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Colorado Rule of Evidence 502: Preserving Privilege and Work Product Protection in Discovery

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Colorado Rule of Evidence 502 follows Federal Rule of Evidence 502 in taking a flexible approach to determining whether a waiver of the attorney–client privilege or work product protection has occurred in civil and criminal actions. This article explores the main provisions of the rule.

The Colorado Supreme Court adopted Colorado Rule of Evidence (CRE) 502 effective March 22, 2016. The new rule is based on a similar provision added in 2008 to the Federal Rules of Evidence (FRE) that takes a flexible approach to the question whether disclosure in civil or criminal actions can result in a waiver of attorney–client privilege or work product protection. Fourteen other states have also adopted versions of FRE 502.[1]

Major Provisions of CRE 502

Briefly, the new rule contains five major provisions:

1. CRE 502(b) provides that inadvertent production does not necessarily waive claims of attorney–client privilege or work product protection. In this respect, the rule complements the "clawback" provision in Colorado Rule of Civil Procedure (CRCP) 26(b)(5)(B), adopted in 2014, which allows the producing party to seek return of material disclosed inadvertently and bars the receiving party from using or disclosing it until a court can rule on the underlying issues. The clawback provision assumes that inadvertent disclosure doesn't necessarily waive claims of privilege or work product, and CRE 502 adopts this principle in the form of a rule that is a statement of positive law.
2. CRE 502(a) sets a standard for the extent of waiver of privilege or work product protection: *Intentional* waiver extends to undisclosed material dealing with "the same subject matter" as the disclosed material to the extent that the former "ought in fairness" to be considered with what was disclosed. *Inadvertent* disclosure—to the extent that it results in waiver at all—extends only to what was actually disclosed. In other words, broad subject matter waiver is discarded where disclosure is inadvertent.
3. CRE 502(d) and (e) provide for court orders and party agreements dealing with the effects of disclosure on claims of privilege or work product protection. Under Rule 502(e), such agreements and court orders are enforceable among the parties.
4. CRE 502(d) also provides that court orders (which typically embody agreements reached by the parties) are enforceable in other state or federal proceedings, which means that they are enforceable not only against the parties in the proceeding that generated the court order, but against nonsigning outside parties in other proceedings as well.
5. CRE 502(c) addresses the effect in Colorado proceedings of disclosures in other federal or state courts. It provides that 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 courts if those disclosures would not have resulted in waiver had they occurred in a Colorado proceeding. Both FRE 502 and CRE 502 are silent on what happens if

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disclosure occurs in proceedings in other courts that have entered orders governing the matter. The framers of the federal provision thought that orders entered by state courts would be honored by federal courts, as a matter of full faith and credit, and that orders entered by federal courts would be honored in other federal courts, as a matter of federal preclusion law and full faith and credit if the order affected privilege claims based on state law.[2] Hence the federal framers thought no rule was necessary for these situations, and CRE 502 reflects the same underlying view.

The following sections look more closely at these provisions.

Waiver by Inadvertent Production

Until late in the last century, giants such as Wigmore and McCormick took the view that litigants disclosed at their peril.[3] The prevailing attitude was that "privileges shut out the light" and confer only "speculative benefits," so a kind of "absolute liability" was appropriate.[4] Disclosure meant that the claimant hadn't exercised proper care, so protection was lost no matter how disclosure occurred.

In the digital age, however, with increasingly complex litigation and an explosion of electronically stored information, a strict waiver rule no longer makes sense (arguably, it made no sense 50 years ago either). Indeed, electronically stored information is such a common phenomenon that it has acquired an acronym recognized everywhere—ESI. Anyone who writes a brief or article knows that it's impossible to catch every typo, no matter how much time is spent in the effort. In much modern litigation (in both civil and criminal cases) it's also impossible to catch every document embraced by attorney–client privilege or work product protection.

Equally important, the cost of an exhaustive effort to conduct a privilege and work product review is often vastly disproportional to the risks: A great many documents that are privileged or work product may also be inconsequential or of marginal utility, so disclosure has little or no impact. But this is not always the case, which is why it is critical to prevent inadvertent or accidental disclosure from having serious consequences. Some documents reflect client statements not known to the other side, and some reveal tactics or strategy that would be embarrassing or damaging, even though these documents reflect careful and responsible legal representation.

