

POTAWATOMI LAW AND ORDER CODE

**TITLE 11
EVIDENCE**

**CHAPTER 11-1
GENERAL PROVISIONS**

Section 11-1-1. Scope.

This Title governs evidentiary questions in all proceedings in the Courts of the Prairie Band of Potawatomi Tribe, except as may be otherwise specifically provided by the tribal law. This Title shall be known as the General Rules of Evidence.

Section 11-1-2. Purpose and Construction.

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

Section 11-1-3. Ruling on Evidence.

(A) Error may not be had on a ruling which admits or excludes evidence unless a substantial right of the party is affected, and;

(1) when admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) when excluding evidence, the substance of the evidence was made known to the Court by offer of proof, or was apparent from the context within which questions were asked.

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

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

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

Section 11-1-4. Preliminary Questions.

(A) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the Court, subject to the provisions of Subsection 11-1-4(B). In making its determination, it is not bound by this Title except those provisions with respect to privileges.

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

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

Section 11-1-5. Limited Admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the Court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Section 11-1-6. Related Writings or Recorded Statements.

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

Section 11-1-7. Judicial Notice of Adjudicative Facts.

The Courts may take judicial notice, whether requested or not. The Courts shall take judicial notice if requested by a party and supplied with the necessary information, or when required to do so by tribal law. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice may be taken at any stage of the proceeding. In a civil action or proceeding, the Court shall instruct the jury to accept as conclusive any fact judicially noticed. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

(A) generally known within the territorial jurisdiction of the Court, or

(B) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Section 11-1-8. Presumptions in Civil Actions.

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

**CHAPTER 11-2
RELEVANCY AND ITS LIMITS**

Section 11-2-1. Relevant Evidence.

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. All relevant evidence is admissible, except as otherwise provided by the Constitution and By-laws, ordinance, this Title, or by other rules prescribed by the Court of Appeals pursuant to statutory authority. Evidence which is not relevant is not admissible.

Section 11-2-2. Exclusion of Evidence.

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

Section 11-2-3. Character Evidence.

(A) Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity on a particular occasion, except:

- (1) when offered by an accused, or by the prosecution to rebut the same after the accused has offered such character evidence;
- (2) evidence of the character of a witness, as provided in Section 11-4-6, and 11-4-7.
- (3) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Section 11-2-4. Proving Character.

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Section 11-2-5. Habit or Routine.

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

Section 11-2-6. Subsequent Remedial Measures.

When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event, in order to encourage additional safety measures to be taken for the protection of the public whether or not the previous measures were sufficient to prevent a finding of negligent or culpable conduct.

Section 11-2-7. Compromise and Offers to Compromise.

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

- (A) furnishing or offering or promising to furnish, or
- (B) accepting or offering or promising to accept,

a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Section 11-2-8. Payment of Medical and Similar Expenses.

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

Section 11-2-9. Liability Insurance.

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

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

**CHAPTER 11-3
PRIVILEGES**

Section 11-3-1. Privileges Recognized.

Except as otherwise provided by the Constitution and By-laws or statute, including this Title, or rules promulgated by the Court of Appeals, 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 11-3-2. Lawyer/Client Privilege.

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

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

(C) There is no privilege under this Section:

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

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

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

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

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

(6) As to communication between a public officer or agency and its lawyers unless the communication concerns a pending or contemplated investigation, claim, or action and the Court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Section 11-3-3. Patient/Physician Privilege.

(A) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physical or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(B) The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication, and any other persons directly involved in treatment sessions, are presumed to have authority to claim the privilege but only on behalf of the patient.

(C) **Exceptions.**

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

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

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

Section 11-3-4. Husband and Wife Privilege.

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

- (A) the other,
- (B) a child of either,
- (C) a person residing in the household of either,

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

Section 11-3-5. Religious Privilege.

(A) A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

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

Section 11-3-6. Trade Secrets.

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the Court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

Section 11-3-7. Governmental/Official Privileges.

(A) If the law of the United States creates a governmental privilege that the Courts of this Tribe must recognize under the Constitution and statutes of the United States, the privileges may be claimed as provided by the law of the United States. No other special governmental privilege is recognized except as created by the Constitution or statutes of the Tribe, including this Title.

(B) The following governmental privileges are recognized:

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

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

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

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

Section 11-3-8. Waiver of Privilege.

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

(B) A claim of privilege is not defeated by a disclosure which was:

- (1) compelled erroneously, or
- (2) made without opportunity to claim the privilege.

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

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

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

**CHAPTER 11-4
WITNESSES**

Section 11-4-1. General Rule of Competency.

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

Section 11-4-2. Lack of Personal Knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This Section is subject to the provisions of Section 11-5-3, relating to opinion testimony by expert witnesses.

Section 11-4-3. Oath or Affirmation.

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

Section 11-4-4. Competency of Judge as Witness.

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

Section 11-4-5. Competency of Jurors as Witness.

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

(B) Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention, whether the jury determined the verdict, amount of damages, sentence or other matter relevant to a determination of the issues in the case by flipping a coin or other method determined purely by chance, or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Section 11-4-6. Who May Impeach.

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

Section 11-4-7. Evidence of Character and Conduct of Witness.

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

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

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

- (1) concerning his character for truthfulness or untruthfulness, or

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

Section 11-4-8. Religious Beliefs or Opinions.

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

Section 11-4-9. Presentation.

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

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

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

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

Section 11-4-10. Writing Used to Refresh Memory.

