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CONFLICT OF LAWS AND THE ATTORNEY-CLIENT PRIVILEGE: A TERRITORIAL SOLUTION

Steven Bradford*

I. INTRODUCTION

Choice-of-law issues have always been among the most difficult legal issues. Legal questions that are difficult when only one state is involved become herculean when a choice must be made from among the different laws of several jurisdictions. The difficulty of conflicts law is increased by the theoretical quarrels among courts and scholars. Scholars and judges are unable to agree on an underlying theory of choice of law, much less the result in particular cases. A number of different approaches compete for attention, producing an eclectic body of case law.

Originally, “vested rights” territorialism dominated choice of law. Courts applied the law of the state where the cause of action or legal right vested or accrued. However, this approach, best represented by the Restatement of Conflict of Laws, often produced dissatisfying results. The result was often ambiguous in tough cases; courts frequently disagreed about where particular rights vested. Conscious or unconscious manipulation was possible. Further, many of the territorial rules in the First Restatement had no particular anchor in policy.

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5. See, e.g., J. Beale, CONFLICT OF LAWS (1935); J. Story, COMMENTARIES ON THE CONFLICT OF LAWS (1834).
6. RESTATEMENT OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT].
7. See R. Leflar, L. McDougal & R. Felix, supra note 2, at 256-61.
Dissatisfaction with vested rights territorialism led to the proposal of alternative approaches, many of which fall under the general heading of interest analysis and trace their roots to the work of Professor Brainerd Currie. The key to most of the modern approaches is the identification of policy interests a state might have in applying its law to the particular case before the court. Interest analysis and its variants have been popular and have been embraced by many courts, but interest analysis has also produced dissatisfaction. It is just as manipulable and misunderstood as vested rights territorialism, probably more so because the subjectivity of interest analysis allows for mistakes even in easy cases. Critics have also charged that interest analysts artificially limit state policy concerns to simplify choice-of-law analysis. One scholar charges that interest analysis suffers from pro-resident, pro-forum, and pro-recovery biases, reflecting "nothing more than the unexplained value preferences of its proponents."

These problems have led some to reject interest analysis and reaffirm territorialism; over one-fourth of the states still adhere to traditional First Restatement territorialism. The Restatement (Second) of Conflict of Laws responds with a combination of territorialism, interest analysis, and a mishmash of other ideas. The Second Restatement fails miserably at reducing the ambiguity and manipulation inherent in the modern, policy-based approaches. Its compromise approach can

8. See infra text accompanying notes 54-62.
10. See sources cited infra note 56.
12. Brilmayer, supra note 9, at 461.
14. Solimine, supra note 11, at 54.
15. Restatement (Second) of Conflict of Laws (1971) [hereinafter Second Restatement].
16. See Restatement (Second) of Conflict of Laws (1969). See Reppy, supra note 3, at 655-66 (conceding that the Second Restatement has been read this way, but arguing that it was intended to be primarily a territorial method).
17. [T]he Restatement Second may fail to provide enough guidance to the courts to produce
be used to justify virtually any choice of law. In spite of its problems, however, the Second Restatement has also been popular with the courts. One scholar claims that almost half of the states follow the Second Restatement.\(^\text{18}\)

No consensus approach has emerged; the opinions of conflicts scholars and courts are as diffuse today as they have ever been.\(^\text{19}\) There is "profound disagreement" among scholars concerning the proper methodology for handling choice-of-law cases.\(^\text{20}\) Part of the problem is that scholars are viewing the problem too broadly. Most conflicts scholars are searching for a single, grand theory acceptable for all cases. The result is a broad, vaguely worded standard that provides little guidance in particular cases.\(^\text{21}\)

In their rush to describe the majesty and scope of the choice-of-law forest, scholars have missed the details of individual trees. Substantive legal rules differ in ways that a global choice-of-law theory cannot capture; more particularized treatment is needed. We must ask what particular approach or rule works well in particular types of cases.\(^\text{22}\) Some scholars have argued that their general approaches will eventually lead to particular rules,\(^\text{23}\) but this view is backwards. We must first focus on specific areas of the law and adopt narrow, particular rules that fit each area well. Those narrow rules may eventually lead to a more generally applicable common approach or set of approaches, or even a semblance of uniformity among the states following its method. In the drafters' attempt to mollify their critics, they have created an umbrella for traditionalist and modern theorist alike: a fragile shelter that may prove itself unable to survive any but the most gentle of showers.

Kay, supra note 1, at 562. See also infra text accompanying notes 100-28.

18. Solimine, supra note 11, at 54 n.32.

19. The only issue as to which a consensus has emerged is the rejection of the traditional First Restatement approach. See Kay, supra note 1, at 586.

20. Kay, The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience, 68 Calif. L. Rev. 577, 615 (1980). "The tidal wave of creative effort that followed the collapse of the First Restatement has receded, leaving isolated, stagnant pools of doctrine, each jealously guarded by its adherents." Id.

21. For all too long, conflicts scholars have engaged in jurisprudential cerebrations without much regard for the consequences of the rules and approaches they have advocated. There is a widespread belief that the conflicts of laws is different from all other legal disciplines in that practical results and workability do not matter.

Juenger, supra note 9, at 523.

22. Perhaps this will also stop the focus on guest statutes, interspousal immunity, coverture, and other vestiges of the past. See Paul v. National Life, 352 S.E.2d 550, 551-53 (W. Va. 1986).

perhaps the elusive grand theory that fits a broad range of cases does not exist. Whether or not a grand, comprehensive solution eventually results, choice-of-law analysis will benefit from improvements to the specific rules applied to particular types of cases.

My focus in this Article is on the choice-of-law problems associated with the attorney-client privilege. When a court is faced with a claim of attorney-client privilege, and there are factual connections to more than one state, which state's law should determine the scope of the privilege? To take an extreme example, assume that the forum is State A, the party asserting the privilege is from State B, the attorney with whom the client conferred practices in State C, their communication occurred in State D, the other parties to the case are from State E, and the lawsuit involves activities occurring in State F. Which state's law determines whether the client's communications with his attorney are protected?

Why examine the attorney-client privilege rather than some other substantive area? First, it is an area of the law where there is general agreement on substantive policy and the reasons for that policy. Instead of debating the merits of the attorney-client privilege, the focus can be on the choice-of-law issues. Second, it is an area of conflicts law where there is considerable disagreement about the appropriate result. The available choice-of-law theories and the cases support practically any result. Third, the case law and scholarly commentary are manageable enough to allow a fairly detailed look at the available theories, the applications of those theories, and the policy issues. Finally, and most importantly, the cases and commentary have generally missed the salient features of the problem. Scholars have not noticed that the existing theories do not fit the attorney-client privilege well.

All of the existing approaches—interest analysis, the law-of-the-forum approach of the *First Restatement*, the most significant relationship approach of the *Second Restatement*, and others—fail when applied to the attorney-client privilege. Certainty and predictability are essential if the attorney-client privilege is to serve its purpose and none of these approaches produces a certain, predictable result. Only a territorial rule will allow an attorney and client to know in advance whether their communications will be protected, and for this reason only a territorial rule will enhance the effectiveness of legal representation as the attorney-client privilege is meant to do. But what territorial rule? I examine the possible rules and conclude that the most sensible rule is always to apply the privilege law of the attorney's state of practice.
The proposed solution has been overlooked because it is a territorial solution and territorialism is not in vogue. Fashion has overcome function. In the rush to overthrow the First Restatement, all territorial rules have been rejected, but the failure of the First Restatement rules does not discredit territorialism generally. A territorial rule works best for the attorney-client privilege; in fact, a territorial rule is the only approach that works, given the purpose of the privilege. The proposed rule should not be rejected merely because it is unfashionable.

II. THE POLICY UNDERLYING THE ATTORNEY-CLIENT PRIVILEGE

Before examining the choice-of-law issues, we must briefly examine the attorney-client privilege itself. The attorney-client privilege is the oldest of the various legally recognized privileges for confidential communications. The rule that an advocate could not be called as a witness against his client existed in Roman times. It is unclear whether the Roman tradition influenced the Anglo-Saxon attorney-client privilege, but English recognition of the privilege goes back at least to Elizabethan times.

The policy justifications for the privilege have evolved over time. The Roman rule was designed to protect against perjury. The theory was that an advocate had a strong motive to misstate the facts in favor of his client; the advocate was not allowed to testify because his testimony could not be believed. The English attorney-client privilege was based originally on the oath and honor of attorneys as "gentlemen" not to betray confidences reposed in them. The attorney could not testify

27. C. MCCORMICK, supra note 26, § 87, at 204.
28. 8 J. WIGMORE, supra note 25, § 2290, at 542. Wigmore cites cases dating back to 1577. Id. The strength of the English recognition of the privilege prior to the nineteenth century is disputed. Wigmore contends that the attorney-client privilege has been "unquestioned" since Elizabethan times, id., but Professor Hazard argues that the historical foundations of the privilege are not as firm as Wigmore's language suggests. According to Hazard, recognition of the attorney-client privilege was slow and halting until the 1800s. Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 CALIF. L. REV. 1061, 1070 (1978). Professor Hazard's article contains a detailed discussion of the history of the attorney-client privilege. See id. at 1070-91.
29. Radin, supra note 26, at 488.
30. 8 J. WIGMORE, supra note 25, § 2290, at 543; Radin, supra note 26, at 487.
not because of any practical risks, but because it was his duty not to disclose his client's secrets.

By the late eighteenth century, the original English justification was repudiated and replaced by a new, more utilitarian argument, which survives today. The modern justification focuses on the needs of the adversary system if it is to produce just results. The attorney-client privilege is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good. The privilege is also considered necessary to the lawyer's function as confidential counselor in law on the similar theory that the legal counselor can properly advise the client what to do only if the client is free to make full disclosure.

This justification, which has been "virtually unchallenged" in modern times, rests on three assumptions. First, it assumes that a client will communicate with counsel more fully and truthfully if attorney-client communications are protected from disclosure. Second, it assumes that an attorney can advise her client more effectively if the client is more forthcoming. Finally, it assumes that the value of the resulting improved legal representation exceeds the cost of undisclosed evidence.

The attorney-client privilege thus represents a tradeoff between effective legal representation and full disclosure of all pertinent facts. The privilege limits the available relevant evidence, seriously impeding the search for truth, but it does so in pursuit of what is perceived to be a higher value. "The proposition is that the detriment to justice from a power to shut off inquiry into pertinent facts in court will be outweighed by the benefits to justice . . . from a franker disclosure in the lawyer's office." The assumption that one outweighs the other is essentially unverifiable.

