Ho-Chunk Nation Department of Justice
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August 20, 2018

Clerk of Supreme Court of Wisconsin
Attention: Deputy Clerk-Rules
P.O. Box 1688
Madison, WI 53701-1688
clerk@wicourts.gov

RE: Rule Petition 18-04, Tribal *Pro Hac Vice* Admission

Honorable Justices of the Wisconsin Supreme Court:

Shekóli, Nicole Homer ní: yukyáts. Onʌyota'a:ká: níwakuhutsyo:tʌ̲ (ukwehuwé:ne). Otháyu:ni nuki'talo:tʌ. Greetings, my name is Nicole M. Homer. I am from the Oneida Nation of the Thames, Ontario, Canada. I am of the Wolf clan.

I am a Wisconsin state licensed attorney (Bar No. 1062025), who does a substantial amount of Indian child welfare work in-house for a tribe. As Tribal Counsel for the Ho-Chunk Nation, I have represented the Tribe in Indian child custody proceedings all across the United States. The process to appear, and gaining access to needed information and notice of hearings, has often been *difficult* to say the least. Having run into such difficulties, I offer my support for Rule Petition 18-04.

The federal Indian Child Welfare Act (hereinafter ICWA), 25 U.S.C. § 1911 *et seq.*, seeks to protect the best interests of Indian children and families by establishing minimum standards for removal and requiring placements to reflect the unique values of the Indian child's culture. However, part of the best interests of an Indian child are the interests of their tribe. It is in the Indian child's best interests that their tribe remain stable and secure, and that the child is assisted in establishing, developing, and maintaining a political, cultural, and social relationship with the tribe and tribal community. Ultimately, these children are the future of our tribes. They will be our future tribal leaders. If tribes are to continue to be resilient and persevere from our tragic past into the seventh generation, each tribe must have strong and connected children willing to take the reins when they become adults.

There are currently 573 federally recognized tribes in the United States. The ICWA applies to Indian children of all 573 tribes- regardless of where they reside in the United States. As one can imagine, comparing 573 separate sovereigns, you are bound to find a wide array of differences. Among these differences includes the wealth of the tribe, the access to resources for out-of-state legal representation, and the number of in-house counsel, if any.

Tribes are often limited in the funds necessary to hire attorneys in every state in which an ICWA proceeding occurs. As with citizens of the United States, citizens of tribes are transient. Further, the effects of forced assimilation, termination of reservations, boarding school era removals, and removals of Indians to urban areas still plague tribes today. Tribal people live all across the country. As such, it becomes a financial strain on tribes to be able to afford to hire attorneys in every single state to handle a case either alone, or in concert as associated counsel pursuant to local practice rules. By forcing tribes to pay for such legal services, it can constructively close the door on

federally permitted tribal participation in ICWA hearings. Yet, the very purpose and spirit of the ICWA was to have tribal participation, whereby the tribes could ensure tribal connections for their children. *See generally People v. ex rel. A.T.* (Colorado case and description found at http://www.narf.org/cases/people-ex-rel-at/); *In re the Interest of Elias L.,* 277 Neb. 1023 (Neb. 2009); *State ex rel. Juv. Dept. v. Shuey*, 850 P.2d 378 (Or. App. 1993).

The Ho-Chunk Nation's Department of Justice submitted official comments on the proposed ICWA regulations to the Bureau of Indian Affairs in May of 2015. The comments addressed the above-mentioned concern. Specifically, the Nation commented that:

> **Rule 23.111**
> 1) Tribes are often limited in the funds necessary to hire attorneys in every state in which an ICWA proceeding occurs. As with citizens of the United States, citizens of tribes are extremely transient. Further, the effects of forced assimilation, termination of reservations, boarding school era removals, and removals of Indians to urban areas still plague tribes today. Tribal people live all across the country. As such, it becomes a financial strain on tribes to be able to afford to hire attorneys in every single state to handle a case either alone or in concert as associated counsel under the various states' requirements for association with counsel in order to practice *pro hac vice*. By forcing tribes to pay for such legal services, it can constructively close the door on tribal participation in ICWA hearings. And the very purpose and spirit of the ICWA was to have tribal participation and to protect the tribal interest in their children and the children's interest in their tribal connections.
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> a. 23.111(c)(4)(ii) & (iii) should be clarified to state that the Tribe (a) need not have an attorney to intervene and (b) that tribal attorneys may appear through a generic *pro hac vice* without having to associate with local counsel (citation omitted).
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> b. 23.111(h) "may" should be deleted and replaced with "shall" or "should."
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> **Rule 23.133**
> 1) (d) should be amended to read "[t]he court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and *tribal attorneys and/or representatives*, such as participation by telephone, videoconferencing, or other methods."

