

Formal Rules of Evidence

CHAPTER 27. SAN MANUEL FORMAL RULES OF EVIDENCE¹

SMTC 27 .1 General Provisions

27.1.1 **Scope.** These rules govern proceedings in the courts of the San Manuel Band of Mission Indians unless the San Manuel Informal Rules of Evidence (SMTC Chapter 28) have been invoked in a civil case by one of the parties, and this invocation has been approved by the judge.

27.1.2 **Purpose and Construction.** This chapter is adopted by the San Manuel Band of Mission Indians, a federally recognized Indian tribe ("Tribe"), acting through its General Council in the exercise of its inherent sovereign power to enact ordinances and otherwise safeguard and provide for the health and welfare of the Tribe and its citizens.

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

27.1.3 **Rulings on Evidence.**

a. **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

1. **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

2. **Offer of Proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

b. **Record of Offer and Ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

c. **Plain Error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

27.1.4 **Record of Excluded Evidence.** In an action tried to the court, the judge may receive such excluded testimony into the record. The judge shall not rely upon such excluded testimony in making a factual finding.

¹ Adopted by the General Council on September 26, 2007.

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27.1.5 Preliminary Questions.

a. **Questions of Admissibility Generally.** Questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by this chapter except with respect to privileges.

b. **Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

c. **Testimony by Accused.** The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

d. **Weight and Credibility.** This rule does not limit the right of a party to introduce evidence relevant to weight or credibility.

27.1.6 **Limited Admissibility.** When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope.

27.1.7 **Remainder of or Related Writings or Recorded Statements.** When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

SMTC 27.2 Judicial Notice of Adjudicative Facts

27.2.1 **Scope of Rule.** This rule governs only judicial notice of adjudicative facts.

27.2.2 **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

- a. generally known within the territorial jurisdiction of the trial court; or
- b. capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

27.2.3 **When Discretionary.** A court may take judicial notice, whether requested or not.

27.2.4 **When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

27.2.5 **Opportunity to be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

27.2.6 **Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.

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a. The court may take judicial notice of facts related to San Manuel custom, tradition, or culture under the following circumstances and with the understanding that relevancy shall be demonstrated. The court may take judicial notice of San Manuel custom, tradition, or culture and may dispense with proof of the existence of a San Manuel custom, tradition or culture if it finds the custom, tradition or culture to be generally known and accepted within the San Manuel Tribe. A party who intends to raise an issue of unwritten custom, tradition or culture shall give prior notice to the trial court and to the other party. Where the court cannot take judicial notice of facts related to a San Manuel custom, tradition, or culture, the party seeking to introduce San Manuel custom, tradition, or culture into the legal resolution shall plead it with sufficient evidence so as to establish its existence and show how it is relevant to the issue before the court.

b. Where the court cannot take judicial notice of facts related to foreign custom, tradition, or culture, the party seeking to introduce foreign custom, tradition, or culture into the legal resolution shall plead it with sufficient evidence so as to establish its existence and show how it is relevant to the issue before the court. A party who intends to raise an issue of unwritten custom, tradition or culture shall give prior notice to the trial court and to the other party.

SMTC 27.3 Presumptions; Applicability of Tribal Law

27.3.1 Presumptions in General in Civil Actions and Proceedings. In all civil actions and proceedings not otherwise provided for by San Manuel tribal law or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

27.3.2 Applicability of San Manuel Tribal Law in Civil Actions and Proceedings. In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which San Manuel tribal law supplies the rule of decision is determined in accordance with San Manuel tribal law.

SMTC 27.4 Relevance and its Limits

27.4.1 Definition of “Relevant Evidence”. “Relevant Evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

27.4.2 Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible. All Relevant Evidence is admissible, except as otherwise provided by San Manuel tribal law. Evidence which is not relevant is not admissible.

