

The Essential Role of Qualified Expert Witnesses in Complying with the Indian Child Welfare Act

I'm Julia Scott, host of this Judicial Council of California podcast. Today we'll be diving into a defining aspect of ICWA, the Indian Child Welfare Act, which is the federal law that dates back to 1978 and seeks to keep Indian children with their families, communities and cultures. Today we'll look specifically at the role of the Qualified Expert Witness – a special kind of witness the law requires in court proceedings that concern the possible removal of Indian children. Qualified Expert Witnesses hold the interest of the child to heart and give judges a deep understanding of the cultural context and family tribal practices at play in each case.

The role and purpose of the Qualified Expert Witness is still not always well understood, by players within the justice system across the country and here in California. The problems that creates are part of what we're going to explore today. But for now, we're going to start with the story of a young boy from the Chumash tribe in Santa Barbara who remembers being raised around a general sense of fear.

Dr. Art Martinez: I grew up during the time when the removal of native children from their homes was a common practice. I want to say it was rampant. The adults around us were always very concerned that someone might remove us.

Growing up, Dr. Art Martinez was too young to understand exactly who he was supposed to fear, or why. But he and his siblings had a strategy to stay safe that they developed over time.

Dr. Martinez: Once people came to our house, particularly if it was a car that we didn't know, we all ran and we always ran. It just happened every time. I was raised in a little house in an orchard. So, we ran into the orchard. And we would just run and sit in the trees until we knew that it was absolutely safe.

This wasn't paranoia at work. Art knew some cousins who had been taken away by social services and placed away from his family and tribal community with no explanation. Everyone had a story like that. At the time that ICWA was passed, in the late 1970s, Indian children across the United States were being systematically removed from their families and communities.

Californian Indian children were eight times more likely to be removed from their families than non-Indian children, and more than 90 percent were placed in non-Indian homes.

It took years of testimony and activism, but in 1978 Congress passed ICWA after finding that state social service agencies and state courts across the country had served to remove Indian children at an alarmingly high rate, and that it was oftentimes unwarranted. ICWA made sure that a single report from Child Protective Services could never again be the final word in dependency court when judges were obliged to decide if an Indian child should be removed from their family. And to make sure of this, among the protections that ICWA created, was the role of the Qualified Expert Witness.

Art Martinez grew up and became a child psychologist and tribal child welfare specialist who has served as a Qualified Expert Witness in more than 3,500 dependency cases involving Indian children. Those early childhood experiences led him to a calling that has spanned 35 years.

Dr. Martinez: I ran one of the first Indian child welfare programs in California that was funded under the Act.

But before we situate his childhood story in the ‘bad old days,’ consider that according to the California Child Welfare Indicators Project, Native American children are still two and a half times more likely than white children to have an allegation, or report of abuse and neglect made about a parent today. And Native children are four and a half times more likely than white children to get formally placed into foster care, rather than stay at home or return to their family. In case you’re wondering, according to the U.S. Census Bureau, close to 4% of Californians identify as American Indian or Alaska Native alone or in combination with two or more racial groups.

How could this still be happening?

The experts I spoke to for this podcast attribute this ongoing trend to a combination of unconscious bias and a simple lack of education about tribal customs and child-rearing practices ... And they say it shows how ignorance about the essential function of the Qualified

Expert Witness can lead to systemic failures, needless separations, and failure to comply with the spirit and letter of ICWA.

Today we'll talk to Qualified Expert Witnesses and judges alike about where this process can break down. And we'll offer concrete, actionable best practices for judges, attorneys, social workers and Qualified Expert Witnesses for when they're acting on behalf of the interests of an Indian child – whose future depends on all of them.

To review, the heart of ICWA and the reason it was enacted was to protect the interests of Indian children and to promote the stability and security of Indian tribes. Congress found those to be mutually reinforcing goals. The interests of Indian children are promoted by keeping them connected to their cultures and their communities. Decades of studies have backed what the law already mandates: Indian children thrive in Indian families and communities.

A word about opinion evidence here. In the courtroom, opinion evidence is the exception. Most witnesses are there to present facts about things they actually saw and heard themselves. Under California law, opinion evidence is allowable only if it relates to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.

So why would Congress require courts that already hear child welfare cases every day to have the testimony of an expert witness in cases involving Indian children? Because of the differences in child rearing practices and family structures in tribal communities versus the dominant culture. The Qualified Expert Witness is an essential part of ensuring an Indian child is protected. As an impartial, independent court participant who is beholden only to the well-being of the child, they are there to provide deep understanding of the cultural context and family tribal practices at play in each case.