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31. 8 J. WIGMORE, supra note 25, § 2290, at 543.
32. Hazard, supra note 28, at 1061. See also Upjohn v. United States, 449 U.S. 383, 389 (1981); 2 J. WEINSTEIN & M. BERGER, supra note 25, ¶ 503(02), at 503-16. C. MCCORMICK, supra note 26, § 87, at 204-05. As Gergacz points out, this benefits the attorney as well as the client. Gergacz, Attorney-Client Privilege, 37 BUS. LAW. 461, 467-68 (1982).
33. Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 HARV. L. REV. 464, 466 (1977). See also Gergacz, supra note 32, at 463 (this rationale "was not questioned in the cases").
34. See, e.g., 2 J. WEINSTEIN & M. BERGER, supra note 25, ¶ 503(02), at 503-16; C. MCCORMICK, supra note 26, § 87, at 204-05; 8 J. WIGMORE, supra note 25, § 2291, at 554.
35. See, e.g., Gergacz, supra note 32, at 468; Radin, supra note 26, at 490.
36. C. MCCORMICK, supra note 26, § 87, at 205.
37. 2 J. WEINSTEIN & M. BERGER, supra note 25, ¶ 503(02), at 503-17. Because it impeded
Other rationales have been offered to support the attorney-client privilege, but none fits particularly well. Several authors argue that the privilege is based on the public policy against self-incrimination, but this explanation is partial at best because the privilege is not limited to criminal defendants or those likely to be criminal defendants. It applies to all clients, civil and criminal, and may be used by plaintiffs as well as defendants. More importantly, the privilege against self-incrimination may be waived, and this rationale fails to explain why disclosure to the attorney is not itself a waiver. There is no waiver only if there is an expectation of privacy, and there is an expectation of privacy only because of the privilege. Thus, the self-incrimination rationale assumes its own conclusion.

Other authors have argued that the privilege is based on a right of privacy, but this explanation is also inadequate. The attorney-client relationship is not the intimate type of relationship that one would expect a right of privacy to protect; it is primarily a business relationship, and business relationships are not usually shielded from discovery. Other proffered rationales for the attorney-client privilege have also been repudiated. The best explanation for the attorney-client privilege is the desire to promote effective legal representation.

III. POSSIBLE APPROACHES

Given the desire to promote effective legal representation, and given the tradeoff between effective representation and disclosure, what choice-of-law approach should be chosen? At least six approaches to choice-of-law have been used or suggested with respect to the attorney-client privilege. They are the First Restatement’s forum law approach, the public policy approach, interest analysis, the most significant relationship, the search for truth in the individual case, Wigmore argued that the attorney-client privilege should be “strictly confined within the narrowest possible limits consistent with the logic of its principle.” 8 J. WIGMORE, supra note 25, § 2291, at 554.

38. See Cain, The Attorney’s Obligation of Confidentiality—Its Effect on the Ascertainment of Truth in an Adversary System of Justice, 3 Glendale L. Rev. 81, 93 (1978-79); Radin, supra note 26, at 490. One author argues that the individual accused of a crime has a constitutional right to the attorney-client privilege because of a combination of the sixth amendment right to counsel and the fifth amendment privilege against self-incrimination. See Note, supra note 33, at 485-86.

39. See Note, supra note 33, at 483.

40. For an excellent discussion rejecting the privacy rationale see id. at 483-84. See also Sterk, Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems, 61 Minn. L. Rev. 461, 471-72 (1977).

41. See Gergacz, supra note 32, at 465-66.
tionship test, the compromise approach adopted by section 139 of the Second Restatement, and the "better law" approach advocated by Professor Leflar. I will discuss each of these approaches and how each applies to the attorney-client privilege. Then, in the next section, I will propose an alternative and demonstrate why it is preferable to the existing approaches.

A. The First Restatement Approach and Forum Preference

The Restatement of Conflict of Laws distinguished substantive and procedural legal issues. All procedural questions were to be determined by the law of the forum.42 The forum court generally had to decide according to its own rules whether a given issue was substantive or procedural,43 but sections 596 and 597 of the First Restatement expressly provided that the law of the forum governed issues of "the competency and the credibility of witnesses"44 and "the admissibility of a particular piece of evidence."45

Of course, unlike evidentiary rules, the attorney-client privilege has little to do with the quality or the relevance of the evidence. Unlike evidence excluded on evidentiary grounds, evidence of attorney-client communications is generally admissible if the client waives the privilege.46 In addition, the attorney is generally competent to testify about communications with the client if the privilege is waived. Finally, unlike a rule of evidence, the attorney-client privilege not only precludes use at trial but also bars discovery of the communication and even dis-

42. Restatement (Second) of Conflict of Laws § 585 (1934). Application of this rule is not as straightforward as it seems. When a deposition is taken in one state to be used as evidence in a trial in another state, which state is the "forum?" See Comment, Privileged Communications under Rule 26(b): Conflict of Laws in Diversity Cases, 23 U. Chi. L. Rev. 704, 710-14 (1956). This Comment concludes that "any attempt to define the concepts 'forum' and 'procedure' and to reason deductively from such definitions to a solution of the conflict-of-privilege-law problem is doomed to failure." Id. at 714. Accepting a law-of-the-forum rule when the state of deposition and the trial forum are the same, id. at 714-15, the Comment proposes an interest-based approach when they differ, which in most cases results in application of the stronger privilege. Id. at 715-18.

43. Restatement (Second) of Conflict of Laws § 584 (1934).

44. Id. § 596.

45. Id. § 597. The First Restatement comments offer the following illustration: A brings an action in state X against B for the wrongful death in state Y of A's husband. B on the witness stand desires to state a conversation with the deceased immediately after the accident which eventually caused the death. By the law of Y, such evidence is admissible, but not by the law of X. The offered evidence is excluded. Restatement (Second) of Conflict of Laws § 597, illustration 1 (1934).

46. See C. McCormick, supra note 26, § 93; 8 J. Wigmore, supra note 25, § 2327.
closure of the communication outside of the litigation context. Viewed
narrowly, the purpose of the attorney-client privilege—the promotion of
effective legal representation—might be termed substantive rather than
procedural. The Federal Rules of Evidence recognize a substantive ba-
sis to privilege rules such as this by treating privilege questions as is-
issues of state law in diversity cases. But if procedure is defined more
broadly to include any rule designed to make the process of litigation
unbiased and efficient, the attorney-client privilege seems largely pro-
cedural. The privilege is designed to encourage communications be-
tween attorney and client not because such communications have any
intrinsic value, but because we believe open attorney-client communica-
tions make our dispute-resolution system work better. In this sense, the
attorney-client privilege is procedural.

Since the attorney-client privilege is not a rule of admissibility or
competence, it is not specifically covered by sections 596 or 597 of the
First Restatement; neither the First Restatement nor its comments ex-
pressly deal with privileges or professional relationships. However,
courts accepting the First Restatement's distinction between substance
and procedure have traditionally treated the attorney-client privilege as
a question of evidence or procedure to be resolved by forum law.

B. Public Policy of the Forum

A second approach also applies the law of the forum, but for dif-
ferent reasons. This approach, which has had limited use, applies forum
privilege law on the ground that it would violate the forum's public

47. FED. R. EVID. 501.
guishing substance and procedure for purposes of Erie).
49. Union Planters Nat'l Bank v. ABC Records, Inc., 82 F.R.D. 472 (W.D. Tenn. 1979), is
typical. The plaintiff in that case sought to compel the defendant, a New York corporation, to
produce documents arising out of communications which took place in California between the
defendant and its counsel. Applying the conflicts rules of Tennessee, the court with little discus-
sion concluded that "the Tennessee courts, and particularly its Supreme Court, would hold that in
the present situation the attorney-client privilege is a question of evidence, and that in determining
the scope and validity of the privilege the law of Tennessee would govern." Id. at 474.
See also Drimmer v. Appleton, 628 F. Supp. 1249, 1250 (S.D.N.Y. 1986) (applying New
York conflicts law); Duttle v. Bandler & Kass, 127 F.R.D. 46, 52 (S.D.N.Y. 1989) (applying federal law). For examples of courts applying this "procedure of the forum" approach to other
types of privileges, see, e.g., Cervantes v. Time, Inc., 464 F.2d 986, 989 n.5 (8th Cir. 1972), cert.
denied, 409 U.S. 1125 (1973) (applying Missouri conflicts law to a question of a reporter's privi-
lege not to disclose news sources); Ghana Supply Comm'n v. New England Power Co., 83 F.R.D.
586, 589 (D. Mass. 1979) (applying Massachusetts conflicts law to a question of governmental
executive privilege).
policy to apply the law of another jurisdiction. One of the few attorney-client privilege cases to accept this rationale is *Duplan Corp. v. Deering Milliken, Inc.* involving communications with foreign patent agents. The court recognized that such communications would be protected under French and British law, but decided that those foreign statutes contravened

the public policy of the United States as enunciated in the Federal Rules of Civil Procedure and the federal court decisions relating thereto. The federal rules are designed to promote discovery whereas these two foreign statutes necessarily restrict discovery. It is thoroughly established that comity will not be extended to foreign law or rights based thereon if it opposes settled public policy of the forum.

The district court therefore refused to apply the foreign privilege to any communications “touching base with the United States.”

The public policy argument is obviously overstated. Courts adopting this approach have set forth no guidelines for deciding when forum public policy is strong enough to trump the otherwise applicable rule and when it is not. Under this reasoning, every privilege could be viewed as expressing a strong public policy, and the forum could always apply its own privilege law. Thus, the public policy argument produces the same result as the *First Restatement* approach.

50. 397 F. Supp. 1146 (D.S.C. 1974). *In re Franklin Washington Trust Co.*, 1 Misc. 2d 697, 698, 148 N.Y.S.2d 731 (1956), might also be considered a public policy case. The court rejected an argument that the attorney-client privilege concerned only the admissibility of evidence and therefore should be governed by the law of the trial forum. *In re Franklin Washington Trust Co.*, 148 N.Y.S.2d at 733-34. The opinion could be read as an attempt to analyze the interests of the respective states, but it at least recites the public policy argument:

Respondents are attorneys in this state and the inquiry concerns professional acts done here. They should not be allowed to reveal, much less compelled to, any matter which the public policy of this state deems inviolate. The evil which is sought to be avoided is the revelation of the confidential matter per se, not the exclusion of testimony which might be in some way harmful. The restriction of the statute is only an echo of the mandate of the canon of ethics in that regard and only applies to testimony what is the rule in regard to all communications in or out of court.

Id. (emphasis added). *See also In re Walsh*, 40 Misc. 2d 413, 414, 243 N.Y.S.2d 325, 326 (1963) (quoting the emphasized language).

51. 397 F. Supp. at 1169.

52. Id. *

53. One might argue that such reasoning requires the application of forum law only when the forum has a privilege and the other state does not. If the forum has no privilege, it has no public policy on the issue. The absence of a privilege, however, does not indicate that the forum lacks a policy, but that it has a policy favoring disclosure. Application of the other state’s privilege law would violate this forum public policy favoring disclosure as much as applying another state’s law requiring disclosure would violate a forum public policy favoring the privilege. Thus, the pub-
C. **Interest Analysis**

Professor Brainerd Currie originated an approach to choice-of-law questions known as "governmental interest analysis" or simply "interest analysis." Professor Currie's approach, which has been popular among scholars and in the courts, focuses on the policy interests underlying the laws of each state. Interest analysis asks whether applying a particular state's law to the particular facts before the court would serve a policy concern of that state. The application of interest analysis produces three categories of cases: (1) false conflicts, where only one state has a legitimate policy interest in applying its law to the particular case; (2) so-called unprovided-for cases, where none of the involved states has a legitimate policy interest in applying its law; and (3) true

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lic policy argument usually results in the application of forum law.


