

**RULES OF EVIDENCE OF THE TRIBAL
COURT OF THE BLUE LAKE RANCHERIA**

The Chief Judge of the Tribal Court of the Blue Lake Rancheria ("Tribe"), in consultation with the Business Council of the Tribe, does hereby promulgate the following rules of evidence which shall govern and be applicable to any and all proceedings of the Tribal Court. Except as otherwise provided by these rules, the following rules of evidence shall apply to every action before the Tribal Court of the Tribe:

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Chapter 1

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Rule 1. Application of definitions. Unless the provision or context otherwise requires, these definitions govern the construction of these rules.

Rule 2. Burden of producing evidence. "Burden of producing

evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against that party on the issue.

Rule 3. Burden of proof. "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he/she establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by these rules, the burden of proof requires proof by a preponderance of the evidence.

Rule 4. Civil action. "Civil action" includes all civil proceedings of every kind.

Rule 5. Conduct. "Conduct" includes all active and passive behavior, both verbal and nonverbal.

Rule 6. Declarant. "Declarant" is a person who makes a statement.

Rule 7. Evidence. "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

Rule 8. Proof. "Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.

Rule 9. Public employee. "Public employee" means an officer, agent or employee of a public entity.

Rule 10. Public entity. "Public entity" includes a tribe, nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic.

Rule 11. Relevant evidence. "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

Rule 12. State. "State" means any state, district, commonwealth, territory, or insular possession of the United States.

Rule 13. Statement. "Statement" means (a) an oral or written verbal expression or (b) nonverbal conduct of a person intended by him/her as a substitute for oral or written verbal expression.

Rule 14. Tribe. "Tribe" means an Indian tribe, band, nation, or other organized group or community which is recognized as eligible

for services provided by the United States because of their status as an Indian Tribe.

Rule 15. Unavailable as a witness.

(a) Except as otherwise provided in subdivision (b) below, "unavailable as a witness" means that the declarant is:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his/her statement is relevant;

(2) Disqualified from testifying to the matter;

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity;

(4) Absent from the hearing and the court is unable to compel his/her attendance by its process; or

(5) Absent from the hearing and the proponent of his/her statement has exercised reasonable diligence but has been unable to procure his/her attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his/her statement for the purpose of preventing the declarant from attending or testifying.

Rule 16. Writing. "Writing" means handwriting, typewriting, printing, photocopying, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.

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Rule 17. Questions of law for court. All questions of law (including but not limited to questions concerning the construction of tribal, state or federal laws and other writings, the admissibility of evidence, and other rules of evidence) are to be decided by the court. Determination of issues of fact preliminary to the admission of evidence are to be decided by the court as provided in these rules.

Rule 18. Jury as trier of fact. Except as otherwise provided by applicable federal or tribal law or these rules where the trial is by jury:

(a) All questions of fact are to be decided by the jury.

(b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

Rule 19. Power of court to regulate order of proof. Except as otherwise provided by applicable federal or tribal law, the court in its discretion shall regulate the order of proof.

Rule 20. Only relevant evidence admissible. No evidence is admissible except relevant evidence.

Rule 21. Admissibility of relevant evidence. Except as otherwise provided by applicable federal or tribal law or these rules, all relevant evidence is admissible.

Rule 22. Discretion of court to exclude evidence. The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create a substantial

danger of undue prejudice, of confusing the issues, or of misleading the jury.

Rule 23. Effect of erroneous admission of evidence. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

Rule 24. Effect of erroneous exclusion of evidence. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;

(b) The rulings of the court made compliance with subdivision (a) futile; or

(c) The evidence was sought by questions asked during cross-examination or recross-examination.

Rule 25. Entire act, declaration, conversation, or writing may be brought out to elucidate part offered. Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

Rule 26. Preliminary fact. As used in these rules, "preliminary fact" means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence. The phrase "the admissibility or inadmissibility of evidence" includes the qualification or disqualification of a person to be a witness and the existence or nonexistence of a privilege.

Rule 27. Proffered evidence. As used in these rules, "proffered evidence" means evidence, the admissibility or inadmissibility of

which is dependent upon the existence or nonexistence of a preliminary fact.

Rule 28. Procedure for determining foundational and other preliminary facts.

