CHAPTER V

RULES OF EVIDENCE

Section 1 General Guidelines

Objections to the admissibility of any evidence may be based on, but are not limited to, the rules of evidence within this Law and Order Code or any ordinance hereafter passed; provided, that when an objection is based on some ground other than those specifically enumerated within this Code or ordinances of the Tribal Council, the presiding judge shall exercise his discretion in ruling upon the objection. In so doing, said judge shall demand from the party offering the evidence a reliable foundation for the admittance thereof, showing the court his source of information and the dependability of that source. Before ruling upon the admissibility of any evidence the Court may require proof of any other facts it deems necessary to guarantee the reliability of the offered evidence and ensure that all parties receive a fair and just trial not based upon frivilous or unreliable evidence. It shall be the duty of the Court to assure that the offered evidence is trustworthy and relevant. Objections to the admissibility of any evidence in any case may be made by any party to the action not offering the same and shall be ruled upon by the presiding judge.

When an objection is made, the presiding judge shall either rule upon it at that time or take it under advisement and rule upon it at a later time prior to allowing the case to go to the trier of fact. If the objection is taken under advisement, the presiding judge, upon making a ruling thereon, shall inform the trier of fact and the parties of the significance of his ruling. The admission or exclusion of any evidence shall not be grounds for appeal unless timely objection is made thereto by the appealing party at the time it is offered.

Obedience to any of the rules of evidence of the court may be waived by written stipulation of all parties, or by oral stipulation in Court and on the record. The Court is not bound by any stipulations or waivers and may, in its discretion, require adherence to all rules of evidence.

When an objection is made, the judge must apply the law, but he must do this carefully and be certain that it is applicable. In addition, he should consider whether or not the application of the particular law is fair.

The judge should not hesitate to use common sense in ruling on objections to the evidence offered. The judge shall have no duty to exclude evidence unless an objection is made by a party to the action and the judge thereafter decides to exclude it. When the trial judge desires additional information or help in deciding whether an objection should be overruled or sustaned, he may invite arguments from each party on the objection. When the trial is before a jury, arguments on the objection should be heard outside the present of the jury.

When no objection is made, and only in the interest of justice, the judge should upon his own motion refuse to permit the introduction of evidence that is not relevant to the issue, or is merely cumulative. He also has the right to call witnesses or to examine any witness called to the stand by either party. But all questioning must be fair, impartial and jusidious to avoid any bias towards a party, or the possibility of implying that the witness is not telling the truth. His role is to clarify obscruities and elicit the facts- not to become the advocate on the bench. A judge must avoid any appearance of partiality. The judge has the responsibility of conducting the trial in accordance with the rules of evidence, He must perform his duty firmly, make his ruling in a manner that moves the trial along as rapidly as possible and that encourages a forthright disclosure of the facts by all parties in a fair, open and courteous way.

Before the trial begins, the judge should inform himself as fully as possible on the issues each of the parties will be trying to prove or refute. In complicated cases, a judge can and should call a pretrail conference for the express purpose of having the parties clearly define the issues, disclose the names of witnesses, and show each other any propsed exhibits that will be offered during the trial.

All the rules of evidence shall apply in both civil and criminal cases unless specifically limited by each individual rule herein or ordinance hereafter enacted.

Section 2 Leading Questions

A question which suggests to the witness the answer which the examining party desires to denominated a leading questions shall not be allowed, except in the sound discretion of the court, under special circumstances,

making it appear that the interests of justice require it. Leading questions shall always be permitted in the following situations:

a) on cross-examination;

b) on undisputed preliminary matters or introductory facts when the answer is not offered as proof of a genuine factual issue in the trial, such as the witness' name, address, occupation, or location of a witness at the time of the relevant event;

c) when the examiner can genuinely claim surprise at the testimony of the witness, or when the witness turns out to be hostile or is called as an adverse witness;

d) when the court in its discretion so allows it.

Section 3 — Re-examination and Recalling of Witnesses

A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled by the same party without leave of the court. Leave shall be granted or withheld by the court in the exercise of sound discretion. This rule shall not preclude the adverse party from calling such witness as his own witness for direct examination.

