THE COMMON-INTEREST DOCTRINE (OR LACK THEREOF) IN TEXAS

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BIOGRAPHICAL INFORMATION

Mary represents both plaintiffs and defendants in a wide variety of complex commercial litigation, with an emphasis on oil and gas matters, pharmaceutical defense, and general business disputes. Mary has also assisted with the representation of clients in front of the Railroad Commission.

EDUCATION

B.A., summa cum laude, Smith College
J.D., cum laude, Harvard Law School

BAR ADMISSIONS & ACTIVITIES

Admitted to the State Bar of Texas and to the U.S. District Courts for the Western and Northern Districts of Texas
Austin Bar Association
Austin Young Lawyers Association

REPRESENTATIVE MATTERS

Obtained summary judgment in favor of an oil and gas company based on the interpretation of a contested mineral deed.

Successfully settled dispute regarding the valuation of shares of client company's stock.

Assisted oil and gas client in having certain land owners declared unavailable by the General Land Office so the land could be put up for auction.

Advised startup company on legal ethics issues.

Represented hearing impaired clients in appeal to the U.S. Supreme Court from Fifth Circuit's dismissal of ADA claims against state agency.

Represented juvenile client in appeal to the First Court of Appeals at Houston in connection with immigration classification matter.

ARTICLES & PRESENTATIONS

The Common Interest Doctrine (or Lack Thereof) in Texas, Texas Bar CLE Webcast, December 2016 (co-author with David Shank)

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BIOGRAPHICAL INFORMATION

David Shank is a commercial trial lawyer who represents plaintiffs and defendants in complex, high-stakes disputes before federal courts, state courts, and arbitration panels around the country. David has represented clients in disputes involving a wide range of issues, including trade-secret misappropriation, business breakups, consumer class actions, securities fraud, and even rare and valuable art. He has extensive experience examining and cross-examining key witnesses at trial, and has argued and won dispositive and many other motions in court. In addition to work at the trial level, David also has experience handling appeals for his clients.

EDUCATION

B.A., Economics, Political Science, and Middle Eastern Studies (triple major), Trinity University
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ACTIVITIES & HONORS

Austin Bar Association

Austin Young Lawyers Association

Texas Rising Star, a Thompson Reuters business, Business Litigation, 2016 & 2017

Associate, Patrick E. Higginbotham American Inn of Court, 2011-2012

Order of the Coif

National Champion, 18th Annual Duberstein Moot Court Competition

ARTICLES & PRESENTATIONS

The Common Interest Doctrine (or Lack Thereof) in Texas, Texas Bar CLE Webcast, December 2016 (co-author with Mary Byars)

Ethical Challenges in Preparing and Presenting Witnesses, 40th Annual Page Keeton Civil Litigation Conference, October 2016 (co-author with Steve McConnico)

Forget What You Might "Know" About the Texas Attorney Fee Statute, HEADNOTES, September 2015 (co-author with Omar Ochoa)

Wish List from Chambers: Easy Ways to Improve Written and Oral Advocacy, TEXAS LAWBOOK, 2013 (co-author with The Honorable Barbara M.G. Lynn)

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I. INTRODUCTION

Abstract: *This article describes Texas' allied litigant doctrine and explains how it differs from the common-interest doctrine applied in other jurisdictions. It further explores the interaction between the allied litigant doctrine and work-product privilege and provides practice tips for Texas practitioners.*

II. THE COMMON–INTEREST DOCTRINE

Generally, the attorney–client privilege will not protect communications made in the presence of third parties. Likewise, the privilege is waived if a communication is made in confidence but subsequently revealed to a third party by the client. There are, of course, exceptions to these rules. For instance, under the joint-client doctrine, "[w]here [an] attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients." *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 50 (Tex. 2012).