(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this rule.

(b) In the case of a jury trial, the court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury.

(c) A ruling on the admissibility of evidence implies whatever finding of fact is a prerequisite thereto; a separate or formal finding is unnecessary unless required by law or else by these rules.

Rule 29. Determination of foundational and other preliminary facts where relevancy, personal knowledge, or authenticity is disputed.

(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his/her testimony;

(3) The preliminary fact is the authenticity of a writing;
or

(4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself/herself.

Rule 30. Determination of whether proffered evidence is

incriminatory. Whenever the proffered evidence is claimed to be privileged under these rules, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him/her; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

Rule 31. Direct evidence. As used in this chapter, "direct evidence" means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively

establishes that fact.

Rule 32. Direct evidence of one witness sufficient. Except where additional evidence is required by law or these rules, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.

Rule 33. Party's failure to explain or deny evidence. In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his/her testimony such evidence or facts in the case against him/her, or his/her willful suppression of evidence relating thereto, if such be the case.

Rule 34. Judicial notice may be taken only as authorized by these rules. Judicial notice may not be taken of any matter unless authorized or required by these rules.

Rule 35. Matters which must be judicially noticed. Judicial notice shall be taken of:

(a) The decisional, constitutional and statutory law of the Tribe, a state and the United States.

(b) Rules of pleading, practice, and procedure prescribed by the Tribal Court, United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.

(c) The true signification of all English words and phrases and of all legal expressions.

(d) The official membership role of any Indian Tribe.

(e) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

Rule 36. Matters which may be judicially noticed. Judicial notice may be taken of the following matters to the extent that they are not embraced within Rule 35:

(a) The decisional, constitutional, and statutory law of any Tribe, state of the United States or public entity and the resolutions and private acts of the Congress of the United States and of the legislature of any state.

(b) Regulations and legislative enactments issued by or under the authority of the United States, Tribe or any public entity.

(c) Official acts of the legislative, executive, and judicial departments of the United States, any Tribe or of any state of the United States.

(d) Records of any court of record of the United States, of any Tribe, or of any state of the United States.

(e) Rules of court of the United States, any Tribe or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

Rule 37. Compulsory judicial notice upon request. The Tribal Court shall take judicial notice of any matter specified in Rule 36 if a party requests it and:

(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Rule 38. Information that may be used in taking judicial notice.

(a) In determining the propriety of taking judicial notice of a matter, or the tenor thereof:

(1) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party.

(2) Exclusionary rules of evidence do not apply except for Rule 22 and the rules of privilege.

(b) Where the subject of judicial notice is the law of an organization of nations, a foreign nation, or a public entity in a foreign nation and the court resorts to the advice of persons learned in the subject matter, such advice, if not received in open court, shall be in writing.

(c) If the trial court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

Rule 39. Noting for record denial of request to take judicial notice.

If the trial court denies a request to take judicial notice of any matter, the court shall at the earliest practicable time so advise the parties and indicate for the record that it has denied the request.

Rule 40. Judicial notice by trial court in subsequent proceedings.

The failure or refusal of the trial court to take judicial notice of a matter does not preclude the trial court in subsequent proceedings in the action from taking judicial notice of the matter in accordance with the procedure specified in this division.

Chapter 5

**Burden of Proof, Burden of Producing Evidence;
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Rule 41. Party who has the burden of proof. Except as otherwise provided by tribal or federal law or these rules, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he/she is asserting.

Rule 42. Claim that person guilty of crime or wrongdoing. The party claiming that a person is guilty of crime or wrongdoing has the burden

of proof on that issue.

Rule 43. Claim that person did not exercise care. The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue.

Rule 44. Claim that person is or was insane. The party claiming that any person, including himself/herself, is or was insane has the burden of proof on that issue.

Rule 45. Party who has the burden of producing evidence.

(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence.

(b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact.

Rule 46. Presumption and inference defined.

(a) A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.

(b) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.

Rule 47. Classification of presumptions. A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.

Rule 48. Effect of presumption affecting burden of producing evidence. The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding or its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.

Rule 49. Effect of presumption affecting burden of proof. The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the non-existence of the presumed fact.

