# *Chapter Ten*: The Application of Conflict of Laws to Evidentiary Privileges

E. Todd Presnell

James A. Beakes

Return to book table of contents

E. Todd Presnell is a Member in the Nashville office of Miller & Martin PLLC where he practices in the areas of commercial, employment, and products liability litigation. He is a frequent author and lecturer on attorney-client privilege and related issues. Mr. Presnell is a graduate of The University of Memphis, Cecil C. Humphreys School of Law, where he served as the Editor-in-Chief of *The University of Memphis Law Review*. He currently serves as Chair of the DRI Young Lawyers Committee.

James A. Beakes is an Associate in the Nashville office of Miller & Martin PLLC where he practices primarily in the areas of personal injury, products liability, and transportation litigation. Mr. Beakes is a graduate of Duke University and Vanderbilt University Law School, where he was a Managing Editor of *The Vanderbilt Law Review*.

# The Application of Conflict of Laws to Evidentiary Privileges

## Table of Contents

I. Conflict of Laws in State Courts .......... 162
A. Territorial Approach .......... 162
B. Interest-Related or Most Significant Relationship Approach .......... 163
II. Conflict of Laws in Federal Courts .......... 167
A. Vertical Choice of Law Analysis .......... 168
B. Horizontal Choice of Law Analysis .......... 168
III. Choice of Law Contract Provisions .......... 168
IV. Practice Tips .......... 170

# The Application of Conflict of Laws to Evidentiary Privileges

A complicated yet important issue that may arise in cases involving corporate evidentiary privileges is the choice of law (also referred to as conflict of laws) that will be applied by courts in resolving a dispute when a privilege claim arises. At its simplest, choice of law considerations may arise in "[a]ny case whose facts relate to more than one state or nation, so that in deciding the case it is necessary to make a choice between the relevant laws of the different states or countries…" R. Lefler, L. McDougal, and R. Felix, AMERICAN CONFLICTS LAW, at 3 (4th ed. 1987). In the context of evidentiary privileges, a question may arise whenever a privilege claim is asserted in a court of the forum state to protect a communication made or received in one or more different states. While the choice of law consideration will not arise in cases where the law of different jurisdictions is not implicated, when it does come into play, the choice of law to be applied by a court can be of extreme importance in determining whether a communication is or is not discoverable.

Due to the varying legal constructs applied by federal and state courts, it can be a daunting task for corporate counsel to determine on the front end whether documents or communications may be considered privileged. Indeed, the recognition and interpretation of the various evidentiary privileges can vary greatly both from state to state and between state and federal courts. In short, not all privilege laws are the same. Further, the choice of law issue becomes more complicated in federal court depending upon whether the case presents federal question, supplemental or pendent, or diversity jurisdiction.

In an attempt to provide some clarity to this often esoteric and confusing concept, the following hypothetical provides an example of circumstances under which such a choice of law question may arise:

> A case is pending in the state court of state A involving an automobile accident that occurred in state B between a citizen and resident of state B and a trucking company with its principal place of business in state A and its driver who is a resident of state C. As a result of the accident, the plaintiff sought medical treatment from a doctor in state D. The defendant intends to depose the plaintiff's treating physician and is seeking testimony from the physician concerning his consultation and treatment of the plaintiff, and more specifically regarding statements made by the plaintiff regarding previous injuries and the extent of his injuries. The plaintiff objects to the provision of such testimony by the physician based on the physician-patient privilege.
>
> State A does not recognize any form of the physician-patient privilege. However, state D (where the communication took place) recognizes the physician-patient privilege based on the widely recognized policy of fostering free exchange of information between a patient and his physician. Further, the plaintiff's home state, state B, recognizes the physician-patient privilege, but deems such a privilege waived when the plaintiff puts his physical condition at issue in a pending litigation.

When the court in state A is faced with determining whether to allow the testimony of the plaintiff's physician sought by the defendant, the question that naturally arises in this hypothetical is which state's law relating to the application and interpretation of the physician-patient privilege will the court apply.

While this hypothetical cites the specific example of the application and interpretation of the physician-patient privilege, conflict of law considerations are equally applicable to each of the different types of privilege claims. *See, e.g.*, *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995) (discussing choice of law considerations relating to the attorney-client privilege); *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466 (S.D.N.Y. 2003) (discussing choice of law considerations relating to joint defense privilege); *Bondi v. Grant Thornton Int'l*, No 04 Civ. 9771 (LAK), 2006 WL 1817313 (S.D.N.Y. June 30, 2006) (discussing choice of law considerations relating to self-evaluation privilege); *Hercules, Inc. v. Martin Marietta Corp.*, 143 F.R.D. 266 (D. Utah 1992) (discussing choice of law considerations relating to accountant-client privilege); *Davis v. Leal*, 43 F. Supp. 2d 1102 (E.D. Cal. 1999) (discussing choice of law consideration relating to financial privacy/bank examiners privilege and trade secret privilege); *Patt v. Family Health Sys., Inc.*, 189 F.R.D. 518 (E.D. Wis. 1999) (discussing choice of law consideration relating to peer review privilege). Accordingly, understanding

the legal constructs that may be applied by the courts of different states or the federal courts is of particular importance to corporate counsel. This chapter, therefore, provides a workable overview of the various considerations that corporate counsel must navigate in deciding how to approach the conflict of laws problem.

