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April 11, 2017

Representative Taylor Barras
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

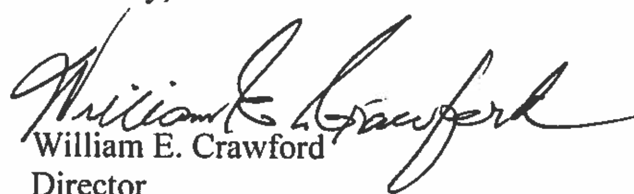
Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

RE: HCR 114 OF 2016

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature relative to the rules of discovery in the Code of Civil Procedure.

Sincerely,



William E. Crawford
Director

WEC/puc

Enclosure

cc: Representative Robby Carter

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.us
Secretary of State, Mr. Tom Schedler
admin@sos.louisiana.gov

LOUISIANA STATE LAW INSTITUTE
CODE OF CIVIL PROCEDURE COMMITTEE

REPORT TO THE LEGISLATURE
IN RESPONSE TO HCR 114 OF THE 2016 REGULAR SESSION

Relative to the rules of the discovery in the Code of Civil Procedure

Prepared for the
Louisiana Legislature on

April 11, 2017

Baton Rouge, Louisiana

LOUISIANA STATE LAW INSTITUTE
CODE OF CIVIL PROCEDURE COMMITTEE

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William R. Forrester, Jr., Reporter
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ENROLLED

2016 Regular Session

HOUSE CONCURRENT RESOLUTION NO. 114

BY REPRESENTATIVE ROBBY CARTER

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study the laws regarding the rules of discovery in Louisiana and to submit a written report of its findings with recommendations relative to establishing consistent and specific procedures and rules for discovery including the discovery of expert reports, the discovery of surveillance of parties, and the discovery of witness statements.

WHEREAS, the rules of discovery have been created to facilitate fair and just outcomes of lawsuits; and

WHEREAS, the Code of Civil Procedure provides rules for the discovery of evidence and obtaining expert reports; and

WHEREAS, the Code of Civil Procedure also sets forth limitations on producing surveillance of a party and provides parameters for discovering recorded statements; and

WHEREAS, there is potential for the rules of discovery to be abused and exploited for tactical advantages in lawsuits; and

WHEREAS, the prevention of misuse of discovery to facilitate fair and just trials should be of the utmost importance to the people of Louisiana.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to evaluate and analyze the rules of discovery in Louisiana, to consider these rules, and to make recommendations relative to establishing fair and consistent procedures for discovery, and in particular for the exchange of expert reports, the surveillance of parties, and the exchange and discoverability of non-party recorded statements.

BE IT FURTHER RESOLVED that a written report of its findings and recommendations be submitted to the House Committee on Civil Law and Procedure and

the Senate Committee on Judiciary A no later than sixty days prior to the 2017 Regular Session of the Legislature of Louisiana.

BE IT FURTHER RESOLVED that a suitable copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

April 11, 2017

To: Representative Taylor F. Barras
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

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REPORT TO THE LEGISLATURE
IN RESPONSE TO HCR 114 OF THE 2016 REGULAR SESSION

During the 2016 Regular Session of the Louisiana Legislature, House Bill No. 1065, introduced by Representative Robby Carter, proposed changes to the discovery articles in the Code of Civil Procedure with respect to pretrial production of: (i) non-party witness statements, (ii) surveillance material of a party, and (iii) reports of non-testifying consulting experts. Upon consideration of House Bill No. 1065 by the House Committee on Civil Law and Procedure and at the request of Representative Carter, the Committee voted to defer action and instead convert the bill into a study resolution to be submitted to the Louisiana State Law Institute.

This resolution, House Concurrent Resolution No. 114 of the 2016 Regular Session, urged and requested the Law Institute to study the laws regarding the rules of discovery in Louisiana and to make recommendations relative to the establishment of consistent and specific procedures and rules for discovery, including the discovery of expert reports, surveillance of parties, and witness statements. In fulfillment of this request, the Law Institute assigned the project to its Code of Civil Procedure Committee, which operates under the direction of William R. Forrester, Jr. as Reporter. The Committee, under the direction of the Reporter, conducted background research and compiled information with respect to all three of these issues. The following report reflects the Law Institute's conclusions with respect to the discoverability of non-party witness statements, surveillance material, and reports of experts not expected to testify at trial.

