

1 **SENATE FLOOR VERSION**

2 February 23, 2021

3 SENATE BILL NO. 322

By: Daniels

4
5
6 An Act relating to the Oklahoma Discovery Code;
7 amending 12 O.S. 2011, Section 3226, as last amended
8 by Section 3, Chapter 378, O.S.L. 2017 (12 O.S. Supp.
9 2020, Section 3226), which relates to discovery
10 methods; requiring inclusion of certain information
11 in initial disclosures; authorizing sanctions for
12 certain noncompliance; and providing an effective
13 date.

14 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

15 SECTION 1. AMENDATORY 12 O.S. 2011, Section 3226, as
16 last amended by Section 3, Chapter 378, O.S.L. 2017 (12 O.S. Supp.
17 2020, Section 3226), is amended to read as follows:

18 Section 3226. A. DISCOVERY METHODS; INITIAL DISCLOSURES.

19 1. DISCOVERY METHODS. Parties may obtain discovery regarding
20 any matter that is relevant to any party's claim or defense by one
21 or more of the following methods: Depositions upon oral examination
22 or written questions; written interrogatories; production of
23 documents or things or permission to enter upon land or other
24 property, for inspection and other purposes; physical and mental
examinations; requests for admission; authorizations for release of
records; and otherwise by court order upon showing of good cause.

1 Except as provided in this section or unless the court orders
2 otherwise under this section, the frequency of use of these methods
3 is not limited.

4 2. INITIAL DISCLOSURES.

5 a. Except in categories of proceedings specified in
6 subparagraph b of this paragraph, or to the extent
7 otherwise stipulated or directed by order, a party,
8 without awaiting a discovery request, shall provide to
9 other parties a computation of any category of damages
10 claimed by the disclosing party, making available for
11 inspection and copying the documents or other
12 evidentiary material, not privileged or protected from
13 disclosure, on which such computation is based,
14 including materials bearing on the nature and extent
15 of injuries suffered. Subject to subsection B of this
16 section, in any action in which physical or mental
17 injury is claimed, the party making the claim shall
18 provide to the other parties a release or
19 authorization allowing the parties to obtain relevant
20 medical records and bills, and, when relevant, a
21 release or authorization for employment and scholastic
22 records. Additionally, a party making a claim for
23 physical or mental injury shall provide explanation of
24 benefits, payment logs or other written documentation

1 of payments made on behalf of the party by an
2 insurance company or state or federal agency that
3 provides health care coverage toward medical bills
4 claimed as damages in the action.

5 b. The following categories of proceedings are exempt
6 from initial disclosure under subparagraph a of this
7 paragraph:

8 (1) an action for review of an administrative record,

9 (2) a petition for habeas corpus or other proceeding
10 to challenge a criminal conviction or sentence,

11 (3) an action brought without counsel by a person in
12 custody of the United States, a state, or a state
13 subdivision,

14 (4) an action to enforce or quash an administrative
15 summons or subpoena,

16 (5) an action by the United States to recover benefit
17 payments,

18 (6) an action by the United States to collect on a
19 student loan guaranteed by the United States,

20 (7) a proceeding ancillary to proceedings in other
21 courts, and

22 (8) an action to enforce an arbitration award.

23 c. Disclosures required under this paragraph shall be
24 made at or within sixty (60) days after service unless

1 a different time is set by stipulation or court order,
2 or unless a party objects that initial disclosures are
3 not appropriate in the circumstances of the action and
4 states the objection in a motion filed with the court.
5 In ruling on the objection, the court shall determine
6 what disclosures, if any, are to be made and set the
7 time for disclosure. A party shall make its initial
8 disclosures based on the information then readily
9 available to it and is not excused from making its
10 disclosures because it has not fully completed its
11 investigation of the case or because it challenges the
12 sufficiency of another party's disclosures or because
13 another party has not made its disclosures. Failure
14 to comply with the requirements set forth in this
15 paragraph shall subject the noncompliant party to
16 sanctions pursuant to Section 3237 of this title.

17 B. DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by
18 order of the court in accordance with the Oklahoma Discovery Code,
19 the scope of discovery is as follows:

20 1. IN GENERAL.

