

## CHAPTER 17 - EVIDENCE

SUB-CHAPTER ONE  
GENERAL PROVISIONS**Section 1701.        Title.**

This Act may be known and cited as the Rules of Evidence, or the Evidence Code of the Tribe.

**Section 1701.01.    Scope.**

This Act governs evidentiary questions in all proceedings in the Courts of the Sac and Fox Nation, whether civil, criminal, juvenile, or otherwise except as may be otherwise specifically provided by Tribal law.

**Section 1701.02.    Purpose and Construction.**

This Act shall be constructed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

**Section 1701.03.    Rulings on Evidence.**

(A)    **Effect of erroneous ruling.** Error may not be predicated, nor a judgment reversed or modified, upon a ruling which admits or excludes evidence unless a substantial rights of the party is affected, and:

(1)    **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2)    **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof, or was apparent from the context within which questions were asked.

(B)    **Record of offer and ruling.** The Court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(C)    **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent

practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury. Questions on evidentiary matters known to be in issue prior to trial may be determined by a hearing prior to trial, and the matter does not have to be raised at the trial by the party whose evidence is ruled inadmissible in order to preserve the error so long as the error is apparent from the transcript of the hearing. Questions which arise concerning the admissibility of evidence during the trial may be resolved in open Court, if practicable, at a hearing at the bench out of the hearing of the jury, if practicable, or a recess may be taken and a hearing held upon the admissibility of the evidence at issue.

(D) **Plain error.** Nothing in this Section precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

#### **Section 1701.04. Preliminary Questions.**

(A) **Questions of admissibility generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by this Act except those with respect to privileges.

(B) **Relevancy conditioned on fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or may admit it subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(C) **Hearing of jury.** Hearings on the admissibility of confessions in a criminal case shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused in a criminal case is a witness, if he so requests.

(D) **Testimony by accused.** The accused in a criminal case does not, by testifying upon a preliminary matter, or other matter which would be heard outside the hearing of the jury, if any, subject himself to cross-examination as to other issues in the case. The accused in a criminal case waives his right against self-incrimination as to all issues in the case by testifying upon any fact pertaining to any element of the charge against him during the actual trial of the case before the jury or other finder of fact.

(E) **Weight and credibility.** This Section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

#### **Section 1701.05. Limited Admissibility.**

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the

evidence to its proper scope and instruct the jury accordingly.

**Section 1701.06.     Remainder or Related Writings or Recorded Statements.**

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

**SUB - CHAPTER TWO  
JUDICIAL NOTICE**

**Section 1702.01. Judicial Notice of Adjudicative Facts.**

- (A) **Scope of Chapter.** This Chapter governs only judicial notice of adjudicative facts.
- (B) **Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either
  - (1) generally known within the territorial jurisdiction of the Court, or,
  - (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (C) **When discretionary.** The Courts may take judicial notice, whether requested or not.
- (D) **When mandatory.** The Courts shall take judicial notice if requested by a party and supplied with the necessary information, or when required to do so by Tribal law.
- (E) **Opportunity to be heard.** A party is entitled upon timely request to an opportunity in all actions and proceedings, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift the risk of non-persuasion, which remains upon the party on whom it was originally cast.

**SUB - CHAPTER THREE  
PRESUMPTIONS**

**Section 1703.01. Presumptions in General in Civil Actions and Proceedings.**

In all civil and criminal actions and proceedings, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift the risk of non-persuasion, which remains upon the party on whom it was originally cast.

**SUB - CHAPTER FOUR**  
**RELEVANCY AND ITS LIMITS**

**Section 1704.01.     Definition of "Relevant Evidence"**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**Section 1704.02.     Relevant Evidence Generally Admissible Irrelevant Evidence Inadmissible**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the Sac and Fox Nation, by Act or Ordinance of the Business Committee, by this Act, or by other rules prescribed by the Supreme Court of the Nation pursuant to statutory authority. Evidence which is not relevant is not admissible.

**Section 1704.03.     Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence, or unfair and harmful surprise. However, in a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the Attorney General to show the general appearance and condition of the victim while alive.

**Section 1704.04.     Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes**

(A)     **Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except;

(1)     **Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same after the accused has offered such character evidence;

(2)     **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same after the accused has offered such character evidence, or evidence of a character trait of peacefulness of the

victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in Sections 1706.07, 1706.08, and 1706.09 of this Act.

(4) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

**Section 1704.05. Methods of Proving Character.**

(A) **Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(B) **Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

**Section 1704.06. Habit; Routine Practice.**

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

**Section 1704.07. Subsequent Remedial Measures.**

When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event, in order to encourage additional safety measures to be taken for the protection of the public whether or not the previous measures were sufficient to prevent a finding of negligent or culpable conduct. This Section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

**Section 1704.08. Compromise and Offers to Compromise.**

In order to encourage the non-judicial settlement of disputes, evidence of:

(A) furnishing or offering or promising to furnish, or

(B) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This Section does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This Section also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

**Section 1704.09. Payment of Medical and Similar Expenses.**

In order to encourage non-judicial settlement of disputes and to encourage persons to assist one another for their joint benefit, evidence of furnishing or offering or promising to pay, or the payment of medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury. Evidence of payment of such charges may be introduced by the person making such payment for the purpose of reducing a judgment for damages.

