KING & JURGENS LLC

MEMORANDUM

TO: Dr. Ron Luke
FROM: King & Jurgens, L.L.C.
DATE: May 28, 2024
RE: Expert Discovery and Disclosure Requirements in Louisiana and Comparison with the Federal Rules of Civil Procedure

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The purpose of this Memorandum is to summarize the written discovery rules for expert witnesses under the Louisiana Code of Civil Procedure. This Memorandum will also compare the expert discovery rules in Louisiana to the rules governing expert discovery under the Federal Rules of Civil Procedure.

I. Who is an Expert Generally.

1. Louisiana.

The Louisiana Code of Civil Procedure does not expressly define an expert. Rather, La. C.C.P. art. 1425, which governs expert discovery, refers to experts as defined under the Louisiana Code of Evidence: "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**." La. C.C.P. art. 1425(A) (emphasis added). In turn, La. Code Evid. art. 702(A) provides that: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education…"

The Louisiana Code of Civil Procedure distinguishes between the two types of retained experts – namely, testifying experts and non-testifying (or consulting) experts – and the types of discovery that can be requested from either type of expert. *Compare* La. C.C.P. art. 1425 (B)-(D)(1) (addressing testifying experts), *with id.* at 1425(D)(2) (addressing non-testifying experts).

2. Federal.

Like Louisiana, the Federal Rules do not define an expert, but do refer to Fed. R. Evid. 702. *See* Fed. R. Civ. P. 26(a)(2)(A). In turn, Fed. R. Evid. 702 contains essentially the identical definition for an expert witness as in the Louisiana analog to 702 as persons "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702.

The Federal Rules of Civil Procedure distinguish between several types of experts and with respect to required disclosures, as well as the type of discovery that can be requested from each type of expert. Specifically, Fed. R. Civ. P. 26 distinguishes between experts that are specifically retained or employed to give trial testimony, experts that have not been specifically retained to give trial testimony, and consulting experts that have been retained for trial preparation but are not expected to provide trial testimony.

II. General Rules of Discovery.

1. Louisiana.

La. C.C.P. art. 1422 provides for the general scope of discovery in civil litigation in Louisiana. Article 1422 provides that: "Unless otherwise limited by order of the court in accordance with this Chapter, the scope of discovery is as set forth in this Article and in Articles 1423 through 1425." The Article then sets forth the general scope of discovery, as follows:

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

La. C.C.P. art. 1422.

Article 1422's reference to discoverable materials relating to any matter that is "not privileged," removes from the scope of discovery any materials that are protected under the attorney-client privilege or work product doctrine.

Louisiana's work product protection is set forth in La. C.C.P. art. 1424 which provides that: "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**." La. C.C.P. art. 1424(A) (emphasis added). Accordingly, materials prepared in anticipation of litigation by a party and certain representatives of the party (e.g., his attorney, surety, indemnitor) are off limits in discovery unless the party seeking the information can show unfair prejudice or undue hardship or injustice if the materials are not produced. Notably, La. C.C.P. art. 1424 previously included the term experts as other party representatives that were afforded work product protection under the Article. However, in 2003 La. C.C.P. art. 1424 was amended to remove the word expert for the purpose of "eliminating the protection from discovery of writings of all expert witnesses previously provided by [La. C.C.P. art. 1424]." La. C.C.P. art. 1424, 2003 Revision Comment. Work product protection as applied to experts is governed by La. C.C.P. art. 1425 discussed below.

Louisiana law provides near absolute protection for "attorney work product" – i.e., materials that reflect "the mental impressions, conclusions, opinions, or theories of an attorney," providing that "the court shall not order the production or inspection of" any such materials. La.

