July 26, 2015

Using Occam’s Razor to Solve International Attorney-Client Privilege Choice of Law Issues: An Old Solution to a New Problem

Nathan M Crystal
Francesca Giannoni-Crystal

Available at: https://works.bepress.com/nathan_crystal/36/
Using Occam’s Razor to Solve International Attorney-Client Privilege Choice of Law Issues: An Old Solution to a New Problem

Nathan M. Crystal* & Francesca Giannoni-Crystal*

I. Introduction

The practice of law is increasingly becoming “delocalized.” Globalization and the use of technology are two important factors in this fundamental change in practice. Lawyers using the Internet are now practicing law at vast distances with clients located all over the world. Documents and other data containing client information are transferred daily between international borders. Also, because of the use of the cloud, client information is stored in servers located in many different countries, even unknown to cloud users, in case of public clouds.

Delocalization is affecting many aspects of practice. For example, broadening of U.S. jurisdiction over foreign persons coupled with the vast growth in electronic commerce has increased the possibility of U.S. litigation involving foreign clients. With some caveats, it is recognized today that American courts have the power to exercise jurisdiction over many foreign companies through the “stream of commerce” doctrine. In World-Wide Volkswagen Corp v. Woodson,¹, the Court stated: ‘‘[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a [foreign] corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by

---

* Nathan M. Crystal, Esq. is Professor Emeritus of Professional Responsibility and Contract Law, University of South Carolina (admitted in DC, GA, NY and SC). Francesca Giannoni-Crystal, Esq., (admitted DC, NY, Italy, and in SC as FLC, not a member of SC Bar). They are both Partners at Crystal & Giannoni-Crystal, LLC (offices in New York; Washington, DC; and Charleston, SC - http://www.cgcfirm.com.) Email: info@cgcfirm.com

¹ 444 U.S. 286 (1980).
consumers in the forum State.”  

Financial transactions increasingly occur electronically. Use of the banking system for electronic transfers can be the basis of jurisdiction. The Second Circuit has decided that it is consistent with federal due process to hale into court a nonresident defendant bank based on its correspondent banking accounts in New York, which were used to execute several wire transfers. Claims have been made – and rejected, for now -- that the mere visibility of social media sites of a company in a jurisdiction is enough to ground personal jurisdiction.

Delocalization is affecting issues involving attorney-client privilege (“ACP). The internationalization and the use of technology in the practice of law have produced a vast increase in issues dealing with both the creation and waiver of ACP. The creation of the privilege is affected because in many cases lawyers and clients exchange communications at considerable distance and between different countries. In addition, communications occur through means, such as social networks, that were unimaginable in the past. Similarly, waiver of the privilege is much more likely to happen today because of the use of technology, for example, when a lawyer negligently entrusts client information to a cloud provider that does not adopt adequate safeguards for the information.

The combination of globalization and technology results in a growing number of demands for communications between foreign clients and their lawyers. Lawyers typically object to such

\footnote{Id. at 297-98. Recently clarified in part by J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) and Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).}


\footnote{See Paula Shaefer, Technology’s Triple Threat to the Attorney Client Privilege, 2013 J. Prof. Law. 171: “Three issues – volume of recorded communications, ease of dissemination, and lack of knowledge – are today’s primary technology-related threats to the attorney client privilege.”}
claims on ground of ACP. Often these claims deal with “international ACP,” i.e. privileges that concern (1) communications that (1) “happened” abroad (or across country boundaries) (2) documents that were “formed” abroad, or (3) parties from different countries (for example, foreign lawyers or foreign clients or both). We refer to these types of privilege claims as “International ACP.” In addressing such claims courts must deal with a fundamental question: What law governs the existence, scope, and exceptions to these International ACP?

To some extent the choice-of-law rules governing ACP (in general, both domestic and international) are also – like other fields of the law - being “delocalized,” but only partially, or better – in our view – not in the right direction. In Part IV of this paper we discuss six approaches to choice of law issues governing ACP. Aside from the traditional lex loci approach (which simply applies the law of the forum to the claim of privilege), the five remaining approaches all to a greater or lesser extent seek to determine, using a variety of factors, which jurisdiction has the most significant interest in having its law govern ACP. However, ultimately, these approaches all remain tethered to geographical factors.

Does it make sense that the choice of law in ACP matters is still “anchored” to localization factors (for example, where the communication took place or whether the communication “touches base” with a certain jurisdiction)? We believe that it does not.

Instead, we offer an approach that may seem to be ironic given the above criticism -- ironic because it seems the reverse of “delocalization.” We argue that in cases involving International ACP courts should apply the lex fori (in slightly modified form), but for policy reasons of fairness and efficiency, not based on protectionist or local preferences.

In cases involving International ACP a court should apply its own law to determine whether the privilege exists (i.e. an international communication should be considered privileged
if in the forum state an internal communication of that sort would be considered privileged) but with one elaboration. If the communication involves a foreign professional, because in the U.S. only members of the Bar enjoy the ACP, a U.S. court applying its own law to determine application of the ACP must define when a non-US lawyer should be treated as a “member of the Bar.” We argue that if the person is treated as a “member of the Bar” in his or her own country, then this person would enjoy the same ACP that an American attorney would enjoy. To be a “member of the Bar” for our purposes means that the person has the credentials required by that particular jurisdiction to be recognized as a lawyer.  

We argue that the *lex fori* approach – with the elaboration discussed above - is a superior approach in international matters for the following reasons:

*First*, in our view the *lex fori* approach (in our suggested “modified” version) avoids unfair results that would occur from applying approaches that point to foreign law. In almost all foreign countries the “rationale, scope, and limitations of the [professional] privilege are not so clearly defined” as the American counterpart, in significant part because almost all foreign countries do not have pretrial discovery. If a court applies foreign law dealing with ACP, it

---

6 Depending on the country, this includes either or both of the following requirements: (1) issuance of a license by the state (through the court system or otherwise) to practice law, and (2) (if required in that country) membership in an organization that has the power to regulate the profession. Under our approach lawyers from countries that do not have an established compulsory bar (e.g., Mexico) would enjoy the ACP. However, as for those countries that have an established bar (e.g. Italy and France), persons who are not enrolled in that established bar would not enjoy the privilege. As a consequence, in-house counsel, who in most European countries are not enrolled in the relevant bar, would not be treated as members of the bar for ACP issues.


8 Also, when civil countries have something similar to ACP (i.e. professional privilege), this is not a rule of evidence that would make evidence inadmissible but it only gives lawyers the right to refuse to testify.
will almost always conclude that the privilege does not apply because of the absence or lack of development of the privilege in the civil law country.\textsuperscript{9} This result would be “unfair” because it would lead to the production of communications that would not be subject to production in a civil law country because of the absence or limitations on discovery in such countries.

Second, use of the \textit{lex fori} is a more efficient way of resolving ACP disputes in international matters. To illustrate this, allow us to borrow the principle of parsimony elaborated by the Franciscan friar William of Ockham (1287 – 1347): \textit{“Pluralitas non est ponenda sine necessitate,”}\textsuperscript{10} which could be translated as “do not multiply actors if is not necessary.” The concepts of “privilege” in the US and in civil law countries are so different that it becomes a difficult and expensive task, often requiring the use of expert testimony, to understand what the foreign law says about the privilege. Moreover, trying to determine whether a certain communication would be protected from discovery in another country is pointless and artificial reasoning because American-style discovery does not exist outside of United States. Under our modified \textit{lex fori} approach, it will only be necessary to obtain a certificate of good standing (or its equivalent) from the foreign country to determine whether a foreign lawyer is “enrolled in a bar” and therefore entitled to ACP, and then to apply the forum court’s ACP law. We argue that the better approach is for a court to ask whether a foreign document would be protected by ACP in the U.S. By asking this question, the court is using a more direct method that applies privilege concepts in connection with a system that recognizes discovery. We borrow again from Occam:

\textsuperscript{9} For an example of the “unfairness” resulting from application of the foreign law of privilege see \textit{Alpex Computer Corp. v. Nintendo Co}, 1992 U.S. Dist. LEXIS 3129; 1992 WL 51534 discussed in Part IV below. For the recognition of the problem of the application of the, see \textit{Astra Aktiebolag v. Andrx Pharms.}, Inc., 208 F.R.D. 92 (S.D.N.Y. 2002). In this latter, the court recognized the problem and created a new approach (which we call “reserve comity” in Part IV of this Paper) but this approach also suffers from difficulties, primarily efficiency.

\textsuperscript{10}
“Frustra fit per plura quod potest fieri per pauciora” (i.e. “It is pointless to do with more what can be done with fewer.”).

Because in International ACP, the case for efficiency also serves the case for fairness, we have referenced the Occom’s razor in our title and we really believe applying that old principle solves the modern problems of International ACP.

II. Attorney client privilege – a primer for non-American readers

The American attorney-client privilege belongs to the client (see, e.g. Gilbert v. State, 169 Ga. App. 383 (Ga. Ct. App. 1983), holding “it is axiomatic that the privilege belongs to the client, not the attorney”) and prevents the admission into evidence of any communications between a lawyer or an agent of the lawyer and the client or an agent of the client that are made in confidence for the purpose of seeking legal advice.\(^{11}\) Essential to the application of the attorney-client privilege are three requirements. First, the communication must be between lawyer and client or their agents. Second, the communication must be in confidence. Third, the communication must be for the purpose of seeking legal advice.”\(^{12}\) When we say “communication,” we mean a vast array of exchanges, such as direct meetings between lawyer and client but also letters, emails, and other documents exchanged between lawyer and client for the purpose of seeking legal advice.\(^{13}\) The traditional rationale for the purpose of the privilege is the promotion of a full and frank communication between lawyer and client. As a result of a full sharing of information, clients would receive more accurate advice and would be more likely to

---

\(^{11}\) Crystal & Giannoni-Crystal, Understanding Akzo Nobel, supra note 7 at 15.

\(^{12}\) Id. at 16. See also the Restatement (Third) of the Law Governing Lawyers, §68:

> Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to:
> (1) a communication
> (2) made between privileged persons
> (3) in confidence
> (4) for the purpose of obtaining or providing legal assistance for the client.

\(^{13}\) Crystal & F. Giannoni-Crystal’s Akzo Nobel supra note 7 at 16.
conform their conduct to the law as advised by the lawyer.\textsuperscript{14} As the Supreme Court put it in \textit{Upjohn v. United States}\textsuperscript{15} “the privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice.”\textsuperscript{16}

Critics of the traditional rational of the privilege argue that it is questionable whether today a strict ACP is still necessary to foster clients’ compliance with the law.

While the privilege is well recognized in the US, its foundation has been subject to criticism. A long-standing argument against the privilege is that the privilege is socially harmful because it precludes a tribunal from access to relevant truthful information. More recently, some scholars have focused on other consequences of the privilege. … [A]s one of the coauthors of this article has shown, clients who wish to conform their conduct to the law already have an incentive to be frank with their lawyers. On the other hand, clients who are seeking to avoid or violate the law should not receive the protections of the privilege.\textsuperscript{17}

Sometimes the ACP is confused with the duty of confidentiality or with the work product doctrine (“WPD”). The three concepts should be kept distinct:

Subject to certain exceptions the … [ethical duty of confidentiality] prohibits lawyers from revealing information “relating to the representation” under all circumstances, whether in connection with court proceedings or otherwise. The ethical duty applies to situations in which compulsion is directed to the lawyer to provide such information—for example, when the lawyer receives a subpoena for a client file or is being deposed about a client communication. In situations of compulsion the lawyer has an ethical duty to raise a claim of attorney client privilege or work product… However, the ethical duty is not limited to situations of compulsion. For example, in connection with the use of technology, lawyers

\textsuperscript{14} Id.