## I. Conflict of Laws in State Courts

There are two main approaches taken by state courts in dealing with choice of law questions relating to evidentiary privileges. While there are a few hybrid choice of law rules recognized by courts in a small minority of states, for the purposes of this summary these choice of law rules will be grouped into two larger general categories—the "territorial approach" as set forth in the *Restatement (First) Conflict of Laws* and the "most substantial relationship" test set forth in the *Restatement (Second) Conflict of Laws*. A summary of each of these two approaches, as well as a survey of the states that have chosen to apply each approach, is provided below. Moreover, a listing of states that have not definitively chosen either choice of law rule in the context of evidentiary privileges is provided, along with a summary of each state's choice of law tendencies in other areas of the law. In these instances, it is difficult to predict the rule a court in each state would apply if confronted with this issue, which may arise in innumerable factual scenarios. Therefore, one can only hope to make a prediction based on each state's courts' rulings on choice of law issues in other areas of the law.

### A. Territorial Approach

The first approach, which is less common but still applied in a minority of states, is the approach set forth in the *Restatement (First) Conflict of Laws*. Section 597 of the *Restatement (First)* provides, simply, that "[t]he law of the forum determines the admissibility of a particular piece of evidence." Restatement (First) Conflict of Laws §597. In a general sense, this "territorial approach" concentrates on the location where the particular event at issue took place. In the realm of tort law, this choice of law construct is commonly termed *lex loci delicti*, which means the place where the tort was committed. In the area of contract law, it is termed *lex loci contractus*, which focuses on where the subject contract was executed or to be performed. As it relates to evidentiary privileges, this approach provides that the evidentiary rules of the forum state—where the action is pending—should be applied to resolve any choice of law issues relating to evidentiary privileges.

Although this rule provides a very efficient and accurate means for determining which jurisdiction's law will be applied in deciding a privilege claim, it ignores the various policy considerations underlying different jurisdictions' acceptance or refusal to recognize the various evidentiary privileges. For this reason, while this approach was, at one time, the majority approach in dealing with choice of law questions in the context of evidentiary privileges, the approach has come to be widely criticized by scholars as outmoded, and has been rejected in all but a small number of states.

Under the hypothetical set forth above, if state A is one of the minority of jurisdictions still following this "territorial approach," the answer to the choice of law question is an easy one—the state A court would apply its own law on the physician-patient privilege without regard for the various policy considerations of the other states with an interest in the case. Therefore, the state A court would allow the defendant to elicit the sought-after physician's testimony regardless of the privilege law of the state of residence of the party making the statements (the plaintiff) or of the party to whom the statements were made (the physician) or of the state where the actual statements were made.

The following states apply the territorial approach as set for in the *Restatement (First) Conflict of Laws*:

*Alabama*. The United States District Court for the Southern District of Alabama held that Alabama courts remain faithful to the principle of *lex loci delicti*, explicitly rejecting the *Restatement (Second) Conflict of Laws* "substantial relationship" test. This rejection of the *Restatement (Second) Conflict of Laws* amounts to an acceptance of the *Restatement (First) Conflict of Laws* §597 territorial approach. *See Whatley v. Merit Distribution Servs.*, 191 F.R.D. 655, 659–60 (S.D. Ala. 2000).

*Alaska.* While not a definitive statement of Alaska law, the United States District Court for the District of Alaska suggested in *Garner v. Ford Motor Co.*, 61 F.R.D. 22, 23 (D. Alaska 1973), that Alaska courts

would follow the "territorial approach" of the *Restatement (First) Conflict of Laws* in applying the law of the forum state to determine whether the plaintiff had waived the physician-patient privilege.

*Arkansas*. Arkansas courts unequivocally still apply the "territorial approach" of the *Restatement (First) Conflict of Laws*. *See Bussard v. Arkansas*, 747 S.W.2d 71, 76 (Ark. 1988) ("It is well settled that the admissibility of evidence is governed by the law of the forum state.") (citing *Restatement (First) Conflict of Laws* §597 (1934)); *see also Harlan v. Lewis*, 141 F.R.D. 107, 110 (E.D. Ark. 1992).

*Nevada*. The United States District Court for the District of Nevada specifically rejected the *Restatement (Second) Conflict of Laws* approach and, instead, found that Nevada courts follow the vested rights theory (also known as the *lex loci* rule). *See Laxalt v. C.K. McClatchy*, 116 F.R.D. 438, 447 (D. Nev. 1987).