55. See B. Currie, supra note 54, at 183-84. Reese and Rosenberg provide the latest modification of Professor Currie's theory before his death:

1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.

2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.

3. If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.

4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.

5. If the forum is disinterested, but an unavoidable conflict exists between the interests of two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum, at least if that law corresponds with the law of one of the other states. Alternatively, the court might decide the case by a candid exercise of legislative discretion, resolving the conflict as it believes it would be resolved by a supreme legislative body having power to determine which interest should be required to yield.

6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own state, but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest should be required to yield.

conflicts, where more than one state has a legitimate policy interest in applying its law. The key to interest analysis is the discovery of false conflicts, where only one state is interested. Where there is a false conflict, interest analysts agree that the court should apply the law of the only interested state.

Interest analysis produces false conflicts by emphasizing primarily domicile-based policy interests. A state has an interest in applying its law if doing so would compensate a local plaintiff or protect a local defendant. Interest analysts sometimes also consider regulatory interests—indeed of the parties' domicile, does a state have an interest in regulating local conduct? The key is whether the social and economic consequences of applying a state's rule to the particular transaction at issue will be felt in that state. In Professor Sedler's words,

when a law reflects a compensatory or protective policy, a state's interest in applying its law to implement that policy is usually predicated on a party's residence in that state since it is there that the consequences toward which the compensatory or protective policy is directed are likely to be felt. When a law, however, reflects a regulatory or admonitory policy, a state's interest in applying its law to implement that policy is predicated on the connection between

56. See Corr, Interest Analysis and Choice of Law: The Dubious Dominance of Domicile, 1983 UT AH L. REV. 651, 653, 665; Reppy, supra note 3, at 647 n.12; Ely, Choice of Law and the State's Interest In Protecting Its Own, 23 WM. & MARY L. REV. 173, 175-179 (1981); Note, Interest Analysis Applied to Corporations: The Unprincipled Use of A Choice of Law Method, 98 YALE L.J. 597, 600 (1989). Currie himself focused on a state's interest in protecting its domiciliaries. See B. CURRIE, supra note 54, at 270, 291-93, 417, 704-05, 724-25. Professor Sedler, a strong proponent of interest analysis, counters that interest analysis recognizes that states sometimes have a policy interest in applying their law to non-domiciliaries, but Sedler's own analysis shows that domicile-based interests are usually predominant. See Sedler, Interest Analysis and Forum Preference in the Conflicts of Laws: A Response to the 'New Critics', 34 MERCER L. REV. 593, 620-35 (1983). Even Ely, the strongest critic of this aspect of interest analysis, concedes that interest analysts sometimes recognize regulatory interests in influencing local behavior. Ely, supra, at 177. Ely argues, however, that such regulatory interests tend to be ignored or downplayed as compared to the interests of states in protecting domiciliaries. Id. The focus on a state's domiciliaries may be essential to the success of interest analysis:

This protect-the-locals conception forms a crucial element of interest analysis, for it narrows the scope of purportedly conflicting laws. Without such a mechanism to discount state interests in non-local litigants, all apparent conflicts would be true conflicts and interest analysis' primary achievement—the identification of false conflicts—would be diminished. Note, supra, at 600. See also Ely, supra, at 175-76.

57. This is a generalization based on Professor Sedler's treatment of accident liability rules: In the typical accident case, the relevant interests are compensatory and protective ones, and a state's interest in applying its law in order to implement those policies indeed depends on a party's residence in that state, since the consequences of the accident and of imposing or denying liability will be felt by the parties and the insurer in the parties' home state.

Sedler, supra note 56, at 621 (emphasis in original).
that state and the conduct sought to be regulated or prevented, totally apart from the residence of the actor or the victim.\textsuperscript{58}

In cases involving true conflicts, interest analysis becomes more controversial and its adherents disagree about how to proceed.\textsuperscript{59} Professor Currie argued for the application of forum law in such cases, and strongly objected to any balancing of the states’ respective policy interests.\textsuperscript{60} Other interest analysts have rejected Currie’s resolution of true conflicts and have argued for a weighing of interests\textsuperscript{61} or even a return to the territorial rules.\textsuperscript{62}

To apply interest analysis to the attorney-client privilege, it is necessary to reexamine the policies underlying the privilege and to determine which state or states are interested in applying those policies.

1. Evaluating the Interests

Every state in this country has some form of attorney-client privilege, so it is not useful to speak of the state with the privilege and the state without the privilege. It is more appropriate to speak of the state with the stronger privilege and the state with the weaker privilege. The state with the weaker attorney-client privilege has decided, as a matter of policy, that the search for truth is promoted by discovery of the particular communications at issue. The state with the stronger privilege has decided that it is more important to strengthen the attorney-client relationship by protecting the particular communications.

The possibly interested states include the forum, the state in which a deposition of the attorney or client is being taken, the state in which the attorney practices, the client’s state of domicile, the state or states in which the attorney-client communications took place, the state of

\textsuperscript{58} Id. at 622.

\textsuperscript{59} “Interest analysis has lost cohesion and coherence. No longer a single doctrine, it has become but a loose amalgamation of different approaches that furnish scant guidance to judges faced with multistate problems.” Juenger, \textit{supra} note 9, at \S 10.

\textsuperscript{60} B. Currie, \textit{supra} note 54, at 184; W. Reese & M. Rosenberg, \textit{supra} note 55, at 478.

\textsuperscript{61} Professor Ehrenzweig wrote in 1966 that “as far as I can see, all courts and writers who have professed acceptance of Currie’s interest language have transformed it by indulging in that very weighing and balancing of interests from which Currie refrained.” Ehrenzweig, \textit{A Counter-Revolution in Conflicts Law? From Beale to Cavers}, 80 Harv. L. Rev. 377, 389 (1966). A more recent source agrees. See R. Leflar, L. McDougal & R. Felix, \textit{supra} note 2, \S 91, at 268-69. A notable exception is Professor Sedler, who adheres to Professor Currie’s forum-preference rule, but for somewhat different reasons. See Sedler, \textit{The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation}, 25 UCLA L. Rev. 181, 218-20, 227-33 (1977).

domicile of the other party or parties to the lawsuit, and the state or states in which the facts giving rise to the underlying cause of action occurred. In any given case, more than one of these contacts may be grouped in a single state. For example, the state in which the attorney practices, the client's state of domicile, and the state in which the communications occurred may often be the same. It is convenient, however, to analyze each set of interests separately in order to determine exactly which contact gives the multicontact state a policy interest. Interests are generally additive, so this separation of the multicontact state's interests is theoretically acceptable.

a. The Interest of the Forum

Most authorities argue that the forum has an interest in applying its law when it has the weaker privilege. First, it is said that the forum has an administrative interest in applying its rule because its own law will be easier to administer and to determine. The problem is that the forum almost always has such an efficiency-based interest in applying forum law. A forum court can almost always determine and apply its own privilege law more easily than it can determine and apply the law of another state.

The second reason frequently given for applying forum law when its privilege is weaker is the forum's interest in the discovery of truth and achieving just results. However, if the forum has no other policy interest in the outcome of the case, where does its interest in a just result come from? Professor Sterk grounds this interest in the effect of the decision on the reputation of the forum's judicial system, but, like ease of administration, this interest would justify the application of forum law in all cases.

Scholars frequently argue that the forum has no interest in apply-

63. Sterk, supra note 40, at 475.

64. This will not be true in all choice-of-law problems. For example, if the foreign law would result in dismissal of the case, the forum's overall administrative burden would be less if the foreign rule is applied and the case dismissed than if forum law is applied and the case continued. The attorney-client privilege presents no such exception to the general rule that applying forum law will be easier.


66. See Sterk, supra note 40, at 475-76.
ing its law when it has the stronger privilege. Its interest in a just result does not support a rule which excludes good evidence, and the forum should not care about the effectiveness of attorneys representing clients in other states. The ease-of-administration rationale is equally applicable, however, so arguably the forum has an interest even when its privilege is stronger.

b. The Interest of the State of Deposition

What if disclosure of the attorney-client communications is sought not in the state of trial, but in a deposition in another state? What, if any, separate interests does the deposition state have?

The deposition forum, unlike the trial forum, is merely helping the parties collect evidence and is not required to reach an ultimate conclusion as to truth or justice. Thus, the interest in a just result is not a valid rationale for applying the deposition state's weaker privilege law. A court in the deposition state does have the ever-present interest in ease of administration, but such an interest, if recognized, always works in favor of the law of the court making the choice-of-law decision. The state of deposition has no other interest in applying its privilege law, whether its law is weaker or stronger. The client or attorney often will reside in the state where the deposition is taken, which may give the deposition state an interest, but its interest solely as the place of the deposition is minimal.

c. The Interest of the State or States in Which the Underlying Cause of Action Arose

What of the state or states where the actions giving rise to liability occurred? Does that state, if it has no other connection to the attorney-client communications, have an interest in applying its privilege? The answer, surprisingly, is sometimes yes.

Traditional interest analysis rejects territorial analysis, so the state where the cause of action arose does not automatically have reason to apply its law. Even interest analysts, however, recognize that a territorially-connected state has an interest in deterring wrongful conduct within its borders. If deterrence is a viable interest in the particular case, then the state where the cause of action arose has an interest in

67. See Reese & Leiwant, supra note 65, at 85; Sterk, supra note 40, at 479; Dunham, supra note 65, at 43-44; Comment, supra note 65, at 299.
68. Sterk, supra note 40, at 496-97.
having the wrongdoer punished. It therefore wants to see the cause of action handled effectively and correctly. A strong privilege withholds evidence and makes effective punishment less likely. If the state where the cause of action arose has a weaker privilege, it has an interest in applying its law to make a correct result more likely and to deter the wrongdoing more effectively. The state where the cause of action arose does not have an interest in applying its law when its privilege is stronger, however, because it has no interest in less effective deterrence.

d. The Interest of the Client's Domicile

The state of domicile of the client whose communications with his attorney are at issue may also have an interest in applying its law, particularly if the state has a stronger privilege which would protect the communications. The state has an interest in protecting its domiciliary, and application of its attorney-client privilege would do so by increasing the quality of legal representation available to the client.

