00:00:08.610

Vida Castaneda: Good afternoon, everyone I am Vida Casteneda, Senior Analyst in the Tribal State Programs Unit at the Judicial Council of California, and descendant of the Chumash, Ohlone, Zapotec, and Tarahumara nations. We would like to acknowledge our presentation is brought to you today from the original and current lands of the Ohlone people in the San Francisco Bay area where our Judicial Council of California offices currently located. We thank the Ohlone ancestors and present tribal communities as well as the tribal lands and communities from where our presenters are speaking from.

Welcome to everyone joining us today. We will be featuring qualified expert witnesses in Indian Child Welfare Act cases: what judges and attorneys need to know in today's webinar. If you have questions during the webinar please write them in the chat box to our panelists, and we will be answering your questions at the very end of the presentation if time permits. We will be offering MCLE, court staff and judicial officer continuing education units for today. Please email Amanda Morris if you would like the certificate.

And now let's meet our panelists. We have joining us today Judge Jerilyn Borack, Presiding Judge of the Juvenile Court, Superior Court of California, County of Sacramento; Scott Castillo, Attorney; Liz Elgin DeRouen, Executive Director, Indian Child and Family Preservation Program and ICWA QEW; Vevila Hussey, ICWA QEW and ICWA trainer; Jeremy Meltzer, county counsel, County Mendocino; and Joanne Willis Newton, General Council to Indian Child and Family Preservation Program.

On your screen, you will see a list of the objectives for today's training, you should have all of this information within your materials as well. Next slide.

And next slide, Scott.

00:02:19.140

Scott Castillo: Alright, good afternoon to everyone. So you're probably aware the ICWA as its referred to a pretty handily stands for the Indian Child Welfare Act. We have given you the formal cite, the United States code cite there. It is federal law, and it was enacted quite some time ago, and it was really done in response to what was going on in the country in with native children in particular, which involved high rates of removal of Indian children from their families and communities. Some of you may be aware, familiar with some of the relocation projects, some of the adoption programs that occurred largely throughout the Midwest and this, this law, which is federal law was enacted in direct response to some of those actions, probably all of those actions. It is again a federal law, which means that it is, it occupies a higher place then state law, so for the attorneys out there, you understand that clearly.

For non-attorneys, what that means is that the federal law can be enhanced by the states, in other words, if the federal law says, you have to do this, the states can say, in addition to doing that you have to do something else. But State law cannot reduce the protections under federal law and so that's why we look to the Indian Child welfare Act, the ICWA as controlling in cases where native children are involved. Next slide please.

The purposes of ICWA. You can see that, to protect the best interests of Indian children and to promote the stability and security of Indian tribes.

My experience, and I think a lot of practitioners experience with ICWA working in primarily a dependency system, although ICWA also applies, can apply in guardianship cases and occasionally in family law cases as well, but the best interest of the Indian child is really unique. It goes a little bit beyond what we would look at in best interest with regards to dependency.

Promoting the stability and security of Indian tribes again the core purpose of the Indian Child Welfare Act was to maintain the existing Indian family or to reconstitute that family. and there are differences when you're handling an ICWA case versus a non-ICWA case in how you approach the case, in the what you look at as the best interest, and that second part of the slide up more than security and stability of tribes. If you wanted it to eradicate a culture or a segment of the culture, the surefire way to do that, of course, is with the children, and while it wasn't that extreme, in the discussion when ICWA was promulgated, it was certainly a concern that the Indian children being taken from their families, removed from their cultures and their heritage would eventually lead to the extinguishment of the Indian native culture. So, u, the tribe stability and their security rest with their children and their ability of their tribe to continue to go forward and to flourish and that's by way of maintaining that connection between the child and the tribe.

There were a couple of events that occurred which both before and after, after the enactment of ICWAs in ‘78. There was testimony Gavin Isaac was Chief of Mississippi band of Choctaw Indians, which we also have a leading Supreme Court case on that guides us in ICWA matters. Also indicated, there was probably no area that's more important to tribal sovereignty when it comes to their children, and that that tribal sovereignty has to be respected, and there'll be a little bit more on that here in a couple of minutes. Next slide please.

Alright, so we give you here some references. You'll have you have this and materials, you can certainly go in and look at it. The first one is the ICWA as stated that under federal law, and then we have the code of federal regulations, so this was enacted in, I think the final approval was December of 2016, so it's been in play for about five years.

Prior to the code of federal regulations, we had guidelines. And guidelines are kinda you should do this without the regulation and the CFR. I highly encourage you to take a look at if you're not familiar with it. It is a good resource of information and definitions in there that we didn't previously have under the guidelines. And there's a lot of helpful information. This is again federal. We also have the BIA guidelines for state courts, and we have some cases in the federal courts, which we don't go into detail here, but we do have a couple of US Supreme Court cases, you might be familiar with them, and we have a case or two out of the Ninth Circuit.