NON-PARTY WITNESS STATEMENTS

The first issue included in House Concurrent Resolution No. 114 of the 2016 Regular Session is the discoverability of non-party witness statements. Under Code of Civil Procedure Article 1424, both parties and non-party witnesses have an absolute right to obtain their own statements concerning the subject matter of an action. Article 1424(B) provides: "A party may obtain without the required showing a statement concerning 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." Presumably, once the non-party witness statement is in the possession of the witness who provided it, production during discovery can be requested or even compelled by a party to

the action by serving a subpoena duces tecum on the witness. As a result, the work product protection set forth in Article 1424(A) should not apply.

However, the work product protection provided by Article 1424(A) has created difficult and arguably unnecessary issues when a party to the action wants to use pretrial discovery to obtain the statement of a non-party witness that is in the exclusive possession of an adverse party or his attorney, surety, indemnitor, or agent. When these non-party witness statements have been obtained by the adverse party, usually through his attorney, employer, or claims adjuster, "in anticipation of litigation or in preparation for trial" as provided by Article 1424(A), the work product protection may protect the statement from pretrial disclosure unless the requesting party files a motion to compel and proves that he will suffer "undue hardship or injustice" if the statement is not produced. A related issue arises when the party in possession of the witness statement asserts the work product protection to avoid pretrial production of the statement but later attempts to use the statement for impeachment purposes at trial. At least in some cases, the party in possession of the witness statement has nevertheless been allowed to use the statement by successfully arguing that it was rebuttal evidence that was not required to be produced during discovery or even identified in a pretrial order.

Still, the work product protection provided by Article 1424(A) has traditionally been considered by many litigators as an important protection of confidential information, including witness statements, that is necessary for a thorough internal review of facts and for the formulation of strategy by counsel for settlement consideration or trial preparation. Proponents of the work product protection do not believe that they should be required to share their investigatory and research materials with an adverse party when they are paying for and obtaining this information. Accordingly, many litigators are of the opinion that they should not have to produce witness statements that they have obtained and for which they have paid when these witnesses were equally accessible to other parties as well. To others, however, the work product protection afforded by Article 1424(A) is too often used improperly to deny or hide vital discoverable factual information from both adverse parties and the court. Additionally, critics complain that the vague and ambiguous requirements of obtaining material "in anticipation of litigation or in preparation for trial" and of showing "undue hardship or injustice" are not suited to quick and inexpensive resolution, thus creating problems for litigants with limited resources. In further support of their position, critics of the work product protection cite the Louisiana Supreme Court's decision in *Ogea v. Jacobs*, 344 So. 2d 953 (La. 1977).

In *Ogea*, a critical eyewitness to the plaintiff's oil rig accident suffered from several lapses in memory during his deposition, which was taken almost two years after the accident. *Id.* at 955. However, the witness testified that within a few days of the accident he had prepared a written accident report that contained his statement as to the accident's basic cause. *Id.* Because this accident report was in the possession of the insurer of the plaintiff's employer, the plaintiff filed a motion to compel production, which was denied on the basis of the work product protection. *Id.* The Louisiana Supreme Court granted writs and, in a seven page opinion providing a detailed review of the circumstances surrounding the preparation of the report, reversed the trial court's judgment and instead ordered that the report be produced for inspection by the plaintiff. *Id.* at 955-60.

To solve the problems discussed above, House Bill No. 1065 proposed a substantial change to Article 1424: to eliminate the first sentence of Paragraph A, the traditional work product protection, and instead replace it with a sentence that reads: "The court shall order the production or inspection of any writing, recorded statement, or electronically stored information, obtained or prepared by any witness unless the witness is a party to the litigation." Paragraph A's second sentence, exempting from production material that reflects the mental impressions, conclusions, opinions, or theories of an attorney, would remain unchanged. The Committee and the Council concluded that such a major change to the work product protection to accomplish the limited objective of expanding the discoverability of non-party witness statements "throws the baby out with the bath water." Rather, the Committee proposed, and the Council considered, an alternative that would remove witness statements from the work product protection provided by Article 1424(A), thereby also eliminating the necessity for the type of drawn-out judicial participation in the discovery process illustrated by the *Ogea* case.