In many jurisdictions, the "common-interest" or "common-legal-interest" doctrine is another exception to these rules. Although courts and commentators use a variety of (sometimes conflicting) terminology in this area, the common-interest or common-legal-interest doctrine generally refers to a rule that protects otherwise privileged communications shared between separately represented clients (and/or their lawyers) who share a common legal interest in the subject matter of the representation. This usually is held to include communications shared between co-parties in litigation and between potential co-parties in litigation. *See United States v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002). For instance, the Fifth Circuit has explained that the common-interest doctrine protects: "(1) communications between co-defendants in actual litigation and their counsel; and (2) communications between *potential* co-defendants and their counsel." *In re Santa Fe Intern. Corp.*, 272 F.3d 705, 710 (5th Cir. 2001) (citing *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977); *Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir. 1985); *Aiken v. Texas Farm Bureau Mut. Ins. Co.*, 151 F.R.D. 621, 624 (E.D. Tex. 1993)). Similarly, the New York Court of Appeals recently held "that where two or more clients *separately* retain counsel to advise them on matters of common legal interest, the common interest exception allows them to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest." *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 35 (N.Y. 2016).

The common-interest doctrine "has come to be known by many names: 'common interest arrangement,' 'common legal interest doctrine,' 'joint litigant privilege,' 'pooled information privilege,' 'allied lawyer doctrine' and 'allied litigant privilege,' among others." *Id.* at 35 n.1. Just as the name is not uniform across jurisdictions, the precise contours of the doctrine vary from jurisdiction to jurisdiction. For example, some courts limit the doctrine to communications between defendants or potential defendants, excluding plaintiffs or potential plaintiffs. *E.g.*, *Crosby v. Blue Cross Blue Shield of Louisiana*, No. CIV.A. 08-0693, 2012 WL 5450040, at *4 (E.D. La. Nov. 7, 2012) (holding that common-legal-interest privilege does not extend to plaintiffs); *see also BCR Safeguard Holding, L.L.C. v. Morgan Stanley Real Estate Advisor, Inc.*, 614 F. App'x 690, 703–04 (5th Cir. 2015) (noting that "[o]n the merits, whether the common legal interest privilege applies only to co-defendants is a close question," but declining to reach the issue). Most courts, however, hold that the doctrine applies equally to plaintiffs and defendants. *E.g.*, *United States v. Under Seal (In re Grand Jury Subpoenas, 89–3 & 89–4, John Doe 89–129)*, 902 F.2d 244, 249 (4th Cir. 1990) ("[W]hether the jointly interested persons are defendants or plaintiffs, . . . the rationale . . . remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.").

Similarly, although courts generally agree that the doctrine extends only to communications between those who share a common *legal* interest (as opposed to a purely commercial or financial interest), *see, e.g.*, *United States v. Ocwen Loan Servicing, LLC*, No. 4:12-CV-543, 2016 WL 1031157, at *6 (E.D. Tex. Mar. 15, 2016) ("A shared rooting interest in the 'successful outcome of a case' . . . is not a common *legal* interest."), courts differ on how closely that legal interest must relate to litigation. For example, some courts, including the Fifth Circuit, hold that the common-interest doctrine applies only to communications between parties or potential parties to litigation. *E.g.*, *In re Santa Fe Intern. Corp.*, 272 F.3d 705, 710 (5th Cir. 2001). For those courts, the doctrine only applies if there is at least a "palpable threat of litigation at the time of the communication, rather than a mere awareness that one's questionable conduct might some day result in litigation." *Id.* Other courts expressly reject this restriction and instead hold that "communications need not be made in anticipation of litigation to fall within the common interest doctrine." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007) (citing

In re Grand Jury Subpoena (Custodian of Records, Newparent, Inc.), 274 F.3d 563, 572 (1st Cir. 2001); *In re Regents of the Univ. of California*, 101 F.3d 1386, 1390–91 (Fed. Cir. 1996); *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996); *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989); *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987)). Thus, the Third Circuit has stated that the common-interest doctrine, which it calls the community-of-interest privilege, "applies in civil and criminal litigation, and *even in purely transactional contexts*." *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (emphasis added). Further, the Restatement provides that the common-interest doctrine applies "[i]f two or more clients with a common interest in a litigated *or nonlitigated* matter are represented by separate lawyers and they agree to exchange information concerning the matter." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (emphasis added).

