by the parent, Indian custodian(s) and tribe. In addition, the parent, or Indian custodian or the tribe, shall, upon request, be granted up to twenty additional days to prepare for such a proceeding (25 U.S.C. 1912(a)).

Even if no response is received, the child welfare worker should continue to send notice of each statutory hearing until a response is received that confirms or denies Indian heritage or until the Court declares it does not apply.

Perhaps most important to any discussion or consideration of the ICWA's notice requirements is that failure to provide proper notice is grounds for invalidating the court's action (25 U.S.C. § 1914). This has resulted in the disruption of long standing adoptions and the return of children after many years to the parent. Without arguing the benefit or harm that can result from such an outcome, it is painfully clear that decisions that are made in full compliance with the ICWA provide the greatest assurance of finality. Exercising an abundance of caution and providing notice where there is only scant indication of possible tribal affiliation may involve extra effort and expense, but it is well worth it to avoid potential negative consequences. **Best practice dictates that notice is given as soon as possible so that interested persons and entities can protect their rights.** Delay in giving notice could allow inequities to develop. For example, parties should not be able to successfully argue that there is good cause not to transfer a proceeding to tribal court because the proceedings are at an advanced stage when that situation resulted from a failure to give prompt notice.

ICWA states that when there is a change of placement, independent notice is triggered – if a Tribe does not intervene because a child is placed with extended Indian family and the state seeks to change that placement to a non-Indian home, new notice is required under ICWA.²⁶

²⁶Faculty should review existing state statutes and case law with respect to notice timelines and requirements. In some states, such as California, if notice is sent, and no determinative response is received after 60 days, the Court may rule that ICWA does not apply (see California Rules of Court 5.482 161 Cal.App.4th 253, 74 Cal.Rptr.3d 138)

If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary (of the Interior) in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

FACULTY TIP: Emphasize notice as key issue at the Preliminary Protective Hearing (custody or shelter care hearing) or at Pre-Hearing Conference conducted prior to the Preliminary Protective Hearing (notice must be given to Tribe as they are entitled to intervene); **Notice can be to BIA if Tribe unknown**

The tribe and parents/ custodians must receive notice 10 days prior to a hearing and may request an additional 20 days (25 U.S.C. 1912(a)). An exception to this is the Preliminary Protective Hearing (or emergency or shelter care hearing) must be held within 48-72 hours to permit a judicial officer to determine if the non-judicial removal of the child was justified.

Some summary thoughts on notice:

- ICWA expressly requires notice in involuntary proceedings but many provisions of ICWA that apply to tribes cannot be invoked if the tribe does not get notice of an ICWA proceeding.
- A number of states have implemented ICWA laws that expressly require notice in ICWA voluntary proceedings.²⁷
- The tribe and parents have to be notified of any foster care placement or termination of parental rights where an Indian child may be involved, whether or not the parent agrees. **Where the identity or location of a tribe, parent or Indian custodian cannot be determined, giving notice to the BIA is required.**
- If notice is not provided to the tribe at the beginning of a case and the tribe is later identified, the tribe must be notified as soon as possible thereafter.

²⁷ See the National Conference of State Legislature's website for a resource on state statutes related to ICWA [available at <http://www.ncsl.org/research/human-services/state-statutes-related-to-indian-child-welfare.aspx>].

Tribes should be given notice as soon as there is information that a child may be Indian.

- Notice must be sent by registered mail, return receipt requested to the tribe's designated agent for service and contact should be initiated through other avenues of communication such as email and telephone, in conjunction with registered mail, to facilitate response. In addition, notice may be sent to the director of the tribe's social services department.
- Use the internet, contact the BIA or State Indian Affairs Office to find tribal addresses and contact information. Each year, the updated list of ICWA notice designated agents is posted on BIA's website, in the Federal Register, and re-posted by the Native American Rights Fund and the National Indian Child Welfare Association. The National American Indian Court Judges Association also maintains an online searchable database containing contact information for tribal ICWA agents and tribal courts (see www.naicja.org). Best practice is to call the tribe to determine the name and contact information of the current tribally designated agent.

Additional faculty notes on notice:

SLIDE 19: TRANSFER OF PROCEEDINGS

25 U.S.C. 1911

State Court shall transfer to a tribal court a foster care placement or TPR proceeding involving an Indian child not domiciled or residing within the reservation of the child's tribe when:

- Requested to do so by the Indian parent or Indian custodian or the Indian child's tribe;
- The tribal court does not decline jurisdiction; and
- The state court does not find there is good cause to deny the transfer.

It is apparent, at least from the Supreme Court's discussion of transfer in *Holyfield*, that Congress believed that transfer should be the rule and not the exception (the Supreme Court called the tribe's jurisdiction over children living outside the reservation boundaries its presumptive jurisdiction (*Holyfield* at 36)). One of Congress's concerns in enacting ICWA was that state courts and social services personnel, because of the cultural gap between predominantly non-Indian judges and social workers and Indian families, were perhaps incapable of passing judgment on the fitness of Indian child-rearing practices, to assess a family's capability to provide for a child.

It's important to note that under ICWA "transfer" refers to a transfer of jurisdiction and not necessarily to a physical transfer of a child back to a reservation. Many tribes, after a transfer of jurisdiction, may choose to leave a child at his or her placement immediately preceding a transfer request and may even request that state officials monitor the placement. Some states and tribes have entered into cooperative agreements addressing this issue as well as others that are subject to resolution by agreement under the provisions of ICWA.

It's also important to point out that tribal laws or regulations often set out the way in which a tribal court is to consider accepting a transferred case. ICWA presumes acceptance by the tribal court, but this is not always permitted under tribal law without additional steps.

A parent has the absolute veto right over transfer.

FACULTY TIP: Review any local state and tribal agreements surrounding transfer.

DISCUSSION ACTIVITY: ICWA states that except in emergencies or upon petition of the parent, Indian custodian or an Indian child's Tribe, any child placement/custody proceedings involving an Indian child, who neither resides nor is domiciled within the reservation of such child's Tribe, must be transferred to the tribal court unless "good cause to the contrary exists for the transfer." (25 U.S.C. 1903(12)).

Ask the judges to share their thoughts on what would constitute "good cause" for not transferring?

In this discussion, faculty should look for the following as examples of "good cause" for not transferring:

- No tribal court exists to take the case
- Indian child over 12 objects to the transfer
- Evidence necessary to decide the case could not be adequately presented in tribal court without hardship to the parties or witnesses

BIA Guidelines list several factors a court should not consider "good cause" for not transferring:

- Whether the case is at an advanced stage
- Whether transfer would result in a change in the placement of the child
- The Indian child's contacts with the tribe or reservation
- Socio-economic conditions or any perceived inadequacy of tribal or BIA services or systems
- The tribal court's prospective placement (BIA Guidelines, pg. 10156)

"It is presumptively in the best interests of the Indian child, consistent with the Act, to transfer the case to the jurisdiction of the Indian tribe." (BIA Guidelines, pg. 10156)

State court judges should consider tribal courts as equal and parallel systems of justice. **If the matter is not transferred to tribal court, the child's tribe may intervene at any point in the case.** If the tribe does not intervene, ICWA still applies and the tribe still has rights under ICWA.

In de-briefing the discussion and section on transfer of proceedings, faculty should summarize by noting the following:

- ICWA presumes transfer of jurisdiction, unless a parent objects and requires a finding of good cause before such a motion can be denied

25 U.S.C. 1911(d)

If a case is transferred, the tribe is entitled to all court records (see 1912(c)) – all parties are entitled to reports and other documents filed in the case. A State court must give full faith and credit to public acts, records and judicial proceedings of the tribe. Before a public act, record or order from a judicial proceeding is entitled to full faith and credit under Section 1911(d) there must be a finding that the document is related to a child custody proceeding. Granting full faith and credit to a document or court order, however, should be distinguished from the question of whether a proper evidentiary foundation has been laid to admit a document or court order into evidence. The answer to that may lie in the state's rules of evidence. Most records of Indian tribes are admissible under the public records or business records exception to the hearsay rule, and most tribal court orders should be authenticated in a way that conforms to the state's recognition of foreign judgements act (Jones, 1995).

Additional faculty notes on transfer and full faith and credit:

[illegible]

SLIDE 21: RIGHT TO INTERVENE

25 U.S.C. 1911(c)

ICWA grants to the parents, Indian custodian, and tribe the unqualified right to intervene at any stage of a foster care placement or termination of parental rights proceeding, even when the case is on appeal (25 U.S.C. 1911(c)).

In any state court proceeding for the foster care placement or TPR of an Indian child, the child's Indian custodian and tribe have:

- The right to intervene
- At any point in the proceeding

The right to intervene is clear, unambiguous, and absolute. The state court has no authority to prevent the Indian custodian(s) or the child's tribe from intervening, and these parties need not seek the permission of the court to intervene. The Congressional findings and declaration of policy surrounding the right to intervene clearly indicate the importance of the child's tribe. The process of identifying and supporting relative placements, services, and permanency planning is greatly enhanced by having more tribal involvement. It should also be noted that the decision of the child's tribe not to intervene does not change the requirement for proper application of the other procedural and evidentiary requirements of ICWA.

Rights of Intervening Tribe:

- To examine and obtain copies of all court documents
- To have a tribal representative participate in proceedings
- To direct and cross-examine witnesses
- All other rights of a party to the proceedings

Rights of Non-intervening Tribe (if the child's tribe does not intervene):

- Receive notice of foster care placement and termination of parental rights hearings

In summary:

- ICWA applies even if a tribe chooses not to intervene.
- Parents cannot block tribal participation in a case; the tribe's right to intervene exists independent of parental rights.

DISCUSSION ACTIVITY: It may be helpful to have judges discuss the situation where a tribe did not respond or did not suggest or provide a tribal option for placement until the last minute –what should be done? This situation presents one of the most difficult dilemmas for judges who believe in ICWA, but who are frustrated by what they perceive as the tribe’s failure to respond until TPR is likely. This scenario reinforces the critical importance of frontloading cases – frontloading is as important in ICWA cases as any case.

Faculty may also wish to have the judges discuss what they would do in situations involving a tribal representative who is not a lawyer or who is a lawyer but who does not have a state bar admission.

Recommended Practices:

- Developing and maintaining relationships with local tribes and with tribal enrollment offices for those tribes whose members appear in court can help improve the timeliness of responses to notice and intervention.
- Judges should ask at every hearing what the child welfare agency has done to involve the tribe and should expect that the agency is applying the active efforts standard to ICWA cases (more about that in a minute), even when the tribe has not intervened.
- The court should allow for tribal participation by telephone or video conferencing and to the extent possible, schedule court hearings to facilitate the attendance of tribal participants.
- Judges should fully explain to parents, in easily understandable language, the requirements of ICWA, their rights, and the tribe’s rights.
- Judges should allow tribes to be represented without an attorney and to allow tribal attorneys who are not admitted in the state to appear without affiliating with local counsel.
- Tribes can intervene via an Indian Child Welfare Worker, or social worker – it need not be an attorney.

Additional faculty notes on right to intervene:

SLIDE 22: RIGHT TO COUNSEL

25 U.S.C. 1912(b)

ICWA mandates that the state court appoint counsel for an indigent parent or Indian custodian in a “removal, placement, or termination proceeding” (25 U.S.C. 1912(b)). If there is no state law mandating appointment of counsel, the state court can apply to the Department of the Interior for reimbursement of court-appointed lawyer’s fees in an ICWA case (25 U.S.C. 1912(b)). **Best practice requires appointing separate counsel for each parent.** ICWA also allows a state court to appoint a lawyer for the Indian child but does not make that appointment mandatory (the statute provides that appointment of counsel for the child depends on the best interest of the child) (25 U.S.C. 1912(b)). The appointment of counsel for the Indian child is purely discretionary with the state court judge, although state law may mandate appointment of counsel.

FACULTY TIP: Review applicable state law regarding appointment of counsel for parents and for children.

SLIDE 23: ICWA AND ACTIVE EFFORTS

25 U.S.C. 1912(d)

A party seeking involuntary removal of an Indian child from his or her parent or Indian custodian, or the involuntary termination of parental rights, must satisfy the court that **“active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful”** 25 U.S.C. § 1912(d)

DISCUSSION ACTIVITY: In non-ICWA child abuse and neglect cases, federal law requires “reasonable efforts” to preserve and reunify families (42 USC 671(a) (15)). So what is the difference between “reasonable” and “active” efforts?”

Ask the judges for their thoughts on the difference between “active efforts” and “reasonable efforts” – how would they determine that “active efforts” have been made? In this discussion, Faculty should draw a parallel to the problem with “reasonable efforts findings” generally - that judges often don’t require proof but make rubber stamp findings and that this is not good judicial practice. De-brief the discussion with the next set of slides providing more information on ICWA and Active Efforts.

SLIDE 24: ICWA AND ACTIVE EFFORTS

25 U.S.C. 1912(d)

Active efforts must be culturally appropriate (taking into consideration the prevailing social and cultural conditions and way of life of the Indian child’s tribe), and **involve and use the available resources of the extended family**, the tribe, Indian social service agencies, and individual Indian caregivers.

Active efforts go beyond “reasonable efforts” and reflect not simply an identification of the problems and proposed tasks and solutions, but must demonstrate proactive casework and active engagement with the family. This is casework that goes beyond merely referring for services ... instead, it’s arranging services and actively assisting families to engage those services. In active efforts, there is an emphasis on culturally appropriate casework and working in collaboration with tribes to ensure services.

Contained in the “active efforts” language are two general requirements: first, actual service delivery; and second, the character of services offered and actually provided.

The drafters of ICWA considered the character of social work practice then common around the country: Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts, the intent of the drafters of ICWA, is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own. For instance, rather than requiring a client to find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, ICWA would require that the case worker help the client develop job and parenting skills necessary to retain custody of her child (Dorsay, 1992).

The BIA Guidelines address a second component of the “active efforts” provision—the design of services and programs aimed at Indian families. The Guidelines states that active efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child’s tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies, and individual Indian care givers. **Active efforts require something more than reasonable efforts. Agency workers must take additional steps beyond what is normally done in other cases.**

- Frequent face-to-face contact is required – more frequent contact is expected (above and beyond policy requirements)
- Tribal and ICWA placement preferences should be followed – **consultation with tribe about the location of relatives, without more, is not a diligent search** and is not an “active effort” in attempts to follow the placement preferences²⁸

The **cornerstone to active efforts is active and early participation and consultation with the child’s tribe in ALL case planning decisions**, for the entire duration of the case (including initial service plans, visitation plans). A service agreement or letter of expectation should be done in consultation with the child’s tribe in every ICWA case. When the agency has attempted to provide a service, but the provider has not worked out for some reason, the agency is required to make an effort to provide the service in a more creative way (they need to continue working toward finding the needed service). **If services are not readily available, the agency must make active efforts to develop, modify, and coordinate services that will address the conditions and circumstances that brought the child into state custody.**

Active efforts are required to follow the “spirit of ICWA.” It is at the discretion of the judge to provide an active efforts approach to non-ICWA cases to which Indian families are not eligible for enrollment or from non-federally recognized tribes. It is also important

²⁸ The BIA Guidelines provide a list of 15 examples of active efforts (BIA Guidelines, pg. 10150).

to note that even if Indian families are from non-federally recognized tribes or not eligible for enrollment, these Indian families may still qualify to receive services from Indian agencies/ health centers/ educational resources/ college recruiting at **no** cost to the county or court –this is especially true for urban communities.

FACULTY TIP: Faculty should note how reasonable efforts are articulated in appropriate state statutes and contrast those with active efforts. Faculty may also wish to share examples of tribal-state collaborations on **Active Efforts Principles**, such as those in Oregon, that are intended for use by courts, DHS staff, and local Citizen Review Boards in evaluating whether active efforts have been made. In Oregon, for example, all efforts will be measured against the following goals (applies to children who have already been removed, so not to active efforts to prevent removal):

- Requires early contact and active engagement of the child's tribe
- Expectation of close collaboration between state and tribe
- **More vigorous and higher level of effort than those that typically constitute reasonable efforts**
- Proactively engaging in diligent casework activity and to casework that goes beyond the minimum requirements ... to creatively meeting the need of children and families
- Using culturally appropriate methods and services; assessments and services should be provided in the client's primary language
- Extending services to all household members who will be in a caretaker role with the child (not just parent or Indian custodian)

In California, the California Department of Social Services has put MOU's and MOA's on a website, some of which articulate detail for notice and active efforts. Many other states have MOU's and MOA's as well.

SLIDE 25: ACTIVE EFFORTS AND ASFA

ASFA does not alter ICWA's active efforts requirement –

- Even where ASFA may relieve the State from proving reasonable efforts (e.g., when aggravated circumstances exist), active efforts must be proved
- Active efforts are required in every ICWA case (BIA Guidelines, 80 FR 10146 at 10150-151)

Courts must make active and reasonable efforts findings in ICWA cases.

DISCUSSION ACTIVITY: Faculty may wish to pose the following true and false questions to the judges for discussion purposes and to gauge their understanding of the material ...

TRUE OR FALSE:

- **Whatever is required under state law may not meet the active efforts requirements under ICWA [TRUE]**

The remedial and rehabilitative services requirement of 1912(d) may require something more than is required under general state law. The social services agency must actively assist the Indian family in achieving the case service plan objectives.

- **If aggravated circumstances exist under state law, the State does not have to provide remedial and rehabilitative services to the Indian family [FALSE]**

ICWA active efforts standards exist independently of standards enacted pursuant to ASFA that allow remedial efforts to be terminated when aggravated circumstances exist, and case law consistently confirms the requirement to provide remedial efforts under ICWA even when the ASFA standard has been met.

