Rule ~~510~~511. [Waiver of Privilege]. ~~by Voluntary Disclosure].~~

(a) Voluntary disclosure. A person upon whom these rules confer a privilege against disclosure waives the privilege if the person ~~he~~ or the person's ~~his~~ predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) Involuntary disclosure. A claim of privilege is not waived by a disclosure which was:

(1) compelled erroneously; or

(2) made without an opportunity to claim the privilege.

Reporter's Note

This proposal for amending renumbered Rule 511(a) with the heading "Voluntary disclosure" in this Tentative Draft #3 eliminates the gender-specific language in the rule. It is technical and no change in substance is intended.

Renumbered Rule 511 is also recast to deal with both the voluntary and involuntary waiver of a privilege as a matter of substance in one comprehensive rule by proposing the deletion of existing Uniform Rule 511 as in Tentative Draft #2 and also deleting Rule 512(c) as was also proposed in Tentative Draft #2. Subdivision (a) deals with waiver by voluntary disclosure and embraces the substance of existing Uniform Rule 510, now renumbered as Rule 511, which it is suggested be amended to eliminate the gender-specific language. Subdivision (b) deals with involuntary waiver and is the same in substance as existing Uniform Rule 511.

Proposed Uniform Rule 511 in this Tentative Draft #3 does not address the subject of inadvertent disclosure as a waiver in the blackletter of the rule. In contrast, three general approaches have been employed by the courts to determine whether an inadvertent disclosure constitutes a waiver: an objective analysis; a subjective analysis; and a balancing analysis. Under an objective analysis, an inadvertent waiver will result since the court need only confirm that the document was made available to opposing counsel; "the 'confidentiality' of the document has been breached by the disclosure, thereby destroying the basis for the continued existence of the privilege." See *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., supra,* citing *Underwater Storage, Inc. v. United States Rubber Co., 314 F.Supp 546 (D. D.C. 1970).* Under a subjective analysis, inadvertent disclosure can never result in a true waiver because "there was

no intention to waive the privilege, and one cannot waive the privilege without intending to do so." See *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 851 F.R.D. 204 (N.D. Ill. 1990),* citing *Connecticut Mutual Life Insurance Co. v. Shields, 18 F.R.D. 448 (S.D. N.Y. 1955).* Under a balancing analysis, the court considers five factors to determine if a party has waived the privilege. These are: "(1) the reasonableness of the precautions taken to prevent 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." See *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., supra,* citing *Bud Antle, Inc. v. Grow Tech, Inc., 131 F.R.D. 179 (N.D. Cal. 1990).*

First, a majority of the state jurisdictions appear to apply the objective analysis and conclude that an inadvertent disclosure results in a waiver of the privilege. These are: **Alabama,** *Bassett v. Newton, 658 So.2d 398 (Ala. 1995)*(waiver of the attorney-client privilege by conduct, such as a partial disclosure, that would make it unfair for the client to claim the privilege thereafter); **Alaska,** *Houston v. State, 602 P.2d 784 (Alaska 1979)*(waiver of the attorney-client privilege by examining a defense psychiatrist who relied on the report of a psychiatrist who had conducted a pre-trial psychiatric examination at defense counsel's request) and *Lowery v. State, 762 P.2d 457 (Alaska 1988)*(waiver of work-product privilege to reports of an investigator used to impeach one witness and refresh the recollection of another witness); **Arizona,** *State v. Cuffle, 171 Ariz. 49, 828 P.2d 773 (1992)*(waiver of attorney-client privilege to at least as much of what was previously privileged as necessary to enable an attorney to defend himself to a client's claim of the ineffective assistance of counsel); **Arkansas,** *Firestone Tire & Rubber Company v. Little, 276 Ark. 511, 639 S.W.2d 726 (1982)*(waiver of attorney-client privilege through surrender of letter in answer to a discovery motion which defendant inadvertently permitted to fall into the hands of a third party); **California,** *Aerojet-General Corporation v. Transport Indemnity Insurance, 18 Cal.App.4th 996, 22 Cal. Rptr.2d 862 (1993)*("The attorney-client privilege is a shield against deliberate intrusion; it is not an insurer against inadvertent disclosure.") and *Kanter v. Superior Court, 253 Cal.Rptr. 810 (1988)*("Even though a communication is made in confidence to an attorney, the privilege may be lost (i.e., impliedly waived) by disclosure of the subject communication or by conduct inconsistent with a claim of privilege."); **Colorado,** *Lanari v. People, 827 P.2d 495 (Colo. 1992)*(waiver of attorney-client privilege through endorsement of a psychiatrist as a witness, failure to object to the prosecution's interview of the witness and failure to request the trial court to enter protective orders with respect to any statements of the defendant obtained during the course of the interview); **Idaho,** *Farr v. Mischler, 923 P.2d 446 (Idaho 1996)*(waiver of attorney-client privilege by seller of business by leaving a letter in files which were among the assets of the business transferred to the buyers upon the sale of the business); **Iowa,** *State v. Randle, 484 N.W.2d 220 (Iowa 1992)*(waiver of physician-patient privilege by sexually abused victim releasing results of MMPI test to Department of Criminal Investigation); **Kentucky,** *Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985)*(waiver of attorney-client privilege by client where the competence of the client's attorney is attacked); **Maine,** *Northup v. State, 272 A.2d 747 (Me. 1971);*(waiver of attorney-client privilege by client where the competence of the client's attorney is attacked); **Minnesota,** *State v. Schneider, 402 N.W.2d*