Rule 50. Conclusive presumptions. The presumptions established by this Chapter, and all other presumptions declared by tribal law or these rules to be conclusive, are conclusive presumptions.

Rule 51. Legitimacy. Notwithstanding any other provision of law, the children of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate.

Rule 52. Facts recited in written instrument. The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.

Rule 53. Estoppel by own statement or conduct. Whenever a party has, by his/her own statement or conduct, intentionally and deliberately led another to believe a particular thing is true and to act upon such belief, he/she is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

Rule 54. Presumptions affecting the burden of producing evidence. The presumptions established by this Chapter are presumptions affecting the burden of producing evidence.

Rule 55. Money delivered by one to another. Money delivered by one to another is presumed to have been due to the latter.

Rule 56. Thing delivered by one to another. A thing delivered by one to another is presumed to have belonged to the latter.

Rule 57. Ownership of things possessed. The things which a person possesses are presumed to be owned by him/her.

Rule 58. Writing truly dated. A writing is presumed to have been truly dated.

Rule 59. Letter received in ordinary course of mail. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.

Rule 60. Authenticity of ancient document. A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if it:

- (a) Is at least 30 years old;
- (b) Is in such condition as to create no suspicion concerning its authenticity;
- (c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and
- (d) Has been generally acted upon as authentic by persons having an interest in the matter.

Rule 61. Legitimacy. A child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution

thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the husband of the wife, or the descendant of one or both of them. In a civil action, this presumption may be rebutted only by clear and convincing proof.

Rule 62. Owner of legal title to property is owner of beneficial title. The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

Rule 63. Death of person not heard from in seven years. A person not heard from in seven years is presumed to be dead.

Chapter 6

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Rule 64. General rule as to competency. Except as otherwise provided by these rules or tribal law, every person is qualified to be a witness and no person is disqualified to testify to any matter.

Rule 65. Disqualification of witness. A person is disqualified to be a witness if he/she is:

(a) Incapable of expressing himself/herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him/her; or

(b) Incapable of understanding the duty of a witness to tell the truth.

Rule 66. Personal knowledge of witness.

(a) Subject to Rule 106, the testimony of a witness concerning a particular matter is inadmissible unless he/she has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

(b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his/her own testimony.

Rule 67. Judge as witness.

(a) Before the judge presiding at the trial of an action may be called to testify in that trial as a witness, he/she shall, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he/she has concerning any fact or matter about which he/she will be called to testify.

(b) Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. Upon such objection, the judge shall declare a mistrial and order the action assigned for trial before another judge.

(c) The calling of the judge presiding at a trial to testify in that trial as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a judge shall be deemed a motion for mistrial.

(d) In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness.

Rule 68. Oath required. Every witness before testifying shall take an oath or make an affirmation or declaration in the form established by the Chief Judge of the Tribal Court for that purpose.

Rule 69. Confrontation. At the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

Rule 70. Qualification as an expert witness.

(a) A person is qualified to testify as an expert if he/she has special knowledge, skill experience, training, or education sufficient to qualify him/her as an expert on the subject to which his/her testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

(b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his/her own testimony.

Rule 71. Cross-examination of expert witness.

(a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his/her qualifications, (2) the subject to which his/her expert testimony relates, and (3) the matter upon which his/her opinion is based and the reasons for his/her opinion.

(b) If a witness testifying as an expert testifies in the form of an opinion, he/she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless:

(1) The witness referred to, considered, or relied upon such publication in arriving at or forming his/her opinion; or

(2) Such publication has been admitted into evidence.

Rule 72. Credibility of expert witness. The compensation and expenses paid or to be paid to an expert witness by the party calling his/her is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his/her testimony.

Rule 73. Appointment of expert by court. When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to

the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which such expert evidence is or may be required. The court may fix the compensation for such services, if any, rendered by any person appointed under this Rule, in addition to any service as a witness, at such amount as seems reasonable to the court subject to those amounts being appropriated and approved by the Tribal Council in the Tribal Court's budget.

Rule 74. Calling and examining court-appointed expert. Any expert appointed by the court under Rule 73 may be called and examined by the court or by any party to the action. When such witness is called and examined by the court, the parties shall have the right to cross-examine the witness and to object to the questions asked and the evidence adduced.

