SENATE FLOOR VERSION
March 1, 2011

COMMITTEE SUBSTITUTE
FOR
SENATE BILL NO. 941 By: Anderson of the Senate

and

Grau of the House

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

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

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

Section 3226. A. DISCOVERY METHODS; INITIAL DISCLOSURES.

1. DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and

requests for admission. Except as provided in this section or unless the court orders otherwise under this section, the frequency of use of these methods is not limited.

2. INITIAL DISCLOSURES.

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

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

(1) an action for review of an administrative record,

(2) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence,

(3) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision,

(4) an action to enforce or quash an administrative summons or subpoena,

(5) an action by the United States to recover benefit payments,

(6) an action by the United States to collect on a student loan guaranteed by the United States,

(7) a proceeding ancillary to proceedings in other courts, and

(8) an action to enforce an arbitration award.

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

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

1. IN GENERAL.

a. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any documents, electronically stored information or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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

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

2. LIMITATIONS ON FREQUENCY AND EXTENT.

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

b. A party is not required to provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of subparagraph c of paragraph 2 of

subsection B of this section. The court may specify conditions for the discovery.

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

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

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

(3) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

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

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

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

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

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

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

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

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

~~a.~~ (1) a written statement that the person has signed or otherwise adopted or approved ~~by the person making it~~, or

~~b.~~ (2) a contemporaneous stenographic, mechanical, electrical, or other recording, or a transcription thereof, which ~~substantially~~ recites ~~an~~ substantially verbatim the person's oral statement ~~by the person making it and contemporaneously recorded~~.

4. TRIAL PREPARATION: EXPERTS.

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

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

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

(2) After disclosure of the names and addresses of the expert witnesses, the other party expects to call as witnesses, the party, who has requested disclosure, may depose any such expert witnesses subject to scope of this section. Prior to taking the deposition the party must give notice as required in subsections A and C of Section 3230 of this title. ~~If any documents are provided to such disclosed expert witnesses, the documents shall not be protected from disclosure by privilege or work product protection and they may be obtained through discovery.~~

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

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

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

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

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

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

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

~~c.~~

d. Unless manifest injustice would result:

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

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

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

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

a. When a party withholds information otherwise discoverable under the Oklahoma Discovery Code by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

b. If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may

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

C. PROTECTIVE ORDERS.

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

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

a. that the discovery not be had,

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

c. that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery,

d. that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters,

e. that discovery be conducted with no one present except persons designated by the court,

f. that a deposition after being sealed be opened only by order of the court,

g. that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way, and

h. that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

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

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

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

c. a requirement that any party obtaining a protective order place the protected material in a sealed manila envelope clearly marked with the caption and case number and is clearly marked with the word "CONFIDENTIAL", and stating the date the order was entered and the name of the judge entering the order;

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

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

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

6. Counsel for the respective parties shall be responsible for informing witnesses, as necessary, of the contents of the protective order; and

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

D. SEQUENCE AND TIMING OF DISCOVERY. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence. The fact that a party is conducting

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

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

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

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

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

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

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

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

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

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

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

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

2. A proposed plan and schedule of discovery;

3. Any limitations proposed to be placed on discovery;

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

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

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

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

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

G. SIGNING OF DISCOVERY REQUESTS, RESPONSES AND OBJECTIONS. Every request for discovery, response or objection thereto made by a party represented by an attorney shall be signed by at least one of the party's attorneys of record in the party's individual name whose address shall be stated. A party who is not represented by an attorney shall sign the request, response or objection and state the party's address. The signature of the attorney or party constitutes a certification that the party has read the request, response or objection, and that it is:

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

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

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

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

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

SECTION 2. This act shall become effective November 1, 2011.

COMMITTEE REPORT BY: COMMITTEE ON RULES, dated 2-23-11 - DO PASS, As Amended and Coauthored.