

Regular Session, 2007
HOUSE BILL NO. 203

ACT No. 140

BY REPRESENTATIVE ANSARDI

(On Recommendation of the Louisiana State Law Institute)

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

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AN ACT

To amend and reenact Code of Civil Procedure Articles 1424, 1425, 1460, 1461, and 1462 and R.S. 13:3205 and to enact Code of Civil Procedure Article 1633.1, relative to discovery; to provide for the scope of discovery; to provide exceptions to disclosure; to provide remedies for inadvertent disclosure; to provide for discovery of experts; to provide for discovery of electronically stored information; to provide for live trial testimony by video; to provide for delivery of process by commercial carrier; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Code of Civil Procedure Articles 1424, 1425, 1460, 1461, and 1462 are hereby amended and reenacted and Code of Civil Procedure Article 1633.1 is hereby enacted to read as follows:

Art. 1424. Scope of discovery; trial preparation; materials

A. The court shall not order the production or inspection of any writing, or electronically stored information, obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. ~~The~~ Except as otherwise provided in Article 1425(E)(1), the court shall not order the production or inspection of any part of the writing, or electronically stored information, that reflects the mental impressions, conclusions, opinions, or theories of an attorney.

1 B. A party may obtain without the required showing a statement concerning
2 the action or its subject matter previously made by that party. Upon request, a
3 person not a party may obtain without the required showing a statement concerning
4 the action or its subject matter previously made by that person. If the request is
5 refused, the person may move for a court order. The provisions of Article 1469(4)
6 apply to the award of expenses incurred in relation to the motion. For purposes of
7 this Paragraph, a statement previously made is a written statement signed or
8 otherwise adopted or approved by the person making it, or a stenographic,
9 mechanical, ~~electrical~~, electronically stored, or other recording, or a transcription
10 thereof, which is a substantially verbatim recital of an oral statement by the person
11 making it and contemporaneously recorded.

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

18 D. A disclosure of a communication or information covered by the attorney-
19 client privilege or work product protection does not operate as a waiver if the
20 disclosure is inadvertent and is made in connection with litigation or administrative
21 proceedings, and if the person entitled to assert the privilege or work product
22 protection took reasonably prompt measures, once the holder knew of the disclosure,
23 to notify the receiving party of the inadvertence of the disclosure and the privilege
24 asserted. Once notice is received, the receiving party shall either return or promptly
25 safeguard the inadvertently disclosed material, but with the option of asserting a
26 waiver. Even without notice of the inadvertent disclosure from the sending party,
27 if it is clear that the material received is privileged and inadvertently produced, the
28 receiving party shall either return or promptly safeguard the material, and shall notify
29 the sending party of the material received, but with the option of asserting a waiver.

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Comments–2007

(a) Paragraph C adopts language taken from Fed. R. Civ. P. 26(b)(5) relating to the assertion of a privilege during discovery.

(b) Waiving a privilege during discovery through inadvertent disclosure is a growing problem exacerbated by the expansive volume of documents produced in complex cases and discovery requests involving electronically stored information. Paragraph D states the rule that a privilege should not be considered waived provided a lawyer inadvertently producing privileged material has taken reasonable steps to avoid a waiver and promptly takes action to notify the receiving party that a privilege is being asserted. Upon receiving notice, the receiving party must either return or safeguard the inadvertently disclosed material with the option to assert a waiver. Even without notice of the mistake from the sending party, the receiving party must notify the sending party of the material received if it is clear that it is privileged and inadvertently produced. See Rule of Professional Conduct 4.4(b). The 2007 amendment protecting inadvertent disclosures of privileged documents is consistent with Louisiana jurisprudence. See *Hebert v. Anderson*, 681 So.2d 29 (La. App. 4Cir. 1996).

Art. 1425. Experts; pretrial disclosures; scope of discovery

A. A party may through interrogatories or by deposition require any other party to identify each person who may be used at trial to present evidence under Articles 702 through 705 of the Louisiana Code of Evidence.

B. Upon contradictory motion of any party or on the court's own motion, an order may be entered requiring that each party that has retained or specially employed a person to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony provide a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor and the data or other information considered by the witness in forming the opinions. The parties, upon agreement, or if ordered by the court, shall include in the report any or all of the following: exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

C. The disclosures of Paragraph B of this Article shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures required pursuant to Paragraph B

CODING: Words in ~~struck through~~ type are deletions from existing law; words underscored are additions.