**Section 1704.10. Pleas and Plea Discussions; Admissibility of Evidence**

(A) Except as otherwise provided in this section evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty which is later withdrawn.

(B) However, such a statement is admissible in:

(1) any proceeding wherein another statement made in the course of the same plea

or plea discussions has been introduced and the statement, as a matter of justice, should be considered contemporaneously with it; or

(2) a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

**Section 1704.11. Liability Insurance.**

(A) Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This Section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

(B) In the sound discretion of the Tribal District Court, and subject to any exclusionary rule promulgated by Supreme Court of the Tribe, evidence that a person was or was not insured against liability and the limits of coverage and other relevant factors is admissible in a bifurcated jury or judge trial sounding in tort, or otherwise, in the second phase of the trial upon the issue of the amount of actual and consequential damages to be awarded, after liability has been determined in the first phase of the trial, as provided in the Civil Procedure Act.

**Section 1704.12. Sexual Offense Against Another Person; Evidence of Other Sexual Behavior Inadmissible; Exceptions**

(A) In a criminal case in which a person is accused of a sexual offense against another person, the following is not admissible:

(1) Evidence of reputation or opinion regarding other sexual behavior of a victim or the sexual offense alleged.

(2) Evidence of specific instances of sexual behavior of an alleged victim with persons other than the accused offered on the issue of whether the alleged victim consented to the sexual behavior with respect to the sexual offense alleged.

(B) The provisions of subsection (A) of this section do not require the exclusion of evidence of:

(1) Specific instances of sexual behavior if offered for a purpose other than the issue of consent, including proof of the source of semen, pregnancy, disease or injury;

(2) False allegations of sexual offenses; or

(3) Similar sexual acts in the presence of the accused with persons other than the accused which occurs at the time of the event giving rise to the sexual offense alleged.



(C) (1) If the defendant intends to offer evidence described in subsection B of this section, the defendant shall file a written motion to offer such evidence accompanied by an offer of proof not later than fifteen (15) days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties by counsel for the defendant and on the alleged victim by the district attorney.

(2) If the court determines that the motion and offer of proof described in paragraph 1 of this subsection contains evidence described in subsection B of this section, the court may order an in-camera hearing to determine whether the proffered evidence is admissible under subsection B of this section.

**Section 1704.13. Sexual Assault Offense; Commission of Other Offenses Admissible; Definition**

(A) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(B) In a case in which the tribe intends to offer evidence under this rule, the attorney for the tribe shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen (15) days before the scheduled date of trial or at such later time as the court may allow for good cause.

(C) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(D) For purposes of this rule, “offense of sexual assault” means a crime under federal law or the laws of this tribe that involve:

(1) Any conduct proscribed by Sections 230 through 242 of Title 10 of the Sac and Fox Code;

(2) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, emotional distress, or physical pain on another person; or

(5) An attempt or conspiracy to engage in conduct described in paragraphs 1 through 4 of this subsection.

**Section 1704.14. Child Molestation Offense; Commission of Other Offenses Admissible; Definitions**

(A) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(B) In a case in which the tribe intends to offer evidence under this rule, the attorney for the tribe shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen (15) days before the scheduled date of trial or at such later time as the court may allow for good cause.

(C) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(D) For purposes of this rule, "child" means a person below the age of sixteen (16), and "offense of child molestation" means a crime under federal law or the laws of this tribe that involve:

(1) Any conduct proscribed by Sections 230 through 242 of Title 10 of the Sac and Fox Code, that was committed in relation to a child;

(2) Contact between any part of the defendant's body or an object and the genitals or anus of a child;

(3) Contact between the genitals or anus of the defendant and any part of the body of a child;

(4) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, emotional distress, or physical pain on a child; or

(5) An attempt or conspiracy to engage in conduct described in paragraphs (1) through (4) of this subsection.

**SUB - CHAPTER FIVE  
PRIVILEGES**

**Section 1705.01. Privileges Recognized Only as Provided.**

Except as otherwise provided by the Tribal Constitution or Tribal Resolution or Ordinance, including this Act, or rules promulgated by the Supreme Court of the Tribe pursuant to legislative authority, or as may be required by federal law, no person has a privilege to:

- (A) refuse to be a witness;
- (B) refuse to disclose any matter;
- (C) refuse to produce any object or writing; or
- (D) prevent another from being a witness or disclosing any matter or producing any object or writing.

**Section 1705.02. Lawyer-Client Privilege.**

- (A) **Definitions.** As used in this Section:

(1) A "Client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law by any Indian tribe, or state, or nation.

(4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the retention of professional legal services to the client or those reasonable necessary for the transmission of the communication, including close relatives who assist the client in obtaining legal counsel and whom the client requests to be present during discussions with the lawyer for the purpose of obtaining representation.

(B) **General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.

(1) between himself or his representative and his lawyer or his lawyer's representative,

(2) between his lawyer and the lawyer's representative,

(3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein,

(4) between representatives of the client or between the client and a representative of the client, or

(5) among lawyers and their representatives representing the same client.