C.C.P. art. 1424(A). The only exception to the absolute protection for attorney-work product is La. C.C.P. art. 1425(E)(1), which permits a party to obtain drafts of expert reports even if they would "reveal the mental impressions, opinions, or trial strategy of the attorney for the party," but only on "a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means." La. C.C.P. art. 1425(E)(1). Though discovery of expert drafts is permitted – obviously, a party's efforts to seek expert draft reports may often present complicated discovery disputes requiring *in camera* review and other measures necessary to protect privilege issues that may implicated with expert report preparation. Typically, parties will more often rely on more common tools of expert discovery, such as discovery of non-privileged facts and data considered by the expert and expert depositions.

Pursuant to La. C.C.P. art. 1426, parties may seek protection from overly intrusive or improper discovery requests. Specifically, Article 1426 allows a court to issue an order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense…" La. C.C.P. art. 1426(A).

2. Federal.

Fed. R. Civ. P. 26(b)(1) sets forth the general scope of discovery. Rule 26 likewise provides that: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense…" Fed. R. Civ. P. 26(b)(1). In 2015, the Federal Rules were amended to add a proportionality requirement in which discovery requests must be "proportional to the needs of the case," considering the following factors: (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, the importance of the discovery in resolving the issues," and (5) "whether the burden or expense of the proposed discovery outweighs its likely benefit."

Louisiana has not adopted a similar proportionality requirement like the recent change to the Federal Rules.

III. Discovery Rules Involving Testifying Experts.

1. Louisiana – Available Modes of Discovery and Report Requirements.

The Louisiana Rules do not contain an automatic disclosure obligation with respect to the identity of persons a party may use to present expert opinion testimony. However, "[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." La. C.C.P. art. 1425(A).

La. C.C.P. art. 1425(D)(1) sets forth the general discovery rules regarding testifying experts and provides that: **"**Except as otherwise provided in Paragraph E of this Article, a party may, through interrogatories, deposition, and a request for documents and tangible things, discover facts known or opinions held by any person who has been identified as an expert whose opinions may

be presented at trial." La. C.C.P. art. 1425(D)(1).[1] Accordingly, Louisiana law affords parties the discovery tools of interrogatories, requests for documents, and depositions to obtain information regarding the facts known and opinions held by testifying experts.

If the testifying expert has been ordered to provide a written report, the deposition of an expert may only be conducted after the written report has been provided. *See* La. C.C.P. art. 1425(D)(1).

The Louisiana Code of Civil Procedure does not automatically require the production of written reports from experts that have been retained by a party to testify at trial. Rather, Article 1425 provides that "[u]pon 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." La. C.C.P. art. 1425(B). The comments to La. C.C.P. art. 1425 state that expert reports should not be required in all cases, but rather that: "the court should always consider the complexity of the case, amount in controversy, and the limitations on the financial resources of the parties in determining whether the added expense to the parties in providing an expert report is justified." La. C.C.P. art. 1425, 2003 Revision Comment. However, many standard scheduling orders used in Louisiana's state courts contain an expert report production deadline, such that in most cases, expert reports are required to be exchanged.

La. C.C.P. art. 1425(B) sets forth the requirements of the expert report (if ordered) which is that the report contain: (i) "a complete statement of all opinions to be expressed and the basis and reasons therefor," and (ii) "the data or other information considered by the witness in forming the opinions." In addition, the parties may stipulate or the court may order that the report also contain the following, additional information: (1) "exhibits to be used as a summary of or support for the opinions;" (2) "the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;" (3) "the compensation to be paid for the study and testimony;" and/or (4) "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."

2. Federal – Available Modes of Discovery and Report Requirements.

The Federal Rules differ from Louisiana in that many expert disclosure and production requirements are automatic. Rule 26(a)(2)(A) provides that: "In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." Fed. R. Civ. P. 26 (a)(2)(A). Thus, disclosure of the identity of any potential testifying expert (whether retained or not retained) is automatic under the Federal Rules.

Rule 26(a)(2)(B) also requires that the expert disclosures required under Rule 26(a)(2)(A) be accompanied with a written report for any retained, testifying experts. The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them;

[1] La. C.C.P. art. 1425(D)(1) applies to all testifying experts (whether or not retained) and thus can be used to discover opinions held by non-retained experts expected to provide testimony at trial, such as treating physicians.

(ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case. Fed. R. Civ. P. 26(a)(2)(B).

For non-retained experts that are expected to give testimony at trial (e.g., treating physicians, engineers who performed inspections, etc.), the party must provide a more limited summary disclosure consisting of: (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify. Fed. R. Civ. P. 26(a)(2)(C). As noted, the disclosure required under Rule 26(a)(2)(C) differs from Rule 26(a)(2)(B), in that the party (rather than the expert) provides the summary disclosure.

In Louisiana, a party can still obtain information with respect to the opinions of non-retained testifying experts, but must request this information through interrogatories, depositions, or requests for production.

Finally, like Louisiana, the parties can depose experts that are expected to provide testimony at trial. *See* Fed. R. Civ. P. 26(b)(4)(A).

3. Draft Reports, Notes, & Other Materials of Retained Testifying Experts – Louisiana.

La. C.C.P. art. 1425(E)(1) generally provides for protection of an expert's draft reports, communications, and notes which would reveal the mental impressions, opinions, or trial strategy of counsel. That Article provides that:

> The expert's **drafts** of a report required under Paragraph B of this Article, **and communications, including notes and electronically stored information or portions thereof <u>that would reveal the mental impressions, opinions, or trial strategy of the attorney</u> for the party who has retained the expert to testify**, shall not be discoverable except, in either case, on a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means. La. C.C.P. art. 1425(E)(1) (emphasis added).

The protection in La. C.C.P. art. 1425(E)(1) is qualified by the next subsection (E)(2) which provides that the Article shall not "preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches, or into the validity of the expert's opinions."

The comments to La. C.C.P. art. 1425 explain that "Paragraph E was added in 2007 to protect from discovery drafts of required expert reports and communications with testifying

experts that would reveal the attorney's mental impressions, opinions, or trial strategy, without sacrificing full discoverability of facts and data supporting the expert's opinions." La. C.C.P. art. 1425, 2007 Revision Comment. Thus, if "documents or electronically stored information contain both facts and protected material of an attorney, the court may order production subject to redaction." *Id.* Though the Louisiana rules contain lesser protections with respect to expert draft reports when compared to the Federal Rules, there is little jurisprudence addressing expert discovery disputes when a party seeks draft reports which contain both discoverable facts and data relied on by the expert, as well as protected attorney mental impressions. The limited jurisprudence indicates that such disputes require *in camera* inspections of the draft reports for redaction from the draft reports of any protected attorney mental impressions, opinions, or trial strategy.

Consistent with the addition of La. C.C.P. art. 1425(E) and the Revision Comments, the courts have generally permitted discovery requests to expert witnesses which request production of communications between a retained expert and the attorney, subject to the requirement that any portions of communications that would reveal the "mental impressions, opinions, or trial strategy" be redacted. *See DirecTV, LLC v. Bridges*, 21-646 (La. App. 5 Cir. 1/21/22) (La. App. 5 Cir. Jan. 21, 2022) (ordering *in camera* review by trial court of communications between retained expert and law firm and that any portions revealing mental impressions, opinions or trial strategy of counsel would be protected).

Subject to the protection for counsel's mental impressions, La. C.C.P. art. 1425(E)(2) provides that nothing in the Article shall "preclude opposing counsel from obtaining any facts or data the **expert is relying on** in forming his opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data **the expert considered**, whether the expert considered alternative approaches, or into the validity of the expert's opinions." (emphasis added).

There is a sparse amount of case law on the scope of discovery under 1425(E)(2) and the extent of information that must be produced under the Article. However, the Article's use of the term "considered" is notably broader and arguably includes any materials that the expert reviewed, regardless of whether the expert relies on them in support of his opinions. *See* Fed. R. Civ. P. 26, 1993 Revision Comment (noting that with the addition of the word "considered" to the expert disclosure requirements, "litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.").

