Colorado Rules of Juvenile Procedure Redraft Committee

November 4, 2016, Presentation of Discovery Rules Subcommittee

Exhibit #	Document
1	Subcommittee Roster
2	*People v. Higgins,* 2016 CO 68 (Colo. 2016).
3	"Colorado Rule of Evidence 502: Preserving the Privilege and Work Product Distinction in Discovery", Colorado Lawyer (October 2016) Vol. 45, No. 10, pp. 19-23.
4	Draft Proposed Rules
5	Draft Release of Information
6	State of Colorado – Consent to Release Information

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2016 WL 5745698

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Supreme Court of Colorado.

In re: The PEOPLE of the State of Colorado, Plaintiff,
v.
Brooke Ann HIGGINS, Defendant.

Supreme Court Case No. 16SA94

October 3, 2016

Original Proceeding Pursuant to C.A.R. 21, Douglas County District Court Case No. 16CR28, Honorable Paul A. King, Judge

Attorneys and Law Firms

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En banc

Opinion

CHIEF JUSTICE RICE delivered the Opinion of the Court.

*1 ¶1 This companion case to People v. Johnson, 2016 CO 69, ——P.3d ——, raises two questions. First, does a trial court have statutory authority to order a juvenile charged as an adult to undergo a state-administered mental health assessment for a reverse-transfer proceeding? We answered that question in the negative in Johnson, but we do not answer that question here because it is hypothetical —the question is not based on the facts of this case. Second, is a trial court required, before a mental health assessment, to provide a juvenile with warnings based on the Fifth Amendment right against self-incrimination? We do not answer that question as well, because (1) Higgins consented to the evaluation while represented by counsel, and (2) any claims that ineffective assistance of counsel vitiated Higgins's consent are premature. Therefore, we vacate the order to show cause and remand the case for further proceedings.

I. Facts and Procedural History

¶2 This controversy began when the petitioner–defendant, Brooke Higgins, was a juvenile respondent in front of a magistrate judge on December 17, 2015. The district attorney requested, and Higgins's then-defense-counsel agreed to, a state-administered mental health assessment[1] of Higgins. Because the parties agreed, the magistrate judge ordered the mental health assessment.

¶3 On January 14, 2016, now in front of trial court Judge King, the district attorney dismissed the juvenile charges against Higgins and charged her as an adult with two counts of conspiracy to commit murder. Higgins sought, and the trial court granted, a reverse-transfer hearing to determine whether she should remain in adult court or return to juvenile court. On January 21, 2016, before the reverse-transfer hearing occurred, Higgins, represented by different counsel, filed a motion to suppress the mental health assessment and disqualify Judge King. Judge King denied both requests, reasoning that, notwithstanding the parties' stipulation to the state mental health assessment, there was independent statutory authority for the magistrate judge to order a state mental health assessment of Higgins.

¶4 Higgins then petitioned this court for relief under C.A.R. 21, arguing that (1) the trial court lacked authority to order a juvenile charged as an adult to undergo a mental health assessment for a reverse-transfer proceeding, and (2) the United States Constitution precludes such orders and requires the trial court to advise a juvenile of her Fifth Amendment rights in such an assessment. We issued a rule to show cause.

II. Original Jurisdiction

¶5 "This court will generally elect to hear C.A.R. 21 cases that raise issues of first impression and that are of significant public importance." People v. Steen, 2014 CO 9, ¶ 8, 318 P.3d 487, 490. We granted review in this case as a companion to People v. Johnson, 2016 CO 69, —— P.3d ——. This case raises two issues of first impression. First, one of the issues we considered in Johnson, whether a trial court may order a juvenile who requested a reverse-transfer hearing to submit to a mental health assessment by a state doctor. Second, whether the Constitution requires a trial court to advise a juvenile of her Fifth Amendment rights before such an assessment.

*2 ¶6 These issues are of significant public importance because they will impact when a district attorney files adult charges against a juvenile and when a trial court may order mental health assessments for juveniles. Therefore, original relief is appropriate in this case.

III. Standard of Review

¶7 The interpretation of statutes and the United States Constitution are questions of law, which we review de novo. See Bostelman v. People, 162 P.3d 686, 689 (Colo. 2007).

IV. Analysis

¶8 Under section 19–2–517(1), C.R.S. (2016), district attorneys have the power to direct file adult criminal charges against a juvenile. After a district attorney has direct filed against a juvenile, the juvenile can request a reverse-transfer hearing —seeking transfer of the case to juvenile court— pursuant to section 19–2–517(3). After a juvenile requests a reverse-transfer hearing, the trial court "shall consider" eleven factors to decide whether it should reverse-transfer the case to juvenile court. See § 19–2–517(3)(b). Of those factors, one is relevant to this appeal: Section 19–2–517(3)(b)(VI) states that the trial court shall consider "[t]he current and past mental health status of the juvenile as evidenced by relevant mental health or psychological assessments or screenings that are made available to both the district attorney and defense counsel." Here, we first consider whether a trial court may order a juvenile who requested a reverse-transfer hearing to submit to a mental health assessment by a state doctor. Next, we consider whether the U.S. Constitution requires trial courts to advise a juvenile of her Fifth Amendment rights before such an assessment.

