

ICWA/MIFPA

Qualified Expert Witness Training

January 2026



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About TWG

Established in 2009, The Whitener Group (TWG) is a team of professionals dedicated to the advancement and sustainability of Indian Tribes. TWG is owned by Robert “Bob” Whitener and Hon. Ronald “Ron” Whitener, both enrolled members of the Squaxin Island Tribe, and Jennifer Whitener Ulrich, a descendant of the Squaxin Island Tribe. Together, the owners bring distinguished experience across government, business, and education. TWG works directly with tribes and tribally led organizations on economic development, tribal court needs assessments, tribal justice system planning and development, meeting facilitation, strategic planning, and code drafting. In addition, TWG also provides tribal engagement support and trainings for non-tribal entities, including the development of the online Indian Country 101 curriculum.

Learn more about our team at www.whitenergroup.biz.

About Your Trainers



Kathryn (Kate) E. Fort is the Director of Clinics at Michigan State University College of Law and runs the Indian Law Clinic, where she teaches the Clinic class and other classes in federal Indian law. In 2015, she started the Indian Child Welfare Act Appellate Project, which represents tribes in complex ICWA litigation across the country. She is the author of *American Indian Children and the Law*, published by Carolina Academic Press. Prof. Fort has written articles on laches and land claims and has researched and written extensively on the Indian Child Welfare Act.



Adrian (Addie) Smith was the first ever staff attorney at the National Indian Child Welfare Association (NICWA). In that role she helped coordinate the Indian Country response to the Supreme Court challenge to the Indian Child Welfare Act, *Adoptive Couple v. Baby Girl*, and advocacy efforts on the first comprehensive federal ICWA regulations. Addie left NICWA after being appointed by the Governor of Oregon to coordinate a statewide taskforce on representation in child welfare cases and then went on to become a counsel to the Judiciary Committees in the Oregon legislature. Addie has her own small consulting firm where she works closely with states on ICWA compliance issues and tribes on child welfare and judicial system improvement.

The “Four Ws” Overview

WHAT

What is a QEW?

Qualified Expert Witness

Required by ICWA & MIFPA.

Testifies in State Court to:
“Is the Indian child likely to suffer serious emotional or physical damage if they stay in custody of their parent?”

WHEN

When do we need QEWs?

In **State Court** (Not Tribal Court)

+

If the child is an **Indian child**

+

During the following Child Custody Proceedings:

- Foster Care Proceedings (*Including Guardianships*)
- Termination of Parental Rights Proceedings

WHY

Why do we have QEWs?

Legal Protection under ICWA & MIFPA

Tribal Context
Beyond the Case File

Historical Child Removal & Government Overreach

Ongoing Disproportionality

WHO

Who should be a QEW? Who finds them?

Who should be a QEW?

A person with knowledge of tribal customs, social/cultural standards and child-rearing practices.

Who finds the QEW?

The State!

(Required under ICWA & MIFPA)



A **Qualified Expert Witness (QEW)** is a person required by the Indian Child Welfare Act (ICWA) and Michigan Indian Family Preservation Act (MIFPA) to testify in state court as to whether an Indian child is likely to suffer serious emotional or physical damage if they stay in the custody of their parent.

Notes:



ICWA: The Indian Child Welfare Act

25 U.S.C. § 1912. Pending court proceedings

...
(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, **including testimony of qualified expert witnesses**, 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.

**(f) Parental rights termination
orders; evidence; determination of
damage to child**

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including **testimony of qualified expert witnesses**, 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.

ICWA is a federal law that...

- Protects a tribe's right to care for and make decisions about its families when abuse or neglect may have occurred.
- Provides state child welfare agencies and family courts guidance on how to work with Indian children and families.
- Guarantees a tribe's right to participate in state's attempts to care for and make decisions about Indian children when abuse or neglect may have occurred.

Notes:

MIFPA: The Michigan Indian Family Preservation Act

712B.15. ...removal of child from parent or Indian custodian; clear and convincing evidence; termination of parental rights; remedial services and rehabilitative programs; determination that continued custody likely to result in serious emotional or physical damage

...