Rule 75. Rules relating to witnesses apply to interpreters and translators. A person who serves as an interpreter or translator in any action is subject to all the rules of evidence relating to witnesses.

Rule 76. Oath required of interpreters and translators.

(a) An interpreter shall take an oath that he/she will make a true interpretation to the witness in a language that the witness understands and that he/she will make a true interpretation of the witness' answers to questions to counsel, court, or jury, in the English language, with his/her best skill and judgment.

(b) A translator shall take an oath that he/she will make a true translation in the English language of any writing he/she is to decipher or translate.

Rule 77. Interpreters for witnesses.

(a) When a witness is incapable of hearing or understanding the English language or is incapable of expressing himself/herself in the English language so as to be understood directly by counsel, court, and jury, an interpreter whom he/she can understand and who can understand him/her shall be sworn to interpret for him/her.

(b) The interpreter may be appointed by the Chief Judge and compensation by the party requesting the interpreter or by the Court in such an amount as the Tribal council of the Tribe shall establish by resolution provided there are sufficient funds available in the Tribal Court budget for this purpose.

Rule 78. Translators of writings. When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language may be sworn to decipherer or translator the

writing. The party seeking to introduce the writing into evidence shall pay for the costs or fees of the translator to decipher the writing.

Rule 79. Direct examination. "Direct examination" is the first examination of a witness upon a matter that is not within the scope of a previous examination of the witness.

Rule 80. Cross-examination. "Cross-examination" is the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness.

Rule 81. Redirect examination. "Redirect examination" is an examination of a witness by the direct examiner subsequent to the cross-examination of the witness.

Rule 82. Recross-examination. "Recross-examination" is an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness.

Rule 83. Leading question. A "leading question" is a question the suggests to the witness the answer that the examining party desires.

Rule 84. Court to control mode of examination. The court shall exercise reasonable control over the mode of examination of a witness so as (a) to make such examination as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and (b) to protect the witness from undue harassment or embarrassment.

Rule 85. Responsive answers. A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party.

Rule 86. Leading questions. Except under special circumstances where the interests of justice otherwise require:

(a) A leading question may not be asked of a witness on direct or redirect examination.

(b) A leading question may be asked of a witness on cross-examination or recross-examination.

Rule 87. Writings.

(a) In examining a witness concerning a writing, it is not necessary to show, read, or disclose to him/her any part of the writing.

(b) If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any questions concerning it may be asked of the witness.

Rule 88. Evidence of inconsistent statement of witness. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his/her testimony at the hearing shall be excluded unless:

(a) The witness was so examined while testifying as to give him/her an opportunity to explain or to deny the statement; or

(b) The witness has not been excused from giving further testimony of the action.

Rule 89. Production of writing used to refresh memory.

(a) Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his/her memory with respect to any matter about which he/she testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.

(b) If the writing is produced at the hearing, the adverse party may, if he/she chooses, inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness.

(c) Production of the writing is excused, and the testimony of the witness shall not be stricken, if the writing:

(1) Is not in the possession or control of the witness or the party who produced his/her testimony concerning the matter; and

(2) Was not reasonably procurable by such party through the use of the court's process or other available means.

Rule 90. Order of examination.

(a) The examination of a witness shall proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination.

(b) Unless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the succeeding phase begins.

(c) A party may, in the discretion of the court, interrupt his/her cross-examination, redirect examination, or recross-examination of a witness, in order to examine the witness upon a matter not within the scope of a previous examination of the witness.

Rule 91. Cross-examination.

(a) A witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each other party to the action in such order as the court directs.

(b) The cross-examination of a witness by any party whose interest is not adverse to the party calling him/her is subject to the same rules that are applicable to the direct examination.

Rule 92. Re-examination. A witness once examined cannot be re-examined as to the same matter without leave of the court, but he/she may be re-examined as to any new matter upon which he/she has been examined by another party to the action. Leave may be granted or withheld in the court's discretion.

Rule 93. Court may call witnesses. The court, on its own motion or on the motion of any party, may call witnesses and examine them the same as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced the same as if such witnesses were called and examined by an adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the court directs.

Rule 94. Examination of adverse party or witness.

(a) A party of record to any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness.

