

1 **SENATE FLOOR VERSION**

2 April 12, 2017

3 COMMITTEE SUBSTITUTE
4 FOR ENGROSSED
5 HOUSE BILL NO. 1570

By: Echols of the House

and

Holt of the Senate

7
8 COMMITTEE SUBSTITUTE

9 [Oklahoma Discovery Code - construction, general
10 provisions, production of documents and inspection
11 and sanctions - limitations on scope of discovery -
12 compelling discovery under specified circumstances -
13 effective date]

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

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

17 Section 3225. The Discovery Code shall be ~~liberally constructed~~
18 construed, administered and employed by courts and parties to
19 provide secure the just, speedy and inexpensive determination of
20 every action.

21 SECTION 2. AMENDATORY 12 O.S. 2011, Section 3226, as
22 last amended by Section 1, Chapter 192, O.S.L. 2014 (12 O.S. Supp.
23 2016, Section 3226), is amended to read as follows:

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

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

12 2. INITIAL DISCLOSURES.

13 a. Except in categories of proceedings specified in
14 subparagraph b of this paragraph, or to the extent
15 otherwise stipulated or directed by order, a party,
16 without awaiting a discovery request, shall provide to
17 other parties a computation of any category of damages
18 claimed by the disclosing party, making available for
19 inspection and copying the documents or other
20 evidentiary material, not privileged or protected from
21 disclosure, on which such computation is based,
22 including materials bearing on the nature and extent
23 of injuries suffered. Subject to subsection B of this
24 section, in any action in which physical or mental

1 injury is claimed, the party making the claim shall
2 provide to the other parties a release or
3 authorization allowing the parties to obtain relevant
4 medical records and bills, and, when relevant, a
5 release or authorization for employment and scholastic
6 records.

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

- 10 (1) an action for review of an administrative record,
11 (2) a petition for habeas corpus or other proceeding
12 to challenge a criminal conviction or sentence,
13 (3) an action brought without counsel by a person in
14 custody of the United States, a state, or a state
15 subdivision,
16 (4) an action to enforce or quash an administrative
17 summons or subpoena,
18 (5) an action by the United States to recover benefit
19 payments,
20 (6) an action by the United States to collect on a
21 student loan guaranteed by the United States,
22 (7) a proceeding ancillary to proceedings in other
23 courts, and
24 (8) an action to enforce an arbitration award.

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.

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

19 1. IN GENERAL.

20 a. Parties may obtain discovery regarding any matter, not
21 privileged, which is relevant to ~~the subject matter~~
22 ~~involved in the pending action, whether it relates to~~
23 ~~the claim or defense of the party seeking discovery or~~
24 ~~to the claim or defense of any other party, including~~

1 ~~the existence, description, nature, custody, condition~~
2 ~~and location of any documents, electronically stored~~
3 ~~information or other tangible things and the identity~~
4 ~~and location of persons having knowledge of any~~
5 ~~discoverable matter. It is not a ground for objection~~
6 ~~that the information sought will be inadmissible at~~
7 ~~the trial if the information sought appears reasonably~~
8 ~~calculated to lead to the discovery of admissible~~
9 ~~evidence~~ any party's claim or defense and proportional
10 to the needs of the case, considering the importance
11 of the issues at stake in the action, the amount in
12 controversy, the parties' relative access to relevant
13 information, the parties' resources, the importance of
14 the discovery in resolving the issues, and whether the
15 burden or expense of the proposed discovery outweighs
16 its likely benefit. Information within this scope of
17 discovery need not be admissible in evidence to be
18 discoverable.

- 19 b. A party shall produce upon request pursuant to Section
20 3234 of this title, any insurance agreement under
21 which any person carrying on an insurance business may
22 be liable to satisfy part or all of a judgment which
23 may be entered in the action or to indemnify or
24 reimburse for payments made to satisfy the judgment.

1 Information concerning the insurance agreement is not
2 by reason of disclosure admissible in evidence at
3 trial. For purposes of this section, an application
4 for insurance shall not be treated as a part of an
5 insurance agreement.

6 2. LIMITATIONS ON FREQUENCY AND EXTENT.

