

# RESPONDING TO IMPROPER INFLUENCES IN ICWA CASES

2018 TICA/ILPC Conference

# General Disclaimers

- I am not a “regular” dependency/ICWA attorney; my background is litigation.



# Celebration Parade

## LADY



## COUGARS

Surrounding communities are  
invited to come celebrate

**WE ARE NOT RESPONSIBLE  
FOR THEFT OR INJURIES**

**03/18/17  
10:00 am**

Banner ceremony  
will follow in  
Al Grindsdale

Gymnasium  
**DRUG FREE**



**EVENT**



## THIS HOMECOMING



**10.5.18**  
Stadium



## THOREAU



## HAWKS

**7:00 PM**



# Areas covered

- How do I know if the GAL/foster parents is/are getting advice from an outside group?
- What can I do if my case starts getting media coverage?
- How do I handle an ICWA case in a state without any Indian tribes?
- How do I deal with a biased GAL?

# External Advocacy Groups



# Recognizing external involvement

- Unexplained sudden increase in ICWA knowledge
- Use of anti-ICWA talking points in arguments
- Use of “canned” ICWA challenges in pleadings
- Unexplained attacks on a tribe or its attorneys
- Outside groups or attorneys may be involved “behind the scenes”

# Examples of anti-ICWA language

- Close family members are “strangers”
  - What the Goldwater Institute calls “racial strangers” others have called “family members” for centuries.
- Indian reservations are “bad places”
  - References to crime rates on reservations
- Tribal courts are “unfair” forums



# Canned arguments

- Equal Protection
- Tenth Amendment
- Existing Indian Family Exception
  - Now “repackaged” as minimum contacts
- Unauthorized Practice of Law



# Responding to canned arguments

- “For every canned argument, there is an equal or greater canned response.” ~ Murphy (2018)
- Know your resources and how much to devote on any given issue

# Unauthorized practice of law

Second, the case law from at least four states supports the Community's right to participate, through a tribal employee, in ICWA proceedings based upon the preemption doctrine and ICWA's legislative purposes. These cases *uniformly* hold that an Indian tribe participating in a child custody proceeding under ICWA is not required to appear through a state-licensed attorney. *In re Elias L.*, 277 Neb. 1023, 767 N.W.2d 98 (Neb. 2009); *In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008); *J.P.H. v. Fla. Dep't of Children & Families*, 39 So.3d 560 (Fla.App. 2010); *State ex rel. Juv. Dep't of Lane County v. Shuey*, 119 Or.Ap. 185, 850 P.2d 378 (Ore.App. 1993).



# Litigation strategies

- Bring in additional attorneys (if possible)
- Ask for help
- Learn the state dependency law:
  - Code provisions
  - Juvenile court rules
  - Local rules

News Media



# News media

- ABA Model Rule 3.6 “Trial Publicity”
  - Applies only to attorneys
- State law regarding dependency cases varies significantly
- Qualitatively evaluating news media sources
  - Who is your audience?
  - *National* v. *local* v. *tribal*
- Recognizing “friendly” media sources

## ABA Rule 3.6

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.



## Before going forward...

- From 1987 to 1994, I was a faculty member in communications (UNLV, Southern Utah University, Miami University)
- Time spent on communications is time spent away from your case.

# Press release v. press statement

- Are you on offense or defense?
- When to use a press release:
  - To publicize a favorable decision
  - To counter negative publicity
  - Distributed to various media outlets
- When to use a press statement:
  - Generally reactionary
  - Distributed when requested



# Drafting a press statement

- Keep it short and concise
- Use plain language
- Write it like a reporter
- Incorporate quotations from tribal leaders
- Remember your audience
- Prepare ahead of time