- **Parents' refusal to engage in services meets the active efforts requirement [TRUE]**

Meeting the active efforts requirement of ICWA requires proving that the services provided have proved unsuccessful. Even though the parents may refuse to engage in services, active efforts may still have been made.

- **Tribes do not have anything to offer with regard to providing services to the family [FALSE]**

Tribes can be valuable partners in providing services in general as well as culturally appropriate services that will meet the active efforts standard.

FACULTY TIP: Faculty may wish to review when reasonable efforts are not required under ASFA, as well as local state statutes for aggravated circumstances when covering this material on reasonable vs. active efforts.

ASFA does not require reasonable efforts when the parent (42 USC 6671(a) (15) (C), (D)

- Subjected the child to aggravated circumstances as defined by state law;
- Committed murder or voluntary manslaughter of another child of the parent;
- Aided or abetted, attempted, conspired or solicited to commit such murder or manslaughter;
- Committed a felony assault that results in serious bodily injury to the child or another child of the parent; or
- Had his or her parental rights to a sibling involuntarily terminated.

In summary, **recommended practices** with respect to ICWA and active efforts include:

- State and tribal social services workers should jointly develop a case plan designed to meet the needs of the Indian family to achieve reunification.
- Tribal services or urban Indian program services should be an integral component of any such case plan.
- Social services workers should actively assist family members in accessing and completing recommended services. Service provision designed to address the specific needs of the particular family and active participation in assisting the family in accessing and participating in those services will allow permanency to be achieved more quickly for Indian children, whether that permanency is reunification or an alternative placement.
- **Judges, as leaders, can advocate for services necessary to meet the needs of parents and children involved in the child welfare system. Judges should partner with community members, tribal leaders, and other judges to advocate on behalf of children and families.**

Additional faculty notes on active efforts:

SLIDE 26: ICWA AND HEIGHTENED BURDEN OF PROOF

25 U.S.C. 1912 (e-f)

Involuntary foster care placement requires clear and convincing evidence that the continued custody of the child by the parent(s) or Indian custodian(s) is likely to result in serious emotional or physical damage to the child (25 U.S.C. § 1912(e)). The standard of proof increases to “beyond a reasonable doubt” when the proceeding is for the termination of parental rights (25 U.S.C. §1912(f)).

The higher burden of proof is intended to overcome any bias on the part of the State Court or state social workers.

The BIA Guidelines instruct that:

[e]vidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. **The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result (BIA Guidelines, pg. 10156)** – a dirty home, for example, can only be reason for removal IF there is some evidence that it is likely to actually cause damage to the child.

This interpretation focuses on the parent’s or Indian custodian’s current unfitness. Where parental deficits have persisted for a sufficient period of time to indicate that continuing efforts are unlikely to reduce the likely risk of harm to the child, permanent placement away from the parent or the Indian custodian is considered in the child’s best interest. This determination is based on the parent(s) or Indian custodian(s) having failed to reduce the risk he or she poses to the child. However, this harm should be distinguished from the anticipated harm that disrupting the psychological bond of an Indian child to a foster or prospective adoptive parent might cause. Bonding and attachment to the foster or pre-adoptive parent is not to be used as the sole basis or primary reason for finding that return to the parent is likely to result in serious emotional or physical damage to the child.²⁹ In fact, the BIA Guidelines specify that the ordinary bonding and attachment that may have occurred as a result of a placement does not constitute good cause to deviate from placement preferences (BIA Guidelines, 80 FR 10146 at 10158).

²⁹ See *In re Phoebe S.*, 11 Neb. Ct. App. 919, 936–938, 664 N.W.2d 470 (2003); *In re Teela H.*, 547 N.W.2d 512 (Neb. Ct. App. 1996)

In Summary

Foster care placement – requires **clear and convincing evidence**, including testimony of at least one qualified expert witness that continued custody is likely to result in serious emotional or physical damage to the child.

Termination of parental rights – requires evidence **beyond a reasonable doubt**, including testimony of at least one qualified expert witness to show that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child

The standards of evidence are connected with active efforts and expert witness provisions of ICWA. The active efforts requirement is more rigorous than the reasonable efforts requirement and conducive to providing higher standards of evidence. The testimony provided by expert witnesses (more about expert witnesses in a minute) assists the court to determine if the evidence standards for foster care placement (clear and convincing) and termination of parental rights (beyond a reasonable doubt) have been met.

Additional faculty notes on the heightened burden of proof:

SLIDE 27: ICWA AND VOLUNTARY CONSENT

25 U.S.C. 1913

Voluntary consent to foster placement requires court certification as well as a signed voluntary placement agreement that specifies the child's legal status and spells out the rights and obligations of the child, parent(s) or Indian custodian and agency, including the duty of the agency to return the child upon demand. The consent must be executed in writing and recorded before a judge of competent jurisdiction and be clear that the parent understood what they were agreeing to (25 U.S.C. 1913).

Voluntary consent to relinquishment (consent of a parent or Indian custodian to permanently give up custody of a child, to have parental rights terminated and then have the child placed for adoption) requires the consent be executed in writing and recorded before a judge in a court of competent jurisdiction, cannot be given prior to or within the first 10 days of the child's birth, and must be accompanied by the presiding judge's

certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood what they were agreeing to (25 U.S.C. 1913).

Any parent or Indian custodian may withdraw voluntary consent to (25 U.S.C. 1913 (c) and (d)):

- The Indian child’s placement in foster care at any time and the child must be returned.
- Voluntary TPR at any time prior to entry of a final decree of voluntary termination or adoption.
- Voluntary adoption within 2 years of entry of final decree of adoption when the court finds fraud or duress.

Additional faculty notes on voluntary consents:

SLIDE 28: BEST INTERESTS FOR THE INDIAN CHILD

25 U.S.C. 1902

What we think of generally as “best interests” of a child is subjective and is culturally linked to dominant Anglo-American culture. In actuality, family units are extremely diverse in character, and there are many satisfactory ways to address the best interests of a child. In enacting ICWA, Congress determined that retaining an Indian child in his or her culture or placing an Indian child in a culturally appropriate placement best serves the needs of that Indian child; (25 U.S.C. 1902). Congress concluded that proper implementation of the act itself would serve the best interest of the Indian child.³⁰ Case law also holds that ICWA as a whole is in the best interests of the Indian child.³¹

It is in the best interests of Indian children to foster and encourage their connection to and involvement with their tribal culture. Knowledge of tribal culture and family connection serves the best interest of the Indian child and is most likely to lead to a

³⁰ See House Report at 19, where the House stated that compliance with the ICWA is “in the best interest of the Indian child.”

³¹ See generally *Holyfield*, 490 U.S. 30 (1989); *In re the Adoption of M.T.S.*, 489 N.W.2d, 288 (Minn. Ct. App. 1992).

healthy, well-rounded adult. The best interests of an Indian child are interwoven with the best interests of the Indian child's Tribe. **Best interests must be informed by an understanding of the damage that is suffered by Indian children if family and child tribal identity and contact are denied.**

Additional faculty notes on best interests and ICWA:

SLIDE 29: ICWA QUALIFIED EXPERT WITNESS

25 U.S.C. 1912 (e) (f)

A Qualified Expert Witness is required for (1) removal of a child from his/her parent or Indian Custodian and for (2) TPR.

Specifically, ICWA prohibits foster care placement unless a court determines by clear and convincing evidence after hearing testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. ICWA prohibits termination of parental rights unless a court determines beyond a reasonable doubt, after hearing the testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

SLIDE 30:

Specific qualifications for an expert witness are not stipulated by ICWA, but the Bureau of Indian Affairs (BIA) emphasized that a qualified expert witness should have knowledge of the prevailing social and cultural values and tribal customs of the child's tribe, especially those related to family organization and childrearing practices. Such knowledge can be acquired through education, experience, or a combination of both.

The term “**qualified expert witness**” is meant to encompass those persons who are, because of their knowledge of Indian culture and traditions, particularly as they pertain to childrearing practices, capable of giving an opinion on the question of whether an Indian child is suffering from some form of emotional or physical harm because of the commissions or omissions of the family.

Qualified expert witnesses in ICWA cases:

- A person qualified to address whether continued custody will likely result in serious harm to the child
- Requires knowledge of tribal culture, family and childrearing practices
- The court or any party may request assistance from the child's tribe or the BIA agency serving the child's tribe in locating persons qualified to serve as expert witnesses (BIA Guidelines, pg. 10157)

Expert witnesses allow the court to assess the child's safety and well-being within the context of tribal family traditions and practices that may not be those of the dominant culture.

The expert witness provisions of ICWA (1912 e-f) complement the requirements for active efforts. The expert witness can provide an assessment regarding the adequacy of efforts to prevent removal or termination of parental rights, as well as testimony (or written declaration) that addresses if the child is likely to suffer serious emotional or physical harm in the custody of the parent or Indian custodian. The expert witness can also educate the child welfare staff and the court regarding customary tribal values, particularly those related to child-rearing. In this way, the expert witness serves as an additional check against unwarranted removal and adoption of Indian children.

It is important to note that the QEW is the state's witness, not the tribe's witness. While it is good to check with the tribe to ensure that the QEW has a genuine understanding of the child's tribe, it is the state's responsibility to secure an appropriate QEW and to remember that the QEW is not testifying on behalf of the tribe. The QEW testifies for the state based

on both cultural knowledge and an assessment of whether continued custody will likely result in serious harm to the child.

SLIDE 31:

BIA guidelines identify four types of qualified expert witnesses for ICWA cases (BIA Guidelines, pg. 10157):

- A **member of the Indian child's tribe** who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family or organization in child-rearing practices
- A **member of another tribe** who is recognized to be a qualified expert witness by the Indian child's tribe based on the knowledge of the delivery of child and family services to Indians and to the Indian child's tribe
- A **lay expert witness** having substantial experience in the delivery of child and family services to Indians and an extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
- A **professional** having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

“An expert witness must be able to provide the Court with knowledge of the social and cultural aspects of Indian life [in order] to diminish the risk of any cultural bias”
(*In re N.L.*, 754 P.2d. 863, 867 (Okla. 1988)).

FACULTY TIP: Faculty should familiarize themselves with case law, regulations, court rules and state statutes regarding qualified expert witnesses for ICWA cases, in order to tailor this discussion to the local context.

DISCUSSION ACTIVITY: Faculty may wish to pose the following questions about qualified expert witnesses and ICWA

- ***“Is it true that qualified expert witnesses, as set out in ICWA, are only required in a case where cultural factors affect the family’s fitness to parent?”***
 - No – A qualified expert witness is always required for cases involving foster care placement or termination of parental rights (1912 e-f)
- ***“Are social workers qualified expert witnesses as construed by ICWA?”***
 - Qualified expert witness “is meant to apply expertise beyond the normal social worker qualifications” (House Report No. 95-1386 (95th Congress, 2d session, reprinted in 6 USCCSAN 7530, 7454) (1978)). The use of state social service caseworkers or state employees as expert witnesses to meet ICWA requirements generally should be avoided.
- ***“Can an ICWA expert be a qualified expert witness?”***
 - A qualified expert witness in Indian cases is not necessarily an expert on ICWA or in child welfare in general, but is an **expert on the culture and the unique family and childrearing traditions and practices of the Indian child’s tribe**. (NCJFCJ Indian Child Welfare Act Checklists, 2003).
- ***“What challenges has your jurisdiction faced in accessing qualified expert witnesses, and what strategies have been used (or might be used, in your opinion) to address those challenges?”***
 - Seek the advice of the child’s tribe – the tribe is likely to know tribal members who can address the issue of child endangerment within the context of the tribe’s prevailing social and cultural standards (of course, that person will need to meet the criteria set forth for a qualified expert witness)
 - State Courts should develop lists of qualified expert witnesses (preferably in collaboration with local tribes) that can be called upon to appear at proceedings and to contribute to the courts’ understanding of the family’s circumstances or tribal cultural tradition. (The Administrative Office of the Courts in California has developed such a list at <http://www.courts.ca.gov/8105.htm>)
 - If the court agrees, qualified expert witnesses may appear by telephone.

In summary, the following are **recommended practices** with respect to expert witnesses and ICWA cases:

- Requiring the involvement of a qualified expert at any early stage of any ICWA proceeding will help identify, from the tribe's perspective, the services, including culturally relevant services that will be most likely to address the conditions that lead to removal of the child, and lead to successful reunification of the family.
- Work with local tribes to develop a list of qualified expert witnesses.
- Qualified expert witnesses can augment the information provided to the court and assist judges in decision-making that is consistent with the intent of ICWA.

Additional faculty notes/ examples of ICWA expert witnesses:

[illegible]

SLIDE 32: ICWA PRIORITIES FOR PLACEMENT – FOSTER CARE PLACEMENT

25 U.S.C. 1915 (b)

Recall that an important goal of Congress in enacting the ICWA was to ensure the placement of Indian children in homes that would reflect the unique values of Indian culture. This was achieved by the placement provisions of the ICWA, which govern both voluntary and involuntary placements of Indian children and define placement preferences that public and private agencies must follow. (Indian tribes are permitted under the ICWA to change the order of the act's placement preferences, so you must investigate with each tribe you encounter the order of its particular preference scheme.)

Foster care placement preferences or priorities under ICWA for Indian children are as follows:

1. Extended family;
2. Foster home licensed, approved or specified by the tribe;
3. Indian foster home licensed by the state;
4. Institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs; and
5. Other foster homes licensed by the State.

SLIDE 33: ICWA PRIORITIES FOR PLACEMENT – ADOPTIVE PLACEMENT

25 U.S.C. 1915 (a)

Adoptive placement preferences:

In an adoptive placement of an Indian child, preference shall be given in the following order:

1. Member of child's extended family
2. Other members of child's tribe
3. Other Indian families

ICWA provides that the tribe may also provide, by resolution, public acts, records or judicial proceedings, for a different order of preference (25 U.S.C. 1915 (c)). The state court should follow the tribe's preferences as long as the placement is the least restrictive setting appropriate to the particular needs of the child. The standards for complying with placement are prevailing social and cultural standards of the tribe (in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties).

An Indian child's tribe's order of preference by resolution, public acts, records or judicial proceedings, shall be followed by the agency or court effecting the placement so long as the placement is the least restrictive setting appropriate to the particular needs of the child (25 U.S.C. 1915 (c)). **The Court must follow placement preferences unless good cause not to follow.**

DISCUSSION ACTIVITY: Faculty may pose the following questions to gauge understanding around the placement preferences/ priorities in ICWA:

- ***“What is “good cause to the contrary” not to follow placement preferences under ICWA?”***
 - Parent, Indian custodian, tribe or guardian asks for a different placement
 - The child asks (if the child is of sufficient age)
 - Extraordinary needs of the child established by testimony of a qualified expert witness
 - No placement that meets the preference is found after a fully documented diligent search

However, good cause should be narrowly applied to limit avoidance of ICWA's placement preferences.

- ***“Do the preferences apply to emergency removal situations?”***
 - The preferences may not expressly apply to emergency removal, but should be followed if possible in emergency circumstances in order to promote placement stability.
 - ***“Is bonding of an Indian child with non-Indian caretaker(s) good cause not to follow ICWA placement preference?”***
 - Bonding is a normal occurrence to be encouraged, but it is not grounds to avoid the placement provisions of the Act.
 - ***“Do the placement preferences in ICWA trump a tribe's placement preferences?”***
 - If the tribe's preferences are different, the court must follow the tribe's preferences.
-

In summary, the following are **recommended practices** with respect to placement and ICWA:

- State agencies should be encouraged from the earliest moment to look diligently for placements that comply with the placement preferences of ICWA and to involve the relevant tribe in placement search efforts as much as possible. Agencies should also find out if the tribe's preferences are different than ICWA preferences.
- Good cause should be narrowly applied to limit avoidance of ICWA's placement preferences.
- Placement in a non-preferential home should not occur just because the non-preferred home that is available might offer more opportunities for an Indian child. Recall that an important goal of Congress in enacting ICWA was to ensure the placement of Indian children in homes that would reflect the unique values of Indian culture. There is a substantial amount of clinical evidence to suggest that Indian children placed in non-Indian homes are at risk in their later development (American Academy of Child Adolescent Psychiatry, 2013). While they may be cared for by devoted and well-intentioned foster or adoptive parents, Indian children are subject to ethnic/identity confusion and a pervasive sense of abandonment when placed with no connection to their unique culture and values. Non-tribal racial placements also greatly troubled tribes because they not only jeopardized the continued viability of the tribes themselves but also led to the alienation of Indian children.
- Parental preference for a particular placement should not be used without good reason to avoid the placement preferences of ICWA.

Additional faculty notes on placement preferences under ICWA:

SLIDE 34: ICWA AND POST PLACEMENT ISSUES

ICWA continues to play a role in child custody proceedings involving Indian children even after a placement, either foster care or adoptive, has been effected. The continued role assures that if the placement goes awry the intent of Congress will once again be realized in the post-placement proceedings.

Removal from Foster Home – If an Indian child is removed from a foster home or other institution, the placement preference criteria apply to any future placement, unless the removal from the foster home is for the purpose of returning the child to his or her parent or Indian custodian (25 U.S.C. 1916(b)). This prevents state courts from initially effecting a placement in compliance with ICWA and then removing the child from that home for placement that may not comply with the placement provisions.

Vacation of Adoption Decree – If an adoption decree is set aside under state law or the adoptive parent voluntarily terminates their parental rights, the biological or prior Indian custodian may petition the court for a return of custody and shall be restored to custody unless there is a showing that return would not be in the best interest of the child (25 U.S.C. 1916(a)).

