The Puzzle of Privileges in Interstate Litigation

Graham C Lilly
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I. Introduction

The problem is simple to state, the solution elusive. Suppose State X, where litigation is pending, does not recognize a particular testimonial privilege. But a witness (W) is called to testify (or give a deposition) is from State Y, which does recognize the privilege in question and would presumably honor it. The witness, who holds the privilege, claims it. How should the court rule? A similar problem arises when State X recognizes the privilege, but State Y (W’s home state) does not. Citing the privilege law of the forum state (X), W claims the privilege in question.

The issue posed in both instances may, of course, be generally classified as falling within the boundaries of that nebulous legal field called “conflicts” or, more properly, “conflict of laws” or “choice of law.” Conflicts is untidy, to say the least, and I shall say more about that below. Of course, the field of conflicts embraces clashes of a wide variety of laws ranging from those that are obviously substantive (e.g., differences in contract or tort law) to those that rest on the borderline between substance and procedure (e.g., statutes of limitation and statutes of fraud).1 “Conflicts”

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1 Such quasi-substantive rules are increasingly (though not uniformly) thought to influence the outcome of a case sufficiently to warrant a “substantive” treatment. See, e.g.,
questions arise when the differing laws of two (or more) sovereigns might be applicable because the litigants are from different states (or nations) or the litigated event spans sovereign borders.

Generally, it is important for clients and their lawyers to be able to predict what law will govern a transaction or event that may be the subject of litigation. Accurate forecasting is especially important in the application of privilege law, for it often happens that the privilege holder, who speaks or otherwise communicates, is relying on the protection from compelled disclosure that privilege law generally affords. That reliance is undercut if the privilege law of another jurisdiction is applied and disclosure is ordered by a court, agency, or some other sovereign tribunal. To a surprising degree, there is currently a risk that a communication made in the privileged context of one sovereign may lose its protected status in interstate litigation because a court (or other tribunal) applies the privilege law of another sovereign. This uncertainty, especially incompatible with privilege law, is not confined to privilege law, but, as we shall see, is a principal characteristic of modern regimes governing choice of law.

Most observers agree that conflict of laws is a mess. There is no law there. Four or more different approaches are pursued by the courts and even with a single approach case results are inconsistent and unpredictable. One would suppose that at least testimonial privileges – a comparatively narrow field in which predictability is particularly important – could be governed by a readily grasped, uniform set of rules and principles. But judicial outcomes fall far short of this ideal.

In multi-jurisdictional disputes, some early courts favored the law of the forum; others gave substantial weight to the law of the state where the “privileged” communication took place. The problem is vexing because, generally speaking, privileges are designed to encourage communications by assuring the communicants that their conversation is protected from compelled disclosure. Yet when a communication implicates two states, only one of which recognizes the privilege in question, the law of the state of non-recognition may apply, thus defeating any claim to privilege. Should a generalized interest in full evidentiary disclosure trump the non-disclosure policy underlying the privilege in question? In this article, I argue that it usually should not. But the issues are complex, and the answers uncertain.

In recent years, courts have increasingly turned to the Second Restatement, Conflict of Laws, for guidance in resolving issues of privilege in an interstate context. Recourse to the Second Restatement is understandable, for the decided cases are still comparatively few and, as we shall see, the results are inconsistent. The authors of a leading treatise on conflict of laws confirm that “[p]roblems of assessing when the parties in one state court can invoke the privileges of another are not frequently discussed and the relevant case law is sparse.”\(^2\) Thus, the Second Restatement, which at least proffers a solution, is becoming increasingly important in the resolution of interstate privilege issues. Section 139 is the key provision, and we shall examine it shortly. For the moment, it suffices to say that the Second Restatement favors the subordination of privileges to the goal of fuller evidentiary disclosure. Some background is necessary in order to appreciate fully the difficulties posed by the Second Restatement generally – difficulties that are reflected in Section 139 which

\(^2\) E. Scoles et al., Conflict of Laws § 12-11 at 537 (4th ed. 2004).
II. Context and Background

To understand Section 139 and assess its practical implementation, it is first necessary to appreciate the dramatic changes in choice of law that have taken place over the last half of the twentieth century. The disparate, often incompatible themes of both traditional and modern choice of law are combined in the Second Restatement, which is a major source of its weakness and uncertainty. For present purposes, it will suffice to sketch the historical highlights from the early twentieth century forward, briefly describing and illustrating these main themes.³

The story begins⁴ with the First Restatement, Conflict of Laws, and its territorial or “vested rights” approach, championed by the late Professor Joseph Beale,⁵ and still used by a few states. The First Restatement’s conflicts rules are closely tied to the territory in which certain specified activities took place (e.g., the acceptance of a contractual offer) or in which a certain “status” existed at a particular time (e.g., a person’s domicile, marital domicile, or the location of property). For example, all substantive aspects of a suit in tort – such as who is liable, who can recover, and what damages are allowable – are, generally speaking, governed by the law of the sovereign where the purported injury is suffered. Most contractual issues are resolved under the law of the state or nation where the acceptance takes place, with the exception that issues pertaining to performance are

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³ For a comprehensive treatment, see id. at 68-110.

⁴ There were, of course, earlier developments. Particularly influential was the work of Justice (and Professor) Joseph Story entitled Commentaries on the Conflict of Laws, Foreign and Domestic (1834).

⁵ Professor Beale was the reporter of the American Law Institute’s First Restatement, Conflict of Laws.
referred to the sovereign that is the place of performance. Courts need only isolate the critical event (or status) specified by the subject-matter rule in point (e.g., intentional tort) and then apply the law of the sovereign in which the event occurred (or the status existed). In short, the thrust of the First Restatement is to fashion detailed rules that revolve around the centerpiece of territory; the aims of this Restatement are simplicity, predictability, prevention of forum shopping, and, in most cases, at least, conformity with party expectations – parties presumably expect to be governed by the laws of the place of their activities or, for example, the place where disputed property is located.6

There were, and still are, a number of difficulties with the territorial (vested rights) regime that dominates the First Restatement. To begin with, the contents of the laws competing for recognition by a court are, in theory at least, irrelevant. The court is typically instructed to isolate the critical event or status, determine its geographic locus (where parties’ rights “vest”), and then consult the law of the appropriate sovereign. Secondly, the rules of the First Restatement are inflexible, made so, presumably, in pursuit of stability, predictability, and the elimination of forum shopping. A simple example, essentially drawn from an early case pre-dating the First Restatement, will illustrate these deficiencies.

Suppose State X grants a corporate charter to a railroad and also passes a statute that overrides the common law fellow-servant rule, thus rendering the railroad vicariously liable for the negligence of an employee who injures a fellow-worker. Assume that railroad employees E-1 and E-2 both live in State X and that before a particular train leaves that state, E-1 fails to couple properly

6 For a concise, but excellent treatment of the First Restatement, see W. Richman & W. Reynolds, Understanding Conflict of Laws 177-202 (3d ed. 2002).
one of the cars in a string of cars destined for distant states. As the train is passing through State Y, the improperly coupled car breaks free, injuring E-2, who later sues his employer in a State X court. The railroad’s defense is that State Y, where the injury was suffered, retains the fellow-servant rule.