Section 4 — Relevancy

Matters offered in evidence in a case must be relevant to the issues and tend to establish or disprove them. Evidence which does not throw any light upon, or have any logical relation to, the facts in issue which must be established by one party or disproved by the other or which is too remote, is not properly admissible in evidence and upon proper objection must be excluded. The relevancy of any matter objected to shall be within the sole discretion of the court and a ruling thereon shall not be disturbed on appeal unless an abuse of discretion clearly appears. The rule of relevancy shall apply to all forms of evidence.

Section 5 — Exclusionary Rule

In criminal prosecutions, any evidence obtained by means of an unlawful search and seizure by any State, Federal or Tribal law enforcement or government official is not admissible against the accused where timely objection to the use of such evidence is made. This rule shall also apply to any evidence obtained by any method which is morally reprehensible and offensive to fair dealing based on:

a) local customs of the Shoshone Bannock Tribes; or

b) Tribal Code, Constitution and Ordinances; or

c) Indian Civil Rights Act of 1968; or

d) Any other rights guaranteed the Indians by Federal, State or Tribal laws.

Section 6 — Opinion and Speculation of Non-Expert

Upon timely objection, no witness shall be allowed to testify to a fact of which he has no personal knowledge and which he did no acquire through his own senses; nor shall the court allow a witness to testify as to his impressions, conclusions or beliefs that are not founded on fact. The opinion of a witness who has not been qualified as an expert in the field of his testimony shall not be admissible as to matters that require some knowledge or experience outside of what is normal for the average person.

Section 7 — Opinion of an Expert

An expert witness is permitted to give an opinion when: (1) the significance of the facts is one normally considered to be beyond the knowledge and experience of the ordinary layman, and his testimony will assist the understanding of the trier of fact; and (2) the witness is shown to have special education, knowledge, skill, training or experience in the particular field. The qualification of an expert is a matter of discretion with the trial judge. The opinion of the expert may be based on:

a) Facts which he has observed; or

b) Facts which he has been asked to assume that were testified to by other witnesses during the trial; or

c) Hearsay evidence of facts if they are of a type reasonably relied on by experts in forming opinions or inferences on the subject.

Section 8 — Compromise Offer or Negotiations

Evidence of an offer to compromise or acceptance made by a party shall not be admissible on the issue of liability or invalidity of a claim. Evidence of paying or offering to pay medical, hospital or similar costs of an injured party shall also be inadmissible to prove liability for the injury. Evidence of offers to plead guilty or a guilty plea withdrawn shall also be inadmissible to prove guilt. These and any other negotiations between parties to a civil or criminal action shall be deemed confidential and privileged communications which shall not be admissible as evidence.

Section 9 — Best Evidence

When a party wishes to prove the contents of a writing, no evidence other than the original writing itself shall be admissible for this purpose; except, that a copy of an original writing, or oral testimony of its contents, can be used to prove the content of a writing, but before a copy or testimony of its contents is admissible, a foundation must be laid showing that the original document has been lost, destroyed, or stolen, or that it is in the exclusive possession of the other party who has not produced it upon request, or that it is not within the jurisdiction of the court or subject to process from the court. This rule shall apply only to writings and not to physical objects or testimony.

Section 10 — Self-Incrimination

In criminal prosecutions, an accused cannot be compelled to testify where he is the defendant. The prosecutor cannot comment to the judge or jury on the defendant's exercise of this privilege, and no inference of guilt can be drawn therefrom. If comment is made by the prosecutor on defendant's failure to so testify, the court shall make a determination as to whether the trier of fact was prejudiced thereby, and if such prejudice did result, shall grant, upon defendant's motion, a mistrial. When a defendant voluntarily testifies on his own behalf, however, he waives his privilege not to answer incriminating questions that are within the scope of relevant cross-examination.

In civil cases a witness shall not be compelled to give testimony or evidence which might subject him to criminal penalties in either state, federal or tribal jurisdictions.

The privilege against self-incrimination shall not apply where the witness may be subject only to civil liability because of his testimony; or where the witness has an absolute defense to prosecution; or if the prosecution grants immunity from prosecution to the witness; or where the testimony of the witness may incriminate another person and not himself.

