Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems

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The diversity of state rules regarding testimonial privileges has fostered several interesting and significant choice of law problems.


1. Privilege law, like the law of evidence in general, has long been plagued by lack of uniformity. Over the last forty years, several attempts at comprehensive reform of evidence law have been made. See, e.g., MODEL CODE OF EVIDENCE (1942); UNIFORM RULES OF EVIDENCE (1953). No state legislatures, however, adopted the Model Code; only Kansas and New Jersey enacted the Uniform Rules and, even in those states, alterations were made. In 1974, the 1953 Uniform Rules were superseded by a new set of Rules, see UNIFORM RULES OF EVIDENCE (1974). No jurisdiction has, as yet, adopted these rules.


Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

This Rule provides no statutory standards for the federal courts when jurisdiction is based on the existence of a federal question and insists only that state law govern the privilege question as to issues on which state substantive law is applied, a result arguably compelled by Erie R.R. v. Tompkins, 304 U.S. 64 (1938). See generally Korn, Continuing
problems. The Restatement (Second) of Conflict of Laws, in abandoning the inflexible rule that "the law of the forum determines the admissibility of a particular piece of evidence," has given these important problems some of the attention they deserve. Even the Second Restatement, however, fails to focus sufficiently on the policies underlying the various privileges. This Article explores the privilege situation in greater depth and seeks to provide the courts with additional guidance for making rational choice of law decisions.

Imagine the plight of a court of state $F$ faced with a suit by Jones against Smith Corporation alleging breach of an implied warranty of fitness, based on the following facts. Plaintiff Jones claims that while vacationing in his home state, $C$, he contracted food poisoning after consuming some canned beans manufactured by Smith Corporation in state $F$. Jones immediately consulted Dr. Rich, a fellow vacationer in $C$, but a permanent resident of $D$. The actual content of their conversation remains unknown, but Jones may have discussed his diet for the day immediately preceding his illness and the extent of his discomfort, and Dr. Rich may have made a diagnosis. Smith Corporation seeks to secure Dr. Rich's testimony concerning the consultation. Dr. Rich is at home in $D$, beyond the process of the courts of $F$, so Smith Corporation attempts to examine him on deposition in $D$. Under the law of state $C$, no physician-patient privilege exists. $F$ has a statute, designed to foster free communication between doctor and patient, which prevents disclosure of such communications in court, but the privilege is deemed waived when the patient puts his physical condition in issue. $D$ has a broad physician-patient privilege to protect the patient's privacy from unwarranted intrusion, and only the express consent of the patient can effect a waiver.


In its present form, Federal Rule 501 is clearly unsuitable for enactment by state legislatures, since it deals primarily with issues the state courts do not address. Moreover, the Rule provides no guidance for the resolution of privilege questions, beyond interpreting the principles of the common law "in the light of reason and experience." Thus, widespread acceptance of the Federal Rules is unlikely to create greater uniformity in the privilege area. For a brief survey of the current state of disarray in privilege law, see note 8 infra.

2. Restatement (First) of Conflict of Laws § 597 (1934).
3. See Restatement (Second) of Conflict of Laws § 139 (1971) and accompanying comment. Section 139 is quoted in text accompanying note 54 and in note 81 infra.
Should the court in \( F \) authorize a deposition of Dr. Rich? The *Restatement (First) of Conflict of Laws* would treat this as a mere question of evidence, to be determined by application of \( F \)'s own law.\(^5\) Thus, since \( F \)'s statute would not permit disclosure until Jones actually puts his physical condition in issue, Smith Corporation would not immediately be entitled to Dr. Rich's testimony. Since the disputed conversation took place in a state which recognizes no privilege at all, were the court in \( F \) following the *Second Restatement* it would order the deposition.\(^6\) If \( F \) instead approached choice of law questions by applying governmental interest analysis,\(^7\) before the court could decide whether to order the deposition, it would have to determine the interests of the forum state, the state with the most significant relation to the communication, and the deposition state.

The problem is a complex one. Jones cannot claim that he relied on the existence of a privilege in communicating with Dr. Rich because \( C \), the site of the conversation, recognizes no privilege at all. \( F \) has an interest in encouraging communications between doctor and patient, but allowing the testimony might not interfere with this policy because the communication took place in \( C \) rather than in \( F \). The \( F \) court might, by asserting that \( D \) has no interest in the controversy, choose to ignore \( D \)'s interest in protecting the privacy of all patients. To complicate matters further, however, even if the court in \( F \) decided that the deposition should proceed, were Dr. Rich to challenge Smith Corporation's attempt to learn the contents of his conversation with Jones, a \( D \) court, recognizing that state's statute and policy, might not permit the testimony.

The hypothetical situation described above is well within the realm of possibility, since most testimonial privileges are recognized in some, but not all, jurisdictions,\(^8\) and the scope and

\(^5\) *Restatement (First) of Conflict of Laws* § 597 (1934).
\(^6\) See text accompanying note 54 infra.
\(^7\) The various commentators who favor interest analysis have different rules for resolving choice of law problems. See note 26 infra.
\(^8\) The privilege against self-incrimination is, of course, universally honored, but because it is primarily a matter of federal constitutional law, it poses no significant choice of law problems and will not be discussed further. If, however, one state decided to recognize a broader self-incrimination privilege than the one mandated by the federal constitution, choice of law problems could arise.

Among communications privileges, on which this Article focuses, only the attorney-client privilege is recognized in every state. Its scope, however, varies from state to state. *Compare* N.Y. Civ. Prac. Law. § 4503 (McKinney Supp. 1976) with Schwartz v. Wenger, 267 Minn. 40,
limitations of many privileges vary widely from state to state.⁹

⁹. Waiver rules, for instance, vary widely depending upon the privilege and the state. Many states deem the physician-patient privilege waived whenever the patient puts his physical condition in issue, see, e.g., San Francisco v. Superior Court, 37 Cal. 2d 227, 221 P.2d 26 (1951); Phipps v. Sasser, 74 Wash. 439, 445 P.2d 624 (1968), while others find an implied waiver as soon as the patient commences a personal injury action, see, e.g., Mathis v. Hilderbrand, 416 P.2d 8 (Alaska 1966).

In the case of the anti-spousal privilege, different states have different rules as to who may assert it. In some states anti-spousal testimony is absolutely incompetent, see, e.g., Wyo. Stat. § 1-142 (Supp. 1975), in others the party spouse can prevent the testimony, see, e.g., Mich. Comp. Laws Ann. § 600.2162 (West 1968), while in still others only the witness spouse can refuse to testify, see, e.g., Cal. Evid. Code § 970 (West 1966).

Some states restrict the priest-penitent privilege to clergymen who are "authorized or accustomed to hear, and [have] a duty to keep secret, penitential communications." See, e.g., Uniform Rule of Evidence 29 (1)(a) (1953). Such a formulation benefits primarily, if not exclusively, Catholic priests and penitents seeking to maintain the confi-
Thus, a horizontal choice of law question can arise whenever a privilege claim is asserted in a court of the forum state to protect a communication made in another state. The choice of law problem is even more complex when testimony about an arguably privileged communication is sought not at trial but on deposition outside the forum.

