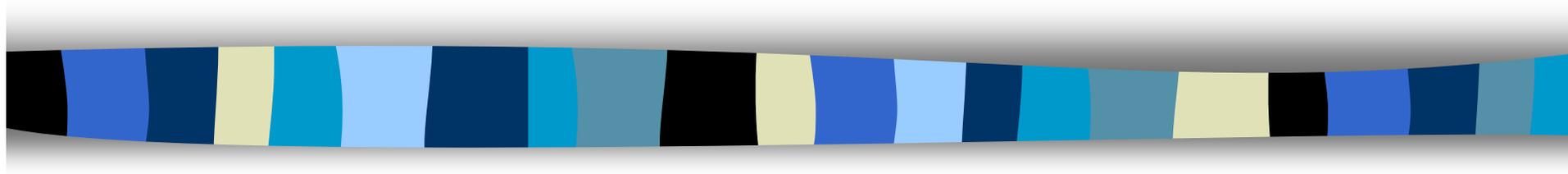
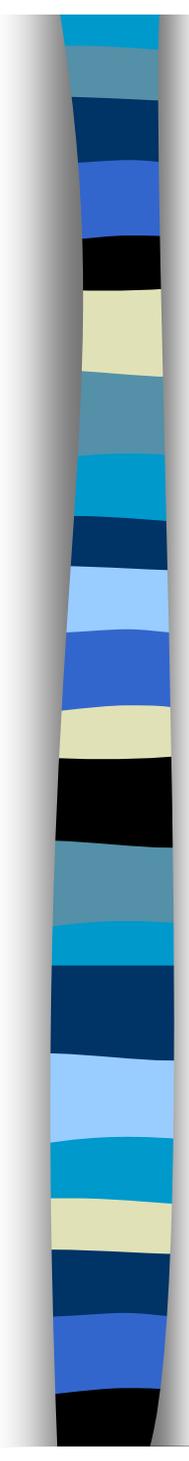


# The ICWA Expert Witness in New York State



Presenting Quality Evidence  
To Protect the Best Interests of  
Indian Children  
By Margaret A. Burt, Esq.  
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## When are ICWA experts used?

