



Qualified Expert Witnesses:
*Bringing Cultural Knowledge to
State Court ICWA Cases*



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What we will be talking about

Purpose of a Qualified Expert Witness (QEW)

When a QEW is required

What a QEW testifies about

Process of becoming a QEW

Preparing to provide testimony



Purpose of a Qualified Expert Witness

- Federal requirement under ICWA
- Intended to prevent removals of Indigenous children from their home unless expert testimony shows it is necessary
- To help prevent removals based on white, middle-class standards which have contributed to the disproportionate numbers of Indigenous children in the child welfare system



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Possible Characteristics of QEW's

A member of the child's Tribe that the Tribe recognizes as being knowledgeable in Tribal customs pertaining to family organization and childrearing practices

A person with substantial experience in delivering child and family services to Indian people, with an extensive knowledge of prevailing social and cultural standards and childrearing practices within the child's Tribe

A professional having substantial education and experience in the area of his or her specialty



Characteristics – Clarified

- Congress wanted to ensure that State courts heard from experts other than State social workers or experts whose testimony would be based solely on western values
- In fact, the regulation provides that the social worker regularly assigned to the child (i.e., the state agency seeking the action) may not serve as the QEW



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What it means to be an "expert"

- Someone who is qualified
 - by knowledge, skill, experience, training, or education
- **And** who is prepared to provide testimony in the form of an opinion



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When QEW Testimony is Required

Contested Removal

- Child is likely to suffer serious emotional or physical damage if left in the custody of the parent or Indian custodian
- “Clear and convincing” evidence

Termination of Parental Rights

- Continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child
- Evidence “beyond a reasonable doubt”





Burden of Proof

- No involuntary foster care placement or termination of parental rights may be ordered without QEW testimony
- No party can waive this requirement
- The state has not met its burden of proof if it cannot provide a qualified expert witness



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Alaska Supreme Court Opinion - Cissy A. & Butch R.

Because OCS failed to properly contextualize the cases within the culture and values of the children's Tribes – the court could not terminate parental rights

As a default rule, cultural expert testimony is needed to terminate parental rights under ICWA

Burden is on OCS to show that culture is plainly irrelevant to the case, such that it falls within the very limited exception to the need for cultural expert testimony

OCS should not have to ask ICWA workers if the case implicates cultural issues



QEW must testify about one or both:

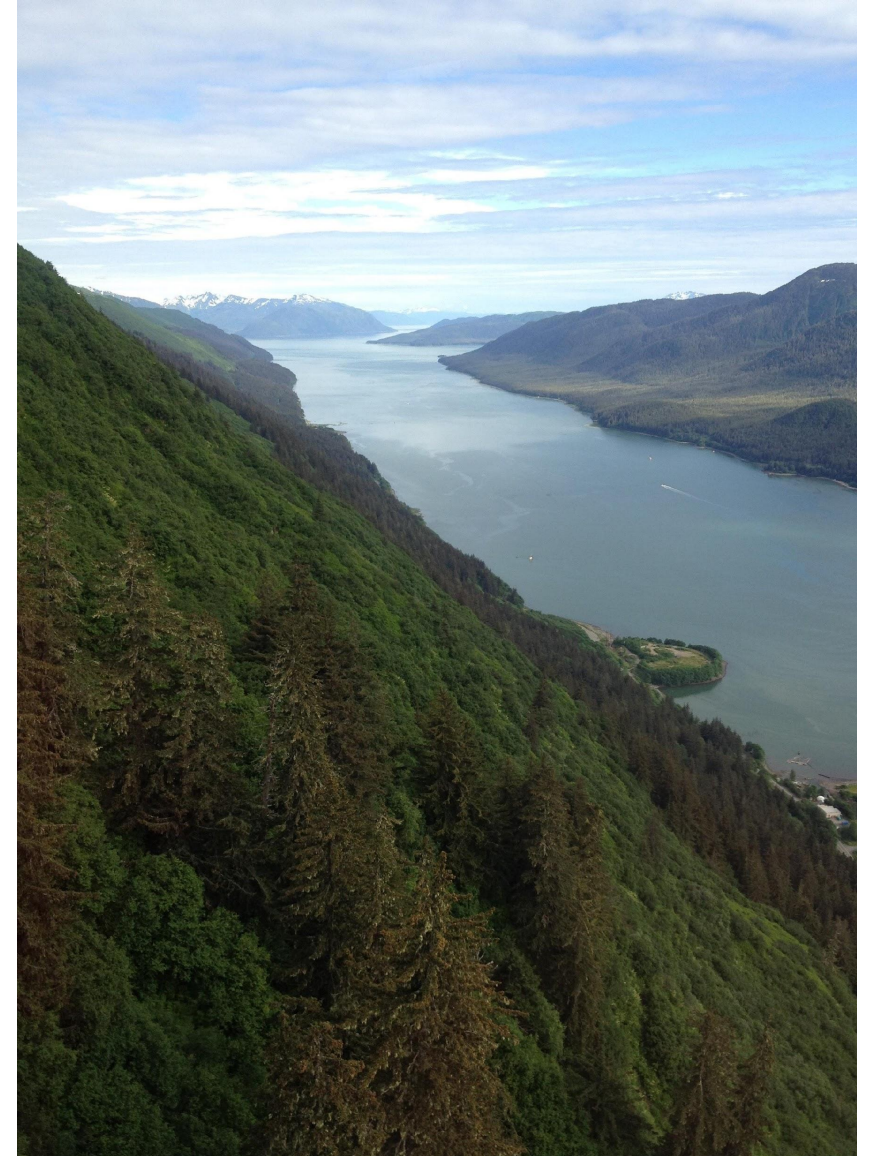
1. Whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child

