

TITLE V

EVIDENCE

Chapter 5.1

Privileges

- 5.101 Self-incrimination. Every natural person shall have a privilege which he may claim, to refuse to disclose in any action before the Community Court, or to any public division thereof, any matter which, if so disclosed, Would subject such person to criminal prosecution before the Community or Federal Court. No person shall be compelled except that a Defendant in a criminal case who voluntarily takes the stand to testify in his own behalf may be required to give testimony as to any matter pertaining to facts and circumstances reasonably related to the criminal offense for which that person is being prosecuted.
- 5.102 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, upon its own motion and without requiring objection by a witness, to advise a witness at an appropriate time of his rights to refuse to answer any question requiring the disclosure of any privileged communication or requiring or tending to require the witness to give testimony which might incriminate him.
- 5.103 Definition of incrimination. A matter will be considered to 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 the United States or of the Saginaw Chippewa Tribe so as to subject that person to prosecution or punishment whereof. No privilege shall exist where the witness has for any reason become permanently immune to prosecution for the offense for which his testimony would be incriminating.
- 5.104 Claiming privilege. The objection that the communication is privileged must be made by or in behalf of the person making the communication.
- 5.105 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 that person:
- (1) Without coercion and with knowledge of this privilege, has disclosed any part of the matter to any person, or.
 - (2) Consented to such disclosure of any part of the

matter by anyone who has knowledge of such matter.

- 5.106 Attorney - client privilege; definitions. Any attorney may not and shall not, without the consent of the client, be examined as to any communication made by the client to the attorney the course of professional employment.

"Attorney" shall include 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 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 shall possess such a privilege if the Judge shall find 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.

- 5.107 Marital privilege: definition. A husband shall not be required to give evidence against his wife without her consent; nor a wife 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. No privilege based upon the marriage relationship shall exist in the following situations:

- (1) A civil action or proceeding by one against the other, or an action by one of them for annulment of marriage, divorce, or separate maintenance from the other, or for damages for the alienation of the affections of the other, criminal conversation with the other or in any case involving abuse of their children;
- (2) A criminal action which one of them is charged with a crime committed by one against the other including bases 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 shall include 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.

- 5.108 Clergyman - penitent privilege; definition. A clergyman or priest shall not, 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 or clergyman in the course of the discipline or practice of the church or religious denomination of which the penitent is a member.

- 5.109 Physician - patient privilege: definition. A physician or surgeon or other regular practitioner of the healing art shall not, 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 the physician to prescribe or act for the patient.

No person shall have such 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 detention 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.

- 5.110 Counselor-Client Privilege: definition. A counselor shall not, without the consent of his client, be examined in any action as to any information acquired in a professional relationship with the client and which was necessary in pursuit of a course of treatment with and for such client.

For the purposes of this Section a counselor shall include any individual licensed by any state, or the federal government, as such, and also any individual affiliated with or employed by the Saginaw Chippewa Tribe in such a capacity.

Communication between counselor and client means such information transmitted between counselor and client, including information obtained by an examination of the client, 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.

Chapter 5.2

Qualifications, Examination, Credibility of Witnesses

- 5.201 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 with regard to which inquiry is being made to the witness and is a privileged communication within the meaning of this title; or
 - (2) The proposed witness is incapable of understanding the duty of a witness to tell the truth.
- 5.202 Interpreters. When a witness neither understands nor speaks the English language or is otherwise incapable 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.
- 5.203 Oath. Every witness before testifying shall be required to express that he shall 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 word "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 a witness shall be required to express his purpose and shall 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 with respect to witnesses.

5.204 Control of Judge over presentation of evidence. Except as otherwise provided in this Code, the Judge shall control the conduct of the trial and at the discretion may determine:

- (1) The order in which evidence shall be received and witnesses shall be called and examined.
- (2) The number of witnesses a party may reasonably call to offer testimony as to a particular matter.
- (3) Whether to call witnesses upon his own motion, and to extent a witness, may be interrogated.
- (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.

5.205 Adverse party's right of examination and cross-examination: by opposing parties. A party, or any person for whose immediate benefit an action or proceeding is prosecuting or defended, may call an adverse party and interrogate him by leading questions, and may 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.

5.206 Unwilling or hostile witnesses; examination by leading questions. A party may, with the permission of the Court, interrogate any unwilling or hostile witness by leading questions even though such witness may have been called by the examining party.

5.207 Witness convicted of perjury. The testimony of any person convicted of perjury or the subornation of perjury may not, for that reason only, be excluded from consideration by the Court or jury. Any party y, however, upon the admission of testimony by such a witness, raise such conviction upon cross-examination and examine the witness with respect to the circumstances out of which the perjury or subornation of perjury conviction arose.

5.208 Judge, juror, or attorney as witness. The Judge or any 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 be continued 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, he shall not further participate in such trial as an attorney.