The client's state of domicile has no interest in applying its law when its privilege law is weaker. Its weaker rule, which would allow discovery of the communications, does not protect its domiciliary. The state of domicile might have an interest in promoting broad discovery to protect the client from an unjust result but not where, by claiming privilege protection, the client has already shown that he is better protected by nondisclosure. Since, under traditional interest analysis, the state of domicile has no interest in making the client worse off, it has no interest in applying its weaker privilege.

e. The Interest of the Domicile of Other Parties to the Case

Courts and scholars applying interest analysis to privilege questions often overlook the domicile of the other party to the litigation, the party who is seeking discovery of the attorney-client communications. This is a strange oversight, given the strong interest analysis focus on domicile. If the other party's domicile has a strong privilege, it clearly has no interest in applying its law. To do so would disadvantage its

69. See Weinstein, Recognition in the United States of the Privileges of Another Jurisdiction, 56 COLUM. L. REV. 535, 537-39 (1956). Weinstein is discussing a situation where the state whose substantive law applies is also the forum, but he clearly recognizes the relationship between the policy of the substantive law and the protection of the privilege.
domiciliary and, under traditional interest analysis, the state has no interest in doing that.

It does have an interest in applying its law when its privilege is the weaker one. It has an interest in protecting its domiciliary from the possible injustice that might result if the communications are not disclosed. The other party's domicile has no particular territorial connection to the communications, but interest analysis does not require territorial connections and the state has an interest in protecting its own.

f. The Interest of the Attorney's State of Practice

The state in which the attorney who communicated with the client practices is another state that receives short shrift in most interest analysis discussions. When the state of practice has the weaker privilege, it probably has no interest in applying its law. The state of practice's interest in promoting and protecting its attorneys is not furthered by a less protective rule.

The attorney's state of practice may have an interest, however, when its privilege is the stronger one. A state has an interest in having effective attorneys, as shown by the general licensing and ethical standards applied to its bar. If the privilege increases the effectiveness of legal representation as claimed, the attorney's state of practice may be interested in applying its law for this reason. Some courts applying a state of practice rule have analogized the privilege to general ethical standards affecting attorneys. 70

This interest, however, falls short in traditional interest analysis. More effective legal representation has no value in a vacuum; it is desirable because of the benefits it provides clients. Thus, the interest in effective legal representation really centers on the client, not the attorney. The attorney's state of practice has no interest in applying its stronger privilege merely because the attorney is there; it has an interest under traditional interest analysis only if the client is also domiciled there.

g. The Interest of the Situs of the Attorney-Client Communications

Courts and scholars applying interest analysis to privilege ques-

70. See In re Walsh, 40 Misc. 2d 413, 414, 243 N.Y.S.2d 325, 326 (1963); In re Franklin Washington Trust Co., 1 Misc. 2d 697, 698, 148 N.Y.S.2d 731, 734 (1956); In re Whitlock, 3 N.Y.S. 855, 857 (1889).
tions often focus on the state or states where the communications occurred. In applying traditional interest analysis, however, the state in which the attorney-client communications occurred has very little interest in applying its law. When the situs of the communications has the weaker privilege, it has no real reason to care whose law is applied. The chosen privilege rule will not harm or protect its domiciliaries, and application of some other state's stronger privilege will not influence conduct within its borders in any negative way. It is also unclear why the situs of the communications is interested when it has a stronger attorney-client privilege.

If the attorney and client are just two strangers passing through the state, the situs has no interest in enhancing their relationship, at least not according to traditional, domicile-based interest analysis. Application of a stronger privilege rule produces no desirable in-state consequences. The situs might want its stronger attorney-client privilege rule applied to encourage attorneys and their clients to travel to the state, but traditional interest analysis seldom recognizes such promotion-of-business rationales. In any event, it is doubtful that any state has adopted a stronger attorney-client privilege to promote tourism, or that the strength of a state's attorney-client privilege has much of an effect on tourism.

2. **Summary of the Interests**

The interests of the various states are summarized in the following chart. A plus sign indicates situations where the state arguably has an interest in applying its law. A minus sign indicates situations where the state has no interest under traditional interest analysis. A question mark has been added in places where the discussion raised doubts about the interest claimed.

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72. Most sources simply state without explanation that the state of the communications has an interest in encouraging such communications within its jurisdiction. See Sterk, * supra* note 40, at 475 n.39; Comment, * supra* note 65, at 300. It is sometimes argued that this is the law the parties to the communication relied on, see Dunham, * supra* note 65, at 38, but that argument is circular. Parties would rely on that law only if the conflicts rules called for its application. The reliance argument is also factually suspect. If the attorney and the client are from other states, would they really rely on the law of the state they are passing through?
Cases where there is at least one positive, and all of the applicable positives fall on the same side of the chart, would be false conflicts. Where only negatives are present, the situation would be an unprovided-for case. A true conflict would exist if there is at least one positive on each side of the chart. True conflicts, false conflicts, and unprovided for cases are all possible.

Interest analysts generally agree about how to handle false conflicts. Since only one state has a legitimate policy interest in applying its law, that state's law should apply. Unprovided-for cases are more difficult, because by definition no state has a legitimate policy interest in applying its law. For example, consider a case where the forum, which is also where the underlying cause of action arose and where the other party to the case resides, has the stronger privilege and the state of communications, which is also the domicile of the client and the attorney's state of practice, has the weaker privilege. Under the conventional analysis, the forum has no interest in applying its stronger privilege and the other state has no interest in applying its weaker privilege. There is no obvious resolution of the problem. Most scholars who have written on the privilege issue agree, however, that the court should usually apply the weaker privilege in this case. This choice can

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73. See Reese & Leiwant, supra note 65, at 93-94; Sterk, supra note 40, at 479-80; Dunham, supra note 65, at 43-44; Weinstein, supra note 69, at 543-44; Comment, supra note 65, at 298-300.
be justified in two ways, either in terms of a residuary preference for
the law of the forum or in terms of a residuary preference for openness
and full disclosure.

The interest-based approaches present two major problems. One is
the difficulty in identifying which states have an interest in applying
their law to any given case. As shown above, whether a state has a
legitimate interest is often debatable. In fact, the whole “interest” con-
cept is questionable. The second problem with interest-based ap-
proaches arises in the true conflict setting. Consider a case where the
forum has the weaker privilege and other interested states (the state of
communications, the state of the client’s domicile, and the attorney’s
state of practice) have the stronger privilege. This case presents a
true conflict under conventional analysis. The forum has an interest in
the discovery of truth and achieving just results. The other state has an
interest in protecting the communications to promote the attorney-cli-
ent relationship.

In this situation, the scholars are hopelessly split. Although Profes-
sor Currie never specifically considered the attorney-client privilege, his
general fall-back rule for true conflicts is to apply forum law.76 One
student comment agrees with this resolution of true conflicts for privi-
leges.76 Professors Reese and Leiwant would “frequently” apply forum
law in such cases, but argue that the court should make “the best ac-
commodation that it can between the conflicting interests of the two
states.”77 They argue that the court must weigh the need for the evi-
dence, the parties’ reliance on the privilege, and the extent of the con-
tacts between the case and the forum.78 The more important the evi-
dence, the lesser the reliance interest, and the greater the forum
contacts, the more willing the trial court should be to apply its own
privilege law.

On the other hand, Professors Sterk and Dunham would generally
apply the stronger privilege law of the non-forum state. Professor Sterk

74. Many scholars circumvent the problem of determining the most interested state or the
state with the most significant relationship to the communications by assuming that an unspecified
state is the most interested and then posing the problem as a choice between the law of that
unspecified state and the law of the forum. See Sterk, supra note 40, at 475, 479-95; Dunham,
supra note 65, at 36-53; Comment, A Choice of Law Analysis of Evidentiary Privileges, 50 LA. L.
75. B. CURRIE, supra note 54, at 184.
76. Comment, supra note 65, at 301.
77. Reese & Leiwant, supra note 65, at 104.
78. Id. at 95-97.
would always apply the other state’s law based on his conclusion that the other state’s “interests are clearly stronger.” Professor Dunham would generally apply the law of the other interested state, with three exceptions:

First, where a plaintiff seeks redress in the forum’s court system and attempts to invoke a foreign privilege. Second, where the privilege of one state is helpful to the communicators in perpetrating a harm on the citizens and policies of another state. Third, where the testimony is of little relevance or can be obtained from another source.

Professor Weinstein’s unique resolution focuses on the substantive law applicable to the underlying case. If the forum will be applying its own substantive law, Weinstein believes forum privilege law should also apply. If the substantive law of another interested state applies, Weinstein believes that its privilege law should apply as well.

As this shows, interest analysis is difficult to analyze, because in the hardest cases, those where there are true conflicts, it disintegrates into a number of possible approaches. The cases purporting to apply interest analysis to choice-of-law problems involving the attorney-client privilege reflect this confusion. These cases demonstrate a surprising territoriality and a surprising lack of concrete analysis. Almost without exception, they merely recite a string of territorial contacts with the state whose law the court decides to apply and without further discussion conclude that state has a superior interest.
Even cases which initially seem analytical fall apart on close ex-
illustrates this point nicely. The plaintiff, Connolly Data Systems, was
a New Hampshire corporation headquartered in Massachusetts. The
defendant, Victor Technologies, was incorporated and headquartered in
California. Each party claimed that the other breached a distributor-
ship agreement allowing Connolly to market and distribute a desktop
computer manufactured by Victor. The lawsuit was filed in federal dis-
trict court in Massachusetts. Thereafter, Victor's Massachusetts attor-
ney had conversations, on the telephone and in California, with Han-
son, Victor's former treasurer. At a deposition in California, Hanson
refused to answer questions about these conversations.

The California court purported to apply interest analysis to deter-
mine whether to apply Massachusetts or California privilege law. The
court began by noting that Victor, the party asserting the privilege, was
a California corporation with its principal place of business in Califor-
nia. According to the court, “The state of domicile of the corporation
asserting the attorney-client privilege is an important factor to consider
in choosing the law that governs the scope of that privilege.” The
court did not explain why that connection gave California an interest in
applying its law.

The court then noted that the communications took place “primar-
ily” in California and that any expectation of confidentiality the parties
had “would likely stem from the laws in the state in which he resided
and from which he spoke.” This second reason is stronger, but leaves
several questions unanswered. First, why does this expectation of confi-
dentiality give California a governmental policy interest in applying its
law? Under traditional interest analysis, California might have an in-
terest in applying its privilege to protect the California client, but not
in this case because the court ultimately decides that California law
does not protect the conversations. Second, even if California has an
does not even allow one to identify other potentially interested states. For example, what is the
defendant's state of incorporation and why is that not relevant? Cf. Note, supra note 56 (arguing
that interest analysis does not (and cannot) deal well with corporations). This conclusory analysis
is typical of the cases applying interest analysis to the attorney-client privilege.

86. 114 F.R.D. 89.
87. *Id.* at 91.
88. The court cites *Super Tire Eng'g Co.*, 562 F. Supp. at 440, but that case also reaches
this conclusion summarily without explanation.
90. *Id.* at 93-96.
interest, why does Massachusetts not also have an interest given that its resident was the other party to the conversation and spoke in at least one instance (the telephone conversation) from Massachusetts? Finally, this portion of the argument is circular. Hanson and the attorney could have a justified expectation of confidentiality stemming from California law only if they knew the court would apply California law. If the conflicts rule applied the law of the attorney's domicile, any justified expectation of confidentiality would stem from Massachusetts law.

