

CHAPTER 967
CRIMINAL PROCEDURE — GENERAL PROVISIONS

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967.02 Words and phrases defined. In chs. 967 to 979, unless the context of a specific section manifestly requires a different construction:

- (1) "Clerk" means clerk of Ho-Chunk Nation court including the clerk's assistants.
- (3) "Bail" means the amount of money set by the court which is required to be obligated and secured as provided by law for the release of a person in custody so that the person will appear before the court in which the person's appearance may be required and that the person will comply with such conditions as are set forth in the bail bond.
- (4) "Bond" means an undertaking either secured or unsecured entered into by a person in custody by which the person binds himself or herself to comply with such conditions as are set forth therein.
- (5) "Law enforcement officer" means any person who by virtue of the person's office or public employment is vested by law with the duty to maintain public order or to make arrests for crimes while acting within the scope of the person's authority.
- (6) "Judge" means judge of a court of record.
- (7) "Court" means the Ho-Chunk Nation court unless otherwise indicated.
- (8) "Judgment" means an adjudication by the court that the defendant is guilty or not guilty.

967.03 Tribal Prosecutor. Wherever in chs. 967 to 979 powers or duties are imposed upon the tribal prosecutor, the same powers and duties may be discharged by any of their duly qualified deputies or assistants.

967.04 Depositions in criminal proceedings. (1) If it appears that a prospective witness may be unable to attend or prevented from attending a criminal trial or hearing, that the prospective witness's testimony is material and that it is necessary to take the prospective witness's deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion and notice to the parties order that the prospective witness's testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed pursuant to s. 969.01 (3), the court shall direct that the witness's deposition be taken upon notice to the parties. After the deposition has been subscribed, the court shall discharge the witness.

(2) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time. Upon request of all defendants, unless good cause to the contrary is shown, the court may order that a deposition under this section be taken on the record by telephone or live audiovisual means.

(3) A deposition shall be taken as provided in civil actions. At the request of a party, the court may direct that a deposition be taken on written interrogatories as provided in civil actions.

(4) (a) If the Nation or a witness procures such an order, the notice shall inform the defendant that the defendant is required to personally attend at the taking of the deposition and that the defendant's failure so to do is a waiver of the defendant's right to face the witness whose deposition is to be taken. Failure to attend shall constitute a waiver unless the defendant was physically unable to attend.

(b) If the defendant is not in custody, the defendant shall be paid witness fees for travel and attendance. If the defendant is in custody, the defendant's custodian shall, at Nation expense, produce the defendant at the taking of the deposition. If the defendant is in custody, leave to take a deposition on motion of the Nation shall not be granted unless all states which the custodian will enter with the defendant in going to the place the deposition is to be taken have conferred upon the officers of this state the right to convey prisoners in and through them.

(5)(a) At the trial or upon any hearing, a part or all of a deposition, so far as it is otherwise admissible under the rules of evidence, may be used if any of the following conditions appears to have been met:

1. The witness is dead.
2. The witness is out of state, unless it appears that the absence of the witness was procured by the party offering the deposition.
3. The witness is unable to attend or testify because of sickness or infirmity.
4. The party offering the deposition has been unable to procure the attendance of the witness by subpoena.

(b) Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to offer all of it which is relevant to the part offered and any party may offer other parts.

(6) Objections to receiving in evidence a deposition may be made as in civil actions.

(7)(a) In any criminal prosecution or any proceeding under 4 HCC § 3, any party may move the court to order that a deposition of a child who has been or is likely to be called as a witness be taken by audiovisual means. Upon notice and hearing, the court may issue an order for such a deposition if the trial or hearing in which the child may be called will commence:

1. Prior to the child's 12th birthday; or

2. Prior to the child's 16th birthday and the court finds that the interests of justice warrant that the child's testimony be prerecorded for use at the trial or hearing under par. (b).

(b) Among the factors which the court may consider in determining the interests of justice are any of the following:

1. The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.

2. The child's general physical and mental health.

3. Whether the events about which the child will testify constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

4. The child's custodial situation and the attitude of other household members to the events about which the child will testify and to the underlying proceeding.

5. The child's familial or emotional relationship to those involved in the underlying proceeding.

6. The child's behavior at or reaction to previous interviews concerning the events involved.

7. Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

8. Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

9. The number of separate investigative, administrative and judicial proceedings at which the child's testimony may be required, the likely length of time until the last such proceeding, and the mental or emotional strain associated with keeping the child's recollection of the events witnessed fresh for that period of time.

10. Whether the use of a recorded deposition would reduce the mental or emotional strain of testifying and whether the deposition could be used to reduce the number of times the child will be required to testify.

