

**CITIZEN POTAWATOMI NATION
EVIDENCE
TITLE 16**

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CHAPTER ONE GENERAL PROVISIONS

Section 16-1-101 Scope

This Act governs evidentiary questions in all proceedings.

Section 16-1-102 Purpose and Construction

This Act shall be construed to secure: fairness in administration; elimination of unjustifiable expense and delay; promotion of growth and development of the law of evidence, truth and Justice.

Section 16-1-103 Rulings on Evidence

- (A) **Effect of erroneous ruling.** Unless a substantial right of the party is affected, a judgment shall not be reversed or modified, upon an evidentiary ruling, and:
 - (1) **Objection.** If the ruling is an admission, a timely objection or motion to strike was made, stating specific grounds, if not contextually apparent; or
 - (2) **Offer of proof.** If the ruling is exclusion, the evidence's substance was made by offer of proof, or was apparent from the context.
- (B) **Record of offer and ruling.** The Court may add statements which show the character of the evidence, the form it was offered, the objection, and the ruling. It may direct the making of an offer in question and answer form.
- (C) **Hearing of jury.** In jury cases, proceedings shall prevent inadmissible evidence from being suggested, like making statements or offers of proof or asking questions in the hearing of the jury. Prior evidentiary matters may be determined by a prior hearing. Questions concerning admissibility during trial may be resolved in open Court, at the bench out of the hearing of the jury, or a recess may be taken.
- (D) **Plain error.** Nothing precludes taking notice of plain errors affecting substantial rights not brought to the attention of the court.

Section 16-1-104 Preliminary Questions

- (A) **Questions of admissibility generally.** Preliminary questions concerning the witness qualifications of a person, the existence of privilege, or the admissibility of evidence shall be determined by the court.

- (B) **Relevancy conditioned on fact.** When relevancy depends upon the fulfillment of a condition of fact, the court shall admit it upon, or may admit it subject to, evidence sufficient to support the fulfillment of the condition.
- (C) **Hearing of jury.** Admissibility of confessions shall be conducted out of the jury hearing. Preliminary matters shall be conducted when the interests of justice require or, when an accused is a witness, if they request.
- (D) **Testimony by accused.** The accused's testimony on a preliminary matter, or matter heard outside the hearing of the jury, does not subject them to cross-examination to other issues. The accused waives his right against self-incrimination to all issues by testifying upon any fact pertaining to any element of the charge during the trial.
- (E) **Weight and credibility.** This Section does not limit the right of a party to introduce evidence relevant to weight or credibility.

Section 16-1-105 Limited Admissibility

Evidence which is admissible to one party or for one purpose but not admissible to another party or another purpose is admitted, the court, shall restrict the evidence to its proper scope and instruct the jury.

Section 16-1-106 Remainder or Related Writings or Recorded Statements

When a writing or recorded statement is introduced, an adverse party may require the introduction of any other part which ought in fairness be considered contemporaneously.

CHAPTER TWO JUDICIAL NOTICE

Section 16-2-101 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 not be subject to reasonable dispute, it is either
 - (1) generally known within the jurisdiction, or,
 - (2) capable of accurate and ready determination by accurate sources.
- (C) **When discretionary.** The Courts may take judicial notice, whether requested or not at any stage.

- (D) **When mandatory.** The Courts shall take judicial notice if requested and supplied with the necessary information.
- (E) **Opportunity to be heard.** A party may request a hearing about the propriety of judicial notice. A request may be subsequently made.
- (F) **Instructing jury.** In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

CHAPTER THREE PRESUMPTIONS

Section 16-3-101 Presumptions in General in Civil Actions and Proceedings

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 original party.

CHAPTER FOUR RELEVANCY AND ITS LIMITS

Section 16-4-101 Definition of "Relevant Evidence"

"Relevant evidence": any tendency to make the existence of any fact of consequence more probable or less probable.

Section 16-4-102 Relevant Evidence Generally Admissible Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as provided by Tribal Law or rules prescribed by the Supreme Court. Evidence not relevant is not admissible.

Section 16-4-103 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Relevant evidence, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury, or considerations of delay, waste of time, or needless presentation of cumulative evidence.

