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Memorandum To: Justice Hurwitz, Judge McKibben, and Federal-State Jurisdiction Committee
From: Daniel Capra, Reporter, Advisory Committee on Evidence Rules
Re: Research on State Laws on Inadvertent Disclosure of Privileged Material
Date: December 24, 2006

Proposed Evidence Rule 502 provides that certain disclosures of attorney-client privilege and work product made in federal proceedings are not waivers, either in state or federal court. The Advisory Committee is aware of the concern expressed by members of both the state and federal judiciary about the possibility that the rule may encroach on some state prerogatives in determining privilege waiver. In November, representatives of the Advisory Committee met with representatives of the Conference of State Chief Justices to discuss Rule 502. At that meeting, the representatives expressed interest in determining what the actual impact of the proposed Rule might be on existing state laws on waiver of privilege.

This memorandum is in response to some of the questions raised at that November meeting. It sets forth some research that was conducted to determine whether the federal rule on waiver that would be enacted under Rule 502 would in fact conflict with state law in a subsequent state proceeding.

Please consider the following points and provisos in reviewing this research:

1. Rule 502 does not cover state disclosures in the first instance. It only treats disclosures made at the federal level. State laws are implicated only when a federal disclosure protected by Rule 502 is subsequently raised in a state proceeding, and the argument is that the holder waived the privilege by having disclosed the information in the federal proceeding. The question then is, which law is used to determine waiver, state or federal? Rule 502 provides that federal law applies, the reasoning being that there is a federal interest in regulating disclosures that were made initially at the federal level.

It follows that Rule 502 has no impact on state court actions in at least two situations: a) where the disclosure is initially made at the state level; and b) where the disclosure is made at the federal level, but there is no conflict (or a false conflict) between the state and federal rules on waiver. It is in this latter situation that research is needed to determine the

likelihood of conflict.

2. The research presented is on state laws on *inadvertent waiver only*. Rule 502 might also provide a federal rule on *selective* waiver, but research on state laws of selective waiver has not been conducted. There are at least two reasons for this limitation. First, selective waiver is extremely controversial on the merits. The Advisory Committee has not voted in favor of selective waiver. The provision concerning selective waiver in Rule 502 (Rule 502(c)) remains in brackets, pending a public comment period. So it may be the case that a state conflict with a federal selective waiver rule will never arise with respect to selective waiver, because the federal rule simply will not provide for it. Second, a quick review of case law indicates that while at least one state has adopted selective waiver, most have not. See, e.g., *McKesson HBOC, Inc. v. Superior Court of San Francisco,* 9 Cal.Reptr.3d 812 (Cal.Ct. App. 2004), and *McKesson Corp. v. Green,* 610 S.E.2d 54 (Ga. 2005) (both denying selective waiver); *Saito v. McKesson HBOC, Inc.*, No. Civ. A. 18553, 2002 WL 31657622 (Del. Ch. 2002) (adopting selective waiver). *See also* Mitchell, *Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power over State Courts,* 86 B.U. L.Rev. 691 (2006) (noting that most states have rejected selective waiver, but concluding that Congress has the power to enforce selective waiver on state courts for disclosures made to federal regulators). The general absence of selective waiver protection in the states is not a surprise, as almost all the federal courts have rejected selective waiver. The fact that a selective waiver provision is likely to conflict with both existing federal common law and the privilege laws of the states is something that will, of course, be taken into account in any decision on the merits of that provision.

3. Rule 502(b) essentially proposes a negligence test in determining whether mistaken disclosures are waivers. The only conflict with state law that should give rise to concern is with a state rule providing that mistaken disclosures are *always* waivers. This conclusion is based on the following reasoning:

a) If a state uses the negligence test that is used in the majority of federal and state courts, then there would be no conflict with the federal rule in a subsequent state proceeding; there might be cases in which the factors employed to determine negligence may differ between the state and Rule 502, but any difference would undoubtedly be at the margins and would not seem to create substantial concerns for state prerogatives.

b) If a state has a rule that inadvertent disclosures are *never* waivers, then there is no conflict with the federal rule, *as the state rule of waiver can apply in a subsequent state proceeding*. This is because the federal rule establishes a *floor* of protection against waiver, it does not establish a *ceiling*. Rule 502 states what kind of inadvertent disclosure is *not* a waiver; it leaves federal common law to determine what is a waiver. Under Rule 502, then, the states are free to hold that conduct found to be a waiver in a federal proceeding does not constitute a waiver in a subsequent

state proceeding. What they would not be permitted to do under the rule is to find conduct that is not a waiver under the Federal Rule to be a waiver in the subsequent state proceeding.

c) If a state has *no law* on the consequences of mistaken disclosure, then the federal rule would not be in conflict with state law, as there is none — though it could be argued to the contrary that application of the federal law would preempt the state prerogative to determine the law on its own. (I leave that one to the Committee).

