

Title 4A – Criminal Procedure Rules of Court

Table of Contents

4A.1 Scope.....	1
4A.2 Jurisdiction – Generally.....	1
4A.3 Choice of Law.....	1
4A.4 Extradition.....	1
4A.5 Probable Cause.....	2
4A.6 Search & Seizure.....	2
4A.6.1 Search Warrant – Authority.....	2
4A.6.2 Search Warrant – Application.....	2
4A.6.3 Search Warrant – Issuance.....	3
4A.6.4 Execution & Return of Search Warrant.....	3
4A.6.5 Time Limitations of Search Warrant.....	4
4A.6.6 Admissibility at Trial.....	4
4A.6.7 Warrantless Search & Seizure.....	4
4A.7 Arrest of Person.....	5
4A.7.1 Arrest Warrant – Authority.....	5
4A.7.2 Arrest Warrant – Application.....	5
4A.7.3 Arrest Warrant – Issuance.....	5
4A.7.4 Execution & Return of Warrant.....	5
4A.7.5 Time Limitations for Warrants.....	6
4A.7.6 Warrantless Arrest.....	6
4A.7.7 Advisement of Rights at Time of Arrest.....	6
4A.7.8 Daily Jail Roster.....	6
4A.8 Rights of the Accused.....	7
4A.9 Prosecutorial Direction.....	7
4A.10 Complaints.....	7
4A.10.1 Limitations on Filing Complaints.....	8
4A.10.2 Nature & Contents of Complaint.....	8
4A.10.3 Amendment of Complaint.....	9
4A.11 Clerk Duties & Conformed Copies.....	9

4A.12 Joinder or Severance of Cases.....	9
4A.13 Summons to Court.....	10
4A.14 No Discussion With Judges.....	10
4A.15 Failure to Appear by Defendant.....	10
4A.16 Failure to Appear by Legal Representative or Spokesperson.....	10
4A.16.1 Withdrawal by Attorney in Criminal Case.....	11
4A.17 First Appearance in Court: Probable Cause; Bail; Arraignment.....	11
4A.18 Habeas Corpus.....	12
4A.19 Probable Cause: Initial Appearance.....	12
4A.20 Personal Recognizance.....	13
4A.21 Denial of Bail.....	13
4A.22 Bail.....	13
4A.22.1 Bail Schedule.....	14
4A.23 Request to Appear Telephonically.....	14
4A.24 Request for Continuance.....	14
4A.25 Arraignment.....	15
4A.26 Alternatives to Pleas.....	16
4A.26.1 Deferred Prosecution.....	16
4A.26.2 Stipulated Order of Continuance.....	17
4A.26.3 Plea Negotiations and Recommendations.....	17
4A.27 Trial Preparation and Pre-Trial Procedure.....	18
4A.27.1 Discovery.....	18
4A.27.2 Prosecutor's Discovery Obligations.....	18
4A.27.3 Defendant's Discovery Obligations.....	19
4A.27.4 Continuing Duty to Disclose.....	20
4A.27.5 Failure to Comply With Discovery.....	20
4A.27.6 Pre-Trial Motions.....	20
4A.27.7 Written or Oral Motions.....	21
4A.27.8 Oral Argument on Motions.....	21
4A.27.9 Hearing for Oral Arguments.....	22
4A.27.10 Suppression of Evidence.....	22

4A.27.11 Requests for Witnesses and Subpoenas Ducus Tecum for Documents.....	22
4A.27.12 Pre-Trial Hearing.....	23
4A.27.13 Time.....	23
4A.27.14 Purpose.....	24
4A.27.15 Stipulations.....	24
4A.27.16 Continuance.....	24
4A.27.17 Memorandum.....	24
4A.28 Trial Readiness.....	25
4A.29 Trial Procedure.....	25
4A.29.1 Time for Trial.....	25
4A.29.2 Procedure to be Followed at Trial.....	25
4A.29.3 Impaneling a Jury.....	26
4A.29.4 Opening Statement.....	26
4A.29.5 Case in Chief.....	26
4A.29.6 Introduction of Evidence.....	26
4A.29.7 Closing Argument.....	28
4A.29.8 Burden of Proof.....	29
4A.29.9 Bench Trial.....	29
4A.29.10 Jury Trial.....	29
4A.29.11 Jury Instructions.....	29
4A.29.12 Impaneling a Jury.....	30
4A.29.13 Juror's Duties.....	31
4A.29.14 Jury Verdict.....	31
4A.30 Sentencing.....	32
4A.31 Post-Trial Motions.....	33
4A.32 Probation; Revocation.....	33
4A.33 Applicability of Judicial Discretion.....	34
4A.34 Confidentiality.....	34
4A.35 Appeals.....	35
4A.36 Applicability of Other Obligations and Rights.....	35
4A.37 Severability; Amendments; Savings Clause.....	35

Title 4A
Criminal Procedure Rules of Court

4A.1 Scope

Criminal proceedings in Makah Tribal Court shall be conducted to give full force and effect to the rights and guarantees contained in the Indian Civil Rights Act, the Constitution and Bylaws of the Makah Indian Tribe of the Makah Reservation, and provisions of the Makah Law and Order Code (MLOC), consistent with the rules set forth in this chapter. If these Rules do not address a specific practice or timeline requirement, those found in the Makah Civil Procedure Rules of Court shall apply.

4A.2 Jurisdiction - Generally

Consistent with applicable sections of MLOC, the Makah Tribal Court shall have jurisdiction over all criminal offenses enumerated in Makah Law and Order Code or in any other ordinances that may be adopted by the Makah Tribal Council, when committed by any person subject to Makah jurisdiction under any applicable law.

4A.3 Choice of Law

In the event the Makah Law and Order Code or rules or procedures are silent on any issue of law, rule, or procedure, the Court shall have the authority to look to and adopt other laws, rules and/or procedures, in the following order of preference:

- a) Federal law, rules, or procedures;
- b) Laws, rules, or procedures from other tribes;
- c) Washington law, rules or procedures.

4A.4 Extradition

- a) Consistent with applicable sections of MLOC, if a person is charged with a violation of the laws of any other tribe or reservation or the federal or state government, the Makah Tribal Court may order that such person be delivered to the proper authorities, provided that a copy of the warrant or proof of its existence is presented to a judge of the Makah Tribal Court and that such appears to be

current, valid, and in the best interest of justice. The court shall also be notified whether the issuing jurisdiction has been notified and is willing and able to retrieve the individual within 24 hours.

- b) Upon receipt of a valid warrant, the judge may issue a court order directed to the Chief of the Neah Bay Police Department, instructing that the person named shall be apprehended and delivered to the proper authority.
- c) When such person is apprehended, it shall be the duty of the Chief of Police or the arresting officer to notify the proper foreign authority of the apprehension of the subject, and the subject may be detained in the tribal jail for a period not to exceed 24 hours from the time of apprehension. If the lawful authority requesting the apprehension of the subject, after first being notified, does not take possession of the person within 24 hours, the Court shall not honor the same warrant for the person but shall require that a new warrant to be presented and that the requesting authority's representative accompany the tribal officer to apprehend the person and then take immediate custody over the person.

4A.5 Probable Cause – General Definition

Probable cause is a level of probability, which refers to the amount and quality of information required to arrest someone, to search or seize private property, or to charge someone with a crime. The precise amount of evidence that constitutes probable cause depends on the circumstances in the case. Because probable cause is a fluid concept, which changes in accord with different factual circumstances, guidance should be sought through current federal case law applicable under the Indian Civil Rights Act.

4A.6 Search and Seizure

4A.6.1 Search Warrant – Authority

Consistent with applicable sections of MLOC, each judge of the Tribal Court shall have authority to issue warrants for the search and seizure of any person(s), premise(s), or property found within the jurisdiction of the Makah Tribe, including any technology and/or devices on which written or oral conversations or records are stored or capable of being stored.

4A.6.2 Search Warrant – Application

Consistent with applicable sections of MLOC, no warrant for search and seizure shall be issued except upon presentation of a written or oral complaint based upon probable cause, supported by oath or

affirmation of the requesting law enforcement officer, that an alleged crime, an attempt to commit a crime, or a conspiracy to commit a crime has been committed within tribal jurisdiction. Only in situations where the requesting party does not reasonably have sufficient time to prepare a written complaint request for a warrant, shall an oral request be permitted, and the requesting party must provide a sworn verbal statement as to why there is no time to prepare a written request.

