

Qualified Expert Witness  
Wisconsin Indian Child Welfare Act  
Implementing Guidelines  
2013

**“ICWA has a profound effect, not just for a day, not just a month,  
but for their lifetime”**

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Despite the federal passage of the law, many states, like Wisconsin, were left to respond to the Indian Child Welfare Act without clear guidance other than the Bureau of Indian Affairs (BIA) guidelines. Several areas of the federal law were presented in ambiguous terms such as active efforts and qualified expert witness. As a result of the ambiguity, Wisconsin tribes and stakeholders pursued clarity in defining both terms during the legislative process. Once Wisconsin codified the federal Indian Child Welfare Act into the Children’s Code (Chapter 48) and Juvenile Justice Code (Chapter 938), the twelve sovereigns began the process of implementing the law.

The following policy position is the work of the Wisconsin Indian Child Welfare Act (WICWA) State Advisory Board and the Department of Children and Families to provide guidance for consistent application of the WICWA Qualified Expert Witness provisions and provide critical resource information in order to assist in the implementation of §48.028 (2)(g) and (4)(f).

**Why QEW is critical to WICWA**

The Indian Child Welfare Act was the first federal law to recognize the devastating practice of removal of a child from their parent, family and community. The law also emphasized the differences in child rearing practices by the culture and traditions of the American Indian population. The law further proclaimed that those differences were not to be utilized for the basis of continued and overwhelming removals of Indian children from their families, community and tribe. As a protection of tribal child rearing practices, Congress supported the introduction of a ‘qualified expert witness’ in child custody proceedings in the event of removal from the parent or Indian Custodian. This legal term remained undefined in the federal legislation, but was defined in the Bureau of Indian Affairs guidelines as “person providing testimony specific to the child rearing practices and traditions of the child’s tribe and whether those practices were detrimental to the child remaining with the parent or caretaker.”

The state requirements for the qualified expert witness are two-fold; first, to ensure that the norms, culture or traditions of the tribe are not used as a premise

for removal; second, to aid the court's determination as to whether continued custody of the child by the parent or Indian custodian is likely to result in serious physical or emotional harm if returned to the parent. In every proceeding involving the out-of-home placement of or termination of parents rights to an Indian child, the petitioning party must obtain a qualified expert to provide this testimony.

### **QEW Testimony**

It is important to emphasize what is viewed as important testimony based on the foundations and spirit of the federal and state Indian Child Welfare laws. The Indian Child Welfare Act mandates the testimony of Qualified Expert Witnesses in proceedings in which the placement of an Indian child in out-of-home care or the involuntary termination of parental rights involving an Indian child is being pursued. This section will focus on the testimony of the QEW.

The first instance in which QEW testimony is mandated is when placing a child in out-of-home care. 48.028(4)(d)(1)

A) Clear and convincing evidence is needed to place an Indian child in court ordered foster care. The evidence must include the testimony of QEW and must support a determination that 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.

The second instance in which QEW testimony is mandated is when the court considers involuntarily terminating parental rights. 48.028(4)(e) (1)

A) Evidence beyond a reasonable doubt is needed to terminate the parental rights of a parent or Indian custodian. This finding must include the testimony of QEW's that 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.

The QEW's role is to offer a culturally relevant assessment in cases involving Indian children (as defined in ICWA). The QEW must be someone knowledgeable about the tribal customs and child-rearing practices of the child's tribe. However, often the family does not reside in proximity to the tribe, so frequently the QEW is located in another part of the state or in another state from the location of the court proceeding. For this reason it is extremely important that courts allow the testimony to be provided telephonically or by videoconferencing. (National Association of State Indian Child Welfare Managers Policy, 2011)

One aspect of required QEW testimony is to determine whether cultural child rearing practices are (or have been) a reason for the removal of an Indian child. A tribal member, specifically one that is connected to the child's tribe, immersed in the tribe's culture, customs and traditions, is the first statutory preference to provide testimony regarding the child-rearing practices and family organization of the child's tribe. In many cases, this QEW may be an elder from the child's tribe recognized as a cultural traditional expert but may not be knowledgeable to respond to expert testimony questions regarding the specific case.

### **QEW Tiers**

The Wisconsin Indian Child Welfare Act intentionally provides a clearer definition and distinction between 'types' or orders of preference of qualified expert witnesses than the federal law does. This established process provides cultural protections to the Indian child and provides more options and flexibility for the state/county agency required to provide QEW testimony.