A. We do not reach the first issue because it did not occur in Higgins's case.

¶9 Higgins asks this court to decide whether the trial court possessed authority to order a juvenile to submit to a state mental health assessment. We answered that question in the negative in Johnson, 2016 CO 69, —P.3d ——, but we decline to address that question here. Higgins was not ordered by a trial court to undergo a state mental health assessment. Rather, Higgins (via defense counsel) agreed to submit to the state mental health assessment while in front of a magistrate judge in juvenile court. Because we do not "give advisory opinions based on hypothetical fact situations," we decline to decide Higgins's first issue. Tippett v. Johnson, 742 P.2d 314, 315 (Colo. 1987).

B. We do not reach the second issue because it is premature.

¶10 Higgins argues that the mental health assessment should be suppressed because (1) the trial court did not provide Fifth Amendment warnings prior to the mental health assessment, and (2) any consent Higgins gave to the mental health evaluation was vitiated by her defense counsel's ineffective assistance in violation of Higgins's Sixth Amendment rights. Because these arguments are premature, we decline to reach them.

¶11 First, the Fifth Amendment to the U.S. Constitution guarantees that no person "shall be compelled in any criminal case to be a witness

against [her]self." But we decline to reach Higgins's claimed deficient Fifth Amendment warnings because Higgins consented to the state mental health evaluation and had defense counsel to provide her advice. The cases Higgins cites for her argument that her Fifth Amendment rights were violated by a lack of warning from the trial court are distinguishable, because in those cases the defendant either (1) objected to the mental health assessment but was forced to participate anyway or (2) did not have access to counsel at the time the trial court ordered the assessment. See, e.g., People v. Branch, 805 P.2d 1075, 1084 (Colo. 1991) (requiring trial court to give defendant warnings when he did not have counsel present); People in Interest of A.D.G., 895 P.2d 1067, 1073 (Colo. App. 1994) (holding that court could not force juvenile to submit to state psychological examination after juvenile objected).

*3 ¶12 Second, the Sixth Amendment guarantees that a defendant have access to effective assistance of counsel. Carmichael v. People, 206 P.3d 800, 805 (Colo. 2009). But we do not consider Higgins's argument that her consent to the mental health evaluation was vitiated by ineffective assistance of counsel in violation of her Sixth Amendment rights because that argument is premature. To show ineffective assistance of counsel, a defendant must show that (1) an attorney's performance was "deficient," and (2) the defendant suffered prejudice as a result of this deficient performance. Id. at 805–06 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "The prejudice determination is a mixed question of law and fact." Id. at 807. A finding of ineffective assistance of counsel requires findings of fact that have yet to occur, and "[a]s an appellate court, we will not engage in fact finding." People v. Matheny, 46 P.3d 453, 462 (Colo. 2002). Therefore, we do not decide Higgins's second issue.

V. Conclusion

¶13 We do not reach either of Higgins's arguments. The first argument is based on a hypothetical fact situation. The second argument is premature and would require this court to improperly engage in fact finding. Therefore, we vacate the order to show cause and remand the case for further proceedings.

JUSTICE BOATRIGHT does not participate.

All Citations

--- P.3d ----, 2016 WL 5745698, 2016 CO 68

Footnotes

1 We use the term "mental health assessment" to cover all mental health or psychological screenings or assessments.

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

by Christopher B. Mueller, Ronald J. Hedges, and Lino S. Lipinsky

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

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

Major Provisions of CRE 502

Briefly, the new rule contains five major provisions:

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

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

The following sections look more closely at these provisions.

Waiver by Inadvertent Production

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

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

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

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

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

Extent of Waiver

Under FRE 502(a)(1) and (3), "intentional" disclosure waives privilege or work product protection for material actually disclosed and for other material that "ought in fairness to be considered" with it. This provision aims to prevent selective disclosure for tactical reasons that might distort the truth. But under FRE 502(b), "inadvertent" disclosure can waive privilege or work product protection only for material actually disclosed. More important, under FRE 502(b)(2) and (3), such disclosure does not waive privilege or work product protection at all if the disclosing party "took reasonable steps" to prevent it and "promptly took reasonable steps to rectify the error."

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

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

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

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

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

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

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

Agreements and Court Orders

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

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

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

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

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

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

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

Colorado Court Orders Enforceable Elsewhere

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

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

Effects in Colorado Courts of Disclosures in Other Courts

As noted above, CRE 502 has the effect of directing Colorado courts to find against waiver on account of disclosure in a suit in another state or the federal system if such disclosure would not have that effect in that forum. The rule expressly refers only to disclosure in such forum if there is no court order, and silently assumes that a Colorado court would reach the same conclusion when there is a court order. It seems appropriate for Colorado to have such a rule because a Colorado court must resolve issues of waiver on account of disclosure in a distant forum by applying some choice-of-law principle, and in effect CRE 502 sets forth such a principle: In this situation, it directs Colorado courts to fol-

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

Conclusion

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

Notes

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

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

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

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

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

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

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

8. *Id.* at 226–27.

9. *Id.* at 221–22.

10. *Id.* at 224.

11. *Id.* at 225.

12. *Id.*

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

14. *Id.* at *3.

15. *Id.*

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

17. *Id.* at *3.

18. *Id.* at *5.

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

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

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

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

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

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

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

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

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

28. *Id.* at *6.

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

30. *Id.* at *2–3.

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

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

Rule 1. Applicability.

