

## **CHAPTER 1-9 RULES OF EVIDENCE**

### **1-9-1**

#### **Purpose and Applicability**

(a) The purpose of these rules of evidence is to provide for fundamental fairness consistent with the values, customs and traditions of the Confederated Tribes of the Colville Reservation and to ensure that the Tribal Court and juries are able to determine the relevant facts with minimal delay, confusion, and uncertainty and without being unfairly prejudicial.

(b) These rules apply in every proceeding before the Colville Tribal Court, except as set forth in subparagraph (c), and where provided otherwise in specified proceedings under the Colville Tribal Code. The rules of evidence used in state and federal courts shall not apply to hearings in the Tribal Court.

(c) Except as applied to privileges, these rules shall not apply in the following situations:

(1) When the Court is making a preliminary determination as to whether evidence is admissible;

(2) In proceedings for contempt in which the Court may act summarily;

(3) In proceedings for extradition or rendition, issuing an arrest warrant, criminal summons, or search warrant, sentencing, granting or revoking probation or supervised release, considering whether to release on bail or otherwise, and MINOC temporary custody and review hearings.

### **1-9-2**

#### **General Rule**

(a) When determining the admissibility of evidence, the Court shall determine whether the evidence is relevant, and the Court shall exclude the evidence if its probative value is outweighed by its potential to be unfairly prejudicial. (b) Evidence admitted in the Tribal Court must be relevant. Evidence is relevant if it has a reasonable and logical connection either to the issues before the Court or to the weight and credibility that should be given to other evidence. When relevance is questioned by the judge or another party, the party who wishes to present certain evidence shall explain why he or she thinks the evidence is relevant.

(c) The most reliable evidence available to the court on a particular subject is preferred, including testimony from personal knowledge as opposed to second-hand knowledge. The Court may allow and consider other evidence.

(d) When the relevance or reliability of evidence, including evidence presented in writing, is challenged and the Court decides whether or not to admit the evidence, the Court shall explain the decision. The Court may exclude relevant evidence if it would not promote the purpose of these rules.

(e) Unless allowed under the Code or the rules, a person's character is not relevant evidence, but evidence of habit or routine practice may be introduced to prove that a person acted in accordance with that habit or routine practice.

(f) In criminal and youth offender actions, the defendant will be afforded the protections provided by Colville law and the Indian Civil Rights Act.

### **1-9-3**

#### **Hearsay**

(a) Hearsay is testimony or documents that quote statements made by persons outside of court to prove the truth of the matter at issue.

(b) Hearsay is inadmissible. It is presumed to be unreliable, and presumed to violate the right to confront and examine witnesses. Hearsay will not be admitted as evidence, unless an exception applies.

(c) Exceptions to Hearsay. Exceptions are situations where the circumstances show that the evidence may be reliable, and does not violate the right to confront, even though it is hearsay. Examples of such evidence, in addition to any others provided in law, include:

- (1) Present sense impression, which is a statement describing or explaining the declarant's sensation or perception of an event or condition, made while or immediately after the declarant perceived or sensed it;
- (2) Spontaneous, excited, or startled utterance;
- (3) Statements made for purposes of medical diagnosis or treatment;
- (4) Records of regularly conducted activity routinely made in the course of business, including medical records, but not including police reports in a criminal or youth offender case;
- (5) Absence of entry in records of regularly conducted activity;
- (6) Public records and reports that have been regularly maintained;
- (7) Records of vital statistics;
- (8) Absence of public record or entry;
- (9) Records of religious or spiritual organizations;
- (10) Marriage, baptismal, and similar certificates;
- (11) Family records;
- (12) Learned treatises;
- (13) Reputation as to character, if character is at issue;
- (14) Any statement of a party-opponent;
- (15) A statement made by a witness when under oath or subject to cross-examination;
- (16) A statement against pecuniary or proprietary interest;
- (17) A statement of a deceased declarant, if there are sufficient guarantees of reliability;  
or
- (18) A statement not specifically covered by any of the foregoing examples but which has comparable guarantees of reliability, and for which the right to confront does not apply.

(d) Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms to an exception to the hearsay rule provided in these rules.

#### **1-9-4**

##### **Child Hearsay Exception.**

(a) A statement made by a child that describes or denies any form of neglect or abuse is a hearsay exception if there is corroborative evidence, which may include:

- (1) Medical reports showing that abuse occurred;

- (2) Testimonial evidence, including observations of investigators;
- (3) Physical evidence; or
- (4) Any other evidence with reasonable indications of reliability that corroborates that neglect or abuse occurred or did not occur.

(b) Out-of-court statements made by a child regarding neglect or abuse may be admitted if the trustworthiness of such statements can be established upon consideration of:

- (1) The statement's relevance to the issue to be determined;
- (2) The circumstances of the statement that indicate reliability; and
- (3) The child-declarant's testimony to the judge in chambers or additional evidence that corroborates the statement.