Now state law, you can see we've got references there and the timelines for a few of those with regards to ICWA. Interestingly tribal customer adoption that's been around now, for you know about 12, 12 years or so. In my experience, and I would have to say, probably a lot of practitioners’ experience, it's still not necessarily something readily known. Tribes…this was created by the legislature, as a way to look at some permanency per child, but there are a lot of counties I'm dealing, dealing with one right now as matter of fact they've never done a TCA. S,o these tribal customer adoptions were created by the legislature again as a way to provide permanency but also recognizes tribal sovereignty gives tribes an option when it comes to permanency.

And we've got then of course some other references, there for state law, California rules of court, you can take a look at, and we have some Supreme Court cases and several Court of Appeal cases. Every now and then, we'll still have a Court of Appeal case when it comes to notice. It seems like notice in the ICWA cases seems to still be elusive but it's sometimes… okay next slide please.

Next presenter.

00:09:48.840

Joanne Willis Newton: For now we're going to turn the segment dealing with a purpose and the legal requirements of the ICWA qualified expert witness. Then go the next slide.

So, the purpose of the qualified expert witness requirement, it was to remediate a problem that was brought to light during the Congressional hearing, leading to the anatomy of ICWA and those some of those key findings are contained in the preamble section 1901of ICWA.

And that reflects the finding that an alarmingly high percentage of Indian families are, were being broken up and they're still being broken up by the removal often unwarranted of children from non tribal public and private agencies, and that state courts have often fail to recognize the cultural and social standards prevailing community and family. And what was occurring was that children were being removed in many cases do to cultural bias, rather than actual abuse and neglect.

And so the idea with the qualified expert witness testimony is that before a court, a state court can remove an Indian child from their parents or terminate parental rights to an Indian child, the recommendation for removal of termination for parental rights should be screened through the appropriate cultural lens. So, ICWA itself established minimum federal standards for state courts for the removal of Indian children from their families and placing such as children in foster care when necessary. And that would reflect those values of Indian culture that we're being ignored and leading to be disproportionate number of Indian children from their family.

Next slide.

00:11:43.980

Vida Castaneda: We're just going to do a very quick switch because some folks are having some technical issues that Amanda needs to handle, so I'm going to take over the slides so just give us a few minutes to work some of these tech issues out.

Okay, can the panelists confirm that they can see my slides there?

[yes]

All good? Okay, great. Okay, so Judge Borack? She having some audio issues so let's just hang on for just a moment, can see her connecting.

Joanne Willis Newton: You want me to take this one, Vida?

Vida Castaneda: Yeah, I think she's having some audio issues so maybe if you could take this... We can keep moving.

00:13:42.450

Joanne Willis Newton: So, in the case of in re Brandon T., the Court of Appeal really recognize the importance of the qualified expert witness requirement and here's a quote here from that case: “Knowledge of tribal culture and childbearing practices will frequently be very valuable to the Court in determining the likely impact of parental custody under the standards of the ICWA because 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.” Next slide.

00:14:23.370

Vevila Hussey: So, in order for a foster care placement to be ordered a determination has to be made and supported by clearing convincing evidence, including QEW testimony that continued custody of the child, by the parent or Indian custodian would likely result in serious emotional or physical damage to the child.

00:14:59.430

Joanne Willis Newton: The clear and convincing evidence standard has been described by the Court, the Court of Appeal in a juvenile case as follows, “clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt, so it is a very high standard, you have it into your hands standards reflected in ICWA in general are higher than the regular standards in juvenile dependency law.

The detriment finding for terminating parental rights is exactly the same as the detriment finding for removing the child from their parents, except that the burden of proof is elevated to beyond a reasonable doubt, so again we're talking about very high standards of proof necessary to terminate parental rights to an Indian child.

Scott.

00:16:14.250

Scott Castillo: Yes, I'm sorry. I think this is me so, the code of federal regulations which was referenced earlier restates items E and F under the ICWA section 1912, and E talks about removal from the parents and detriment and F goes to the termination of parental rights. The code of federal regulations requires, it clarifies if there was any question, that testimony of one or more expert witnesses is required.

And when we were preparing it into getting this presentation, together we there was some discussion over, you know, how many expert witnesses can you have and what is their purpose? ICWA requires one or more there, there is some up and down the state, perhaps some different views on who would qualify as an expert and whether you only need one, but the, the code itself, the CFR in ICWA says one or more, which does leave the door open to potentially more than one expert witness.

 This CFR and if you haven't looked at it, you certainly should take the time and look at it, it is very informative; it's very instructive. It is consistent with the former BIA guidelines, and in the case in re Brandon T from 2008. Note that the Brandon T case is 2008; the CFR was not effective until 2016, and it is federal so you do have some balancing there, and certainly your County Counsel can give you guidance if you're a worker. And if you're an attorney you obviously know the difference between state law and federal law. Next slide please

Joanne Willis Newton: Is the judge still…?

00:18:26.850

Hon. Jerilyn Borack: The judge is here now. Can you hear me? (yes)

This was, absolutely, I hope I'm a better judge than I am a computer technician, and I apologize, I still can't get my video to go.

