AGENDA

COLORADO SUPREME COURT ADVISORY COMMITTEE ON RULES OF EVIDENCE

Friday, October 24, 2014, 1:30p.m.
Ralph L. Carr Colorado Judicial Center
2 E.14th Ave., Denver CO 80203
Fourth Floor, Supreme Court Conference Room

I. Call to order

II. Announcements from the Chair

a. Welcome to new members from The Honorable Gale T. Miller, Chair [Roster Page 2-4]
b. CRE 803(10) adopted by Colorado Supreme Court February 18, 2014 [Page 5]

III. Business

a. FRE 502, proposed adoption of similar Colorado rule. (David DeMuro, federal rules subcommittee chair for the Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure)
   i. Memorandum March 10, 2014 [Page 6-8]
   ii. Judge Webb's March 15 email [Page 9]
   iii. Memorandum March 25, 2014 [10-12]
   iv. CRCP 26(b)(5)(B) as adopted by the supreme court [Page 13-14]
   v. FRCP 26 and Federal Comment [Page 15-28]
   vi. Floyd v. Coors Brewing Company, 952 P.2d 797 (1997) [Page 29-46]
   vii. FRE 502 [Page 47-57]

b. Proposed amendment to FRE 801(d)(1)(B).
   i. Report of the Advisory Committee on Evidence Rules [Page 58-61]
   ii. Transmittal of Proposed Amendments to the Federal Rules of Evidence [Page 62-66]
   iii. Proposed FRE 801 [Page 67-70]

c. Proposed amendments to FRE 803 (6)-(8).
   i. Report of the Advisory Committee on Evidence Rules [Page 58-61]
   ii. Transmittal of Proposed Amendments to the Federal Rules of Evidence [Page 62-66]
   iii. Proposed FRE 803(6)-(8)[Page 71 -78]

d. Future agenda items

IV. Adjourn

COLORADO SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Member	Contact Information	Term
Justice Nathan B. Coats, Liaison	nathan.coats@judicial.state.co.us Ralph L. Carr Colorado Judicial Center 2 East 14 Avenue Denver, CO 80203 720-625-5150	N/A
Judge Gale T. Miller, Chair	gale.miller@judicial.state.co.us Ralph L. Carr Colorado Judicial Center 2 East 14 Avenue Denver, CO 80203 720-625-5150	January 1, 2014 to December 31, 2016
Catherine P. Adkisson, Deputy Solicitor General	catherine.adkisson@state.co.us Colorado Department of Law 1300 Broadway, 10th Floor Denver, CO 80203 720-508-6000	March 1, 2014 – February 28, 2017
Harlan Bockman	harboc@hotmail.com JAMS 410 17th Street ,Suite 1600 Denver, Colorado 80202 303-534-1254	July 1, 2014 – June 30, 2017
Philip A. Cherner	philcherner@vicentesederberg.com Vicente Sederberg 1244 Grant St. Denver CO 80203 303 860 4501	March 1, 2014 – February 28, 2017
Judge Theresa Cisneros	theresa.cisneros@judicial.state.co.us 270 S. Tejon Street Colorado Springs, CO 80903 719-452-5000	July 1, 2014 – June 30, 2017

COLORADO SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Member	Contact Information	Term
David R. DeMuro	ddemuro@vaughandemuro.com Vaughan & DeMuro 3900 E. Mexico Ave., Suite 620 Denver, Colorado 80210 303-837-9200	March 1, 2014 – February 28, 2017
Judge Martin Egelhoff	martin.egelhoff@judicial.state.co.us Second Judicial District 520 W. Colfax Avenue Denver, CO 80204 720-865-8301	March 1, 2014 – February 28, 2017
Elizabeth F. Griffin	liz.griffin@coloradodefenders.us Colorado Public Defender's Office 1300 Broadway, Suite 300 Denver, CO 80203 303-764-1400	March 1, 2014 – February 28, 2017
Judge Marcelo Kopcow	marcelo.kopcow@judicial.state.co.us Weld County Courthouse 910 10th Avenue Greeley, CO 80631 970-475-2400	July 1, 2014 – June 30, 2017
Professor Shelia Hyatt	shyatt@law.du.edu Sturm College of Law University of Denver 2255 E. Evans Avenue Denver, CO 80208 303-871-6293	July 1, 2014 – June 30, 2017
Chief Judge Alan Loeb	alan.loeb@judicial.state.co.us Ralph L. Carr Colorado Judicial Center 2 East 14 Avenue Denver, CO 80203 720-625-5150	October 1, 2013 – September 30, 2016

Member	Contact Information	Term
Professor Christopher B. Mueller	muellerc@spot.colorado.edu University of Colorado School of Law Campus Box 401 Boulder, CO 80309 303-492-6973	March 1, 2014 – February 28, 2017
Normal R. Mueller	nmueller@hmflaw.com Haddon, Morgan & Foreman 150 East 10th Avenue Denver, CO 80203 303-831-7364	July 1, 2014 – June 30, 2017
Henry R. Reeve	hrr@denverda.org Denver District Attorney 201 W. Colfax Avenue Denver, CO 80202 720-913-9000	July 1, 2014 – June 30, 2017
Robert M. Russel	robert.russel@usdoj.gov Office of the United States Attorney 1225 Seventeenth Street, Suite 700 Denver, CO 80202 303-454-0100	March 1, 2014 – February 28, 2017

RULE CHANGE 2014(3)

Colorado Rules of Evidence
Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) through (9) [NO CHANGE]

(10) **Absence of a Ppublic Rrecord~~or entry~~.** Testimony - or a certification under Rule 902 - that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that
(i) the record or statement does not exist; or
(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice – unless the court sets a different time for the notice or the objection.

~~To prove the absence of a record, report, statement, or data compilation, in any form, or the non-occurrence or non-existence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.~~

~~(Federal Rule Identical.)~~

COMMITTEE COMMENT

The Committee recommended adoption of this amended version of C.R.E. 803(10) to follow the identical amendment to F.R.E. 803(10) which took effect on December 1, 2013.

(11) through (18) [NO CHANGE]

Amended and Adopted by the Court, En Banc, February 18, 2014, effective immediately.

By the Court:

Nathan B. Coats
Justice, Colorado Supreme Court

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March 10, 2014

Via E-mail: Michael.berger@judicial.state.co.us

Honorable Michael Berger
Colorado Court of Appeals
Chairman, Colorado Supreme Court Committee on
The Rules of Civil Procedure
2 East 14th Avenue
Denver, CO 80203

Re: ***Report of Subcommittee on Federal Rules Changes***

Dear Judge Berger:

In a letter dated October 24, 2011, the subcommittee on review of federal rules changes requested that the Civil Rules Committee recommend that the Colorado Supreme Court adopt a slightly modified version of Fed.R.Civ.P. 26(b)(5)(B). This rule, sometimes called the "claw back rule," sets forth a procedure to be followed when a party discovers it has inadvertently produced privileged information during discovery.

The full committee deferred consideration of our 2011 proposal because of concern that this and other changes being considered at the time could interfere with the data collection efforts for the Pilot Project which began on January 1, 2012. Today, that concern seems to have decreased as the Pilot Project is well into its third year and we believe that this change would not have an adverse impact. Therefore, the subcommittee requests that this proposal be considered again.

Fed.R.Civ.P. 26(b)(5)(B)

We recommend that a slightly modified version of this Rule be adopted as C.R.C.P. 26(b)(5)(B) or 26(b)(6). Attached are copies of the federal version of Rule 26(b) with the applicable federal committee comment, Colorado Rule 26(b) and our Colorado proposal.

This rule addresses the situation where a party learns that it has already produced information in disclosures or discovery that is subject to a claim of privilege or the work product rule. In this event, the party seeking to assert tardily the privilege or work product rule may notify any party that received the information of the basis for its claim. The party receiving notice must promptly return, sequester or destroy the

information, not use it until the claim is resolved, retrieve the information from anyone to whom it was disclosed, and "may" promptly present the information to the court under seal for determination of the claim. In that circumstance, the court determines whether the information is protected by a privilege or the work product rule and, if so, whether the privilege or work product rule has been waived.

We think that this Rule is an appropriate way to handle the problem of inadvertent disclosure of privileged information which can occur occasionally, especially in cases involving large volumes of documents or a large amount of electronically-stored information.

Please note that the "claw back" issue is also addressed in Rule 502 of the Federal Rules of Evidence, but the Colorado Supreme Court Committee on the Rules of Evidence recommended that the Supreme Court not adopt Evidence Rule 502 and instead let the matter be addressed by the Civil Rules Committee in Rule 26. The Colorado Supreme Court accepted that recommendation of the Evidence Committee without comment. Also, there is something of a "claw back" rule in Rule 4.4(b) and (c) of the Colorado Rules of Professional Conduct.

Our Proposal

There are two changes from Federal Rule 26(b)(5)(B) in our Colorado proposal. The first is that the word "disclosures" be added to make it clear that this rule applies to information produced in either disclosures or discovery, even though some would define the word "discovery" to include disclosures. The second change is in placement of this subsection within Rule 26. In the Federal Rule 26, it is labeled as (B) under Rule 26(b)(5) after the rule requiring a privilege log. Our Colorado Rule 26(b) also contains the rule on privilege logs in subsection (5), but there is no (A). We could either re-label the material in subsection (5) as (A) and add the new material as (B), or we could add the new material as C.R.C.P. 26(b)(6).

The subcommittee looks forward to discussing this matter at an upcoming meeting at the Civil Rules Committee.

Sincerely,

David R. DeMuro

DRD/lma

cc: The Honorable Jerry Jones *(via E-mail)*
The Honorable Lisa Hamilton Fieldman *(via E-mail)*
Professor Christopher Mueller *(via E-mail)*
Richard Holme, Esq. *(via E-mail)*
Enclosure(s): Various Documents

3/10/14
Proposal

Proposed New 26(b)(6) or 26(b)(5)(B):

(taken from Fed.R.Civ.P. 26(b)(5)(B))

> (6) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

David DeMuro

From: berger, michael [michael.berger@judicial.state.co.us]
Sent: Wednesday, March 19, 2014 9:39 AM
To: 'Ben Vinci'; berger, michael; 'Charles Kall'; 'Christopher Mueller'; David DeMuro; 'David Little'; 'Debra Knapp'; 'Dick Laugesen'; eid, allison; 'Fred Skillern'; frick, ann; haller, carol; 'J. Gregory Whitehair'; jones, jerry; kane, thomas; layne, cheryl; 'Lee Sternal'; 'Lisa Hamilton Fieldman '; loeb, alan; moore, jenny; nicewicz, cecily; 'Peter Goldstein'; 'Richard Holme'; rotolo, ann; voisinet, chris; webb, john; zenisek, christopher
Subject: FW: Claw back proposal

Michael H. Berger
720 625-5231
Michael.berger@judicial.state.co.us

From: webb, john
Sent: Saturday, March 15, 2014 4:30 PM
To: ddemuro@vaughanddemuro.com
Cc: berger, michael
Subject: Claw back proposal

Gentlemen:

Because I may be unavailable on Friday, I offer the following comments, some of which proceed from an R.P.C. project on which J. Berger and I recently worked. While closely paralleling the federal language has merit, I wonder if "claim of privilege" should be "claim of statutory privilege"

More broadly, I am concerned that the process imposes no consequence on the producing attorney, who has at least some culpability, at least as compared to the receiving attorney. Specifically, a mere assertion of privilege or work product paralyzes the receiving attorney, unless that attorney obtains court relief. The same would be true if the producing attorney asserted the privilege before producing. But after production, why should the burden any longer be on the receiving attorney to obtain judicial relief?