7 a. By order, the court may alter the limits on the length
8 of depositions under Section 3230 of this title, on
9 the number of interrogatories under Section 3233 of
10 this title, on the number of requests to produce under
11 Section 3234 of this title, or on the number of
12 requests for admission under Section 3236 of this
13 title.

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

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

6 (1) the discovery sought is unreasonably cumulative
7 or duplicative, or can be obtained from some
8 other source that is more convenient, less
9 burdensome, or less expensive,

10 (2) the party seeking discovery has had ample
11 opportunity to obtain the information by
12 discovery in the action, or

13 ~~(3) the burden or expense of the proposed discovery~~
14 ~~outweighs its likely benefit, considering the~~
15 ~~needs of the case, the amount in controversy, the~~
16 ~~parties' resources, the importance of the issues~~
17 ~~at stake in the action, and the importance of the~~
18 ~~discovery in resolving the issues~~ is outside the
19 scope permitted by subparagraph a of paragraph 1
20 of this subsection.

21 d. If an officer, director or managing agent of a
22 corporation or a government official is served with
23 notice of a deposition or subpoena regarding a matter
24 about which he or she has no knowledge, he or she may

1 submit at a reasonable time prior to the date of the
2 deposition an affidavit to the noticing party so
3 stating and identifying a person within the
4 corporation or government entity who has knowledge of
5 the subject matter involved in the pending action.

6 Notwithstanding such affidavit, the noticing party may
7 proceed with the deposition, subject to the noticed
8 witness's right to seek a protective order.

9 3. TRIAL PREPARATION: MATERIALS.

10 a. Unless as provided by paragraph 4 of this subsection,
11 a party may not discover documents and tangible things
12 that are prepared in anticipation of litigation or for
13 trial by or for another party or its representative,
14 including the other party's attorney, consultant,
15 surety, indemnitor, insurer or agent. Subject to
16 paragraph 4 of this subsection, such materials may be
17 discovered if:

18 (1) they are otherwise discoverable under paragraph 1
19 of this subsection, and

20 (2) the party shows that it has substantial need for
21 the materials to prepare its case and cannot,
22 without undue hardship, obtain their substantial
23 equivalent by other means.
24

1 b. If the court orders discovery of such materials, the
2 court shall protect against disclosure of the mental
3 impressions, conclusions, opinions or legal theories
4 of a party's attorney or other representative
5 concerning the litigation.

6 c. A party or other person may, upon request and without
7 the required showing, obtain the person's own previous
8 statement about the action or its subject matter. If
9 the request is refused, the person may move for a
10 court order, and the provisions of paragraph 4 of
11 subsection A of Section 3237 of this title apply to
12 the award of expenses. A previous statement is
13 either:

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

16 (2) a contemporaneous stenographic, mechanical,
17 electrical, or other recording, or a
18 transcription thereof, which recites
19 substantially verbatim the person's oral
20 statement.

21 4. TRIAL PREPARATION: EXPERTS.

22 a. Discovery of facts known and opinions held by experts,
23 otherwise discoverable under the provisions of
24 paragraph 1 of this subsection and acquired or

1 developed in anticipation of litigation or for trial,
2 may be obtained only as follows:

3 (1) a party may, through interrogatories, require any
4 other party to identify each person whom that
5 other party expects to call as an expert witness
6 at trial and give the address at which that
7 expert witness may be located,

8 (2) after disclosure of the names and addresses of
9 the expert witnesses, the other party expects to
10 call as witnesses, the party, who has requested
11 disclosure, may depose any such expert witnesses
12 subject to scope of this section. Prior to
13 taking the deposition the party must give notice
14 as required in subsections A and C of Section
15 3230 of this title, and

16 (3) in addition to taking the depositions of expert
17 witnesses the party may, through interrogatories,
18 require the party who expects to call the expert
19 witnesses to state the subject matter on which
20 each expert witness is expected to testify; the
21 substance of the facts and opinions to which the
22 expert is expected to testify and a summary of
23 the grounds for each opinion; the qualifications
24 of each expert witness, including a list of all

1 publications authored by the expert witness
2 within the preceding ten (10) years; the
3 compensation to be paid to the expert witness for
4 the testimony and preparation for the testimony;
5 and a listing of any other cases in which the
6 expert witness has testified as an expert at
7 trial or by deposition within the preceding four
8 (4) years. An interrogatory seeking the
9 information specified above shall be treated as a
10 single interrogatory for purposes of the
11 limitation on the number of interrogatories in
12 Section 3233 of this title.