(b) A witness examined by a party under this Rule may be cross-examined by all other parties to the action in such order as the court directs; but the witness may be examined only as if under redirect examination by:

(1) In the case of a witness who is a party, his/her own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

(c) For the purpose of this Rule, parties represented by the same counsel are deemed to be a single party.

(d) For the purpose of this Rule, a person is identified with a party if he/she is:

(1) A person for whose immediate benefit the action is prosecuted or defended by the party.

(2) A director, officer, superintendent, member, agent,

employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of the Tribe or a public entity when such public entity is the party.

(3) A person who was in any of the relationships specified in paragraph (2) at the time he/she obtained knowledge of the matter concerning which he/she is sought to be examined under this section.

Rule 95. Exclusion of witness.

(a) Subject to subdivision (b) and (c), the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.

(b) A party to the action cannot be excluded under this section.

(c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.

Rule 96. Recall of witness. After a witness has been excused from giving further testimony in the action, he/she cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion.

Rule 97. General rule as to credibility. Except as otherwise provided by these rules or tribal law, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his/her testimony at the hearing, including but not limited to any of the following:

(a) His/her demeanor while testifying and the manner in which he/she testifies.

(b) The character of his/her testimony.

(c) The extent of his/her capacity to perceive, to recollect, or to communicate any matter about which he/she testifies.

(d) The extent of his/her opportunity to perceive any matter about which he/she testifies.

(e) His/her character for honesty or veracity or their opposites.

(f) The existence or nonexistence of a bias, interest, or other motive.

(g) A statement previously made by him/her that is inconsistent with his/her testimony at the hearing.

(i) A statement made by him/her that is inconsistent with his/her testimony at the hearing.

(h) A statement made by him/her that is inconsistent with any part of his/her testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by him/her.

(j) His/her attitude toward the action in which he/she testifies or toward the giving of testimony.

(k) His/her admission of untruthfulness.

Rule 98. Parties may attack or support credibility. The credibility of a witness may be attacked or supported by any party, including the party calling him/her.

Rule 99. Character evidence generally. Evidence of traits of his/her character other than honesty or veracity, or their opposites, is admissible to attack or support the credibility of a witness.

Rule 100. Specific instances of conduct. Subject to Rule 101, evidence of specific instances of his/her conduct relevant only as tending to prove a trait of his/her character is inadmissible to attack or support the credibility of a witness.

Rule 101. Prior felony conviction. For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he/she has been convicted of a felony unless:

(a) A pardon based on his/her innocence has been granted to the witness by the jurisdiction in which he/she was convicted.

(b) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure established by law in that jurisdiction.

Rule 102. Religious belief. Evidence of his/her religious belief or lack thereof is admissible to attack or support the credibility of a witness.

Rule 103. Good character of witness. Evidence of the good character of a witness is inadmissible to support his/her credibility unless evidence of his/her bad character has been admitted for the purpose of attacking his/her credibility.

Rule 104. Prior consistent statement of witness. Evidence of a statement previously made by a witness that is consistent with his/her testimony at the hearing is inadmissible to support his/her

credibility unless it is offered after:

(a) Evidence of a statement made by him/her that is inconsistent with any part of his/her testimony at the hearing has been admitted for the purpose of attacking his/her credibility, and the statement was made before the alleged inconsistent statement; or

(b) An express or implied charge has been made that his/her testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

Chapter 7

Opinion Testimony and Scientific Evidence

Rule:

- 105 Opinion Testimony by Law Witness
- 106 Opinion Testimony by Expert Witness
- 107 Statement of Basis of Opinion
- 108 Opinion Based on Improper Matter
- 109 Opinion Based on Opinion or Statement of Another
- 110 Opinion on Ultimate Issue
- 111 Opinion As to Sanity
- 112 Order for Blood Tests in Action Involving Paternity
- 113 Tests Made by Experts
- 114 Compensation of Experts
- 115 Determination of Paternity
- 116 General Rules As to Privilege
- 117 Waiver of Privilege
- 118 Comment On and Inferences From, Exercise of Privilege
- 119 Disclosure of Privileged Information In Ruling On Claim of Privilege
- 120 Presumption That Certain Communications Are Confidential
- 121 Effect of Error in Overruling Claim of Privilege
- 122 Admissibility Where Disclosure Erroneously Compelled
- 123 Privilege Against Self-Incrimination
- 124 Confidential Communication Between Client and Lawyer/ Advocate
- 125 Lawyer-Client Privilege
- 126 When Lawyer Required to Claim Privilege
- 127 Exception: Crime or Fraud
- 128 Privilege Not to Testify Against Spouse
- 129 When Privilege Not Applicable
- 130 Waiver of Privilege
- 131 Confidential Communication Between Patient and Physician
- 132 Holder of the Privilege
- 133 Physician-Patient Privilege
- 134 When Physician Required to Claim Privilege

