

The Oklahoma Discovery Code
An Overview

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I. Sources of Discovery Law

Title 12 O.S. § 3224-3237 (the “Oklahoma Discovery Code”) governs discovery in all civil cases in Oklahoma state courts¹. Discovery in criminal cases is covered separately in Title 22². Although not part of the Oklahoma Discovery Code, counsel should also become familiar with Title 12 O.S. § 2004.1, which governs the use of subpoenas, an important discovery tool for obtaining materials and information from non-parties.

While there are significant distinctions between the Oklahoma Discovery Code and federal discovery procedures, Oklahoma’s discovery statutes are based on federal law. Therefore, Oklahoma state courts may use federal interpretation as a guide when dealing with provisions of the state discovery law that have a federal counterpart³. For this reason, it is common, and appropriate, for litigants in state court to cite to federal decisions when dealing with discovery issues.

II. The Purpose of Discovery and the Responsibilities of Counsel

“The aim of these discovery rules is to make trial less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent⁴.”

Trials are not to be conducted in the dark. The purpose of discovery is to obtain the fullest possible knowledge of the issues and facts before trial. To this end, the Oklahoma Discovery Code

¹ 12 O.S. § 3224

² 22 O.S. § 2001-2002 (“Oklahoma Criminal Discovery Code”)

³ *Hotels, Inc. v. Kampar Corp.*, Okla. Civ. App. Div. 2, 964 P.2d 933 (1988), rehearing denied, certiorari denied; *Unit Petroleum Co. v. Nuex Corp.*, 1991 OK 21 ¶¶ 5-9, 807 P.2d 251,252-253; *Warner v. Hillcrest Med. Ctr.*, 1995 OK CIV APP 123 ¶ 8, 914 P.2d 1060,1064.

⁴ *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir. 1978)

provides that it should be liberally construed to provide the just, speedy and inexpensive determination of every action⁵.

Discovery procedures are designed to work without court involvement. In fact, it is primarily the responsibility of counsel to ensure that the discovery process achieves its purpose of allowing litigants to obtain the fullest possible knowledge of the issues and facts before trial. The Oklahoma Discovery Code makes it clear that counsel bear significant responsibility for the behavior of their clients in the discovery process. The Code requires that every request for discovery, response or objection by a party represented by an attorney be signed by at least one of the party's attorneys of record in his or her *individual* name⁶. By her signature, counsel is certifying that he or she has read the request, response or objection, and that it is:

1. To the best of her 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 law⁷;

2. Interposed in good faith and not primarily to cause delay or for any other improper purpose⁸; 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 litigation⁹.

⁵ 12 O.S. § 3225

⁶ 12 O.S. § 3226(G)

⁷ 12 O.S. § 3226(G)(1)

⁸ 12 O.S. § 3226(G)(2)

⁹ 12 O.S. § 3226(G)(3)

III. The Scope of Discovery

The admissibility of the material or information sought in discovery is not a factor when determining if the material or information is discoverable¹⁰. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action¹¹. The phrase “relevant to the subject matter” should be liberally construed as encompassing any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be involved in the case¹².

While “relevancy” is intended to be construed broadly, it does have its limits. The courts will generally protect a party from discovery that appears to be aimed more at annoyance, embarrassment, oppression, or undue burden or expense than at obtaining material truly “relevant” to the case. In determining what is “relevant” in a particular case, the court can consider the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation¹³. The trial court is accorded broad discretion in deciding such discovery matters and its decision will only be overturned if it is contrary to law or an abuse of its broad discretion¹⁴.

IV. Privileges and Work Product Doctrine

Oklahoma recognizes several qualified privileges that permit a party or non-party to refuse to disclose certain matters, objects or writings. These privileges include, but are not limited to, the following: attorney-client privilege¹⁵, physician and psychotherapist-patient privilege¹⁶, husband-

¹⁰ 12 O.S. § 3226(B)(1)

¹¹ *Id.*

¹² *Puerto Rico Aqueduct & Sewer Auth. V. Clow Corp.*, 108 F.R.D. 304, 311 (D.P.R. 1985); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978).