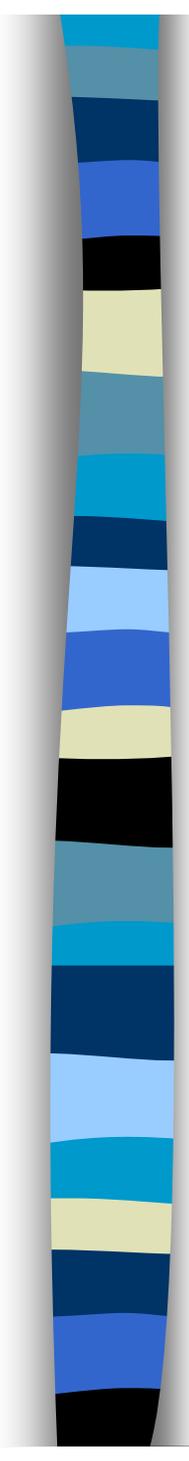
ICWA child - Removal from Home

ICWA child - Termination of Parental Rights

ICWA child – placement decisions

Before court to advise agency, tribe

In court as the required expert

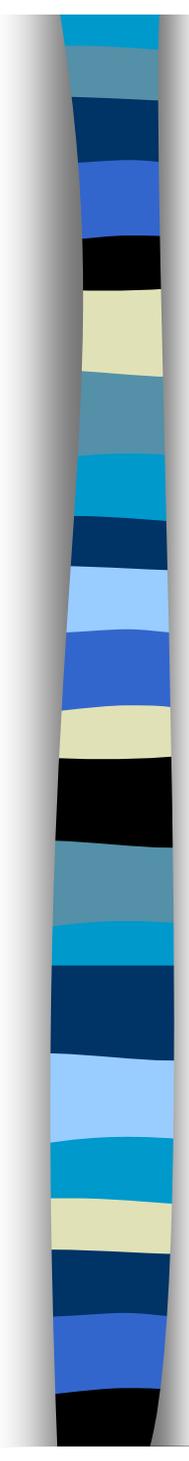


# Who is a QEW?

Federal Guidelines “D4” BUT

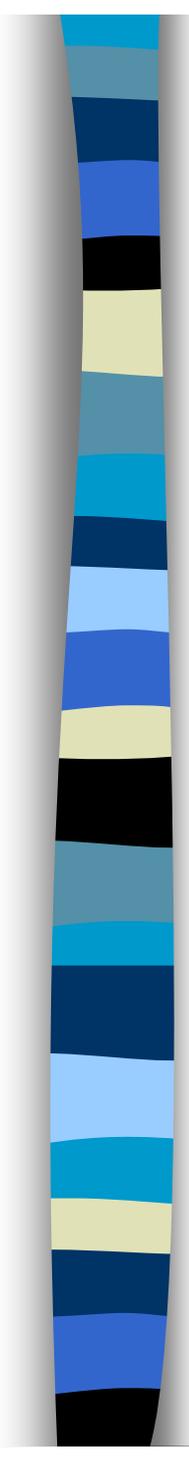
18 New York State Rules and Regulations  
431.18(5)

Remember that the NYS definition is  
more restrictive than the federal one



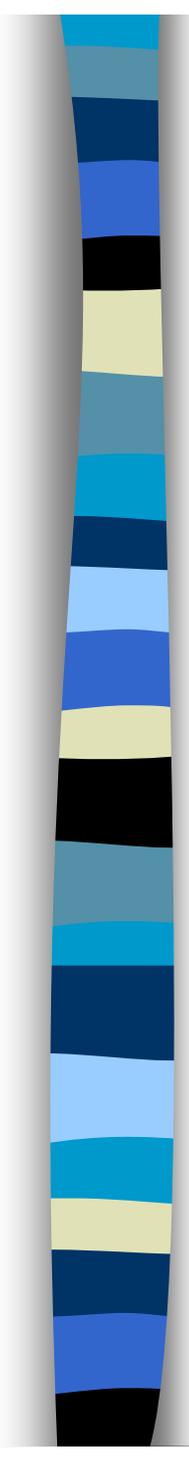
# Who would be a “qualified expert witness”?

Member of Indian child’s tribe who is recognized by tribal community as knowledgeable in tribal customs as they pertain to family organizations and childrearing practices



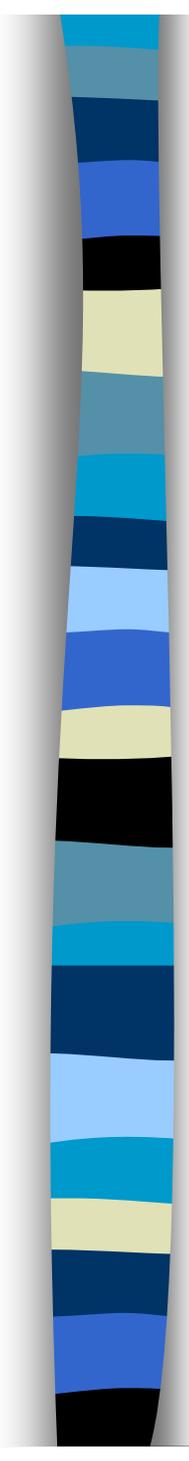
OR?

A lay 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 within the Indian child's tribe



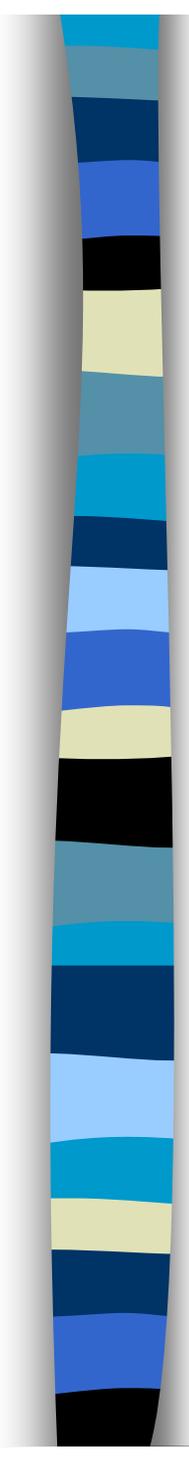
OR?