\textsuperscript{16} Id.

\textsuperscript{17} See Crystal & Giannoni-Crystal, \textit{Understanding Akzo Nobel}, supra note 7 at 18 note 60 (citing Nathan M. Crystal, Confidentiality under the Model Rules of Professional Conduct, 30 Kan. L. Rev. 215 (1982)). Professor Crystal’s basic point is that “strict confidentiality,” i.e. a duty of confidentiality with few if any exceptions, is not justified by client rights, history, or policy. At the time of the article, Professor Crystal focused his criticism on the ethical duty of confidentiality, but his argument should also apply to the attorney-client privilege.
have an obligation to take reasonable steps to protect the confidentiality of client information. … By contrast to the ethical duty of confidentiality, the attorney-client privilege is a rule of evidence that deals with the question when a lawyer may be compelled in court or other official proceedings or investigations to reveal information received from or given in confidence to a client.18

ACP should also be distinguished from WPD:

The work product doctrine, a discovery rule recognized by the U.S. Supreme Court in the leading case of Hickman v. Taylor,19 prevents discovery of materials prepared “in anticipation of litigation” unless the party seeking discovery makes a special showing that the party has “substantial need” for the materials and cannot obtain equivalent materials without “undue hardship.” See FRCP 26(b)(3).20

A strict ACP, coupled with the WPD, is particularly important as a shield to pretrial discovery.

For nonAmerican readers, allow us to briefly explain the process of discovery can be described as follows:

Discovery is the pretrial process of compelling an opponent or a third-party to provide information in civil cases (and to a very limited extent in criminal cases). Discovery devices used in civil lawsuits are derived from the practice rules of equity, which gave a party the right to compel an adverse party to disclose material facts and documents that supported a cause of action. … Because discovery in the US allows wide-reaching access to information possessed by an opposing party or a third party, it runs the risk of infringing upon fundamental rights. Without the attorney-client privilege the lawyer and the client could be forced to deliver to the adversary all the emails, letters, opinions, memoranda and generally any documents prepared by the client to obtain advice from the lawyer and by the lawyer to render this advice. …

Thus, the attorney-client privilege is necessary (together with the work product doctrine) as a limit to discovery: everything within the scope of the privilege is


19 329 U.S. 95 (1947).

20 Crystal on Confidentiality, Privilege, and Work Product, supra note 18.
not discoverable.\textsuperscript{21}

Discovery is extremely important in the American litigation and can stretch for months if not years. It is very expensive for the parties (every party bears his or her own cost in answering the request of discovery of the other side) – and in case of electronic discovery (called e-discovery or ESI) can even cost millions.\textsuperscript{22} It consists of several tools (automatic disclosure, interrogatories, depositions, documental discovery); a complete discussion of which is beyond the scope of this article. Discovery generates much litigation in itself because the requested party often objects to the discovery requests of the other side (for example, on claims of privilege) and the requesting party often objects to the way in which the information is delivered. In addition, discovery can also result in sanctions for counsel, parties, or both in case they do not conduct discovery according to the rules.\textsuperscript{23}

Both the ACP and WPD are subject to exceptions,\textsuperscript{24} although the exceptions to the ACP are generally narrower. For example, material subject to WPP can be obtained if the party seeking such material shows substantial need and the inability to obtain the substantial equivalent of such material without undue hardship.\textsuperscript{25} Both the privilege and work product

\textsuperscript{21}Crystal & Giannoni-Crystal, \textit{Understanding Akzo Nobel}, supra note 7, at 22.
\textsuperscript{22}The Federal Rules of Civil Procedure provide for “cost shifting” of electronic discovery under certain circumstances. See Adrian K. Felix, E-discovery, Shifting the Costs of Compliance, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/e_discovery_shifting_the_costs_of_compliance.html
\textsuperscript{24}See, e.g. the “good cause” exception recognized by some courts in derivative actions. See \textit{Garner v. Wolfinbarger}, 430 F.2d 1093 (5th Cir. 1970) and \textit{Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Trust Fund IBEW}, 95 A.3d 1264 (Del. 2014).
\textsuperscript{25}See FRCP 26(b)(3)(A).
protection can be waived.\textsuperscript{26} In federal court Federal Rule of Evidence 502 determines when inadvertent disclosure of material amounts to a waiver of the attorney-client privilege or work product protection and under what circumstances a subject matter waiver occurs.\textsuperscript{27}

III. Attorney client privilege (rectius: professional privilege) in Europe

A. The professional privilege

The European professional privilege ("PP") and the ACP are different both in scope and in purpose.\textsuperscript{28} Moreover, the rationale, scope, and limitations of the PP are less clearly defined than the American counterpart.\textsuperscript{29}

There is probably not a single rationale for the privilege valid for all European countries.\textsuperscript{30} In \textit{AM&S Europe v. Commission},\textsuperscript{31} the European Court of Justice ("ECJ") made clear that one common denominator for the privilege throughout Europe seems to be that the privilege is necessary to respect and protect the right of defense. The connection of the professional privilege with the right of defense in Europe has always been strong. To facilitate a person’s right to be assisted by an independent professional third party (i.e. the lawyer),\textsuperscript{32} and to

\textsuperscript{26} Restatement (Third) of the Law Governing Lawyers, §78-80.

\textsuperscript{27} For a detailed analysis on this point, see Nathan Crystal, \textit{Inadvertent Production of Privileged Information in Discovery in Federal Court: The Need for Well-Drafted Clawback Agreements}, 64 S.C.L. Rev. 581 (2013).


\textsuperscript{29} Crystal & Giannoni-Crystal, \textit{Understanding Akzo Nobel}, supra note 7, at 18.

\textsuperscript{30} Id.


\textsuperscript{32} See, e.g., Italian Constitutional Court, April 8 1997, no. 87, ¶2 available at
enable the full disclosure of facts and circumstances without the fear that the lawyer might be forced to reveal the information in court, the lawyer has historically been given the right to withhold information from court. Since the privilege is generally based on the right of defense, in the majority of the European countries, the privilege is limited to lawyers enrolled in a bar.\(^{33}\)

All this seems very similar to saying that the privilege’s rationale is to foster full and frank communications between client and lawyer, which is the basis of the American ACP. However, a deeper analysis reveals several important differences between the ACP and the PP.

*First*, in some countries the privilege is also founded on the lawyer’s role in the administration of justice as contributing to the maintenance of the rule of law.\(^{34}\)

*Second*, the “ownership” of PP is different. While in the US the privilege belongs indisputably to the client, in Europe the issue is not so clear. Traditionally it has been said that the privilege is not a right of the client but rather an ancient right/duty of the lawyer and a corollary of the lawyer’s professional duty of confidentiality. However, other authorities indicate that neither the client nor the lawyer control the privilege: The professional privilege of lawyer is not a privilege or a benefit of the lawyer or of the client. It is above all indispensable to the good working of a free and democratic society. To complicate the matter even further, there are recent important authorities in the sense that the lawyer has no right -- independently from

\[\text{http://www.giurcost.org/decisioni/1997/0087s-97.html} \]

The rules on the [duty of] secrecy of the person who perform the profession of lawyer and the corresponding right to withhold his testimony at trial about what he has known in his profession, are inspired by a basic principle that is quite old. The rules have the purpose of ensuring a professional defense, based on knowledge of facts and situations, and unaffected as it can be by the compulsion [for the lawyer] to contribute his knowledge to the court, through his testimony. (unofficial translation by the authors).

\(^{33}\) Crystal & Giannoni-Crystal, *Understanding Akzo Nobel*, supra note 7, at 19.

\(^{34}\) *Id.* at 19.
his client -- to assert the privilege.\textsuperscript{35}

Third (which is a consequence of the second difference), clients do not control the PP. In the US the decision of whether the privilege applies is a legal matter to be determined by a court. In Europe even if a lawyer’s decision on the claim of privilege could also be subject to court decision, there appears to be a more personal component in the lawyer’s decision. A lawyer must evaluate the claim of privilege based on the lawyer’s ethical obligations.

Fourth, unlike the ACP, the PP is not waivable. Clients do not have the right to free lawyers from their obligation to maintain as secret what lawyers learned during their representation, and even if the facts have become known (for example, because of a client’s negligent, reckless, or voluntary action) the privilege has not been waived: the lawyer can still avail himself of the privilege to refuse to render testimony or to refuse to show the relevant documents.

Fifth, the PP is often coupled in Europe with a criminal provision. In addition, however, the disclosure of facts known because of the representation, is not only a serious ethical violation for a lawyer but also in many European countries a crime.\textsuperscript{36} This is true, for example in Italy,\textsuperscript{37} France,\textsuperscript{38} Germany,\textsuperscript{39} and Spain.\textsuperscript{40}

Italian law illustrates the lawyers’ professional obligation of secrecy, lawyers’ obligation not to testify based on facts that they learned in their professional relationship, and the possible

\textsuperscript{35} Id. at 21 (internal quotations and citations omitted)
\textsuperscript{36} Id. at 21.
\textsuperscript{37} Article 622 of Italian Criminal Code.
\textsuperscript{38} Article 226-13 of French Criminal Code.
\textsuperscript{39} Article 203 of German Criminal Code.
\textsuperscript{40} Article 199 of Spanish Code.
criminal consequences if lawyers violate this duty. The secrecy obligation is established by the
Professional Law:

Article 6. Professional Secrecy 1. The lawyer is bound -- in the interest of his or
her client – to keep strictly confidential facts and circumstances that he or she has
learned in his or her activity of assistance and representation in a litigation, and
also in his or her non litigation activity.\(^{41}\)

The privilege against testimony is found in Article 6.3 of the Italian Professional Law:

A lawyer and his or her assistants and employees cannot be forced to give
testimony in legal proceedings or in any types of proceedings on facts that they
have learned in the practice of law or because of the relationship of cooperation or
employment with lawyers, except in the cases established by law.\(^{42}\)

Under Article 622 of the Italian Criminal Code a lawyer who discloses a client’s
confidential information without good cause or who uses the information for personal profit is
punishable by up to one year in prison and a fine.

It is interesting to notice that the duty of secrecy is not only for lawyers. Professionals in
general (for example, in certain countries members of the board of directors)\(^{43}\) and ministers\(^{44}\)
are subject to the same criminal sanctions.

*Sixth* (perhaps the most important difference) in Europe, unlike in the U.S., the
professional privilege is *not* a rule of evidence. Violation of confidentiality is an ethical
violation,\(^{45}\) but does not trigger inadmissibility of the evidence. If a lawyer chooses to testify,

---

\(^{41}\) Article 6.1 of Law 247/2012. Unofficial translation made by the authors.

\(^{42}\) Article 6.3 of Law 247/2012. Unofficial translation made by the authors.

\(^{43}\) See Article 622 of Italian Criminal Code.