Texas has defined the exception strictly, making it particularly important that Texas lawyers understand its limits so as to avoid unintentional waiver of the attorney-client privilege.

III. TEXAS' ALLIED LITIGANT DOCTRINE

Texas courts refer not to the "common-interest" doctrine, but to the "allied litigant" doctrine. *See In re XL Specialty Ins. Co.*, 373 S.W.3d at 52. The allied litigant doctrine stems from Texas Rule of Evidence 503, which provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client . . . by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action.

Tex. R. Evid. 503(b)(1)(C). In *In re XL Specialty*, the Supreme Court of Texas explained how the allied litigant doctrine applies in Texas. In that case, an employee of Cintas Corporation, Jerome Wagner, sought workers' compensation benefits for a work-related injury. *In re XL Specialty*, 373 S.W.3d at 48. Wagner's claim was denied, resulting in a contested administrative hearing between Wagner and XL Specialty Insurance Company, Cintas' workers' compensation insurer. *Id.* During that hearing, XL's outside counsel sent communications about the status and the evaluation of the proceedings to Cintas. *See id.* Wagner later sued XL and sought discovery of those communications. *See id.* XL argued that the communications were protected by the attorney–client privilege, but the Texas Supreme Court disagreed.

The court first defined three different terms that are sometimes used interchangeably but, according to the court, "involve distinct doctrines that serve different purposes." *Id.* at 50–52. The three terms are "joint client," "joint defense," and "common interest." *Id.* The joint-client doctrine applies "[w]hen the same attorney simultaneously represents two or more clients on the same matter." *Id.* at 50 (alteration in original) (quoting PAUL R. RICE, ATTORNEY–CLIENT PRIVILEGE IN THE UNITED STATES § 4:30 (2011)). As noted above, communications made by joint clients to their attorney are privileged. *Id.*

The court then defined "what have been called the joint defense and common interest doctrines." *Id.* at 50–51. "The joint defense rule applies when multiple parties to a lawsuit, each represented by different attorneys, communicate among themselves for the purpose of forming a common defense strategy." *Id.* at 51 (citing *In re JDN Real Estate—McKinney L.P.*, 211 S.W.3d 907, 922 (Tex. App.—Dallas 2006, pet. denied)). As defined by the court, "[t]he joint defense doctrine applies only in the context of litigation." *Id.* (citing VINCENT S. WALKOWIAK, THE ATTORNEY–CLIENT PRIVILEGE IN CIVIL LITIGATION 18 (4th ed. 2008)). The "common interest rule" (which, the court explained, is "also known as the 'community of interest,' 'pooled interests,' or 'allied lawyer' doctrine'") is "more expansive than the joint defense doctrine" because, although the parties "must share a mutual interest," the rule applies to "two or more separately represented persons whatever their denomination in the pleadings *and whether or not involved in litigation*." *Id.* (emphasis added) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 reporter's note to cmt. b (AM. LAW INST. 2000)).

The court ultimately concluded, however, that none of these three doctrines accurately described the privilege at issue in the case before it. The joint client doctrine did not apply because XL Specialty and Cintas were not joint clients of the same lawyer. *Id.* at 54–55. As for the joint defense and common-interest doctrines, the court held that the applicable Texas Rule of Evidence, Rule 503(b)(1)(C), does not conform perfectly to either doctrine. *Id.* at 51–53. Instead, the court determined that the Texas rule is more appropriately termed an "allied litigant" doctrine. *Id.* at 52. It then laid out the restrictions imposed by that doctrine and explained how it differs from others.