Formerly, these choice of law problems were simplistically resolved by application of the First Restatement's principle that the forum's evidentiary rules should govern in cases of conflict. Although the law of evidence has developed principally to ensure that "the truth may be ascertained and proceedings justly determined," testimonial privileges are often recognized for reasons unrelated to efficiency and accuracy in adjudication. The broad forum-oriented rule used to resolve evidentiary conflicts, although appropriate when only accuracy in adjudication is at stake, affords insufficient attention to the entirely different state policies that support privilege rules. In light of these shortcomings, courts and scholars became convinced that sister state privilege rules merited closer consideration.

The Second Restatement was a reaction to the inflexible approach of the First Restatement. Although it represents a vast improvement, it too has its shortcomings. Not only does it fail to consider the possibly independent interests of a deposition state, but it provides a single rule for all privileges without recognizing the different state policies that different privileges may reflect. For these reasons, it is necessary to develop a more flex-

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10. A horizontal choice of law question forces the court to select one rule from among those of two or more states. A vertical question, by contrast, requires a choice between a state rule and a federal rule. See note 65 infra.


12. FED. R. EVID. 102.

ible approach that considers the policies underlying the existence and form of the various privilege statutes.

The purpose of this Article is to provide the forum court with guidelines for determining whether to admit testimony about a communication at either the trial or the deposition stage of a judicial proceeding. In order to solve this problem, it is imperative to recognize that different privileges have different purposes and that both these purposes and the stage of the proceedings at which the problem arises will determine what rules to apply. In its deliberation, the court first must deal with any justifiable reliance interest of the parties. Then, the court must ascertain whether failure to honor a particular privilege claim would undermine a fundamental policy of any state connected with the controversy. Finally, the effect of a particular privilege ruling on the workings of the interstate system, both as a whole and in the specific case, must be considered. The analysis below should help the forum court to recognize the various interests involved and to decide whether to apply the forum’s law, the law of the state with the most significant relationship to the transaction or occurrence at issue, or the law of the state in which the deposition is to be taken.

I. THE POLICY BASES OF TESTIMONIAL PRIVILEGES

A. General Justifications

In the long history of privilege law, courts and legal scholars have advanced a number of justifications for the recognition of professional and personal privileges, only three of which

14. See note 73 infra and accompanying text.
15. Some cases described in this Article are used as illustrations in both the trial situation and the deposition situation, because similar issues may be raised regardless of the specific type of forum. Thus, before deciding whether to order a deposition elsewhere, the forum must consider its policy toward the privilege as well as that of the deposition state. Similarly, before allowing a deposition to proceed over a challenge, the court in the deposition state must make the same determinations.
16. For instance, in the early 1600's, it was argued that the obligations of "honor among gentlemen" prevented professional men from testifying about communications with their clients. 8 J. WIGMORE, EVIDENCE § 2286 (J. McNaughton rev. ed. 1961). Lord Mansfield sounded the death knell for this widely accepted rationale in a 1776 case involving the physician-patient privilege, the Duchess of Kingston's Case, 20 How. St. Trials 355 (P. 1776):

If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour, and of great indiscre-
retain any vitality today. First, a privilege may encourage free and open communication within the confines of a specified relationship. Second, a privilege may protect personal privacy rights against intrusion by the judicial system. Finally, recognition of a privilege for attorney-client communications assures fairness in the litigation process.

Some of society's most important relationships can be maintained satisfactorily only if there is full, frank, and entirely truthful communication between the parties. A physician, for example, cannot properly perform his duties if his patient does not fully disclose the nature of his ailments, and an attorney cannot effectively represent a client unless he is fully acquainted with the facts of the client's case. Assurances of confidentiality are often necessary to induce a free flow of information. If the existence of a testimonial privilege will encourage open communication and truthfulness, and if society will benefit more from this increased communication than it would from the evidence that would be available if no privilege existed, recognition of a testimonial privilege on this "encouraging communications" rationale is justified.

Privileges also protect personal privacy by recognizing "a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping." Unlike the "encouraging communications" rationale, in which a balance can be struck between the need to facilitate open communications and the need for full disclosure of evidence, the

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18. For a more detailed exposition of this justification, see 8 WIGMORE, supra note 16, § 2285 at 527-28.
interests in conflict when a privacy rationale is asserted are extremely difficult to balance. The effect on a confidential relationship is not the prime factor to be weighed against the need for evidence; rather, it is the individual's own interest in informational control and personal privacy, the objective value of which is often impossible to assess. Thus, the privacy justification for privileges tends to take an absolute form, for it is difficult to place the individual interest in personal privacy on the same scale with the societal interest in just adjudication.

A third justification for recognition of a privilege applies only to the attorney-client relationship. Procedural fairness in litigation may require recognition of some form of attorney-client privilege. Even absent an interest in encouraging communication between lawyer and client, it would be unjust in an adversary system to allow one party to force the opposing lawyer to disclose damaging admissions made by his client. In criminal cases, this problem reaches constitutional dimensions, for failure to recognize a privilege could force a defendant to choose between his right to effective counsel and his privilege against self-incrimination.

20. With privileges that encourage communications, one can purportedly weigh the effect of denying the privilege. The result is simply less communication. With privacy-based privileges, the only effect is that privacy has been violated, which is arguably bad in itself. Thus, the decision whether or not to recognize such a privilege depends on just how much privacy is worth, an absolute, as opposed to comparative, determination.

21. Perhaps the best judicial discussion of the privacy basis for privileges appears in In re Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970). In response to a psychiatrist's refusal to obey an order directing him to answer questions, the California supreme court noted: "We do not face the alternatives of enshrouding the patient's communication to the psychotherapist in the black veil of absolute privilege or of exposing it to the white glare of absolute publicity. Our choice lies, rather, in the grey area." Id. at 422, 467 P.2d at 561, 85 Cal. Rptr. at 833.

In this case, however, it was the psychiatrist who asserted that the order unconstitutionally infringed both his personal privacy rights and those of his patients. Although the court refused to honor his privilege claim, the result might have been different had the patient asserted the privilege on his own behalf.

22. Because this justification applies only to the attorney-client privilege, it will be further discussed only in passing. See text accompanying note 112 infra.

23. Although this rationale does have the effect of encouraging communication, one may not care at all whether a client talks to his lawyer but may still believe that if he does talk, it is unfair to allow these disclosures to be released to his opponent. These two rationales do, however, overlap to a certain extent. See text preceding note 17 supra.

24. If there were no attorney-client privilege, a defendant who ad-
Not every privilege can be justified on each of the aforementioned rationales. Unfortunately, very few of even the most thoughtful works on the subject of privileges have examined this problem. Yet, that each privilege may have a different raison d'être has important implications for choice of law decisions. To the extent that different privileges protect fundamentally different interests, it is inappropriate to treat them uniformly for choice of law purposes.

mitted incriminating matters to his attorney would subject the information to disclosure, and, in effect, incriminate himself. If, on the other hand, the defendant chose not to disclose the information, he would, in effect, relinquish his right to effective counsel.

Two scholars have urged that "[t]he state should not be able to abandon its duty to 'hunt up evidence' by virtue of the fact that the accused exercised his constitutionally guaranteed right to consult an attorney," Sedler & Simeone, The Realities of Attorney-Client Confidences, 24 Ohio St. L.J. 1, 9 (1963).