Hello, everyone. [laughs] I'm sorry that I'm late. Vida, is there anything that you want me to address now, except for this slide?

00:18:57.030

Vida Castaneda: No, we were able to address issues on in previous slides. So, you can begin with this.

00:19:07.530

Hon. Jerilyn Borack: All right, thank you. Um, these are these are two cases that address what happens when there are some conflicts. Both of them were termination of parental rights cases under 366 point two, six. Both of the cases were affirmed by the appellate court.

The case of in re N.S. was one where first the tribal court recommended tribal court adoption and then the tribe, the tribe change their recommendation to a guardianship. They did not want the, the tribal adoption. The court chose adoption over the guardianship recommendation of the tribe. The agency recommendation was for adoption. And the court clarified that the tribe does not have a veto power. In other words, if the court takes into consideration the tribe’s preferences, it can still choose adoption.

In the matter of M.B., the, it was, it had to do with the value or the weight of the expert testimony. The Court acknowledged that it didn't know what the exact specifications would be to qualify an expert. However, technically speaking, there was no objection, so the adequacy of the expert was not a question that the appellate court had to address. This was a case that had to do with sexual abuse by a parent, and it was determined that, that would not be okay within the cultural context, and so the, the trial court was affirmed.

Next slide.

00:21:55.980

Joanne Willis Newton: So the disposition, and there's a provision in 361 subdivision c 6 that says that an Indian, a dependent Indian child shall not be taken from the physical custody of his or her parents or Indian custodian with whom the child resides at the time to petition was initiated, unless the court makes the necessary ICWA detriment finding supported by testimony of a qualified expert witness, and the reason why we draw your attention to this is there are some appellate cases, and it is a practice in many counties, that overlooks this provision, and the practice is not to apply the ICWA evidentiary standards when the child is placed with the non-custodial or non-offending parents. But this provision, makes it very clear that if the child is going to be removed from the parent with whom they’re residing at the time that petition’s initiated, the ICWA detriment finding and the requirement from qualified expert witnesses do apply.

And just something to consider is that when we're talking about the six-month or 12-month or 18- or 24-month review hearing and the...I'm sorry I'm talking about a different slide, so back to what, what happens if we're recommending that the child remain in the home or the parent with whom they are residing: Should ICWA apply?

And, again, it's a practice in many counties following some appellate decisions there's conflicting appellate decision on this issue that, if the child is remaining in the home, the parent with whom they’re residing, then ICWA is not triggered because there's not a removal.

However, the new, newer federal regulations make it clear that the parent child custody proceedings, in other words an ICWA case, includes any action that may culminate in a foster care placement, and so when there are sufficient risk factors in the home that you feel you have to file a petition with the court, you know it's my view, and I'm sure there might be some disagreement of the panelists, that the child is at risk of entering foster care and so best practice would be to continue to apply ICWA, even when the child is remaining in the home and the parents with whom it’s residing at the time to petition was filed, and this could prevent, you know, a number of appeals and also the whole purpose of the standards of ICWA is to increase resiliency factors for children and achieve better outcomes for Indian families and children, and there is empirical evidence now to show that the implementation of the minimum standards of ICWA do in fact achieve better outcomes for Indian children, and so again my, my advocacy is always to apply the standards of ICWA as best practice, rather than look for reasons to avoid application of ICWA.

As to the detriment finding at disposition, the parents, the Indian custodian or tribe may waive the requirements for the expert witness testimony but only in other words, there could be a declaration or an affidavit submitted in writing by the expert witness, but they may stipulate that only if the Court has confirmed that they knowingly and intelligently waive the requirement. Also, the failure to meet the non-Indian family and child-rearing community standards or the existence of a behavior and conditions that meet the general removal standards of Section 361 will not support an order for removal, in the absence of the ICWA detriment finding, so, in other words, you, the basis for removing child in a non-ICWA case is not sufficient, without the ICWA detriment finding.

Next slide.

00:26:05.760

Jeremy Meltzer: Good morning. I think this slide really emphasizes just the need to have the QEW at removal, of course if parental rights are going to be terminated, and considering the cultural and social standards of the child's tribe. And if we didn't do this there, I think there wouldn't be much difference between an ICWA case and a non-ICWA case. We know a disposition, in order to remove and child in a non-ICWA case, the court still has to find clearing convincing evidence that there would be a substantial threat to the emotional or physical safety of the child.

So those standards are fairly similar, but what the ICWA does is it applies it through the lens of someone who has tribal experience and tribal knowledge, and that makes the whole difference. We know that the ICWA part of the reason it was put in place was because many Indian children were removed from their families unnecessarily, and part of the reason was because we were applying non-Indian mainstream societal standards to Indian families and Indian tribal lands, so what the qualified expert witness really does is look at it through the lens of the, the Indian nation, so when the judge makes that decision, the judges is doing that, under the proper cultural and societal standards. I would also comment that I think the qualified expert witness, the law regarding that has, has, um, has changed somewhat I think in a positive way now under WIC 224.6(a) a qualified expert witness shall be qualified to testify as to the prevailing on social and cultural standards of the tribe. I think, in the past, the court had to consider those standards, but the qualified expert witness did not actually have to testify, or have that knowledge, so I think we're moving toward a higher standard and a better standard for the Court to make that important decision.

