

## **Rule 502 of the Federal Rules of Evidence** **by Cheryl R. Zwart**

Effective Date: Rule 502 of the Federal Rules of Evidence applies to all proceedings commenced after the date of enactment, September 19, 2008, and “insofar as is just and practicable,” all proceedings pending on that date. [Act of Sept. 19, 2008, Pub. L. No. 110-322, §1\(c\), 122 Stat. 3537, 3538.](#)

Purpose: Rule 502 is an evidence rule. However, the cases citing, interpreting, and applying the rule address its impact on the scope of discovery. Rule 502 was enacted to alleviate some of the costs associated with electronic discovery and document production by reducing the risks associated with producing material protected by the attorney-client privilege or the work product doctrine. *Silverstein v. Fed. Bureau of Prisons*, [2009 WL 4949959](#), [2009 U.S. Dist. LEXIS 121753](#) (D. Colo. Dec. 14, 2009).<sup>1</sup> Specifically, Rule 502:

- clarifies whether and when a “subject-matter waiver” occurs due to an intentional or inadvertent disclosure of attorney-client and work product communications;
- promotes uniformity in the federal courts by clarifying the circumstances under which inadvertent disclosure of information results in waiver of the attorney-client privilege or work product doctrine;
- allows parties to enter into agreements concerning the effect of disclosure in a federal proceeding; and
- allows a federal court to enter an order finding that disclosure in its court does not constitute a waiver for the purposes of litigation in other forums or cases.

General Scope: Rule 502:

- Defines and differentiates the scope of intentional and inadvertent waivers of the attorney-client privilege and work product doctrine;
- Applies to information disclosed in “in a Federal proceeding,” ([Fed. R. Evid. 502\(a\) & \(b\)](#)). The term “federal proceeding” is not defined by Rule 502, but includes:
  - Any “conduct taking place within the context of a federal proceeding,” (*Multiquip, Inc. v. Water Mgmt. Sys. LLC*, [2009 WL 4261214](#), [2009 U.S. Dist. LEXIS 109148](#), 10-11 (D. Idaho Nov. 23, 2009));<sup>2</sup> and
  - “Federal court-annexed and Federal court-mandated arbitration proceedings,” ([Fed. R. Evid. 502\(f\)](#)).
- Applies to information disclosed “to a Federal office or agency;” for example, to government authorities pursuing an investigation. *United States v. Treacy*, [2009 WL 812033](#), [2009 U.S. Dist. LEXIS 66016](#) (S.D.N.Y. Mar. 24, 2009).
- Does not apply to:
  - party-initiated arbitration proceedings, (*Fuller v. Interview, Inc.*, [2009 WL 3241542](#), [2009 U.S. Dist. LEXIS 93157](#) (S.D.N.Y. Sept. 30, 2009));
  - communications exchanged before a federal case was initiated or contemplated, (*Alpert v. Riley*, [2010 WL 1558588](#), [2010 U.S. Dist. LEXIS 38331](#) (S.D. Tex. Apr. 19, 2010));<sup>3</sup> or
  - alleged waivers of confidential information other than attorney-client communications and work product; for example, it has no application to information protected by other privileges such as the marital, clergy, or physician communication privileges; trade secrets; or business and/or income, deliberative process, or self-critical analysis information.

Practical Impact of Rule 502: In general, Rule 502 codified the underlying principles already followed in Nebraska federal courts; specifically the Rule does not change:

- the threshold analysis of whether a protected communication occurred; or
- the waiver law historically applied in the Nebraska federal courts.

## I. Communications Protected under Rule 502.

Rule 502 applies to information and communications protected under the attorney-client privilege or work product doctrine.

A. **Burden of Proof:** Under Rule 502, the party asserting the attorney-client privilege or work product protection bears the burden of proof. *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*, [2009 WL 464989](#), [2009 U.S. Dist. LEXIS 15901](#) (N.D. Tex. Feb. 23, 2009).<sup>4</sup>

B. **“Applicable Law.”** Privileged attorney-client communications and confidential work product information are protected to the extent of “applicable law,”<sup>5</sup> determined as follows:

1) Attorney-client privilege—diversity cases.

-- When the federal court exercises diversity jurisdiction over a civil case, the attorney-client privilege held by “a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.” [Fed. R. Evid. 501](#).<sup>6</sup>

-- A Nebraska federal court exercising diversity jurisdiction first looks to Nebraska state court decisions when deciding which state’s law applies in determining the existence of an attorney-client privilege, and applies Nebraska’s choice of law on that issue.<sup>7</sup>

-- Nebraska federal district courts have historically applied the law of the forum--Nebraska attorney-client privilege law—in civil diversity cases.<sup>8</sup>

2) Attorney-Client Privilege--Nondiversity Cases.

-- In all cases other than civil diversity actions, the court applies federal common law to determine whether a communication is subject to the attorney-client privilege. *In re Grand Jury Subpoena Duces Tecum*, [112 F.3d 910](#), 915 (8th Cir.1997).<sup>9</sup>

-- The federal common law of attorney-client privilege is applied in nondiversity cases even when the plaintiff's complaint includes pendent state law claims. *Hancock v. Dodson*, [958 F.2d 1367](#), 1372 (6th Cir. 1992); *Memorial Hosp. v. Shadur*, [664 F.2d 1058](#), 1061 n.3 (7th Cir. 1981).

3) Work Product Doctrine.

-- The work-product doctrine is a procedural rule of federal law governed by Rule 26(b)(3) of the Federal Rules of Civil Procedure. Thus, in all cases, including those over which the court is exercising diversity jurisdiction, the court applies federal law to resolve work product issues. *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1053 (8th Cir. 2000).

## II. Rule 502 Waivers of Attorney-Client Privilege and Work Product Protection.

A. **Burden of Proof.** When information protected under Rule 502 has been disclosed, the person or entity who holds the privilege, or who seeks continued work product confidentiality, bears the burden of proving the attorney-client privilege and work product protection were not waived by the disclosure.<sup>10</sup>

-- Conclusory statements are insufficient to meet the burden of proving the elements of Rule 502(b).<sup>11</sup>

-- However, the terms of a protective order can limit the showing required under Rule 502(b).<sup>12</sup>

### B. **Rule 502(a)–Intentional Disclosures/Subject Matter Waiver.**

1) Purpose: Rule 502(a) is intended to alleviate uncertainty and provides a universal interpretation of the law by:

-- rejecting the position taken by some federal and state courts that disclosure of some protected material automatically constitutes a general subject matter waiver as to other documents or information addressing the same subject matter;<sup>13</sup> and

-- providing that the federal rule on subject matter waiver governs subsequent state court determinations concerning the existence and scope of the waiver.