In recent years the Supreme Court has been unsympathetic towards rules which force witnesses, and especially criminal defendants, to choose between constitutional rights. See, e.g., Brooks v. Tennessee, 406 U.S. 605 (1972); Simmons v. United States, 390 U.S. 377 (1968); cf. Note, Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings, 76 Colum. L. Rev. 674 (1976).

Since the attorney-client privilege is universally recognized, at least in some form, there has been no real need to rest the privilege on a constitutional basis. The only serious problems that have arisen in this context involve incriminating documents delivered by the client to his attorney. In some cases, the courts refuse to allow privilege claims in this situation, holding that no constitutional right is violated even if the attorney in possession of the documents is permitted to assert neither the attorney-client privilege nor the privilege against self-incrimination on behalf of his client. See, e.g., Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963). But see, United States v. Judson, 322 F.2d 460 (9th Cir. 1963); In re House, 144 F. Supp. 95 (N.D. Cal. 1956).


26. Modern conflicts analysis properly attaches great importance to the interests protected by a given rule of law. The Second Restatement
B. POLICY BASES OF INDIVIDUAL PRIVILEGES

Some privilege rules can be justified only on an "encouraging communications" theory. Others are defensible solely as protections of privacy rights. Most privileges, however, fall somewhere on a continuum between these two extremes, and may be justifiable on both grounds—or on neither.

Recognition of the marital privileges is based almost entirely on the importance of protecting privacy. In the words of Professor Louisell, "[a] marriage without the right of complete privacy would necessarily be an imperfect union."\textsuperscript{27} Especially since Griswold v. Connecticut,\textsuperscript{28} in which the Supreme Court placed the marital relationship within a constitutionally protected "zone of privacy," the privacy rationale for marital privileges appears exceedingly strong.

On the other hand, the argument that marital privileges should be recognized because they encourage marital communication is very weak. Because a marital relationship is, or should be, based on complete trust, the recognition of a testimonial privilege is not necessary to assure free, confidential communication between husband and wife.\textsuperscript{29} Such communication will continue

\textsuperscript{27} Louisell, supra note 19, at 113.
\textsuperscript{28} 381 U.S. 479 (1965).
\textsuperscript{29} There are, of course, two marital privileges—the marital communications privilege and the privilege not to testify against a spouse. \textit{See} note 8 supra. As to the former, even its supporters admit that there is little awareness of the privilege, and hence little reliance upon it. \textit{See} Reutlinger, supra note 25; Note, \textit{Marital Evidentiary Privileges in Minnesota}, 36 Minn. L. Rev. 251 (1952); Note, \textit{The Husband-Wife Privileges of Testimonial Non-Disclosure}, 56 Nw. U.L. Rev. 28 (1961). Even if the privilege does not induce free communication, some argue that its abrogation might draw public attention and thereby inhibit communication. \textit{Id.} On reflection, however, it should be clear that the existence of a testimonial privilege, in anything short of a police state atmosphere, will have no effect on free, confidential communication between husband and wife.

The anti-spousal privilege only protects those married at the time
whether or not there is a privilege.\(^{30}\)

In the case of the attorney-client privilege, the arguments are just the opposite. Most clients will disclose damaging information to attorneys only after careful consideration. They are likely first to think about the consequences of their words and even to question the attorney if they have any doubts that a communication may not be confidential. Those who have had frequent contact with attorneys may be aware of a privilege and rely on it as a matter of course.\(^{31}\) Given these factors, withdrawal of the attorney-client privilege would almost certainly inhibit free communication. Since open communication is essential to the satisfactory maintenance of the attorney-client relationship, courts should recognize that the privilege is based primarily on this “encouraging communications” rationale.

The privacy basis for the attorney-client privilege, by contrast, is quite weak. Few people are likely to treat an attorney as a personal confidant as they would a spouse, a relative, a friend, or a clergyman. Most people do not maintain ongoing relationships with lawyers; a client’s interaction with an attorney is very similar to that with other professionals and business people, except that open communication is more important to the maintenance of a satisfactory attorney-client relation-

\(^{30}\) Professor Louisell, a staunch supporter of privileges, has admitted that Wigmore’s utilitarian “promotion of full disclosure” rationale rests on a highly conjectural basis. Louisell, supra note 19, at 111.

\(^{31}\) Even an unsophisticated client could reasonably expect his attorney, who is an expert on the law, to stop him from making any damaging admissions, if, in fact, any admissions to the attorney could be damaging. Since the police, who are not acting directly in an accused citizen’s interest, are required to give a Miranda warning to those being questioned, a fact known to all Americans who have ever watched a police story on television, would it not seem incredible to the average lay person that statements made to a lawyer, without such a warning, could be used against the client’s interests? For those citizens who are unaware of the existence of the privilege, common sense and experience suggest that disclosures can be freely made to an attorney. In this sense, at least, people rely on the existence of the privilege.

This analysis in no way contradicts the author’s disavowal of any privacy basis for this privilege. See text preceding note 32 infra. Just because clients recognize that legal problems can be freely discussed with lawyers does not mean that these lawyers are being trusted as personal confidantes. Rather, clients talk freely to attorneys because they have been led to believe that doing so will have no adverse legal consequences.
ship. This suggests that the privilege be retained to encourage free communication, but it certainly has little relevance to a right to privacy. In fact, there is no greater privacy interest in communications between attorney and client than there is in confidential conversations between any two people. Extending a privilege to all confidential communications would cripple the adjudicatory process, to the detriment of society's interest in winnowing out the truth.

The remaining communication privileges fall somewhere on the spectrum between the marital privileges and the attorney-client privilege. Like the former, the clergyman-communicant privilege is based on a strong personal bond of trust; it can be sustained on the privacy rationale, but not necessarily on an "encouraging communications" basis. The physician-patient privilege may not be justified on either ground, while a

32. In addition to the loss of admissible evidence caused by such a broad privilege, the court would have to spend an inordinate amount of time determining whether or not a communication was meant to be confidential.

33. The "encouraging communications" rationale for this privilege is especially unpersuasive when the clergyman is a Catholic priest, because a parishioner will almost certainly know of the inviolability of the seal of confession. If there were no privilege, and the Catholic penitent were aware of that fact, he would be no less willing to confess (except perhaps out of consideration for the potential future anguish of the priest) because of his knowledge that the priest would not divulge the contents of the confession under any circumstances.

The clergyman-communicant privilege raises several constitutional questions. For instance, if a Catholic priest were required to testify about communications made in confessional, both he and his communicant might well claim a deprivation of the right to "free exercise" of religion. On the other hand, a privilege limited to Catholic priests might involve an "establishment" of religion within the meaning of the first amendment. And even a broader clergyman-communicant privilege might run afoul of the establishment clause if no similar privilege were extended to other spiritual and moral advisers. For a discussion of these problems, see Stoyles, The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses, 29 U. Pitt. L. Rev. 27 (1967).

Natural repugnance toward compelling a priest to violate his sacred trust presents another rationale for recognizing this privilege. Even Bentham, one of history's harshest critics of privilege doctrine, was appalled at the thought of forcing priests to testify. He noted that "[t]o all individuals of that profession, it would be an order to violate what by them is numbered amongst the most sacred of religious duties."

4 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 588 (Bowring's ed. 1827), cited in 8 WIGMORE, supra note 16, § 2396 at 877. Since this argument protects only the priest and provides no support for the right of the penitent to prevent disclosure, however, it is of rather limited application.