¹³ *Wigler v. Electronic Data Sys. Corp.*, 108 F.R.D. 204, 206 (D.Md. 1985).

¹⁴ *Bank of Oklahoma, N.A. v. Briscoe*, 1995 OK CIV APP 156, ¶ 27, 911 P.2d 311, 318

¹⁵ 12 O.S. § 2502

¹⁶ 12 O.S. § 2503

wife privilege¹⁷, religious privilege¹⁸, newsman's privilege¹⁹, trade secrets privilege²⁰, and the privilege against self-incrimination²¹.

The Work Product Doctrine, often incorrectly thought to be synonymous with the attorney-client privilege, protects from disclosure certain things prepared in anticipation of litigation or trial and certain thoughts and theories formed in connection with the case. The Work Product Doctrine applies to two different categories of "work product." The first category is "ordinary work product," which includes things prepared in anticipation of litigation or for trial by or for a party or a representative of a party, including the party's attorney, consultant, surety, and indemnitor²². An example of "ordinary work product" could include a report from an internal investigation. "Ordinary work product" is discoverable only upon a showing of substantial need for the materials and inability, without undue hardship, to obtain substantially equivalent materials by other means²³. Whether or not something has been prepared "in anticipation of litigation," and thus entitled to protection from disclosure as work product, is a matter of fact and is case specific. The determination will normally depend upon the primary motivating purpose behind creation of materials²⁴. If litigation is not imminent at the time the materials are created, they may still be considered "work product" if created primarily to aid in possible future litigation²⁵.

The second category of work product is "opinion work product." This category of work product consists of the mental impressions, conclusions, opinions or legal theories, including trial

¹⁷ 12 O.S. § 2504

¹⁸ 12 O.S. § 2505

¹⁹ 12 O.S. § 2506

²⁰ 12 O.S. § 2508

²¹ 5th Amendment, U.S. Constitution

²² 12 O.S. § 3226(B)(2)

²³ *Id.*; *Ellison v. Gray*, 1985 OK 35, 702 P.2d 360, 363 (1985)

²⁴ *Heffron v. District Court of Oklahoma County*, 77 P.3d 1069 (2003)

²⁵ *Id.*

strategies, theories, and inferences drawn from the research and investigative efforts of counsel²⁶. “Opinion work product” is only discoverable upon a showing of “exclusivity of relevant knowledge within control of counsel which has been placed in issue by the party who seeks to prevent disclosure²⁷.”

Neither the Work Product Doctrine nor claims of privilege apply to documents provided to a disclosed expert witness²⁸. If expert witnesses are being used, counsel must keep in mind that by providing documents to an expert witness, they are subjecting the materials to disclosure through discovery. In addition, the Work Product Doctrine does not apply to certain statements of parties and non-parties made concerning the action or its subject matter²⁹. The party or non-party making the statement can generally obtain it from another party even if the party possessing the statement considers it their “work product.”

The party objecting to discovery based on a privilege has the burden of raising the objection and of establishing the existence of the privilege³⁰. A party claiming an exemption from discovery must make the claim expressly and describe the nature of the materials or information in a manner that will enable the other parties to assess the applicability of the claimed privilege or protection³¹. The purpose of requiring that withheld materials or information be described is to reduce the need for in camera examination of documents. Failure to make a claim expressly and to describe the nature of the materials or information withheld is sanctionable and may be viewed as a waiver of the privilege or protection³².

