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**TITLE 3  
EVIDENCE**

**Chapter 3.01  
Privileges**

**3.0101 Self-incrimination.**

Every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this Tribe or any governmental agency or division thereof any matter that will incriminate him. He cannot be compelled in a criminal action to be a witness against himself, except a defendant in a criminal case who takes the stand to testify on his own behalf may be required to give testimony against himself. Such testimony shall be limited to the charge on trial.

**3.0102 Privileged communication; Duty of Court to advise witness and to protect rights of person who is not present or represented.**

It shall be the duty of the Court, of its own motion and without waiting for objection, to advise a witness at the appropriate time of his rights to refuse to answer any question requiring disclosure of any privileged communication or requiring or tending to require the witness give testimony which might incriminate him.

In all cases where it shall appear to the Court that any person who is not present nor represented at the hearing should be protected in his right to have any privileged communication excluded, it shall be the duty of the Court to make such objections and orders for such purpose as the Court may deem necessary.

**3.0103 Definition of incrimination.**

A matter will incriminate a person within the meaning of this Code if it constitutes, or forms an essential part of, or, taken in connection with other matters already disclosed, is a basis for a reasonable inference of such a violation of the laws of any jurisdiction as to subject him to liability to punishment therefore. Statements may not be used to incriminate him if he has become for any reason permanently immune from punishment therefore.

**3.0104 Claiming privilege.**

The objection that the communication is privileged must be made by or in behalf of the person making the communication.

**3.0105 Waiver of privilege by previous disclosure.**

In the event that a person has a privilege to refuse to disclose a matter or to prevent another from disclosing a matter, the judge may rule that the person has waived such privilege if he:

1. Without coercion and with knowledge of his privilege, has disclosed any part of the matter to any other person, or
2. Consented to such disclosure of any part of the matter by anyone who has knowledge of such a matter.

**3.0106 Attorney-client privilege; Definitions.**

An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

Attorney means any person authorized, or reasonably believed by the client to be authorized to practice law before any Tribal, State, or Federal Court.

Communication between client and lawyer means information transmitted by a voluntary act of disclosure between a client and his attorney in confidence and by a means which discloses the information to no third persons other than

those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it was transmitted.

No person has any privilege if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or to plan to commit a crime or a tort.

**3.0107 Marital privilege; Definition.**

A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be without the consent of the other examined as to any communication made by one to the other during the marriage. Neither spouse has a privilege in:

1. A civil action or proceeding by one against the other, or an action by one of them for annulment of marriage, divorce, or separation from the other, or for damages for the alienation of the affections of the other, criminal conversation with the other or for any case involving abuse of their children;
2. A criminal action in which one of them is charged with a crime committed by one against the other including cases of bigamy and adultery; and
3. A criminal action in which the accused offers evidence of a communication between him and his spouse.

Communication between spouses means information transmitted by a voluntary act of disclosure by one spouse to the other without the intention that it be disclosed to a third person and by a means which does not disclose it to a third person.

**3.0108 Clergyman-penitent privilege; Definition.**

A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline practiced by the church to which he belongs.

Communication between clergyman and penitent means a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of the discipline or practice of the church or religious denomination of which the penitent is a member.

**3.0109 Physician-patient privilege; Definition.**

A physician or surgeon, or other regular practitioner of the healing art, cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

No person has a privilege if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.

Communication between physician and patient means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

**3.0110 Public officer; Official information privileged; Definitions.**

A public officer cannot be examined as to official information communicated to him in an official confidence, when the public interests would suffer by the disclosure.

## **Qualifications, Examination, Credibility of Witnesses**

### **3.0201 Qualifications of witnesses.**

No person offered or called as a witness in any action or special proceeding in any court or before any officer or person having authority to examine witnesses or hear evidence shall be excluded or excused from testifying unless the court or official receiving such testimony finds that:

1. The proposed witness has a right to refuse to disclose the information being inquired about because such information was confidentially made to the witness and is a privileged communication within the meaning of this Title; or
2. The proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury or other official receiving such testimony either directly or through interpretation by one who can understand him; or
3. The proposed witness is incapable of understanding the duty of a witness to tell the truth.

### **3.0202 Interpreters.**

When a witness does not understand and speak the English language or is otherwise incapable of expressing himself so as to be understood by the judge and jury or other official receiving the testimony, the Court shall procure and appoint a disinterested person who is capable of understanding and interpreting the language or expressions of the witness to act as an interpreter.