\(^{44}\) The assimilation between professionals and ministers, is perhaps a remnant of the sacral nature of secrecy in the
Middle Age: “[Since] the Middle Age had conferred to justice a religious character, the one who assumed the
function of defender of justice, was invested of the same secret of the one who received a confession.” See Crystal
& Giannoni-Crystal, *Understanding Akzo Nobel*, supra note 7 at 20,

\(^{45}\) See Italian Professional Law, art. 6.4.
the evidence is not inadmissible even if the lawyer violates his professional duty of secrecy.\textsuperscript{46}

This conclusion is based on an analysis of several European countries (Italy, Germany, France, and Spain) and the conclusions of the CCBE, Conseil des Barreaux Europeenne.\textsuperscript{47}

This difference between the ACP and the PP can produce results that we consider to be “unfair” if an America court applies foreign privilege law in a claim of privilege.\textsuperscript{48} Indeed, if the choice-of-law rule used by an American court\textsuperscript{49} identifies a foreign law that does not consider PP

\textsuperscript{46} Crystal & Giannoni-Crystal, \textit{Understanding Akzo Nobel}, supra note 7, at 21.

\textsuperscript{47} See \textit{The Professional Secret, Confidentiality and Legal Professional Privilege in Europe, Update of Report} by D.A.O. Edwards, QC (2003) ("Edwards Report"), http://www.ccbe.org/fileadmin/user_upload/NTCdocument/update_edwards_rep1_118_2333982.pdf which discusses inadmissibility for only one country, Norway. Our research has not revealed any authorities under German, French, or Spanish law that would exclude the testimony of an attorney even if the testimony is in violation of the professional privilege. Therefore, since inadmissibility is the exception for all relevant evidence, we must conclude that the evidence should be admissible in those countries. In contrast, in the U.S., the ACP is an evidentiary rule that keeps a privileged document outside of discovery and of trial.

In Italy, we found authorities that state that evidence in violation of the professional privilege is not inadmissible but the lawyer who wishes to testify must withdraw from representation. See, e.g., Tribunale di Napoli, December 15, 1976; Remo Danovi, \textit{La testimonianza dell’avvocato nel processo}, Foro It. 1997, I, 955; Judge Luciana Razete, \textit{La prova per testimoni}, lecture given at a Conference in Rome on May 24-26, 1999, available at appinter.csm.it/incontri/vis_relaz_inc.php?&ri=MjI0NA%3D%3D. But see Tribunale di Milano, May 8, 1996, Foro It. 97, Part I, 956 (holding that a “lawyer of one party in a proceeding is institutionally and functionally incapable to testify in same proceeding”). The decision of the Tribunale di Milano has been criticized by Judge Giulio Cataldi (Giulio Cataldi, \textit{Le prove costituende: ammissibilita’, rilevanza e modalita’ di assunzione}, a lecture given in the workshop \textit{I modelli probatori nel procedimento civile ordinario e in quelli sommari}, Rome, October 28-30, 2002, held by Consiglio Superiore della Magistratura, Ninth Commission – Professional Education, available at appinter.csm.it/incontri/vis_relaz_inc.php?&ri=Nzc3OQ%3D%3D.) Judge Cataldi based his criticism on the Italian Ethics Code (Article 58), which provides that “as much as possible, the lawyer has to avoid to testify on facts and circumstances known in the performance of his professional activity and concerning (his activity). (emphasis added).

\textsuperscript{48} See Part IV of this paper.

\textsuperscript{49} See Part IV for the several approaches followed by American courts.
as a bar to the introduction of evidence (as is often the case), then the evidence will be
admissible in the American proceeding even if it would be “privileged” in the forum state. As a
matter of fact, if in the foreign country the consequence of privilege is only that the lawyer could
(but is not bound to) refuse testimony, this would not keep the evidence outside of the U.S.
proceeding. This is one of the reasons why we advocate that in case a foreign jurisdiction is
involved, also as a question of comity, an American court should always apply the *lex fori.*

**B. The Akzo Nobel decision**

It is often stated that one of the main differences between the ACP and the PP is that in
civil law countries, unlike in the U.S., in-house counsel do not enjoy the ACP. It is also often
stated that this is the product of the ECJ’s decision *Akzo Nobel Chemicals Ltd. v. EU.* This
characterization of *Akzo Nobel* misstates the holding and ignores the background of the case.
Far from restricting the privilege, the ECJ might even have created a new European concept of
“privilege” by combining the duty of secrecy and the right to withhold testimony. To be true, the
ACP under European law was a jurisprudential *creation* of the ECJ in *AM&S Europe v.
Commission (AM&S)* in the context of Article 14 of Regulation 17, which allows the European

---

50 See Part IV. This is actually “reverse comity,” applying US privilege law to prevent a communication from being
admissible because the communication would be inadmissible in the foreign country due to lack of discovery in that
country rather than foreign privilege law. See *Astra Aktiebolag v. Andrx Pharms., Inc.*, 208 F.R.D. 92 (S.D.N.Y.
2002) (applying US privilege law to protect against discovery of Korean documents that were not privileged but
would not have been discoverable under Korean law). The case is discussed in more detail in Part IV.
51 European Court of Justice (ECJ) Case-550/07, decision available at
&occ=first&part=1&cid=234453
52 Francesca Giannoni-Crystal, The EU Court’s decision *Akzo Nobel* is Not a Big, Bad Wolf, South Carolina
Lawyer 17 (January 2012), *passim.* For a more detailed discussion about *Akzo Nobel,* see Crystal & Giannoni-
Commission to demand from organizations the production of documents necessary to investigate possible infringement of the EU competition rules.\textsuperscript{54} Prior to AM\&S the concept of ACP did not exist – as such -- in continental Europe. The ECJ derived its creation of the privilege from the principle of confidentiality and applied it only to the Commission’s power under Article 14 of Regulation 17.

The national laws of the member states protect, in similar circumstances [i.e. when a public authority-- like the EU Commission in this case -- demands the production of documents] the confidentiality of written communications between lawyer and client provided that on the one hand, such communications are made for the purposes and in the interests of the client’s rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment . . . However, the principle of confidentiality does not prevent a lawyer’s client from disclosing the written communications between them if he considers that it is in his interests to do so.\textsuperscript{55}

To “create” the privilege, the ECJ grounded it on two pillars/justifications (which the Court derived from a comparative analysis of the law of the several member states on confidentiality and duty of secrecy): right of defense and lawyer’s independence. Hence, the newly created privilege was held to cover communications exchanged pursuant to the client’s right of defense and emanating from an independent lawyer.

\textit{Akzo Nobel} like AM\&S was an antitrust case: In 2003 the European Commission officials, while investigating anti-competitive practice by the Akzo group, seized two emails exchanged between an Akzo executive and Akzo’s coordinator for competition law. Akzo objected that they were privileged, being for the purpose of giving legal advice by the in-house counsel who was a permanent employee of Akzo but was also enrolled as an Advocaat of the

\textsuperscript{54} Id., at 16.

\textsuperscript{55} Id., at 28.
Netherlands Bar. The court of first instance (“General Court”) rejected the claim of privilege and Akzo appealed to the ECJ.

In *Akzo Nobel*, the ECJ was asked to extend the privilege that the Court had created in *AM&S* to in-house counsel. The Court refused to do so because the two pillars of the privilege were absent for in-house counsel: in-house counsel cannot represent clients at trial (so cannot assist clients in their right of defense) and they are not independent (in the majority of EU members the in-house counsel are not even members of the bar).56

The ECJ held that in-house counsel were not entitled to the privilege because they were not independent from their clients. As a result an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client. … Independence is necessary because of the lawyer’s role as collaborating in the administration of justice by the courts. Being independent means that a lawyer must structurally, hierarchically and functionally, be a third party in relation to the undertaking receiving that advice. The lack of independence exists even if the attorney is enrolled as a member of the bar…57

For purposes of this article, it is important to recognize the limited nature of the holding in *Akzo Nobel*. The decision has no direct application at a national level, i.e. it only applies in European Union proceedings (for example, antitrust proceeding like those of *AM&S* and *Akzo Nobel*). U.S. cases involving application of foreign privilege law will be generally based on the law of specific countries, not EU law. In such cases *Akzo Nobel* will not be controlling law, although it might be considered as indicative of the state of privilege law in the EU countries.58

56 Note that this was not true for the in-house counsel involved in *Akzo Nobel*. That lawyer was a member of the Dutch Bar, the Netherlands being one of the few European countries that do allow in-house to be members of the bar. However, the ECJ did not find this determinative: “this lack of independence exists even if the attorney is enrolled as a member of the bar, as was the Dutch attorney in the case.” Crystal & Giannoni-Crystal, *Understanding Akzo Nobel*, supra note 7, at 8.

57 Francesca Giannoni-Crystal, The EU Court’s decision *Akzo Nobel* is Not a Big, Bad Wolf, above note 53. Internal citation omitted.

58 In-house counsel friendly states: Ireland, UK, Malta, Norway, ...not many.
IV. Choice of law issues - Which rules apply to identify the law applicable to privileges in an international context?

A. Description of context in which the issue arises: some fact patterns

While it is very common that a dispute arises between parties to litigation on whether a certain communication (or document) is protected by ACP, not every one of such disputes involve a choice-of-law issue. A “choice of law” or “conflict of laws” issue arises when a privilege is asserted as to a communication in a tribunal but one or more aspects of the communication involve jurisdictions different from the forum state (for example, if the communication took place in whole or in part in another jurisdiction). The choice-of-laws issue may occur both when foreign countries are involved and when two or more U.S. jurisdictions are involved, although the issue is more significant when a foreign jurisdiction is involved because in that case the difference with U.S. privilege law is likely to be determinative of the claim. This is the case when one or more of the jurisdictions do not recognize ACP; however, even if a jurisdiction recognizes the privilege, the application or recognition of doctrines such as subject matter waiver and common interest doctrine may vary and this might be outcome determinative. The scope of ACP depends on the rules of evidence applicable in each jurisdiction.\(^{59}\)

Consider some of the fact patterns in which choice of law issues involving ACP may arise:

No. 1. The CEO of an Italian company, which has a wholly-owned American subsidiary, asks its Italian in-house counsel advice concerning the delivery clause of a contract of which the American company is a party and which is governed by the law of an American jurisdiction. The in-house counsel delivers a memorandum. The parties’ interpretation of the delivery time is at

issue in a breach of contract claim. Litigation ensues in the U.S. between the American subsidiary and its counterparty. The latter seeks production of the memorandum. Is the memorandum subject to ACP or work product protection? The critical issue here is that the Italian in-house counsel, as employee of the company, is not enrolled in any bar and does not enjoy the privilege in Italy.\footnote{See above at Part III(B).}

No. 2. A Spanish company asks its patent agent in Spain whether it must disclose to the patent office that a third party claims to be the inventor. The patent is filed with the U.S. patent office. The parties’ knowledge of a third party’s claim is at issue in the litigation that ensues. The critical issue here is that the patent agent is not an attorney and may not enjoy the privilege.

No. 3. A Canadian subsidiary of a German car manufacturer asks advice to its in-house counsel based in Germany about the legal consequences of some technical defects that the cars manufactured in Canada seem to present. Many of the cars in question are involved in car accidents in the United States. The manufacturing defect is alleged to be the cause of the accidents. The critical issue here is that the German in-house counsel, while probably a member of the German bar, does not enjoy ACP in Germany.