Assuming that the above reasoning is accepted, then the research set forth below shows that there is no substantial conflict between Rule 502(b) and the law of any state. The research did not find any state with a rule that mistaken disclosure is always a waiver, no matter how innocent the disclosure.

This memorandum now proceeds to set forth the state laws on inadvertent waiver.

Alabama

The research conducted did not reveal a statute or any reported case directly addressing the issue of inadvertent waiver.

Alaska

1. Alaska R Evid § 510- privilege is waived whenever the holder voluntarily discloses or consents to disclose any significant part of the matter.

2. Alaska R Evid §511-Evidence of a statement or any other disclosure of privilege is not admissible against privilege's holder if disclosure was compelled erroneously or made without opportunity to claim the privilege.

Section 510 may be read to mean that any voluntary disclosure is a waiver, meaning no protection for mistaken disclosures — though it seems unlikely that a court would reach such a drastic result under the language of the rule. On the other hand, Section 511 may mean that mistaken disclosures are not waivers because they are made without the opportunity to claim the privilege, at least at the time of disclosure. In can also be argued, as is the case in California (see below) that a mistaken disclosure made in the context of discovery is "compelled erroneously" by the discovery demand and therefore no such disclosure can be a waiver. There is no case law in Alaska that is helpful in determining the law on mistaken disclosures.

Arizona

I asked Justice Hurwitz to report on Arizona law on mistaken disclosure, and he graciously filed this report:

> My research and that of my clerk indicate that there is no Arizona case law directly addressing the issue. The closest case is *State v. Sucharew*, 66 P.3d 59 (Ariz. Ct. App. 2003), which involved the State's contention that the attorney-client privilege had been waived by the presence of the juvenile defendant's parents during a conference between the minor and counsel. The court of appeals rejected that argument on the merits, citing out-of-state and federal cases for the proposition that the presence of parents who had hired counsel and were acting as the child's advisors is not a waiver. Before doing so, in describing the general rule that the presence of third parties will usually defeat the privilege, the court noted that "[t]his general rule does not apply, however, where the third party's presence does not indicate a lack of intent to keep the communication confidential." Id. at 65. This language would support an argument that inadvertent disclosure should not waive the privilege, as it is not indicative of intent to waive.

Arkansas

Arkansas courts seem to hold that an inadvertent disclosure never amounts to waiver. The Supreme Court of Arkansas, in *Barr v. State*, 336 Ark. 220, 984 S.W.2d 792 (Ark. 1999), reviewed a disclosure made inadvertently by a non-party's attorney to appellant's attorney. The appellant sought to introduce this medical report at his own trial by arguing that the inadvertent disclosure waived the privilege. The court held that "the claim of privilege is not defeated by a disclosure which was inadvertently made." (Again, this means no conflict with Rule 502(b), as the states are free to give more protection against waiver than is provided by the federal rule.)

California

The California courts seem to be split upon the issue. Waiver of privilege is governed by Rule 912 of the California Evidence Code which provides:

> . . . the right of any person to claim a privilege . . . is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure . . . .

The rule if read broadly could mean that mistaken disclosure is always a waiver.

Yet in *O'Mary v. Mitsubishi Electronics America, Inc.*, 59 Cal. App. 4th 563, 69 Cal.Rptr 2d 389 (Cal. Ct. App. 1997), the court held that inadvertent production during discovery did not waive the privilege. At the outset of its discussion the court noted that as soon as the inadvertent production of documents was discovered, counsel for Mitsubishi demanded their return from opposing counsel and also filed an in limine motion to preclude their introduction into evidence. O'Mary argued that any disclosure, whether inadvertent or not, that occurs without coercion waives the privilege. The court disagreed, holding that discovery demands constituted "coercion" under Rule 912 and that:

> Inadvertent disclosure during discovery by no stretch of the imagination shows consent to the disclosure: It merely demonstrates that the poor paralegal or junior associate who was lumbered with the tedious job of going through voluminous files and records in preparation for a document production may have missed something. O'Mary invites us to adopt a "gotcha" theory of waiver, in which an underling's slipup in a document production becomes the equivalent of actual consent. . . . The substance of an inadvertent disclosure under such circumstances demonstrates that there was no voluntary release.