34. In earlier times when persons with certain illnesses were likely to be ostracized, the pressure to conceal the existence of a disease was
privilege between psychotherapist and patient is probably valid on both. The other professional privileges—those between accountant and client and between journalist and source—rest almost exclusively on the public policy of encouraging communications.

great. Slovenko, supra note 17, at 178. This consideration is less important in modern times and, since failure to communicate freely with a doctor could result in continued illness or even death, the need to encourage such communication by a privilege rule is slight. Physical diseases that are still accompanied by social stigma—for example, drug addiction and venereal disease—present a more complex situation, but do not necessarily suggest that a broad privilege to encourage communication is required.

Similarly, the doctor-patient relationship has become much less personal with the demise of the house call and the general practitioner, and the increased cost of medical services. As a result, the claim for a privacy-based privilege has become weaker, cf. Felber v. Foote, 321 F. Supp. 85, 88-89 (D. Conn. 1970), and many cases have begun to cut back on the scope of the physician-patient privilege, see, e.g., Mathis v. Hilderbrand, 416 P.2d 8 (Alaska 1966); San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951); Randa v. Bear, 50 Wash. 2d 415, 312 P.2d 640 (1957).

35. People are still far more ashamed of mental ill health than of physical ill health. See M. GUTTMACHER & H. WEHOFEN, PSYCHIATRY AND THE LAW 269-87 (1952). Thus, fear of disclosure in court might cause patients to be less candid with their therapists. This would not only make treatment less effective, but might deter some people from seeking psychiatric help altogether. Fisher, The Psychotherapeutic Professions and the Law of Privileged Communications, 10 WAYNE L. REV. 609, 622 (1964). Moreover, the people most likely to be deterred will tend to be those with the most damaging admissions to make—the very people who have the greatest need for help. Id. at 622-23. Clearly, a psychotherapist-patient privilege is justifiable on an "encouraging communications" basis.

The privacy rationale for this privilege is equally compelling. In a sense, psychotherapy itself is one of the most severe invasions of privacy imaginable, since it involves the deepest prying into both the conscious and the unconscious knowledge of the patient. Louisell, supra note 25, at 745. The therapist may learn information about his patient that the patient himself does not know and, often, does not want to know. Therapists generally recognize the strong desire of most patients to maintain strict confidentiality, and, as a result, there is a particularly strong ethic against disclosure among psychiatrists. Slovenko, supra note 17, at 188-89.

Additionally, the nature of disclosures made during psychiatric examinations may make evidence obtained through testimony about these disclosures both unreliable and highly prejudicial to the patient. Slovenko, supra note 25, at 187-88. Since patients may say things in therapy that bear little or no relation to reality, forcing the therapist to disclose these communications would not help to provide reliable evidence. This argument is unique to the psychotherapist-patient privilege and is really an argument for incompetency of the witness rather than privilege.

36. The accountant-client relationship is even less justifiable on a privacy basis than the attorney-client privilege. But see Couch v.
Of course, each of the various American jurisdictions may have its own justifications for recognizing certain privileges. Some states may recognize them for reasons that appear outdated, or even irrational. Where a clear statement of the purpose behind the privilege exists, however, such evidence of state policy is quite important in resolving choice of law problems. Unfortunately, the official state policy underlying a privilege is rarely explained. As a result, the courts of one state will often be forced to speculate as to the policy justifications for the privileges of a sister state.

II. CHOICE OF LAW CONSIDERATIONS IN EVALUATING PRIVILEGE CLAIMS ASSERTED ABOUT TESTIMONY AT TRIAL

Choice of law decisions, both generally and in regard to privileges, necessarily involve a balancing process. The court must weigh the benefits of having privileged communications admitted as testimony against those of having the testimony excluded. It is a primary thesis of this Article that because different communications privileges have different policy foundations, choosing the applicable law will, in many circumstances, depend on the particular privilege.

United States, 409 U.S. 322, 341 (1973) (Douglas, J., dissenting), in which Justice Douglas argued that there is even a privacy aspect to this privilege.

The reporter's privilege, where it is recognized, implements society's desire to maintain a vigorous free press by promising otherwise reluctant informants that their identities will remain confidential. Here, too, there is little interest in personal privacy at stake, except the general desire any individual may feel to control the use of information that he has divulged.

Although the attempt to place the reporter's privilege on a constitutional basis, derived from the first amendment, has failed, Branzburg v. Hayes, 408 U.S. 665 (1972), this of course does not diminish the right of a state to enforce such a privilege as a matter of legislative policy.

37. Unlike federal statutes, state laws rarely have any documented legislative history. This is particularly true in the area of testimonial privileges since many of the statutes are merely codifications of the common law.

38. This problem is not peculiar to the testimonial privilege situation, but exists whenever choice of law questions arise. For examples of courts struggling to identify the state policies underlying substantive rules of law in a classic choice of law situation— the applicability of foreign automobile guest passenger statutes—see Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).
A. THE INTERESTS INVOLVED

When a choice of law question involves a claim of privilege asserted at trial, the dispute normally centers on whether the privilege law of the forum state, $F$, should apply or whether the court should look to the state which has the most significant relationship with the communication, $C$. In a few situations the law of another state may also be entitled to consideration. This section examines the competing considerations present in the choice of law process.

1. The Interests of the Forum

The forum state has a legitimate interest in promoting ease of administration in its courts. By applying its own privilege rules rather than those of a sister state, $F$ eliminates the need for its judges to familiarize themselves with a different approach. This is likely both to save time and to put the decision on firmer ground.

In addition, the forum state has an interest in reaching just results in domestic litigation.

39. The state of most significant relationship will almost always be the state where the communication took place. The Second Restatement adopted the “most significant relationship” terminology to cover the rare cases in which the state of communication is entirely fortuitous. Thus, if a married couple is domiciled in state $X$, and the wife communicates to the husband while both are spending a weekend in state $Y$, $X$ is the state of most significant relationship. See Restatement (Second) of Conflict of Laws § 139, Comment e (1971). If both parties to a communication are domiciled in state $A$, but travel to state $B$ to communicate in reliance upon state $B$'s privilege law, however, $B$, not $A$, should be treated as the state of most significant relationship.

It should be noted that in the case of the anti-spousal privilege, because there is no communication, there can be no state of most significant relationship to the communication. When this privilege is asserted, the court will have to decide whether to apply forum law or the law of the state with the most significant relationship to the married couple—usually their domicile.

40. See note 52 & notes 108-11 infra and accompanying text.

41. See Restatement (Second) of Conflict of Laws § 122 (1971). Comment a provides in part: “Enormous burdens are avoided when a court applies its own rules, rather than the rules of another state, to issues relating to judicial administration.”

42. See Leflar, supra note 28, at 249-50. Of course, if promotion of this interest were taken to its extreme, a court would never need to apply foreign law. As Professor Leflar has said: “It has been argued that a court should apply its own local law unless there is good reason for not doing so. No one can deny the propriety of this argument so long as the ‘unless’ clause is adequately emphasized.” Id. at 250.

43. Restatement (Second) of Conflict of Laws § 139, Comment d (1971).
The system may depend, in part, on the success with which the courts uncover the facts of a given case. Thus, absent a compelling reason for recognizing a privilege claim, the interest of F's courts in admitting relevant testimony is entitled to weighty consideration.