Any written or audio record of a search warrant request shall contain a statement of facts constituting probable cause that an alleged crime(s) was committed; and state the person(s) and or item(s) sought, and the specific location if applicable. Requests to search a specific location and/or person shall also state why the request is "ripe," i.e., that the item(s) sought is likely to still be present if a search warrant is issued. Any audio record of a search warrant request shall be reduced to a written search warrant request for the issuing judge's review and any applicable revision within 1 business day after the verbal search warrant request was made. Any audio recording of a search warrant request, shall also be provided to the court within 1 business day of the issuance and be sealed in the court file. The audio recording shall be provided to defense counsel in the discovery process, unless the court orders that such recording be sealed, in which case the issue shall be subject to argument in open court.

4A.6.3 Search Warrant – Issuance

Consistent with any applicable section of MLOC, any warrant for search and seizure must be verified by a judge of the Makah Tribal Court in a written order including the name or description of the person, premises, communication(s) or property to be searched and/or seized, and the time frame along with any other special circumstances under which the warrant may be executed.

4A.6.4 Execution and Return of Search Warrants

Service of search and seizure warrants shall be made by a law enforcement officer. The officer shall inventory any item(s) taken from any person or premises under authority of a tribal warrant. The officer taking property under authority of the warrant shall give to the person from whom or from whose premises the property is taken, a copy of the warrant and a receipt for the property. If no such person is present at the premises, the officer shall post a copy of the warrant and a receipt or inventory account of property seized at the premises. The officer shall also file an inventory account with the court within two (2) business days, identifying items seized and the time and place they were found, or the Court may determine that any seized evidence is not admissible at trial.

4A.6.5 Time Limitation for Search Warrants

No warrant issued under this Code shall be effective for more than seven (7) calendar days; unless the issuing judge authorizes the search warrant to be extended or renewed for a specified purpose and an additional specified period of time.

4A.6.6 Admissibility at Trial

Any information or evidence seized pursuant to a search warrant issued under this Code shall be presumed to be admissible at trial unless otherwise ruled by the Court. The trial court shall presume all evidence obtained pursuant to a valid search warrant to be admissible at trial unless the Court finds that there is a preponderance of evidence to believe that the warrant was fraudulently or improperly obtained or unless there is preponderance of evidence that the evidence was seized in violation of any rights guaranteed in the Makah Constitution, the Indian Civil Rights Act or other applicable tribal or federal law.

Challenges to Admissibility: Any party challenging the admissibility at trial of any information or evidence seized pursuant to a search warrant or otherwise seized by law enforcement may make a motion to suppress such evidence from consideration at trial. The trial court shall rule on any such motions prior to impaneling a jury, or as appropriate before or during the course of a trial.

4A.6.7 Warrantless Search and Seizure

Consistent with applicable MLOC, no law enforcement officer shall search any person or premises without a warrant unless:

- a) The officer has probable cause to believe that the person has committed an offense and is in possession of property related to the commission of the offense and exigent circumstances prevent the officer from obtaining a warrant;
- b) The person knowingly and voluntarily consents to the search after having been advised of the right to refuse, and any other rights protected by applicable case law or statutory law;
- c) The officer has reasonable suspicion that a weapon is within reach of a person who might present a danger if armed;
- d) The officer has personally witnessed the alleged commission of a crime and the search is incident to arrest; or
- e) The search is pursuant to any exception to the warrant requirement recognized by federal courts or under applicable tribal law.

4A.7 Arrest of Person

4A.7.1 Arrest Warrant – Authority.

Each judge of the Tribal Court shall have authority to issue warrants for the arrest of any person(s) subject to the criminal jurisdiction of the Makah Tribe.

4A.7.2 Arrest Warrant – Application

Consistent with applicable sections of MLOC, no warrant for arrest shall be issued except upon presentation of a written or oral complaint based upon probable cause, supported by oath or affirmation of the requesting law enforcement officer, that an alleged crime, an attempt to commit a crime, or a conspiracy to commit a crime has been committed within tribal jurisdiction by the person(s) for whom the warrant is requested, and that the person be unlikely to respond to a summons for arraignment, or the person possesses a danger to him/herself or the community if he/she were to remain at large. A police report may be used in requesting a probable cause arrest warrant. Only in situations where the requesting party does not reasonably have sufficient time to prepare a written complaint request for a warrant, shall an oral request be permitted, and the requesting party must provide a sworn verbal statement as to why there is no time to prepare a written request.

Any audio record of an arrest warrant request shall be reduced to a written arrest warrant request for the issuing judge's review and any applicable revision within 1 business day after the verbal arrest warrant request was made. Any audio recording of an arrest warrant request shall also be provided to the court within 1 business day of the issuance and be sealed in the court file. The audio recording shall be provided to defense counsel in the discovery process, unless the court orders that such recording be sealed, in which case the issue shall be subject to argument in open court.

4A.7.3 Arrest Warrant – Issuance

Any warrant for arrest must be verified by a judge of the Makah Tribal Court in a written order containing the name or description of the person to be arrested.

4A.7.4 Execution and Return of Warrants

Execution of arrest warrants shall be completed by a law enforcement officer. All arrest warrants must be verified through police dispatch if the arresting officer does not have a written warrant in hand at the

time of arrest. The officer shall arrest the named person under authority of a tribal warrant and shall give to the person named therein a copy of the warrant as soon as a written warrant becomes available. The officer shall also ensure that the person is properly booked, with notice given to the court within one (1) business day that the arrest warrant has been executed and that the person is in custody awaiting a hearing.

4A.7.5 Time Limitation for Arrest Warrants

An arrest warrant issued under this Code shall be effective for no more than three (3) years, unless otherwise provided for in the warrant, or unless an application for renewal of the warrant for an additional three (3) years is approved by the court.

4A.7.6 Warrantless Arrest

No Neah Bay Police Officer shall arrest any person for a criminal offense except when such offense occurs in the presence of the arresting officer, or the arresting officer has probable cause that the person has committed an offense within the previous 48 hours, unless cite and release is appropriate, or unless otherwise provided by timelines under applicable sections of MLOC.

4A.7.7 Advisement of Rights at Time of Arrest

At the time of arrest, a detained person shall be informed of his or her applicable rights from a police department issued card. These rights may include, but may not be limited to the following:

- a) The right to remain silent and that any statement made may be used against them in any court of law;
- b) The right to retain counsel of his or her choosing and to have counsel, at his or her own expense, present before and during questioning or the making of any statement;
- c) The right to request appointment of a spokesperson if the defendant cannot afford one, if the tribe has the resources available; and
- d) The right to exercise any of the above rights at any time before or during questioning.

4A.7.8 Daily Jail Roster

Each business day, the jail shall be required to publicly post a roster of all individuals arrested and held in the ACC.

4A.8 Rights of the Accused

In all proceedings for offenses punishable by loss of liberty or loss of property, the defendant shall have the following rights in criminal proceedings in Makah Tribal Court, and shall be verbally and in writing be advised of the same at the defendant's first appearance before the court:

- a) The right to remain silent and not testify, the exercise of which right shall not be used against the accused in court nor commented upon by the prosecution;
- b) The right to know the nature and factual basis of the charge; and to receive a copy of the complaint and evidence supporting that complaint in sufficient time to prepare a defense at trial;
- c) The right to be represented by a spokesperson or attorney at your own expense. It is possible that a spokesperson may be provided at no cost to you upon your request, if tribal resources are available;
- d) The right to plead not guilty, guilty, or no contest;
- e) The right to be present at every stage of the proceeding;
- f) The right to cross-examine witnesses;
- g) The right to have witnesses subpoenaed on your own behalf and to obtain physical evidence within the jurisdiction of the Makah Indian Tribe;
- h) The right to a speedy and public trial;
- i) The right to a fair trial by judge or by jury;
- j) The right to request bail, if you are currently incarcerated, until time for trial;
- k) The right to appeal a finding of guilty, made by either a jury or the judge; and
- l) Any other rights enumerated under the Indian Civil Rights Act or other applicable law, as may be amended from time to time.

4A.9 Prosecutorial Discretion

Any abuse of prosecutorial discretion may be subject to sanction by the court. Sanctions may range from reprimand to possible disbarment.