This policy position describes processes to attain QEW for ICWA/WICWA cases and a general resource listing of identified professions that may be available in each statutory QEW Tier. Section 48.028 (4) (f) supports the order of preference of the QEW.

***Tier 1-§48.028(2) (g) (1)***

***A member of the Indian child's tribe recognized by the Indian child's tribal community as knowledgeable regarding the tribe's customs relating to family organization or child-rearing practices.***

Historically, in Wisconsin, Indian children were 1600 times more likely to be removed from their families and tribes than non-Indian (House Report No. 95-386, 1978). During the federal congressional hearings, tribes and advocates emphasized the differences between Euro-American family systems and tribal cultural family systems and explained that cultural misunderstandings were resulting in the unnecessary removal of Indian children. The WICWA identifies that those people best able to convey distinct child-rearing practices of the Indian child's tribe are members of the child's tribe. Hence, they are the first order of QEW preference.

### **Tier 1 Resources**

**Is the action, or inaction, of the parent or Indian custodian likely to result in serious emotional or physical damage to the child?**

This question seeks to determine if the child rearing practices of the Indian parent or custodian are endangering the welfare of the child. There are some tribal parenting practices that have been viewed by Euro centric middle class standards as harmful to children. For example, the practice of extended family participating in child rearing has been viewed as neglectful parenting. In this situation, QEW testimony can assist the court in understanding that tribal child rearing practices of involving extended family are not harmful to Indian children. The BIA Guidelines Commentary recognized the need for the testimony of the QEW in this type of a situation: “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.” (NASICWM, 2011)

Depending upon the background of the QEW, questions may be asked about whether the parents’ parenting practices are consistent with tribal custom and tradition. If the QEW confirms that the parenting practices are tribal practices, the QEW may be asked if the practices may be harmful to children, and the QEW may also be asked for the rationale behind the determination of whether the practice is harmful. (ibid.)

- *A state/county agency responsible to contact a QEW for an involuntary custody proceeding may contact the Tribe’s Indian Child Welfare Director listed on the back cover of the WICWA Desk Aid, or found on the Department of Children and Families web-site:  
<http://dcf.wisconsin.gov/files/cwportal/wicwa/wifedrectribes.pdf>*
- *The Tribal contact may recommend a QEW or provide QEW testimony. The Tribe is not under any obligation to provide QEW and the petitioning party must be prepared to find a QEW elsewhere if the Tribe is unable or unwilling.*
- *Out-of –State Tribes and Resources*

It is important that the responsible agency document diligent efforts to secure a QEW. If it is necessary to recruit a QEW from a lower tier, efforts must be documented and retained for record by the agency. If a tribe elects not provide a QEW, this meets the due diligence efforts.

***Tier 2 - §48.028(2) (g) (2)***

***A member of another tribe who is knowledgeable regarding the customs of the Indian child’s tribe relating to family organization or child-rearing practices.***

The WICWA language permits state/county agencies to enlist the QEW from Tier 2; provided the child’s tribe is unable or unwilling to provide the agency with a tribal member QEW and the state/county agency have documented those efforts. Tier 2 must employ a member of another tribe who has knowledge of the child’s tribe.

### Tier 2 Resources

- *The state/county agency responsible for contacting a QEW might utilize the following listed resources for a ‘member of another tribe’ to provide testimony regarding the customs of the child’s tribal family organization or child-rearing practices.*
  - *WICWA Desk Aid listing of Tribal ICWA Directors*
  - *UW-Tribal member Professors*
  - *Great Lakes Intertribal Council*

### ***Tier 3- §48.028(2) (g) (3)***

***A professional person having substantial education and experience in the person’s professional specialty and having substantial knowledge of the customs, traditions, and values of the Indian child’s tribe relating to family organization or child-rearing practices.***

Tier 3 of the statute provides alternatives when the responsible agency cannot locate a QEW from Tier 1 or Tier 2, **and** those searches or diligent efforts have been documented. A professional person is considered as possessing substantive experience, education and expertise in the designated area, but who also has substantial knowledge of the customs of the child’s tribe. This designated person (e.g., psychologists, social worker, health provider, teacher, and law enforcement officer) may not have a direct connection to the child’s tribe but may have the knowledge gained through experience, marriage, employment with the tribe or long-standing relationship with tribal members. It is not expected that this person is a tribal member, but will be required to provide testimony related to the child’s tribal customs, traditions and values as a QEW.