Section 16-4-104 Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

- (A) **Character evidence generally.** A person's character or trait is not admissible to prove he acted similarly on a particular occasion, except;
- (1) **Character of accused.** Evidence of a pertinent trait offered by an accused, or the prosecution is rebuttal;
 - (2) **Character of victim.** Evidence of a pertinent trait of the victim offered by an accused, or the prosecution is rebuttal, or evidence of a trait of peacefulness offered by the prosecution to rebut evidence the victim was the first aggressor;
 - (3) **Character of witness.** Evidence of the character of a witness, from impeachment or credibility.
 - (4) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible. It may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
- (B) This Section does not apply to Domestic Violence, or sexual abuse cases where character, character traits and past: Crimes; Charges Filed; and Police Reports are admissible.

Section 16-4-105 Methods of Proving Character

- (A) **Reputation or opinion.** If evidence of character or trait is admissible, proof may be made by testimony or in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
- (B) **Specific instances of conduct.** Where character or a trait of character is an essential element, proof may also be made by specific instances of conduct.

Section 16-4-106 Habit; Routine Practice

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

Section 16-4-107 Subsequent Remedial Measures

When measures are taken which would have made an event less likely to occur, evidence of subsequent measures is not admissible to prove negligence or culpable conduct. This Section does not require exclusion of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted.

Section 16-4-108 Compromise and Offers to Compromise

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, is not admissible to prove liability, invalidity or amount. Evidence of conduct or statements in negotiations is not admissible. This Section does not require the exclusion of evidence discoverable presented during compromise negotiations. This Section does not require exclusion of evidence offered for another purpose, such as proving: bias; prejudice; undue delay; obstructing a criminal investigation or prosecution.

Section 16-4-109 Payment of Medical and Similar Expenses

Evidence of furnishing, offering or promising to pay, or the payment of medical, hospital, or similar expenses is not admissible to prove liability. Evidence of payment may be introduced to reduce judgment damages.

Section 16-4-110 Inadmissibility of Pleas, Offers of Pleas, and Related Statements

- (A) Evidence of a plea of guilty, later withdrawn, or nolo contendere, or any offer, or statements, relevant to, any pleas or offers, is not admissible. Such statements, are admissible in a criminal proceeding for perjury or false statement if the statement was made under oath, on the record, and in the presence of counsel.
- (B) A plea of guilty which has not been withdrawn, and statements made in connection therewith are admissible if relevant.

Section 16-4-111 Liability Insurance

- (A) Evidence that a person was or was not insured is not admissible upon whether he acted negligently or 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 discretion of the District Court, and subject to rules, 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 for damages only, or in the second phase upon the issue of the amount of actual and consequential damages, after liability has been determined.

CHAPTER FIVE PRIVILEGES

Section 16-5-101 Privileges Recognized Only as Provided

Except as otherwise provided, 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 16-5-102 Lawyer-Client Privilege

(A) Definitions.

- (1) A "Client" is a person, public officer, or corporation, association, or organization or entity, public or private, who is rendered professional legal services, or who consults a lawyer to obtain professional legal services.
- (2) A client's representative has authority to obtain professional legal services, and to act on advice rendered.
- (3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law.
- (4) A "representative of the lawyer" is employed by the lawyer to assist in providing professional legal services.
- (5) A communication is "confidential" if not intended to be disclosed to third persons made in furtherance of the retention of professional services or reasonably necessary for the provision of services.

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

- (1) between themselves or their representative and their lawyer or lawyer's representative,
- (2) between their lawyer and the lawyer's representative,

- (3) by them, or their representative or their 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 common interest,
 - (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, their guardian or conservator or relative who assists in obtaining legal representation, the personal representative of a deceased client, or the successor, trustee, or representative of a corporation, association, other organization. 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 when:
- (1) **Furtherance of crime or fraud.** If the services 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.** Communication between parties who claim through the same deceased client, whether the claims are testate, intestate succession or between the living.
 - (3) **Breach of duty by a lawyer or client.** Communication of breach of duty by the lawyer to client or by the client to lawyer;
 - (4) **Document attested by a lawyer.** Communication concerning an attested document which the lawyer is an attesting witness;
 - (5) **Joint clients.** Communication of common interest among clients if made to a lawyer retained or consulted in common, when offered between or among the clients or;
 - (6) **Public officer or agency.** Communication between a public officer, agency and its lawyers unless concerning pending or contemplated investigation, claim, or action and the court determines disclosure will seriously impair the ability to process the claim or investigation, litigation, or proceeding in the public interest. Communications of the Tribal Attorney are not within this exception unless such communications have been released for public information.