These rules govern disclosures and discovery in Dependency and Neglect proceedings. Where not governed by these rules or the procedures set forth in The Colorado Children's Code, discovery shall be conducted according to the Colorado Rules of Civil Procedure.

Rule 2. Definitions.

As used in this article:

(a) "Confidential information" means information in which the subject of the information possesses a reasonable expectation of privacy based upon the type of information involved, the sensitive personal nature of the information, and legal protections that exist concerning the access to such information.

(1) Examples of confidential information include, but are not limited to social security numbers pursuant to 42 United States Code 405(c)(2)(C)(viii)(1); certain educational records as required by the Federal Educational and Privacy Act (FERPA); medical information not within the child abuse and neglect reporting exception consistent with the Health Insurance Portability and Accountability Act (HIPAA); substance abuse related information as noted in 42 United States Code 290ee-3 and Colorado Revised Statutes 27-81-113 and 27-82-109; the identity of reporting parties as protected by Colorado Revised Statue 19-1-307(1)(a); and identifying information about foster home or other out of home placement providers in accord with Colorado Revised Statute 19-3-502(7).

(2) Confidential information about a party may be accessed only through the agreement of the holder or as court-ordered upon a finding that the relevance and materiality of the confidential information to the issues before the court outweigh the privacy interest claimed by the holder. Where appropriate, the court shall consider entering appropriate protection orders.

(b) "Disclosure" means the self-executing process by which parties share information, such as witness lists, exhibit lists, reports, curricula vitae of experts, etc., in advance of court hearings.

(c) "Discovery" means the process by which parties seek case or party information through a more formal process including, but not limited to, the use of Subpoena, Written Request for Production of Documents, Requests for Admission, Depositions, and Interrogatories.

(d) "Parties" mean the local Department of Human Services, the Guardian(s) ad litem for the child(ren), Respondents, and Intervenors. The term "parties" does not include the Guardian ad litem for respondents or Special Respondents unless the Court has granted Special Respondents full party status for specific issues or hearings.

(e) "Privileged information" means information that is entitled to greater protections based upon the relationship between two individuals as defined in Colorado Revised Statute 13-90-107, including, but not limited to, information shared between an attorney and client; doctor and patient; and therapist and client. "Privileged information" does not include correspondence and/or communication between a local DHS caseworker and a party to a dependency and neglect or correspondence/communication between a guardian ad litem and the child to whose best interest they are appointed to represent.

Rule 3. Intent.

(a) **Construction.** These rules shall be liberally construed to secure the just and speedy determination of every action, and to do so in the best interests of the children involved. Proceedings are civil in nature.

(b) **Policy Statement.** Dependency and Neglect cases are highly sensitive proceedings that deal with confidential and privileged information. To the extent that such information is shared between the parties or others directly involved in the case, such use shall be restricted solely to appropriate use directly related to the case. If a party believes such information may be or has been misused in anyway, the matter shall be brought to the attention of the court as soon as possible.

(c) **Balancing Interests.** The rights of confidentiality and restricted access to privileged information must be balanced against the court's duty and obligation to protect the safety and welfare of the children who fall within its jurisdiction, as well as the rights of the parties.

Rule 4. Service of Discovery and Disclosures.

(a) **Upon Whom.** Service of disclosures and discovery under these rules shall, for parties represented by counsel, consist of service upon the counsel of record for that party, unless the court orders service directly upon the party. If a party is not represented by counsel, then service shall be directly upon that party.

(b) **Manner of Service.** Parties are encouraged to use the most expeditious manner of service available, to include electronic mail, electronic filing, and electronic service, where available. Service may be accomplished by:

(1) Mailing to the last known address. Service by mail is complete upon mailing

(2) Delivering by electronic filing or electronic service pursuant to Colorado Rule of Civil Procedure 121(1-26) in those jurisdictions with such capability. Service by electronic filing or service is complete upon transmission.

(3) Delivering by electronic mail or facsimile when the person or attorney has agreed to service by such means or the court has otherwise ordered service by such means. Service by electronic mail or facsimile is complete upon transmission.

(4) Delivering by handing it to the person, leaving it at the person's office with a clerk or other person in charge, or leaving it at a person's dwelling with someone 18 years of age or older who resides there.

Rule 5. Information Generally Not Discoverable.

The following information shall not be discoverable without a court order or release from the privilege holder:

(a) Reports, statements, or records subject to federal and/or state privilege laws;

(b) Attorney work product.

Rule 6. Written Documentation Regarding Withheld Information.

Any party withholding information shall provide a written document generally describing what has been withheld and the basis for the withholding.

Rule 7. Privilege Holder Defined.

(a) **Competent Adults.** Every competent adult may exercise or waive his or her own privilege.

(b) **Children and/or Incompetent Person.** The privilege holder designated by the court in accordance with applicable law may exercise or waive the privilege of a child or incompetent person.

Rule 8. Waiver of Privilege.

(a) **Waiver.** Persons wishing to waive privilege must execute a written release. See Form 1 for an example.

(b) **Limited Waiver**. Except as provided in Colorado Revised Statutes 19-1-303 and 19-1-307, if a privilege holder executes a limited waiver authorizing certain parties to access privileged information, other parties seeking the privileged information must seek it from the privilege holder or the court, not the party authorized to access it through the limited waiver.