Not satisfied to stop there, the court pointed out that Hanson's deposition was taken in California. The court noted that "[u]nder such circumstances, federal courts have applied the privilege law of the forum where the deposition took place."91 Again, the court did not explain why the location of the deposition gave California an interest in applying its law.

Finally, without discussion, the court concluded that Massachusetts had no interest and therefore a false conflict existed.92 The closest the court came to examining the possible interests of Massachusetts was a conclusory statement that "[t]he fact that the underlying litigation is pending in Massachusetts is not controlling."93

None of the other cases applying interest analysis to the attorney-client privilege fare any better than Connolly.94 All are intellectually vacuous—the court slaps the interest analysis label on a conclusion and is done with it.95

Often the interest analysis cases apply the law of the state of communications, which is usually the domicile of the client.96 Some cases, however, never mention in their choice-of-law analysis where the communications occurred.97 Other cases mention that the communications

91. Id. at 92. Curiously, the one case the court cites, Wright v. Jeep Corp., 547 F. Supp. 871 (E.D. Mich. 1982), is not an interest analysis case at all. Wright applies the privilege law of the state of deposition without any choice-of-law analysis. 547 F. Supp. at 874-75.
92. 114 F.R.D. at 92.
93. Id.
94. See supra note 84.
95. One person who read an earlier draft of this Article pointed out that this is probably an overly harsh criticism of the courts because scholars who try to identify the relevant interests often do little better.
97. See Command Transp., Inc., 116 F.R.D. at 94, 95 (factual discussion indicates that the communication occurred in Massachusetts, but this is not listed as one of the reasons for applying Massachusetts law). See also Super Tire Eng'g Co., 562 F. Supp. at 440 (court says that the
occurred in the state whose law is being applied, but list other connections to that state and do not say which contacts are important or why. In some cases it is unclear what the court is relying on. One court uses interest analysis to treat the privilege as a rule of evidence governed by the law of the forum. In sum, the cases applying interest analysis to the attorney-client privilege are unclear at best and confused or manipulative at worst.

D. The "Most Significant Relationship" Test

Another modern approach to choice-of-law is the "most significant relationship" test used in the *Second Restatement*. For many legal issues, the *Second Restatement* applies the law of the state with the "most significant relationship" to the issue. The *Second Restatement* does not apply a simple most significant relationship test to privileges, but since some courts have done so, this Article examines the "most significant relationship" test in the context of the attorney-client privilege.

attorney-client relationship "arose in Iowa, the state of Bandag's corporate headquarters," but does not say whether this means that the communications occurred there).

98. See McNulty, 120 F.R.D. at 31; Connelly Data Sys., Inc., 114 F.R.D. at 91-92; Emejota Eng'g Corp., 1985 W.L. 4019.

99. See ICI Ams. Inc. v. John Wanamaker, 1989 W.L. 38647 (E.D. Pa.) ("the scope of attorney-client privilege is collateral to the contract and concerns issues of discovery, evidence, and privilege more associated with Pennsylvania civil practice than California contract law").

100. Id.

101. See, e.g., *Restatement (Second) of Conflict of Laws* § 145 (1969) (tort liability); id. § 188 (contract liability).

102. See infra text accompanying notes 129-42.

103. See infra notes 124-25.

104. A preliminary issue to be resolved is whether, in applying the most significant relationship test or any other interest-based test, a court should look to the state with the most significant relationship to the privileged communications or the state with the most significant relationship to the underlying cause of action. The Second Restatement opts for the former, looking to the state which has the most significant relationship with the privileged communications. See *Restatement (Second) of Conflict of Laws* § 139 comment e (1969). This is consistent with the modern acceptance of *dépeçage*, the process of applying conflicts rules on an issue-by-issue basis. See generally Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 *COLUM. L. REV.* 58 (1973). At least one court, however, has applied the privilege law of the state with the most significant relationship to the underlying cause of action. In Hyde Constr. Co. v. Koehring Co., 455 F.2d 337 (5th Cir. 1972), the plaintiff alleged that earlier litigation by the defendant to avoid a Mississippi judgment constituted abuse of process. The plaintiff sought to compel the defendant to produce a number of documents which the defendant claimed were protected by the attorney-client privilege. Since the action was a diversity case brought in Mississippi, the court looked to Mississippi's choice-of-law rules. Id. at 340. Mississippi had recently adopted a "center of gravity" choice of law test and the court decided that, under that test, Mississippi had the most substantial
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The Second Restatement does not define "most significant relationship," but it does list factors a court should consider in making that determination. These are:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

The first factor, the needs of the interstate and international systems, is unlikely to be determinative. The comments discussing this factor stress two themes, harmony and uniformity. First, according to the comment, choice-of-law rules "should seek to further harmonious relations between states and to facilitate commercial intercourse between them." Second, states should choose rules that are likely to be adopted by other states as well, leading to greater certainty, predictability, and uniformity. Neither of these policies favors the attorney-client privilege of any particular state. These policies, however, do favor an easily applicable, predictable rule so that different states using contacts with the alleged tort. Id. at 341. Without discussing which state had the most substantial contacts with the communications, the court continued: "For purposes of this litigation we also believe that Mississippi would treat the attorney-client privilege as a substantive matter. It follows that the court would thus use the center of gravity test and apply Mississippi law to any such claim of privilege." Id. Thus, the Fifth Circuit assumed without discussion that the law governing the cause of action would govern the privilege claim as well. See also supra text accompanying notes 80-81.

105. See Restatement (Second) of Conflict of Laws § 6 (1969). Particular sections also list particular contacts to be considered in applying those general principles. For example, § 145 instructs a court in tort cases to consider the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties is centered. Restatement (Second) of Conflict of Laws § 145(2). See also id. § 188(2) (contacts to consider in contract cases). Section 145 indicates that these contacts should "be evaluated according to their relative importance with respect to the particular issue." Id. § 145(2). The precise relationship between these specifically listed contacts and the general principles in § 6 is unclear.

106. Restatement (Second) of Conflict of Laws § 6(2) (1969). The comments to § 6 indicate that the list of factors is not exclusive and that a court might occasionally consider other, unspecified factors. Id. § 6 comment c. The possibility of other considerations makes this approach even more murky than the text that follows indicates.


the same test will reach the same result. An easily applicable rule also promotes harmonious relations between the states. If the choice is clear, other states will be less suspicious that, in the guise of weighing or balancing interests, the forum is actually motivated by politics or a naked preference for forum law. Beyond that, the first factor provides little guidance.

Factors two and three of section 6 of the Second Restatement look to the relevant policies of the forum and other interested states, and the relative interests of the other interested states in the determination of the particular issue. This sounds like interest analysis and the comments support that conclusion. The comments suggest a focus on the purposes of each state's rule and indicate that one should “appraise the relative interests of the states involved in the determination of the particular issue.” A forum should not apply its own rule solely because it is the forum, but only if the purposes sought to be achieved by the local rule would be served by its application to out-of-state facts. According to the comments, a court should generally apply the law of “the state whose interests are most deeply affected.” This tracks interest analysis fairly closely; therefore, the discussion of interest analysis applies here as well.

The fourth factor to be considered is the protection of justified expectations. The comment notes that “it would be unfair and improper to hold a person liable under [the] local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.” The justified expectations argument is circular; in a multistate transaction, an expectation that a particular state's law will apply is justified only if the conflicts rules call for application of that state's law. An attorney could justifiably assume that his own state's law would protect communications with his client only if that were the

110. Id. § 6 comment f.
111. Id. § 6 comment e. The comment recognizes the interest of the forum qua forum in applying its rules relating to trial administration. Id.
112. Id. § 6 comment f.
113. See Melville v. American Home Assurance Co., 443 F. Supp. 1064, 1084 (E.D. Pa. 1977), rev'd, 584 F.2d 1306 (3d Cir. 1978) (The analysis required by these two factors is “virtually indistinguishable from Professor Currie's interest analysis.”). But see Reppy, supra note 3, at 655-62 (arguing that the crux of the Second Restatement methodology is center of gravity territorialism, but conceding that the comments discussing these two factors sound like interest analysis).
114. See supra text accompanying notes 63-100.
115. Restatement (Second) of Conflict of Laws § 6 comment g (1969).
existing conflicts rule. But the whole purpose of the justified expectations argument is to help a court choose the conflicts rule. This logical fallacy can be avoided by reading justified expectations as synonymous with predictability or foreseeability. When the attorney and client conferred, which state’s laws would predictably apply? The parties would be justified in relying on predictably applicable laws to the exclusion of others, but this would not help a court choose among the privileges of more than one predictable state. When attorney and client confer, they could foresee that the privileges of the attorney’s domicile, the client’s domicile, and the state of the communication might apply. In many circumstances, they would also be aware of the state where the underlying transaction occurred or was to occur, and might foresee the application of its law. But the fourth factor would not support the application of the law of a naked forum, a state with no other connection to the dispute or the communications. In most cases, the attorney and client cannot predict what the eventual forum will be.

Section 6 next directs an examination of the basic policies underlying the particular field of law. The comment expands on this consideration:

This factor is of particular importance in situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local law rules. In such instances, there is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved. Read this way, the fifth factor is similar to the “comparative impairment” approach advocated by Professor Baxter. Although states’ particular laws might differ, they often share common policies; a court should apply the rule which best furthers the shared policies.

At a basic level, states with a narrow attorney-client privilege and states with a broader attorney-client privilege have common policy concerns. Each is interested in the discovery of truth and the proper application of law. The specific rules adopted to achieve those broad goals differ. The state with the narrow privilege believes that those policies are best served by the free discovery and admissibility of the particular

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116. The client’s expectations might be more naive, but the client is unlikely to have more than a vague, generalized expectation of confidentiality. See infra text accompanying notes 172-73. The client is unlikely to be relying on the law of any particular state or even know the details of the attorney-client privilege of any particular state.


attorney-client communications before the court. The state with the stronger privilege has the same goal, but pursues that goal differently. It believes that the freer communications and enhanced legal representation resulting from the broader privilege will further the search for truth more than will the open discovery favored by the state with the weaker privilege.

The two states thus disagree about the balance between effective representation and availability of evidence which is most likely to produce justice, with justice being defined as proper application of the law. They also may disagree about the causal connection between confidentiality and effective representation in the individual case. A court has no way to determine which local law better serves the common policy other than to make its own, independent policy decision. This is not legitimate choice of law, but merely the substitution of a third view of better policy—the forum court's—for that of the two states. There is no reason to accord the forum court's policy view any special deference, or to treat it as superior to that of either of the states. Thus, the fifth Second Restatement factor, where it makes a difference, evaporates into judicial fiat.

