



QUALIFIED EXPERT WITNESS

INDIAN CHILD WELFARE ACT

"Carrying out the duties of a QEW is one way to become part of the protective circle for Indian children involved in the state child welfare system. It's a sacred responsibility. Gratitude to all who serve."
- A Tribal Elder

All Indian children deserve a strong, protective circle of caring adults to ensure they are loved, safe, and connected to their community, tribe and culture. The Indian Child Welfare Act (ICWA) of 1978 is a federal law that recognizes how important those connections are while also ensuring the continued existence of tribal nations as unique, distinct, and sovereign.

ICWA was passed into law in response to the alarmingly high number of American Indian and Alaska Native children being removed from their families and placed outside of their community. ICWA requires states and courts to protect the best interest of Indian children by

establishing a higher standards of evidence and by maintaining and strengthening their connection to family, community, culture, and tribal nation.

ICWA is considered the "gold standard" in child welfare policy and practice and requires state child welfare agencies and courts to:

1. Provide active efforts to both prevent removal from and to reunify children with their families
2. Follow preferred placement preferences
3. Obtain testimony of a **qualified expert witness (QEW)** at the removal hearing and in the event of a termination of parental rights

In 2016 the Bureau of Indian Affairs issued both official regulations and accompanying guidelines to help state courts and child welfare agencies implement ICWA; these regulations and guidelines provide clarification on important aspects of the law including standards of practice with families.



ICWA ONLINE GUIDE – EXPERT WITNESSES

A [Practical Guide to the Indian Child Welfare Act](#) developed by the Native American Rights Fund, offers a section on expert witnesses and includes answers to these frequently asked questions:

- When is an expert witness required in an ICWA case?
- Who may be qualified as an expert witness under this section?
- What qualifications must a qualified expert witness possess?
- How many experts are required?
- Can the qualifications of an expert be challenged?
- What is the effect of failing to use a qualified expert witness?
- Does a state social worker qualify as an expert witness?
- Does a tribal social worker qualify as an expert witness?
- Must expert witness testimony be based on direct personal contact with the relevant parties?
- How is expert testimony used in cases involving ICWA and the state law burden of proof?
- How can one locate an expert witness?



ICWA: LAW & REGULATIONS

[The Indian Child Welfare Act \(25 U.S.C. §§ 1901–1963\)](#)

[BIA Federal Regulations \(25 C.F.R. Part 23, Indian Child Welfare Act Proceedings, Final Rule\)](#)

[BIA Guidelines for Implementing the Indian Child Welfare Act](#)

PERSPECTIVE

[Kelly Buffalo Quinn: Tribal Baby Battle](#)

[I Lost Control of My Baby's Adoption Because of the Indian Child Welfare Act. And I'm Glad It Happened](#)

SERVING AS AN ICWA QEW

Per the Federal Rules of Evidence, an expert witness is someone who is qualified by knowledge, skill, experience, training, or education and may provide court testimony in the form of an opinion. To serve as a QEW in ICWA cases, one must meet certain criteria and must not also be the state social worker.

25 C.F.R. § 23.122 (2016 BIA Federal Regulations)

Who may serve as a qualified expert witness?

- (a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.
- (b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.
- (c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

Sample Characteristics of an ICWA QEW

- Oregon
- Wisconsin

PROVIDING TESTIMONY

Testimony from the ICWA QEW is a critical part of the decision-making process and is intended to mitigate removal of Indian children and the accompanying findings of neglect and abuse that have historically been based on white, middle class standards and have contributed to the disproportionate numbers of Indian children in the child welfare system.

Testimony is also an opportunity to educate the state and the court about the ways of knowing and being, the values, the prevailing social and cultural standards of the child's tribe, culturally relevant services, and active efforts. Such understanding is crucial for the disposition of any particular ICWA case and has impact on subsequent ICWA cases in the future as it helps build the capacity of the state and court to carry out both the spirit and letter of the law.

- [QEW Testimony – Questions to Consider](#) (University of North Dakota)
- [Qualified Expert Witness Job Aid](#) (Michigan DHHS)

NAMIHƏWET (“I WITNESS” IN PENOBSCOT) - QUALIFIED EXPERT WITNESS (MAINE TRIBAL-STATE ICWA WORKGROUP)

A QEW provides testimony in court about the specific facts of each case and makes a determination about whether or not continued custody with the parent or custodian is likely to result in serious physical or emotional damage to the child.

The QEW needs to take into consideration the prevailing cultural and social standards and child rearing practices of the child's tribe. The QEW also looks at how well the state did in providing active efforts and culturally relevant services to the family.

The QEW is paid by the state for their time spent preparing and delivering testimony, that includes reading case files, interviewing parties involved, attending court hearings, and writing the report.

[Learn more about the Maine Tribal State ICWA Workgroup](#)

SAMPLE EDUCATIONAL RESOURCES

The Nebraska Indian Child Welfare Act Qualified Expert Witnesses (QEW) Training (PPT and training videos)

Presented by Robert McEwen, J.D. Staff Attorney, Child Welfare Program Nebraska Appleseed and Jill Holt, ICWA Program Coordinator.

NICWA Qualified Expert Witness Training (fee-based)

This three-day training prepares participants with information about the basic legal requirements of ICWA and will train participants on how to provide qualified expert witness testimony in ICWA cases as well as the practice issues involved.

Qualified Expert Witness Objectives

Qualified Expert Witness Agenda (example)

Advanced Indian Child Welfare Act (ICWA): Active Efforts and Expert Witness V2.0 (participant workbook)

Part of Calswec's ICWA training, this includes information on expert witness as related to active efforts, qualifications, selection, testimony, questions in action, and reflections for QEWs. The goals and learning objectives for this training is also electronically available.

RESOURCES FOR COURTS & ATTORNEYS

QEW One-Pager for Attorneys (Maine Tribal-State ICWA Workgroup)

Improving Outcomes in Indian Child Welfare Cases: Strategies for State-Tribe Collaboration (Shanna Knight, Victoria Sweet, and David Simmons – American Bar Association)

Keeping Cultural Bias Out of the Courtroom: How ICWA “Qualified Expert Witnesses” Make a Difference (American Indian Law Review, Elizabeth Low)

Understanding the 2016 Indian Child Welfare Act Regulations (Scott Trowbridge – American Bar Association)





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