The judicial system must also protect the rights of its citizens to privacy. When a forum recognizes a privilege because it would be offensive to F's citizens for the judicial system to pry into certain kinds of communications, F may be inclined to prohibit testimony about the confidential matter, even if the communications were originally made in a state that does not recognize this testimonial privilege.

2. The Interests of the State of Most Significant Relationship

C often has an interest in assuring that its privileges are honored in the courts of F. If C's policy is to encourage open communication in certain protected relationships, C will not want its policy diluted by the admissibility of the confidential material in F's courts. Refusal by the courts of F to honor C's privilege may deter free communication in C.

In addition, C's privacy-based privileges may be designed to protect the sanctity of certain relationships within C. Thus, even if F's non-recognition of C's privilege would not affect the behavior of C's citizens, C might have an interest in assuring that certain communications made within its borders are protected from any state intrusion. 44

When C recognizes no privilege, its interests in any privilege decision made by F's courts is minimal. If C has an unusually strong interest in achieving a just result in a particular litigation in F's courts, C may want all relevant evidence admitted, 45 but

44. For instance, suppose that in a court of F, testimony is sought concerning marital communications made within C by citizens of C. C may have an interest in protecting its citizens, who acted only within C, from foreign invasions of privacy. C's interest, however, does not necessarily depend upon the citizenship of the communicant. In the case of a patient who crosses state lines to visit a psychiatrist, for example, even if the privilege in the psychiatrist's state is based strictly on a privacy rationale, that state might have an interest in protecting the inviolability of the relationship, whether or not the patient is a resident.

45. Assume, for example, a major stock market swindle in New York. Suit is brought in New Jersey because that state is the only place in which plaintiff can get personal jurisdiction over all the defendants. Otherwise New Jersey is only a forum. New York recognizes no privilege, while New Jersey does. Although it could be argued that New York has no interest in the litigation, a plausible argument could be
even in such a case, $F$'s interest in assuring a just outcome is likely to be greater than $C$'s. If $F$ has a strong interest in suppressing privileged testimony in this situation, $C$'s desire to admit the evidence should be of little concern.

3. The Interests of the Communicating Parties

Whenever the parties to a particular communication have relied on $C$'s privilege, it would be unfair to compel disclosure of the contents of the communication in a judicial proceeding in $F$. Moreover, even when the parties do not specifically rely on, or even know of, $C$'s privilege, it may be inconsistent with notions of federalism to ignore the reasonable expectations of parties who act only within $C$ that their communications will be governed by $C$'s legal standards. Thus, the parties to a communication that is privileged where made often have a legitimate interest in asserting the privilege in the courts of $F$.

4. The Interests of the Litigants

The litigants in the particular case have an interest in obtaining a judicial decision based on a thorough knowledge of the relevant facts. Recognition of a privilege, however, is based in part on the belief that the need to protect the confidentiality of certain communications outweighs the importance of hearing relevant testimony. Thus, the interests of the individ-

made that New York has some interest, however minimal, in the outcome of the suit, and hence in the privilege determination.

46. Cf. Miller v. Miller, 22 N.Y.2d 12, 28, 237 N.E.2d 877, 886, 290 N.Y.S.2d 734, 747 (1968) (Breitel, J., dissenting): "Justified expectations are . . . relevant in a[n] . . . intangible way: it is jurisprudentially significant that parties' rights be determined by the law or system of rules which they most probably believed would control their relationship."

The federal system in the United States is based on the territorial sovereignty of the several states. Parties acting wholly within a state will normally expect their actions to be governed by the laws of that state. Absent competing considerations, comity requires that these expectations be honored. Cf. Cavers, supra note 26, at 134-35.

47. Despite certain superficial similarities between the interests of the state with the most significant relationship and those of the communicating parties, these are two distinct interests. The parties are not bothered by the future effects in state $C$ of the court’s choice of law; they are concerned about the effect on themselves in the instant litigation.

48. Of course, in many instances, only one litigant will want all the facts exposed in court; the other will want to see a privilege claim upheld. While a litigant may have several reasons for claiming a privilege, the desire to hinder the adjudicatory process is not a legitimate one.

49. See text accompanying notes 17-21 supra.
ual litigants are subordinate to the general public policy expressed in the privilege rules. \(^{50}\) When failure to apply a privilege would offend no public policy, however, fairness to the litigants requires that the testimony be admitted.

5. **Prevention of Forum Shopping**

Choice of law rules should be designed, to the extent possible, to prevent plaintiffs from choosing to sue in a particular state merely because that state will apply a more favorable body of law. \(^{51}\) Excessive forum shopping distorts the processes of the interstate system, and may diminish public confidence in the courts. Application of an arbitrary rule, such as "the law of the state of communication governs," could eliminate all forum shopping problems. Since such arbitrary rules ignore the other factors enumerated above, however, they create more inequities than they eliminate. As in other choice of law determinations, a court faced with conflicting privilege rules must sometimes weigh the desire to discourage forum shopping against other important interests in deciding what law to apply.

B. **RESOLVING THE PROBLEMS**

In almost every choice of law problem that arises at trial, the forum court will have to choose between application of C's privilege law and its own. \(^{52}\) In the preceding sections the

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50. Most privilege statutes speak in absolute terms: no matter how important the privileged information might be to accurate factfinding in an individual case, the testimony cannot be admitted without the consent of the holder of the privilege. On the other hand, a handful of state statutes, especially those dealing with the physician-patient privilege, give the courts discretion to admit the testimony when suppression would defeat the ends of justice. See, e.g., N.C. GEN. STAT. § 8-53 (1969), which prohibits disclosure of medical confidences "[p]rovided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to proper administration of justice." See also De Foe v. Duhl, 286 F.2d 205 (4th Cir. 1961); Va. Code § 8-289.1 (Supp. 1976).

When these equivocal privilege statutes are involved, the interests of the litigants become more important in the choice of law process. Since such statutes are rare, however, they will receive only this brief mention.

51. The desire to prevent forum shopping applies to both the substantive law and the choice of law rules that the forum court will follow.

52. There are a few instances, important only for their theoretical interest, in which the law of another state might be significant. For example, husband and wife, domiciliaries of state X, have an auto accident in X as a result of the husband's negligent driving. A month after
rationales for the various communications privileges were discussed and the possible competing interests of different states were identified. Specific choice of law problems that are likely to arise will now be examined to determine which interests should prevail in resolving the issues. Existing case law will be discussed, but since most of the decisions in this area are remarkably unilluminating, an attempt will be made to develop a rational system to provide guidance to courts in the future.

1. *F recognizes the privilege; C does not*

First, consider the case of a privilege designed to encourage open communications. The *F* court may want to apply its privilege because it is accustomed to applying the privilege in similar situations in purely domestic litigation. On the other hand, the desire to assure accurate fact-finding may favor receiving the testimony, absent strong reasons for honoring the privilege. Here, no public policy of *F* would prohibit admission of the testimony. Since the privilege, by hypothesis, is based on an “encouraging communications” rationale, and since *F* has little interest in encouraging communications in *C*,*5* *F* has no stake in applying its privilege.