One other thing I would mention, I know we've talked about how we need to qualify expert witness at removal when there's a have a foster care placement. Mendocino County may handle this a little differently than many other counties. I know we before ordering a legal guardianship at a 366 point two six hearing we also have QEW testimony. I'm not saying that necessarily is a requirement, but I know that one section 361.7 subdivision c does also indicate that a foster care placement or a guardianship shall not be ordered in a proceeding absent QEW testimony.

I think we would all agree we certainly would need a QEW if there is a guardianship at disposition at the initial removal, but we look at it also as if that is another foster care proceeding if we're doing a guardianship at a two six hearing. I would also say, obviously we don't have to follow an unpublished case, but I know, in the first district where Mendocino County is situated, there was a 2008 unpublished case In re K.L., it is A118130, and in that case the court did reverse a guardianship at a two six hearing because QEW testimony was not provided.

I know the CEB practice guide doesn't indicate that one would need a QEW at a guardianship but, again, I think, as Mr. Castillo, Attorney Castillo mentioned earlier, we can heighten those protections we just can't lower them.

And I would say next ready for the next slide.

00:29:59.910

Liz Elgin DeRouen: That comment from Jeremy Meltzer, County Counsel for Mendocino County, is very much appreciated.

My name is Liz DeRouen, and I serve as a qualified expert witness oftentimes in Mendocino County, and Jeremy is right true collaboration really makes the case a lot more acceptable I think going through the process together and making sure we are informed, well informed ahead.

As a slide reads, declaration in lieu of testimony, and what does that really mean?

The court may accept a declaration or an affidavit from a qualified expert witness in lieu of testimony, but only if the parties have so stipulated and in writing, and that the court is also satisfied that the stipulation is made knowingly, intelligently, and voluntarily, and below you'll find the welfare and institutions code 224.6 paren e, which better defines it. I do want to make an acknowledgement here that don't misunderstand that just because the declaration may be done, let’s not assume that it always happens. Very often we have tribes’ qualified expert witnesses like myself who like to testify in open court that way we dispel any type of question with regard to what the findings are, what the evidence was. There's good cross examination and very good collaboration on how the interviews and some of the investigation took place with regard to my testimony. Also it affords me the opportunity to educate and also inform the court and everyone there about what is essential, with regard to the children and the children's tribe, so I appreciate those comments from you, Mr. Meltzer. Next slide.

00:31:55.950

Vida Castaneda: Okay, so I have two quick questions for the panelists, so whoever would like to jump in after I asked, please do so. First question I have is: From the QEW perspective, why is it vital for tribes to be involved as soon as possible?

00:32:17.850

Hon. Jerilyn Borack: I’ll jump in on this one. This is Judge Borack again.

There are timelines by which we must get a child to a child's case to disposition. And, as we all know, in dealing with expert witnesses, which are required in ICWA cases it often takes a while to find them. Maybe they're involved in another case. Maybe you need to find another one. It's, it's a very time-consuming process, sometimes, and so the earlier that gets started the better. That's what it looks like from my point of view, anyway.

00:33:08.040

Vida Castaneda: Thank you. Anyone else?

00:33:10.110

Scott Castillo: Yeah, I'd also add on to that that, you know, under ICWA, the court’s required to make a finding of active efforts, and the best way to have that done and accomplished, and then, subsequently, the court make that finding, is by involving the tribe.

What resources does the tribe have? Do they have a placement resources? Do they have a service resources? What can the tribe tell you about what the standard is for that particular tribal community?

A number of different questions could be asked and information can be obtained, and the earlier get that, I think, the better that the Agency and the counsel around the table can look at what is an appropriate placement for the child, what services should be referred, and also because it is an ICWA case is there a continued reason to maintain the child out of the home?

00:34:10.020

Vida Castaneda: Right.. Thank you. Um, so the second question I have for the panelists are what are some of the assumptions made if the tribes provide the QEW?

00:34:30.390

Hon. Jerilyn Borack: From the court’s perspective, we're not supposed to make assumptions, that's called prejudging a case.

So, I’ll let someone else answer the question.

00:34:41.310

Joanne Willis Newton: Well, I would, I would hope the presumption would be that you are dealing with the expert who the tribe has approved, which is you know required under the federal regulations as far as the most preferred type of expert and you’d have an expert that is familiar with and prevailing social and cultural standards of the tribe, you know which needs to be factored into the decision making.

00:35:06.000

Jeremy Meltzer: I would just add that we would always prefer to have a QEW who is designated by the tribe, and just as Ms. Willis Newton said, that way we are assured that person has the knowledge of the tribe’s social, cultural norms.