Id. at 577.

Thus, although it noted at the outset of its analysis the prompt notification of the disclosure, the court did not seem to consider this fact in its analysis. The court seemed to hold that an inadvertent disclosure never amounts to a waiver of the attorney-client privilege.

In *State Compensation Insurance Fund v. Telanoff*, 70 Cal App. 4th 644, 82 Cal. Rptr. 2d 799 (Cal. Ct. App. 1999), however, the court employed a multi-factor test, considering 1. The subjective intent of the holder; 2. Procedures utilized by counsel to prevent the production of privileged documents; and 3. The promptness with which counsel moved to secure return of the documents.

Based on the California case law, there is no conflict with Rule 502, as the law is either a multi-factor test or a rule that mistaken disclosure is never a waiver.

Colorado

Colorado courts apply a multi-factor (negligence-based) test. An example is *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo. Ct. App. 1997), where the Court of Appeals set forth the following factors 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.

Connecticut

Connecticut courts use a multi-factor test. See *Harp v. King*, 266 Conn. 747, 835 A.2d 953 (Conn. 2002), where the Supreme Court of Connecticut listed the following factors: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production; 2. The number of inadvertent disclosures; 3. The extent of the disclosures; 4. The promptness of measures taken to rectify the disclosure; and 5. Whether the overriding interest

of justice would be served by relieving the party of its error.

Delaware

Delaware follows the multi-factor approach. An example is *Monsanto Co. v. Aetna*, 88C-JA-118, 1994 Del. Super. LEXIS 261 (Del. Super. Ct. May 31, 1994), where the court set forth the following factors: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure; 2. The time taken to rectify the error; 3. The scope of discovery and extent of disclosure; and 4. Overall fairness, judged against the care or negligence with which the privilege is guarded.

Florida

Florida has adopted a multi-factor test. An example is *GMC v. McGee*, 837 So. 2d 1010 (Fla. Dist. Ct. App. 2002), where the court listed the following factors as relevant to whether the mistaken disclosure is a waiver: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; 2. The number of inadvertent disclosures; 3. The extent of the disclosure; 4. Any delay and measures taken to rectify the disclosures; and 5. Whether the overriding interests of justice would be served by relieving a party of its error.

Georgia

Georgia courts seem to follow the rule that inadvertent production by an attorney never amounts to waiver of privilege. For example, in *Revera v. State*, 223 Ga. App. 450, 477 S.E.2d 849 (Ga. Ct. App. 1996), the court held that "[t]he privileged nature of a confidential communication is not lost or waived even if the attorney should voluntarily or inadvertently produce a transcript of the communication."

Hawaii

Hawaii courts follow a multi-factor analysis. In *Save Sunset Beach Coalition v. Honolulu*, 102 Haw. 465, 78 P.3d 1 (Haw. 2003), the Supreme Court of Hawaii listed the following factors as relevant: 1. The reasonableness of precautions taken to prevent disclosure; 2. The amount of time

taken to remedy the error; 3. The scope of discovery; 4. The extent of the disclosure; and 5. The overriding issue of fairness.

Idaho

The research conducted did not reveal a statute or any reported case directly addressing the issue of inadvertent waiver. In *Farr. v. Mischler*, 129 Idaho 201, 923 P.2d 446 (Idaho 1996), the Idaho Supreme Court refused to address the merits of whether an inadvertent production of privileged communications constituted a waiver of the privilege. The disclosure in that case was made intentionally as part of the transfer of assets of a corporation, and so any law on inadvertent waiver was irrelevant.

Illinois

The Illinois courts have adopted two different tests; there is essentially a split in the lower appellate courts that has not yet been rectified by the State Supreme Court. In *People v. Murry*, 305 Ill. App.3d 311, 711 N.E.2d 1230 (Ill. App. Ct. 1999), the court held that "inadvertent disclosure can never result in a waiver of the privilege because the client had no intention of waiving the privilege, and a client must knowingly waive the privilege." In *Dalen v. Ozite Corp.*, 230 Ill. App. 3d 18, 594 N.E.2d 1365 (Ill. App. Ct. 1992), however, the court adopted a multi-factor test similar to that of proposed Rule 502. The factors listed as relevant are: 1. The reasonableness of the precautions taken to prevent the disclosure; 2. The time taken to rectify the error; 3. The scope of the discovery; 4. The extent of the disclosure; and 5. The overriding issue of fairness.