A. Pending Action Requirement

The court first explained that "in contrast to the proposed federal rule," which expressly embodies a

more expansive common-interest doctrine,[1] "Texas requires that the communications be made in the context of a pending action." *Id.* at 51-52 (citations omitted). Therefore, "in jurisdictions like Texas, which have a pending action requirement, no commonality of interest exists absent actual litigation." *Id.* at 52. Texas is not alone in imposing this requirement. Hawaii, Maine, Mississippi, New Hampshire, Oklahoma, North Dakota, South Dakota, Arkansas, Kentucky, and Vermont also require communications to be made in the context of pending litigation in order for the doctrine to apply. *See id.* at 52 n.8; *Ambac Assur. Corp.*, 57 N.E.3d at 36 n.2. In addition, Uniform Rule of Evidence 502(b)(3) includes a "pending action" requirement. UNIF. R. EVID. 502(b)(3) (UNIF. LAW COMM'N 1999). Nevertheless, as explained above, federal circuit courts generally do not limit the doctrine to co-litigants in pending litigation—indeed, the majority of circuits do not require a connection to even potential litigation.

B. Attorney-Sharing Requirement

Next, the court in *In re XL Specialty* clarified that Texas' "allied litigant doctrine protects communications made between a client, or the client's lawyer, to another party's lawyer, *not to the other party itself*." *In re XL Specialty*, 373 S.W.3d at 52–53 (emphasis added). According to the court, "[t]his attorney-sharing requirement makes clear that the privilege applies only when the parties have separate counsel." *Id.* at 53. It also makes clear that, even when there is a common legal interest between parties during a pending action, communication of privileged information between the parties themselves will waive the privilege.

Some federal courts impose the same restriction when applying their formulations of the common-interest doctrine. *See In re Teleglobe*, 493 F.3d at 364 ("[T]o be eligible for continued protection, the communication must be shared with the *attorney* of the member of the community of interest. Sharing the communication directly with a member of the community may destroy the privilege." (citations and footnote omitted)). But not all jurisdictions limit the common-interest doctrine this way. For example, the Fifth Circuit has described, with approval, a case out of the Eastern District of Texas where audio tapes containing conversations between various defendants were held not to be privileged "because they did not meet the basic prerequisites for communications protected by the attorney-client privilege," as they were "merely examples of schmoozing" and were not intended to facilitate the rendition of legal services. *Id.* at 712 (citing *Aiken v. Texas Farm Bureau Mutual Insurance Co.*, 151 F.R.D. 621, 623 (E.D. Tex. 1993)). The Fifth Circuit acknowledged, however, that "it was certainly possible in *Aiken* for the [common-legal-interest] privilege to apply, since the parties asserting the privilege were actual defendants in a lawsuit at the time the communications were made," making clear that, in contrast to the Texas rule, there is no attorney-sharing requirement in the Fifth Circuit. *See id.*

C. Application in *XL Specialty*

After describing the pending action and attorney-sharing requirements, the Supreme Court of Texas concluded that the communications at issue in *In re XL* (namely, the communications regarding the administrative hearing sent from the outside counsel of XL, the workers compensation insurer, to Cintas, the employer) were not protected by the allied litigant doctrine. The court explained: "Here, XL is the client, and the communications were between XL's lawyer and a third party, Cintas, who was not represented by XL's lawyer (or any other lawyer) and was not a party to the litigation or any other related pending action." *In re XL Specialty Ins. Co.*, 373 S.W.3d at 53. While the court acknowledged that XL and Cintas shared a joint interest during the administrative hearings, it explained that "no matter how common XL's and Cintas's interests might have been, our rule requires that the communication be made to a *lawyer or her representative* representing another party in a *pending action.* . . . Those requirements were not met here." *Id.* at 54 (citation omitted).

It is possible that the communications at issue in *In re XL Specialty* would not have been protected even under some federal courts' formulations of the common-interest doctrine. After all, in Texas, workers' compensation claims are brought directly against the workers' compensation insurer, not the employer. *Id.* at 54. That being so, Cintas was arguably not even a potential party, and the communications therefore likely would not have been covered under the Fifth Circuit's conception of the common-interest doctrine. In those courts that do not require a common interest in litigation, however, the communications arguably could have been covered.