Rule 105. Opinion testimony by lay witness. If a witness is not testifying as an expert, his/her testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:

- (a) Rationally based on the perception of the witness; and
- (b) Helpful to a clear understanding of his/her testimony.

Rule 106. Opinion testimony by expert witness. If a witness is testifying as an expert, his/her testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his/her special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him/her at or before the hearing, whether or not admissible, that is of a type that reasonably may be relief upon by an expert in forming an opinion upon the subject to which his/her testimony relates, unless an expert is precluded by law from using such matter as a basis for his/her opinion.

Rule 107. Statement of basis of opinion. A witness testifying in the form of an opinion may state on direct examination the reasons for his/her opinion and the matter (including, in the case of an expert, his/her special knowledge, skill, experience, training, and education) upon which it is based, unless he/she is precluded by law from using such reasons or matter as a basis for his/her opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his/her opinion is based.

Rule 108. Opinion based on improper matter. The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his/her opinion, then state his/her opinion after excluding from consideration the matter determined to be improper.

Rule 109. Opinion based on opinion or statement of another.

(a) If a witness testifying as an expert testifies that his/her opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.

(b) This section is not applicable if the person upon whose

opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert witness has relied.

(c) Nothing in this Rule makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(d) An expert opinion otherwise admissible is not made inadmissible by this Rule because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this Rule.

Rule 110. Opinion on ultimate issue. Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

Rule 111. Opinion as to sanity. A witness may state his/her opinion as to the sanity of a person when:

(a) The witness is an intimate acquaintance of the person whose sanity is in question;

(b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and the opinion relates to the sanity of such person at the time the writing was signed; or

(c) The witness is qualified under Rule 105 or 106 to testify in the form of an opinion.

Rule 112. Order for blood tests in actions involving paternity. In any action in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, and shall upon motion of any party to the action made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

Rule 113. Tests made by experts. Paternity tests shall be made by experts qualified as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of the court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court.

Rule 114. Compensation of experts. The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, and that, after payment by the parties all or part or none of it be taxed as costs in the action.

Rule 115. Determination of paternity. If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence.

Rule 116. General rule as to privileges. Except as otherwise provided by statute:

(a) No person has a privilege to refuse to be a witness.

(b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.

(c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.

Rule 117. Waiver of privilege.

(a) Except as otherwise provided in this Rule, the right of any person to claim a privilege provided by these rules [i.e. (lawyer-client privilege), (privilege for confidential marital communications), (physician-patient privilege)] is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his/her consent to the disclosure, including his/her failure to claim the privilege in any proceeding in which he/she has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by these rules, a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege for confidential marital communications, a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a lawyer-client privilege or physician-patient privilege, when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer or physician was consulted, is not a waiver of the privilege.

Rule 118. Comment on, and inferences from, exercise of privilege.

If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding Judge nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

Rule 119. Disclosure of privileged information in ruling on claim of privilege.

Subject to subdivision (b), the presiding Judge may not require disclosure of information claimed to be privileged under this chapter in order to rule on the claim of privilege.

Rule 120. Presumption that certain communications are confidential.

Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

Rule 121. Effect of error in overruling claim of privilege.

A party may predicate error on a ruling disallowing a claim of privilege only if he/she is the holder of the privilege, except that party may predicate error on a ruling disallowing a claim of privilege by his/her spouse.

Rule 122. Admissibility where disclosure erroneously compelled.

Evidence of a statement or other disclosure of privileged information is inadmissible against a holder of the privilege if:

(a) A person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made; or

(b) The presiding Judge did not exclude the privileged information as required by these Rules.

