



Judge Leonard Edwards
Santa Clara Superior Court (Ret.)

“Active Efforts” and “Reasonable Efforts”: Do They Mean the Same Thing?¹

Active efforts is a term included in the Indian Child Welfare Act (ICWA). It refers to the amount of effort a social worker must devote to providing services to a parent in order to prevent state removal of an Indian child from parental care and to assist a parent rehabilitate so a child may safely be returned. “Reasonable efforts” is a term taken from federal and state law governing the effort a social worker must exert for the same tasks for non-Indian children.

Starting with the case of *In re Michael G.*, (1998) 63 Cal. App.4th 700, California appellate courts have consistently held that the two terms mean the same thing. In the most recent case, *In re C.F.*, (2014) 230 Cal. App.4th 227, the appellate court repeated the California position, stating that “the standards for determining whether active efforts were made are ‘essentially undifferentiable’ from those for assessing whether reasonable services under state law were provided.” (at p. 239). The appellate court goes on to write that “[n]either ICWA nor section 361.7 defines active efforts.” (at p. 239).

California courts are in the minority in their interpretation of the meaning of “active efforts,” being joined only by Colorado.

The majority of state appellate court opinions and legal commentators conclude that the two terms are different and that “active efforts” requires a higher standard of social worker conduct. (See *In the Interest of P.S.E.*, (2012) 816 N.W.2d 110 [Supreme Court, South Dakota] and the cases cited therein).

In 2006 (after the *In re. Michael G.*, decision) the California legislature enacted SB 678 (Stats. 2006 ch. 838) which addressed the Indian Child Welfare Act in California statutory law. SB 678 included a specific definition of “active efforts” in section 361.7 of the Welfare and Institutions Code. Although section 361.7 does not expressly say that active efforts must be to a higher level than reasonable efforts, it is significant that the legislature felt the need to include a distinct definition of active efforts. Further, section 361.7 does make it clear that active efforts must be of a different nature than reasonable efforts. In keeping with ICWA’s recognition of the potential for cultural bias in the child welfare system as well as the need to acknowledge the importance of the relationship of an Indian child and family’s community and tribe in the child welfare process, section 361.7 requires that:

The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child’s tribe. Active efforts shall utilize the available resources of the Indian child’s extended family, tribe, tribal and other Indian social service agencies and individual Indian caregiver service providers. (emphasis added)

At a minimum then, section 361.7 requires that active efforts draw in the child and family’s extended family and tribe, that they include tribal service providers, and that they be tailored to the cultural values of the child and family’s tribe. As discussed in more detail below, the requirements of section 361.7 are reflected in California Rule of Court, Rule 5.484(c) and are consistent with the recently enacted *Bureau of Indian Affairs Guidelines*.

The Department of the Interior, Bureau of Indian Affairs, recently issued *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (Guidelines)*. The updated *Guidelines* provide “a framework for State courts and child welfare agencies to follow, as well as best practices for ICWA compliance.”

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They are effective as of February 25, 2015.

The *Guidelines* make it clear that “active efforts” “constitute more than reasonable efforts” as required by the federal law. The *Guidelines* spell out what “active efforts” means. In 15 separate paragraphs the *Guidelines* define “active efforts” and detail what is required of a social worker when working with an Indian child. These paragraphs instruct the social worker to engage “the Indian child, the Indian child’s parents, the Indian child’s extended family members, and the Indian child’s custodian(s).” They require the social worker to identify appropriate services and to help “the parents to overcome barriers, including actively assisting the parents in obtaining such services.” Further, the *Guidelines* require that the social worker take “into account the Indian child’s tribe’s prevailing social and cultural conditions and way of life,” and request “the assistance of representatives designated by the Indian child’s tribe with substantial knowledge of the prevailing social and cultural standards.” Under the *Guidelines* the social worker must offer and employ “all available and culturally appropriate family preservation strategies” and notify and consult with “extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve as a placement resource for the Indian child.” The social worker must also identify community resources “including housing, financial, transportation, mental health, substance abuse, and peer support services,” and actively assist “the Indian child’s parents or extended family in utilizing and accessing those resources.” These requirements are only a

selection from the *Guidelines*. The *Guidelines* conclude with the statement that “Active efforts” are separate and distinct from requirements of the Adoption and Safe Families Act (ASFA) and that ASFA’s exceptions to reunification efforts do not apply to ICWA proceedings.

California Rule of Court, Rule 5.484(c) is consistent with the *Guidelines* and the interpretation of the meaning of “active efforts,” although it does not include the extensive list of required services and actions contained in the *Guidelines*.

Compare the *Guidelines* careful description of “active efforts” to the California Rule of Court, rule 5.502(33) and the California definition of “reasonable efforts.”

‘Reasonable efforts’ or ‘reasonable services’ means those efforts made or services offered or provided by the county welfare agency or probation department to prevent or eliminate the need

for removing the child, or to resolve the issues that led to the child’s removal in order for the child to be returned home, or to finalize the placement of the child.”

Clearly the two definitions refer to a different level of social worker efforts required depending on whether the child is an Indian child.

It is apparent that California appellate law needs to be adjusted to comply with the federal *Guidelines*. They make clear that “active efforts” are separate and distinct from “reasonable efforts” and require much more of a social worker than the legal requirements for “reasonable efforts.” As Justice William Thorne (ret. Utah Appellate Court) has said: “active efforts’ means the social worker should treat the child as you would your own child and do whatever it takes,” while Judge April Attebury of the Karuk Tribal Court tells social workers

they “should hold the client’s hand from start to finish.”²

“Active efforts” has been carefully defined by the California Legislature and more recently by the *Bureau of Indian Affairs’ Guidelines*. These definitions demonstrate a higher and more sophisticated degree of services than the definition of “reasonable efforts.”³ The time has come for California law and practice to reflect these changes. 

Endnotes:

- 1 The author thanks Ann Gilmour Esq. for her assistance with this article.
- 2 See Chapter V (The Indian Child Welfare Act and Active Efforts) in *Reasonable Efforts: A Judicial Perspective* by Judge Leonard Edwards (ret.) at footnote 96.
- 3 *Id.*, at p. 364.

Word Jambalaya Answers

V	R	G	N	A	O
G	A	V	R	O	N

A	R	E	E	R	P	I
P	E	R	E	I	R	A

C	A	M	D	O	S	U
D	A	C	U	M	O	S

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When the judge asked her colleagues to go to the greasy spoon diner again for lunch, her request was:

O	V	E	R	R	U	L	E	D
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