OPINION

Colorado Adopts New Rule of Evidence

Our state clarifies the law on privilege waivers by disclosure

BY CHRISTOPHER MUELLER, RONALD HEDGES AND LINO LIPINSKY DE ORLOV
LAW WEEK COLORADO

On March 22, the Colorado Supreme Court adopted new Rule of Evidence 502, which clarifies the law on waivers of the attorney-client privilege and attorney work product protection through disclosures. The Colorado Rule is based on Federal Rule of Evidence 502, which has been in place for more than four years.

The drafters of the new rule recognized that a strict waiver rule does not make sense in an era involving the review and production of massive amounts of electronically stored information. Every experienced litigator knows that perfection is unattainable, whether in drafting motions or briefs or in privilege reviews of high volumes of paper documents or ESI. Further, the cost of an exhaustive effort can be disproportional to the risks. Because many documents that include information that is privileged or subject to work product protection are also inconsequential, their inadvertent disclosure would have little or no impact.

Colorado Rule 502 addresses five key issues:

- When an intentional disclosure of protected material waives the privilege or work product protection;
- When an inadvertent disclosure results in a waiver;
- The impact in a Colorado proceeding of disclosures in proceedings outside the state;
- The effect of a Colorado court order governing waiver; and
- The controlling effect of parties' agreements on disclosure.

WHEN AN INTENTIONAL DISCLOSURE RESULTS IN A WAIVER

Under Rule 502(a)(1), an intentional disclosure waives privilege or work product protection for communications and information concerning the same subject matter as the material actually disclosed and for other material that "ought in fairness to be considered" with it. This provision is intended to prevent "selective" disclosure for tactical reasons. For example, an attorney may wish to produce a privileged document that supports her case, while attempting to shield other privileged materials addressing the same subject matter that place the client in a less favorable light.

THE EFFECT OF INADVERTENT DISCLOSURES

The new rule makes clear that inadvertent productions do not necessarily waive claims of privilege or work product protection. In this respect, Rule 502 complements the "clawback" provision in Civil Rule 26(b)(5)(B), adopted in 2014, that allows the producing party to seek return of material disclosed inadvertently and bars the receiving party from using or disclosing such material until a court rules on the underlying issues. Rule 502(b) expressly adopts this principle.

An inadvertent disclosure does not waive privilege or work product protection at all if the disclosing party "took reasonable steps" to prevent it and "promptly took reasonable steps to rectify the error." The determination whether steps are reasonable is fact-intensive. Colorado judges have broad discretion to determine reasonableness under Rule 502(b). Such decisions are likely unreviewable within a sufficient time to affect the impact of a waiver on ongoing litigation.

Although the Colorado courts have yet to interpret the "reasonable steps" language of Rule 502(b), the decisions applying its federal analogue are instructive. In Rhoads Industries v. Building Materials Corp., the court found that the producing party had not waived the privilege through an inadvertent production where the party had put its IT expert in charge, deployed special software, and only 812 out of the 78,000 documents produced were privileged.

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Although the Colorado courts also have yet to determine what steps are reasonable in rectifying an accidental production under Rule 502(b), Colorado Rule 26(b)(5)(B) contains clawback language not found in the federal rules. Under the Colorado rule, when faced with a request to return documents, the receiving party has 14 days in which to object to the claim of privilege or work product, and the producing party has 14 days to defend its privilege or work product claim. No state or federal rule imposes time restrictions on the producing party to seek return of the material, although delay in trying to rectify a known mistake can have a negative impact on claims of privilege or work product protection.

Rule 502(b) does not represent a significant change in Colorado law, as the courts in this state previously recognized that an inadvertent production does not result in an automatic waiver of the privilege. In Floyd v. Coors Brewing Co., reversed on other grounds, the Court of Appeals adopted a five-part test for determining whether a waiver had occurred: "(1) the extent to which reasonable precautions were taken to prevent the disclosure of privileged information; (2) the number of inadvertent disclosures made in relation to the total number of documents produced; (3) the extent to which the disclosure, albeit inadvertent, has, nevertheless, caused such a lack of confidentiality that no meaningful confidentiality can be restored; (4) the extent to which the disclosing party has sought remedial measures in a timely fashion; and (5) considerations of fairness to both parties under the circumstances."

THE IMPACT OF DISCLOSURES MADE IN OTHER JURISDICTIONS

Under Rule 502(c), disclosures in other state or federal courts that are not covered by a court order do not waive privilege claims or work product protection in Colorado proceedings, so long as those disclosures would not have accomplished a waiver if they had occurred in a Colorado proceeding. Rule 502 is silent on the effect of a disclosure in proceedings in another court that entered an order governing the impact of the disclosure, because a Colorado court would honor such orders as a matter of full faith and credit, in the case of state court orders, and as a matter of supremacy, in the case of federal court orders.

In addition, Rule 502(c) directs Colorado courts to find against waiver on account of disclosure in a suit in another state or the federal system if such disclosure would not have that effect in the other forum. It seems appropriate for Colorado to have such a rule because a Colorado court must resolve issues of waiver on account of disclosure in a distant forum by applying choice-of-law principles. In effect, Rule 502 sets forth such a principle. It also offers reciprocity to other jurisdictions that have a rule similar to Colorado Rule 502.

THE EFFECT OF COURT ORDERS REGARDING WAIVERS

Rule 502(d) provides that Colorado court orders addressing waivers by disclosure (which often embody agreements reached by the parties) are enforceable in other state or federal proceedings. They are enforceable not only against the litigants in the present proceeding, but also against outside parties and in other proceedings. No federal court has yet determined, however, whether a state court rule on waiver is binding on a federal tribunal.

THE ENFORCEABILITY OF PARTIES' AGREEMENTS ON WAIVER

Under Rule 502(e), agreements regarding the effect of inadvertent production are enforceable among the parties. Litigants can enter into an agreement that is enforceable among themselves in the present suit. Such agreements are "binding only on the parties" and, therefore, do not bind third parties who are not signatories. Further, there is no assurance that a court in another proceeding would honor the agreement.

CONCLUSION

New Rule 502 seeks to modernize the law of waiver by disclosure in Colorado. Although the Colorado courts have yet to construe Rule 502, it is consistent with the Floyd decision and, therefore, does not represent a radical change in Colorado law. The Rule should have the positive impact of adapting Colorado law to the realities of litigation in the world of ESI. •

— Christopher Mueller is a Lindsley Professor at the University of Colorado Law School, Ronald Hedges is a former U.S. Magistrate Judge, and Lino Lipinsky de Orlov is a partner at Dentons

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Maine took a similar approach late last year and came up with a widely applauded proposal that was drawn up by utilities, the solar industry, environmentalists, customers and Maine's public advocate. The collaborative approach was seen by analysts and various industry officials as a sound model that could work elsewhere.

"Each state is different and they have local factors to consider, but this process worked well in Maine, where they avoided much of the controversy that we've seen," said Proudlove, from the N.C. Clean Energy Technology Center. It's not what the different parties would have written themselves, she said. "But they all got much of what they wanted and could live with. It's workable."

But the proposal needed approval from Maine's Legislature and politics ensnared the plan. Republican Gov. Paul LePage vetoed it at the end of April, saying it would increase energy prices for homes and businesses that cannot afford solar panels and pick winners and losers in Maine's energy industries. The House failed to override the veto.

Despite the outcome this year, many analysts such as Proudlove say Maine's approach is sound and can serve as a model for other states that are grappling with the issue. •

—Jon Frandsen, distributed by Stateline, an initiative of the Pew Charitable Trusts