1 of this Article shall be made at least ninety days before the trial date or the date the
2 case is to be ready for trial or, if the evidence is intended solely to contradict or rebut
3 evidence on the same subject matter identified by another party under Paragraph B,
4 within thirty days after the disclosure made by the other party. The parties shall
5 supplement these disclosures when required by Article 1428.

6 D.(1) ~~A~~ Except as otherwise provided in Paragraph E of this Article, a party
7 may, through interrogatories, deposition, and a request for documents and tangible
8 things, discover facts known or opinions held by any person who has been identified
9 as an expert whose opinions may be presented at trial. If a report from the expert is
10 required under Paragraph B, the deposition shall not be conducted until after the
11 report is provided.

12 (2) A party may, through interrogatories or by deposition, discover facts
13 known by and opinions held by an expert who has been retained or specially
14 employed by another party in anticipation of litigation or preparation for trial and
15 who is not expected to be called as a witness at trial, only as provided in Article 1465
16 or upon a showing of exceptional circumstances under which it is impracticable for
17 the party seeking discovery to obtain facts or opinions on the same subject by other
18 means.

19 (3) Unless manifest injustice would result, the court shall require that the
20 party seeking discovery pay the expert a reasonable fee for time spent in responding
21 to discovery under ~~Subparagraph (1) of this Paragraph~~; and with respect to discovery
22 obtained under Subparagraph (2) of this Paragraph, the court shall also require the
23 party seeking discovery to pay the other party a fair portion of the fees and expenses
24 reasonably incurred by the latter party in obtaining facts and opinions from the
25 expert.

26 E.(1) The expert's drafts of a report required under Paragraph B of this
27 Article, and communications, including notes and electronically stored information
28 or portions thereof that would reveal the mental impressions, opinions, or trial
29 strategy of the attorney for the party who has retained the expert to testify, shall not
30 be discoverable except, in either case, on a showing of exceptional circumstances

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Comment–2007

Article 1460 was amended in 2007 to clarify its application to discovery of electronically stored information. The amendment is consistent with a similar change to Fed. R. Civ. P. 33 in 2006.

Art. 1461. Production of documents and things; entry upon land; scope

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect, ~~and~~ copy, test, and sample any designated documents or electronically stored information, including writings, drawings, graphs, charts, photographs, phono-records, sound recordings, images, and other data or data compilations in any medium from which information can be obtained, translated, if necessary, by the respondent through detection and other devices into reasonably usable form, or except as provided in Article 1462(E), to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Articles 1422 through 1425 and which are in the possession, custody, or control of the party upon whom the request is served; or (2) except as provided in Article 1462(E), to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Articles 1422 through 1425.

Comments–2007

(a) Prior to their amendments, Articles 1461 and 1462 allowed requests for production of documents and other designated materials and direct access to inspect, test and sample any operations or tangible things in the control of the responding party which contained the requested information. The Articles were enacted in 1976 and made no reference to procedures for the discovery of the now widely used electronic storage of information on computers. The 2007 changes to Articles 1461 and 1462 make it clear that a requesting party may, within the scope of Articles 1422 through 1425, inspect and copy the product of a computer such as a printout of electronically stored information on paper or on a disc resulting from the translation of the stored information. This authorization does not require a responding party to produce electronically stored information from sources that are shown not to be reasonably accessible because of undue burden or cost. When the responding party presents a valid objection to production on this basis the court may consider production under more convenient and less burdensome conditions and with an allocation of the cost of production between the parties. See Article 1426(A) and Fed. R. Civ. P. 26(b)(2).

(b) Because direct access to a computer may present novel and difficult problems and risks for the responding party, including the burden of locating and

1 segregating the requested information and protecting from disclosure proprietary,
 2 privileged, personal, or irrelevant material, the amended Articles do not give the
 3 requesting party the right initially to conduct the actual search of the responding
 4 party's computer.