Section 16-5-103 Physician and Psychotherapist - Patient Privilege

- (A) **Definitions.**
- (1) "patient" a person who consults or is examined or interviewed by a physician or psychotherapist.
 - (2) "physician" a person authorized to practice medicine or healing arts.
 - (3) A "psychotherapist" is:
 - (a) a physician engaged in diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or
 - (b) a person licensed or certified as a psychologist.
- (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 their physical, mental or emotional condition, including alcohol or drug addiction.
- (C) **Who may claim the privilege.** The privilege may be claimed by the patient, their guardian or conservator, or representative. The physician or psychotherapist, and any other persons directly involved have authority to claim the privilege on behalf of the patient.
- (D) **Exceptions.**
- (1) **Proceeding for hospitalization.** No privilege for communications in proceedings to hospitalize the patient for mental illness, if the physician or psychotherapist has determined the patient needs hospitalization.
 - (2) **Examination by order of court.** If the court orders an examination of the physical, mental or emotional condition of a patient, party or witness, communications made are not privileged.
 - (3) **Condition an element of claim or defense.** No privilege for communication of the physical, mental or emotional condition in which the condition; is an element or, after the patient's death, any party where the condition is an element.

Section 16-5-104 Husband and Wife Privilege

- (A) **Definition.** A communication is confidential if made privately to their spouse not intended for disclosure.
- (B) **General rule of privilege.** An accused may prevent his spouse from testifying to any confidential communication.

- (C) **Exceptions.** No privilege in legal separation or divorce when relevant for separate maintenance, divorce, or 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 while committing a crime against any of the above.
 - (5) Except a Tribal Action to protect a child. Testimony received under this exception may not be used or referred to in any other proceeding.

Section 16-5-105 Religious Privilege

- (A) **Definitions.** As used in this Section:
- (1) "clergyman" a minister, priest, rabbi, accredited Christian Science Practitioner, Native American Church Roadman, properly traditional band or society headman or fire keeper or functionary of a religious organization of a recognized active traditional Tribal religion, or individual reasonably believed by the person consulting him.
- (B) **General rule of privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing communication to a clergyman as spiritual advisor.
- (C) **Who may claim the privilege.** The privilege may be claimed by the person, guardian, conservator, or personal representative if deceased. The clergyman has authority to claim the privilege on behalf of the communicant.

Section 16-5-106 Political Vote

- (A) **General rule of privilege.** Every person has a privilege to refuse to disclose his vote.
- (B) **Exceptions.** This privilege does not apply if the court finds the vote was cast illegally or disclosure should be compelled pursuant to election laws.

Section 16-5-107 Trade Secrets

A privilege, may be claimed by a person, agent or employee, to not disclose and prevent others from disclosing a trade secret, if the privilege will not conceal fraud or work injustice. If disclosure is directed, the court shall take protective measures.

Section 16-5-108 Secrets of the Tribal Government and Other Official Information: Governmental Privileges

- (A) United States Law created governmental privilege, may be claimed.
- (B) No other governmental privilege is recognized except as created by Tribal Constitution Law.
- (C) **Privileges Recognized.** The following governmental privileges are recognized:
 - (1) Tribal Legislature Members are privileged against disclosure of their mental processes and reasoning in any vote, except where alleged unlawful influence or bribery or attempted bribery was involved. This privilege is waived if the member testifies.
 - (2) Justices, Judges, and Magistrates are privileged against disclosure of their mental processes and reasoning, except a proceeding where alleged unlawful influence, bribery or attempted bribery was involved. The Supreme Court may remand for further findings of fact or conclusions of law to obtain an adequate record.
 - (3) Tribal Officers instituting legal proceedings before any agency or Courts to enforce Tribal law have a privilege against disclosure of mental processes and reasoning in the determination of whether or not to institute legal proceedings.
- (D) **Effect of sustaining claim.** If a claim of governmental privilege is sustained and a party is deprived of material evidence, the court shall make any order the interests of justice require, including striking testimony, declaring a mistrial, finding against the Government upon an issue which the evidence is relevant, or dismissing the action.