For reasons discussed above, neither of these approaches to waiver raises any substantial conflict with Rule 502.

Indiana

The Indiana courts use a multi-factor test to determine the consequences of mistaken disclosure. In *Buntin v. Becker*, 727 N.E.2d 734 (Ind. Ct. App. 2000), the Court of Appeals for the Fifth Circuit considered the following factors: 1. The reasonableness of the precautions to prevent inadvertent disclosure; 2. The time taken to rectify the error; 3. The scope of discovery; 4. The extent of the disclosure; and 5. The overriding issue of fairness.

Iowa

The research conducted did not reveal a statute or any reported case directly addressing inadvertent waiver. In *Wells Dairy, Inc. v. American Industrial Refrigeration, Inc.*, 690 N.W.2d 38 (Iowa 2004), the Iowa Supreme Court refused to decide the issue. The court noted: "We have not previously considered how the work-product doctrine is affected by the inadvertent disclosure of documents or materials." Id. at 42. The court proceeded to list the three lines of authority generally followed, but failed to reach the issue because it held that the documents were not protected in the first place.

Kansas

The Kansas state courts do not appear to have reached the issue of mistaken disclosures. But a Federal District Court, in *Steele v. First Nat'l Bank*, CV No. 90-1592-B, 1992 U.S. Dist. LEXIS 8501 (D. Kan. May 26, 1992), purporting to apply Kansas law, adopted a multi-factor test, listing the following factors: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure; 2. The time taken to rectify the error; 3. The scope of discovery; 4. The extent of disclosure; and 5. The overriding issue of fairness.

Kentucky

The research conducted did not reveal a statute or any reported case directly addressing the question of inadvertent waiver.

Louisiana

Louisiana courts appear to hold that an inadvertent disclosure never amounts to waiver. In *Hebert v. Anderson,* 681 So. 2d 29 (La. Ct. App. 1996), the court declared that "the inadvertent disclosure of . . . communication[s] by defendants' counsel does not constitute a waiver of that privilege." The court cited *Succession of Smith v. Kavanaugh*, 513 So. 2d 1138 (La. 1987), which was not an inadvertent waiver case, but which did state that the client is the holder of the privilege, and only he or his attorney or agent acting with his authority, can waive it. (Which the *Hebert* court took to mean that a mistaken disclosure can never be a waiver because the client by definition does not authorize it.).

Maine

Maine follows the rule that a mistaken disclosure is never a waiver. See *Corey v. Norman*, 1999 Me. 196, 742 A.2d 933 (Me. 1999), where the court stated:

> A truly inadvertent disclosure cannot and does not constitute a waiver of the attorney-client privilege. The issue for counsel and the court upon a claim of inadvertent disclosure must be whether the disclosure was actually inadvertent, that is, whether there was intent and authority for the disclosure. . . . If receiving counsel understands the disclosure to have been inadvertent, no waiver will have occurred. Unless receiving counsel has a reasonable belief that the disclosure was authorized by the client and intended by the attorney, the receiving attorney should return the document and make no further use of it.

Maryland

Maryland follows the multi-factor test. For example, in *Elkton v. Quality Care*, 145 Md. App. 532, 805 A.2d 1177 (Md. Ct. Spec. App. 2002), the court listed the following factors as relevant to whether a mistaken disclosure constitutes a waiver: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; 2. The number of inadvertent disclosures; 3. The extent of the disclosure; 4. Any delay and measures taken to rectify the disclosure; and 5. Whether the overriding interests of justice would or would not be served by relieving a party of its error.

Massachusetts

Massachusetts courts follow the multi-factor approach. For example, in *McMahon v. Universal Golf*, 20 Mass. L. Rep. 59 (Mass. Super. Ct. 2005), the court declared that "the inadvertent disclosure of a privileged document is not a waiver of the attorney-client privilege as to that document when the client establishes that adequate precautions were taken to ensure the document's confidentiality." The court went on to note the following factors to be considered when making that determination: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure; 2. The amount of time it took the producing party to recognize its error; 3. The scope of the production; 4. The extent of the inadvertent disclosure; and 5. The overriding interest of fairness and justice.