Even before the adoption of CRE 502, Colorado case law had embraced the view that inadvertent production does not necessarily waive attorney–client privilege. The salient authority is the Colorado Court of Appeals decision in *Floyd v. Coors Brewing Co.*,[5] which followed what the Court called the "modern trend." *Floyd* endorsed consideration of the following factors in deciding whether inadvertent production might result in waiver of attorney–client privilege:

- the extent to which reasonable precautions were taken to prevent the disclosure of privileged information;
- the number of inadvertent disclosures made in relation to the total number of documents produced;
- the extent to which the disclosure, albeit inadvertent, has caused such a lack of confidentiality that no meaningful confidentiality can be restored;
- the extent to which the disclosing party has sought remedial measures in a timely fashion; and
- considerations of fairness to both parties under the circumstances.[6]

Extent of Waiver

Under FRE 502(a)(1) and (3), "intentional" disclosure waives privilege or work product protection for material actually disclosed and for other material that "ought in fairness to be considered" with it. This provision aims to prevent selective disclosure for tactical reasons that might distort the truth. But under FRE 502(b), "inadvertent" disclosure can waive privilege or work product protection only for material actually disclosed. More important, under FRE 502(b)(2) and (3), such 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 challenge is to know what constitutes "reasonable steps," particularly before disclosure, where the question is whether the disclosing party took reasonable steps to catch privileged material and work product, but failed to do so and wound up inadvertently disclosing it. *Rhoads Industries v. Building Materials Corp.*[7] provides the most extensive discussion of this matter. Citing the same five factors stressed in *Floyd,* the federal court in *Rhoads Industries* concluded that inadvertent production did not waive the plaintiff's privilege claim, with the exception of some documents that were withheld and not included on a privilege log (for these documents, the court concluded that the privilege was waived).[8] For the other documents, the court held that inadvertent production did not waive the privilege: The court stressed that the plaintiff put its information technology expert in charge, deployed special software, and offered reasonable explanations for the fact that some documents accidentally got through.[9] In the end, the *Rhoads* court was impressed that only 812 out of 78,000 documents produced were privileged (1% of the total).[10] The court, however, also criticized the plaintiff for delays in preparing for production during discovery in the case that it was initiating, and for delays in rectifying the error in producing privileged documents.[11] The decisive factor for the court was the "interests of justice," which led it to conclude that the defendant had no right to expect access to privileged material and that the privilege claim survived the plaintiff's missteps.[12]

Particularly where the parties have not agreed on a protocol for culling out privileged material and work product, the risk of waiver by disclosure remains significant. In contrast with *Rhoads*, a West Virginia federal court in *Justus v. Ethicon, Inc.* found that the plaintiff waived her privilege by disclosing a letter from her lawyer during a court-ordered physical examination by a doctor.[13] She simply handed the letter to the doctor's staff and "failed to take reasonable precautions to prevent disclosure," having made no effort "to limit the staff's access to the information contained in the letter."[14] It was not one of "thousands of documents" and the plaintiff was not "pressured to produce it," and it was not even labeled as "privileged" or otherwise identified as an attorney–client communication.[15]

But inadvertent production, even where it seems careless or ill-advised, does not waive privilege or work product protection for additional material dealing with the same general subject.[16] Thus, in *Greenleaf Arms Realty Trust I, LLC v. New Boston Fund, Inc.*, a Massachusetts court found that inclusion of an email from the plaintiff's lawyer as an exhibit to a complaint did not waive a privilege claim for other material in the files of the lawyer because the point of the exhibit was to highlight an email from defense counsel, so inclusion of the email from plaintiff's counsel was apparently accidental.[17] Although the lawyer "let the cat out of the bag," the

court concluded, he acted "inadvertently and without authorization," and this misstep "should not entitle the adverse party to take the horse, the dog, the hamsters, and the goldfish too."[18]

Even the meaning of "reasonable steps" in the other setting—what the disclosing party should do after making its mistake—can be a challenge to sort out. The clawback provision in CRCP 26(b)(5)(B) contains 14-day time limitations that are not in the federal counterpart. It provides that when faced with a request to return documents, the receiving party has 14 days to object to the claim of privilege or work product, and the producing party then has 14 days to "put up or shut up"—to defend its privilege or work product claim or to abandon it.

Neither the state nor the federal rule restricts the time during which the producing party may seek return of the material, although delay in trying to correct an inadvertent production when the producing party learns of problems can have a negative impact on claims of privilege or work product. On this point, the federal Advisory Committee Note to FRE 502 offers the comment that there is no obligation to "engage in a post-production review," although the producing party must "follow up on any obvious indications" of mistaken production.[19] A moment's reflection suggests the wisdom of the Advisory Committee on this point: If the producing party has to keep covering its own tracks, for example by reviewing documents after producing them, the intended benefit of a flexible waiver doctrine would be lost. Yet it also appears to be correct that further delays could be unfair to the receiving party if the producing party procrastinates when it has been put on notice that it may have inadvertently produced privileged material or work product.