Section 16-5-109 Identity of Informer

- (A) **Rule of privilege.** The Tribe, 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 by law enforcement, the Court and legislative committee.
- (B) **Who may claim.** The privilege may be claimed by a representative.
- (C) **Exceptions:**

- (1) **Voluntary disclosure; informer a witness.** No privilege exists if the identity of the informer or his interest has been disclosed by a holder of the privilege, the informer, or if the informer appears as a witness.
- (2) **Testimony on relevant issue.** If an informer is able to testify in a case where a public entity is a party, and the public entity invokes the privilege. The court shall give the public entity an in camera hearing to determine whether the informer can supply testimony. The showing will ordinarily be affidavits. The court may take testimony if not resolved upon affidavit. If there is a reasonable probability the informer can give the testimony, and the public entity elects not to disclose identity, in criminal cases the court on motion of the defendant or its own shall grant appropriate relief. Relief may include: requiring the Prosecution comply with a defense request for relevant information, granting the defendant additional time or a continuance, relieving the defendant from making disclosures prohibiting the prosecution from introducing specific evidence, and dismissing charges. In civil cases, the court may make any order. Evidence submitted in camera shall be sealed and preserved to be made available to the Supreme Court. The contents shall not be revealed without consent. No counsel or party shall be permitted to be present at in camera hearings.

Section 16-5-110 Waiver of Privilege by Voluntary Disclosure

A person waives if they or their predecessor voluntarily discloses or consents to disclose any part of the privileged matter.

Section 16-5-111 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 16-5-112 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 a prior occasion, is not a proper subject of comment by judge or counsel.
- (B) **Claiming privilege without knowledge of jury.** In jury cases, proceedings shall be conducted, to facilitate the making of claims of privilege without jury knowledge.

- (C) **Jury instruction.** 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.

CHAPTER SIX WITNESSES

Section 16-6-101 Lack of Personal Knowledge

A witness may not testify unless evidence is introduced he has personal knowledge. Evidence may, but need not, consist of the witness testimony.

Section 16-6-102 Oath or Affirmation

Every witness shall be required to declare they will testify truthfully, by oath or affirmation administered in a form approved by the Court.

Section 16-6-103 Interpreters

An interpreter is subject to qualification as an expert and an oath or affirmation he will make a true translation.

Section 16-6-104 Competency of Judge as Witness

The presiding judge may not testify in that trial.

Section 16-6-105 Competency of Juror as Witness

- (A) **At trial.** A sitting jury member may not testify in the trial.
- (B) **Inquiry into validity of verdict or indictment.** Upon inquiry into the validity of a verdict or indictment, a juror may not testify, provide an affidavit or evidence of statement to any matter or statement occurring during deliberations or effect of anything upon their or any other juror's mind or emotions influencing their assent or dissent. A juror may testify whether extraneous prejudicial information was improperly brought to the jury's attention, whether the jury determined the verdict, or other relevant issues by chance, or whether any outside influence was brought. Nor may their affidavit or evidence of any statement by them concerning a matter they were precluded from testifying be received for these purposes.

Section 16-6-106 Who May Impeach

The credibility of a witness may be attacked by any party.

Section 16-6-107 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 opinion or reputation, 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.
- (B) **Specific instances of conduct.** Specific instances of witness conduct attacking or supporting credibility, may not be proved by extrinsic evidence. Specific instances of conduct may, in the discretion of the Court, if probative of truthfulness or untruthfulness, be inquired during cross-examination
- (1) concerning character for truthfulness or untruthfulness, or
 - (2) concerning character for truthfulness or untruthfulness of another witness to which the witness being cross-examined has testified.
- (C) **Special Rule for Criminal cases.** Testimony, by an accused or other witness, does not operate as a waiver of self-incrimination with respect to matters which relate only to credibility.