In sum, *In re XL* leaves no doubt that, in Texas, the pending action and attorney-sharing requirements make Texas' allied litigant doctrine significantly narrower than the common-interest doctrine applied in many other jurisdictions.

[1] Specifically, Proposed Federal Rule of Evidence 503(b) defines the attorney–client privilege to cover a communication between a client "or his lawyer to a lawyer representing another in a matter of common interest."

IV. INTERACTION BETWEEN THE COMMON-INTEREST DOCTRINE AND THE WORK-PRODUCT PRIVILEGE

Although the Texas Supreme Court in *In re XL Specialty* clearly held that the common-interest doctrine is not an exception to waiver of the attorney–client privilege in Texas, it is currently unclear whether the doctrine (or something like it) applies to work-product under Texas law.

A. Federal Law on Waiver of Work-Product Protection

Federal courts, including the Fifth Circuit, recognize a distinction between waiver of attorney–client privilege and waiver of work-product. Although voluntary disclosure of attorney-client communications to a third party generally waives the privilege (barring some exception such as the common-interest doctrine), "the mere voluntary disclosure to a third person is insufficient in itself to waive the work product privilege." *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989). Rather, voluntarily disclosing work product to a third party constitutes a waiver only when doing so "has substantially increased the opportunities for potential adversaries to obtain the information." *Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 378 (5th Cir. 2010) (quoting 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2024 (3d ed. 2010)). This is because, unlike the attorney-client privilege, "[t]he work product privilege . . . does not exist to protect a confidential relationship but to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of an opponent." *Shields*, 864 F.2d at 382; *accord United States v. Deloitte LLP*, 610 F.3d 129, 140 (D.C. Cir. 2010) ("Voluntary disclosure does not necessarily waive work-product protection, however, because it does not necessarily undercut the adversary process.").

Thus, many federal courts hold that disclosure of work-product to a nonparty will not waive work-product protection, even where disclosure of privileged material to the same nonparty would operate as a waiver of the attorney–client privilege under the applicable form of the common-interest doctrine. This is so even in diversity cases, in which federal courts apply state privilege law, as "the issue of whether documents are exempt from discovery under the attorney work product doctrine is governed by federal law in diversity cases because work product is not a substantive privilege within the meaning of Federal Rule of Civil Procedure 501." *Orchestrate HR, Inc. v. Trombetta*, No. 3:13-CV-2110-P, 2014 WL 884742, at *2 (N.D. Tex. Feb. 27, 2014); *see* Fed. R. Evid. 501 ("[I]n a civil case, state law governs privilege regarding a claim or defense for which state law provides the rule of decision."); *Benson v. Rosenthal*, No. CV 15-782, 2016 WL 3001129, at *8 (E.D. La. May 25, 2016) (applying Texas privilege law and holding that disclosure of privileged communications to nonparty resulted in waiver under allied litigant doctrine but disclosure of work-product to same nonparty did not waive work-product protection); *Boze Mem'l, Inc v. The Travelers Lloyds Ins. Co.*, No. 3:12-CV-669-P, 2013 WL 12123898, at *5 (N.D. Tex. Aug. 16, 2013) (same).

B. Waiver of Work-Product in Texas

It is unclear, however, when the disclosure of work-product to nonparties results in a waiver when the action is pending in Texas state court and, thus, is governed by Texas' work-product doctrine. The work-product doctrine applicable in Texas state court arises from Texas Rule of Civil Procedure 192.5. Neither that rule nor any other rule of procedure describes the circumstances under which disclosure of work-product to third parties will waive work-product protection. Texas case law similarly provides little guidance. The absence of definitive authority permits good-faith arguments on both sides of the issue.