An alternative approach would be to impose the sequester and nonuse obligations for only "a reasonable time." Thereafter, if the producing attorney does not obtain juducial relief, the receiving attorney is no longer restricted. Under this approach, "and may promptly present the information..." would become a separate sentence, such as, "Either party may promptly present..."

Thank you,
JRWebb

MEMORANDUM

To: Federal Rules Subcommittee of the Civil Rules Committee

From: Dave DeMuro

Re: Rule 26(b)(5)(B)

Date: March 25, 2014

At the meeting of the full committee on March 21, 2014, I presented our proposed rule change which would add a "claw back" procedure, almost identical to that found in Fed.R.Civ.P. 26(b)(5)(B). After some debate, the matter was sent back to our subcommittee to consider amendments to our current proposal. A copy of my March 10, 2014, letter and proposed change to Judge Berger is attached.

Before the meeting, we received some comments in the form of an e-mail from Judge Webb dated March 15, 2014, which is also attached. He first questioned whether the phrase "claim of privilege" should be written as "claim of statutory privilege." I think that he is only talking about modifying that phrase, not about dropping the references to the work-product rule. Although I think we are mostly dealing with the statutory attorney-client privilege here, I would rather not add "statutory" because a privilege recognized by case law or the constitution could be at issue.

Second, Judge Webb was concerned that there was no consequence on the attorney producing the privileged information in the rule, which transferred the burden to seek relief in court on the attorney receiving the information. This had some support at the committee. The traditional view is that the attorney producing privileged material has an obligation to claim privilege or work product and supply a privilege log. In reading the comments to the federal version of the rule, however, it appears that the rule was written in this fashion to protect the producing attorney who is facing a huge production of data and does not want to go to the expense or the delay of conducting a thorough review for privilege. In this situation, the issue probably arises when the receiving attorney finds the "smoking gun" memo in the produced documents and then reveals it later in a list of pretrial exhibits or at a deposition. Several members felt that the producing party should do the work of seeking relief in court.

A related concern expressed by Judge Webb is that the producing attorney should be given some deadline to act or the information is no longer privileged. This had some considerable support at the meeting.

It seems to me that one way to respond to these questions would be to set up deadlines, such as 14 days for the receiving party to give notice that it contests the claim of privilege, and then 14 days for the claiming party to seek relief in court and bear the

burden of proving the existence of the privilege and that it was not waived.

On the issue of the standard for the trial court to consider as to whether there has been a waiver of privilege by inadvertent disclosure, Judge Berger suggested that we review Floyd v. Coors Brewing Co., 952 P.2d 797, 807-09 (Colo. App. 1997), reversed on other grounds, 978 P.2d 663 (Colo. 1999). A copy of the Court of Appeals opinion is also attached. Please note that our proposed Rule 26(b)(5)(B) is simply a mechanism to bring an inadvertent disclosure issue of this type before the court, and does not actually provide the standard for the district court to use to make a determination.

Professor Mueller points out that the standard is addressed in FRE 502 (a copy also attached) which works together with Fed.R.Civ.P. 26(b)(5)(B). A few years ago, the Colorado Supreme Court Evidence Committee declined to recommend adoption of a comparable version of FRE 502 as the rule contains a number of subsections that would make it difficult to transfer it readily into the Colorado Rules of Evidence. After the discussion that took place in the civil rules committee on March 21, however, I will ask the new chairman of the Evidence Committee, Judge Miller, whether he would like the Evidence Committee to address Rule 502 again.

Judge Berger raised an additional issue with me this week, which is whether our proposed rule should be aimed at only "parties," as it is drafted, or to any "person." In other words, if a non-party inadvertently produces privileged or work-product information pursuant to a subpoena, should that non-party have the same opportunity to "claw back" such information? I think that is also a question that we need to address, although perhaps the revised subpoena rule, Rule 45, is the place to address that issue.

There was a motion made at the meeting to approve the rule as we proposed it, but that motion was later withdrawn after Judge Berger requested that the subcommittee consider these additional issues.

Finally, I am attaching a new proposed C.R.C.P. 26(b)(5)(B) which tries to address some of the concerns raised by Judge Webb and other committee members. It does not, however, address either the standard to be applied by the court or whether the rule should apply to any "person."

There are enough issues here to hold a meeting, but maybe a conference call or just exchanging e-mails will be sufficient. Let's see how much you like or dislike my new proposal and we can plan from there.

Thanks for your thoughts on this.

Proposed New C.R.C.P. 26(b)(5)(B):

(taken from Fed.R.Civ.P. 26(b)(5)(B))

(A) [Retain language currently in C.R.C.P. 26(b)(5)]

(B) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and shall give notice within 14 days if it contests the claim. If the claim is contested, the party making the claim may within 14 days after receiving such notice present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived.

(3/25/14 Version)

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) [NO CHANGE]

(b)(1) – (4) [NO CHANGE]

(5)(A) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must not review, use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and shall give notice to the party making the claim within 14 days if it contests the claim. If the claim is not contested within the 14-day period, or is timely contested but resolved in favor of the party claiming privilege or protection of trial-preparation material, then the receiving party must also promptly return, sequester, or destroy the specified information and any copies that the receiving party has. If the claim is contested, the party making the claim shall within 14 days after receiving such notice present the information to the court under seal for a determination of the claim, or the claim is waived. The producing party must preserve the information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this rule shall be in writing.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) [NO CHANGE]

(b)(1) – (4) [NO CHANGE]

(5)(A) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must not review, use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and shall give notice to the party making the claim within 14 days if it contests the claim. If the claim is not contested within the 14-day period, or is timely contested but resolved in favor of the party claiming privilege or protection of trial-preparation material, then the receiving party must also promptly return, sequester, or destroy the specified information and any copies that the receiving party has. If the claim is contested, the party making the claim shall within 14 days after receiving such notice present the information to the court under seal for a determination of the claim, or the claim is waived. The producing party must preserve the information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this rule shall be in writing.

Federal Rules of Civil Procedure Rule 26

United States Code Annotated Currentness
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)
Rule 26. Duty to Disclose; General Provisions Governing Discovery

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 26 are displayed in two separate documents. Notes of Decisions for subdivisions I to III are contained in this document. For Notes of Decisions for subdivisions IV to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 26.>

(a) Required Disclosures.

(1) ***Initial Disclosure.***

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures--In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures--For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) ***Disclosure of Expert Testimony.***

(A) *In General.* 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.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(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.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(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.

(D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) ***Pretrial Disclosures.***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, andRule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B)protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(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.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) ***Sequence.*** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) ***In General.*** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including--if the parties agree on a procedure to assert these claims after production--whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Federal Comment
FRCP 26

2006 Amendment

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term "electronically stored information" has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term "data compilations" is deleted as unnecessary because it is a subset of both documents and electronically stored information.

[Subdivision (a)(1)(E).] Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of -- and the ability to search -- much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information

sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry -- whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations ofRule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues.Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

952 P.2d 797, RICO Bus.Disp.Guide 9310, 13 IER Cases 115, 97 CJ C.A.R. 1213
(Cite as: 952 P.2d 797)

Colorado Court of Appeals,
Div. I.
David J. FLOYD, Plaintiff-Appellant,
v.
COORS BREWING COMPANY, a Colorado corporation; and Bradley, Campbell, Carney & Madsen, P.C., a Colorado professional corporation, Defendants-Appellees.

No. 96CA1059.
July 24, 1997.
As Modified on Denial of Rehearing Oct. 2, 1997.
Certiorari Granted Feb. 23, 1998.

Employee brought action against employer, alleging breach of contract and promissory estoppel, and against employer and its attorneys, alleging wrongful discharge, outrageous conduct and violation of Colorado's Organized Crime Control Act (COCCA). The District Court, Jefferson County, William P. DeMoulin, J., dismissed claims, and employee appealed. The Court of Appeals, Criswell, J., held that: (1) allegations were insufficient to provide employee with standing to pursue COCCA claim; (2) reasonable people could differ as to whether alleged conduct of employer and its attorneys was sufficiently outrageous to be actionable; (3) employee stated cognizable claim against employer for wrongful discharge in violation of public policy; (4) none of employee's assertions supported breach of contract claim based upon employer's written disciplinary policy; (5) doctrine of promissory estoppel was inapplicable; and (6) as a matter of first impression in a Colorado appellate opinion, that ad hoc approach applies in determining whether alleged inadvertent voluntary disclosure of confidential communication waives attorney client privilege.

Affirmed in part; reversed in part; remanded with directions.

West Headnotes

[1] Appeal and Error 30 ⚿347(2)

30 Appeal and Error
30VII Transfer of Cause
30VII(A) Time of Taking Proceedings
30k343 Commencement of Period of Limitation
30k347 Rendition or Entry of Judgment or Order
30k347(2) k. Character of Judgment or Order. Most Cited Cases

Trial court's orders in action involving multiple parties and multiple claims, dismissing employee's claims against employer's attorneys, were not final judgments, for purpose of calculating whether employee's appeal was timely, where orders did not contain certification of final judgments and outstanding claims remained against employer. Rules Civ.Proc., Rule 54(b).

[2] Appeal and Error 30 ⚿1042(5)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)5 Pleading
30k1042 Striking Out or Dismissing
30k1042(5) k. Effect on Error of Trial or Determination. Most Cited Cases

Any error committed by original judge in not vacating previous order dismissing claims on plead-

952 P.2d 797, RICO Bus.Disp.Guide 9310, 13 IER Cases 115, 97 CJ C.A.R. 1213
(Cite as: 952 P.2d 797)

ings when she concluded that her recusal was necessary was rendered harmless by second judge's substantive review of order.