No. 4. A Japanese conglomerate is engaged in negotiations to acquire an American company. The Japanese law firm representing the company issues a report to the company on whether the acquisition would violate Japanese antitrust law. The acquisition takes places, but a U.S. competitor later sues the Japanese company for violation of U.S. antitrust laws. The plaintiff seeks to obtain a copy of the report from the Japanese company. The central issue here is that the ACP does not apply in Japan to documents that the client receives from its lawyer.
No. 5. In connection with a case pending in Italy concerning an American contract, an
American attorney flies to Italy to meet with an Italian attorney to discuss the matter and
coordinate their activities. Counsel for the defendant tries to depose the American attorney in a
28 U.S. Code § 1782 - Assistance to foreign and international tribunals and to litigants before
such tribunals. The American attorney refuses to answer based on a claim of ACP or Work
Product protection. The defendant moves to compel the deposition. The issue here is that the
communication took place in Italy, and it is related to an Italian proceeding. The scope of Italian
privilege is questionable.

While choice-of-law issues regarding ACP and Work Product can occur in domestic
litigation, the identification of the law applicable to ACP is particularly critical in international
litigation. By “international litigation” we include international commercial arbitration (unless
specified) and we refer to disputes among nationals of different countries and/or disputes in
which foreign issues may come into play. In this kind of litigation, certain issues are more likely
to be of significance (e.g., personal jurisdiction, service of process, evidence from abroad,
enforcement of judgments, privacy and data protection issues, and privilege issues, and others).
In international litigation, you are likely to have some International ACP issues.

Generally speaking, in international litigation, absent a treaty (or when possible
agreement between the parties), courts apply their own conflict of law rules to determine the
substantive law that governs the matter and apply their own procedural rules. But which
particular law does a court apply to a claim of ACP?

B. The several approaches followed in the US

---

62 Restatement (Second) Conflict of Laws §122 and the following.
The number of approaches used by courts to determine what law governs the application of the ACP is striking. Based on our review of the case law and literature, we have identified at least six approaches to the issue. To understand the differences among these approaches, it is useful to consider them on a spectrum running from the nearest to the forum state to the foreign. The two approaches lying at the opposite ends of the spectrum are the (1) *lex fori* approach, including the “functional equivalent” variation of the *lex fori* and (2) the “most significant relationship approach”. Between these poles we find several approaches that blend in different ways elements taken from these polar possibilities. These intermediate approaches include (3) the *Restatement (Second) Conflict of Laws* § 139, (4) the “touch base,” (5) the “law of the decision” approach, and (6) the “comity” approach.  

1. **Law of the forum approach (lex fori)**

The Law-of-the-forum approach is the traditional approach to determining the law of privilege, which is reflected in the *Restatement (First) Conflict of Law*: “The law of the forum

---

63 Our classification is not followed by everybody. For example E. Todd Presnell & James A. Beakes in their *Chapter Ten: The Application of Conflict of Laws to Evidentiary Privileges*, available at http://presnellonprivileges.files.wordpress.com/2012/09/conflicts-of-laws.pdf (“Presnell & Beakes’s *Evidentiary Privileges*”), p. 161 follow a different categorization, dividing into a territorial approach and an “interest-related approach” or “most significant relationship approach”. We prefer a more articulate classification because by “territorial approach,” commentators collapse two different concepts: the *lex fori*, which looks at the evidentiary law of the place in which the tribunal sits and the *lex loci delicti* (the term is most used in torts) which looks at the place in which the privilege was formed. But this is exactly one of issues: where was the privilege formed? Also: by “interest-related” approach, commentators combine two concepts that are distinct: the most “significant relationship” approach (which considers several factors to identify the jurisdiction that has the most direct and compelling interest in whether the communication should remain confidential) and the “touch base” approach, which looks at the subject of the advice as the most significant element of the conflict of law analysis. For the first 5 categories of our classification, we give credit to a presentation held by Jeff E. Butler (Clifford Chance), inside the CLE Attorney-Client Privilege vs. the Concept of Professional Secrecy in Continental Europe, at the ABA International Section Spring meeting April 2014.
determines the admissibility of a particular piece of evidence.”\textsuperscript{64} Under this approach ACP is treated as procedural; thus, the court follows the rules of the forum.\textsuperscript{65} At least eight American jurisdictions follow the traditional approach as reflected in the Restatement (First).\textsuperscript{66} Alabama,

\begin{flushleft}
\textsuperscript{64} Restatement (First) of Conflict of Laws §597 (1934).
\end{flushleft}

\begin{flushleft}
\textsuperscript{65} In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., 2011 U.S. Dist. LEXIS 39820 (S.D. Ill. 2011), the court criticizes the First Restatement approach:

The First Restatement, however, does not specifically address how privilege choice of law matters should be resolved. Under the First Restatement, matters are either substantive or procedural and procedural matters are to be governed by the law of the forum. Sections 596 and 597 of the First Restatement, specifically provide that the law of the forum governs issues of the competency and credibility of witnesses and the admissibility of a particular piece of evidence. The Attorney-client privilege, however, is not a rule of competency or credibility. Nor can it be classified as a procedural rule. [internal quotation marks omitted].

\end{flushleft}

\begin{flushleft}
\textsuperscript{66} Our source for this information is In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., 2011 U.S. Dist. LEXIS 39820 (S.D. Ill. 2011), which lists several approaches followed by US jurisdictions and among those, the Restatement (First) approach.
\end{flushleft}
Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia.\textsuperscript{67} Alaska does it impliedly.\textsuperscript{68} Probably Arkansas follows the same approach.\textsuperscript{69}

An example of the \textit{lex fori} approach is \textit{Ex parte Sparrow},\textsuperscript{70} a libel action brought by the state governor against a publishing company (a New York corporation) that had published an article about the conditions of state prisons during the governor’s term. The governor attempted to depose a witness, Sparrow, in Alabama; Sparrow was an employee of an Alabama newspaper and the source of the information for the article. He refused to deliver information regarding certain facts received in confidence from employees of the state department on ground of journalist privilege. The plaintiff moved for an adjournment of the deposition and applied to an Alabama court for an order compelling testimony.


\textsuperscript{69} Bussard v Arkansas, 747 S.W.2d 71, 76 (Ark. 1988), unequivocally applying Restatement (First) Conflict of Law §597 (law of the forum).

\textsuperscript{70} \textit{Ex parte Sparrow}, 14 F.R.D. 351 (D. Ala. 1953).
The defendant conceded that the “sources of information given to a journalist are not privileged under the law of New York and that if Sparrow were to appear as a witness there, he could and would be compelled to disclose his sources of information.”\(^{71}\) Not so in Alabama:\(^{72}\)

No federal case has been called to my attention: I have found none, dealing with the claim of privilege by a journalist with respect to the sources of his information. The Alabama statute clearly privileges such sources of information. … This court is not bound to apply the Alabama law in interpreting the words “nonprivileged” as they appear in … [Fed. R. Civ. Proc. 26]. But it would not be justified in ignoring such a clear and unequivocal pronouncement of the public policy of the state in which it sits, merely to reach out and apply a rule against the asserted privilege established in a non-federal jurisdiction.\(^{73}\)

In conclusion, the court upheld “Sparrow’s claim of privilege” and denied the motion to compel\(^{74}\).

A variation of the *lex fori* approach is the *functional approach*, which consists in asking whether the functions performed by the foreigner who is engaged in the communication are the “functional equivalent” of those of an American attorney. For example, in *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus.*,\(^{75}\) involving plaintiff’s German patent agent, the court found that the documents that the German patent agent prepared were protected under the attorney-client privilege because in Germany he was the functional equivalent of an American attorney and his agents.

2. **Restatement §139 approach**

---

\(^{71}\) *Id.* at 353.

\(^{72}\) Alabama recognizes both an absolute privilege for reporters from disclosing sources of information obtained in gathering news for their articles if the information was published, broadcast or televised (Ala. Code Ann. §12-21-412, the Alabama shield statute) and a qualified reporter’s privilege. See Reporter’s Privilege: Alabama, The Reporters Committee for Freedom of the Press, available at https://www.rcfp.org/rcfp/orders/docs/privilege/AL.pdf

\(^{73}\) *Ex parte Sparrow*, above note 70 at 353.

\(^{74}\) *Id.*

A very common approach is that of the Restatement (Second) Conflict of Laws § 139:

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

2. Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.76

The approach of the Second Restatement directs courts to examine both the lex fori and the law of the jurisdiction with the most significant relationship. If the law of privilege of the two jurisdictions is the same (i.e., both consider the communication as privileged or both consider the communication as not privileged), the analysis ends: privilege is either recognized or not. If the laws of the two jurisdictions differ, then the law which allows the admission of the communication in evidence (i.e., the law that considered the communication as nonprivileged) will be applied with two caveats: if the communication is not privileged for the jurisdiction with “the most significant relationship,” but it is privileged under the lex fori, then the communication will be admissible unless the admission contrasts with a “strong public policy of the forum.” On converse if the communication is privileged under the law of the jurisdiction with the “most significant relationship,” but is not under the lex fori, then the communication will be admissible unless there are “some special reasons why the forum policy favoring admission would not be given effect.” Comment d to § 139 identifies the following as special reasons: (1) the number and nature of the contacts in the forum state; (2) the relative materiality of the evidence that is sought to be excluded; (3) the kind of privilege involved; and (4) fairness to the parties.77 Also,

76 Example are the following cases: Delaware: In re Teleglobe Communications Corp., 493 F3d 345, 358-59 (3d Circ. 2007); Florida: Anas v Blecker, 141 F.R.D. 530, 532 (M.D. Fla 1992).

77 Restatement (Second) Conflict Of Laws §139, cmt. d.
The court should be “more inclined to give effect to a privilege if it was probably relied upon by the parties.”

The approach of §139 can be simplified without any significant distortion as follows: a communication that involves a claim of privilege will be admitted unless the forum jurisdiction and the law of the most interested jurisdiction both deem the communication privileged or if the laws differ, there are strong reasons (flowing from one of the relevant jurisdictions) that would keep it out.

A very good example of the use of this approach is In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., a multidistrict litigation (MDL case) concerning the prescription drugs Yaz, Yasmin, and Ocella. The MDL involved cases originating in nearly every state in the country, the District of Columbia, and Puerto Rico. One of the parties, Bayer produced almost 3 million documents while withholding 12,857 unique documents based on a claim of attorney-client privilege. The controversy between plaintiff and defendant concerned 330 of documents subject to a claim of privilege.

After deciding that Rule 501 of the Federal Rules of Evidence mandates the application of state law of privileges, and not federal common law, in diversity cases because the law of privilege is substantive, the court then turned to the choice of which state law applied to determine which documents were privileged. The court chose to apply §139 of the Restatement (Second) of Conflict of Laws. As discussed above §139 involves a two-step analysis:

---

78 Id. See also Presnell & Beakes’s Evidentiary Privileges, supra note 63 at 164.

79 To be sure, because of the difference between the two caveats (“strong public policy” in the one case and “special reasons” in the second) in our opinion §139 prefers the law of the state with the most significant relationship,” however maintaining a bias for admissibility.