2) Application: Under Rule 502(a), when the attorney-client privilege or work product protection is waived by a disclosure, the waiver also extends to undisclosed communications or information in a federal or state proceeding only if:

-- the disclosure was **intentionally** made;

-- the intentionally disclosed information and the undisclosed information concern the **same subject matter**;<sup>14</sup> and

-- the disclosed and undisclosed information **should in fairness be considered together**.<sup>15</sup>

In other words, if a person or entity intentionally produces one privileged document in a federal proceeding or to a federal agency, any resulting waiver of the privilege would not extend to other related documents provided there was no intentional and misleading use of the protected or privileged information; however, if a party intentionally places protected information into a federal investigation or litigation in a selective, misleading, and unfair manner, such conduct will waive protection as to undisclosed information concerning the same subject matter.

The idea is to limit subject matter waiver to situations in which the privilege holder seeks to use the disclosed material for advantage in the litigation but to invoke the privilege to deny its adversary access to additional materials that could provide an important context for proper understanding of the privileged materials. . . . As the Explanatory Note to Rule 502(a) states, the Rule creates a general presumption that a waiver is limited only to the materials actually disclosed and limits a subject matter waiver to “unusual” situations.

*Silverstein v. Fed. Bureau of Prisons*, [2009 WL 4949959](#), [2009 U.S. Dist. LEXIS 121753](#) (D. Colo. Dec. 14, 2009)(internal citations omitted).<sup>16</sup>

**C. Rule 502(b)–Inadvertent Disclosures.**

1) Purpose: Rule 502(b) promotes certainty by resolving a split among the courts regarding the consequences of inadvertent disclosure. As explained in *Gray v. Bicknell*, [86 F.3d 1472](#), 1483 (8th Cir. 1996), state and federal courts had followed one of three approaches to determine if an inadvertent disclosure results in waiver of the attorney-client privilege or work product protection:

- the “lenient approach,” which requires a knowing and intentional disclosure to find that the attorney-client privilege was waived; an unintentional disclosure could not serve to waive attorney-client privilege or work product protection;
- the “middle of the road” approach, wherein the court conducts a fact-specific analysis to determine if inadvertently produced documents should remain protected as confidential;<sup>17</sup> and
- the “strict approach,” which holds confidentiality is waived irrespective of whether the disclosure was intentional or inadvertent.

*Gray v. Bicknell*, [86 F.3d 1472](#), 1483 (8th Cir. 1996).<sup>18</sup> In general, Rule 502(b) codified the majority, “middle-of-the-road,” approach used by several federal courts, including the Eighth Circuit, before the Rule was enacted. Under the “middle of the road” approach, the court considers multiple factors in determining whether the privilege should be extended, including:

- (a) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production;
- (b) the number of inadvertent disclosures;
- (c) the extent of the disclosures;
- (d) the promptness of measures taken to rectify the disclosure; and
- (e) whether the overriding interest of justice would be served by relieving the party of its error.

*Gray*, [86 F.3d at 1483-84](#).

The “middle of the road” approach was followed in the Nebraska federal courts before Rule 502 was enacted. *Adams Land & Cattle Co., v. Hartford Fire Ins. Co.*, [2007 WL 4522627](#), [2008 U.S. Dist. LEXIS 4089](#) (D. Neb. Dec. 18, 2007) (Strom, J.). See also *Kansas-Nebraska Natural Gas Co., Inc., v. Marathon Oil Co.*, [109 F.R.D 12](#), 19-21 (D. Neb. 1985) (conducting a balancing test by discussing the volume of documents produced and the procedural screening efforts taken by the party producing the documents to resolve a waiver issue).

2) Application: Provided applying the rule will not undermine the interests of justice, Rule 502(b) provides that disclosure of privileged or work product information does not waive confidentiality if: (a) the disclosure was inadvertent; (b) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (c) the holder took reasonable steps to rectify the error, including following Fed. R. Civ. Proc. 26 (b) (5) (B).<sup>19</sup>

a. Rule 502(b)(1)-- the disclosure was “inadvertent.” Rule 502(b) applies to only “inadvertent” disclosures, but does not define “inadvertent.”

-- Some courts define “inadvertent” as “unintentional,” employing a “simple analysis of considering if the party intended to produce a privileged document or if the production was a mistake.” *Amobi v. D.C. Dep't of Corr.*, [262 F.R.D. 45](#), 53 (D.D.C. 2009).<sup>20</sup>

-- Other courts consider a number of factors to determine inadvertency, including the number of documents produced in discovery, the level of care with which the review for privilege was conducted, and the actions of the producing party after discovering that the document had been produced. *Silverstein v. Fed. Bureau of Prisons*, [2009 WL 4949959](#), [2009 U.S. Dist. LEXIS 121753](#) (D. Colo. Dec. 14, 2009).<sup>21</sup>

b. Rule 502(b)(2)--Reasonable Precautions to Avoid Disclosure.

Although Rule 502(b)(2) provides no specific criteria for determining whether a party used reasonable steps to avoid disclosure, courts primarily consider: the extent of the discovery requested; any time constraints for response; the extent and type of precautions taken to prevent inadvertent disclosure compared to the document production as a whole; and the number of inadvertent disclosures compared to the total number of documents produced.<sup>22</sup>

c. Rule 502(b)(3)–Reasonable Attempts to Promptly Rectify the Disclosure.

