

1 **HOUSE OF REPRESENTATIVES - FLOOR VERSION**

2 STATE OF OKLAHOMA

3 1st Session of the 56th Legislature (2017)

4 COMMITTEE SUBSTITUTE
5 FOR
6 HOUSE BILL NO. 1570

By: Echols of the House

and

Holt of the Senate

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8
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10 COMMITTEE SUBSTITUTE

11 An Act relating to the Oklahoma Discovery Code;
12 amending 12 O.S. 2011, Sections 3225, 3226, as last
13 amended by Section 1, Chapter 192, O.S.L. 2014, 3234
14 and 3237 (12 O.S. Supp. 2016, Section 3226), which
15 relate to construction, general provisions,
16 production of documents and inspection and sanctions;
17 clarifying scope of Discovery Code; modifying
18 limitations on scope of discovery; listing categories
19 of electronically stored information exempt from
20 discovery; limiting frequency and extent of certain
21 discovery; modifying requirement for sequence of
22 discovery; establishing requirements for the
23 preservation of specified documents and information;
24 providing exceptions; establishing limitations for
 production or inspection requests; modifying
 requirements for written response; allowing
 application for order compelling discovery under
 specified circumstances; limiting sanctions for
 failure to preserve relevant information; and
 providing an effective date.

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

2 SECTION 1. AMENDATORY 12 O.S. 2011, Section 3225, is
3 amended to read as follows:

4 Section 3225. The Discovery Code shall be ~~liberally constructed~~
5 construed, administered and employed by courts to provide the just,
6 speedy and inexpensive determination of every action.

7 SECTION 2. AMENDATORY 12 O.S. 2011, Section 3226, as
8 last amended by Section 1, Chapter 192, O.S.L. 2014 (12 O.S. Supp.
9 2016, Section 3226), is amended to read as follows:

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

11 1. DISCOVERY METHODS. Parties may obtain discovery regarding
12 any matter that is relevant to any party's claim or defense by one
13 or more of the following methods: Depositions upon oral examination
14 or written questions; written interrogatories; production of
15 documents or things or permission to enter upon land or other
16 property, for inspection and other purposes; physical and mental
17 examinations; requests for admission; authorizations for release of
18 records; and otherwise by court order upon showing of good cause.
19 Except as provided in this section or unless the court orders
20 otherwise under this section, the frequency of use of these methods
21 is not limited.

22 2. INITIAL DISCLOSURES.

23 a. Except in categories of proceedings specified in
24 subparagraph b of this paragraph, or to the extent

1 otherwise stipulated or directed by order, a party,
2 without awaiting a discovery request, shall provide to
3 other parties a computation of any category of damages
4 claimed by the disclosing party, making available for
5 inspection and copying the documents or other
6 evidentiary material, not privileged or protected from
7 disclosure, on which such computation is based,
8 including materials bearing on the nature and extent
9 of injuries suffered. Subject to subsection B of this
10 section, in any action in which physical or mental
11 injury is claimed, the party making the claim shall
12 provide to the other parties a release or
13 authorization allowing the parties to obtain relevant
14 medical records and bills, and, when relevant, a
15 release or authorization for employment and scholastic
16 records.

17 b. The following categories of proceedings are exempt
18 from initial disclosure under subparagraph a of this
19 paragraph:

- 20 (1) an action for review of an administrative record,
- 21 (2) a petition for habeas corpus or other proceeding
22 to challenge a criminal conviction or sentence,
23
24

- 1 (3) an action brought without counsel by a person in
- 2 custody of the United States, a state, or a state
- 3 subdivision,
- 4 (4) an action to enforce or quash an administrative
- 5 summons or subpoena,
- 6 (5) an action by the United States to recover benefit
- 7 payments,
- 8 (6) an action by the United States to collect on a
- 9 student loan guaranteed by the United States,
- 10 (7) a proceeding ancillary to proceedings in other
- 11 courts, and
- 12 (8) an action to enforce an arbitration award.

