'Multi-jurisdictional' cases complicate attorney-client privilege analysis

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Litigators in discovery practice are certainly used to wrestling with attorney-client privilege decisions, which are interesting and challenging enough even when the case involves parties and a court that all share the same “citizenship.” But how is the analysis affected when the parties, the court and perhaps the source of the requested information (such as a non-party) are in different states? What about when there are many plaintiffs from different states in a single consolidated case, as often happens in multidistrict litigation?

Choice of law analysis

Cases that cross jurisdictional lines frequently add a layer or two of complexity to attorney-client privilege decisions, in that they require some choice of law analysis. An example is Wolpin v. Philip Morris, Inc., 189 F.R.D. 418 (C.D. Cal. 1999), which involved a plaintiff who sued a cigarette manufacturer in Florida, alleging injuries due to secondhand smoke. The plaintiff relied in part on an epidemiological study that focused on whether exposure to secondhand smoke increased the risk of lung cancer in nonsmoking women. The study was conducted by five institutions, one of which was the University of Southern California. The defendant served a subpoena on USC seeking production of raw data that had been collected for the study. USC resisted the subpoena, and a motion to compel followed.

In resolving this discovery dispute, the District Court first noted it had to decide which law governed. In federal cases, attorney-client privilege analysis starts with Federal Rule of Evidence 501, which states that, generally, federal common law governs – except that in civil cases, if a claim or defense is to be resolved under state law, then “state law governs privilege.” But which state’s law – California’s? Florida’s?

Several authorities, including the Wolpin court (and the 7th Circuit – see Roberts v. Carrier Corp., 107 F.R.D. 678 (N.D. Ind. 1985), citing Palmer v. Fisher, 228 F.2d 603 (7th Cir. 1955), cert. denied, 351 U.S. 965 (1956), abrogated on other grounds, Carter Products, Inc. v. Eversharf, Inc., 360 F.2d 868 (7th Cir. 1966)), hold that the court hearing the discovery dispute should apply its state’s law. This starts by applying the forum state’s choice of law rules to determine what state’s substantive
privilege law governs.

Government interest analysis

In Wolpin, that meant starting with California’s choice of law rules, which require courts to apply a “government interest analysis,” examining the interests of the competing jurisdictions and applying the substantive law of the state with the more compelling interest. The Wolpin court concluded that California’s interest in the study data was stronger than Florida’s. For instance, most of the study’s subjects were California residents, none were from Florida, and the California Department of Health Services participated in collecting and storing the data. Therefore, the substantive privilege law of California should govern. Under Florida’s choice of law rules, the court reasoned that the conclusion would be the same. This was because Florida applies the Restatement (Second) of Conflict of Laws, Section 139, which focuses on the state with the “most significant relationship with the communication” – generally the state where the communication took place. So even using Florida conflict of law rules would result in California privilege law being applied.

Turning to California privilege analysis, the court assessed USC’s claims of privilege under the California Health and Safety Code and the California Constitution, and concluded that while privileges applied, they were not absolute. Rather, they were outweighed by the requesting party’s need for highly relevant information and the fact that personally identifiable information about the study participants would not be revealed.

Multidistrict litigation cases

As illustrated by Wolpin, cases that involve several jurisdictional factors – different citizenship, different court locations, etc. – require the parties to do the choice of law analysis first, because it will drive what substantive privilege principles are applied. This reality is even more vivid in multidistrict litigation cases, where it is common to have parties from many states in one consolidated proceeding.

What should the approach be, for example, when a Delaware corporate defendant in a Colorado MDL product liability case is responding to discovery requests from a group of plaintiffs who come from a dozen different states? Some courts have simply applied federal common law privilege principles across the board, but this approach ignores Federal Rule of Evidence 501’s requirement that state privilege law applies for claims or defenses that are governed by state law.


The court first considered but rejected the plaintiffs’ argument that Illinois choice of law principles should apply to all the consolidated cases simply because Illinois was the forum state. Instead, the court concluded that Illinois choice of law rules should apply to cases that originated in Illinois, pursuant to 7th Circuit authority. For cases that had been filed in other districts but were transferred to the MDL, the law of the originating state would apply. Finally, for cases that originated in other districts (that is, they involved a non-Illinois plaintiff) but were directly filed in the Illinois MDL, the Yasmin court noted that there was District Court authority for both the forum-state approach and the originating-state approach, but concluded that the originating-state approach was more fair.

In essence, the Yasmin court recognized that it would have been easier to apply
federal privilege law comprehensively, or apply Illinois choice of law rules no matter where a case originated, but those blanket approaches are hard to justify for any reason other than convenience. Still, the approach the court chose seems daunting because it anticipates examining the choice of law rules, and perhaps the privilege law, of dozens of states.

The most significant relationship to the communication

The Yasmin court undertook that challenge, though, and canvassed the law of all 50 states. It concluded that it was likely that most states would apply the privilege law of the state with the most significant relationship to the communication, which is the test used under the Second Restatement, Section 139. The court noted that 13 states, the District of Columbia, and Puerto Rico have adopted Section 139 or cited it with approval. Another 23 states, which have not yet specifically considered Section 139, nevertheless apply the Second Restatement in other situations. Six more states (including Indiana) apply an interest analysis similar to the Second Restatement’s when addressing conflict of law issues. The remaining eight states adhere to the traditional analysis found in the First Restatement – typically lex loci delicti in tort cases. However, the Yasmin court also found that a “special circumstance” (a Second Restatement concept) warranted application of the most significant relationship test even in cases originating in states following the First Restatement approach, because fairness to the expectations of the parties to a privileged communication militated in favor of applying the rules of the state with the most significant relationship to the communication.

Thus, while the Yasmin court’s approach required extensive analysis, it arrived at a conclusion that offers a streamlined and practical solution for the parties to MDL cases, because applying the most significant relationship test will often result in one state’s substantive privilege law (the state where the communication took place) being applied, rather than the privilege law of several states. This approach also helps avoid the complications that would arise if one tried to apply different states’ inconsistent privilege laws to the same communication.

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