(c) In civil and youth offender proceedings without a jury the Court shall consider and articulate the weight being given the evidence when ruling on the admissibility of child hearsay.

#### **1-9-5 Right to Confront and Examine Witnesses**

(a) Any person who stands accused in a criminal or youth offender proceeding shall have the right to challenge any evidence offered against them. This right includes:

- (1) The right to receive discovery of evidence a sufficient time before that evidence is offered in court to be able to prepare to challenge such evidence; and
- (2) The right to confront and cross-examine witnesses at trial.

(b) In all proceedings, the right to challenge evidence shall be balanced against other considerations as set forth in this code, Tribal law, and Tribal customs and traditions.

(c) In all criminal and youth offender proceedings, the right to challenge evidence is presumed and will not be abridged except as set forth in the Colville Tribal Code.

#### **1-9-6 Self-Incrimination**

(a) Every person who appears as a witness in Tribal Court has the right to refuse to answer a question if the answer will incriminate the witness.

(b) In any criminal or youth offender proceeding, the defendant shall not be made to testify against his or her will. However, incriminating statements which an adult criminal defendant made voluntarily out of court may be presented in court.

(c) In youth offender proceedings, statements made by an allegedly offending youth to law enforcement personnel or persons acting under their direction shall not be introduced against the youth unless the Court receives sufficient evidence that the statement was made knowingly and voluntarily. In determining whether the statement was made knowingly and voluntarily, the Court shall take into account all relevant factors, including but not limited to:

- (1) Whether the youth had the opportunity to consult with his or her parent, guardian, custodian, or counsel before making the statement;
- (2) The youth's age, maturity, and level of education;
- (3) The youth's level of intelligence and mental development, as well as the presence of any cognitive or mental disability or impairment;
- (4) The youth's physical and mental condition at the time the statement was made;

(5) If the youth was incarcerated when the youth made the statement, the length of time the youth was detained prior to interrogation, and the length of time the youth was interrogated;

(6) The environment in which the interrogation took place;

(7) Any use of deception by the law enforcement officers conducting the interrogation; and

(8) Whether, either prior to or during the interrogation, the youth was held in isolation, deprived of food or sleep, or subjected to other potentially coercive measures.

(d) In youth offender proceedings, statements made by the allegedly offending youth in the course of a custodial interrogation shall not be introduced against the youth unless the youth was advised of his or her rights, the youth understood the potential consequences of providing the statement, and the youth clearly and affirmatively waived his or her rights before being questioned.

(e) The foregoing restrictions limiting the introduction of an alleged youth offender's statements against the youth shall not prohibit the introduction of statements that the Tribes shows, upon a preponderance of evidence, to be:

(1) A statement made by the youth in open court in any court proceeding in which the youth was represented by counsel;

(2) A statement made in response to a question that is routinely asked during the processing of a youth being taken into custody and not a question that the law enforcement officer knows or should have known would be likely to elicit an incriminating response.

#### **1-9-7**

##### **Privilege**

(a) Privileged communications are exempted from being presented as evidence. Privileged communications are confidential communications that take place within a protected relationship. A communication is confidential if it is made privately by one person within the protected relationship to the other member or members of the relationship and is not intended for disclosure to another person outside the relationship. Examples of protected relationships include those between a spokesperson and client, a doctor and patient, a mental health counselor and client, a priest and penitent, and between spouses.

(b) The Court cannot compel someone validly invoking a privilege to divulge the contents of the privileged communication unless the privilege is waived, the dispute before the Court is between the members of the protected relationship (including where one member is the victim of a crime alleged to have been committed by another member), or Colville law specifically negates the privilege for a particular purpose. The accidental or inadvertent disclosure of privileged communication is not a waiver of the privilege.

#### **1-9-8**

##### **Peacemakers and Sacred Teachings**

(a) Evidence that necessarily asks the participant to share "stim aspuús" is not admissible for any purpose since traditional teachings and practices, including Peacemaking, sweats, and other cultural practices, depend upon and seek the spiritual powers of the Columbia Plateau People and were meant to be relayed within respective tribes or bands, family groups, or with respected elders or traditional healers.

(b) Preservation of the Tribal Culture cannot occur unless it is shared within the protected group (i.e. band, family, women, etc.). It is not sufficient to say that this is a privileged communication. Rather, it is inherently protected by the sanctity of the culture and tradition of the people in whose memory those teachings are stored and who are obliged to teach or otherwise share such

information. It is an affront to the sanctity of those teachings to compel the use of the whole or extraction of any part of that vital journey for use before the Court.

**1-9-9      Settlement and Plea Discussions, and Prior Pleas**

(a) Evidence that settlement or plea discussions have taken place shall not be admissible for the purpose of establishing liability or guilt, and no statement made in settlement or plea discussions may be admissible as evidence.