Section 11 — Privileged Communications

Section 11.1 — Policy

It is the policy of the Tribal Court to encourage certain relationships of trust and confidence. It is believed by the Court that the probative value of certain communications is outweighed by the impairment of the particular relationship that would result from disclosure.

Section 11.2 General Principles

These general principles shall be observed when applying the rules of evidence on privileged communications, and they shall be binding on all parties and the court:

1) The communication must come under the rule, e.g., a conversation with a lawyer not related to his professional employment is not privileged.

2) Generally, the privilege does not cease on termination of the relationship.

3) Communications to be related to a third party are not privileged because they are not made in confidence. The same rule applies when they are made in the presence of a third person not also entitled to claim the privilege.

4) The privilege does not extend to communications in furtherance of a criminal purpose. After the commission of a crime, a communication with a lawyer or advocate may be privileged if the professional relationship exists.

5) Waiver of the privilege can be asserted only by the client. The professional person cannot waive if the client objects, but if the client waives, the professional person cannot refuse to testify.

6) An eavesdropper - a third person unknown to the holder of the privilege - cannot testify about the communication between the parties unless the communication took place in a location where there was no reasonable expectation of privacy on behalf of the party claiming the privilege.

Section 11.3 Husband - Wife Privilege

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 afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other, not does this exception apply to any case of physical injury to a child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents. Upon the death of one spouse, the privilege of that spouse may be waived by the surviving spouse alone.

Section 11.4 Lawyer (Advocate) - Client Privilege

All confidential communications between a lawyer (Advocate) and his client shall be privileged. This privilege shall not apply when a client seeks legal counseling to commit or plan a crime or fraud, that is, future wrongdoing; or when legal disputes arise out of dealings between the attorney (Advocate) and client. The privilege may be asserted only if the client consults the lawyer (Advocate) for legal services, but it is not necessary that the lawyer (Advocate) be paid a fee. In the event the client should decease, said communications shall forever be confidential and cannot be revealed unless it can be shown that the client intended that the communications be revealed after his death. The word "client" used herein shall be deemed to include a person, corporation or an association.

Section 11.5 Physician - Patient Privilege

A physician or surgeon 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, provided, however, that:

(A) Nothing herein contained shall be deemed to preclude physicians from reporting of and testifying at all cases of physical injury to children, where it appears the injury has been caused as a result of physical abuse or neglect by a parent, guardian or legal custodian of the child.

(B) After the death of the patient, in any action involving the validity of any will or other instrument executed, or claimed to have been executed, by him, conveying or transferring any real or personal property or incurring any financial obligation, such physician or surgeon may testify to the mental or physical conditions of such patient and in so testifying may disclose information acquired by him concerning such patient which was necessary to enable him to prescribe or act for such deceased.

(C) Where any person or his heirs or representatives brings an action to recover damages for personal injuries or death, such action shall be deemed to constitute consent by the person bringing such action that any physician who has prescribed for or treated said injured or deceased person and whose testimony is material in the action may testify.

(D) If the patient be dead and during lifetime had not given such consent, the bringing of an action by a beneficiary, assignee or payee or by the legal representative of the insured, to recover

on any life, health or accident insurance policy shall constitute a consent by such beneficiary, assignee, payee or legal representative to the testimony of any physician who attended the deceased.

(E) This privilege applies only to civil actions and not to criminal proceedings.

Section 11.6 Clergy - Penitent Privilege

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 enjoyed by the church to which he belongs. This privilege ceases to exist upon death of the person making the confession, or when he ceases to be a member of the church to which the clergyman or priest belong, of his own will or by action of the church.

Section 11.7 Parent - Child Privilege

Any parent, guardian or legal custodian shall not be forced to disclose any communication made by their minor child or ward to them concerning matter in any civil or criminal action to which such child or ward is a party. Such matters so communicated shall be privileged and protected against disclosure; excepting, this section does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other, nor does this section apply to any case of physical injury to a minor child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents, guardian or legal custodian.

Section 12 Parol Evidence

For purposes of this secton, "Parol Evidence" shall mean all prior oral or written expressions made during any negotiations leading up to the writing in question, as well as any oral expressions of intent or belief about the meaning of the writing.