13 c. Disclosures required under this paragraph shall be
14 made at or within sixty (60) days after service unless
15 a different time is set by stipulation or court order,
16 or unless a party objects that initial disclosures are
17 not appropriate in the circumstances of the action and
18 states the objection in a motion filed with the court.
19 In ruling on the objection, the court shall determine
20 what disclosures, if any, are to be made and set the
21 time for disclosure. A party shall make its initial
22 disclosures based on the information then readily
23 available to it and is not excused from making its
24 disclosures because it has not fully completed its

1 investigation of the case or because it challenges the
2 sufficiency of another party's disclosures or because
3 another party has not made its disclosures.

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

7 1. IN GENERAL.

8 a. ~~Parties may obtain discovery regarding any matter, not~~
9 ~~privileged, which is relevant to the subject matter~~
10 ~~involved in the pending action, whether it relates to~~
11 ~~the claim or defense of the party seeking discovery or~~
12 ~~to the claim or defense of any other party, including~~
13 ~~the existence, description, nature, custody, condition~~
14 ~~and location of any documents, electronically stored~~
15 ~~information or other tangible things and the identity~~
16 ~~and location of persons having knowledge of any~~
17 ~~discoverable matter. It is not a ground for objection~~
18 ~~that the information sought will be inadmissible at~~
19 ~~the trial if the information sought appears reasonably~~
20 ~~calculated to lead to the discovery of admissible~~
21 ~~evidence~~ The scope of discovery is limited to any
22 nonprivileged matter that would support proof of a
23 claim or defense and shall comport with the

1 proportionality assessment required by subparagraph c
2 of paragraph 2 of this subsection.

3 b. A party shall produce upon request pursuant to Section
4 3234 of this title, any insurance agreement under
5 which any person carrying on an insurance business may
6 be liable to satisfy part or all of a judgment which
7 may be entered in the action or to indemnify or
8 reimburse for payments made to satisfy the judgment.
9 Information concerning the insurance agreement is not
10 by reason of disclosure admissible in evidence at
11 trial. For purposes of this section, an application
12 for insurance shall not be treated as a part of an
13 insurance agreement.

14 2. LIMITATIONS ON FREQUENCY AND EXTENT.

15 a. By order, the court may alter the limits on the length
16 of depositions under Section 3230 of this title, on
17 the number of interrogatories under Section 3233 of
18 this title, on the number of requests to produce, the
19 temporal scope of the requests or the number of
20 custodial sources required to be searched for requests
21 under Section 3234 of this title, or on the number of
22 requests for admission under Section 3236 of this
23 title.

1 b. A party is not required to provide discovery of the
2 following categories of electronically stored
3 information ~~from sources~~ absent a showing by the
4 receiving party of substantial need and good cause,
5 subject to the proportionality assessment pursuant to
6 subparagraph c of this paragraph:

7 (1) deleted, slack, fragmented or other data only
8 accessible by forensics,

9 (2) random access memory (RAM), temp files or other
10 ephemeral data that are difficult to preserve
11 without disabling the operating system,

12 (3) online access data such as temporary Internet
13 files, history, cache, cookies and the like,

14 (4) information of which retrieval cannot be
15 accomplished without substantial additional
16 programming or without transforming it into
17 another form before search and retrieval can be
18 achieved,

19 (5) backup data that is substantially duplicative of
20 data that are more accessible elsewhere,

21 (6) physically damaged media,

22 (7) legacy data remaining from obsolete systems that
23 is unintelligible on successor systems, or
24

1 (8) any other data that are not available to the
2 producing party in the ordinary course of
3 business and that the party identifies as not
4 reasonably accessible because of undue burden or
5 cost.—~~On,~~ and that on motion to compel discovery
6 or for a protective order, the party from whom
7 discovery is sought must show that the
8 information is not reasonably accessible because
9 of undue burden or cost. If that showing is
10 made, the court may order discovery from such
11 sources if the requesting party shows good cause,
12 considering the limitations of subparagraph c of
13 this paragraph. The court may specify conditions
14 for the discovery.