[3] Pleading 302 ⚿350(3.1)

302 Pleading
302XVI Motions
302k342 Judgment on Pleadings
302k350 Application and Proceedings Thereon
302k350(3) Hearing, Determination, and Relief
302k350(3.1) k. In General. Most Cited Cases

Pretrial Procedure 307A ⚿679

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak679 k. Construction of Pleadings. Most Cited Cases

In considering either motion for judgment on the pleadings or motion to dismiss, court must construe allegations of pleadings strictly against movant, must consider allegations of opposing party's pleadings as true, and should not grant motion unless pleadings themselves show that dismissal is required.

[4] Pretrial Procedure 307A ⚿624

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)4 Pleading, Defects In, in General
307Ak623 Clear and Certain Nature of Insufficiency
307Ak624 k. Availability of Relief Under Any State of Facts Provable. Most Cited Cases

To grant motion to dismiss, pleadings must demonstrate that nonmovant is entitled to no relief under any statement of facts which might be proved in support of claims.

[5] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Appellate review of motion for judgment on the pleadings and motion to dismiss is de novo.

[6] Racketeer Influenced and Corrupt Organizations 319H ⚿111

319H Racketeer Influenced and Corrupt Organizations
319HII State Regulation
319HII(B) Civil Remedies and Proceedings
319Hk111 k. Persons Entitled to Sue or Recover. Most Cited Cases

Allegations were insufficient to provide former employee with standing to pursue Colorado's Organized Crime Control Act (COCCA) claim against employer and its attorneys, where employee alleged that his discharge resulted from employer's attempt to cover up its prior criminal acts. West's C.R.S.A. § 18-17-104(3, 4).

[7] Racketeer Influenced and Corrupt Organizations 319H ⚿100

952 P.2d 797, RICO Bus.Disp.Guide 9310, 13 IER Cases 115, 97 CJ C.A.R. 1213
(Cite as: 952 P.2d 797)

319H Racketeer Influenced and Corrupt Organizations
319HII State Regulation
319HII(A) In General
319Hk100 k. In General. Most Cited Cases

Colorado's Organized Crime Control Act (COCCA) is patterned after federal Racketeer Influenced and Corrupt Organizations Act (RICO), and thus, federal decisions construing RICO may be instructive upon similar issues arising under state statute. 18 U.S.C.A. § 1961 et seq.; West's C.R.S.A. § 18-17-101 et seq.

[8] Racketeer Influenced and Corrupt Organizations 319H 111

319H Racketeer Influenced and Corrupt Organizations
319HII State Regulation
319HII(B) Civil Remedies and Proceedings
319Hk111 k. Persons Entitled to Sue or Recover. Most Cited Cases

Under Colorado's Organized Crime Control Act (COCCA), plaintiff need not demonstrate that some injury resulted from pattern of racketeering; rather, it is sufficient to demonstrate that one or more injuries to someone resulted from each of the predicate acts. West's C.R.S.A. § 18-17-101 et seq.

[9] Racketeer Influenced and Corrupt Organizations 319H 111

319H Racketeer Influenced and Corrupt Organizations
319HII State Regulation
319HII(B) Civil Remedies and Proceedings
319Hk111 k. Persons Entitled to Sue or Recover. Most Cited Cases

Under Colorado's Organized Crime Control Act (COCCA), plaintiff need not show injury resulting to himself from *each* illegal act alleged. West's C.R.S.A. § 18-17-101 et seq.

[10] Racketeer Influenced and Corrupt Organizations 319H 62

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(B) Civil Remedies and Proceedings
319Hk56 Persons Entitled to Sue or Recover
319Hk62 k. Causal Relationship; Direct or Indirect Injury. Most Cited Cases

Under Racketeer Influenced and Corrupt Organizations Act (RICO), plaintiff can recover only for harm caused by one or more predicate acts. 18 U.S.C.A. § 1961 et seq.

[11] Racketeer Influenced and Corrupt Organizations 319H 58

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(B) Civil Remedies and Proceedings
319Hk56 Persons Entitled to Sue or Recover
319Hk58 k. Injury in General. Most Cited Cases

Employees discharged for refusing to participate in, or for reporting, pattern of racketeering activity lack standing to pursue Racketeer Influenced and Corrupt Organizations Act (RICO) claim because discharge itself is not conduct violative of RICO. 18 U.S.C.A. § 1961 et seq.

[12] Damages 115 208(6)

115 Damages
115X Proceedings for Assessment
115k208 Questions for Jury
115k208(6) k. Mental Suffering and Emotional Distress. Most Cited Cases

Reasonable people could differ as to whether alleged conduct of employer and its attorneys was sufficiently outrageous to be actionable, and thus, trial court erred in dismissing employee's claim, where employee alleged that defendants conducted illegal undercover drug investigations, ordered employee to participate in investigations, "laundered" proceeds used in investigation through attorneys' bank account, and later discharged employee to conceal their involvement and to place all blame for any illegal conduct upon employee.

[13] Appeal and Error 30 173(2)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k173 Grounds of Defense or Opposition
30k173(2) k. Nature or Subject-Matter in General. Most Cited Cases

Appeal and Error 30 758.1

30 Appeal and Error
30XII Briefs
30k758 Specification of Errors
30k758.1 k. In General. Most Cited Cases

Court of Appeals declined to address argument that employee abandoned outrageous conduct claim by failing to refer to noneconomic damages in disclosure statement filed with trial court several months after trial court dismissed such claim on pleadings, where issue was not raised before trial court or in any brief filed with Court of Appeals.

[14] Damages 115 57.21

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage
115k57.21 k. Elements in General. Most Cited Cases
(Formerly 115k50.10)

Elements of tort of extreme and outrageous conduct include the following: (1) defendant engaged in extreme and outrageous conduct; (2) defendant engaged in such conduct recklessly or with intent of causing plaintiff severe emotional distress; and (3) defendant's conduct caused plaintiff to suffer severe emotional distress; accompanying physical injury is not required.

[15] Damages 115 57.22

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage
115k57.22 k. Nature of Conduct. Most Cited Cases
(Formerly 115k50.10)

Liability for outrageous conduct can be found only if conduct is so outrageous in character and so

extreme in degree as to go beyond all possible bounds of decency.

[16] Damages 115 ⚿208(6)

115 Damages
115X Proceedings for Assessment
115k208 Questions for Jury
115k208(6) k. Mental Suffering and Emotional Distress. Most Cited Cases

Whether specified conduct is sufficiently outrageous to be actionable is normally jury question; however, it is for court to determine, in first instance, whether reasonable persons could differ on this issue.

[17] Damages 115 ⚿57.52

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.50 Labor and Employment
115k57.52 k. Termination in General. Most Cited Cases
(Formerly 115k50.10)

Ordinarily, mere discharge of employee, without more, cannot support claim of outrageous conduct.

[18] Labor and Employment 231H ⚿783

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk781 Refusal to Engage in Wrongdoing
231Hk783 k. Particular Cases in General. Most Cited Cases
(Formerly 255k30(1.10) Master and Servant)

Employee stated cognizable claim against employer for wrongful discharge in violation of public policy, where employee contended that he was ordered to perform illegal undercover narcotics investigations, that he was instructed to conceal drug transactions and that he was terminated to conceal participation of employer's executives and attorneys in transactions and to make it appear that employee was solely responsible for illegal activities.

[19] Labor and Employment 231H ⚿759

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk759 k. Public Policy Considerations in General. Most Cited Cases
(Formerly 255k30(1.10) Master and Servant)

Policies which may invoke public policy exception to at-will employment doctrine involve matters that affect society at large, rather than purely personal or proprietary interests of plaintiff or employer, that lead to an outrageous result clearly inconsistent with stated public policy, or that strike at heart of citizen's social rights, duties, and responsibilities.

[20] Labor and Employment 231H ⚿759

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk759 k. Public Policy Considerations in General. Most Cited Cases
(Formerly 255k30(1.10) Master and Servant)

In order for public policy exception to at-will employment doctrine to apply, public policy invoked must relate to behavior that has such impact upon

public that interference with employer's business decisions is justified.

[21] Labor and Employment 231H 759

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk759 k. Public Policy Considerations in General. Most Cited Cases
(Formerly 255k30(1.10) Master and Servant)

Labor and Employment 231H 800

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk799 Health and Safety
231Hk800 k. In General. Most Cited Cases
(Formerly 255k30(1.10) Master and Servant)

In order to establish public policy exception to at-will employment doctrine, employee may show that employer's action violates specific statute relating to public health, safety, or welfare or that it would undermine clearly expressed public policy relating to employee's rights as worker.

[22] Estoppel 156 85

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k85 k. Future Events; Promissory Estoppel. Most Cited Cases

Labor and Employment 231H 50

231H Labor and Employment
231HI In General
231Hk49 Manuals, Handbooks, and Policy Statements
231Hk50 k. In General. Most Cited Cases
(Formerly 255k7 Master and Servant)

If employee seeks to rely upon employee handbook or other written policy of employer as basis for implied contract or promissory estoppel claim, employee must accept whole of that policy.

[23] Constitutional Law 92 3941

92 Constitutional Law
92XXVII Due Process
92XXVII(D) Applicability to Governmental or Private Conduct; State Action
92k3941 k. Non-Government Entities and Individuals, Actions Of. Most Cited Cases
(Formerly 92k254(4))

Labor and Employment 231H 50

231H Labor and Employment
231HI In General
231Hk49 Manuals, Handbooks, and Policy Statements
231Hk50 k. In General. Most Cited Cases
(Formerly 255k31(3) Master and Servant)

In the case of private employer, whose conduct is not restricted by Fourteenth Amendment, there is no requirement that employee disciplinary or grievance procedure unilaterally adopted by employer incorporate concepts traditionally associated with procedural due process of law; hence, courts should not read into provisions establishing such procedures requirements that are not described in those provisions. U.S.C.A. Const.Amend. 14.

[24] Labor and Employment 231H 840

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk838 Manuals, Handbooks, and Policy Statements, Adverse Action Under
231Hk840 k. Particular Cases. Most Cited Cases
(Formerly 255k31(3) Master and Servant)

Argument that good cause for discharge did not exist was not available to employee, alleging breach of contract based upon employer's written disciplinary policy, where policy provided that decision of appeals board would be final and binding such that only possible contract breach employee could assert would be that appeal board's decision resulted from violation of procedures adopted by that policy.

[25] Labor and Employment 231H 840

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk838 Manuals, Handbooks, and Policy Statements, Adverse Action Under
231Hk840 k. Particular Cases. Most Cited Cases
(Formerly 255k31(3) Master and Servant)

Employee's assertion that he was restricted in presentation of witness failed to support breach of contract claim based upon employer's written disciplinary policy, where policy authorized member of employee relations department to determine relevance and admissibility of information proffered and employee made no offer to call witnesses or to describe what information he wanted to present.