Liz Elgin DeRouen: I think if the qualified expert witness is brought in to, one, meet the letter of the law, they also should have the knowledge and the information about the significance and the importance of the child remaining in the tribal community. Without our children, our tribes cease to exist.

Liz Elgin DeRouen [el-GIN de-ROW-an] is executive director of the Santa Rosa-based Indian Child and Family Preservation Program, which is a consortium of federally recognized tribes in Sonoma County.

Liz DeRouen: I am a descendant from the Dry Creek Rancheria, the Manchester Point Arena band of Pomo Indians, which are my parents' tribes.

There are two places where the court must have evidence from a Qualified Expert Witness.

A child may be removed on an emergency basis and placed in foster care due to abuse or neglect. If the court takes jurisdiction of the case, there's a disposition hearing. That's where the court decides where the child will live while the case progresses. Should they be returned home? Sent to live with relatives in their tribe? Will the court provide services for rehabilitation? Or will the child be sent to live in some other form of foster care?

This is the first step where a Qualified Expert Witness is brought in... to testify as to whether there is 'clear and convincing evidence' that continued custody by the parent is likely to result in serious emotional or physical harm to the child.

The second question is: if it IS likely to cause such harm, can resources be brought to bear to prevent the breakup of this family?

In order to answer these questions, a Qualified Expert Witness has a lot of work to do before they can submit their report.

Liz DeRouen: There's a lot of reading, a lot of gathering of information. We go back through a court record. And then we also do a lot of live interviews with people, with children, caregivers, tribal officials, advocates, court personnel, social workers, attorneys, and parents. And then we also just conduct our own investigation as to whether or not we believe certain things were done. And then asking, did this happen? Did that happen?

ICWA uniquely requires that active efforts – that's the term of art – must be provided to prevent the breakup of the Indian family. In non-ICWA cases the standard is "reasonable efforts". Active

efforts must make maximum use of the available resources of the extended family, the tribe, tribal social service agencies, and other Indian care providers ... all to prevent the breakup of the Indian family.

These efforts must take into account the “prevailing social and cultural values and way of life of the Indian child’s tribe.” And it's the county’s responsibility to document and report back to the court about them.

Earlier I mentioned emergency removals. But very often, child removals reflect issues like alcohol abuse and poverty. That’s where active efforts become even more essential – because there’s a good chance issues in the family can be healed in the long run if the family is provided with the culturally appropriate active efforts that they need. Here’s Liz DeRouen again.

Liz DeRouen: Because if you don't have an emergency warrant or emergency removal, then you have to provide all those remedial and rehabilitative services before a child is removed from the home. And they have to be documented. Those services not only have to be offered, afforded and documented, but they have to be culturally appropriate. So, you have to look for those particular things. If someone just comes in and says, hey, we're going to take you down here and this is what you're going to do. If you don't do this, then we're going to take your kids. That's not active efforts.

Most times, families reunify, the kids go home, and families meet the requirement placed on them to attend parenting classes, for instance. But if they don’t fulfill the requirements in their court approved case plan, parents can run out of time.

In most cases parents only have 24 months to resolve the issues that caused their children to be removed from the home. If they don’t, the court is going to conclude they may not be capable of looking after their kids.

A judge will terminate reunification services and order an alternative permanent plan. If this happens, there can be a hearing to permanently terminate parental rights, and that’s another place where there must be evidence from a Qualified Expert Witness.

Tribal families don't generally follow the "nuclear" family model. In tribal communities, children are at the center of a much larger web of connection that includes the child's extended family - aunts, uncles, grandparents - and other members of the community who all have responsibility for the child. If a parent is unable to care for the child, other members of the community step in. This is another area where a Qualified Expert Witness can shed light.

Under ICWA, parental rights can only be terminated in the cases where the evidence proves 'beyond a reasonable doubt' that keeping the child in the custody of the parent or Indian guardian is likely to result in serious emotional or physical damage to the child.

The law is clear that whenever possible, children should be reunified with their parents. But sometimes that can't happen because the court finds, beyond a reasonable doubt, that it would cause serious emotional or physical damage to the child. That's when there needs to be an alternative permanent plan.