779 (Minn. 1987)(Implied waiver of attorney-client privilege where defendant was required to submit to an examination by a court-appointed psychiatrist to avail himself of the defense of insanity); **Mississippi,** *Alexander v. State, 358 So.2d 379 (Miss. 1979)*(waiver of physician-patient privilege where information given to expert witness for the express purpose of preparing to testify and forming a basis for testimony that the defendant was insane); **Nevada,** *Wardleigh v. Second Judicial Dist. Court of State of Nev. in and for County of Washoe, 111 Nev. 345, 891 P.2d 1180 (1995)*(waiver of attorney-client privilege as it relates to subject matter of privileged communication partially disclosed); **Ohio,** *State v. McDermott, 79 Ohio App.3d 772, 607 N.E.2d 1164 (1992)*(waiver of attorney-client privilege when the client discloses any part of a confidential communication that is inconsistent with the maintenance of the confidential nature of the attorney-client privilege); **Oklahoma,** *Driskell v. State, 659 P.2d 343 (Okl. Cr. 1983)*(waiver of physician-patient privilege when permission given by patient for physician to speak to officers investigating a murder) and *Herbert v. Chicago, Rock Island and Pacific Railroad Company, 544 P.2d 898 (Okl. 1975)*(waiver of physician-patient privilege relating to back injuries where patient testifies at trial concerning nature and treatment of back injuries even though physician not called by the patient as a witness); **Rhode Island,** *State v. von Bulow, 475 A.2d 995 (R.I. 1984)*(waiver of attorney-client privilege where there is a selective disclosure of otherwise privileged communications); **South Carolina,** *Marshall v. Marshall, 282 S.C. 534, 320 S.E.2d 44 (1984)*(waiver of attorney-client privilege not only as to the specific communication voluntarily disclosed, but as to all other communications relating to the same subject matter); **Virginia,** *Clagett v. Commonwealth, 252 Va. 79, 472 S.E.2d 263 (1996)*(attorney-client privilege waived on cross-examination where expert overheard defense counsel's conversation regarding expert's mistake while testifying on direct examination); and **West Virginia,** *State ex rel. McCormick v. Zakaib, 189 W.Va. 258, 430 S.E.2d 316 (1993)* and *Marano v. Holland, 179 W.Va. 156, 366 S.E.2d 117 (1988)*(waiver of attorney-client privilege not only as to the specific communication voluntarily disclosed, but as to all other communications relating to the same subject matter).