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

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

22 (2) the party seeking discovery has had ample
23 opportunity to obtain the information by
24 discovery in the action, or

1 (3) the burden or expense of the proposed discovery
2 outweighs its likely benefit, or is not
3 proportional to the claims and defenses at issue
4 considering the needs of the case, the amount in
5 controversy, the parties' resources, the
6 complexity and importance of the issues at stake
7 in the action, and the importance of the
8 discovery in resolving the issues.

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

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.
24

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
24

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 or
13 place,
- 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,

24

- 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 upon motion orders otherwise, for the
9 convenience of parties and witnesses and in the interests of
10 justice, orders otherwise, methods of discovery may be used in any
11 sequence. The fact that a party is conducting discovery, whether by
12 deposition or otherwise, shall not operate to delay discovery by any
13 other party.

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

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

- 20 a. the identity and location of persons having knowledge
21 of discoverable matters, and
22 b. the identity of each person expected to be called as
23 an expert witness at trial, the subject matter on
24

1 which the person is expected to testify, and the
2 substance of the testimony of the person;

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

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

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

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

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

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

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

22 2. A proposed plan and schedule of discovery;

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

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

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

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 H. PRESERVATION.

4 1. DUTY TO PRESERVE. Unless otherwise ordered by the court,
5 preservation of documents, intangible items and electronically
6 stored information is limited to matters that would enable a party
7 to prove or disprove a claim or defense and shall comport with the
8 proportionality assessment required by paragraph 2 of subsection B
9 of this section. All preservation is subject to the limitations
10 imposed by paragraph 2 of subsection B of this section. The court
11 may specify conditions for preservation.

12 2. SPECIFIC LIMITATIONS ON ELECTRONICALLY STORED INFORMATION.

13 Absent court order demonstrating that the requesting party has (a) a
14 substantial need for discovery of the electronically stored
15 information requested and (b) preservation is subject to the
16 limitations of paragraph 1 of this subsection, a party need not
17 preserve the following categories of electronically stored
18 information:

- 19 a. deleted, slack, fragmented or other data only
20 accessible by forensics,
21 b. random access memory (RAM), temp files or other
22 ephemeral data that are difficult to preserve without
23 disabling the operating system,
24

- 1 c. online access data such as temporary Internet files,
2 history, cache, cookies and the like,
3 d. information of which retrieval cannot be accomplished
4 without substantial additional programming or without
5 transferring it into another form before search and
6 retrieval can be achieved,
7 e. backup data that is substantially duplicative of data
8 that are more accessible elsewhere,
9 f. physically damaged media,
10 g. legacy data remaining from obsolete systems that is
11 unintelligible on successor systems, or
12 h. any other data that are not available to the producing
13 party in the ordinary course of business.

14 SECTION 3. AMENDATORY 12 O.S. 2011, Section 3234, is
15 amended to read as follows:

16 Section 3234. A. SCOPE. Any party may serve on any other
17 party a request:

18 1. To produce and permit the party making the request, or
19 someone acting on the party's behalf, to inspect, copy, test and
20 sample any designated documents or electronically stored information
21 - including, but not limited to, writings, drawings, graphs, charts,
22 photographs, motion picture films, phonograph records, tape and
23 video recordings, records and other data compilations from which
24 information can be obtained - translated, if necessary, by the

1 respondent through detection devices into reasonably usable form, or
2 to inspect and copy, test or sample any tangible things which
3 constitute or contain matters within the scope of subsection B of
4 Section 3226 of this title and which are in the possession, custody
5 or control of the party upon whom the request is served; or

6 2. To permit entry upon designated land or other property in
7 the possession or control of the party upon whom the request is
8 served for the purpose of inspection and measuring, surveying,
9 photographing, testing or sampling the property or any designated
10 object or operation thereon, within the scope of subsection B of
11 Section 3226 of this title.

12 B. PROCEDURE. 1. The request to produce or permit inspection
13 or copying may, without leave of court, be served upon the plaintiff
14 after commencement of the action and upon any other party with the
15 summons and petition or after service of the summons and petition
16 upon that party.