²⁶ 12 O.S. § 3226(B)(2); *Ellison* at 363

²⁷ *Ellison* at 366-67; *Scott v. Peterson*, 126 P.3d 1232 (2005)

²⁸ 12 O.S. § 3225(B)(3)(a)(2)

²⁹ 12 O.S. § 3225(B)(2)

³⁰ *Hall v. Goodwin*, 775 P.2d 291 (1989)

³¹ 12 O.S. 3226(B)(4)

V. Methods of Discovery

A. Depositions

Depositions may be taken orally or through the use of written questions. Of the two methods, oral depositions are far more common. Deposition transcripts may be used to perpetuate testimony, for impeachment, or as an alternative to presenting live testimony from certain witnesses, including witnesses that are unavailable due to death or illness, witnesses that do not reside in the country where the trial is taking place, and witnesses beyond the subpoena power of the court³³.

It is customary for the examining attorney to coordinate with the other parties to arrange deposition schedules. Absent agreement or court order, a deposition can not be taken within 30 days of service of the summons and petition on any defendant in the case³⁴, must be held between 8:00 A.M. and 5:00 P.M. on weekdays other than a holiday, and may not last more than six hours³⁵. Parties may be compelled to attend a deposition upon notice from an opposing party. Non-party witnesses may be compelled to attend a deposition by subpoena³⁶. Notice of a deposition must be served on all parties at such a time to provide the party sufficient travel time to attend the deposition plus 3 days for preparation, exclusive of the day of service³⁷. In the case of a party, the 30-day response time granted to respond to a request for production of documents cannot be subverted by scheduling a deposition prior to the expiration of the 30-day period and requesting that the party bring certain documents to the deposition³⁸.

³² 12 O.S. 3237; *In re Aircrash Disaster Near Roselawn, Ind.*, Oct. 31, 1994, 172 F.R.D. 295, 307 (N.D. Ill. 1997); *Burns v. Imagine Films Entertainment, Inc.*, 164 F.R.D. 589, 594 (W.D.N.Y. 1996)

³³ 12 O.S. § 3232

³⁴ 12 O.S. § 3230(A)(2)(a)(2)

³⁵ 12 O.S. § 3230(A)(3)

³⁶ 12 O.S. § 3230(A)(1); 12 O.S. § 2004.1

³⁷ 12 O.S. § 3230(C)(1)

³⁸ 12 O.S. § 3230(C)(5)

Witnesses may be compelled to attend a deposition in the county where the witness resides or an adjoining county, or the county where the notice or subpoena was served³⁹. In addition, parties may be deposed in the county where the action is pending⁴⁰. It is customary, however, to permit represented parties to be deposed at the office of their counsel. Non-party witnesses must be paid witness and travel fees to attend a deposition⁴¹. If a non-party witness resides outside of Oklahoma, counsel will need to check the laws of the state where the witness is located for guidance on compelling the witness' attendance at the deposition. It may be appropriate in some circumstances to consider questioning by telephone as an alternative for questioning an out-of-town witness⁴².

The handling of experts in discovery requires some special attention from counsel. An expert that is going to be a trial witness can be deposed once they are disclosed by the sponsoring party⁴³. In contrast to federal discovery practice, disclosure of testifying experts is not automatic under Oklahoma law. Therefore, it is necessary to ask an opposing party, normally through the use of interrogatories, to identify any expert witness that they intend to present at trial. It is also important to understand that the party seeking discovery from an expert witness (including through deposition) is responsible for paying the expert witness a reasonable fee for their time in responding to discovery⁴⁴. Facts known by or opinions held by non-testifying experts (i.e., consulting experts) are generally not subject to discovery absent exceptional circumstances⁴⁵.

³⁹ 12 O.S. § 3230(B)(1)

⁴⁰ 12 O.S. § 3230(B)(2)

⁴¹ 12 O.S. § 3230(I)

⁴² 12 O.S. § 3230(C)(6)

⁴³ 12 O.S. § 3226(B)(3)(a)(2)

⁴⁴ 12 O.S. § 3226(B)(3)(c)

⁴⁵ 12 O.S. 3225(B)(3)(b); *In re Shell Refinery* 132 F.R.D. 437, 442 (E.D.La. 1990)