### **3.0203 Oath.**

Every witness before testifying shall be required to express his purpose to testify only to the truth, by oath or affirmation as follows:

"You do solemnly swear that the evidence you shall give relative to the matter now before this Court or Tribunal, shall be the truth, the whole truth and nothing but the truth, so help you God".

Any person objecting to taking this oath shall be allowed to make affirmation, substituting for the "swear", the word "affirm", and for the words "so help you God" the following: "This you do under the pains and penalties of perjury".

Any person called to be an interpreter for any witness shall be required to express his purpose and be administered the following oath:

"You do solemnly swear that you will justly, truly, and impartially interpret to (the name of the witness) the oath about to be administered to him; and the questions which may be asked him and the answers that he shall give to such questions, relative to the cause now under consideration before this Court (or officer), so help you God".

If the interpreter objects to taking this oath, he may affirm in form as hereinbefore provided in case of witness.

### **3.0204 General limitation upon testimony.**

A witness may testify that he perceived any material matter unless the judge finds that a jury could not reasonably believe that the witness perceived the matter.

### **3.0205 Control of judges over presentation of evidence.**

Except or otherwise provided in this Code, the judge controls the conduct of the trial and at his discretion determines, among other things:

1. In what order evidence shall be offered and witnesses shall be called and examined.
2. How many witnesses a party may reasonably call to testify to a material matter.
3. Whether to call witnesses of his own motion, and whether, and to what extent, to interrogate a witness by whomever called.

4. What reasonable restraints shall be imposed upon the examiner of a witness in order that the witness not be misled, intimidated, harassed or unduly disconcerted.
5. Whether or upon what condition an adverse party shall upon demand made at the trial submit for inspection to the demanding party a writing or object found by the judge to be in the control of the adverse party and readily accessible and to constitute or contain evidence admissible against the adverse party.

**3.0206 Adverse party's right of examination and cross-examination; By opposing parties.**

A party, or any person for whose immediate benefit the action or proceeding is prosecuted or defended, may call an adverse party and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by an opposing party. Any other opposing party may contradict and impeach any such witness.

**3.0207 Unwilling or hostile witnesses; Examination by leading questions.**

A party may interrogate any unwilling or hostile witness by leading questions. When it appears by the attitude and demeanor of a witness either by facts or circumstances of his examination that he is not a willing witness, a party may use leading questions in his examination even though he has called such party as a witness.

**3.0208 Witness convicted of perjury.**

Any person who has been convicted of perjury or a subornation of perjury shall be excluded as a witness in any action, proceeding, or matter whatsoever upon his own behalf; in any action or proceeding between adverse parties against any person who shall object thereto.

If the testimony of a person convicted of perjury or subornation of perjury has been received without objection, the rights of the parties claiming under the proceeding shall not be affected, unless, the party calling the witness knows of the prior conviction.

**3.0209 Judge, juror, or attorney as witnesses.**

The judge himself or any other juror may be called as a witness by either party; but in such case it is in the discretion of the Court or judge to order the trial to be postponed and to take place before another judge or jury.

When an attorney is a witness for his client upon any trial except as to merely formal matters such as the attestation or custody of an instrument or the like, he shall not further participate in such trial.

**3.0210 Tribal Court empowered to appoint expert witnesses.**

Whenever, in a civil or criminal proceeding, issues arise upon which the Court deems expert evidence is desirable, the Court, on its own motion, or on the request of either the Tribe or the defendant in a criminal proceeding, or of any party in a civil proceeding, may appoint one (1) or more experts to testify at the trial.

Before appointing expert witnesses, the Court may seek to bring the parties to an agreement as to the expert's desire, and if the parties agree, the experts so selected shall be appointed.

The provisions of this rule shall not preclude either party to either a criminal or a civil proceeding from calling an expert witness.

**3.0211 Inspection and examination of subject matter by experts; Cross-examination of experts.**

Expert witnesses appointed by the Court shall, at the request of the Court or of any party, make such inspection and examination of the person or subject

matter committed to them as they deem necessary for the full understanding thereof and such further reasonable inspection and examination as any party may request. Reasonable notice shall be given and each party shall be permitted to be represented at such inspection and examination. Expert witnesses shall be subject to cross-examination by any party on his qualifications and the subject of his testimony.

**3.0212 Admissibility of evidence; Discretion of judge.**

The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will:

1. Necessitate undue consumption of time;
2. Create substantial danger of undue prejudice or of confusing the issue or of misleading the jury;
3. Unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered.