A professional person having substantial education and experience in the area the provision of services to Indian children and their families



## Who isn't likely to be a QEW?

Without some other connection as described above a QEW is not likely to be: any attorney including the child's attorney, the local district's caseworker, a history professor, a law enforcement officer, the Judge



# Is the QEW more than a witness?

Adds a “nonagency” perspective re active efforts and safety

Provides the parties with the tribe’s position on the matter

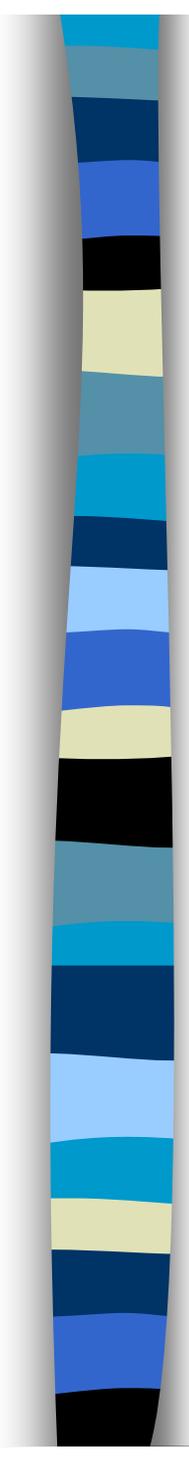
Good practice says it should be a person who really does provide court with better understanding of the tribes’ family and child rearing traditions

# Could there be more than one expert in a case?

Who actually decides who is an expert?

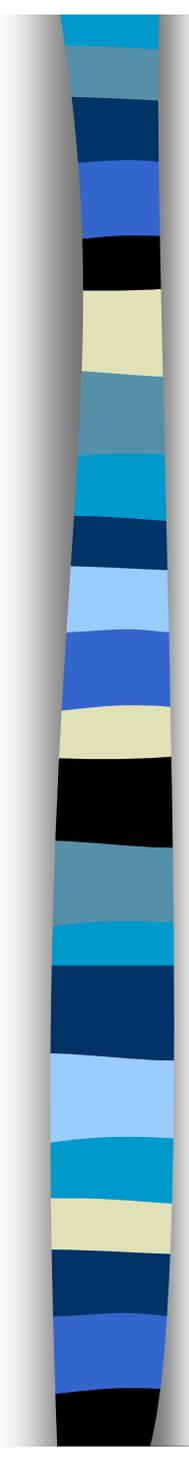
What if the experts disagree?

Does the Judge have to “obey” the expert?



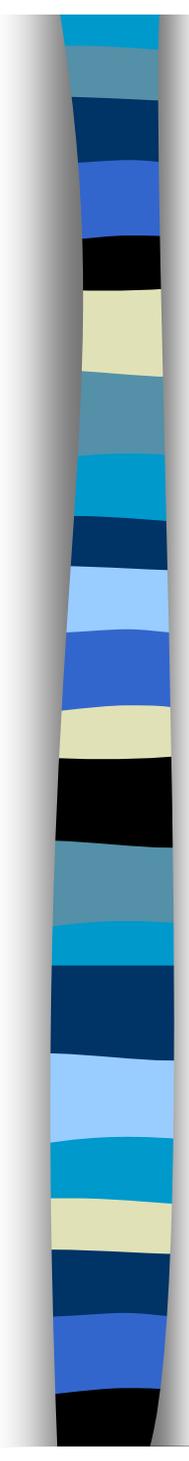
## What does the expert actually testify about?

Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child



## Why do you need an “expert” on Indian issues to prove likely damage to a child?

The party who is seeking to have the child removed or parental rights terminated must prove to the court that active efforts, in the context of the prevailing social and cultural conditions and way of life of the Indian tribe, have been made and that available family and tribal services and been used and that the risk is still present



# So what kind of things would an expert need to know about?

the tribe's history

how children are  
viewed by the tribe

child rearing in the  
tribe

use of discipline

cultural expectations

tribe's services

family's history

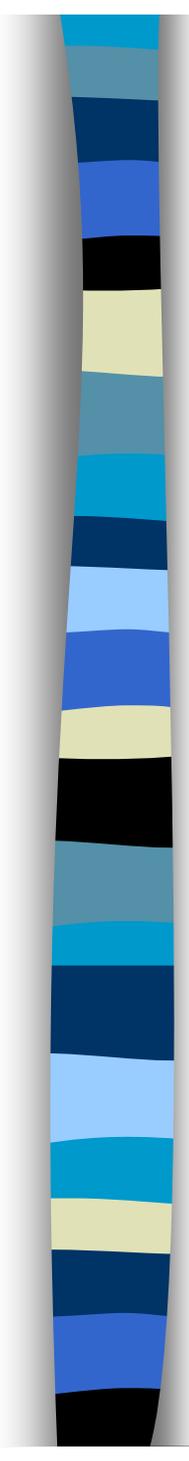
protective issues in  
family

particular incidents

this child's needs

agency responses

tribe and family view of  
situation



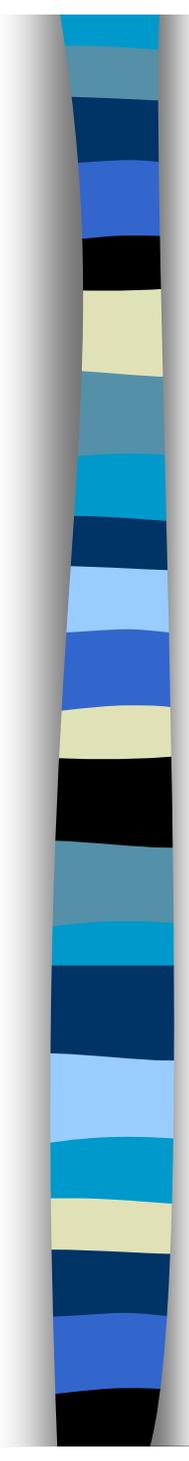
## Experts in general:

Experts “teach” the court

Testify only to what you know and what you have an opinion on - don't be “pushed”

Remain objective and professional - can you have been “involved” in the case?

Dress, demeanor, decorum



## Think About:

Your expertise and credentials

What do you want the Judge to know?

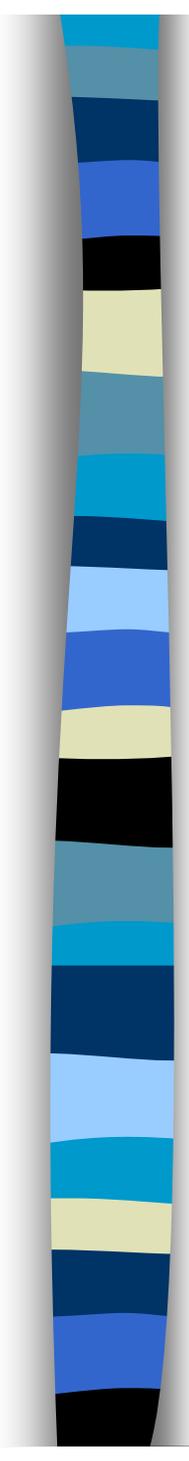
Take your time

Speak plainly

Body language and facial expressions

Don't argue or lose your cool

Case is not about you



Also:

Did you talk to the attorney?