-- The holder of a privilege must promptly take reasonable steps to rectify the erroneous disclosure, including following Federal Rule of Civil Procedure 26(b)(5)(B).<sup>23</sup>

-- Sanctions may be imposed against a receiving party who fails to comply with Rule 26(b)(5)(B) by refusing to return or destroy inadvertently disclosed privileged or work product information.<sup>24</sup>

d. Interests of Justice. Rule 502(b) will not be enforced in a manner contrary to the interests of justice.<sup>25</sup> When considering the interests of justice, the courts continue to afford high protection to opinion work product.<sup>26</sup>

**D. Rule 502 (c) & (f)–The Federal-State Comity Provisions.**

- 1) Purpose: Subparagraph (c) and (f) of Rule 502 attempt to resolve how the courts address waiver when a disclosure has occurred in a state proceeding and the information is now at issue in a federal proceeding, or the disclosure occurred in a federal proceeding and the information is now at issue in a state proceeding.<sup>27</sup>

2) Application:

a. Rule 502(c) focuses on how the federal court responds when a disclosure occurred in a state forum. If there is a disclosure in a state proceeding, and the waiver issue was not addressed by a state court order, admissibility in any subsequent federal proceeding will be determined by the law that is **most protective against waiver**. In other words, subject to any state court order directly addressing the issue:

-- If under state law, the disclosure is considered a waiver, but had the same disclosure occurred in a federal forum, it would not be considered a waiver, the state disclosure will not waive confidentiality protection in the federal forum; and

-- If a disclosure in a state proceeding is not a waiver under state law, but would have been a waiver under Rule 502 had it occurred in a federal proceeding, the state disclosure will not be interpreted as a waiver in the federal forum.

b. Rule 502(f) states that if a disclosure is not a waiver under federal law when made “in a Federal proceeding or to a Federal office or agency;” ([Fed. R. Evid 502\(a\) & \(b\)](#)), it will not be considered a waiver in state proceedings.

**E. Rule 502 (d) & (e)–Agreements and Court Orders.**

1) Under Rule 502 (e), parties can enter into an agreement concerning the effect of disclosure in a federal proceeding, but that agreement will only be binding on the parties to the agreement unless it is incorporated into a court order pursuant to subsection (d).

2) Rule 502 (d) allows a federal court to enter an order finding that a disclosure of privileged or protected information does not constitute a waiver. If such

an order is entered, under Rule 502(d), the order will be enforceable against persons in federal or state proceedings and third parties.<sup>28</sup>

-- For example, a producing party's attorney may choose to intentionally produce an array of documents without reviewing them, knowing with near certainty that they will contain some privileged documents, but rely on the Rule 502(d) order to protect against waiver. Under such circumstances, the receiving party can initially review the documents, (referred to by some authorities as “sneaking a peek”), identify the documents it wants to receive and provide notice to the producing party, and allow the producing party to assert any privilege or work product claims and “claw back” the confidential documents. If attorney-client or work product claims are raised by the producing party, the receiving party can then decide whether to refrain from using the documents, or file a motion to compel.<sup>29</sup>

-- See Appendix B for examples of Rule 502(d) agreements or orders.<sup>30</sup>

### **III. Filing Motions, Supporting Evidence, and Briefs with the Court’s CM/ECF System.**

- A. A party moving for an *in camera* review to determine if requested documents are privileged, work product, or related to an intentionally produced document and therefore within the scope of a potential subject matter waiver under Rule 502(a), must comply with Nebraska Civil Rule 7.5 ([NECivR 7.5](#)), or Nebraska Criminal Rule 12.4 ([NECrimR 12.4](#)).
- B. If information already disclosed to the opposing party must be reviewed by the court for the purpose of considering the merits of a motion, (including, for example, a motion to determine whether an erroneously disclosed document must be returned or destroyed under Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure), the parties must comply with the procedures set forth in Nebraska Civil Rule 5.0.3(c), ([NECivR 5.0.3\(c\)](#)), or Nebraska Criminal Rule 49.1(c), ([NECrimR 49.1\(c\)](#)).<sup>31</sup>

1. As explained in *Silverstein*, the prevalence of electronic communications has dramatically increased the task of responding to document discovery, with “fortunes . . . spent analyzing every piece lest the inadvertent production of one be deemed a waiver not only as to the piece inadvertently disclosed but as to all the others that relate to the same subject matter.” *Silverstein v. Fed. Bureau of Prisons*, [2009 WL 4949959](#), [2009 U.S. Dist. LEXIS 121753](#) (D. Colo. Dec. 14, 2009).

2. *Multiquip, Inc. v. Water Mgmt. Sys. LLC*, [2009 WL 4261214](#), [2009 U.S. Dist. LEXIS 109148](#), 10-11 (D. Idaho Nov. 23, 2009) held Rule 502 was applicable when a federal defendant’s email containing attorney-client communications was inadvertently copied to a third party who, in turn, forwarded the email to the federal plaintiff.

3. *Alpert v. Riley*, [2010 WL 1558588](#), [2010 U.S. Dist. LEXIS 38331](#) (S.D. Tex. Apr. 19, 2010) held Rule 502 did not apply to information which was placed by a defendant on a third party’s computer prior to the commencement of federal litigation. “The waiver issue is not governed by Rule 502 or its Texas counterpart, but rather by common law.” *Id.*

4. See also *Peterson v. Bernardi*, [262 F.R.D. 424](#), 428 (D.N.J. 2009), which held that a plaintiff’s “broad unsupported allegations” failed to prove privilege where he “simply attached a privilege log and assumed that all the listed documents are protected by the attorney client privilege and work product doctrine.”

5. Fed. R. Evid. 502(g) states:

“Attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and

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

6. See also *Union County, Iowa v. Piper Jaffray & Co., Inc.*, [525 F.3d 643](#), 646 (8th Cir. 2008); *Simon v. G.D. Searle & Co.*, [816 F.2d 397](#), 402 (8th Cir. 1987).

7. Relying on *Klaxon v. Stentor Electric Mfg. Co.*, [313 U.S. 487](#) (1941), the Eighth Circuit in *Pritchard-Keang Nam Corp. v. Jaworski*, [751 F.2d 277](#), 281 n. 4 (8th Cir. 1984), noted:

In diversity cases, privileges are determined according to the state law that supplies the rule of decision. Fed.R.Evid. 501. Rule 501 does not, however, specify which state’s privilege rules control. Under the *Erie* doctrine, a federal court must apply the forum’s conflict of laws rules. See *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). This case was brought in Missouri, so Missouri choice of law rules apply. . . . No Missouri case law has decided what the specific choice of law rule is regarding privilege. Nevertheless, the general rule is that the law of the forum governs admissibility of evidence. *Rosser v. Standard Milling Co.*, 312 S.W.2d 106, 110 (Mo.1958).

