

1 STATE OF OKLAHOMA

2 1st Session of the 56th Legislature (2017)

3 SENATE BILL 361

By: Holt

4  
5  
6  
7 AS INTRODUCED

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

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

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

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

4 SECTION 2. AMENDATORY 12 O.S. 2011, Section 3226, as  
5 last amended by Section 1, Chapter 192, O.S.L. 2014 (12 O.S. Supp.  
6 2016, Section 3226), is amended to read as follows:

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

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

19 2. INITIAL DISCLOSURES.

20 a. Except in categories of proceedings specified in  
21 subparagraph b of this paragraph, or to the extent  
22 otherwise stipulated or directed by order, a party,  
23 without awaiting a discovery request, shall provide to  
24 other parties a computation of any category of damages

1           claimed by the disclosing party, making available for  
2           inspection and copying the documents or other  
3           evidentiary material, not privileged or protected from  
4           disclosure, on which such computation is based,  
5           including materials bearing on the nature and extent  
6           of injuries suffered. Subject to subsection B of this  
7           section, in any action in which physical or mental  
8           injury is claimed, the party making the claim shall  
9           provide to the other parties a release or  
10          authorization allowing the parties to obtain relevant  
11          medical records and bills, and, when relevant, a  
12          release or authorization for employment and scholastic  
13          records.

14          b. The following categories of proceedings are exempt  
15          from initial disclosure under subparagraph a of this  
16          paragraph:

- 17           (1) an action for review of an administrative record,
- 18           (2) a petition for habeas corpus or other proceeding  
19           to challenge a criminal conviction or sentence,
- 20           (3) an action brought without counsel by a person in  
21           custody of the United States, a state, or a state  
22           subdivision,
- 23           (4) an action to enforce or quash an administrative  
24           summons or subpoena,

- 1 (5) an action by the United States to recover benefit  
2 payments,  
3 (6) an action by the United States to collect on a  
4 student loan guaranteed by the United States,  
5 (7) a proceeding ancillary to proceedings in other  
6 courts, and  
7 (8) an action to enforce an arbitration award.

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

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

4 1. IN GENERAL.

5 a. ~~Parties may obtain discovery regarding any matter, not~~  
6 ~~privileged, which is relevant to the subject matter~~  
7 ~~involved in the pending action, whether it relates to~~  
8 ~~the claim or defense of the party seeking discovery or~~  
9 ~~to the claim or defense of any other party, including~~  
10 ~~the existence, description, nature, custody, condition~~  
11 ~~and location of any documents, electronically stored~~  
12 ~~information or other tangible things and the identity~~  
13 ~~and location of persons having knowledge of any~~  
14 ~~discoverable matter. It is not a ground for objection~~  
15 ~~that the information sought will be inadmissible at~~  
16 ~~the trial if the information sought appears reasonably~~  
17 ~~calculated to lead to the discovery of admissible~~  
18 ~~evidence~~ The scope of discovery is limited to any non-  
19 privileged matter that would support proof of a claim  
20 or defense and shall comport with the proportionality  
21 assessment required by subparagraph c of paragraph 2  
22 of this subsection.

23 b. A party shall produce upon request pursuant to Section  
24 3234 of this title, any insurance agreement under

1 which any person carrying on an insurance business may  
2 be liable to satisfy part or all of a judgment which  
3 may be entered in the action or to indemnify or  
4 reimburse for payments made to satisfy the judgment.  
5 Information concerning the insurance agreement is not  
6 by reason of disclosure admissible in evidence at  
7 trial. For purposes of this section, an application  
8 for insurance shall not be treated as a part of an  
9 insurance agreement.

10 2. LIMITATIONS ON FREQUENCY AND EXTENT.

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

20 b. A party is not required to provide discovery of  
21 electronically stored the following categories of  
22 electronically-stored information from sources absent  
23 a showing by the receiving party of substantial need  
24 and good cause, subject to the proportionality

1 assessment pursuant to subparagraph c of this  
2 paragraph:

3 (1) deleted, slack, fragmented or other data only  
4 accessible by forensics,

5 (2) random access memory (RAM), temp files or other  
6 ephemeral data that is difficult to preserve  
7 without disabling the operating system,

8 (3) online access data such as temporary internet  
9 filed, history, cache, cookies, and the like,

10 (4) data in metadata fields that is frequently  
11 updated automatically, such as last-opened dates,

12 (5) information whose retrieval cannot be  
13 accomplished without substantial additional  
14 programming, or without transforming it into  
15 another form before search and retrieval can be  
16 achieved,

17 (6) backup data that is substantially duplicative of  
18 data that is more accessible elsewhere,

19 (7) physically damaged media,

20 (8) legacy data remaining from obsolete systems that  
21 is unintelligible on successor systems, or

22 (9) any other data that are not available to the  
23 producing party in the ordinary course of

24 business and that the party identifies as not

1 reasonably accessible because of undue burden or  
2 cost. ~~On~~ and that on motion to compel discovery  
3 or for a protective order, the party from whom  
4 discovery is sought must show that the  
5 information is not reasonably accessible because  
6 of undue burden or cost. If that showing is  
7 made, the court may order discovery from such  
8 sources if the requesting party shows good cause,  
9 considering the limitations of subparagraph c of  
10 this paragraph. The court may specify conditions  
11 for the discovery.