Rule 9. Court-Ordered Waiver of Privilege.

(a) **Duty to Confer**. A party wishing to access the privileged materials of another party shall confer with the privilege holder.

(b) **Motion.** If the privilege holder objects, the party seeking the privileged information shall file a motion stating the legal basis for access to the privileged information and the necessity of such information.

Rule 10. Inadvertent Disclosure of Privileged or Protected Information.

(a) **Duty to Notify.** A party who inadvertently produces information subject to a claim of privilege or protection may notify any party who received the information of the claim and the basis for it.

(b) **Duties of Notified Party.** Once notified, a party must not review, use, or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information from any third parties if disclosed before being notified of the initial inadvertent disclosure; and shall give notice to the party making the claim within 14 days if the claim is contested. If the claim is not contested within 14 days, or is timely contested but resolved in favor of the party claiming privilege or protection, then the receiving party must promptly return, sequester, or destroy the specified information and any copies in the party's possession, custody, or control.

(c) **Hearing.** If the claim is contested, the party making the claim shall present the information to the court under seal for a determination of the claim within 14 days after receiving such notice, 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.

(d) **Written Requirement.** All notices pursuant to this rule shall be in writing.

Rule 11. Mandatory Disclosures.

(a) **Before an Initial Hearing Pursuant to Colorado Revised Statutes 19-3-403.** All parties shall disclose as soon as practicable, but no later than prior to the commencement of the initial hearing held pursuant to Colorado Revised Statute 19-3-403, all exhibits it intends to introduce at the initial hearing.

(b) **After the Initial Hearing.**

(1) **By local or county department of human services.** Upon a written request no later than 35 days before the hearing or such lesser time the court determines reasonable and appropriate, the local or county department of human services shall disclose the following items related to the case that are in its custody and control. The disclosure shall be made no later than 14 days before a contested hearing or trial or such lesser time the court determines reasonable and appropriate:

(A) Law enforcement reports;
(B) Photographs;
(C) Interview recordings, notes, and/or transcripts;
(D) Intake assessment summary reports, notes, contact sheets, and/or correspondence; and
(E) Non-privileged medical, dental, mental health, educational, etc. documents.

(2) **By Respondents.** Upon a written request, no later than 35 days before the hearing or such lesser time the court determines reasonable and appropriate, Respondents shall disclose the following items related to the case that are in their custody and control. The disclosure shall be made no later than 14 days before at the contested hearing or trial or such lesser time the court determines reasonable and appropriate:

(A) A copy of the child's birth certificate, social security card, Medicaid/Insurance card;

(B) Proof of enrollment in a Federally Recognized Indian Tribe; and

(C) Medical, dental, mental health (if applicable), and educational, records of the child alleged to be dependent and neglected.

(3) **By Guardians ad Litem, Intervenors, and Other Parties Permitted to Participate in Contested Hearings.** These parties shall make mandatory disclosures as ordered by the court.

(4) **Production of Evidence.** The following shall be disclosed no later than 7 days before the contested hearing or trial or such lesser time the court determines reasonable and appropriate:

(A) Names, addresses, and telephone numbers of all witnesses they intend to present at the contested hearing or trial, and any written or recorded statements of such witnesses;

(B) A written report or summary of the expert testimony they intend to present at the contested hearing or trial; and

(C) A list of all other evidence (including privileged evidence) they intend to present at the contested hearing or trial. Copies shall be provided if not previously disclosed.

Rule 12. Discovery Methods.

(a) **In General.** Unless ordered otherwise by the court or as defined in a case management order, the parties may use the discovery methods identified in this rule. To the extent not addressed herein, the Juvenile Court may allow such other and further discovery as is authorized in the Colorado Rules of Civil Procedure, or as the Court may decide upon good cause shown. In the event of disagreement between the parties, the party seeking the discovery may file a motion with the court explaining the necessity. In such event, the court shall utilize the standards and proportionality tests as found in Colorado Rule of Civil Procedure 26(b)(1) to determine if the discovery will be permitted.

(b) **Subpoenas.** Subpoenas for documents or things must comply with Colorado Rule of Civil Procedure 45.

(c) **Physical and Mental Examinations of Persons.**

(1) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(2) **Right to Refuse and Ramifications Thereof.** Subject to a prior waiver of privilege, a person who receives an order for such an examination shall have a right to refuse to participate in a court-ordered examination on grounds of privilege. If the court finds that the court-ordered evaluation is necessary to resolve issues presented in the case, the party asserting the privilege will be prohibited from submitting evidence regarding such issue or condition which is subject to the request under this rule. Refusal to complete the court-ordered evaluation shall not be a basis for contempt.

(3) **Report of Examiner.** If requested by the party against whom an order is made under section (ii) of this Rule or the person examined, the party causing the examination to be made shall deliver to said other party a copy of a detailed written report of the examiner setting out his or her findings, including results of all tests made, diagnoses, and conclusions, together with like reports of all earlier examinations of the same condition. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial. This section (iii) applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This section (iii) does not preclude discovery of a report of an examiner in accordance with the provisions of any other Rule.

(d) **Depositions.**

(1) **Who May be Deposed.** Each party may take depositions of any party and any expert endorsed to testify at trial. Additional depositions of non-party witnesses may be taken upon agreement of all parties or order of the Court. Depositions of any children may be taken only upon court order. There is a rebuttable presumption that depositions of children is not in the best interests of children.