*Id.* at 281.

8. No Nebraska state court decision was located which discussed Nebraska's choice of law rules in determining whether a privilege exists. Nebraska federal district courts have, without discussion, Nebraska attorney-client privilege law (the law of the forum) in diversity cases. See, e.g., *Seger v. Ernest-Spencer Metals, Inc.*, [2010 WL 378113](#), [2010 U.S. Dist. LEXIS 12754](#) (D. Neb. Jan. 26, 2010) (Thalken, M.J.); *Adams Land & Cattle Co., v. Hartford Fire Ins. Co.*, [2007 WL 4522627](#), [2008 U.S. Dist. LEXIS 4089](#) (D. Neb. Dec. 18, 2007 (Strom, J.)).

9. See also *In re Bieter Co.*, [16 F.3d 929](#), 935-36 (8th Cir.1994); *United States v. Calvert*, [523 F.2d 895](#), 909 (8th Cir. 1975).

10. See *Peterson v. Bernardi*, [262 F.R.D. 424](#), 428 (D.N.J. 2009); *Amobi v. D.C. Dep't of Corr.*, [262 F.R.D. 45](#), 53 (D.D.C. 2009)). See also *Laethem Equip. Co. v. Deere & Co.*, [2008 WL 4997932](#), [2008 U.S. Dist. LEXIS 107635](#) ( E.D. Mich. Nov. 21, 2008) (noting a party's general discovery conduct has no bearing on whether those factors are satisfied); *Community Bank v. Progressive Cas. Ins. Co.*, [2010 WL 1435368](#), [2010 U.S. Dist. LEXIS 34845](#), 11-12 (S.D. Ind. Apr. 8, 2010) (explaining the burden of proof rests on the party holding the privilege even when the information is being sought from a nonparty witness under Rule 45; the plaintiff failed to prove protection under Rule 502 where it "should have known that [the third party's] generalized privilege objections, unsubstantiated by any privilege log, could never hold up," and the privilege holder, not the Rule 45 witness, "should have examined the documents to decide which privileges, if any, it wished to assert.").

Prior to the enactment of Rule 502, state law governed whether the attorney-client privilege was waived in diversity actions filed in federal court, with federal law applied to determine if the privilege was waived in non-diversity cases, and as to all federal cases, whether work product protection was waived. Rule 502 now governs the waiver of attorney-client privilege and work product protection in all cases, including diversity cases, ([Fed. R. Evid. 502 \(f\)](#)), with Rule 502(a) governing intentional disclosures and Rule 502(b) governing inadvertent disclosures.

11. *Eden Isle Marina, Inc. v. United States*, [89 Fed. Cl. 480](#), 508 (Fed. Cl. 2009) (denying protection under Rule 502(b) where the defendant showed only that he reviewed the relevant material twice, the second review took several weeks and covered fifteen boxes of material, and he compiled a list of withheld documents; but provided no information concerning the scope of the defendant's first review, whether he ever identified the memorandum at issue as privileged, or whether the defendant included the memorandum on his list of withheld documents. "Without such information, defendant has not met its burden to demonstrate the adequacy of its efforts to prevent the disclosure of privileged and protected material."); *Comrie v. IPSCO, Inc.*, [2009 WL 4403364](#), [2009 U.S. Dist. LEXIS 111965](#), 5-6 (N.D. Ill. Nov. 30, 2009) (holding the defendant failed to prove Rule 502(b) protection where the defendants claimed they inadvertently produced documents, but except for stating the number of documents produced, failed to support that assertion with facts).

12. *Alcon Mfg. v. Apotex, Inc.*, [2008 WL 5070465](#), [2008 U.S. Dist. LEXIS 96630](#) (S.D. Ind. Nov. 26, 2008) (upholding the terms of the parties' protective order which required only that the producing party "promptly make a good-faith representation" that the production was inadvertent or mistaken. "[E]xpensive, painstaking review is precisely what new Evidence Rule 502 and the protective order in this case were designed to avoid."). But see *Luna Gaming -- San Diego, LLC v.*

*Dorsey & Whitney, LLP*, [2010 WL 275083](#), [2010 U.S. Dist. LEXIS 3188](#) (S.D. Cal. Jan. 13, 2010) (holding that the language of the protective order did not relieve a party from proving the elements of Rule 502(b) where the protective order stated inadvertent disclosure “shall not constitute a waiver of any privilege,” but did not address under what circumstances failure to object to the use of inadvertently produced privileged documents waives the privilege).

13. As explained by the Eighth Circuit in *PaineWebber Group, Inc. v. Zinsmeyer Trusts Partnership*, [187 F.3d 988](#), 992 (8th Cir. 1999), prior to Rule 502, the attorney-client privilege was considered waived by the voluntary disclosure of privileged communications, “and courts typically appl[ie]d such a waiver to all communications on the same subject matter.” *Id.* at 992. See also *United States v. Workman*, [138 F.3d 1261](#), 1263 (8th Cir. 1998) (“Voluntary disclosure of attorney client communications expressly waives the privilege. . . . The waiver covers any information directly related to that which was actually disclosed.”). Although no Nebraska state court case was located which discussed whether and to what extent Nebraska imposes the so-called “subject matter waiver,” under Nebraska Revised Statute § 27-511, the holder of a privilege against disclosure of a confidential matter or communication waives the privilege if he or she . . . “voluntarily discloses or consents to disclosure of any significant *part* of the matter or communication. . . .” [Neb. Rev. Stat. § 27-511](#) (emphasis added). However, the extent of any such subject matter waiver must be tempered by the fundamental consideration of fairness. *State v. Roeder*, [262 Neb. 951, 957, 636 N.W.2d 870, 876](#) (2001).