(1) First, the court looked at the privilege law of the jurisdiction which has “the most significant relationship with the communication.” The court explained that this is “usually the state where the communication took place, i.e., 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.” \(^81\)

(2) Second, the court compared the privilege law of the jurisdiction with the most significant relationship with the privilege law of the forum:

[Un]der the Second Restatement, if a communication is privileged in the state to which it bears the most significant relationship, but not privileged in the forum, the law of the state with the most significant relationship to the communication will apply if there is a special reason not to apply the law of the forum. See Restatement (Second) of Conflict of Laws § 139. Factors to be considered in assessing whether a special reason exists include: (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. Restatement (Second) of Conflict of Laws § 139, Comment d (1971). In addition, where the contacts with the forum are few and insignificant then the forum will likely apply the law of the state with the most significant relationship with the communication. Finally, fairness to the parties is another important consideration. Fairness to the parties requires consideration of the parties’ reasonable expectations of confidentiality which were likely based on the law of the state which has the most significant relationship to the communication. [internal citations and quotations omitted] \(^82\)

Applying the two-step mechanism, the court of In Re Yasmin chose to apply the privilege law of the jurisdiction with the most significant relationship:

Considering the above, in the Court’s view, where the communication at issue is between individuals foreign to the forum, whose relationship is centered outside of the forum, and whose communications regard subject matter not centered in the forum, a special reason exists for not applying the law of the forum and the law of the state with the most significant relationship to the communication should be applied. Accordingly, in the instant case, where state privilege law applies, the Court expects that in most if not all instances the law of the state with the most

\(^81\) *Id.* *28* (internal quotations omitted).

\(^82\) *Id.* *29.*
significant relationship to the communication will govern the existence and scope of attorney-client privilege.\textsuperscript{83}

The Restatement approach is followed (or “cited with approval”) by fifteen jurisdictions\textsuperscript{84} and the jurisdictions that “do not appear to have considered privilege issues in the choice of law context” (twenty-three according to the \textit{Yasmin} court) would probably apply the Restatement when called to decide a conflict issue in ACP.\textsuperscript{85} This makes the Restatement approach the majority approach to conflict of law issues involving ACP.\textsuperscript{86}

The approach of §139 has several advantages: It uses a flexible case-by-case analysis and it pays respect to both the law of the forum and the law of the jurisdiction with the most significant relationship. In addition, §139 clearly favors admissibility of the evidence, a conclusion that is consistent with the principle that admissibility of evidence is the rule and privilege is an exception that keeps from the trier of fact otherwise useful pieces of evidence. However, the approach also suffers from flaws: It requires (1) identification of which jurisdiction has the most significant relationship to the privilege involved in the particular case, (2) determination of the law of the jurisdiction with the most significant relationship to the privilege, (3) identification of the public policy of the jurisdiction with the most significant relationship

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} “thirteen states, the District of Columbia, and Puerto Rico” \textit{Id.} *30 : Colorado, Delaware, District of Columbia, Illinois, Iowa, Kentucky, Maine, Ohio, Minnesota, New York, Pennsylvania, Puerto Rico, Texas. \textit{Id.}

\textsuperscript{85} “research indicates that twenty-three look to the Second Restatement for guidance when resolving choice of law questions in one or more other areas of law”. \textit{Id.} *33.

\textsuperscript{86} Other examples of the Restatement (Second) Conflict Of Laws §139 approach are: \textit{People v Thompson}, 950 P.2d 608, 611, applying Restatement (Second) Conflict Of Laws §139 to spousal privilege; \textit{In re Teleglobe Communications Corp.}, 493 F3d 345, 358-59 (3d Circ. 2007), applying Restatement (Second) Conflict of Laws §139; \textit{Anas v Blecker}, 141 F.R.D. 530, 532 (M.D. Fla 1992), applying Restatement (Second) Conflict of Laws §139.
regarding the application of the privilege in the particular case, (4) determination of the law of the forum, (5) identification of the considerations that might require the application of the law of the forum rather than the law of the jurisdiction with the most significant relationship, and (6) a complex and expensive analysis because of these five requirements.

3. “Center of gravity” (or “most significant relationship”) approach

The “center of gravity” approach applies the law of the country with most direct and compelling interest in whether the communication should remain confidential. One might say that this approach represents part of the analysis under Restatement §139, focusing only on the law of the jurisdiction with the most significant relationship.

For example in *Mitsui & Co. v. Puerto Rico Water Resources Authority*, the Puerto Rican court had to decide whether certain documents prepared by the plaintiff’s New York accountants were privileged. The case involved a contract for the construction of a steam electric station in Puerto Rico between plaintiff Mitsui & Co. (U.S.A.) Inc. (“Mitsui”), a New York Corporation, and defendant Puerto Rico Water Resources Authority (“PRWRA”). Mitsui brought a breach of contract action against PRWRA. After the deposition of Mitsui’s treasurer and assistant manager of the tax department, PRWRA learned that the plaintiff’s accountants in New York were in the best position to produce information about profits and tax returns. As a result PRWRA sought “to obtain by deposing plaintiff’s New York accountants, all documents and communications in relation to the accounting and/or taxation treatment used in connection with the construction contract of the Aguirre Project, covering the period from January 1st 1970 to the

---

The accountants refused the deposition and production and sought a protective order on the ground that the information requested was privileged under Puerto Rican law and they were prohibited from disclosing the information under the Internal Revenue Code.

Based on an analysis of the relevant case law, the court concluded that “a uniform rule” to solve conflict of law in privilege issues did not emerge:

In search for a flexible rule which at the same time would bring out uniform results easily to be followed, we ran into the “new” “interest analysis methodology” within the modern developments in the area of choice of law problems, which as we stated before seems to be the most desirable approach to this conflict of law problem.

This new approach considers the interests of the parties to the relationship, as well as of the deposition state, of the forum state and of the state where the communication occurred, departing from the old inflexible forum-oriented rule. In the majority of the cases, this “interest analysis” would compel us to conclude that the state in which the assertedly privileged relationship was entered and exclusively sited should be deemed to have the most significant interest in determining whether or not that relationship is privileged. The proposition behind this “interest analysis” test is that “a state’s decision to extend (or withhold) a privilege with regard to a relationship existing exclusively within that state should not be disregarded by any other state, whether forum or deposition state.” . . .

Since the judicial conclusion that the privileged nature of the relationship entered and existing exclusively in one state should be determined by the application of the dispositive law of some other state would frustrate (1) the potential expectations of the parties to the relationship; (2) the interest of the situs state-in regulating the relationship and (3) the political capacity of citizens of the situs state to determine the nature of the relationship in that state. . . .

Therefore, when we are faced with a choice of law problems in the area of privileged communications, we must consider the following factors:

1) The place where the communication occurred and the relation of the parties to this communication with the state where it occurred.

2) The public policies underlying the particular privilege statute invoked.

---

88 79 F.R.D. at 74.


[A]ll of the documents and communications sought to be disclosed herein occurred and were executed in New York. The deposition of these three New York accountants would be held in New York. New York does not recognize an accountant-client’s privilege. Puerto Rico does have one embodied within the government’s regulation of the public accountant profession. 79 F.R.D. at 75.

90 IRC §7216, Treasury Reg. §301.7216.
3) The interest of the situs state in preserving or not the confidentiality of this communication.

4) The interest of the forum state in preserving or not the confidentiality of this out of state communication.\(^{91}\)

Based on these principles, the court concluded that New York law should apply:

The accountants sought to be deposed in the case at bar, are licensed and practicing in the State of New York. They know the rules of privilege that apply to their work since they are part and parcel of the regulation by the State of New York of their profession. In our case, New York was the situs of the communication, not by mere chance, but because plaintiff is a New York corporation with main offices there. Therefore, choosing the full disclosure of their communication comports with the expectations of the parties to the relationship and the New York interest against the confidentiality of this communication.

Besides, Puerto Rico has no legitimate interest in maintaining the confidentiality of accountant-client communications held wholly in New York, between New York citizens. On the contrary, Puerto Rico’s interests would be best served by allowing the disclosure sought by a public corporation in Puerto Rico thus, obtaining relevant information for the fast and just resolution of the case at bar.

…. New York is the state with the most significant relationship with the communication and, thus, most interested in its regulation. To impose Puerto Rico’s privilege law to this communication would constitute an unconstitutional exercise of legislative power.\(^{92}\)

In conclusion, the court applied New York privilege law and denied the privilege. Query whether the result would have been different had the privilege at stake been the ACP instead of the accountant-privilege, which the court considered almost unworthy of protection.\(^{93}\)

The center-of-gravity approach suffers from many of the same flaws of the Restatement §139 approach. It requires a determination of the jurisdiction with the most significant relationship, which can be difficult when multiple jurisdictions are involved. More

---

\(^{91}\) 79 F.R.D. at 78 (internal citations omitted).

\(^{92}\) Id. at 79 (internal citations omitted).

\(^{93}\) Id. at 78-79 (“There is no federally created accountant-client privilege or a recognized state created privilege in Federal cases. It has been even looked upon with dismay since the benefits gained by the accountant-client relationship due to the privilege are slight and do not exceed on balance the injury that would inure to the effective administration of justice. Only sixteen states and Puerto Rico have enacted accountant-client privilege statutes.”)
fundamentally, the approach may make sense when applied domestically since U.S. jurisdictions all recognize to a greater or lesser degree the ACP. However, when applied internationally, the approach can produce unfairness because many foreign countries do not recognize an evidentiary ACP.\textsuperscript{94}

4. The “Touch base” approach

This approach originated in international patent and trademark cases. The earliest case that we have found applying this approach is \textit{Chubb Integrated Sys. v. National Bank of Washington}.\textsuperscript{95} In \textit{Chubb} the court held that communications with Chubb’s U.K. patent agent relating to U.S. patents “touched base” with the U.S. and were therefore subject to US law.\textsuperscript{96}

Since then courts have expanded the “touch base” approach beyond patent cases.\textsuperscript{97} The meaning of “touch base,” however, is not completely clear from the case law. When discussing the “touch base” approach courts often use language of comity,\textsuperscript{98} most significant relationship, and sometimes even refer to the Restatement approach.\textsuperscript{99} Discussion that mixes together various approaches creates analytical confusion.

However, a number of courts have an independent test for the “touch base” approach. Under this refined test, U.S. law applies if the communication that is claimed to be privileged has a relationship with the U.S. that is more than “incidental.”\textsuperscript{100} The relationship is more than

\textsuperscript{94} See Part III(A).
\textsuperscript{95} 103 F.R.D. 52 (D.D.C. 1984).
\textsuperscript{96} \textit{Id.} at 64.
\textsuperscript{97} \textit{See}, e.g., \textit{Veleron Holding, B.V. v. BNP Paribas SA}, 2014 U.S. Dist. LEXIS 117509 (applying touch base analysis to securities fraud action).
\textsuperscript{98} \textit{Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.}, 208 F.R.D. 92, 97 (S.D.N.Y. 2002).
\textsuperscript{99} \textit{See} \textit{Veleron Holding, B.V. v. BNP Paribas SA}, supra note 97 (using the term “touch base” but actually employing the framework set forth in Restatement (Second) of Conflict of Laws §139).
\textsuperscript{100} \textit{Gucci America, Inc. v. Guess?}, Inc., 271 F.R.D. 58, 67 (S.D.N.Y. 2010).
incidental when it either concerns “legal proceedings in the United States” (other than the lawsuit itself in which the issue of privilege arises) or “advice regarding American law,” whereas foreign privilege law typically governs communications relating to “foreign legal proceeding[s] or foreign law.”

Two cases illustrate the application of the “touch base” approach: *Cadence Pharms., Inc. v. Fresenius Kabi USA, LLC* and *Gucci Am., Inc. v. Guess, Inc.*

In *Cadence Pharms* the court dealt with the issue of whether certain documents, the “Bichlmaier Documents,” were subject to privilege protection in U.S. litigation. The court held that German law applied to the issue of privilege because the documents (emails) were prepared in Germany, were sent to the defendant’s European personnel, and dealt with patent protection in European countries. While the litigation was pending in the U.S., the U.S. had only an “incidental” relationship to the issue of privilege. Having determined that the communications “touched base” with Germany, the court then had to address a number of other issues: Did Germany recognize a privilege for confidential communications with patent agents? If so, what was the scope of the privilege? Would recognition of a privilege for communications with patent agents offend an U.S. public policy?

