

1 STATE OF OKLAHOMA

2 1st Session of the 53rd Legislature (2011)

3 COMMITTEE SUBSTITUTE  
4 FOR

5 SENATE BILL 941

6 By: Anderson

7 COMMITTEE SUBSTITUTE

8 An Act relating to discovery procedure; amending 12  
9 O.S. 2001, Section 3226, as last amended by Section  
10 4, Chapter 50, O.S.L. 2010 (12 O.S. Supp. 2010,  
11 Section 3226), which relates to general provisions  
12 governing discovery; modifying procedures for  
13 discovery of certain trial preparation materials; and  
14 providing an effective date.

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

16 SECTION 1. AMENDATORY 12 O.S. 2001, Section 3226, as  
17 last amended by Section 4, Chapter 50, O.S.L. 2010 (12 O.S. Supp.  
18 2010, Section 3226), is amended to read as follows:

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

20 1. DISCOVERY METHODS. Parties may obtain discovery by one or  
21 more of the following methods: Depositions upon oral examination or  
22 written questions; written interrogatories; production of documents  
23 or things or permission to enter upon land or other property, for  
24 inspection and other purposes; physical and mental examinations; and  
requests for admission. Except as provided in this section or

1 unless the court orders otherwise under this section, the frequency  
2 of use of these methods is not limited.

3 2. INITIAL DISCLOSURES.

4 a. Except in categories of proceedings specified in  
5 subparagraph b of this paragraph, or to the extent  
6 otherwise stipulated or directed by order, a party,  
7 without awaiting a discovery request, shall provide to  
8 other parties a computation of any category of damages  
9 claimed by the disclosing party, making available for  
10 inspection and copying the documents or other  
11 evidentiary material, not privileged or protected from  
12 disclosure, on which such computation is based,  
13 including materials bearing on the nature and extent  
14 of injuries suffered.

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

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

24

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

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

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.

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  
24 limitations of subparagraph c of paragraph 2 of

1 subsection B of this section. The court may specify  
2 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.

19 3. TRIAL PREPARATION: MATERIALS. ~~Subject to the provisions of~~  
20 ~~paragraph 4 of this subsection, discovery may be obtained of~~

21 a. Unless as provided by paragraph 4 of this subsection,  
22 a party may not discover documents and tangible things  
23 ~~otherwise discoverable under paragraph 1 of this~~  
24 ~~subsection and~~ that are prepared in anticipation of

1 litigation or for trial by or for another party or by  
2 ~~or for the its representative of that other party,~~  
3 including ~~his~~ the other party's attorney, consultant,  
4 surety, indemnitor, ~~only upon a showing that insurer~~  
5 ~~or agent.~~ Subject to paragraph 4 of this subsection,  
6 such materials may be discovered if:

7 (1) they are otherwise discoverable under paragraph 1  
8 of this subsection, and

9 (2) the party ~~seeking discovery~~ shows that it has  
10 substantial need ~~of~~ for the materials ~~in the~~  
11 ~~preparation of his case and that he is unable to~~  
12 ~~prepare its case and cannot,~~ without undue  
13 hardship, ~~to~~ obtain ~~the~~ their substantial  
14 equivalent ~~of the materials~~ by other means. ~~In~~  
15 ordering

16 b. If the court orders discovery of such materials ~~when~~  
17 ~~the required showing has been made,~~ the court shall  
18 protect against disclosure of the mental impressions,  
19 conclusions, opinions or legal theories of ~~an~~ a  
20 party's attorney or other representative ~~of a party~~  
21 concerning the litigation.

22 c. A party or other person may ~~obtain,~~ upon request and  
23 without the required showing, ~~provided for in this~~  
24 ~~paragraph,~~ obtain the person's own previous

1 statement ~~concerning about~~ the action or its subject  
2 matter ~~previously made by that party. Upon request, a~~  
3 ~~person not a party may obtain without the required~~  
4 ~~showing a statement concerning the action or its~~  
5 ~~subject matter previously made by that person. If the~~  
6 request is refused, the person may move for a court  
7 order.—~~The, and the~~ provisions of paragraph 4 of  
8 subsection A of Section 3237 of this title apply to  
9 the award of expenses ~~incurred in relation to the~~  
10 motion. ~~For purposes of this paragraph, a~~ A previous  
11 statement ~~previously made~~ is either:

- 12 a. (1) a written statement that the person has  
13 signed or otherwise adopted or approved ~~by the~~  
14 ~~person making it, or~~
- 15 b. (2) a contemporaneous stenographic, mechanical,  
16 electrical, or other recording, or a  
17 transcription thereof, which ~~substantially~~  
18 recites ~~an~~ substantially verbatim the person's  
19 oral statement ~~by the person making it and~~  
20 ~~contemporaneously recorded.~~

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. ~~If any documents are~~  
16 ~~provided to such disclosed expert witnesses, the~~  
17 ~~documents shall not be protected from disclosure~~  
18 ~~by privilege or work product protection and they~~  
19 ~~may be obtained through discovery.~~

20 (3) In addition to taking the depositions of expert  
21 witnesses the party may, through interrogatories,  
22 require the party who expects to call the expert  
23 witnesses to state the subject matter on which  
24 each expert witness is expected to testify; the

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

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

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

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

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

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

21           e.

22           d. Unless manifest injustice would result:

23           (1) The court shall require that the party seeking  
24           discovery pay the expert a reasonable fee for

1 time spent in responding to discovery under  
2 division (2) of subparagraph a of this paragraph  
3 and subparagraph ~~b~~ c of this paragraph.

4 (2) The court shall require that the party seeking  
5 discovery with respect to discovery obtained  
6 under subparagraph ~~b~~ c of this paragraph, pay the  
7 other party a fair portion of the fees and  
8 expenses reasonably incurred by the latter party  
9 in obtaining facts and opinions from the expert.

10 5. CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL PREPARATION

11 MATERIALS.

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

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

17 C. PROTECTIVE ORDERS.

18 1. Upon motion by a party or by the person from whom discovery  
19 is sought, accompanied by a certification that the movant has in  
20 good faith conferred or attempted to confer, either in person or by  
21 telephone, with other affected parties in an effort to resolve the  
22 dispute without court action, and for good cause shown, the court in  
23 which the action is pending or on matters relating to a deposition,  
24 the district court in the county where the deposition is to be taken

1 may enter any order which justice requires to protect a party or  
2 person from annoyance, harassment, embarrassment, oppression or  
3 undue delay, burden or expense, including one or more of the  
4 following:

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

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

- 9           a. a statement that the court has determined it is  
10           necessary in the interests of justice to remove the  
11           material from the public record,
- 12           b. specific identification of the material which is to be  
13           removed or withdrawn from the public record, or which  
14           is to be filed but not placed in the public record,  
15           and
- 16           c. a requirement that any party obtaining a protective  
17           order place the protected material in a sealed manila  
18           envelope clearly marked with the caption and case  
19           number and is clearly marked with the word  
20           "CONFIDENTIAL", and stating the date the order was  
21           entered and the name of the judge entering the order;

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; and

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 court upon  
21 motion, for the convenience of parties and witnesses and in the  
22 interests of justice, orders otherwise, methods of discovery may be  
23 used in any sequence. The fact that a party is conducting  
24

1 discovery, whether by deposition or otherwise, shall not operate to  
2 delay discovery by any 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 SECTION 2. This act shall become effective November 1, 2011.

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