



**MASHPEE WAMPANOAG TRIBAL COURT
MASHPEE WAMPANOAG TRIBE**

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ADMINISTRATIVE ORDER #24

**AMENDMENTS TO RULES
OF EVIDENCE**

The Rules of Evidence are hereby amended in accordance with the attached effective upon execution of this Order. The amendments will apply to all existing cases as well as cases filed after the effective date of this Order.

The amendments to Rules of Evidence were developed in conjunction with student Jenna M. Borkoski and Nicole Friederichs, Practitioner in Residence, of the Suffolk Law School Indian Law and Indigenous Peoples Clinic. The Court and the Elders Judiciary Committee express their gratitude for their invaluable assistance.

IT IS SO ORDERED this 3rd day of June, 2016.

BY THE COURT:

Robert F. Mills, Acting Chief Judge
Mashpee Wampanoag Supreme Court

**RULES OF EVIDENCE
MASHPEE WAMPANOAG DISTRICT COURT**

As amended May 20, 2016

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Title I General Provisions

Rule 1. Purpose of the Rules

These Rules govern the admissibility and use of evidence in all civil matters before the Mashpee Wampanoag District Court and must be applied to enable the Court to determine the truth with a minimum of delay, confusion, and uncertainty for the parties.

Rule 2. Construction

- a. The Rules are written in a simple style and format to make them more accessible. The District Court Judge may use his or her discretion to explain these Rules to a party who is not represented by an attorney, but the Judge may not act as a lawyer for a party who represents him or herself.
- b. The Rules must be read liberally in order for justice to be served. In close cases, evidence should be admitted rather than excluded.
- c. The District Court Judge, with the agreement of all the parties if practical, may depart from these Rules in order to save time and expense while still achieving the purposes of these Rules. A party may agree to waive a right or protection guaranteed by Tribal law if he or she clearly states that he or she understands what right he or she is waiving.
- d. Application of these Rules must be consistent with applicable Tribal law, including the Mashpee Wampanoag Tribal Court Code of Judicial Conduct.

Rule 3. Definitions

“Court” or **“District Court”** means the District Court of the Mashpee Wampanoag Tribe.

“Judge” or **“District Court Judge”** means a judge of the District Court.

“Oral Traditions” means the stories passed down from generation to generation as a way of recording the history, culture, and beliefs of the Mashpee Wampanoag Tribe, which may be admitted if the oral traditions are valid, reliable, and consistent.

“Perjury” means any person who knowingly makes a false statement under oath, whether verbal or in writing, or procures or induces another person to do so, in any proceeding before or ancillary to the Supreme Court and lower courts of the Tribe.

“**Tribal Constitution**” means the Constitution of the Mashpee Wampanoag Tribe.

“**Tribal Law**” means the law of the Mashpee Wampanoag Tribe unless otherwise specified.

NOTE: (As amended May 20, 2016)

Rule 4. Citation to Rules of Evidence

Citations to these Rules should look as follows:

MWT ROE 5

MWT ROE 6(a)

MWT ROE 8(b)(i)

NOTE: (As amended May 20, 2016)

Title II Relevant Evidence

Rule 5. General Admissibility of Relevant Evidence

All relevant evidence is admissible, unless otherwise prohibited by the Tribal Constitution, Tribal Law or a specific section of these Rules of Evidence. Evidence that is not relevant is not admissible.

Rule 6. Relevant Evidence

- a. Evidence admitted in the District Court must relate to the facts and legal issues of the case.
- b. When questioned by the District Court Judge or another party as to why certain evidence should be admitted, the party who wishes to present the evidence must:
 - i. State the legal or factual issue that the party will use the evidence to prove or demonstrate, and
 - ii. Explain how the evidence relates to that issue and how the evidence is likely to establish a fact or facts that are in dispute.

Rule 7. Exclusion of Relevant Evidence

- a. The District Court Judge may exclude relevant evidence if its value is substantially outweighed by:
 - i. Unfair prejudice;
 - ii. Confusion of the issues; or
 - iii. Causing undo delay or a waste of time.