(2) An Indian child may be removed from a parent or Indian custodian, placed into a foster care placement, or, for an Indian child already taken into protective custody, remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that the active efforts were unsuccessful, and that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe.

The evidence must include the testimony of at least 1 qualified expert witness, who has knowledge of the child rearing practices of the Indian child's tribe, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child.

...

(4) No termination of parental rights may be ordered in a proceeding described in this section without a determination, supported by evidence beyond a reasonable doubt, **including testimony of at least 1 qualified expert witness** as described in section 17, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child.

712B.17. Qualified expert witness

...

(e) If the testimony of a qualified expert witness is required, the court shall accept either of the following in the following order of preference:

- í A member of the Indian child's tribe, or witness approved by the Indian child's tribe, who is recognized by the tribal community as knowledgeable in tribal customs and how the tribal customs pertain to family organization and child rearing practices.
- í A person with knowledge, skill, experience, training, or education and who can speak to the Indian child's tribe and its customs and how the tribal customs pertain to family organization and child rearing practices.

(f) A party to a child custody proceeding may present his or her own qualified expert witness to rebut the testimony of the petitioner's qualified expert witness.

MIFPA is a Michigan law that...

- Incorporates ICWA protections into state law.
- Fills in gaps in the federal ICWA law.
- Provides additional requirements for practitioners in Michigan working with Indian children and their families.

Real Quick: What's the History?

Civilization Act of 1819

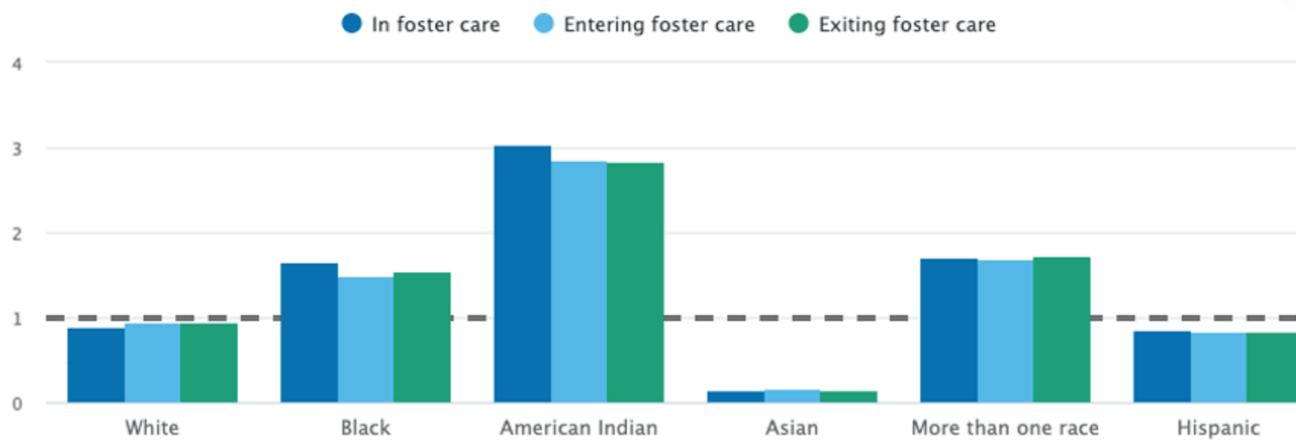
Boarding Schools

Indian Adoption Project

Child Welfare Overreach Recorded by AAIA

Disproportionality: Why ICWA Matters

Disproportionality index: children in, entering, and exiting foster care: United States, 2021



Source: NCJFCJ

WHEN

DO WE NEED QEWS?

WHEN does ICWA apply?

In State Court

not in tribal court

Tip:

ICWA applies whether or not a tribe participates in the state court case!