13 b. The protection provided by paragraph 3 of this
14 subsection extends to communications between the
15 party's attorney and any expert witness retained or
16 specially employed to provide expert testimony in the
17 case or whose duties as the party's employee regularly
18 involve giving expert testimony, except to the extent
19 that the communications:

20 (1) relate to compensation for the expert's study or
21 testimony,

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

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

4 c. A party may not, by interrogatories or deposition,
5 discover facts known or opinions held by an expert who
6 has been retained or specially employed by another
7 party in anticipation of litigation or to prepare for
8 trial and who is not expected to be called as a
9 witness at trial, except as provided in Section 3235
10 of this title or upon a showing of exceptional
11 circumstances under which it is impracticable for the
12 party to obtain facts or opinions on the same subject
13 by other means.

14 d. Unless manifest injustice would result:

15 (1) the court shall require that the party seeking
16 discovery pay the expert a reasonable fee for
17 time spent in responding to discovery under
18 division (2) of subparagraph a of this paragraph
19 and subparagraph c of this paragraph, and

20 (2) the court shall require that the party seeking
21 discovery with respect to discovery obtained
22 under subparagraph c of this paragraph, pay the
23 other party a fair portion of the fees and
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1 expenses reasonably incurred by the latter party
2 in obtaining facts and opinions from the expert.

3 5. CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL PREPARATION
4 MATERIALS.

- 5 a. When a party withholds information otherwise
6 discoverable under the Oklahoma Discovery Code by
7 claiming that it is privileged or subject to
8 protection as trial preparation material, the party
9 shall make the claim expressly and shall describe the
10 nature of the documents, communications, or things not
11 produced or disclosed in a manner that, without
12 revealing information itself privileged or protected,
13 will enable other parties to assess the applicability
14 of the privilege or protection.
- 15 b. If information produced in discovery is subject to a
16 claim of privilege or of protection as trial
17 preparation material, the party making the claim may
18 notify any party that received the information of the
19 claim and the basis for it. After being notified, a
20 party shall promptly return, sequester, or destroy the
21 specified information and any copies the party has;
22 shall not use or disclose the information until the
23 claim is resolved; shall take reasonable steps to
24 retrieve the information if the party has disclosed it

1 before being notified; and may promptly present the
2 information to the court under seal for a
3 determination of the claim. The producing party shall
4 preserve the information until the claim is resolved.
5 This mechanism is procedural only and does not alter
6 the standards governing whether the information is
7 privileged or subject to protection as trial
8 preparation material or whether such privilege or
9 protection has been waived.

10 C. PROTECTIVE ORDERS.

11 1. Upon motion by a party or by the person from whom discovery
12 is sought, accompanied by a certification that the movant has in
13 good faith conferred or attempted to confer, either in person or by
14 telephone, with other affected parties in an effort to resolve the
15 dispute without court action, and for good cause shown, the court in
16 which the action is pending or on matters relating to a deposition,
17 the district court in the county where the deposition is to be taken
18 may enter any order which justice requires to protect a party or
19 person from annoyance, harassment, embarrassment, oppression or
20 undue delay, burden or expense, including one or more of the
21 following:

22 a. that the discovery not be had,

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- 1 b. that the discovery may be had only on specified terms
2 and conditions, including a designation of the time
3 ~~or~~, place or the allocation of expenses,
4 c. that the discovery may be had only by a method of
5 discovery other than that selected by the party
6 seeking discovery,
7 d. that certain matters not be inquired into, or that the
8 scope of the disclosure or discovery be limited to
9 certain matters,
10 e. that discovery be conducted with no one present except
11 persons designated by the court,
12 f. that a deposition after being sealed be opened only by
13 order of the court,
14 g. that a trade secret or other confidential research,
15 development or commercial information not be disclosed
16 or be disclosed only in a designated way, and
17 h. that the parties simultaneously file specified
18 documents or information enclosed in sealed envelopes
19 to be opened as directed by the court.