Rule 8. Character Evidence; Crimes or Other Past Acts

- a. *Character Evidence.* Except as provided in subsection (b), evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
- b. The following exceptions apply in a criminal case:
 - i. A defendant may offer evidence of his or her pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
 - ii. Except for limitations specified in Rule 14, a defendant may offer evidence of an alleged victim’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

- iii. Evidence of a witness's character may be admitted under Rule 17.
- c. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character. However, this type of evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Upon the defendant's request, the prosecution must provide reasonable notice of the general nature of the evidence in advance of trial, or during trial if the court, for good cause, excuses pretrial notice.

NOTE: (As amended May 20, 2016)

Rule 9. Measures Taken After the Event in Question

- a. Except as provided in subsection (b), evidence of measures taken after an incident or event that, if taken previously, would have made the incident or event less likely to occur is not admissible to prove negligence or culpable conduct.
- b. Evidence of measures taken after an incident or event that, if taken previously, would have made the incident or event less likely to occur is admissible for other purposes, such as proving impeachment, ownership, control, or feasibility of precautionary measures.

Rule 10. Liability Insurance

- a. Evidence that a person was or was not insured against liability is not admissible to prove that the party acted negligently or otherwise wrongfully.
- b. Evidence that a person was or was not insured against liability is admissible for another purpose, such as proof of agency, ownership, control, bias, or prejudice of a witness.

Title III Mashpee Wampanoag Tribal Customary Law

Rule 11. Mashpee Wampanoag Tribal Customary Law/Oral Traditions

- a. If a party intends to rely on Mashpee Wampanoag tribal customary law or practice, then he or she must provide evidence of the law or practice through written documents, direct testimony of qualified tribal experts, or through affidavits of a qualified tribal expert that is based upon that expert's understanding of well-established oral traditions.
- b. If there is conflict among the parties as to the existence or content of tribal customary law, Rule 31 of the Mashpee Wampanoag District Court Rules of Civil Procedure governs.

NOTE: (As amended May 20, 2016)

Title IV Privileges

Rule 12. Privileges Generally

It is the intent of the District Court to protect confidential communications that occur within privileged relationships, including but not limited to the attorney-client privilege, by preventing those communications from being considered as evidence by the Court.

Rule 13. Applicable Privileges

Unless otherwise prescribed by Mashpee Wampanoag Tribal Law, the rules governing privileges will be determined by the application of principles of the common law as

interpreted by the District Court in the light of reason and experience. In determining whether or not a privilege will be recognized, the Court may look to Mashpee Wampanoag Tribal Law, the law of other Native American tribes, state law, and any other laws applicable to the controversy.

Rule 14. Sex-Offense Cases

- a. Except for exceptions listed in (b) and (c), the following evidence is not admissible in a proceeding involving sex offense proceedings:
 - i. Evidence offered to prove that a victim engaged in other sexual behavior; or
 - ii. Evidence offered to prove a victim's sexual predisposition.
- b. The Court may admit evidence offered to prove a victim's other sexual behavior or sexual predisposition if its value substantially outweighs the danger of harm to any victim or unfair prejudice to any party. The Court may admit evidence of a victim's reputation only if the victim has placed it in controversy.
- c. The Court may admit the following evidence:
 - i. Specific instances of sexual behavior if offered for a purpose other than the issue of consent, including proof of the source of semen, pregnancy, disease, injury, mistake of the intent of the accused; or
 - ii. False allegations of sexual offenses; or
 - iii. Sexual behavior with other than the accused at the time of the event giving rise to the sexual offense alleged.

NOTE: (As amended May 20, 2016)

Title V Witnesses

Rule 15. Witnesses Generally

Any witness must testify under oath or affirmation that he or she will testify truthfully as to all matters and must acknowledge that he or she will be subject to cross-examination by the opposing party. Witnesses who commit perjury may be subject to a penalty as provided by Mashpee Wampanoag Tribal Judiciary Ordinance 2008-ORD-002, Chapter 2, § 4 as amended by Mashpee Wampanoag Tribal Judiciary Ordinance 2010-ORD-002, § 3 and as provided under other Tribal law.