27.4.3 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

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27.4.4 Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes.

a. **Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

1. **Character of Accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under SMTC 27.4.4(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

2. **Character of Alleged Victim.** Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

3. **Character of Witness.** Evidence of the character of a witness, as provided in SMTC 27.6.7, SMTC 27.6.8 and SMTC 27.6.9.

b. **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

27.4.5 Methods of Proving Character.

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

b. **Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

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

27.4.7 **Subsequent Remedial Measures.** When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures

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when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

27.4.8 Compromise and Offers to Compromise. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

27.4.9 Payment of Medical and Similar Expenses. Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

27.4.10 Inadmissibility of Pleas, Plea Discussions and Related Statements. Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

1. a plea of guilty which was later withdrawn;
2. a plea of nolo contendere;
3. any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable tribal procedure regarding either of the foregoing pleas; or
4. any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn.

However, such a statement is admissible (1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

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

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27.4.12 Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition.

a. **Evidence Generally Inadmissible.** The following evidence is not admissible in any civil proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

1. Evidence offered to prove that any alleged victim engaged in other sexual behavior.
2. Evidence offered to prove any alleged victim's sexual predisposition.

b. **Exceptions.**

1. Evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

c. **Procedure to Determine Admissibility.**

1. A party intending to offer evidence under subdivision (b) must:

A. file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

B. serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

2. Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

27.4.13 Evidence of Similar Crimes in Sexual Assault Cases.

a. In a case in which the Tribe intends to offer evidence under this rule, the attorney for the Tribe shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

b. This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

c. For purposes of this rule and SMTC 27.4.15, "offense of sexual assault" means a crime under San Manuel tribal law or Federal law that involves:

1. any conduct proscribed by chapter 109A of title 18, United States Code;

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2. contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
3. contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
4. deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
5. an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

27.4.14 Evidence of Similar Crimes in Child Molestation Cases.

a. In a case in which the Tribe intends to offer evidence under this rule, the attorney for the Tribe shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

b. This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

c. For purposes of this rule and SMTC 27.4.15, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or San Manuel tribal law that involves:

1. any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
2. any conduct proscribed by chapter 110 of title 18, United States Code;
3. contact between any part of the defendant's body or an object and the genitals or anus of a child;
4. contact between the genitals or anus of the defendant and any part of the body of a child;
5. deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
6. an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

27.4.15 Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation.

a. In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in SMTC 27.4.13 and SMTC 27.4.14 of these rules.

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b. A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

c. This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

SMTC 27.5 Privileges

27.5.1 General Rule – Privileges. Except as otherwise provided by San Manuel tribal law or other rules applicable to the courts of the San Manuel Tribe, no person has a privilege to:

- a. Refuse to be a witness; or
- b. Refuse to disclose any matter; or
- c. Refuse to produce any object or writing; or
- d. Prevent another from being a witness or disclosing any matter or producing any object or writing.

27.5.2 Attorney – Client Privilege

a. **Definitions.** As used in this rule:

1. A “**Client**” is a person, public officer, or organization, either public or private, who is rendered professional legal services by an attorney, or who consults an attorney with a view to obtaining professional legal services from that attorney.
2. A “**Representative of the Client**” is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.
3. An “**Attorney**” is a person authorized, or reasonably believed by the client to be authorized, to practice law in the courts of any state or nation or Indian tribe.
4. A “**Representative of the Attorney**” is one employed by the attorney to assist the attorney in the rendition of professional legal services.
5. A communication is “**Confidential**” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

b. **General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

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1. between the client or the client's representative and the client's attorney or the client's attorney's representative, or
2. between the client's attorney and the attorney's representative, or
3. by the client or the client's representative or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein, or
4. between representatives of the client or between the client and a representative of the client, or
5. among attorneys and their representatives representing the same client.

c. **Who May Claim the Privilege.** The privilege may be claimed by the client, his guardian or conservator, the personal representative of the deceased client, or the successor, trustee, or similar representative of a corporation, association or other organization, whether or not in existence. The person who was the attorney or the attorney's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

d. **Exceptions.** There is no privilege under this rule where:

1. **Furtherance of Crime or Fraud.** If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or
2. **Claimants through Same Deceased Client.** As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or
3. **Breach of Duty by an Attorney or Client.** As to a communication relevant to an issue of breach of duty by the attorney to the client or by the client to the attorney; or
4. **Document Attested by Attorney.** As to a communication relevant to an issue concerning an attested document to which the attorney is an attesting witness; or
5. **Joint Clients.** As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between any of the clients.