Examination and cross-examination of witnesses during a deposition should proceed as permitted at trial⁴⁶. However, the Oklahoma Discovery Code has been designed to permit the taking of depositions without having the questions and answers interrupted unnecessarily to deal with objections. To this end, most objections, including those involving the competency of witness and the competency, relevancy or materiality of testimony, are considered reserved until trial⁴⁷. As such, it is not necessary to make objections on those grounds during the conduct of a deposition. Certain objections, however, should be made during the deposition or they will be waived. Objections that are waived if not made are those involving the qualifications of the court reporter, irregularities in the manner of the examination, form of the questions or answers, conduct of the parties, or any errors which might be obviated, removed or cured if promptly presented⁴⁸. Privilege and the protections of the Work Product Doctrine are also waived if not made during the deposition.

When an objection is made, it must be stated concisely and in a non-argumentative and non-suggestive manner⁴⁹. A witness may be instructed not to answer a question only to preserve a privilege or work product, to enforce a previous court order, or to move for an order to protect the deponent from bad faith, annoyance, harassment, embarrassment, or oppression. In all other cases, the appropriate objection should be made and noted by the court reporter, but the testimony should proceed and be taken subject to the objection⁵⁰.

Court reporters will routinely ask counsel prior to the start of a deposition if the “usual stipulations” apply. Counsel are cautioned against agreeing to the “usual stipulations” unless they have a clear understanding, as outlined on the record, what the “usual stipulations”

⁴⁶ 12 O.S. § 3230(D)

⁴⁷ 12 O.S. § 3232(D)(3)(a)

⁴⁸ 12 O.S. § 3232(D)(3)(b)

⁴⁹ 12 O.S. § 3230(E)

consist of. It is a better practice to simply state that the deposition is being taken in accordance with the provisions of the Oklahoma Discovery Code. This will avoid the potential for a later disagreement over what a party believed they were agreeing to by consenting to the “usual stipulations.” It is also advisable to always serve a subpoena on non-party witnesses, even if they have agreed to appear for a deposition by consent. Failure to serve a non-party witness with a deposition subpoena could subject the questioning party to the other parties’ expenses incurred to attend the deposition, including attorney fees, should the non-party witness fail to appear for the deposition⁵¹. Counsel should also keep in mind that each witness may only be deposed once absent agreement or court order to the contrary. Finally, the use of video deposition technology, while somewhat costly, can be worth the added expense depending on the issues in the case and the role of the witness being deposed⁵².

B. Interrogatories

Unlike depositions, interrogatories are used only between parties. Interrogatories may be served upon the plaintiff after the commencement of the action and upon any other party with the summons and petition, or anytime thereafter⁵³. Absent agreement or court order, parties are limited to serving 30 interrogatories on each party⁵⁴. Subparts of an interrogatory are considered separate interrogatories, but interrogatories inquiring as to the names and locations of witnesses, or the existence, location and custodian of documents or physical evidence are considered one interrogatory for the purpose of the 30 interrogatory limit⁵⁵.

⁵⁰ 12 O.S. § 3230(D)

⁵¹ 12 O.S. § 3230(H)(2)

⁵² 12 O.S. § 3230(C)(4)

⁵³ 12 O.S. § 3233(A)

⁵⁴ *Id.*

⁵⁵ *Id.*

Answers or objections are due 30 days after service of the interrogatories, unless they are served with the summons and petition, in which case answers or objections are due 45 days after service⁵⁶. Objections not timely made are waived⁵⁷. Unless objected to, each interrogatory must be answered separately and fully in writing under oath⁵⁸. If an interrogatory is objected to, the objection must be stated with specificity and the interrogatory must still be answered to the extent it is not objectionable⁵⁹. The purpose of interrogatories is to narrow the issues and ascertain the facts relevant to a case. To achieve that purpose, answers to interrogatories must be candid, responsive, full, complete and not evasive⁶⁰ and an evasive or incomplete answer is to be treated as a failure to answer⁶¹.