4. Draft Reports, Notes, & Other Materials of Retained Testifying Experts – Federal.

Following the 2010 Amendments to the Federal Rules governing expert disclosures, drafts of expert reports are squarely protected under Fed. R. Civ. P. 26(b)(4)(B) which provides work product protection to draft reports. Compared to Rule 26, the protection in Louisiana is more limited because only draft reports "that would reveal the mental impressions, opinions, or trial strategy of the attorney for the party," are exempt from discovery, whereas Rule 26 contains no such limitation.

The same can be said for attorney-expert communications. Louisiana only protects attorney-expert communications that reveal or contain the mental impressions, opinions, or trial strategy of counsel. Rule 26(b)(4)(C) exempts all attorney-expert communications from discovery with three exceptions. Specifically, the following attorney-expert communications are discoverable, those that: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. Fed. R. Civ. P. 26(b)(4)(C)(i)-(iii).

5. Discovery About an Expert's Potential Bias – Louisiana.

The Louisiana Code of Civil Procedure does not set forth any specific rules with respect to discovery targeted towards an expert's bias or credibility. Thus, the matter has generally been left to the courts.

To this end, Louisiana courts have been receptive to discovery for the purpose of showing possible bias or a lack of credibility of a retained expert. *See Rowe v. State Farm Mut. Auto. Ins. Co*., 670 So. 2d 718, 726 (La. App. 3d Cir. 1996), *writ denied*, 673 So. 2d 611 (La. 1996) (holding that trial erred in denying plaintiff's subpoena request to defense medical IME expert to obtain financial records of expert for the purpose of demonstrating the amount of expert's work attributable to State Farm and defense counsel); *Brown v. Bush*, 715 So. 2d 464, 465 (La. App. 4th Cir. 1998), *as amended on reh'g* (May 15, 1998), *writ denied*, 724 So. 2d 762 (La. 1998) ("Plaintiff is permitted to discover an expert's bias by discovery or subpoena, [and] to present evidence of such bias to the trier of fact ...'") (citation omitted).

At the same time, courts have also balanced a party's need to discover information related to an adverse expert's bias with the understanding that the information often needed to explore bias, such as financial records, tax records, and third-party medical and IME records often contain sensitive information that must be considered for such requests. In *Rodas v. Nutter*, 22-106 (La. App. 5 Cir. 5/27/22), 2022 WL 1702519, plaintiff, to establish bias of the defendant's IME medical expert, sought the production of extensive financial records of the IME doctor as well as production of reports of previous IME's performed by the doctor. Defendants objected to the scope of subpoena.

The Louisiana Fifth Circuit found that the plaintiff had failed to show relevance and the good cause necessary to justify production of sensitive financial information and IME reports which contained the private health information of third-parties. *Id.* at *2. However, the Fifth Circuit agreed that the plaintiff had a right "to seek information regarding the IMEs performed by Dr. Watson." *Id.* Thus, the Court modified the subpoena to order that the defense expert provide sworn responses regarding: (1) "the number of IMEs he has performed over the last three years," and (2) "the percentage of his income that he earned from performing IMEs in 2019, 2020 and 2021…" *Id.*