Under the territorial rules of the First Restatement governing liability for negligent conduct, this defense is valid. The fortuitous place of injury supplies the governing legal rule, despite the fact that all interested parties are from State X. Observe, also, that State X, through passage of the statute noted, has declared that its residents shall have the right to sue their employers for the negligence of fellow servants engaged in employment activities. In contrast, State Y shields its employers from vicarious liability. Yet, it is apparent that Y’s protective policy is not offended by the suit in the present case, lodged by a State X citizen against a State X corporation, under the substantive laws of State X.

Even though the First Restatement often produces results that are quite defensible, its shortcomings have grown more apparent with the passage of time, especially in the field of torts. Some cases, like the illustrative railroad case, yield unsatisfactory results; other cases would have yielded questionable results but for trial and appellate judicial manipulations that skewed the application of the First Restatement rule in point. For example, under the First Restatement a forum court will apply its own procedure. A result-oriented court may declare a rule “procedural” that most observers would denominate substantive, thus allowing the application of forum law. In effect, the court performs a judicial “recharacterization” of a legal rule. For example, legal rules governing

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7 See Alabama Great Southern Railroad Co. v. Carroll, 97 Ala. 126, 11 So. 803 (1892). Although decided before the 1934 adoption of the First Restatement, Section 386 of that Restatement yields the same result.

8 Restatement (First) of Conflict of Laws § 585.
the survival of causes of action\(^9\) and imposing a ceiling on damages\(^10\) have been recharacterized as procedural rules so that forum law (allowing the action and imposing no ceiling) prevails. This “recharacterization” process can also be used to take a case out of one (substantive) subject matter area (e.g., torts) and place it in another (e.g., contracts), where the rules of the latter field favor the desired result. For example, where a forum state’s statute permits a plaintiff injured by a rental car to sue the rental company (even though the place of the accident gives no cause of action), a court may declare that the case before it is contractual in nature.\(^11\) The justification for this slight of hand is that the forum’s liability-imposing statute is an implicit part of every car-rental contract in the forum state, with the result that plaintiff is a contractual third-party beneficiary.

There are other disingenuous escape devices used to avoid the rigors of the First Restatement.\(^12\) Whatever might be said about the results in the particular cases, by the middle of the twentieth century fault lines in the First Restatement were manifest. Even judicial manipulations undertaken to achieve a sensible outcome eventually fell short of their mark. There are several points of note: first, when a court recharacterizes a legal rule from, say, tort to family law, that

\(^9\) *Grant v. McAuliffe*, 41 Cal.2d 859, 264 P.2d 944 (1953).

\(^10\) *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 172 N.E. 2d 526 (1961). The court also declared that to enforce that damage limitation imposed by the state in which the accident in question occurred would offend the public policy of the forum state.

\(^11\) *Levy v. Daniels’ U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163 (1928). For a recharacterization that post-dates the adoption of the First Restatement (1934), see *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W. 2d 814 (1959) (suit in tort for wife against husband for injuries suffered in automobile accident characterized as family law suit; forum law applied).

\(^12\) See Richman & Reynolds, *supra* note 6 at 180-99.
“family law” rule, if followed in future cases with different facts, may produce questionable results;\(^{13}\) second, the use of escape devices undercuts major goals of the First Restatement: uniformity, predictability, and prevention of forum shopping. It should be added, however, that it is not far-fetched to believe that the First Restatement could have been carefully revised and its main focus, territoriality, preserved, at least for the most part. The major failures of the First Restatement were in torts cases and, more than that, torts cases that exhibit a pattern: the place of injury was in a state that had little or no connection with the parties or the disputed legal issue. The typical dispute was concerned with \textit{compensation} between the parties and, as to this issue, the mechanical application of the “place-of-the-wrong” rule seemed indefensible.

This last point is dramatically revealed in a case, \textit{Babcock v. Jackson},\(^ {14}\) in which the New York Court of Appeals broke with the place-of-injury rule of the First Restatement. The issue in \textit{Babcock} was whether an Ontario guest statute would defeat the suit of a New York passenger against a New York driver. The single-car accident in question occurred during a short trip by two New Yorkers (the plaintiff and defendant) into Canada in a car registered and insured in New York. Application of Ontario’s guest statute\(^ {15}\) would have disallowed a suit by the non-paying guest-passenger against the host-driver. On the assumption that the purpose of a guest statute is to defeat

\(^{13}\) Suppose for example, the forum court holds that a tort suit by a (passenger) wife against a (driver) husband is not referenced to the substantive rules of tort, but to those of family law and hence governed by the law of the marital domicile. In a subsequent case, the court may find that applying the law of marital domicile leads to an undesirable result.


\(^{15}\) These statutes, now largely repealed, were once popular, especially during the early and mid-twentieth century. The statutes either disallowed a suit by the guest-passenger or made her recovery more difficult – for example, by making her prove gross negligence.
collusive suits between friendly litigants (to the detriment of the driver’s insurer), the New York Court of Appeals refused to apply the territorial (vested-rights) rule of the First Restatement. New York had an interest in providing a means of compensation for its injured plaintiff; Ontario’s interest in the prevention of collusive suits was not implicated by a suit between two New Yorkers in which a New York insurance company provided the driver-defendant’s liability coverage.

The Babcock court purported to apply a choice-of-law approach called “grouping of contracts” or “center of gravity” (still used by a few courts) in which the forum court examines the number and nature of the contacts that the parties and the underlying transaction have with each of the affiliated states. Under this approach, some contacts may be more important than others; in the end, however, the court chooses the law of the state in which the most meaningful contacts predominate.

Observe how the setting in Babcock affords the opportunity to employ other approaches to choice of law – approaches that compete with both the territorial, and the “grouping of contacts” methodologies. For example, one factor that might persuade a court to choose X’s law over that of Y is that the latter’s law is antiquated, a vestige of prior years and outdated thinking. In short State X’s law is chosen because it is the “better rule.” Indeed, one modern approach to choice of law is simply to identify “choice-influencing” considerations such as predictability of result, ease of judicial administration, advancement of the policy interests of the states involved, and (importantly) an assessment of which state has the better rule of law in light of social, economic, and jurisprudential considerations. Professor Robert Leflar has proposed and elaborated upon such an approach.16 His

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system (which has no “rules” but only broad criteria) has been adopted in five states and has influenced judicial outcomes in several others.\textsuperscript{17}

Another approach to the Babcock case is to examine only the interests of the involved states. To discover the interest (if any) of each affiliated state, it is necessary to first identify the policy or objective that undergirds the competing laws in question. This step precedes and informs the resolution of the next and critical step, which is to determine whether each of the involved states has an interest in the application of its own law to the interstate case before the court. This critical determination – whether an involved state has an interest – usually produces one of two patterned responses: first, State X and State Y each has an interest in the application of its own law (a “true” conflict); second, only one state, for instance X, has an interest in the application of its own law (a “false” conflict). On relatively rare occasions, a third pattern emerges: neither X nor Y has an interest in providing the governing law (the “unprovided-for” or “no-interest” case).