Under current law, if a non-party witness obtains a statement given by him concerning the subject matter of an action, that statement can then be requested or even compelled from the witness by a party to the action. Once the statement is obtained from the witness and is in the exclusive possession of the party, he can either voluntary produce the statement if it is favorable to his case, or, if unfavorable, block its disclosure in the name of the work product protection afforded by Article 1424(A). This would then force the requesting party to file a motion to compel and make the required showing of "undue hardship or injustice." Critics of the work-product protection would argue that this seems unnecessary, since more often than not, denying a party the statement of a key eyewitness does create a hardship during discovery and eventually at trial. In fact, the outcome of the case could very well depend on the content of eyewitness statements. As a result, the Committee agreed that restricting the discoverability of these key witnesses' statements can result in "hiding the ball," thereby undermining one of the very purposes of discovery.

The Committee also found that eliminating the discovery protection of all witness statements is not a radical new idea; in fact, in 1999 Texas amended its procedural law to carve out all witness statements as an exception to the work product privilege. *See* Texas Rules of Civil Procedure, Rules 192.3(h) and 192.5(c)(1). Following the Texas approach, the Committee drafted a proposed change to Article 1424(B) that would eliminate the applicability of the work product protection to non-party witness statements. Nevertheless, several concerns with respect to this proposal were raised during the Committee's presentation to the Law Institute's Council. For one, the Council was reluctant to recommend a huge change to the work product protection currently afforded by both Louisiana law and the Federal Rules of Civil Procedure when, as of now, only one state throughout the country has made such a change. Additionally, the Council concluded that the questioning of a witness during the taking of a statement will almost always reflect the thoughts and opinions of an attorney or other representative of a party in anticipation of litigation, particularly when the statement is being taken directly by an attorney as is commonly the case.

Although the Council recognized the immeasurable value of providing both parties with access to a statement taken contemporaneously at the time of an incident, it also recognized that Article 1424(B) already grants the witness who provided the statement the absolute right to

obtain a copy of it. As an alternative to the Committee's proposal, then, the Council suggested that perhaps an amendment could be made to Article 1424(B) requiring a non-party witness giving a statement to be informed that he has the right to request and obtain the statement. Ultimately, though, the Law Institute concluded that non-party witness statements should remain subject to the work product protection currently afforded by Article 1424(A) and that no change to Article 1424(B) should be recommended to the legislature at this time.

SURVEILLANCE MATERIAL

The second issue presented by House Concurrent Resolution No. 114 is the discoverability surveillance material taken by one party of the other. According to Representative Carter, Louisiana Supreme Court jurisprudence pertaining to the sequence for the production of surveillance material is being misused to create an unfair advantage in favor of the party responding to requests for such production. Specifically, some attorneys are using the jurisprudential rule to avoid producing surveillance material in their possession by electing not to depose the party requesting such material, which is nevertheless then used upon cross-examination at trial although it was never produced to or seen by the requesting party.

To remedy such improper conduct, House Bill No. 1065 proposed the addition of Article 1424(E). Subparagraph (1) of proposed Paragraph E would provide that all surveillance material must be produced by the responding party within ninety days after a request for such material. The provision would also give the responding party the right to depose the requesting party before producing the surveillance material, but only if the deposition is taken within ninety days of the request. Presumably, if the responding party fails to depose the requesting party within the ninety-day time period, the surveillance material must nevertheless be produced to the requesting party without further delay. Arguably, then, the problem discussed above would be solved because the requesting party would have the right to view the material prior to being deposed or, at least, prior to being cross examined at trial if the responding party failed to comply with the ninety-day time limitation.

Though the proposed enactment of Article 1424(E)(1) was well intended, both the Committee and the Council questioned whether it is actually necessary to remedy the problem discussed above. For example, the addition of a mandatory ninety-day period for the production of all surveillance material is likely to conflict with the broad discretion provided to trial judges for the purpose of expediting trial dates by managing discovery through pretrial scheduling orders. *See* C.C.P. Article 1551. In fact, this time period is three times longer than the thirty-day period applicable to other discovery responses. Further, applying such a rule to all surveillance material would create a conflict with existing Louisiana Supreme Court jurisprudence, including the leading case of *Bell v. Treasure Chest Casino, L.L.C.*, 950 So. 2d 654 (La. 2007).

In the *Bell* case, the Louisiana Supreme Court confirmed that surveillance material is subject to discovery but recognized an important distinction with respect to the timing of the production of the two different types of surveillance material. *Id.* at 655-56. When the surveillance material is taken of the actual incident, the timing of its production during discovery is treated like any other evidence – the surveillance material must be produced within thirty days of a request under Article 1462, and it can be obtained in any sequence under Article 1427. *Id.*

No additional legislation should be necessary with respect to this type of surveillance material, since the applicable time period is already provided by law. On the other hand, when the surveillance material has been obtained after the incident for purposes of cross-examining or impeaching a party or witness rather than being used as direct evidence, the Louisiana Supreme Court has stated that the responding party can delay the production of this material until after the party or witness is deposed. *Id.* The purpose of this judicially created rule is to facilitate the use of surveillance material to expose spurious claims by maximizing the value of cross-examination "in the search for truth." *Id.* at 656.