Whether reasonable steps were taken to guard against disclosure and to retrieve privileged or work product materials produced inadvertently is a matter of discretion for the trial court. As a practical matter, such decisions are nearly unreviewable, not only because the trial court enjoys broad discretion, but also because such orders are interlocutory in nature (hence usually not subject to immediate appeal) and the question to be answered depends on the individual facts of the case. It is a slightly different matter when a Colorado magistrate or a federal magistrate judge makes such decisions and a dissatisfied party may seek immediate review of pretrial orders by the presiding trial judge.[20]

Agreements and Court Orders

Planning can help avoid the kind of questions *Rhoads* addressed. Parties can enter into agreements and courts can enter orders that govern in some detail the steps to be taken in culling privileged and work product material from documents turned over in discovery. Through agreements, parties can define, for example, "due care" that excuses inadvertent production and lets the producing party "put the cat back in the bag." Moreover, every litigator in this state should consider seeking a Rule 502 order in every civil action. As one federal judicial officer famously pronounced, "it is malpractice to not seek a 502(d) order from the court before you seek documents."[21]

Parties can also agree on the use of specific litigation consultants or computer programs that conduct searches with minimal human involvement, or on the use of search protocols to be followed by lawyers, paralegals, or technicians.[22] It seems probable that the parties can even agree on taking no precautionary measures to cull privileged or work product material from what is produced. The Advisory Committee Note to FRE 502 contemplates that a court order can endorse such arrangements, and courts are often prepared to honor private agreements taking this approach.[23] Under this arrangement, the producing party turns over all material responsive to the production request, the receiving party takes a "quick peek" at this material and designates the documents it wants to use, and the producing party can then claim or forego privilege or work product protection. This practice has enjoyed growing acceptance in federal courts.[24] There does not, however, seem to be a reported Colorado decision dealing with this arrangement, and the same is true in many other states.[25] And some modern decisions hold that even "quick peek" agreements do not protect a party who is "reckless" in disclosing material for which it later claims a privilege.[26]

Courts and parties don't always see eye to eye on the value of this approach. In *Rajala v. McGuire Woods, LLP*,[27] for example, a fed-

eral court put in place a "quick peek" arrangement at the request of the producing party—a law firm being sued by a trustee in bankruptcy for alleged violations of securities law. The court rejected the plaintiff's argument that going forward in this manner would improperly shift to the plaintiff the work of doing the defendant's privilege review. The court found that FRE 502 authorizes this approach, and stressed that the suit involved a huge number of email messages among "thousands of clients," with high risk of inadvertent disclosure of privileged or work product material.[28] But another federal court, in *Good v. American Water Works Co.*,[29] declined the request of the information-seeking plaintiff for such an arrangement. In *Good,* the defendants wanted "the opportunity to conduct some level of human due diligence prior to disclosing vast amounts of information." Stressing that FRE 502 does not prohibit this "cautious approach" and that defendants "appear ready to move expeditiously," the court agreed with their request, with the "expectation that the defendants will marshal the resources necessary" to minimize delay.[30]

The lesson to be drawn from *McGuire Woods* and *Good* is not that the decisions conflict on the propriety of "quick peek" arrangements (although one allowed it and the other didn't), nor that courts side with the producing party (although the producing party won in both cases). Rather, the lesson is that such arrangements can appear advantageous to either side. Sometimes the producing party wants it, and sometimes the information seeker (the receiving party) wants it, and courts have leeway to approve different approaches in different situations.

Court orders on such points are important for two reasons. First, FRE 502(e) provides that an order controls waiver of privilege or work product protection not only among the parties and in the action in which the order was entered, but as against third parties and in other actions. Litigants can enter into an agreement that is enforceable among themselves, and FRE 502(e) recognizes this point obliquely by saying such an agreement "is binding only on the parties." Such an agreement does not, however, bind third parties who are not signatories, and there is no assurance that a court in another action will honor it. FRE 502(d) states, however, that if an agreement is "incorporated into a court order," then waiver by disclosure is governed by that order in "any other state or federal" proceeding.

A second reason why court orders are important in litigation is that if litigants cannot agree on an approach to waiver of privilege or work product during discovery, as happened in *McGuire Woods* and *Good*, a court can resolve the matter for them, regardless whether the parties agree.