4A.10 Complaints

Prosecution for violations of the Makah Law and Order Code shall be by criminal complaint. No complaint filed in the Makah Tribal Court shall be valid unless it shall bear the signature of the tribal prosecutor

or tribal law enforcement officer signed under oath and penalty of perjury, provided, that citations issued by law enforcement officers pursuant to this Code shall also satisfy all requirements for complaints. Complaints must be filed at the earliest time possible, but in no event later than the date of arraignment.

4A.10.1 Limitation on Filing of Complaints

Consistent with any applicable sections of MLOC, no complaint shall be filed charging the commission of any offense defined in this Code unless such offense is alleged to have been committed or discovered within the following statutes of limitation:

- a) 1 year period prior to the date of the complaint if the offense is an infraction;
- b) 1 year period prior to the date of the complaint if the offense is a Class C offense;
- c) 2 year period prior to the date of the complaint if the offense is a Class B offense;
- d) 3 year period prior to the date of the complaint if the offense is a Class A offense; or
- e) 5 year period prior to the date of the complaint if the offense is a Class AA offense.

If the complaint has been filed within the limitation period, there shall be no time limitation on further proceedings in the prosecution of the complaint, including apprehension, arrest, trial and sentencing, except as provided for in this chapter, **however**, nothing in this section or any other section of these rules shall deny a defendant the right to a speedy trial without his or her consent.

4A.10.2 Nature and Contents of Complaint

All criminal complaints shall state the identity and date of birth of the defendant and shall:

- a) state the facts upon which the Tribe is asserting personal jurisdiction over the defendant and territorial and subject matter jurisdiction over the offense alleged;
- b) state the essential facts constituting the offense charged in plain ordinary language, including the time and place of the alleged offense;
- c) contain the specific citation to the Makah Tribal Code (MLOC) or other provision of law or any regulation which the defendant is alleged to have violated;
- d) state the possible consequences if the defendant were to be found guilty of, or were to plead guilty to the offense, including the possible maximum jail sentence, fine, and whether restitution may be ordered for the offense.

4A.10.3 Amendment of Complaint

The court may permit a complaint to be amended at any time before trial if substantial rights of the defendant are not prejudiced.

4A.11 Clerk Duties- Service & Conformed Copies

4A.11.1 Service

The initial summons and complaint shall be served by the Clerk, through whatever method is most reliable. The Clerk shall then file a Declaration of Service listing the names of the documents served, the person served, and the address at which the documents are served. Any service using U.S. Mail shall be deemed to have been served if it has been at least 10 days and the mail has not been returned to the Clerk's office. If mail is returned, the Court shall have the discretion to determine additional methods of service.

- a) **Service of Subsequent Documents.** All documents following an initial summons and complaint shall be served by the Party filing the documents. An Affidavit of Service shall be filed with the Clerk citing the time, date, individual, and documents served.
- b) **Conformed Copies.** The parties shall file all pleadings and other papers with the clerk. The filing date shall be noted at the time of filing. The document(s) should be immediately stamped on the first page with the official stamp of the Court. All filing of court documents shall be commenced through the front window of the Court Clerk's Office.

The clerk shall only accept original documents, which will become part of the record of the case. If the filing party wants conformed copies, the Clerk shall make one copy at the time of filing the original. If additional persons need to be served, the Party filing the original is responsible for making additional copies, and for service of the conformed copies.

4A.12 Joinder or Severance of Cases

The court may order two or more defendants to be tried together or may order a single defendant tried on more than one complaint at a single trial, upon written motion from the prosecutor or defendant. If it appears the defendant or the Tribe is substantially prejudiced by joinder of defendants or offenses the court may separate the defendants or offenses for trial.

4A.13 Summons to Court

If a complaint is filed and the defendant is not otherwise brought into court, the Court shall direct the Clerk to issue a summons commanding the defendant to appear before the court at a specified time and place. A summons will issue in lieu of a warrant unless the Court finds there is reasonable cause to believe that the defendant will not appear in court in response to a summons, or that arrest is necessary to prevent serious bodily harm to another or the accused.

4A.14 No Discussion with Judge

In accord with any applicable sections of MLOC, no witness, party, or any other person with an interest in a case shall attempt to discuss any case pending before the court with any of the judges, except in open court, with the court clerk or one of the other judges present, and shall not attempt to influence the court's decision except during the course of regular court proceedings.

4A.15 Failure To Appear by Defendant

If a defendant has been served notice of a hearing by summons or by other court document, including any citation issued by law enforcement on which a court date is written, and the defendant fails to appear for the hearing at the scheduled date and time, the court in its discretion may issue a bench warrant and/or an order to show cause. A defendant who is found to have failed to appear without good cause shown may be ordered to pay a contempt of court fine unless the defendant has paid bail, which may be forfeited instead.

4A.16 Failure to Appear by Legal Representative/Spokesperson

If a person who is legal representative or spokesperson for a party has been served notice of a hearing by summons or by other court document and that person fails to appear for the hearing at the scheduled date and time, the court in its discretion, may issue an order to show cause. A legal representative who is found to have failed to appear without good cause shown may be ordered to pay a contempt of court fine and may be subject to disciplinary proceedings, including but not limited to disbarment from appearing in the Makah Tribal Court.

4A.16.1 Withdrawal by Attorney in Criminal Case

Whenever a criminal case has been set for trial, no legal representative/spokesperson shall be allowed to withdraw from said case, except upon written consent of the court, for good and sufficient reason shown.

4A.17 First Appearance in Court – Probable Cause Determination, Bail Hearing and Arraignment

Every person who is in custody after having been arrested and charged with an offense under the Makah Law and Order Code shall be brought to court within reasonable time of arrest, as determined by the judge, for the court to:

- a) Determine whether probable cause exists to believe that a criminal offense occurred and that the defendant is the person responsible for committing that offense;
- b) Determine bail and other conditions of release;
- c) Determine whether a criminal complaint has been filed and if so, determine whether the arraignment hearing should also proceed or whether the arraignment should be scheduled for a later date; and
- d) Determine whether any temporary orders, including but not limited to No Contact Orders, should be entered prior to arraignment and/or disposition of the case.

If the requisite probable cause is not established at the bail hearing or initial hearing, or if the complaining party fails to provide or refuses to provide a sworn police report or sworn statement at the initial appearance, or if the bail review hearing is not held within a reasonable amount of time (as determined by the judge), the defendant may be released and the court may sanction the complaining party. A bail hearing shall not be continued for the defendant to secure representation, but if the defendant has representation she/he may appear. A defendant held in custody, who is denied bail pending arraignment, shall have the right to be arraigned within three (3) business days of the bail hearing. Bail may be revisited at any subsequent hearing.

An arraignment may be continued upon request of the defendant, upon good cause shown by the complaining party, or at the discretion of the Court.

Any person who has been cited or charged with an offense and is not in custody shall appear in court for arraignment on the date and time designated on the citation or in the summons issued by the court clerk.

4A.18 Habeas Corpus

At any time subsequent to arrest, the defendant shall have a right to file a Writ of Habeas Corpus with the tribal court to test the legality of his/her detention, and may petition the Court to stay further detention pending the habeas proceeding. The police department, upon booking a defendant, shall provide the defendant with a written notice of the right to file a Writ of Habeas Corpus, upon a form approved by the Court. If a defendant fills out the form, the police shall immediately upon opening of the Court, file it with the Clerk, unless the defendant has legal representation, in which case the attorney or spokesperson shall file the Writ.

Reasons for filing a Writ of Habeas Corpus may include, but are not limited to: failure of law enforcement to advise a defendant of his/her rights upon arrest; failure of defendant to be allowed to make any necessary phone calls to attempt to secure bail and/or legal representation; being held without a timely bail hearing and/or arraignment; being held without notice provided to the Court; lack of probable cause for underlying arrest; prohibiting or unreasonably limiting contact between defendant and his/her legal representative; or any other violations of rights guaranteed under the Indian Civil Rights Act or applicable Makah Law or Constitution and Bylaws provisions.