This interest-analysis approach to choice-of-law was developed and refined by the late Professor Brainerd Currie and, although his system has been exclusively adopted in only a few states, it has been highly influential as a major factor in choice-of-law decisions across the United States. To illustrate its operation, recall the railway accident that occurred in State Y, but involved two State X employees and a railroad company incorporated in State X. Under the territorial approach of the First Restatement, State Y law would apply because the injury to the plaintiff-employee occurred in Y. Thus, the application of Y’s fellow-servant rule would defeat the injured employee’s suit against the employer-railroad. Yet, as we have seen, State Y has no interest in the outcome of this suit.\textsuperscript{17}

\textsuperscript{17} Scoles et al., supra note 2 at 104.
protective policy that undergirds its legal rule is not offended if the injured employee from State X recovers a judgment against his State X employer. State X, on the other hand, does have an interest in the outcome of the injured employee’s suit: X has expressed a policy of compensating its injured employees by passing a statute that negates the fellow-servant rule. Furthermore, State X has an interest in promoting safe practices by the railroad it has chartered. Exposing the railway company to potential liability for an employee’s negligence provides an incentive for the railroad to more closely attend to safety concerns. From the prospective of interest analysis, this case presents a false conflict and such conflicts are resolved by applying the law of the only state that has an interest – State X.

Suppose, however, the defendant railroad were a State Y corporation, but the plaintiff was a State X domiciliary. Now Y has an interest in the application of Y law (the fellow-servant rule), for its policy is to protect its employer from liability; X also has an interest in the application of its law, which would allow its injured resident to recover. Professor Currie would resolve this “true conflict” by applying the law of the forum state – a questionable solution because it encourages forum shopping. Currie’s approach does, however, favor ease of judicial administration and, more importantly, it precludes a presiding judge from weighing the interests of the competing states in an attempt to choose the law of the state that, in his or her view, has the stronger interest in the application of its law. If such a choice is to be made, Currie argued, it should be made by a

Currie also applied this preference for forum law to the occasional case in which neither involved state has any interest in the application of its law. For an example of the “unprovided for” or “no interest” case, see Erwin v. Thomas, 264 Or. 454, 506 P.2d 494 (1973). The few “unprovided for” cases suggest a general pattern: the law of the plaintiff’s state favors the non-resident defendant; the law of the defendant’s state favors the non-resident plaintiff. Neither state’s policy is advanced by applying its own law to the detriment of its own citizen and to the advantage of the non-resident litigant who would secure more favorable law than that available to him in his home state.
legislative body, not by a judge. Nonetheless, modern courts that employ interest analysis do weigh the interests of the affiliated states and select the state with the stronger interest.19

This brief overview of the principal approaches to Conflict of Laws brings us to a consideration of the most popular system of conflicts resolution, and the one that is the most influential in resolving issues of privilege in an interstate context. In order to understand fully the section of the Second Restatement that governs privileges, it is necessary to flesh out the general framework of the Restatement.

III. The Second Restatement

The Restatement (Second) of Conflict of laws was drafted in the midst of a great upheaval in both academic and judicial circles, centering, of course, on the proper approach to choice of law. The First Restatement was under a barrage of academic criticism; courts were also showing their displeasure with its vested rights theory by either refusing to recognize the governing territorial principle or by invoking various escape devices to achieve the results desired. This was especially true in torts cases. So heated was the controversy and so many were the disparate voices favoring one of the “modern” systems of choice-of-law that the Second Restatement’s drafting process dragged on from 1953 to 1972, when, at last, the project was concluded – perhaps due to sheer exhaustion.20

The final product was a vast compromise, a composite of almost every choice-of-law theory,


20 For a full account, including the influence of scholars not mentioned in the preceding background summary, see Scoles et al., supra note 2 at 58-68.
past and present. Every academic and judicial voice was heard and heeded by the drafters. Although the Second Restatement, like the First, has clusters of rules and principles grouped by legal subject matter (such as torts, contracts, and property), the overriding theme is this: a court should apply the law of the state which has the “most significant relationship” to the particular issue in play. Assuming there is no statutory directive to guide the court, the judge first characterizes the conflicts issue by subject matter. He or she then examines the contacts of the parties and of the disputed transaction such as, for example, the contacts generated by the design, manufacture, distribution, purchase, and failure of a defective product. For some legal areas, the Restatement sets out a non-exclusive list of connecting factors or contacts that are likely to be relevant to the choice-of-law decision, such as (in the case of torts) the place of injury, the place of the conduct in question, the parties’ domicile or place of business, and the place where the parties’ relationship is centered.21 In other legal areas, the relevant connecting factors are not enumerated; it falls to the court to identify them.

Scattered throughout the Second Restatement, but not uniformly provided, are various tentative or “presumptive” choices – selections of the jurisdiction whose law will usually control.22 Generally speaking, these presumptive choices can be displaced if, under the facts of a particular case, another connected sovereign has a stronger claim to the application of its law than the sovereign tentatively chosen.23 To be more specific, another sovereign has a more “significant

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21 Restatement, Second, Conflict of Laws § 145 (2).

22 See, e.g., Restatement (Second) of Conflict of Laws § 156 (1), (2) (applicable law that determines if “actor’s conduct was tortious . . . will usually be the local law of the state where the injury occurred.”)

23 See, e.g., Restatement (Second) of Conflict of Laws § 146 (rights and liabilities of
relationship” to the particular issue than does the presumptively selected state. As we shall see, under the Second Restatement all paths eventually lead to Section 6 and its criteria for selecting the state that has the most important relationship to the particular issue before the court. A presumptive choice, if there is one, is typically only a tentative selection of that decisive or “most significant” state relationship; if there is no presumptive choice, the court conducts its search without the benefit of this tentative selection.\textsuperscript{24} The factors used ultimately to determine which state has the “most significant relationship” to the issue before the court are set out in Section 6, the centerpiece of the Second Restatement. These factors, accompanied by my own brief editorial comments, are set out below:

(a) the needs of the interstate and international systems [This factor is rarely cited by courts; its obvious vagueness makes it difficult to apply. Presumably, the forum should take a broad view of the operation of its choice-of-law system, deferring to another affiliated sovereign when doing so would promote such values as comity, predictability, recognition of the superior interest of state(s) other than the forum, and so forth.];

(b) the relative policies or the forum [The forum may have general policies, such as compensation to the injured, fulfillment of party expectations, and ease of judicial administration, but, in addition, may

\footnote{Occasionally, the standard or principal theme “most significant” state is used as a restraint on the operation of another Second Restatement Rule. \textit{See, e.g.,} section 187 (governing party autonomy in choosing the law that will govern contractual validity, rights, and duties).}
have specific policy concerns that arise by reason of the particular case before the court – for example, safety in product design and manufacture; foreseeability of the litigated event; or protection of its domiciliary (or business enterprise) from excessive liability.];

(c) the relevant policies of other interested states and the relative interests of these states in the determination of the particular issue [The comments in connection with subsection (b) are relevant here. Note that both (b) and (c), in particular, as well as, to a lesser extent, (d), introduce interest analysis into the Second Restatement. It is important to note, however, that under the textual terms of the Restatement, interest analysis is not the exclusive means of resolving choice-of-law issues.];

(d) the basic policies underlying the particular field of law [A basic policy of torts, for example, is to make whole a victim who was injured through the fault of another; a basic policy of contracts is to validate private arrangements (that do not violate a public policy) and to fulfill the expectations of the contracting parties.];

(e) certainty, predictability, and uniformity of result [These are lofty goals, yet basic to any choice-of-law system that is likely to endure; it is the implementation of these goals that poses the difficult challenge.]; and

(f) ease of the determination and application of the law to be applied.
[This factor tends to favor the application of the forum’s substantive law and certainly counsels that a forum’s routine procedural law, such as pleading and motion practice should ordinarily be applied.]