Colorado Court Orders Enforceable Elsewhere

As noted above, CRE 502(d) provides that a court order addressing the effect of inadvertent disclosure on attorney–client privilege or work product protection is enforceable in actions in federal court or the courts of other states.

Lurking behind CRE 502(d), as it relates to enforcement of Colorado court orders in other jurisdictions, are serious issues of federalism. To begin with, there is the question how a Colorado rule can determine the effect of a Colorado court order in, for example, a Kansas court or a federal court. First, if the recognition jurisdiction (the state of Kansas or a federal court) has its own Rule 502, recognition is likely and the problem should be solved.[31] (In fact, Kansas has adopted its own Rule 502, and of course, FRE 502 applies in the federal system.) Second, if the court in the jurisdiction where a party seeks recognition of an order does not itself have the substantial equivalent of Rule 502, ordinary notions of full faith and credit and comity are likely to solve the problem. These principles normally call for the court in which recognition is sought of an order entered by a court in another jurisdiction to apply the preclusion law of the latter jurisdiction (the law of the jurisdiction where the court entered the order.)[32] In Colorado, CRE 502 states the law, so a court in another state asked to recognize a Colorado court order relating to the preservation of attorney–client privilege or work product during discovery in a Colorado action should respect and apply CRE 502, giving the same effect, in that jurisdiction, that a Colorado court would give to the Colorado order.

Effects in Colorado Courts of Disclosures in Other Courts

As noted above, CRE 502 has the effect of directing 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 that forum. The rule expressly refers only to disclosure in such forum if there is no court order, and silently assumes that a Colorado court would reach the same conclusion when there is a court order. 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 some choice-of-law principle, and in effect CRE 502 sets forth such a principle: In this situation, it directs Colorado courts to fol-

low the law of the jurisdiction where the disclosure occurred. This provision also has the effect of offering reciprocity to other systems that have a rule similar to CRE 502.

Conclusion

CRE 502 seeks to modernize principles of waiver by disclosure as it relates to attorney–client privilege and work product protection. The new provision, which is substantially identical to FRE 502 and is now the law in 14 other states, is one of considerable subtlety, as described above. It has yet to be construed in reported Colorado decisions, but is consistent with the approach signaled for Colorado in the *Floyd* case. And the new provision should have a positive impact in adapting Colorado law to new litigation realities.

Notes

1. The other states are Alabama, Arizona, Delaware, Illinois, Indiana, Iowa, Kansas, Oklahoma, Tennessee, Vermont, Washington, West Virginia, and Wisconsin. *See* "K & L Gates Electronic Discovery Law," www.ediscoverylaw.com/state-district-court-rules. The matter is also under consideration in Pennsylvania.

2. *See* Advisory Committee Note to FRE 502, which states that the matter is governed by "statutory law and principles of federalism and comity" (citing 28 USC § 1738, which is the federal full faith and credit statute, and a district court case that speaks of "principles of comity, courtesy, and … federalism"). The intent is clear: The Advisory Committee Note says federal courts are to "apply the law that is most protective of privilege and work product," whether state or federal.

3. *See, e.g.*, Wigmore, 8 *Wigmore on Evidence* § 2325 (McNaughton rev. 1961) ("all disclosures (oral or written) voluntarily made to the opposing party" amount to "implied waiver" of attorney–client privilege); McCormick, *McCormick on Evidence* § 87 (2d ed. 1972) (practically speaking, it is impossible to abolish the privilege, but at least "its obstructive effect has been substantially lessened by the development of liberal doctrines as to waiver").

4. *Wigmore, supra* note 3 at § 2291 (benefits of privilege "are all indirect and speculative," but "its obstruction is plain and concrete").

5. *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo.App. 1997), *rev'd on other grounds,* 978 P.2d 663 (Colo. 1999).

6. *Id.* at 809. *See also In re Marriage of Amich & Adiutori*, 192 P.3d 422, 424 (Colo.App. 2007) (citing *Floyd* as holding that Colorado follows an "ad hoc" approach in determining whether "inadvertent disclosure of privileged documents by an attorney or client constitutes a waiver," and concluding that no waiver occurred where wife found, on end table under phone in home where "she no longer lived in and no longer had a key to," husband's notes describing conversation with lawyer).

7. *Rhoads Indus. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 216 (E.D. Pa. 2008).

8. *Id.* at 226–27.

9. *Id.* at 221–22.

10. *Id.* at 224.