27.5.3 Physician, Traditional Healer and Psychotherapist – Patient Privilege.

a. **Definitions.** As used in this rule:

1. A **“Patient”** is a person who consults or is examined or interviewed by a physician, traditional healer, or psychotherapist.

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2. A **“Physician”** is a person authorized to practice medicine in any state or nation, or is recognized by the Tribe, or another Indian nation or tribe, or is reasonably believed by the patient to be such.

3. A **“Traditional Healer”** is a person recognized in any tribal community, or who is recognized by the Tribe, to practice traditional healing, or is reasonably believed by the patient to be such.

4. A **“Psychotherapist”** is

A. a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or

B. a person licensed or certified as a psychologist or psychological examiner under the laws of any state or nation, while similarly engaged.

5. A communication is **“Confidential”** if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician, traditional healer, or psychotherapist, including members of the patient's family.

b. **General Rule of Privilege.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional condition, including alcohol or drug addiction, among the patient, the physician, traditional healer, or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician, traditional healer, or psychotherapist, including member of the patient's family.

c. **Privilege of Accused.** When an examination of the mental condition of an accused in a criminal proceeding is ordered by the court for the purpose of determining the accused's criminal responsibility, the accused has a privilege to refuse to disclose and to prevent any other person from disclosing any communication concerning the offense with which he is charged, made in the course of the examination.

d. **Who May Claim the Privilege.** The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the physician, traditional healer, or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

e. **Exceptions.**

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

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2. **Examination by Order of Court.** Except as otherwise provided in subdivision (c), if the court orders an examination of the physical, mental or emotional condition of a patient, whether a party or witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

3. **Condition an Element of Claim or Defense.** There is no privilege under this rule as to communications relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient, or of any party claiming, through or under the patient or because of the patient's condition, or claiming as a beneficiary of the patient, through a contract to which the patient is or was a party, or after the patient's death, in any proceeding in which any party puts the condition in issue.

4. **Neglect or Abuse Proceedings.** There is no privilege under this rule as to communications or records relevant to any investigation into or proceedings involving allegations of abuse or neglect of children, the elderly, the disabled or the incompetent.

27.5.4 Marital Privilege.

a. **Definitions.** A communication is "confidential" if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person.

b. **General Rule of Privilege.** In any action, a spouse has a privilege to refuse to disclose and to prevent the other spouse from disclosing any confidential communication made by one spouse to the other during the marriage.

c. **Who May Claim Privilege.** The privilege may be claimed by the person who made the communication or by the spouse in his or her behalf. The authority of the spouse to do so is presumed.

d. **Exceptions.** There is no privilege under this rule in a proceeding in which one spouse is charged with a crime against the person or property of:

1. the other,
2. a child of either,
3. any person residing in the household of either, or

4. a third person committed in the course of committing a crime against any of them; in a civil proceeding in which the spouses are adverse parties; or in child custody proceedings in which the minor child of either spouse is alleged to be the victim of abuse or neglect.

27.5.5 Religious Privilege.

a. **Definitions.** As used in this rule:

1. A "clergy person" is:

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A. a minister, priest, rabbi, or practitioner of any religious denomination accredited by the religious body to which he or she belongs, or an individual reasonably believed so to be by the person consulting him or her; or

B. a traditional and/or spiritual adviser is a person recognized in any tribal community, or who is recognized by the Tribe, or an individual reasonably believed so to be by the person consulting the adviser.

2. A communication is "**Confidential**" if made privately and not intended for further disclosure except to other persons present in furtherance of the communication.

b. **General Rule of Privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to the clergy person in his or her professional character as spiritual adviser.

c. **Who May Claim the Privilege.** The privilege may be claimed by the person, by the person's guardian or conservator or the person's personal representative if he or she is deceased. The person who was the clergy person at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

27.5.6 **Trade Secrets.** A person has a privilege, which may be claimed by the person, the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties as the furtherance of justice may require.

