PURSUANT TO RULE 27(f) OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE, THE RULES COMMITTEE ON CIVIL PRACTICE AND PROCEDURE SEEKS COMMENTS FROM THE BENCH, THE BAR AND THE PUBLIC ON THE PROPOSED AMENDMENT TO **RULE 502 OF THE MISSISSIPPI RULES OF EVIDENCE**.

Comments should be filed with the Clerk of the Supreme Court,
Gartin Justice Building, P.O. Box 249, Jackson, Mississippi 39205-0249.
Deadline: **September 6, 2011.**

## RULE 502. LAWYER-CLIENT PRIVILEGE

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**(e) Limitations on Waiver.** The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the lawyer-client privilege or work product protection.

*(1) Disclosure made in a Mississippi proceeding; scope of a waiver.* When the disclosure is made in a Mississippi proceeding and waives the lawyer-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Mississippi proceeding only if:

(i) the waiver is intentional;

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

(iii) they ought in fairness be considered together.

*(2) Inadvertent disclosure.* When made in a Mississippi proceeding, the disclosure does not operate as a waiver in a Mississippi proceeding if:

(i) the disclosure is inadvertent;

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

(iii) the holder promptly took reasonable steps to rectify the error, including (if applicable) following MRCP 26(b)(6)(b).

*(3) Disclosure made in a proceeding in federal court or another state.* When the disclosure is made in a proceeding in federal court or another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Mississippi proceeding if the disclosure:

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

(ii) is not a waiver under federal law or the law of the state where the disclosure occurred.

*(4) Controlling effect of a court order.* A Mississippi 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 proceeding.

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

*(6) Definitions.* In this rule:

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

(ii) "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.

**Comment**

Rule 502(e) addresses two main issues. The first is the effect of certain disclosures of matters protected by the attorney-client privilege or as work product. The second is the concern over otherwise unnecessary litigation costs incurred to protect against inadvertent waiver -- especially in cases involving electronic discovery. *See, e.g., Hopson*

*v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

Rule 502(e)(1) provides that an *intentional* disclosure, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence. *See* Rule 502(e)(2); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. An *inadvertent* disclosure of protected information can never result in a subject matter waiver.

Under Rule 502(e)(2), considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. *See Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey,* 109 F.R.D. 323, 332 (N.D.Cal. 1985) (the factors, which by necessity will vary from case-to-case, include the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure, and the overriding issue of fairness). A party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may effectively protect against a finding of waiver. *See Kandel v. Brother International Corp.,* 683 F.Supp.2d 1076 (C.D.Cal. 2010) (Party hired a consultant to scan its servers and archives and put documents into a database that could be reviewed. Counsel provided consultant and document review team with a protocol containing specific instructions on designating protected materials). *But see Peterson v. Bernardi,* 262 F.R.D. 424 (D.N.J. 2009) (party took minimal steps to protect against inadvertent disclosure, and general statement that a privilege review was done, without any supporting details, was entitled to little weight); *Callan v. Christian Audigier, Inc.,* 263 F.R.D. 564 (C.D.Cal. 2009) (likewise finding that party did not meet burden of establishing it took reasonable steps). The rule does not require the producing party to engage in a post-production review; but the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently. *See* MRCP 26(b)(6)(b).

Rule 502(e)(4) enables the use of confidentiality orders to limit the costs of

privilege review, especially important in cases involving electronic discovery. The rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. *See Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003).

Rule 502(e)(6) makes no attempt to alter the law on whether a communication or information is protected under the attorney-client privilege or work-product protection as an initial matter.