

Pokégnek Bodéwadmik
Pokagon Band of Potawatomi

Litigating Difficult ICWA Cases: Advocate and Educate

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The Difference

In any litigation—

The Judge and the attorneys for the litigants know why they are there and why the other participants are there.

The Judge and the attorneys know the applicable law.



The Difference: Unfamiliarity makes litigation difficult

Attorneys don't usually confess what they know or don't know, but in an ICWA case we routinely hear....“we don't get many ICWA cases..”

The unfamiliarity with the law puts the Tribal attorney in a difficult situation.



The ICWA Expert

When an attorney or a Judge mentions “they don’t get many ICWA cases...” this can mean... “so we don’t know what to do....”

Or, in the extreme, it can mean... “so we are going to ignore it or not spend the extra time to learn it”.



The Unusual Role of the Tribal Attorney

For the Tribal attorney, representing the client includes strong advocacy but also protecting other interests.

- Case gets appealed resulting in delay for the child
- Court returns child for failure to apply the law (Section 1914) and that can put the child in danger if parents are not safe for the child.



Roles and Responsibilities

This is what makes virtually any ICWA case difficult to litigate.

The Tribal Attorney becomes the educator in addition to the advocate. And the one protecting the interests of all parties by ensuring ICWA is correctly applied.



Advocate and Educate

Four suggestions:

1. Represent your client.
2. Make your record/Protect the record- even if it takes time
3. Be prepared. Use the opportunity to educate.
4. Maintain your professionalism.



Represent Your Client

Your client, the government, is an equal party in the case.

- Be aware of and careful of conflicts of interest.
- For example, being asked to present the testimony of the QEW. The witness is required for the petitioner's case-in-chief.



Protect the Record/Make the Record

- Cite to the specific statutes so that a reviewing court knows what you are talking about.
- Provide the Judge specific findings. For instance support a “finding of active efforts, as required by 25 USC § 1912(d) and as defined in 25 CFR § 23.2 specifically.....”



Make your record/Protect the record

Child protection cases often involve a small circle of attorneys who all know each other.

Judge's are used to doing things efficiently.

Dockets are crowded and the facts of each case are sad.

ICWA cases—if done correctly—take more time.

Make your record.



Make your record/Protect the record- Pleadings

- File a pleading at intervention.
- Use the pleading as an opportunity to paper the file with a document which provides the citations to the ICWA.
- Include an appearance—this will get you listed as one of the attorneys in the Court file.



Be Prepared

Obviously, right? But the preparation includes anticipating how much the others might not know.

- The Tribal attorney may be the one attorney who knows this area of law. Use the opportunity to educate.
- Anticipate issues and have extra copies of relevant cases.
- Have extra copies of the ICWA or the Final Rule.
- Make it easy for the other parties to get it right.



Be Prepared- Before the Hearing

Before the first hearing, reach out to the legal representative of the Petitioner.

Explain who you represent.

This provides a chance to privately take some of the mystery out of the ICWA case—especially when it comes to the QEW.



Maintain Professionalism

This can be hard –

Careless and ignorant comments come with the territory. Child protection cases are factually already difficult. Ignorance makes it more difficult.

Prepare for the comments so you can respond in a way that represents your client.



Maintain Professionalism

This can be hard –

ICWA cases go up on appeal. Appeals prolong permanency and safety for children.

Getting it right in the trial court may avoid the appeal. And may reunite a child with parents or give a child permanency.



Maintain Professionalism

This can be hard –

But consider whether it is better to be remembered for creating a scene...or for creating a new way of thinking.



Advocate and Educate

Using every opportunity to educate and advocate can make a difference .

The way you represent your client may educate the Court and the attorneys and the next Indian child will benefit from your advocacy and the education you provided.



Contact Information

Thank you

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