

1 STATE OF OKLAHOMA

2 1st Session of the 58th Legislature (2021)

3 SENATE BILL 322

By: Daniels

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6 AS INTRODUCED

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

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

16 SECTION 1. AMENDATORY 12 O.S. 2011, Section 3226, as
17 last amended by Section 3, Chapter 378, O.S.L. 2017 (12 O.S. Supp.
18 2020, Section 3226), is amended to read as follows:

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

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

1 records; and otherwise by court order upon showing of good cause.
2 Except as provided in this section or unless the court orders
3 otherwise under this section, the frequency of use of these methods
4 is not limited.

5 2. INITIAL DISCLOSURES.

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

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

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

- 9 (1) an action for review of an administrative record,
10 (2) a petition for habeas corpus or other proceeding
11 to challenge a criminal conviction or sentence,
12 (3) an action brought without counsel by a person in
13 custody of the United States, a state, or a state
14 subdivision,
15 (4) an action to enforce or quash an administrative
16 summons or subpoena,
17 (5) an action by the United States to recover benefit
18 payments,
19 (6) an action by the United States to collect on a
20 student loan guaranteed by the United States,
21 (7) a proceeding ancillary to proceedings in other
22 courts, and
23 (8) an action to enforce an arbitration award.
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1 c. Disclosures required under this paragraph shall be
2 made at or within sixty (60) days after service unless
3 a different time is set by stipulation or court order,
4 or unless a party objects that initial disclosures are
5 not appropriate in the circumstances of the action and
6 states the objection in a motion filed with the court.
7 In ruling on the objection, the court shall determine
8 what disclosures, if any, are to be made and set the
9 time for disclosure. A party shall make its initial
10 disclosures based on the information then readily
11 available to it and is not excused from making its
12 disclosures because it has not fully completed its
13 investigation of the case or because it challenges the
14 sufficiency of another party's disclosures or because
15 another party has not made its disclosures. Failure
16 to comply with the requirements set forth in this
17 paragraph shall subject the noncompliant party to
18 sanctions pursuant to Section 3237 of this title.

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

22 1. IN GENERAL.

23 a. Parties may obtain discovery regarding any matter, not
24 privileged, which is relevant to any party's claim or
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1 defense, reasonably calculated to lead to the
2 discovery of admissible evidence and proportional to
3 the needs of the case, considering the importance of
4 the issues at stake in the action, the amount in
5 controversy, the parties' relative access to relevant
6 information, the parties' resources, the importance of
7 the discovery in resolving the issues, and whether the
8 burden or expense of the proposed discovery outweighs
9 its likely benefit. Information within this scope of
10 discovery need not be admissible in evidence to be
11 discoverable.

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

23 2. LIMITATIONS ON FREQUENCY AND EXTENT.
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1 a. By order, the court may alter the limits on the length
2 of depositions under Section 3230 of this title, on
3 the number of interrogatories under Section 3233 of
4 this title, on the number of requests to produce under
5 Section 3234 of this title, or on the number of
6 requests for admission under Section 3236 of this
7 title.

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

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

- 23 (1) the discovery sought is unreasonably cumulative
24 or duplicative, or can be obtained from some

1 other source that is more convenient, less
2 burdensome, or less expensive,

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

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

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

21 3. TRIAL PREPARATION: MATERIALS.

22 a. Unless as provided by paragraph 4 of this subsection,
23 a party may not discover documents and tangible things
24 that are prepared in anticipation of litigation or for
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1 trial by or for another party or its representative,
2 including the other party's attorney, consultant,
3 surety, indemnitor, insurer or agent. Subject to
4 paragraph 4 of this subsection, such materials may be
5 discovered if:

- 6 (1) they are otherwise discoverable under paragraph 1
7 of this subsection, and
- 8 (2) the party shows that it has substantial need for
9 the materials to prepare its case and cannot,
10 without undue hardship, obtain their substantial
11 equivalent by other means.

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

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

- 1 (1) a written statement that the person has signed or
2 otherwise adopted or approved, or
3 (2) a contemporaneous stenographic, mechanical,
4 electrical, or other recording, or a
5 transcription thereof, which recites
6 substantially verbatim the person's oral
7 statement.

8 4. TRIAL PREPARATION: EXPERTS.

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

- 14 (1) a party may, through interrogatories, require any
15 other party to identify each person whom that
16 other party expects to call as an expert witness
17 at trial and give the address at which that
18 expert witness may be located,
19 (2) after disclosure of the names and addresses of
20 the expert witnesses, the other party expects to
21 call as witnesses, the party, who has requested
22 disclosure, may depose any such expert witnesses
23 subject to scope of this section. Prior to
24 taking the deposition the party must give notice

1 as required in subsections A and C of Section
2 3230 of this title, and

3 (3) in addition to taking the depositions of expert
4 witnesses the party may, through interrogatories,
5 require the party who expects to call the expert
6 witnesses to state the subject matter on which
7 each expert witness is expected to testify; the
8 substance of the facts and opinions to which the
9 expert is expected to testify and a summary of
10 the grounds for each opinion; the qualifications
11 of each expert witness, including a list of all
12 publications authored by the expert witness
13 within the preceding ten (10) years; the
14 compensation to be paid to the expert witness for
15 the testimony and preparation for the testimony;
16 and a listing of any other cases in which the
17 expert witness has testified as an expert at
18 trial or by deposition within the preceding four
19 (4) years. An interrogatory seeking the
20 information specified above shall be treated as a
21 single interrogatory for purposes of the
22 limitation on the number of interrogatories in
23 Section 3233 of this title.
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1 b. The protection provided by paragraph 3 of this
2 subsection extends to communications between the
3 party's attorney and any expert witness retained or
4 specially employed to provide expert testimony in the
5 case or whose duties as the party's employee regularly
6 involve giving expert testimony, except to the extent
7 that the communications:

8 (1) relate to compensation for the expert's study or
9 testimony,

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

13 (3) identify assumptions that the party's attorney
14 provided and that the expert relied upon in
15 forming the opinions to be expressed.