27.5.7 Executive Privilege.

a. **Definition.** A communication is "**Confidential**" if made privately and not intended for further disclosure except to other persons present in furtherance of the communication. Confidential communications protected within this privilege include but are not limited to minutes and working documents of the Business Committee made at any time.

b. **General Rule of Privilege.** Business Committee members have a privilege to refuse to disclose and to prevent another from disclosing all confidential communications made during San Manuel Business Committee meetings, deliberations or other decision making activities of both the body and its individual members in furtherance of their Business Committee duties. Executive privilege applies in matters relating to official San Manuel tribal business to protect important diplomatic or sensitive tribal government interests.

c. **Who May Claim the Privilege.** The privilege may be claimed by past and present Business Committee members. Participants of any confidential communication made with Business Committee members are presumed to have authority to claim the privilege but only on behalf of the Business Committee and shall be extended specifically but not exclusively to:

1. Present and former members of the San Manuel Business Committee.
2. Staff members of the San Manuel Business Committee.

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3. Any employee reporting to the San Manuel Business Committee.
4. Attorneys employed by the San Manuel Legal Department.

d. **Exceptions.** Persons covered by executive privilege cannot, without authorization by the San Manuel Business Committee, testify in a Tribal Court proceeding, including, but not limited to: court testimony, interrogatories, depositions or other discovery proceedings. Only the incumbent San Manuel Business Committee shall be authorized to waive executive privilege.

27.5.8 Peacemaking Privilege.

a. **General Rule of Privilege.** Communications made during any formal peacemaking activities are privileged. This shall not include final written peacemaking agreements.

b. **Who May Claim the Privilege.** A peacemaking privilege in any matter relating to formal peacemaking activities shall be extended to:

1. Present and former peacemakers.
2. Participants in any formal peacemaking session.

c. **Exceptions.** Persons covered by the peacemaking privilege cannot, without the written consent of all participants involved in the formal peacemaking session, or related sessions, testify in a Tribal Court proceeding, including, but not limited to: court testimony, interrogatories, depositions or other discovery proceedings.

27.5.9 Identity of Informer.

a. **General Rule of Privilege.** An Indian tribe or nation, the United States, a state or subdivision thereof, or any foreign country has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

b. **Who May Claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

c. **Exceptions.**

1. **Voluntary Disclosure; Informer a Witness.** No privilege exists under this rule if the identity of the informer or his or her interest in the subject matter of his or her communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the San Manuel Tribe.

2. **Testimony on Relevant Issue.** If it appears in the case that an informer may be able to give testimony relevant to any issue in a civil or criminal case to which a public entity is a party and the informed public entity invokes the privilege, the court may give the public

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entity an opportunity to show in camera and on the record facts relevant to determining whether the informer can, in fact, supply that testimony. The showing may be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give relevant testimony, the court on motion of a party or on its own motion may enter a conditional order for appropriate relief, to be granted if the public entity elects not to disclose within the time specified the identity of such informer. In a criminal case such relief may include one or more of the following: granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of him or her, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing the charges. In a civil case the court may provide any relief that the interests of justice require. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and a docket entry shall be made specifying the form of such evidence but not its content or the identity of any declarant. The contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except at a showing in camera at which only counsel for the public entity shall be permitted to be present.

27.5.10 Waiver of Privilege by Voluntary Disclosure. A person upon whom these rules confer a privilege against disclosure waives the privilege if he or she or his or her predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

27.5.11 Privileged Matter Disclosed Under Compulsion Without Opportunity to Claim Privilege. A claim of privilege is not defeated by a disclosure which was:

- a. compelled erroneously; or
- b. made without opportunity to claim the privilege.

27.5.12 Comment Upon or Inference From Claim of Privilege in Criminal Cases.

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

27.5.13 Claim of Privilege in Civil Cases.

a. **Comment or Inference Permitted.** The claim of privilege by a party in a civil action or proceeding, whether in the present proceeding or upon a prior occasion, is a proper subject of comment by judge or counsel. An appropriate inference may be drawn therefrom.

b. **Claim of Privilege by Nonparty Witness.** The claim of a privilege by a nonparty witness in a civil action or proceeding shall be governed by the provisions of SMTTC 27.5.11.