Michigan

Michigan courts seem to hold that an inadvertent disclosure never amounts to waiver. Thus, in *Leibel v. GMC Corp.*, 250 Mich. App. 229, 646 N.W.2d 179 (Mich. Ct. App. 2002), the court considered the disclosure of a memo inadvertently disclosed in other litigation. The court held that "a document inadvertently produced that is otherwise protected by the attorney-client privilege remains protected."

Minnesota

Minnesota courts appear to hold that an inadvertent disclosure never amounts to a waiver of the attorney-client privilege. In *Lundman v. McKown*, 530 N.W.2d 807 (Ct. App. Minn. 1995), the court reviewed a trial court's refusal to allow the introduction of certain evidence that had been disclosed to the appellants. The court, without considering any factors, held that the trial court "properly excluded [the] evidence on the ground that its admission would violate respondent's attorney-client privilege and that it had been inadvertently disclosed to appellants."

Missouri

Missouri courts seem to be employing a multi-factor test. In *State ex rel. v. Dandurand*, 30 S.W.3d 831 (Mo. 2000), the Supreme Court of Missouri rejected the rule that a mistaken disclosure is always a waiver. It stated that it did "not mean to suggest that a trial court in other contexts lacks discretion to order the return of inadvertently-disclosed attorney-client communications. Missouri does provide strong protection for attorney-client communications." The court went on to cite favorably a federal case, *Gray v. Bicknell*, 86 F.3d 1472 (8th Cir. 1996), and noted that the *Gray* court, while "inferring Missouri law, used a balancing test to measure the trial judge's discretion to order return of privileged documents inadvertently disclosed." The court in *Gray* adopted the multi-factor test, relying on the following factors: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production; 2. The number of inadvertent disclosures; 3. The extent of the disclosures; 4. The promptness of measures taken to rectify the disclosure; and 5. Whether the overriding interest of justice would be served by relieving the party of its error.

Montana

Montana courts employ a multi-factor test. In *Pacificorp v. Dept. of Revenue*, 254 Mont. 387 (Mont. 1992), the Supreme Court of Montana considered: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure; 2. The extent of the disclosures; and 3. The promptness of measures taken to rectify the disclosure. The test is somewhat different from the five-factor test employed by most federal courts, as it drops two factors: the number of disclosures and the overriding issue of fairness. But the practical difference is likely minimal, because the "number of disclosures" factor overlaps with the "extent of disclosures" factor, and the overriding "fairness" fact is probably implicit in any review to determine waiver of the privilege.

Nebraska

Nebraska state courts have not weighed in on mistaken disclosures. Rule 512 of the Nebraska Rules of Evidence provides that disclosure is not a waiver if it was (1) compelled erroneously or (2) made without opportunity to claim the privilege. If read broadly, the rule could mean that mistaken disclosures are never waivers. But it could also mean the opposite, if the court were to rule that mistaken disclosures in discovery are "erroneously compelled" by the discovery demand, as is the case in California.

The Federal District Court of Nebraska has interpreted the state privilege law to embody a multi-factor test to determine whether a mistaken disclosure constitutes a waiver. In *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12 (D. Neb. 1985), the court declared that under Nebraska privilege law, "mere inadvertent production does not waive the privilege" and that waiver is determined by the following factors: 1. The number of documents produced; and 2. Procedures utilized for screening the discovery requests for privileged information.

Nevada

The research conducted did not reveal a statute or any reported case directly addressing inadvertent waiver. In *Premiere Digital v. Central Telephone*, 360 F. Supp.2d 1168 (D. Nev. 2005), however, the Federal District Court, applying Nevada privilege law, declared that mistaken disclosures are never waivers. In *Premiere*, the inadvertent disclosure at issue occurred because of the misstep of a new paralegal. The court held that:

> As the Nevada statutes and the precedent of the Nevada Supreme Court establish that waiver of the privilege may only occur due to a voluntary disclosure, and that disclosure must be

made by the client, the Court finds that under Nevada law the privilege has attached and has not been waived.

Id. at 1174-75 (citing Nev. Rev. Stat. 49.105; *Manley v. State*, 115 Nev. 114, 121 n.1, (Nev. 1999).).

New Hampshire

Inadvertent disclosure in New Hampshire is governed by New Hampshire Rule of Evidence 511, which provides:

> A claim of privilege is not defeated by a disclosure that was compelled erroneously or by a disclosure that was made inadvertently during the course of discovery.

The Reporter's Notes accompanying Rule 511 state as follows:

> This Rule is intended to cover instances of disclosure of otherwise privileged material, where the disclosure was made through compulsion later found by a Court to be improper, or where the material was disclosed during the course of discovery, and the disclosure was made through mistake and inadvertence, rather than through carelessness or neglect.