17 2. The number of requests to produce or permit inspection or
18 copying shall not exceed thirty in number. If counsel for a party
19 believes that more than thirty requests to produce or permit
20 inspection or copying are necessary, he or she shall consult with
21 opposing counsel promptly and attempt to reach a written stipulation
22 as to a reasonable number of additional requests. Counsel ~~are~~ is
23 expected to comply with this requirement in good faith. In the
24 event a written stipulation cannot be agreed upon, the party seeking

1 to submit such additional requests for production or inspection
2 shall file a motion with the court (1) showing that counsel have
3 conferred in good faith but sincere attempts to resolve the issue
4 have been unavailing, (2) showing reasons establishing good cause
5 for their use, and (3) setting forth the proposed additional
6 requests for production or inspection.

7 3. The request:

- 8 a. shall set forth and describe with reasonable
9 particularity the items to be inspected either by
10 individual item or by category,
11 b. unless otherwise stipulated or ordered by the court,
12 shall be limited in a manner consistent with
13 subsection B of Section 3226 of this title, to:
14 (1) a reasonable number of requests, not to exceed
15 thirty including all discrete subparts, and
16 (2) a reasonable number of custodial or other
17 information sources for production, not to exceed
18 ten,
19 c. shall specify a reasonable time, place and manner of
20 making the inspection and performing the related acts,
21 and
22 ~~e.~~ d. may specify the form or forms in which electronically
23 stored information is to be produced.
24

1 4. a. The party, upon whom the request is served, shall
2 serve a written response within thirty (30) days after
3 the service of the request, except that a defendant
4 may serve a response within forty-five (45) days after
5 service of the summons and petition upon that
6 defendant. The court may allow a shorter or longer
7 time.

8 b. The response shall state, with respect to each item or
9 category, that inspection and related activities shall
10 be permitted as requested, ~~unless~~ or state with
11 specificity the grounds for objecting to the request
12 ~~is objected to~~, in which event the reasons for
13 objection shall be stated. If objection is made to
14 part of an item or category, the part shall be
15 specified and inspection permitted of the remaining
16 parts. The responding party may state that it will
17 produce copies of documents or of electronically
18 stored information instead of permitting inspection.
19 The production shall then be completed no later than
20 the time for inspection specified in the request or
21 another reasonable time specified in the request or
22 the response.

23 c. If objection is made to the requested form or forms
24 for producing electronically stored information, or if

1 no form was specified in the request, the responding
2 party shall state the form or forms it intends to use.

3 d. The party submitting the request may move for an order
4 under subsection A of Section 3237 of this title with
5 respect to any objection to or other failure to
6 respond to the request or any part thereof, or any
7 failure to permit inspection as requested.

8 5. Unless the parties otherwise agree, or the court otherwise
9 orders:

10 a. a party who produces documents for inspection shall
11 produce them as they are kept in the usual course of
12 business or shall organize and label them to
13 correspond with the categories in the request,

14 b. if a request does not specify the form or forms for
15 producing electronically stored information, a
16 responding party shall produce the information in a
17 form or forms in which it is ordinarily maintained or
18 in a form or forms that are reasonably usable, and

19 c. a party is not required to produce the same
20 electronically stored information in more than one
21 form.

22 C. PERSONS NOT PARTIES. A person not a party to the action may
23 be compelled to produce documents and things or to submit to an
24 inspection as provided in Section 2004.1 of this title.

1 SECTION 4. AMENDATORY 12 O.S. 2011, Section 3237, is
2 amended to read as follows:

3 Section 3237. A. MOTION FOR ORDER COMPELLING DISCOVERY. A
4 party, upon reasonable notice to other parties and all persons
5 affected thereby, may apply for an order compelling discovery as
6 follows:

7 1. APPROPRIATE COURT. An application for an order to a party
8 may be made to the court in which the action is pending, or, on
9 matters, relating to a deposition, to the district court in the
10 county where the deposition is being taken. An application for an
11 order to a deponent who is not a party shall be made to the district
12 court in the county where the deposition is being taken or to the
13 court in which the action is pending.