Record of Placements – Each state that places an Indian child in either foster care or in an adoptive placement must keep records of each placement along with efforts exerted by the state agency to comply with the placement preferences of ICWA (25 U.S.C. 1915(a)). Such records shall be made available to either the Indian child's tribe or the Department of the Interior upon request (not withstanding any state law requiring confidentiality).

By enrolling an Indian child in his or her tribe before an adoption is finalized, or requiring the child's enrollment as a requirement of finalizing the adoption decree, later problems in unsealing adoption records can be avoided.

Additional faculty notes on ICWA and post-placement issues:

Other Federal Laws Impacting ICWA

SLIDE 35: MULTI-ETHNIC PLACEMENT ACT

42 U.S.C. 622,671, 1996a and 1996b

The Multi-Ethnic Placement Act (P.L. 103-82) was passed into law in 1994 in response to a belief that policies that gave consideration to race, color or national origin in making foster care and adoptive placement decisions often created a barrier to achieving permanency for children of color. In 1996 MEPA was amended –the amendments, entitled *Removal of Barriers to Interethnic Adoption* were passed because Congress believed the original intent of MEPA was not being followed and that changes were necessary to remove ambiguity about whether race, color or national origin could be considered in making placement decisions for children.

While the Removal of Barriers to Interethnic Adoption amendments provided new guidelines for foster care and adoptive placements, these new guidelines do not apply to placements made for eligible Indian children under ICWA. Congress recognized the unique political relationship that Indian children have with their tribal governments and how this forms the basis for an Indian child being given protections under ICWA. This political status is distinct and separate from a racial classification which forms the basis for other federal or state policies such as the Removal of Barriers to Interethnic Adoption.

“The relationship between Indian tribes and the federal government is a “political” relationship between two [sovereign] nations, not a relationship based on the racial classification of Native Americans.

The Supreme Court has recognized that Congress can treat Native Americans differently from other racially distinct groups ... because of the unique relationship between the tribes and the government.”

(Jones, 1995, Indian Child Welfare Act Handbook)

MEPA also requires that states provide a description of how they will recruit foster and adoptive homes in their Title IV-B Child Welfare Services Plan (Section 554): “provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the state for whom foster and adoptive homes are needed.” This provision is important for ICWA because one of the most common reasons for non-compliance with ICWA comes from not having enough Indian foster or adoptive homes. Many times, state and private child placing agencies use recruitment strategies that are not effective with Indian families. This results in inadequate numbers of Indian foster and adoptive homes being licensed, and ultimately, delays for Indian

children needing out-of-home care. States rarely support tribal efforts to recruit foster parents, which are also the most effective way to increase foster homes for Indian children. The MEPA requirement to describe foster and adoptive home recruitment strategies provides a catalyst to improved collaboration between Indian communities and child-placing agencies.

Additional faculty notes on MEPA:

SLIDE 36: FOSTERING CONNECTIONS ACT

The Fostering Connections to Success and Increasing Adoptions Act (H.R. 6893/P.L. 110-351) was signed on Oct. 7, 2008. This law helps to: connect foster children with their relatives; better coordinate the health care and education of foster children; support permanent families through relative guardianship; and enhance adoption subsidies and supports to older youth in foster care.

Fostering Connections to Success and Increasing Adoptions Act (P.L. 110-351) can strengthen the placement provisions of ICWA through stronger emphasis on family inclusion, relative search and sibling placements as well as supporting tribal access to federal Title IV-E foster care resources.

Among the provisions under the Fostering Connections Act of 2008, are some provisions with specific relevance to ICWA cases.

Sibling Placement

- States must make reasonable efforts to place siblings in the same foster care placement
- If siblings can't be placed together, the state must make reasonable efforts to provide frequent visitations among the siblings

Educational stability

- **Requires agency to coordinate with local education agencies to ensure that the child remain in their original school if in the child’s best interests**
- If not in the child’s best interests, the state must provide assurances that the child is immediately enrolled in a new school and all records are transferred

Notice

- Fostering Connections **requires due diligence to identify and provide notice to all adult relatives within 30 days of removal** (42 U.S.C. Section 671(29)). This includes non-resident fathers and paternal relatives.

Fostering Connections created a new plan to provide kinship guardianship payments to tribal relative guardians. This supports more culturally relevant permanency. Adoption, and specifically TPR, is not common or culturally appropriate in most tribal communities. Under Fostering Connections, federally recognized tribes can now apply for IV-E funds directly for foster care adoption assistance and kinship guardianship assistance. These new, subsidized guardianships offer an important permanency option for tribal families. However, only 32 states have taken on this optional program – the other state’s tribes remain without culturally appropriate permanency options.

Fostering Connections also authorized **one time grants to assist in developing IV-E programs in tribes**. The Act required the U.S. Department of Health and Human Services to provide technical assistance and implementation services to tribes seeking to establish IV-B and IV-E programs.

Additional faculty notes linking Fostering Connections and ICWA:

FACULTY TIP: As previously mentioned, faculty may wish to cover the *Baby Veronica* Case in more detail in this Module. This may be done here, before moving onto the concluding summary and discussion exercise section, or at the end of the summary material.

Presentational materials on the *Baby Veronica* Case are included for your use at the end of this Module. Accompanying Power Point slides can be found at the end of the Module III Power Point template (Slides 55-59).

SLIDE 37-39: CONCLUDING THIS MODULE - IN SUMMARY ...

The basic intent of ICWA is to protect the integrity of Indian tribes through protection of its Indian families. ICWA seeks to prevent the removal of Indian children from their family homes and placement away from extended family and tribal systems.

ICWA accomplishes this goal by:

- Requiring that **active efforts** are made to identify a child's membership or eligibility for membership in any federally recognized Indian tribe;
- Providing for the **dismissal or mandatory transfer of cases where the tribe has exclusive jurisdiction**;
- Providing for **transfer of jurisdiction over Indian child welfare cases to tribal court upon request in all other cases barring good cause to the contrary** as defined under ICWA;
- Requiring that states give **full faith and credit** to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings;
- Requiring state courts, in the removal of Indian children and in the termination of parental rights of Indian children, to **observe the highest standards applicable to prevent the destruction of Indian families**. These standards apply to:
 - The level of effort required to prevent removal;
 - The level of effort required to reunify children with families;
 - The level of evidence required in judicial proceedings; and
 - The requirement for a qualified expert witness under ICWA.
- Requiring **compliance with the placement preferences** as set forth in the ICWA, unless the tribe has adopted a different order of preference;
- Requiring that the **prevailing social and cultural standards of the local Indian community be applied in placement decisions**;
- Requiring **notice** to tribe(s), Indian parent(s), and Indian custodian(s) of state court child custody proceedings;
- Providing for the right of parent(s), Indian custodian(s), and/or tribe(s) of an Indian child to **intervene** in the state court proceedings;

- Providing for **court appointed counsel** to represent indigent parent(s) or Indian custodian(s) of an Indian child;
- Providing **protections for the parent(s) who voluntarily place their child in foster care or terminate parental rights**;
- Requiring **tribal and parental access, in accordance with applicable law, to records maintained by the state**;
- Recognizing tribal licensing and/or approval of standards for foster homes;
- Funding of tribal social services to Indian families and their children;
- Providing for a process to invalidate the state court's action when ICWA has been violated; and;
- Assisting Indian adults who were adopted as children to establish tribal affiliation.

FACULTY TIP: Include a summary of relevant state statutes in the summary of ICWA. Faculty may want to consider including a handout of the summary above.

Additional faculty notes to summarize this Module:

DISCUSSION EXERCISE: **Summary Decision-Trees/ Flow charts** – Step the judges through each of these decision-trees posing questions as you work through the flow chart. In order to facilitate discussion, custom animations have been added to the Power Point slides allowing for the display of aspects of the flow chart individually.

FACULTY TIP: Faculty Tip: Time permitting, faculty may also summarize the Module with a **DISCUSSION EXERCISE** that steps the judges through a series of **decision making flowcharts** for determining whether ICWA will apply in a case, determining jurisdiction, complying with notice requirements, making removal or termination decisions, voluntary consents (and withdrawals), and complying with placement preferences. See **DISCUSSION EXERCISE SLIDES 39-52**.

Faculty Tip: If time does not permit inclusion of the **DISCUSSION EXERCISE** flowcharts to end this Module, skip ahead to conclude the Module by projecting **SLIDE 53** and ***asking if the judges have any questions that haven't been answered?*** (You may want to revisit the flip chart notes developed during participant introductions outlining the judges' expectations for the training). If those questions will be answered in upcoming Modules, let the judges know that that information will be covered ... otherwise, take the time to ensure any unanswered questions have been addressed. If time on the agenda does not permit time to address questions, be sure to let the judges know that you can follow up with them after the training to provide them with the information they seek. **Note**: some of the decision-tree or flow charts may be helpful in answering the judges' outstanding questions.

SLIDE 40: WILL ICWA APPLY TO THIS CASE?

SLIDE 41: WILL ICWA APPLY TO THIS CASE?

SLIDE 42: WILL ICWA APPLY TO THIS CASE?

SLIDE 43: WILL ICWA APPLY TO THIS CASE?

SLIDE 44: WILL ICWA APPLY TO THIS CASE?

SLIDE 45: JURISDICTION AND ICWA

SLIDE 46: JURISDICTION AND ICWA

SLIDE 47: JURISDICTION AND ICWA

SLIDE 48: EMERGENCY REMOVAL

SLIDE 49: NOTICE REQUIREMENTS

SLIDE 50: REMOVAL OR TERMINATION DECISION

SLIDE 51: PLACEMENT PREFERENCES

SLIDE 52: VOLUNTARY CONSENT TO TPR

SLIDE 53: WITHDRAWAL OF CONSENT

SLIDE 54: CONCLUDING THIS MODULE – ANY QUESTIONS? THOUGHTS?

FACULTY TIP: In addition to asking if there are any outstanding questions, **conclude this Module by referring back to the experience of the video – reinforcing for the judges the spirit of ICWA –why the law is necessary and the critical importance of compliance.** You may want to repeat quotes from the video, or reiterate any stories or narratives shared during the training in order to strengthen the emotional component and reinforce learning.

Conclude the Module ***by asking if the judges have any questions that haven't been answered?*** (You may want to revisit the flip chart notes developed during participant introductions outlining the judges' expectations for the training). If those questions will be answered in upcoming Modules, let the judges know that that information will be covered ... otherwise, take the time to ensure any unanswered questions have been addressed. If time on the agenda does not permit time to address any questions, be sure to let the judges know that you can follow-up with them after the training to provide them with the information they seek.

Additional faculty notes to conclude the Module:

Supplemental Material on “*Baby Veronica*” Case³²

The 2013 U.S. Supreme Court case *Adoptive Couple v. Baby Girl* involved a private adoptive placement by the mother over the objection of the father. The case was popularly known as the *Baby Veronica* case. It was the first Supreme Court case involving ICWA in many years. It resulted in relatively narrow holdings.

³² This section has been written for the Curriculum by Scott Trowbridge, J.D., of the National Child Welfare Resource Center on Legal and Judicial Issues.

SLIDE 55: BACKGROUND

The parents were unmarried at the time of the child's birth - they had been engaged at the time of the pregnancy, but broke it off before the birth. The mother decided to place the child for adoption and asked the father via text message if he would relinquish his rights. He agreed, but apparently did not understand what this entailed, thinking instead he was giving her sole custody.

The mother approached a private adoption agency. She told them that the father was Cherokee, but the notice sent to the tribe had his name misspelled and his birth date wrong.³³ As such, the tribe could not verify his status and did not intervene until later. The mother circled "Hispanic" and did not state the father was an enrolled Cherokee citizen on the Interstate Compact for the Placement of Children (ICPC) paperwork – if she had stated truthfully that the father was an enrolled Cherokee citizen, Veronica would not have been allowed to leave the state.

The adoptive couple supported the mother through the pregnancy. There was some question about whether or not the father supported her as the father is on record in court documents in the lower court stating that he and his family did offer money and gifts to the mother, but she refused. An adoption petition was filed shortly after birth. However, the father first received formal notice of the adoption when the child was four months old.³⁴ He was on active duty in the Army and was to be deployed a few days before he was given the adoption papers – he immediately requested a stay in the proceedings. The stay was granted while father was deployed. The child was left with the prospective adoptive parents during this time.

Once the father returned, he resumed the fight for his child. The trial court and South Carolina Supreme Court found for the father, the latter primarily on finding that the prospective adoptive couple failed to show the child would suffer serious emotional or physical harm from the father getting custody. Other than his lack of support and contact for the first four months of her life, no allegations of a lack of fitness had been made.³⁵

³³ *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 554 (S.C. 2012).

³⁴ *Ibid.* at 555.

³⁵ Some states have codified ICWA into state law and if this private adoption situation had occurred in those states there would have been a very different outcome and process due to their state ICWA requirements (see for example California).

SLIDE 56: HOLDINGS IN BRIEF

The US Supreme Court reversed the state court decisions. The court determined that first, in a private custody case involving an Indian child where a parent never had legal or physical custody, the trial court does not need to make findings regarding emotional/physical damage and active efforts requirements of the ICWA.

Second, it determined that ICWA adoptive preferences do not apply when there are not competing prospective adoptive parties.

SLIDE 57: HOLDINGS IN DETAIL

Termination Standards

In terminating the rights of the parent of an Indian child, ICWA § 1912(f) requires that the court determine beyond a reasonable doubt, including with testimony of a qualified expert witness, that “continued custody” of the child is “likely to result in serious emotional or physical damage.”³⁶

The Supreme Court focused here on the language “continued custody.” It held that the section was inapplicable where a parent never had legal or physical custody because custody would be prospective, not continuing. The phrase “continued custody,” therefore, refers to custody that a parent already has (or at least had at some point in the past).³⁷

It was undisputed in the case that the father (Mr. Brown) never had physical custody before the termination hearing. As to legal custody, South Carolina law provided that an unwed father’s consent was not required for an adoption filed within six months of birth if he did not live with the child or mother or did not pay support.³⁸ Thus, the Court concluded the father had never had legal custody.³⁹

The applicability of this case will depend on the state’s law regarding paternity and whether or how a birth father loses his right to contest to an adoption by failing to provide support or visit. If a father has legal custodial rights under the state law, ICWA § 1912(f) will still require a qualified expert witness and finding of serious emotional or physical damage.

Second, as implied by the Supreme Court in this section of the majority opinion, the holding is limited to private adoption cases. The Court emphasized that the

³⁶ 25 U.S.C. § 1912(f) (1978).

³⁷ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2560 (2013).

³⁸ *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 560 n. 19 (S.C. 2012).

³⁹ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2562 (2013).

primary purpose of ICWA is preventing ‘removal’ of Indian children by states.⁴⁰ Justice Breyer’s concurrence (which was required to form the 5 justice majority) also emphasized that the holding was narrow – “...we should decide here no more than is necessary. Thus, this case does not involve a father with visitation rights or a father who has paid ‘all of his child support obligations.’...Neither does it involve special circumstances such as a father who was deceived about the existence of the child or a father who was prevented from supporting his child.”⁴¹

For other reasons, **the fact pattern that these holdings rested on should be rare in a public child welfare case. A father should be notified immediately of a removal, offered visitation, and considered as a placement.**⁴² A father in Mr. Brown’s position would have likely served as a placement or a custodian had the four-month-old child been removed by a state at under the Adoption and Safe Families Act (ASFA). At that point, even in a state where he would have had no presumptive custody due to lack of support or contact, he would *then* have physical custody, and the case would be distinguishable from *Baby Veronica*.

SLIDE 58: HOLDINGS IN DETAIL

Active Efforts

ICWA provides for active efforts “to prevent the breakup of the Indian family...” 25 U.S.C. 1912(d)

Similarly here, the court focused on the term ‘breakup’ and held the section inapplicable because father had abandoned the child and never had legal or physical custody.⁴³ Also similarly, the Court reiterated that this was a provision that made sense in child welfare, but not private adoption contexts. It noted that to apply the active efforts requirements to adoptive parents might prevent some Indian children from being adopted.⁴⁴

Even if the opinion had not suggested that the holding was limited to private cases, distinguishable facts will be common in child welfare cases. In a public case, both parents will be offered a case plan⁴⁵ and assistance in working toward reunification absent aggravated circumstances.

⁴⁰ *Ibid.* at 2560-2.

⁴¹ *Ibid.* at 2571 (concurrence)

⁴² Each child must have a case plan “designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available.” 42 USC § 675(5)(A).

⁴³ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2562 (2013).

⁴⁴ *Ibid.* at 2563-4.

⁴⁵ Each child must have a “plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster *parents* in order to improve the conditions in the parents’ home, facilitate return of the child to his own safe home”) *emphasis added*; 42 U.S.C.A. § 675(1)(B) (2008); *See also*, 45 CFR § 1356.21(g) (2008).

If a father like Mr. Brown were offered a case plan, **a father who had no allegations that the child would be unsafe with him, a public child welfare case would not change to an adoption goal unless the father then failed to develop the ability to provide a safe home in a timely manner.** While some state's aggravated circumstances sections do allow the court to find no further efforts are required due to abandonment, these actions are rare for such short periods of inaction as was seen in this case.

SLIDE 59: HOLDINGS IN DETAIL

Adoptive Placements

ICWA provides preferences in an adoption of an Indian child for "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families," "absent good cause to the contrary" (25 U.S.C. 1915 (a)).

The Supreme Court found this section inapplicable because the father or other family members had not sought to adopt the child, just to prevent termination.