14. *Trs. of the Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, [266 F.R.D. 1](#) (D.D.C. 2010) (using *in camera* review to determine if the disclosed and undisclosed information cover the same subject matter); *Confederated Tribes of the Chehalis Reservation v. Thurston County Bd. of Equalization*, [2009 WL 3835304](#), [2009 U.S. Dist. LEXIS 105457](#) (W.D. Wash. Nov. 12, 2009) (although attorney-client communications were intentionally disclosed, subject matter waiver was denied until the documents were identified on a privilege and/or provided for *in camera* review to determine whether absent disclosure, justice will be denied).

15. When assessing the “fairness” of granting a subject-matter waiver of work-product protection under Rule 502(a), the court affords special protection to opinion work product. *Chick-Fil-A v. ExxonMobil Corp.*, [2009 WL 3763032](#), [2009 U.S. Dist. LEXIS 109588](#), 21-22 (S.D. Fla. Nov. 10, 2009) (“Rule 502 does not abrogate the Eleventh Circuit’s ruling that the subject matter waiver doctrine does not extend to materials protected by the opinion work product privilege.”).

16. See also *United States v. Treacy*, [2009 WL 812033](#), [2009 U.S. Dist. LEXIS 66016](#) (S.D.N.Y. Mar. 24, 2009) (“[I]f privileged material is disclosed to the Government, any waiver that occurs only extends to additional, undisclosed material if, in the case of an intentional waiver, the disclosed and undisclosed materials concern the same subject matter and “ought in fairness to be considered together.”); *Mainstay High Yield Corporate Bond Fund v. Heartland Indus. Partners, L.P.*, [263 F.R.D. 478, 480](#) (E.D. Mich. 2009) (“[S]ubject matter waiver is applicable in circumstances where ‘fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.’”).

17. The “middle of the road” test is also known as the *Hydraflow* test because it served as the basis for the decision in *Hydraflow, Inc. v. Enidine, Inc.*, [145 F.R.D. 626](#), 637 (W.D.N.Y. 1993).

18. The Nebraska state courts have yet to explain which approach will be followed in Nebraska. See *Seeger v. Ernest-Spencer Metals, Inc.*, [2010 WL 378113](#), [2010 U.S. Dist. LEXIS 12754](#) (D. Neb. Jan. 26, 2010) (Thalken, M.J.); *Adams Land & Cattle Co., v. Hartford Fire Ins. Co.*, [2007 WL 4522627](#), [2008 U.S. Dist. LEXIS 4089](#) (D. Neb. Dec. 18, 2007 (Strom, J.)). However, applying the strict approach would appear to violate the fundamental considerations of fairness announced in *State v. Roeder*, [262 Neb. 951, 957, 636 N.W.2d 870, 876](#) (2001), and Nebraska statutory law which states:

A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

[Neb. Rev. Stat. § 27-503\(1\)\(d\)](#) (emphasis added).

19. Pursuant to Rule 26(b)(5)(B):

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

[Fed. R. Civ. P. 26\(b\)\(5\)\(B\)](#).

20. *Amobi v. D.C. Dep't of Corr.*, [262 F.R.D. 45](#), 53 (D.D.C. 2009) (holding Rule 502(b) was drafted to devise a rule to protect privilege in the face of an innocent mistake; defining inadvertent as mistaken comports with the dictionary definition of the word; inadvertence and the reasonable efforts required under Rule 502(b)(2-3) are separate and separated concepts under the language of the rule itself; and a document mistakenly disclosed by a lawyer is an inadvertent disclosure; “[c]oncluding that a lawyer’s mistake never qualifies as inadvertent disclosure under Fed. R. Evid. 502(b) would gut that rule like a fish. It would essentially reinstate the strict waiver rule in cases where lawyers reviewed documents, and it would create a perverse incentive not to have attorneys review documents for privilege.”); *Multiquip, Inc. v. Water Mgmt. Sys. LLC*, [2009 WL 4261214](#), [2009 U.S. Dist. LEXIS 109148](#), 10-11 (D. Idaho Nov. 23, 2009) (finding “inadvertence based on defendant’s statement, “Before I noticed the mistake, I hit send and the email, containing information and advice from my attorney concerning this case, was unintentionally misdirected to [plaintiff’s counsel];” explaining with the recent proliferation of both electronic communications and electronic documents, “Now it only takes the click of a mouse - an accidental ‘reply to all,’ for example - to inadvertently transmit a privileged electronic communication.”); *Convertino v. United States DOJ*, [674 F. Supp. 2d 97](#), 109-110 (D.D.C. 2009) (holding the disclosure of email was inadvertent; the employee “had no intentions of allowing the DOJ, his employer, to read the e-mails he was sending to his personal attorney through his work e-mail account.”) See also *Coburn Group, LLC v.*

*Whitecap Advisors LLC*, [640 F. Supp. 2d 1032](#), 1038 (N.D. Ill. 2009).

21. See also *Heriot v. Byrne*, [257 F.R.D. 645](#) (N.D. Ill. March 20, 2009); *United States v. Sensient Colors, Inc.*, [2009 WL 2905474](#), [2009 U.S. Dist. LEXIS 81951](#), 15-16 (D.N.J. Sept. 9, 2009) (“[P]laintiff’s subjective intent is not controlling. All inadvertent disclosures are by definition unintentional. . . . To determine if plaintiff’s production was inadvertent the Court must look at a multitude of factors, including whether plaintiff took reasonable precautions to prevent errors.”); *Peterson v. Bernardi*, [262 F.R.D. 424](#), 428 (D.N.J. 2009) (“For the purpose of deciding plaintiff’s motion, the Court does not question the sincerity of plaintiff’s argument that he did not intend to produce the documents in question. However, plaintiff’s subjective intent is not controlling. All inadvertent disclosures are by definition unintentional.”)

22. *Coburn Group, LLC v. Whitecap Advisors LLC*, [640 F. Supp. 2d 1032](#), 1038 (N.D. Ill. 2009) (explaining the factors to consider include the number of documents to be reviewed, the time constraints for production, and the scope of the requested discovery; when the discovery requests are extensive, “mistakes are inevitable and claims of inadvertence are properly honored so long as appropriate precautions are taken.”); *Amobi v. D.C. Dep’t of Corr.*, [262 F.R.D. 45](#), 53 (D.D.C. 2009) (“Fed. R. Evid. 502 advisory committee note gives guidance on the topic of reasonableness by providing some non-dispositive factors a court may consider, including the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of the disclosure, the number of documents to be reviewed, the time constraints for production, and the overriding issue of fairness. Despite that guidance, the Committee indicates that it consciously chose not to codify any factors in the rule because the analysis should be flexible and should be applied on a case by case basis.”).