No parol evidence shall be admitted which would tend to change or supplement any material terms stated in a valid written contract or other writing intended by the parties to be the final and complete expression of their agreement; except, that parol evidence which is not inconsistent with matters stated in the writing is admissible. The writing in question shall be deemed to be the entire understanding of the parties. When the writing itself cannot furnish its own interpretation, parol evidence can be received only to clarify uncertain or ambiguous terms therein. The parol evidence rule shall not apply when the question of mistake or fraud in the preparation of the writing is part of the ultimate issue in the action.

Section 13 — Who May Be Witnesses - Credibility of Witnesses

All persons, without exception, other than those specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of a crime; nor persons on account of their opinions on matters of religious belief; although in every case, the credibility of the witness may be drawn into question by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence; and the trier of fact is the exclusive judge of his credibility.

Section 13.1 — Who May Not Testify

The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination;

2. Children under ten(10) years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly;

3. Parties or assignors of parties to an action or proceedings, or persons in whose behalf an action or proceeding is prosecuted against an executive or administrator, upon a claim or demand against the estate of a deceased person, as to any communication or agreement, not in writing, occuring before the death of such deceased person.

Section 14 — Judge or Juror as Witness

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

Section 15 — Interpreters

In any civil or criminal action in which any witness or party does not understand or speak the English language or who has a physical handicap which prevents him from fully hearing or speaking the English language, the court shall appoint a qualified interpreter to interpret the proceedings to and the testimony of such witness or party. Upon appointment of such interpreter, the court shall cause to have the interpreter served with a subpeona as other witnesses, and such interpreter shall be sworn to accurately and fully interpret the testimony given at the hearing or trial to the best of his ability before

assuming his duties as an interpreter. The court shall determine a reasonable fee for all such interpreter services which shall be paid out of the general tribal funds if his assistance was requested by the court. If an interpreter is requested by a party to the action, such party shall pay said fee.

Section 16 — Transfers of Real Property To Be In Writing

No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over, or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

Section 16.1 — Exceptions to Preceding Section

The preceding section must not be construed to affect the power of a testator in the disposition of his real property by last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.

Section 17 — Certain Agreements To Be In Writing

In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:

1. An agreement that by its terms is not to be performed within a year from the making thereof;

2. A special promise to answer for the debt, default or miscarriage of another;

3. An agreement made upon consideration of marriage, other than a mutual promise to marry;

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than $500, unless the buyer accepts and receives part of such goods and chattels, or the evidences, or some of them of such things in action, or pay, at the time, some part of the purchase-money; but when a sale is made by auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of the sale, the price and the names of the purchaser and the person on whose account the sale is made, is sufficient memorandum.

5. An agreement for the leasing, for a longer period than one year, or for the sale, or real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

Section 18 — Explanation of Alterations

The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another without his ooncurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise.

Section 19 — Hearsay

Section 19.1 — Rule

Hearsay evidence shall not be admissible incourt, subject to the exceptions listed in this Code or prescribed by any ordinance hereafter enacted.

Seciton 19.2 — In General

For purposes of this section, Hearsay shall be defined as evidence which derives its value, not solely from the credit to be given to the witness upon the stand, but in part from the veracity and competency of some other person, and which is offered to prove the truth of the matter asserted. Hearsay can be in oral or written form or may consist of nonverbal behavior, if it is intended by the declarant to be an assertion.

Section 19.3 — Reasons for Hearsay Rule

The hearsay rule is used because the declarant is not subject to three important conditions which our legal system normally imposes before statements are allowed into evidence: (1) under oath or affirmation or an indication of compuncation to tell the truth; (2) testifying in the personal presence of the trier of the fact so that the witness' demeanor is under observation; and (3) subject to cross-examination.

Section 19.4 Judicial Guidelines

Before a court may give any credibility to testimony, such testimony should be given by the one with personal knowledge of the fact to be proven rather than information which has been relayed second-hand. There is real danger that the offered hearsay evidence may be merely gossip or a distortion of the true facts.