This note seems to suggest that New Hampshire courts should consider the factors commonly utilized in the multi-factor analysis of proposed Rule 502 to determine whether the disclosure will amount to a waiver. But the note seems inconsistent with the text of the rule, which states that inadvertent disclosures are never waivers. The research conducted did not uncover any New Hampshire case law interpreting Rule 511. For purposes of this memorandum, it is not important whether the text of the rule or the note controls. Under either, there is no conflict with Rule 502.

New Jersey

In New Jersey, a mistaken disclosure never amounts to a waiver. An example is *Trilogy Communications, Inc. v. Excom Realty, Inc.*, 279 N.J. Super. 442, 652 A.2d 1273 (N.J. Sup. Ct. Law Div. 1994), where the court held that "mere inadvertent production of a privileged document by the attorney does not waive the client's privilege." The court reasoned that the privilege was held by the client and so could not be waived by a disclosure that the client never authorized.

New Mexico

New Mexico follows a multi-factor test. In *Hartman v. El Paso Natural Gas*, 107 N.M. 679 763 P.2d 1144 (N.M. 1988), the Supreme Court of New Mexico found the following factors were relevant in determining whether a mistaken disclosure constitutes a waiver: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; 2. The number of inadvertent disclosures; 3. The extent of the disclosure; 4. Any delay and measures taken to rectify the disclosures; and 5. Whether the overriding interests of justice would be served by relieving a party of its error.

New York

New York courts use a multi-factor test. For example, in *Baliva v. State Farm Mutual*, 275 A.D.2d 1030, 713 N.Y.S.2d 376 (4th Dep't 2000), the court considered the following factors: 1. Whether the client intended to retain the confidentiality of the document; 2. Whether the client took reasonable steps to prevent its disclosure; 3. Whether there was a prompt objection to the disclosure after discovering it; and 4. Whether the party claiming waiver will suffer prejudice if a protective order is granted.

North Carolina

The research conducted did not reveal a statute or any reported case directly addressing the question of inadvertent waiver.

North Dakota

North Dakota uses a multi-factor test. The Supreme Court of North Dakota, in *Farm Credit Bank v. Huether*, 454 N.W.2d 710 (N.D. 1990), held that courts should analyze the following factors when determining whether an inadvertent disclosure constitutes waiver of privilege:1. The reasonableness of the precautions taken to prevent the inadvertent disclosure in view of the extent of the document production; 2. The number of inadvertent disclosures; 3. The extent of disclosure; 4. The delay and measures taken to rectify the disclosure; and 5. Whether the overriding interests of justice would or would not be served by relieving a part of its error.

Ohio

The Ohio courts have adopted a multi-factor test. An example is *Miles-McClellan Constr. Co. v. Bd. of Educ. Westerville*, 2006 Ohio 3439 (Ohio Ct. App. 2006), where the court relied on the following factors to determine whether mistaken disclosure constituted a waiver: 1. The reasonableness of the precautions taken by the party asserting privilege to prevent the disclosure; 2. The time taken to rectify the inadvertent error; 3. The scope and nature of the discovery proceedings; 4. The extent of the disclosure in relation to a role in discovery proceedings; and 5. The overriding issue of fairness.

Oklahoma

Oklahoma seems to follow a multi-factor test. In *Browning v. State*, 2006 Okla. Crim. 8, 134 P.2d 816 (Okla. Crim. App. 2006), the Court of Criminal Appeals of Oklahoma held that an inadvertent disclosure by an attorney could not have resulted in a waiver of the physician-patient privilege because the attorney "did not exercise the privilege . . . ." In reviewing the trial court's determination, the court discussed the following: 1. Whether the disclosure was inadvertent; 2. Whether the opposing party asked for the documents; 3. The actions taken after discovery of the disclosure; and 4. The privilege holder's intent.

Though the court was deciding the issue in the context of physician-client privilege, the mistaken disclosure was by the attorney and so the reasoning would seem equally applicable to mistaken disclosure of material protected by the attorney-client privilege.

Oregon

Oregon follows a multi-factor approach. In *Goldsborough v. Eagle Crest*, 314 Or. 336, 838 P.2d 1069 (Or. 1992), the Supreme Court of Oregon held that "[a] court need not necessarily conclude that the lawyer-client privilege has been waived when a document has been produced during discovery." The court went on to list the following factors to be considered by a court in determining waiver: 1. Whether the disclosure was inadvertent; 2. Whether any attempt was made to remedy any error promptly; and 3. Whether preservation of the privilege will occasion unfairness to the opponent.