And we would always prefer that rather than choosing our own, and that's our policy in Mendocino County.

00:35:33.420

Vida Castaneda: Liz, do you have anything to add to that?

I saw you unmuted.

00:35:38.250

Liz Elgin DeRouen: Oh yes, thank you, Vida. You know I, I guess, there are pros and cons, you know with regard to assuming. Very often, you know tribes are having to make different types of recommendations, but overall, you know the tribe comes in and is looking at the best interests of the Indian child always and I think what was said earlier, was there might be an assumption that maybe there is some perceived bias.

And I can, I can honestly tell you that I would, you know, at least on 50% of my cases, yes that's the assumption. I'm not saying all counties work in that fashion. But I think the more and more that counties become more comfortable in understanding what the Indian Child Welfare Act stands for and what its provisions, how it’s applied, and really just following the letter of the law, I think there's a there will be a better understanding of how the qualified expert witness doesn't always have to come off as somebody who is biased just because of their tribal, just because they come from the same tribe. I've been working with my tribes for 28 years, and all of my parents, my grandparents, everybody's native and so we're related to a multitude of tribal people in, you know, dozens of counties and out of state, and I think that is one of the presumptions is that you know we will automatically side with you know not removal, but what we are looking at is best interest of the child and risk factors also making sure that the child is safe, and those would be things that, you know, we're coming in. Also if we're part of an investigation and we're collaborating with the county from the very initial hot call, you know, that we're going out, we're interviewing, we're sitting there, also coinvestigating, that also can come in from the qualified expert witness perspective as to, you know, what I know - this is an active effort, I was involved in that, and yes, absolutely we have information that we can provide.

00:37:54.780

Vida Castaneda: Great. Thank you so much. We'll move to the next slide now.

00:38:01.140

Liz Elgin DeRouen: And I think this is my slide, Vida. Some of the things that we look for in providing qualified expert witness testimony is that we're wanting to make sure that we have all access to all the information, of course, but some of the things we look for primarily, are examples, and they're laid out here in some of your mandatory and some of your optional forms - your JV-320 form, your orders under the WIC code, and you'll see the citations there, and then also some of your optional forms under the JV-421.

As a qualified expert witness, we're looking for these types of documentation, so that we know exactly what happened in court prior to us becoming involved. We also want to make sure that we have, you know, evidence that supports that we have due process and that everything was done accordingly. Sometimes we don't have anything to refer to you, we don't have findings and orders that have been forwarded to us, or nor do we have that in the record.

A lot of counties do things orally, so they write on their document, which is totally acceptable, it makes it more understanding for us, but if, you know, counties need some assistance, these forms are absolutely good forms to look at and reference. And make sure that if you're needing to reference something that these forms are there for your use. So I would highly recommend that you go to the website and take a look at those, and maybe those can be attached in the presentation here?

Also, what we're finding is that we want to make sure that certain detriment findings things have been found on the record to be true or accurate and that will be gone over the next slide, but these are some of the things as a qualified expert witness that we're looking for.

Joanne Willis Newton: The purpose of this slide is kind of have to make you think about when we're looking at the 6-, 12-, 18- and 24-month review hearings, what should be the detriment standard when we're talking about an Indian child because at these review hearings the WIC language is that the court must order return to the parent. The presumption, is that the parent will have the child return unless the Court makes a detriment finding and the language, you know, for that specific detriment finding is here: Would the return create a substantial risk of detriment to the safety, protection, or physical, emotional wellbeing of the child?

And this is not specific to Indian children, this is general language for all dependency cases, and having taken part in the drafting of SB 678, Scott went over earlier, I can tell you it's kind of just an oversight that we didn't catch this and make it clear that when we're talking about the Indian child, and we're talking about continuing out of home placement, as opposed to initiating the out of home placement, it should be the ICWA detriment finding that applies. Now this is not the practice here in California, but at least one Court of Appeal case assumed that it should be the ICWA detriment finding, you know, without analyzing the issue. It wasn't argued before the court, it was just an assumption that the court made. So just something to think about, and also something that might be rectified in future legislation that the tribes are involved in with the California Tribal Families Coalition.

Next slide.

00:41:43.230

Liz Elgin DeRouen: Sorry about that; I was on mute. I was speaking. Causal relationship, the requirements for the causal relationships is a new requirement under you'll find that under the 25 CFR section 23.121(c).

In that for foster care placements or termination of parental rights, the evidence must show that there is a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who's the subject of the child custody proceeding. Very often, when I provide qualified expert witness testimony, I have a separate section which does go over the causal relationship requirements.

Next slide.

00:42:38.940

Vevila Hussey: So, without that causal relationship, the appropriate findings and orders that must be made cannot be made and so it's important to make note of Section 23.121(d).

00:43:11.550

Hon. Jerilyn Borack: Alright. What should the judicial officer be looking for?