Because the Louisiana Supreme Court's holding in *Bell* leaves to the parties and the trial court the matter of setting specific deadlines necessary to implement this procedure, the ninety-day deadline contemplated by House Bill No. 1065 might serve a useful purpose in preventing the use of unproductive tactics by the responding party as well as the necessity, in some cases, of applying to the court for a scheduling order. Nevertheless, given the complexities with respect to the scheduling of discovery inherent in many cases, both the Committee and Council concluded that, instead of imposing a mandatory ninety-day time period within which to produce surveillance material, perhaps the better approach would be to allow the trial court in its discretion to resolve any problems with respect to the scheduling of discovery should such problems arise.

In contrast to proposed Article 1424(E)(1), House Bill No. 1065's proposed Subparagraph (E)(2) would apply where surveillance material is generated after the requesting party's request for the production of such material. In those cases, if the requesting party has not been deposed, the responding party would be obligated to produce the surveillance material within ninety days after the conduction of such material; however, if the requesting party has been deposed, the responding party would be obligated to produce the surveillance material immediately upon its conduction. Additionally, if the surveillance material is produced after the requesting party's deposition, that party would presumably have the right to supplement his previous statements at his deposition, taking the position that his memory would have been better if he had seen the surveillance material in the first place.

However, both the Committee and Council agreed that this amendment to Article 1424 is likely unnecessary, since the trial judge usually handles these types of concerns on a case-by-case basis. Additionally, Article 1428 already provides that discovery responses must be supplemented if the original response "is no longer true," as would be the case when the responding party did not have surveillance material in his possession at the time of the request for production but later conducts surveillance material that would be responsive to that request. If supplementation of discovery responses is not made by the responding party as required by Article 1428, the trial court may impose appropriate sanctions, including barring the responding party from using the surveillance material in any way. Further, if the responding party is planning to use the surveillance material at trial, the identity of such material should be disclosed in the pretrial order. If the responding party has attempted to hide the existence of surveillance material during discovery, the trial judge should prevent the responding party from using such material at trial. An objection by the requesting party in the pretrial order, in a motion in limine, or spontaneously at trial should be effective in preventing the responding party from using the surveillance material at trial to ambush either a party or a witness.

As a result, the Law Institute determined that an amendment to the Code of Civil Procedure to prevent the improper withholding of surveillance material by the party responding to a request for production is not necessary. If the responding party is "playing games" by refusing to produce the requested surveillance material or to depose the requesting party, that party should file a motion asking the trial court to rule, in accordance with the Louisiana Supreme Court's decision in *Bell*, that the responding party has waived any further right to withhold the surveillance material. If the trial court concludes that the responding party has been in bad faith in its refusal to produce surveillance material or to depose the requesting party, the trial court could impose sanctions that would bar the responding party from using the surveillance material at trial for any purpose. Accordingly, no change to Article 1424 is being recommended by the Law Institute at this time.

REPORTS OF EXPERTS NOT EXPECTED TO TESTIFY

The third and final issue for the Law Institute to study pursuant to House Concurrent Resolution No. 114 of the 2016 Regular Session is the discoverability of non-testifying expert reports. House Bill No. 1065 purported to render the work product protection inapplicable to reports prepared in anticipation of litigation or for trial by non-testifying expert witnesses, often referred to as consultants, under Article 1425. As proposed, the bill would eliminate in its entirety Article 1425(D)(2), which sets forth this protection, and would add a sentence to Subparagraph (D)(1) of the Article expressly requiring the production of reports prepared by "any person identified as an expert…even if that person is not expected to be called as a witness at trial."