*Virginia*. The United States District Court for the Eastern District of Virginia specifically held that Virginia courts apply the law of the forum when dealing with questions of evidentiary privileges. *See Hatfill v. The New York Times Co.*, 459 F. Supp. 2d 462, 465 (E. D. Va. 2006).

While courts in the following states have not definitively chosen the choice of law rule to be applied in the context of evidentiary privileges, case law suggests that, if faced with this question, the courts would apply the territorial approach set for in the *Restatement (First) Conflict of Laws*:

*Connecticut*. Connecticut has not specifically addressed the choice of law issue relating to evidentiary privileges. Although there is no case law directly on point, in *O'Connor v. O'Connor*, 519 A.2d 13, 22 n.7 (Conn. 1986) the Connecticut Supreme Court held that it would "incorporate the guidelines of the Restatement as the governing principles of those cases in which the application of the doctrine of lex loci would produce an arbitrary, irrational result." Subsequently, however, one court stated that "Connecticut has not abandoned the traditional *lex loci delicti* rule for choice of law questions in tort cases." *See*, *e.g.*, *Belisle v. Dari-Farms Ice Cream Co., Inc.*, No. 2:92CV-940 (JAC), 1993 WL 513277, at *2 (D. Conn. 1993).

*Georgia*. While Georgia courts have not addressed the choice of law question with regards to evidentiary privilege issues, Georgia appears to follow the "territorial approach." Georgia has consistently applied the "territorial approach" to other choice of law issues and Georgia courts appear to hold the *Restatement (Second) Conflict of Laws* in low esteem. *See*, *e.g.*, *Dowis v. Mud Slingers, Inc.*, 621 S.E.2d 413, 416, 418, 419 (Ga. 2005); *Shorewood Packaging Corp. v. Commercial Union Ins. Co.*, 865 F. Supp. 1577, 1578 (N.D. Ga. 1994).

*Kansas*. Although Kansas has not directly addressed choice of law in the privilege context, Kansas generally follows the *Restatement (First) Conflict of Laws* in deciding conflict of laws issues. *See Ary Jewelers, LLC v. Krigel*, 85 P.3d 1151, 1162 (Kan. 2004).

*New Mexico*. New Mexico courts have not adopted a choice of law rule relating to evidentiary privileges. It appears, however, that New Mexico courts continue to apply the traditional *lex loci* approach in conflict of laws areas. *See*, *e.g.*, *Terrazas v. Garland & Loman, Inc.*, 142 P.3d 374, 378 (N.M. Ct. App. 2006).

*South Carolina*. While it does not appear that courts in South Carolina have dealt with choice of law considerations in the context of evidentiary privileges, South Carolina courts seem to suggest that they still follow the traditional choice of law rules. *See Rawl's Auto Auction Sales, Inc. v. Dick Herriman Ford, Inc.*, 690 F.2d 422, 426 (4th Cir. 1982).

### B. Interest-Related or Most Significant Relationship Approach

The majority of states currently look to the principles set forth in the *Restatement (Second) Conflict of Laws* when dealing with choice of law issues as they relate to evidentiary privileges. This approach has been described as an "interest analysis" or the "most significant relationship" analysis.

Section 127 of the *Restatement (Second)* provides that "[t]he local law of the forum governs rules of pleading and the conduct of proceedings in court." Restatement (Second) Conflict of Laws §127 (1971). The rule generally involves issues pertaining to the form of pleadings, amendments, joinder, discovery, trial practice, costs, and proceedings on appeal. *Id.* cmt. a. The issue of privileges, therefore, should not be considered under this rule. *See Sterling Fin. Mgmt., LP v. UBS Painewebber, Inc.*, 782 N.E.2d 895 (Ill. App. Ct. 2002). Section 138 of the *Restatement (Second) Conflict of Laws*, rather, should be considered as it provides that "[t]he local law of the forum determines the admissibility of evidence, except as

provided in §§139–141." RESTATEMENT (SECOND) CONFLICT OF LAWS §138.

The primary exception—Section 139—pertains to "privileged communications" and provides as follows:

(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.

(2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

RESTATEMENT (SECOND) CONFLICT OF LAWS §139. These somewhat confusing paragraphs can be simplified by saying that the *Restatement*'s approach implements the "most significant relationship" principle but does so in a way that favors admission of the privileged communication. Generally, subsection (1) permits the admission of privileged communications if the state with the most significant relationship allows it.

Subsection (2), on the other hand, does not permit the admission of communications privileged under the law of the state with the most significant relationship unless there are countervailing reasons for doing so. In determining whether there are countervailing considerations, a court should consider (1) the number and nature of the contacts in the forum state; (2) the relative materiality of the evidence that is sought to be excluded; (3) the kind of privilege involved; and (4) fairness to the parties. RESTATEMENT (SECOND) CONFLICT OF LAWS §139 cmt. d. It is important to note that the forum court should be "more inclined to give effect to a privilege if it was probably relied upon by the parties." *Id.* As one court described it, "the purpose of the attorney-client privilege and the reliance placed by the client on the confidential nature of the communications create special reasons" why the forum should yield to the privilege law of the state with the most significant relationship. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995).