I think it's the checklist is what we've all been talking about all along here. The things that you should look for our that the, the expert witnesses an expert witness, in other words, they're, they're an expert because the subject that we have to make a decision about is beyond common experience so their opinion has to be based upon special knowledge, skill, experience, training and education, it has to be an informed opinion.

And that information.

So you want to know that this is a person who is, who has special knowledge in the tribal culture, in the context of the tribal culture.

And that, in addition, that the expert has done their job, that they have… Who have they interviewed? What have they reviewed? Who have they talked to in the tribes? This would be what my checklist looks like. And there was just a kind of, as an aside, there was a chat going on in the in the chat room about well, when is removal of an Indian child - removal of a non-Indian child - different from the removal of a, an Indian child in terms of actually what you're talking about? And I think the example of sex, sexual abuse, was was the one that was given, and I think that that's not exactly the question that would be on the judge’s mind. What the judge is looking, the judge has to realize that I can't assess the likelihood of substantial physical danger to the child in the context of my culture. I can't decide this case in a vacuum, and I can't decide it as compared to how I raised my children or how I was raised as a child.

It's essential for me to know what context I have to put this child into in terms of a family context, that is something that is beyond my common experience to help me assess the safety of the child in their own prevailing tribal culture.

Actually, I was, I was thinking, the other day that, as a Jewish woman, I am part of a tribe also and I would not want anyone to think that because I did not serve bacon to my children with their eggs that, somehow, I was abusing them. It's, it's something that you have to understand in in a context, and I hope that helps to answer the question.

I talked a little bit about required timelines, and we are the required findings and orders, we are you know greatly helped out with those by the Judicial Council forms in terms of what we have to, what kinds of findings, we have to make for an Indian child. In terms of requests for continuances, I don't believe that Indian children or any different than non-Indian children in terms of not wanting to delay their certainty about what their life is going to be like. We don't like to continue cases, and there has to be good cause, and we give that a lot of consideration.

I hope that that these were very general topics, and I hope that that helps to kind of put the context of what we're looking for in the expert witness testimony, so that we can make the legal findings and orders, that is: Is it, is it likely or *un*likely that what we're dealing with will cause serious emotional or physical harm and how can the expert’s background and experience help the court make this finding of likelihood, and how can the expert’s background and experience provide the court with relevant information regarding the tribe’s values, cultures, and practices?

In terms of their qualifications once again, they should have knowledge and experience of the tribe’s values. They should have an opinion based upon interviews, observation, reviewing the materials, talking with tribal members, and once again I think harkening back a couple of slides, we must find that causal relationship, also, that is, I think we've referred to as a nexus in other cases between the, the danger, the likelihood of, of serious emotional and physical harm and what the parent is doing.

So, I hope that answers these categories enough for you, and we'll go on to the next slide.

00:50:27.000

Liz Elgin DeRouen: Selecting a qualified expert witness. So who may serve as a qualified expert witness? You'll see the citation noted on the left.

But, primarily the qualified expert witness is there to provide testimony with regard to the continuation of the custody by the parent or the Indian custodian and whether or not that custody is likely to result in serious emotional or physical damage to the child or children. And it must be…the person qualified to testify has to qualify or has to testify, with regard to the prevailing social, cultural standards of the Indian child’s tribe.

Now this likely may be done by one or more expert witness but usually if I'm called into a case to provide that service, I can testify to both of these provisions.

Next slide.

Who may serve as a qualified expert witness? A child's tribe may designate a person as being qualified to testify to the prevailing social and cultural standards of the tribe.

The Court or any other party may ask the child's tribe, or they can ask for assistance from the Bureau of Indian affairs if they need help in locating a qualified expert witness.

One thing that cannot happen, though, is the person who is providing that testimony cannot be an employee of the agency or the person recommending the foster care placement or the termination of parental rights. Those person, *that* person may not serve as the qualified expert witness themselves.

00:52:18.540

Vevila Hussey: So, the persons most likely to meet the legal requirements include, first of all, a person designated by the child's tribe as being qualified to testify in that capacity.

Number two, a member of the child's tribe, who was recognized by the tribal community to testify in that capacity and have that knowledge and wisdom.

Number three, 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 with the child's tribe.

00:53:00.690

Scott Castillo: So, some of you may be familiar with the former law on QEW’s and their qualifications. For those who've been around for a while and done this work, it used to be the BIA guidelines, which were replaced by the regulation, talked about professional person, and there were a number of different areas that someone could have experience in or education in, and they could qualify as a QEW. And then we had the Krystle D. case from 1994 but, again, this is a contrast of what former law allowed. The CFR, among other things, gave some clarity and some direction with defining what's a QEW. Next slide.

00:53:59.070

Vevila Hussey: So how to locate a QEW. So first of all, you always want to check with the child’s tribe, um, only the tribe can verify whether the person has expertise in their culture.

However, in some cases, tribe may be out of contact or not involved, or if they do not have a designated QEW, the Judicial Council does provide a list, and you'll see the link to that list on this slide.