(8) (a) If the court orders a deposition under sub. (7), the judge shall preside at the taking of the deposition and enforce compliance with the applicable provisions of *HCN R. Civ. Pro.*, Rule 33. All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Upon request of any party, where the witness has refused to answer, and with the consent of the

court, the court may rule by telephone on any objection. The court's ruling shall be recorded in the same manner as the testimony of the deponent. In the absence of a ruling by the court, the evidence objected to shall be taken subject to the objections and the judge shall make rulings thereon as at trial. The clerk of court shall keep the certified original recording of a deposition taken under sub. (7) in a secure place. No person may inspect or copy the deposition except by order of the court upon a showing that inspection or copying is required for editing pursuant to a court order or for the investigation, prosecution or defense of the action in which it was authorized or the provision of services to the child. The original must be kept secure, and only copies made be edited pursuant to court ordered instructions.

(b) If the court orders that a deposition be taken by audiovisual means under sub. (7), the court shall do all of the following:

1. Schedule the deposition on a date when the child's recollection is likely to be fresh and at a time of day when the child's energy and attention span are likely to be greatest.

2. Schedule the deposition in a room which provides adequate privacy, freedom from distractions, informality and comfort appropriate to the child's developmental level.

3. Order a recess whenever the energy, comfort or attention span of the child or other circumstances so warrant.

4. Determine that the child understands that it is wrong to tell a lie and will testify truthfully if the child's developmental level or verbal skills are such that administration of an oath or affirmation in the usual form would be inappropriate.

5. Before questioning by the parties begins, attempt to place the child at ease, explain to the child the purpose of the deposition and identify all persons attending.

6. Allow any questioner to have an adviser to assist the questioner, and upon permission of the judge, to conduct the questioning.

7. Supervise the spatial arrangements of the room and the location, movement, and deportment of all persons in attendance.

8. Allow the child to testify while sitting on the floor, on a platform, on an appropriately sized chair, or on the lap of a trusted adult, or while moving about the room within range of the visual and audio recording equipment.

9. Permit the defendant to be in a position from which the defendant can communicate privately and conveniently with counsel.

10. Upon request, make appropriate orders for the discovery and examination by the defendant of documents and other evidence in the possession of the state which are relevant to the issues to be covered at the deposition at a reasonable time prior thereto.

11. Bar or terminate the attendance of any person whose presence is not necessary to the taking of the deposition, or whose behavior is disruptive of the deposition or unduly stressful to the child. A reasonable number of persons deemed by the court supportive of the child or any defendant may be considered necessary to the taking of the deposition under this paragraph.

(9) In any criminal prosecution or juvenile fact-finding hearing under 4 HCC § 3, the court may admit into evidence a recorded deposition taken under subs. (7) and (8) without an additional hearing. In any proceeding under s. 973.10 (2), the hearing examiner may order that a deposition

be taken by audiovisual means and preside at the taking of the deposition using the procedure provided in subs. (7) and (8) and may admit the recorded deposition into evidence without an additional hearing.

(10) If a court or hearing examiner admits a recorded deposition into evidence under sub. (9), the child may not be called as a witness at the proceeding in which it was admitted unless the court or hearing examiner so orders upon a showing that additional testimony by the child is required in the interest of fairness for reasons neither known nor with reasonable diligence discoverable at the time of the deposition by the party seeking to call the child. The testimony of a child who is required to testify under this subsection may be taken in accordance with s. 972.11 (2m), if applicable.

967.05 Methods of Prosecution

- (1) A prosecution may be commenced by the filing of:
 - (a) A complaint;
 - (b) In the case of a corporation or limited liability company, an information;
 - (c) An indictment.
- (2) The trial of a misdemeanor action shall be upon a complaint.
- (3) The trial of a felony action shall be upon an information.

967.055 Prosecution of offenses; operation of a motor vehicle or motorboat; alcohol, intoxicant or drug. (1) INTENT. (a) To encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or having a prohibited alcohol concentration, offenses concerning the operation of motor vehicles by persons with a detectable amount of a restricted controlled substance in his or her blood, and offenses concerning the operation of commercial motor vehicles by persons with an alcohol concentration of 0.04 or more.

(2) DISMISSING OR AMENDING CHARGE. (a) Notwithstanding s. 971.29, if the prosecutor seeks to dismiss or amend a charge or a local ordinance in conformity therewith, where the offense involved the use of a vehicle or an improper refusal, the prosecutor shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving, in deterring the operation of motor vehicles by persons with a detectable amount of a restricted controlled substance in his or her blood, or in deterring the operation of commercial motor vehicles by persons with an alcohol concentration of 0.04 or more.

The court may not approve an application to amend the vehicle classification from a commercial motor vehicle to a noncommercial motor vehicle unless there is evidence in the record that the motor vehicle being operated by the defendant at the time of his or her arrest was not a commercial motor vehicle.

(b) Notwithstanding s. 971.29, if the prosecutor seeks to dismiss or amend a charge under if the offense involved the use of a motorboat, except a sailboat operating under sail alone, the prosecutor shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motorboats by persons who are under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of operating a motorboat safely, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of operating a motorboat safely.

