

CIVIL PROCEDURE

CHAPTER FOUR

DEPOSITIONS AND DISCOVERY

Section 401. General Provisions Governing Discovery

(a) **Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the Court orders otherwise under subdivisions (c) of this Section, the frequency of use of these methods is not limited. Discovery may be obtained as provided herein in aid of execution upon a judgment.

(b) **Scope of Discovery.** Unless otherwise limited by order of the Court in accordance with this Chapter, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreements under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreements.

(3) Trial preparation: materials. Subject to the provisions of subdivision (b)(4) of this Section, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Section 412(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording,

CIVIL PROCEDURE

or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this Section and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the Court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this section, concerning fees and expenses as the Court may deem appropriate.

(B) A party may discover the facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Section 410(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this Section; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this Section the Court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this Section the Court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party obtaining facts and opinions from the expert.

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause, shown, the Court or alternatively, on matters relating to deposition, the court in the jurisdiction where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the Court; (6) that a deposition after being sealed be opened only by order of the Court; (7) that a trade secret or other confidential research development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court.

If the motion for a protective order is denied in whole or in part, the Court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Section 412(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) **Sequence and Timing of Discovery.** Unless the Court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by

CIVIL PROCEDURE

deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of Responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the Court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

[History: PUBLIC LAW #-85-58, June 21, 1985.]

Section 402. Depositions Before Action or Pending Appeal

(a) **Before Action.**

(1) **Petition.** A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in court may file a verified petition in the District Court if the tribal jurisdiction is the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in the Tribe Court but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and his interest therein, (3) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (4) the names or description of the person he expects will be adverse parties and their addresses so far as known, and (5) the names and addresses of the person to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the person to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) **Notice and service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the Court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the Tribal jurisdiction in the manner provided in Section 217(d) for service of summons. If personal service cannot with due diligence be made upon any expected adverse party named in the petition, the Court may make such order as is just for service by publication or otherwise, and shall appoint, for person not served in the manner provided in Section 217(d), an attorney or advocate who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Section 301(c) apply. Any attorney

CIVIL PROCEDURE

appointed pursuant to this Section shall be compensated as provided by the Court from the Court funds, such compensation to be taxed as costs against the person perpetuating the testimony.

(3) **Order and examination.** If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with this Chapter; and the Court may make orders of the character provided for by Sections 409 and 410.

(4) **Use of deposition.** If a deposition to perpetuate testimony is taken under this Chapter or if, although not so taken, it would be admissible in evidence in the Courts of the jurisdiction in which it is taken, it may be used in any action involving the same subject matter subsequently brought in the District Court, in accordance with the provisions of Section 407(a).

(b) **Pending Appeal.** If an appeal has been taken from a judgment of the District Court or before the taking of an appeal if the time therefor has not expired, the court may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the District Court. In such case the party who desires to perpetuate the testimony may make a motion in the District Court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the Court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the Court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Sections 409, and 410, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these sections for depositions taken in actions pending in the District Court.

(c) **Perpetuation by Action.** This Section does not limit the power of a Court to entertain an action to perpetuate testimony.

[History: PUBLIC LAW #85-58, June 21, 1985.]

Section 403. Persons Before Whom Depositions May Be Taken

(a) **Within the Tribal Jurisdiction.** Within the jurisdiction of the Tribal, depositions shall be taken before an Officer authorized to administer oaths by the laws of the Tribe, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. All parties shall be subject to these provisions anywhere within the reservation as defined in this Act.

(b) **Outside the Tribal Jurisdiction.** Outside the Tribe jurisdiction, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may designate the person before whom the deposition is to be taken either by name

CIVIL PROCEDURE

or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (Here Name of Tribe, State, or Country)." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the tribal jurisdiction under these sections.

(c) **Disqualification for Interest.** No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

[History: PUBLIC LAW #85-58, June 21, 1985.]

Section 404. Stipulations Regarding Discovery Procedure

Unless the Court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by this Chapter for other methods of discovery, except that stipulations extending the time provided in Sections 408, 409, and 411 for responses to discovery may be made only with the approval of the Court.