- a) A court shall grant a stay if the court:
 - 1. Finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
 - 2. After giving the prosecutor an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

4A.19 Probable Cause: Initial Appearance

At every initial appearance, regardless of whether the defendant is in or out of custody, the court shall make a probable cause determination. To make a probable cause determination, the complaining party shall be required to provide the presiding judge with a true and correct copy of any police report, citation, or statement that led to the defendant's arrest or to the filing of the criminal complaint. The police report shall be in writing, signed under oath and penalty of perjury by the law enforcement officer(s) who investigated the alleged criminal activity. If the requisite probable cause is not established, or if the complaining party fails to provide or refuses to provide a sworn police report or sworn statement at the initial appearance, the defendant may be released, the case may be dismissed, and the court may sanction the complaining party.

4A.20 Personal Recognizance

In lieu of bail, a person charged with any offense may be released on his personal recognizance (PR) without posting bail or bond, pursuant to the discretion of the court. In determining whether to grant PR, the Court may consider the following factors:

- a) Whether the person has identified himself satisfactorily;
- b) Whether detention appears necessary to prevent imminent bodily harm to the person or to another, injury to property, or breach of the peace;
- c) Whether the person has ties to the community or is a local resident, so as to provide reasonable assurance of his appearance before a Tribal Court, or whether there is substantial likelihood that he will refuse to appear for trial; and
- d) In any case, to secure his release, the person must give his written promise to appear in court as scheduled, and agree to abide by any Release Conditions ordered by the court.

4A.21 Denial of Bail

Consistent with any applicable provisions of MLOC, the court may deny a person release on bail if it appears reasonably certain that the person will pose a serious threat to the safety and well being of himself, the Reservation, or its residents if released, or if there is a substantial likelihood that the person will not appear for trial. In considering whether to deny bail, the court may look at the defendant's criminal history, both in nature and length, as well as defendant's warrant history, if any.

4A.22 Bail

The purpose of bail is to ensure that a defendant appears for all court hearings until his/her case is concluded and to protect the community, alleged victim, and/or defendant, when necessary (as determined by the judge). Consistent with any applicable sections of MLOC, where a bail amount is set, bail shall be by cash deposit or by assurance of two reliable residents of the community who shall execute an agreement that they understand that they will be responsible to pay any bail forfeited. In no case shall the bail specified in the agreement exceed twice the maximum fine set for the charged offense. The bail or bond agreement shall be executed at the Adult Correctional Center (ACC) by any employee authorized by the Tribal Council to accept bail. A copy of the receipt shall be provided to the person posting bail and or bond. The ACC shall maintain a copy of the receipt for its own records; and shall cause the original bail or bond receipt to be

promptly filed with the clerk of the court. In any instance where bail is to be returned, it shall only be returned to the individual posting the bail, and not to any other party.

4A.22.1 Bail Schedule

Consistent with any applicable section of MLOC Title 2, the Chief Judge may establish a bail schedule for all offenses under the MLOC and any other applicable regulations, resolutions or ordinances promulgated by the Makah Tribal Council. A person arrested and taken into custody for violation of such law or regulations may be released before arraignment upon posting the specified bail with the clerk or any other person authorized by the court to receive bail, unless release on personal recognizance or detention is ordered by the court. As a condition to any release under this section, such person shall sign a written promise to appear in court at the time set for arraignment. Failure to appear may result in forfeiture of bail and arrest.

4A.23 Request to Appear Telephonically or Electronically

Requests to appear telephonically or electronically at a hearing should be made in writing in a timely manner before the hearing, although oral requests may be considered. The presiding judge has discretion to rule on such motions on a case-by-case basis. When a party makes a request to introduce testimony by telephone or other electronic means, the court shall weigh: i) the vulnerability of the witness due to age, disability or other considerations which would merit the protection of electronic transmission of testimony; ii) economic and practical considerations connected to isolation of the reservation and similar factors; iii) reliability of the testimony and other factors bearing on admissibility of the testimony and possibility of confusion; and iv) right of each party to confront the opposing witnesses. The most compelling of the factors shall be reliability of the evidence.

4A.24 Request for Continuance

Any party requesting a continuance of a hearing shall do so in writing, with a sworn statement explaining the reason for the requested continuance, and shall provide proof that the other party has been notified of the request. In emergency situations, the Court may consider whether to grant an oral continuance request and or a continuance request where the other party could not be timely notified of the request. All continuances shall be in the form of a written order, with the basis for the continuance included. Whether to grant or deny a continuance is always at the sole discretion of the trial court. However, the court will normally

grant a continuance request made orally at the arraignment stage if agreed to by both parties and/or if the defendant has not obtained a public defender or other legal counsel and desires to do so prior to the arraignment.

4A.25 Arraignment

Consistent with any applicable sections of MLOC, when a defendant is brought before the judge for arraignment, the judge shall review any sworn police report or probable cause statement to determine if probable cause exists, if such a determination has not already been made. A criminal complaint shall be read and explained to the defendant, unless it has already been explained to the defendant and the reading is waived by the defendant. A copy of the complaint and the sworn police report or sworn probable cause statement shall be filed with the court in as timely a manner as reasonably possible before the arraignment begins, and the defendant shall be provided with a copy of the complaint and the police report or probable cause statement unless he has already received the same. If the police report or probable cause statement contains any information regarding a confidential informant or witness, the court may order that such information be redacted.

At the arraignment, the court shall ensure that the defendant is informed of the:

- a) The nature of the charge, including its definition or elements;
- b) The penalties prescribed for the charge by the Makah Tribal Code and the allegations made which support the charge;
- c) The rights afforded a defendant under the Makah Tribal Code and any other applicable law, including the right to a jury trial where jail time may be imposed, provided that the right is invoked at the time the defendant enters a not guilty plea which indicates the defendant's wish for a trial. The judge shall also cause the defendant to be informed of his right to appear and defend the charge with a spokesperson – which the Tribe is not required to provide but may provide at no cost if tribal resources permit; and
- d) Provided that the court finds that the requisite probable cause exists, the court shall also ensure that the defendant is instructed to enter a plea of not guilty, guilty, or no contest. If the defendant refuses or is unable to plead, the judge shall state that the defendant is refusing or unable, on the record, and shall enter a plea of 'not guilty' on his behalf.
- e) At arraignment, the case shall be set for trial within sixty (60) days if defendant is to remain in custody or is unlikely to pay any bail set, or within ninety (90) days if the defendant is released on Personal

Recognizance, unless timelines are extended for good cause, as determined by the court. A case management schedule shall be set at arraignment with any additional dates for pre-trial and/or trial readiness as necessary and/or agreed to by the parties.

4A.26 Alternatives to Pleas: Deferred Prosecutions and Stipulated Orders of Continuance

The court encourages prosecution and defense, where appropriate, to seek alternatives to taking a matter to trial whenever possible. The following alternative dispositions are allowable in the Makah Tribal Court.

4A.26.1 Deferred Prosecution Agreement.

Deferred prosecutions may be offered consistent with any applicable sections of MLOC. Deferred prosecutions may not be allowed in cases of domestic violence or violent crimes.

- a) Conditions for Agreement. At any time, the Prosecutor and a Defendant may agree to the deferral of a prosecution for a specified period of time based on one or more of the following conditions:
 - 1. That the defendant may not commit any offense within the time specified for the deferral;
 - 2. That the defendant may not engage in specified activities, conduct, and associations bearing a relationship to the conduct upon which the charge against the defendant is based;
 - 3. That the defendant shall participate in a supervised rehabilitation program, which may include treatment, counseling, training, or education;
 - 4. That the defendant shall make restitution in a specified manner for harm or loss caused by the offense, or any other reasonable conditions, including voluntary exclusion from the Reservation; and
 - 5. Participation in the Makah Healing Court.
- b) Contents of Agreement. A deferred prosecution agreement is subject to approval by the Tribal Court. The agreement must be in writing, must be signed by the parties, and must state that the defendant waives the right to speedy trial for an additional 60 days past the end of the deferral period. The agreement may include stipulations concerning the admissibility of the police report, specified

testimony, or dispositions if the deferred prosecution is revoked. The agreement shall be filed with the Court.

- c) Violations of Agreement. The prosecution must be deferred for the period specified in the agreement unless there has been a violation of its terms. Sanctions can be imposed for violation of the agreement, without revoking the agreement in its entirety. The conditions of the agreement shall be monitored by the Makah Probation Officer.
- d) Expungement of Records. Whenever the Court has deferred the prosecution and after expiration of the period of deferral and after the defendant's successful completion of any conditions of deferral, upon motion by the Court, the defendant, or the defendant's counsel, the Court shall allow the expungement of the Court records of all record of the proceedings by entering an order of dismissal of charges and expungement, inscribing record of the proceedings with the word "Expunged" and sealing the file.