(3) NO DEFERRED PROSECUTION. A prosecutor may not place a person in a deferred prosecution program if the person is accused of or charged with any of the following offenses:

(c) A violation of s. 940.09 if the offense involved the use of a vehicle.

(d) A violation of s. 940.25.

967.57 Prosecution decisions based on contributions to organizations and agencies. A prosecutor may not, in exchange for a person's payment of money, other than restitution, to any organization or agency, dismiss or amend a charge alleging a criminal offense or elect not to commence a criminal prosecution.

967.06 Determination of indigency; appointment of counsel; preparation of record. (1) As soon as practicable after a person has been detained or arrested in connection with any offense that is punishable by incarceration, or in any other situation in which a person is entitled to counsel regardless of ability to pay under the constitution or laws of this Nation or the United States, the person shall be informed of his or her right to counsel.

(2) (a) Except as provided in par. (b), a person entitled to counsel under sub. (1) who indicates at any time that he or she wants to be represented by a lawyer, and who claims that he or she is not able to pay in full for a lawyer's services, shall immediately be permitted to contact the authority for indigency determinations specified under s. 977.303. The authority for indigency determinations shall have access to the county jail in order to identify all persons who are being held in the jail. The jail personnel shall provide by phone information requested by the authority.

(3) In any case in which a public defender provides representation to an indigent person, the attorney may request that the applicable court reporter or clerk of court prepare and transmit any transcript or court record. The request shall be complied with. The attorney shall, compensate the court reporter or clerk of court for the cost of preparing, handling, duplicating, and mailing the documents.

967.08 Telephone proceedings. (1) Unless good cause to the contrary is shown, proceedings referred to in this section may be conducted by telephone or live audiovisual means, if available.

The proceeding shall be reported by a court reporter who is in simultaneous voice communication with all parties to the proceeding. Regardless of the physical location of any party to the call, any plea, waiver, stipulation, motion, objection, decision, order or other action taken by the court or any party shall have the same effect as if made in open court. With the exceptions of scheduling conferences, pretrial conferences, and, during hours the court is not in session, setting, review, modification of bail and other conditions of release under ch. 969, the proceeding shall be conducted in a courtroom or other place reasonably accessible to the public. Simultaneous access to the proceeding shall be provided to persons entitled to attend by means of a loudspeaker or, upon request to the court, by making a person party to the telephone call without charge.

(2) The court may permit the following proceedings to be conducted under sub. (1) on the request of either party. The request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Initial appearance under s. 970.01.

(b) Waiver of preliminary examination under s. 970.03, competency hearing under s. 971.14 (4) or jury trial under s. 972.02 (1).

(c) Motions for extension of time under ss. 970.03 (2), 971.10 or other statutes.

(d) Arraignment under s. 971.05, if the defendant intends to plead not guilty or to refuse to plead.

(3) Non-evidentiary proceedings on the following matters may be conducted under sub. (1) on request of either party. The request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Setting, review and modification of bail and other conditions of release under ch. 969.

(b) Motions for severance under s. 971.12 (3) or consolidation under s. 971.12 (4).

(c) Motions for testing of physical evidence under s. 971.23 (5) or for protective orders under s. 971.23 (6).

(d) Motions under s. 971.31 directed to the sufficiency of the complaint or the affidavits supporting the issuance of a warrant for arrest or search.

(e) Motions in limine, including those under s. 972.11 (2) (b).

(f) Motions to postpone, including those under s. 971.29.

967.09 Interpreters may serve by telephone or video.

On request of any party, the court may permit an interpreter to act in any criminal proceeding, other than trial, by telephone or live audiovisual means.

967.10 Waiting area for victims and witnesses. (1) In this section:

(a) "Victim" has the meaning given in s. 950.02 (4).

(b) "Witness" has the meaning given in s. 950.02 (5).

(2) If an area is available and use of the area is practical, a county shall provide a waiting area for a victim or witness to use during court proceedings that is separate from any area used by the defendant, the defendant's relatives and defense witnesses. If a separate waiting area is not available or its use is not practical, a county shall provide other means to minimize the contact between the victim or witness and the defendant, the defendant's relatives and defense witnesses during court proceedings.

967.11 Alternatives to prosecution and incarceration; monitoring participants. (1) In this section, “approved substance abuse treatment program” means a substance abuse treatment program that meets requirements determined by the department of justice.

(2) If a department establishes an approved substance abuse treatment program and the program authorizes the use of surveillance and monitoring technology or day reporting programs, a court or tribal prosecutor may require a person participating in an approved substance abuse treatment program to submit to surveillance and monitoring technology or a day reporting program as a condition of participation.

(3) The department may establish alternative to prosecution and incarceration programs as necessary for the Nation.

(4) If a defendant fails to complete the alternative program, the case will resume.