# Talking to the press

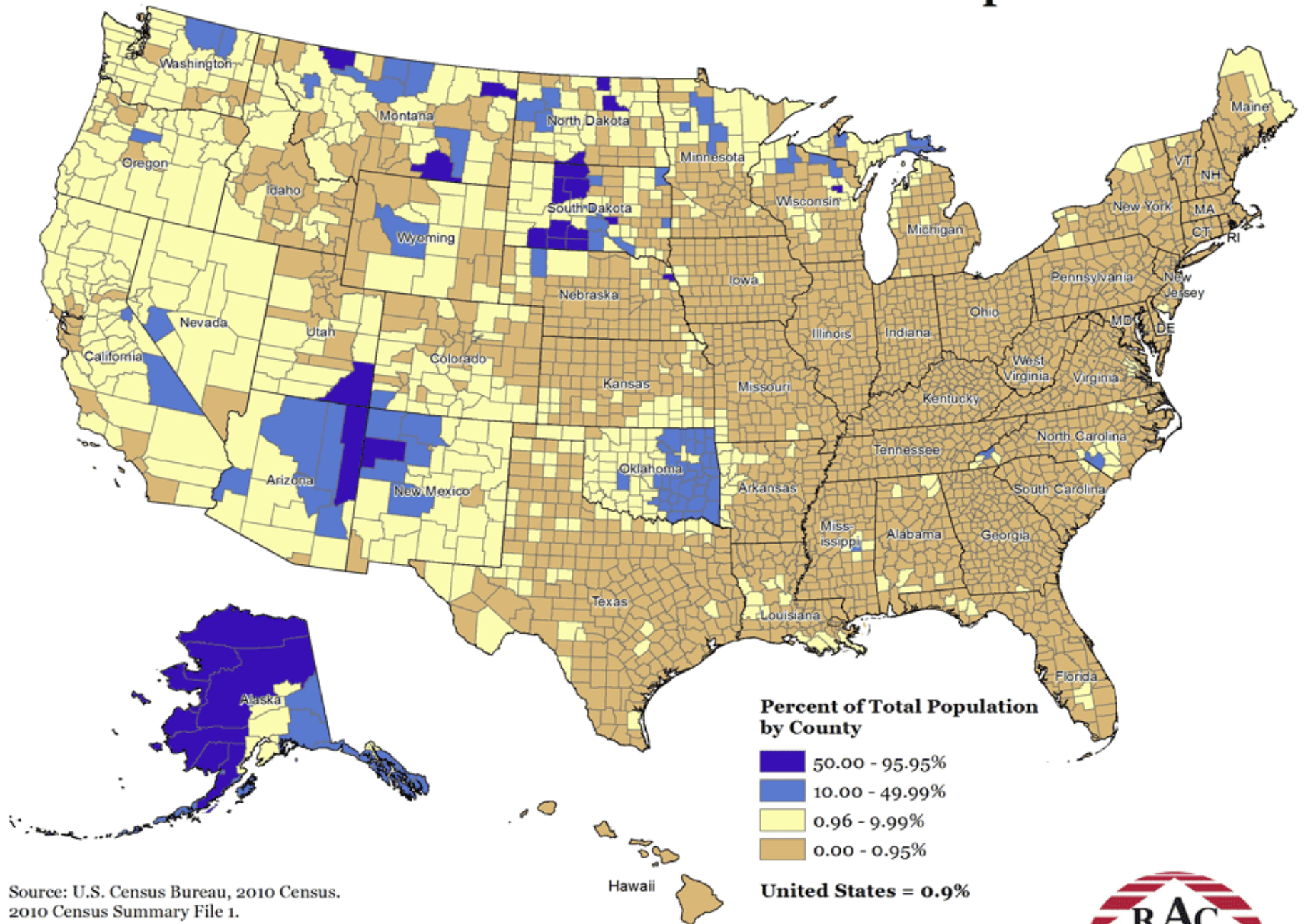
- Obtain appropriate authority
- Let the reporter talk
- Prepare “sound bites” ahead of time

Had Ohio child-welfare agencies properly notified the tribe after the boy came into foster care in 2015, Murphy said, “We wouldn’t be where we are today. By disregarding the law, basically, the child was not placed with relatives when he should have been.”



# Geographic Challenges

# American Indian and Alaska Native Population





# Litigating in states with limited Native presence

- Learn local rules *and* practices
- Assume and plan for the worst case scenario:
  - Consider reported appellate cases on ICWA's transfer provision, 25 U.S.C. § 1911(b)
  - Consider reported appellate cases on good cause to deviate from ICWA's placement preferences, 25 U.S.C. § 1915(b)
  - Consider appellate decisions like this:

recording of the conference is part of the record on appeal. We also considered and rejected the argument that the tribal court could exercise citizenship based on personal jurisdiction over the child. *Id.* at ¶ 96-97.



# Tribal attorney as educator

- Q. Why do state courts rarely take action on UPL allegations?
- A. They want you there.
- Embracing your role as an advocate/educator:
  - Prepare and file trial briefs
    - Shorter is better in juvenile court
    - Keep trial briefs issue specific
  - Trial courts may be more receptive than appellate courts
  - Educate aligned attorneys on ICWA provisions



# Focus on the big picture

- *In re C.J., Jr.* (Ohio)
  - Tenth District (intermediate appellate court) reversed the Juvenile Court's order recognizing the tribal court order and granting transfer
  - Goldwater has not appeared in the Juvenile Court
    - But now we have the Pacific Legal Foundation...
  - Actions taken before the case was remanded:
    - Prepared (amended) motion to remove the GAL
    - ICPC approval for tribal placement

# Guardian *ad litem* Bias



# Guardian *ad litem* bias

- A recurring problem in ICWA cases is the GAL becoming a “de facto” advocate for the foster placement
- Know the state law and rules for GALs as well as case law on grounds for removal:
  - What are the GAL’s duties?
  - Do the GAL’s actions (1) further the discharge of his/her duties; or (2) violate those duties?
  - What does “best interests of the child” mean?
- Removal is very rare; generally reviewed under abuse of discretion standard.