Section 16-6-108 Impeachment by Evidence of Conviction of Crime

- (A) **General Rule.** To attack the credibility of a witness, evidence of conviction shall be admitted if elicited from them or established by public record during cross-examination only if the crime
- (1) was punishable by death or imprisonment more than one year under federal or state law, and the Court determines the probative value of admitting outweighs its prejudicial effect (if the defendant's credibility is being questioned), or
 - (2) involved dishonesty or false statement, or
 - (3) was punishable by banishment or imprisonment for six months, or is classified as a serious offense.
- (B) **Time Limit.** A conviction is not admissible if more than ten years ago or since release from confinement or punishment, whichever is later. The Court may determine the probative value of the conviction supported by circumstances substantially outweighs its prejudicial effect. A conviction more than 10 years

old, is not admissible unless the proponent gives the adverse party sufficient notice to provide a fair opportunity. Convictions may be admissible if other admissible convictions not ten years old have occurred since the conviction in question.

- (C) **Effect of pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible if:
 - (1) the conviction has been pardoned, annulled, rehabilitated, based on a finding of rehabilitation, and they have not been convicted of a subsequent crime, or
 - (2) the conviction has been pardoned, annulled, or equivalent procedure based on a finding of innocence.
- (D) **Juvenile adjudications.** Juvenile adjudications are generally not admissible. The Court may, in a criminal case allow evidence of a juvenile adjudication of a witness, other than the accused, if conviction would be admissible to attack the credibility of an adult and the Court is satisfied admission is necessary.
- (E) **Pendency of appeal.** Evidence of the pendency of an appeal is admissible when evidence of the underlying convictions has been introduced.

Section 16-6-109 Religious Beliefs or Opinions

Evidence of the religious beliefs or opinions of a witness is not admissible to show by reason of their nature their credibility is impaired or enhanced.

Section 16-6-110 Mode and Order of Interrogation and Presentation

- (A) **Control by Court.** The Court shall exercise reasonable control to:
 - (1) make the interrogation and presentation effective,
 - (2) avoid needless consumption of time, and
 - (3) protect witnesses from harassment or embarrassment.
- (B) **Scope of cross-examination.** Cross-examination should be limited to the direct examination and the credibility of the witness. The Court may, permit inquiry as if direct examination.
- (C) **Leading questions.** Leading questions should not be used on the direct examination of a witness except to develop testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a child, or person with trouble understanding questions, a hostile witness, an adverse

party, or a witness identified with an adverse party, interrogation may be by leading questions.

- (D) Narrative Testimony may be allowed from parties as the Court determines.

Section 16-6-111 Writing Used to Refresh Memory

- (A) If a witness uses a writing to refresh their memory while or before testifying, an adverse party may have the writing produced to inspect, cross-examine, and introduce.
- (B) If the writing contains matters not related to the testimony the Court shall examine the writing in camera, make deletions and order delivery of the remainder. Any portion withheld over objections shall be preserved. If a writing is not produced or delivered, the Court shall make any order required. In criminal cases, if the prosecution does not comply, the Court may declare a mistrial.

Section 16-6-112 Prior Statements of Witnesses

- (A) **Examining witness concerning prior statements.** A witness examined concerning a prior statement, the statement need not be shown nor its contents disclosed, but on request shall be shown or disclosed to opposing counsel.
- (B) **Extrinsic evidence of prior inconsistent statements of witness.** Extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is allowed to explain and the opposing party to interrogate.

Section 16-6-113 Calling and Interrogation of Witnesses by Court

- (A) **Calling by Court.** The Court may call witnesses, and all parties are entitled to cross-examine.
- (B) **Interrogation by Court.** The Court may interrogate all witnesses.
- (C) **Objections.** Objections may be made or at the next opportunity when the jury is not present. The Court should exercise its authority to call or question witnesses with great restraint in a jury trial.

Section 16-6-114 Exclusion of Witnesses

The Court on its own or at a party's request may exclude witnesses. This does not authorize exclusion of

- (1) a party, or
- (2) an officer or employee, designated as its representative, or

- (3) a person who is essential to the presentation of their cause.

CHAPTER SEVEN OPINIONS AND EXPERT TESTIMONY

Section 16-7-101 Opinion Testimony by Lay Witnesses

If the witness is not an expert, their opinion or inferences are limited to those which are:

- (A) rationally based;
- (B) helpful to an understanding of their testimony or determination of a fact; and
- (C) a subject which is presumed the general public has sufficient knowledge to reach a reasonable opinion, conclusion, or inference.

Section 16-7-102 Testimony by Experts

If scientific, technical, or specialized knowledge will assist to understand evidence or determine fact, a witness qualified as an expert by knowledge, skill, experience, training, or education, may offer opinion.