There is at least one jurisdiction where the court has refused to decide the question of whether an inadvertent disclosure of privileged information waives the privilege. In **Florida,** in *Kusch v. Ballard, 645 So.2d 1035 (Dist. Ct. App. 1994),* the court did suggest a more expansive approach in resolving the issue as follows: ". . . we do not have the kind of fully developed record of facts and law in this common law certiorari case that would allow us to assay whether it is necessary to pronounce a global rule on the subject. It might be enough, if the issue were directly and necessarily presented, to decide that whether the privilege is lost by inadvertent disclosure depends on the totality of the circumstances. If there is no need for a universal rule, then we should not create one."

Second, other jurisdictions apply a subjective test in determining whether there has been a inadvertent waiver of the privilege by requiring an intent to waive the privilege. These are: **Delaware,** *Moyer v. Moyer, 602 A.2d 68 (Del. 1992)*(". . . the privilege does not apply to communications between an attorney and his client where the circumstances indicate that the client did not intend the communication to remain confidential, and therefore, the attorney may

be examined as to such communications."); and **Indiana,** *Hazlewood v. State, 609 N.E.2d 10 (Ind. 1993)* and *Kindred v. State, 524 N.E.2d 279 (Ind. 1988)*(marital privilege is not waived unless there is an express manifestation of the intent to waive the privilege). In **Michigan,** "waiver through inadvertent disclosure requires a finding of no intent to maintain confidentiality or circumstances evidencing a lack of such intent." See *Sterling v. Keidan, 162 Mich. App. 88, 412 N.W.2d 255 (1987).* In **New Jersey,** "it must be shown the party charged with the waiver knew their legal rights and deliberately intended to relinquish them." See *Triology Communications, Inc. v. Excom Realty, Inc., 279 N.J.Super. 442, 652 A.2d 1273 (1994).*

In **Georgia,** the client's intent, together with the circumstances of the disclosure, appear to govern the waiver of a privilege. See, respectively, *Revera v. State, 223 Ga. App. 450, 477 S.E.2d 849 (1996)* and *Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981).*

Finally, there appear to be nine jurisdictions which employ a balancing analysis in determining whether there is a waiver of the privilege through an inadvertent disclosure. See **Illinois,** *Dalen v. Ozite Corporation, 230 Ill.App.3rd 18, 594 N.E.2d 1365 (1992)*(". . . we adopt the 'balancing test' set forth in Golden Valley [,*supra*]. The two other approaches, the objective and subjective approaches would appear to result in decisions based on mere mechanical application rather than a judicial reason and fairness.") and *People v. Knuckles, 165 Ill.2d 125, 650 N.E.2d 974, 209 Ill.Dec. 1 (1995)*(the attorney-client privilege is not waived merely by pleading the insanity defense and employing a psychiatrist to assist in the preparation of the defense); **Montana,** *Pacificorp v. Department of Revenue of the State of Montana, 254 Mont. 387, 838 P.2d 914 (1992)*(the mere inadvertent production of documents is not in itself sufficient to establish a waiver of the attorney-client privilege, but it requires consideration of the elements of implied intention, and fairness and consistency); **Nebraska,** *League v. Vanice, 221 Neb. 34, 374 N.W.2d 849 (1985)*(fairness is an important and fundamental consideration in determining whether the attorney-client privilege has been waived); **New Mexico,** *Hartman v. El Paso Natural Gas Company, 107 N.M. 679, 763 P.2d 1144 (1988)*(waiver of the attorney-client privilege and work-product immunity requires an application of the five factors set forth in Golden Valley Microwave Foods, Inc., *supra*); **New York,** *Manufacturers and Traders Trust Company v. Servotronics, Inc., 132 A.D.2d 392, 522 N.Y.S.2d 999 (Sup.Ct. App.Div. 1987)*(waiver of the attorney-client privilege involves the client's intent to retain the confidentiality of the privileged materials and taking reasonable steps to prevent disclosure, together with determining whether the party claiming the waiver will suffer prejudice if a waiver is not granted); **North Dakota,** *Farm Credit Bank of St. Paul v. Heuther, 454 N.W.2d 710 (N.D. 1990)*(waiver of the attorney-client privilege requires an application of the five factors set forth in Golden Valley Microwave Foods, Inc., *supra*); **Oregon,** *Goldsborough v. Eagle Crest Partners, Ltd., 314 O4. 336, 838 P.2d 1069 (1992)*(waiver of the attorney-client privilege involves a consideration of whether the disclosure was inadvertent, an attempt was made to remedy the error promptly and the preservation of the privilege will occasion unfairness to the opponent); **Utah,** *Gold Standard, Inc. v. American Barrick Resources Corporation, 805 P.2d*