Despite the requirement to answer interrogatories fully, completely and with candor, a party is only required to answer with information within her basic knowledge and she is not required to provide answers to overly burdensome interrogatories⁶². In determining what interrogatories are overly burdensome, the court will balance the burden on the party required to produce answers against the benefit to the party requesting the information⁶³. A party is not required to do research or compile data or information not readily known to the party⁶⁴. However, the answering party cannot limit her answers to matters within her own knowledge and ignore information immediately available to her or under her control. If an answer to an interrogatory can be found in business records and the burden of deriving or ascertaining the answer is substantially

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Miller v. Doctor's General Hospital*, 76 F.R.D. 136,139-140 (W.D. Okl. 1977); *Dollar v. Long Mfg.*, 561 F.2d 613, 616 (5th Cir. 1977); *West v. Cajun's Wharf, Inc.*, 1998 OK 92 ¶ 13, 770 P.2d 558, 562

⁶¹ 12 O.S. § 3237(A)(3)

⁶² 12 O.S. § 3226(C)

⁶³ *Hoffman v. United Telecommunications, Inc.*, 117 F.R.D. 436, 438 (D. Kan. 1987)

⁶⁴ *Coca Cola Co. v. Dixi-Cola Laboratories*, 30 F.Supp. 275, 278 (D. Md. 1939); *O'Brien v. Equitably Life Assur. Soc.*, 13 F.R.D. 475, 476 (W.D. Mo. 1953)

the same for the party serving the interrogatory as the party served, it is sufficient to give the requesting party the opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries thereof⁶⁵.

If the answering party lacks necessary information to make a full, fair and specific answer to an interrogatory, she should set forth in detail the efforts made to obtain the information⁶⁶. A party will not be required to answer hypothetical questions (i.e., legal question unconnected to the facts of the case at bar)⁶⁷ or provide information that is equally available to the party requesting it (e.g., public records)⁶⁸. However, that an answer involves an opinion or contention that relates to facts or the application of law to facts is not a valid objection⁶⁹.

In almost every case, counsel should serve an interrogatory concerning expert witnesses. Parties are required to respond to an interrogatory inquiring into the following matters regarding their expert witnesses⁷⁰:

1. The identity and contact information of each expert witness expected to testify;
2. The subject matter on which each expert witness is expected to testify;
3. The substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion;
4. The qualifications of each expert witness, including a list of all publications authored by the expert witness within the preceding ten (10) years;
5. The compensation to be paid to the expert witness for the testimony and preparation for the testimony; and

⁶⁵ 12 O.S. § 3233(C)

⁶⁶ *Miller* at 139

⁶⁷ *Abbot v. U.S.*, 177 F.R.D. 92, 93 (N.D. NY. 1997)

⁶⁸ *Dushkin Publ'g Group, Inc., v. Kinko's Serv. Corp.*, 136 F.R.D. 334,335 (D.D.C. 1991); *Hoffman* at 438

⁶⁹ 12 O.S. 3233(B)

⁷⁰ 12 O.S. § 3225(B)(3)(A)

6. 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 30 interrogatory limit⁷¹. When dealing with discovery and expert witnesses, counsel should keep in mind the distinction between an expert witness (e.g., a physician testifying about his opinion based on his particular realm of expertise and his review of relevant materials) and a fact witness (e.g., a treating physician testifying about the care and treatment she provided to a party). The distinction is an important one when it comes to discovery procedures.

C. Production of Documents or Things and Inspections

Like interrogatories, requests for production and requests to make inspections are discovery tools applicable only between parties. Similar requests to non-parties may be made by subpoena⁷². Requests for production and requests to make inspections may be served upon the plaintiff after the commencement of the action and upon any other party with the summons and petition, or anytime thereafter⁷³. Absent agreement or court order, parties are limited to serving 30 such request on each party⁷⁴.