4A.26.2 Stipulated Order of Continuance.

In certain circumstances, a Stipulated Order of Continuance (SOC) may be available, with the court's approval. A Stipulated Order of Continuance is generally only allowed one time per defendant, for a relatively minor offense that does not include any act of violence or a drug-related charge that does not include any intent to sell or distribute. Conditions similar to those in subsection (a) above may be required in order for the court to grant an SOC, including a period of time in which the defendant must comply with terms and conditions set at the time of entry of the SOC. The judge is not required to accept the conditions listed within the SOC, and may amend if he/she sees fit. If the parties no longer agree with the additional or amended provisions, the SOC may be withdrawn by either party.

4A.26.3 Plea Negotiations and Recommendations

A Prosecutor and a defendant may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty to a charged offense or to a lesser or related offense, the Prosecutor will do one of the following upon successful completion of any required services (including but not limited to mental health, chemical dependency, etc.):

- a) Move for dismissal of other charges; or
- b) Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that the recommendation or request may not be binding on the Court; or
- c) Reduce the charges.

A plea bargain agreement (either Deferred Prosecution or Stipulated Order of Continuance) may be entered into at any time prior to a verdict or finding of guilt by Judge or jury. However, if a jury trial has already commenced and the delay in accepting the plea offer is due to the defendant's delay, the court may assess jury costs to the defendant as part of the agreement. If a plea agreement has been reached by the parties, the Court shall, on the record, require a disclosure of the agreement in open Court at the time the plea is offered. All sentencing decisions are at the sole discretion of the judge, who may accept the negotiated agreement, or who may impose up to the maximum sentence authorized under applicable sections of MLOC.

4A.27 Trial Preparation and Pre-Trial Procedure

4A.27.1 Discovery

Any and all discovery that either party intends to use, or may use, including witness lists with the nature of proposed testimony, and any exhibits or other written, visual, or verbal evidence that either party may rely upon or attempt to introduce, shall be filed with the court and provided to the opposing party immediately when it becomes known or available, and in no instance later than the date of pre-trial, unless it is not yet available. Failure to faithfully, honestly, and continuously provide any discovery to the opposing party shall subject the withholding party to sanctions as determined by the court, and may include dismissal of criminal charges if the court determines that the prosecutor has intentionally or with bad faith withheld information from the defendant or his/her representative.

Any defendant appearing without counsel shall be entitled to all discovery, including but not limited to police reports, phone logs, dispatch logs and evidence logs, and shall not be required to file a Notice of Appearance in order to receive the same. If any discovery contains confidential or protected information, the Prosecutor shall redact any of that information prior to providing the discovery to the defendant. If an attorney or spokesperson later appears on behalf of defendant, the Prosecutor shall provide a duplicate copy of discovery upon request.

4A.27.2 Prosecutor Discovery Obligations

Except as otherwise provided by court order, the prosecutor shall disclose to the defendant the following as early in the case as possible, and no later than five (5) business days before the pre-trial hearing:

- a) The names and addresses of all persons the Tribe intends to call as witnesses and a copy of all written or recorded statements of such persons and the substance of all oral statements;

- b) All written, recorded or oral statements made by the defendant and the names of all persons known by the Tribe who heard such statements;
- c) The names of all persons known by the Tribe who have information concerning the alleged offense, the nature of the information and whether the Tribe intends to call them as witnesses;
- d) Any books, papers, documents, photographs or other tangible objects the Tribe intends to use at trial;
- e) A list of all physical and photographic evidence collected by or in the control of the Tribe;
- f) Any information or material known to the Tribe which might tend to negate evidence of the defendant's guilt and or mitigate the sentence;
- g) The names and addresses of any expert witnesses the Tribe intends to call at trial with a summary of their testimony and qualifications;
- h) Any and all reports made by the agents of the Tribe, or agents working on behalf of the Tribe, pertaining to the investigation of the case, including but not limited to all police reports, addendums to police reports, other reports and copies of search warrants; and
- i) Any prior criminal convictions known to the prosecutor of the defendant which the prosecutor intends to disclose to the court; and any witnesses the prosecutor intends to call.

Failure of the prosecutor to provide exculpatory evidence within a reasonable period of time after the prosecutor has discovered or should have discovered the exculpatory evidence may be grounds for any applicable remedies at law, including but not limited to dismissal of the case with or without prejudice.

4A.27.3 Defendant's Discovery Obligations

Except as otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecutor the following as early in the case as possible, but no later than five (5) business days before the pre-trial hearing:

- a) The names and addresses of any person the defendant intends to call and a copy of all written or recorded statements of such persons and the substance of any oral statements;
- b) Whether there is any claim of duress, pursuant to any applicable sections of MLOC;
- c) Whether there is any claim of lawful use of force, consistent with any applicable sections of MLOC;
- d) Whether there is any claim of justifiable homicide pursuant to any applicable sections of MLOC;
- e) Whether there is any claim of incompetency;
- f) Whether there is any claim of insanity, pursuant to any applicable sections of MLOC;

- g) Whether there is any claim of lack of jurisdiction pursuant to any applicable sections of MLOC; and
- h) Whether there is any claim of alibi.

4A.27.4 Continuing Duty to Disclose

If either the defense or prosecution discovers additional material subject to disclosure under discovery requirements he or she shall immediately notify the other party's counsel and the court of the existence of the material. The court may permit any showing of cause for denial or regulation of disclosure, to be made without oral recording in the judge's chambers. A written record shall be made of all such in-chambers proceedings. If the court enters an order granting relief following an in-chambers hearing, the written record of the in chambers meeting shall be made available to the Appellate Court in the event of an appeal.

4A.27.5 Failure to Comply with Discovery

If a party fails to comply with discovery subject to disclosure under discovery requirements the court may grant a continuance, exclude the evidence not disclosed, or impose other applicable remedies at law, which the Court deems appropriate. A party seeking discovery that has not been provided, may file a motion for an order to compel discovery. If the discovery material is not thereafter provided, the party may file a motion for an order to show-cause why the non-compliant party should not be found in contempt, with the Court imposing any appropriate remedies at law.

4A.27.6 Pre-trial Motions

Parties may make motions prior to trial in an effort to clarify or narrow any issues that may be resolved by the court. Parties are encouraged to use motions if they can dispose of issues in an efficient and fair manner, however, motions shall not be used to cause unnecessary delay or to harass either Plaintiff or Defendant. Any Party found by the court to abuse the use of motions may be sanctioned accordingly.

All Motions shall be clearly identified (if in writing, the purpose of the Motion shall be listed in the caption of the document) so the opposing Party and the Court know what the motion seeks to resolve. Any Motion based on a perceived emergency shall state "Emergency" in the caption as well. Proposed orders shall accompany every written Motion, with provision for the judge to add any additional or clarifying language, or the Court may direct the moving Party to draft an order after the Court rules on the Motion.

4A.27.7 Written or Oral Motion

Any defense or objection that may be decided by the court without a trial of the facts, and any request for change in the conditions of release until trial, may be raised in the form of a motion at arraignment or within a reasonable time thereafter. Either the defendant or the prosecutor may make any written or oral motion to the court necessary to set limits on the trial, including but not limited to motions arguing:

- a) Defects in the complaint;
- b) Defects in the notice or warrant;
- c) Separation of trial of co-defendants or charges;
- d) Admissibility or suppression of evidence;
- e) Motions to exclude testimony of witnesses;
- f) Violation of the Indian Civil Rights Act;
- g) Interpretation of the code section at issue;
- h) Failure of the complaint to state an offense under the facts;
- i) Lack of jurisdiction;
- j) Change of plea;
- k) Dismissal of the case;
- l) Failure to provide discovery, including failure of prosecutor to provide exculpatory evidence;
- m) Claims that the defendant is not competent to stand trial; and/or
- n) Any motion to remand the defendant to an appropriate facility for a psychiatric evaluation to determine competence.

The moving party may state the applicable tribal and federal law and facts that are the basis of his or her motion, and the responding party may state the applicable tribal and federal law and facts relevant to his or her response to the motion. Each party shall notify and provide a copy to the other party of its written motion, response to motion, etc. The Court in its discretion may require the motion and/or response be in writing, with copies for the court of any laws or cases cited therein. The Court may require briefing on any Motions presented.

