



Judicial Council of California

ICWA Information Sheet: Q&A Regarding ICWA Qualified Expert Witnesses (QEW)

Q. What is the Purpose of the Indian Child Welfare Act (ICWA) and the Qualified Expert Witness (QEW) Requirement?

ICWA¹ established minimum federal standards for state court child welfare proceedings and many other “child custody” proceedings involving Indian children. Effective January 1, 2007, California codified many of these requirements into provisions of the Welfare & Institutions Code, Family Code, and Probate Code that govern Indian child custody proceedings.² In passing ICWA in 1978, Congress noted the alarmingly high rate at which Indian children were removed from their families by child welfare authorities.³ Further, these removals were often unwarranted and resulted from cultural bias or a misunderstanding of tribal family structures and childrearing practices rather than any real danger to the children.⁴ Testimony before Congress stated that:

“One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing.”⁵

Under ICWA and corresponding state law, the court cannot make a foster care placement of or terminate parental rights to an Indian child unless the court can make a finding by clear and convincing evidence that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.⁶ To make such a finding, the court must consider QEW testimony regarding whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child as well as the prevailing social and cultural standards of the Indian child’s tribe, including that

¹ 25 U.S.C. §§ 1901 et seq., www.courts.ca.gov/documents/1-icwa-1091.pdf.

² See Sen. Bill 678, www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0651-0700/sb_678_bill_20060930_chaptered.pdf.

³ For additional information on ICWA, please visit www.courts.ca.gov/3067.htm.

⁴ 25 U.S.C. §§ 1901(4)(5).

⁵ United States. Congress. Senate. Select Committee on Indian Affairs, (1977) Indian child welfare act of 1977: hearing before the United States Senate, Select Committee on Indian Affairs, Ninety-fifth Congress, first session, on S. 1214 ... Aug. 4, 1977. Retrieved from the Digital Public Library of America, <http://catalog.hathitrust.org/Record/011340230> (pp. 155–156).

⁶ 25 U.S.C. § 1912(e); Welf. & Inst. Code, §§ 361(c)(6), 361.7(c).

tribe's family organization and child-rearing practices.⁷

When testimony of a "qualified expert witness" is required in an Indian child custody proceeding, a person may be designated by the child's tribe as qualified to testify to the prevailing social and cultural standards of the Indian child's tribe....⁸

Q: When Does a QEW Testify in ICWA Proceedings?

The testimony of a QEW is required (1) before a state court can make an order for involuntary foster care placement or before a state court can involuntarily terminate parental rights of the parent of an Indian child,⁹ and (2) in California if a party is seeking to deviate from the ICWA placement preferences based on the needs of the child.¹⁰

Burden of Proof Required

The burden of proof to place a child in foster care, appoint a guardian, or award custody to a nonparent is *clear and convincing evidence*, including testimony of a qualified expert witness establishing that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The burden of proof to terminate parental rights is *beyond a reasonable doubt*, including testimony of a qualified expert witness establishing that continued custody of the child by the child's custodian is likely to result in serious emotional or physical damage to the child.¹¹

Q: Who Can Serve as a QEW in ICWA Proceedings?

There are three categories of people likely to meet the requirements for a QEW:

- A person designated by the tribe as being qualified to testify to the prevailing social and cultural standards of the child's tribe;
- A member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices; and
- An 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 of the Indian child's tribe.¹²

More than one QEW may serve in the same case. For example, more than one of the parties may provide their own QEW, or the initial QEW is unable to continue working on the case and the party needs to retain another QEW. An employee of the person or agency recommending foster care placement or termination of parental rights cannot serve as a QEW on an active case.¹³

⁷ Welf. & Inst. Code, § 224.6(b)(2).

⁸ Welf. & Inst. Code, § 224.6(a).

⁹ Welf. & Inst. Code, § 224.6(b), 224.6; Fam. Code, § 177(a); and Prob. Code, § 1459.5(b).

¹⁰ 25 U.S.C. § 1912(e)-(f); Welf. & Inst. Code, § 224.6.

¹¹ Welf. & Inst. Code, §§ 361.7(c), 366.26(c)(2)(B).

¹² Welf. & Inst. Code, § 224.6(c)(1)(2)(3).

¹³ Welf. & Inst. Code, §224.6(a).

Tip: It is the best practice to consult with the tribe first as to whether they recommend a specific QEW. The tribe itself or the person they recommend serving in the QEW role will have knowledge as to the parenting practices and cultural standards of the child's tribe. If a QEW is not familiar with the child's tribe's parenting practices or cultural standards and has not consulted with the tribe about them, the court may find that the person is not qualified to testify.

Q: What are the Roles and Responsibilities of a QEW?