11. *Id.* at 225.

12. *Id.*

13. *Justus v. Ethicon, Inc.*, No. 2:12-cv-00956, 2016 WL 1452422 (S.D.W. Va. Apr. 13, 2016).

14. *Id.* at *3.

15. *Id.*

16. *Greenleaf Arms Realty Trust I, LLC v. New Boston Fund, Inc.*, 2012 WL 5316014 (Mass. Super.Ct. Aug. 8, 2012).

17. *Id.* at *3.

18. *Id.* at *5.

19. *See* Advisory Committee Note to FRE 502 (the rule "does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake").

20. *See* 28 USC § 636(b)(1)(A) (allowing district judge to correct an order that is "clearly erroneous or contrary to law"); FRCP 72(b) (authorizing a party dissatisfied with a pretrial ruling by a magistrate judge to "serve and file objections" within 14 days), and 72(a) (requiring the district judge to "consider timely objections and modify or set aside any part" of an order that is "clearly erroneous or contrary to law"). *See also* Colorado Magistrate Rule 6(c)(1) and 7(a) (the former authorizes magistrates to hear and rule on discovery motions; the latter authorizes petitions for review to a district judge, who can reject or modify a magistrate's order for clear error).

21. The Sedona Conference, Commentary on Protection of Privileged ESI (Dec. 2015) at 3 n.8.

22. *See, e.g.*, *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 162 (3d Cir. 2012) (in antitrust suit involving discovery of more than 500,000 documents, parties agreed that use of certain search terms raised presumption that reasonable search was performed). For a contemporary example of a stipulated protective order, set forth in full, *see Taylor v. Meadowbrook Meat Co.*, No. 3:15-cv-00132-LB, 2016 WL 1375622 (N.D. Cal. Apr. 6, 2016).

23. *See* Advisory Committee Note to FRE 502 (court order "may provide for return of documents without waiver irrespective of the care taken by the disclosing party"); *Royal Park Invs. SAV/NV v. Deutsche Bank Nat'l Trust Co.*, No. 14-CV-04394 (AJN) (BCM), 2016 WL 2977175, at *3 (S.D.N.Y. May 20, 2016) (court's protective order did not require producing party to show that it took "reasonable steps" to prevent disclosure or that it "promptly" rectified the error; producing party's conduct is to be judged under that order, not under the standard that FRE 502 would otherwise impose).

24. *See, e.g.*, *Summerville v. Moran*, No. 1:14-cv-02099-WTL-TAB, 2016 WL 233627 (S.D. Ind. Jan. 20, 2016); *Wells Fargo & Co. v. U.S.*, No. 09–CV–2764 (PJS/TNL), 2014 WL 2855417 (D. Minn. June 16, 2014); *Ebert v. C.R. Bard, Inc.*, No. 12–01253, 2014 WL 1632155 (E.D. Pa. Apr. 24, 2014) (all using "quick peek" procedures).

25. On "quick peek" arrangements, *see* Barkley and Anderson, "The Brave New World of E-Discovery—Part II," 36 *The Colorado Lawyer* 43 (Sept. 2007) (discussing quick peek and clawback agreements).

26. *U.S. Commodity Futures Trading Comm'n v. Parnon Energy, Inc.*, No. 11 Civ. 3543 (WHP), 2014 WL 2116147, at *7 (S.D.N.Y. May 14, 2014) ("wholesale production of privileged material from third parties was reckless," hence "does not qualify as an inadvertent disclosure subject to the clawback provision of the protective order").

27. *Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010).

28. *Id.* at *6.

29. *Good v. American Water Works Co. Inc.*, No. 2:14–01374, 2014 WL 5486827 (S.D.W. Va. Oct. 29, 2014).

30. *Id.* at *2–3.

31. For an example of a federal decision that honored a state court order governing privilege waiver, *see Wal-Mart Stores, Inc. v. City of Pontiac Gen'l Emps.' Ret. Sys.*, 314 F.R.D. 138 (D. Del. 2016) (under order of Delaware court, production did not waive claim of attorney–client privilege, so privilege was not waived in federal securities class action).

32. *See supra* note 2. In short, the law of the forum normally determines the effect of its own judgments. *See, e.g.*, *Restatement (Second) Conflict of Laws* § 95 (what issues are resolved by a judgment "is determined, subject to constitutional limitations, by the local law of the State where the judgment was rendered"); *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985) (law of the state of the court entering judgment governs its issue preclusive effect); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (federal law governs issue preclusive effect of federal judgments). ■