(2) **Scope and Manner.** The scope, manner, and the use of depositions shall be governed by Colorado Rules of Civil Procedure 26, 29, 30, 32, and 45, unless inconsistent with these rules or ordered otherwise.

(3) **Unavailable Witnesses.**

(A) **Standard.** After the initial hearing, any party file a motion asking the court to order the testimony of a person or party be taken by deposition upon oral examination, if:

(I) There is a reasonable probability that the witness will be unavailable to testify at the hearing or trial due to physical or mental illness, infirmity, or death;

(II) The party requesting the deposition cannot procure the attendance of the witness at the hearing or trial by subpoena, court order, or other reasonable means; or

(III) Upon a showing that the information sought cannot be obtained by other means.

(4) **Subpoena.** Attendance of witnesses at oral deposition may be compelled by subpoena as provided by Colorado Rule of Civil Procedure 45.

(5) **Notice.** A party taking a deposition shall give reasonable notice of the deposition no less than seven days before the deposition. The deposition shall be taken before an officer authorized to administer oaths by the laws of the United States, or before a person appointed by the court in which the matter is pending. The parties shall agree on or the court shall order the manner of recording of the deposition. A stenographic transcription may be made at a party's request. Examination and cross-examination of witnesses shall be as permitted as at trial. However, the deponent shall answer any otherwise objectionable question, except that which would reveal privileged material.

(e) **Interrogatories.** A party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single request. Interrogatories shall be served no later than 35 days before the hearing or such lesser time the court determines reasonable and the court determines reasonable and appropriate. The scope and manner of written interrogatories, and the use thereof, shall otherwise be governed by Colorado Rule of Civil Procedure 26 and 33, where not inconsistent with these rules or ordered otherwise.

(f) **Requests for Admission.** A party may serve on each adverse party 30 requests for admission, each of which shall consist of a single request. Admissions shall be served no later than 35 days before the hearing or such lesser time the court determines reasonable and appropriate. Responses are due no later than 21 days after service or such lesser time the court determines reasonable and appropriate. The scope and manner of requests for admission, and the use thereof, shall otherwise be governed by Colorado Rule of Civil Procedure 36, where not inconsistent with these rules or ordered otherwise.

(g) **Requests to produce or permit a party to inspect or copy designated documents and things in the possession or control of another party.** Each party may make up to 30 requests to produce or permit a party to inspect or copy designated documents and things in the possession or control of another party, in addition to those documents produced as disclosures under these rules. Requests shall be served no later than 35 days before the hearing or such lesser time the court determines reasonable and appropriate. Responses are due no later than 21 days after service or such lesser time the court determines reasonable and appropriate.

Rule 13. Resolution of Discovery Disputes.

Parties are encouraged to resolve discovery disputes as informally as possible. If court intervention is required to resolve a dispute, including the assertion of a privilege at a deposition, the parties shall confer, then jointly call the court to schedule a telephone conference or a hearing to resolve the dispute. At the discretion of the court, the matter may be heard forthwith via telephone conference.

Rule 14. Protective Orders.

Upon a motion, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other parties, and for good cause, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

(a) The discovery may not be had;

(b) The discovery may be had on specified terms and conditions, including a designation of the time, place, or manner, and/or the allocation of expenses;

(c) The discovery may be had by a method other than the one selected by the party seeking discovery;

(d) The scope of the may discovery be limited to certain matters;

(e) The discovery may be conducted in the presence of persons designated by the court; and/or

(f) A deposition be sealed and opened only by court order.

Rule 15. Court Orders Requiring Discovery.

Court orders requiring discovery shall specify the time, place, and manner of the permitted discovery and/or inspection. They may prescribe other just terms and conditions.

Rule 16. Discovery Sanctions.

(a) **Process.** Any party may file a motion demonstrating that a party failed to comply with a discovery rule or court order regarding discovery.

(b) **Standard.** When making a determination regarding the failure of a party to comply with these discovery rules or court order regarding discovery, the Court shall, first and foremost, consider the best interests of the child. Additional considerations may include the due process rights of the parties and relevant facts and circumstances.

(c) **Sanction Options.** The court may enter orders including, but not limited to, one or more of the following:

(1) Requiring the unresponsive party to permit discovery or inspection;

(2) Granting a continuance;

(3) Indicating that the matters related to the order, or other designated facts, shall be deemed established;

(4) Prohibiting the unresponsive party from supporting or opposing designated claims;

(5) Prohibiting the unresponsive party from introducing designated matters in evidence;

(6) Entering a finding that the petition or certain parts thereof shall be deemed established; and/or

(7) Requiring the unresponsive party, their counsel, or both, to pay reasonable expenses, which may include attorney's fees caused by the lack of the response.

_______________ **COUNTY DEPARTMENT OF HUMAN SERVICES**
Address: _______________
Telephone Number: _______________

PART 1 OF 4:
AUTHORIZATION FOR PERSONS, AGENCIES, AND INSTITUTIONS TO RELEASE INFORMATION TO COUNTY DEPARTMENT OF HUMAN SERVICES

Printed Name: _______________ **Date of Birth:** _______________

I authorize the following persons, agencies, or institutions to supply the following information to the _______________ County Department of Human Services (County DHS) concerning my application for/receipt of social services. I permit any authorized representative of the County DHS to inspect and reproduce records pertaining to me in the possession of the following persons, agencies, or institutions. I release the following persons, agencies, and institutions from any and all liability for supplying such information.