(C) **Who may claim the privilege.** The privilege may be claimed by the client, his guardian or conservator or close relative who assists in obtaining legal representation, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege on behalf of the client.

(D) **Exceptions.** There is no privilege under this Section:

(1) **Furtherance of crime or fraud.** If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) **Claimants through same deceased client.** As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by intervivos transaction;

(3) **Breach of duty by a lawyer or client.** As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) **Document attested by a lawyer.** As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) **Joint clients.** As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients or;

(6) **Public officer or agency.** As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending or contemplated investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest. Communications of the Sac and Fox Attorney General, Tribal Attorney or Special Counsel or Attorney to the Tribe and their associated attorneys are not within this exception unless such communications have been released for public information by the appropriate Tribal officials.

**Section 1705.03. Physician and Psychotherapist - Patient Privilege.**

(A) **Definitions.** As used in this Section:

(1) A "patient" is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A "physician" is a person authorized to practice medicine or the healing arts by any Indian tribe, or state, or nation, or reasonably believed by the patient so to be.

(3) A "psychotherapist" is:

(a) a person authorized to practice medicine or the healing arts by any Indian tribe, or state, or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or

(b) a person licensed or certified as a psychologist under the laws of any Indian tribe, or state, or nation, while similarly engaged.

(4) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(B) **General rule of privilege.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physical or psychotherapist, including members of the patient's family.

(C) **Who may claim the privilege.** The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication, and any other persons directly

involved in treatment sessions, are presumed to have authority to claim the privilege but only on behalf of the patient.

(D) **Exceptions.**

(1) **Proceeding for hospitalization.** There is no privilege under this Section for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the physician or psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) **Examination by order of court.** If the court orders an examination of the physical, mental or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this Section with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) **Condition an element of claim or defense.** There is no privilege under this Section as to a communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

**Section 1705.04. Husband and Wife Privilege.**

(A) **Definition.** A communication is confidential if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person.

(B) **General rule of privilege.** An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse.

(C) **Exceptions.** There is no privilege under this Section in a proceeding for legal separation or divorce between the parties when the communication is relevant to the issues in the action for separate maintenance or divorce, or in which one spouse is charged with a crime against the person or property of:

- (1) the other,
- (2) a child of either,
- (3) a person residing in the household of either, or
- (4) a third person committed in the course of committing a crime against any of them.

Except in an action brought by the Tribe to protect a child subject to abuse, neglect, or other cause which is sufficient to maintain a juvenile court action, testimony received pursuant to this exception in an action for divorce or legal separation between the husband and wife may not be used or referred to in any other proceeding between either the husband or wife and third persons.

**Section 1705.05. Religious Privilege.**

(A) **Definitions.** As used in this Section:

(1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science Practitioner, Native American Church Roadman, traditional clan chiefs or other similar functionary of a religious organization of a recognized active traditional Tribal religion, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present or to other persons to whom disclosure would be privileged under this Act if the disclosure had been made directly to such other person in furtherance of the purpose of the communication.

(B) **General rule of privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.

(C) **Who may claim the privilege.** The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication, is presumed to have authority to claim the privilege but only on behalf of the communicant.

**Section 1705.06. Political Vote.**

(A) **General rule of privilege.** Every person has a privilege to refuse to disclose the tenor of his vote at any political election conducted by secret ballot.

(B) **Exceptions.** This privilege does not apply if the court finds that the vote was cast illegally or determines that the disclosure should be compelled pursuant to the election laws of the Tribe.

**Section 1705.07. Trade Secrets.**

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure

is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interest of justice require.

**Section 1705.08. Secrets of the Tribal Government and Other Official Information: Governmental Privileges**

(A) If the law of the United States creates a governmental privilege that the courts of this Tribe must recognize under the Constitution and statutes of the United States, the privilege may be claimed as provided by the law of the United States.

(B) No other special governmental privilege is recognized except as created by the Constitution or statutes of the Tribe, including this Act.

(C) **Privileges Recognized.** The following governmental privileges are recognized:

(1) Elected members of the Business Committee have a privilege against disclosure of their mental processes and reasoning in the casting of any vote by them at a duly constituted meeting of that body, except in cases where it is alleged that unlawful influence or bribery or attempted bribery was involved in that vote. This privilege may be claimed only by the member and is waived if the member testifies as to such matters.

(2) Justices, Judges, and Magistrates have a privilege against disclosure of their mental processes and reasoning in the determination of any matter before them in any proceeding collateral to that matter, except in a collateral proceeding where it is alleged that unlawful influence or bribery or attempted bribery was involved in the underlying matter. The explanation and reasons for the decision of Judicial Officers which should appear on the record shall be sufficient. This Section shall not preclude the Supreme Court of the Tribe from remanding an action to a Judge or Magistrate for further findings of fact or conclusions of law in order to obtain an adequate record for review or to determine all issues necessary to a decision in a case.

(3) Tribal Officers charged with the institution of legal proceedings before any agency of the Tribe or the Tribal Courts to enforce Tribal law have a privilege against disclosure of their mental processes and reasoning in the determination of any matter brought before them for a decision as to whether or not to institute such legal proceedings.