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

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

19 (2) the party seeking discovery has had ample  
20 opportunity to obtain the information by  
21 discovery in the action, or

22 (3) the burden or expense of the proposed discovery  
23 outweighs its likely benefit, or is not  
24 proportional to the claims and defenses at issue



1                   considering the needs of the case, the amount in  
2                   controversy, the parties' resources, the  
3                   complexity and importance of the issues at stake  
4                   in the action, and the importance of the  
5                   discovery in resolving the issues.

6           3. TRIAL PREPARATION: MATERIALS.

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

15           (1) they are otherwise discoverable under paragraph 1  
16           of this subsection, and

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

21           b. If the court orders discovery of such materials, the  
22           court shall protect against disclosure of the mental  
23           impressions, conclusions, opinions or legal theories  
24

1 of a party's attorney or other representative  
2 concerning the litigation.

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

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

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

18 4. TRIAL PREPARATION: EXPERTS.

19 a. Discovery of facts known and opinions held by experts,  
20 otherwise discoverable under the provisions of  
21 paragraph 1 of this subsection and acquired or  
22 developed in anticipation of litigation or for trial,  
23 may be obtained only as follows:  
24

- 1 (1) a party may, through interrogatories, require any  
2 other party to identify each person whom that  
3 other party expects to call as an expert witness  
4 at trial and give the address at which that  
5 expert witness may be located,
- 6 (2) after disclosure of the names and addresses of  
7 the expert witnesses, the other party expects to  
8 call as witnesses, the party, who has requested  
9 disclosure, may depose any such expert witnesses  
10 subject to scope of this section. Prior to  
11 taking the deposition the party must give notice  
12 as required in subsections A and C of Section  
13 3230 of this title, and
- 14 (3) in addition to taking the depositions of expert  
15 witnesses the party may, through interrogatories,  
16 require the party who expects to call the expert  
17 witnesses to state the subject matter on which  
18 each expert witness is expected to testify; the  
19 substance of the facts and opinions to which the  
20 expert is expected to testify and a summary of  
21 the grounds for each opinion; the qualifications  
22 of each expert witness, including a list of all  
23 publications authored by the expert witness  
24 within the preceding ten (10) years; the

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

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

- 18 (1) relate to compensation for the expert's study or  
19 testimony,  
20 (2) identify facts or data that the party's attorney  
21 provided and that the expert considered in  
22 forming the opinions to be expressed, or  
23  
24

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  
24

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,  
23  
24

- 1           b.    that the discovery may be had only on specified terms  
2                    and conditions, including a designation of the time or  
3                    place,  
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  
24

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 H. PRESERVATION.

19 1. DUTY TO PRESERVE. Unless otherwise ordered by the court,  
20 preservation of documents, intangible items and electronically-  
21 stored information is limited to matters that would enable a party  
22 to prove or disprove a claim or defense, and shall comport with the  
23 proportionality assessment required by paragraph 2 of subsection B  
24 of this section. All preservation is subject to the limitations

1 imposed by paragraph 2 of subsection B of this section. The court  
2 may specify conditions for preservation.

3 2. SPECIFIC LIMITATIONS ON ELECTRONICALLY-STORED INFORMATION.

4 Absent court order demonstrating that the requesting party has (a) a  
5 substantial need for discovery of the electronically-stored  
6 information requested and (b) preservation is subject to the  
7 limitations of paragraph 1 of this subsection, a party need not  
8 preserve the following categories of electronically-stored  
9 information:

- 10 a. deleted, slack, fragmented or other data only  
11 accessible by forensics,
- 12 b. random access memory (RAM), temp files or other  
13 ephemeral data that is difficult to preserve without  
14 disabling the operating system,
- 15 c. online access data such as temporary internet files,  
16 history, cache, cookies and the like,
- 17 d. data in metadata fields that are frequently updated  
18 automatically, such as last-opened dates,
- 19 e. information whose retrieval cannot be accomplished  
20 without substantial additional programming, or without  
21 transferring it into another form before search and  
22 retrieval can be achieved,
- 23 f. backup data that is substantially duplicative of data  
24 that is more accessible elsewhere,

- 1           g. physically-damaged media,  
2           h. legacy data remaining from obsolete systems that is  
3           unintelligible on successor systems, or  
4           i. any other data that is not available to the producing  
5           party in the ordinary course of business.