The sixth factor—certainty, predictability, and uniformity—is somewhat incompatible with the most significant relationship test and the entire Second Restatement approach. An uncertain, multifactor balancing test hardly seems likely to promote certainty or predictability and the latitude given judges is unlikely to produce uniformity. Not surprisingly, the comments minimize this consideration's importance. "These values," the comment states, "can . . . be purchased at too great a price. In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules."120

Predictability requires a conflicts rule the results of which the parties can know in advance. The balancing and policy analysis inherent in most of the modern approaches are not easily predictable. Courts applying these tests to the attorney-client privilege can and have differed in their choice of law; attorney and client are thus unable to predict at the time of the communication which state's privilege a court will eventually choose. A forum law rule like that of the First Restatement

119. For a convincing rejection of the "shared policy" method of analysis, see Ely, supra note 56, at 201-203.
120. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comment i (1969).
presents similar problems; the conferring attorney and client usually cannot predict which state will be the forum. Thus, none of the existing rules is predictable.

Uniformity is also unlikely under any multifactor balancing test. A concern for uniformity again supports a definite rule, and again a law-of-the-forum rule is unacceptable. If each forum applies its own law, identical cases are treated differently depending on where the lawsuit is filed. In addition to producing disuniformity, this encourages forum-shopping by plaintiffs who anticipate an attorney-client privilege issue.¹²¹

The meaning of “certainty” is unclear, but the desire for “certainty” appears to add little to the analysis. If this means certainty at the time of the conduct—when attorney and client communicate—then everything said concerning predictability applies equally to certainty. If this means certainty at the time of decision, then this is merely another label for the final factor, ease in the determination and application of the law to be applied, and, as argued below, a law of the forum approach is preferable.

The final section 6 consideration is ease in the determination and application of the law to be applied. This consideration almost always favors forum law. A forum-preference rule makes the court’s decision easy, unlike choice-of-law rules which require the identification and balancing of state interests. And what law is easier to locate and apply than the forum’s own local law? If this consideration were determinative, the forum’s attorney-client privilege would always be applied. The comments, however, minimize the importance of this factor;¹²² it is at best something to be considered if a weighing of the other factors produces no definitive result.

There is something for everyone in the Second Restatement’s seven factors. Depending on the weight given to each factor, the most significant relationship test could be used to justify the application of almost any state’s attorney-client privilege. The cases do not adequately reflect this ambiguity, however, because, for the most part, the

¹²¹ It is not clear how often plaintiffs could anticipate a claim of attorney-client privilege. This is most likely in lawsuits against corporations, especially where the plaintiff is aware of an internal corporate investigation of the transaction at issue. Even if the plaintiff could anticipate a claim of attorney-client privilege, numerous other considerations affect the choice of forum, and differing attorney-client privileges might not strongly affect the choice.

¹²² “This policy should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results.” Restatement (Second) of Conflict of Laws § 6 comment j (1969).
few cases purporting to apply the most significant relationship test, or the related center of gravity test, to the attorney-client privilege have not involved difficult facts. The few cases involving tough choices are as conclusory as the interest analysis cases.

The comments to the Second Restatement indicate that the state where the communication took place will usually have the most significant relationship with a privileged communication. However, a domicile-based analysis is introduced where there is a prior relationship between the parties to the communication, as there often will be between attorney and client. “If there was such a prior relationship between the parties, the state of most significant relationship will be that state where the relationship was centered unless the state where the communication took place has substantial contacts with the parties and the transaction.” Thus, if both attorney and client are domiciled in State X but confer while on a brief vacation in State Y, the privilege law of

123. Professor Reppy argues that “[t]he crux of the Restatement Second’s methodology is center of gravity territorialism,” except that the Second Restatement seeks to determine center of gravity on an issue-by-issue basis, rather than determining a single center of gravity for the entire cause of action. Reppy, supra note 3, at 655.

124. Brandman v. Cross & Brown Co., Inc., 125 Misc. 2d 185, 479 N.Y.S.2d 435 (1984), is typical. In Brandman, the attorney was a New York attorney, the client was a company located in New York, the attorney-client communications occurred in New York, and New York was the forum. The court easily decided to apply New York law. Brandman, 479 N.Y.S.2d at 437. See also In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 76 F.R.D. 47 (W.D. Pa. 1977).

125. One of the few “most significant relationship” cases involving a tough choice is Renfield Corp. v. E. Remy Martin & Co., 98 F.R.D. 442 (D. Del. 1982). Renfield brought an antitrust action against E. Remy Martin & Co., a French company, and its American affiliate, Remy Amerique. Renfield sought documents relating to communications between officials of both defendants and employees of the French company identified as in-house counsel. Some of those documents were in France and some were in the United States. The Renfield court assumed that the documents were not privileged under French law, but held that they were privileged under U.S. law. 98 F.R.D. at 444. As to documents located in France, the court held that the Hague Evidence Convention allowed the witness to assert a privilege if either state recognized it. 98 F.R.D. at 443-44. The court held, however, that the Hague Convention did not apply to documents located in the United States. With respect to the documents located in the United States, the court held that the United States had the most significant relationship with the communications. The court’s analysis was brief, compacted into one sentence: “The officials located in the New York office of Remy Amerique are the ones who sought the legal advice and the United States has the same interest in protecting the freedom of these individuals to obtain legal advice as it does for any other American residents.” 98 F.R.D. at 445.

126. Restatement (Second) of Conflict of Laws § 139 comment e (1969). Accord Reese & Leiwant, supra note 65, at 93; Dunham, supra note 65, at 42.

State X will probably apply. If their contacts with State Y are less ephemeral, the result is indeterminate.

E. Section 139 of the Second Restatement

The Second Restatement does not apply an unadorned “most significant relationship” test to privileges. The Second Restatement retains the First Restatement’s rules that questions of witnesses’ competence and the admissibility of evidence are determined by forum law, but adds a section dealing specifically with privileges. Section 139, the privilege section, uses the “most significant relationship” test, but not exclusively. Instead, a court following section 139 almost always applies the law that rejects the attorney-client privilege. Section 139(1) provides that if evidence is privileged under forum law, but not under the law of the state with the most significant relationship with the communication, it will be admitted unless its admission would violate a strong public policy of the forum. Under section 139(2), if evidence is not privileged under forum law, but is privileged under the law of the state with the most significant relationship, it will also be admitted, “unless there is some special reason why the forum policy favoring admission should not be given effect.” Thus, unless one of the exceptions applies, section 139 always chooses the weaker privilege.

It is unclear what the “strong public policy” exception to section 139(1) means. Apparently, if the forum is really serious about its attorney-client privilege and willing to use the public policy exception liberally, it can always apply its own law. So used, section 139 reverts to the First Restatement “law of the forum” approach. The comments to sec-

128. This example is based on the following example in comment (e):

[1] If a husband and wife are domiciled in state X and the wife makes a statement to the husband in state Y while the spouses are spending a weekend in the latter state, X is the state which has the most significant relationship with the communication. Y, on the other hand, might be the state of most significant relationship if the spouses spent a considerable portion of their time there.

Restatement (Second) of Conflict of Laws § 139 comment e (1969).


130. See Restatement (Second) of Conflict of Laws § 139 (1969). Curiously, § 139 and the comments to § 139 are phrased in terms of the admissibility of evidence concerning the communications, rather than discoverability. It is not clear why the drafters used this language. That the drafters meant for § 139 to cover discoverability as well as admissibility at trial is clear. See Restatement (Second) of Conflict of Laws § 139 comment f (1988 rev.). Comment (f) discusses the choice of law problem when depositions are taken in a state other than the trial forum state. Id.


tion 139, however, indicate that the public policy exception should be applied only in "rare" instances. The comment notes that the forum may want to use this exception "occasionally" when, even though it does not have the most significant relationship with the communication, it "does have a substantial relationship to the parties and the transaction and a real interest in the outcome of the case." The comment does not explain why the forum's "substantial relationship" and real interest in the case's outcome outweighs the other state's greater "most significant relationship" and real interest in the case's outcome. Apparently, forum preference is acceptable if the forum has a strong connection to the facts. The forum preference is even more blatant in the following sentence of the comment, which states that, "[o]n still rarer occasions, the state of the forum might consider a given privilege, as that of priest and penitent, sacrosanct and therefore not permit introduction of the evidence even though the state of the forum has no relationship to the transaction . . . ." This expressly approves reversion to a pure law-of-the-forum rule—if a state feels strongly enough about the attorney-client relationship, it can always apply its own privilege.

The exception to section 139(2) is also unclear. The comment indicates that, in deciding whether to apply the privilege of the state that has the most significant relationship with the privilege, the forum should consider "(1) the number and nature of the contacts that the state of the forum has with the parties and the transaction involved, (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." According to the comments, a forum should be more inclined to apply the foreign privilege in a section 139(2) case if the forum's contacts to the issue are insignificant or the evidence is unlikely to affect the case, if the privilege is well established and recognized in many states rather than a relatively novel one, or if the parties to the communication have relied on the privilege. Finally, "[t]he forum will

133. Restatement (Second) of Conflict of Laws § 139 comment c (1969).
134. Id.
135. Id. (emphasis added).
137. Id.
138. Id. This sounds a lot like the "better law" approach accepted by some authorities. See infra text accompanying notes 145-52.

Such reliance may be found if at the time of the communication the parties were aware of the existence of the privilege in the local law of the state of most significant relationship.
take such steps as may be necessary to prevent a party to the action from taking an inequitable advantage of the privilege." Thus, although section 139(2) begins as a rule of forum preference, the exception makes it a balancing test that allows the judge broad discretion.

Section 139 has not been widely adopted. The only attorney-client privilege case which expressly followed the section is Consolidation Coal Co. v. Bucyrus-Erie Co., a 1980 Illinois decision. Consolidation Coal used section 139(2) to apply forum law even though the court held that another state had the most significant relationship to the communications.

F. Professor Leflar's Principles and the "Better" Law Approach

Professor Leflar has proposed five choice-influencing considerations for choice-of-law decisions. These considerations are (1) predictability of results, (2) maintenance of the interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests, and (5) application of the better rule of law. With the exception of the last consideration, Leflar's principles corre-

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140. Id.
142. The defendant in that case was headquartered in Wisconsin and its principal place of business was in Wisconsin. The plaintiff sought to discover notes taken by the defendant's in-house counsel of interviews in Wisconsin with the defendant's employees. Wisconsin's attorney-client privilege protected these notes, but Illinois's did not. The court concluded that Wisconsin had the most significant relationship to the privilege questions because the communications were in Wisconsin. Consolidation Coal, 416 N.E.2d at 1094. However, citing § 139(2), the court applied Illinois law. "We have reviewed the countervailing considerations in favor of Wisconsin's policy . . .," the court wrote, "and have determined that they do not outweigh the Illinois policy favoring discoverability." Id.
144. Leflar, Choice-Influencing Considerations, supra note 143, at 282; see also Leflar, Conflicts Law, supra note 143, at 1586-88. For a general discussion of these five factors, see R. Leflar, L. McDougal & R. Felix, supra note 2, at 290-300.
spond fairly closely to the principles of section 6 of the Second Restatement, and the analysis of the Second Restatement principles would apply. Leflar’s unique contribution is the “better law” principle. According to Leflar, “[s]uperiority of one rule of law over another, in terms of socioeconomic jurisprudential standards, is far from being the whole basis for choice of law, but it is one of the relevant considerations.” Leflar’s “better law” consideration has been used surprisingly often by the courts.