Only a moment’s reflection will reveal how difficult it is to apply Section 6 to a concrete case. Typically, some of the factors in Section 6 will point toward State X law, while others point to the law of State Y. The judge’s task is made more difficult because there is no hierarchy or preference order in Section 6. Furthermore, the phrase “most significant relationship” is nowhere defined. One could imagine a court seizing upon the Section 6 considerations that suggest the use of interest analysis, particularly subsections (b) and (c), and giving these factors great or even, perhaps, decisive weight. Indeed, many courts have in fact viewed the interests of the competing states as decisive. This interest-analysis dominance, however, often impairs or defeats other goals of Section 6, such as the protection of justified expectations, predictability, and uniformity. The reason is that interest analysis, as a singular or predominate choice-of-law system, falters except in the easy cases where it is clear either that only one state is interested or that one state’s interest is overwhelming. Where two or more states have a significant interest (a “true conflict”), interest analysis often produces unpredictable, questionable outcomes that frustrate party expectations. Indeed, the number of unsatisfactory results under interest analysis appear to rival those that were yielded by the much maligned First Restatement.

An illustrative case will make the point. In Lilienthal v. Kaufman, the defendant, an Oregon businessman, traveled to California where he sought out the plaintiff for purposes of securing a loan.

25 See Scoles et al., supra note 2 at 64.

26 239 Or. 1, 395 P.2d 543 (1964).
The loan was made in California; it was to be repaid there; and all related business dealings between
the parties took place in that state. Unbeknownst to the California plaintiff, the defendant had been
declared a “spendthrift” under Oregon law, a status which empowered his conservator to void his
contracts. The defendant defaulted on the loan, the plaintiff sued him in Oregon, the conservator
voided the contract, and the Oregon Supreme Court held in the defendant’s favor. California had an
interest in protecting its creditor, fulfilling party expectations, and encouraging a stable contractual
(business) environment. Oregon, on the other hand, had an interest in protecting the assets of
spendthrifts, presumably for the ultimate protection of those dependent on him. Had the court taken
full account of territorial considerations, party expectations, and fairness to the plaintiff, it should
have ruled in the lender’s favor.

In another famous (or, perhaps, infamous) interest-analysis case, Bernhard v. Harrah’s
Club, the Supreme Court of California permitted the imposition of civil liability on a Nevada
casino for serving “excessive” alcoholic beverages to one of its customers. After consuming several
or more drinks, the customer drove his car on a California highway where he struck and injured a
California plaintiff. California, but not Nevada, had a “dram shop” law, making a tavern liable for
serving drinks to an intoxicated patron. Nevada had an interest in protecting its business from dram
shop liability; California had an interest in protecting highway users from risks posed by intoxicated
drivers. Weighing the competing interests, the California Supreme Court concluded that California
would suffer the greater impairment of its policies – and thus its interests – if its law were not
applied. Recognizing the gravity of its decision and its potential for interstate disharmony, the Court

27 Supra note 19.
limited its decision to Nevada establishments that actively solicit business in California. 27 Nonetheless, the proximity of Nevada to heavily-populated California suggests that solicitation of California customers, if not commonplace, is frequent. Thus, under the banner of interest analysis, Nevada got a dram shop act, created and imposed by the California Supreme Court. 28

Interest analysis, although only one of a number of choice-of-law theories embedded in the Second Restatement, 29 has generally been an influential component in determining which of several states has the “most significant relationship” to the issue before the court. Thus, it may be useful briefly to examine the merits and shortcomings of this approach. The major contribution of interest analysis is to lay bare the false conflict, where only one connected state has an interest in the application of its law. In other patterns, notably true conflicts, the deficiencies in interest analysis have become painfully apparent. First, it is often difficult to identify the interest(s) of a given state. Legislative histories are notoriously vague and conflicting, and judicial pronouncements are often shifting and unreliable as well. For example, at least three separate policies have been advanced as the “policy” underlying guest statutes: (1) a reluctance to permit an ungrateful, non-paying guest to

27 The California Supreme Court also noted that a Nevada statute declared that serving an intoxicating beverage to an inebriated customer constituted a misdemeanor. However, three years prior to the Court’s decision, this statute had been repealed. See Nev. Stat. § 604.8 (1973). Thus, this Nevada law could no longer serve as a justification for the choice of California law.

28 The potential impact of Bernhard will never be known, for the Court’s decision, at least for future cases, was legislatively abrogated. See Cal. Bus. & Prof. C. § 25602.

29 Note that some sections of the Second Restatement rely on territorial principles. See, e.g., §§ 223-240 (real property). The Second Restatement also lends itself to the choice-of-law approach in which a court examines the various contacts and attempts to identify the greater number of important contacts thus yielding the “most significant relationship.” See, e.g., Johnson v. Spider Staging Co., 87 Wash. 2d 577, 555 P.2d 997 (1976) (emphasizing the importance of contacts relevant to a state interest).
recover against her host-driver; (2) prevention of collusive suits against the insurance company covering the driver’s liability; and (3) preservation of the insurance proceeds for the protection of the parties occupying the other car(s) involved in the accident in question.\(^{30}\)

Obviously, a court can affect the interest of a state by its choice of the underlying policy or rationale. Thus, if driver and passenger from State X (which has no guest statute) collide with a third party in State Y (a guest statute state), State Y is a disinterested state under the first two policy assumptions – at least if we assume the driver’s car is registered and insured in State X. Under the third assumption, State Y would presumably have an interest in the application of its guest statute if one or more occupants of the other car were State Y residents. The situation arguably would be different if the occupants of the other car were from State Z, in which case State Y may not have an interest in preserving the host-driver’s insurance proceeds. Yet, suppose the occupants of the State Z car sustained serious injuries and were treated for a protracted period by State Y health providers. Would State Y now have an interest in protecting its medical creditors? A forum-court judge must decide this difficult question.