**3.0213 Judicial notice.**

The judge shall take judicial notice of the common law, statutes of every State constitutional guarantees, duly enacted ordinances and governmental regulations of every other tribe, and other jurisdiction of the United States of America. The judge may take judicial notice of:

1. Specific facts which are so certain as not to be the subject of reasonable dispute, and
2. Specific facts and propositions, which are common, every day knowledge in the particular jurisdiction, which everyone of average intelligence and knowledge of things about him can be presumed to know.

Facts entitled to judicial notice need not be pleaded or proved and the judge will direct the jury to find such fact.

**3.0214 Procedure for judicial notice.**

The person requesting judicial notice must:

1. Furnish the judge with sufficient information to enable him properly to comply with the request;
2. Give each adverse party the opportunity to prepare to meet the request.

**3.0215 Illegally obtained evidence.**

Evidence obtained under any condition or circumstances which would violate any laws of the tribe shall be inadmissible in any Court as proof of any fact.

**3.0216 Opinion evidence.**

Non-expert opinions are admissible when words will not adequately describe the subject matter in issue so the trier of the fact can form an adequate judgment thereon.

Where the facts observed can be exactly and fully reproduced by the witness so that the jury can draw equally well an inference from them, the witness' opinion shall be excluded.

**3.0217 Authentication of writings.**

A writing, offered in evidence as authentic, is admissible, if sufficient evidence has been introduced to sustain a finding of its authenticity or the judge finds that the writing:

1. Is at least thirty (30) years old at the time it is so offered, and
2. Is in such condition as to create no suspicion concerning its authenticity, and
3. At the time of its discovery was in a place in which such a document, if authentic, would be likely to be found.

In order to prove the terms or contents of a writing or document, the writing or document itself must be produced or its unavailability shown before any

other evidence will be received to prove the terms or contents of such writing or document.

### **Chapter 3.03 Hearsay**

**3.0301**     **Definition.**

Hearsay evidence is an assertion made orally or in writing or by conduct by one out of court, which assertion is offered in court to prove the truth of the fact asserted.

**3.0302**     **Admissibility of hearsay evidence.**

Hearsay evidence is inadmissible except as stated in Section 3.0303 through Section 3.0316.

**3.0303**     **Reported testimony.**

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a transcript or deposition from a prior proceeding may be used against any party who was present or represented at the taking of such prior testimony, or who had due notice thereof, in accordance with any of the following provisions:

1. The party, against whom the reported testimony is presently offered, was a party to the former proceedings and was afforded an opportunity to cross-examine the witness in that proceeding, and the issue upon which the reported testimony is presently offered is related to the same subject matter as that in the prior case.
2. Any transcript or deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the declarant as a witness.
3. The transcript or deposition of a party or of anyone who at the time of taking such testimony was an officer, director, managing agent, or partner of a public or private corporation, partnership, or association which is a party, may be used by an adverse party for any purpose.
4. The transcript or deposition of a witness whether or not a party, may be used by any party for any purpose if the Court finds:
  - a. That the witness is dead;
  - b. That the witness is not on the reservation, unless it appears that the absence of the witness was procured by the party offering the evidence;
  - c. The witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment;
  - d. That the party offering the evidence has been unable to procure the attendance of the witness by subpoena; or
  - e. Upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.
  - f. Any party to the action or proceeding may introduce any part of any transcript or deposition or file therein, at any time, if such part is competent, relevant, and material.
  - g. Substitution of parties does not affect the right to use depositions previously taken.
  - h. When an action has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefore.

**3.0304**     **Confessions.**

Evidence of a hearsay statement by an accused that he has done or omitted something, the doing or omission of which constitutes a crime or an essential



part of a crime, is admissible against him in a criminal action, but only if the judge finds that:

1. The accused was not induced to make the statement by:
  - a. infliction of physical suffering upon him or threats thereof, or
  - b. threats or promises, likely to cause him to make such a statement falsely, which concerned action to be taken by a public official whom the accused reasonably believed to have the power or authority to secure the execution of the threats or promises; and
2. The accused when making the statement was conscious and was capable of understanding what he said and did.

**3.0305 Admissions.**

Evidence of a hearsay statement is admissible against the declarant if the judge finds that the declarant:

1. is a party to the action in his individual capacity, or
2. is a party to the action in a representative capacity and was acting in that capacity in making the statement.