Section 16-7-103 Basis of Opinion Testimony by Experts

The facts or data upon which an expert bases an opinion or inference may be those perceived by or made known to them. If of a type reasonably relied upon by experts in forming opinions or inferences, the facts or data need not be admissible.

Section 16-7-104 Opinion on Ultimate Issue

Opinion or inference testimony admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Section 16-7-105 Disclosure of Facts or Data Underlying Expert Opinion

Experts may give reasons for opinions or inferences without prior disclosure of the underlying facts or data, unless the Court requires otherwise. The expert may be required to disclose underlying facts or data on cross-examination.

Section 16-7-106 Court Appointed Experts

- (A) **Appointment.** The Court may or upon motion enter an order to show cause why expert witnesses should not be appointed, and request parties to submit nominations. The Court may appoint any expert witnesses agreed upon, and of its

own. An expert witness shall not be appointed unless he consents. A witness appointed shall be informed of his duties, a copy of which shall be filed with the clerk, or at a conference. The witness shall advise the parties of his findings, his deposition may be taken; and he may be called to testify. He shall be subject to cross-examination.

- (B) **Compensation.** Expert witnesses are entitled to reasonable compensation as the Court allows, payable from the Court fund, reimbursed by the parties as the Court directs, and thereafter charged in like manner as other costs.
- (C) **Disclosure of Appointment.** The Court may authorize disclosure to the jury that the Court appointed the expert witness.
- (D) **Parties' Experts of Own Selection.** The parties may call their own experts.

CHAPTER EIGHT HEARSAY

Section 16-8-101 Definitions

The following definitions apply under this Chapter:

- (A) **Statement:** an oral or written assertion or Non-verbal conduct, intended as an assertion.
- (B) **Declarant:** A person who makes a statement.
- (C) **Hearsay:** a statement, other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted. This includes affidavits and notarized statements unless made admissible.
- (D) **Statements which are not hearsay.** A statement is not hearsay if:
 - (1) **Prior statement by witness.** The declarant testifies, is subject to cross-examination and is:
 - (a) inconsistent with their testimony, and was given under oath at a proceeding, or deposition, or
 - (b) consistent with their testimony and is offered to rebut an express or implied charge of recent fabrication, 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 the statement is made:
- (a) in their individual or representative capacity or
 - (b) of their adoption or belief in its truth, or
 - (c) by a person authorized concerning the subject, or
 - (d) by their agent or servant within the scope of agency or employment, during the existence of the relationship, or
 - (e) by a co-conspirator during the course and in furtherance of the conspiracy.

Section 16-8-102 Hearsay Rule

Hearsay is not admissible except as provided or prescribed by Tribal Law.

Section 16-8-103 Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded, though the declarant is available as a witness:

- (A) **Present sense impression.** A statement describing or explaining an event or condition made while perceiving the event or condition, or immediately thereafter.
- (B) **Excited utterance.** A statement relating to a startling event or condition made while under the stress of excitement caused by the event or condition.
- (C) **Then existing mental, emotional, or physical condition.** A statement of existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), not including a statement of memory or belief to prove the fact remembered or believed unless it concerns probate.
- (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.
- (E) **Recorded recollection.** A memorandum or record which a witness once had knowledge but now has insufficient recollection to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh. If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.

- (F) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, 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 regularly conducted business, as shown by the testimony of the custodian or qualified witness, unless the source, method or circumstances indicate lack of trustworthiness.
- (G) **Absence of entry in records.** Evidence a matter is not included in the memoranda reports, records, or data compilations, to prove the non-occurrence or nonexistence, if the matter was one which a memorandum, report, record, or data compilation was regularly made and preserved, unless the source or circumstances indicate lack of trustworthiness.
- (H) **Public records and reports.** Records, reports, statements, or data compilations, of public offices or agencies, setting forth
- (1) activities of the office or agency, or
 - (2) matters observed pursuant to duty which there was a duty to report, excluding, in criminal cases matters observed by law enforcement personnel, or
 - (3) in civil actions and against the Government in criminal cases, factual findings resulting from an investigation, unless the source or circumstances indicate lack of trustworthiness.
- (I) **Records of vital statistics.** Records or data compilations, of birth, fetal deaths, deaths, or marriages, made to a public office.
- (J) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, was regularly made and preserved by a public office or agency, evidence, 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 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 person authorized by a religious organization or, and purporting to have been issued at the time or within a reasonable time.