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

(B) If it is claimed that the writing contains matters not related to the subject matter of the testimony the Court shall examine the writing in *camera*, exercise any portions not so related and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the Court of Appeals in the event of an appeal. If a writing is not produced or delivered

pursuant to order of the Court under this Section, the Court shall make any order justice requires.

Section 11-4-11. Prior Statements of Witnesses.

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

(B) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposing party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party opponent as defined in Subsection 11-6-1(B).

Section 11-4-12. Interrogation by Court.

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

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

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

Section 11-4-13. Exclusion of Witnesses.

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

(A) a party who is a natural person, or

(B) an officer or employee of a party, designated as its representative by its attorney, when the party is not a natural person, or

(C) a person whose presence is shown by a party to be essential to the presentation of his cause.

**CHAPTER 11-5
OPINIONS AND EXPERT TESTIMONY**

Section 11-5-1. Opinion Testimony by Lay Witnesses.

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

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

Section 11-5-2. Testimony by Experts.

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

Section 11-5-3. Basis of Opinion Testimony by Experts.

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

Section 11-5-4. Opinion of Ultimate Issue.

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

Section 11-5-5. Disclosure of Facts Underlying Expert Opinions.

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

Section 11-5-6. Court Appointed Experts.

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

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

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

(D) Nothing in this Section limits the parties in calling expert witnesses of their own selection.

**CHAPTER 11-6
HEARSAY**

Section 11-6-1. Definitions.

A statement is not hearsay if;

(A) The one making the statement testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

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

- (B) The statement is offered against a party and is:
- (1) his own statement, in either his individual or a representative capacity, or
 - (2) a statement of which he has manifested his adoption or belief in its truth, or
 - (3) a statement by a person authorized by him to make a statement concerning the subject, or
 - (4) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or
 - (5) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Section 11-6-2. Hearsay Rule.

Hearsay is not admissible except as provided by this Title or by other rules prescribed by the Court of Appeals pursuant to statutory authority or by Act or Ordinance.

Section 11-6-3. Hearsay Exceptions; Declarant Available.

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

- (A) A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (B) 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) A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
- (D) Statements 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 as reasonably pertinent to diagnosis or treatment.
- (E) A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(F) A memorandum, report, record, or data compilation, in any form, concerning 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.

(G) Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of Subsection 11-6-3(F), to prove the non-occurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(H) Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth

- (1)** the activities of the office or agency, or
- (2)** matters observed pursuant to duty imposed by law as to which matters there was a duty to report, or
- (3)** 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 or data compilations, in any form, of birth, fetal deaths, deaths, or marriages, if the report was made to a public office pursuant to requirements of law.

(J) To prove the absence of a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Section 11-7-2, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

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

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

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

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

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

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

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

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

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

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

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

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

Section 11-6-4. Hearsay Exceptions; Declarant Unavailable.

(A) “Unavailability as a witness” includes situations in which the declarant:

- (1) is exempted by ruling of the Court on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the Court to do so; or
- (3) testifies to a lack of memory of the subject matter of his statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under Subsection 11-6-4(B)(2), 11-6-4(B)(3), or 11-6-4(B)(4), his attendance or testimony) by process or other reasonable means.

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

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

- (1) 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) In a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil liability, or to render invalid a claim by him against another, that a reasonable person in his position would not have made the statement unless he believed it to be true.

(4) Statement of personal or family history:

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

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

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

Section 11-6-5. Hearsay Within Hearsay.

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

Section 11-6-6. Credibility of Declarant.

When a hearsay statement, or a statement defined in Subsection 11-6-1(B)(3), 11-6-1(B)(4), or 11-6-1(B)(5), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible

for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he be afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

CHAPTER 11-7 AUTHENTICATION AND IDENTIFICATION

Section 11-7-1. Requirements.

The requirements 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.

Section 11-7-2. Self-authentication.

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

(A) A document bearing a seal purporting to be that of the United States, any Indian tribe, state, district, commonwealth, territory, insular possession, the Trust Territory of the Pacific Islands, political subdivision, department, officer, or agency and a signature purporting to be an attestation or execution.

(B) A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in Subsection 11-7-2(A), 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) A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to genuineness of the signature and official position:

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

A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If

reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the Court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(D) A copy of an official record or report or entry, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Subsection 11-7-2(A), 11-7-2(B), or 11-7-2(C) or complying with any act or ordinance of the Tribal Council or rule prescribed by the Court of Appeals pursuant to statutory authority.

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

(F) Printed materials purporting to be newspapers or periodicals.

(G) Inscription, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(H) 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 or administer oaths.

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

(J) Any signature, document, or other matter declared by act or ordinance of the Tribal Council to be presumptively or *prima facie* genuine or authentic.

Section 11-7-3. Subscribing Witness Testimony Unnecessary.

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

CHAPTER 11-8
CONTENTS OF WRITING, RECORDINGS, AND PHOTOGRAPHS

Section 11-8-1. Requirement of Original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in this Title or by act or ordinance of the Tribal Council.

Section 11-8-2. Admissibility of Duplicates.

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

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

Section 11-8-3. 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) All originals that are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- (B) No original can be obtained by any available judicial process or procedure; or
- (C) At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or
- (D) The writings, recording, or photograph is not closely related to a controlling issue.

Section 11-8-4. Public Records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilation in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Section 11-7-2 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Section 11-8-5. Summaries.

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

Section 11-8-6. Testimony or Written Admission of Party.

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

Section 11-8-7. Functions of Court and Jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under this Title depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the Court to determine in accordance with the provisions of Section 11-1-4. 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.