6. Discovery About a Testifying Expert's Bias – Federal.

Like Louisiana, the Federal Rules do not expressly address the scope of discovery into the records of an expert for the purpose of exploring bias, leaving the matter to the discretion of the courts. However, Fed. R. Evid. 607, like its Louisiana analog, generally allows the credibility of any witness to be attacked, including experts. Thus, Federal courts have held that "information regarding the bias of a witness, including expert witnesses, may fall within the scope of discovery." *Narcisse v. All Ways Transportation, LLC*, 2023 WL 6545423, at *6 (M.D. La. July 7, 2023). For instance, "the amount of income derived from services related to testifying as an expert witness is relevant to show bias or financial interest." *Butler v. Rigsby*, 1998 WL 164857, at *4 (E.D. La. Apr. 7, 1998). Nonetheless, some courts have recognized that there are limits to discovery of expert records – noting that "the financial records of expert witnesses may be discoverable for the purposes of addressing bias, although such evidence may open up numerous collateral issues that would result in delay and confusion at trial." *Narcisse*, 2023 WL 6545423, at *6. Thus, courts have suggested that were a party seeks collateral information from an expert that is not directly related to his opinions, such as tax or financial information, the party must show that the requested information is likely to demonstrate the expert's bias. *See id. See also Wacker v. Gehl Co*., 157 F.R.D. 58, 59 (W.D. Mo. 1994) (holding that plaintiff's expert need not provide tax records or income from consulting in other cases where defendants had not discovered more specific evidence of possible bias such as a special relationship between the expert and counsel).

Given there is no uniform rule on the scope of discovery as regards expert bias, this would be decided on a case-by-case basis and in light of the general considerations for all discovery of balancing the need for the information versus the burden posed on parties and non-parties by the discovery.

7. Destruction of Evidence by an Expert – Louisiana.

There do not appear to be any cases discussing the issue of destruction of discoverable expert materials by an expert. As a general matter, however, under Louisiana law, "[w]hen a party has notice that certain evidence within its control is relevant to pending or imminent litigation, the party has an obligation to preserve the evidence." *Roussell v. Circle K Store, Inc*., 340 So. 3d 52, 56 (La. App. 1 Cir. 2021). "A trial court has the authority to impose sanctions on a party for spoliation of evidence and other discovery misconduct under both its inherent power to manage its own affairs and the discovery articles provided in the Louisiana Code of Civil Procedure." *Carter v. Hi Nabor Super Market, LLC*, 13-0529 (La. App. 1 Cir. 12/30/14), 168 So.3d 698, 703, *writ denied*, 15-0190 (La. 4/17/15), 168 So.3d 399.

To the extent an expert is deemed to destroy or delete evidence in his possession, a party may face sanctions under La. C.C.P. art. 1471 (Louisiana's analog to Rule 37), which allows a court to sanction a party, including by issuing any of the following: (1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order. (2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence. [or] (3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing

the action or proceeding or any part thereof, or rendering a default judgment against the disobedient party upon presentation of proof as required by Article 1702. La. C.C.P. art. 1471 (A). Another frequent remedy that courts impose for loss or destruction of evidence is to issue an adverse inference instruction to the jury that it may infer that the destroyed evidence was detrimental to that party. *Roussell*, 340 So. 3d at 56. The type and severity of sanctions would depend on the specific facts of the case.

8. Destruction of Evidence by an Expert – Federal.

Likewise, under the Federal Rules, the analysis of what remedy (if any) to impose on an expert is fact-specific. Courts have held that the destruction of notes used by an expert to prepare a report did not warrant sanctions in the form of an adverse inference where there was no showing of bad faith by the expert. *See St. Tammany Par. Hosp. Serv. Dist. No. 1 v. Travelers Prop. Cas. Co. of Am.*, 250 F.R.D. 275 (E.D. La. 2008) (plaintiff's expert destruction of notes used to prepare expert report did not warrant adverse inference sanction for spoliation of evidence where plaintiff demonstrated that expert merely discarded the notes in an innocuous fashion after incorporating them into his report).

Because of the inherent risk presented the by destruction of evidence – whether under Louisiana or Federal law – the safest course of action would always be to preserve any information or data that might be considered discoverable expert reliance materials so that they can be produced if ordered. Further, even if sanctions are not awarded, opposing counsel is surely to use an expert's destruction of evidence to attack the expert's credibility at trial or at the expert's deposition.

9. Duty to Supplement – Louisiana.

Louisiana law imposes a duty to supplement discovery responses as related to experts. La. C.C.P. art. 1428(A) provides:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters, **and the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony**. (emphasis added).