---

101 *Id.* at 65.
103 Gucci America, Inc. v. Guess?, supra note 100.
104 *Cadence Pharms., Inc. v. Fresenius Kabi USA, LLC*, supra note 102 at 1020.
105 *Id.* at 1021.
106 *Id.* at 1021-24.
Other cases have reached similar conclusions that when the communications touched based with a foreign country and the US had only an incidental relationship to the communications, foreign law should apply. ¹⁰⁷

By contrast in Gucci Am., Inc. v. Guess, Inc.¹⁰⁸ the court applying the “touch base” approach concluded that U.S. rather than foreign law applied. In Gucci the court divided the communications into pre- and post-2008 communications. During the earlier period Gucci was investigating whether Guess was using a similar trademark, and it sent a cease-and-desist letter to Guess in the United States. In the latter period Gucci was developing a strategy that involved litigation in both Italy and the United States. The court found that during both periods the communications had more than an incidental connection with the United States, accordingly they touched base with the U.S., and therefore U.S. privilege law applied.

As to the post-2008 period, the court found that communications made by and with Mr. Vanni Volpi (a trained legal professional in the field of intellectual property, but not an attorney) were subject to attorney-client privilege in the US because Volpi was acting under the supervision of a US admitted attorney, Ms. Della Rosa, who was admitted in New York, as well as Italy and Belgium.¹⁰⁹ The court stated that the test is “whether the third-party agent is supervised directly by an attorney and whether the communications were intended to remain confidential.”¹¹⁰ Moreover, the “privilege extends to an agent proceeding autonomously, including ‘gathering information from the client without involving the attorney every step of the

¹⁰⁸ Gucci Am., Inc. v. Guess, Inc., supra note 100.
¹⁰⁹ Id. at 62-63.
¹¹⁰ Id. at 72.
The court also found that the post-2008 communications involving Volpi were also protected by work product because they were “in anticipation of litigation.”

With regard to the pre-2008 communications, the court found that they were not subject to either ACP or work product protection. As to ACP privilege, during that period Volpi was not working under the supervision of an attorney. Work product protection also did not apply because communications were not reasonably in anticipation of litigation; while Gucci sent a cease-and-desist letter during this period, Gucci issued this letter in the ordinary course of business.

The court’s opinion contains an extensive discussion of the relationship between the professional obligation of secrecy in Italy and the attorney client privilege, as well as the limited availability of discovery in Italy (and in civil law countries generally).

5. **Law of the decision approach**

Another possible approach is that the law that governs the substance of the dispute would also apply to determine the law of ACP. There are few cases dealing with this approach, but the situation in which it is most likely to be asserted is when the parties have a choice-of-law clause in a contract.

The Restatement (Second) of Conflicts of Laws generally approves of this approach:

1. The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties

---

111 Id.
112 Id. at 75. Because the work product doctrine is procedural rather than substantive, U.S. rather than foreign law applies. Id. at 73.
113 Id. at 73.
114 Id. at 74.
115 Id. at 67-68.
116 Id. at 68-69.
could have resolved by an explicit provision in their agreement directed to that issue.

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

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

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

3. In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.\textsuperscript{117}

\textit{Hercules, Inc. v. Martin Marietta Corp.},\textsuperscript{118} is an example of the judicial attitude to the application of choice-of-law clauses to privilege issues. Martin Marietta had a government contract with the U.S. Air Force; Hercules was a subcontractor hired by Martin Marietta. The litigation centered around activities that took place in Utah. Martin Marietta sought to compel the production of certain documents and materials that Hercules claimed were subject to accountant-client privilege. Colorado recognized the accountant-client privilege, but Utah did not. The court therefore had to decide whether Colorado or Utah law applied to the privilege issue. The contract had the following choice of law clause:

The Contract shall be governed by, subject to, and construed according to the laws of the State of Colorado, except that when Federal common law of government contracts exists on substantive matters requiring construction under this Contract, such Federal common law shall apply in lieu of state law. . .\textsuperscript{119}

\textsuperscript{117} Restatement (Second) of Conflict of Laws §187.

\textsuperscript{118} 143 F.R.D. 266 (D. Colo. 1992).

\textsuperscript{119} \textit{Id.} at 268.
The court found that the choice of law provision did not apply to the privilege issue before it:

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

The court rejected Hercules’ argument that the choice of law provision applied to the substantive terms of the contract and privilege law was substantive. The court reasoned that “[p]rivilege law is adjectival and governs the admission, exclusion and discovery of evidence in litigation,” and this choice of law provision did not "take into consideration the specific contract terms, the relevant evidentiary events, or the justification for application of any privilege." The court concluded that Utah law applied and that the documents must be produced.

The choice of law clause in Hercules did not specifically refer to issues of privilege (or work product). In our opinion a court is more likely to apply a choice-of-law clause to privilege and work product issues when the clause specifically mentions those issues, subject of course to public policy restrictions as set forth in the Restatement. However, even if a court would uphold a choice-of-law clause that specifically refers to privilege and work product, this approach is only available in those few cases in which the parties have not only a choice-of-law clause, but one that is carefully drafted to refer to both privilege and work product issues.

6. **Reverse comity: Using American law to protect the interest of foreign jurisdictions**

---

120 *Id.* at 268.
121 *Id.*
122 *Id.*
123 *Id.* at 270.
Some courts have adopted what we call “reverse comity,” an approach in which the court determines that foreign law applies, but then applies US law as a matter of comity.

One of the best examples of the application of the reverse comity approach is Astra Aktiebolag v. Andrx Pharms., Inc. The evidentiary dispute there centered on several foreign documents that, differently, touched on German, Korean, and American law. The court declared that it was applying the “touch base” approach to determine which law to apply, but ultimately it reached a solution based on comity. After noticing that “[m]ost, if not all, of the challenged documents are foreign documents; therefore, determination of the applicability of attorney-client privilege or work product protection to many of the challenged documents implicates issues of foreign law” the court stated that

Where, as here, alleged privileged communications took place in a foreign country or involved foreign attorneys or proceedings, this court defers to the law of the country that has the predominant or the most direct and compelling interest in whether those communications should remain confidential, unless that foreign law is contrary to the public policy of this forum. (internal quotations omitted)

The court clarified that “[t]he jurisdiction with the predominant interest is either the place where the allegedly privileged relationship was entered into or the place in which that relationship was centered at the time the communication was sent.” Under this standard, some of the documents called for the application of German law and some others for the application of Korean law. As to the German documents, some of the documents were communications between Astra’s in-house counsel or Astra’s employees and the German counsel for legal advice.

125 Id. *12.
126 Id. *15. Even if the court did not mention it, this is in essence §139 of the Restatement (Second) of Conflict of Laws approach. See Part IV(B)(2) above.
127 Id. *15. The court relied on Golden Trade supra note 107.
concerning German law, so that “Germany has the most compelling interest in whether these documents are protected”.\textsuperscript{128} Applying German law to these documents, the court denied the motion to compel production of the documents because it found that German law affords confidentiality to communications between a patent attorney and his or her client.\textsuperscript{129}

Other documents were “connected” to Korea because they referred to four Korean proceedings concerning a Korean patent and were communications between Astra employees and Astra in-house counsel and the Korean law firm representing Astra. The court decided it should apply Korean law based on the legitimate expectations of the parties that exchanged the communication and comity principles.\textsuperscript{130}

The court, however, did not apply Korean law as such (and this is the interesting twist of the \textit{Astra Akiebolag} opinion). The court noted that Korea is a civil law country and “Judges in civil law countries do not make new law in the sense that common law courts do; instead, they interpret the statutory codes of their countries”\textsuperscript{131} The court noted that Korean law provides for certain attorney-client protections by statute. Specifically, attorneys are excused from revealing their clients’ secrets while testifying. However, only attorneys, not their clients, can invoke the privilege. Also, the privilege is limited to confidential information that the attorney receives from a client, not to the reverse. Moreover, Korean law does not recognize a work product doctrine.\textsuperscript{132}

\textsuperscript{128} \textit{Id.} *16.
\textsuperscript{129} \textit{Id.} *20.
\textsuperscript{130} \textit{Id.} *22-23.
\textsuperscript{131} \textit{Id.} *23-24.

When a Korean attorney is representing a foreign client in a Korean proceeding, the Korean attorney will generally anticipate that the Korean law of privilege will apply to the attorney’s communications with the client and the work product created for that proceeding. Under applicable principles of comity, this court will apply the law of Korea to Andrx's challenges to ... [a number of] documents, all of which relate to the four Korean proceedings. \textit{Id.}*18 (internal citations and quotations omitted)
The court noted, however, that there are precedents to the effect that “the fact that a [foreign] statute requires a party to keep clients’ affairs secret does not mean that a privilege exists, and that, even in the United States, there are confidentiality requirements in the law that do not create a privilege equivalent to the attorney/client privilege.” (internal citations and quotations omitted). The court held, therefore, that “the documents are not shielded from production on that basis.”

But this conclusion does not end the inquiry on the foreign law, however. The finding of a lack of attorney-client and work product privileges assumed that the parties “may be ordered or required to testify or produce documents concerning confidential communication by a Korean court during a lawsuit,” a situation not present in this case because Korean law provides for such compulsion only in very limited circumstances. “Thus, if this court were to apply Korean law to the question of whether these documents should be produced, the court would not require production.”

While the court agreed with Andrx that it should not apply “Korean law of discovery, since the law regarding document disclosure is procedural”, it does not agree …that the absence of Korean attorney-client privilege and work product provisions requires this

---

Under Korean law, a court may only issue an order to compel document production under specific limited circumstances designated by statute. These challenged documents would not be ordered produced under any of the three limited circumstances described by Article 316 of the Korean Code of Civil Procedure. That is, none of challenged documents were cited during Astra’s Korean legal proceedings, Andrx has no independent legal right to the documents under Korean law, and none of the documents evidences a legal relationship between Andrx and Astra that would under Korean law entitle Andrx to demand their delivery or inspection. (internal citations and quotations omitted).