4A.27.8 Oral Argument on Motion

Any party wanting a hearing for oral argument on a motion shall notify the court and the responding party, which shall then inform the court as to whether it agrees with or objects to said hearing. The moving party, and where applicable the counter-moving party, shall file a proposed order to accompany its motion.

4A.27.9 Hearing for Oral Argument

The court may set a hearing for oral argument of pre-trial motions, in its sole discretion. Hearings on pre-trial motions may be by written motion and response, oral argument, and/or by testimony and submission of other evidence in the case of a motion to suppress. All pre-trial motions must be submitted and decided prior to the start of the trial, preferably on the date set for Trial Readiness.

In the case of contested motions, the judge shall issue a ruling setting forth the legal basis for his or her decision, and either the judge, the prevailing party, or the party assigned by the judge shall draft the written ruling with its legal basis for entry into the written record.

4A.27.10 Suppression of Evidence

The court shall exclude oral, physical, or identification evidence from admission at trial if the court finds that the evidence was discovered in violation of a defendant's rights under applicable law, including the Indian Civil Rights Act. If a party moves for suppression of any evidence, the Court may require briefing and/or hold a hearing at which the court shall set forth its findings and its reasons for the admissibility or inadmissibility of evidence. The Court may permit testimony and oral and written argument at a suppression hearing. The Court may require the Parties to provide copies of any laws or cases cited therein

4A.27.11 Requests for Subpoenas for Witnesses & Subpoenas *Duces Tecum* for Documents

The following procedure shall apply to those witnesses and/or items which the custodian may not be inclined to deliver on any number of bases, including but not limited to a claim of tribal sovereign immunity from legal process.

- a) Any party wanting the court to issue a subpoena to order a witness to appear at a hearing shall file a proposed subpoena with the court clerk. The subpoena shall include the case name, number, address the witness by name and title, and state the date and time of the hearing which the witness is to be ordered to appear at. The subpoena should also state whether the person is to serve as a witness for the plaintiff or the defense; and should include current contact information so the witness may contact the party's legal counsel to prepare for the hearing.
- b) Any party wanting the court to issue a subpoena *duces tecum* to order that documents or other tangible items be delivered to the court shall file a proposed subpoena *duces tecum* with the court clerk. The subpoena *duces tecum* shall include the case name, number, physical location of the item sought to be subpoenaed, the relevance of the item sought, and a deadline for the item to be

delivered. The subpoena *duces tecum* should also state whether the subpoenaed item is to serve as an exhibit for the plaintiff or the defense; and should include current contact information of the requesting party so the custodian of the item may contact the party's legal counsel to arrange to provide the item.

- c) Because the Makah Tribe is a sovereign tribal nation with immunity from legal process, only in situations where the Tribe through its General Manager or other person designated by the Tribal Council, has consented to legal process, may any party obtain the Tribe's proprietary information, i.e., documents or property owned by the Tribe that are not publicly available. Therefore, except as provided below, any party wanting to subpoena a tribal official, tribal documents or other tribal property for evidentiary purposes, must follow the Makah Tribe Information Policy (as currently written or as it may be revised) to request the Tribe's consent to legal process.

Legal practitioners who are members of the tribal court bar are allowed access to public information records and files as they are conducting research in the normal course of business, and are allowed to obtain copies of documents containing official signatures. Some proprietary information such as police reports, inmate reports, dispatch logs, etc., may be obtained through a court subpoena or a specific directive from the General Manager, or other designee.

However, in some instances there are confidential documents in public record files which may not be re-produced or copied by the court even with a release of information. To obtain a copy, the requesting party must go to the agency that originated the document. In the case of personnel records, the court may require that the employee sign a release in order for his/her records to be released to any person outside of Human Resources, otherwise these records may be withheld at the employee's request.

4A.27.12 Pre-Trial Hearing

At arraignment when a plea of not guilty is entered, a pre-trial hearing may be scheduled unless waived by the defendant or upon an agreement by the parties that no issues are anticipated which would require a pre-trial hearing.

4A.27.13 Time

The time set for the pre-trial hearing shall allow reasonable time for the parties to initiate and complete discovery; conduct further investigation of the case, as needed; and to continue any plea

discussions. The time set for trial readiness shall also ensure adequate time for parties to prepare following any ruling from the court on any motions or other issues brought to the court's attention.

4A.27.14 Purpose

At the pre-trial hearing, the court shall:

1. ensure that the defendant has had an adequate opportunity to obtain legal counsel and that standards regarding provision of counsel and or a spokespersons list have been complied with;
2. ascertain whether the parties have completed discovery and, if not, make orders appropriate to expedite completion;
3. enter rulings on any motions, and ascertain whether any additional motions or requests will be made at a trial readiness hearing;
4. ascertain whether there are any procedural or constitutional issues which should be considered;
5. permit the defendant to change his plea; and/or
6. schedule the trial readiness or trial date, as appropriate.

4A.27.15 Stipulations

Any motions or other requests, which may be stipulated to, should be raised by counsel or the court in its discretion, and if resolved by stipulation, may be informally disposed of, for example, a defendant's stipulation to enrollment in a federally-recognized tribe. Stipulations should be made at the earliest reasonable opportunity, and if possible by the date of the trial readiness.

4A.27.16 Continuance

If the court determines that it is proper and not in violation of the defendant's rights to do so, the court may continue the pre-trial hearing to allow sufficient time for completion of additional discovery, investigation or preparation, or evidentiary hearing.

4A.27.17 Memorandum

At the conclusion of the pre-trial hearing, a docket order shall be written by the court, including any additional filing deadlines or hearing dates, as necessary.

4A.28 Trial Readiness

4A.28.1 Trial Readiness Hearing

The Parties may request, and the court may grant or set an additional hearing prior to the date set for trial in order to determine whether parties are ready to proceed to trial and/or to hear any pre-trial motions or make any other discretionary arguments or rulings prior to trial.

4A.29 Trial Procedure

4A.29.1 Time for Trial

- a) Every person charged with a criminal offense has a right to speedy and public trial before an impartial jury from within the territorial jurisdiction of the Makah Tribe. Timelines for speedy trial are as follows, unless timelines are extended for good cause, as determined by the court:
 1. If defendant is in custody, a trial shall be held no later than sixty (60) days from the date of arraignment, unless requested by or agreed to by defendant;
 2. If defendant is out of custody, a trial shall be held no later than ninety (90) days from the date of arraignment, unless requested by or agreed to by defendant; or
 3. If defendant was in custody, but posted bail or was otherwise released prior to pre-trial, speed trial shall be set on the ninety (90) day schedule, unless requested by or agreed to by defendant.
- b) Any speedy trial challenge for delay beyond the enumerated time period shall be determined after considering the following factors:
 1. Length of delay;
 2. Reason for delay;
 3. Whether defendant objected to the delay; and
 4. Prejudice, if any, to the defendant.

4A.29.2 Procedure to Be Followed at Trial

Trial procedure shall begin with any final pre-trial motions or issues to resolve, then jury selection (if jury trial is requested at arraignment), then opening statement(s), then case-in-chief (witnesses and evidence

presentation), then closing statements, followed by jury instructions and submission of the case to jury (if jury trial), concluding with verdict.

4A.29.3 Impaneling a Jury

The Clerk, Court and Parties shall comply with all applicable provisions of any applicable sections of MLOC, as well as with the procedures outlined below, in order to seat a jury when a jury trial was requested by defendant.

4A.29.4 Opening Statement

Consistent with any applicable sections of MLOC, each party, beginning with the prosecutor, may make an opening statement that will explain to either the judge in the case of a bench trial, or the jury in the case of a jury trial: i) that party's position in the case; ii) what evidence that party expects to introduce at the trial, if any; and iii) how that party expects the evidence, if any, to support his or her position.

4A.29.5 Case-In-Chief.

Consistent with any applicable sections of MLOC, subsequent to the opportunity to make opening arguments, each party may present its case-in-chief. The tribe, as the Plaintiff in all criminal matters, has the burden of proving its case beyond a reasonable doubt. The tribe shall first present its evidence and any witnesses. Defendants are allowed to, but are not required to present a case-in-chief.

4A.29.6 Introduction of Evidence

Each party may introduce evidence, which may consist of either testimony from witnesses or physical evidence, to support their argument or position in the case.