### Tier 3 Resources

- *Tribal Professional employees*
  - *Psychologists, social workers, health providers, teachers, law enforcement officers*
- *University of Wisconsin Indian Studies Professors/Directors*
  - *UW - Green Bay*
  - *UW – Madison*
  - *UW – Eau Claire*
  - *UW - Milwaukee*
- *Tribal College Professors*
  - *Lac Courte Oreilles Tribal Community College*
  - *Menominee Tribal College*
- *Milwaukee Urban Indian Organizations*

- *Spotted Eagle, Inc*
- *Indian Community School*
- *American Indian Center of Milwaukee*
- *Potawatomi Foundation*
- *Gerald L Ignace Heath Center*
- *American Indian Council on Alcoholism*
- *Indian Council of the Elderly*
- *Untied Indians of Milwaukee*

*Tier 4 - §48.028(2) (g) (4)*

***A lay person having substantial experience in the delivery of child and family services to Indians and substantial knowledge of the prevailing social and cultural standards and child-rearing practices of the Indian child's tribe.***

By definition, a lay person must possess substantial experience and knowledge in the delivery of child and family services and the child rearing practices of the Indian child's tribe. The Tier 4 QEW is not required to be a tribal member. The test is whether the lay person meets the criteria of substantial experience and knowledge in the requested areas. Utilization of Tier 4 candidates requires that previous searches and diligent efforts have failed to provide a QEW from any of the other Tiers and that the attempts of the county/state agency have been documented and are filed with the responsible agency.

#### *Tier 4 Resources*

- *Persons experienced working with Indian families*
- *CASA*
- *Tribal GAL*
- *Tribal Youth Services*
- *Tribal Day Care providers*
- *Parents of Indian children*
- *Retired Tribal Social Workers, GALs, etc.*

#### ***Expert Testimony***

There are other important matters which would usually require the assessment and testimony of experts. Often QEW's are called upon to provide this testimony in these areas, whether they are qualified to do so or not. We feel it important to draw the distinction.

Expert testimony includes such things as:

- Tribal services and law:
  - The court may need expert testimony regarding services available through the tribe or Indian organizations or local services with appropriate cultural components which can reduce or ameliorate risk to the child or provide the possibility of healing for the family. This testimony would be most appropriately provided by tribal personnel who are most familiar with these services, and with the unique circumstances of the family and needs of the child.
  
- ICWA-related legal requirements:
  - Often in child welfare court proceedings, the court or other parties ask QEW's whether the state or county child welfare agency provided proper notice to the tribe, whether active efforts were provided to prevent the need for out-of-home placement, whether ICWA placement preferences were followed when the child was removed, whether a specific planned placement is appropriate, and other questions related to the requirements of ICWA on state agencies. An expert witness could also be asked to testify to the impact that a proposed permanency plan could have on the relationship between the child and the child's tribe. In these matters, which spring from legal requirements of ICWA, QEW's who are only qualified as to cultural expertise, are not qualified to testify to the legal requirements of ICWA. We suggest that this type of information is best provided by the professionals who have the primary responsibility for the case, including the state social worker, mental health professionals, and others specific to the case. Although the QEW's may have knowledge of the areas listed above, it should not be an expectation of the court that the Qualified Expert Witness be the primary source of such information.

For expert testimony as described in this section, testimony may be based upon a review of the case file, a review of evidence, interviews with family members, and other preparation specific to the facts of the case that is permitted by law.

## Out of State Resources

- **NICWA**
  - <http://www.nicwa.org/>
- **National Resource for Tribes**
  - <http://www.nrc4tribes.org/>
- **National Association of State Indian Child Welfare Managers**
- **State listed QEW**
  - **Montana**
    - <http://www.dphhs.mt.gov/cfsd/icwa/expertwitnesses.shtml>
  - **California**
    - <http://www.courts.ca.gov/8105.htm>
  - **Oregon**
    - <http://www.dhs.state.or.us/policy/childwelfare/icwa/icwa.htm>



## APPENDIX A

### Qualified Expert Witness Questions

**The following questions are parameters that meet the intent of the federal and state Indian Child Welfare Acts; this is a sample of questioning and is not an exhaustive list. However, the information being sought through the questioning process is to establish whether the behaviors of the parents reflect the child's tribe customs and practices child rearing practices, and whether returning the child to the parent, custodian, will result in serious physical and/or emotional risk or harm.**

What is your tribal affiliation? Are you a member of an Indian tribe? If not, what is your connection with the (insert name) tribe?