House Bill No. 1065 is not the first indication of problems with respect to the scope of the work product protection and its shielding of consultant reports from pretrial discovery. Critics of current law argue that parties with substantial resources can hire consultants to perform most of the underlying research and investigation involved in formulating expert opinions with respect to the case at hand. Then, upon request for production by the adverse party, these parties use the work product protection afforded by Article 1425(D)(2) to hide the consultant's reports from the requesting party by asserting that the consultant is not expected to testify at trial. Nevertheless, the responding party's testifying expert may rely heavily on the favorable conclusions made in the consultant's reports in the opinions given during his deposition and/or at trial, despite the responding party's refusal to produce the consultant's reports or failure to disclose that these reports even exist. As a result, the requesting party will be unable to determine whether the consultant's reports included any conclusions that were unfavorable to the responding party in addition to those that were favorable. Critics also assert that the requirement in Article 1425(D)(2) of a "showing of exceptional circumstances" by the requesting party in order to obtain a motion to compel production is seldom determined to be satisfied by the trial court, thereby leaving the requesting party at a disadvantage in thoroughly probing the opinions of the responding party's testifying expert.

Although House Bill No. 1065's proposed revisions are a worthwhile attempt to improve the transparency of discovery as it relates to non-testifying consulting experts, the bill goes too far by completely eliminating the work product protection with respect to consultant reports.

Rather, the Committee decided that the reports of some consultants should remain subject to the work product protection from disclosure during discovery. As a compromise, then, the Committee considered the approach recently taken by Texas in Rule 192.3(e) of its Rules of Civil Procedure. This Rule subjects consultants to full discovery only when their opinions have been "reviewed by" the testifying expert, an approach that makes sense because in reality the consultant and the testifying expert could be considered as working hand-in-hand. However, the Committee ultimately decided that the "reviewed by" standard is too broad and instead favored a requirement that any reports prepared by a consulting expert and "relied upon" by the testifying expert should be discoverable.

Nevertheless, during its discussions the Committee consulted Article 1425(B), which provides that upon motion of any party or the court, a testifying expert must provide a written report containing the basis and reasons for his opinions and the data or other information considered by the testifying expert in formulating those opinions. Both the Committee and Council determined that, pursuant to this provision, consultant reports that were relied upon by a testifying expert would qualify as "other information" considered by the testifying expert in formulating his opinions. The Committee and Council therefore determined that any recommendation for proposed legislation would be unnecessary in light of Article 1425(B), and as a result, the Law Institute recommends that no change to the article be made at this time.

SUMMARY AND CONCLUSIONS

First, with respect to non-party witness statements, a sound argument can be made that all statements made by third party witnesses to an incident should be discoverable, regardless of whether they are made in anticipation of litigation. More often than not, these statements provide the most reliable contemporaneous description of the incident, which is invaluable to both parties in evaluating their respective cases against one another. Furthermore, requiring the requesting party to file a motion to compel and prove "undue hardship or injustice" to obtain the statement is not only difficult, but also time-consuming and expensive. Nevertheless, there is a strong resistance to amending this long-standing discovery provision, since federal courts and all states but one still vigorously apply the work product protection to the statements of non-party witnesses. As a result, the Law Institute is not recommending any change to Article 1424 with respect to non-party witness statements at this time.

Concerning the issue of the discoverability of surveillance material, the Law Institute determined that there is no pressing need to incorporate special procedures in the Code of Civil Procedure for purposes of dealing with the timing of production of surveillance material. Rather, the Law Institute concluded that, according to the Louisiana Supreme Court's holding in *Bell v. Treasure Chest Casino, L.L.C.*, 950 So. 2d 654 (La. 2007), determinations with respect to the production of surveillance material should be made by the judge in his broad discretion on a case-by-case basis through the use of scheduling orders, and, when necessary, motion practice. As a result, the Law Institute recommends that no legislation requiring the production of surveillance material within a certain time should be proposed.

Finally, with respect to reports of experts not expected to testify at trial, the Law Institute concluded that parties should, in general, be able to rely on the work product protection for the

reports of consultants prepared in anticipation of litigation or in preparation for trial. However, if the reports are reviewed and relied upon by the testifying expert in formulating his opinions to be expressed at trial, the reports should be subject to production during discovery in order to facilitate cross-examination as to the basis of the testifying expert's opinions at his deposition. Nevertheless, current Article 1425(B) provides that, upon motion of any party or the court, a testifying expert must provide a written report containing the basis and reasons for his opinions and the data or other information considered by the testifying expert in formulating those opinions. This data or other information would include the reports of consultants. Additionally, under current Article 1425(D), the interrogation of testifying experts at their depositions is virtually unlimited and should include anything the expert has used to support his opinions, other than input from counsel. In light of these provisions, the Law Institute concluded that no amendments to Article 1425 are necessary at this time.