

PROPOSED AMENDMENT TO TEXAS RULE OF EVIDENCE 511
(Jan 20, 2011 revised draft)

Rule 511. Waiver by Voluntary Disclosure

(a) General Rule

A person upon whom these rules confer a privilege against disclosure waives the privilege if:

- (1) 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 itself is privileged; or
- (2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

(b) Limitations on Waiver

Notwithstanding paragraph (a), the following provisions apply, in the circumstances set out, to disclosure of a communication or information privileged by these rules or covered by the work-product protection.

(1) Disclosure made in a federal or state proceeding or to a federal or state office or agency; scope of a waiver. — When the disclosure is made in a federal or state proceeding of any state or to a federal or state office or agency of any state and waives the privilege or protection, the waiver extends to an undisclosed communication or information only if:

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

(2) Inadvertent Disclosure in State Civil Proceedings. — When made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Tex. R. Civ. P. 193.3(d).

(3) Controlling Effect of a Court Order (alternative #1)

A disclosure made in litigation pending before a federal court or a state court of any state that has entered an order that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in a Texas state proceeding.

(3) Controlling Effect of a Court Order (alternative #2)

(A) *Order of any state court.* A disclosure made pursuant to an order of a state court of any state that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in any Texas state proceeding.

(B) *Order of a federal court.* A disclosure made in litigation pending before a federal court that has entered an order that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in a Texas state proceeding.

(3) Controlling Effect of a Court Order (alternative #3- currently favored by AREC)

(A) *Generally.* A disclosure made in litigation pending before a federal court or a state court of any state that has entered an order that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in a Texas state proceeding.

(B) *Limitation for order of a state court.* The order of a state court of any state that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is not effective in a Texas state proceeding (except the proceeding in which the order is entered) unless the disclosure was made either pursuant to the court order or pursuant to an agreement of the parties, subsequently incorporated into an order of the court, regarding the effect of a disclosure.

(4) Controlling Effect of a Party Agreement. — An agreement on the effect of disclosure in a state proceeding of any state is binding only on the parties to the agreement, unless it is incorporated into a court order.

Comment

The addition of Rule 511(b) is designed to align Texas law with Federal Rule 502, which was enacted in 2008 and which governs only lawyer-client privilege and work-product waivers. Consequently, Rule 511(b) addresses only those waiver issues addressed in Federal Rule 502. As the phrase "in the circumstances set out" in the first sentence of Rule 511(b) makes clear, Rule 511(b) governs only certain types of waiver issues regarding the lawyer-client privilege and work-product. The failure to address in Rule 511(b) other waiver issues and waiver issues regarding other privileges or protections is not intended to affect the law regarding those other issues, privileges or protections.

Rule 511(b) does not govern whether an inadvertent disclosure of privileged matter constitutes a waiver. An inadvertent disclosure that is made in the course of state civil discovery is governed by Texas Rule of Civil Procedure 193.3(d). An inadvertent disclosure that is made in a Federal proceeding or to a Federal office or agency is governed by Federal Rule 502(b).

Rule 511(b) intentionally does not define "work product." It is anticipated that courts will apply the definition of "work product" applicable at the time. *See, e.g.,* TEX. R. CIV. P. 192.5 (defining "work product" for civil cases), and *Pope v. State*, 207 S.W.3d 352, 357-363 (Tex. Crim. App. 2006) (addressing "work product" in criminal case).

Rule 511(b) provides the rule of decision governing the effect disclosures made to offices or agencies of any state, and to disclosures, orders, or agreements made in proceedings pending in courts of any state.

Rule 511(b)(3) recognizes that "[c]onfidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery." Advisory Committee's Note to Federal Rule of Evidence 502. Rule 511(b)(3) authorizes the use of such confidentiality orders and addresses to extent to which Texas courts are bound by such confidentiality orders entered by a federal court, the court of another state, or another Texas court.

Rule 511(b)(4) makes clear that a confidentiality agreement entered into between parties that has not been incorporated into a court order binds only the parties to the agreement. The effect of a confidentiality order entered by a court—whether of the court's own devising or that incorporates an agreement between the parties—is governed by Rule 511(b)(3).

Comments that could accompany Alternative #3 to part (3), above:

Rule 511(b)(3) recognizes that “[c]onfidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery.” Advisory Committee’s Note to Federal Rule of Evidence 502. Rule 511(b)(3) authorizes the use of such confidentiality orders and addresses to extent to which Texas courts are bound by such confidentiality orders entered by a federal court, the court of another state, or another Texas court.

When a federal court enters such an order--providing that a disclosure connected with the litigation pending before that court of lawyer-client or work-product privileged material does not constitute a waiver—Rule 511(b)(3)(A) provides that Texas courts must honor that order. That is mandated by Federal Rule of Evidence 502(d).

*Likewise, when either another Texas state court or the state court of another state enters such a confidentiality order, Rule 511(b)(3)(A) provides that Texas courts must honor that order. Rule 511(b)(3)(B), however, limits in one respect this general rule with regard to such orders entered by either another Texas state court or the state court of another state. It does not allow a party who has waived the privilege to undo the waiver as to parties in other litigation or future adversaries by obtaining an after-the-fact order protecting already-waived material. For example, a party that deliberately discloses privileged material by blogging, see, e.g., *Lenz v. Universal Music Corp.*, 2010 WL 4286329 (N.D.Cal. 2010), would ordinarily be deemed to have waived the privilege under the applicable provisions of Rule 511(a) and (b)(1)-(2). Even if the parties had previously agreed to or the court had previously entered a confidentiality order providing that disclosure of privileged material during discovery would not constitute a waiver, the disclosure by blogging would not have been pursuant to such an agreement or order and would still constitute a waiver. A party should not be permitted to undo the waiver by offering to settle the case on terms favorable to its opponent on the condition that the opponent not object to the party’s obtaining a court order declaring that no waiver had occurred. If a court were to enter such an order, Rule 511(b)(3)(B) provides that a Texas court would not be bound by that order. This limitation in Rule 511(b)(3)(B) applies only to such orders entered by state courts because Federal Rule of Evidence 502(d) arguably would compel state courts to honor such orders entered by federal courts.*

Rule 511(b)(4) makes clear that a confidentiality agreement entered into between parties that has not been incorporated into a court order binds only the parties to the agreement. The effect of a confidentiality order entered by a court—whether of the court’s own devising or that incorporates an agreement between the parties—is governed by Rule 511(b)(3).