

# OADC OUTLOOK

A Publication of the Oklahoma Association of Defense Counsel

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## OADC Outlook

Page 1

President's Message

Page 2

New Changes to  
Oklahoma's  
Discovery Code

Effective November 2017

Page 3

Nominations Wanted

[www.OADC.org](http://www.OADC.org)

For a complete list of all  
upcoming functions go to:

Submissions should be sent to Skoshi Heron  
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## President's Message

by Michael D. Carter

One of the most rewarding duties of the OADC President is representing our organization at DRI regional and national meetings. Over the last two years, as President and President-elect, I have had the privilege of doing just that at DRI Regional, SLDO, and Annual meetings.

Meeting with leaders of other states' defense lawyer groups is a great opportunity to exchange ideas and learn what works and what doesn't for organizations like OADC. One of the main things I have learned is that OADC's state legislative and lobbying effort is at the very top compared to other defense lawyer groups nationwide. Not only does OADC commit more in resources to our legislative program, we are tops in member involvement as well.

This superior program doesn't occur without the efforts of many in OADC, too numerous to mention here. But it also takes money. All of our legislative efforts are supported solely by our member dues. Membership renewals will go out soon, and I encourage all members to send your renewals back as soon as you can. Your annual dues make all of this possible!

Please also plan to attend the Winter Meeting at RiverSpirit Casino in Tulsa on January 19, 2018. We will welcome our new president, Eric Begin, and have a fundraiser for D-PAC, our political action committee. See you at the Winter Meeting!

## Winter Meeting

January 19, 2018

**RIVER SPIRIT**<sup>®</sup>  
CASINO RESORT

Tulsa, OK

# New Changes To Oklahoma's Discovery Code Effective November 2017

by Andrew Wakeman  
Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco

In 2015, Rule 26 of the Federal Rules of Civil Procedure, along with other Rules related to discovery, were amended in an attempt to limit the scope of discovery and address continued problems of “over-discovery.” On November, 1, 2017, various changes to the Oklahoma Discovery Code will take effect, in what appears to be an attempt to also address concerns of discovery abuses. 2017, HB 1570, c. 378 § 3. However, in comparing the changes to Rule 26, with the upcoming changes to 12 O.S. 3226, the changes to the Oklahoma Discovery Code may not alter the scope of discovery as much as some may hope.

It is clear from the Advisory Committee Notes that Rule 26 was amended to specifically address discovery abuses. Under the old rule, information was discoverable if it was relevant to a party's claims or defenses. Relevant information did not need to be admissible if the discovery was “reasonably calculated” to lead to the discovery of admissible evidence. The new rule removed the “reasonably calculated” language in its entirety. Instead, information is discoverable if it is relevant to a party's claims or defenses and is “proportional to the needs of the case.”

The removal of the “reasonably calculated” language in Rule 26 was specifically addressed in the Advisory Committee Notes:

[t]he phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the ‘reasonably calculated’ phrase to define the scope of discovery ‘might swallow any other limitation on the scope of discovery. . . .’ The 2000 amendments sought to prevent such misuse by adding the word ‘Relevant’ at the beginning of the sentence, making clear that ‘relevant means within the scope of discovery as defined in this subdivision . . .’ The ‘reasonably calculated’ phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that ‘Information within the scope of discovery need not be admissible in evidence to be discoverable.’

The argument the Oklahoma Legislature intended to limit the scope of discovery through the upcoming changes to the Discovery Code is supported by initial change to Section 3225, which removed the term “liberally” from how the Discovery Code was to be construed and administered. However, the changes to Section 3226 are not consistent with the changes to Rule 26, and therefore, it is unclear as to what effect, if any, the changes will actually have on the scope of discovery.

Like Rule 26, under the old rule, Section 3226 allowed for the discovery of information if it was relevant to the subject matter involved in the action. Relevant information need not be admissible if it was “reasonably calculated to lead to the discovery of admissible evidence.” While the upcoming revisions to Section 3226 will add a proportionality requirement to discovery, the revisions do not remove the “reasonably calculated” language. The new rule in its entirety states:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to any party's claim or defense, reasonably calculated to lead to the discovery of admissible evidence and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.

By failing to remove the “reasonably calculated” language, it becomes unclear what the Oklahoma Legislature's intent was in revising Section 3226. By keeping this language in Section 3226, it becomes much harder to cite to federal cases limiting discovery under Rule 26 to support a corresponding argument under limiting discovery under Section 3226.

the case, (2) the amount in controversy, (3) the parties resources, (4) the importance of the issues at stake in the action, (5) and the importance of the discovery in resolving the issues. Under the new rule, discovery must be proportional to the needs of the case, considering (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

The cost benefit analysis under the old rule has become just one of the 6 factors in looking at the proportionality under the new rule. At this point, it is also unclear how this specific change will actually affect how discovery is governed. Arguably, the proportionality argument could allow for additional and/or costly discovery where the court is asked to look at the request proportional to the first five factors as opposed to the burden or expense of the request.

Either way, one clear implication of the November 1, 2017 changes to the Discovery Code is that state court discovery objections should be adjusted to something along the lines of the request at issue is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence and is not proportional to any one of the above factors applicable to the discovery request. If you have not already modified your discovery objections in federal court, changes should be made according to the 2015 amendments to Rule 26.

## Nominations Wanted

### 2017 Outstanding Defense Lawyer

Candidate has demonstrated an outstanding commitment to the work of OADC and during 2017 has obtained one or more substantial litigation wins (not necessarily a defense verdict).

#### Nominations must include:

1. Candidate
2. Candidate's Firm
3. Person Nominating
4. Reason for Nomination

Send all nominations to Michael Carter @ [mdcarter@phillipsmurrah.com](mailto:mdcarter@phillipsmurrah.com) by **January 1**.

### 2017 Outstanding Young Lawyer

Candidates for the award must have demonstrated outstanding commitment to the work of OADC and during the 2017 year have one or more of the following:

1. Published Articles
2. Pro Bono Work
3. Work with Law Students
4. Community Service

### Board Members

#### Three Positions Open 3 Year Terms

#### Requirements:

1. Participate in the monthly conference calls. These are set for noon and are usually the last Thursday of the month, Feb. – May and July – Dec. They usually take about 30 – 45 min, sometimes less. No call in Jan. or June due to the other meetings.
  - a. Of course, there are times when work conflicts with the monthly call or the meetings. We ask that board members try their best to attend and be active; board members can be removed after 3 unexcused absences.
2. Participate/attend the winter meeting.
3. Participate/ attend in the summer meeting.
4. Be an active participant on a committee of your choosing.
5. Recruit OADC members.