---

133 Id. *25.
134 Id. *26
135 Id. *26.
136 Id.*26-27.
137 Id. *28.
court to order the wholesale production of all of the Korean documents in their entirety.” 138

Instead, the court recognized that the absence of a developed ACP and WP protection in Korea depends on the fact Korea does not allow a broad “American style” discovery. Instead, the court concluded that a strict application of the principle of comity to recognize the application of Korean law would be inconsistent with the concept of comity itself and with US public policy. 139

To … [order the wholesale production of all of the Korean documents in their entirety] would violate principles of comity and would offend the public policy of this forum. The fact is that vastly different discovery practices, which permit only minimal discovery, are applicable to civil suits conducted in Korea. Indeed, none of the documents at issue here would be discoverable in a Korean civil suit. Under these circumstances, where virtually no disclosure is contemplated, it is hardly surprising that Korea has not developed a substantive law relating to attorney-client privilege and work product that is co-extensive with our own law. It also seems clear that to apply Korean privilege law, or the lack thereof, in a vacuum--without taking account of the very limited discovery provided in Korean civil cases--would offend the very principles of comity that choice-of-law rules were intended to protect. Id. (internal citations omitted). 140

Allowing discovery, the court held, would also be a violation of the forum’s public policy:

Further, ordering discovery without any protection also offends the public policy of this forum, which promotes full discovery but, at the same time, prevents disclosure of privileged documents. If the court were to rule without taking Korea’s discovery practices into account, the court would be required to order complete disclosure of all of the Korean documents, many of which would be protected under either the attorney-client privilege or work product doctrine as applied in this jurisdiction. Contrary to the policies of upholding or expanding privilege to protect documents whenever they would be protected in other countries … application of foreign privilege law in this case would require disclosure of many documents (1) that are protected from disclosure under American law and (2) that would not be discoverable under Korean law. 141

138 Id. *29.
139 Id. *29-30.
140 Id. *29-30.
141 Id. *30-31.
The court concluded that that it “will apply its own privilege law to the Korean documents, even though the communications do not ‘touch base’ with the United States.”142

V. What is the best rule for international privileges? A “modified” lex fori

1. Description of the Modified lex fori approach

As we mentioned above, American courts have used several approaches to determination of ACP law. While these approaches differ, they are similar under two perspectives:

(1) The factors considered are often “geographical” (location of the communication, domicile and licensure of lawyers, domicile of client, subject of the advice, and the like.). However, should the location of a communication matter when the lawyer and the client communicate while located at great distance from one another? Moreover, where is the communication located when, for example, a Spanish client calls from Madrid his lawyer located in Alexandria, Virginia? And would it matter at all if the lawyer uses Google as a mail service and the server from which the email transit is in Ireland? Does the licensure of the attorneys matter when lawyers can work in remote from any place and they may have more than one licensure? Does it make sense that the choice of law in ACP is still anchored to localization factors? We believe that it does not.

(2) They purport to use a “comity” principle in the determination of ACP, trying to give some recognition to foreign legal principles. However, the application of foreign law often results in legal fictions. When a court asks itself what is the law of privilege in a foreign country, and purports to apply it, it actually does one of two things: i) it applies foreign law “literally” asking whether “there is a ACP in that country” and if the answer is no, the communication is admissible (in contrast with the result that a court of that country would reach but for a different

142 Id. *31.
reason – i.e. there is no discovery). ii) the court fictionalizes or distorts foreign law.

Fictionalization can occur when an American court asks – explicitly or implicitly - this question: *If* the foreign country had discovery (which it does not have), would it have created or recognized an ACP in this case? Distortion takes place when the court confuses the ethical duty of confidentiality in a foreign country with ACP so that the fact that a foreign lawyer is ethically bound to preserve confidentiality is (wrongly) treated as the equivalent of recognition of ACP by the foreign country. Distortion also happens – to a smaller degree – when a court acknowledges the fact that foreign lawyers may have a right to refuse to testify on the circumstances they have learned while representing a client, treats it as ACP, without considering that this is not an evidentiary rule, meaning that the evidence rendered by a lawyer who chooses to testify, would not be inadmissible (even if that lawyers does commit an ethical violation for breaching of confidentiality).

To explain why American courts could be driven to either fictionalization or distortion, we should consider that, outside of the United States, with the notable exception of the other common law countries, American-style pretrial discovery is unknown. Because no discovery exists, the law of privilege is not as developed as in the US. We have discussed above the difference between the ACP in United States and in Europe (which is much deeper than the commonly understood proposition that in Europe in-house counsel do not enjoy the privilege, which is only a little wrinkle of a very different legal system). Importantly enough the ACP

---

143 See Part II of this paper.

144 As explained in Part III of this paper, the differences include who controls the privilege (which in many civil law countries is not the client) and the principle that the ACP is not a rule of evidence. In the U.S. the ACP is typically applied in the context of pretrial discovery, which is almost totally unknown outside of the United States. In the U.S. the ACP is an evidentiary rule that keeps a privileged document outside of discovery (in the first place) and of trial (in the second place). See for details Part III of this paper. Since almost all foreign countries do not have pretrial discovery, you will not find a well-developed law on the ACP with a clear
(which is more properly called “professional privilege” in Europe\textsuperscript{145}) is not a rule of evidence (intending a rule that governs the admissibility of evidence) but rather is a professional obligation (similar to the American ethical duty of confidentiality as set forth in ABA Model Rule 1.6), a criminal provision (as duty of secrecy)\textsuperscript{146} and an excuse to the duty of testify.\textsuperscript{147}

To avoid fictionalization and distortion, we recommend that American courts, in case of International ACP, abandon the several “touch base”, center of gravity, Restatement (Second)§139, and similar approaches, using which (for the described differences in the legal system) fictionalization or distortion (or both) are inevitable. Instead, for reasons of both fairness and efficiency, we recommend that a court should apply its own law (lex fori) – with only one slight modification - to determine the ACP.

In applying this approach courts will need to determine who is a “foreign lawyer” for purpose of determining the application of local law on ACP. Because in the U.S. only lawyers enjoy the ACP, a court should determine whether the person who engaged in the communication is recognized as a lawyer in his or her own country; if so, then this person would enjoy the same ACP in an American proceeding that an American attorney would enjoy. To be a “foreign lawyer” for our purposes means that the person has the credentials required by that particular jurisdiction to be recognized as a lawyer. Depending on the country, this include either or both of the following requirements: (1) issuance of a license by the state (through the court system or otherwise) to practice law, and (2) (if required in that country) membership in an organization that has the power to regulate the profession. Under our approach lawyers from countries that do

\textsuperscript{145} See above Part III.
\textsuperscript{146} Part III(A).
\textsuperscript{147} Id.
not have an established compulsory bar (e.g., Mexico) would enjoy the ACP. However, as for those countries that have an established bar (e.g., Italy and France), persons who are not enrolled in that established bar would not enjoy the privilege.

As a consequence, in-house counsel, who in most European countries are not recognized as lawyers because they are not enrolled in the relevant bar, would not be treated as American lawyers for ACP issues. Note that if someone is not enrolled in a bar (when this is required to practice law), he or she is not bound by ethical rules, which is the case for European in-house counsel.  

In many foreign countries, unlike the U.S., restrictions on the unauthorized practice of law may be limited to appearances before courts, and may not apply to transactional matters. Thus, accountants, patent agents, intellectual property professionals may in many countries perform what would be considered to be legal services in the U.S. so that to be prohibited as unauthorized practice of law. Such professionals are not “foreign lawyers” under the definition used in this article. Whether communications with such persons would be subject to a claim of privilege is beyond the scope of this article, but a similar analysis could be applied. For example, if a U.S. jurisdiction recognizes a privilege between accountant and client, the privilege could apply to a foreign accountant if the communication complied with the law of the relevant jurisdiction. On the other hand, if under U.S. law the accountant would not enjoy a privilege, no

---

148 On converse in countries in which there is not a compulsory bar (e.g., Mexico), lawyers are bound by ethical rules and in our vision, they would enjoy the privilege. Mexican lawyers for example are bound to keep the confidences of their clients confidential:

Art. 10. Ethics Code of the Mexican Bar – Professional secrecy - To maintain professional secrecy is both a duty and a right of a lawyer. Towards the clients it is a duty that lasts forever also after [clients] are not given services anymore; and it is a duty in front of judges and other authorities. When called as a witness, the lawyer must attend the hearing and with all independence of judgment, refuse to answer the questions that would lead to a violation of the duty of secrecy or would trigger that risk. (unofficial translation by authors)
privilege would be recognized in the U.S. even if it could be argued that in the foreign country that professional would be subject to a secrecy obligation and could refuse to testify in a proceeding in his country.

This paper deals only ACP. There are of course other privileges that shield from discovery communications with other professionals and for which a conflict of laws issue can occur both in domestic settings and in international settings (e.g., physician-patient privilege, priest-penitent privilege, spousal privilege, accountant privilege). Our paper does not deal with those privileges, however, we would generally recommend the same approach of a modified *lex fori* to deal with international conflicts of law concerning those privileges. The reasons are the same as those predicated for ACP. Therefore a court should look at its own law to see if the situation would be covered by privilege in its own jurisdiction (example: would the *lex fori* recognize an accountant privilege?), even if the communication happened abroad. However, the court should determine whether the person involved in the communication is in fact recognized as a member of the relevant profession.

---

149 For example, *Presnell & Beakes's Evidentiary Privileges* (supra note 65) presents a hypothetical concerning physician-patient privilege. While this hypothetical describes a conflict of law between American jurisdictions (the critical situation being that not every jurisdiction recognizes the physician-patient privilege), the same problem could occur in an international setting.

A case is pending in the state court of state A involving an automobile accident that occurred in state B between a citizen and resident of state B and a trucking company with its principal place of business in state A and its driver who is a resident of state C. As a result of the accident, the plaintiff sought medical treatment from a doctor in state D. The defendant intends to depose the plaintiff’s treating physician and is seeking testimony from the physician concerning his consultation and treatment of the plaintiff, and more specifically regarding statements made by the plaintiff regarding previous injuries and the extent of his injuries. The plaintiff objects to the provision of such testimony by the physician based on the physician patient privilege. *Id.* at 161.

150 For example, if we are dealing with a communication with an accountant, the court should verify if in the relevant country, the person is recognized as a member of the accounting profession. The issue is the same as for lawyers: if in the relevant country, a professional would need to be enrolled in a roll or to be granted a governmental authorization to perform accounting function, then the court must ascertain that the person is in fact enrolled and or
2. Consequences of Using the Modified Lex Fori Approach

The positive consequence of our approach (including the definition of foreign lawyer),
can be seen by applying our method to two cases decided according to the “touch base”
approach. As these two examples show, our approach would not change the result but it would
avoid a lengthy and expensive proceeding aimed at ascertaining foreign law.

In *Anwar v. Fairfield Greenwich Ltd.*, plaintiffs wanted to depose an in-house counsel
of a Dutch bank who allegedly provided financial services to a Bernard Madoff feeder fund (i.e.
one of the hundreds funds that invested in Madoff’s $50 billion Ponzi scheme.) On advice of the
bank’s counsel, the Dutch in-house counsel refused to answer some questions and to turn over
certain emails on ground of ACP. The Dutch in-house counsel was a lawyer by education but
unlicensed and not a member of the bar. Plaintiffs move to compel testimony and production.
The dispute basically revolved around which law should govern the ACP. Plaintiffs argued that
Dutch law should apply (Dutch law does not recognize an attorney-client privilege for
communications with unlicensed in-house lawyers); defendant contended that American law
should govern arguing that the bank’s communications with its attorney were privileged even if
he was unlicensed because the bank had a “reasonable belief” that he was their attorney.

The Second Circuit applied the “touch base” approach, looking to “the law of the country
that has the ‘predominant’ or ‘the most direct and compelling interest’ in whether [the]
communications should remain confidential.”

---

152 Id. *22.
that relationship was centered at the time the communication was sent.”\textsuperscript{153} American law typically applies to communications concerning “legal proceedings in the United States” or “advice regarding American law,” while communications relating to “foreign legal proceeding[s] or foreign law” are generally governed by foreign privilege law.\textsuperscript{154} The Second Circuit concluded that the communications “likely” touched base with American law since they concerned Madoff’s funds. However, the Court also held that under American law the communications were not privileged because the attorney was unlicensed and the defendants failed to establish their “reasonable belief” that he was their attorney. Accordingly, the court granted plaintiffs’ motion to compel.