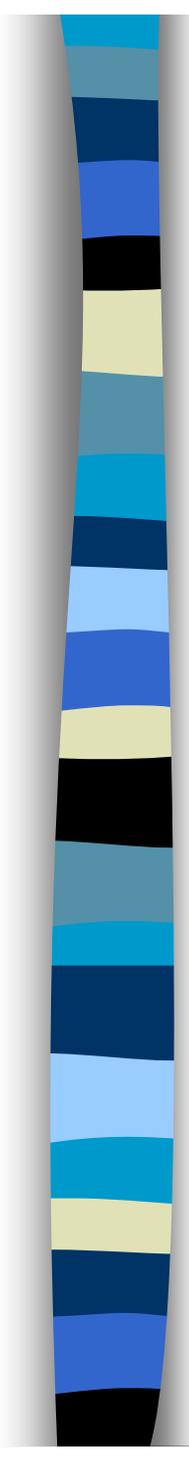
Talking in advance to the “other side”

Don't add information

Don't read from notes but bring them

Don't assume the report has been read  
but don't assume it hasn't

You are not the “expert of all things”!!



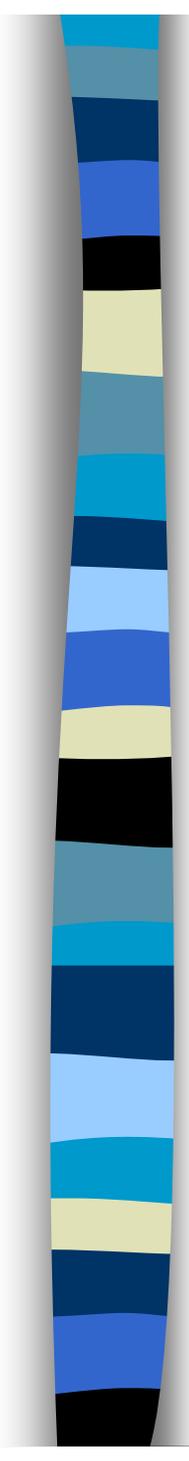
## Preparation on your own:

Review all the records

Talk to all the relevant people

Consider how the cultural knowledge that you have is relevant to the issues in the case

WHAT serious physical or emotional damage do others think is likely - do you agree or disagree and why?



# Prep with the attorney

You **NEED** to work with the attorney who is calling you to the stand

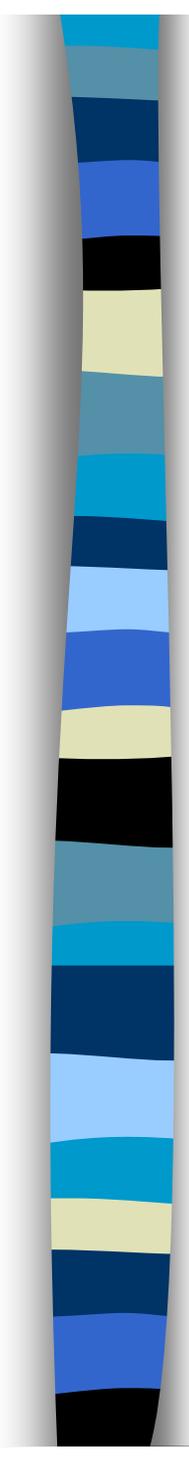
What does the attorney think he/she needs from you?

**EDUCATE** the attorney

Review your credentials

Other cases you have been involved in

Be clear about what you can/cannot say



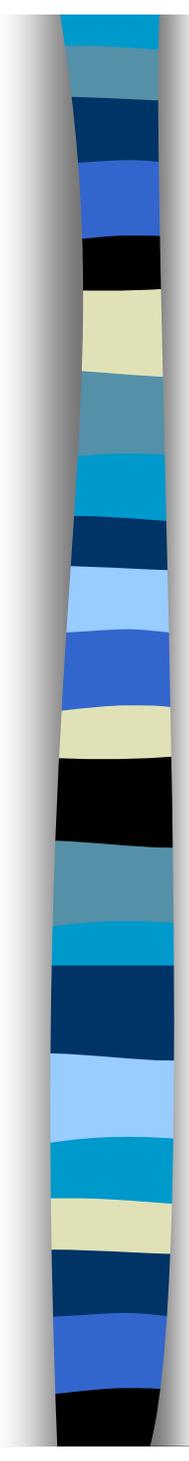
# Prep with the attorney

Any literature or props that would be helpful?