The requests should set forth and describe with particularity the items to be inspected either by individual item or by category of items⁷⁵. While it is customary for the inspection to take place at a mutually convenient time and place by agreement of counsel, the request should specify a reasonable time, place and manner of making the inspection⁷⁶. Answers or objections are due 30

⁷¹ *Id.*

⁷² 12 O.S. § 3234(C); 12 O.S. § 2004.1

⁷³ 12 O.S. § 3234(B)

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

days after service of the requests, unless they are served with the summons and petition, in which case answers or objections are due 45 days after service⁷⁷.

Documents in the possession, custody or control of a party must be produced when requested⁷⁸. Parties must either produce documents for inspection as they are kept in the usual course of business or organize and label them to correspond with the categories in the request⁷⁹. The requesting party has the right to not only inspect responsive documents, but to copy them⁸⁰. In the case of a relatively small amount of responsive material, it is a good practice to simply attach copies of the requested documents to the response. In the case of a request to inspect property, the requesting party is responsible for the expense of making the property available for the requested inspection⁸¹.

D. Physical and Mental Examinations

When the physical or mental condition of a party is at issue in a case in which a party relies on such a condition as an element of his claim or defense, an adverse party may compel a physical or mental exam⁸². The request for the exam may not be served until 30 days after the summons and petition have been served and the party receiving the request cannot be compelled to attend the exam less than five days after service of the notice⁸³. If the physical or mental condition of a party is at issue, but the party is not relying on the condition as an element of his claim or defense, an exam can only be compelled by order of the court issued only upon good cause shown by the requesting party⁸⁴. Upon request, the party examined is entitled to a detailed written report

⁷⁷ *Id.*

⁷⁸ 12 O.S. § 3234(A)(1)

⁷⁹ 12 O.S. § 3234(B)

⁸⁰ 12 O.S. § 3234(A)(1)

⁸¹ 12 O.S. § 3237(C)

⁸² 12 O.S. § 3235(A)

⁸³ 12 O.S. § 3235(B)

⁸⁴ 12 O.S. § 3235(C)

of the examiner setting out his findings, diagnoses and conclusions⁸⁵. If such a report is requested by the examined party, the examining party, after delivery of the report, is entitled to receive from the examined party a like report of any examination, previously or thereafter made, of the same condition⁸⁶. Requesting the report of an examination can also have important consequences with respect to the party's ability to assert a physician or psychotherapist-patient privilege⁸⁷

E. Request for Admissions

Like interrogatories, requests for production and request to make inspections, requests for admissions are discovery tools applicable only between parties. No similar mechanism exists for use with non-parties. Unlike other discovery tools, the primary use of requests for admissions is not to discover new information, but to confirm information already known or believed to be true. Requests for admissions may be served upon the plaintiff after the commencement of the action and upon any other party with the summons and petition, or anytime thereafter⁸⁸. Absent agreement or court order, parties are limited to serving 30 such request on each party⁸⁹.

The requests should set forth separately each matter of which an admission is requested⁹⁰. Answers or objections are due 30 days after service of the requests, unless they are served with the summons and petition, in which case answers or objections are due 45 days after service⁹¹. Failure to make a timely response results in the truth of the matter being conclusively established and the

⁸⁵ 12 O.S. § 3235(E)(1)

⁸⁶ *Id.*

⁸⁷ 12 O.S. § 3235(E)(2)

⁸⁸ 12 O.S. § 3236(A)

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

admission may be the basis for summary judgment⁹². It is recommended that counsel document by letter an opposing party's failure to make a timely response to a request for admission. By putting the opposing party on notice that the requested matter has been admitted and that the requesting party is relying on the admission for purposes of trial, counsel may be more likely to defeat a later motion by the opposing party to "amend" their response to avoid the admission.

A party is only required to admit or deny matters based on his own information or knowledge or that information or knowledge readily obtainable by him⁹³. However, there is a requirement to make an inquiry to obtain relevant information or knowledge reasonably available to the party⁹⁴. The reasonable inquiry required to respond to a request for admission is generally limited to a review and inquiry of those persons and documents that are within the responding party's control⁹⁵. An evasive or incomplete answer to a request for admission without some explanation for the lack of a complete response is to be treated as a failure to answer⁹⁶.