1. Argument to Follow the Federal Approach

On the one hand, one might argue that Texas rules governing the waiver of the attorney–client and other evidentiary privileges do not apply to work-product and, therefore, the same common-law principles that govern waiver of work-product in federal court should govern it in state court. Texas Rule of Evidence 511 sets out the general rule for waiver of evidentiary privileges: "A person *upon whom these rules confer a privilege* against disclosure waives the privilege if . . . the person . . . voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged." Tex. R. Evid. 511(1) (emphasis added). But the work-product privilege is not a privilege conferred by "these rules," i.e., the Texas Rules of Evidence. Rather, as noted above, the work-product doctrine is a function of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 192.5. And although Texas Rule of Civil Procedure 192.5 states that an assertion of work-product is "[f]or purposes of *these rules* [i.e., the Texas Rules of Civil Procedure] . . . an assertion of privilege," Tex. R. Civ. P. 192.5(d), it does not say that work-product is a privilege for purposes of Texas Rule of Evidence 511.

Moreover, the Texas Supreme Court often looks to federal law in interpreting the scope of work-product protection. *E.g.*, *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 202 (Tex. 1993) ("There is nothing to indicate that the Texas concept of 'work product' was intended to be different from that of the federal courts. We have in the past looked to federal precedent in deciding work product questions." (citations omitted)

(citing *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987))). In fact, the Austin Court of Appeals has cited the preeminent federal case on work-product waiver in discussing the scope of work-product protection, though without actually discussing the waiver issue. *Wiley v. Williams*, 769 S.W.2d 715, 717 (Tex. App.—Austin 1989, no writ) (citing *United States v. AT&T Co.*, 642 F.2d 1285 (D.C. Cir. 1980)) ("The purpose of the work product privilege is to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery efforts of the opponent.").

Based on these authorities, one could argue that Texas courts should look to federal law for standards on waiver of work-product and hold that disclosing work-product to a nonparty waives work-product protection only if doing so "has substantially increased the opportunities for potential adversaries to obtain the information." *Ecuadorian Plaintiffs*, 619 F.3d at 378.

2. Argument that Texas Rule of Evidence 511 Applies

On the other hand, one could also make a good-faith argument that work-product is subject to the general waiver rule in Texas Rule of Evidence 511 and, therefore, is waived by voluntary disclosure to nonparties. Indeed, the Texas Supreme Court has cited Texas Rule of Evidence 511 in holding that a party waived the work-product privilege. *Axelson, Inc. v. McIlhaney*, 798 S.W.2d 550, 553–54 (Tex. 1992) (citing Tex. R. Evid. 511) (holding that attorney–client and work-product privileges were waived because of disclosure to nonparties); *see also In re Bexar Cty. Criminal Dist. Attorney's Office*, 224 S.W.3d 182, 196 (Tex. 2007) (Johnson, J., dissenting) ("[T]o the extent a work product privilege exists, it can be waived . . . If a privilege applies, it is waived if the 'person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure is itself privileged.'" (quoting Tex. R. Evid. 511(a)(1))). It is worth noting, however, that the parties in *Axelson* did not expressly raise the applicability of Rule 511 to work-product, and even if they had, the disclosures in that case likely would have constituted waivers even under federal work-product law because they increased the likelihood that adversaries would discover the information. *See Axelson*, 798 S.W.2d at 554 ("[T]here was evidence that the investigation was disclosed to the FBI, IRS, and the *Wall Street Journal*.").

Rule 511 itself provides additional support for applying its strict waiver rule to work-product. In 2015, Rule 511 was amended to add paragraph (b), which provides circumstances under which attorney–client *and work-product* privileges are not waived, "[n]otwithstanding paragraph (a)." *See* Tex. R. Evid. 511(b). Of course, if the general waiver rule in paragraph (a) of Rule 511 does not apply to work-product, then there would be little reason to specifically include work-product in the exception provided in subsection (b). Therefore, the recent amendment suggests that the drafters of that amendment believed work-product was already subject to the waiver rule in paragraph (a).