21 a. Parties may obtain discovery regarding any matter, not
22 privileged, which is relevant to any party's claim or
23 defense, reasonably calculated to lead to the
24 discovery of admissible evidence and proportional to

1 the needs of the case, considering the importance of
2 the issues at stake in the action, the amount in
3 controversy, the parties' relative access to relevant
4 information, the parties' resources, the importance of
5 the discovery in resolving the issues, and whether the
6 burden or expense of the proposed discovery outweighs
7 its likely benefit. Information within this scope of
8 discovery need not be admissible in evidence to be
9 discoverable.

10 b. A party shall produce upon request pursuant to Section
11 3234 of this title, any insurance agreement under
12 which any person carrying on an insurance business may
13 be liable to satisfy part or all of a judgment which
14 may be entered in the action or to indemnify or
15 reimburse for payments made to satisfy the judgment.
16 Information concerning the insurance agreement is not
17 by reason of disclosure admissible in evidence at
18 trial. For purposes of this section, an application
19 for insurance shall not be treated as a part of an
20 insurance agreement.

21 2. LIMITATIONS ON FREQUENCY AND EXTENT.

22 a. By order, the court may alter the limits on the length
23 of depositions under Section 3230 of this title, on
24 the number of interrogatories under Section 3233 of

1 this title, on the number of requests to produce under
2 Section 3234 of this title, or on the number of
3 requests for admission under Section 3236 of this
4 title.

5 b. A party is not required to provide discovery of
6 electronically stored information from sources that
7 the party identifies as not reasonably accessible
8 because of undue burden or cost. On motion to compel
9 discovery or for a protective order, the party from
10 whom discovery is sought must show that the
11 information is not reasonably accessible because of
12 undue burden or cost. If that showing is made, the
13 court may order discovery from such sources if the
14 requesting party shows good cause, considering the
15 limitations of subparagraph c of this paragraph. The
16 court may specify conditions for the discovery.

17 c. On motion or on its own, the court shall limit the
18 frequency or extent of discovery otherwise allowed if
19 it determines that:

20 (1) the discovery sought is unreasonably cumulative
21 or duplicative, or can be obtained from some
22 other source that is more convenient, less
23 burdensome, or less expensive,

1 (2) the party seeking discovery has had ample
2 opportunity to obtain the information by
3 discovery in the action, or

4 (3) the proposed discovery is outside the scope
5 permitted by subparagraph a of paragraph 1 of
6 this subsection.

7 d. If an officer, director or managing agent of a
8 corporation or a government official is served with
9 notice of a deposition or subpoena regarding a matter
10 about which he or she has no knowledge, he or she may
11 submit at a reasonable time prior to the date of the
12 deposition an affidavit to the noticing party so
13 stating and identifying a person within the
14 corporation or government entity who has knowledge of
15 the subject matter involved in the pending action.
16 Notwithstanding such affidavit, the noticing party may
17 proceed with the deposition, subject to the noticed
18 witness's right to seek a protective order.

19 3. TRIAL PREPARATION: MATERIALS.

20 a. Unless as provided by paragraph 4 of this subsection,
21 a party may not discover documents and tangible things
22 that are prepared in anticipation of litigation or for
23 trial by or for another party or its representative,
24 including the other party's attorney, consultant,

1 surety, indemnitor, insurer or agent. Subject to
2 paragraph 4 of this subsection, such materials may be
3 discovered if:

4 (1) they are otherwise discoverable under paragraph 1
5 of this subsection, and

6 (2) the party shows that it has substantial need for
7 the materials to prepare its case and cannot,
8 without undue hardship, obtain their substantial
9 equivalent by other means.

10 b. If the court orders discovery of such materials, the
11 court shall protect against disclosure of the mental
12 impressions, conclusions, opinions or legal theories
13 of a party's attorney or other representative
14 concerning the litigation.

15 c. A party or other person may, upon request and without
16 the required showing, obtain the person's own previous
17 statement about the action or its subject matter. If
18 the request is refused, the person may move for a
19 court order, and the provisions of paragraph 4 of
20 subsection A of Section 3237 of this title apply to
21 the award of expenses. A previous statement is
22 either:

23 (1) a written statement that the person has signed or
24 otherwise adopted or approved, or

1 (2) a contemporaneous stenographic, mechanical,
2 electrical, or other recording, or a
3 transcription thereof, which recites
4 substantially verbatim the person's oral
5 statement.