Unfortunately, Leflar proposes no objective standard for determining which law is “better,” and it is impossible to conceive of such a standard. How is one to say that the attorney-client privilege of State A is objectively “better” than the attorney-client privilege of State B? Obviously, State B does not think so or it would adopt State A’s rule. The “better law” consideration is likely to be merely another justification for applying forum law. Leflar concedes that a court is likely to determine that its own law is better, but argues that forum law is not the inevitable result of the “better law” approach. However, Professor Reppy in 1983 was able to find only three reported cases where the substantive law of another state was held to be better than forum law. In any event, the “better law” approach, even more than the other modern approaches, gives a court unfettered discretion to choose the applicable privilege.

145. See supra text accompanying notes 101-128.
147. See Kay, supra note 1, at 571.
148. Professor Weintraub suggested that the “better law” approach should be applied only where the other state’s law is anachronistic or aberrational. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 343 (3d ed. 1986). A rule is anachronistic as he uses the term if “over recent time, many states with the rule have abandoned it and none or very few have adopted it.” Id. at 289. A rule is aberrational if “adopted by one or very few states and sufficient time has passed to make it clear that more states are unlikely to adopt the rule.” Id. at 290. Apart from other possible objections to this standard, it is unlikely to assist in deciding attorney-client privilege questions. Few of the cases involving conflicts in the scope of the attorney-client privilege involve rules that could be termed anachronistic or aberrational. Under Weintraub’s revision, the “better law” consideration is not relevant to the inquiry of this Article.
149. On first approach, and often on exams as well, some of my conflicts students equate “better law” with recovery for the plaintiff.
150. “It is evident that the search for the better rule of law may lead a court almost automatically to its own lawbooks.” Leflar, Choice-Influencing Considerations, supra note 143, at 298.
151. “A court sufficiently aware of the relation between law and societal needs to recognize superiority of one rule over another need not be restrained in its choice by the fact that the outmoded rule happens still to prevail in its own state.” R. LEFLAR, L. MCDougAL & R. FELIX, supra note 2, at 299.
152. Reppy, supra note 3, at 674 n.139.
IV. THE NEED FOR CERTAINTY AND PREDICTABILITY: A RETURN TO TERRITORIALISM

A basic problem with all of the existing choice-of-law tests as applied to the attorney-client privilege is that they are unpredictable. The attorney-client privilege will encourage communications between attorney and client only if both parties know at the time of their communications whether the privilege will apply.158 If they are uncertain, their communications will be chilled, and the purpose of the privilege will be entirely defeated. The U.S. Supreme Court has recognized that

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.159

Outside the conflicts setting, courts rarely try to engage in case-by-case balancing to determine the scope of the privilege.160 Opinions recognize that certainty and predictability are needed if the privilege is to serve its purpose.161 The refusal to balance in individual cases rests on a rule-utilitarian view that departures from the privilege in individual cases might seem just, but the resulting uncertainty would destroy the value of the privilege for all attorney-client communications.162 As
one commentator has argued, "An ad hoc approach to privilege pursuant to a vague standard achieves the worst of possible worlds: harm in the particular case because information may be concealed; and a lack of compensating long-range benefit because persisting uncertainty about the availability of the privilege will discourage some communications."\(^\text{158}\)

For some reason, the choice-of-law cases involving the attorney-client privilege\(^\text{159}\) have never focused on the need for certainty and predictability, even though the modern approaches recognize the value of certainty and predictability in other substantive areas, such as mar-

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1. Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, supra note 153, at 426. See also Note, The Attorney-Client Privilege and the Corporation in Shareholder Litigation, supra note 153, at 308:

Although a more flexible approach, where the magnitude of the harm of suppression might be considered in each case, would have the advantage of minimizing the suppression of evidence, this needed element of certainty logically requires a privilege against disclosure governed by a standard rule and not by ad hoc determinations.

2. An exception is Comment, Discovery in Complex Litigation: The Dilemma Faced by the Judiciary, 19 Loy. U. Chi. L.J. 1113, 1131 (1988) (calling for the American Law Institute to adopt a uniform privilege rule for complex, multijurisdictional litigation). Curiously, the Comment ignores the problem presented in the text—the uncertainty that unclear choice of law rules produce when only one forum is involved.
riage and real property. In those areas, the modern approaches generally revert to territorialism. The departure from the normal analysis is justified by a special need for uniformity, predictability and certainty. For example, in discussing the marriage rule, Leflar, McDougal, and Felix argue that "predictability . . . is as important here as in any area of the law." The place-of-the-marriage rule arises not from territoriality but in part "from the fact that the parties need to know reliably and certainly, and at once, whether they are married or not." Similarly, the situs rule is applied to real property questions because "[p]redictability and uniformity of results . . . are of first importance" in that area. Thus, even the advocates of the modern approaches recognize that their general approaches are too uncertain and too unpredictable in some cases.

The need for certainty and predictability has had surprisingly little affect on choice of law involving the attorney-client privilege. Forum law rules are inherently unpredictable; attorney and client usually do not know when they communicate what the forum will be. Interest analysis, the most significant relationship test, section 139 of the Second Restatement, and the better law approach all require post hoc judgments concerning the weight of state policy interests. Such tests are inherently uncertain, more than one alternative is often logically justifiable, and attorney and client cannot reliably predict which law any given court will choose. Thus, a flexible approach like interest analysis might achieve better results in particular cases, but only at the

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160. See, e.g., Restatement (Second) of Conflict of Laws § 283(2) (1969) (a marriage valid where contracted will be recognized everywhere unless it violates a strong public policy of the state with the most significant relationship to the spouses and the marriage); R. Leflar, L. McDougal & R. Felix, supra note 2, § 220 (validity of a marriage determined by the law of the state where the marriage occurred).

161. See, e.g., Restatement (Second) of Conflict of Laws §§ 223-43 (1969) (law of the situs applied to questions of title to real property); R. Leflar, L. McDougal & R. Felix, supra note 2, § 165 (same).

162. See, e.g., Restatement (Second) of Conflict of Laws § 223 comment a (1969); R. Leflar, L. McDougal & R. Felix, supra note 2, § 165, at 474, § 220, at 605.


164. Id.

165. Id. § 165, at 474.

166. The ability to justify a decision logically has never been a strong concern of courts in the conflicts area.

167. Even this is doubtful, given the way that courts manipulate or misunderstand interest analysis.
expense of the policies the attorney-client privilege was meant to serve.\textsuperscript{168}

A rule is needed, a rule that will allow client and attorney to know at the time of their communication which state's privilege law will apply, and therefore whether their conversation is protected from disclosure. Such a rule cannot be interest-based; as shown above, interest analysis is inherently ambiguous. Such a rule cannot require a weighing or balancing of policies; no one can reliably predict in advance the result of balancing. A rigid, territorial rule is the only choice-of-law approach consistent with the objectives of the attorney-client privilege. But what territorial rule?

Two possibilities may be rejected fairly easily. A law-of-the-forum rule is territorial, but certainly not predictable at the time of the communications. Application of the law of the state where the underlying cause of action arose is also territorial, but again unpredictable. For one thing, it is notoriously difficult to locate an interstate cause of action in a particular state. The manipulation and disuniformity inherent in that enterprise are reasons the First Restatement rules fell from favor. Second, even assuming a court could accurately identify after the fact where the cause of action “arose,” attorney and client often cannot do so at the time of their communication. If the client is seeking advice about a potential transaction, no particular locus for the transaction may have been determined. Even if the transaction has already occurred, attorney and client might find it difficult to predict where a court would place the locus of the transaction.

The attorney and client can reliably identify only three states when they communicate—the state in which the communication occurs, the state of the attorney's practice, and the state of the client's domicile.\textsuperscript{169} In many cases, these three may be the same state and the

\textsuperscript{168} One might object that a certain, predictable rule is not needed because the basic tenet underlying the attorney-client privilege is flawed—clients will not be less candid if they do not know their communications with their attorneys are protected. See supra note 157. That may be, and this Article does not attempt to challenge or support that behavioral assumption. Complete elimination of the attorney-client privilege might have no effect at all on communications between attorney and client. But acceptance or rejection of that assumption is not the province of the conflicts scholar or the court applying choice-of-law principles. For better or worse, courts and legislatures have decided that the attorney-client privilege fosters communications between attorney and client. Those who disagree with that assumption may attempt to eliminate the attorney-client privilege. In the choice of law context, courts are faced with a choice between the law of two states, each of which accepts the behavioral assumptions underlying the privilege.

\textsuperscript{169} The last two states—the attorney's state of practice and the client's domicile—may change subsequent to the communication. Either the attorney or the client might relocate. Obvi-
choice-of-law solution is easy. But what about the hard case where they differ? Which of the three possible territorial rules should a court choose, keeping in mind the policy objective of the attorney-client privilege?

A state of communication rule presents unique problems justifying its rejection. Its major flaw is that it does not provide the necessary certainty and predictability. If the state of the communications has no other connection to the case, attorney and client are unlikely to be familiar with its privilege law. They could research that law before they confer, but that imposes a substantial cost on them to obtain certainty and predictability. They could just assume that the state in which they communicate has the same law as the privilege law with which they are familiar, but they do so at the risk of being wrong. This possibility and the likelihood of subsequent disclosure will chill their communications. Their safest strategy would be to assume that the state of communications has a restrictive privilege law, and to curtail their communications accordingly. Thus, a state of communications rule is likely to have a lowest-common-denominator effect that chills attorney-client communications.

In addition, there may be a problem in some cases identifying the state of communication. When the client is in one state and the attorney in another, and they communicate either by phone or the mails, what is the situs of that communication? What about multiparty communications, where each of the parties is located in different states? What about communications on airplanes or trains or in automobiles—does the privilege law suddenly change as the parties cross a state line? More importantly, as indicated earlier, there is no

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170. This problem is akin to the problem under the First Restatement of identifying the place of contracting. See, e.g., Linn v. Employers Reinsurance Corp., 392 Pa. 58, 139 A.2d 638 (1958); Poole v. Perkins, 126 Va. 33, 101 S.E. 240 (1919).

Of course, a similar problem arises in identifying the state of the attorney’s practice or the state of the client’s domicile. An attorney may practice in more than one state and it may be difficult to determine the domicile of a client with a multistate presence. See infra text accompanying note 173. It is difficult to say whether the proposed state of practice rule presents more multistate choices than a state of communication rule. Most attorney-client communications occur within a single state but most attorneys are only licensed to practice in a single state as well. In any event, a state of communication rule can be rejected because the attorney’s familiarity with his own state’s privilege enhances predictability. Further, the text proposes an easy way to deal with multistate practitioners. See infra section V(B).

171. See supra text accompanying notes 71-72.
policy reason to apply the law of the state where the communications occurred. Absent some other connection to the case, attorney and client are just passing through, and the state of the communications has little regulatory interest in their communications.