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SMTC 27.6 Witnesses

27.6.1 General Rule of Competency.

a. **General rule of Competency.** Every person is competent to be a witness except as otherwise provided in these rules or other tribal law.

b. **Disqualification of Witness.** A person is not qualified to be a witness if the court finds that:

1. the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge either directly or through interpretation by one who can understand him;
2. the proposed witness is incapable of understanding the duty of a witness to tell the truth;
3. the proposed witness lacked any reasonable ability to perceive the matter; or
4. the proposed witness lacks any reasonable ability to remember the matter.

An interpreter is subject to all the provisions of these rules relating to witnesses.

27.6.2 **Lack of Personal Knowledge.** A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of SMTC 27.7.3, relating to opinion testimony by expert witnesses.

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

27.6.4 **Interpreters.** An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

27.6.5 **Competency of Judge as Witness.** The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

27.6.6 **Who May Impeach.** The credibility of a witness may be attacked by any party, including the party calling the witness.

27.6.7 Evidence of Character and Conduct of Witness.

a. **Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

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

b. Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in SMTC 27.6.9, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

1. concerning the witness' character for truthfulness or untruthfulness; or
2. concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

27.6.8 Impeachment by Evidence of Conviction of Crime.

a. General Rule. For the purpose of attacking the credibility of a witness:

1. evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to SMTC 27.4.3, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or if the crime was punishable by imprisonment of one year under the law of a tribe under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

2. evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

b. Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

c. Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if:

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1. the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year; or

2. the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

d. Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

e. Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

27.6.9 Religious Beliefs or Opinions. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

27.6.10 Mode and Order of Interrogation and Presentation.

a. Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

1. make the interrogation and presentation effective for the ascertainment of the truth;
2. avoid needless consumption of time; and
3. protect witnesses from harassment or undue embarrassment.

b. Scope of Cross-Examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

c. Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be conducted by leading questions.

d. Tribal Cultural Experts and Oral Historians. The court shall approve and conduct questioning of tribal cultural experts, tribal oral historians and tribal knowledge bearers upon cross-examination where there is a risk of non-consensual participation due to perceived potential harassment or embarrassment.

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27.6.11 Writing Used to Refresh Memory. Except as otherwise provided in criminal proceedings by San Manuel tribal law, if a witness uses a writing to refresh memory for the purpose of testifying, either, (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

27.6.12 Prior Statements of Witnesses.

a. Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

b. Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in SMTTC 27.8.1(d)(2).

27.6.13 Calling and Interrogation of Witnesses by Court.

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

b. Interrogation by Court. The court may interrogate witnesses, whether called by itself or by a party.

c. Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time.

27.6.14 Exclusion of Witnesses. At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

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SMTC 27.7 Opinions and Expert Testimony

27.7.1 Opinion Testimony by Lay Witnesses. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- a. rationally based on the perception of the witness;
- b. helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
- c. not based on scientific, technical, or other specialized knowledge within the scope of SMTC 27.7.2.

27.7.2 Testimony by Experts.

a. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

b. The Tribe's certification of a tribal cultural expert is prima facie evidence that (1) the testimony is based upon sufficient facts or data, and (2) the testimony is the product of reliable principles and methods.

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

27.7.4 Opinion on Ultimate Issue.

a. Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

b. No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

27.7.5 Disclosure of Facts or Data Underlying Expert Opinion. The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

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27.7.6 Court Appointed Experts.

a. **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. With the exception of tribal cultural experts and oral historians, where there is a risk of non-consensual participation due to perceived potential harassment or embarrassment, the witness shall be subject to cross-examination by each party, including a party calling the witness. Tribal cultural experts and oral historians, where there is a risk of non-consensual participation due to perceived potential harassment or embarrassment, shall be subject to questions approved by the judge and questioning conducted by the judge in lieu of cross-examination.

b. **Compensation.** [Reserved pending enactment of San Manuel Commercial Code.]

c. **Parties' Experts of Own Selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