(D) **Effect of sustaining claim.** If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the Government upon an issue as to which the evidence is relevant, or dismissing the action.

**Section 1705.09. Identity of Informer.**



(A) **Rule of privilege.** The Tribe, the United States, or a state, or subdivision thereof having police powers has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(B) **Who may claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(C) **Exceptions:**

(1) **Voluntary disclosure; informer a witness.** No privilege exists under this Section if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent or be adversely affected by the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.

(2) **Testimony on relevant issue.** If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the courts finds that there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose his identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply with a defense request for relevant information, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of him, prohibiting the prosecuting attorney from introducing specific evidence, and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court in camera shall be sealed and preserved to be made available to the Supreme Court in the event of an appeal and the contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except a showing *in camera* at which no counsel or party shall be permitted to be present.

**Section 1705.10. Waiver of Privilege by Voluntary Disclosure.**

A person upon whom this Chapter confers a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclose of any significant part of the privileged matter. This Section does not apply if the disclosure itself is privileged.

**Section 1705.11. Privileged Matter Disclosed Under Compulsion or without Opportunity to Claim Privilege.**

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

**Section 1705.12. Comment Upon and Inference From Claim of Privilege; Instruction.**

(A) **Comment or inference not permitted.** The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(B) **Claiming privilege without knowledge of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(C) **Jury instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

**SUB - CHAPTER SIX  
WITNESSES**

**Section 1706.01.     General Rules of Competency.**

Every person is competent to be a witness except as otherwise provided in this Act or other relevant Tribal law.

**Section 1706.02.     Lack of Personal Knowledge.**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This Section is subject to the provisions of Section 1707.03, relating to opinion testimony by expert witnesses.

**Section 1706.03.     Oath or Affirmation.**

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

**Section 1706.04.     Interpreters.**

An interpreter is subject to the provisions of this Act relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

**Section 1706.05.     Competency of Judge as Witness.**

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

**Section 1706.06.     Competency of Juror as Witness.**

(A)   **At the trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called to testify the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(B)   **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the

course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention, whether the jury determined the verdict, amount of damages, sentence or other matter relevant to a determination of the issues in the case by flipping a coin or other method determined purely by chance, or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

**Section 1706.07. Who May Impeach.**

The credibility of a witness may be attacked by any party, including the party calling him.

**Section 1706.08. Evidence of Character and Conduct of Witness.**

(A) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

- (1) the evidence may refer only to character for truthfulness or untruthfulness, and
- (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(B) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Section 1706.09, may not be proved by extrinsic evidence. Specific instances of conduct may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness

- (1) concerning his character for truthfulness or untruthfulness, or
- (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(C) **Special Rule for Criminal cases.** The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

**Section 1706.09. Impeachment by Evidence of Conviction of Crime.**

(A) **General Rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime

(1) was punishable by death or imprisonment in excess of one year under a federal or state law, under which he was convicted, and the Court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant (if it is the defendant in a criminal case whose credibility is being questioned), or

(2) involved dishonesty or false statement, regardless of the punishment or jurisdiction involved or

(3) was punishable by banishment or imprisonment for six months, or is otherwise classified as a serious offense under the laws of an Indian Tribe in whose Courts the conviction was obtained.

(B) **Time Limit.** Evidence of a conviction under this Section is not admissible if a period of more than ten years has lapsed since the date of the conviction or of the release of the witness from the confinement or other punishment imposed for that conviction, whichever is the later date, unless the Court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence. Subject to subsection (C) of this Section and the discretion of the Court, such convictions are admissible if other admissible convictions not ten years old as calculated herein have occurred since the conviction in question.

(C) **Effect of pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible under this Section if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which would be admissible under subparagraph (A) above, or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(D) **Juvenile adjudications.** Evidence of juvenile adjudications is generally not admissible under this Section. The Court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness, other than the accused, if conviction of the offense would be admissible to attack the credibility of an adult and the Court is satisfied that admission in evidence

is necessary for a fair determination of the issue of guilt or innocence of the accused.

(E) **Pendency of appeal.** The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible when evidence of the underlying convictions in the case has been introduced.

**Section 1706.10. Religious Beliefs or Opinions.**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reasons of their nature his credibility is impaired or enhanced.

**Section 1706.11. Mode and Order of Interrogation and Presentation.**

(A) **Control by Court.** The Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

- (1) make the interrogation and presentation effective for the ascertainment of the truth,
- (2) avoid needless consumption of time, and
- (3) protect witnesses from unnecessary harassment or undue embarrassment.

(B) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(C) **Leading questions.** A leading question is ordinarily a question which calls for a yes or no answer. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a child of young age, or other person who may have significant trouble understanding questions due to age, infirmity, lack of understanding of the English language, or other cause, a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

**§ 1706.12. Minor or Incapacitated Witnesses; Closing of Testimony to Public; Taking Testimony Outside Courtroom; Meeting in Chambers with Judge and Attorneys; Presence of Support Person**

(A) It is the intent of the Nation in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of incapacitated persons, while ensuring the rights of a criminal defendant and the integrity of the judicial process.