Like with the first two holdings, non-ICWA federal law would disrupt the fact pattern here. Most notably, Title IV-E provides that all adult relatives will be notified within 30 days of removal and informed of their options for participating in the case.⁴⁶ In this case, in fact, the grandparents' home had been visited and found appropriate by a case worker,⁴⁷ though they were never apparently considered as an option given the private adoption context.

Conclusion

The *Baby Veronica* case has important implications for private adoption cases in certain states where a father has not met the requirements to be deemed to have custodial rights. In public child welfare contexts, it should have limited impact.

⁴⁶ 42 U.S.C.A. § 671(a)(29) (2008).

⁴⁷ *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 582 (S.C. 2012).

References, Additional Resources and Supplemental Readings – ICWA KEY COMPONENTS

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Some presentational materials in this Module were adapted from training materials supplied by: Margaret Burt, J.D., Judge Raquel Montoya-Lewis (Chief Judge Lummi Tribe and Associate Professor Western Washington University), Judge William A. Thorne, Jill Tompkins (Casey Family Programs), the National Council of Juvenile and Family Court Judges Child Abuse and Neglect Institute trainings, and Tribal STAR.

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In re Adoption of M.T.S., 489 N.W. 2d, 288 (Minn. Ct. App. 1992)

In re Dependency of Colnar, 757 P.2d 534 (Wash. App. 1988)

In re Kahlen, W., 285 Cal. Rptr. 507 (Cal. App. 5 Dist. 1991)

In re M.E.M., 635 P.2d 1313 (Mont. 1981)

In re N.L., 754 P.2d 863, 867 (Okla. 1988)

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Iowa Code 232.B5 (8) (2003)

Matter of Baby Boy Doe, 849 P.2d 925 (Idaho 1993)

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Mississippi Choctaw Indian Band v. Holyfield, 490 U.S. 30 (1989)

Multi-Ethnic Placement Act, Public Law 103-82 (1994); 42 U.S.C. 622, 671, 1996a and 1996b

Public Law 280 (1953), 18 U.S.C. 1162, 28 U.S.C. 1360

State Plan for Foster Care and Adoption Assistance, 42 U.S. Code 671

Resources

Noticing Agents for Tribes and Lists of Federally Recognized Tribes

- Bureau of Indian Affairs www.bia.gov/DocumentLibrary/index.htm
- California Department of Social Services (maintains regularly updated list of federally recognized tribes)
<http://www.childsworld.ca.gov/res/pdf/CDSSTribes.pdf>

Example of state court listing of qualified expert witnesses

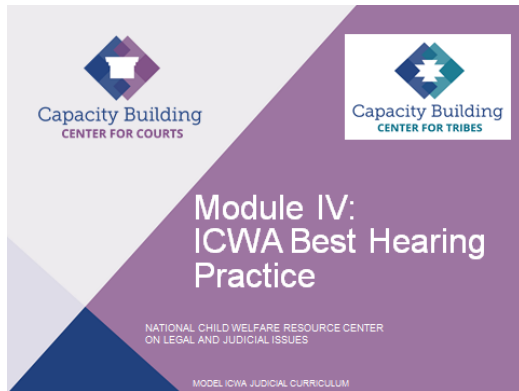
- California Administrative Office of the Courts, at
<http://www.courts.ca.gov/8105.htm>

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MODULE IV:

ICWA AND BEST HEARING PRACTICE

MODULE IV: ICWA AND BEST HEARING PRACTICE

Module Overview

This Module provides judges with an opportunity to apply the material covered in previous Modules in interactive exercises. These exercises allow participants to reflect on the content material and put it into practice through case scenarios, small group work and consideration of what is required at specific stages of the child abuse and neglect hearing process to comply with both the letter and spirit of ICWA.

Module Objectives

- To apply knowledge of ICWA's key provision and standards in practice; and
- To help judges in meeting ICWA requirements at each hearing stage by engaging them in case scenario or mock hearing exercises and a consideration of the decisions that must be made at each stage of the child abuse and neglect hearing process.

Activities and Exercises

- Case Scenario Exercise
- Mock hearing scripts
- Consideration of Best Hearing Practice

Approximate Time for Module: 1 hour and 15 minutes [time is dependent on discussion exercises and activities selected and inclusion of additional state/local information as needed]

Faculty Tips/ Notes –

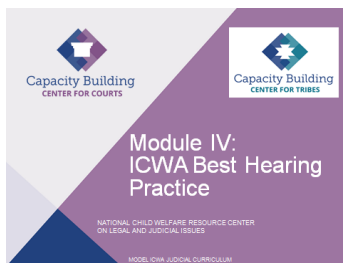
Preparing for the Module and Additional or Alternate Activities and Exercises

1. This Module is interactive in nature – driven primarily by exercises, group work and discussion. This Module is intended to be covered after *Module III the Key Components of ICWA* so that judges have the foundational background to apply to the case scenario fact pattern used and to a consideration of best hearing practice in ICWA cases.
2. **Case Scenario Exercise**: For small group breakouts using the case scenario, faculty may want to recruit facilitators to guide the judges through the case scenario questions. Alternatively, judges can select a volunteer “facilitator” for each small group to guide the discussion. Thoroughly review the case scenario fact pattern to ensure you know the case well. In your review, try to anticipate the questions that may arise and prepare your responses. The case scenario materials are included in the Appendix.
3. **ICWA Hearing Checklists**: In this section, faculty engage judges in a discussion of the key inquiries, decisions, and written findings of fact and conclusions of law related to ICWA and specific hearing stages of the child abuse and neglect court process. Faculty should familiarize themselves with, and use, the NCJFCJ *Indian Child Welfare Act Checklists* to facilitate this discussion. The checklists are also recommended as “take away” technical assistance tools to accompany this Curriculum. Template Power Point slides have been developed from the Checklists for use in this discussion, covering the Preliminary Protective, Adjudication, Disposition, Review, Permanency, and Termination of Parental Rights Hearings. Template slides for the Adoption Hearing are not included (in many jurisdictions judges hearing child abuse and neglect cases do not preside over the Adoption). However, an Adoption Hearing ICWA Checklist is included in the NCJFCJ ICWA Checklists and faculty should refer to that checklist if they wish to include a discussion of Adoption Hearings.

As needed, faculty should supplement the material on each of the hearing checklists with relevant state statutory requirements as they pertain to ICWA. Depending on the time available for this section of the Module, faculty may choose to cover only some of the Hearings (e.g., faculty may select hearings to focus on based on a training needs assessment that indicated problematic areas or based on the questions and issues raised by the judges in earlier Modules or during the case scenario exercise).

Alternate, Optional or Supplemental Activities and Exercises

4. As an alternative to the case scenario breakout discussions, faculty may wish to implement a **MOCK HEARING ACTIVITY**. In this activity, the facilitator and (non-faculty) role-play a hearing for which they have been prepared in advance. The role-players in the mock hearing face the audience with the judge at the podium. Bring props such as a robe and a gavel. After each short scene, the facilitator asks questions of the audience. A sample mock hearing script following the same fact pattern as the case scenario is included. Also included is an alternate, shorter mock hearing. The first mock hearing script should be used in conjunction with the case scenario while the second mock hearing script can be used on its own; either at the beginning of the Module to open discussion or another point during the presentation.



MODULE IV PRESENTATION

Total Time: 1 hour and 15 minutes [time allotted dependent on selection of discussion exercises and activities and inclusion of state/local information as needed]

SLIDE 2: CASE SCENARIO EXERCISE [approx. 60 minutes]

For larger trainings: Break the group into smaller breakout sessions, have participants take a few minutes to read the case scenario. Then have facilitators in each small group lead participants through a discussion of the issues by posing the questions noted below in the instructions. Judges may also volunteer to serve as facilitators in each group. Ask for volunteers from each group to report the results of their discussion. When the groups reconvene in the training room, be sure to process with the participants what they have learned and what was valuable about the discussion. **For smaller trainings:** Follow the instructions below but do not breakout the group. Faculty may choose to provide the questions on a separate sheet of paper for participants. This may be especially helpful when working with a very large group.

This scenario can be preceded by the accompanying mock hearing exercise, or the separate mock hearing could be conducted alone.

CASE SCENARIO INSTRUCTIONS: In your participant materials you will find a case scenario - **the scenario outlines the core facts you know about the case at the Preliminary Protective Hearing (initial custody or shelter care hearing). After reviewing the facts, consider the following questions on your handout and discuss as a group** [see Appendix for a handout of questions for discussion]:

1. Do you believe that Tribal Case Manager Nancy and CPS Investigative Case Manager Callie were qualified to testify as expert witnesses?
 - a) What factors would be important in deciding whether the ICWA standard for qualified expert testimony was met?
 - b) Was it reasonable for Nancy to expect to receive documentation other than the child abuse and neglect petition prior to the hearing?
2. Did all interested parties receive adequate and timely notice under ICWA?
 - a) Did Callie make sufficient efforts to contact the parents, other family members, or a representative of the Northern Indian Tribe?
 - b) Would it have been of use for Callie to contact the Tribe prior to attending the Preliminary Protective Hearing?
 - c) Was the notification for the hearing made appropriately? How should notice of the hearing have been provided to both the parents and the Northern Indian Tribe?
3. Were adequate efforts made to determine whether Betty or Aaron were “Indian children” within the meaning of ICWA?
 - a) Is the court required to make an inquiry at the Shelter Hearing as to whether ICWA applies to the child or children in question?
 - b) Does Aaron have to be an enrolled member of a Tribe for ICWA to apply?
4. Was the Court correct in finding that neither child was subject to the Indian Child Welfare Act?
 - a) Was there compliance with ICWA in the emergency foster care placement?
 - b) Should Callie have explored placement with John’s sister?
5. Did the Judge respond appropriately to the Tribe’s request to intervene and the Motion for Transfer?
 - a) In particular, must there be good cause to transfer the case to the Tribe?
 - b) When may a judge properly refuse to transfer?

Provide 45 minutes for the group to review the case scenario materials and complete the case scenario exercise (check in at 30 minutes to ensure the judges still need time

to complete the exercise). The last 15 minutes of this session can either be allocated to provide more time for the judges to work through the scenario if needed, or to begin the debrief of the exercise.

When everyone has completed the exercise, ask for volunteers to report the results of their discussion. You may call on different judges/ small groups for different questions or ask volunteers to go through the answers to all of the questions before calling another participant/ group.

Additional faculty notes on the case scenario exercise:

ICWA and Best Hearing Practice – ICWA Checklist Review and Discussion

FACULTY TIP: This section uses the **National Council of Juvenile and Family Court Judges' Indian Child Welfare Act Checklists** to walk the judges through best hearing practice and ICWA. Judges should have the checklists as handouts to assist them in following along. If time is an issue, faculty may wish to select some and not all of the hearings for discussion. For example, faculty may wish to cover only the Preliminary Protective Hearing and Termination of Parental Rights Hearing as critical hearings with respect to ICWA issues. Whenever possible, however, the selection of hearings for this discussion should be based on an understanding of the needs of the audience (e.g., based on a training needs assessment and/or based on the questions or issues judges raised during previous Modules and items they may have struggled with during the case scenario exercise).

FACULTY TIP: As needed, supplement the material on the Checklists (in your discussion and/or by adapting the Power Point slides) with relevant state statute requirements.

ICWA and Best Hearing Practice

In this next section, we are going to step through the key questions, decisions and findings that should happen at critical stages of the child abuse and neglect hearing process to ensure compliance with ICWA. We'll be using the National Council of Juvenile and Family Court Judges ICWA Checklists for Judges as a tool to guide our discussion. But before we cover what needs to happen at specific hearings, we'd like you to consider, that as a measure of best practice in every case, you make a habit of asking yourself some questions.

SLIDE 3: SELF-REFLECTION QUESTIONS

The National Council of Juvenile and Family Court Judges⁴⁸ recommend that to protect yourself against any institutional bias that may creep into your decision-making you should **make a habit of asking yourself as a judge:**

- What assumptions have I made about the cultural identity, genders and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?

⁴⁸National Council of Juvenile and Family Court Judges, (2010), *Right from the Start: The CCC Preliminary Protective Hearing Benchcard, a Tool for Judicial Decision-Making*, NCJFCJ: Reno, NV; National Council of Juvenile and Family Court Judges, (under development 2014), *"RESOURCE GUIDELINES: Improving Court Practice in Child Abuse and Neglect Cases Revised Edition,"* NCJFCJ: Reno, NV.

- How has the court’s past contact and involvement with this family influenced (or how might it influence) my decision making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that **active efforts** have been made in an individualized way to match the needs of the family?
- Am I considering relatives, other members of the child’s tribe and other tribal families as a preferred placement options as long as they can protect the child and support the permanency plan?

Additional faculty notes on **self-reflection questions** to protect against bias in decision-making:

Best ICWA Practice at the Preliminary Protective Hearing

DISCUSSION ACTIVITY: *“What key inquiries, decisions and findings should the judge make related to ICWA at the preliminary protective hearing?” “What do you want to know?” “What information do you need to make the ICWA determination?” “Who would you like to be present?”*

De-brief this discussion by stepping through the next set of slides on the Preliminary Protective Hearing, noting items the judges got and ones they might have missed.

The next set of slides step through the **Preliminary Protective Hearing with a focus on ICWA.**

SLIDE 4-5: THE PRELIMINARY PROTECTIVE HEARING - KEY ICWA INQUIRIES

Additional faculty notes on **key inquiries** at the Preliminary Protective Hearing:

SLIDE 6-7: THE PRELIMINARY PROTECTIVE HEARING - KEY ICWA DECISIONS THE COURT SHOULD MAKE

Additional faculty notes on **key decisions** at the Preliminary Protective Hearing:

SLIDE 8-9: THE PRELIMINARY PROTECTIVE HEARING - ICWA REQUIRED NOTICE AND ADVICE OF RIGHTS

Additional faculty notes on **notice and advisement of rights** at the Preliminary
Protective Hearing:

SLIDE 10-11: PRELIMINARY PROTECTIVE HEARING - KEY WRITTEN FINDINGS THE COURT MUST MAKE

Additional faculty notes on **key written findings** at the Preliminary Protective Hearing:

The Adjudication Hearing

DISCUSSION ACTIVITY: *“What key inquiries, decisions, written findings of fact and conclusions of law* De-brief this discussion by stepping through the next set of slides on the Adjudication Hearing, noting items the judges got and ones they might have missed.

SLIDE 12: ADJUDICATION HEARING - KEY ICWA DECISIONS THE COURT SHOULD MAKE

Additional decisions – If the Disposition Hearing will not occur within a short time after the Adjudication Hearing, the judge will need to make temporary decisions at the conclusion of adjudication such as:

- Determine where child is to be placed prior to Disposition Hearing
- Order further testing or evaluation of the child, parent(s) or Indian custodian in preparation for the Disposition Hearing and **ensure that all assessments are culturally appropriate**
- **Make sure the agency is, in preparation for disposition, making prompt and diligent efforts to identify and evaluate extended family or, if no family member is available, other tribal members or other Indian families as caretaker**
- Order the alleged perpetrator to stay out of the family home and have no contacts with the child
- **Direct the agency to continue its efforts to notify non-custodial parents, including unwed fathers whose paternity has been acknowledged or established (25 U.S.C. 1903(9))**

- Set the terms for visitation, support, and other intra-family communication including parent-child and sibling visits when the child is in foster care prior to disposition.

Additional faculty notes on **key decisions** at the Adjudication Hearing:

SLIDE 13-14: ADJUDICATION HEARING – KEY ICWA WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW

SLIDE 15-16:

Additional faculty notes on **written findings of fact and conclusions of law** at the Adjudication Hearing:

The Disposition Hearing

DISCUSSION ACTIVITY: *“What key inquiries, decisions, written findings of fact and conclusions of law must the court make related to ICWA at the Disposition Hearing?”*

De-brief this discussion by stepping through the next set of slides on the Disposition Hearing, noting items the judges got and ones they might have missed.

SLIDE 17-18: THE DISPOSITION HEARING – WHEN FOSTER CARE PLACEMENT RECOMMENDED

AFFIDAVIT DOCUMENTING ACTIVE EFFORTS

Additional faculty notes on **affidavit documenting active efforts** submitted at the Disposition Hearing:

SLIDE 19-20: DISPOSITION HEARING - KEY ICWA DECISIONS THE COURT MUST MAKE

Additional faculty notes on **key decisions** at the Disposition Hearing:

SLIDE 21-22: THE DISPOSITION HEARING – KEY ICWA WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW

SLIDE 23-24:

Additional faculty notes **written findings of fact and conclusions of law** the Court should make at the Disposition Hearing:

The Review Hearing

DISCUSSION ACTIVITY: *“What key inquiries, decisions, written findings of fact and conclusions of law must the court make related to ICWA at the Review Hearing?” “What additional information do you need at this stage/ what additional expectations do you have of parties?”*

Note that you are not referring to the Permanency Hearing mandated by ASFA at 12 months from removal, but the 3-6 month review. De-brief this discussion by stepping through the next set of slides on the Review Hearing, noting items the judges got and ones they might have missed.