Requests for admissions can be a powerful tool in shaping a case for trial for a number of reasons. One such reason is that evidentiary rules excluding hearsay do not apply to admissions⁹⁷. In other words, once a matter is admitted, it is unlikely the information can be kept out of evidence based on a hearsay objection. In addition, requests for admissions can work to shift costs and fees. If a matter is of substantial importance to an issue in the case and the truth of the matter is denied without the denying party having reasonable grounds for the denial, the requesting party is entitled to recovery of its expenses incurred to prove the matter at trial, including attorney fees⁹⁸. Counsel can increase the overall effectiveness of their requests for admissions by combining them with

⁹² *Id.*; 12 O.S. § 3236(B); *Donovan v. Porter*, 584 F.Supp. 202, 207-208 (D.Md. 1984); *Stubbs v. Comm'r of I.R.S.*, 797 F.2d 936 (11th Cir. 1986)

⁹³ 12 O.S. § 3236(A)

⁹⁴ *Herrera v. Scully*, 143 F.R.D. 454, 548 (S.D.N.Y. 1992)

⁹⁵ *T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co.*, 174 F.R.D. 38, 43 (S.D.N.Y. 1997)

⁹⁶ 12 O.S. § 3237(A)(3)

⁹⁷ 12 O.S.1991 § 2801(4)(b)

corresponding interrogatories requiring the responding party to provide a detailed basis for any denials.

VI. Duty to Supplement Discovery

The general rule is that there is no duty to supplement responses to discovery if the responses were complete and correct when made⁹⁹. Despite this general rule, discovery requests frequently include language implying a duty to supplement the responses thereto. Absent an agreement or court order, this is not an enforceable requirement. Counsel should avoid the appearance of any agreement of this nature, unless one does in fact exist, by stating a general denial of the requirement to supplement in their response. This is sometimes done by including a blanket objection in the response to any requirements made in the request that exceeds the responding party's obligations under the Oklahoma Discovery Code.

Despite the general rule that there is no duty to supplement a discovery response that was complete and correct when made, the responding party does have an affirmative duty to supplement, without request, the following:

1. Responses with respect to the identity and location of persons having knowledge of discoverable answers¹⁰⁰;
2. Responses with respect to the identity of expert witnesses expected to testify and the subject matter and substance of their testimony¹⁰¹; and
3. Responses that the party learns were incorrect in some material respect when made or that are no longer true and the additional or corrective information has not otherwise been provided to the other parties during the discovery process or in writing¹⁰².

⁹⁸ 12 O.S. § 3237(D)

⁹⁹ 12 O.S. § 3226(E)

¹⁰⁰ 12 O.S. § 3226(E)(1)(a)

¹⁰¹ 12 O.S. § 3226(E)(1)(b)

If counsel wishes to have another party supplement their previous discovery responses with respect to matters which do not trigger the duty to supplement, they should make a new request to the party for supplementation of prior responses¹⁰³. Counsel should also bear in mind that the automatic duty to supplement responses does not apply to deposition testimony. For that reason, it is common for counsel during a deposition to ask the witness to agree to inform counsel should they later learn that one of their answers was or becomes incorrect or incomplete.

VII. Discovery Disputes

If counsel are unable to resolve their discovery disputes without court involvement, it may be necessary to file a Motion to Compel Discovery or to seek a protective order. A Motion to Compel generally asks the court for an order directing a party to comply with a discovery obligation¹⁰⁴. Before filing a Motion to Compel, the parties are required to confer or attempt to confer either in person or by phone in an effort to resolve the issue¹⁰⁵. In the event a Motion to Compel is filed, the party that prevails on the Motion may be entitled to the expenses incurred in bringing or opposing the motion, as the case may be, including attorney fees¹⁰⁶. In addition to awarding expenses, the court may issue an order compelling a party to comply with their discovery obligations. Failure to comply with such an order can lead to severe sanctions, including a default judgment, dismissal with prejudice, or a finding of contempt¹⁰⁷.