(b) Evidence of a guilty plea that was later withdrawn, or of a nolo contendere or no-contest plea, shall not be admissible as evidence of guilt.

**1-9-10      Questioning Witnesses**

(a) The Court shall determine the order in which parties or their representatives shall be allowed to question witnesses. The Court shall protect the witnesses from harassment or unnecessarily repetitive questioning.

(b) During the questioning of a witness, the Court may exclude witnesses who have not yet testified from the courtroom if this seems necessary to ensure that all witnesses will give truthful testimony and that their testimony will not be influenced by the testimony of other witnesses. When the Tribes or one of its agencies is a party to the action, a representative of the agency may remain in the courtroom, even though he or she may be called as a witness.

(c) When questioning a witness, the judge and parties or their representatives shall not ask in such a way as to suggest the answer desired, unless the witness is being cross-examined or is clearly hostile to the person asking questions.

(d) By testifying on a preliminary question, a defendant in a criminal or youth offender case does not become subject to cross-examination on other issues in the case.

(e) The Court may call a witness to testify and may question any witness on his or her initiative.

**1-9-11      Impeachment**

(a) Impeachment is evidence that shows that a witness or evidence is, or may not be, reliable or trustworthy. Any party may impeach a witness.

(b) Impeachment can be accomplished by testimony or evidence relevant to the witness's reputation for having a character for honesty or dishonesty, except that evidence of an honest character may not be admitted unless evidence or testimony of the witness's dishonesty has been introduced. A criminal conviction less than 10 years old is relevant to a witness's character if it was a serious offense or if the offense contained an element of dishonesty. Evidence of a youth offender conviction or disposition or of a deferred prosecution that is proceeding or has been successfully dismissed shall not be admissible.

(c) A witness cannot be impeached by:

(1) specific instances of conduct, except on cross-examination if the specific conduct is specifically relevant to the witness's honesty or dishonesty, or as otherwise allowed under these rules; nor

(2) evidence of a person's religious belief or opinion

**1-9-12      Prior Crimes, Wrongs, and Other Acts**

(a) Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(b) The Court may admit evidence of a crime, wrong, or other act for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(c) On the request of a criminal defendant or youth offender, the prosecutor must provide reasonable notice of the general nature of any such evidence the prosecutor intends to offer at trial and do so before trial.

(d) Evidence in Sex Offense Cases; Victim's Sexual Behavior or History. [Reserved. *See* CTC § 3-1-21].

**1-9-13      Documentary Evidence**

(a) Written records, photographs, and other documentary evidence are valid unless a party impeaches their validity as evidence, in accordance with these rules.

(b) Copies of written records, photographs, and other documentary evidence shall be considered equally valid as originals, unless a party impeaches their validity as copies in accordance with these rules.

**1-9-14      Expert Witnesses**

(a) When specialized knowledge will assist the Court to understand the evidence or to determine a fact in issue, or when a party desires to make a record regarding Colville Tribal customs and traditions, a witness qualified as an expert by knowledge, skill, experience, training, or education may present opinion testimony within his or her field of expertise.

(b) An expert witness must not state an opinion about whether defendant party did or did not have a mental state or condition that constitutes an element of the crime, youth offense, cause of action or of a defense. Those matters are for the trier of fact alone.

**1-9-15      Court Responsibility to Make Accommodations to Help Children Testify**

(a) The Court shall create court rules to protect a child and recognize their rights in all court proceedings. The Court shall scrupulously take into consideration the traumatic effect on a child of testifying, facing a respondent or defendant, and of being subject to cross-examination.

(b) A child shall not be required to testify unless accommodations are provided to ensure providing testimony does not unduly traumatize the child. Such accommodations may include but are not limited to:

- (1) providing a child-friendly oath;
- (2) rearranging the courtroom so that the child does not sit near or is not within direct line of sight of the alleged offender or defendant during questioning;
- (3) creating a safe and comfortable area for a child witness to wait before testifying;
- (4) allowing the child to hold a comfort item during his or her testimony; and
- (5) if a therapy animal is available, with a handler in attendance, it may be allowed to assist a child requesting such while testifying.

(c) A child witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding.

**1-9-16**

**Court Testimony of a Child in Chambers or by Videotape**

(a) The Court, upon its own motion, or upon the motion of any party, may take testimony from any child appearing as a witness and in its discretion may exclude the child's parents or guardians and other persons from the courtroom or interview the child in chambers, provided that a court clerk and the child's counsel are present and the interview is recorded, if the Court finds such action would be in the best interests of the child.

(b) In lieu of testimony and upon written motion, the Court may review a recorded forensic interview in chambers in the presence of counsel or a party or parties, if the party is not represented.

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