Rule 16. Witness Competence

A person with the capacity to observe, receive, record, remember and describe may be a witness. A witness must have personal knowledge of a relevant fact.

Rule 17. Challenging Witness Credibility

- a. Any party, including the party calling the witness to testify, may challenge a witness's credibility.
- b. The truthfulness of a witness may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness, or by testimony in the form of an opinion about that witness's truthful character. Evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
- c. Extrinsic evidence is not admissible to prove specific instances of a witness's conduct used to attack or support the witness's character for untruthfulness. On cross-

examination, the Court may allow specific instances of conduct to be examined if they are probative of the character for truthfulness of the witness; or another witness whose character the witness being cross-examined has testified about.

- d. Proof of a conviction of a felony under tribal, state or federal law within ten (10) years of the date of testimony is admissible for purposes of proving untruthfulness if the probative value of the evidence outweighs its prejudicial effect to that witness. Proof of a conviction of a crime within ten (10) years of the date of testimony that is not a felony, but which did involve a dishonest act or false statement is admissible subject to Rule 6 and at the discretion of the District Court Judge.
- e. Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.
- f. A party may challenge a witness's credibility by questioning the witness about prior inconsistent statements. That witness's testimony is admissible, but the Judge may exclude other evidence about whether or not the statement was made if exclusion would be fair and promote the orderly administration of justice.

NOTE: (As amended May 20, 2016)

Rule 18. Mode and Order of Examining Witnesses and Presenting Evidence

- a. The District Court exercises control over the mode and order of examination of witnesses and presenting evidence, including the ability to exclude witnesses from hearing other witness's testimony, where necessary, to:
 - i. Ensure that witness testimony is untainted;
 - ii. Avoid wasting time; or
 - iii. Protect witnesses from harassment or undue embarrassment.
- b. Cross-examination should not go beyond the subject matter of the direct examination or matters affecting the witness's credibility, but the Court may, in its discretion, allow inquiry into additional matters as if on direct examination.
- c. Leading questions are questions that suggest their own answers. Leading questions should not be used on direct examination but may be allowed at the discretion of the District Court Judge:
 - i. To develop the testimony of the witness regarding matters that are not in dispute, and
 - ii. If the witness is unwilling, hostile, is an opposing party or is identified with an opposing party.
- d. During cross-examination, questions must be based upon a good faith belief that the facts recited in the questions are true.

Rule 19. Writing Used to Refresh Memory

- a. For the purposes of refreshing his or her memory while giving evidence, a witness may, at the discretion of the District Court Judge, review a document made at a time when his or her memory was fresh.
- b. If, when questioning a witness, a party proposes to use a document or to show a document to a witness, that document must be shown to every other party to the proceeding.
- c. An opposing party is entitled to have a copy of any document that a party intends to produce at trial under this rule, in order to:
 - i. Inspect the document;

- ii. Cross-examine the witness about the document at trial; and
 - iii. Introduce into evidence those portions of the document which relate to the testimony of the witness.
- d. If a party claims that a writing contains matters unrelated to the subject matter of the testimony, the Court may examine the writing and remove any portions unrelated to the testimony, and return what remains to the party. The Court will retain a full text version of the writing for purposes of appeal.

Title VI Hearsay

Rule 20. Hearsay Generally

Any statement a person makes - except a statement made while testifying in the current proceeding - is hearsay if it is offered to prove the truth of the matter asserted. Hearsay may consist of oral statements, written statements, assertive non-verbal conduct, or recordings of statements or non-verbal conduct. A person who makes a hearsay statement is a declarant.

Rule 21. Hearsay Generally Inadmissible

Hearsay is not admissible, except as provided by these Rules, by Tribal law or as allowed at the discretion of the District Court Judge under Rule 25.