In cases like those, ICWA sets out a clear order of placement preferences. Indian children should be placed with extended family – as that term is defined by the tribe – which may be more expansive than the typical American societal conception of family... then, other members of the child's tribe... and then, and only then, outside the tribe.

So far, so good... at least on paper. In reality, the way the Qualified Expert Witness' role was written into federal law created room for a lot of loopholes and gray areas... which, in turn, have led to confusion in courtrooms. In 2016 the federal government enacted new regulations to clarify some of these issues. Then in 2018, California passed legislation to incorporate these changes into state law and increase compliance with ICWA across the board. But significant issues persist.

Here we come to our first example of where the process can break down. As we just heard, under ICWA, no foster care placement or termination of parental rights can be ordered without the testimony of a Qualified Expert Witness. Because the county is the party asking for the foster care placement or termination of parental rights, California practice has historically been to say that in juvenile cases, the agency is the party responsible for hiring and paying for the Qualified Expert Witness.

But that can easily take away from the impartiality and independence that they need to have.

Here's Art Martinez.

Dr. Martinez: They're presenting their case for the removal of an Indian child, and there's no contesting view. There is no other opinion that the court has to go by. And so, the expert witness truly serves as a person who offers a second opinion to the court.

In point of fact, the statute isn't clear about which party puts that witness forward – only that the court needs to have evidence from a Qualified Expert Witness before it can make an order.

But we'll get back to that in a moment. Because we first need to spend some time talking about the qualities that a Qualified Expert Witness must have according to federal law. Put simply, it's someone with specialized knowledge of the Indian child's tribal culture and customs ... especially as they pertain to family organization and childrearing practices. They should also be able to call on knowledge of any family services that are available from the child's tribe.

Notice that I didn't mention the need for specific credentials. There's no need for advanced credentials. It's great if they have a background in psychology or social work, but it's not necessary, as long as they have specialized knowledge of the Indian child's tribal culture and customs as they pertain to family organization and childrearing practices. Tribal values and traditions are not taught in graduate school. They are learned through time with tribal elders and community members.

Liz DeRouen: What I think is a huge mistake is that people look at credibility on paper, and you have to have somebody that's going to come into the courtroom and be honest about what they find.

The Qualified Expert Witness is often a member of the child's own tribe or has been selected by the tribe. Many tribes even have an ICWA representative who maintains a list of people that the tribe has determined have the knowledge necessary to serve as a Qualified Expert Witness in cases involving their children.

However, they mustn't be an employee of the county that is seeking to terminate parental rights. An employee wouldn't have the necessary independence to serve as a Qualified Expert Witness and would likely just give the county what they want – as opposed to an independent witness who will do the thinking that is necessary in these cases.

That's why both federal and state law say that the Qualified Expert Witness cannot be an employee of the agency seeking the order for foster care placement or termination of parental rights. But if the county is the one paying the Qualified Expert Witness, it can still be a problem.

Liz DeRouen: They look around for people that are easy to agree with them. And that's not how the letter of the law was intended.

Liz DeRouen has a rule that she'll only testify in ICWA cases where everybody agrees that she has the specialized knowledge and the ability to meet all the requirements, and also that she can deliver her report independently and educate everybody in the courtroom.

Art Martinez has developed his own rule over the years: he simply requests that he be appointed by the court. That way he knows his opinion will be read and taken seriously. Which unfortunately isn't always the case when it offers a perspective the county may not agree with. There is a little used provision in the California Evidence Code – found in section 730 – that allows the court to appoint an expert on its own motion. Evidence Code section 731 further says that in juvenile court proceedings the county must pay the costs. Art says this helps avoid bias in the Qualified Expert Witness testimony.

Here are some other best practices.

To minimize conflicts of interest and confusion, consider having your county change its practices in ICWA cases so that the court can appoint the Qualified Expert Witness rather than having them hired by the county.

The removing party should ask the tribe first if the tribe has a Qualified Expert Witness. If the tribe doesn't have a Qualified Expert Witness to recommend, the Judicial Council maintains such a list. Go to the Judicial Council website at www.courts.ca.gov and search for '[California ICWA Expert Witness List](#).'

California's pretty enormous... and while some judges see quite a few ICWA cases each year, others don't. As a result, the Qualified Expert Witness process can feel like a mystery – to judges, attorneys, and social workers alike.

The second problem area we'll talk about today arises because there aren't currently clear standards for what the Qualified Expert Witness should be doing as "due diligence" before they present their opinion on the case.