164 (Utah 1991)(waiver of attorney-client privilege, as well as work-product protection, requires an application of the five factors set forth in Golden Valley Microwave Foods, Inc., *supra*); and **Washington,** *State v. Balkin, 48 Wash. App. 1, 737 P.2d 1035 (Wash. App. 1987*(waiver of privilege involves consideration of elements of implied intention, fairness and consistency).

See also, **Kansas,** which has applied a "balance of interests" test in determining whether a qualified privilege of so-called "self-critical analysis" has been waived. See *Kansas, Gas & Electric v. Eye, 246 Kan. 419, 789 P.2d 1161 (1990).* In **Maryland,** a balancing test is applied in determining a right of access to records of internal police investigations which are confidential. See *Blades v. Woods, 107 Md. App. 178, 667 A.2d 917 (1995).* In **Texas,** a balancing test is also applied by weighing the (1) circumstances confirming an involuntary disclosure; (2) precautionary measures taken; (3) delay in rectifying the error; (4) extent of any inadvertent disclosure; and (5) scope of discovery. Inadvertent production is distinguishable from involuntary production and will constitute a waiver. *Granada Corp. v. Honorable First Court of Appeals, 844 S.W.2d 223 (Tex. 1992).*

No cases specifically dealing with the inadvertent disclosure of privileged information were found for **Connecticut, Hawaii, Massachusetts, Missouri, New Hampshire, North Carolina, Pennsylvania, South Dakota, Tennessee, Vermont, Wisconsin** and **Wyoming.**

For an exhaustive analysis of federal authorities on the issue of inadvertent disclosure, see *Simpson, Reagan Wm., Civil Discovery and Depositions § 3.41 (2d ed.).*

Uniform Rule 612 may also be implicated in the waiver issue, in particular with regard to waiving attorney work-product information that has been supplied to an expert in developing theories of liability or defense. Rule 612 permits an opposing party to examine written materials used to refresh the recollection of a witness. For example, do the written materials furnished to an expert have a sufficient impact on an expert's testimony to implicate an application of Rule 612 and thereby waive the privilege of work-product? Or, in the words of one court analyzing the question under Rule 612 of the Federal Rules of Evidence,

> "it is disquieting to posit that a party's lawyer may 'aid' a witness with items of work-product and then prevent totally the access that might reveal and counteract the effects of such assistance. There is much to be said for a view that a party or its lawyer, meaning to invoke the privilege, ought to use other and different materials, available later to a cross-examiner, in the preparation of witnesses. When this simple choice emerges the decision to give the work product to the witness could well be deemed a waiver of the privilege."

See *Berkey Photo, Inc. v. Eastman Kodak Company, 74 F.R.D. 613 (S.D.N.Y. 1977).*

However, it has been argued that Federal Rule 612:

> "does not provide a good means for resolving the issue of waiver when work product is provided to a testifying expert. In most situations, the expert is not really using the documents to refresh his or her memory. A better way to analyze the problem is purely on waiver grounds. Was the work product immunity waived by providing information to a testifying expert, whose opinions are intended to be disclosed to an adversary?

See *Reagan William Simpson, et al., Recent Developments in Civil Procedure and Evidence, 32 Tort & Ins. L. J. 231 (1997).*

~~**Rule 511. [Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege].**~~

~~A claim of privilege is not defeated by a disclosure which was (a) compelled erroneously or (b) made without opportunity to claim the privilege.~~

Reporter's Note

Pending further discussion of the Drafting Committee, it is recommended that this rule be deleted since it has been incorporated as subdivision (b) of the proposed renumbered Uniform Rule 511 without substantive change.