See also *Mt. Hawley Ins. Co. v. Felman Prod.*, [2010 WL 1990555](#), [2010 U.S. Dist. LEXIS 49083](#), 35-37 (S.D. W. Va. May 18, 2010) (finding a waiver occurred because failing to test the reliability of keyword searches for electronic discovery is imprudent, and a large number of documents were improperly disclosed, “which underscores the lack of care taken in the review process”); *United States v. Sensient Colors, Inc.*, [2009 WL 2905474](#), [2009 U.S. Dist. LEXIS 81951](#), 15-16 (D.N.J. Sept. 9, 2009) (finding the plaintiff proved the requirement of Rule 502(b)(2) where it used a sophisticated computer program to conduct its privilege review; although mistakes occurred, the producing party “should not be unduly punished for occasional mistakes that occurred while it started to use new software to organize and sort its documents,” particularly where it not only used a computer program, but employed twelve professionals to conduct its review and performed a “QA/QC to: (1) ensure completeness of the review, (2) minimize false negatives, i.e., designations of privileged information as non-privileged, and (3) minimize false positives, i.e., designations of discoverable information as privileged”); *Laethem Equip. Co. v. Deere & Co.*, [2008 WL 4997932](#), [2008 U.S. Dist. LEXIS 107635](#) ( E.D. Mich. Nov. 21, 2008) (holding plaintiffs took reasonable steps to prevent disclosure where, despite the voluminous discovery, the disks at issue were the only privileged matters inadvertently disclosed and the materials were copied by defense counsel outside the “inspect and copy” procedure established by the parties, thereby denying plaintiffs’ opportunity to conduct a privilege review before turning that data over to the defendants).

23. In the following cases, the court held the party asserting the privilege failed to prove the requirements of Rule 502(b)(3).

*Mt. Hawley Ins. Co. v. Felman Prod.*, [2010 WL 1990555](#), [2010 U.S. Dist. LEXIS 49083](#), 35-37 (S.D. W. Va. May 18, 2010) (finding the plaintiffs waived confidentiality where the extent of the disclosures was unknown because the 377 documents at issue were not submitted to the court for *in camera* review; the defendant, not the plaintiff, discovered the mistake; and the plaintiff s “pointed to no overriding interests in justice that would excuse them from the consequences of producing privileged/protected materials”);

*Luna Gaming -- San Diego, LLC v. Dorsey & Whitney, LLP*, [2010 WL 275083](#), [2010 U.S. Dist. LEXIS 3188](#) (S.D. Cal. Jan. 13, 2010) (“[When] a privileged document is used at a deposition, and the privilege holder fails to object immediately, the privilege is waived.”);

*Thompson v. Quorum Health Res., LLC*, [2010 WL 234801](#), [2010 U.S. Dist. LEXIS 2668](#) (W.D. Ky. Jan. 12, 2010) (holding any attorney-client privilege that attached to a draft audit questionnaire was effectively waived by plaintiff's counsel when he introduced it at a deposition, used it to question a deponent, made a copy for defendant's counsel, and failed to file a motion to exclude the document until ten months after the deposition);

*Eden Isle Marina, Inc. v. United States*, [89 Fed. Cl. 480](#), 508 (Fed. Cl. 2009) (holding the defendant did not demonstrate it promptly took reasonable steps to rectify its disclosure where the plaintiff obtained the memorandum in the fall of 2006; the defendant first learned of its disclosure during a deposition in 2008; and defense counsel permitted lengthy deposition questioning and did not immediately object despite the obvious marking on the face of the memorandum);

*Clarke v. J.P. Morgan Chase & Co.*, [2009 WL 970940](#), [2009 U.S. Dist. LEXIS 30719](#), 15-16 (S.D.N.Y. Apr. 10, 2009) (finding waiver where the defendant should have noticed the email at issue was allegedly privileged when it served its initial disclosures, the email was among a small group of documents produced, and the defendant should have been aware the e-mail was mistakenly disclosed and responded immediately when the plaintiff produced a copy as part of plaintiff's own document production, placing the document on the top of a stack of documents produced);

*Relion, Inc. v. Hydra Fuel Cell Corp.*, [2008 WL 5122828](#), [2008 U.S. Dist. LEXIS 98400](#) (D. Or. Dec. 4, 2008) (finding the plaintiff failed to prove Rule 502(b)(3) where it sought the return of two e-mails as protected by attorney-client privilege, but the discovery documents were inspected by attorneys and support staff before being produced to a second defendant, the plaintiff had two additional opportunities to review the documents, and it did not assert the two e-mails were privileged until four months after they were initially produced).

In the following cases, the court held the party asserting the privilege met the burden of proving the requirements of Rule 502(b)(3).

*Multiquip, Inc. v. Water Mgmt. Sys. LLC*, [2009 WL 4261214](#), [2009 U.S. Dist. LEXIS 109148](#), 10-11 (D. Idaho Nov. 23, 2009) (holding defense counsel promptly responded to his client's inadvertent disclosure of an email where counsel immediately requested the email's return, reiterated the demand the next day, and shortly after learning of the misdirected email, defense counsel provided instruction to avoid future mis-directed emails, including directions to 1) erase the email address of plaintiff's counsel from the client's email address book, 2) check to assure the email autofill program worked as expected, 3) send email to only one attorney to forward as necessary, and 4) create a group email address for sending certain emails rather than relying on the autofill process);

*United States v. Cinergy Corp.*, [2009 WL 6327414](#), [2009 U.S. Dist. LEXIS 126820](#) (S.D. Ind. Nov. 10, 2009) (holding defense counsel adequately proved Rule 502(b)(3) where he first learned of the mistaken disclosure when the plaintiff used the document during a deposition, immediately objected and requested the document's return);

*Rhoades v. YWCA*, [2009 WL 3319820](#), [2009 U.S. Dist. LEXIS 95486](#), 8-9 (W.D. Pa. Oct. 14, 2009) (finding no waiver where the documents in question were carefully reviewed in categories, over 1600 pages were produced with only four pages of privileged documents disclosed due to an administrative error, the defendant requested the documents back immediately after learning of the mistake; and only five days lapsed before the mistake was discovered);