Indian Child

under 18 at start of case;

unmarried; and

member of tribe; or
eligible for membership
[and one bio parent is a
member]*

Child Custody Proceedings

foster care proceedings

Including guardianship
proceedings

termination of parental rights
proceedings

pre-adoptive proceedings

adoption proceedings

*not required in MI cases

WHEN does ICWA require a QEW?

Child Custody Proceedings

foster care proceedings

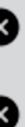
including guardianships
proceedings

termination of parental rights proceedings

pre-adoptive proceedings

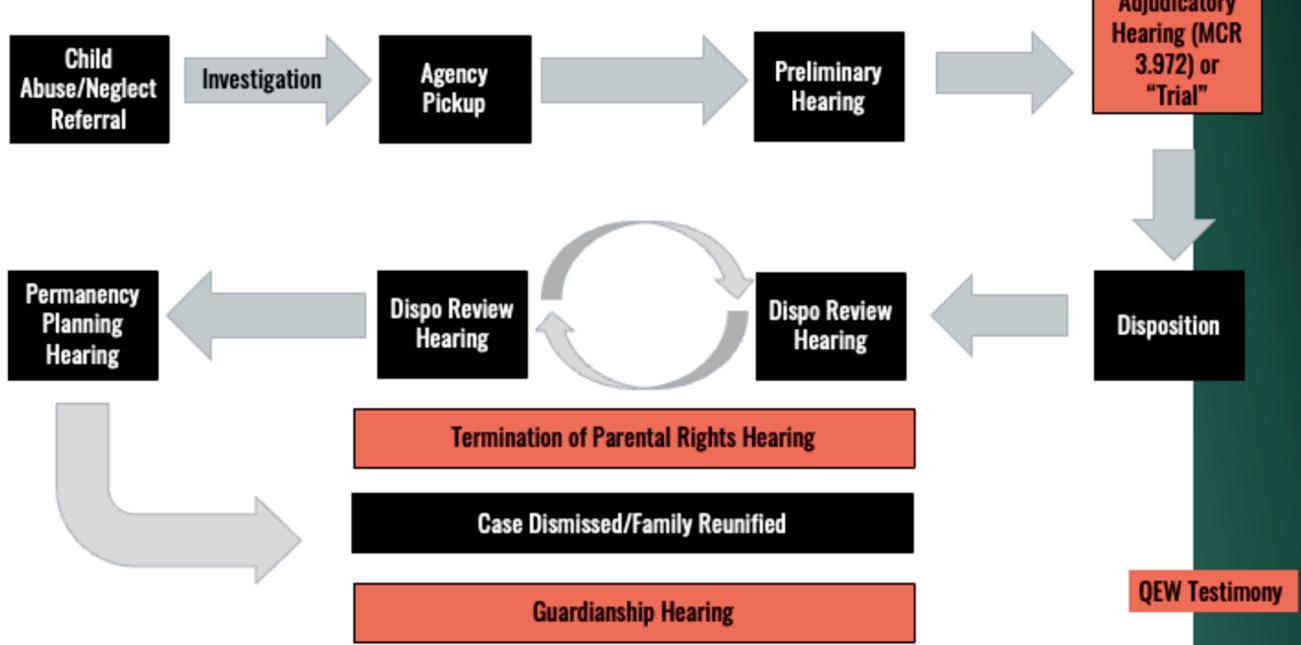
adoption proceedings

Notes:



WHEN does a QEW Testify in Michigan?

Michigan Child Welfare Court Process



Notes:



WHO

SHOULD BE A QEW?
AND WHO FINDS THEM?

ICWA QEW Purpose

Congress wanted to make sure that Indian child-welfare determinations are not based on "white middle-class standards" which, in many cases, have led to unnecessary removal and termination of parental rights or have prevented placement with an Indian family.

Congress also recognized that States often fail to recognize the essential Tribal relations of Indian people and the cultural and social standards that prevail in Indian communities and families when making decisions about Indian families.

A QEW is an **expert** on:

Knowledge of tribal customs as they pertain to family organization, child rearing, roles of relatives in caregiving, importance of tribal identity.

Prevailing social and cultural standards and child-rearing practices.