[26] Labor and Employment 231H 840

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk838 Manuals, Handbooks, and Policy Statements, Adverse Action Under
231Hk840 k. Particular Cases. Most Cited Cases
(Formerly 255k31(3) Master and Servant)

Employee's assertion that he was not allowed to have attorney represent him before appeal board failed to support breach of contract claim based upon employer's written disciplinary policy, where policy did not authorize appearance of attorneys for any parties before board.

[27] Labor and Employment 231H 840

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk838 Manuals, Handbooks, and Policy Statements, Adverse Action Under
231Hk840 k. Particular Cases. Most Cited Cases
(Formerly 255k31(3) Master and Servant)

Fact that employer's disciplinary policy did not provide all guarantees that would be afforded by tribunal required to observe requirements of procedural due process of law, such as review before neutral party, was irrelevant to employee's breach of contract claim based on policy; absent review procedures adopted by employer, at-will employee would have had no right to any type of review of employer's disciplinary decision, except court determination of any claimed violation of statute or public policy. U.S.C.A. Const.Amend. 14.

[28] Labor and Employment 231H 854

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(B) Actions

231Hk854 k. Exhaustion. Most Cited Cases
(Formerly 255k31(3) Master and Servant)

Employee waived claims that employer violated its written disciplinary policy, for purpose of breach of contract claim, by failing to raise claims during internal review process provided in policy.

[29] Estoppel 156 ⚿85

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k85 k. Future Events; Promissory Estoppel. Most Cited Cases

"Promissory estoppel" is equitable concept developed to enforce, under appropriate circumstances, unilateral promise for which no consideration was provided.

[30] Estoppel 156 ⚿85

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k85 k. Future Events; Promissory Estoppel. Most Cited Cases

Promissory estoppel is only available as remedy in absence of otherwise enforceable contract.

[31] Estoppel 156 ⚿85

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k85 k. Future Events; Promissory Estoppel. Most Cited Cases

Employer's written disciplinary policy provided basis for implied contract claim, and thus, doctrine of promissory estoppel was inapplicable to breach of contract claim based upon policy.

[32] Privileged Communications and Confidentiality 311H ⚿137

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk135 Mode or Form of Communications
311Hk137 k. Documents and Records in General. Most Cited Cases
(Formerly 410k204(2))

Document, made during meeting attended by attorney for employer and containing legal opinions and advice given by that attorney with respect to employee's claims against employer, was protected by attorney-client privilege. West's C.R.S.A. § 13-90-107(1)(b).

[33] Privileged Communications and Confidentiality 311H ⚿137

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk135 Mode or Form of Communications
311Hk137 k. Documents and Records in General. Most Cited Cases
(Formerly 410k204(2))

Document, consisting of typed memorandum memorializing meeting attended by attorney for employer at which legal strategies for potential legal and criminal litigation involving employee was discussed, was protected by attorney-client privilege. West's C.R.S.A. § 13-90-107(1)(b).

[34] Privileged Communications and Confidenti-

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(Cite as: 952 P.2d 797)

ality 311H ⚿137

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk135 Mode or Form of Communications
311Hk137 k. Documents and Records in General. Most Cited Cases
(Formerly 410k204(2))

Document, consisting of handwritten memorandum from attorney for employer directed to manager involved in employee's termination, was protected by attorney-client privilege, where document contained legal analysis and opinions. West's C.R.S.A. § 13-90-107(1)(b).

[35] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

Voluntary disclosure of confidential communications to potential adversary will waive attorney-client privilege. West's C.R.S.A. § 13-90-107(1)(b).

[36] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

Under ad hoc approach for determining whether alleged inadvertent voluntary disclosure of confidential communication waives attorney client privilege, courts must determine whether disclosure resulted from excusable inadvertence or from some chargeable negligence or other fault, considering the following factors: (*1*) extent to which reasonable precautions were taken to prevent disclosure of privileged information; (2) number of inadvertent disclosures made in relation to total number of documents produced; (3) extent to which disclosure has caused such lack of confidentiality that no meaningful confidentiality can be restored; (4) extent to which disclosing party has sought remedial measures in timely fashion; and (5) considerations circumstances. West's C.R.S.A. § 13-90-107(1)(b).

***801** Cheryl Redmond Doyle, Denver, for Plaintiff-Appellant.

Hall & Evans, L.L.C., Daniel R. Satriana, Jr., Steven M. Gutierrez, Denver, for Defendant-Appellee Coors Brewing Company.

Brega & Winters, P.C., Charles F. Brega, Wesley B. Howard, Denver, for Defendant-Appellee Bradley, Campbell, Carney & Madsen, P.C.

Opinion by Judge CRISWELL.

Plaintiff, David J. Floyd, appeals from the judgment dismissing all of the claims asserted by him against Coors Brewing Company (Coors) and Bradley, Campbell, Carney, and Madsen, P.C. (the lawyers). We affirm in part, reverse in part, and remand for further proceedings.

The events giving rise to this litigation are those surrounding the termination of plaintiff's employment by Coors. At the time of his termination, plaintiff had been employed by Coors for 15 years and was its director of security, safety, and occupational health.

Plaintiff's termination was based upon his alleged misuse of company funds, his alleged inability to

account for such funds, and his alleged sexual improprieties with a female subordinate. He appealed his termination pursuant to certain of Coors' written policies to an internal appeals panel. That panel, however, approved the termination.

Plaintiff then instituted this action. In his original complaint, he asserted six claims for relief, including a claim based upon 42 U.S.C. § 1983 (1994). As a result of the inclusion of this claim, the cause was removed to the federal court which dismissed his civil rights claim and remanded the cause to the trial court.

The five remaining claims were based upon breach of contract and promissory estoppel against Coors and upon wrongful discharge, outrageous conduct, and violation of Colorado's Organized Crime Control Act (COCCA), § 18-17-101, et seq., C.R.S. (1986 Repl.Vol. 8B), against both Coors and the lawyers.

All of these claims, however, were based upon a common core of factual allegations. ***802** Plaintiff alleged that, in his capacity as Coors' director of security, safety, and occupational health, he had engaged in a series of covert drug purchases under the direction of and with the full approval and cooperation of his supervisors. He alleges that these purchases were undertaken to discover the use of illicit drugs by Coors' employees. He asserts that, because such purchases by a private individual, such as he, were illegal, arrangements were made to fund the purchases by monies deposited in, and later withdrawn from, a bank account of the lawyers, who represented Coors.

He alleges that, when it appeared that this clandestine operation might become known, his supervisors conspired to discharge him, so as to make it appear that he had engaged in the previous illegalities solely on his own.

The trial court initially dismissed plaintiff's claims for wrongful discharge, outrageous conduct, and violation of COCCA based solely upon plaintiff's pleadings. Thereafter, the judge who passed upon these claims recused herself, and a different judge, in response to Coors' motion for summary judgment, dismissed plaintiff's breach of contract and promissory estoppel claims.

I.

[1] As a preliminary matter, we address the lawyers' assertion that plaintiff's appeal of the judgment dismissing the claims against them is untimely. We reject that assertion.

When multiple parties or claims are joined in an action, a trial court may direct the entry of a final judgment as to fewer than all of the claims or all of the parties only upon a determination that there is no just reason for delay and with the express direction for the entry of judgment. Without such a determination and directive, any order of dismissal is subject to revision at any time before the entry of a judgment adjudicating all of the claims. C.R.C.P. 54(b); *Berry v. Westknit Originals, Inc.,* 145 Colo. 48, 357 P.2d 652 (1960); *Forbes v. Goldenhersh,* 899 P.2d 246 (Colo.App.1994).

Here, the trial court entered an order dismissing plaintiff's COCCA, outrageous conduct, and wrongful discharge claims against both defendants on April 27, 1995. Later, the trial court entered an order granting plaintiff's motion to dismiss the contract breach and promissory estoppel claims against the lawyers. Neither of these orders contained the requisite certification under C.R.C.P. 54(b). Hence, because there were still outstanding claims for contract breach and promissory estoppel against Coors, such orders were not final judgments.

Plaintiff's remaining claims were not dismissed until April 26, 1996. Hence, there was no final judgment from which plaintiff could have appealed until

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(Cite as: 952 P.2d 797)

this latter date. And, this appeal was filed in a timely fashion thereafter.

II.

[2] Plaintiff first contends that the first trial judge erred by refusing to vacate the previous order dismissing the three claims on the pleadings when she concluded that her recusal was necessary. We conclude, however, that the second judge's substantive review of this order rendered any prior refusal to vacate harmless.

After plaintiff's COCCA, outrageous conduct, and wrongful discharge claims were dismissed, plaintiff filed a motion to recuse the judge then assigned to the cause. That judge granted the motion and recused herself.

After this recusal, plaintiff asked that the initial judge's action in dismissing the three claims be reconsidered. After a full briefing by the parties of the relevant issues, the newly assigned judge denied plaintiff's motion for reconsideration, based on his determination that the original order of dismissal was correct.

Hence, because of this later independent review, any error committed by the original judge in not vacating the previous order was rendered harmless.

III.

Plaintiff argues that the trial court erred in dismissing his outrageous conduct, wrongful***803** discharge, and COCCA claims on the pleadings. We agree in part.

A.

[3][4][5] In considering either a motion for judgment on the pleadings or a motion to dismiss, a court must construe the allegations of the pleadings strictly against the movant, must consider the allegations of the opposing party's pleadings as true, and should not grant the motion unless the pleadings themselves show that a dismissal is required. And, in the case of a motion to dismiss, the pleadings must demonstrate that the non-moving party is entitled to no relief under any statement of facts which might be proved in support of the claims. Appellate review of such motions is *de novo. Humphrey v. O'Connor,* 940 P.2d 1015 (Colo.App.1996).

B.

[6] In his complaint, plaintiff alleged that his COCCA claim was based on §§ 18-17-104(3) and 18-17-104(4), C.R.S. (1986 Repl.Vol. 8B). These statutes provide that:

> (3) It is unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.
>
> (4) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsection (1), (2), or (3) of this section.

Plaintiff alleged that, as a part of the undercover drug investigations that he was directed to engage in, defendants violated at least ten Colorado statutes referred to in § 18-17-103, C.R.S. (1986 Repl.Vol. 8B), as well as federal law. He also alleged that, as a result of these violations and as a part of defendants' attempts to conceal their misconduct, plaintiff was terminated from his employment.

However, we agree with the trial court's determination that plaintiff lacked standing to maintain a claim under COCCA because none of the damages alleged by him was caused by the underlying acts of criminality that he relied upon to establish a pattern of racketeering activity.

[7] Because COCCA is patterned after the federal

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, et seq. (1994), federal decisions construing RICO may be instructive upon similar issues arising under the state statute. *Tallitsch v. Child Support Services, Inc.*, 926 P.2d 143 (Colo.App.1996).