Rule 123. Privilege against self-incrimination. To the extent that such privilege exists under the Constitution of the United States or Tribal Law, a person has a privilege to refuse to disclose any matter that may tend to incriminate him/her.

Rule 124. Confidential communication between client and lawyer/advocate. As used in this article, "confidential

communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes advice given by the lawyer in the course of that relationship. As used herein the term lawyer means a person authorized to practice law by any Tribe, State or nation and includes Tribal Court advocates.

Rule 125. Lawyer-client privilege. Except as otherwise provided in these rules, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

Rule 126. When lawyer required to claim privilege. The lawyer who received or made a communication subject to the privilege under this chapter shall claim the privilege whenever he/she is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Rule 125.

Rule 127. Exception: Crime or fraud. There is no privilege under this chapter if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

Rule 128. Privilege not to testify against spouse. Except as otherwise provided by tribal law, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding or testify against his/her spouse without the prior express consent of the spouse having the privilege under this Rule.

Rule 129. When privilege not applicable. A married person does not have a privilege under this chapter in:

- (a) A proceeding brought by or on behalf of one spouse against the other spouse.
- (b) A proceeding to commit or otherwise place his/her spouse or

his/her spouse's property, or both, under the control of another because of the spouse's alleged mental or physical condition.

(c) A proceeding brought by or on behalf of a spouse to establish his/her competence.

(d) A proceeding under the Tribes Child Welfare Ordinance.

Rule 130. Waiver of Privilege.

(a) Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his/her spouse is a party, or who testifies against his/her spouse in any proceeding, does not have a privilege under this chapter in the proceeding in which such testimony is given.

(b) There is no privilege under this chapter in any proceeding brought or defended by a married person for the immediate benefit of his/her spouse or of himself/herself and his/her spouse.

Rule 131. Confidential communication between patient and physician.

As used in this chapter, "confidential communication between patient and physician" means information including information obtained by an examination of the patient, transmitted between a patient and his/her physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonable necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes advice given by the physician in the course of the relationship. As used herein the term physician means a person authorized by any state or nation to practice medicine.

Rule 132. Holder of the privilege. As used in this chapter, "holder of the privilege" means:

(a) the patient, client, spouse when he/she has no guardian or conservator.

(b) A guardian or conservator of the patient, client or spouse when the patient, client or spouse has a guardian or conservator.

(c) The personal representative of the patient, client or spouse if the patient, client or spouse is dead.

Rule 133. Physician-patient privilege. Except as otherwise provided in this chapter, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the physician at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he/she is otherwise instructed by a person authorized to permit disclosure.

Rule 134. When physician required to claim privilege. The physician who received or made a communication subject to the privilege under this chapter shall claim the privilege whenever he/she is present when the communication is sought to be disclosed and is authorized to claim the privilege under Rule 133 (c).

Chapter 8

Evidence Affected or Excluded By Extrinsic Policies

Rule:

- 135 Manner of Proof of Character
- 136 Evidence of Character to Prove Conduct
- 137 Character Trait for Care or Skill
- 138 Habit or Custom to Prove Specific Behavior

Rule 135. Manner of proof of character. Except as otherwise provide by tribal law or these rules, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his/her character.

Rule 136. Evidence of character to prove conduct.

(a) Except as provided in this Rule, evidence of a person's character or a trait of his/her character (whether in the form of an opinion, evidence of reputation, or evidence or specific instances of his/her conduct) is inadmissible when offered to prove his/her conduct on a specified occasion.

(b) Nothing in this Rule prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his/her disposition to commit such acts.

(c) Nothing in this Rule affects the admissibility of evidence offered to support or attack the credibility of a witness.

Rule 137. Character trait for care or skill. Evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his/her conduct on a specified occasion.

Rule 138. Habit or custom to prove specific behavior. Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

Chapter 9

Hearsay Evidence

Rule:

139 Definitions
140 Hearsay Rule
141 Hearsay Exceptions; Availability of Declarant Immaterial
142 Hearsay Exceptions; Declarant Unavailable
143 Traditional Oral Histories
144 Attacking and Supporting Credibility of Declarant

Rule 139. Definitions. The following definitions apply under this chapter:

(a) Statement. A "Statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "Declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is an out-of-court statement offered to prove the truth of the matter asserted.