Names and Addresses of Persons, Agencies, and Institutions	Type of Person, Agency, or Institution	Type of Information the **Listed Persons, Agencies and Institutions May Disclose to the County DHS**
	☐ Domestic violence ☐ Medical ☐ Mental health/psychiatric/ psychological/psychosexual /psychosocial ☐ Substance abuse ☐ Other:	☐ Assessments and evaluations ☐ HIV records ☐ Intake summaries ☐ Treatment plan(s) and goals ☐ Frequency of treatment ☐ Treatment progress ☐ Discharge summaries ☐ Clinical/psychosocial history ☐ Educational records, IEPs and/or behavioral reports ☐ Court orders ☐ Other court records ☐ Child Family Investigator (CFI) reports ☐ Police reports ☐ Probation department records ☐ District Attorney records ☐ Other: _______________
	☐ Domestic violence ☐ Medical ☐ Mental health/psychiatric/ psychological/psychosexual /psychosocial ☐ Substance abuse ☐ Other:	
	☐ Domestic violence ☐ Medical ☐ Mental health/psychiatric/ psychological/psychosexual /psychosocial ☐ Substance abuse ☐ Other:	
	☐ Domestic violence ☐ Medical ☐ Mental health/psychiatric/ psychological/psychosexual /psychosocial ☐ Substance abuse ☐ Other:	
	☐ Domestic violence ☐ Medical ☐ Mental health/psychiatric/ psychological/psychosexual /psychosocial ☐ Substance abuse ☐ Other:	

PETITIONER'S EXHIBIT
S

PART 2 of 4:
AUTHORIZATION FOR COUNTY DEPARTMENT OF HUMAN SERVICES TO RELEASE INFORMATION TO PERSONS, AGENCIES, OR INSTITUTIONS

I authorize the ____________________ County Department of Human Services (County DHS) to supply information obtained directly from me in the course of my application for/receipt of social services to the following persons, agencies, and/or institutions. I authorize the County DHS to supply information obtained from any persons, agencies, or institutions that has provided information to the County DHS with my written consent. I release the County from any and all liability for supplying information as permitted in this document.

Names and Addresses of Persons, Agencies, and Institutions	Type of Person, Agency, or Institution	Type of Information **the County DHS May Disclose to the Listed Persons, Agencies and Institutions**
	☐ Domestic violence ☐ Medical ☐ Mental health/psychiatric/ psychological/psychosexual /psychosocial ☐ Substance abuse ☐ Other:	☐ Assessments and evaluations ☐ HIV records ☐ Intake summaries ☐ Treatment plan(s) and goals ☐ Frequency of treatment ☐ Treatment progress ☐ Discharge summaries ☐ Clinical/psychosocial history ☐ Educational records, IEPs and/or behavioral reports ☐ Court orders ☐ Other court records ☐ Child Family Investigator (CFI) reports ☐ Police reports ☐ Probation department records ☐ District Attorney records ☐ Other: ____________________
	☐ Domestic violence ☐ Medical ☐ Mental health/psychiatric/ psychological/psychosexual /psychosocial ☐ Substance abuse ☐ Other:	
	☐ Domestic violence ☐ Medical ☐ Mental health/psychiatric/ psychological/psychosexual /psychosocial ☐ Substance abuse ☐ Other:	
	☐ Domestic violence ☐ Medical ☐ Mental health/psychiatric/ psychological/psychosexual /psychosocial ☐ Substance abuse ☐ Other:	
	☐ Domestic violence ☐ Medical ☐ Mental health/psychiatric/ psychological/psychosexual /psychosocial ☐ Substance abuse ☐ Other:	
	☐ Domestic violence ☐ Medical ☐ Mental health/psychiatric/ psychological/psychosexual /psychosocial ☐ Substance abuse ☐ Other:	

PART 3 of 4:
GENERAL TERMS AND CONDITIONS

Limitation Regarding Use: The above releases of information are for the limited purpose of the County Department's administration of social services.

Effective Dates: The above releases shall be in effect for six (6) months, unless rescinded earlier in writing.

Signatures

Signature of adult client: _____
Printed legal name of client: _____
First Middle Last

Signature of youth(s) 15 or older whose records are sought pursuant to this release:

_____
Printed Legal Name: _____
First Middle Last

Signature of child's/youth's client's parent, guardian, legal custodian, or other authorized legal representative: _____
Printed Legal Name: _____
First Middle Last

Effective Date: _____

Distribution of Copies

Did the client receive a copy of this signed release form? □Yes □No

_____Client Initials indicating receipt of copy

Notice of Rights And Remedies

YOU HAVE THE RIGHT TO REVOKE THESE RELEASES AT ANY TIME BY GIVING WRITTEN NOTICE TO THE COUNTY DHS. IF YOU DO NOT REVOKE THESE RELEASES, THEY WILL EXPIRE ON THE FOLLOWING DATE: _____ (six months from date the client signed this form). **BEFORE THIS RELEASE EXPIRES, YOU MAY BE ASKED TO VOLUNTARILY SIGN A NEW ONE. DOING SO WILL EXTEND THIS RELEASE AN ADDITIONAL SIX MONTHS.**

THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) PROVIDES STUDENTS CERTAIN RIGHTS RELATED TO THE PRIVACY OF, OR ACCESS TO, THEIR EDUCATIONAL RECORDS. STUDENTS MAY VOLUNTARILY CHOOSE TO SIGN THIS RELEASE AUTHORIZING RELEASE OF THEIR EDUCATIONAL RECORDS TO LISTED THIRD PARTIES. PLEASE SEE THE UNITED STATES DEPARTMENT OF EDUCATION WEBSITE AT www.ed.gov/policy/gen/guid/fpco/ferpa/ index.html FOR ADDITIONAL INFORMATION ABOUT FERPA.