SMTC 27.8 Hearsay

27.8.1 Definitions.

The following definitions apply under this article:

a. **Statement.** A "statement" is:

1. an oral or written assertion; or
2. nonverbal conduct of a person, if it is intended by the person as an assertion.

b. **Declarant.** A "declarant" is a person who makes a statement.

c. **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

d. **Statements Which Are Not Hearsay.** A statement is not hearsay if:

1. **Prior Statement by Witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

- A. inconsistent with the declarant's testimony; or

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B. consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or

C. one of identification of a person made after perceiving the person; or

2. **Admission by Party-Opponent.** The statement is offered against a party and is:

A. the party's own statement, in either an individual or a representative capacity; or

B. a statement of which the party has manifested an adoption or belief in its truth; or

C. a statement by a person authorized by the party to make a statement concerning the subject, or

D. a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

E. a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

27.8.2 **Hearsay Rule.** Hearsay is not admissible except as provided by these rules or by relevant statute.

27.8.3 **Hearsay Exceptions: Availability of Declarant Immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

a. **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

b. **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

c. **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

d. **Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

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e. **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

f. **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with SMTC 27.9.2(k) and SMTC 27.9.2(l), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

g. **Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph (f).** 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 paragraph (f), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

h. **Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth:

1. the activities of the office or agency; or
2. matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; or
3. in civil actions and proceedings and against the Tribe in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

i. **Records of Vital Statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

j. **Absence of Public Record or Entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with SMTC 27.9.2, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

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- k. **Records of Religious Organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.
- l. **Marriage, Baptismal, and Similar Certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.
- m. **Family Records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.
- n. **Records of Documents Affecting an Interest in Property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.
- o. **Statements in Documents Affecting an Interest in Property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
- p. **Statements in Ancient Documents.** Statements in a document in existence twenty years or more the authenticity of which is established.
- q. **Market Reports, Commercial Publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.
- r. **Tribal Oral Histories.** Statements of facts derived from the oral traditional histories of the Tribe, generally used and relied upon by the members of the Tribe, made by a person certified by the General Council of the San Manuel Tribe as a Tribal Cultural Expert, Tribal Oral Historian or Tribal Knowledge Bearer.
- s. **Learned Treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.
- t. **Reputation Concerning Personal or Family History.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death,

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legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

u. **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

v. **Reputation as to Character.** Reputation of a person's character among associates or in the community.

w. **Judgment of Previous Conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, or where a person is adjudged guilty of a crime punishable by imprisonment for one year in tribal court, to prove any fact essential to sustain the judgment, but not including, when offered by the Tribe in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

x. **Judgment as to Personal, Family, or General History, or Boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

y. **Other Exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the Court determines that:

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

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

27.8.4 Hearsay Exceptions; Declarant Unavailable.

a. **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant:

1. is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

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2. persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
3. testifies to a lack of memory of the subject matter of the declarant's statement; or
4. is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
5. is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

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

b. Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

1. **Former Testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

2. **Statement Under Belief of Impending Death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

3. **Statement Against Interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

4. **Statement of Personal or Family History.** (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

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5. **Forfeiture by Wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

6. **Other Exceptions.** A statement not specifically covered by any of the foregoing exceptions by having equivalent circumstantial guarantees of trustworthiness, if the court determines that:

- A. the statement is offered as evidence of a material fact;
- B. the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
- C. the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

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

27.8.5 **Hearsay Within Hearsay.** Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

27.8.6 **Attacking and Supporting Credibility of Declarant.** When a hearsay statement, or a statement defined in SMTC 27.8.1(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

SMTC 27.9 Authentication and Identification

27.9.1 Requirement of Authentication of Identification.

a. **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

b. **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

1. **Testimony of Witness with Knowledge.** Testimony that a matter is what it is claimed to be.

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2. **Nonexpert Opinion on Handwriting.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

3. **Comparison by Trier or Expert Witness.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

4. **Distinctive Characteristics and the Like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

5. **Voice Identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

6. **Telephone Conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:

A. in the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

B. in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

7. **Public Records or Reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

8. **Ancient Documents or Data Compilation.** Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

9. **Process or System.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

10. **Methods Provided by Resolution or Rule.** Any method of authentication or identification provided by Resolution of the San Manuel General Council or by other rules prescribed by the San Manuel Tribal Court.