Um, assuming the tribe is available, and you've been in contact with the tribe which, hopefully, you have, I mean you always want to consult with a tribe before finalizing your selection.

00:54:40.830

Vida Castaneda: Okay, so this question is directed to Liz to start us off. Uh, Liz, can you explain to our audience why it can be problematic when counties contract with the same QEW’s for every case?

00:54:59.370

Liz Elgin DeRouen: Thank you, Vida. So, we are met with this type of question quite often, in that we have cases in multiple counties. We want to make sure that each case is treated uniquely, that each case plan, each family is, is being fairly allowed to participate and have a fair shot at family reunification, if that's what the plan is. And if we are looking at just cookie cutter approach on, you know, making these findings, running the system through, and not really going through the process of taking a look at these individual families and children, I think we're doing a…we're not doing a good service.

Every tribe is distinct, every child is unique, and our families need to be represented in that fashion. I think what happens when we just unilaterally select somebody to provide qualified expert witness on every single case that comes in the county, it's not giving two things: It's not allowing the Court and other parties to have full understanding and knowledge of really about this tribe or the children's tribe and family, extended community, and we really want to take, you know, an opportunity to educate at this point. It's also required under law that every tribe be contacted and have an opportunity to participate, and this is one way that they can participate in allowing the court to know who they are more so for the children with regard to the prevailing social and cultural standards.

00:56:47.070

Vida Castaneda: Would anybody, like to add to that, or shall we move to the next slide?

Okay, we will move.

00:57:05.610

Joanne Willis Newton: So, although the ICWA only requires qualified expert witness testimony in support of the detriment finding, there are a number of other findings that the Court must make an ICWA case, and there are other findings that may come into play in an ICWA case, and so, if the agency has retained a qualified expert witness, it can be good practice for the agency to use that qualified expert witness to support these other findings that must be made It can be helpful to the Court to have that expertise when it's making these particular findings. So, for example, the active efforts finding that ICWA requires. The Court has to find that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful in order to make a foster care order, or a guardianship order, or a termination of parental rights order. Um, also the um, it's necessary when applying the placement preferences of ICWA to apply the prevailing social and cultural standards of the child's tribe to meet those placement preferences, and so it can be an useful point to have qualified expert witness testimony there as well.

If it's necessary to place a child outside of the placement preferences, the Court has to make a good cause finding to support that departure from the placement preferences, and this is another area that can be illuminated by qualified expert witness testimony.

And then, in other cases, there are instances where tribal law or custom can come into play, for example, does the particular individual meet the tribe’s definition of extended family member? This is something that the expert witness could be used to confirm. And is the person an Indian custodian in that they… an Indian person who has custody of the child under tribal law or custom? Is the person in a parent within the meaning of ICWA, because they have adopted the child in accordance with tribal law or custom? These are areas that can be illuminated by the qualified expert witness.

00:59:28.620

Liz Elgin DeRouen: What are the qualified expert witness requirements? I like this slide that Joanne just went over because it dovetails in very nicely with regard to some of the additional things that

qualified expert witnesses need to prepare for their testimony or their or their declaration if that's going to be submitted.

We would need copies of all the petitions, any of the agency reports and attachments, any of the delivered service logs, findings and orders. Those would probably be the most necessary documents, but sometimes we have other attachments, other reports, other pictures, other examples that would be very helpful for the tribe to have, would also be very helpful for the qualified expert witness to have when going out and interviewing. Want to make sure we make reference to certain documentation that may be contained in some of these reports and logs.

Sufficient time. That is a really sensitive area, and I know qualified expert witnesses who may be on the training, right now, they, they are, you know, just nudging me here to make sure that you know that we need time, time to review the materials and to conduct proper interviews.

The interviews not only need to take place with the parents, but extended family members, maybe tribal officials, also with tribal social workers, social workers in general. Any of the tribal representatives involved and sometimes we're talking about multiple tribes in these cases. We're also talking about parents and Indian custodians and Indian custodians are very likely in, you know, a lot of our cases here, and any other providers that the child may have or has been working with.

Advance notice of the declaration and/or live testimony should be required of, we need to know the timeline. Very often we get a phone call, sometimes an email, but usually a phone call saying, can you serve as a qualified expert witness next week and we don't even have discovery. That's probably not going to happen, but normally if we are given ample time, we can prepare a declaration. It's not preferred by most of the tribes, most of the tribes like to have live testimony so that, if there is cross examination, and if they need other answers from the qualified expert witness that they have the opportunity to ask those questions. Again, also having ample time, having time to review, and being furnished with all copies of the materials in preparation for our testimony, we need to have an understanding of what does the agreement look like and those payment for services. In a couple of counties, we do have contracts with counties.

In some counties, we have MOU’s and others we have contacts points of contacts with different counties that know who to contact when any of the tribes that are involved in our consortium are involved.

We've made that due diligence and sent letters and made sure that they know that they have a contact and, and we also have a website so if we need to be contacted that way, we can. But those things are essential, just to get started with going forward and obtaining a qualified expert witness. Next slide.