5 (c) Article 1462(E) now permits direct access during discovery to computers
 6 and other types of the devices to inspect, copy, test, and sample the requested
 7 electronically stored information which such devices may contain only after the
 8 responding party has had an opportunity to search for and produce the information
 9 in a reasonably usable form. Absent an agreement between the parties, a requesting
 10 party, dissatisfied with an initial response, must successfully prosecute a motion to
 11 compel discovery under Article 1469 and obtain an order permitting direct access to
 12 the responding parties computer in the form of an inspection, copying, testing or
 13 sampling of its contents to determine if there has been a failure to comply with the
 14 discovery request. Such an order should be granted only when the requesting party
 15 has shown good cause that the initial production of electronically stored information
 16 for inspection and copying may not have been in compliance with an appropriate
 17 discovery request, and after alternative and less burdensome forms of production
 18 have been considered by the court. Furthermore, the order should provide for
 19 protections of the type set forth in Article 1426 as to the manner and scope of the
 20 search necessary to protect the responding party from an undue burden and
 21 disclosure of protected information. As stated in the Advisory Committee Notes to
 22 the 2006 amendments to Fed. R. Civ. P. 34(a), the parallel provision of the amended
 23 Article, "courts should guard against undue intrusiveness resulting from inspecting
 24 and testing" computer systems. See *In Re Ford Motor Co.*, 345 F.3d 1315 (11th Cir.
 25 2003).

26 Art. 1462. Production of documents and things; entry upon land; procedure

27 A. The request under Article 1461 may, without leave of court, be served
 28 upon the plaintiff after commencement of the action and upon any other party with
 29 or after service of the petition upon that party. The request shall set forth the items
 30 to be inspected either by individual item or by category, and describe each item and
 31 category with reasonable particularity. The request shall specify a reasonable time,
 32 place, and manner of making the inspection and performing the related acts. The
 33 request may specify the form or forms in which information, including electronically
 34 stored information, is to be produced.

35 B. The party upon whom the request is served shall serve a written response
 36 within fifteen days after service of the request, except that a defendant may serve a
 37 response within thirty days after service of the petition upon that defendant. The
 38 court may allow a shorter or longer time. With respect to each item or category, the
 39 response shall state that inspection and related activities will be permitted as
 40 requested, unless the request is objected to, in which event the reasons for objection
 41 shall be stated. If objection is made to part of an item or category, the part shall be

1 specified. The party submitting the request may move for an order under Article
 2 1469 with respect to any objection to or other failure to respond to the request, or any
 3 part thereof, or any failure to permit inspection as requested. If objection is made to
 4 the requested form or forms for producing information, including electronically
 5 stored information, or if no form was specified in the request, the responding party
 6 shall state in its response the form or forms it intends to use.

7 C. A party who produces documents for inspection shall produce them as
 8 they are kept in the usual course of business or shall organize and label them to
 9 correspond with the categories of the request. If a request does not specify the form
 10 or forms for producing information, including electronically stored information, a
 11 responding party shall produce the information in a form or forms in which it is
 12 ordinarily maintained or in a form or forms that are reasonably usable.

13 D. Unless otherwise ordered by the court, a party need not produce the same
 14 information, including electronically stored information, in more than one form.

15 E. If the requesting party considers that the production of designated
 16 electronically stored information is not in compliance with the request, the
 17 requesting party may move under Article 1469 for an order compelling discovery,
 18 and in addition to the other relief afforded by Article 1469, upon a showing of good
 19 cause by the requesting party, the court may order the responding party to afford
 20 access under specified conditions and scope to the requesting party, the
 21 representative of the requesting party, or the designee of the court to the computers
 22 or other types of devices used for the electronic storage of information to inspect,
 23 copy, test, and sample the designated electronically stored information within the
 24 scope of Articles 1422 and 1425.

25 Comment–2007

26 See the 2007 Comments to Article 1461.

27 * * *

28 Art. 1633.1. Live trial testimony by video

29 The court may order, upon a showing of appropriate safeguards, live
 30 testimony of a witness to be presented in open court by teleconference, video link,

1 (1) Mailed the process to the defendant, showing that it was enclosed in an
2 envelope properly addressed to the defendant, with sufficient postage affixed, and
3 the date it was deposited in the United States mail, to which shall be attached the
4 return receipt of the defendant; or

5 (2) Utilized the services of a commercial courier to make delivery of the
6 process to the defendant, showing the name of the commercial courier, the date, and
7 address at which the process was delivered to the defendant, to which shall be
8 attached the commercial courier's confirmation of delivery; or

9 (3) Actually delivered the process to the defendant, showing the date, place,
10 and manner of delivery.

11 Comment–2007

12 The 2007 amendment adds Paragraph (2) to specify the procedure for
13 utilizing a commercial courier to serve process. Previously the statute provided an
14 impractical requirement that only the individual employed by the commercial courier
15 who actually delivered the process to the defendant could sign the required affidavit
16 of service.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____