The court should remember that when the only reason for introducing the statement is to show that it was made, and not to prove the truth of what was said, the statement is not hearsay. Further, when it is determined that a statement or document is hearsay, the court will be given a wide range of discretion in deciding whether to admit such evidence. In making such a determination the court should consider such factors as reliability of the declarant and witness, authenticity of the document, verification, certification, whether justice demands allowing the opposing party the right to cross-examine the declarant, and any other factors the court deems necessary to assure fairness to all parties. The court should demand the best method of proof available rather than rely on hearsay.

Section 19.5 Exceptions to Hearsay Rule

Section 19.5.1 Admissions or Confessions

Subject to the limitations below, admissions or confessions shall be admissible into evidence as an exception to the Hearsay Rule.

An "admission" shall be defined as an out-of-court statement or act by a party (or in a civil action, by an agent or representative authorized to make statements about the subject) that is an acknowledgement of a relevant fact or circumstance and is offered in evidence against him by his opponent in the litigation. In criminal cases, the acknowledgement must be of some fact or circumstance that is helpful in the process of inferring the guilt of the defendant.

A "confession" shall be defined as an out-of-court statement, oral or written, by one accused of a crime, admitting that he is guilty of the crime with which he is charged.

Both admissions and confessions must have been made voluntarily in order to be used in court. An admission shall be received in evidence when the facts satisfy the judge that the statement was made voluntarily. Whereas the due process clause of the

Indian Civil Rights Act of 1968 requires a more strict rule to be applied to confessions, the following shall be observed: When it appears that a confession is about to be introduced and the defense counsel indicates the voluntary nature of the confession is in doubt, the trial judge must recess the trial and take up the matter with both counsel; if trial is before a jury, this hearing must be in the absence of the jury. The court has the responsibility of determining whether the confession was voluntary. If the trial judge decides the confession was not made voluntarily, he must reject it and not permit any facts related to the making of the confession to be presented to the jury. If the judge decides that the confession was made voluntarily, he may admit it in evidence.

Section 19.5.2 Tacit Admission or Silence

Also admissible in civil cases, as an exception to the hearsay rule, is an admission by adoption or acquiesence in the statement of another. Thus, if a statement is made in the presence of a person in regard to facts affecting his rights and he makes no reply, his silence may be construed as a tacit admission of the facts stated. However, it must first be shown by the offering party that:

1) the statement was made in his presence and hearing; and

2) he was capable of understanding the meaning of the statement; and

3) he had sufficient knowledge of the facts embraced in the statement to reply thereto; and

4) he was at liberty to deny it or reply thereto; and

5) the statement was made under such circumstances and by such persons as naturally call for a reply.

Thus, if the subject matter of a statement is something not within a person's knowledge, or if the statement is made by a stranger whom he is not called on to notice, or if he is restrained by fear, or by doubt of his rights, or by a belief that his security will be best promoted by his silence, then no inference of assent can be drawn from his silence. The doctrine of assent by silence shall not apply to statements made in the course of judicial proceedings.

When a statement tending to incriminate one accused of committing a crime is made in his presence and such statement is not denied, contradicted, or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him as evidence of his acquiesence in its truth, that is, as a tacit admission of the

facts stated, or as indicative of a consciousness of guilt. To constitute proof of an admission by silence in a criminal proceeding, the offering party must show that:

1) the statement was made outside courtroom proceedings; and

2) it was incriminatory or accusative in import; and

3) it was one to which an innocent man would in the situation and surrounding circumstances naturally respond; and

4) it was uttered in the presence and hearing of the accused; and

5) he was capable of understanding the incriminatory meaning of the statement; and

6) he had sufficient knowledge of the facts embraced in the statement to reply thereto; and

7) he was at liberty to deny or reply thereto. An accused shall not be deemed at liberty to deny or reply to an inculpatory statement where he is restrained from doing so by such circumstances as fear or force, physical pain or suffering, or the advice of counsel (advocate).

An evasive answer, or one unresponsive to the statement made to the accused, is tantamount to absolute silence, and both the statement and the unresponsive answer are admissible under the rule as to tacit admissions.

Section 19.6 Timely Objections Mandatory

Hearsay evidence which would be inadmissible if objected to but which is admitted without objection may properly be considered by the trier of fact, and may be considered by the court in ruling upon any post-trial motions.

Hearsay evidence which has been admitted without objection may also be considered by appellate courts, at their discretion.