Inasmuch as *C* does not recognize the privilege at all, admission of the testimony would violate no public policy of that state. Moreover, the parties themselves cannot claim that they

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the accident, the couple moves to state *C-F*, where the husband confidentially admits to his wife that he had been driving negligently at the time of the accident. State *C-F* does not allow tort suits by one spouse against the other but permits the marital communications privilege to be waived by either spouse. State *X* allows tort suits between spouses but requires the consent of both spouses to waive the marital communications privilege. Wife brings suit in *C-F*, and the *C-F* court, using its own choice of law rules, must apply *X* law on the issues of negligence and tort immunity. Which privilege rule should control?

If *C-F* uses its own privilege law in this situation, the wife may be able to recover from her husband, although she would not be able to do so if *X*'s law were applied to all issues or if *C-F*'s law were applied across the board. This result is not necessarily bad, but if *C-F* and *X* were each trying to discourage suits between spouses and were only using different means to achieve the same goal, it would be counterproductive to allow the wife to waive the privilege without her husband's consent. For a general discussion of the problems inherent in using the rules of one jurisdiction to govern some elements of a case and the rules of another jurisdiction to govern others, see Reese, *Deposition: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58 (1973).

53. As long as *F*'s citizens are assured that communications made in *F* will be accorded full protection from disclosure, failure to recognize the privilege for communications made in *C* should not have any significant deterrent effect on *F*'s citizens.
had any justifiable expectation of confidentiality, since communications made in C would normally be unprivileged. Thus, when F recognizes a privilege designed to encourage communications, and C does not, F should ignore its own privilege and admit the testimony.

The Second Restatement would reach the same result in this situation. Section 139(1) provides:

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.54

Since admission of the communication in this hypothetical situation would not violate any strong forum policy, the privilege would not be honored.55

Unfortunately, courts have not been particularly enlightened in their approach to this problem.56 Instead, in many of the older cases, the courts tended simply to parrot the position of the First Restatement that the admissibility of evidence was to be determined by the law of the forum.57 Levy v. Mutual Life

54. Restatement (Second) of Conflict of Laws § 139(1) (1971).
55. Id. § 139, Comment c, provides in part:
The evidence will not, however, be admitted in those rare instances where its admission would be contrary to the strong public policy of the forum. Such a situation may occasionally arise when the state of the forum, although it is not the state which has the most significant relationship with the communication, does have a substantial relationship to the parties and the transaction and a real interest in the outcome of the case.

It is unclear from the comment when such a situation would occur, but this exception is apparently meant to be a narrow one.

56. This is not surprising since, until very recently, the First Restatement was accepted in almost all jurisdictions. Some courts still apply the philosophy, if not the letter, of the First Restatement to certain rules. See, e.g., Palmer v. Fisher, 228 F.2d 603 (7th Cir. 1955); Hare v. Family Publications Service, Inc., 334 F. Supp. 953 (D. Md. 1971); Ex parte Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953). Moreover, the First Restatement's rule makes sense in a number of evidentiary situations other than those involving privileges. See Restatement (Second) of Conflict of Laws § 138 (1971); note 113 infra.

57. See, e.g., Wexler v. Metropolitan Life Ins. Co., 38 N.Y.S.2d 889 (N.Y. City Ct. 1942), a case in which the beneficiary of a life insurance policy sought to prevent testimony by physicians about examination and treatment, matters privileged under New York law, even though the insured was a New Hampshire resident, and both the communications and the contract were made in New Hampshire, whose privilege did not cover the situation. Id. at 889. New York, the forum state, refused to permit the insurance company to depose the physicians in question, noting that "the public policy of this state does not permit the use of such evidence.
Insurance Co. is perhaps the best example of the less dogmatic approach that sometimes prevailed. In an action to recover on a life insurance policy brought in New York, defendant moved for an order directing that the testimony of physicians in Georgia be taken. Both the communications and the insurance contract in issue had been made in Georgia. Although the forum, New York, recognized a physician-patient privilege, the court held that Georgia law applied and denied the privilege claim.

There have been only two recent cases on this point. *Hare v. Family Publications Service, Inc.*, a 1971 case involving the attorney-client and accountant-client privileges, began as a suit for breach of contract, conspiracy to induce breach, and intentionally inducing breach. While the action was pending in federal district court in Maryland, plaintiffs sought to compel defendants to answer interrogatories in New York, the site of the communications. New York did not recognize an accountant-client privilege, but Maryland did. The trial court, in a rather


58. 56 N.Y.S.2d 32 (Sup. Ct. 1945). The case is also discussed in the text accompanying notes 127-28 infra.

59. There were, in fact, a few complications in the case. The insured had signed a contractual waiver of any physician-patient privilege when she took out the policy. The court is less than clear whether it granted the defendant's motion on the basis of this waiver or on the broader ground of lack of privilege. *Id.* at 34. New York did not at that time recognize contractual waiver of the physician-patient privilege, but Georgia, the state whose contract law the court applied, had no public policy opposing such a clause. Professor Weinstein found the decision explicable on this narrow ground, Weinstein, *supra* note 13, at 543 n.43, but it can also be read more broadly. In either event, the result was correct.


61. Because of the procedural posture of the case, the court never reached the question of the applicability of the asserted attorney-client privilege. Defendants initially had moved to dismiss plaintiffs' complaint on the ground, among others, that the court lacked subject matter jurisdiction. The court then granted plaintiffs leave to file interrogatories directed solely to the issue of jurisdiction. Defendants interposed a number of objections, including the attorney-client and accountant-client privileges, and plaintiffs moved to compel answers to the interrogatories. 334 F. Supp. at 955. The court ordered the defendants to answer some of the interrogatories but denied the motion for others that did not deal solely with the jurisdictional issue. *Id.* at 960. Since the interrogatories arguably involving privileged communications between attorney and client were in this latter group, the court never had to examine the relevant New York and Maryland statutes.
confused opinion, concluded that requiring disclosure would violate Maryland's public policy and ruled against the plaintiffs. This result was wholly unjustifiable because Maryland had no legitimate interest in maintaining the confidentiality of accountant-client communications made in New York. To the contrary, Maryland's interests would have best been served by admitting the evidence, thus improving the accuracy of the fact-finding process. Since neither the parties nor New York had any bona fide interest in suppressing the testimony, the court should have ruled in the plaintiffs' favor.

The second case, *Hyde Construction Co. v. Koehring Co.*, was decided in 1972 by the Fifth Circuit. The litigation took place in Mississippi and arose from torts allegedly committed in that state and Oklahoma by the Koehring Company, a Wisconsin

62. The judge noted the prediction of Hill v. Huddleston, 263 F. Supp. 108 (D. Md. 1967), that the Maryland courts would have the deposition court apply the law of the state with the most significant relationship to the communication. 334 F. Supp. at 961. Then, however, the judge concluded that the Maryland courts would not adopt the New York rule in the instant case, although New York was clearly the state with the most significant relationship to the communication. Id. at 961.

63. The court reasoned:

> Comity between the states does not require the Maryland courts to enforce a law or public policy of a sister state when such action would violate the public policy of Maryland. The language of the Maryland statute creating the accountant-client privilege does not in terms apply only to communications made in the state of Maryland or only to communications otherwise having a significant relationship to Maryland; the language of the statute, on the contrary, purports to speak in absolute terms Id. (citations omitted).

> This justification, which amounts to nothing more than application of the discredited "plain meaning" rule, see, e.g., Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975), is particularly bizarre in a choice of law case. Privilege statutes are not written with choice of law problems in mind, and no inferences as to the intent of the drafters can be drawn from the "absolute" language of the Maryland statute.