Rule 22. Statements Which Are Not Hearsay

- a. **Prior Statements by Witness.** A prior statement by a witness is not hearsay when the witness who made the prior statement testifies as to that statement and is subject to cross-examination, provided that the statement is:
 - i. Inconsistent with the witness's testimony at trial; or
 - ii. Consistent with the witness's testimony and is offered to rebut an express or implied charge against the witness of improper influence or motive; or
 - iii. One of identification of a person made by a witness.
- b. **Statement by a Party Opponent.** A statement by a party opponent is not hearsay. A statement by a party opponent is one which is offered against an opposing party and is:
 - i. The party's own statement, or one which the party has indicated he or she believed to be true;
 - ii. A statement by a person authorized by the party to make a statement;
 - iii. A statement by the party's agent, acting within the scope of agency or employment; or
 - iv. A statement made during the course of a conspiracy and in furtherance of the conspiracy by the party's co-conspirator.

Rule 23. Hearsay Exceptions

The following are exceptions to the hearsay rule:

- a. **Present Sense Impression.** A statement made by a declarant describing or explaining an event or condition, made while it is happening or immediately after the event.
- b. **Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

- c. Statements for Purpose of Medical Diagnosis or Treatment. A statement made by a declarant about his or her physical condition, medical history, or symptoms for the purpose of diagnosis or treatment.
- d. Recorded Recollection. A record that:
 - i. Is on a matter the witness once knew about but cannot recall well enough to testify fully and accurately about;
 - ii. Was made or adopted by the witness when the matter was fresh in the witness's memory; and
 - iii. Accurately reflects the witness's knowledge.

If admitted, a recorded recollection may be read into evidence, but the writing itself is inadmissible unless offered by an opposing party.

- e. Regularly Kept Records. Regularly kept records of businesses, organizations, the Mashpee Wampanoag Tribal Government, religious organizations or other similar entities are admissible, provided that the witness called to authenticate the record has personal knowledge of the making of the record in the ordinary course of operations, and the information in the record must be of a type that the Tribe, business, or organization usually records.
 - i. Recordings of the Executive Sessions of the Tribal Council of the Mashpee Wampanoag Tribe are generally inadmissible prior to their availability to Tribal members, but, the Court may, in its discretion, admit into evidence a record not yet generally available to Tribal members when justice so requires. If admission of such a recording is sought, the Judge may review the report in chambers prior to admission and take appropriate measures to protect the confidentiality of the information contained therein.
- f. Absence of Business Records. Evidence that a matter is not included in the records described in these Rules may be admitted if:
 - i. The evidence is admitted to prove that the matter did not occur or exist;
 - ii. A record was regularly kept for a matter of that kind; and
 - iii. Either the source of the information or other circumstances show that the record keeping is reliable.
- g. Oral Traditions. The Court may use the following criteria to determine the truthfulness of oral traditions:
 - i. Validity, or the ability of the Mashpee Wampanoag member to corroborate the evidence with other materials, such as documents, recordings, photographs, etc.
 - ii. Reliability, or the consistency with which a member will tell the same story about the same events on different occasions.
 - iii. Consistency, or the degree to which the form or content of one testimony conforms with other testimonies.
 - iv. The age of the oral tradition evidence.
 - v. The degree of formality used in conveying the oral traditional evidence.

The procedure for admitting such evidence should follow Rule 11 of these Rules.

NOTE: (As amended May 20, 2016)

Rule 24. Hearsay Exceptions if Declarant Unavailable

A declarant is considered to be unavailable as a witness if the declarant is prevented from testifying due to a privilege, refuses to testify, testifies that he or she cannot remember the

subject matter, or cannot testify due to illness or death. If the District Court Judge determines that the declarant is unavailable, then the following are admissible:

- a. Former Testimony. Prior testimony that was given by a witness, under oath, at a trial, hearing, or lawful deposition is admissible if, at the time the statements were made, the party against whom the former testimony is offered had an opportunity to develop direct, cross, or redirect examination.
- b. Dying Declarations. A statement made by a person who believed he or she was about to die provided that the statement relates to the cause or circumstances of the declarant's death.
- c. Statement Against Interest. A statement made by a declarant that is against the declarant's monetary or property interest to such an extent that the declarant would not have made the statement unless the declarant believed the statement to be true.
- d. Statement of Personal or Family History. A statement about the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, marriage, or similar facts of personal or family history. Also, a statement about another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so closely linked with the person's family that the declarant's information is likely to be accurate.