- (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.
- (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.
- (O) **Statements in documents affecting an interest in property.** A statement in a document purporting to establish or affect an interest in property if relevant to the document, unless subsequent dealings have been inconsistent with the truth 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 professionals.
- (R) **Learned treatises.** When an expert witness during examination, relies upon statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or, established as a reliable authority. 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 family members by blood, adoption, or marriage, or among 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, and reputation as to general history important to the Tribe, community, State or nation.
- (U) **Reputation as to character.** Reputation of a person's character among his associates or in the community.
- (V) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty, 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 but having equivalent circumstantial guarantees of trustworthiness, if the Court determines
- (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 purposes of justice will best be served by admission.

A statement may not be admitted unless the proponent gives advance notice to the adverse party sufficient to object. The notice will include particulars including the name and address of the declarant.

Section 16-8-104 Hearsay Exceptions; Declarant Unavailable

- (A) **Definition of unavailability:** Situations which the declarant:
- (1) is exempted by the Court on privilege; or
 - (2) in refuses to testify despite a Court order; or
 - (3) testifies to a lack of memory; or
 - (4) is unable to be present or testify because of death or existing physical or mental illness or infirmity; or
 - (5) is absent and the proponent of his statement has been unable to procure his attendance 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 to prevent the witness from attending or testifying.

- (B) **Hearsay exceptions.** The following are not excluded if the declarant is unavailable:
- (1) **Former testimony.** Previous testimony or deposition, if an opposing party, or interest, had an opportunity and motive to develop the testimony by examination.

- (2) **Statement under belief of impending death.** In any proceeding, a statement made believing death was imminent, concerning the cause or circumstances of what was believed to be their impending death.
- (3) **Statement against interest.** A statement contrary to pecuniary or proprietary interest, or tended to subject to liability, or render invalid a claim, that a reasonable person would not have made the statement unless they believed it was true. A statement to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate trustworthiness.
- (4) **Statement of personal or family history.**
 - (a) a statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other fact of personal or family history, even though declarant had no means of acquiring personal knowledge; or
 - (b) a statement concerning the foregoing matters, and death, of another person, if the declarant was related to the other by blood, adoption, or marriage or was intimately associated with the other's family to likely have accurate information.
- (5) **Other exceptions.** A statement not specifically covered by the foregoing exceptions having equivalent circumstantial guarantees of trustworthiness, if the Court determines:
 - (a) the statement is offered as evidence of a material fact;
 - (b) the statement is probative on the point for which offered than any other evidence which the proponent can procure through reasonable efforts; and
 - (c) the purposes of justice will be served by admission. A statement may not be admitted under this exception unless the proponent gives notice to the adverse party before trial or hearing to provide a fair opportunity to oppose it, and the particulars, including the name and address of the declarant.

Section 16-8-105 Hearsay Within Hearsay

Hearsay within hearsay is not excluded if each part of the combined statements conforms with an exception provided.

Section 16-8-106 Attacking and Supporting Credibility of Declarant

When the hearsay statement, or a statement has been admitted in evidence, the credibility of the declarant may be attacked, and may be supported, by any evidence admissible 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, the party is entitled to examine him as if cross-examination.

CHAPTER NINE AUTHENTICATION AND IDENTIFICATION

Section 16-9-101 Requirement of Authentication or Identification

- (A) **General provision.** Authentication or identification as a condition of admissibility is satisfied by evidence supporting a finding the matter in question is what its proponent claims.
- (B) **Illustrations.** By illustration, and not limitation, the following are examples:
 - (1) **Testimony of witness with knowledge.** Testimony a matter is what it is claimed to be.
 - (2) **Non-expert opinion on handwriting.** Non-expert opinion as to genuineness of handwriting, based upon familiarity not acquired for purposes of litigation.
 - (3) **Comparison by trier or expert witness.** Comparison by the trier of fact or by expert witnesses with a 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.** Evidence a call was made to the number assigned at the time by the telephone company to a particular person or business, if:
 - (a) circumstances, including self-identification, show the person answering to be the one called, or

- (b) the call was made to a place of business and the conversation related to business 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, is from the public office where items are kept.
- (8) **Ancient document or data compilation.** Evidence that a document or data compilation,
 - (a) is in condition to create no suspicion concerning its authenticity,
 - (b) was in a place where, if authentic, would be likely to be, and
 - (c) has been in existence 20 years or more at the time offered.