The [Guidelines for Implementing the Indian Child Welfare Act](#) issued by the Bureau of Indian Affairs in 2016 say that the Qualified Expert Witness "...should be someone familiar with that particular child and that *if* the expert makes contact with the parents, observes interactions between the parent(s) and child, and meets with extended family members in the child's life, the expert will be able to provide a more complete picture to the court."

Note the IF in that sentence. We'll get into the details of what kind of legwork judges should expect from a good Qualified Expert Witness before they file a report or set foot in the courtroom. But first, let's talk about what the bigger goal is here. Judges read social workers' reports all the time. They hear evidence about child abuse and neglect... and make decisions about those cases without expert testimony.

Anyone can review a report and formulate an opinion on it, but if the reports submitted to the court don't contain accurate information, or if documentation is unclear, these are factors that can impact everything.

If the Qualified Expert Witness could just look at the same reports the judge is reading, what are they adding? Clearly Congress intended the Qualified Expert Witness opinion to provide some additional insight into the case *beyond* what the court could get from agency reports and other witnesses.

Judge Dean Stout: I've seen expert witnesses that have written reports that, for example, just have a lot of conclusions.

Over time, Judge Dean Stout has developed the ability to discern when he's reading a Qualified Expert Witness report that contains a perfunctory analysis. He was a judge of the Inyo County Superior Court for many years, home to five federally recognized tribes.

Judge Stout: And we are if they're qualified, allowing them to express their opinions. But I want to see the source of their information and what facts or information they were relying on to formulate and to express their opinion. So, if a report is just loaded with conclusions and a lack of information about the basis of their opinions, I have concerns, particularly if we're talking about whether or not there's a likelihood of substantial emotional or physical harm to the child if returned to the home.

So why would Congress require Qualified Expert Witness testimony in these cases? What is beyond the knowledge and outside the experience of a judge that requires this special form of testimony? It's the cultural piece and knowledge of tribal systems and family relationships... of tribal ways of addressing issues ... that supports the requirement for Qualified Expert Witness testimony.

But getting to the heart of these requirements can feel daunting.

Judge Moorman: I was really, frankly, quite afraid of ICWA. We would hear stories about, you know, the judge not following ICWA and getting reversed and that it was very technical and very difficult and loaded with places where mistakes could be made. And, you know, you better have your P's and Q's all together in order to be able to comply.

Like Judge Dean Stout, Superior Court Judge Ann Moorman is not of tribal descent. But as a jurist in Mendocino County, which has a very large number of federally recognized Indian tribes, she needed to learn the ins and outs of ICWA during the years she served in dependency court.

Judge Moorman: I didn't practice family law as a lawyer. Um, so when I stepped into the dependency court, it was with a background of, oh my gosh. But frankly, that feeling or that fear, to the extent I had it, went away almost immediately.

Judge Moorman says learning about ICWA at Judicial Council trainings helped a lot. She learned to set a tone in her courtroom for the respected participation of the Qualified Expert Witness.

A big part of the process was realizing why ICWA was created in the first place.

Judge Moorman: If you start to think about why it exists, kind of the difficulty drops away. So why does it exist? Indian families just are organized so much differently than many Anglo families, and it's essential that we don't take presumptions that apply from one culture and impose them on a different culture, thinking that that might be in the best interest of the child.

Normally witnesses are supposed to testify as to facts of: things they actually saw or heard or observed. ICWA asks the Qualified Expert Witness to deliver not just facts, but an opinion that is informed by something more.

The 'something more' Judge Moorman has come to expect is that a Qualified Expert Witness will always sit down and speak with immediate family and the child, if possible, at the very least, but ideally also anyone who can add insight - broader family and friends included. She's also not shy about asking for more details in court or even before the hearing starts.

Judge Moorman: They provide a wealth of information that the judge can use, in addition to all the lovely and really thorough information that the social worker provides in their reports. So you can see the family dynamics that are in existence. Um, are the parents working towards resolving the issues that led to removal? Are they not? Are they completely out of the picture? Is there you know, a grandmother that's stepping up or an aunt or a cousin or an older sibling? It is an additional layer of thorough sociological information about the family that can help you not only decide, is the child going to be removed from, from the parent's care, at disposition or at the end of the case through a guardianship for example? And if so, what should be the case plan that would lead to returning the child to the home? They can help you to, you know, refine your case plan that tribes often will be offering services themselves that are culturally sensitive and culturally appropriate services to the parents or parent, if there's only one that needs them.