6           I. DISCOVERY COST ALLOCATION. A party submitting a request for  
7 discovery is required to pay the reasonable costs incurred by a  
8 party responding to a discovery request.

9           1. Such costs include the costs of preserving, collecting,  
10 reviewing and producing electronic and paper documents, producing  
11 witnesses for deposition and responding to interrogatories.

12           2. Each party is responsible for its own costs related to  
13 responding to initial disclosure requirements under Section 3226 of  
14 this title.

15           3. Nonparties responding to subpoenas under Section 2004.1 of  
16 this title shall be entitled to recovery of reasonable costs  
17 associated with compliance with the subpoena.

18           4. The costs described in paragraphs 1 and 3 of this subsection  
19 shall be considered taxable costs.

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

22           Section 3234. A. SCOPE. Any party may serve on any other  
23 party a request:  
24



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

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

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

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

15           3. The request:

- 16           a. shall set forth and describe with reasonable  
17           particularity the items to be inspected either by  
18           individual item or by category,  
19           b. unless otherwise stipulated or ordered by the court,  
20           shall be limited in a manner consistent with  
21           subsection B of Section 3226 of this title, to:  
22           (1) a reasonable number of requests, not to exceed  
23           twenty-five, including all discrete subparts,  
24

1           (2) a reasonable time period of not more than two  
2                           years prior to the filing date of the complaint,

3                           and

4           (3) a reasonable number of custodial or other  
5                           information sources for production, not to exceed  
6                           ten,

7       c. shall specify a reasonable time, place and manner of  
8           making the inspection and performing the related acts,  
9           and

10       ~~e.~~ d. may specify the form or forms in which  
11           ~~electronically stored~~ electronically-stored  
12           information is to be produced.

13       4. a. The party, upon whom the request is served, shall  
14           serve a written response within thirty (30) days after  
15           the service of the request, except that a defendant  
16           may serve a response within forty-five (45) days after  
17           service of the summons and petition upon that  
18           defendant. The court may allow a shorter or longer  
19           time.

20       b. The response shall state, with respect to each item or  
21           category, that inspection and related activities shall  
22           be permitted as requested, ~~unless~~ or state with  
23           specificity the grounds for objecting to the request  
24           ~~is objected to~~, in which event the reasons for

1 objection shall be stated. If objection is made to  
2 part of an item or category, the part shall be  
3 specified and inspection permitted of the remaining  
4 parts. The responding party may state that it will  
5 produce copies of documents or of electronically-  
6 stored information instead of permitting inspection.  
7 The production shall then be completed no later than  
8 the time for inspection specified in the request or  
9 another reasonable time specified in the request or  
10 the response.

11 c. If objection is made to the requested form or forms  
12 for producing ~~electronically stored~~ electronically-  
13 stored information, or if no form was specified in the  
14 request, the responding party shall state the form or  
15 forms it intends to use.

16 d. The party submitting the request may move for an order  
17 under subsection A of Section 3237 of this title with  
18 respect to any objection to or other failure to  
19 respond to the request or any part thereof, or any  
20 failure to permit inspection as requested.

21 5. Unless the parties otherwise agree, or the court otherwise  
22 orders:

23 a. a party who produces documents for inspection shall  
24 produce them as they are kept in the usual course of

1 business or shall organize and label them to  
2 correspond with the categories in the request,

3 b. if a request does not specify the form or forms for  
4 producing ~~electronically stored~~ electronically-stored  
5 information, a responding party shall produce the  
6 information in a form or forms in which it is  
7 ordinarily maintained or in a form or forms that are  
8 reasonably usable, and

9 c. a party is not required to produce the same  
10 ~~electronically stored~~ electronically-stored  
11 information in more than one form.

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

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

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

21 1. APPROPRIATE COURT. An application for an order to a party  
22 may be made to the court in which the action is pending, or, on  
23 matters, relating to a deposition, to the district court in the  
24 county where the deposition is being taken. An application for an

1 order to a deponent who is not a party shall be made to the district  
2 court in the county where the deposition is being taken or to the  
3 court in which the action is pending.