[8][9] Under COCCA, a plaintiff need not demonstrate that some injury resulted from a *pattern* of racketeering. Rather, it is sufficient to demonstrate that one or more injuries to someone resulted from each of the predicate acts. Further, the plaintiff need not show injury resulting to himself from *each* illegal act alleged. *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363 (Colo.App.1993).

However, all this is not to say that the injury for which compensation is demanded need not be caused by *any* of the predicate acts.

[10] Section 18-17-106(7), C.R.S. (1986 Repl.Vol. 8B), the provision specifying the civil remedies available under COCCA, allows "[a]ny person *injured by reason of* any violation of the provisions of section 18-17-104" to maintain a private cause of action. (emphasis supplied) The United States Supreme Court has construed the "injured by reason of" language in a nearly identical RICO provision to provide standing to a plaintiff only if that plaintiff has been injured by the conduct constituting the violation. A plaintiff can recover only for harm caused by one or more of the predicate acts. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

[11] Further, damages resulting from a wrongful discharge do not result from a predicate act unless the discharge itself constitutes one of the acts described by the statute. Hence, employees discharged for refusing to participate in, or for reporting, a pattern of racketeering activity lack standing to pursue a RICO claim because the discharge itself is not conduct violative of RICO. *See* ***804***Miranda v. Ponce Federal Bank*, 948 F.2d 41 (1st Cir.1991); *Reddy v. Litton Industries, Inc.*, 912 F.2d 291 (9th Cir.1990); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir.1990); *Cullom v. Hibernia National Bank*, 859 F.2d 1211 (5th Cir.1988).

In dictum, it has been suggested that a claim might be sustained under RICO if the employee's discharge constituted the commission of the crime of obstruction of justice. *See Miranda v. Ponce Federal Bank, supra.* However, no such claim is asserted here. Rather, plaintiff alleged that his discharge resulted from his superiors' attempt to cover up their prior criminal acts; he does not allege that such cover-up was itself a predicate act under COCCA.

Hence, we conclude that the allegations at issue were insufficient to provide plaintiff with standing to pursue any COCCA claim. We need not, therefore, address defendants' other contentions with respect to that claim.

C.

[12] Plaintiff next contends that the trial court erred by dismissing his outrageous conduct claim against all defendants at the pleading stage. With this contention, we agree.

[13] We first observe that, in their petition for rehearing, the lawyers argue that, because plaintiff did not refer to noneconomic damages in a disclosure statement filed with the trial court several months after that court had dismissed, on the pleadings, his claim for outrageous conduct, plaintiff has somehow abandoned that claim. However, because the lawyers did not raise this issue either before the trial court or in any brief filed in this court, we decline to address it. See *Flagstaff Enterprises Construction, Inc. v. Snow*, 908 P.2d 1183 (Colo.App.1995) (argument first presented in reply brief will not be considered); *Mohawk Green Apartments v. Kramer*, 709 P.2d 955 (Colo.App.1985)

(issues not raised in the trial court will not be considered on appeal).

[14] The elements of the tort of extreme and outrageous conduct are: (1) the defendant engaged in extreme and outrageous conduct; (2) the defendant engaged in such conduct recklessly or with the intent of causing the plaintiff severe emotional distress; and (3) defendant's conduct caused plaintiff to suffer severe emotional distress; accompanying physical injury is not required. *Culpepper v. Pearl Street Building, Inc.*, 877 P.2d 877 (Colo.1994).

[15][16] Liability for outrageous conduct can be found only if the conduct is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. Whether specified conduct is sufficiently outrageous to be actionable is normally a question for the jury. However, it is for the court to determine, in the first instance, whether reasonable persons could differ on this issue. *Rugg v. McCarty,* 173 Colo. 170, 476 P.2d 753 (1970); *Meiter v. Cavanaugh,* 40 Colo.App. 454, 580 P.2d 399 (1978).

[17] Ordinarily, the mere discharge of an employee, without more, cannot support a claim of outrageous conduct. *Bigby v. Big 3 Supply Co.,* 937 P.2d 794 (Colo.App.1996). Here, however, plaintiff alleges conduct that went far beyond his mere termination. He alleges that defendants conducted illegal undercover drug investigations, ordered plaintiff to participate in the investigations, "laundered" the proceeds used in the investigation through the lawyers' trust account, and later discharged plaintiff to conceal their involvement and to place all blame for any illegal conduct upon him.

Giving plaintiff the benefit of all proper inferences, we conclude that reasonable people could differ on the question whether this alleged series of acts was "outrageous." *See Barham v. Scalia,* 928 P.2d 1381 (Colo.App.1996) (allegations by terminated professor that dean disliked him, sent secret memorandum to trustees to initiate dismissal proceedings, and instructed other faculty not to communicate with him sufficient to state claim for outrageous conduct); *see also Meiter v. Cavanaugh, supra* (combination of acts which alone might be considered simply isolated unkindness, in combination, constituted sufficiently outrageous conduct to survive a motion for directed verdict). Hence, the trial court erred in dismissing this claim.

***805** D.

[18] Plaintiff also contends that the trial court erred in dismissing his wrongful discharge claim against Coors at the pleading stage. We also agree with this contention.

[19] The public policy exception to the at-will employment doctrine is based upon the notion that an employer should not be allowed to discharge an employee with impunity for reasons that contravene widely accepted and substantial public policies. The policies which may invoke this exception are not subject to a precise specification. They are those, however, that involve a "matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer, leads to an outrageous result clearly inconsistent with a stated public policy, or 'strike at the heart of a citizen's social rights, duties, and responsibilities.' " *Crawford Rehabilitation Services, Inc. v. Weissman,* 938 P.2d 540 (Colo.1997).

[20] Hence, in order for this exception to apply, the public policy invoked must relate to behavior that has such an impact upon the public that interference with an employer's business decisions is justified. *Rocky Mountain Hospital & Medical Service v. Mariani,* 916 P.2d 519 (Colo.1996).

[21] Contrary to the trial court's conclusion, the public policy exception is not limited to the factual

circumstances described in *Martin Marietta Corp. v. Lorenz,* 823 P.2d 100 (Colo.1992). There, the supreme court recognized the public's interest in prohibiting an employer from terminating an employee for refusing to engage in unlawful or unethical conduct. However, in addition to this circumstance, an employee may also show that the action by the employer violates a specific statute relating to the public health, safety, or welfare or that it would undermine a clearly expressed public policy relating to the employee's rights as a worker. *Crawford Rehabilitation Services, Inc. v. Weissman, supra. See also Lathrop v. Entenmann's, Inc.,* 770 P.2d 1367 (Colo.App.1989).

Here, plaintiff contends that he was ordered to perform illegal undercover narcotics investigations and that he was instructed to conceal these drug transactions, as well as the cash expenditures related to them. He asserts that he was then terminated so as to conceal the participation of certain of Coors' senior executives and of the lawyers in these transactions and to make it appear that plaintiff was solely responsible for any illegal activities.

Accepting plaintiff's allegations as true and viewing his claims in the light most favorable to him, we conclude that plaintiff's claims do implicate an important public policy. Deterring employers from concealing their illegal conduct by discharging an employee relates to a substantial public interest that affects society as a whole. Hence, we conclude that plaintiff has stated a cognizable claim for wrongful discharge in violation of public policy.

IV.

Plaintiff also contends that the trial court erred by granting Coors' motion for summary judgment on his breach of contract and promissory estoppel claims. We disagree.

A.

In reviewing a trial court's grant of summary judgment, we must determine whether there is a clear showing that there is no issue of material fact and, therefore, whether the moving party is entitled to judgment as a matter of law. *Churchey v. Adolph Coors Co.,* 759 P.2d 1336 (Colo.1988); *Knappenberger v. Shea,* 874 P.2d 498 (Colo.App.1994).

Once the party moving for summary judgment has met its initial burden of production, the burden shifts to the nonmoving party to establish, through specific facts, that a triable issue of fact exists. *Continental Air Lines, Inc. v. Keenan,* 731 P.2d 708 (Colo.1987). Also, review of a judgment granting a motion for summary judgment is *de novo. Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Board,* 901 P.2d 1251 (Colo.1995).

B.

Plaintiff's claim of breach of contract is grounded upon the provisions of Coors' written policy that set forth the procedures for ***806** the internal review of disciplinary actions taken against employees. He asserts that Coors not only did not follow the procedures adopted by its written policy, but that such procedures are inadequate and unfair. The undisputed evidence establishes, however, that such a claim is unsupportable.

[22] If an employee, such as plaintiff here, seeks to rely upon an employee handbook or other written policy of the employer as the basis for an implied contract or promissory estoppel claim, that employee must accept the whole of that policy. The employee may not accept those portions of the policy that are deemed to be favorable and reject those that may be considered unfavorable. *Allsup v. Mount Carmel Medical Center,* 22 Kan.App.2d 613, 922 P.2d 1097, 1102 (1996) ("By [the employee] availing himself of the benefits (contending he has an implied contract by virtue of [the employer's] policies), [the employee] must also accept the responsibility of the policies-the grievance procedure.").

[23] Further, in the case of a private employer, whose conduct is not restricted by the Fourteenth Amendment, there is no requirement that an employee disciplinary or grievance procedure unilaterally adopted by that employer incorporate concepts traditionally associated with procedural due process of law. Hence, courts should not read into provisions establishing such procedures requirements that are not described in those provisions. *Suburban Hospital, Inc. v. Dwiggins,* 324 Md. 294, 596 A.2d 1069 (1991); *Meleen v. Hazelden Foundation,* 740 F.Supp. 687 (D.Minn.1990), *aff'd,* 928 F.2d 795 (8th Cir.1991); *Pagdilao v. Maui Intercontinental Hotel,* 703 F.Supp. 863 (D.Hawai'i 1988).

Here, plaintiff's implied contract claim is grounded upon the provisions of a personnel policy of Coors that reads, in part, as follows:

> Appeals involving charges of unjust treatment in which written disciplinary action has been taken, are reviewed by an Appeal Board. The employee may appeal the justification for the disciplinary action or the severity of the action.
>
> ....
>
> The Appeal Board will review the actions of management to determine if just cause existed for the disciplinary action and whether all applicable company policies were followed. Decisions of the C[onflict]-R[esolution] P[rocess] are final and binding on the Company, as well as the employee.

Other provisions of this policy provide that the Appeal Board is to be composed of six members, consisting of three of the disciplined employee's "peers," two members from Coors management, and one member from its Employee Relations Department. Such members are randomly selected from a list compiled from the employee records system, and the employee is granted the right to strike names from that list and to have substitutes appointed.

Plaintiff appealed his discharge to the Appeal Board. Names of members were selected to which plaintiff objected in part, and new members were selected. Thereafter, a hearing took place at the end of which plaintiff's discharge was upheld.

[24] Plaintiff first argues that there did not, in fact, exist "good cause" for his discharge. This argument, however, is not available to him.