That said, if the general waiver-by-disclosure rule in Rule 511 applies to work-product, it is unclear if even the allied litigant doctrine (much less the common-interest doctrine) would apply. Rule 511 itself does not contain any joint-client or allied-litigant exceptions. Instead, it states that if the holder of a privilege voluntarily discloses privileged information, the privilege is waived "*unless such disclosure is itself privileged*." Disclosure of *attorney–client* communications to allied litigants is itself privileged because Rule 503(b)(1)(C) makes it so. But nothing in Rule 503 or any other rule makes such disclosures of work-product similarly privileged. Thus, applying Rule 511(a) to work-product could require Texas state courts to apply a much stricter waiver standard to work-product than attorney–client privilege, which would run counter to the rule in federal court and the logical underpinnings of the work-product doctrine.

Although good arguments exist on both sides of the issue, until Texas courts provide guidance on the waiver of work-product, attorneys would be wise to operate under the assumption that Rule 511 applies to disclosure and waiver of work-product.

V. SUGGESTIONS FOR MULTI-STATE PRACTICE IN LIGHT OF *XL SPECIALTY*

Because Texas' allied litigant doctrine differs significantly from the common-interest doctrine recognized by many federal courts and other states, out-of-state clients and counsel might incorrectly assume that communications with certain nonparties are protected when they are not. It is therefore critical to advise clients and co-counsel about the restrictions of the allied litigant doctrine as early as possible.

It is also important to determine if Texas privilege law applies in the first place. This is not always an easy task. Of course, federal courts exercising federal-question jurisdiction will apply the federal common law of attorney–client privilege, including the common-interest doctrine. It is equally clear, as explained above, that federal courts sitting in either federal-question or diversity jurisdiction will apply the federal work-product doctrine. It is less clear, however, what privilege law applies in federal courts sitting in diversity. Federal Rule of Evidence 501 states that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." But the rule is silent on *which* state's law applies to the state-law

claim or defense. Is it the law of the same state whose law supplies the rule of decision? That is, if the case involves a breach of contract claim governed by New York law, does New York law necessarily govern privilege in the case? Some federal courts in Texas appear to have assumed this to be the proper approach. *In re: Depuy Orthopaedics, Inc.*, No. 3:11-MD-2244-K, 2016 WL 6583654, at *1 (N.D. Tex. Jan. 5, 2016) (applying Texas privilege law because "[a]ll parties have applied Texas law in their legal arguments"); *Strategic Forecasting Inc. v. Scottsdale Indem. Co.*, No. A-13-CV-829 LY, 2013 WL 12183361, at *3 n.4 (W.D. Tex. Nov. 14, 2013) (applying Texas privilege law because "the dispute underlying this matter is governed by Texas law").

Alternatively, should the federal court apply the conflict-of-laws rules of the state in which it sits to determine which state's privilege law applies? Returning to the New York-law breach-of-contract claim example, assume that the federal court in question sits in Texas. Rather than simply applying New York privilege law because it supplies the rule of decision, should the federal court instead apply Texas conflict-of-laws principles to determine which state's privilege law applies, effectively applying the same privilege law that a Texas state court would? This appears to be the approach approved by the Fifth Circuit. *See Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980) ("[T]he availability of a privilege in a diversity case is governed by the law of the forum state. The question of which law *Texas, the forum state, would apply* is difficult." (emphasis added)).

Texas state courts (and thus Texas federal courts sitting in diversity that follow the approach just discussed) apply Section 139 of the Restatement (Second) of Conflict of Laws to determine which state's privilege law applies in a particular case.[3] *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995). If the communication would not be protected under Texas attorney–client privilege, but would be under the law of the state with the "most significant relationship" to the communication, Texas courts will apply the law of the state with the most significant relationship. *Id.* Usually, the state with the most significant relationship will be the state where the communication took place. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 139 cmt. e). Thus, parties hoping to protect communications that would not be privileged under Texas privilege law should consider whether the communications were made in a state where they would be privileged.

[3] This is not true of work-product "privilege." Like federal courts, Texas state courts apply their own work-product doctrine.