*United States v. Sensient Colors, Inc.*, [2009 WL 2905474](#), [2009 U.S. Dist. LEXIS 81951](#), 15-16 (D.N.J. Sept. 9, 2009) (finding no waiver where the defendant notified the plaintiff of plaintiff's error and within eight days, after confirming the error, the plaintiff asked that Rule 26 (b)(5)(B) be followed. "If a party is on notice of an error in its document production it should not wait for its adversary to discover its error and then claim protection under FRE 502(b). . . . The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake,. . . but does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently");

*ClubCom, LLC v. Captive Media, Inc.*, [2009 WL 1885712](#), [2009 U.S. Dist. LEXIS 55651](#) (W.D. Pa. June 30, 2009) (finding no waiver where only four of approximately 4,000 documents produced were privileged, there was no evidence the disclosure was intentional, and the producing party promptly attempted to recall the four documents);

*Laethem Equip. Co. v. Deere & Co.*, [2008 WL 4997932](#), [2008 U.S. Dist. LEXIS 107635](#) (E.D. Mich. Nov. 21, 2008) (holding plaintiffs took prompt action to secure return of the privileged matter where they discovered the mistake during their expert's discovery deposition, immediately objected, sent a letter demanding return of the information the same

day, lodged repeated objections and requests for return at subsequent depositions, and within three weeks, had secured a court order compelling the defendants to return the inadvertently disclosed disks).

24. *King Pharms., Inc. v. Purdue Pharma L.P.*, [2010 WL 2243872](#), [2010 U.S. Dist. LEXIS 54407](#), 5-6 (W.D. Va. June 2, 2010) (holding no waiver of privilege as to four unredacted pages disclosed in a voluminous production; the fact that the document had been reviewed and partially redacted does not alone undermine a finding of inadvertence. The receiving party's failure to promptly destroy or return the documents once notified of the inadvertent disclosure violated Rule 26(b)(5)(B) and the parties' Stipulated Protective Order); *Community Bank v. Progressive Cas. Ins. Co.*, [2010 WL 1435368](#), [2010 U.S. Dist. LEXIS 34845](#), 11-12 (S.D. Ind. Apr. 8, 2010) (sanctioning the defendant under Rule 26(b)(5)(B) for refusing to destroy or return the privileged documents; the defendant "impermissibly resorted to self-help to try and avoid the risk that [it] couldn't use the disputed materials as evidence in this matter. . .").

25. *Oppliger v. United States*, [2010 WL 503042](#), [2010 U.S. Dist. LEXIS 15251](#), 15-16 (D. Neb. 2010) (finding no waiver of the attorney-client privilege based on an overriding interest of justice where the witness did not realize he had any choice but to produce privileged correspondence in response to the United States' subpoena; did not compromise the confidentiality of the document for his own benefit; and once the plaintiff's counsel raised the issue, promptly attempted to rectify the disclosure by informing counsel and the court of his intent to rely on the privilege).

26. *Eden Isle Marina, Inc. v. United States*, [89 Fed. Cl. 480](#), 508 (Fed. Cl. 2009) (Federal Rule of Civil Procedure 26(b)(3)(B) continues to provide special protection for opinion work product).

27. Note that Rule 502 (c) and (f) may raise constitutional questions to the extent they undermine the holding of *Erie Railroad Co. v. Tomkins*, [304 U.S. 64](#) (1938) by encroaching on a state's substantive privilege law in federal diversity actions, mandate the application of federal waiver law in state proceedings, or impose a federal court privilege ruling in a separate case and on a person or entity who was not a party to the federal action. Moreover, Rule 502 does not apply to any disclosure made in a state proceeding that is later introduced in a subsequent state proceeding.

28. See, e.g., *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*, [2009 WL 464989](#), [2009 U.S. Dist. LEXIS 15901](#) (N.D. Tex. Feb. 23, 2009) (explaining that as to the underlying state case, the attorney-client privilege and work-product protection are not waived by disclosing confidential privileged communications and attorney billing information in a federal action over the former counsel's billing; "[the defendant] has not pointed to any reason why a Texas court would not recognize an order entered under Rule 502, nor is this Court aware of a basis for a Texas court to find privileges waived in state proceedings based on a Federal court's order requiring discovery in a federal case to proceed.").

29. See, e.g., *Jicarilla Apache Nation v. United States*, [91 Fed. Cl. 489](#), 494 (Fed. Cl. 2010) ("If defendant truly is concerned that the production here would occasion a waiver of the privilege in other cases, it can easily remedy that matter by formally seeking relief under [Rule 502(d)]."); *Capitol Records, Inc. v. MP3tunes, LLC*, [261 F.R.D. 44](#), 51 (S.D.N.Y. 2009) (explaining that if the defendant wants to ensure an ability to timely respond to discovery despite the need to review its

emails for privilege issues, it can confer with the plaintiff and seek a court-ordered “clawback agreement.”).

30. Note, however, *CleanCut, LLC v. Rug Doctor*, [2010 WL 149877](#), [2010 U.S. Dist. LEXIS 2966](#), 5-6 (D. Utah Jan. 14, 2010) (“Including a provision in the protective order that permits the producing party to recall the documents prior to a determination of the privilege and the non-producing party to seek court intervention after the documents have already been returned, adds confusion to the procedures set forth in rule 26(b)(5)(B). [The parties proposed protective order] cannot explicitly adopt the procedures of rules 502 and 26(b)(5)(B) and then provide an optional alternative method for addressing this issue.”); *United States v. Cinergy Corp.*, [2009 WL 6327414](#), [2009 U.S. Dist. LEXIS 126820](#) (S.D. Ind. Nov. 10, 2009) (holding a protective order did not qualify under Rule 502(d) where the agreement stated the parties could exchange “confidential information” without fear that those documents would be shared with the public or used for purposes not connected to this litigation, and included a claw-back provision allowing a party to retrieve the disclosed but unlabeled versions, but contains no provision exempting even inadvertently disclosed confidential information from discovery).

31. To this end, the parties may want to include language such as the following in proposed protective orders submitted for court approval.