The application of the "most significant relationship" approach to the factual scenario set forth in the hypothetical above presents a much more difficult analysis to predict which state's law the court in state A would apply to determine whether the defendant may elicit the testimony it seeks. To make such a prediction, counsel would first look to Section 139 of the *Restatement (Second) Conflict of Laws*. At the outset, counsel must predict which state a court would determine has the "most significant relationship" with the sought-after communication. While this determination is clearly a very subjective one, it could be strongly argued that state D (where the actual communication took place) has the "most significant relationship" with the subject communication. However, one could also make a plausible argument that the privilege law of state B (plaintiff's state of residence and the state where the accident at issue occurred) has the "most significant relationship" with the subject communication.

Since a court would most likely determine that state D has the "most significant relationship" to the communication at issue, counsel should rely upon *Restatement (Second) Conflict of Laws* §139(2) since the physician/patient communications would be privileged under the privilege law of state D, and because these communications would not be privileged under the law of the forum state A. Under §139(2), the defendant would be allowed to elicit the physician's testimony unless there is "some special reason" why state A's policy favoring admission of this evidence should not be given effect. Counsel for plaintiff, who wishes to prevent the defendant from eliciting this testimony, would then be forced to present an argument setting forth any "special reason[s]" why the defendant should not be allowed to obtain this testimony. It would then be up to the state A court to decide whether these "special reason[s]" outweigh its own policy favoring the admission of physician/patient communications.

The following states currently appear to apply the modern "most significant relationship" approach set for in the *Restatement (Second) Conflict of Laws*, or a similar multi-factored interest test:

*California*. The United States District Court for the Central District of California held that California's "most significant relationship" test would be applied to determine which state's law applied to determine

whether the subject university study documents were privileged. *See Wolpin v. Phillip Morris, Inc.*, 189 F.R.D. 418, 423–24 (C.D. Cal. 1999).

*Colorado*. The Colorado Court of Appeals adopted the *Restatement (Second) Conflict of Laws* approach in finding that Colorado law governed in this case dealing with the spousal privilege. *See People v. Thompson*, 950 P.2d 608, 611 (Colo. Ct. App. 1997).

*Delaware*. Delaware courts look to the *Restatement (Second) Conflict of Laws* for guidance in choice of law disputes. The Third Circuit Court of Appeals applied *Restatement (Second) Conflict of Laws* §139 in dealing with choice of law questions in the context of evidentiary privileges. *See In re Teleglobe Communications Corp.*, 493 F.3d 345, 358–59 (3d Cir. 2007) (quoting *Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116 (Del. Ch. 2003)).

*Florida*. The United States District Court for the Middle District of Florida applied §139 of the *Restatement (Second) Conflict of Laws* when applying Florida's choice of law rules in the context of evidentiary privileges. *See Anas v. Blecker*, 141 F.R.D. 530, 532 (M.D. Fla. 1992).

*Illinois*. Illinois courts follow the Restatement *(Second) Conflict of Laws* "most significant relationship" test in the context of evidentiary privileges. *See People v. Allen*, 784 N.E.2d 393, 394 (Ill. App. Ct. 2003).

*Iowa*. Iowa follows the *Restatement (Second) Conflict of Laws* "most significant relationship" test in the context of evidentiary privileges. *See Iowa v. Elderenkamp*, 541 N.W.2d 877, 881 (Iowa 1995).

*Maine*. Maine employs a "functional—multi-factored," "interest analysis," or a "most significant relationship" test in the context of evidentiary privileges. *See State v. Lipham*, 910 A.2d 388, 392 (Me. 2006).

*Maryland*. The United States District Court for the District of Maryland, applying the law of Maryland, used the "most significant relationship" test in dealing with the application of the physician-patient privilege. *See Hill v. Huddleston*, 263 F. Supp. 108, 110 (D. Md. 1967).

*Massachusetts*. Both the First Circuit Court of Appeals and the United States District Court for the District of Massachusetts have indicated that Massachusetts follows the "most significant relationship" test set forth in the *Restatement (Second) Conflict of Laws*. *See Bi-Rite Enter., Inc. v. Bruce Miner Co., Inc.*, 757 F.2d 440, 442 (1st Cir. 1985); *VLT Corp. v. Unitrode Corp.*, 194 F.R.D. 8, 16 (D. Mass. 2000).

*Michigan*. The United States District Court for the Eastern District of Michigan specifically applied the "most significant relationship" test in dealing with a question relating to the application of the reporter's privilege. *See Compuware Corp. v. Moody's Investors Servs., Inc.*, 222 F.R.D. 124, 131, 133 (E.D. Mich. 2004).