**3.0306 Authorized and adoptive admissions.**

Evidence of a hearsay statement is admissible against a party to the action if the judge finds that:

1. the declarant was authorized by the party to make a statement or statements for him concerning the subject matter of the statement; or
2. the party, with knowledge of the content of the statement by words or other conduct, manifested his adoption or approval of the statement or his belief in its truth; or
3. the declaration concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of the agency or employment; or
4. the party and the declarant were participants in a plan to commit a crime or civil wrong and the declaration was relevant to the plan or its subject matter and was made while the plan was in existence and before its execution was complete.

**3.0307 Admissions in pleadings.**

Statements of admission appearing in pleadings filed in either a previous case or filed in a present case are admissible as admissions against the declaring party.

**3.0308 Declarations against interest.**

1. A declaration is against the interest of a declarant if the judge finds that the fact asserted in the declaration was at the time of the declaration so far contrary to the declarants pecuniary or proprietary interest, or so far subjected him to civil or criminal liability, created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have the declaration unless he believed it to be true.
2. A declaration against interest is not admissible unless the declarant is not available as a witness.

**3.0309 Contemporaneous or spontaneous statements.**

Evidence of a hearsay statement is admissible if the judge finds that the hearsay statement was made:

1. while the declarant was viewing the event or condition which the statement narrates or describes or explains, or immediately thereafter; or
2. while the declarant was under the stress of a nervous excitement caused by his perception of the event or condition which the statement narrates or describes or explains.

**3.0310 Declarations of a state of mind, emotion, or physical sensation.**

Evidence of a hearsay declaration of a declarant's state of mind, emotion, or physical sensation, tending to prove the fact remembered or believed is admissible unless the judge finds that the declarant made the declaration in bad faith.

**3.0311 Admissibility of business records.**

1. The term "business" shall include every kind of business, profession, occupation, calling, or operation of institutions whether carried on for profit or not.
2. A record of an act, condition, or event, insofar as relevant, shall be competent evidence if the custodian or other qualified witness, who has personal knowledge of such an act, event, or condition, testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, or within a reasonable time thereafter and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.
3. Evidence of the absence of a memorandum or record of an asserted act, event, or condition from the memoranda of a business is admissible as tending to prove the non-occurrence of the act or event or the non-existence of the condition in that business, if the Court finds that it was the regular course of that business to make such memoranda of all such acts, events, or conditions at the time thereof or within a reasonable time thereafter, and to preserve them.

**3.0312 Admissibility of public records and reports.**

1. Entries in public or other official books or records, made in the course of official duty, by or under the direction of a public officer or board, or by another person in the performance of a duty established by law, are prima facie evidence of the facts stated therein.
2. Certified copies of such entries shall be admissible in evidence. Whenever a copy of any such entry is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original or of a specified part thereof. The certification shall be made by the official who was responsible for the copy of the entry, record or document, or by his superior who has knowledge that it is a true copy.
3. Every instrument in writing which is acknowledged or witnessed and duly recorded or duly filed and such record or a certified copy of such record, or a certified copy of such filed instrument duly certified by the proper custodian of the record or instrument, is admissible in evidence without further proof of its authenticity.
4. A written certificate, signed by an officer having the custody of an official record or by his deputy, that after diligent search no record or entry of a specified matter is found to exist in the records of his office, is admissible as evidence that the records of his office contain no such record or entry.

**3.0313 Photographic copies of business and public records as evidence.**

If any business institution, member of a profession or calling, or any department or agency of the Tribe or United States government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, or any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by a photograph, Photostat, microfilm, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

**3.0314 Discretion of the Court to exclude evidence.**

The Court, at its discretion may exclude evidence admissible under Sections 3.0312 and 3.0313, if it is found that the party against whom it is offered has not been furnished a copy of the writing or of its material portions a reasonable time before the evidence is offered.

**3.0315 Admissibility of declarations of pedigree; Witness has no personal knowledge.**

Evidence of a hearsay statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the witness had no means of acquiring personal knowledge of the matter declared:

1. is admissible if the Court finds that the declarant is unavailable, and
2. may be admitted to the Court in the exercise of its discretion even if the declarant is available.

**3.0316 Admissibility of declaration of pedigree; Declarant related or closely associated.**

Evidence of a hearsay statement of a matter concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant is admissible if the Court finds:

1. That the declarant was related to the other by blood or marriage or finds that the declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family; and
2. That the declarant is unavailable as a witness. Evidence of the hearsay may be admitted by the Court in the exercise of its discretion if it is found that the facts specified in clause (1) of this paragraph exist, even if all declarants are available.