The policy upon which plaintiff relies specifically provides that the decision of the Appeal Board shall be final and binding upon both Coors and the employee. Hence, the only possible contract breach that plaintiff can assert would be one grounded upon allegations that the Appeal Board's decision resulted from a violation of the procedures adopted by that policy. *See Bellairs v. Coors Brewing Co.,* 907 F.Supp. 1448 (D.Colo.1995), *aff'd* 107 F.3d 880 (10th Cir.1997).

Upon this issue, plaintiff asserts that (1) he was restricted in the presentation of witnesses, (2) he was not allowed to have an attorney represent him before the Appeal Board, (3) other procedural irregularities occurred, and (4) the review procedure adopted by Coors' policy is intrinsically unfair.

[25] However, the written policy upon which plaintiff relies specifically authorizes ***807** the member from the Employee Relations Department to determine the relevance and admissibility of any information proffered. And, here, plaintiff made no offer before the Appeal Board to call any witnesses on his behalf, nor did he otherwise describe what information he wanted to present. Plaintiff has made no showing of any violation of any portion of the written policy as a result of any limitation placed upon him in this respect.

[26] Further, the written policy does not authorize

the appearance of attorneys for any of the parties before the Appeal Board. And, we would not be justified in concluding that an employer's unilateral adoption of an internal grievance procedure necessarily contemplates an adversarial hearing with legal representation. The denial of such representation in such proceedings, therefore, cannot be considered to be a violation of Coors' policy for internal review proceedings.

[27] It is true that the internal review proceeding established by Coors does not make use of an independent neutral. To this extent, the persons conducting the review may not be wholly disinterested. However, we are aware of no requirement that an employer who voluntarily establishes an internal disciplinary review proceeding must adopt a procedure that is the substantial equivalent of arbitration. On the contrary, absent the review procedures implemented by Coors, plaintiff, as an at-will employee, would have had no right to have any type of review of Coors' disciplinary decision, except a court determination of any claimed violation of statute or public policy. Hence, the fact that the Coors' disciplinary policy may not provide all of the guarantees that would be afforded by a tribunal required to observe the requirements of procedural due process of law is irrelevant.

[28] Finally, we have considered plaintiff's assertions with respect to other alleged procedural violations of Coor's policy and we reject them. Plaintiff waived some of these objections by failing to raise them during the Appeal Board process. In addition, in his response to Coor's motion for summary judgment, plaintiff presented insufficient evidence to support the assertion that any of these alleged irregularities violated any provision of the pertinent policy.

We conclude, therefore, that none of plaintiff's assertions about the alleged defects in Coors' disciplinary procedures can, as a matter of law, support any claim based upon an implied contract.

C.

[29][30] Promissory estoppel is an equitable concept developed to enforce, under appropriate circumstances, a unilateral promise for which no consideration was provided. *Soderlun v. Public Service Co.,* 944 P.2d 616 (Colo.App.1997). Promissory estoppel is only available as a remedy in the absence of an otherwise enforceable contract. *Scott Co. v. MK-Ferguson Co.,* 832 P.2d 1000 (Colo.App.1991).

[31] Here, because we have concluded that Coors' written policy provided the basis for an implied contract claim, the doctrine of promissory estoppel is inapplicable. *See Bellairs v. Coors Brewing Company, supra.*

V.

Plaintiff finally argues that the trial court erred by suppressing several documents inadvertently provided to him by defendants through discovery. Because we conclude that the trial court may not have considered certain relevant factors, we remand this issue for its further consideration.

As a part of its responses to plaintiff's request for production, Coors furnished plaintiff with four documents that it later claimed were privileged as communications between client and counsel. The documents were initially accompanied by a response that was not signed by any Coors official. Later, however, this response was signed by such an official.

Coors claimed that, immediately upon discovery of these inadvertent disclosures, it requested the return of the four pertinent documents. It then sought a protective order suppressing use of the documents by plaintiff.

***808** In support of such an order, counsel for Coors presented an affidavit that detailed the method *counsel* had used in reviewing documents to be supplied to plaintiff in response to his request. No show-

ing was made, however, as to the procedure that Coors itself used in supplying the documents to counsel or the method of review used by the Coors' official before that official signed the response to plaintiff's request.

After reviewing the affidavit submitted, the trial court found three of the four documents to be privileged. Further, because it found their disclosure to have been inadvertent, it suppressed the documents, holding that Coors had not waived its attorney-client privilege.

[32] The first document consists of a handwritten memorandum made contemporaneously during a meeting attended by the Director of Litigation of Coors, who is a lawyer. It contains legal opinions and advice given by that attorney with respect to plaintiff's claims.

[33] The second document consists of a typed memorandum again memorializing the same meeting at which legal strategies for potential legal and criminal litigation involving plaintiff were discussed.

[34] The third document consists of a handwritten memorandum from the Director of Litigation directed to the manager involved in plaintiff's termination. This document contains legal analysis and opinions.

Because these three documents contain legal opinions and advice given by an attorney from Coors' legal department to Coors employees concerning potential litigation between plaintiff and Coors, we agree with the trial court's conclusion that they fall within the scope of § 13-90-107(1)(b), C.R.S. (1987 Repl.Vol. 6A). Hence, they were privileged documents.

[35] The attorney-client privilege, as codified in § 13-90-107(1)(b), is intended for the benefit of, and is personal to, the client. *Sholine v. Harris,* 22 Colo.App. 63, 123 P. 330 (1911). It is not, however, absolute and can be waived by the client. And, the voluntary disclosure of confidential communications to a potential adversary will waive the privilege. *Denver Post Corp. v. University of Colorado,* 739 P.2d 874 (Colo.App.1987).

[36] To what extent, however, will a voluntary, but allegedly inadvertent, disclosure of such a communication waive the privilege?

No prior Colorado appellate opinion has considered this question. The decisions from other jurisdictions have taken three different approaches to the issue. For a general discussion of these three approaches, *see* M. Joffe & E. Rice, *Oops! Can I take It Back?,* 62 Def. Couns. J. 450 (1995); H. McNeil & C. Littlefield, *The Inadvertent Disclosure of Privileged Documents,* 30 Ariz. Atty 10 (November 1993).

Some courts have adopted an almost absolute "cat out of the bag" rule. These courts say that, once the communication has been disclosed, even through inadvertence, its disclosure cannot be retracted; the disclosure waives the privilege. *See In re Sealed Case,* 877 F.2d 976 (D.C.Cir.1989); *Federal Deposit Insurance Corp. v. Marine Midland Realty Credit Corp.,* 138 F.R.D. 479 (E.D.Va.1991).

Other courts, concluding that an inadvertent disclosure is the antithesis of a voluntary act, hold that, if truly inadvertent, the disclosure will not waive the privilege, and the communication can be retracted. *See Trilogy Communications, Inc. v. Excom Realty, Inc.,* 279 N.J.Super. 442, 652 A.2d 1273 (1994); *Mendenhall v. Barber-Greene Co.,* 531 F.Supp. 951 (N.D.Ill.1982). *See also* ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 82-368 (Oct. 16, 1992) (if lawyer receives privileged documents under circumstances in which their disclosure was "obviously inadvertent," lawyer has duty not to examine them but to return

them).

Finally, in what has been described as the "modern trend," *see* H. McNeil & C. Littlefield, *The Inadvertent Disclosure of Privileged Documents, supra,* the majority of courts, at least in circumstances involving disclosures made during formal discovery proceedings attendant to litigation, adopts an "ad hoc" approach. Under this approach, the courts consider a number of factors to determine whether the disclosure resulted from excusable inadvertence or from some ***809** chargeable negligence or other fault. Among the factors considered by these courts are: (*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. *See United States v. de la Jara,* 973 F.2d 746 (9th Cir.1992); *Monarch Cement Co. v. Lone Star Industries, Inc.,* 132 F.R.D. 558 (D.Kan.1990).

We conclude that this latter so-called "ad hoc" approach is the most appropriate means to determine whether an alleged inadvertent disclosure should be considered a waiver of the privilege, at least in those instances in which the disclosure has occurred during the course of judicial discovery proceedings.

Given our conclusion in this respect, the trial court upon remand should reconsider its decision in light of the foregoing comments. And, because Coors itself signed a document approving the disclosure, the reasonableness of its actions and procedures, as well as the reasonableness of the actions and procedures of its counsel, should be considered. The trial court shall, of course, have discretion to determine whether an evidentiary hearing need be conducted with respect to this issue.

The judgments dismissing plaintiff's claims for contract breach, promissory estoppel, and alleged violation of the Organized Crime Control Act are affirmed. The judgment dismissing the claim against Coors for wrongful discharge in violation of public policy and the claim against both defendants for outrageous conduct is reversed, and the cause is remanded to the trial court for further proceedings consistent with the views set forth in this opinion.

METZGER and MARQUEZ, JJ., concur.

Colo.App.,1997.
Floyd v. Coors Brewing Co.
952 P.2d 797, RICO Bus.Disp.Guide 9310, 13 IER Cases 115, 97 CJ C.A.R. 1213

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Federal Rules of Evidence Rule 502, 28 U.S.C.A.

United States Code Annotated Currentness
Federal Rules of Evidence (Refs & Annos)
Article V. Privileges
Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

CREDIT(S)
(Pub.L. 110-322, § 1(a), Sept. 19, 2008, 122 Stat. 3537; Apr. 26, 2011, eff. Dec. 1, 2011.)
ADVISORY COMMITTEE NOTES

2011 Amendments

Rule 502 has been amended by changing the initial letter of a few words from uppercase to lowercase as part of the restyling of the Evidence Rules to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTES

Explanatory Note (Revised 11/28/2007)

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product--specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See,*

e.g., Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999)(reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g.*, *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. *See* Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver--"ought in fairness"--is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally* *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical

software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

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. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). *See also Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. *See generallyHopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for

privilege and work product. *See* Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). The rule provides a party with a predictable protection from a court order--predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

Under subdivision (d), a federal court may order that disclosure of privileged or protected information "in connection with" a federal proceeding does not result in waiver. But subdivision (d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal. If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then subdivision (d) is inapplicable. Subdivision (c) would govern the federal court's determination whether the state-court disclosure waived the privilege or protection in the federal proceeding.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(f) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

The definition of work product "materials" is intended to include both tangible and intangible information. *See* In re Cendant Corp. Sec. Litig., 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

Committee Letter

The letter from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to the Committee on the Judiciary of the U.S. Senate and House of Representatives, dated September 26, 2007, provided:

On behalf of the Judicial Conference of the United States, I respectfully submit a proposed addition to the Federal Rules of Evidence. The Conference recommends that Congress adopt this proposed rule as Federal Rule of Evidence 502.