SUBSTANCE ABUSE RECORDS ARE PROTECTED BY 42 CODE OF FEDERAL REGULATIONS (C.F.R.) PART 2 CONFIDENTIALITY OF ALCOHOL AND DRUG ABUSE RECORDS. SUBSTANCE ABUSE RECORDS AND CANNOT BE DISCLOSED WITHOUT YOUR CONSENT, UNLESS OTHERWISE PROVIDED FOR IN THE REGULATIONS. EXCEPT FOR ANY ACTION ALREADY TAKEN IN RELIANCE UPON THIS RELEASE, YOU MAY RESCIND THIS RELEASE AT ANY TIME.

IF RECORDS AND INFORMATION REGARDING YOUTHS 15 OR OLDER ARE SOUGHT PURSUANT TO THIS RELEASE, THE YOUTH MUST SIGN THIS RELEASE, AS WELL AS A PARENT, GUARDIAN, LEGAL CUSTODIAN, OR OTHER LEGAL REPRESENTATIVE.

PART 4 OF 4:
REVOCATION OF RELEASES

If you wish to revoke your releases, sign the below and deliver this signed document to your County DHS.

_____
Signature and Date of Revocation of Release

_____
Printed Name of Person Signing Revocation of Release

State of Colorado

Authorization — Consent to Release Information

This is a(n)	Choose One:	Date of Prior Request (if applicable):

Agency Requesting Information:

Name of Agency		Name of Agency Representative	
Address of Agency			
City	State Choose One	Zip	Email
Phone 1	Phone 2	Fax	Date

Youth Information

Full Name Last Name	First Name	MI	Date of Birth
Mailing Address			
City	State Choose One	Zip	Phone
Type of Identifier: ☐ SSN ☐ School ID ☐ DL ☐ State ID ☐ Child Welfare Case # ☐ Case Report # ☐ JD#			Identifier:

Name of Consenter/Person Authorizing Consent

Name			
Mailing Address			
City		State Choose One	Zip
Email	Phone 1	Phone 2	
Type of Identifier: (Choose One)	Identifiers:	Role: (Choose One)	

Authorizes:

☐ CDE	☐ District Court	☐ Municipal Probation	☐ Attorney/PD	☐ GAL
☐ CDCW	☐ LEA	☐ District Probation	☐ JAC	☐ DYC
☐ OBH	☐ District School	☐ Diversion	☐ SB94	☐ County Court
☐ Municipal Court	☐ Private School	☐ DA	☐ County DHS	
☐ Service Provider		☐ Other		

To Release Information To:

☐ CDE	☐ District Court	☐ Municipal Probation	☐ Attorney/PD	☐ GAL
☐ CDCW	☐ LEA	☐ District Probation	☐ JAC	☐ DYC
☐ OBH	☐ District School	☐ Diversion	☐ SB94	☐ County Court
☐ Municipal Court	☐ Private School	☐ DA	☐ County DHS	
☐ Service Provider		☐ Other		

To Receive Information From:

☐ CDE	☐ District Court	☐ Municipal Probation	☐ Attorney/PD	☐ GAL
☐ CDCW	☐ LEA	☐ District Probation	☐ JAC	☐ DYC
☐ OBH	☐ District School	☐ Diversion	☐ SB94	☐ County Court
☐ Municipal Court	☐ Private School	☐ DA	☐ County DHS	
☐ Service Provider		☐ Other		

For the Purpose of: (Choose One)

Type of Records/Information Requested:

Education	Substance Abuse	Medical	Mental Health	Court	Other Records
☐ School Grades	☐ Treatment History	☐ Current Prescription	☐ MH Intake	☐ Probation History	☐ Human Service Records
☐ School Attendance Records	☐ Treatment Screens	☐ Medical History	☐ MH Screen	☐ Programs	☐ Child Welfare History
☐ School Behavior Reports	☐ Evaluations	☐ Immunizations	☐ MH Treatment History	☐ Pre-Trial Services	☐ Other:
☐ IEP's/504		☐ HIV/AIDS	☐ Diagnosis	☐ Other Court Records	Please Specify

Date Range of Youth Records: From: To:

Date Range of Authorization/Consent: From: To:

How is this infomation being released? ☐ Fax ☐ Email ☐ Telephone ☐ In Person ☐ Other Please Specify

Signature of person authorizing consent: Date:

Type or print name:

Signature of youth: Date:

Type or print name:

☐ By my signature, I consent to the release of information contained on this form for use by the requesting agency(cies), and I understand that any agency or individual using the confidential information or records obtained will take all necessary steps to protect the confidentiality of the above named youth's identity. I acknowledge that I have been informed of my rights to refuse to sign this form, and any conditions related to my consent or refusal, and that I am entitled to receive a copy of the signed form.