14 2. MOTION. If a deponent fails to answer a question propounded
15 or submitted under Section 3230 or 3231 of this title, or a
16 corporation or other entity fails to make a designation under
17 paragraph 6 of subsection C of Section 3230 or subsection A of
18 Section 3231 of this title, or a party fails to answer an
19 interrogatory submitted under Section 3233 of this title, or if a
20 party, in response to a request for inspection and copying submitted
21 under Section 3234 of this title, fails to produce documents or
22 fails to respond that the inspection or copying will be permitted as
23 requested or fails to permit the inspection or copying as requested,
24 or if a party or witness objects to the inspection or copying of any

1 materials designated in a subpoena issued pursuant to subsection A
2 of Section 2004.1 of this title, the discovering party may move for
3 an order compelling an answer, or a designation, or an order
4 compelling inspection and copying in accordance with the request or
5 subpoena. The motion must include a statement that the movant has
6 in good faith conferred or attempted to confer either in person or
7 by telephone with the person or party failing to make the discovery
8 in an effort to secure the information or material without court
9 action. When taking a deposition on oral examination, the proponent
10 of the question may complete or adjourn the examination before
11 applying for an order.

12 When a claim of privilege or other protection from discovery is
13 made in response to any request or subpoena for documents, and the
14 court, in its discretion, determines that a privilege log is
15 necessary in order to determine the validity of the claim, the court
16 shall order the party claiming the privilege to prepare and serve a
17 privilege log upon the terms and conditions deemed appropriate by
18 the court. The privilege log shall be served upon all other
19 parties. Unless otherwise ordered by the court, the privilege log
20 shall include, as to each document for which a claim of privilege or
21 other protection from discovery has been made, the following:

- 22 a. the author or authors,
- 23 b. the recipient or recipients,
- 24 c. its origination date,

- d. its length,
- e. the nature of the document or its intended purpose,
- and
- f. the basis for the objection.

The court may conduct an in camera review of the documents for which the privilege or other protection from discovery is claimed. 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 subsection C of Section 3226 of this title.

3. EVASIVE OR INCOMPLETE ANSWER. For purposes of this subsection, an evasive or incomplete answer is to be treated as a failure to answer.

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 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,

1 including attorney fees, unless the court finds that the making of
2 the motion was substantially justified or that other circumstances
3 make an award of expenses unjust.

4 If the motion is granted in part and denied in part, the court
5 may apportion the reasonable expenses incurred in relation to the
6 motion among the parties and persons in a just manner.

7 B. FAILURE TO COMPLY WITH ORDER.

8 1. SANCTIONS BY COURT IN COUNTY WHERE DEPOSITION IS TAKEN. If
9 a deponent fails to be sworn or to answer a question after being
10 directed to do so by the court in the county in which the deposition
11 is being taken, the failure may be considered a contempt of that
12 court.

13 2. SANCTION BY COURT IN WHICH ACTION IS PENDING. If a party or
14 an officer, director or managing agent of a party or a person
15 designated under paragraph ~~6~~ 5 of subsection C of Section 3230 or
16 subsection A of Section 3231 of this title to testify on behalf of a
17 party fails to obey an order to provide or permit discovery,
18 including an order made under subsection A of this section or
19 Section 3235 of this title, or if a party fails to obey an order
20 entered under subsection F of Section 3226 of this title, the court
21 in which the action is pending may make such orders in regard to the
22 failure as are just. Such orders may include the following:

23 a. An order that the matters regarding which the order
24 was made or any other designated facts shall be taken

1 to be established for the purposes of the action in
2 accordance with the claim of the party obtaining the
3 order,

4 b. An order refusing to allow the disobedient party to
5 support or oppose designated claims or defenses, or
6 prohibiting him from introducing designated matters in
7 evidence,

8 c. An order striking out pleadings or parts thereof, or
9 staying further proceedings until the order is obeyed,
10 or dismissing the action or proceedings or any part
11 thereof, or rendering a judgment by default against
12 the disobedient party,

13 d. In lieu of or in addition to the orders provided for
14 in subparagraphs a through c of this paragraph, an
15 order treating as a contempt of court the failure to
16 obey any orders except an order to submit to a
17 physical or mental examination,

18 e. Where a party has failed to comply with an order under
19 subsection A of Section 3235 of this title requiring
20 him to produce another for examination, such orders as
21 are listed in subparagraphs a, b and c of this
22 paragraph, unless the party failing to comply shows
23 that he is unable to produce such person for
24 examination,

1 f. If a person, not a party, fails to obey an order
2 entered under subsection C of Section 3234 of this
3 title, the court may treat the failure to obey the
4 order as contempt of court.