20 2. If the motion for a protective order is denied in whole or
21 in part, the court may, on such terms and conditions as are just,
22 order that any party or person provide or permit discovery. The
23 provisions of paragraph 4 of subsection A of Section 3237 of this
24 title apply to the award of expenses incurred in relation to the

1 motion. Any protective order of the court which has the effect of
2 removing any material obtained by discovery from the public record
3 shall contain the following:

4 a. a statement that the court has determined it is
5 necessary in the interests of justice to remove the
6 material from the public record,

7 b. specific identification of the material which is to be
8 removed or withdrawn from the public record, or which
9 is to be filed but not placed in the public record,
10 and

11 c. a requirement that any party obtaining a protective
12 order place the protected material in a sealed manila
13 envelope clearly marked with the caption and case
14 number and is clearly marked with the word
15 "CONFIDENTIAL", and stating the date the order was
16 entered and the name of the judge entering the order.
17 This requirement may also be satisfied by requiring
18 the party to file the documents pursuant to the
19 procedure for electronically filing sealed or
20 confidential documents approved for electronic filing
21 in the courts of this state.

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

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

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

7 6. Counsel for the respective parties shall be responsible for
8 informing witnesses, as necessary, of the contents of the protective
9 order.

10 7. When a case is filed in which a party intends to seek a
11 protective order removing material from the public record, the
12 plaintiff(s) and defendant(s) shall be initially designated on the
13 petition under pseudonym such as "John or Jane Doe", or "Roe", and
14 the petition shall clearly indicate that the party designations are
15 fictitious. The party seeking confidentiality or other order
16 removing the case, in whole or in part, from the public record,
17 shall immediately present application to the court, seeking
18 instructions for the conduct of the case, including confidentiality
19 of the records.

20 D. SEQUENCE AND TIMING OF DISCOVERY. Unless the parties
21 stipulate or the court ~~upon motion,~~ orders otherwise for the
22 convenience of parties and witnesses and in the interests of
23 justice, ~~orders otherwise,~~ methods of discovery may be used in any
24 sequence. The fact that a party is conducting discovery, whether by

1 deposition or otherwise, shall not operate to delay discovery by any
2 other party.

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

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

9 a. the identity and location of persons having knowledge
10 of discoverable matters, and

11 b. the identity of each person expected to be called as
12 an expert witness at trial, the subject matter on
13 which the person is expected to testify, and the
14 substance of the testimony of the person;

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

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

20 (2) the party knows that the response, which was
21 correct when made, is no longer true in some
22 material respect, and
23
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1 b. the additional or corrective information has not
2 otherwise been made known to the other parties during
3 the discovery process or in writing; and

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

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

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

12 2. A proposed plan and schedule of discovery;

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

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

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

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

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

10 Subject to the right of a party who properly moves for a
11 discovery conference to prompt convening of the conference, the
12 court may combine the discovery conference with a pretrial
13 conference.

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

15 Every request for discovery, response or objection thereto made by a
16 party represented by an attorney shall be signed by at least one of
17 the party's attorneys of record in the party's individual name whose
18 address shall be stated. A party who is not represented by an
19 attorney shall sign the request, response or objection and state the
20 party's address. The signature of the attorney or party constitutes
21 a certification that the party has read the request, response or
22 objection, and that it is:

23 1. To the best of the party's knowledge, information and belief
24 formed after a reasonable inquiry consistent with the Oklahoma

1 Discovery Code and warranted by existing law or a good faith
2 argument for the extension, modification or reversal of existing
3 law;

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

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

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

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

20 Section 3234. A. SCOPE. Any party may serve on any other
21 party a request:

22 1. To produce and permit the party making the request, or
23 someone acting on the party's behalf, to inspect, copy, test and
24 sample any designated documents or electronically stored information