☐ Consenter declined release of information. [Copy Provided to Client]

PETITIONER'S EXHIBIT 6

Confidentiality Notice for Electronic Transmittal:
This release, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential information. If you have received this communication in error, please immediately notify the sender. In addition, if you have received this in error, do not review, distribute, or copy the document or attachments.

Consent Expiration:
This authorization - consent expires on/no later than DATE, or at end of event, completion of treatment, whichever is less. Length of time consent is valid can be specific by program or provider, or set by length of program/ referral, period of time that records are utilized for specified consent purpose. See specific agency authorization and consent rules for agency specific time frames for record retention.

Authorization/Consent Period:
This release shall remain in effect until such time as I provide the (AGENCY) with a written or oral notification to revoke. Exceptions do not cover data that was previously released for specific treatment or referral.

Copies of Authorization/Consent Valid:
A copy, photocopy, or facsimile transmission of this release will have the same authority as the original. ***Colorado Office of Information Technology Policy Colorado Open Records Act (sections 24-72-201, et. seq.), the laws governing state archives and public records management (sections 24-80-101, et. seq.) or local statute. Governmental entities that agree to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means (see Section 24-71.3-105).***

Interdepartmental data protocol:
In Interdepartmental data protocol means an interoperable, cross-departmental data management system and file sharing procedure that permits the merging of unit records for the purposes of policy analysis and determination of program effectiveness. The Interdepartmental data protocol at a minimum shall include protocols and procedures to be used by state agencies in data processing, including but not limited to collecting, storing, manipulating, sharing, retrieving, and releasing data related to the named juvenile. See Colorado Juvenile Risk Assessment (CJRA) C.R.S.§ 19-2-922 and Attorney General Model Acts for data exchange- C.R.S. § 19-1-304(2)(a)(XV)

Non-consensual Release of Confidential Treatment Data:
Under the State of Colorado and Federal Confidentiality Regulations, no information about the juvenile's participation in treatment can be disclosed without written consent except in the case of medical emergency, child abuse or Court Order.

Disclosure Notice to Receiving Agencies:
THIS INFORMATION HAS BEEN DISCLOSED TO YOU FROM RECORDS WHOSE CONFIDENTIALITY IS PROTECTED BY FEDERAL LAW. FEDERAL LAW PROHIBITS YOU FROM MAKING FURTHER DISCLOSURE OF THIS INFORMATION WITHOUT THE SPECIFIC WRITTEN CONSENT OF THE PERSON TO WHOM IT PERTAINS. IF APPLICABLE, A MINIMUM NECESSARY DETERMINATION HAS BEEN APPLIED TO THIS RELEASE/ AUTHORIZATION. IF YOU HAVE QUESTIONS CONCERNING THIS RELEASE PLEASE CALL (PROVIDER AGENCY PHONE #) OR PLEASE SEND INFORMATION TO: (PROVIDER AGENCY NAME AND ADDRESS AND FAX)

Revocation Limitation:
This release/authorization may be revoked at any time by written notice to AGENCY, except to the extent that action has already been taken to comply with it. Without such revocation, this release/ authorization will expire on (specific date) or if left blank, one year from the date signed, or if included as part of a Court Order or condition of probation, upon the terms specified. Consenter may revoke consent in writing by contacting the releasing agency. This revocation will be recorded in the AGENCY record. HIPAA requires written revocation of an authorization to release HIPAA information (45 CFR §164.508(b)(5)). Both Part 2 and HIPAA allow the program to make a disclosure for services already rendered in reliance on a signed consent or authorization form. See 42 CFR §2.31(a)(8) and 45 CFR §164.508.

Treatment Data Disclosure Limitation:
Under the State of Colorado and Federal Confidentiality Regulations, no information about NAMED child's participation in treatment can be disclosed without written consent except in the case of medical emergency, child abuse or Court Order. A substance abuse treatment program is defined as an individual or entity that provides alcohol or drug abuse diagnosis, treatment or referral. In this document, the term "program" includes both individual substance abuse providers and substance abuse provider organizations. See also Colorado Mental Health Treatment records http://www.leg.state.co.us (SRS Art 25(Health, Title 1 Administration, Part 8 and Colorado Medical Records Access Laws http://www.leg.state.co.us/

Written/ Verbal Authorization/ Consent:
This consent must be in writing to be valid, unless consent is for Substance Abuse Treatment – when verbal consent is acceptable. Verbal consent may also be accepted in specific emergency situations. See agency specific policies for more details.

Electronic Transmission of Personal Information:
It is a violation of law to electronically transmit any form which contains "Personal information" (a Colorado resident's first name or first initial and last name in combination with any one or more of the following data elements that relate to the resident - Social Security Number (SSN); Driver's license number or identification card number; Account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to a resident's financial account) when the data elements are not encrypted, redacted, or secured by any other method rendering the name or the element unreadable or unusable. See C.R.S.6-1-716, 1(a)

Preparer's Initials _____ Consenter's Initials _____

Preparer's Intitials

Consenter's Intitials

Preparer's Initials

Consenter's Initials

Clear Form

Email Form

Print Form