Document Review

- The QEW is required to review case-related documents to provide appropriate testimony and needs to be provided with (1) the petition, (2) all agency reports and attachments, (3) delivered service logs, and (4) findings and orders.¹⁴
- It is important that the QEW be provided with the documents as soon as the QEW is retained. They need enough time to thoroughly review the documents and ask questions or request additional documents if needed.

Consultation

The QEW will consult with the tribe, social worker, county counsel, caregivers, parents, attorneys, service providers, and sometimes extended family members.

- Consultation will be primarily by phone; in-person or video meetings may be held if preferred.
- The QEW will document the date, name and title of the person they spoke to, relationship to the child, and information gathered when conducting consultation during the case.

Testimony

The QEW must testify to:

- *Harm to the child.*
 - QEW testimony must address whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.¹⁵
- *The cultural standards within the child's tribe.*
 - Under California law, in making the determination whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, the court must consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and childrearing practices.¹⁶

The QEW may also testify to:

- Active efforts;

¹⁴ Welf. & Inst. Code, § 224.6(b).

¹⁵ 25 U.S.C. § 1912 (e)–(f).

¹⁶ Welf. & Inst. Code, § 224.6(b)(2).

- Whether prevailing social and cultural standards of the child’s tribe have been applied in meeting placement preferences;
- Whether there is good cause to deviate from placement preferences; and
- Findings involving law or customs of the child’s tribe.

The court may accept a declaration or affidavit from a QEW in lieu of testimony only if:

- The parties have so stipulated in writing; and
- The court is satisfied the stipulation is made knowingly, intelligently, and voluntarily.¹⁷

Tip: It is best practice to find a QEW as soon after the detention hearing as possible. The QEW needs time to consult and prepare testimony and must submit their declaration within 30 days prior to the dispositional hearing. If the dates of court proceedings change, please notify the QEW immediately.

Q. How Do I Find a QEW for ICWA Proceedings?

Ask the tribe from the onset of contact if the tribe has its own QEW. If the tribe doesn’t have a QEW to suggest:

- Your county may already work with QEW professionals in California.
- You may contact the Bureau of Indian Affairs (BIA) at:
 - 202-208-5116; or
 - www.bia.gov/bia.
- You may view the California Expert Witness List at www.courts.ca.gov/8105.htm.

Your county may want to reach out to tribes that are frequently interfacing within your county and create a list of QEWs from those tribes. This may expedite locating a tribal-specific QEW.

Tip: Your county may have policies or procedures about working with a tribe to locate a QEW and working with a QEW. If there are no policies or procedures currently in place—or they are outdated—consider creating new ones or revising the ones you have.

Additional References

- **Tribal/State Programs Unit**, www.courts.ca.gov/programs-tribal.htm
- **ICWA Requirements:**
 - Dependency, www.courts.ca.gov/documents/ICWA-SSDRequirements.pdf
 - Delinquency, www.courts.ca.gov/documents/ICWAProbationRequirements.pdf

¹⁷ Welf. & Inst. Code, § 224.6(e), https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC§ionNum=224.6.

- Family, www.courts.ca.gov/documents/ICWAFamilyCtsRequirements.pdf
- Probate, www.courts.ca.gov/documents/ICWAProbateCourtRequirements.pdf
- **ICWA Laws, Regulations & Rules**, www.courts.ca.gov/8709.htm
- **Webinar, ICWA Qualified Expert Witness: What Judges & Attorneys Need to Know:**
 - **Video**, www.courts.ca.gov/8075.htm#panel15022
 - **Materials**, www.courts.ca.gov/documents/ICWA-QEW-Webinar-2222022-Materials-R.pdf
- **CDSS ICWA Desk Reference (pages 45–46, 59–60, 86–87)**, www.cdss.ca.gov/Portals/9/Additional-Resources/ICWA/ICWA%20Desk%20Reference_whb_9-30-20.pdf
- **ACIN I-40-10, Requirement of the Use of an Expert Witness by the Indian Child Welfare Act (ICWA)**, www.cdss.ca.gov/lettersnotices/entres/getinfo/acin/2010/I-40_10.pdf
- **BIA Guidelines**, www.federalregister.gov/documents/2015/02/25/2015-03925/guidelines-for-state-courts-and-agencies-in-indian-child-custody-proceedings
- **BIA Quick Reference Sheet for State Court Personnel**, www.bia.gov/sites/default/files/dup/assets/bia/ois/ois/pdf/idc2-041404.pdf
- **BIA Quick Reference Sheet for State Agency Personnel in Involuntary Proceedings**, www.bia.gov/sites/default/files/dup/assets/bia/ois/ois/pdf/idc2-041403.pdf
- **Following the Spirit of the Indian Child Welfare Act**, www.courts.ca.gov/documents/Tribal-FollowSpiritICWA.pdf