If the answers to these questions are not already clear, judges should be prepared to ask them. A good Qualified Expert Witness should be able to answer.

There are some other best practices that Judges Stout and Moorman recommend for judicial officers who want to be prepared for ICWA cases. One is, get out into the community. Identify tribal court judges in or near your jurisdiction to reach out to and have lunch. Encourage regular meetings between your county's child welfare workers and the tribal social workers so they can build relationships and decide how to best communicate with one another. Doing this will also increase trust and confidence in the relationship between the court and local tribes.

Finally, don't forget that you can always reach out to the Judicial Council staff at the Center for Families, Children and the Courts with questions or to ask for a training.

I'll give Judge Stout the final word here.

Judge Stout: ICWA is not a burden. I think, for some who don't have familiarity with the reasons behind Congress enacting the Indian Child Welfare Act, they don't understand Native American history. It looks like just another layer of findings and orders that they have to make. It's just kind of viewed perhaps as not just to check the box, but, you know, kind of be a bureaucratic overlay, if you will. And I would encourage judges to not just learn the law of the Indian Child Welfare Act but learn the spirit of it.

Experts I spoke with for this podcast say they've noticed a change in recent years: while the pace of removal of native children has been steady, or even increased a little bit, fewer and fewer of those cases come down to documented clear-cut physical and sexual abuse. Today it's most common for children to be detained for allegations of neglect. Maybe the family is temporarily living in poverty or homelessness, or a parent is struggling with addiction. Maybe there's domestic violence between the parents, but the child is the one who is taken away.

There are smaller issues that can also raise alarm with county child protective services. Here's Art Martinez.

Dr. Martinez: There we see things in protective services reports or filings with the court. I've seen things like there are, the house is unkept. The lawn is not mowed. Um, you know, all pointing to things that are basically saying this is a very culturally different house.

But those cultural differences don't necessarily put a child at risk of physical or emotional harm. Liz DeRouen has seen evidence presented in dependency court that she thinks says less about a child's family situation than about a standardized system that has no capacity for understanding that not everyone has access to the same quality of living.

Liz DeRouen: Maybe the family is experiencing hardship right now or say, for instance, the family doesn't have a refrigerator and uses an ice chest. Or you don't have internet, you don't have phone service, you don't have things that... you don't have access to health care, you don't have a bus system coming in allowing people to jump on the bus to go you know take care of your appointments that you need to. And so these things are automatically looked at as, well, you know, our kids require better, they need you know, we're always looking out for their best interest. Okay. But up to this point, they've been doing pretty good. Those are just some simple things that we see. Is that the basis for removal? No, but that's factored. And it does play a big role.

This is where we come to the third area where ICWA can break down and where a Qualified Expert Witness is essential: to speak to the tribal cultural standards, family practices and day-to-day realities that, frankly, a typical state courtroom will overlook. In a situation like that, a person's own assumptions and biases can take over. And as we've seen, the stakes are high.

Judge Abby Abinanti is Chief Judge of the Yurok Tribe, the largest tribe in California. Here's how she breaks it down.

Judge Abinanti: California has 109 surviving tribes. We also have the highest population of Native Americans because of forced relocation from other states. Now, what that has left us with is a very significant population of native people that have, frankly, become invisible in general to the general public, and to the judicial system. And so, what you have is people who lack information on the area that they're supposed to be making

decisions. And part of what we're trying to do here is give them information so that they can make good decisions.

Judge Abby, which is what she prefers to be called, points out that if you don't know the subject area, you tend to revert to what you do know. And if that happens to be not applicable, then you're going to make a mistake.

Judge Abinanti: And so, part of what we have to do also as tribal people and part of what we're trying to do with the Qualified Expert Witness is give information on different standards. So that the decision maker will know and will be able to ask questions.

As we've talked about, ICWA clearly prioritizes making active efforts to keep a child with their parent or parents whenever possible. The next best options are extended family, then other members of the child's tribe. But today's reality doesn't reflect those mandates, and part of the reason is bias.

I asked people for examples of where this bias or misunderstanding can result in the unjustified removal of a child... and got a LOT of answers.

Roberta Javier: Well, I think for me the most classic situation is the family who has relocated here. They relocated to an urban community and they got a place to live, but then the money ran out.