What does it mean to have "knowledge of tribal customs" or "child-rearing"? Here are some examples:

The Tribe's History

How Children are Viewed by the Tribe

A Child's Role in Tribal Culture

Familial Relationships and Life Values

Use of Discipline

Cultural Expectations

Role of Extended Family in Raising a Child

Available Tribal Services (Formal & Informal)

Who can serve as a QEW under MIFPA?

- a) A member of the Indian child's tribe, or witness approved by the Indian child's tribe, who is recognized by the tribal community as knowledgeable in tribal customs and how the tribal customs pertain to family organization and child rearing practices.
- (b) A person with knowledge, skill, experience, training, or education and who can speak to the Indian child's tribe and its customs and how the tribal customs pertain to family organization and child rearing practices.

MIFPA 712B.17

Tip: There only needs to be one QEW, but there can be additional expert witnesses to testify on various issues, including whether the child can be returned to the home.

Who finds the QEW under ICWA & MIFPA?

The State must
secure the QEW.

ICWA & MIFPA

The State must contact the Tribe to find a QEW.

NAA 205

If the Tribe does not respond,
the State may look for a
different QEW.

If the Tribe can identify a QEW, that's best practice. It makes it more likely that tribal community standards will be considered by the Court.

Notes:

HOW TO PREPARE A QEW

Efforts must be made to assist the QEW with preparation for the court hearing. (NAA 210)

The **ultimate question** a QEW must testify to in Court

Will the continued custody of the child by the parents likely result in serious emotional or physical damage?

Tip: This may include not only the current impact on the child of parental behavior, but also if the parents are capable and willing to modify their behavior if adequate support ("active efforts") are provided or circumstances are changed.

What a QEW should know about the case:



A QEW may want to **Review:**

-  Case Notes
-  Service Provider Notes & Reports
-  Court Reports
-  CASA Reports
-  Visitation Notes
-  Risk Assessments
-  Other Court Filings

Note: If any documents are missing, request them from the state attorney and/or case worker

A QEW may want to **Talk to:**

-  The Family & Extended Family
-  The State Case Worker
-  Treatment Providers
-  The Tribal ICW Worker
-  The Foster Family
-  A QEW may also want to observe visitation or parent-child interactions

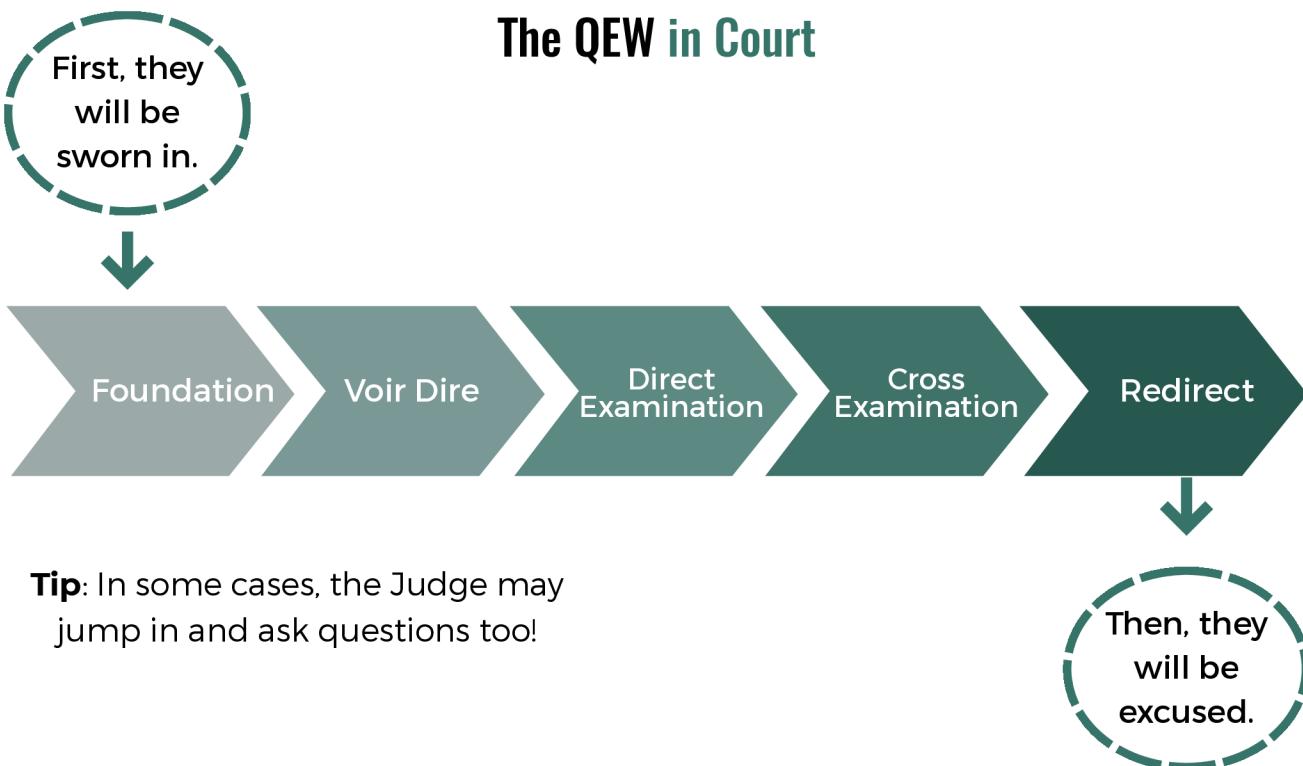
Note: Ask the State Case Worker and State Attorney to provide you the questions they plan on asking, take you to the courtroom to see it in advance, and to practice with you!