- a) Testimony: Either party may call either lay witnesses or expert witnesses to testify on their behalf.

A lay witness may testify as to personal observation or knowledge, or as to his or her opinion only when that opinion is based primarily upon the personal observation or knowledge of the lay witness.

A witness may testify as an expert based upon specialized knowledge acquired through education, training, and/or experience and an expert witness may testify as to his or her opinion relating to any hypothetical matter within that field of expertise. If a party presents a witness as an expert, the parties or court may request supporting documentation such as a resume, certifications, vitae, and may examine the witness to determine the basis for any specialized knowledge to qualify as an expert and the court shall then determine whether that witness is qualified to testify as an expert, or

whether he shall testify as a lay witness. The clerk of the court shall prepare a list of all witnesses called by each party, and such list shall be kept as a part of the official court file.

- b) Failure To Appear by Subpoenaed/Non-Subpoenaed Witness: Non-appearance of an anticipated witness who has not been subpoenaed does not serve as grounds for a continuance of the trial. Non-appearance of an anticipated witness who has been subpoenaed may serve as grounds for a continuance of the trial if it appears the witness' testimony is reasonably needed by the party for a fair trial. The court in its discretion may issue a bench warrant for the subpoenaed witness who has failed to appear. A witness who is found to have failed to appear without good cause shown, may be ordered to pay a contempt of court fine.
- c) Physical Evidence: At a reasonable time prior to trial, physical evidence, including documents, which is sought to be introduced by either party, must first be presented to the clerk for assignment of an exhibit number and indication of whether it is presented by the Plaintiff or the Defendant, and then identified and authenticated by a witness during his or her testimony before being considered by the court for admission during trial. Each party shall prepare the originals and copies of all physical evidence that they will seek to introduce at trial, and present these to the clerk of the court prior to the court proceeding so the clerk may assign an exhibit number for each piece of physical evidence.

The clerk of the court shall compile a list of all exhibits of physical evidence that each party seeks to introduce at trial, with the exhibit number assigned to each piece of evidence, the party offering it for admission, and a notation of the court's ruling as to whether the exhibit was admitted or not admitted. The clerk's list of all physical evidence sought to be introduced by each party, together with notation of the court's ruling as to admission of that evidence, shall be kept as part of the trial court record.

The process for admitting physical evidence shall consist of a party: i) preparing originals and copies of all physical evidence; ii) presenting the original of all physical evidence to the clerk for assignment of an exhibit number; iii) providing a copy of all physical evidence to the opposing party, or if that is not feasible, allowing the opposing party sufficient opportunity to examine the evidence outside of the trial proceeding; iv) having a witness identify and authenticate the exhibit to establish its reliability; and v) formally asking the court to admit the exhibit, at which time the opposing party shall have the opportunity to object.

- d) Admissible Evidence: Only evidence which is both relevant to a matter at issue and which is not unduly prejudicial, time-consuming or confusing will be admissible at trial. The court may determine

to admit hearsay evidence, after: i) weighing the defendant's right to confront a witness as guaranteed under the Indian Civil Rights Act; ii) weighing the reliability of the hearsay evidence and providing any appropriate instruction to the jury; and iii) weighing the potential that the hearsay evidence is unduly prejudicial or likely to overly confuse the jury. Formal Federal Rules of Evidence and Washington Rules of Evidence do not apply unless the court determines that they serve the interests of justice, or the parties agree to their use and ask the court to approve.

- e) Objections to Evidence: Either party may object to evidence being introduced by the other party, whether such evidence is in the form of exhibits or testimony. Upon objection, all testimony shall immediately stop to allow the court to make a ruling. The objecting party shall make a concise statement as to why the evidence should not be admissible, and the other party shall make a concise statement in response. The court may then issue its ruling or the court may take the issue under advisement until a later time. A party may not object to admissibility of evidence already admitted without objection, unless exigent circumstances are proven. The clerk shall keep a separate list noting all objections made by each party to each piece of evidence, whether exhibits or testimony. The clerk's list of objections, including whether each objection was sustained, overruled, or taken under advisement, shall be kept with the official court file for purpose of appeal.

4A.29.7 Closing Argument

At the conclusion of all testimony and presentation of evidence, and consistent any applicable sections of MLOC, each party, beginning with the prosecutor, may make an closing argument that will argue to either the judge in the case of a bench trial, or the jury in the case of a jury trial why the judge or jury should rule in favor of that party. Such argument may consist of: i) summarizing and emphasizing specific evidence that was admitted into the record during the trial; ii) arguing that certain inferences should be made based upon that evidence; and iii) in the case of jury trials, arguing how evidence should be interpreted based upon the court's instructions to the jury, or in the case of bench trials, arguing how the law should be interpreted within the facts of this case. Each party shall be given the same amount of time to make closing arguments; however, the prosecutor may reserve a portion of his or her time to afterwards respond to the defense closing. Evidence not admitted shall not be referenced in a closing argument.

4A.29.8 Burden of Proof

Consistent with any applicable sections of MLOC, in all criminal prosecutions, the burden shall be on the Tribe to prove defendant's guilt beyond a reasonable doubt. Therefore, each element of the charged offense must be proved beyond a reasonable doubt. If the Tribe does not meet this standard, the accused shall be declared not guilty. For the purpose of all motions, evidentiary matters and other matters regarding trial process and procedure, the burden shall be on the moving party and the burden of proof for those other matters shall be by preponderance of the evidence or as otherwise set forth in applicable law relating to trial and motions practice.

4A.29.9 Bench Trial

Consistent with any applicable sections of MLOC, in a case tried without a jury, whereby the defendant did not demand a jury trial at his or her arraignment, the judge shall make a finding of guilt or innocence and shall, upon request of any party, make specific written findings of fact and conclusions of law. In general, it is the responsibility of the prevailing party to prepare and present the proposed order, which the judge in his or her discretion may revise.

4A.29.10 Jury Trial

Consistent with any applicable sections of MLOC, all criminal cases shall be tried before a jury whenever the defendant has invoked such right at the time of his or her arraignment.

4A.29.11 Jury Instructions

- a) Prior to trial, the court may direct the Plaintiff and Defendant to submit their proposed jury instructions.
- b) All proposed jury instructions shall be provided to the clerk, to opposing counsel and a bench copy provided to the judge no later than four days prior to trial. The judge shall have the final determination as to the instructions given to the jury.
- c) The judge shall orally instruct the jury pursuant to the law of the Makah Indian Tribe, or other applicable law. Final jury instructions shall also be provided to the jury upon deliberation.
- d) All proposed jury instructions and the final jury instructions which are administered by the court shall be preserved in the court file as part of the record for purposes of appeal.

4A.29.12 Impaneling a Jury

Clerk, with at least one witness present, shall prepare separate ballots containing the names Consistent with any applicable sections of MLOC, a jury shall consist of six (6) persons, not including alternates. The jury shall be composed from a list of eligible voters of the Makah Indian Reservation as certified to the Chief Judge by the Makah Tribal Council. The list shall be updated from time to time by the Makah Tribal Council. The Clerk shall cause to be summoned a sufficient number of potential jurors from the list of residents of the Makah Indian Reservation.

- a) The names of potential jurors who have not been excused by the court shall be deposited into a box. The Clerk shall then cause to be drawn at random, a sufficient number of prospective jurors names as may be needed to obtain enough prospective jurors for the purpose of *voir dire* examination, so that ultimately six (6) jurors and an alternate juror may be appointed. Any additions to the panel shall be drawn using the same procedure until a jury has been selected.
- b) In accordance with any applicable sections of MLOC, no person, including members of the court's staff, any of the parties or witnesses or any other person, shall discuss any case before or after a trial, with a person who is known as a juror or as a prospective juror.
- c) Failure to impanel a jury for any reason will constitute good cause to extend the trial date, unless otherwise required for good cause. An extension for impaneling a jury under this provision shall be for no more than fifteen (15) business days.
- d) A *voir dire* examination of summoned jurors by the prosecutor, the defense counsel and/or the judge shall be conducted for purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The court may permit the defendant and the prosecutor to conduct the examination or the court may itself conduct the examination. If the court conducts the examination it shall permit the defendant and the prosecutor to submit additional supplemental questions as it deems proper.
- e) Either party to a case may challenge not more than three (3) jurors without cause and any number for cause which shall consist of, but is not limited to:
 1. Having been a juror, party or witness in any civil or criminal case involving the same facts and parties;
 2. Having a close family (first or second degree), business, or legal relationship with the defendant, defense spokesperson, alleged victim(s), prosecutor, witnesses, or any law enforcement officer called as a witness against the defendant;

3. Having an opinion on the guilt or innocence of the defendant as would impair impartiality; or
 4. Having been convicted of, or pled guilty to, a criminal offense in Makah tribal court within the preceding six months of the current trial.
- f) In the absence of six (6) jurors and the failure of the parties to stipulate to continue the trial in the absence of six (6) jurors, the jury shall be discharged and a new jury shall be selected, no later than fifteen (15) business days, or as soon thereafter as possible, to hear the case.
 - g) When the trial is in a recesses or other time when the Court is not on the record, jurors shall be sequestered in a location where they cannot overhear, intentionally or inadvertently, any conversations between the prosecutor and any witnesses or the public defender and defendant or defense witnesses

4A.29.13 Jurors' Duties

When a jury has been seated, the juror's oath shall be administered by the judge or the clerk.

