

# The ICWA Expert Witness



Presenting Quality Evidence  
To Protect the Best Interests of  
Indian Children

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# When are ICWA experts used?

- ICWA child - Removal from Home
- ICWA child - Termination of Parental Rights
- ICWA child – placement decisions
  
- Before court to advise agency, tribe
- In court as the required expert



# Who would be a “qualified expert witness”?

- Member of Indian child’s tribe who is recognized by tribal community as knowledgeable in tribal customs as they pertain to family organizations and childrearing practices



# OR?

- A lay expert witness having substantial experience in the delivery of child and family services to Indians, AND extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe



# OR?

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



# Is the QEW more than a witness?

- Add a “nonagency” prespective re active services and safety
- Provide all parties with the tribe’s position on the matter
- Caselaw says it should be a person who really does provide court with better understanding of tribe’s family and childrearing traditions

# Could there be more than one expert in a case?

Who actually decides who is an expert?

What if the experts disagree?

Does the Judge have to “obey” the expert?



# What does the expert actually testify about?

- Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child



# Why do you need an “expert” on Indian issues to prove likely damage to a child?

- The party who is seeking to have the child removed or parental rights terminated must prove to the court that active efforts, in the context of the prevailing social and cultural conditions and way of life of the Indian tribe, have been made and that available family and tribal services and been used and that the risk is still present



# So what kind of things would an expert need to know about?

- the tribe's history
- how children are viewed by the tribe
- child rearing in the tribe
- use of discipline
- cultural expectations
- tribe's services
- family's history
- protective issues in family
- particular incidents
- this child's needs
- agency responses
- tribe and family view of situation



# General Tips to Testifying

- Direct Examination by attorney for Party who calls you to the stand - TIPS
- Cross Examination by all the other attorneys- TIPS
- Redirect and Recross
- Judge might ask questions



# Experts in general:

- Experts “teach” the court
- Testify only to what you know and what you have an opinion on - don’t be “pushed”
- Remain objective and professional - can you have been “involved” in the case?
- Dress, demeanor, decorum



# Think About:

- Your expertise and credentials
- What do you want the Judge to know?
- Take your time
- Speak plainly
- Body language and facial expressions
- Don't argue or lose your cool
- Case is not about you



## Also:

- Did you talk to the attorney?
- Talking in advance to the “other side”
- Don’t add information
- Don’t read from notes but bring them
- Don’t assume the report has been read but don’t assume it hasn’t
- You are not the “expert of all things”!!



# Preparation on your own:

- Review all the records
- Talk to all the relevant people
- Consider how the cultural knowledge that you have is relevant to the issues in the case
- **WHAT** serious physical or emotional damage do others think is likely - do you agree or disagree and why?



# Prep with the attorney

- You **NEED** to work with the attorney who is calling you to the stand
- What does the attorney think he/she needs from you?
- **EDUCATE** the attorney
- Review your credentials
- Other cases you have been involved in
- Be clear about what you can/cannot say



# Prep with the attorney

- Any literature or props that would be helpful?
- Who have you talked to - who have you not talked to?
- Do you have notes or a file that you have created? Should you do a written report?
- What questions will be key?



# In Court:

- Will the case actually go to trial?
- Will you be able to listen to the other witnesses?
- How are experts “qualified”? Stipulation vs Foundational Questions
- Use of a CV
- “Voir Dire” of expert’s qualifications
- “Certification” as an expert



# Types of Questions:

- Putting a report in evidence
- Review of your knowledge base
- Explaining theories
- Use of hypothetical questions
- The factual basis for the conclusions

# THE opinion question:



Do you have an opinion within a reasonable degree of certainty as to whether continued custody by the child's parents would likely result in serious physical or emotional damage?



# Some details to think about:

- Confidentiality
- Money (do you admit this?)
- Expert banks
- Conflicts in opinion
- The “larger” role of the expert
- Next steps
- How frequent is this?
- Are there any negatives to doing this?
- Is this something that I want to do?