(B) As used in this section:

(1) “Support person” means a parent, other relative or a next friend chosen by the witness to accompany the witness to court proceedings;

(2) “Incapacitated witness” means any witness in a criminal proceeding that is a person who is defined as an incapacitated person or vulnerable adult as such terms are defined by the provisions of Section 8-103 of Title 13 of the Sac and Fox Codes; and

(3) “Witness” means incapacitated witness.

(C) The court, upon motion of counsel, shall conduct a hearing to determine whether the testimony of a witness shall be closed to the public. In making the decision, the court shall consider:

(1) The nature and seriousness of the issues in the proceeding;

(2) The age of the witness;

(3) The relationship, if any, of the witness to the defendant;

(4) The extent to which the size of the community would preclude the anonymity of the witness;

(5) The likelihood of public disgrace of the witness;

(6) Whether there is an overriding public interest in having the testimony of the witness presented in open court;

(7) The substantial risk that the identity of the witness would be disclosed to the public during the proceeding;

(8) The substantial probability that the disclosure of the identity of the witness would cause serious harm to the witness;

(9) Whether the witness has disclosed information concerning the case to the public in a manner which would preclude anonymity of the witness; and

(10) Other factors the court may deem necessary to protect the interests of justice.

(D) If the court determines that the testimony of the witness is to be closed to the public, the court shall in its order accordingly note such factors and set forth the persons who can be present during the taking of testimony of the witness, which shall include:

(1) The parties to the proceeding and their counsel;

(2) Any officer having custody of the witness;

(3) Court personnel as may be necessary to conduct the hearing and maintain order, including but not limited to the judge, the court clerk, the bailiff, and the court reporter;

(4) Jury members, if appropriate; and

(5) The witness and a support person for the witness.

(E) The testimony of the witness may be taken in the courtroom, in chambers, or in some other comfortable place. If the testimony of a witness is to be taken in a courtroom, the witness and support person shall be assembled in the court chambers prior to the taking of the testimony to meet for a reasonable period of time with the judge, and counsel for the parties. At this meeting court procedures shall be explained to the witness and counsel shall be given an opportunity to establish a rapport with the witness to facilitate taking the testimony of the witness at a later time. The facts involved in the proceeding shall not be discussed with the witness during this meeting.

(F) A witness shall have the right to be accompanied by a support person while giving testimony in the proceeding, but the support person shall not discuss the testimony of the witness with any other witnesses or attempt to prompt or influence the testimony of the witness in any way.

#### UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS

##### § 1706.13.01. Short Title

Sections 1706.13.01 to 1706.13.09 of this Chapter shall be known and may be cited as the “**Uniform Child Witness Testimony by Alternative Methods Act**”.

##### § 1706.13.02. Definitions

As used in the Uniform Child Witness Testimony by Alternative Methods Act:

(1) “**Alternative method**” means a method by which a child witness testifies which does not include all of the following:

(a) having the child testify in person in an open forum,

(b) having the child testify in the presence and full view of the finder of fact and presiding officer, and

(c) allowing all of the parties to be present, to participate, and to view and be viewed



by the child;

(2) “**Child witness**” means an individual under thirteen (13) years of age who has been or will be called to testify in a proceeding;

(3) “**Criminal proceeding**” means a deposition, conditional examination ordered pursuant to Sac and Fox Criminal Code, trial or hearing before a court in a prosecution of a person charged with violating a criminal law of this jurisdiction, a juvenile certified to stand trial as an adult pursuant to Section 102(a) of Title 20, Juvenile Procedure, of the Sac and Fox Code, a juvenile prosecuted as an adult pursuant to Section 3(m) of Title 20 of the Sac and Fox Code, or a delinquent child prosecuted pursuant to Section 340(a) of Title 20 of the Sac and Fox Code, and

(4) “**Noncriminal proceeding**” means a deposition, trial or hearing before a court or an administrative agency of this Nation having judicial or quasi-judicial powers, other than a criminal proceeding.

#### **§ 1706.13.03. Testimony to Which Act Applies; Other Procedures Not Precluded**

The Uniform Child Witness Testimony by Alternative Methods Act applies to the testimony of a child witness in a criminal or noncriminal proceeding. However, the Uniform Child Witness Testimony by Alternative Methods Act does not preclude, in a noncriminal proceeding, any other procedure permitted by law for a child witness to testify in a proceeding conducted pursuant to the Sac and Fox Juvenile Procedure Code.

#### **§ 1706.13.04. Hearing; Determination of Whether to Use Alternative Method Testimony**

(A) The judge or presiding officer in a criminal or noncriminal proceeding may order a hearing to determine whether to allow a child witness to testify by an alternative method. The judge or presiding officer, for good cause shown, shall order the hearing upon motion of a party, a child witness, or an individual determined by the judge or presiding officer to have sufficient standing to act on behalf of the child.

(B) A hearing to determine whether to allow a child witness to testify by an alternative method shall be conducted on the record after reasonable notice to all parties, any nonparty movant, and any other person the presiding officer specifies. The presence of the child is not required at the hearing unless ordered by the judge or presiding officer. In conducting the hearing, the judge or presiding officer shall not be bound by rules of evidence except the rules of privilege.