Roberta Javier is a retired children's social worker in the American Indian Unit of the Department of Children and Family Services in Los Angeles.

Roberta Javier: So, they don't have electricity. They might not have running water. And maybe they don't have gas. So. We're a judge now, or a commissioner or a social worker in Los Angeles, and we go out to this house and there's no running water, there's no no electricity. Can't afford it. We paid the rent. That's all we could do. And we're down because we haven't found a job. We can't find a job because we can't get a babysitter. We can't afford a babysitter because we can't get a job. So, the cyclical problems that develop and balloon out of those kinds of situations, that kind of family could be supported in place with the proper resources and funding.

Here's another example she encountered often in her 11 years working in the American Indian Unit.

Roberta Javier: We're in Los Angeles. Tons of drug abuse. Does that mean we need to go and remove the children? Not necessarily. If we can remove the problem, which is often done in non-native families. When it can be an answer that if I call the tribe and say, what do you do in this instance? And the tribe says to me, you know, we have a council that we call in that that sits down and talks with the parent who's abusing meth, and they find ways, and we have Indian health services come in and they have ways of improving the situation or making it easier on the family to deal with it, rather than grabbing the kids out of the house and trying to place them with a prophylactic family that doesn't know anything about them.

The more you talk to veterans of ICWA, the more stories you hear about cases that probably should have been left out of the system in the first place... or so-called evidence of neglect that actually wasn't. Here's Art Martinez.

Dr. Martinez: In one case, I can remember they said the child was walking around with a bottle that they had been forced to drink. A young infant or toddler. And that the bottle appeared to have beer in it. Um, or possibly urine. And so, you know, there were all these little artifacts that were kind of painted into this picture of this very abusive family. When I got involved, I actually looked into well what was that about. And the parents said, well, you can actually check with her doctor that the baby was having urine and intestinal problems. And the doctor had encouraged her to put apple juice in the bottle and drink apple juice because it helped flush the intestines, I guess. And urinary tract. So, I actually checked that and that's what was happening.

Judge Abinanti: You know, basically what you're often looking at is do you have shared values or not?

Here's a story from Judge Abby, who was in a pre-court ICWA meeting about a father who had failed to attend a mandatory class for reunification.

Judge Abinanti: And so, I said, well, do you know why he didn't go? No, he didn't go. And now he's used up his last chance. And I said, well, I think the better course is to ask why he didn't. So, we went into court, and we asked, and he hadn't, because his child was placed with a grandmother who was near 80, and she wanted to bring the child down for visitation that was set up. But if he had had the visitation at the set time, then that old grandmother would be driving in the dark back over the hill an hour and a half. So, he made the decision, I'll just tell grandma we'll do it at 1:00, and then she'll be able to get home, because that's when she wanted to do it. And I said he made the right cultural decision, and if he had made the other one, he would have been rebuked by me. But what he didn't do was let anybody know why he did it. So, part of it is the lack of knowledge of the standards in a community.

Other misunderstandings about tribal life sometimes concern perceptions of overcrowding in a home, although without any documented negative effects on the children. School truancy is another: it's not uncommon for a child raised in a Native American household to be held back from school if they're needed around the house for a time.

Judge Abinanti: And if you have parents who cannot read and write, it's really hard to then enforce the mandate of going to school.

Finally, there's the nuclear family bias. As I already mentioned, the concept of an Indian family very often extends well beyond parents to all members of a child's local tribe. So often, children are being raised by their grandparents or aunts or elders, and sometimes these are not blood relatives – and that can be hard for social workers to relate to. That's why federal and state law say that "extended family" under ICWA is defined by the tribe.

So, what do all these stories point to? ICWA's essential ingredient is cultural humility. The need to believe that there are other ways families can work. And the willingness to broaden one's perspective. This, again, is where the Qualified Expert Witness can step in to help.

Here's Roberta Javier again.

Roberta Javier: As a social worker, I can remember wanting to, you know, write my reports and be perfect so that I could make the judgment and make the work easier for

the judge or the commissioner. But the true reality of that is that as the children's social worker, I probably know nothing about their tribe. I know nothing about their current environment. And without all that knowledge in both of those areas, I'm not giving a fair, a fair package of information to anybody.

Javier herself is of tribal descent. She is Cherokee and Sac and Fox. But she says that never made her an expert on any situation she investigated.