6 4. TRIAL PREPARATION: EXPERTS.

7 a. Discovery of facts known and opinions held by experts,
8 otherwise discoverable under the provisions of
9 paragraph 1 of this subsection and acquired or
10 developed in anticipation of litigation or for trial,
11 may be obtained only as follows:

12 (1) a party may, through interrogatories, require any
13 other party to identify each person whom that
14 other party expects to call as an expert witness
15 at trial and give the address at which that
16 expert witness may be located,

17 (2) after disclosure of the names and addresses of
18 the expert witnesses, the other party expects to
19 call as witnesses, the party, who has requested
20 disclosure, may depose any such expert witnesses
21 subject to scope of this section. Prior to
22 taking the deposition the party must give notice
23 as required in subsections A and C of Section
24 3230 of this title, and

1 (3) in addition to taking the depositions of expert
2 witnesses the party may, through interrogatories,
3 require the party who expects to call the expert
4 witnesses to state the subject matter on which
5 each expert witness is expected to testify; the
6 substance of the facts and opinions to which the
7 expert is expected to testify and a summary of
8 the grounds for each opinion; the qualifications
9 of each expert witness, including a list of all
10 publications authored by the expert witness
11 within the preceding ten (10) years; the
12 compensation to be paid to the expert witness for
13 the testimony and preparation for the testimony;
14 and a listing of any other cases in which the
15 expert witness has testified as an expert at
16 trial or by deposition within the preceding four
17 (4) years. An interrogatory seeking the
18 information specified above shall be treated as a
19 single interrogatory for purposes of the
20 limitation on the number of interrogatories in
21 Section 3233 of this title.

22 b. The protection provided by paragraph 3 of this
23 subsection extends to communications between the
24 party's attorney and any expert witness retained or

1 specially employed to provide expert testimony in the
2 case or whose duties as the party's employee regularly
3 involve giving expert testimony, except to the extent
4 that the communications:

5 (1) relate to compensation for the expert's study or
6 testimony,

7 (2) identify facts or data that the party's attorney
8 provided and that the expert considered in
9 forming the opinions to be expressed, or

10 (3) identify assumptions that the party's attorney
11 provided and that the expert relied upon in
12 forming the opinions to be expressed.

13 c. A party may not, by interrogatories or deposition,
14 discover facts known or opinions held by an expert who
15 has been retained or specially employed by another
16 party in anticipation of litigation or to prepare for
17 trial and who is not expected to be called as a
18 witness at trial, except as provided in Section 3235
19 of this title or upon a showing of exceptional
20 circumstances under which it is impracticable for the
21 party to obtain facts or opinions on the same subject
22 by other means.

23 d. Unless manifest injustice would result:
24

- 1 (1) the court shall require that the party seeking
2 discovery pay the expert a reasonable fee for
3 time spent in responding to discovery under
4 division (2) of subparagraph a of this paragraph
5 and subparagraph c of this paragraph, and
6 (2) the court shall require that the party seeking
7 discovery with respect to discovery obtained
8 under subparagraph c of this paragraph, pay the
9 other party a fair portion of the fees and
10 expenses reasonably incurred by the latter party
11 in obtaining facts and opinions from the expert.

12 5. CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL PREPARATION
13 MATERIALS.

- 14 a. When a party withholds information otherwise
15 discoverable under the Oklahoma Discovery Code by
16 claiming that it is privileged or subject to
17 protection as trial preparation material, the party
18 shall make the claim expressly and shall describe the
19 nature of the documents, communications, or things not
20 produced or disclosed in a manner that, without
21 revealing information itself privileged or protected,
22 will enable other parties to assess the applicability
23 of the privilege or protection.