Who have you talked to - who have you not talked to?

Do you have notes or a file that you have created? Should you do a written report?

What questions will be key?



## In Court:

Will the case actually go to trial?

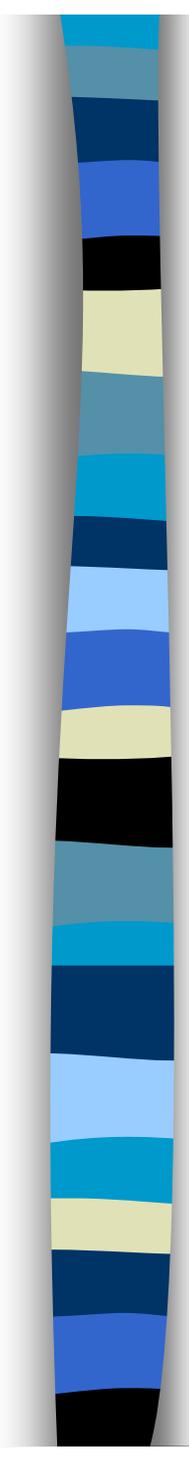
Will you be able to listen to the other witnesses?

How are experts “qualified”? Stipulation vs Foundational Questions

Use of a CV

“Voir Dire” of expert’s qualifications

“Certification” as an expert



# Types of Questions:

Putting a report in evidence

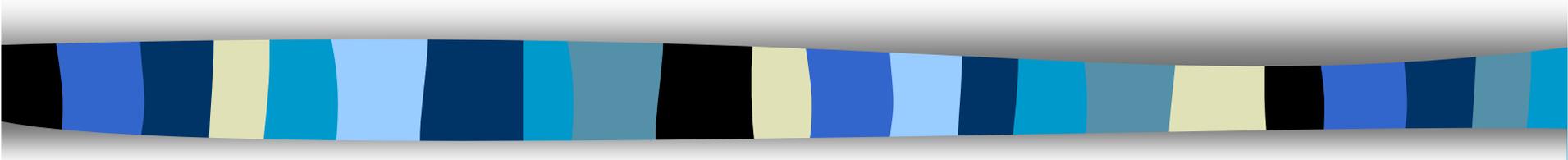
Review of your knowledge base

Explaining theories

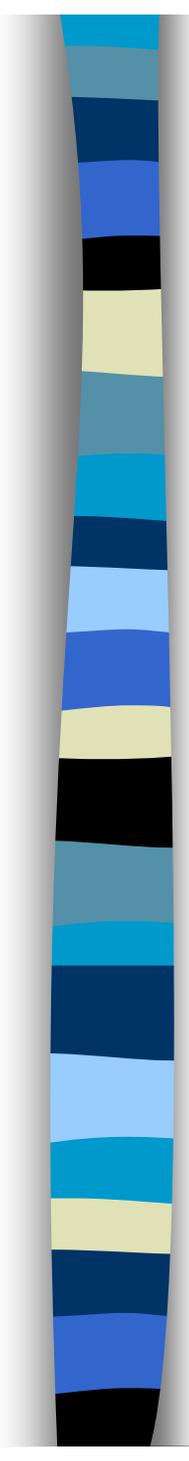
Use of hypothetical questions

The factual basis for the conclusions

# THE opinion question:



Do you have an opinion within a reasonable degree of certainty as to whether continued custody by the child's parents would likely result in serious physical or emotional damage?



## Some details to think about:

Confidentiality

Money (do you admit this?)

Expert banks

Conflicts in opinion

The “larger” role of the expert

Next steps

How frequent is this?

Are there any negatives to doing this?

Is this something that I want to do?