Other difficulties with interest analysis could be cited. Modern interest-analysis courts shun Professor Currie’s admonition that the solution to a true conflict is to apply forum law. If identification of the underlying state policies and resulting interests is difficult, weighing their respective strengths is even more daunting. Note, also, that the dismissal of territorial concerns (such as where the parties acted with respect to the litigated transaction) as a principal determinant for conflict of law resolution discards a factor that bears heavily on both party expectations and

predictability of judicial outcomes. Indeed, after unsuccessfu lly experimenting with modern conflict theories (largely, interest analysis), the New York Court of Appeals has returned to a system that emphasizes rules instead of an open-ended approach. In addition to recognizing the interests of the affiliated state, New York places considerable importance on the domicile of the parties and on the physical location of the events in question – that is, on the law of the state in which the contested events took place. New York’s approach may not be the best solution to the intractable problem of choice of law, but it does incorporate territorial concerns, party expectations, and policy considerations. Any system which completely ignores one of these fundamental features is unlikely to survive.

IV. The Second Restatement and Testimonial Privilege: In General

One might anticipate that the Second Restatement principle governing privilege would simply state that the law of the state having the most significant relationship to the privilege issue before the court will govern. That position would be consistent with the central thrust of the Restatement drafters. Alternatively, the Restatement might say that the law of the state where the privileged communication originates will ordinarily apply, unless the holder of the privilege in question could not reasonably have expected the privilege to apply and another connected state has a more significant relationship to the communication than does the state where it was made. Other formulations of the controlling rule or principle can be imagined, but the rules actually adopted in

31 See Neumeier v. Kuehner, 31 N.Y. 2d 121, 286 N.E. 2d 454 (1972). The rules formulated in Neumeier were addressed to guest statutes. Subsequently, the principles contained in the rules were extended to another area of torts. See Schultz v. Boy Scouts of America, Inc., 65 N.Y. 2d 189, 480 N.E. 2d 679 (1985). Nevada has also turned its attention to rules of the
Section 139 are surprising:

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

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

It is clear that the core principle of Section 139 is evidentiary disclosure, for in each of its two subsections the rule favors the law of the state in which the privilege in question is inapplicable.

Party expectation or reliance is mentioned briefly in the Comments accompanying Section 139, but only in connection with the broader considerations, such as the role of the important criterion “most significant relationship” and the several policy concerns that might convince a forum court to recognize a privilege conferred by another affiliated state. Indeed, Section 139 leaves the impression that privileges are a minor nuisance and, in most cases, should be brushed aside for the sake of accurate fact-finding.

There are two general rationales for creating and preserving privileges. The traditional, widely accepted utilitarian justification is that privileged communications are excluded from evidence because their disclosure would discourage the free flow of information that is essential to a private relationship or a governmental interest that society deems worthy of protecting and encouraging. Typical examples are the privileges conferred upon communications between client and attorney, penitent and priest, patient and psychotherapist, and the President and his advisors. The utilitarian or instrumental rationale does not, however, adequately explain all privileges. For example, private communications between a married couple are privileged in all American jurisdictions, but this marital privilege is difficult to justify on instrumental grounds alone. While it is true that society wants to encourage and sustain the institution of marriage, it is highly doubtful that the existence of the marital privilege is necessary to facilitate intimate, confidential communications between married partners. Most married couples are probably unaware of the privilege and, in any event, usually would not deem the privilege an important determinant in their marital communications. A second, more recent rationale, however, does explain recognition of the marital privilege: some privileges are supported wholly or in part by a privacy or autonomy principle. That is, certain intimate relationships should be shielded from governmental prying and intrusion. The central point, though, is that privileges, whatever their rationale, are emphatically not designed to promote accurate fact-finding; indeed, they are purposefully created at the expense of

32 For elaboration and some additional justifications, see C. Mueller & L. Kirkpatrick, Evidence § 5.1 at 286-87 (2003).


accurate fact-finding.

In addition to its preference for disclosure, Section 139 has other curious aspects. First, it neglects to flesh out the general policies – utilitarianism and privacy – that justify the creation of privileges. Nor does the section (or the accompanying Comments) address specific policy concerns that sometimes animate a particular privilege.\(^{35}\) Second, Section 139 treats privileges collectively, leaving the impression that they are fungible. Of course, as the drafters well knew, privileges vary widely in the extent of their recognition, their scope, their policy underpinnings, their importance, and the ease with which they can be waived or forfeited, sometimes by a judicial override. It appears that the drafters turned to the pliable concepts of “most significant relation” and especially, “strong public policy” to act as surrogates for the many individual features of privileges. These two broad criteria permit a court to take into account important differences among the various privileges in deciding the strengths of the relationship and policies traceable to a particular privilege and thence to the affiliated states. Third, neither the expectation nor the reliance interest of the communicating parties – and especially the holder for whom a given privilege is created – is assigned a paramount or even an important role in the decision whether or not a claimed privilege should be recognized. Fourth, no distinction is suggested between privileges in which one of the communicants is a

\(^{35}\) For example, the psychotherapist-patient privilege is justified primarily because it is considered essential to induce a patient’s free and full disclosure. It is speculated, furthermore, that the loss of evidence through recognition of the privilege is modest: if there were no privilege, the patient would simply withhold information. In addition, important public and private concerns are served by the privilege: the patient is usually helped and the public is benefitted by an improvement in “[t]he mental health of its citizenry, . . . a public good of transcendent importance.” *See Jaffee v. Redmond*, 518 U.S. 1, 11 (1996). The attorney-client privilege is sometimes said to be justified on fairness grounds: it would be unjust for the attorney to encourage frank disclosures from the client, and subsequently reveal them in courtroom proceedings.
professional such as an attorney (likely to know about the privilege and to advise of its existence) and privileges involving lay persons such as husband and wife, who may be ignorant of the privilege in question. Fifth, the drafters of Section 139 fail to justify their core position that often allows a general policy of evidentiary disclosure, shared by all courts, to trump the specific policy concerns that have led to the recognition of the privilege in question at the expense of evidentiary disclosure.

Finally, the scheme of Section 139, which favors disclosure in the forum court, injects uncertainty into the status of many privileged communications and may encourage forum shopping. When the privileged communication is made, the location of the forum where its recognition will be tested may not be known. Further, even if the identity of that court is known, it is difficult to predict how a forum judge will rule when he or she weighs the disclosure policy of Section 139 against the various – and often vague – interest and policy concerns of the affiliated states. In sum, without offering an adequate pragmatic or policy justification, the Second Restatement disrupts the normal operation of privilege law and threatens to override parties’ expectations and reliance. It remains to observe more closely the impact of Section 139.