[History: PUBLIC LAW #85-58, June 21, 1985.]

Section 405. Depositions Upon Oral Examinations

(a) **When Depositions May Be Taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made by publication, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this Section. The attendance of witnesses may be compelled by subpoena as provided in Section 222. The deposition of a person confined in prison may be taken only by Leave of Court on such terms as the Court prescribes.

(b) **Notice of Examination: General Requirements; Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization.**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of Court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the tribal jurisdiction and outside the reservation, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney

CIVIL PROCEDURE

shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Section 111 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise due diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The Court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The Court may at the motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Section 409 for the production of documents and tangible things at the taking of the deposition. The procedure of Section 409 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these sections.

(c) **Examination and Cross-Examination; Record of Examination; Oath; Objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Tribal Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this Section. If requested by one of the parties, the testimony shall be transcribed.

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. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) **Motion to Terminate or Limit Examination.** At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in an unreasonable manner to annoy, embarrass, or oppress the deponent or party, the District Court or the Court in the jurisdiction where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may

CIVIL PROCEDURE

limit the scope and manner of the taking of the deposition as provided in Section 401(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the District Court. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Section 412(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) **Submission to Witness; Changes; Signing.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Section 407(d)(4) the Court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) **Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.**

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the District Court or send it by registered or certified mail to the Clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent. The court may, by section, establish the maximum charges which are reasonable for such services.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) **Failure to Attend or to Serve Subpoena; Expenses.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the Court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

CIVIL PROCEDURE

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the Court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

[History: PUBLIC LAW #85-58, June 21, 1985.]

Section 406. Depositions Upon Written Questions

(a) **Serving Questions; Notice.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Section 222. The deposition of a person confined in prison may be taken only by Leave of Court on such terms as the Court prescribes.

A party desiring to take a deposition upon written question shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Section 405(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect question upon all other parties. Within 10 days after being served with redirect question, a party may serve re-cross questions upon all other parties. The Court may for cause shown enlarge or shorten the time.

(b) **Officer to Take Responses and Prepare Record.** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly in the manner provided by Section 405(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) **Notice of Filing.** When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

[History: PUBLIC LAW #85-58, June 21, 1985.]

Section 407. Use of Depositions in Court Proceedings

(a) **Use of Depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice, thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or

CIVIL PROCEDURE

impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Section 405(b)(6) or Section 406(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Court finds: (A) that the witness is dead; or (B) that the witness is outside the jurisdiction of the Tribe, and cannot be served with a subpoena to testify at trial while within the Tribal jurisdiction unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witness orally in open court to allow the deposition to be used.

(4) If only part of the deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts, subject to the Rules of Evidence.

Substitution of parties pursuant to Section 310 does not affect the right to use depositions previously taken; and, when an action in any court of any Indian Tribe, the United States, or of any State has been dismissed and another action involving the same subject matter is afterward brought between the same parties, or their representative or successors in interest, in the Tribal District Court, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(b) **Objections to Admissibility.** Subject to the provisions of Section 403(b) and subdivision (c) (3) of this Section, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reasons which would require the exclusion of the evidence if the witness were then present and testifying.

(c) **Effect of Errors and Irregularities in Depositions.**

(1) As to notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to disqualification of officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to taking of deposition.

(i) objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

CIVIL PROCEDURE

(ii) errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(iii) objections to the form of written questions submitted under Section 406 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Section 405 and 406 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been ascertained.

[History: PUBLIC LAW #85-58, June 21, 1985.]

Section 408. Interrogatories to Parties

(a) **Availability; Procedures for Use.** Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of Court be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. In the answers, the full text of the interrogatory shall immediately precede the answer to that interrogatory. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The Court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Section 412(a) with respect to an objection to or other failure to answer an interrogatory.

(b) **Scope; Use at Trial.** Interrogatories may relate to any matters which can be inquired into under Section 401(b), and the answers may be used to the extent permitted by the Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) **Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a

CIVIL PROCEDURE

compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries.

[History: PUBLIC LAW #85-58, June 21, 1985.]