5.209 Community Court empowered to appoint expert witnesses. Whenever, in either a civil or criminal proceeding, issues arise upon which the Court deems expert evidence desirable,

the Court may, upon, motion or upon request of either the Tribe or the Defendant in a criminal proceeding, or of any party in a civil proceeding, appoint one 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 particular experts desired, and if the parties shall 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 proceedings from calling an expert witness.

5.210 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 shall 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. An expert witness shall be subject to cross-examination by any party upon his qualifications and the subject of his testimony.

5.211 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 misleading the jury.
- (3) Unfairly surprise a party who has not had reasonable grounds to anticipate that such evidence would be offered.

5.212 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 jurisdictions of the United States of America. The Judge may also 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 who possesses reasonably knowledge of things about him can be presumed to

know.

Matters entitled to judicial notice need not be pleaded or proved and the Judge shall direct the jury to find such matters to be fact.

5.213 Procedures for judicial notice. The person requesting judicial notice of a matter shall:

- (1) Furnish the Judge with sufficient information to enable him to properly comply with the request,
- (2) Give each adverse party sufficient notice to enable the adverse party to prepare to meet the request.

5.214 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.

5.215 Opinion evidence. Non-expert opinions are admissible when words can not adequately describe the subject matter in issue so as to allow the trier of fact to form adequate judgement thereon. Where the facts observed can be exactly and fully reproduced by the witness so that the jury can equally well draw an inference from them, the witness's opinion shall be excluded.

5.216 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 years old at the time it is so offered, and
- (2) Is in such condition as to create no reasonable suspicion concerning its authenticity, and
- (3) At the time of its discovery was in a place in which such 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 5.3

Hearsay

5.301 Definition. Hearsay evidence is an assertion made orally, in writing, or by one out of Court, which assertion is offered in Court to prove the truth of the matter asserted.

5.302 Admissibility of hearsay evidence. Hearsay evidence is inadmissible except as is provided in Section 3. 303 through Section 3. 314.

5.303 Reported testimony. At 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 party to the former proceeding 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 involved in the prior case.
- (2) Any transcript or deposition may be used by any party for the purpose of contradiction or impeaching the testimony of the declarant as a witness.
- (3) The transcript of the testimony or the deposition of a party or of any one who at the time of taking such testimony has an officer, director, managing agent, or partner of public or private corporation, partnership, or association which is a party, may be used by any 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 that any of the following are true:
 - (a) That the witness is deceased;
 - (b) That the witness is not on the Reservation, unless it appears that the party absence of the witness was procured by the party offering the evidence;
 - (c) That 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 subpoenas; 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 importance of presenting the testimony of witnesses orally in open Court, to allow the deposition to be used.

(5) 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.

(6) Substitution of parties does not affect the right to use depositions previously taken.

(7) 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 therefor.

5.304 Confessions. Evidence of a hearsay statement by an accused that he has done or omitted something, the doing or omission of which constitute a crime or an essential part of a crime, is admissible against the accused in a criminal action, if the Judge finds that:

(1) The accused was not induced to make the statement by:

(a) The infliction of physical or mental 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 to 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.

5.305 Admissions. Evidence of a hearsay statement is admissible against the declarant if the Judge finds that the declarant:

(a) Is a party to the action in his individual capacity, or

(b) Is a party to the action in a representative capacity and was acting in that capacity in making the statement.

5.306 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 matter within the scope of an agency or employment of the declarant for the party and was made
- (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.

5.307 Admissions in pleading. Statements of admission appearing in pleading filed in either a prior cause or filed in a present action are admissible as admissions against the declaring party.

5.308 Declarations against interest. 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 declarant 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 made a declaration unless he believed it to be true.

5.309 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, 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, describes, or explains.

5.310 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.

5.311

Admissibility of business records and Statements Made For Purposes of Medical Treatment or Medical Diagnosis in Connection with Treatment.

- (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) Records of Regularly Conducted Activity. A memorandum, report, record or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.
- (3) Absence of Entry and Records Kept In Accordance With The Provisions Set Forth in the Preceding Paragraph. 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 the preceding paragraph, to prove the non-occurrence or non-existence 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.
- (4) Statements Made For Purposes Of Medical Treatment Or Medical Diagnosis in Connection With Treatment. Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or its general source thereof insofar as reasonably necessary to such diagnosis and treatment.

5.312

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 of 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.

5.313 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, the State of Michigan, or the 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 any photograph, photostat, microfilm, computer program, or other similar method for reproducing the original, and the original has been destroyed in the regular course of business, such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original if the same shall be found to exist.

5.314 Discretion of the Court to exclude evidence. The Court, in its discretion, may exclude evidence admissible under Sections 4.312 and 4.313, 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 prior to the time the evidence is offered.

Enacted October 4, 1982, Res. No. L&O-14-82 (app'd by BIA October 29, 1982); amended October 19, 1982, Res. No. (app'd by BIA October 29, 1982); and subsection 5.311 amended August 9, 2001, by Res. No. 01-122.