V. Section 139(1)

It will be recalled that Section 139(1) addresses the case in which the communication in question is not privileged under the law at the state having the “most significant relationship” with it. Subsection (1) directs that the forum court admit the evidence in question, unless its admission “would be contrary to the strong public policy of the forum.” It is rare that the admission of

36 When the Federal Rules of Evidence were adopted in 1975, Congress was unable to agree on the nine specific non-constitutional privileges contained in Proposed Fed. R. Evid. 502-10. However, these proposed rules still serve as a useful reference and are often cited by courts. They include these privileges: required reports, attorney-client, psychotherapist-patient, husband-
evidence, not privileged in the dominantly affiliated state but privileged in the forum state, would be rejected on public policy grounds. In the Comment to Subsection (1), the author suggests that “[s]uch a situation may occasionally arise when the state of the forum, although it is not the state which has the most significant relationship with the communication, does have a substantial relationship to the parties and to the transaction and a real interest in the outcome of the case.”37 In the vast majority of cases, once the presiding judge in the forum state concludes that the state with the most significant relationship to the contested communication does not grant to it a privileged status, the court will nearly always admit the evidence. The justifiable premise for this ruling is that Section 139(1)’s core principle is sound: there is usually no sufficient reason for a forum state to apply its privilege when the state with the most significant relationship to the communication in question has declined to do so. In short, under the general principle of evidentiary disclosure, the privilege will usually yield. Typically, the communicating parties will have no persuasive claim that they expected protection or relied on the privilege in question.38

Of course, the judge must determine that a state other than the forum state is the jurisdiction of greatest significance and that it does not confer a privilege. (This task, often difficult when only two states are involved, may become more complicated when there are three or more affiliated states.) Nonetheless, Comment (e) to Section 139 provides some guidance for the forum court judge, wife, clergyman-communicant, political vote, trade secrets, secrets of state, and informer identity.

37 Restatement (Second) of Conflict of Laws § 139, comment (c).

38 For an illustrative case, accompanied by a thorough appellate discussion, see State v. Heaney, 689 N.W. 2d 168 (Minn. 2004) (after a one-car accident in Minnesota, blood sample taken in nearby Wisconsin hospital; held, although alcohol test results subject to physician-patient privilege in forum, Minnesota, results nonetheless admissible because not privileged in Wisconsin, the state of most significant relationship.)
for it asserts that “[t]he state which has the most significant relationship with a communication will usually be the state where the communication took place which . . . is the state where an oral interchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing.” One feature of this Comment is troublesome. If the holder of a privilege, domiciled in State X, sends a privileged written communication to a recipient in State Y, which does not recognize the privilege, State X has a strong claim that a forum should recognize the privilege. The claim is especially compelling if the holder reasonably relied on the privilege, a reliance that can be presumed if a professional advised that the privilege was available.

Why should the privilege law of the “receiving” state be decisive?

Comment (e) also contains a qualification of its tentative identification of the most significantly related state: if there was “a prior relationship between the [communicating] parties, the state of the most significant relationship will be that where the relationship was centered unless the state where the communication took place has substantial contacts with the parties and the transaction.” To illustrate: if a husband and wife, domiciliaries of State X, exchanged a confidential marital communication while temporarily visiting State Y, their home state would have the most significant relationship to the disclosures between them. This is a sensible solution for the husband-wife privilege. But would the answer be the same if the married couple consulted a physician, accountant, or attorney in State Y? The Restatement is silent, but the response should be that the professional relationship in question is centered in State Y and the fact that the couple is domiciled in State X is of marginal importance. The parties could reasonably expect the application of State Y law. State Y, and not State X, also has the superior interest in deciding whether or not to
pursue a policy that is designed to facilitate the acquisition of pertinent information by its licensed professionals. Put otherwise, State Y has “substantial contacts with the parties and the transaction” and thus it is the state with the “most significant relationship.”

There are other important concerns in choosing the state with the dominant relationship; these are addressed in connection with the troublesome Section 139(2). It suffices it to say at this point that tying the “most significant relationship” to the laws of the state in which the communication was “made” might have worked adequately in 1971, when the Second Restatement was adopted. Today, interstate litigation is common, and communications routinely cross interstate and international boundaries, often in wire and wireless forms unknown in 1971. Determining the jurisdiction where the communication “took place” will not always be a simple task in the contemporary environment.

VI. Section 139(2)

Recall that Subsection (2) of Section 139 continues the preference for disclosure over privilege. It does so, however in a setting in which Section 139’s approach is much more problematic. Under Subsection (2), the assumption is that the forum state, X, declines to grant a privilege, but another affiliated state “which has the most significant relationship with the communication” confers a privilege on the disclosure in question. The Restatement’s proposed solution is to admit the contested evidence “unless there is some special reason why the forum policy

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

40 Id.

41 Restatement (Second) of Conflict of Laws § 139(2).
favoring admission should not be given effect.” As the text of Section 139(2) is now written, a critical issue is what constitutes a “special reason” justifying the recognition of the dominant state’s privilege rule? Of course, it is first necessary to identify the state that has the dominant interest. As noted above, Comment (e) declares that the state in which the communication in question took place will “usually be” the state with the “most significant relationship.” Comment (e) elaborates: “[t]he state where the communication took place . . . is the state where an oral exchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing.” If the linked activities of communicative expression and sensory reception take place in a single state the reference to the “significant” jurisdiction is straightforward. But, as we have noted, in the modern world, communications in various modes often originate in one sovereign and are received in another. It is not clear, for example, why the state in which a written communication is received should usually be the state with the dominant relationship.

When a privilege is conferred on a professional relationship, such as attorney-client, accountant-client, source-reporter, physician-patient, clergyman-penitent, a primary focus should be on the privilege law of the state in which the relationship was formed or, in some instances, the state in which it is centered because of the frequency of communicative activities. For example, if a professional relationship entitled to a “privileged status” were formed in a transient environment – as where a doctor initially treats a patient while both are attending a conference in a distant state – the jurisdiction having the most significant relationship should be the state of the physician’s practice

42 Id.

43 For example, a patient might be examined by a physician or a client might take financial statements he has prepared for his accountant for the latter to analyze.
where treatments were continued. If there were no subsequent consultations, neither the state where
the initial treatment was administered, nor the state of the patient’s residence is likely to have a
strong claim to the dominant relationship. However, if the physician and patient share a common
domicile and, under the circumstances, reasonably relied on the privilege of their state of residence, a
forum court should consider that state the jurisdiction with the most significant relationship to the
physician-patient exchange. In many circumstances, however, a determination of the state with the
most significant relationship to the communication in question will be difficult and unpredictable—
just as it is under Section 139(1).

That said, the more troublesome problem is Section 139(2)’s preference for forum law in
circumstances in which the state with the most significant relationship, once identified, recognizes a
privilege, but the forum state does not. Here the Second Restatement, in Comment (d), offers a
laundry list of considerations bearing on whether or not the forum court might discover “a special
reason” not to apply its no-privilege rule. The thrust of Section 139(2), augmented by Comment (d),
is to favor application of the forum rule, but to permit the special circumstances of a given case to
counsel the application of the privilege rule of the affiliated state with the most significant
relationship. Comment (d) offers a non-exclusive list of factors “the forum will consider in
determining whether or not to admit the [contested] evidence.” The relevant concerns are:

(1) the number and nature of the contacts that the state of the forum
    has with the parties and with 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.