Pennsylvania

Pennsylvania appears to use a multi-factor test, though there is not complete agreement on the relevant factors. In *Minatronics Corp. v. Buchanan Ingersol, P.C.*, 23 Pa. D. & C.4th 1, 14 (C.P. Ct. Alleg. 1995), the court held that the disclosure of documents protected by the attorney-client privilege does not waive the privilege where: 1. The disclosure was inadvertent; 2. It is still possible to afford the party that produced the documents many of the protections provided by the attorney-client privilege; 3. Counsel took reasonable steps after learning of the inadvertent production; and 4. The party receiving the documents will not be prejudiced by a court order prohibiting or restricting that party's use of the documents. In *Herman Goldner Co. Inc. v. Cimco Lewis Indus.*, 58 Pa. D. & C.4th 173, 182-83 (C.P. Ct. Phil. 2002), the court, while noting the four factors utilized in *Minatronics*, came up with a somewhat different list: 1. The reasonableness of the precautions taken to prevent disclosure; 2. The inadvertence, extent and number of the disclosures; 3. The steps taken after learning of the disclosure and the time frame in which those steps were taken; 4. Issues of fairness and justice, including the utility of extending the attorney-client privilege and the prejudice the receiving party would suffer. While these tests are articulated differently, the various factors are flexible enough that results are unlikely to differ — and are unlikely to differ from the five-factor federal common law test.

Rhode Island

The research conducted did not reveal a statute or any reported case directly addressing inadvertent waiver.

South Carolina

The research conducted did not reveal a statute or any reported case directly addressing inadvertent waiver in connection with litigation. In *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984), however, the court held that a wife's inadvertent disclosure of a letter from her attorney did not waive the privilege. The court reasoned as follows:

> Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject. . . . She obviously left the letter in the truck through oversight and inadvertence and certainly did not intend for Mr. Marshall to see it. Under these circumstances, it can hardly be claimed Mrs. Marshall voluntarily disclosed the contents of this letter to her husband.

The court seems to confuse the term "voluntary" with the term "intentional." Nobody coerced the wife to leave the letter in the truck, so the act was voluntary. But in any case, the court seems to state

that a mistaken disclosure can never be a waiver.

South Dakota

The research conducted did not reveal a statute or any reported case directly addressing inadvertent waiver.

Tennessee

The Tennessee state courts have not reached the issue of mistaken disclosure. But in *Fleet Bus. Credit Corp. v. Hill City Oil Co.*, No. 01-02417, 2002 U.S. Dist. LEXIS 23896 (W.D. Tenn. Dec. 5, 2002), the Federal District Court applied Tennessee privilege law and held that the following factors should be analyzed in determining whether the privilege is waived: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure; 2. The time taken to rectify the error; 3. The scope of the production; 4. The extent of the disclosure; and 5. The overriding issues of fairness.

Texas

Mistaken disclosures in Texas are governed by Rule 193.3(d) of the Texas Rules of Civil Procedure which provides that:

> A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if-within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made-the producing party amends the response, identifying the material or information produced and stating the privilege asserted.

In *In re Living Centers of Texas, Inc.*, 175 S.W.3d 253, 260 (Tex. 2005), the Supreme Court of Texas held that "inadvertent disclosure does not automatically waive a claim of privilege" under Rule 193.3(d). The court also held that "a party's inadvertent failure to utilize its own internal procedure for identifying privileged documents does not automatically waive the privilege" either.

The Texas rule does not provide absolute protection against mistaken disclosures. Rather, it provides a kind of safe harbor that is temporally limited, because diligent efforts are needed to get the materials returned. However the rule is characterized, it does not conflict with Rule 502 because it is more protective against waiver than is the Federal Rule, and Rule 502 does not affect state

attempts to provide greater protection than that provided by federal law.

Utah

The waiver of privilege in Utah is governed by Utah Rule of Evidence 507 which provides in pertinent part:

> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or a predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure. This rule does not apply if the disclosure is itself a privileged communication.

The Utah rule provides a negligence-based test, similar though not identical to Federal Rule 502, which considers not only reasonable precautions against disclosure but also reasonable attempts to retrieve the information. But because the Utah rule has fewer requirements, it provides a more protective rule against waiver and as such does not conflict with Rule 502.