The federal government provided the following response within its publication of the Final Rule on June 14, 2016:

> Commenters also stated that the new definition should clarify that even if the Tribal representative is an attorney, the State may not require licensure in the jurisdiction where the child-custody proceeding is located. A commenter stated that appearing *pro hac vice* is often not a viable alternative because of the cost, number of appearances, requirements for local co-counsel, and ultimately the discretion of the State to deny the application to appear *pro hac vice.*
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> *Response:* The Department declines to adopt the comments' suggestion at this time. The suggested definition and requirements for State courts were not included in the proposed rule, ***and the Department believes that it is advisable***

> ***to obtain the views of State courts*** and other interested stakeholders before such provisions are included in a final rule.
>
> The Department recognizes that it may be difficult for many Tribes to participate in State court proceedings, particularly where those actions take place outside of the Tribe's State. Section 23.133 encourages State courts to permit alternative means of participation in Indian child-custody proceedings in order to minimize burdens on Tribes and other parties. **The Department agrees with the practice adopted by the State courts that permit Tribal representatives to present before the court in ICWA proceedings regardless of whether they are attorneys or attorneys licensed in that State.** *See e.g., J.P.H.* v. *Fla. Dep't of Children & Families,* 39 So.3d 560 (Fla. Dist. Ct. App. 2010) (per curiam); *State* v. *Jennifer M. (In re Elias L.),* 767 N.W.2d 98, 104 (Neb. 2009); *In re N.N.E.,* 752 N.W.2d 1, 12 (Iowa 2008); *State ex rel. Juvenile Dep't of Lane Cty.* v. *Shuey,* 850 P.2d 378 (Or. Ct. App. 1993).

Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. 38778, 38798-99 (June 14, 2016)(publishing the final rule and announcing effective date)(emphasis added).

There are a growing number of state courts that are solidifying the above-mentioned practice of permitting tribal attorneys to participate in ICWA matters without harsh *pro hac vice* requirements. Oregon and Michigan both have *pro hac vice* waivers for tribal attorneys in ICWA cases. *See* OR. UNIFORM TR. CT. R. 3.170; MI. CT. R. 8.126. Nebraska likewise addresses this issue, but does so statutorily. Neb. Rev. Stat. § 43-1504(3)(declaring that "[t]he Indian child's tribe or tribes and their counsel are not required to associate with local counsel or pay a fee to appear *pro hac vice* in a child custody proceeding under the Nebraska Indian Child Welfare Act"). Minnesota's rules alleviate attorneys representing Indian tribes in juvenile protection matters from not only having to associate with counsel, but from having to follow rules as they relate to e-filing. MINN. R. JUV. PROT. P. 3.06.

On June 7, 2018, Washington became the most recent state to amend their admission and practice rules to allow for an exception for tribal attorneys in ICWA cases, with its rule becoming effective September 1, 2018. Their rule is as follows:

> (6) Exception for Indian Child Welfare Cases. A member in good standing of, and permitted to practice law in, the bar of any other state or territory of the United States or of the District of Columbia may appear as a lawyer in an action or proceeding, and shall not be required to comply with the association of counsel and fee and assessment requirements of subsection (b) of this rule, if the applicant establishes to the satisfaction of the Court that:
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> (A) The applicant seeks to appear in a Washington Court for the limited purpose of participating in a "child custody proceeding" as defined by RCW 13.38.040, pursuant to the Washington State Indian Child Welfare Act, ch.13.38 RCW, or by 25 U.S.C. § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq.;
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> (B) The applicant represents an "Indian tribe" as defined by RCW 13.38.040 or 25 U.S.C. § 1903;
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> (C) The Indian child's tribe has executed an affidavit asserting the tribe's intent to intervene and participate in the state court proceeding and affirming

> that under tribal law (i) the child is a member or (ii) the child is eligible for membership and the biological parent of the child is a member; and
>
> (D) The applicant has provided, or will provide within seven (7) days of appearing on the case, written notice to the Washington State Bar of their appearance in the case. Such written notice shall be by providing in writing the following information: the cause number and name of the case; the attorney's name, employer, and contact information; and the bar number and jurisdiction of the applicant's license to practice law.

WASH. SUP. CT. APR 8. Wisconsin now joins Arizona and California, in having pending amendments for consideration. Arizona and California's proposed amendments are currently under final deliberation, as comment periods for both have expired.

I contend that the *pro hac vice* process overall is exceedingly burdensome for nonresident tribal counsel looking to effectively advocate for out-of-state tribes in ICWA cases. For this reason, I support Wisconsin Supreme Court Rule, 10.03 to include an exemption for nonresident tribal counsel in Wisconsin Indian child custody proceedings. The language proposed in Supreme Court Rule Petition 18-04 will ensure tribes are effectively represented in Wisconsin Indian child custody proceedings. In the alternative, even simpler language mirrored after the nonresident military counsel exemption, could equally suffice:

> A court in this state shall allow a nonresident attorney to appear and participate in any Indian child custody proceeding pursuant to the Indian Child Welfare Act (state and federal), while representing a tribe, without being in association with an active member of the state bar of Wisconsin and without being subject to any application fees required by this rule.

See e.g., WIS. SUP. CT. R. 10.03(4)(c).

I respectively ask that Wisconsin **continue** to be on the forefront of promoting equal access to justice for tribes. Wisconsin has a deep judicial history of working well with sovereign tribal nations, as evidenced by the *Teague* protocol, allowing for discretionary transfer of civil matters to tribal courts under Wis. Stat. § 801.54, and maintaining a State-Tribal Justice Forum. Amending Wisconsin Supreme Court Rule 10.03 would be one more step in furthering this mutual respect between sovereigns. Should you have any questions, please feel free to contact me at 715-284-3170 or nicole.homer@ho-chunk.com. Thank you for taking the time to consider my support of Supreme Court Rule Petition 18-04.

Yaw^Λkó,

Nicole M. Homer
Tribal Counsel
Wis. Bar No.: 1062025

Cc: Attorney Starlyn R. Tourtillott, Petitioner
Attorney Danica J. Zawieja, Petitioner