1 b. If information produced in discovery is subject to a
2 claim of privilege or of protection as trial
3 preparation material, the party making the claim may
4 notify any party that received the information of the
5 claim and the basis for it. After being notified, a
6 party shall promptly return, sequester, or destroy the
7 specified information and any copies the party has;
8 shall not use or disclose the information until the
9 claim is resolved; shall take reasonable steps to
10 retrieve the information if the party has disclosed it
11 before being notified; and may promptly present the
12 information to the court under seal for a
13 determination of the claim. The producing party shall
14 preserve the information until the claim is resolved.
15 This mechanism is procedural only and does not alter
16 the standards governing whether the information is
17 privileged or subject to protection as trial
18 preparation material or whether such privilege or
19 protection has been waived.

20 C. PROTECTIVE ORDERS.

21 1. Upon motion by a party or by the person from whom discovery
22 is sought, accompanied by a certification that the movant has in
23 good faith conferred or attempted to confer, either in person or by
24 telephone, with other affected parties in an effort to resolve the

1 dispute without court action, and for good cause shown, the court in
2 which the action is pending or on matters relating to a deposition,
3 the district court in the county where the deposition is to be taken
4 may enter any order which justice requires to protect a party or
5 person from annoyance, harassment, embarrassment, oppression or
6 undue delay, burden or expense, including one or more of the
7 following:

- 8 a. that the discovery not be had,
- 9 b. that the discovery may be had only on specified terms
10 and conditions, including a designation of the time,
11 place or the allocation of expenses,
- 12 c. that the discovery may be had only by a method of
13 discovery other than that selected by the party
14 seeking discovery,
- 15 d. that certain matters not be inquired into, or that the
16 scope of the disclosure or discovery be limited to
17 certain matters,
- 18 e. that discovery be conducted with no one present except
19 persons designated by the court,
- 20 f. that a deposition after being sealed be opened only by
21 order of the court,
- 22 g. that a trade secret or other confidential research,
23 development or commercial information not be disclosed
24 or be disclosed only in a designated way, and

1 h. that the parties simultaneously file specified
2 documents or information enclosed in sealed envelopes
3 to be opened as directed by the court.

4 2. If the motion for a protective order is denied in whole or
5 in part, the court may, on such terms and conditions as are just,
6 order that any party or person provide or permit discovery. The
7 provisions of paragraph 4 of subsection A of Section 3237 of this
8 title apply to the award of expenses incurred in relation to the
9 motion. Any protective order of the court which has the effect of
10 removing any material obtained by discovery from the public record
11 shall contain the following:

12 a. a statement that the court has determined it is
13 necessary in the interests of justice to remove the
14 material from the public record,

15 b. specific identification of the material which is to be
16 removed or withdrawn from the public record, or which
17 is to be filed but not placed in the public record,
18 and

19 c. a requirement that any party obtaining a protective
20 order place the protected material in a sealed manila
21 envelope clearly marked with the caption and case
22 number and is clearly marked with the word
23 "CONFIDENTIAL", and stating the date the order was
24 entered and the name of the judge entering the order.

1 This requirement may also be satisfied by requiring
2 the party to file the documents pursuant to the
3 procedure for electronically filing sealed or
4 confidential documents approved for electronic filing
5 in the courts of this state.

6 3. No protective order entered after the filing and
7 microfilming of documents of any kind shall be construed to require
8 the microfilm record of such filing to be amended in any fashion.

9 4. The party or counsel which has received the protective order
10 shall be responsible for promptly presenting the order to
11 appropriate court clerk personnel for appropriate action.

12 5. All documents produced or testimony given under a protective
13 order shall be retained in the office of counsel until required by
14 the court to be filed in the case.

15 6. Counsel for the respective parties shall be responsible for
16 informing witnesses, as necessary, of the contents of the protective
17 order.

18 7. When a case is filed in which a party intends to seek a
19 protective order removing material from the public record, the
20 plaintiff(s) and defendant(s) shall be initially designated on the
21 petition under pseudonym such as "John or Jane Doe", or "Roe", and
22 the petition shall clearly indicate that the party designations are
23 fictitious. The party seeking confidentiality or other order
24 removing the case, in whole or in part, from the public record,

1 shall immediately present application to the court, seeking
2 instructions for the conduct of the case, including confidentiality
3 of the records.

4 D. SEQUENCE AND TIMING OF DISCOVERY. Unless the parties
5 stipulate or the court orders otherwise for the convenience of
6 parties and witnesses and in the interests of justice, methods of
7 discovery may be used in any sequence. The fact that a party is
8 conducting discovery, whether by deposition or otherwise, shall not
9 operate to delay discovery by any other party.