#### **§ 1706.13.05. Situations Where Alternative Method Testimony Permitted**

(A) In a criminal proceeding, the judge or presiding officer may allow a child witness to testify by an alternative method only in the following situations:

(1) The child may testify otherwise than in an open forum in the presence and full view of the finder of fact if the judge or presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to testify in the open forum; and

(2) The child may testify other than face-to-face with the defendant if the judge or presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant.

(B) In a criminal proceeding, the child may have an advocate appointed by the court to monitor the potential for emotional trauma. The advocate shall be a registered professional social worker, psychologist, or psychiatrist.

(C) In a noncriminal proceeding, the judge or presiding officer may allow a child witness to testify by an alternative method if the judge or presiding officer finds by a preponderance of the evidence that allowing the child to testify by an alternative method is necessary to serve the best interests of the child or enable the child to communicate with the finder of fact. In making the finding, the judge or presiding officer shall consider:

(1) The nature of the proceeding;

(2) The age and maturity of the child;

(3) The relationship of the child to the parties in the proceeding;

(4) The nature and degree of emotional trauma that the child may suffer in testifying;  
and

(5) Any other relevant factor.

**§ 1706.13.06. Determination of Whether to Allow Child Witness to Testify by an Alternative Method**

If the judge or presiding officer determines that a standard under Section 611.6 of this Act has been met, the judge or presiding officer shall determine whether to allow a child witness to testify by an alternative method and in doing so shall consider:

(1) Alternative methods reasonably available;

(2) Available means for protecting the interests of or reducing emotional trauma to the child without resort to an alternative method;

- (3) The nature of the case;
- (4) The relative rights of the parties;
- (5) The importance of the proposed testimony of the child;
- (6) The nature and degree of emotional trauma that the child may suffer if an alternative method is not used; and
- (7) Any other relevant factor.

**§ 1706.13.07. Order; Required Contents**

(A) An order allowing or disallowing a child witness to testify by an alternative method shall state the findings of fact and conclusions of law that support the determination of the judge or presiding officer.

(B) An order allowing a child witness to testify by an alternative method shall:

- (1) State the method by which the child is to testify;
- (2) List any individual or category of individuals allowed to be in, or required to be excluded from, the presence of the child during the testimony;
- (3) State any special conditions necessary to facilitate a party's right to examine or cross-examine the child;
- (4) State any condition or limitation upon the participation of individuals present during the testimony of the child; and
- (5) State any other condition necessary for taking or presenting the testimony.

C. The alternative method ordered by the judge or presiding officer shall not be more restrictive of the rights of the parties than is necessary under the circumstance to serve the purposes of the order.

**§ 1706.13.08. Opportunity for Examination and Cross-examination**

An alternative method ordered by the judge or presiding officer shall permit a full and fair opportunity for examination or cross-examination of the child witness by each party.

**§ 1706.13.09. Construction and Application of Act**

In applying and construing the Uniform Child Witness Testimony by Alternative Methods Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among jurisdictions that enact it.

**Section 1706.14. Writing Used to Refresh Memory.**

(A) If a witness uses a writing to refresh his memory either while testifying or before testifying, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

(B) If it is claimed that the writing contains matters not related to the subject matter of the testimony the Court shall examine the writing in camera, exercise any portions not so related and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the Supreme Court in the event of an appeal. If a writing is not produced or delivered pursuant to order of the Court under this Section, the Court shall make any order justice required, except that in criminal cases when the prosecution elects not to comply, the Court may declare a mistrial.

**Section 1706.15. Prior Statements of Witnesses.**

(A) **Examining witness concerning prior statements.** In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(B) **Extrinsic evidence of prior inconsistent statements of witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded in opportunity to explain or deny the same and the opposing party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Section 1708.01(D)(2).

**Section 1706.16. Calling and Interrogation of Witnesses by Court.**

(A) **Calling by Court.** The Court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(B) **Interrogation by Court.** The Court may interrogate witnesses, whether called by itself or by a party.

(C) **Objections.** Objections to the calling of witnesses by the Court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present. Ordinarily, the Court should exercise its authority to call or question witnesses with great restraint in a jury trial.

**Section 1706.17. Exclusion of Witnesses.**

At the request of a party the Court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This request may be made by a party by requesting that the Court "invoke the rule" or words of similar import. This rule does not authorize exclusion of

- (1) a party who is a natural person, or
- (2) an officer or employee of a party, designated as its representative by its attorney, when the party is not a natural person, or
- (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

**SUB - CHAPTER SEVEN  
OPINIONS AND EXPERT TESTIMONY**

**Section 1707.01.     Opinion Testimony by Lay Witnesses.**

If the witness is not testifying as an expert, his testimony in the form of opinion or inferences is limited to those opinions or inferences which are:

- (A)     rationally based on the perception of the witness;
- (B)     helpful to a clear understanding of his testimony or the determination of a fact in issue; and
- (C)     upon a subject which it is presumed that the general public has sufficient knowledge to reach a reasonable opinion, conclusion, or inference.