SLIDE 25-26: THE REVIEW HEARING – WHEN FOSTER CARE PLACEMENT RECOMMENDED

AFFIDAVIT DOCUMENTING ACTIVE EFFORTS

Additional faculty notes on **affidavit documenting active efforts** submitted at the Review Hearing:

SLIDE 27-28: THE REVIEW HEARING – KEY ICWA DECISIONS THE COURT MUST MAKE

Additional faculty notes on **key ICWA decisions** the Court must make at the Review Hearing:

SLIDE 29-30: THE REVIEW HEARING – KEY ICWA WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW

SLIDE 31:

Additional faculty notes on **key ICWA written findings of fact and conclusions of law** at the Review Hearing:

The Permanency Hearing

DISCUSSION ACTIVITY: *“What key inquiries, decisions, written findings of fact and conclusions of law must the court make related to ICWA at the Permanency Hearing?” “What additional information /reports do you need at this stage/ what additional expectations do you have of parties?” “Who do you need to be present at the Hearing?”*

Note that you are referring to the Permanency Hearing mandated by ASFA at 12 months from removal. De-brief this discussion by stepping through the next set of slides on the Permanency Hearing, noting items the judges got and ones they might have missed.

SLIDE 39: THE PERMANENCY HEARING – KEY ICWA DECISIONS THE COURT SHOULD MAKE

Additional faculty notes on **key ICWA decisions** the Court should make at the Permanency Hearing:

SLIDE 40-41: THE PERMANENCY HEARING – ICWA KEY WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW

Additional faculty notes on **key ICWA written findings of fact and conclusions of law** at the Permanency Hearing:

The Termination of Parental Rights Hearing

DISCUSSION ACTIVITY: *“What key inquiries, decisions, written findings of fact and conclusions of law must the court make related to ICWA at the Termination of Parental Rights Hearing?” “What additional information /reports do you need at this stage/ what additional expectations do you have of parties?”*

De-brief this discussion by stepping through the next set of slides on the Termination of Parental Rights Hearing, noting items the judges got and ones they might have missed.

SLIDE 42: THE TERMINATION OF PARENTAL RIGHTS HEARING – KEY ICWA DECISIONS

FACULTY TIP: Reinforce for judges that if notice was given to a tribe or even the BIA at the beginning of the case but there was no response, the court cannot assume that the case is not an ICWA case. Notice must be given again.

Additional faculty notes on **key ICWA decisions** at the Termination of Parental Rights Hearing:

SLIDE 43: THE TERMINATION OF PARENTAL RIGHTS HEARING – KEY ICWA WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW [CONTESTED HEARING]

SLIDE 44: THE TERMINATION OF PARENTAL RIGHTS HEARING – KEY ICWA WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW [UNCONTESTED HEARING]

Additional faculty notes on **key ICWA written findings of fact and conclusions of law** at the Termination of Parental Rights Hearing:

SLIDE 45: CONCLUDING THE MODULE

Conclude the Module by providing the judges with an opportunity to ask any final or outstanding questions.

References, Additional Resources and Supplemental Readings – ICWA BEST HEARING PRACTICES

References

National Council of Juvenile and Family Court Judges. (2003). *Indian Child Welfare Act Checklists for Juvenile and Family Court Judges*.

National Council of Juvenile and Family Court Judges. (1995). *RESOURCE GUIDELINES: Improving Court Practice in Child Abuse and Neglect Cases*, NCJFCJ: Reno, NV.

National Council of Juvenile and Family Court Judges. (Forthcoming, 2016). *RESOURCE GUIDELINES REVISED: Improving Court Practice in Child Abuse and Neglect Cases*, NCJFCJ: Reno, NV.



MODULE V:

ICWA AND THE LEADERSHIP ROLE OF THE JUDGE – On-the- Bench and Off-the-Bench in Meaningful Engagement and Collaboration

MODULE V: ICWA AND THE LEADERSHIP ROLE OF THE JUDGE

Module Overview

The goal of this Module is to emphasize the application of the material in this Curriculum to the role of the juvenile or dependency court judge –to not only ensure the legal requirements of ICWA are followed, but also to exercise judicial leadership to improve the court’s handling of cases involving Indian children and their families and to improve outcomes for Indian children and families. Judges in child abuse and neglect cases have a unique leadership role that involves much more than making decisions in a courtroom. The judges’ role as leader is discussed as requiring both on-the-bench activities (e.g., setting clear expectations for practice in the handling of cases, holding all players accountable for meeting those expectations, and exercising strong judicial oversight of case progress) and off-the-bench activities in collaboration with system and tribal partners to ensure positive outcomes for Indian children and their families. The Module provides strategies and tips for collaborating with tribal judges and leaders, as well as urban Indian organizations.

The Module stresses why the material in this training should be of concern to all judges by reinforcing their leadership role in ensuring compliance with ICWA and engaging in meaningful collaboration to improve outcomes for Indian children and their families.

Module Objectives

- To review the unique role of the juvenile or dependency court judge, including leadership components of that role;
- To understand that the leadership role of the judge involves both on-the-bench and off-the-bench components;
- To understand why judicial leadership is necessary to ensure better outcomes for Indian children and their families who become involved in the juvenile court system;
- To provide specific ways the judicial leadership role applies to improving outcomes for Indian children and their families.
 - To help judges identify ways to exercise their on-the-bench and off-the-bench role in improving compliance with ICWA
 - To begin to develop an action plan for leadership on-the-bench and off-the-bench in engagement and collaboration

Faculty Tips/ Notes – Preparing for the Module and Additional or Alternate Activities and Exercises

Presentation Outline

- The Role of the Juvenile Court Judge
 - Unique role (includes many non-traditional functions)
 - How judges can make a difference to outcomes for Indian children and their families by exercising their leadership role
- Using a Continuous Quality Improvement (CQI) Approach to Engage Stakeholders and Improve Outcomes
- The Steps for Meaningful Engagement and Collaboration
 - Relationship building
 - Training to develop understanding
 - Assessing current practice
 - Action planning for change

Activities and Exercises

- Discussion – reflection on judicial leadership role; specific ways judges have exercised leadership on and off the bench, and how they have (or might in the future) exercised leadership to improve the court's handling of ICWA cases and improve outcomes
- Individual or Small Group Activity – utilize the ICWA Discussion Guide to identify resources and gaps in resources or understanding
- Personal Action Plan
- Approximate Time for Module: 1 hour and 15 minutes [time dependent on discussion exercises and activities selected]

1. This Module stresses the unique role and responsibilities of the juvenile or dependency court judge – a role requiring them to exercise leadership both on- and off-the-bench to ensure well-being and positive outcomes for all children and families involved in the juvenile court system.⁴⁹ The Module is best taught by judicial faculty who supplement the presentational material with examples of how they have exercised judicial leadership both on and off the bench to improve outcomes for children and families, and specifically to ensure ICWA compliance and positive outcomes for Indian children and their families.

The material in this Module should be presented in an inspirational and encouraging manner. Faculty should share personal or other examples of how collaboration resulted in improved outcomes or processes.

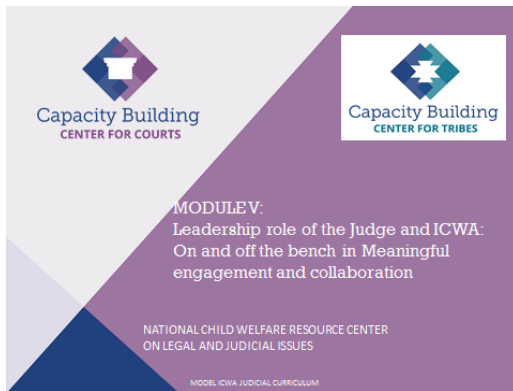
⁴⁹ See for example *Achieving Excellence in Judicial Leadership: Leading Change for Better Outcomes for Children and Families – A Judicial Leadership Curriculum*. National Child Welfare Resource Center on Legal and Judicial Issues.

2. This Module is designed to be implemented by a judge who has experience in developing relationships with tribes and who has developed a collaborative stakeholder group. As such, it is expected that faculty will add examples from their professional and personal experiences to help illustrate the points and clarify the material. If appropriate, a state Court Improvement Program (CIP) Director may be able to discuss the Children’s Bureau mandate for “*meaningful and ongoing engagement with tribes*” and ways in which the CIP is actively meeting this mandate. Involvement of tribal experts in this Module (either as co-faculty or as participants) is also ideal as it models collaboration between state courts and tribes – especially if the judicial and tribal faculty have worked together to improve compliance with ICWA.
3. Prior to the training, faculty should reflect on their own experiences leading a collaborative and their experiences in developing relationships with tribes and provide examples of both when presenting.

Alternate, Optional or Supplemental Activities and Exercises

4. If the training needs assessment calls for even more focus on the judge’s leadership role and how that applies to ensuring ICWA compliance, faculty may wish to consider providing the judges with an opportunity to complete a **leadership self-assessment**. Completing a leadership self-assessment exercise will help generate a list of leadership strengths and weaknesses that the judges can use in action planning to strategize ways to capitalize on those strengths and overcome those weaknesses. Leadership self-assessments specific to the judicial role and successfully used in trainings for judges are available from the National Child Welfare Resource Center on Legal and Judicial Issues and the National Council of Juvenile and Family Court Judge’s National Judicial Leadership Curriculum (see references at the end of this Module).
5. Faculty may wish to include an additional **large group discussion** where participants share some of the barriers or stumbling blocks they have experienced, or expect to experience, when exercising judicial leadership (both on- and off-the-bench) to improve compliance with ICWA. After identifying barriers, faculty would facilitate further discussion of specific strategies to overcome those barriers. Barriers and strategies should be flip-charted. As faculty move through other sections of the Module, and additional barriers and strategies are revealed through discussion or participant questions, faculty can update the flip charts to reflect the evolving nature of the learning. The flip charts can be displayed around the room and referred to by the judges in the personal action exercise.

6. An **action planning activity** is included in this Module. Depending on the experience of participants and the time allowed for this Module, faculty can lead participants through the initial action planning stages after using the *Discussion Guide* as outlined in the Module (acknowledging that judges will need to review the *Discussion Guide* with their larger collaborative to ensure all resources are captured). Alternatively, the action planning exercise can be focused on creating a personal action plan for the judges – focused on the on-the-bench and off-the-bench strategies they will employ when the training is concluded (i.e., the personal “next steps” for change, which could include outreaching to their collaborative teams and tribal representatives for further action planning).
 7. If there is a statewide Indian Commission or a state-level ICWA office through the Department of Human Services, you may wish to invite people from these offices to supplement the discussion of local resources.
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MODULE V PRESENTATION

Total Time: 1 hour and 15 minutes [time dependent upon discussion exercises and activities selected]

SLIDE 2: LEARNING OBJECTIVES

- To review the unique role of the juvenile or dependency court judge, including leadership components of that role;
- To understand that the leadership role of the judge involves both on-the-bench and off-the-bench components;
- To understand why judicial leadership is necessary to ensure better outcomes for Indian children and their families who become involved in the juvenile court system;
- To provide specific ways the judicial leadership role applies to improving outcomes for Indian children and their families.
 - To help judges identify ways to exercise their on-the-bench and off-the-bench role in improving compliance with ICWA
 - To begin to develop an action plan for leadership on-the-bench and off-the-bench in engagement and collaboration

SLIDE 3: THE ROLE OF THE JUVENILE COURT JUDGE

The prototypical traditional judge hears the case, decides the winner/loser and walks off the bench. She'll never see the parties again. Her job has been to control the process, get the evidence, give a decision and that's all. **But, in the juvenile court context, the judge doesn't just decide the cases ...**

In exercising their role, the Juvenile Court Judge must do much more. The juvenile dependency court is the original problem-solving court - judges must work with system stakeholders and the community to address the needs of the children and families before the court – **the role of the juvenile dependency court judge involves leadership functions.**

SLIDE 4: UNIQUE ROLE OF THE JUVENILE COURT JUDGE

The Juvenile Court Judge's role is **UNIQUE**

- Includes many non-traditional functions
 - Combines judicial, administrative, collaborative and advocacy components
- Decisions set standards within the community and the systems connected to the court
 - Ensure systems work efficiently and fairly, and adequate resources exist to respond to caseloads –the judge sets the tone for the entire system
- The Juvenile Court Judge exercises **judicial leadership** both on- and off-the-bench

SLIDE 5: LEADERSHIP ROLE OF THE JUVENILE COURT JUDGE

- Leadership is **exercised on the bench** through **strong judicial oversight of cases**
 - the juvenile dependency court judge is the gatekeeper
 - the jurist of law and fact
 - the administrator of due process
 - the applier of therapeutic and restorative justice
 - and an inquiring magistrate of well-being, safety and plan for children in care
- Leadership is **exercised off-the-bench** through convening collaborative groups, supporting and encouraging education on best practices, and promoting innovation designed at improving outcomes for children and families

“We believe that it is the responsibility of the judge to fill voids in the system. Unless there is specific authority to the contrary, I will assume that I have the authority, as well as the responsibility, to fill the voids” – Judge Stephen Rubin, Tucson Arizona (past president National Council of Juvenile and Family Court Judges and Lead Faculty for the National Council’s Child Abuse and Neglect Institute).

SLIDE 6: RESPONSIBILITIES OF THE JUVENILE COURT JUDGE

- Permanent plan for the child
- Monitor services provided
- Set standards by which the juvenile system will be governed
 - e.g., do you accept cookie-cutter case plans? Do you accept bad lawyering?
 - It's up to the judge to raise the bar - to set expectations for others
- Provide **leadership** to community and ALL participants in the juvenile court system

The Juvenile Court Judge's job is to focus on the well-being and safety of ALL children. The Juvenile Court judge sets standards and expectations for the court and the community. There is an important policy role for the judge. **You don't have to be the presiding judge to engage the community in the well-being and safety of its children.**

SLIDE 7:

LARGE GROUP DISCUSSION – LINKING JUDICIAL LEADERSHIP ROLE TO ICWA IMPLEMENTATION

TIME: Approx. 20 Minutes

Ask the judges to share examples of how they have exercised leadership, both on and off the bench, to ensure provisions of ICWA are followed by all stakeholders and to improve outcomes for Indian children and families. Allow approximately 10 minutes for discussion of on-the-bench examples and 10 minutes for off-the-bench examples. Be prepared with some examples of your own (flip chart participant examples).

FACULTY TIP: In facilitating this discussion, here are some of the **on-the-bench judicial leadership examples** you are looking for:

- Judges should inquire of all parties particularly at the first hearing in the case if there is any reason to believe ICWA applies. Judges should satisfy themselves that the agency had asked the right people questions about ICWA and Indian heritage. The court should personally ask the parties and any relatives who may be present in the courtroom if they have tribal affiliation.
- If the answer is yes the court should order the agency to notify the tribe. If the answer is no or unknown the court should order the agency to further investigate and report back at the next hearing.
- Make sure your courtroom is set up to easily include the tribal attorney; qualified expert witness and/or tribal social worker have seating on par with the other parties.

All of the above should be done in every case. **The court will be exercising on the bench leadership by ensuring everyone is aware the court needs this information.** At every subsequent hearing the court should ask the questions. **Create the expectation that active efforts will be made in every case and the court, just like with the required ASFA findings, will hold the state/county agency accountable for making those efforts.** It is not the responsibility of Tribal Social Services to make Active Efforts.

Faculty Tip: In facilitating this discussion, here are some of the **off-the-bench judicial leadership examples** you are looking for:

- Commit to a vision of 100% ICWA compliance with child welfare system stakeholders, including tribes working collaboratively to begin a strategic plan of action.
- Ensure judicial officers and system stakeholders are effectively trained on historical trauma and institutional bias, as well as the spirit and context of the legislation.
- Engage tribes by developing authentic relationships, judge-to-judge, court-to-court, and system-to-system to solve issues.

Invite tribes to participate on the state's Court Improvement Program committee, current teams, workgroups, projects, initiatives, training opportunities, and as valued partners.

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SLIDE 8: IN SUMMARY ...YOU CAN MAKE A DIFFERENCE

- **Judges can exercise their leadership role**
 - **On-the-Bench**
 - Strong judicial oversight, clear expectations, hold parties accountable for practice and outcomes –including themselves –ensure everyone is committed to ICWA compliance
 - **Off-the-Bench**
 - In collaboration with system partners work to promote positive outcomes for Indian children and their families – judges can act as convener and advocate to ensure accountability of system
 - Communicate importance of the issue and vision for improvement
 - Design of court-run interventions focused on improving practice
 - Support of multi-disciplinary trainings

FACULTY TIP: Because judicial code of ethics are often mentioned as a stumbling block to off-the-bench leadership and collaboration, faculty should emphasize that **model judicial rules of ethics for juvenile court judges actually encourage judicial leadership** (e.g., reference the ABA's New Code of Ethics which authorizes judges to act as leaders). Be prepared to reference applicable state rules/ code of ethics as well.

SLIDE 9: JUDICIAL OVERSIGHT, THE BIG PICTURE –

Remember the big picture is ...

- To ensure that every child that should be in care is in care, but not a single child more
- To ensure that every child that is in care is in a safe, nurturing placement that is supportive of the permanency plan

The role of the Juvenile Dependency Court Judge is unique in the court system. You have the opportunity to have a significant impact on the way the juvenile dependency court and the court system operate. You have a significant impact on the lives of **all** children and families.

Leadership by the court is essential to ensure ICWA compliance. Indian children should not be subject to their placements and permanency plans being disrupted well into the final stages of the case. When ICWA is not followed, this risk arises.

With vision and commitment both on and off-the bench, judges have the power to make change. Judges are gatekeepers to the foster care system. As gatekeepers, they are capable of initiating systems change through their leadership of a multidisciplinary

collaborative body. No child enters or leaves foster care without a judge's order. Children's experiences are impacted by the decisions made and expectations set by judicial officers.

SLIDE 10: WHEN A JUDGE CONVEYS SUPPORT FOR ICWA

When a judge conveys support for ICWA, this can

- Improve child welfare practice
- Reduce the number of ICWA-related appeals
- Reduce ICWA-related court costs
- Strengthen relationships between states, counties, and tribes and improve collaboration.