Section 409. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts photographs, phone-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy test, or sample any tangible things which constitute or contain matters within the scope of Section 401(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing testing, or sampling the property or any designated object or operation thereon, within the scope of Section (b).

(b) **Procedure.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Section 412(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any other failure to permit inspection as requested.

(c) **Persons Not Parties.** This Section does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[History: PUBLIC LAW #85-58, June 21, 1985.]

Section 410. Physical and Mental Examination of Persons

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of party, is in controversy, the Court may order the party to submit to a physical or mental examination by a physical or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall

CIVIL PROCEDURE

specify the item, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **Reporting of Examining Physician.**

(1) If requested by the party against whom an order is made under Section 410(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report or examination of a person not a party, the party shows that he is unable to obtain it. The Court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physical in accordance with the provisions of any other Section of this Act.

[History: PUBLIC LAW #85-58, June 21, 1985.]

Section 411. Requests for Admission

(a) **Requests for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Section 401(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of Court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the Court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit to deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of

CIVIL PROCEDURE

information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that matter on which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Section 412(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objection. Unless the Court determines that an objection is justified, it shall order that an answer be served. If the Court determines that an answer does not comply with the requirements of this Section, it may order either that the matter is admitted or that an amended answer be served. The Court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Section 412(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) **Effect of Admission.** Any matter admitted under this Section is conclusively established unless the Court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Section 119 governing amendment of a pre-trial order, the Court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the Court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. An admission made by a party under this Section is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

[History: PUBLIC LAW #85-58, June 21, 1985.]

Section 412. Failure to Make Discovery: Sanctions

(a) **Motion for Order Compelling Discovery.** A party, upon reasonable notice to other parties and all person affected thereby, may apply for an order compelling discovery as follows:

(1) **Appropriate Court.** An application for an order to a party may be made to the District Court, or, on matter relating to a deposition, to the court in the jurisdiction where the deposition is being taken if necessary. An application for an order to a deponent who is not a party may be made to the Court in the jurisdiction where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Sections 405 or 406, or a corporation or other entity fails to make a designation under Section 405(b)(6) or Section 406(a), or a party fails to answer an interrogatory submitted under Section 408, or if a party, in response to a request for inspection submitted under Section 409 fails, to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the Court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Section 401(c).

(3) **Evasive or Incomplete Answer.** for purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

CIVIL PROCEDURE

(4) **Award of Expenses of Motion.** If the motion is granted, the Court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the Court finds that the making of the motion was substantially justified or that other circumstances made an award of expenses unjust.

If the motion is granted in part and denied in part, the Court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in just manner.

(b) Failure to Comply with Order.

(1) **Sanctions by Court in Jurisdiction Where Deposition is Taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the jurisdiction in which the deposition is being taken, the failure may be considered a contempt of that court. Sanctions imposed in such matters by any foreign court shall be given full faith and credit and promptly enforced by the Tribal Court, subject to the Tribal Courts authority to modify the sanctions imposed as justice may require.

(2) **Sanction by Court in Which Action is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Section 405(b)(6) or Section 406(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this Section or Section 410, the Court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(i) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defense, or prohibiting him from introducing designated matters in evidence;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination;

(v) Where a party has failed to comply with an order under Section 410(a) requiring him to produce another for examination, such orders as are listed in paragraphs (i), (ii), and (iii) of this subdivision, unless the party failing to comply shows that his is unable to produce such person for examination.

CIVIL PROCEDURE

In lieu of any of the foregoing orders or in addition thereto, the Court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) **Expenses on Failure to Admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Section 411, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The Court shall make the order unless it finds that (1) the request was held objectionable pursuant to Section 411(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit has reasonable grounds to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) **Failure of Party to attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Section 405(b)(6) or Section 406(a) to testify on behalf of a party fails (1) to appear before the officer who is take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Section 408, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Section 409, after proper service of the request, the District Court on motion may make such order in regard to the failure as are just, and among other it may taken any action authorized under paragraphs (i), (ii), and (iii) of subdivision (b) (2) of this Section. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the grounds that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Section 401(c).

[History: PUBLIC LAW #85-58, June 21, 1985.]