In *Gold Standard, Inc. v. American Barrick*, 805 P.2d 164 (Utah 1990), the Supreme Court of Utah considered both the more detailed multi-factor test employed by most courts as well as a the narrower test of the Utah Rule that focuses on the intent of, and precautions taken by, the holder. The court found it unnecessary to decide between the tests because both of them resulted in the same finding of no waiver under the circumstances of the case. The multi-factor test considered by the court set forth the following factors: 1. The reasonableness of the precautions to prevent inadvertent disclosure; 2. The time taken to rectify the error; 3. The scope of the discovery; 4. The extent of the disclosure; and 5. The overriding issue of fairness.

Vermont

Vermont courts appear to hold that an inadvertent disclosure never amounts to a waiver. In *Hartnett v. Medical Center Hospital of Vermont*, 146 Vt. 297, 503 A.2d 1134 (Vt. 1985), the Supreme Court of Vermont upheld a lower court's ruling that an attorney had not waived work product privilege after a document was inadvertently disclosed to opposing counsel. The lower court held that "there was no credible showing that [the attorney] handled the memorandum in such a way as to know it would be disclosed to plaintiffs' attorney." The Supreme Court, in reviewing the lower courts ruling, seemed to focus on the intent and actions of the producing attorney:

> The . . . attorney never authorized or knew that [the document] was included in the . . . file. In fact, the . . . attorney believed that the only copy of [the document] was in his file. He had never provided a copy of [the document] to a third person, and did not know how the document got into the . . . file. Under these facts, we are unable to say that the court erred in finding that no waiver occurred.

Virginia

It appears that in Virginia inadvertent disclosure never amounts to a waiver. An example is *Stupp Bros. Bridge v. Comm'r. of Dep't of Highways*, 6 Va. Cir. 240 (Cir. Ct. Rich. 1985), in which the court held that inadvertent disclosure does not constitute a waiver of work product. The court did not analyze any of the multiple factors commonly considered, therefore suggesting that the privilege is never waived by inadvertent disclosure.

Washington

Research did not find any case law or statute that directly addresses the issue of inadvertent disclosure. In *Harris v. Drake*, 152 Wn.2d 480, 99 P.2d 872 (Wash. 2004), however, a dissenting opinion written by Chief Judge Alexander adopts the multi-factor test. Chief Judge Alexander dissented because the majority, after finding documents to be covered under the attorney work product privilege, ignored the fact that an attorney voluntarily but mistakenly provided a copy of the document to his adversaries. He noted that there was no law on the subject of mistaken disclosures in Washington, but that in the absence of any such precedent, Washington case law indicates that "we look to the federal courts' interpretation of similar rules of civil procedure." Chief Judge Alexander noted that most federal courts have adopted a multi-factor test considering: 1. The reasonableness of the precautions taken by the producing party to prevent inadvertent disclosure of privileged documents; 2. The volume of discovery versus the extent of the specific disclosure at issue; 3. The length of time taken by the producing party to rectify the disclosure; and 4. The overarching issue of fairness. His opinion was that the multi-factor test was the law in the State of Washington as well, at least until Washington courts ruled otherwise.

West Virginia

West Virginia applies a multi-factor test. In *State ex. rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (W. Va. 1998), the Supreme Court of Appeals of West Virginia relied

on the following factors: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production; 2. The number of inadvertent disclosures; 3. The extent of the disclosures; 4. The promptness of measures taken to rectify the disclosure; 5. Whether the overriding interest of justice would be served by relieving the party of its error; and 6. Any other factors found to be relevant.

Wisconsin

Wisconsin cases appear to indicate that a mistaken disclosure can never be a waiver. The leading treatment is in *Harold Sampson Childrens Trust v. Linda Gale Sampson 1979 Trust*, 2004 Wi. 57, 679 N.W.2d 794 (2004), in which the court declared that "the policies undergirding the attorney-client privilege support [the] conclusion that a lawyer, without the consent or knowledge of a client, cannot waive the attorney-client privilege by voluntarily producing privileged documents (which the attorney does not recognize as privileged) to an opposing attorney in response to a discovery request." The court based its opinion upon the fact that "the client holds and controls the attorney-client privilege and only the client can waive it." The court noted that its holding was "similar to the lenient rule adopted by several courts in inadvertent disclosure cases."

Wyoming

The research conducted did not reveal a statute or any reported case directly addressing the issue of inadvertent waiver.