ICWA is best practice for family reunification. ICWA is best practice for placement (*Judges' Journal*, 2013).

Additional faculty notes/ concluding comments on the judicial leadership role to improve ICWA compliance and outcomes:

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Steps to Improved Compliance through Meaningful Engagement and Collaboration

As we've been discussing, improved compliance with ICWA cannot be achieved only in the courtroom. It requires actively developing relationships, examining current practices, and collaborating with traditional and new partners.

FACULTY TIP: Note for the judges that this will only be the beginning of their process to identify ways to improve compliance and collaboration. They will need to return to their communities to further develop their understanding of local resources and gaps in resources.

Faculty Tip: Building on the material previously covered, stress again for the judges that they need to work both on- and off-the-bench to develop relationships with tribes and other stakeholders who are committed to improving compliance with the ICWA (if they aren't already).

SLIDE 11:

The National Council of Juvenile and Family Court Judges (NCJFCJ) has described a four step process for improved ICWA compliance. We'll step through that process in the next set of slides to illustrate a strategy for you to implement at home to improve ICWA compliance and outcomes.

Steps to Improved Compliance:

- Meaningful and ongoing collaboration
 - Develop respectful and authentic relationships with tribes to fully implement ICWA and best serve Indian children (this is the first and most critical and ongoing step)
- Examine court practices – including obtaining baseline data
- Build understanding through training and education
- Develop an action plan and monitor that action plan to ensure accountability and progress.

Judges and child welfare workers must commit to a course of action that is inclusive of tribal voices and that leads to real and sustainable change for Indian children and families. The recommended practices we are going to discuss are based on the framework of judicially-led collaborative systems change processes where all stakeholder groups are represented at the table and contributing to the systems change

work, such as those utilized in NCJFCJ Model Courts (see the “*Model Court Effect*,” 2010).

SLIDE 12: MEANINGFUL AND ONGOING COLLABORATION

STEP ONE: DEVELOP RELATIONSHIPS

All relationships take time, communication, and respect to develop. Developing meaningful and respectful relationships with tribal partners is critical to improving a state court’s ICWA compliance because it is the first step to understanding the significance of keeping Native children connected with their culture and community.

“The extent to which tribal and state cooperation succeeds or fails depends in large part upon the ability to understand each other’s philosophical, legal, and historical realities. Cultural barriers to communication can, if left unattended, prevent meaningful cooperation from taking place”

(Organick & Kowalski, 2008).

FACULTY TIP: It is not necessary to review the entire list below; build into this discussion any relevant examples the judges shared during the large group discussion of on-the-bench and off-the-bench leadership. Ask participants if they have personal examples to share related to developing relationships with tribal judges and leaders.

Judges can develop or improve relationships with tribal judges and leaders by:

- Identify tribes within the state and in neighboring states, including tribes that are not federally or state recognized using the Tribal Leaders Directory from the BIA or other resources to obtain contact information. If there are no tribes within the state, identify tribes outside of the state whose members may be represented in the child welfare population.
- Research the state and local history regarding tribes. Learn about tribes that were removed from their lands within state borders, relocated, or extinguished.
- Determine if the tribes have a court, problem-solving council, or other resolution process in the community. The judge or judicial officer should reach out to the tribal court judge or tribal representative personally. This may require a series of phone calls or an in-person meeting, for example for coffee or lunch, to develop rapport and begin to build a meaningful relationship.
- Visit a tribal community to observe the tribal court and to learn more about the community culture. Be sure to ask the tribal court judge about how to follow tribal protocols.
- Invite the tribal court judge and/or tribal representatives to participate in the next collaborative meeting and ask the tribal court judge and/or tribal representative to

talk about the tribal community, its history, tribal family law, and parenting practices.

- Ask a tribal court judge or tribal representative to participate in the judicially-led collaborative as an active stakeholder. The knowledge and expertise that this person will bring can help the collaborative more effectively problem solve and improve the well-being of Indian children and families. Tribes are not required to comply with ICWA; however, they have a vested interest in the state court following the law.
- Identify any urban Indian organizations in the state.
- Identify existing resources and ICWA advocates or specialists within the state who may be located at universities, state agencies, and local non-profit organizations and who have relationships with tribes or are working with tribal communities.
- Encourage work on a statewide level. Consider convening a tribal court-state forum to improve relationships and the functioning of tribal and state judicial systems. Work with the state Court Improvement Program (CIP) to assist in fulfilling the CIP's mandate of meaningful and ongoing engagement with tribes.

SLIDE 13: TIPS FOR FOLLOWING PROTOCOL & DEVELOPING RELATIONSHIPS

These materials were developed by Tribal STAR, a program of the San Diego State University School of Social Work, Academy for Professional Excellence.

Protocol:

Protocol is defined as: “a code prescribing strict adherence to correct etiquette and precedence.” The ability to follow and understand protocol when working with Tribal communities will assist one's efforts to set a foundation for long-lasting and trusting relationships.

Following protocol when engaging with Native community members can show Tribal gatekeepers that one has taken the time to learn the value of culture, tradition, and humility. Using protocol does not guarantee Tribal participation, however it increases the probability. The following recommendations are not based on the culture of any single tribe, but on the application of Tribal values to group and individual interaction.

Common features of protocol are:

- Demonstrating respect for Elders, Tribal Leaders, elected Tribal Leaders, and Spiritual Leaders by acknowledging and appreciating their roles in the community and seeking their advice as experts of the community.
- Being willing to hold meetings and trainings on tribal land.
- Scheduling meetings and events around meals, and impart the sense of importance of eating together combined with community sharing.

- Tribal Star has also developed *Recommendations for Developing and Maintaining Tribal Relationships* (available on their website at: <http://theacademy.sdsu.edu/TribalSTAR/resources/>) that stresses creativity, patience, preparation, and respect as critical components.

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Building Understanding through Training

It is essential for judges and child welfare stakeholders to develop a solid working knowledge of the requirements of ICWA, as well as an understanding of why the law is necessary in order to achieve full compliance.

ICWA trainings should include an understanding of tribal sovereignty, intergenerational trauma, institutional and structural racism, and implicit bias. In the process of examining the history of institutional and structural racism, the court system should engage in *Courageous Conversations*⁵⁰ facilitated by an expert so each member of the collaborative has an opportunity to examine his or her own unconscious biases and belief systems, and their effect on decision making in the child welfare system. This training has attempted to provide each of these aspects; however, participants are encouraged to continue learning more about ICWA and tribal communities as they return to their communities to work on improving compliance. A multidisciplinary approach to training should be developed in collaboration with tribal partners, including tribal faculty, especially the voices of those who have experienced the child welfare system.

SLIDE 14: JUDICIAL ROLE IN TRAINING

It is not enough to train only on the law. Judges should help other stakeholders to understand the concepts of tribal sovereignty and cultural respect.

Additional faculty notes on building understanding through training:

⁵⁰ This term has been used in the public and private sector to describe discussions that may be uncomfortable, but are necessary for forward progress. Singleton and Linton (2005) may have first introduced this concept as it pertains to discussion of race (Singleton, G.E. & Linton, C. (2005). *Courageous Conversations about Race: A Field Guide for Achieving Equity in Schools*. Corwin Press; Thousand Oaks, CA).

SLIDE 15: ASSESS CURRENT PRACTICE

Once new and existing collaborative tribal partners have been identified, the next step is to begin to work together to exchange information about child welfare practices in state and tribal systems in order to coordinate efforts where necessary – **this is where a Continuous Quality Improvement (CQI) approach can be particularly helpful.**

CQI is a cyclical data-driven decision making process. When you implement a CQI process, you are repeatedly collecting, analyzing and reacting to data. Changes are made based on what the data is telling you.

To achieve ICWA compliance it is essential at this early stage to assess the court and child welfare system's capacity to collect and evaluate data, including baseline data, so compliance can be measured.

The work the collaborative accomplishes through information sharing and assessing practice is paramount to achieving the goal of full ICWA compliance and improving outcomes for Indian children. Without it, the collaborative is subject to using a decision making process that lacks the necessary information and insight required to fully implement ICWA to the letter.

Once data is available, courts should be mindful of the fact that tribes have a vested interest in their children. Data involving tribal members represents the tribe's story of what is happening to its children. Since the tribe should be the one to tell its own story, whenever possible the tribe should be involved in how the data will be shared to develop strategies for achieving full ICWA compliance. Historically, data have been misused to promote the careers of individual researchers or programs with extremely negative effects on tribes. A collaborative approach must be taken when collecting or reporting data.

Assessment should include:

- Discussing successes and challenges in current and past initiatives
- Examining baseline data and information related to current practices

FACULTY TIP: Participants should be provided with the *ICWA Compliance Discussion Guide* developed by the National Council of Juvenile and Family Court Judges (see references to this Module). You can pause here and review the guide or describe it in the next section related to action planning. This tool, adapted from the California American Indian Enhancement Project's (CAIEP) *"Implementation Toolkit,"* is designed to generate discussion among members of a judicially-led collaborative about current practices, including challenges and successes in complying with ICWA. Judges should set meetings with child welfare stakeholders and tribal partners, if any have been identified, to discuss efforts at collaboration, training and resources, and court practice. This initial step will help identify priority areas for improvement that can be targeted in an action plan designed to improve ICWA compliance. Participants will want to bring this tool back to their collaborative to discuss and may want to add this discussion to their action plan.

Additional faculty notes on assessing practice:

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SLIDE 16: Incorporate a Continuous Quality Improvement Approach as a Strategy for Assessing Practice

An effective way to engage stakeholders in addressing ICWA compliance and better outcomes for Indian children and families is through a Continuous Quality Improvement (CQI) process.

CQI is a mindset - a purposeful way of assessing information and making decisions. It can be applied at every level from a broad system-wide issue to a specific intervention.

The basic steps of CQI: collect, analyze, and react.

Child welfare agencies, courts, and state Court Improvement Programs in each state (CIPs) have adopted a Continuous Quality Improvement approach to action planning. This involves a “complete process of identifying, describing and analyzing strengths and problems and then testing, implementing, learning from and revising solutions” (Casey Family Programs & National Child Welfare Resource Center on Organizational Improvement, 2005).

SLIDE 17:

In implementing a CQI approach, collaborative teams work together to:

- Identify a need- the Discussion Guide referenced in this Curriculum can be helpful in identifying needs.
- Identify what the group proposes to do about the need
- Identify the changes that the group hopes to achieve
- Identify what you will look at to determine if the change is occurring
- Identify how you will use that data to create a feedback loop for ongoing improvement

Collaborative teams should include the tribal and state courts, attorneys, tribal elders, service providers, tribal and state social services, and state Court Improvement Program directors or staff, at a minimum and should be based on the needs of the local community.

FACULTY TIP: You may want to share some examples from the National Court Improvement Programs that use CQI to improve ICWA compliance. For example, Wisconsin CIP used a CQI approach to develop an ICWA compliance instrument and to engage in an ICWA review process. This review appraised ICWA practice and evaluated the effectiveness of local services. The results are used by counties and the state to create action plans, enhance local practice, and target training and technical assistance. [Additional examples can be obtained from the National Child Welfare Resource Center on Legal and Judicial Issues; see <http://apps.americanbar.org/child/rccli/cfsr/home.html>]

Additional faculty notes on the use of CQI process to engage stakeholders and to improve ICWA compliance:

[illegible]

SLIDE 18: ACTION PLANNING FOR CHANGE

Action planning is critical to achieve full ICWA compliance. **By following a CQI approach to action planning, judicially-led collaborative groups can better assess and respond to challenges in complying with ICWA and measure the results of their efforts.**

Typically, action planning participants should include the judicially-led collaborative, tribal representatives and/or urban Indian organizations, child welfare and judicial training organizations with ICWA expertise, university-based professionals, and/or CIP representatives who may be able to assist with data collection and performance measurement.

The action plan should include:

- A description of each strategy, step, or activity
- Persons responsible for each strategy, step, or activity
- Time frames for completing the strategy, step, or activity
- Resources or materials needed
- Data or evidence to be collected to indicate accomplishments
- Plan for dissemination of results, both the successes and challenges

ACTIVITY: Using the framework provided, **ask participants to develop an action plan describing the steps they will take to improve ICWA compliance.** Strong commitments from judicial leaders will demonstrate the vision for compliance and will motivate others to do the same. Note for the judges that they will need to continue working on this plan in collaboration with their collaborative group(s).

MEANINGFUL & ONGOING COLLABORATION				
<u>Strategies</u>	<u>Responsibility</u>	<u>Outputs</u>	<u>Data</u>	<u>Due Date</u>
<i>What are the identified steps to improve current capacity or court performance related to this goal?</i>	<i>Who will lead this activity and who else will need to be involved?</i>	<i>What will be the result of this activity?</i>	<i>Are data currently available, if not, what is the plan to collect and analyze data?</i>	

Alternatively, this activity can be adapted to focus more specifically on developing a “personal judicial action plan to improve ICWA compliance.”

Additional faculty notes to explain and facilitate the action-planning process:

SLIDE 19: IN CONCLUSION...

Remember, relationship-building should be done with humility and openness. It may take multiple efforts to engage tribal judges and leaders. Ongoing training is essential for judges and other stakeholders. Involving tribes in training opportunities can go a long way to developing relationships. Assessing your own practices and policies demonstrates that you are willing to make change and action planning can help coordinate efforts to improve compliance.

Additional faculty notes to conclude Module:

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References, Additional Resources and Supplemental Readings – ICWA AND THE LEADERSHIP ROLE OF THE JUDGE – ON-THE-BENCH AND OFF-THE-BENCH IN MEANINGFUL ENGAGEMENT AND COLLABORATION

References

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Singleton, G.E. and Linton, C. (2005). *Courageous Conversations about Race: A Field Guide for Achieving Equity in Schools*. Corwin Press: Thousand Oaks, CA.

Tribal Star (n.d.) "*Recommendations for Developing and Maintaining Tribal Relationships*," Tribal STAR, Academy of Profession Excellence, and San Diego State University School of Social Work: San Diego, CA. Available at: <http://theacademy.sdsu.edu/TribalSTAR/resources/>

Resources

Continuous Quality Improvement Implementation Examples and Resources

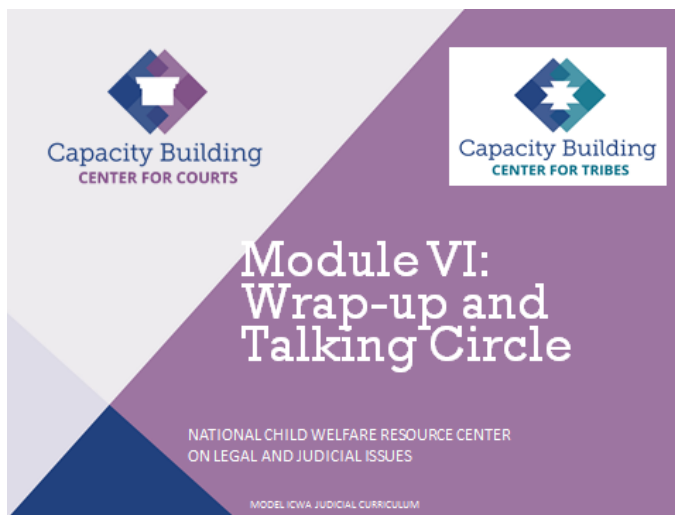
- National Child Welfare Resource Center on Legal and Judicial Issues (<http://apps.americanbar.org/child/rccli/>)

Supplemental Readings

Gatowski, S.I., Dobbin, S.A. and Maxwell, D. (2004). *Building a Better Collaboration: Facilitating Change in the Court and Child Welfare System*. National Council of Juvenile and Family Court Judges: Reno, NV.

National Council of Juvenile and Family Court Judges (1995). *THE RESOURCE GUIDELINES: Improving Court Practice in Child Abuse and Neglect Cases*. National Council of Juvenile and Family Court Judges: Reno, NV.

National Council of Juvenile and Family Court Judges (Forthcoming, 2014). *THE RESOURCE GUIDELINES (REVISED): Improving Court Practice in Child Abuse and Neglect Cases*. National Council of Juvenile and Family Court Judges: Reno, NV.



MODULE VI

CONCLUDING THE TRAINING – Wrap-Up and Talking Circle

MODULE VI: CONCLUDING THE TRAINING

Module Overview

This Module provides participants with an opportunity to ask any outstanding questions and concludes the training in a way that embraces culture and community by engaging in a closing activity such as a Talking Circle activity. Each participant is given a chance to say what he/she would like on the topic or experience, without being judged or criticized. After concluding the Talking Circle, faculty should thank the participants for their work during the training and contributions, and provide instructions for completing the training evaluation protocols before departing.

Module Objectives

- To provide an opportunity to ask and answer any outstanding questions;
- To identify follow-up technical assistance if needed;
- To lay groundwork for training evaluation protocols; and
- To close the training in a culturally appropriate and respectful manner.

Presentation Outline

- Wrap-Up
 - Outstanding Questions
 - Concluding Thoughts

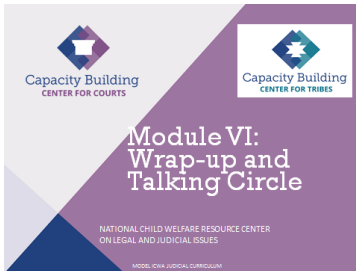
Activities and Exercises

- Talking Circle
- Approximate Time for Module: 15 Minutes for Wrap-Up; additional 45 Minutes for Talking Circle

Faculty Tips/ Notes –

Preparing for the Module and Additional or Alternate Activities and Exercises

1. Ensure the room is set up to accommodate the Talking Circle Activity and that you have a symbolic “talking stick.”
 2. Be sure to answer any outstanding questions identified by the judges. If there isn’t sufficient time, or you don’t know the answer, arrange to follow-up with the judge after the training. Re-visit the flip charts outlining participants’ expectations for the training (generated during the participant introductions), noting which expectations were met. If any expectations were not met, arrange to follow-up to provide the answer or information after the training.
-



MODULE VI PRESENTATION

Total Time: 15 Minutes for Wrap-up; 45 Minutes for Talking Circle

SLIDE 2: CONCLUDING THOUGHTS, WRAP-UP

Wrap-up by briefly reviewing the accomplishments of the day ...