Rule 25. Residual Hearsay Exception

- a. A hearsay statement not specifically covered by an exception may still be admissible under certain circumstances. The Court may admit such a statement if equity requires its admission or if the statement:
 - i. Has equivalent guarantees of trustworthiness;
 - ii. Is more probative than any evidence the party offering it can otherwise reasonably obtain;
 - iii. Is offered as evidence of a material fact; and
 - iv. Will best serve the purposes of these rules and the interests of justice.
- b. Prior to trial or a hearing, a party offering a statement under this exception must give opposing parties reasonable notice of its intent to offer the statement as evidence. Included in the notice must be the details of the statement and the declarant's contact information, so that opposing parties may have an opportunity to challenge the statement's admission or otherwise respond to the statement. Failure to give another party reasonable notice may result in exclusion from evidence of a statement offered under this exception.

Title VII Opinion and Expert Testimony

Rule 26. Opinion Testimony by a Witness

If a witness is not an expert, then testimony in the form of an opinion is limited to opinions and inferences that are:

- a. Based on what a witness actually observed;
- b. Helpful to get a clear understanding of the witness's testimony or determine a fact that is in issue; and
- c. Not based on scientific, technical, or other specialized knowledge.

Rule 27. Expert Testimony

- a. An expert witness must, through his or her testimony, demonstrate that he or she is an expert based upon particular knowledge, skill, experience, training, education or oral traditions, as determined by the District Court Judge.
- b. Once qualified as an expert witness, the expert may offer his or her opinion to the Court if:
 - i. The expert’s scientific, technical, or other specialized knowledge will assist the District Court Judge in understanding the evidence or determining a fact in issue;
 - ii. Testimony is based on sufficient facts or data;
 - iii. Testimony is the product of reliable principles and methods; and
 - iv. The expert witness has reliably applied the principles and methods to the facts of the case.
- c. In addition to subsection (b)(i), the expert testifying on oral traditions must also be a member of the Mashpee Wampanoag Tribe and neutral, impartial, and knowledgeable of such traditions.
- d. An expert opinion is admissible even if it relates to an ultimate issue.
- e. An expert is not initially required to disclose the facts or data that supports his or her opinion, but may be required to disclose on cross-examination.
- f. The District Court Judge, if he or she deems it necessary to a resolution of the case, may appoint an expert from a list of experts agreed upon by the parties, or of his or her own choosing, after providing any party opposing the appointment an opportunity to be heard. The Court will not appoint an expert if any party has already obtained an expert. When the Judge appoints an expert, the Judge will impose reasonable costs of the expert on the parties.

NOTE: (As amended May 20, 2016)

Title VIII Contents of Writings, Recordings and Images

Rule 28. Proving the Contents of Writings, Recordings and Images

- a. In general. A party who seeks to prove the content of a writing, recording or image must produce the original writing, recording or image. Other evidence about the content of the writing, recording or image is inadmissible. A copy of the original may be admitted if the authenticity of the original is not in question and admission would be fair.
- b. Exceptions. Evidence other than an original document, recording or image may be admitted if:
 - i. The original is not reasonably available to the party seeking admission;
 - ii. The evidence is an opposing party’s written or sworn statement;
 - iii. The evidence does not closely relate to a controlling issue; or
 - iv. The evidence relates to an original made unavailable by another party’s bad faith.