01:03:04.740

Vida Castaneda: Joanne, would you like to jump in on this slide?

01:03:07.860

Joanne Willis Newton: Oh sure, I thought that was someone else’s.

So, it in some ways the active efforts requirement of ICWA can implicate the qualified expert witness requirement.

So you know the qualified expert witness statement is just fine as to detriment, but is the detriment due to lack of active efforts? That's something that the qualified expert witness might need to assess and testify to. Also the active efforts requirement requires early and ongoing meaningful collaboration and consultation with the child's tribe, and that includes selection of the qualified expert witness and responding to the qualified expert witness’s conclusion.

01:03:58.200

Vida Castaneda: Ok. So, for this slide, Jeremy, I'd like to ask you, can you highlight how your county has worked with tribes in resolving some of these issues?

01:04:08.100

Jeremy Meltzer: Sure, and even looking at the slide, I wouldn't really even refer to this as an ethical problem, but really a collaboration with the tribe, and the expert witness.

And if we're doing our job correctly, you know we've been communicating with the with the tribe, and the expert witness very early on, hopefully, from the time of the referral investigation, although I know that's a difficult standard to comply with. But if, if the QEW, so the QEW we hope would have all the information we have that the agency is making a recommendation for out of home placement and we're looking for a detriment finding, and if we've given all the information and the tribe, and the expert witness feels that they can't make that detriment finding, then I think we would try to work with the tribe on how to perhaps create some kind of safety plan, maybe even do, you know, have a continuance, if necessary, so maybe the agency would even change its recommendation and go to in-home placement in something like that.

What we don't generally want to do, and we haven't done, is contract an additional expert to try to have competing expert testimony and court. I personally think that our judge would be more persuaded by the tribally chosen expert witness than a secondary expert witness that the agency contracted afterward. So, we would just try to work collaboratively and try to get to a situation where, maybe, everyone would think that the, the child can be kept safely, but maybe in the home if we didn't get a detriment finding.

If we, if the tribe supported a detriment finding, but didn't feel active efforts were made, and I know we've had a situation like this and, again, we would just collaborate with the expert witness.

We probably would need to ask for a continuance in order to shore up the active efforts. So whatever remediation, whatever we didn't do correctly to start the case, we would try to make that up in a reasonable amount of time.

And I know we've also had ICWA cases where there were concerns about active efforts and we were able to offer an additional period of reunification for that time period where there was a concern that active efforts were not made. So, we would just, we would try to work collaboratively, you know, and I think that, in doing that 99% of the time we're going to be able to reach a resolution with the tribe.

I know we also had a situation with the tribe where social services wanted to recommend in-home placement at disposition, but the tribe didn't feel the parent was ready for that. And even in that case the tribe was willing to maybe change its recommendation. We agreed to some considerations the tribe wanted, which was a, an extended period to show that the parent was continuing to make progress, and conditions that the tribe wanted on a safety plan to enable all of the parties to believe that an in-home placement can be safely made. So again, it really goes back to early and, and substantial communication with the tribe and the expert witness and working collaborative… collaboratively along the way, so there aren't any surprises. No, we don't want to get to court and be surprised, but if we're communicating properly that should never happen.

01:07:50.010

Joanne Willis Newton: So, these are just some best practice tips for addressing the qualified expert witness requirement.

You are encouraged to use the Judicial Council forms, which contain the legal findings and orders that that must be made with regard to the qualified expert witness. And Liz had gone over the form numbers, you have that in your presentation. Also it's really important to have clear documentation in all of the reports in order for the qualified expert witness to do their job well. They need to be able to review all of the information that the Court has that it's going to need to make the findings.

And so, you know, if, if it's not documented in the reports then the expert witness is going to assume, as the Court of Appeal does, that you know the work wasn't done or the action was taken.

Also, as Liz pointed out, live testimony is generally preferable to the written declaration and, in many cases it kind of becomes just a checking off the box, you know when the decorations are just submitted to court, instead of having the Court hear: the live testimony, which can be beneficial to the Court in making its decision, particularly when there are contested cases. And the qualified expert witness should be used to make, again, the active efforts finding and also analyze the other findings that the Court has to make. And finally, the departments should consider listing the expectations for the qualified expert witness in their service agreements or, you know, scope of works that they enter into with the qualified expert witness.

01:09:45.000

Vida Castaneda: Okay, so we'd like to leave you with some of this food for thought - questions you should be really thinking about when it comes to needing a QEW on an ICWA case and these you have in your materials so you can review when you have some more time.

So, thank you for attending today's webinar, we hope that you have enjoyed this great discussion on ICWA qualified expert witnesses.

If you have any comments or questions, please feel free to reach out, and I can provide feedback to our panelists or connect you directly. If you would like a certificate for MCLE, court staff, or judicial officer CEU’s, please contact Amanda and we will provide you with one, or you can reach out to me, that's fine too. Have a wonderful day, and we thank you for joining us.