4 2. MOTION. If a deponent fails to answer a question propounded  
5 or submitted under Section 3230 or 3231 of this title, or a  
6 corporation or other entity fails to make a designation under  
7 paragraph 6 of subsection C of Section 3230 or subsection A of  
8 Section 3231 of this title, or a party fails to answer an  
9 interrogatory submitted under Section 3233 of this title, or if a  
10 party, in response to a request for inspection and copying submitted  
11 under Section 3234 of this title, fails to produce documents or  
12 fails to respond that the inspection or copying will be permitted as  
13 requested or fails to permit the inspection or copying as requested,  
14 or if a party or witness objects to the inspection or copying of any  
15 materials designated in a subpoena issued pursuant to subsection A  
16 of Section 2004.1 of this title, the discovering party may move for  
17 an order compelling an answer, or a designation, or an order  
18 compelling inspection and copying in accordance with the request or  
19 subpoena. The motion must include a statement that the movant has  
20 in good faith conferred or attempted to confer either in person or  
21 by telephone with the person or party failing to make the discovery  
22 in an effort to secure the information or material without court  
23 action. When taking a deposition on oral examination, the proponent

24

1 of the question may complete or adjourn the examination before  
2 applying for an order.

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

- 13           a. the author or authors,
- 14           b. the recipient or recipients,
- 15           c. its origination date,
- 16           d. its length,
- 17           e. the nature of the document or its intended purpose,
- 18           and
- 19           f. the basis for the objection.

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

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

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

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

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

22           B.   FAILURE TO COMPLY WITH ORDER.

23           1.   SANCTIONS BY COURT IN COUNTY WHERE DEPOSITION IS TAKEN.   If  
24 a deponent fails to be sworn or to answer a question after being



1 directed to do so by the court in the county in which the deposition  
2 is being taken, the failure may be considered a contempt of that  
3 court.

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

- 14 a. An order that the matters regarding which the order  
15 was made or any other designated facts shall be taken  
16 to be established for the purposes of the action in  
17 accordance with the claim of the party obtaining the  
18 order,
- 19 b. An order refusing to allow the disobedient party to  
20 support or oppose designated claims or defenses, or  
21 prohibiting him from introducing designated matters in  
22 evidence,
- 23 c. An order striking out pleadings or parts thereof, or  
24 staying further proceedings until the order is obeyed,

1 or dismissing the action or proceedings or any part  
2 thereof, or rendering a judgment by default against  
3 the disobedient party,

4 d. In lieu of or in addition to the orders provided for  
5 in subparagraphs a through c of this paragraph, an  
6 order treating as a contempt of court the failure to  
7 obey any orders except an order to submit to a  
8 physical or mental examination,

9 e. Where a party has failed to comply with an order under  
10 subsection A of Section 3235 of this title requiring  
11 him to produce another for examination, such orders as  
12 are listed in subparagraphs a, b and c of this  
13 paragraph, unless the party failing to comply shows  
14 that he is unable to produce such person for  
15 examination,

16 f. If a person, not a party, fails to obey an order  
17 entered under subsection C of Section 3234 of this  
18 title, the court may treat the failure to obey the  
19 order as contempt of court.

20 In lieu of or in addition to the orders provided for in this  
21 paragraph, the court shall require the party failing to obey the  
22 order or the attorney advising the party or both to pay the  
23 reasonable expenses, including attorney fees, caused by the failure,  
24

1 unless the court finds that the failure was substantially justified  
2 or that other circumstances make an award of expenses unjust.

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

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

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

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

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

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

23 E. FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWER  
24 TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION. If a party

1 or an officer, director or managing agent of a party or a person  
2 designated under paragraph 6 of subsection C of Section 3230 or  
3 subsection A of Section 3231 of this title to testify on behalf of a  
4 party fails:

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

7 2. To serve answers or objections to interrogatories submitted  
8 under Section 3233 of this title, after proper service of the  
9 interrogatories; or

10 3. To serve a written response to a request for inspection  
11 submitted under Section 3234 of this title, after proper service of  
12 the request;

13 the court in which the action is pending on motion may make such  
14 orders in regard to the failure as are just, and among others it may  
15 take any action authorized under subparagraphs a, b and c of  
16 paragraph 2 of subsection B of this section. In lieu of or in  
17 addition to any order, the court shall require the party failing to  
18 act or the attorney advising him or her or both to pay the  
19 reasonable expenses, including attorney fees, caused by the failure,  
20 unless the court finds that the failure was substantially justified  
21 or that other circumstances make an award of expenses unjust.

22 The failure to act as described in this subsection may not be  
23 excused on the ground that the discovery sought is objectionable

24

1 unless the party failing to act has applied for a protective order  
2 as provided by subsection C of Section 3226 of this title.

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

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

10 G. ~~ELECTRONICALLY STORED~~ ELECTRONICALLY-STORED INFORMATION.

11 Absent ~~exceptional circumstances~~ willful destruction, a court may  
12 not impose sanctions on a party for failure to provide  
13 ~~electronically stored~~ relevant electronically-stored information  
14 ~~lost as a result of the routine, good-faith operation of an~~  
15 ~~electronic information system~~ for the purpose of preventing its use  
16 in litigation.

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

18  
19 56-1-1322 TEK 1/18/2017 8:09:17 PM  
20  
21  
22  
23  
24