1 - including, but not limited to, writings, drawings, graphs, charts,
2 photographs, motion picture films, phonograph records, tape and
3 video recordings, records and other data compilations from which
4 information can be obtained - translated, if necessary, by the
5 respondent through detection devices into reasonably usable form, or
6 to inspect and copy, test or sample any tangible things which
7 constitute or contain matters within the scope of subsection B of
8 Section 3226 of this title and which are in the possession, custody
9 or control of the party upon whom the request is served; or

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

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

21 2. The number of requests to produce or permit inspection or
22 copying shall not exceed thirty in number. If counsel for a party
23 believes that more than thirty requests to produce or permit
24 inspection or copying are necessary, he or she shall consult with

1 opposing counsel promptly and attempt to reach a written stipulation
2 as to a reasonable number of additional requests. Counsel ~~are~~ is
3 expected to comply with this requirement in good faith. In the
4 event a written stipulation cannot be agreed upon, the party seeking
5 to submit such additional requests for production or inspection
6 shall file a motion with the court (1) showing that counsel have
7 conferred in good faith but sincere attempts to resolve the issue
8 have been unavailing, (2) showing reasons establishing good cause
9 for their use, and (3) setting forth the proposed additional
10 requests for production or inspection.

11 3. The request:

- 12 a. shall set forth and describe with reasonable
13 particularity the items to be inspected either by
14 individual item or by category,
15 b. shall specify a reasonable time, place and manner of
16 making the inspection and performing the related acts,
17 and
18 c. may specify the form or forms in which electronically
19 stored information is to be produced.

20 4. a. The party, upon whom the request is served, shall
21 serve a written response within thirty (30) days after
22 the service of the request, except that a defendant
23 may serve a response within forty-five (45) days after
24 service of the summons and petition upon that

1 defendant. The court may allow a shorter or longer
2 time.

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

18 c. If objection is made to the requested form or forms
19 for producing electronically stored information, or if
20 no form was specified in the request, the responding
21 party shall state the form or forms it intends to use.

22 d. The party submitting the request may move for an order
23 under subsection A of Section 3237 of this title with
24 respect to any objection to or other failure to

1 respond to the request or any part thereof, or any
2 failure to permit inspection as requested.

3 5. Unless the parties otherwise agree, or the court otherwise
4 orders:

5 a. a party who produces documents for inspection shall
6 produce them as they are kept in the usual course of
7 business or shall organize and label them to
8 correspond with the categories in the request,

9 b. if a request does not specify the form or forms for
10 producing electronically stored information, a
11 responding party shall produce the information in a
12 form or forms in which it is ordinarily maintained or
13 in a form or forms that are reasonably usable, and

14 c. a party is not required to produce the same
15 electronically stored information in more than one
16 form.

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

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

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

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

10 2. MOTION. If a deponent fails to answer a question propounded
11 or submitted under Section 3230 or 3231 of this title, or a
12 corporation or other entity fails to make a designation under
13 paragraph 6 of subsection C of Section 3230 or subsection A of
14 Section 3231 of this title, or a party fails to answer an
15 interrogatory submitted under Section 3233 of this title, or if a
16 party, in response to a request for inspection and copying submitted
17 under Section 3234 of this title, fails to produce documents or
18 respond that the inspection or copying will be permitted as
19 requested or fails to permit the inspection or copying as requested,
20 or if a party or witness objects to the inspection or copying of any
21 materials designated in a subpoena issued pursuant to subsection A
22 of Section 2004.1 of this title, the discovering party may move for
23 an order compelling an answer, or a designation, or an order
24 compelling inspection and copying in accordance with the request or

1 subpoena. The motion must include a statement that the movant has
2 in good faith conferred or attempted to confer either in person or
3 by telephone with the person or party failing to make the discovery
4 in an effort to secure the information or material without court
5 action. When taking a deposition on oral examination, the proponent
6 of the question may complete or adjourn the examination before
7 applying for an order.

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

- 18 a. the author or authors,
- 19 b. the recipient or recipients,
- 20 c. its origination date,
- 21 d. its length,
- 22 e. the nature of the document or its intended purpose,
- 23 and
- 24 f. the basis for the objection.