In accordance with Article 1428, courts recognize that the Louisiana Code of Civil Procedure "**imposes a continuing affirmative duty** on a party to timely supplement discovery responses related to witnesses **and experts**." *Chapman v. Regl. Transit Auth./TSMEL*, 681 So. 2d 1301, 1305 (La. App. 4 Cir. 1996) (emphasis added); *Guidry v. Savoie*, 194 So. 3d 1184, 1193 (La. App. 5 Cir. 2016), *writ denied*, 207 So. 3d 1064 (La. 2016). Under La. C.C.P. art. 1428,

experts and counsel should ensure that expert reports (when required) are timely supplemented in order to avoid the possibility of being precluded from offering the supplemental information at trial due to a failure to supplement as required under the Louisiana expert discovery rules.

10. Duty to Supplement – Federal.

The Federal Rules similarly require a party to supplement expert disclosures and reports. *See* Fed. R. Civ. P. 26(a)(2)(E). With respect to retained expert witnesses that must provide a report, the Federal Rules specifically provide that "the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition." Fed. R. Civ. P. 26(e)(2).

IV. Discovery From and About Non-Testifying Retained Experts.

1. Disclosure of Identity of Non-Testifying Consulting Experts – Louisiana.

Pursuant to La. C.C.P. art. 1425(D)(2) a party may only propound discovery related to retained non-testifying experts "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." The 2003 Revision Comments explain that this restriction applies to "**the identity of**, facts known to, writings of, and opinions held by" non-testifying, consulting experts. *See* La. C.C.P. art. 1425, 2003 Revision Comment (emphasis added). As such, the Louisiana rules typically protect the identity of consulting experts from disclosure absent a showing of exceptional circumstances.

2. Disclosure of Non-Testifying Experts – Federal.

The Federal courts are split on whether the identity of consulting experts must be provided. *See Kaleta v. City of Holmes Beach*, 2023 WL 4549610, *4–5 (M.D. Fla. 2023) (canvassing the case law) and *In re Welding Fume Products Liability Litigation*, 534 F. Supp. 2d 761, 767–768, 75 Fed. R. Evid. Serv. 929 (N.D. Ohio 2008) (extensively canvassing case law). The Tenth Circuit has held that identities are protected. *See Ager v. Jane C. Stormont Hospital and Training School for Nurses*, 622 F.2d 496, 503, 29 Fed. R. Serv. 2d 1099 (10th Cir. 1980). The Ninth Circuit has held that identities are not protected. *See Ibrahim v. Department of Homeland Sec*., 669 F.3d 983, 999 (9th Cir. 2012).

Though the Fifth Circuit has not addressed the issue, several Federal district courts within the Fifth Circuit have concluded that the identity of consulting experts need not be disclosed absent a showing of exceptional circumstances. *See Ohio Mgmt., LLC v. James River Ins. Co*., No. 06-280, 2006 WL 1985962, *2 (E.D. La. July 13, 2006) (refusing to order disclosure of consulting expert's identity where movant failed to establish exceptional circumstances); *Quest Diagnostics, Inc. v. Factory Mutual Ins. Co*., No. 07-3877, 2009 WL 10680098 (E.D. La. Mar. 11, 2009) (requiring disclosure of non-testifying expert's identity after finding exceptional circumstances existed); *In re Sinking Barge "Ranger I",* 92 F.R.D. 486, 488 (S.D. Tx. 1981); *Cooper v. Revere Life Ins. Co*., No. CIV. A. 96-2266, 1997 WL 289706, at *1 (E.D. La. May 28, 1997).

3. Disclosure of Facts or Opinions Held by Non-Testifying Experts – Louisiana.

Article 1425 provides:

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

La. C.C.P. art. 1425(D)(2).

The showing of exceptional circumstances typically requires that a party show that the consulting expert is the only source of the information, such as if the consultant was the only expert that was able to inspect a scene or item of equipment before it became changed or made unavailable. *See Friedley v. Pulido*, 2020-0989 (La. App. 1 Cir. 11/23/20) (La. App. 1 Cir. Nov. 23, 2020) (party "successfully demonstrated exceptional circumstances warranting discovery," where non-testifying consulting expert was "the only expert who had the opportunity to examine the trailer that was struck by Raul V. Pulido before it was sold and repaired.").