*Minnesota*. Minnesota adopted the "most significant relationship" test in the context of evidentiary privileges. *See State v. Heaney*, 689 N.W.2d 168, 176 (Minn. 2004).

*Mississippi*. The Mississippi Supreme Court adopted the "center of gravity" test, which is similar to the *Restatement (Second) Conflict of Laws* "most significant relationship" test in that it "directs a determination of which state has the most substantial contacts with the parties and the subject matter of the action." *See Barnes v. Confidential Party*, 628 So. 2d 283, 289 (Miss. 1993).

*New York*. New York courts apply the "center of gravity" or "most significant relationship" test in the context of evidentiary privileges. *See Brandman v. Cross & Brown Co. of Florida*, 479 N.Y.S.2d 435, 437 (N.Y. Sup. Ct. 1984).

*Ohio*. The Ohio Court of Appeals specifically cited to the *Restatement (Second) Conflict of Laws* §139 in deciding which state s law applied to an issue relating to the applicability of the physician-patient privilege. *See Woelfling v. Great-West Life Assurance Co.*, 285 N.E.2d 61, 68 (Ohio Ct. App. 1972).

*Pennsylvania*. Courts in Pennsylvania apply the "most significant relationship" test of the *Restatement (Second) Conflict of Laws* in the context of evidentiary privileges. *See Carbis Walker LLP v. Hill, Barth and King, LLC*, 930 A.2d 573, 577–78 (Pa. Super. Ct. 2007).

*Texas*. The Texas Supreme Court specifically held that Texas courts apply the "most significant relationship" test set forth in the *Restatement (Second) Conflict of Laws*. *See Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995).

*Utah*. The United States District Court for the District of Utah, applying Utah law, applied the "most significant relationship" test in dealing with the application of the accountant-client privilege. *See Hercules, Inc. v. Martin Marietta Corp.*, 143 F.R.D. 266, 269 (D. Utah 1992).

*Washington*. The Washington Court of Appeals specifically applied the "most significant relationship" test set forth in *Restatement (Second) Conflict of Laws* §139. *See State v. Donahue*, 18 P.3d 608, 611 (Wash. Ct. App. 2001).

*Wisconsin*. The Wisconsin Court of Appeals specifically applied the "most significant relationship" test set forth in *Restatement (Second) Conflict of Laws* §139. *See State v. Kennedy*, 396 N.W.2d 765, 770 (Wis. Ct. App. 1986).

Courts in the following states have not specifically adopted either the "territorial approach" of the *Restatement (First) Conflict of Laws* or the "most significant relationship" test of the *Restatement (Second) Conflict of Laws* in the context of evidentiary privileges. Nevertheless, the current state of the law in the following states suggests that, if faced with such a question, courts would adopt the *Restatement (Second) Conflict of Laws* rule or a similar rule.

*Arizona*. While Arizona courts have not specifically adopted a choice of law rule relating to evidentiary privileges, Arizona adheres to the "most significant relationship" test for other actions involving torts, contracts, etc. *See, e.g.*, *Winsor v. Glasswerks PHX, LLC*, 63 P.3d 1040, 1044 (Ariz. Ct. App. 2003); *Swanson v. Image Bank, Inc.*, 77 P.3d 439, 441–42 (Ariz. 2003).

*Hawaii*. Although no Hawaii courts have dealt specifically with the choice of law issue relating to evidentiary privileges, it appears that Hawaii would adopt the *Restatement (Second) Conflict of Laws* "most significant relationship" approach if called upon to answer the question. *See DeBoburt v. Gannett Co., Inc.*, 83 F.R.D. 574, 576–78 (D. Haw. 1979).

*Idaho.* Although no Idaho courts have dealt specifically with the choice of law issue relating to evidentiary privileges, it appears that Idaho would adopt the *Restatement (Second) Conflict of Laws* "most significant relationship" approach if called upon to answer the question. *See Barber v. State Farm Mut. Auto. Ins. Co.*, 921 P.2d 1195, 1199 (Idaho 1997).

*Indiana*. Indiana courts have not specifically addressed choice of law considerations in the context of evidentiary privileges; however, the courts generally follow the "most significant relationship" test in other conflict of laws contexts. *See Am. Employers Ins., Co. v. Coachmen Indus., Inc.*, 838 N.E.2d 1172, 1177 (Ind. Ct. App. 2005).

*Kentucky*. While Kentucky courts have not specifically adopted a choice of law rule relating to evidentiary privileges, Kentucky adheres to the "most significant relationship" test for actions involving torts, contracts, etc. *See Lewis v. Am. Family Ins. Group*, 555 S.W.2d 579, 581 (Ky. 1977).

*Louisiana*. Louisiana adopted a broad civil code that addresses conflicts issues. Although the civil code does not specifically address choice of law as it pertains to evidentiary privileges, there is a general residual conflicts rule which states that "a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue." La. Civ. Code Ann. art. 3515.