The discussion of these factors in the Comment makes it clear, first, that they are flexible guidelines and, second, there is no preference or hierarchy of importance among the considerations listed. In other words, the dominant approach of the entire Second Restatement prevails and, as in the Restatement’s Section 6, the forum court is given a list of considerations that often conflict when applied to a concrete case. This approach does not work well generally and it is particularly troublesome when applied to privileges, an area in which predictability, party expectations, and reliance should be the dominant considerations.

The Second Restatement’s bias in favor of admitting “privileged” evidence has not been lost on the courts. In Sterling Finance Management, L.P. v. UBS PaineWebber, Inc., for example, the issue before the Appellate Court of Illinois was the admissibility of communications (contained in a compliance opinion) between a corporation and its New York counsel. The court conceded that the communications, made in New York, would be within that State’s attorney-client privilege. Illinois, however, had a more restricted corporate attorney-client privilege and the communications in question fell outside its protective boundaries. Applying the Second Restatement’s Section 139(2), the court admitted the challenged evidence. Even though it conceded that New York was the state with the most significant relationship to the communications in question, the court found several

44 For example, Comment (d) states, “If the contacts with the state of the forum are numerous and important, the forum will be more reluctant to give effect to the foreign privilege and to exclude the evidence . . . .” Restatement (Second) of Conflict of Laws, § 139 Comment (d).


features of Section 139(2) that supported the application of Illinois’ narrower attorney-client privilege. After noting that Comment (d) acknowledges a forum court’s “‘strong policy’ . . . in disclosing ‘all relevant facts that are not privileged under its own local law,’”\(^{47}\) the court inquired whether some “special reason” would override this policy in the case before it. The court’s examination of the factors listed in Comment (d) yielded a negative answer. Indeed, added the justices, “we cannot foresee any situation where a special reason would [defeat this state’s broad disclosure policies] . . . in favor of another state’s broader corporate attorney-client privilege.”\(^{48}\)

Similarly, in *Kuhn and Kogan, Chartered v. Jeffrey Mensh & Associates*,\(^{49}\) a federal district court in the District of Columbia had to determine whether documents in the possession of a Maryland accountant must be produced over the plaintiff’s objection that the items sought were protected by Maryland’s accountant-client privilege. Although Maryland recognized this privilege, the District of Columbia did not. The named plaintiff was a District of Columbia corporation (Kuhn and Kogan, Chartered). However, at the time of the suit, Dr. Israel Kogan was the sole corporate owner. Both the corporation and the individual employed the same Maryland accountant. The court had little difficulty denying the corporation’s claim of privilege; the district judge correctly placed great reliance on the fact that the accountant-client privilege is created for the benefit of the client and the client was a District of Columbia corporation. The fact that the records sought happened to be located in Maryland was of only marginal importance.

However, as the court acknowledged, some of the records sought might have contained

\(^{47}\) *Sterling Finance Management, L.P.*, *supra* note 45 at 454, 782 N.E. 2d at 904.

\(^{48}\) *Id.* at 455, 782 N.E.2d at 905.

information provided by Dr. Kogan, in his individual capacity, to his personal accountant. On this assumption, the passage of information was from the individual client, a Maryland resident, to his accountant, whose location was in the same state. Attempting to rule as it believed the local courts of the District of Columbia would rule, the court turned to the Second Restatement, which had been embraced in other contexts by the local courts of the District. Even though it was clear that Maryland would be the jurisdiction with the most significant relationship to communications that were between two Maryland residents, the trial court nonetheless concluded that District law should apply. The Second Restatement’s policy of disclosure should prevail since there was no “special reason” to defer to the privilege law of Maryland.

Other cases applying the Second Restatement’s Section 139 pay more heed to the strong claim of the state of the most significant relationship. For example, in Ford Motor Co. v. Leggat, communications within Michigan’s attorney-client privilege were made to a committee of the Ford Motor Company that convened in Dearborn, Michigan. These disclosures were relevant to litigation in Texas where they were apparently outside of the protection of Texas’ more narrowly-drawn attorney-client privilege. The court had no difficulty concluding that under the Second Restatement’s Section 139, Michigan – where the communications were made – was the state with the most significant relationship to the statements before the court. Stressing the wide-spread

50 Federal courts entertaining a diversity case (or any case governed by state law) apply the conflict-of-law rules of the jurisdiction – here the District of Columbia – in which they sit. See infra Section V.

51 904 S.W. 2d 643 (Tex. 1995). See also Anas v. Blecher, 141 F.R.D. 530 (M.D. Fla. 1992) (communications made during Illinois disciplinary proceeding should not be divulged in Florida suit against real estate appraiser even though Florida has no applicable privilege; special reasons counsel against disclosure).
recognition of the attorney-client privilege, its importance in facilitating the free flow of information between client and attorney, and the necessity that the client be “secure that the communication [within the privilege] will not be disclosed,” the court found “special reasons” not to apply forum law that required disclosure. Note, however, the problem posed if the communications in question had originated in Michigan, but been received in Texas. In this event, a Texas court might conclude that there was no “special reason” to defer to the privilege law of Michigan.

The foregoing cases lay bare the difficulty with Section 139, and particularly Section 139(2): judicial outcomes are uncertain and unpredictable, and privileged communications are frequently rendered insecure. There are, as we have seen, two pivotal and often difficult inquiries: First, which state is the jurisdiction with the “most significant relationship” to the communication in question? Second, under Section 139(2), do special reasons counsel against applying the forum’s no-privilege rule, thus honoring the privilege rule of the most importantly affiliated state?

In State v. Lipham, a husband traveled to a distant state (Y) to visit his family. While there, he made incriminating statements during a telephone call to his wife, who had remained at the couples’ home in State X. The Court held that under Restatement (Second) § 139, State X had the most significant relationship to the communication in question and, since State X was also the forum state, its rule that the privilege had been waived should apply. This ruling appears to be straightforward and correct. A more difficult case, however, could be imagined. Suppose the husband and wife had separated following a marital dispute, and she and the children were residing for an indefinite time with her parents in State Y. During a long-distance telephone call, 

52 Ford Motor Company, supra note 51 at 647.

53 910 A.2d 388 (Me. 2006).
in which the couple discussed reconciliation, the estranged husband records her statements. On the assumption that she is the privilege holder, that she sues on behalf of the children for child support, that State Y would honor her privilege and that State X (where the husband resides) would not, which law would apply?

The first issue, of course, is which state has the most significant relationship. In Lipham, State X was both the forum and the most “significant state.” But in the hypothetical case, State X might be the forum and State Y, where the wife and children now reside, might be the state with the most significant relationship to the marital communication in the context of a suit for child support. Of course, Section 139(2) nonetheless favors disclosure, subject only to some “special reason” why a privilege should exclude the evidence. Note the probability that there was no reliance on the privilege, a factor which a court might find decisive in ruling for disclosure. The imagined case serves to highlight the uncertainties that abound in the application of Section 139.