- Learned about why compliance with ICWA is so important – not only for the protection of children but also to tribal sovereignty
- Visited in detail the key components of ICWA
 - What judges must do
 - What judges should do
- Began to develop strategies for outreach to and meaningful collaboration with tribes to improve ICWA compliance

Concluding comments

Conclude the day by thanking everyone for their participation and by asking participants for their reactions to the program - What stood out for them today? What was the most useful part of the training? What would you like to see done differently? Do you still have any unanswered questions?

Additional faculty notes/ concluding comments

SLIDE 3: ACTIVITY: TALKING CIRCLE

Instructions are adapted from *Indian Child Welfare Act Trainer's Guide*.

Faculty (and/or tribal representative) should direct participants to join the Talking Circle Activity. When engaging in the Talking Circle activity, remember that passing a symbolic “talking stick,” to each person provides an opportunity for every participant to express their feelings at that moment and have closure for the day’s teachings.

Faculty (and/or tribal representative) should instruct and model the Talking Circle. The Talking Circle represents many of the values associated with Indian communities. Inclusion, empowerment, collaboration, respect, honesty are just a few of the values that can be demonstrated through this process. While there are variations on how the Talking Circle is used, there are basic concepts in its implementation:

- Ask everyone to form a circle with the trainer or another designated person who explains the Talking Circle, a specific form of communication
- A leader of the group sets the tone and outlines the rules for the process
- An object of significance is used (a feather, stick, etc.) to be passed from person to person in the group
- Each person is given an opportunity to say what he/she would like on the subject at hand (. Everyone else is expected to listen and not interrupt the speaker. When there is limited time, each person is asked to share one word that describes what they are thinking or feeling
- A person may pass and choose not to say anything
- The circle is an opportunity to speak without being judge or criticized, thus encouraging openness and honesty
- The process is not time limited and ends when everyone has had an opportunity to speak
- The process is one of interconnectedness, inclusiveness, and wholeness.

FACULTY TIP: After concluding the Talking Circle, thank the participants for their hard work and contributions in the training, and instruct them to complete the training evaluation protocols. If a tribal elder is present, ask that they conduct a closing to the training.

References, Additional Resources and Supplemental Readings – WRAP-UP, TALKING CIRCLE AND EVALUATION

References

Judicial Council of California. (2008). *Indian Child Welfare Act: Active Efforts and Expert Witness Trainer's Guide*. Judicial Council of California, Administrative Office of the Courts, Center for Families, Children and the Courts. Available at <http://calswec.berkeley.edu>

Appendix

Introduction: Training Needs Assessment Questions

Module IV: Case Scenario and Mock Hearing Exercises

Module V: Action Planning Workshop

Introduction: ICWA Pre-Training Survey and Needs Assessment Questions

ICWA Training Pre-Survey and Needs Assessment

This sample pre-training survey was developed using the *Guide to Conducting Effective Training Evaluations: Recommendations, Strategies, and Tools for Dependency Court Improvement Programs*, available from the CBCC or online.

Background Questions

1. Please indicate your role below:
 - ☐ Judicial Officer
 - ☐ Court Staff
 - ☐ Parent Attorney
 - ☐ Child Advocate or Attorney
 - ☐ Agency Attorney
 - ☐ Social Worker
 - ☐ Court Improvement Program (CIP) staff
 - ☐ Treatment provider
 - ☐ Other _____
2. Have you had any prior training on the Indian Child Welfare Act (ICWA) statute and/or practices?
 - ☐ Yes
 - ☐ NoIf yes, please indicate how much _____ (# of trainings)
3. What is your level of experience handling ICWA cases?
 - ☐ Extensive
 - ☐ Moderate
 - ☐ Little
 - ☐ None
4. What is your level of experience collaborating with tribal partners?
 - ☐ Extensive
 - ☐ Moderate
 - ☐ Little
 - ☐ None

Current Knowledge

Please indicate your current level of knowledge on the topic areas below on a scale between 1 and 4.

1 – No knowledge at all 2- Little knowledge 3- Fair amount of knowledge 4- Great deal of knowledge

	<i>Please circle below</i>			
The history of tribes in my state	1	2	3	4
The definition of an Indian Child	1	2	3	4
Tribal Court Jurisdiction in ICWA Cases	1	2	3	4
ICWA Notice Requirements	1	2	3	4
ICWA Transfer Provisions	1	2	3	4
The Right to Counsel in ICWA cases	1	2	3	4
The Right to Intervene under ICWA	1	2	3	4
Active efforts	1	2	3	4
ICWA Burden of proof	1	2	3	4

Qualified expert witnesses	1	2	3	4
ICWA Placement Preferences	1	2	3	4
Tribal Court – State Court Collaborations	1	2	3	4
Multi-disciplinary collaborative to improve ICWA Compliance	1	2	3	4

Training Needs

8. Please choose the top three ICWA topic areas in which you need training. Indicate with the numbers 1, 2, and 3 next to the topic that you think is the 1st, 2nd and 3rd most important for you to learn more about.

- | | |
|---|---|
| — Historical and Cultural Perspectives on ICWA | — Determining membership/enrollment |
| — Key Components of ICWA | — Trauma (Intergenerational, institutional) |
| — Tribal sovereignty | — Structural Racism and Implicit Bias |
| — ICWA and Best Hearing Practice | — Transferring jurisdiction |
| — ICWA and the Leadership Role of the Judge On and Off the Bench in Meaningful Engagement and Collaboration | — Notification procedures |
| — Purpose of ICWA | — ICWA placement preferences |
| | — ICWA and qualified expert witness |
| | — Tribal and state collaboration |
| | — Adoption |

9. Please indicate any topics that should be included in ICWA training not listed in the above topic areas.

Post-Training Survey

This sample pre-training survey was developed using the *Guide to Conducting Effective Training Evaluations: Recommendations, Strategies, and Tools for Dependency Court Improvement Programs*, available from the CBCC or online. Ideally, this survey would be sent to participants 2-3 months after the training.

Background Questions

1. Please indicate your role below:

- | | |
|---|---|
| <ul style="list-style-type: none"> <input type="radio"/> Judicial Officer <input type="radio"/> Court Staff <input type="radio"/> Parent Attorney <input type="radio"/> Child Advocate or Attorney <input type="radio"/> Agency Attorney | <ul style="list-style-type: none"> <input type="radio"/> Social Worker/Case Worker <input type="radio"/> Court Improvement Program (CIP) <input type="radio"/> Treatment provider <input type="radio"/> Other |
|---|---|

Knowledge

Please indicate your current level of knowledge on the topic areas below on a scale between 1 and 4.

1 – No knowledge at all 2- Little knowledge 3- Fair amount of knowledge 4- Great deal of knowledge

	<i>Please circle below</i>			
The history of tribes in my state	1	2	3	4
The definition of an Indian Child	1	2	3	4
Tribal Court Jurisdiction in ICWA Cases	1	2	3	4
ICWA Notice Requirements	1	2	3	4
ICWA Transfer Provisions	1	2	3	4
The Right to Counsel in ICWA cases	1	2	3	4
The Right to Intervene under ICWA	1	2	3	4
Active efforts	1	2	3	4
ICWA Burden of proof	1	2	3	4
Qualified expert witnesses	1	2	3	4
ICWA Placement Preferences	1	2	3	4
Tribal Court – State Court Collaborations	1	2	3	4
Multi-disciplinary collaborative to improve ICWA Compliance	1	2	3	4

Practice Change

2. Has insert title of ICWA training:: training increased your capacity for handling ICWA cases?

☐ Yes
☐ No

3. Has insert title of ICWA training:: increased your capacity to collaborate with tribal partners?

☐ Yes
☐ No

4. To what extent did this training make a difference in the way you do your job?

☐ Tremendous difference
☐ Modest difference

- ☐ Little difference ☐ No difference
5. Has your practice changed because of attending the training? ☐ Yes ☐ No
7. If you practice has changed, please describe how. If it has not, please explain why.
8. Are there anticipated barriers or challenges to implementing practice change(s)?

Module IV: Case Scenario and Mock Hearing Exercises
Case Scenario and Mock Hearing Exercises-Option A

FACILITATOR INSTRUCTIONS FOR CASE SCENARIO

In smaller group breakout sessions, have participants take a few minutes to read the case scenario. In the scenario there is content that is related to the questions which are cross-referenced by using **Q1a** for example to refer to Question 1a.

- Lead a small group discussion asking the participants the questions below.
- Be sure to take a few minutes before the end of this session to process with the participants what they learned and what was valuable about the discussion.

FACILITATOR QUESTIONS

1. Do you believe that Tribal Case Manager Nancy and CPS Investigative Case Manager Callie were qualified to testify as expert witnesses?
 - a. What factors would be important in deciding whether the ICWA standard for qualified expert testimony was met?
 - b. Was it reasonable for Nancy to expect to receive documentation other than the dependency petition prior to the hearing?
2. Did all interested parties receive adequate and timely notice under ICWA?
 - a. Did Callie make sufficient efforts to contact the parents, other family members, or a representative of the Northern Indian Tribe?
 - b. Would it have been of use for Callie to contact the Tribe the County Prosecutor prior to attending the Shelter Hearing?
 - c. Was the notification for the hearing made appropriately? How should he have provided notice of the hearing to both the parents and the Northern Indian Tribe?
3. Were adequate efforts made to determine whether Betty or Aaron were “Indian children” within the meaning of ICWA?
 - a. Is the court required to make an inquiry at the Shelter Hearing as to whether the ICWA applies to the child or children in question?
 - b. Does Aaron have to be an enrolled member of a Tribe for the ICWA to apply?
 - c. Was the Court correct in finding that neither child was subject to the Indian Child Welfare Act?
4. Was there compliance with ICWA in the emergency foster care placement?
 - a. Should Callie have explored placement with John’s sister?
5. Did the Judge respond appropriately to the Tribe’s request to intervene and the Motion for Transfer?
 - a. In particular, must there be good cause to transfer the case to the Tribe?
 - b. When may a judge properly refuse to transfer?

INDIAN CHILD WELFARE ACT CASE SCENARIO

**CREATED BY THE ARIZONA STATE, TRIBAL, FEDERAL COURT FORUM, ICWA COMMITTEE,
HON. KATHLEEN QUIGLEY AND HON. KAMI HART, CO-CHAIRS*

JennyMother of Aaron and Betty (No tribal affiliation)
JohnAaron's Father, Ex-husband of Jenny, Enrolled in the Northern Indian Tribe
BradleyBetty's Alleged Father, Enrolled in the Southern Indian Tribe
AaronChild (5), Enrolled in the Northern Indian Tribe
BettyChild (2), Eligible for enrollment in the Southern Indian Tribe
CallieCPS Investigative Case Manager
George & Judy...	Foster parents, Non-Indian, couple Licensed as Emergency Placement
NancyNorthern Indian Tribal Case Manager

GENERAL FACTS:

On 8/8/12, CPS received a hotline call that two young children were found to be unsupervised in a parking lot. Callie, CPS worker on duty, investigated the matter. This was Callie's first investigation after completing her CPS training. **Q1a**

During the course of her investigation, Callie observed two young children, a boy and a girl, in a parking lot along with an adult woman in her thirties. The woman appeared to be trying to place the children in the back seat of her car, but when she would get one child into the car, the other would escape out of the other side. The woman appeared to be having a difficult time walking and she slurred her words as she was yelling and chasing after the children.

Callie introduced herself to the woman and explained that she was from CPS. The woman told her that her name was Jenny and that her ex-husband, John, had just dropped both children off in the parking lot without any advance notice. He only sent her a text message. Jenny explained that her son Aaron was five years old and was John's son. Her daughter Betty was two years old and had a different father. Jenny did not give much information on Betty's father except to say that his name was "Bradley" and

she thought that he was Native American. Jenny was having a hard time standing upright and reported that she had had a few drinks that afternoon. She did not expect to have her children that night since Aaron and Betty usually stay on the Northern Indian Reservation with John (Aaron's father). Callie asked Jenny about her tribal status. Jenny stated that she was not Native.

Jenny assured Callie that she was fine to drive the children home. Callie did not think that it was safe for Jenny to be driving and offered to call someone to give her a ride home and look after the children. Jenny became disorderly and refused to say how to contact either child's father or other relatives or friends. She began to shout and curse at Callie. At that point, Callie called the police. Two police officers came to the scene and arrested Jenny for public intoxication and disturbing the peace. Jenny was released from jail the next morning.

Callie took Aaron and Betty into emergency custody. She placed the children into an emergency foster home with George and Judy, a non-Indian couple. Callie was unable to contact Jenny after Jenny's release from jail. She had not provided contact information for herself or for the children's fathers or any other family members. After further investigation, Callie located Jenny in a homeless shelter. Eventually Callie did obtain John's telephone number. A Dependency Petition was filed on both children.

EMERGENCY HEARING:

At the Emergency Hearing Jenny and John appeared. A Guardian ad Litem (GAL) was appointed for the children. During the Hearing, John stated that he was an enrolled member of the Northern Indian Tribe. He said that he was not Betty's father and had no desire to care for her. He explained that Aaron and Betty frequently stayed with him on the Reservation. He took care of Betty only because his ex-wife usually dropped her off at his home when she dropped off Aaron. He stated that he could not take care of either Aaron or Betty on a long-term basis due to some "personal issues" and he thought that Jenny should take care of them.

Jenny said she wanted to have immediate custody of both of her children and did not understand why this was not happening. She admitted she had been intoxicated when the children were removed, but that she wouldn't drink in the future if the children were going to be in her care. Callie asked Jenny and John to participate in reunification services, specifically substance-abuse assessments, parenting classes, visitation, and urine analysis. John agreed to services but Jenny refused services, insisting that she did not need them.

Upon inquiry by the Judge, **Q3a** Jenny stated that Aaron was a member of the Northern Indian Tribe and she had an enrollment number for him. She believed that Betty's father was a member of a different tribe, but didn't know if Betty was a tribal member and

could not recall the name of the tribe. John explained that he was an enrolled member of the Northern Indian Tribe, but he wasn't sure if Aaron was a member because his brother's kids were not able to be enrolled. **Q3b**

The Judge stated, "I'm finding neither of the children is subject to the Indian Child Welfare Act. CPS, just make sure you serve notice of the dependency to Betty's father before the next hearing." **Q3c**

PLACEMENT:

Callie wondered whether a non-relative, non-ICWA placement for Aaron would be appropriate. (She believed he might qualify as an "Indian child".) Callie had just received a voicemail from John's 40-year-old sister. The sister volunteered to be a permanent placement for her nephew Aaron in her home on the Northern Indian Reservation. Callie said she would need to speak to her supervisors and the Northern Indian Tribe. The County Prosecutor later told Callie she, "didn't have to worry about relative and/or ICWA compliant placements for the children right now," and that they could "address that later."

NOTICE TO THE TRIBE:

After considering John's sister's statement that she would like to have permanent custody of her nephew Aaron, officials decided to contact the Tribe. Nine days before the Adjudicatory Hearing, a copy of the petition was sent to the Northern Indian Tribe along with a handwritten post-it note with the date and time of the hearing, addressed to "To Whom It May Concern." **Q2c**

MOTION TO INTERVENE/TRANSFER OF JURISDICTION:

At the Initial Dependency Hearing, Nancy, the Tribal Case Manager, stated to the court, "Excuse me, Your Honor, but I was just provided notice of this dependency proceeding yesterday. I can confirm Aaron is enrolled in the Northern Indian Tribe. He often lives with his aunt (John's sister) on the Reservation. The Tribe intends to file a Motion to Intervene and would like to move this matter to the Northern Tribal Court as soon as possible." The County Prosecutor objected to the transfer because the tribal court was in a remote location and would not be able to adequately handle the case. The Judge stated, "I'll consider granting your Motion to Intervene once I receive it; however, there is no way I will approve a transfer to the Tribe until you provide me with a good reason to do so." **Q 5a, b**

QUALIFIED EXPERT WITNESS (QEW):

Both the Northern Indian Tribal Case Manager Nancy and Callie were sworn in to testify as Qualified Expert Witnesses. Nancy stated, "I haven't had a chance to examine the

case because I haven't received any documents from CPS other than the dependency petition. I would really like to review the other reports and talk to the family before I give my opinion." **Q1b** Judge stated that Nancy would do just fine and told her to proceed. Nancy testified that she had observed Aaron and Betty being adequately cared for by John and his sister on the Northern Indian Tribal Reservation.

Callie testified about her initial contact with Jenny, her intoxication, arrest, and the absence of any parental supervision. The Judge found that active efforts to prevent removal of the children were made and that the children would be subject to serious emotional or physical damage if they were to remain in the legal or physical custody of their parents.

MOCK HEARING ACTIVITY A

Instructions

The facilitator and (non- faculty) volunteers/nominees for the roles below will take the stage. The role-players in the mock hearing should face the audience with the judge at the podium. Bring props such as a robe and a gavel. After each short scene, the facilitator will ask questions of the audience. Staff will provide microphones so questions can be heard by everyone. Any of the faculty can answer the questions; see Statutory References handout as a resource guide. The references such as **Q1a, b** refer to the Facilitator Questions 1a, b.