A party or person from whom discovery is sought may move the court to enter an order to protect the party or person from annoyance, harassment, embarrassment, oppression, or undue

¹⁰² 12 O.S. § 3226(E)(2)

¹⁰³ 12 O.S. § 3226(E)(3)

¹⁰⁴ 12 O.S. § 3237(A)(2)

¹⁰⁵ 12 O.S. § 3237(A)(2)

¹⁰⁶ 12 O.S. § 3237(A)(4)

¹⁰⁷ 12 O.S. § 3237(B)(2); *Goldman v. Goldman*, 883 P.2d 181, 184 (Okla. Civ. App. 1992); *Hill v. Pierce Mobile Homes, Inc.*, 738 P.2d 1380, 1381; *Barnett v. Simmons*, Okla., 197 P.3d 12 (2008)

delay, burden or expense¹⁰⁸. As with a Motion to Compel, the party that prevails on the Motion may be entitled to the expenses incurred in bringing or opposing the motion, as the case may be, including attorney fees¹⁰⁹.

VIII. Other Procedural Issues, Local Rules and Recent Amendments

In addition to the rules in the Oklahoma Discovery Code, other statutes and local court rules in many jurisdictions have provisions that pertain to discovery practice. For example, while it is not addressed in the Discovery Code itself, there is a requirement in another statute for each discovery request and response to be served on every party in the case, not just the parties making or receiving the request¹¹⁰. An example of a local court rule that creates a discovery obligation beyond those in the Discovery Code is the 14th Judicial District's (Tulsa and Pawnee Counties) rule requiring responses to interrogatories, requests for production, and request for admissions to include the text of the interrogatory or request before each response¹¹¹. This has become a fairly widespread practice in other jurisdictions as well, despite the lack of a formal rule requiring that it be done. If counsel in a jurisdiction that does not have such a rule would like for opposing counsel to include the text of the interrogatory or request with each response, it is helpful for the requesting party to provide the responding party with an electronic copy of the request.

A tool not frequently used in most jurisdictions, perhaps unfortunately so, is the discovery conference. A discovery conference may be ordered by the court on its own motion¹¹². In addition, if counsel are unable to reach an agreed discovery plan, any party is entitled to a discovery conference upon motion to the court and the submission of a proposed plan and schedule of discovery, including a statement of the issues, any limitations proposed to be placed on discovery,

¹⁰⁸ 12 O.S. § 3226(C)(1)

¹⁰⁹ 12 O.S. § 3226(C)(1)

¹¹⁰ 12 O.S. § 2005(A)

¹¹¹ Rule CV 19

and any other proposed orders with respect to discovery¹¹³. If a motion is filed requesting a discovery conference, the other parties must within 10 days file a response setting forth objections or additions to the plan¹¹⁴. Following the discovery conference, the court will enter an order for the proper management of discovery¹¹⁵.

Finally, the Oklahoma Discovery Code was recently amended to include certain mandatory initial disclosures. The amendments take effect on November 1, 2009 and insert two new numbered paragraphs into 12 O.S. § 3226. The new paragraphs are numbered (B)(2) and (B)(3) and result in the renumbering of the remainder of § 3226. The amendments, once effective, will require, without a request from another party, the disclosure within 60 days of service a computation of any category of damages claimed. In addition, the amendments require the party claiming damages to make available for inspection and copying the documents or other evidentiary material, not privileged or otherwise protected from disclosure, on which the computation of damages is based. Certain types of actions are excluded from these requirements, but the vast majority of new cases filed will fall under the provisions of these new initial automatic disclosure requirements.

¹¹² 12 O.S. § 3226(F)

¹¹³ 12 O.S. § 3226(F)(1)-(5)

¹¹⁴ 12 O.S. § 3226(F)

¹¹⁵ *Id.*