As a QEW reviews case documents, talks to people involved in the case and prepares for Court, the QEW should keep notes. Including:

- Why was the child removed?
 - Does that danger still exist? How do you know? Why?
- What have the parents done to become safe?
 - What more could they have done?
 - Are they on the right track but just need more time?
- What services did the child welfare agency provide?
 - What services do you believe they should have provided but didn't?
 - Were the services culturally appropriate?
- Were there any cultural misunderstandings in the case?

The QEW in Court



What if the QEW doesn't agree with removal or TPR?

In re Payne/Phumprey/Fortson, 311 Mich.App. 49 (2015)

In this case, the trial court explicitly recognized that Hillert, the only expert witness at the termination hearing, did not support termination and specifically testified that returning AP and DP to respondent's care would not likely result in serious emotional or physical damage to either child. Nonetheless, considering the other evidence presented, the trial court determined that returning AP and DP to respondent's care would result in such damage beyond a reasonable doubt. In so doing, the trial court essentially disregarded Hillert's testimony, contrary to the plain language of 25 USC 1912(f), MCL 712B.15(4), and MCR 3.977(G)(2). Accordingly, we conclude that the trial court failed to adhere to the requirements of ICWA and its Michigan counterparts, and remand for further proceedings with respect to AP and DP.

What happens if there is no QEW testimony supporting termination?

Lack of QEW testimony may be used as a compelling reason for a permanency goal other than termination of parental rights/return home for Indian children

(NAA 245)

Notes:

A large, empty, rounded rectangular frame with a dark teal border, centered on a white background. The frame is composed of a single, continuous dark teal line that curves at the corners. It occupies most of the page, leaving a wide white margin around the perimeter.

A large, empty rectangular frame with a thick red border, centered on a white background. The frame is composed of a single continuous line, creating a rounded rectangular shape. The red color is a vibrant, saturated shade. The frame is positioned in the center of the image, with a wide white margin around it. The corners of the frame are rounded, giving it a soft, organic appearance. The line thickness is consistent across the entire border.

A large, empty, rounded rectangular frame with a dark green border, centered on a light gray background. The frame is composed of a single, continuous dark green line that curves at the corners. The interior of the frame is a plain, off-white color.

A large, empty rectangular frame with a thick red border, designed to look like a film strip or a frame for a drawing.