4. Disclosure of Facts or Opinions of Non-Testifying Experts – Federal.

Like Louisiana, Fed. R. Civ. P. 26(b)(4)(D) provides that a party ordinarily may not discover facts known or opinions held by a consulting expert unless a showing is made of exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. To establish "exceptional circumstances," under Rule 26(b)(4)(D), a party requesting discovery must show that: (1) the object or condition observed by the non-testifying expert is no longer observable by an expert of the party seeking discovery; or (2) although it is possible to replicate expert discovery on a contested issue, the cost of doing so is judicially prohibitive. *Estate of Manship v. U.S.*, 240 F.R.D. 229 n. 15(M.D. La. 2006); *Louisiana Crawfish Producers Assn.-W. v. Amerada Hess Corp.*, No. 10-CV-348, 2012 WL 12929909, at *4 (W.D. La. Sept. 26, 2012).

5. Discovery About Testifying Expert Redesignated as Non-Testifying Expert -- Louisiana.

There do not appear to be any cases in Louisiana addressing the issue of whether a witness that is initially disclosed as an expert witness, but later designated as a non-testifying consultant is subject to the protections of La. C.C.P. art 1425(D)(2). In the absence of such jurisprudence, the plain language of Article 1425 would appear to protect such opinions.

[2] La. C.C.P. art. 1465 governs the report requirement for independent medical examinations.

6. Discovery About Testifying Expert Redesignated as a Non-Testifying Expert – Federal.

The majority view in the Federal courts is that a party may re-designate an expert from a testifying expert to a consulting expert, after which discovery of the expert is subject to the exceptional circumstances test under Rule 26(b)(4)(D). *See, e.g., See R.C. Olmstead, Inc., v. CU Interface, LLC,* 606 F.3d 262, 272–73 (6th Cir. 2010). Some Federal district courts in the Fifth Circuit have adopted this view. *See Estate of Manship v. U.S.*, 240 F.R.D. 229, 233–37, 99 A.F.T.R.2d 2007-526 (M.D. La. 2006) (extensively discussing two lines of cases before adopting majority view).

V. Requirement to Pay an Expert Responding to Discovery.

The Louisiana Code of Civil Procedure provides that: "Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this Paragraph…" La. C.C.P. art. 1425(D)(1). This includes the reasonable fees incurred by the expert in providing a deposition, and often questions can arise as to the reasonableness of fees incurred by the expert in preparing for and giving the deposition. Further, with respect to discovery obtained from a consulting expert, "the court shall also require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert." *Id.* The Louisiana rule is essentially the same as that provided for under Federal Rule 26(b)(4)(E)(i).

VI. Conclusion.

While Louisiana's expert discovery rules are similar in some respects to the Federal Rules, Louisiana has not harmonized its rules to be in accord with the all-important 2010 revisions to the Federal Rules. The 2010 revisions both increased protections for expert drafts and attorney-expert communications and provided greater clarity on the types of expert materials that are subject to discovery (e.g., facts and data considered by the expert).

In Louisiana, drafts of expert reports and attorney-expert communications do not receive the same stringent protections when compared with those in the Federal Rules. In particular, these materials are not *per se* exempted from discovery in Louisiana, as they are in Federal court. Rather, only the portions of expert drafts and attorney-expert communications that would reveal "the attorney's mental impressions, opinions, or trial strategy…" are protected, typically through redaction. For this reason, it is recommended that retained experts in Louisiana maintain copies of any draft expert reports and communications with the attorney, as those materials are subject to discovery in Louisiana (subject to appropriate redactions and protections discussed above). Obviously, the expert should also maintain copies of all supporting materials (e.g., facts and data) that were considered by the expert in forming his or her opinions.