Rule 29. Authentication of Writings, Recordings and Images

- a. To be admitted, writings, recordings and images must be authenticated to establish that the evidence offered is what it appears to be.
- b. Originals or copies of written records, images, and other documentary evidence may be authenticated if there is a reasonably reliable method to identify the items and the manner in which they were prepared.

- c. Certified copies of any business, organization, religious group, federal, state or local government and the records of any tribal government of a federally acknowledged tribe may be deemed authenticated unless the certification is reasonably called into question.

****¹Rule 30. Depositions; Depositions in Lieu of Testimony at Hearing or Trial**

- a. *Taking Depositions.* All depositions must be taken under oath, and each party or representative must be present and have the opportunity for cross-examination. All questions and answers must be in a written transcript or video recorded. Depositions may be scheduled by agreement between the parties or by order of the District Court.
- b. *Depositions in Lieu of Testimony at Hearing or Trial.* Whenever a witness is unable to be present at a scheduled court proceeding, the testimony of that person may be taken and preserved by a lawful deposition.
 - i. At a scheduled trial or hearing, all or any part of a deposition may be entered into evidence in the same way as if it were live testimony being offered.
 - ii. Where the need for a deposition is challenged, the party seeking the deposition has the burden to show that the testimony would be material and necessary and that the witness would be otherwise unavailable.
 - iii. Objections will be made where appropriate during the taking of a deposition. The District Court Judge will rule upon the objection as soon as possible after receiving a transcript or recorded tape, but in no instance, later than the time of trial. Where an objection is sustained, it will be stricken from the record.
 - iv. In a jury trial, the District Court Judge must fully explain to the jury the procedure and necessity for the use of deposition testimony.
- c. *Depositions at a Criminal Trial.* A defendant in a criminal case must be present at the deposition unless the right has been waived in writing. In no instance will a deposition be taken from a criminal defendant without consent.

NOTE: (As amended May 20, 2016)

Rule 31. Judicial Notice of Adjudicative Facts

- a. Judicial notice of an adjudicative fact may be taken at any time if such a fact is not subject to reasonable dispute in that it is either:
 - i. Generally known within the community; or
 - ii. Capable of accurate and ready determination by sources whose accuracy cannot reasonably be questioned.
- b. The District Court Judge may take judicial notice whether it is requested or not.
- c. A party can request judicial notice provided that they supply the necessary information.
- d. An opposing party can dispute the eligibility of the information supplied to the court to support a motion to take judicial notice.
- e. Judicial notice can be taken at any stage of the proceedings.

Title IX Effective Date

Rule 32. Effective Date

¹ Former Rule 28 (“Sworn Written Testimony”) was repealed on May 20, 2016.

- a. These rules and any amendments take effect at the time specified by the Supreme Court of the Mashpee Wampanoag Tribe.
- b. The Rules of Evidence govern all proceedings after their effective date except to the extent that the District Court Judge determines that their application to a pending matter would not be feasible or would work as an injustice, in which event the former procedure applies.

NOTE: (As amended Dec. 17, 2014)

Glossary of Legal Terms

Disclaimer: This Glossary of Legal Terms is not part of the Rules of Evidence of the Mashpee Wampanoag District Court and therefore cannot be used to interpret the Rules. Its sole purpose is to assist individuals using the Rules of Evidence.

“Culpable Conduct” is conduct that demonstrates guilt, fault, wrongdoing or blameworthiness.

A **“Declarant”** is one who has made a statement.

A **“Material Fact”** is an important fact, the determination of which may affect the outcome of a case or controversy.

A **“Party Opponent”** or **“Opposing Party”** is the person or entity on the other side of the lawsuit.

“Personal Knowledge” is knowledge gained through personal experience rather than from other sources.

A **“Statement”** is an oral or written assertion or a person’s non-verbal conduct, if the conduct is intended to be an assertion.

“Testimony” is oral evidence offered by a witness in Court, which is used to establish a fact or facts.

“Unfair Prejudice” arises in situations where evidence, if admitted, would likely cause the fact finder to make a determination on improper grounds thereby working an injustice.