**Section 1707.02.     Testimony by Experts.**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

**Section 1707.03.     Bases of Opinion Testimony by Experts.**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

**Section 1707.04.     Opinion on Ultimate Issue.**

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

**Section 1707.05.     Disclosure of Facts or Data Underlying Expert Opinion.**

The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the Court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

**Section 1707.06. Court Appointed Experts.**

(A) **Appointment.** The Court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The Court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the Court unless he consents to act. A witness so appointed shall be informed of his duties by the Court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the Court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(B) **Compensation.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the Court may allow. The compensation thus fixed is payable from the Court fund, said fund to be reimbursed by the parties in such proportion and at such time as the Court directs, and thereafter charged in like manner as other costs.

(C) **Disclosure of Appointment.** In the exercise of its discretion, the Court may authorize disclosure to the jury of the fact that the Court appointed the expert witness.

(D) **Parties' Experts of Own Selection.** Nothing in this Section limits the parties in calling expert witnesses of their own selection.

SUB - CHAPTER EIGHT  
HEARSAY**Section 1708.01. Definitions.**

The following definitions apply under this Chapter:

(A) **Statement.** A "Statement" is:

- (1) an oral or written assertion or
- (2) Non-verbal conduct of a person, if it is intended by him as an assertion.

(B) **Declarant.** A "declarant" is a person who makes a statement.

(C) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. This Section generally includes affidavits and notarized statements unless made admissible by some one of these rules.

(D) **Statements which are not hearsay.** A statement is not hearsay if--

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

- (a) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or
- (b) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or
- (c) one of identification of a person or object made after perceiving him or it; or

(2) **Admission by party-opponent.** The statement is offered against a party and is:

- (a) his own statement, in either his individual or a representative capacity or
- (b) a statement of which he has manifested his adoption or belief in its truth, or
- (c) a statement by a person authorized by him to make a statement



concerning the subject, or

(d) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or

(e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

**Section 1708.02. Hearsay Rule.**

Hearsay is not admissible except as provided by this Act or by other rules prescribed by the Tribal Supreme Court pursuant to statutory authority or by Act or Ordinance of the Tribal Business Committee.

**Section 1708.03. Hearsay Exceptions; Availability of Declarant Immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(A) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(B) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(C) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(D) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(E) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(F) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, concerning acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(G) **Absence of entry in records kept in accordance with the provisions of Subsection (f).** Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of Subsection (f), to prove the non-occurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(H) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth

(1) the activities of the office or agency, or

(2) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or

(3) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(I) **Records of vital statistics.** Records or data compilations, in any form, of birth, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(J) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Section 1709.02, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(K) **Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood, marriage, or other similar acts of personal or family history, contained in a regularly kept record of a religious organization.

(L) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a

certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(M) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(N) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(O) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(P) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(Q) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(R) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination, or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or, established as a reliable authority by the testimony or admission of the witness or by other expert witness or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(S) **Reputation concerning personal or family history.** Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(T) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the Tribe or community or State or nation in which located.

(U) **Reputation as to character.** Reputation of a person's character among his associates or in the community.

(V) **Judgement of previous conviction.** Evidence of a final judgement, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime or offense, to prove any fact essential to sustain the judgment in the criminal case as against persons in any civil case, but not against the accused in a criminal case. The pendency of an appeal may be shown but does not affect admissibility.

(W) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the Court determines that

- (1) the statement is offered as evidence of a material fact;
- (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
- (3) the general purposes of this Act and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party in writing sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

**Section 1708.04. Hearsay Exceptions; Declarant Unavailable.**

(A) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant:

- (1) is exempted by ruling of the Court on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) persists in refusing to testify concerning the subject matter of his statements despite an order of the Court to do so; or
- (3) testifies to a lack of memory of the subject matter of his statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (B) (2),

(3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not available as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(B) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) **Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) **Statement of personal or family history.**

(a) statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the Court determines that:

(a) the statement is offered as evidence of a material fact;

(b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(c) the general purposes of this Act and the interests of justice will be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party in writing sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

**Section 1708.05. Hearsay Within Hearsay.**

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in this Act.

**Section 1708.06. Attacking and Supporting Credibility of Declarant.**

When the hearsay statement, or a statement defined in Section 1708.01(D)(2)(c), (d), or (e), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he be afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

**SUB - CHAPTER NINE**  
**AUTHENTICATION AND IDENTIFICATION**

**Section 1709.01.     Requirement of Authentication or Identification.**

(A)     **General provision.** The requirement of authentication or identification as condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(B)     **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Section:

(1)     **Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.

(2)     **Non-expert opinion on handwriting.** Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3)     **Comparison by trier or expert witness.** Comparison by the trier of fact or by expert witnesses with specimen which have been authenticated.

(4)     **Distinctive characteristics and the like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5)     **Voice identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstance connecting it with the alleged speaker.

(6)     **Telephone conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:

(a)     in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or

(b)     in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7)     **Public records or reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of

this nature are kept.

(8) **Ancient document or data compilation.** Evidence that a document or data compilation, in any form:

- (a) is in such condition as to create no suspicion concerning its authenticity,
- (b) was in a place where it, if authentic, would be likely to be, and
- (c) has been in existence 20 years or more at the time it is offered.