- a. In the event a receiving party wishes to use any "CONFIDENTIAL" information or materials in any affidavits, briefs, memoranda of law, or other papers filed with the Court in this lawsuit, the party submitting the information to the court shall electronically file a motion to file restricted access documents and file the documents as restricted access documents using the court's Case Management/Electronic Case Filing system (CM/ECF). The motion shall state the restricted access documents filed contain “CONFIDENTIAL” information which is subject to an agreed protective order between the parties, and not to be placed on the public docket except upon order of the court.
- b. Documents filed by counsel on CM/ECF as restricted access documents can be accessed and viewed by the attorneys of record and the court, but not by the general public. Once the motion to file as restricted access documents is granted, these documents will continue to be accessible for viewing by only the court and the attorneys of record during the pendency of this case and after its conclusion.
- c. This paragraph does not apply to exhibits offered at a hearing or trial. Any Party shall be entitled to seek a protective order concerning "CONFIDENTIAL" material to be introduced in such a proceeding as it deems reasonable and/or necessary to protect disclosure of such information to the public. No later than fourteen (14) days before the date of any hearing or trial, a receiving Party shall advise a producing Party in writing of any "CONFIDENTIAL" material he or she intends to use in such proceeding to afford the producing Party an opportunity to seek a protective order.

## Appendix A

### **Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**

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

(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver.--When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

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

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

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

- (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or
- (2) is not a waiver under the law of the State where the disclosure occurred.

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

(e) Controlling effect of a party agreement.--An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

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

(g) Definitions.--In this rule:

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

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

[Fed. R. Evid. 502.](#)

## Appendix B

### Rule 502(d) Agreements/Orders

*In re Avandia Mktg.*, [2009 U.S. Dist. LEXIS 122246](#), 34-36 (E.D. Pa. Oct. 2, 2009):

#### PRE-TRIAL ORDER NO. UNDER RULE 502(d) OF THE FEDERAL RULES OF EVIDENCE

WHEREAS, in an effort to reduce the number of documents that would otherwise require adjudication by the Special Discovery Master and potential review by this Court in accordance with this Court's September 10, 2009 Order, SmithKlineBeecham Corporation d/b/a GlaxoSmithKline ("GSK") has agreed to produce, subject to the entry of a non-waiver order under Rule 502(d) of the Federal Rules of Evidence, approximately 56 documents (including duplicates), which were among the approximately 120 documents that were reviewed by the Special Discovery Master in connection with his Seventh Report and Recommendation; and

WHEREAS, GSK shall also designate all such documents as "Confidential" under Pre-Trial Order No. 10 in this case;

IT IS HEREBY ORDERED as follows:

1. Non-Waiver. GSK's production of the approximately 56 documents, which it agreed to produce in a September 15, 2009 meeting with the Special Discovery Master, shall not constitute a waiver of any privilege or protection with respect to: (a) those documents; (b) any other communications or documents relating to the subject matter of those documents; or (c) any other communications or documents relating to the parties who sent or received or are named in those documents. This Order is, and shall be construed as, an Order under Rule 502(d) of the Federal Rules of Evidence ordering that privilege or protection is not waived by disclosure connected with the litigation pending before this Court. Accordingly, as is explicitly set forth in Rule 502(d), the production of these documents is not a waiver of any privilege or protection in any other federal or state proceeding. Without limiting the foregoing, the existence of this Order shall not in any way impair or affect GSK's legal right to assert privilege claims for the documents produced in any other actions, shall not effect a waiver, and shall not be used to argue that any waiver of privilege or protection has occurred by virtue of any production of these documents in this case before this Court or any other Court or in any other litigation or proceeding.
2. Use of the Documents Produced. Any use of the documents produced by GSK under this non-waiver order shall be subject to all of the provisions of Pre-Trial Order No. 10 in this case.

3. Security of Protected Documents. Counsel of record shall keep all documents produced by GSK in accordance with this Order within their exclusive possession and control and in separate files or in separate databases. Counsel of record shall maintain the confidentiality of such [\*36] materials and information, and shall not permit unauthorized dissemination of such materials to any person or entity.
4. Designation by GSK. GSK shall designate the 56 documents produced under this non-waiver order by marking on the documents substantially the following words: "CONFIDENTIAL - FOR USE IN IN RE AVANDIA MDL UNDER PROTECTIVE ORDER AND SUBJECT TO NON-WAIVER ORDER UNDER F.R.E. 502(d), IN IN RE AVANDIA MDL, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, NO. 2007-MD-1871."

*Wade v. Gaither*, [2010 WL 624249](#), [2010 U.S. Dist. LEXIS 14456](#), 7-8 (D. Utah Feb. 20, 2010);

IT IS FURTHER ORDERED that the information produced by the Muller and Perkins Subpoenas shall be produced for use limited to this case and shall not be disclosed to persons other than counsel and parties in this case and court personnel without agreement of the parties or further order of the court. Any privilege that applies to such information or other protection is not waived by disclosure connected with this litigation and such disclosure is not a waiver in any other Federal or State proceeding.

*Northern Natural Gas Co. v. L.D. Drilling, Inc.*, [2010 U.S. Dist. LEXIS 8810](#), 16-17 (D. Kan. Feb. 1, 2010)

14. Pursuant to Federal Rule of Evidence 502(d), any privilege or protection shall not be waived by inadvertent disclosure connected with this Litigation. More specifically, if any documents, records, and/or data are disclosed to another party which either the disclosing party or receiving party believe may contain information that is protected by attorney-client or work product protections/privileges, the receiving party shall promptly return such documents to the disclosing party. Such documents will not lose the privilege and/or protection attached thereto by the mere fact such documents were inadvertently disclosed, and the parties do not waive their right to dispute the underlying claim of privilege or work-product protection. If a receiving party disputes or believes it might dispute the claim of privilege or protection, the receiving party may retain a copy of the document, record or data to evaluate such claim of privilege, and the parties shall cooperate to obtain the Court's decision regarding such claim of privilege or protection. In any Court filings regarding such claim of privilege or protection, the parties shall take reasonable steps to ensure that the documents(s) are not viewable other than by the Court (and its personnel) and the parties (and their attorneys and personnel).