A point generally overlooked by both the cases and the Second Restatement is the importance of identifying the holder or, occasionally, holders of the privilege in question. Since

54 For a case that does consider the holder’s residence a decisive point, see Kuhn and Kogan, Chartered v. Jeffrey Mensh & Associates, 77 F. Supp. 2d 52 (D.D.C. 1999).
privileges are primarily created to benefit the holder – such as the client or patient – the identification of the holder sheds particular light on the selection of the state with the most significant relationship to the communication in question. The holder’s affiliation with the competing states is of paramount importance. For example, the holder, domiciled in State X, may have given or received a privileged communication in that state or, by analogy, a business with its principal place of business in X may have generated or received statements upon which X confers a privilege. Since privileges are created for the benefit of the holder (or holders), who is vested with the right to claim or waive the privilege in question, the relation of the holder to the competing states should be a primary factor in determining which state has the most significant relationship to the contested communication. The holder’s relationship should arguably carry greater weight than other relevant factors such as, for example, the state in which a “privileged” communication was received. Another consideration, drawn from the Second Restatement’s Section 6, is the strength of the respective interests of the two (or more) involved states. For example, a state that creates a Physician’s Board of Inquiry to screen and evaluate medical malpractice claims prior to the patient’s right to file suit may have a strong interest in preserving the confidentiality of the proceedings. An atmosphere of confidentiality promotes candor and a willingness to speak and the need for secure communications is not diminished simply because some of the relevant communications crossed sovereign boundaries.

The second issue – the one peculiar to Section 139(2) – injects even more uncertainty into the stability of privileges that are conferred by the law of the state of most significance, but denied by the forum. Here, of course, Section 139(2)’s preference for disclosure adds a second layer of difficulty. What Subsection (2) should say is that when a privilege is conferred by the jurisdiction with the most significant relationship to the challenged communication, the forum will honor that privilege unless
special reasons strongly justify the application of the forum’s (no-privilege) rule. The commitment to honor the privilege is especially strong when the *holder has reasonably relied* on the existence of a privilege. Such reliance should be presumed when one of communicants to the privilege is a professional who is in a position to advise the other communicant of the existence of the privilege.

Countervailing considerations would presumably include such factors as a potent forum policy, coupled with the forum’s substantial (though not dominant) relationship to the *holder and the* communication in question, lack of reasonable expectation or reliance by the communicating parties, and the nature, underlying policy, and degree of acceptance of the privilege in question. Another important concern should be whether the privilege in question was subject to judicial nullification in the state with the strongest relationship to the communication in question. That said, under the general scheme proposed here, application of a forum’s “no-privilege” law would be an exceptional ruling; ordinarily, the privilege rule of the state with the most significant relationship to the contested communication would apply. It should fall to the party seeking disclosure to convince the forum court to negate the putative privileged status of the communication in question.56


56 The approach suggested here can be applied to non-forum depositions and subpoenas for written materials. These discovery proceedings are typically conducted near the home or business of the discoveree. Attorneys are usually present to give advice. Thus, in most cases, the state in which a deposition is taken or a subpoena issues will be the state with the most significant relationship to the communication in question. *See* Reporter’s Note, Restatement (Second) § 139. In any event, if the most significant state has no applicable privilege, the communication sought should ordinarily be admissible in the forum state under Section 139(1). However, a forum should generally honor an applicable privilege in the deposition or subpoena.
VII. Further Complications: Federal Courts

It is daunting enough for state courts to wrestle with the Second Restatement’s Section 139. But the federal courts have even a more difficult task. Under Federal Rule of Evidence 501, federal courts craft the privilege rules for cases arising under federal law. However, in civil proceedings in which state law controls “an element of a claim or defense”, the privilege law to be applied “shall be determined in accordance with state law.” In other words, federal courts defer to state privilege law where the source of a claim or defense is state law. This deference includes state conflict-of-law rules governing privilege in civil suits with interstate features. Since the Second Restatement is adopted in more state jurisdictions than is any other choice-of-law approach, federal courts will

state if that state has the most significant relationship to the communication in question. This is especially so if the holder has relied on the existence of a privilege.

In the unusual case in which, for example, the deposition state is not the state with the most significant relationship to the communication in question, yet it has an applicable privilege the forum state, should ordinarily defer to the privilege law of the state with the most significant relationship.

57 Fed. R. Evid. 501.


59 “The Second Restatement is the dominant conflicts methodology in American Courts today.” W. Richman & W. Reynolds, supra note 6 § 72 at 213. The importance of the Second Restatement is heightened by the fact that the number of “interstate” cases is ever-increasing. As to this increase, courts and commentators agree. See, e.g., G. Rutherglen, International Shoe and the Legacy of Legal Realism, 2001 Sup. Ct. Rev. 347, 369. The increase in federal diversity cases substantiates the point: In the year 2001, there were 48,998 cases commenced in federal district courts in which jurisdiction was based on diversity; by 2005, that number had risen to 62,191, and by 2007, to 72,619. See Reports of the Proceedings of the Judicial Conference of the United States Courts, 2001, 2005, 2007, Table C-2.
frequently turn to Section 139. Often, there will be no clear answer under the state precedent applying Section 139. Furthermore Section 139 itself will offer no clear guidance. Thus, a federal court must make an educated guess as to how the State Supreme Court would respond to issues arising under Section 139 – and particularly Subsection (2) – that it has never confronted. The practical effect is to cast additional doubt on the durability of any privilege made in circumstances in which a privilege initially attaches. The communicants have no assurance that their privilege will endure, for at some future date interstate litigation in a state or federal court could easily result in its nullification.

VIII. Conclusion

Perhaps the field of conflict of laws will never have the stability, predictability, and fairness that have so far eluded the courts and rule makers. Experience thus far teaches that the bright promise of any given conflicts methodology falls far short of fulfillment as new factual patterns test its boundaries and challenge its premises. We know that a single-minded approach in which one factor, such as territory or state interests, is the sole decisive criterion will not work – at least it will not work satisfactorily across the broad array of cases. We also know the deficiencies that undermine a regime of supposedly intractable, hard-and-fast rules (the first Restatement), as well as the difficulties with a methodology that has, essentially, no rules – just broad criteria to be employed in an approach to conflict resolution (Interest Analysis). Perhaps what is needed is the articulation, in some order of preference, of the broad principles that should govern a particular field, implemented by specific rules that will ordinarily be decisive. Indeed the Second Restatement could be so recast within its present framework so as to approximate this model. Section 139, in particular.
could be amended so that most privileged communications would be secure.

As we have seen, however, Section 139’s overriding principle is a preference for disclosure in pursuit of more accurate fact-finding. The drafters also implemented this principle with several tentative rules, as for example, the tentative selection of the state of the most significant relationship. But beneath this simple text lies a quicksand of uncertainties. More importantly, the “rule” contained in Section 139(2) is the wrong rule, for it invites the disruption of privileged relationships, the frustration of expectations, and the undermining of reliance. In essence, Section 139(2) takes the law of privilege – founded on privacy, assurances, and the facilitation of candor – and turns it on its head. Persons communicating within the apparent scope of a privilege have no reliable means of predicting whether, in interstate litigation, a forum judge will follow the Second Restatement’s directive of disclosure.