Roberta Javier: In ICWA cases, we take on the tribe as though we were taking on an extra parent, so we have more people to be responsible to. And we don't know the tribe. And it's very difficult sometimes for us as social workers to not speak on behalf of the tribe. Hence our need to turn over some of our trust to the qualified expert witness, to make sure that that particular puzzle piece is locked in.

Here are some best practices that may counter the effects of bias and hearsay in an ICWA investigation. Some counties have a practice of pairing up a tribal social worker and a child welfare worker to respond together to an abuse or neglect report. This can reduce the number of dependency filings in state court by investigating hearsay. It's also an unparalleled opportunity to learn from one another and to develop voluntary service plans.

If a child is missing school, try to be curious about what may be going on with the parent's own schooling history. Can they read or write? Is it because of a parents' own potentially negative school history, and the intergenerational trauma associated with residential schools, that schooling isn't enforced?

Finally, remember that many major tribes have services, including drug treatment, that can help families reunify, and they can recommend placement with another family member in the meantime. A good Qualified Expert Witness should be able to identify the issues that have caused the child to be at risk in the home and offer suggestions on how this might be changed.

The bottom line? As a social worker, don't assume you understand the whole situation, and don't assume you have all the answers, either. Take the family from where they are – accept them for where they are.

Roberta Javier: And I would like to think that we all start out by saying – can we talk about what we see the problems are? So, mom, dad, auntie, grandparents, you tell me what you think the problems are, and I'm going to tell you what I think the problems are. But you're the expert. You're the expert. This is your family. What do you think needs to be done to help fix it? And then be willing or able without too much further ado, to put those answers in motion.

With so much at stake, it's clear that being an effective Qualified Expert Witness is an important responsibility and can be a challenging role to play. They need to ask tough questions and conduct a thorough investigation. They need to be prepared to stand up for the child in court... even if the opinion they deliver isn't always what some other parties want to hear.

Courts have an equally important role to play ... to go far beyond 'checking the box' when it comes to ICWA ... to appoint an appropriate Qualified Expert Witness and ensure that they have done their due diligence. There's also an opportunity to be curious about tribal life and open to learning about cultural differences to ward off crucial misunderstandings that can force a family to separate when they could reunify or remain together.

Judges and attorneys should inform themselves about any culturally appropriate resources or existing plans in place to proactively help an ICWA child stay with his or her family.... and can work with the Qualified Expert Witness to develop one.

Social workers have a unique opportunity to benefit from ICWA ... by using the tribe as a resource for irreplaceable expertise and context about the child and the way he or she has been raised.

Here are some final thoughts that each of our speakers want to leave you with... starting with Liz DeRouen.

Liz DeRouen: You know what a good, qualified expert witness is speaking from knowledge. And it doesn't come from the book all the time. It's not in a theory, it's not in a thesis. It's who we are, where we come from. And really knowing the significance of how our tribal governments operate and how they intend to continue for their people.

Judge Ann Moorman:

Judge Moorman: Go out into your community, go out into the Indian lands and, you know, go to some cultural activities, and that's the way you get to understand how Indian families function.

Art Martinez:

Dr. Martinez: It's important to remember that we are truly talking about decisions before the court that are going to affect a child's life. And affect the child's life for the future.

Judge Abby:

Judge Abinanti: If you want to develop context for yourself as a judge, you're going to have to figure out how to get that context. And for us, dealing with the tribal people in California, you're going to have to know what their intergenerational trauma exposure was. And it's often different depending on what tribe you're involved with. You have to look to that.

Judge Dean Stout:

Judge Stout: The ICWA placement preferences make all kinds of sense no matter who the child is. And, you know, we've got a Hispanic or Latino child, let's make sure we got a culturally appropriate case plan. So, I really want to encourage judges. There's a lot of benefits in being well versed in ICWA and the spirit of ICWA.

... And finally, Roberta Javier:

Roberta Javier: I really want the judges to understand that their QEW from the tribe may not be a Harvard educated grad, but they may be the height of knowledge, particularly spiritual knowledge, cultural knowledge in this tribe, and know what is best overall for this family or this human being.

To find this episode and other resources from the Judicial Council about ICWA, including a brochure about ICWA for American Indian and Native Alaskan families in California, visit courts.ca.gov/3067.htm. That's courts.ca.gov/3067.htm.

That's it for this episode from the Judicial Council of California. Original music by [Chad Crouch](#). Mixing and sound design by Chris Hoff. I'm Julia Scott. Thanks for listening.