Does the child's tribe recognize you as being knowledgeable in tribal customs? If no, what is your education and experience?

Have you previously testified in court as a qualified expert witness as defined by the Indian Child Welfare Act?

Are you familiar with the social and cultural customs and practices of the child's (children's) tribe for raising children?

Do you know if the child(ren) are member(s) of (insert name) tribe; if not members, do you know if they are eligible for membership into the (insert name) tribe?

Is it culturally appropriate in the (insert name) tribe to (insert allegations of petition)?

Is the father and/ or mother a member of a federally recognized tribe? If so, which parent(s)?

In your expert opinion, at the time of removal, were the children at risk of serious physical and/or emotional risk or harm?

In your expert opinion, at the present time, will returning the children to his/her parents or guardians care and custody likely result in serious physical and/or emotional risk or harm?

Do you have current knowledge of the case, and how did you acquire this knowledge?

### Expert Witness Questions

**The following questions are examples of the questions that an expert witness may be asked in a case subject to the Indian Child Welfare Act. This is not an exhaustive list and is not meant to suggest that the testimony of an expert witness is necessarily required to answer the questions below.**

Do you have current knowledge of the case, and how did you acquire this knowledge?

Do you know if the child(ren) are member(s) of (insert name) tribe; if not members, do you know if they are eligible for membership into the (insert name) tribe?

Is the father and/or mother a member in a federally recognized tribe?  
If so, which parent(s)?

In your expert opinion did the (petitioning agency) provide active efforts to prevent **the removal** of the child(ren)? What were these efforts?

In your expert opinion did the (petitioning agency) provide active efforts to prevent the **break up** of the Indian family? What were these efforts?

What active efforts has the (petitioning agency) made to establish or maintain the child's cultural ties to the child's (children's) tribe?

Does the Tribe support the current out-of-home placement/guardianship/TPR of the child(ren)?

Did the petitioning agency follow the placement preferences in the WICWA and federal Indian Child Welfare Act? If not, is there good cause to depart from the order of preference?

Did the petitioning agency provide proper notice to the child's tribe?

Do you believe that the out-of-home placement (e.g., foster home, relative, group home, or residential placement)/guardianship/TPR/alternative permanency option (e.g., suspension of parental rights or adoption under tribal law or custom) is in the best interest of the Indian child(ren)?

Possible CHIPS Jurisdictional Questions:

Has the child been the victim of abuse? [§ 48.13(3) alleged.]

Is the child at substantial risk of becoming the victim of abuse? [§ 48.13(3m) alleged.]

Is the child in need of special treatment or care? [§§ 48.13(4), (4m), or (9) alleged.]

Is the child suffering from emotional damage? [§ 48.13(11) alleged.]

Is the child suffering from an alcohol or other drug abuse impairment, exhibited to a severe degree? [§ 48.13(11m) alleged.]

## APPENDIX B

### Recommended Training for QEW

	State/county agency staff	DA/Corp. counsel (GAL)	Circuit Court Judges	Tribal QEW
Brief history of ICWA: overview, background, purpose & importance; key provisions	X	X	X	X
Types of court proceedings regarding abuse/neglect Effects of child abuse training	X	X	X	X
Role of QEW	X	X	X	X
Establish QEW Criteria <ul style="list-style-type: none"> <li>• Qualifications</li> <li>• Selection</li> <li>• Tribal</li> <li>• Non-tribal</li> <li>• Cultural training</li> </ul>	X			X
QEW Testifying Processes	X			X
Preparation for Testimony				X
Mock Testimony Presentation				X
<ul style="list-style-type: none"> <li>• Court Exercise</li> </ul>				X
<ul style="list-style-type: none"> <li>• Use of case vignettes</li> </ul>				X
<ul style="list-style-type: none"> <li>• Direct and Cross Examination</li> </ul>				X
Develop Tribal-wide QEW Personal Biography List				X
Develop State-wide QEW Personal Biography List	X			X