(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 the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant or recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement

concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the 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.

Rule 140. Hearsay rule. Hearsay is not admissible except as provided by these rules.

Rule 141. Hearsay exceptions; Availability of declarant immaterial. The following are admissible, 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 declarants 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 declarants 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 the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' 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, of acts, events, conditions, opinions, or diagnoses, 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 paragraph (6). 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 paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was 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 (A) the activities of the office or agency, or (B) 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 (C) in civil actions and proceedings 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 births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to the requirements of law.

(j) Absence of public record of entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which 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 these rules, 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 or marriage, or other similar facts or 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 an 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 the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as reliable authority by the testimony or admission of the witness or by other expert testimony 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 a person's family by blood, adoption, or marriage, or among a person's 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 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, community or State or nation in which located.

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

(v) Judgment of previous conviction. Evidence of a final judgment, entered after trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(w) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment if the same would be provable by evidence or reputation.

(x) 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 these rules 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 sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 142. 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 the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's 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 a statement has been unable to procure the declarants attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), the declarants attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement of wrongdoing of the proponent of a 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 or impending death. In a civil action or proceeding, a statement made by a declarant while believing that the declarants death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarants pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarants position would not have made the statement unless believing 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 truth-worthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarants 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 these rules 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 sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 143. Traditional Oral Histories. In the event where the identity of an individual or an activity performed by an individual is sought to be proved by the testimony of one who knows the oral traditional histories of the Tribe, such testimony shall be considered only if corroborating evidence with the persons' knowledge of the oral history is proved to the satisfaction of the court. The court may take into consideration the following criteria which include but are not limited to: age of the witness, the witness' relationship to the parties, knowledge by others of the witness' knowledge, the witness' interest in the outcome of the action.

Rule 144. Attacking and Supporting Credibility of Declarant. When a hearsay statement 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 the declarant had testified as a witness. Evidence of a statement or conduct by the declarants hearsay statement, is not subject to any requirement that the declarant may have been 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 the declarant on the statement as if under cross-examination.

Chapter 10

Writings

Rule:

- 145 Requirement of Authentication or Identification
- 146 Self-Authentication
- 147 Definitions
- 148 Requirement of Original
- 149 Admissibility of Duplicates
- 150 Admissibility of Other Evidence of Contents
- 151 Public Records
- 152 Summaries
- 153 Testimony or Written Admission of Party
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Rule 145. Requirement of Authentication or Identification.

(a) General provision. The requirement of authentication or identification as a 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 rule:

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

(2) **Nonexpert opinion on handwriting.** Nonexpert 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 specimens 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 circumstances 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 the 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 documents 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 likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) **Process or system.** Evidence describing a process or

system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress, tribal law or by these rules.

Rule 146. Self-Authentication. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(a) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, any Indian tribal government, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a public entity, subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(b) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any public 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.

(c) Certified copies of public records. A copy of an official record or report or 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 paragraph (1), (2), or (3) of this rule or complying with any Act of Congress, tribal law, these rules, or rule prescribed by the Supreme Court pursuant to statutory authority.

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

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

(f) 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.

(g) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(h) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent

provided by general commercial law.

(i) Presumptions under Acts of Congress. Any signature, document or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

Rule 147. Definitions. For purposes of this chapter, the following definitions are applicable:

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

(b) Photographs. "Photographs" include still 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 means 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.

Rule 148. 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 these rules or by tribal law.

Rule 149. Admissibility of Duplicates. A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 150. 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, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(d) Collateral matters. The writing, recording, photograph is not closely related to a controlling issue.

Rule 151. 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 compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with these rules 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.

Rule 152. 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 a reasonable time and place. The court may order that they be produced in court.

Rule 153. 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 that party's written admission, without accounting for the non-production of the original.

Rule 154. Functions of Court and/or Jury. When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules 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 Rule 150. 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.

ORDER

These Rules shall take effect and govern all actions commenced in the Tribal Court on of after _____, 2007.

Chief Judge of the Tribal Court

ATTESTED:

TRIBAL COURT

Clerk of the Tribal Court