10 E. SUPPLEMENTATION OF RESPONSES. A party who has responded to
11 a request for discovery with a response that was complete when it
12 was made is under no duty to supplement the response to include
13 information thereafter acquired, except as follows:

14 1. A party is under a duty seasonably to supplement the
15 response with respect to any question directly addressed to:

16 a. the identity and location of persons having knowledge
17 of discoverable matters, and

18 b. the identity of each person expected to be called as
19 an expert witness at trial, the subject matter on
20 which the person is expected to testify, and the
21 substance of the testimony of the person;

22 2. A party is under a duty seasonably to amend a prior response
23 to an interrogatory, request for production, or request for
24 admission if the party obtains information upon the basis of which:

1 a. (1) the party knows that the response was incorrect
2 in some material respect when made, or

3 (2) the party knows that the response, which was
4 correct when made, is no longer true in some
5 material respect, and

6 b. the additional or corrective information has not
7 otherwise been made known to the other parties during
8 the discovery process or in writing; and

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

12 F. DISCOVERY CONFERENCE. At any time after commencement of an
13 action, the court may direct the attorneys for the parties to appear
14 for a conference on the subject of discovery. The court shall do so
15 upon motion by the attorney for any party if the motion includes:

16 1. A statement of the issues as they then appear;

17 2. A proposed plan and schedule of discovery;

18 3. Any limitations proposed to be placed on discovery;

19 4. Any other proposed orders with respect to discovery; and

20 5. A statement showing that the attorney making the motion has
21 made a reasonable effort to reach agreement with opposing attorneys
22 on the matters set forth in the motion.

23 Each party and his attorney are under a duty to participate in
24 good faith in the framing of a discovery plan if a plan is proposed

1 by the attorney for any party. Notice of the motion shall be served
2 on all parties. Objections or additions to matters set forth in the
3 motion shall be served not later than ten (10) days after service of
4 the motion.

5 Following the discovery conference, the court shall enter an
6 order tentatively identifying the issues for discovery purposes,
7 establishing a plan and schedule for discovery, setting limitations
8 on discovery, if any; and determining such other matters, including
9 the allocation of expenses, as are necessary for the proper
10 management of discovery in the action. In preparing the plan for
11 discovery the court shall protect the parties from excessive or
12 abusive use of discovery. An order shall be altered or amended
13 whenever justice so requires.

14 Subject to the right of a party who properly moves for a
15 discovery conference to prompt convening of the conference, the
16 court may combine the discovery conference with a pretrial
17 conference.

18 G. SIGNING OF DISCOVERY REQUESTS, RESPONSES AND OBJECTIONS.
19 Every request for discovery, response or objection thereto made by a
20 party represented by an attorney shall be signed by at least one of
21 the party's attorneys of record in the party's individual name whose
22 address shall be stated. A party who is not represented by an
23 attorney shall sign the request, response or objection and state the
24 party's address. The signature of the attorney or party constitutes

1 a certification that the party has read the request, response or
2 objection, and that it is:

3 1. To the best of the party's knowledge, information and belief
4 formed after a reasonable inquiry consistent with the Oklahoma
5 Discovery Code and warranted by existing law or a good faith
6 argument for the extension, modification or reversal of existing
7 law;

8 2. Interposed in good faith and not primarily to cause delay or
9 for any other improper purpose; and

10 3. Not unreasonable or unduly burdensome or expensive, given
11 the nature and complexity of the case, the discovery already had in
12 the case, the amount in controversy, and other values at stake in
13 the litigation. If a request, response or objection is not signed,
14 it shall be deemed ineffective.

15 If a certification is made in violation of the provisions of
16 this subsection, the court, upon motion or upon its own initiative,
17 shall impose upon the person who made the certification, the party
18 on whose behalf the request, response or objection is made, or both,
19 an appropriate sanction, which may include an order to pay to the
20 amount of the reasonable expenses occasioned thereby, including a
21 reasonable attorney fee.

22 SECTION 2. This act shall become effective November 1, 2021.

23 COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY
24 February 23, 2021 - DO PASS