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

3 d. Unless manifest injustice would result:

4 (1) the court shall require that the party seeking
5 discovery pay the expert a reasonable fee for
6 time spent in responding to discovery under
7 division (2) of subparagraph a of this paragraph
8 and subparagraph c of this paragraph, and

9 (2) the court shall require that the party seeking
10 discovery with respect to discovery obtained
11 under subparagraph c of this paragraph, pay the
12 other party a fair portion of the fees and
13 expenses reasonably incurred by the latter party
14 in obtaining facts and opinions from the expert.

15 5. CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL PREPARATION
16 MATERIALS.

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

1 will enable other parties to assess the applicability
2 of the privilege or protection.

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

22 C. PROTECTIVE ORDERS.

23 1. Upon motion by a party or by the person from whom discovery
24 is sought, accompanied by a certification that the movant has in

1 good faith conferred or attempted to confer, either in person or by
2 telephone, with other affected parties in an effort to resolve the
3 dispute without court action, and for good cause shown, the court in
4 which the action is pending or on matters relating to a deposition,
5 the district court in the county where the deposition is to be taken
6 may enter any order which justice requires to protect a party or
7 person from annoyance, harassment, embarrassment, oppression or
8 undue delay, burden or expense, including one or more of the
9 following:

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

- 1 g. that a trade secret or other confidential research,
2 development or commercial information not be disclosed
3 or be disclosed only in a designated way, and
4 h. that the parties simultaneously file specified
5 documents or information enclosed in sealed envelopes
6 to be opened as directed by the court.

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

- 15 a. a statement that the court has determined it is
16 necessary in the interests of justice to remove the
17 material from the public record,
18 b. specific identification of the material which is to be
19 removed or withdrawn from the public record, or which
20 is to be filed but not placed in the public record,
21 and
22 c. a requirement that any party obtaining a protective
23 order place the protected material in a sealed manila
24 envelope clearly marked with the caption and case

1 number and is clearly marked with the word
2 "CONFIDENTIAL", and stating the date the order was
3 entered and the name of the judge entering the order.
4 This requirement may also be satisfied by requiring
5 the party to file the documents pursuant to the
6 procedure for electronically filing sealed or
7 confidential documents approved for electronic filing
8 in the courts of this state.

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

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

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

18 6. Counsel for the respective parties shall be responsible for
19 informing witnesses, as necessary, of the contents of the protective
20 order.

21 7. When a case is filed in which a party intends to seek a
22 protective order removing material from the public record, the
23 plaintiff(s) and defendant(s) shall be initially designated on the
24 petition under pseudonym such as "John or Jane Doe", or "Roe", and

1 the petition shall clearly indicate that the party designations are
2 fictitious. The party seeking confidentiality or other order
3 removing the case, in whole or in part, from the public record,
4 shall immediately present application to the court, seeking
5 instructions for the conduct of the case, including confidentiality
6 of the records.

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

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

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

19 a. the identity and location of persons having knowledge
20 of discoverable matters, and

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

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

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

6 (2) the party knows that the response, which was
7 correct when made, is no longer true in some
8 material respect, and

9 b. the additional or corrective information has not
10 otherwise been made known to the other parties during
11 the discovery process or in writing; and

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

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

- 19 1. A statement of the issues as they then appear;
 - 20 2. A proposed plan and schedule of discovery;
 - 21 3. Any limitations proposed to be placed on discovery;
 - 22 4. Any other proposed orders with respect to discovery; and
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1 5. A statement showing that the attorney making the motion has
2 made a reasonable effort to reach agreement with opposing attorneys
3 on the matters set forth in the motion.

4 Each party and his attorney are under a duty to participate in
5 good faith in the framing of a discovery plan if a plan is proposed
6 by the attorney for any party. Notice of the motion shall be served
7 on all parties. Objections or additions to matters set forth in the
8 motion shall be served not later than ten (10) days after service of
9 the motion.

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

19 Subject to the right of a party who properly moves for a
20 discovery conference to prompt convening of the conference, the
21 court may combine the discovery conference with a pretrial
22 conference.

23 G. SIGNING OF DISCOVERY REQUESTS, RESPONSES AND OBJECTIONS.

24 Every request for discovery, response or objection thereto made by a
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1 party represented by an attorney shall be signed by at least one of
2 the party's attorneys of record in the party's individual name whose
3 address shall be stated. A party who is not represented by an
4 attorney shall sign the request, response or objection and state the
5 party's address. The signature of the attorney or party constitutes
6 a certification that the party has read the request, response or
7 objection, and that it is:

8 1. To the best of the party's knowledge, information and belief
9 formed after a reasonable inquiry consistent with the Oklahoma
10 Discovery Code and warranted by existing law or a good faith
11 argument for the extension, modification or reversal of existing
12 law;

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

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

20 If a certification is made in violation of the provisions of
21 this subsection, the court, upon motion or upon its own initiative,
22 shall impose upon the person who made the certification, the party
23 on whose behalf the request, response or objection is made, or both,
24 an appropriate sanction, which may include an order to pay to the

1 amount of the reasonable expenses occasioned thereby, including a
2 reasonable attorney fee.

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

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