Section 16-9-102 Self-Authentication

Extrinsic evidence of authenticity is not required for:

- (1) **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or Indian Tribe, State, District, Commonwealth, territory, 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 their official capacity of an officer or employee of any entity included in paragraph (1) having no seal, if a public officer having a seal and having official duties certifies under seal that the signer has the official capacity and the signature is genuine.
- (3) **Foreign public documents.** A document purporting to be executed or attested in their official capacity authorized by the laws of a foreign country, 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.

A final certification may be made by a diplomatic, or consular agent of the United States, or of the foreign county assigned or accredited to the United States. If reasonable opportunity

has been given to investigate the authenticity and accuracy of official documents, the Court may, for good cause shown, order 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, or a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations, certified as correct by the custodian or authorized person.
- (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, and documents relating to the extent provided by commercial law.
- (10) **Presumptions under Acts or Ordinances.** Any signature, document, or other matter declared by Act or Ordinance of the Tribal Legislature to be presumptively or prima facie genuine or authentic.

Section 16-9-103 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.

CHAPTER TEN CONTENTS OF WRITING, RECORDINGS, AND PHOTOGRAPHS

Section 16-10-101 Definitions

- (A) **Writings and recordings.** consist of letters, words, or numbers or their equivalent, written, typed, printed, photostated, photographed, mechanical or electronic recording, or any form of data compilation.

- (B) **Photographs.** includes X-ray films, video tapes, and motion pictures.
- (C) **Original.** the writing or recording itself or any counterpart intended to have the same effect. An "Original" of a photograph includes the negative or any print. If data is stored in a computer or similar device, any output readable reflecting the data accurately, is an "Original".
- (D) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or the same matrix, or by photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by equivalent techniques which accurately reproduces the original.

Section 16-10-102 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.

Section 16-10-103 Admissibility of Duplicates

A duplicate is admissible unless:

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

Section 16-10-104 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 destroyed, unless the proponent lost or destroyed them in bad faith; or
- (B) **Original not obtainable.** No original can be obtained by any judicial process or procedure; or
- (C) **Original in possession of opponent.** when an original was under the control of the adverse party, who was on notice, the contents would be a subject of proof, and they do not produce the original, or
- (D) **Collateral matters.** The writings, recording, or photograph is not closely related to a controlling issue.

Section 16-10-105 Public Records

The contents of an official record, or an authorized, recorded or filed document, if admissible, may be proved by copy, certified as correct or testified to be correct. If such copy cannot be obtained by reasonable diligence, other evidence of the contents may be given.

Section 16-10-106 Summaries

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

Section 16-10-107 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 nonproduction of the original.

Section 16-10-108 Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs depends upon the fulfillment of a condition, the question whether the condition has been fulfilled is for the Court. However, when an issue is raised (A) whether the writing ever existed, or (B) whether another writing, recording, or photograph produced is the original, or (C) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine.

CHAPTER ELEVEN MISCELLANEOUS RULES

Section 16-11-101 Applicability of Rules

- (A) This Act applies generally to actions and proceedings, except those in which the Court may act summarily.
- (B) Privileges apply at all stage of all actions, cases, and proceedings.
- (C) This Act does not apply:
 - (1) When the Court must make preliminary findings of fact to rule on the admissibility of evidence.
 - (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 for release on bail.

Section 16-11-102 Amendments

The Supreme Court shall have the power to prescribe amendments except any rules relating to privileges. Such amendments shall not take effect until they have been reported in writing to the Tribal Legislative Body by the Chief Justice and until the expiration of ninety days after the report; but if the Tribal Legislative Body within that time shall by formal action disapprove it shall not take effect. The effective date of any amendment may be deferred by Tribal Legislative Body. Any provision in force at such time and in conflict with any amendment shall be of no further force or effect. Any proposed amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by the Tribal Legislative Body. Upon becoming effective, all amendments shall be incorporated into this Ordinance.

Section 16-11-103 Title

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