5 In lieu of or in addition to the orders provided for in this
6 paragraph, the court shall require the party failing to obey the
7 order or the attorney advising the party or both to pay the
8 reasonable expenses, including attorney fees, caused by the failure,
9 unless the court finds that the failure was substantially justified
10 or that other circumstances make an award of expenses unjust.

11 C. EXPENSES ON EXAMINATION OF PROPERTY. The reasonable expense
12 of making the property available under Section 3234 of this title
13 shall be paid by the requesting party, and at the time of the taxing
14 of costs in the case, the court may tax such expenses as costs, or
15 it may apportion such expenses between the parties, or it may
16 provide that they are an expense of the requesting party.

17 D. EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the
18 genuineness of any document or the truth of any matter as requested
19 under Section 3236 of this title, and if the party requesting the
20 admission thereafter proves the genuineness of the document or the
21 truth of the matter, the party may apply to the court for an order
22 requiring the other party to pay him or her the reasonable expenses
23 incurred in making that proof, including reasonable attorney fees.
24 The court shall make the order unless it finds that:

1 1. The request was held objectionable pursuant to subsection C
2 of Section 3236 of this title; or

3 2. The admission sought was of no substantial importance; or

4 3. The party failing to admit had reasonable ground to believe
5 that he or she might prevail on the matter; or

6 4. There was other good reason for the failure to admit.

7 E. FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWER
8 TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION. If a party
9 or an officer, director or managing agent of a party or a person
10 designated under paragraph 6 of subsection C of Section 3230 or
11 subsection A of Section 3231 of this title to testify on behalf of a
12 party fails:

13 1. To appear before the officer who is to take the deposition,
14 after being served with a proper notice; or

15 2. To serve answers or objections to interrogatories submitted
16 under Section 3233 of this title, after proper service of the
17 interrogatories; or

18 3. To serve a written response to a request for inspection
19 submitted under Section 3234 of this title, after proper service of
20 the request; ~~and~~

21 the court in which the action is pending on motion may make such
22 orders in regard to the failure as are just, and among others it may
23 take any action authorized under subparagraphs a, b and c of
24 paragraph 2 of subsection B of this section. In lieu of or in

1 addition to any order, the court shall require the party failing to
2 act or the attorney advising him or her or both to pay the
3 reasonable expenses, including attorney fees, caused by the failure,
4 unless the court finds that the failure was substantially justified
5 or that other circumstances make an award of expenses unjust.

6 The failure to act as described in this subsection may not be
7 excused on the ground that the discovery sought is objectionable
8 unless the party failing to act has applied for a protective order
9 as provided by subsection C of Section 3226 of this title.

10 F. FAILURE TO PARTICIPATE IN THE FRAMING OF A DISCOVERY PLAN.

11 If a party or a party's attorney fails to participate in good faith
12 in the framing of a discovery plan by agreement as is required by
13 subsection F of Section 3226 of this title, the court may, after
14 opportunity for hearing, require such party or his or her attorney
15 to pay to any other party the reasonable expenses, including
16 attorney fees, caused by the failure.

17 G. ~~ELECTRONICALLY STORED INFORMATION. Absent exceptional~~
18 ~~circumstances, a court may not impose sanctions on a party~~ Sanctions
19 for failure to provide preserve relevant information including
20 electronically stored information lost as a result of the routine,
21 good-faith operation of an electronic information system shall be
22 imposed only if a party willfully destroys such information to
23 prevent its use in litigation and the information cannot be restored
24 or replaced through additional discovery.

1 SECTION 5. This act shall become effective November 1, 2017.

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3 COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY - CIVIL AND
4 ENVIRONMENTAL, dated 03/01/2017 - DO PASS, As Amended and
5 Coauthored.
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