The conclusion that advisors who are not enrolled in a bar should not enjoy the privilege is almost always the same when foreign law is applied. For example in \textit{Astrazeneca LP v. Breath Ltd.}\textsuperscript{155} a case involving Astrazeneca’s attempt to enjoin Defendants from manufacturing and selling generic versions of one of its asthma drugs, the court applied the “touch base” approach but found that the communications between plaintiff’s in-house counsel in Sweden and plaintiff’s employees did not touch base with the United States “because they do not relate to the prosecution of United States patent applications or involve United States proceedings, nor do the documents involve communications with United States attorneys.”\textsuperscript{156} Therefore, the court applied “the privilege law of Sweden to determine whether the communications at issue are in fact privileged in this case.”\textsuperscript{157} The defendant produced a Swedish expert who declared that

\textsuperscript{153} \textit{Id.} *22.

\textsuperscript{154} \textit{Id.} *22 (internal citations omitted).

\textsuperscript{155} \textit{Astrazeneca LP v. Breath Ltd.}, 2011 U.S. Dist. LEXIS 42405 (D.N.J. 2011).

\textsuperscript{156} \textit{Id.} *16.

\textsuperscript{157} \textit{Id.} *26.
The attorney-client privilege that exists under Swedish law ... exists only between clients and members of the Swedish Bar Association who bear the title, Advokat. ... Accordingly, only lawyers in private practice are allowed membership in the Swedish Bar Association and in-house counsel are not permitted to be members or bear the Advokat title. ... Thus, communications between in-house counsel and officers, directors and employees of the companies they serve are thus not protected from disclosure by attorney-client privilege according to Swedish law. (quotations and citations omitted). 158

Plaintiff did not challenge these representations. The court concluded that ACP did not cover the documents at issue because they were communications between AstraZeneca in-house counsel and AstraZeneca employees. 159

Applying our approach to these two cases case, the result would have been the same but the reasoning would have proceeded in a more straightforward way, without the need for a lengthy inquiry into foreign law and without the cost of hiring experts.

3. The reasons why the “modified lex fori” approach is superior

We believe that reasons of both fairness and efficiency support the use of the lex fori approach (with our definition of “foreign lawyer”).

(a) Fairness.

Our approach avoids certain unfair results, deriving from the application of foreign law in an American proceeding. One form of unfairness can occur if an American court finds that foreign communications are subject to discovery in a U.S. proceeding because a foreign jurisdiction recognizes professional secrecy but does not recognize ACP. This was the situation in Astra Aktiebolag v. Andrx Pharms., Inc. 160 In that case the court found that the Korean communications in issue were subject to the Korean duty of secrecy, but this obligation was not

158 Id. *26-27.

159 The Court also found that “AstraZeneca has failed to demonstrate that the documents at issue constitute trade secrets under the Swedish Trade Secret Protection Act” Id. *42.

160 Supra note 124.
the equivalent of a recognition of the ACP. Accordingly, under Korean law the communications
were not privileged. However, the court recognized that the communications would not have
been subject to production in Korea because Korea did not allow broad U.S.-style discovery.
The court avoided the unfairness of ordering production of Korean communications that would
not have been subject to production by “reverse comity” holding that ordering production in the
case would be inconsistent with the very principle of comity that it was using and would also
violate U.S. public policy. Under our approach US law would apply directly, and since the
communication was with a “foreign lawyer” and otherwise meets the U.S. requirements for ACP
it would be privileged.

The risk of unfairness is especially great when the law of a civil law country is applied. Once
the law of a civil law country is identified as applicable, simply asking “is there an ACP in that
system that would preclude production of communications?” without going any further, i.e.
without considering that that system may not force the production because there is no a wide
pretrial discovery, produces unfair results. Alpex Computer Corp. v. Nintendo Co161 is a good
example. Alpex is a federal patent infringement action, in the course of which defendant
Nintendo [among others] objected to the Magistrate Judge’s ruling that three documents that
plaintiff Alpex sought were “not privileged under Japanese law”.162 Japan is a civil law country.
The three documents at issue were communications between Nintendo and a Japanese patent
agent, Mr. H. Fukami. The magistrate judge determined that “Japanese law applied to the issue
of whether the Fukami documents are privileged and that if a patent agent privilege existed in
Japan, then comity required the court to apply Japanese law.”163 The magistrate also found that

162 Id. *3.
163 Id. *4.
Japanese law did not shield the communication from discovery.\textsuperscript{164} The district court affirmed.\textsuperscript{165} The court relied on article 281 of Japanese Code of Civil Procedure that allows some professionals (“doctor, dentist, pharmacist, mid-wife, attorney, patent agent, advocate, notary or an occupant of a post connected with religion or worship”) to refuse to testify.\textsuperscript{166} The court noticed that the Article on its face refers only to the right of the patent agent to refuse to testify in certain circumstances. Nothing in the statutory language extended the privilege to the patent agent’s client or to the documents prepared in connection with the patent agent’s advice.\textsuperscript{167} Nintendo pointed out that the magistrate had erred in finding that Japanese judges have no gap-filling authority.\textsuperscript{168} The district court seemed to disagree with Nintendo.\textsuperscript{169} However -- and this is the unfair result that we wanted to mention --the court found that Nintendo failed to offer any Japanese decisions that have filled Article 281’s gaps to the extent of finding that a patent agent privilege shields the documents held by the patent agent’s client.\textsuperscript{170} “Indeed, Nintendo’s Japanese counsel, in their opinion letter to Magistrate, conceded that no court decisions in Japan,

\textsuperscript{164} Id. *5.
\textsuperscript{165} Id. *9.
\textsuperscript{166} Id. *5.
\textsuperscript{167} Id. *6.
\textsuperscript{168} Id. *6.
\textsuperscript{169} Id. *7.
\textsuperscript{170} Id *7.
directly addressed the application of Article 281 to a fact pattern similar to the present one.”\textsuperscript{171} (internal quotation marks omitted). The court affirmed the magistrate’s ruling, finding that Nintendo could not refuse the production of communication.\textsuperscript{172}

Why is it unfair? It is unfair because a Japanese court had \textit{no reason or opportunity to} fill in the gap in the statute, because no broad discovery is allowed in Japan. With our approach the result would have different if in a similar case in the U.S. the communication with the patent agent would have been shielded from discovery. In this regard it should be noted that the U.S. Patent and Trademark Office is currently inviting comments on whether the office should recognize a privilege for foreign patent agents.\textsuperscript{173}

(b) \textit{Efficiency.}

The efficiency justifications for our approach can be seen from a variety of perspectives: avoidance of wasteful activities, elimination of “legal fictions,” cost reduction, and unification of the treatment of ACP and WCP.

In a domestic conflict of ACP, it might be worthwhile to inquire into which jurisdiction has the most compelling interest in governing the ACP (“center of gravity” approach) or which is the jurisdiction with which the communication touches base (“touch base” approach), because both jurisdictions have a similarly articulate regulation of ACP (and waiver thereof). However, this is not the case when a foreign jurisdiction is involved.

Under an efficiency perspective, our approach results also in \textit{avoidance of wasteful activities} (e.g., plethora of expert witnesses to ascertain what foreign ACP law provides when the

\textsuperscript{171} Id *7.
\textsuperscript{172} Id. *9.
foreign law does not recognize the very concept of ACP). Our approach follows Occam’s principle “Pluralitas non est ponenda sine necessitate”.

Through the doctrine of ACP the American legal system has selected certain communications as worth being protected from discovery. In particular, to foster full and frank communication between lawyer and client, the system shields those communications from discovery. Pondering whether a certain communication exchanged between individuals of a civil law country and their lawyers would be protected from discovery in that country (or in other words - looking at the expectations of the authors of the communication), is a pointless and artificial reasoning. Why? Americans-style discovery does not exist outside of United States. It is Occam’s principle “Frustra fit per plura quod potest fieri per pauciora”.

Other efficiency-related reasons support our approach – avoidance of legal fictions and cost reduction. When courts purport to apply one of the several approaches discussed above, courts very often end up applying the lex fori. This result reminds us the criticism that Jeremy Bentham leveled at fictions. In other words, when a court seeks to determine what is the law of privilege in a foreign country, and purports to apply it when the law of that country is

---

174 See Part III of this paper.
175 See the cases discussed in Part IV of this paper.
176 Jeremy Bentham, Fictions of Laws:
Fictions are mighty pretty things. Locke admires them; the author of the Commentaries adores them; most lawyers are, even yet, well pleased with them: with what reason let us see.

What is a fiction? A falsehood; but in this there is nothing to distinguish the peculiarity of its nature. By whom invented? By judges. - On what occasion? On the occasion of their pronouncing a judicial decision. - For what purpose? One may conceive two -either that of doing in a roundabout way what they might do in a direct way, or that of doing in a roundabout way what they had no right to do in any way at all. (Jeremy Bentham, The Works of Jeremy Bentham, vol. 10 (Memoirs Part I and Correspondence)[1843], available at http://oll.libertyfund.org/titles/2085
silent on ACP (as it is the case in civil law countries)\textsuperscript{177} that court actually \textit{creates} law, without acknowledging it.

Our approach instead acknowledges that while privileges are central in the American legal system and are here (and basically only here) well-developed because of the need to shield some communications from discovery, this is not the case abroad. Because a discovery procedure of that sort or amplitude does not exist abroad, it is unlikely that a non-American legal system has developed a theory of privileges comparable to American one. When -- as a result of the application of one of the most common approaches (for example the center of gravity approach) -- an American court identifies as applicable a foreign law (for example, Italian law) and then inquires whether a given communication is privileged there, the court utilizes a fiction in Bentham’s sense if in the foreign country ACP is not a rule of evidence and American-style discovery does not exist. Making a culinary parallel, this is the equivalent of serving certain “Italian” dishes in the U.S., even though they are actually unknown in Italy (e.g., “spaghetti Bolognese”).

Efficiency benefits of our approach can be seen also in \textit{taming of cost}. When a U.S. court determines that another country’s privilege law should apply, the court must define that country’s privilege protection. This normally requires expert testimony. In \textit{Gucci}, for example, \textit{four} experts on Italian law were employed (and in the end the court applied American law).

Finally, our approach has the benefit of unification of the treatment of ACP and WCP. WCP, unlike ACP, is treated as procedural rather than substantive.\textsuperscript{178} Under our approach the \textit{lex loci} would apply to both ACP and WCP.

\textsuperscript{177} Part III of this paper.

\textsuperscript{178} This paper does not deal with WPD. It is quite settled that WPD is a procedural issue so that the local procedural rules apply. Jones v. Tauber & Balser, P.C., 503 B.R. 162 (N.D. Ga. 2013) “Unlike the attorney-client privilege, the scope of protection provided by the work product doctrine is a procedural question and thus governed by federal law in a diversity action.”
V. Conclusion

When courts face issues of ACP in international litigation, they are now engaging in a complex process that involves determination of whether US or foreign law applies; assuming foreign law applies, identification of the country or countries whose law is applicable; and finally examination of whether the law of the applicable countries recognizes the equivalent of US ACP. This process is time consuming, expensive, and fictionalized because of the absence of US-style discovery in almost all other countries of the world. Moreover, in fact in most case the courts apply US law. We recommend use of a new (but actually older) methodology – return to the *lex loci fori* to determine issues of ACP in international cases. As argued in the article this approach offers substantial benefits based on fairness and efficiency considerations. Ironically, although we do not adhere to this movement, our approach is compatible with the new “buy American” approach to choice of law, exemplified by Alabama’s constitutional amendment prohibiting in short every application of foreign law.\(^{179}\)

\(^{179}\) Amendment 1 to Alabama Constitution approved on November 4, 2014.