*Missouri*. While there is no Missouri case law directly on point, in *Baker v. General Motors*, 209 F.3d 1051, 1057 (8th Cir. 2000), the dissenting opinion suggests that Missouri would apply the *Restatement (Second) Conflict of Laws* approach to choice of law issues relating to privileges. The majority did not reach this issue in its opinion.

*Montana*. Although no Montana courts have dealt specifically with the choice of law issue relating to evidentiary privileges, it appears that Montana would adopt the *Restatement (Second) Conflict of Laws* "most significant relationship" approach if called upon to answer the question. *See Mitchell v. State Farm Ins. Co.*, 68 P.3d 703, 708 (Mont. 2003).

*Nebraska*. While Nebraska has not dealt with the choice of law question specifically relating to evidentiary privileges, Nebraska courts have followed the *Restatement (Second) Conflict of Laws* "most significant relationship" approach relating to other issues. *See, e.g.*, *Heinze v. Heinze*, 742 N.W.2d 465, 468–69 (Neb. 2007).

*New Hampshire*. Although no New Hampshire court has adopted a choice of law rule relating specifically to evidentiary privileges, it appears that New Hampshire would likely adopt the *Restatement (Second) Conflict of Laws* "most significant relationship" test if called upon to answer this specific question. *See Glowski v. Allstate Ins. Co.*, 589 A.2d 593, 595 (N.H. 1991).

*New Jersey*. While New Jersey has not dealt with the choice of law question specifically relating to evidentiary privileges, New Jersey courts have followed the "governmental-interest" test and would likely adopt

the "most significant relationship" or similar test. *See, e.g.*, *Safer v. Pack*, 715 A.2d 363 (N.J. Super. Ct. App. Div. 1998).

*North Carolina*. While no North Carolina court has dealt with the specific choice of law rule regarding evidentiary privileges, the United States District Court for the Eastern District of North Carolina predicted that the "most significant relationship" test would apply to choice of law issues regarding privilege claims in North Carolina. *See Metric Constructors v. Bank of Tokyo-Mitsubishi, Ltd.*, No. 5:97-CV-369BR1, 1998 WL 1742589, at *1 (E.D.N.C. 1998).

*North Dakota*. While North Dakota has not dealt with the choice of law question specifically relating to evidentiary privileges, North Dakota courts follow the *Restatement (Second) Conflict of Laws* "most significant relationship" approach relating to other issues. *See*, *e.g.*, *Nodak Mut. Ins. Co. v. Wamsley*, 687 N.W.2d 226, 230–31 (N.D. 2004).

*Oklahoma*. While Oklahoma has not dealt with the choice of law question specifically relating to evidentiary privileges, Oklahoma courts have followed the *Restatement (Second) Conflict of Laws* "most significant relationship" approach relating to other issues. *See, e.g.*, *Beard v. Viene*, 826 P.2d 990, 995 (Okla. 1992).

*Oregon*. While Oregon has not dealt with the choice of law question specifically relating to evidentiary privileges, Oregon courts have followed the *Restatement (Second) Conflict of Laws* "most significant relationship" approach relating to other issues. *See*, *e.g.*, *DeFoor v. Lematta*, 437 P.2d 107, 108 n.5 (Or. 1968).

*Rhode Island*. In adopting the "interest-weighing approach" in a case dealing with a choice of law question in a tort case, the Rhode Island Supreme Court held: "The interest-weighing approach to conflict of law cases is indeed the better rule, and justice will be more equitably administered if the Rhode Island courts apply that rule to tort conflicts cases coming before them." *See Woodward v. Stewart*, 243 A.2d 917, 923 (R.I. 1968). It is predictable, therefore, that Rhode Island courts would follow the same logic for conflict of laws issues in the privilege arena.

*South Dakota*. While South Dakota has not specifically dealt with the choice of law question specifically relating to evidentiary privileges, the South Dakota Supreme Court has generally adopted the "most significant relationship" test of the *Restatement (Second) Conflict of Laws* relating to other choice of law questions. *See Burhenn v. Dennis Supply Co.*, 685 N.W.2d 778, 784 (S.D. 2004).

*Tennessee*. The United States District Court for the Western District of Tennessee found no Tennessee case considering which state's privilege law should govern where the laws of two states are implicated, but, nonetheless, held that the Tennessee Supreme Court would hold that the question is one of evidence and the law of the forum should govern. *See Union Planters Nat'l Bank v. ABC Records, Inc.*, 82 F.R.D. 472, 473–74 (W.D. Tenn. 1979). Several years later, however, the Tennessee Supreme Court has adopted the "most significant relationship" test relating to choice of law questions in contract cases. *See Hataway v. McKinley*, 830 S.W.2d 53 (Tenn. 1992). Accordingly, Tennessee courts would likely reject the *Union Planters* prediction and follow the most significant relationship test in the area of privileges.