1 The court may conduct an in camera review of the documents for which
2 the privilege or other protection from discovery is claimed. If the
3 court denies the motion in whole or in part, it may make such
4 protective order as it would have been empowered to make on a motion
5 made pursuant to subsection C of Section 3226 of this title.

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

9 4. AWARD OF EXPENSES OF MOTION. If the motion is granted, the
10 court shall, after opportunity for hearing, require the party or
11 deponent whose conduct necessitated the motion or the party or
12 attorney advising such conduct or both of them to pay to the moving
13 party the reasonable expenses incurred in obtaining the order,
14 including attorney fees, unless the court finds that the opposition
15 to the motion was substantially justified or that other
16 circumstances make an award of expenses unjust.

17 If the motion is denied, the court shall, after opportunity for
18 hearing, require the moving party or the attorney advising the
19 motion or both of them to pay to the party or deponent who opposed
20 the motion the reasonable expenses incurred in opposing the motion,
21 including attorney fees, unless the court finds that the making of
22 the motion was substantially justified or that other circumstances
23 make an award of expenses unjust.

24

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

4 B. FAILURE TO COMPLY WITH ORDER.

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

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

- 20 a. An order that the matters regarding which the order
21 was made or any other designated facts shall be taken
22 to be established for the purposes of the action in
23 accordance with the claim of the party obtaining the
24 order,

- 1 b. An order refusing to allow the disobedient party to
2 support or oppose designated claims or defenses, or
3 prohibiting him from introducing designated matters in
4 evidence,
- 5 c. An order striking out pleadings or parts thereof, or
6 staying further proceedings until the order is obeyed,
7 or dismissing the action or proceedings or any part
8 thereof, or rendering a judgment by default against
9 the disobedient party,
- 10 d. In lieu of or in addition to the orders provided for
11 in subparagraphs a through c of this paragraph, an
12 order treating as a contempt of court the failure to
13 obey any orders except an order to submit to a
14 physical or mental examination,
- 15 e. Where a party has failed to comply with an order under
16 subsection A of Section 3235 of this title requiring
17 him to produce another for examination, such orders as
18 are listed in subparagraphs a, b and c of this
19 paragraph, unless the party failing to comply shows
20 that he is unable to produce such person for
21 examination,
- 22 f. If a person, not a party, fails to obey an order
23 entered under subsection C of Section 3234 of this
24

1 title, the court may treat the failure to obey the
2 order as contempt of court.

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

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

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

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

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

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

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

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

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

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

16 3. To serve a written response to a request for inspection
17 submitted under Section 3234 of this title, after proper service of
18 the request;
19 the court in which the action is pending on motion may make such
20 orders in regard to the failure as are just, and among others it may
21 take any action authorized under subparagraphs a, b and c of
22 paragraph 2 of subsection B of this section. In lieu of or in
23 addition to any order, the court shall require the party failing to
24 act or the attorney advising him or her or both to pay the

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

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

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

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

15 G. ELECTRONICALLY STORED INFORMATION. ~~Absent exceptional~~
16 ~~circumstances, a court may not impose sanctions on a party for~~
17 ~~failure to provide electronically stored information lost as a~~
18 ~~result of the routine, good-faith operation of an electronic~~
19 ~~information system~~ If electronically stored information that should
20 have been preserved in the anticipation or conduct of litigation is
21 lost because a party failed to take reasonable steps to preserve it,
22 and it cannot be restored or replaced through additional discovery,
23 the court may:

24

1 1. Upon finding prejudice to another party from loss of the
2 information, order measures no greater than necessary to cure the
3 prejudice; or

4 2. Upon finding that the party acted with intent to deprive
5 another party of the information's use in the litigation:

6 a. presume that the lost information was unfavorable to
7 the party,

8 b. instruct the jury that it may or must presume the
9 information was unfavorable to the party, or

10 c. dismiss the action or enter a default judgment.

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

12 COMMITTEE REPORT BY: COMMITTEE ON BUSINESS, COMMERCE AND TOURISM
13 April 12, 2017 - DO PASS AS AMENDED