27.9.2 **Self-Authentication.** Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

a. **Domestic Public Documents Under Seal.** A document bearing a seal purporting to be that of the Tribe, United States, or of any State, or district, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

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- b. **Domestic Public Documents Not Under Seal.** A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (a) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
- c. **Foreign Public Documents.** A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.
- d. **Certified Copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (a), (b), or (c) of this rule or complying with any San Manuel tribal law or rule adopted by the court pursuant to statutory authority.
- e. **Official Publications.** Books, pamphlets, or other publications purporting to be issued by public authority.
- f. **Newspapers and Periodicals.** Printed materials purporting to be newspapers or periodicals.
- g. **Trade Inscriptions and the Like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.
- h. **Acknowledged Documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.
- i. **Commercial Paper and Related Documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
- j. **Presumptions Under San Manuel Tribal Law.** Any signature, document, or other matter declared by San Manuel tribal law to be presumptively or prima facie genuine or authentic.
- k. **Certified Domestic Records of Regularly Conducted Activity.** The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under SMTC 27.8.3(f) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with San Manuel tribal law or rule adopted by the court

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pursuant to statutory authority, certifying that the record:

1. was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
2. was kept in the course of the regularly conducted activity; and
3. was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

1. **Certified Foreign Records of Regularly Conducted Activity.** In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under SMTC 27.8.3(f) if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

1. was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
2. was kept in the course of the regularly conducted activity; and
3. was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

27.9.3 **Subscribing Witness' Testimony Unnecessary.** The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

SMTC 27.10. Contents of Writings, Recordings and Photographs

27.10.1 **Definitions.** For purposes of this section the following definitions are applicable:

a. **Writings and Recordings.** "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

b. **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

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c. **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

d. **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

27.10.2 **Requirement of Original.** To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by San Manuel tribal law.

27.10.3 **Admissibility of Duplicates.** A duplicate is admissible to the same extent as an original unless:

- a. a genuine question is raised as to the authenticity of the original; or
- b. in the circumstances it would be unfair to admit the duplicate in lieu of the original.

27.10.4 **Admissibility of Other Evidence of Contents.** The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

- a. **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- b. **Original not Obtainable.** No original can be obtained by any available judicial process or procedure; or
- c. **Original in Possession of Opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
- d. **Collateral Matters.** The writing, recording, or photograph is not closely related to a controlling issue.

27.10.5 **Public Records.** The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with SMTC 27.9.2 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

27.10.6 **Summaries.** The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination

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or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

27.10.7 Testimony or Written Admission of Party. Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

27.10.8 Functions of Court. When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of SMTC 27.1.5. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

SMTC 27.11 Miscellaneous Provisions

27.11.1 Applicability of Rules.

a. **Rules Applicable.** Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the San Manuel tribal courts.

b. **Rules Inapplicable.** The rules other than those with respect to privileges do not apply in the following situations:

1. **Preliminary Questions of Fact.** The determination of questions of fact preliminary to admissibility of evidence except as otherwise provided in SMTC 27.1.5.

2. **Miscellaneous Proceedings.** Proceedings for sentencing; issuance of warrants; proceedings with respect to release on bail or otherwise; proceedings for granting of probation or parole; proceedings on probation or parole violations; proceedings for determination of probable cause; proceedings for juvenile detention; and extradition matters.

3. **Contempt Proceedings.** Those contempt proceedings in which the court may act summarily.

27.11.2 Amendments. Amendments shall be made in the manner provided for the adoption of tribal ordinances, pursuant to the San Manuel Articles of Association, Article VI.

27.11.3 Title. This Chapter shall be known and cited as the "San Manuel Formal Rules of Evidence".

27.11.4 Repealer.

a. **General Repealer.** Any laws of the Tribe which directly and irreconcilably conflict in any way with the provisions of this Code are hereby repealed to the extent that they are inconsistent with, or are contrary to, the letter, spirit or purpose of this Code.