"Harm Expert"

2. The family's situation in the context of the prevailing cultural and social standards of the child's Tribe

"Cultural Expert"

The same, or separate expert witnesses may be used to testify regarding potential emotional or physical damage to the child and the prevailing social and cultural standards of the Tribe



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Evidence must show a causal relationship

Evidence that shows only the existence of poverty, isolation, single parenthood, age of parent, crowded or inadequate housing, substance misuse, or nonconforming social behavior is not sufficient

Children can thrive when they are kept with their parents, even in homes that may not be ideal in terms of cleanliness, access to nutritious food, personal space, or when a parent is single, impoverished, or misusing substances

There must be a demonstrated correlation between the conditions of the home and a threat to the specific child's emotional or physical well-being



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Finding QEW's

- It is the responsibility of the state/OCS to find a QEW
- 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
- A Tribe can designate a person as being qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe



Establishing Qualifications

- The potential QEW will be asked how they gained their knowledge of the family structure and childrearing practices of the Indian child's Tribe
- Provide an up-to-date resume or statement of experience:
 - Where were you born and raised
 - How you learned about the child's culture
 - Life experience and professional experience related to assessing child safety
 - Education related to child safety
 - Any prior experience testifying in ICWA cases
 - Any other relevant traditional knowledge



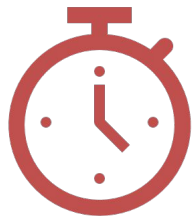
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Negotiating Compensation



The QEW will set their hourly rates



Example:

\$100/hour for records review and interviews
\$150/hour for report writing
\$250/hour for court attendance/testimony/wait
time



The state will set up as a vendor so payment
can be issued



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Gathering information to develop an opinion

- The QEW is paid for their time spent preparing and delivering testimony
- It is recommended that the QEW be somewhat familiar with the child and the child's Tribe
- The QEW evaluates the facts of the case considering their experience and understanding of Tribal family systems



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Information the QEW should have familiarity with

The Tribe's history

How children are viewed by the Tribe

Child rearing practices

Familial relationships and life values

Use of discipline

Cultural expectations

Role of extended family in raising a child

Available Tribal services, formal and informal



What a QEW should know about the case

The family's history

Protective services issues in the family

Substantiated incidents of abuse or neglect

The needs of the child and family, e.g. safety considerations, basic living needs

Agency response, including services provided and family engagement

The Tribe's and family's view of the situation





CINA Rule 8(d)(1) - Disclosures of Witnesses with Special Expertise

- The party shall provide a written summary of
 - the substance of the anticipated testimony of the expert
 - the expert’s opinion, and
 - the underlying basis of the opinion



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Sample QEW Report

- I have experience in child welfare in the following ways...
- I am also qualified to testify about the prevailing social and cultural standards relevant to the children's family through my experience of...
- To offer an opinion in this case, I reviewed the following information...
- I also interviewed...
- Based on my assessment, it is my opinion that if the children return home, they [ARE or ARE NOT] likely to suffer serious emotional or physical harm.
- My opinion is based on the following...





QEW Testimony

- Is the action, or inaction, of the parent or Indian custodian likely to result in serious harm to the child?
- Can this child be safe with their parents at home now?
 - The QEW may be asked for the rationale behind the determination of whether the child rearing practices are harmful.
- The QEW may also look at how well the state did to provide active efforts and culturally relevant services to the family.



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Cultural Context

"Determining the likelihood of future harm frequently involves predicting future behavior – which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm."

(BIA Guidelines for State Courts' Indian Child Custody Proceedings, 11/26/1979)



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Predicting Future Behavior

- Tribes, extended family members and Individual Indian Caregivers may have an impact on the likelihood for change and the prediction of future behavior. An expert witness, depending on their background, may be asked to address culture within the predictions for the future and the importance of culturally competent services.

(Michigan Department of Health and Human Services Native American Affairs)



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Sample Questions

- What is your understanding of how the family came to the attention of child protective services?
- What are the parents' behaviors that are impacting the children?
- Are the parents still able to care for the children despite their challenges?
- How are the parents acting protectively?
- Are there areas where the parents are not meeting the expectations of the Tribal community?
- How are the parents making progress in overcoming their issues?
- How is the state doing in ensuring they have the services they need?
- Are there services or interventions that could have been provided that would have made a difference in this case?
- How is the extended family functioning as a whole to protect the children?
- How are the extended family's efforts consistent, or inconsistent, with community norms?
- Are the efforts of the extended family enough to keep the children safe without state intervention?
- What do you see as the pros and cons of separating the child from their parents/guardians?
- Do you see that removal is necessary to protect the children from harm?



Acknowledging possible challenges in being a QEW

- If you are a Tribal Citizen, is there tension between what you know about your Tribal culture and having to identify yourself as an expert in a state court ICWA case?
 - What are some ways to address that?

Text developed by The Alliance and the Whitener Group



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Thank You!

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