*Vermont*. While Vermont has not specifically dealt with the choice of law question specifically relating to evidentiary privileges, the Vermont Supreme Court generally adopted the "most significant relationship" test of the *Restatement (Second) Conflict of Laws* relating to other choice of law questions. *See Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 971 (Vt. 2006).

*West Virginia*. Although the Supreme Court of West Virginia did not specifically adopt the "most significant relationship" test, it appears that West Virginia courts apply the *Restatement (Second) Conflict of Laws* in the context of evidentiary privileges. *See Kessel v. Leavitt*, 511 S.E.2d 720, 809–10 (W. Va. 1998).

*Wyoming*. Though the choice of law question has not arisen in the context of evidentiary privileges, it appears that, in general, "Wyoming follows the Second Restatement approach in resolving choice of law questions." *R&G Elec., Inc. v. Devon Energy Corp.*, 53 Fed. App'x 857, 859 (10th Cir. 2002).

## II. Conflict of Laws in Federal Courts

When evidentiary privileges are claimed in a case pending in federal court, at least one additional layer of analysis becomes necessary to answer the choice of law question. The relevant questions that must be considered in a federal case were succinctly described as follows:

> Does federal law control, if the case is a federal criminal prosecution? Should federal law control, if the case is civil in nature, based on a cause of action arising under federal law? If the case is a civil action, in which both federal and state claims are before the court, should federal or state law control? And lurking behind all of those questions is the reality that in any circumstance where state law is applicable, the court must then determine *which* state's law it should choose.

John B. Corr, Attorney-Client Privilege in the United States, §12:4 (2d ed. 1999) (emphasis in original).

As these questions indicate, there are two potential conflict of laws issues when a case is pending in federal court. The first is the so-called vertical choice of law analysis, which looks at the conflict between federal and state law. The second is the horizontal choice of law analysis, which, in diversity cases, determines conflict of laws issues between two states. Any attempt at answering these questions must start with Rule 501 of the Federal Rules of Evidence.

### A. Vertical Choice of Law Analysis

With respect to the vertical choice of law analysis, Rule 501 provides that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience." Fed. R. Evid. 501. In other words, when the federal court entertains a case under federal question jurisdiction, 28 U.S.C. §1331, the "[q]uestions of privilege are to be determined by federal common law." *Reed v. Baxter*, 134 F.3d 351, 355 (6th Cir. 1998). Moreover, "in criminal cases, Rule 501 plainly requires that [federal courts] apply the federal law of privilege." *See United States v. Gillock*, 445 U.S. 360, 368 (1980). If the case involves pendent or supplemental state law claims wherein the court has jurisdiction under 28 U.S.C. §1367, the federal court will nevertheless apply federal common law—rather than state law—as to all claims of privilege. *Power & Tel. Supp. Co. v. Suntrust Banks, Inc.*, 2004 WL 784822 (W.D. Tenn. Feb. 17, 2004).

### B. Horizontal Choice of Law Analysis

The rules are different, however, when a federal court entertains a case under diversity jurisdiction, 28 U.S.C. §1332. In that circumstance, Rule 501 provides that, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." Fed. R. Evid. 501. As courts have held, "Rule 501 requires a district court exercising diversity jurisdiction to apply the law of privilege which would be applied by the courts of the state in which it sits." *Union Planters Nat'l Bank of Memphis v. ABC Records, Inc.*, 82 F.R.D. 472, 473 (W.D. Tenn. 1979); *see also Whatley v. Merit Distribution Servs.*, 191 F.R.D. 655, 659 (S.D. Ala. 2000); *Samuelson v. Susen*, 576 F.2d 546, 549 (3d Cir. 1978). This includes a state's conflict of law rules. *Id.* Accordingly, "the court generally looks first to the conflicts of law of the state in which it is sitting and applies that law in determining the privilege asserted." *Id.* In other words, a federal court with diversity jurisdiction will apply the choice-of-law rules of the state in which it is sitting in order to determine which state's privilege law to apply. At that point, counsel must refer to the choice of law rules followed by the forum state and continue the analysis from that point.

## III. Choice of Law Contract Provisions

With all of the uncertainty involved in a conflict of laws analysis, it would seem that, at least in situations where litigation arises over the interpretation of a contract, a choice of law provision in that contract would supply the law that governs any privilege analysis. The ability to create some certainty regarding whether confidential communications and documents will be discoverable would be a significant step for corporate counsel.

Not surprisingly, however, there is a dearth of case law on this subject. Section 187 of the *Restatement (Second) of Conflicts of Law* provides as follows:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit

provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Restatement (Second) Conflicts of Laws §187. While it is clear that the Restatement favors the enforcement of a choice of law provision regarding the interpretation of the contract, it is less clear how the Restatement applies to non-interpretation issues such as evidentiary privileges.