The Rule provides for protections against waiver of the attorney-client privilege or work product immunity. The Conference submits this proposal directly to Congress because of the limitations on the rulemaking function of the federal courts in matters dealing with evidentiary privilege. Unlike all other federal rules of procedure prescribed under the Rules Enabling Act, those rules governing evidentiary privilege must by approved by an Act of Congress, 28 U.S.C. § 2074(b).

Description of the Process Leading to the Proposed Rule

The Judicial Conference Rules Committees have long been concerned about the rising costs of litigation, much of which has been caused by the review, required under current law, of every document produced in discovery, in order to determine whether the document contains privileged information. In 2006, the House Judiciary Committee Chair suggested that the Judicial Conference consider proposing a rule dealing with waiver of attorney-client privilege and work product, in order to limit these rising costs. The Judicial Conference was urged to proceed with rulemaking that would:
•protect against the forfeiture of privilege when a disclosure in discovery is the result of an innocent mistake; and

•permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to litigation.

The task of drafting a proposed rule was referred to the Advisory Committee on Evidence Rules (the "Advisory Committee"). The Advisory Committee prepared a draft Rule 502 and invited a select group of judges, lawyers, and academics to testify before the Advisory Committee about the need for the rule, and to suggest any improvements. The Advisory Committee considered all the testimony presented by these experts and redrafted the rule accordingly. At its Spring 2006 meeting, the Advisory Committee approved for release for public comment a proposed Rule 502 that would provide certain exceptions to the federal common law on waiver of privileges and work product. That rule was approved for release for public comment by the Committee on Rules of Practice and Procedure ("the Standing Committee"). The public comment period began in August 2006 and ended February 15, 2007. The Advisory Committee received more that [sic] 70 public comments, and also heard the testimony of more than 20 witnesses at two public hearings. The rule released for public comment was also carefully reviewed by the Standing Committee's Subcommittee on Style. In April 2007, the Advisory Committee issued a revised proposed Rule 502 taking into account the public comment, the views of the Subcommittee on Style, and its own judgment. The revised rule was approved by the Standing Committee and the Judicial Conference. It is enclosed with this letter.

In order to inform Congress of the legal issues involved in this rule, the proposed Rule 502 also includes a proposed Committee Note of the kind that accompanies all rules adopted through the Rules Enabling Act. This Committee Note may be incorporated as all or part of the legislative history of the rule if it is adopted by Congress. *See, e.g.*, House Conference Report 103-711 (stating that the "Conferees intend that the Advisory Committee Note on [Evidence] Rule 412, as transmitted by the Judicial Conference of the

United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section" of the Violent Crime Control and Law Enforcement Act of 1994).

Problems Addressed by the Proposed Rule

In drafting the proposed Rule, the Advisory Committee concluded that the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Advisory Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members concluded that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made much less expensive. The Advisory Committee noted that the existing law on the effect of inadvertent disclosures and on the scope of waiver is far from consistent or certain. It also noted that agreements between parties with regard to the effect of disclosure on privilege are common, but are unlikely to decrease the costs of discovery due to the ineffectiveness of such agreements as to persons not party to them.

Proposed Rule 502 does not attempt to deal comprehensively with either attorney-client privilege or work-product protection. It also does not purport to cover all issues concerning waiver or forfeiture of either the attorney-client privilege or work-product protection. Rather, it deals primarily with issues involved in the disclosure of protected information in federal court proceedings or to a federal public office or agency. The rule binds state courts only with regard to disclosures made in federal proceedings. It deals with disclosures made in state proceedings only to the extent that the effect of those disclosures becomes an issue in federal litigation. The Rule covers issues of scope of waiver, inadvertent disclosure, and the controlling effect of court orders and agreements.

Rule 502 provides the following protections against waiver of privilege or work product:

•*Limitations on Scope of Waiver.* Subdivision (a) provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information.

•*Protections Against Inadvertent Disclosure.* Subdivision (b) provides that an inadvertent disclosure of privileged or protected communications or information, when made at the federal level, does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

•*Effect on State Proceedings and Disclosures Made in State Courts.* Subdivision (c) provides that 1) if there is a disclosure of privileged or protected communications or information at the federal level, then state courts must honor Rule 502 in subsequent state proceedings; and 2) if there is a disclosure of privileged or protected communications or information in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver.

•*Orders Protecting Privileged Communications Binding on Non-Parties.* Subdivision (d) provides that if a federal court enters an order providing that a disclosure of privileged or protected communications or information does not constitute a waiver, that order is enforceable against all persons and entities in any

federal or state proceeding. This provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review.

•*Agreements Protecting Privileged Communications Binding on Parties.* Subdivision (e) provides that parties in a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding. While those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.

Drafting Choices Made by the Advisory Committee

The Advisory Committee made a number of important drafting choices in Rule 502. This section explains those choices.

1) The effect in state proceedings of disclosures initially made in state proceedings. Rule 502 does not apply to a disclosure made in a state proceeding when the disclosed communication or information is subsequently offered in another state proceeding. The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made. This draft raised the objections of the Conference of State Chief Justices. State judges argued that the Rule as drafted offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are made initially in state proceedings--and even when the disclosed material is then offered in a state proceeding (the so-called "state-to-state" problem). In response to these objections, the Advisory Committee voted unanimously to scale back the Rule, so that it would not cover the "state-to-state" problem. Under the current proposal state courts are bound by the Federal Rule only when a disclosure is made at the federal level and the disclosed communication or information is later offered in a state proceeding (the so-called "federal-to-state" problem).

During the public comment period on the scaled-back rule, the Advisory Committee received many requests from lawyers and lawyer groups to return to the original draft and provide a uniform rule of privilege waiver that would bind both state and federal courts, for disclosures made in either state or federal proceedings. These comments expressed the concern that if states were not bound by a uniform federal rule on privilege waiver, the protections afforded by Rule 502 would be undermined; parties and their lawyers might not be able to rely on the protections of the Rule, for fear that a state law would find a waiver even though the Federal Rule would not.

The Advisory Committee determined that these comments raised a legitimate concern, but decided not to extend Rule 502 to govern a state court's determination of waiver with respect to disclosures made in state proceedings. The Committee relied on the following considerations:
•Rule 502 is located in the Federal Rules of Evidence, a body of rules determining the admissibility of evidence in federal proceedings. Parties in a state proceeding determining the effect of a disclosure made in that proceeding or in other state courts would be unlikely to look to the Federal Rules of Evidence for the answer.

•In the Advisory Committee's view, Rule 502, as proposed herein, does fulfill its primary goal of reducing the costs of discovery in *federal* proceedings. Rule 502 by its terms governs state courts with regard to the effect of disclosures initially made in federal proceedings or to federal offices or agencies. Parties and their lawyers in federal proceedings can therefore predict the consequences of disclosure by referring to Rule 502; there is no possibility that a state court could find a waiver when Rule 502 would not, when the disclosure is initially made at the federal level.

The Judicial Conference has no position on the merits of separate legislation to cover the problem of waiver of privilege and work product when the disclosure is made at the state level and the consequence is to be determined in a state court.

2) Other applications of Rule 502 to state court proceedings. Although disclosures made in state court proceedings and later offered in state proceedings would not be covered, Rule 502 would have an effect on state court proceedings where the disclosure is initially made in a federal proceeding or to a federal office or agency. Most importantly, state courts in such circumstances would be bound by federal protection orders. The other protections against waiver in Rule 502--against mistaken disclosure and subject matter waiver--would also bind state courts as to disclosures initially made at the federal level. The Rule, as submitted, specifically provides that it applies to state proceedings under the circumstances set out in the Rule. This protection is needed, otherwise parties could not rely on Rule 502 even as to federal disclosures, for fear that a state court would find waiver even when a federal court would not.

3) Disclosures made in state proceedings and offered in a subsequent federal proceeding. Earlier drafts of proposed Rule 502 did not determine the question of what rule would apply when a disclosure is made in state court and the waiver determination is to be made in a subsequent federal proceeding. Proposed Rule 502 as submitted herein provides that all of the provisions of Rule 502 apply unless the state law of privilege is more protective (less likely to find waiver) than the federal law. The Advisory Committee determined that this solution best preserved federal interests in protecting against waiver, and also provided appropriate respect for state attempts to give greater protection to communications and information covered by the attorney-client privilege or work-product doctrine.

4) Selective waiver. At the suggestion of the House Judiciary Committee Chair, the Advisory Committee considered a rule that would allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation. Such a rule is known as a "selective waiver" rule, meaning that disclosure of protected communications or information to the government waives the protection only selectively--to the government--and not to any other person or entity.

The selective waiver provision proved to be very controversial. The Advisory Committee determined that it would not propose adoption of a selective waiver provision; but in light of the request from the House Judiciary Committee, the Advisory Committee did prepare language for a selective waiver provision should Congress decide to proceed. The draft language for a selective waiver provision is available on request.

Conclusion

Proposed Rule 502 is respectfully submitted for consideration by Congress as a rule that will effectively limit the skyrocketing costs of discovery. Members of the Standing Committee, the Advisory Committee, as well as their reporters and consultants, are ready to assist Congress in any way it sees fit.

Sincerely,

Lee H. Rosenthal

Chair, Committee on Rules of Practice and Procedure

Addendum to Advisory Committee Notes

STATEMENT OF CONGRESSIONAL INTENT REGARDING RULE 502 OF THE FEDERAL RULES OF EVIDENCE

During consideration of this rule in Congress, a number of questions were raised about the scope and contours of the effect of the proposed rule on current law regarding attorney-client privilege and work-product protection. These questions were ultimately answered satisfactorily, without need to revise the text of the rule as submitted to Congress by the Judicial Conference.

In general, these questions are answered by keeping in mind the limited though important purpose and focus of the rule. The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney-client privilege, or of information that is protected by work-product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or state judicial or administrative proceeding. The rule does not alter the substantive law regarding attorney-client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege (or protection) to prove that the particular information (or communication) qualifies for it. And it is not intended to alter the rules and practices governing use of information outside this evidentiary context.

Some of these questions are addressed more specifically below, in order to help further avoid uncertainty in the interpretation and application of the rule.

Subdivision (a)--Disclosure vs. Use

This subdivision does not alter the substantive law regarding when a party's strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter, so that the information being used can be fairly considered in context. One situation in which this issue arises, the assertion as a defense in patent-infringement litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In this and similar situations, under subdivision (a)(1) the party using an attorney-client communication to its advantage in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter, regardless of the circumstances in which the communication being so used was initially disclosed.