64. 455 F.2d 337 (5th Cir. 1972).

65. Federal cases present some problems that are beyond the scope of this Article. First, the federal court must determine whether state or federal privilege law should apply. For discussions of this problem, see Louisell, supra note 19; Korn, supra note 1; Krattenmaker, supra note 1; Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353 (1969). Only when the court decides, as it did in *Hyde Construction*, that state law should be applied, do the horizontal choice of law questions become significant. Then, under the rule of *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), the federal court must apply the conflicts rules of the state in which it sits.
corporation. Plaintiffs were contesting Koehring's claim that Mississippi's attorney-client privilege protected certain documents from disclosure. They asserted that the Wisconsin privilege law should control, since "Koehring's legal efforts were directed by house counsel located in Wisconsin." The court, however, used a single "center of gravity" test for both the substantive and the privilege issues in the case and concluded that the law of Mississippi, the center of gravity of the transactions, should apply. The court's unwillingness to treat the privilege issues separately led to an incorrect result.

Correct application of the Second Restatement test, as well as proper evaluation of public policy interests, would have required the court to apply the Wisconsin rules. Mississippi might have been the center of gravity of the transactions, but Wisconsin was clearly the state of most significant relationship to the attorney-client communications. Precisely because Mississippi was the center of gravity of the transactions, as well as the forum state, it had a strong interest in disclosure of all relevant information, and no Mississippi state policy would have been offended by applying the less comprehensive Wisconsin rules to the communications made in Wisconsin.

When the privilege in question is recognized in F as a protection of privacy, the choice of law issues are somewhat different. C's interest, if any, in the privilege decision is still minimal. C has no stake in assuring accurate factfinding in the litigation in F, and, whatever position F's courts take towards the communications made in C, no state policy of C will be offended, since C does not protect these communications. Similarly, the parties to the communication can assert no justifiable reliance interest; the privilege, by hypothesis, is not one on which

66. 455 F.2d at 341.
67. The court asserted that the law of the "forum with the greatest interest in the controversy and in which the parties had the most significant relationships concerning the occurrences giving rise to the litigation" should control. Id. at 340. Since the Mississippi courts had adopted the "center of gravity" test of RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 175 (1971) in wrongful death actions, the federal court concluded that the same approach would be extended to cases like Hyde Construction. Id. at 341.
68. Curiously, the court never mentioned Restatement (Second) § 139, even while citing to Restatement (Second) § 175. The section 175 "center of gravity" approach was not designed to apply to privilege questions, and section 139 would compel an opposite result on the facts of this case. See text accompanying note 54 supra.
people are likely to rely, and the absence of any privilege in C makes the possibility of reliance even more remote.

On the other hand, when F's privilege is designed to protect privacy rights rather than to encourage communications, F has good reason to enforce its own privilege. If F has a state policy against intruding upon the privacy of certain relationships, compelling disclosure of communications made within the scope of those relationships violates that policy even if the communications were made out-of-state. If F's citizens are repulsed at the thought of forcing a husband to testify about communications made to him by his wife, that repulsion will be equally great whether the communications took place in C or in F.

Not all privacy-based privileges, however, are so strongly rooted. For instance, if F recognizes a privilege in civil cases only, the argument that F's public policy forbids intrusion on the parties' privacy founders. Rather, F's rule indicates that intrusion is sometimes permissible. When the policy behind F's protection of privacy is weak, and the privilege is recognized only in limited circumstances even in domestic litigation, F's interest in applying its privilege to a communication made in C is less compelling.

One other consideration looms in the background: the possibility of increased forum shopping if F applies its privilege even though it would not be honored were the litigation in C rather than F. When F is selected as the forum solely because of its privilege rules and has no substantial relationship to the subject matter of the litigation, the party seeking to compel disclosure may be unfairly prejudiced if the F court refuses to admit the privileged information and decides the case without the benefit of the disputed testimony.

69. See note 29 supra and accompanying text; note 33 supra.

70. Several states recognize the physician-patient privilege in civil cases only. See, e.g., Mont. Rev. Codes Ann. § 93-701-4(4) (1964).

71. Aside from the privileges that are recognized only in civil litigation, a state may sometimes approve broad waiver provisions for a particular privilege, see note 9 supra, or qualify the privilege, see note 50 supra. Other evidence that the privilege does not reflect a strong state policy may also be available, such as its limitation to certain kinds of conduct or certain types of proceedings, or judicial decisions indicating that the privilege has been treated lightly.

72. It should be noted that this conclusion follows only because F is solely a forum. Were F the home of the plaintiff or the defendant, the results might be different because then F would have some legitimate interests in protecting the privacy rights of its citizens. See text preceding note 70 supra. See also note 74 infra.
Nevertheless, even in this case, unless $F$'s public policy is very weak, sufficient justification for applying the privilege exists. Perhaps the best solution, which would enable $F$'s court both to honor its own state public policy and to avoid undue prejudice to the litigants, would be to dismiss the case on forum non conveniens grounds, or otherwise close the doors to litigation.\textsuperscript{73} Of course, if $F$ has significant contacts with the substantive issues in the case, it should not hesitate to both apply its own privilege and continue to hear the case.\textsuperscript{74}

\textsuperscript{73} The doctrine of forum non conveniens allows a court to decline to hear a case, even when all the formal requisites of jurisdiction exist. The court has discretion to dismiss the case when, for one reason or another, the chosen forum is seriously inconvenient. In Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), the leading case on the issue, Justice Jackson characterized the "availability of compulsory process for attendance of unwilling . . . witnesses" as an important consideration in deciding whether to apply the doctrine to a particular case. \textit{Id.} at 508. An analogous situation exists when a witness can be compelled to attend, but not to testify. Thus, if $F$'s public policy makes it impossible to compel a witness to testify in a court of state $F$, but if the witness could testify in the courts of another state, the $F$ court would be justified in dismissing on forum non conveniens grounds. This is especially true when $F$ has no significant contacts with the subject matter of the case.

If an $F$ court decides not to dismiss under the forum non conveniens doctrine, it might still close its court to the case on public policy grounds. If the suit were brought in $F$ solely to take advantage of $F$'s privilege law, the court could dismiss it to prevent use of $F$'s judicial system to hinder the pursuit of justice. Although "public policy" is most often the justification for closing the doors of the judicial system when plaintiff's claim is repugnant to the forum's policy, the forum should also be able to close its doors when the plaintiff's motives are clearly improper. \textit{See generally} Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).

When either forum non conveniens or "public policy" in this door-closing sense is the court's rationale for dismissing a case pending in $F$, the plaintiff is still free to sue in $C$ or some other state. If obtaining jurisdiction in another state is a problem, the $F$ court can condition its dismissal on the defendant's consent to suit in another state. \textit{See, e.g.,} Aetna Ins. Co. v. Creole Petroleum Corp., 23 N.Y.2d 717, 244 N.E.2d 56, 296 N.Y.S.2d 383 (1968). Since plaintiff is free to sue elsewhere, dismissal does not prejudice any of his substantive rights, assuming the statute of limitations has not run; it only prevents him from unfairly taking advantage of $F$'s privilege rules.

While dismissal is an appropriate remedy when the privilege problem becomes apparent prior to the trial, it is less desirable after the trial has already started. The defense attorney should know which witnesses can assert a privilege claim before trial, however, and the issue can generally be resolved at that time.