The few courts that have addressed the issue, however, take a strict view of the scope of contractual choice of law provisions. *See Abbott Labs v. Airco, Inc.*, 1985 WL 3596 (N.D. Ill. Nov. 4, 1985); *Hercules, Inc. v. Martin Marietta Corp.*, 143 F.R.D. 266 (D. Colo. 1992). The *Hercules* decision, in fact, presents a factual and legal analysis of the issue that is worthy of a law school exam. In that case, the litigation centered around activities occurring in Utah pursuant to a contractual relationship between Hecules and Martin Marietta, which itself was a subcontract of a contract between Martin Marietta and the U.S. Air Force. 143 F.R.D. at 266. Martin Marietta moved to compel various documents and materials that Hercules claimed were protected by the accountant-client privilege. *Id.* at 267. The accountant-client privilege is recognized in Colorado, *see* Colo. Rev. Stat. §13-90-107, but is not recognized under Utah law. The dispositive question before the court, therefore, was whether Colorado or Utah privilege law applied.

The contract between Hercules and Martin Marietta contained a choice of law provision that provided as follows:

> The Contract shall be governed by, subject to, and construed according to the laws of the State of Colorado, except that when Federal common law of government contracts exists on substantive matters requiring construction under this Contract, such Federal common law shall apply in lieu of state law. . .

*Id*. at 268. Hercules, therefore, argued that, pursuant to this clause, Colorado privilege law applied and the documents should be privileged.

The court, however, disagreed and found that the choice of law provision did not apply to privilege law, finding as follows:

> It should be observed that the clause pertains to the "contract." It does not purport to govern all relationships between the parties and federal common law may govern in some instances. *Nothing in the express terms of the contract applies to the law of privileged communications*. The parties have selected the contract law of Colorado as the substantive law to govern the interpretation of the contract and contractual relationships between the parties, *but nothing more*.

*Id.* (emphasis added). Hercules argued that the choice of law provision shows that the parties elected to have Colorado law govern all substantive aspects of the relationship—not just contract interpretation—and that privilege law was substantive. *Id*. The court rejected this argument, finding that it was "an unwarranted extension of the language of the contract provision and beyond the obvious intention of the parties." *Id*. Noting that "[p]rivilege law is adjectival and governs the admission, exclusion and discovery of evidence in litigation," the court found that the choice of law provision did not "take into consideration the specific contract terms, the relevant evidentiary events, or the justification for application of any privilege." *Id*. The court therefore found that Utah law applied and that the documents must be produced. *Id*. at 270.

While there is not a substantial amount of case law on this issue, the *Hercules* ruling is constructive. Corporate counsel, and particularly in-house counsel,

should not rely upon general choice of law provisions to control privilege law. Rather, corporate counsel should expand the language of these provisions to specifically include privileged communications and documents. Otherwise, general choice of law provisions will likely be insufficient.

## IV. Practice Tips

A determination of whether a communication or document is privileged and therefore protected from discovery will, more often than not, be determined by a court many months or even years after its creation. As such, knowing which jurisdiction's privilege law will ultimately apply to a particular communication or document is, at best, difficult. Nonetheless, there are a few practice tips that will assist the corporate counsel in placing her company in the best position to be successful on a privilege claim.

- Counsel should have a working knowledge of the rules and issues identified above so that she can use them to her advantage when responding to an objection to a claim of privilege. The conflict of laws issue is one that is not well known by many practitioners; therefore, maintaining a working knowledge of these rules will enable the corporate counsel to have advantage over her opponents.
- With some forethought, corporate counsel will in many instances be able to predict the jurisdiction in which a claim will be filed. For example, most employment-related claims, such as wage and hour and discrimination claims, will be filed in federal court. Similarly, most intellectual property claims, such as copyright and trademark issues, will be filed in federal court. Accordingly, corporate counsel should anticipate that privilege challenges of communications and documents prepared regarding a potential federal claim will be determined by federal law, even if there are supplemental state-law claims. As such, corporate counsel should know—before the communication or document is created—whether it will be privileged under federal law.
- Similarly, corporate counsel should be able to predict when a potential claim will be governed by state law, such as general tort claims and breach of contract actions. In these instances, however, it will be more difficult to predict which state's privilege law will apply, whether in state court or in federal court under diversity jurisdiction. Nevertheless, with some anticipation, corporate counsel should be able to narrow the scope of potential privilege laws that could apply and take steps to comply with the law of the state that has the most significant relationship to the potential communication or document. With the "most significant relationship" being the majority rule, corporate counsel will have a greater chance of protecting discovery by following the privilege law of the more interested state.
- To the extent possible, corporate counsel should consider including a choice of law provision in contracts with other parties. If included, corporate counsel will have a good argument that this choice of law clause controls the privilege law that should be applied to any privilege challenge. Moreover, given that there is little case law in this area, it is advisable for corporate counsel to assert in the choice of law provision that it specifically applies to privileged communications and documents.

**Return to book table of contents**