(9) **Methods provided by statute or rule.** Any method of authentication or identification provided by Act or Ordinance of the Tribal Business Committee or by other rules prescribed by the Tribal Supreme Court pursuant to statutory authority.

**Section 1709.02. Self-Authentication.**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any Indian Tribe, State, District, Commonwealth, territory, or insular possession thereof, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic public documents not under seal.** A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign public documents.** A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position:

- (a) of the executing or attesting person, or
- (b) of any foreign official whose certificate of genuineness of signature and official position related to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

A final certification may be made by a secretary of embassy or legation, consul general, consul, vice



consul, or consular agent of the United States, or a diplomatic or consular official of the foreign county assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the Court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) **Certified copies of public records.** A copy of an official record or report of entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Subsection (1), (2), or (3) of this Section or complying with any Act or Ordinance of the Tribal Business Committee or rule prescribed by the Supreme Court of the Tribe pursuant to statutory authority.

(5) **Official publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and periodicals.** Printed materials purporting to be newspapers or periodicals.

(7) **Trade inscriptions and the like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged documents.** Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments or administer oaths.

(9) **Commercial paper and related documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **Presumptions under Acts or Ordinances.** Any signature, document, or other matter declared by Act or Ordinance of the Tribal Business Committee to be presumptively or prima facie genuine or authentic.

**Section 1709.03. Subscribing Witness' Testimony Unnecessary.**

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

**SUB - CHAPTER TEN**  
**CONTENTS OF WRITING, RECORDINGS, AND PHOTOGRAPHS**

**Section 1710.01. Definitions.**

For the purpose of this article the following definitions are applicable:

(A) **Writings and recordings.** "Writings" and "recordings" consist of letters, words, or numbers or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical digital, or electronic recording, or other form of data compilation.

(B) **Photographs.** "Photographs" include still and digital photographs, X-ray films, video tapes, and motion pictures.

(C) **Original.** An "Original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "Original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "Original".

(D) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by mean of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

**Section 1710.02. Requirement of Original.**

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in this Act or by Act or Ordinance of the Tribal Business Committee.

**Section 1710.03. Admissibility of Duplicates.**

A duplicate is admissible to the same extent as an original unless:

- (A) a genuine question is raised as to the authenticity of the original or
- (B) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

**Section 1710.04. Admissibility of Other Evidence of Contents.**

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if -

(A) **Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(B) **Original not obtainable.** No original can be obtained by any available judicial process or procedure; or

(C) **Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be subject of proof at the hearing, and he does not produce the original at the hearing; or

(D) **Collateral matters.** The writings, recording, or photograph is not closely related to a controlling issue.

**Section 1710.05. Public Records.**

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilation in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Section 1709.02 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

**Section 1710.06. Summaries.**

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in Court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The Court may order that they be produced in Court.

**Section 1710.07. Testimony or Written Admission of Party.**

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the non-production of the original.

**Section 1710.08.      Functions of Court and Jury.**

When the admissibility of other evidence of contents of writings, recordings, or photographs under this Act depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the Court to determine in accordance with the provisions of Section 1701.04. However, when an issue is raised (A) whether the asserted writing ever existed, or (B) whether another writing, recording, or photograph produced at the trial is the original, or (C) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

**SUB - CHAPTER ELEVEN  
MISCELLANEOUS RULES**

**Section 1711.01.     Applicability of Rules.**

(A) This Act applies to all criminal and civil controversies arising from any transaction or occurrence occurring on land which lies within the jurisdiction of the Tribe and to all other criminal or civil controversies which are subject to the lawful jurisdiction of the Courts of the Tribe.

(B) This Act applies generally to civil actions and proceedings, to criminal actions and proceedings and to contempt proceedings except those in which the Court may act summarily.

(C) The Chapter with respect to privileges applies at all stage of all actions, cases, and proceedings.

(D) This Act (other than with respect to privileges) do not apply in the following situations:

(1) When the Court must make preliminary findings of fact in order to rule on the admissibility of evidence under Section 1701.04.

(2) Proceedings for extradition, preliminary examinations and arraignments in criminal cases, sentencing, granting or revoking parole or probation, issuance of warrants for arrest, criminal summonses, and search warrants, the dispositional phase of juvenile proceedings, and proceedings with respect to release on bail or otherwise.

**Section 1711.02.     Amendments.**

The Supreme Court shall have the power to prescribe amendments to this Act except with respect to any of these rules relating to privileges. Such amendments shall not take effect until they have been reported in writing to the Tribal Business Committee by the Chief Justice and until the expiration of ninety days after they have been so reported; but if a majority of the participating Tribal Business Committee within that time shall by formal affirmative written action disapprove any amendment so reported it shall not take effect. The effective date of any amendment so reported may be deferred by a majority of the Tribal Business Committee. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect. Any proposed amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by Act of the Tribal Business Committee. Upon becoming effective, all amendments made by the Tribal Supreme Court shall be incorporated into this ordinance and thereafter have the force and effect of a Tribal Statute.