- a) The court may prohibit the jury from viewing the premises where the offense or other material facts are alleged to have occurred.
- b) The court may allow jurors to take notes regarding evidence.
- c) The court may order the discharge of a juror who becomes sick or who is otherwise unable to perform the duties of a juror and substitute an alternate juror.
- d) Jurors shall not discuss the case or the witnesses with anyone, even with fellow jurors, until the case has been submitted to the jury for deliberation.
- e) Jurors shall disclose to the Court any attempts by either prosecution or defense to communicate with them, or any inadvertent statements about the case made where the jury could hear.

4A.29.14 Jury Verdict

- a) Consistent with any applicable sections of MLOC, a verdict of guilty must be unanimous. If after the Court determines that the jury is unable to reach a unanimous verdict, the Court shall declare a mistrial or may dismiss the case.
- b) Consistent with any applicable sections of MLOC, a defendant may be found guilty of a lesser-included offense if included in the offense charged.

4A.30 Sentencing *Classifications may be revised*****

- a) Consistent with any applicable sections of MLOC, any person who has been convicted of a criminal offense in the Tribal Court shall be sentenced at once or, in the discretion of the judge, at a later date not to exceed 30 days from the date of the judgment, in accordance with any applicable sections of MLOC, and may be sentenced to one or a combination of the following penalties:
1. pursuant to any applicable sections of MLOC, Class AA offenses shall be punished with a maximum imprisonment term of not more than 1 year; and or a maximum fine of not more than \$5,000;
 2. pursuant to any applicable sections of MLOC, Class A offenses shall be punished with a maximum imprisonment term of not more than 6 months; and or a maximum fine of not more than \$3,000;
 3. pursuant to any applicable sections of MLOC, Class B offenses shall be punished with a maximum imprisonment term of not more than 3 months, and or a maximum fine of not more than \$1,000;
 4. pursuant to any applicable sections of MLOC, Class C offenses shall be punished with a maximum imprisonment term of not more than forty-five days, and or a maximum fine of not more than \$500;
 5. pursuant to any applicable sections of MLOC, Infraction offenses shall be punished with a maximum fine of not more than \$1,000;
 6. Community service for the benefit of the Tribe;
 7. Rehabilitative measures, including but not limited to obtaining a GED or other vocational training, mandatory chemical dependency evaluation and compliance with all treatment recommendations, completion of a certified domestic violence program, completion of theft-awareness or DUI class. If the defendant believes the evaluation results are incorrect or biased, he may Motion the court for approval to obtain and submit results from an independent second evaluation.
- b) Civil Restitution. Consistent with any applicable sections of MLOC, in addition to or instead of the penalties provided in subsection a) above, the court may require a convicted offender who has inflicted injury upon the person or property of another to make restitution or compensate the injured person by means of the surrender of property, payment of money, or the performance of any other act for the benefit of the injured party which is reasonably related to the offense committed. The

court may require the person seeking restitution to document costs for restitution. Testimony of the victim, if offered, shall be considered in the determination of the appropriate disposition under this section.

- c) Pre-Sentence Reports. In determining the appropriate sentence, the court may direct that a pre-sentence investigation be conducted by the probation officer or other qualified agent, and the judge may consider the pre-sentence reports, testimony of the victim, and any other factors which the judge deems relevant.
- d) Consistent with any applicable sections of MLOC, where a sentence of imprisonment or a fine has been imposed on a convicted offender the tribal court may, in its discretion, suspend in whole or in part the serving of such sentence or payment of such fine, and release the person on probation under any reasonable conditions deemed appropriate by the court.

4A.31 Post-Trial Motions

In the trial court's sole discretion, it may consider the following post-verdict motions filed by the defendant or his/her attorney or spokesperson:

- a) Motion for a New Trial – The court can vacate the judgment and allow for a new trial. This may only be granted by a clear and convincing offer of proof that “the interest of justice so requires.”
- b) Motion for Judgment of Acquittal – Court may set aside the jury's verdict and allow the defendant to go free.
- c) Motion to Vacate, Set Aside, or Correct a Sentence – If filed for the purpose of correcting a clerical error in the sentence.

4A.32 Probation; Revocation

- a) The Tribe may appoint a probation officer to monitor and supervise those charged and/or convicted of any criminal or civil offense pursuant to tribal law, including but not limited to the criminal code, hunting and fishing ordinances, juvenile offender cases, and tribal law relating to sex offenses, registration as a sex offender, and domestic violence.
- b) The Probation Officer's supervisor may enter into agreements with other jurisdictions to ensure that offender(s) convicted by the courts of those jurisdictions who live or work within tribal jurisdiction, remain in compliance with court-ordered sentences and services to best protect the safety and welfare of tribal and other community members.

- c) The Probation Officer shall be responsible for:
1. Monitoring offenders to ensure compliance with tribal court-ordered conditions of release and terms of any sentence order upon conviction or other applicable court order;
 2. Maintaining contact with victims, families and others as necessary to provide appropriate monitoring services and make appropriate recommendations to the Court to serve the interests and welfare of the community; and
 3. Reporting violations of probation and conditions of release to the Tribal Court along with recommendations of consequences to such violations as necessary to ensure the safety and welfare of the community.
- d) Consistent with any applicable sections of MLOC, any person who violates the terms of his or her probation may be required by the court to serve the sentence or pay the fine originally imposed or such part of it as the court may determine to be suitable giving consideration to all the circumstances; provided, that such revocation of probation shall not be ordered without a hearing before the court at which time the offender shall have the opportunity to explain his or her actions or otherwise show cause why the suspended sentence should not be revoked.

4A.33 Applicability of Judicial Discretion

These rules do not remove any existing discretion or other authority of the court in carrying out its judicial functions, including but not limited to determining appropriate remedies at law or by custom and tradition.

4A.34 Confidentiality - Compliance with Health Information Patient Accountability Act and other applicable laws

In any and all proceedings under these rules, all parties shall keep any confidential or protected information secure from disclosure to any unauthorized persons. In any matter in which protected health information- including but not limited to chemical dependency, mental health, behavioral health, or physical health information- is provided to prove either facts, compliance or non-compliance with any court orders, it shall be unlawful to release, disclose, or disseminate any such information without the express written consent of the party for whom the information pertains. And person who violates this section shall be subject not only to penalties under the federal Health Information Patient Accountability Act ("HIPAA"), but may also

be subject to prosecution under the laws of the Makah Indian Tribe. Accident shall not be a defense to any prosecution or referral to federal authorities.

4A.35 Appeal

Appeals shall proceed in accordance with the Makah Appellate Code.

4A.36 Applicability of Other Obligations and Rights

These rules do not remove any existing obligations or rights of legal counsel concerning ethical obligations, rights or other requirements, including but not limited to those found in the Title 3A, Civil Procedure Rules of Court.

4A.37 Severability; Amendments; Savings Clause

If any section of these Rules shall be determined to be a violation of any applicable law or rights, that section may be severed without affecting the applicability of the remainder of the Rules. Any amendments to these Rules shall become effective as outlined in the Constitution and Bylaws of the Makah Indian Tribe, or any applicable law. Any action commenced but not concluded prior to enacted amendments shall be heard and shall proceed under the sections in effect at the time the action was commenced.