The other two possible territorial rules are the attorney's state of practice and the client's state of domicile. Either choice is justifiable, as each of the two states has at least an arguable policy interest. On the one hand, the privilege is designed to protect the client and is the client's to assert or waive. This arguably makes the client's interest paramount and therefore the law of the client's domicile should be applied. On the other hand, the attorney-client privilege is designed to increase the effectiveness of the attorney's representation and surely the state of practice has at least some interest in that goal.

When the focus shifts to the need for certainty and predictability, however, the choice is clear. Of the two participants in the communication, only one, the attorney, is likely to know about the scope of the privilege. The client may have a generalized expectation of confidentiality, but is unlikely to know or understand the details of his home state privilege law. The attorney, on the other hand, engages in repeated communications with clients and ought to know the outlines of the privilege law in her state of practice. The attorney will be expected to advise the client as to the protection provided by the privilege and not vice versa. If there is a question, the attorney can more quickly, efficiently, and cheaply evaluate the privilege law of the state in which she practices than she can the privilege law of some other, unfamiliar state. Finally, applying the law of the attorney's state minimizes the number of situations where more than one state qualifies. Although no empirical work verifies this, a client with a multistate presence (e.g., a national corporation) is more likely than an attorney with a multistate presence. Thus, a state-of-the-attorney's-practice rule produces fewer

172. The proposed rule does not work particularly well for the knowledgeable client who confers with attorneys in several states. For example, an insurance company doing business nationwide will deal with attorneys in a number of different states. As a sophisticated repeat litigator, the insurance company is likely to be knowledgeable about legal rules, including the law of privilege. It would be easier for the insurance company if a single privilege law—for example, the law of its principal place of business—were applied instead of the various laws of the states where its attorneys are located.

However, any other rule or approach—forum law, interest analysis, most significant relationship—presents the same problem. The insurance company could not predict which law would apply, and would have to analyze a number of different states' laws. Even a rule applying the law of the company's principal place of business or some other rule based on the company's domicile would lead to definitional problems. See Note, supra note 56, at 603-609.
ambiguous results, and the second-level rule to resolve these multistate situations becomes less important. The balance tips in favor of applying the attorney-client privilege law of the attorney’s state of practice.173

This rule may not always produce a result that makes conflicts scholars comfortable. That is one of the drawbacks of generally applicable rules; the result in the general run of cases should be “correct” or acceptable, but there will always be cases where the rule fits poorly. Interest analysts abhor this possibility; the key idea underlying approaches like interest analysis is to allow judges to reach “correct,” acceptable results in all cases. But an ad hoc, policy-based approach sacrifices certainty and predictability, and those values must be paramount if the attorney-client privilege is to work. With no certainty concerning the rule the court will choose, privilege law degenerates into the lowest common denominator, and attorney-client communications 173. Professor Berger briefly proposes a rule similar to that in the text. Berger, Privileges, Presumptions and Competency of Witnesses in Federal Court: A Federal Choice-of-Laws Rule, 42 BROOKLYN L. REV. 417, 449-450 (1976). She fails, however, to ground that choice in the need for certainty and predictability and as a result makes exceptions to the rule that destroy its utility. For example, if the court determined that the client had a “reasonable expectation” that some other law would apply, she argues that the court should apply that other law. Id. at 450-51. Second, if the communication is made in a state other than the state of practice, Professor Berger would apparently apply the law of the state of practice only if the relationship “had its inception there.” Id. at 450 n.163. Finally, she appears willing to depart from a state of practice rule when another state has a strong policy interest in applying its law. Id. at 453. Thus, what began as a certain, predictable rule quickly evaporates into ambiguity.


are chilled. Ad hoc approaches, like interest analysis, thus purport to apply a more acceptable privilege law in particular cases only at the expense of all privilege law.

This uncertainty and unpredictability might be more acceptable if interest analysis and the other modern approaches delivered what they promised, but they do not. These approaches produce as many "unacceptable" results as would a rigid rule. As discussed above, courts do not have the slightest idea how to apply the "preferred" approaches to the attorney-client privilege. They choose a state with little explanation and results vary widely from court to court. Thus, interest analysis, the most significant relationship test, and the other modern approaches provide little benefit to justify their cost in terms of certainty and predictability.

Of course, the proposed rule does not itself produce absolute certainty or predictability. The attorney-client privilege is not absolutely certain even independent of the problems created by choice-of-law decisions. The extent of the privilege may be unclear on the fringes even within the law of a single state. More importantly, the proposed rule deals only with the uncertainty arising in the horizontal choice-of-law context, the choice among the laws of the states. Left unsettled is the uncertainty arising in the vertical, *Erie* choice-of-law context—the choice between federal and state law. When a federal claim is asserted, the federal law of privilege controls.174 Since attorney and client often will not know when they confer whether the ultimate claim will be state or federal or both, some uncertainty remains about the rule to be applied, with a resulting chill on attorney-client communications.175

This remaining uncertainty does not excuse adding additional uncertainty in the horizontal choice-of-law context, however. The federal rule should probably be changed and each individual state's attorney-client privilege law should be clarified, but the more certain a client and an attorney can be about the privilege, the better. Some uncertainty does not excuse total abrogation of the rule of law.

The proposed choice-of-law rule is most effective, of course, only if most states adopt it or if it is imposed on all states by federal legislation. Little benefit is provided if only a few states adopt a rule requiring application of the law of the attorney's state of practice. Attorney and client would still be unable to predict whose privilege law would apply

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because of the diversity of choice-of-law rules, and communications would be chilled. The best solution would be federal choice-of-law legislation mandating application of the law of the attorney's state of practice, preferably for both state and federal claims. The infringement on the states would be minor, because they would be free to develop their own privilege law for domestic cases, and the need for certainty and predictability would be served.

V. PROBLEMS WITH THE PROPOSED RULE

A. The Possibility of Manipulation

The proposed rule creates a potential problem of manipulation. What if a client purposely chooses an attorney from a state with a strong privilege just to have the protection of that state's privilege? If this occurred, states might be encouraged to broaden their attorney-client privileges to attract legal business, resulting in a spiral of ever-increasing privilege protection. However, this is unlikely to happen. For one thing, a client's choice of attorney is influenced by many things—professional competence, availability, knowledge of the client's business, and specialized expertise, for examples. Each of these attributes is likely to be more important than the scope of privilege protection. It is unlikely that a client will go to an attorney in another state solely to get a broader attorney-client privilege.

Even if some clients choose attorneys because their states of practice have broader privileges, states are unlikely to compete for out-of-state legal business by broadening their privileges. The primary appli-

176. This mirrors the "race to the bottom" argument in corporate law. Some scholars argue that competition among the states for incorporations results in especially lax laws regulating corporate governance. See, e.g., Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L.J. 663 (1974). Others have rejected this argument as economically unsound. See, e.g., Fischel, The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law, 76 NW. U. L. REV. 913 (1982); R. Winter, Government and the Corporation 7-11 (1978).

The similarity of these two arguments should not be surprising as the "race to the bottom," to the extent it occurs, also results from a conflicts rule. The internal affairs rule says that questions concerning the internal affairs of corporations, which include most issues of corporate governance, are decided by the law of the state of incorporation. See Restatement (Second) of Conflict of Laws § 302 (1971). This rule may have constitutional dimensions. See CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88-89 (1987); id. at 95-96 (Scalia, J., concurring); Edgar v. MITE Corp., 457 U.S. 624, 645-46 (1982). The "race to the bottom" is possible only because corporations doing business elsewhere can choose the rules controlling corporate governance by their choice of state of incorporation. Similarly, under the proposed attorney-client privilege rule, clients could choose the scope of their privilege by their choice of attorneys.
cation of each state's attorney-client privilege will always be in internal, domestic cases; in defining its privilege, each state must therefore balance the benefits of the privilege, including the attraction of new legal business, against the cost in terms of loss of evidence in domestic cases. The domestic costs will invariably dwarf the marginal gains in interstate legal business. And a broader rule only for out-of-state clients would probably be unconstitutional.177

B. Multiple Representation

Another problem the proposed rule presents is what to do in cases of multiple representation. Assume that a client consults both Attorney A, who practices in State A, and Attorney B, who practices in State B. Should we apply the privilege law of State A or that of State B? If the client communicates serially with the attorneys, first with Attorney A, then separately with Attorney B, the answer is obvious. The privilege law of State A should apply to the communications with Attorney A and the privilege law of State B should apply to the communications with Attorney B. Each attorney knows the privilege law of her own state, and can adjust her conduct and advise the client accordingly. The client will know the extent to which each communication is protected.

But what if the client communicates with Attorney A and Attorney B simultaneously? Or what if a single attorney practices in more than one jurisdiction? How do we resolve this situation without generating the uncertainty that the proposed rule is designed to prevent? The best answer is to apply the law of the attorney's state with the weaker privilege. This promotes certainty—it is an easy, predictable rule and it applies a law that at least one of the attorneys participating in the communication will know. It also protects against manipulation by the client. If any other rule applied, a client would have an incentive to consult an attorney from a state with a strong privilege just to protect the communications. He could do so without compromising his legal representation because his regular attorney would also be present. Applying the weaker privilege of the two removes any incentive for manipulation. Adding attorneys from other states to a conversation will never strengthen the client's protection.

VI. CONCLUSION

The foregoing analysis shows that interest analysis, the most sig-
significant relationship test, and other "modern" approaches fail when applied to an area of the law like the attorney-client privilege where certainty and predictability are essential. This is not an apology for the traditional rules, because the *First Restatement* approach in this area—the rule of forum preference—is equally inapt. But the problems with the *First Restatement* do not condemn all territorial rules. Sometimes, as in the case of the attorney-client privilege, territorial rules are essential. The mistake of many modern analysts is to generally reject territorialism merely because a particular set of territorial rules, those in the *First Restatement*, make no sense.

Without certainty and predictability, the policies underlying the attorney-client privilege are frustrated. In the absence of a certain, predictable rule, attorney and client cannot know if their communications will be protected and therefore will act as if they were not. Regardless of the privilege rule the court ultimately chooses, attorney-client communications are not fostered. To achieve the necessary certainty and predictability, we must pick a territorial rule that works well in the general run of cases.178

Courts applying a territorial rule will not always achieve the most "just" result in every individual case. But ex ante predictability and ex post justice are not completely compatible. For the same reasons that we have rules of law rather than general principles of equity in other areas of the law, we must often have clear, certain rules for choice of law.179 The inequitable results produced by those rules in the few cases where the rule does not work well are the price we pay for certainty and predictability.180 The alternative is an approach like interest analysis which, because it is uncertain and unpredictable, frustrates the policy of the attorney-client privilege entirely.

Territorial rules may also work well in answering other choice-of-law questions. The need for certainty and predictability is not unique to the attorney-client privilege. That, however, is a story best left for another day. My thesis is more limited—to show that a territorial rule works best in one discrete area of conflicts law. Given the goal of the attorney-client privilege, the territorial solution proposed here is the only sensible choice.

179. *Id.* at 319.
180. "Perfection is not for this world. The advantages which good rules bring are worth the price of an occasional doubtful result." *Id.* at 322.