Roles

Facilitator...See Questions in boxes below

1. **Judge** ... State court _____
2. **Jenny** ... Mother of Aaron and Betty (No tribal affiliation)

3. **Bradley**...Betty's Alleged Father, Southern Tribal Member

4. **John**..... Ongoing Case Manager _____
5. **County Prosecutor** For the state _____
6. **GAL**For Aaron & Betty _____
7. **Southern Tribal Attorney** _____
8. **Bailiff**State court _____

TRIBE'S MOTION TO INTERVENE

Bailiff Calls for all to rise. **JUDGE ENTERS** tells everyone to be seated, calls the case.

Judge grants the Northern Indian Tribe's Motion to Intervene as to Aaron and Motion to Transfer Jurisdiction to the Northern Indian Tribal Court.

GAL objects to case transfer, says they have filed an objection in writing. **Q1a, b**

Judge overrides objection and affirms transfer to the Northern Indian Tribe for Aaron's case. **Q1c**

Facilitator Questions

1. Was it appropriate for the Judge to grant the Transfer Motion made by the Northern Indian Tribe?
 - a. Do Aaron's parents have the right to object to the transfer?
 - b. Is the Northern Indian Tribal Court required to accept the transfer of Aaron's case?
 - c. Does Aaron have the right to object to the transfer through his GAL?

SERVICE

Bradley explains that he had not had any contact with his daughter Betty. He states that until he is able to exercise full parental custody he would like Betty to be placed with his 75-year-old grandfather who is a member of the Southern Indian Tribe. **Q2b**

County Prosecutor leans over and asked John if he knew that Bradley was a member of the Southern Indian Tribe.

John replies, "Yeah, I think he might have mentioned it a few months ago. Is that something I should have told you?" **Q2c**

Facilitator Questions

2. Was Betty's status as an Indian Child determined in a timely fashion?
 - a. Was the Court required to inquire as to whether the ICWA is applicable to Betty's case?
 - b. If Bradley is an enrolled member of the Southern Indian Tribe, does ICWA now apply to Betty's case? What about the fact that he was not married to Jenny?
 - c. What could result from the case manager's failure to disclose that Bradley was a member of the Southern Indian Tribe?

ACTIVE EFFORTS

Judge asks Jenny if she agrees to participate in reunification services.

Jenny says she agrees to participate in reunification services for alcohol and prescription drugs problems.

John shares the services include substance-abuse assessment and treatment, random urinalysis testing, parent-aide services, supervised visitation, and a psychological evaluation. Services for Bradley included parenting classes and education, rule-out urinalysis tests, visitation, and a psychological evaluation.

Bradley asks if CPS could provide parenting education and classes from someone who was familiar with the Southern Indian Tribe's culture because he would be more comfortable working with someone who knew about the Southern Indian Tribe. **Q3a**

Facilitator Questions

3. Did the State satisfy the ICWA requirement that "active efforts" be made to prevent the break-up the Indian family?

a. Is CPS required to provide services to Bradley that are culturally appropriate?

Facilitator- Shares months pass by...

Bailiff - Calls for all to rise. **JUDGE** - Tells everyone to be seated, calls the case for Review Hearing.

John – Reports the following: Jenny and Bradley participated only sporadically in services. There was no contact with Bradley in the last six months and he had failed to participate in reunification services other than genetic testing to establish paternity for Betty. Jenny had visited with Betty regularly but did not participate in reunification services other than a psychological evaluation.

Facilitator Questions

3. Did Court hear sufficient testimony to make the "active efforts" determination required by the ICWA?

b. Is Jenny, a non-Indian, entitled to the standards and services according to ICWA?

Bradley – Asks if he can address the court. He states that he asked the caseworker if Betty could be placed with his grandfather, a member of the Southern Indian Tribe, but he never received a return phone call. He reports he worked with Southern Indian Tribe to get parenting classes through their tribal social services program. He asks the court for Betty to be placed with her his grandfather.

County Prosecutor – Objects to placement saying Betty should not be moved from her current placement because she was doing so well there and it would be hard for her to move after more than six months in the same home, plus she is bonding.

GAL – Asks to address the court. Then states the current foster home met all of Betty’s needs and that Betty was doing very well. Expresses concern that they have had no information about the grandfather.

PLACEMENT

Judge - Agrees with the position of GAL and states that “it is not good for young children to move often...” and denies Bradley’s oral motion for change of physical custody, finding good cause to deviate from the ICWA placement preferences. **Q4b**

Facilitator Questions

4. How should the court resolve the placement question for Betty?
 - a. Do you agree with **County Prosecutor** that Betty’s apparent bonding with her current foster parents offers the Court good cause not to follow placement preferences? What if **County Prosecutor** presented evidence from the caseworker (state or tribal) to support that assertion? What if he presented evidence from a therapist or psychologist?
 - b. Should the position of the child’s GAL be determinative?

Facilitator- Shares time passes...

Bailiff - Calls for all to rise. **JUDGE** - Tells everyone to be seated, calls the case for Permanency Review Hearing.

Southern Indian Tribal Attorney - Moves for a change of physical custody to an ICWA compliant placement that was identified by the Southern Indian Tribe.

County Prosecutor - Objects to the change of placement, arguing that Betty’s current placement wants to adopt her and she was psychologically bonded to them.

Judge - Says that the parties could discuss placement outside of court. If no agreements are reached by the TRP Hearing, a contested placement hearing could follow.

Callie – Asks requests the case plan was changed to TPR.

Southern Indian Tribal Attorney - Objects to a case plan of severance and adoption, arguing that termination of parental rights and adoption would effectively end the child’s

right to affiliate with her Tribe's culture. Also states Betty should not be "adopted by strangers" when there were perfectly good family members living on the Southern Indian Reservation, proposes a guardianship with Betty's grandfather. **Q4c, d**

Facilitator Questions

4. c. Should Judge give special consideration to the testimony given on behalf of the Southern Indian Tribe and to the proposed guardianship rather than a severance and adoption?
- d. Would it make a difference if Betty had fetal alcohol syndrome or another disability?

Facilitator- Shares time passes...

Bailiff - Calls for all to rise. **JUDGE** - Tells everyone to be seated, calls the case for TPR Hearing

Jenny - Declares that she no longer wants to fight this. She states she would consent to TPR because she "was sick of dealing with the DA and the Case Manager." **Q5a**

Southern Indian Tribal Attorney – States they have discussed it with the Tribal social worker at length and does not feel that Bradley had been provided appropriate services or enough time to reunify with his child, Betty.

GAL - States that there was still a safety risk to Betty if she was returned to either parent.

Southern Indian Tribal Attorney – objects to the termination of both Jenny's and Bradley's parental rights. The Tribe's attorney contends that Jenny should be further educated about her rights before she consents to termination. The Southern Indian Tribe does not believe that the case worker could show that active efforts had been made in the case or provide qualified expert witness testimony to support that Betty would be subject to serious emotional or physical damage of Bradley. **Q5b, c**

Facilitator Questions

5. Is there an adequate basis for the termination of Jenny's parental rights and Bradley's parental rights?
 - a. Was Jenny's verbal consent to the termination of her parental rights sufficient?
 - b. Is the Court required to consider the testimony of a qualified expert witness before entering an order on the termination of parental rights?
 - c. Must the agency provide qualified expert witness testimony regarding Jenny's continued parenting, even though Jenny isn't Indian?

Mock Hearing Exercise-Option B^{51,52}

Characters:

Judge played by _____

County Attorney played by _____

Guardian Ad Litem played by _____

Tribal Caseworker played by _____

Scene: County Juvenile Court

Judge: (seated at bench)	The next matter before the Court is Docket No: 2013-AP-0057, In the Matter of the Minor Children: Angelique and Ruben Garcia-Francis. I believe this matter is set for a hearing on the petition for adoption that has been filed by the County on the petitioners' behalf. May I please have counsel identify themselves for the record?
County Attorney:	<i>[Stands]</i> Jeff/Janice Miller, Assistant County Attorney. The petitioners, the minor children's foster parents for the past nine months, Alexander and Beatrice Ryan, are also present. <i>[Sits]</i>
Guardian Ad Litem:	<i>[Stands]</i> Richard/Regina Hagen, Guardian Ad Litem, appearing on behalf of the Minor Children, Your Honor. <i>[Sits]</i>
Judge:	All right then. The petition for termination of parental rights was granted 2 months ago. So there's no need for the minor children's birth parents to be present or represented today. <i>[Mr./Ms.]</i> Miller, are you prepared to proceed?
County Attorney:	I am, Your Honor.
Tribal Caseworker:	<i>[Sitting, raises hand.]</i> Excuse me. Excuse me, Your Honor.
Judge:	<i>[Looking puzzled and annoyed.]</i> Good morning Ma'am, this is closed proceeding.
Caseworker:	<i>[Still sitting]</i> I know that your Honor, but this is an ICWA case.
Judge:	Excuse me? What do you mean?
Caseworker:	The children in this case are eligible for membership in our tribe.

⁵¹ Based loosely on the facts in *B.H. v. People ex rel. X.H.*, 138 P.3d 299 (Colo. 2006).*

⁵² This role play was provide by Judge Robert Lowenbach (Ret.) and Judge Jill Tompkins and is used with permission.

Judge:	And who are you?
Caseworker:	Your Honor, I'm Veronica Aymond. I'm the Indian Child Welfare Caseworker for the Arrowhead Tribe of Maine.
County Attorney:	<i>[Standing]</i> Your Honor, I object to this woman being here. There's been no motion for an Arrowhead Tribe to intervene in this case. . . . And besides I don't think Ms. Aymond is a Colorado-licensed attorney.
Guardian Ad Litem:	<i>[Standing]</i> Your Honor, I believe that notice was sent to a tribe early on in the dependency and neglect case and we never heard anything from a tribe or from the children's father.
Caseworker:	Actually Judge, our tribe didn't receive any kind of written notice, we only heard a couple of days ago about this adoption hearing from the children's grandmother.
Judge:	Hold on one minute, Ms. Aymond. Are you a Colorado-licensed attorney?
Caseworker:	No, Your Honor, I'm not. But I've appeared in several other ICWA cases in other states and I'm always allowed to participate. Sometimes even by phone.
Judge:	Ms. Aymond, when you address the Court, please rise. <i>[Caseworker slowly stands.]</i> Well, we don't have any Indian kids in our county. I can't remember ever having had an ICWA case come through the juvenile court.
Guardian Ad Litem:	<i>[Standing]</i> Your Honor, I have to join in the County's objection. There's been no motion to intervene and this will just delay the adoption and the much needed permanence for these children who've been in care with the Petitioners for 9 months already. <i>[Sits]</i>
Judge:	Well, wait a minute. Ms. Aymond, you said that the children are <i>eligible</i> for membership, but they aren't registered Indians are they? So ICWA wouldn't apply anyway.
Caseworker:	<i>[Standing]</i> ICWA applies to both tribal member children and those that are eligible for membership. <i>[Sits]</i>
Judge:	<i>[Rustling through papers in the case file.]</i> Well let me see what's in the file.
County Attorney:	<i>[Still seated]</i> Your Honor, based on my notes the children's mother said that she thought their father had some Indian heritage, maybe from a tribe in New York. That's all the information we got. Because we didn't know what tribe

	might be involved we mailed the notice to Ms. Sally Jewell, who is the Secretary of the Interior, at her Washington, DC office.
Judge:	And did you hear anything back from Secretary Jewell?
County Attorney:	No, Your Honor we heard nothing.
Caseworker:	<i>[Standing]</i> If I may respond your honor, mailing things to Washington DC is like sending them to the black hole. Your Honor, our tribe is in Maine and we object to this adoption by these well-meaning but non-relative, non-Indians. These children have extended family back on the reservation who want to adopt them if they can't go back to their dad. <i>[Sits]</i>
Guardian Ad Litem:	<i>[Standing]</i> Your Honor, I must renew my objection. There's no motion to intervene. Ms. Aymond is not an attorney licensed by the State of Colorado. Moreover, this case has been pending for almost a year. The children are deeply bonded to the Ryans and they deserve permanency. <i>[Sits]</i>
Caseworker:	<i>[Standing]</i> As I understand it, your honor, the kids' dad didn't get any notice that this case was going on. That's what his mother, the kids' grandmother, said. <i>[Sits]</i>
Judge:	Well, I want to get this right. What does the County say about noticing the father?
County Attorney:	<i>[Standing]</i> Your Honor, the father has not seen these children in years and no one knew where he was. So we published the notice in the Denver Post according to state statute. <i>[Sits]</i>
Judge:	<p>I see in the file that the notice of publication was filed and that notice under ICWA was sent to the Secretary of the Interior. Our Chief Justice Directive 96-08 notes that continuances should only granted when failing to continue a matter would result in manifest injustice.</p> <p>It sounds like the grandmother knew about this case and if anyone could have informed the father, it would be her.</p> <p><i>[PAUSES]</i></p> <p>A review of the dependency file shows that notice to the father was published in the newspaper 10 months ago. At every hearing the court made findings that reasonable efforts were made. The parental rights were terminated based upon clear and convincing evidence and no appeal was filed. These children are free for adoption. The dependency and neglect case was completed three months ago and the time and place to contest the termination was in that case. I find that no manifest injustice would occur in the absence of a continuance.</p>

	These children require permanence. Time is of the essence. It's just too late in the game, Miss Aymond, for the tribe to come in and try to disrupt their placement. [County Attorney] you may proceed. Call your first witness . . .
	[End]

Post role play discussion:

What went wrong in this case--besides the judge and the attorneys being ignorant of ICWA?

- **What constitutes an “Indian” child?** If the father is a tribal member and the children are eligible for membership, ICWA applies
- **Should a caseworker for a tribe be allowed to participate?** The caseworker should have been allowed to participate in the proceedings as the tribe’s representative. The tribe’s federal right to intervene has been ruled to preempt state bar licensing requirements. [*Note however that under ICWA, adoption proceedings are not specifically mentioned in 25 U.S.C. § 1911(c) authorizing tribal intervention and 25 U.S.C. § 1912(a) regarding notice of proceedings.] The problem here was in the failure to give notice in the dependency case.
- **Is written notice of intervention required?** No written notice of intervention is required—but would have been better if it had been so as to give the parties advance notice of the applicability of ICWA.
- **What are the notice requirements if no tribe is identified?** Notice should have been sent to the regional BIA office where the case was pending for both the Tribe and the father. (Under Colorado law, the notices would have had been sent by registered mail, return receipt requested. Once the County received the green cards (return receipts) back from the post office, they would have had to be filed with the court. The published notice to the father would also have had to be done.
- **What ongoing inquiries are necessary in an attempt to identify whether a child is an “Indian Child”?** At every hearing the judge and attorneys should inquire of the parents about Indian heritage.
- **Is it sufficient for the court to find “reasonable efforts” were made to prevent removal, continued removal, and termination?** If the children are Indian children the higher standard of “active efforts” is required. No active efforts findings regarding helping reunify the parents with the children were made in the dependency case.

- **What are the placement preferences for Indian children?** ICWA regulations lay out placement preferences starting with return home with rehabilitative efforts and end with a tribe approved placement that may be non-Indian.
- **What is the proper standard of proof for an Indian child?** ICWA requires proof beyond a reasonable doubt that *active efforts* were made to provide remedial services and programs to prevent breakup. ICWA also requires a finding beyond a reasonable doubt for termination that custody “is likely to result in serious emotional or physical damage to the child.”
- **Were the children disserved by the result in this case?** The underlying dependency and neglect case’s rulings are open to invalidation. The adoption could be granted only to be disrupted later—further delaying the children’s permanence and perhaps causing them emotional/psychological trauma.
- **What resources and tools exist to prevent this type of situation from occurring?**

Module V: Action Planning Worksheets
Improving Compliance with the Indian Child Welfare Act Action Planning Worksheets

MEANINGFUL & ONGOING COLLABORATION				
<u>Strategies</u>	<u>Responsibility</u>	<u>Outputs</u>	<u>Data</u>	<u>Due Date</u>
<i>What are the identified steps to improve current capacity or court performance related to this goal?</i>	<i>Who will lead this activity and who else will need to be involved?</i>	<i>What will be the result of this activity?</i>	<i>Are data currently available, if not, what is the plan to collect and analyze data?</i>	

TRAINING AND EDUCATION			
<u>Responsibility</u> <i>Who will lead this activity and who else will need to be involved?</i>	<u>Outputs</u> <i>What will be the result of this activity?</i>	<u>Data</u> <i>Are data currently available, if not, what is the plan to collect and analyze data?</i>	<u>Due Date</u>

EFFECTIVE COURT PRACTICE				
<u>Strategies</u>	<u>Responsibility</u>	<u>Outputs</u>	<u>Data</u>	<u>Due Date</u>
<i>What are the identified steps to improve current capacity or court performance related to his goal?</i>	<i>Who will lead this activity and who else will need to be involved?</i>	<i>What will be the result of this activity?</i>	<i>Are data currently available, if not, what is the plan to collect and analyze data?</i>	

ADDITIONAL AREAS FOR IMPROVEMENT				
<u>Strategies</u>	<u>Responsibility</u>	<u>Outputs</u>	<u>Data</u>	<u>Due Date</u>
<i>What are the identified steps to improve current capacity or court performance related to his goal?</i>	<i>Who will lead this activity and who else will need to be involved?</i>	<i>What will be the result of this activity?</i>	<i>Are data currently available, if not, what is the plan to collect and analyze data?</i>	

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