Subdivision (b)--Fairness Considerations

The standard set forth in this subdivision for determining whether a disclosure operates as a waiver of the privilege or protection is, as explained elsewhere in this Note, the majority rule in the federal courts. The majority rule has simply been distilled here into a standard designed to be predictable in its application. This distillation is not intended to foreclose notions of fairness from continuing to inform application of the standard in all aspects as appropriate in particular cases--for example, as to whether steps taken to rectify an erroneous inadvertent disclosure were sufficiently prompt under subdivision (b)(3) where the receiving party has relied on the information disclosed.

Subdivisions (a) and (b)--Disclosures to Federal Office or Agency

This rule, as a Federal Rule of Evidence, applies to admissibility of evidence. While subdivisions (a) and (b) are written broadly to apply as appropriate to disclosures of information to a federal office or agency, they do not apply to uses of information--such as routine use in government publications--that fall outside the evidentiary context. Nor do these subdivisions relieve the party seeking to protect the information as privileged from the burden of proving that the privilege applies in the first place.

Subdivision (d)--Court Orders

This subdivision authorizes a court to enter orders only in the context of litigation pending before the court. And it does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information. Therefore, this subdivision does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking the information. This subdivision is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege to preclude use in litigation of information disclosed in such discovery. While the benefits of a court order under this subdivision would be equally available in government enforcement actions as in private actions, acquiescence by the disclosing party in use by the federal agency of information disclosed pursuant to such an order would still be treated as under current law for purposes of determining whether the acquiescence in use of the information, as opposed to its mere disclosure, effects a waiver of the privilege. The same applies to acquiescence in use by another private party.

Moreover, whether the order is entered on motion of one or more parties, or on the court's own motion, the court retains its authority to include the conditions it deems appropriate In the circumstances.

Subdivision (e)--Party Agreements

This subdivision simply makes clear that while parties to a case may agree among themselves regarding the effect of disclosures between each other in a federal proceeding, it is not binding on others unless it is incorporated into a court order. This subdivision does not confer any authority on a court to enter any order regarding the effect of disclosures. That authority must be found in subdivision (d), or elsewhere.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: **Honorable Jeffrey S. Sutton, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **May 7, 2013**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on May 3, 2013 at the University of Miami School of Law, Coral Gables, Florida.

The Committee seeks final Standing Committee approval and transmittal to the Judicial Conference of the United States four proposals: an amendment to Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—to provide that prior consistent statements are

admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility, and amendments to Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records—to eliminate an ambiguity uncovered during the restyling project and clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

II. Action Items

A. Proposed Amendment to Evidence Rule 801(d)(1)(B)

The Committee proposes that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The Standing Committee approved proposed amended Rule 801(d)(1)(B) for publication at its June 2012 meeting. The proposed rule and committee note now presented for final Standing Committee approval are attached as an appendix to this report. They have been modified slightly from the versions issued for publication to address certain concerns raised by public comment.

The proposal to amend Rule 801(d)(1)(B) originated with Judge Frank W. Bullock, Jr., when he was a member of the Standing Committee. Judge Bullock proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility. Under the current Rule, some prior consistent statements offered to rehabilitate a witness's credibility—specifically, those that rebut a charge of recent fabrication or improper influence or motive—are also admissible substantively. But other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of faulty recollection—are not admissible under the hearsay exemption, but only for rehabilitation. There are two basic practical problems in distinguishing between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

The public comment on the proposed amendment is summarized in the appendix to this report. Although largely negative, it is sparse. The Committee found two concerns expressed in the public comment to merit revisions to the proposed rule and committee note. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" is vague and could lead courts to admit prior consistent statements that heretofore have been excluded for any purpose. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness had a motive to falsify, even though the statement was made *after* the motive to falsify arose, thereby undermining the Supreme Court's ruling in *Tome v. United States,* 513 U.S. 150 (1995).

In response to these concerns, the Committee voted, with one member dissenting, to approve proposed Rule 801(d)(1)(B) with the slight modification to (ii) shown on the following blacklined version. The Committee concluded that the proposal preserves the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds—such as to explain an inconsistency or to rebut a charge of bad memory. And the proposal does so without resorting to the potentially vague "otherwise rehabilitates" language.

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> > **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> >
> > * * *
> >
> > **(B)** is consistent with the declarant's testimony and is offered:
> > (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
> > (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; * * *

The committee note has also been slightly modified to account for the proposed changes to the Rule.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 801(d)(1)(B) be approved and transmitted to the Judicial Conference of the United States.

B. Proposed Amendments to Evidence Rules 803(6)-(8)

The Committee proposes that Evidence Rules 803(6)-(8) be amended to address an ambiguity uncovered during restyling, but left unaddressed at that time because the changes required to clarify the ambiguity were viewed as substantive. The Standing Committee approved proposed amended Rules 803(6)-(8) for publication at its June 2012 meeting. The proposed rules and committee notes now presented for final Standing Committee approval are attached as appendixes to this report. The committee notes have been modified slightly from the versions issued for publication to address the concern, raised by public comment, that the notes use language that fails to track the text of the Rules. No changes have been made to the proposed rules as published.

The restyling project uncovered an ambiguity in Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records. These exceptions originally set out admissibility requirements and then provided that a record that met these requirements, although hearsay, was admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The Rules did not specifically state which party had the burden of showing trustworthiness or untrustworthiness.

The restyling project initially sought to clarify this ambiguity by providing that a record that fit the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information or the method or circumstances of preparation indicate lack of trustworthiness. But this proposal did not go forward as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Because the proposal would have changed the law in at least one court, it was deemed substantive and therefore outside the scope of the restyling project. When the Standing Committee approved the Restyled Rules, several members suggested that this Committee consider making the minor substantive change to clarify that the opponent has the burden of showing untrustworthiness.

Initially, the Committee did not think it necessary to propose clarifying amendments to these Rules. At its spring 2012 meeting, however, the Reporter noted that the Texas restyling committee had unanimously concluded that restyled Rules 803(6) and (8) could be interpreted as making substantive changes by placing the burden on the *proponent* of the evidence to show trustworthiness. The Committee then revisited the matter. The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the Committee for the amendments are: first, to resolve a conflict in the case law by providing uniform rules; second, to clarify a possible ambiguity in the Rules as originally adopted and as restyled; and third, to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these Rules are met—requirements that tend to guarantee trustworthiness in the first place.

There were only two public comments on the proposed amendments. Both approved of the text, but one comment suggested that the committee notes use language that fails to track the text of the Rules. Slight changes have been made to each of the three committee notes to address this concern.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rules 803(6)-(8) be approved and transmitted to the Judicial Conference of the United States.

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE JOHN D. BATES
Secretary

November 6, 2013

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: Judge John D. Bates

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 801(d)(1)(B) and 803(6) - (8) of the Federal Rules of Evidence, which were approved by the Judicial Conference at its September 2013 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a redline version of the amendments; (ii) an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the Report of the Advisory Committee on the Federal Rules of Evidence.

Attachments

EXCERPT OF THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 801(d)(1)(B) and 803(6)–(8), with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2012.

Rule 801(d)(1)(B)

Rule 801(d)(1)(B) is the hearsay exemption for certain prior consistent statements. It would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they are admissible to 1) rebut an express or implied charge that the witness recently fabricated testimony or acted from a recent improper influence or motive in so testifying; and 2) rehabilitate the declarant's credibility when attacked on another ground. Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility–specifically, those that rebut a charge of recent fabrication or improper influence or motive–are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements–such as those that explain a prior inconsistency or rebut a charge of faulty recollection–are admissible only for rehabilitation but not substantively. There are two basic practical problems in distinguishing between substantive and credibility use as applied to

prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

In reviewing the comments received after publication, the advisory committee found two concerns that merited revisions. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" is vague and could lead courts to admit prior consistent statements that heretofore have been excluded for any purpose. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness had a motive to falsify, even though the statement was made *after* the motive to falsify arose, thereby undermining the Supreme Court's ruling in *Tome v. United States,* 513 U.S. 150 (1995).

In response to these concerns, the advisory committee voted, with one member dissenting, to approve proposed Rule 801(d)(1)(B) with a slight modification that the advisory committee believes would preserve the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds (such as to explain an inconsistency or to rebut a charge of bad memory). The proposed Committee Note has also been slightly modified to account for the modification to the proposed amendment to the rule.

Rules 803(6)–(8)

The recent restyling project uncovered an ambiguity in Rules 803(6)–(8)–the hearsay exceptions for business records, absence of business records, and public records. The exceptions originally set out admissibility requirements and then provided that a record that met these requirements, although hearsay, was admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules did not specifically state which party had the burden of showing trustworthiness or untrustworthiness.

The restyling project initially sought to clarify this ambiguity by providing that a record that fit the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. But the proposal did not go forward as part of restyling because research into the case law indicated that the change would be substantive. Most courts impose the burden of proving untrustworthiness on the opponent, but a few require the proponent to prove that a record is trustworthy. Because the proposal would have changed the law in at least one court, it was deemed substantive and therefore outside the scope of the restyling project.

When the Committee approved the restyled Evidence Rules, several members suggested that the advisory committee consider making a minor substantive change to clarify that the opponent has the burden of showing untrustworthiness. The proposed amendments do just that. They would clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy.

The advisory committee received two comments on the published proposals. Both approved of the text, but one comment argued that the proposed Committee Notes use language

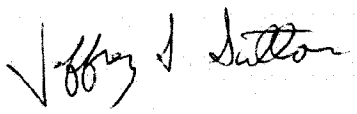
that fails to track the text of the rules. Slight changes have been made to each of the three Committee Notes to address this concern.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Evidence Rules 801(d)(1)(B) and 803(6)–(8), and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



Jeffrey S. Sutton, Chair

James M. Cole	David F. Levi
Dean C. Colson	Patrick J. Schiltz
Roy T. Englert, Jr.	Larry A. Thompson
Gregory G. Garre	Richard C. Wesley
Neil M. Gorsuch	Diane P. Wood
Marilyn L. Huff	Jack Zouhary
Wallace B. Jefferson	

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * * * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * * * *

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it

---

* New material is underlined; matter to be omitted is lined through.

or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

* * * * *

Committee Note

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a

charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or improper influence or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements

otherwise admissible for rehabilitation are now admissible substantively as well.

Changes Made After Publication and Comment

The text of the proposed amendment was changed to clarify that the traditional limits on using prior consistent statements to rebut a charge of recent fabrication or improper influence or motive are retained. The Committee Note was modified to accord with the change in text.

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * *

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * * * *

Committee Note

Subdivision (6)(E). The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show that the source of information or the method or

circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

Changes Made After Publication and Comment

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * *

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * * * *

Committee Note

Subdivision (7)(C). The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

Changes Made After Publication and Comment

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * *

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual

findings from a legally authorized investigation; and

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~or other circumstances indicate a lack of trustworthiness.

* * * * *

Committee Note

Subdivision (8)(B). The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily

required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

Changes Made After Publication and Comment

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.