\textsuperscript{74} $F$ should not have to compromise its interest in protecting privacy rights. At the same time, if $F$ has a significant relationship with the substantive issues in the case, $F$ is an appropriate forum. Although a litigant may suffer some prejudice in this situation, there is always a potential for prejudice when relevant testimony is suppressed by appli-
The Second Restatement's formulation supports this position. When a "strong public policy" of the forum dictates exclusion of the allegedly privileged material, the Restatement calls for enforcement of the forum's privilege. Not surprisingly, considering the relatively recent emergence of the privacy justification for privileges, there is no case law on this point. This lack of precedent should allow the courts to make an enlightened start in the area.

Determining the rationale for the privilege at issue, then, is extremely important whenever $F$ recognizes a privilege and $C$ does not. If the privilege is designed to encourage communications, $F$ should ignore its own precedents and admit the evidence; if the justification is based on protection of personal privacy rights, unless $F$'s policy is weak, $F$ should honor its privilege.

2. $C$ recognizes a privilege; $F$ does not

Where $C$ has a privilege designed to encourage communications, $C$ has a salient interest in insuring its recognition, and failure of $F$ to do so could seriously hamper $C$'s efforts to encourage communication within the state. $C$'s citizens are likely to communicate less freely if they know that confidentiality does not extend to out-of-state judicial proceedings. Moreover, depend-
ing on the circumstances surrounding the communication, the parties may have a reliance interest or, even absent specific reliance, they may generally expect that C's law will apply. F's interest is largely one of assuring accurate factfinding. By not applying C's privilege, the courts of F would be able to gather additional evidence on which to judge the merits of the case.

When F is little more than a naked forum, balancing these competing interests is relatively simple. C may have as high a stake in assuring accurate factfinding as F itself, but it has decided to subordinate this interest to its policy of encouraging communications within its boundaries. Because F's interests are minimal, its courts should defer to C's public policy. A contrary result would encourage forum shopping, since the privilege would clearly be honored if the case were adjudicated in C.

C's privilege should be respected even if F has substantial contacts with the transactions underlying the litigation. It is true that F's interest in assuring accurate adjudication looms somewhat larger in this situation, but the expectation interest of the communicating parties remains important. Further, the long-term effect of ignoring C's privilege would seriously hamper C's ability to promote its policy of encouraging open communication. Even when weighed against the inconvenience of inaccurate factfinding and the difficulty of applying foreign laws to the case at hand, C's interests are clearly stronger. Moreover, forum shopping would remain a problem if F were to ignore C's privilege.

The Second Restatement approach to this situation insufficiently respects the interests of both the state of most significant relationship and the parties to the communication. The Restatement would admit the evidence “unless there is some special reason why the forum policy favoring admission should not be

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79. For instance, if an accountant and his client confer in C, the client might well make disclosures only because he knows of C's privilege. In such a situation, the client would have a significant reliance interest.

80. When C is also the forum state, it will certainly apply its own privilege, even if it has no significant relationship to the substantive issues of the case. If F does not honor C's privilege, forum shopping could result.
given effect." The comment to section 139 indicates that reliance on C's privilege is a consideration that might justify application of the privilege. The concept of reliance is a very broad one, perhaps broad enough to include all communications made in the scope of relationships protected on an "encouraging communications" rationale. But the Restatement treats reliance, as only one factor to be weighed in the ultimate decision, and not as determinative.

81. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(2) (1971) provides:

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.

82. Id. § 139, Comment d, provides, in part:
The forum will be more inclined to give effect to a privilege if it was probably relied upon by the parties. Such reliance may be found if at the time of the communication the parties were aware of the existence of the privilege in the local law of the state of most significant relationship. Such reliance may also be found if the parties, although unaware of the existence of the privilege, made the communication in reliance on the fact that communications of the sort involved are treated in strict confidence in the state of most significant relationship. In this latter situation, the fact that the communication was of a sort treated in strict confidence in the state of most significant relationship was presumably a result of the existence of the privilege. Hence, in a real sense the parties could be said to have relied upon the privilege although ignorant of it.

The last three sentences quoted indicate that even a general expectation that the law of a particular state will govern may be enough to justify application of that state's law. See text accompanying notes 46 & 79 supra.

83. Comment d enumerates four factors to be considered in determining whether to admit the evidence:

(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).

Reliance and expectation interests are subsumed in factor (4). In considering factor (1), the interests of C and the need to discourage forum shopping, taken together, should prevail, even if the forum has numerous contacts with the parties and the transaction. See text preceding note 80 supra.

Materiality of the evidence should not be a significant consideration unless C itself recognizes only a qualified privilege. See note 50 supra. Once C has decided that its citizens are entitled to communicate without fear of disclosure, F should honor that decision, no matter how significant the need for disclosure. Moreover, judging admissibility by the "importance" or materiality of the communication would seriously impair C's policies, for important information is precisely what C's citizens are most interested in protecting. A privilege is worth little if it only applies to unimportant matters.

Finally, the Restatement position would accord more respect to a for-
The leading early case on this point was *Doll v. Equitable Life Assurance Society of the United States*, an action on a life insurance policy originally brought in a New Jersey state court and then removed by defendant to federal court. Defendant sought testimony from a physician who had treated a sister of the deceased in New York about his communications with her in order to show that the deceased had misrepresented his family medical history in an insurance application. The doctor asserted the New York physician-patient privilege, but the court denied the privilege claim, on the ground that the law of the forum controlled. The court's decision cannot be justified. Assuming that the New York privilege was based on an "encouraging communications" rationale, the reliance interest of the patient, combined with New York's interest in safeguarding the confidentiality of physician-patient communications within the state, were sufficient to require recognition of the New York privilege.

A similarly undesirable result was reached in *Abety v. Abety*. Defendant, seeking to have his marriage annulled because his wife had failed to inform him of her sterility, wanted access to records from a New York hospital which dated from a period when both parties resided in that state. The couple had since moved to New Jersey, the site of the instant action. The New Jersey court held that on a deposition to be taken in New York, defendant was entitled to obtain hospital records made in that state, despite the fact that such records were privileged in New York. As in *Doll*, the court was content to rest on the ill-
considered rule that the law of the forum must govern the ad-
missibility of evidence.88

There are a few more recent cases that consider whether
C's privilege should be respected in F when F does not recognize
such a privilege. All these cases involve the marital privileges.89
Since those privileges are probably best justified on a privacy
basis,90 the cases will not be discussed until after consideration of
the appropriate treatment of privacy-based privileges not recog-
nized by the forum state.91

C's interest in enforcing its privacy-based privilege is not as
great as its interest in enforcing a privilege based on encourag-
ing communications. If C's reasons for respecting the privilege
do not reflect a desire to encourage free and open communication,
the possibility that F's failure to recognize it may discourage such
communication will be of little concern to C. Instead, in most
circumstances,92 C will have no interest other than its desire to
assure the inviolability of certain relationships within its borders.
Failure to recognize C's privilege in a few out-of-state actions
is not likely to seriously frustrate the purposes of C's statute,
since confidentiality will not be invaded within C's borders.
Moreover, since recognition of privacy-based privileges has
no effect on primary behavior,93 the parties to the communi-
cation have a weak claim of reliance. Thus, in most circum-
stances where C recognizes a privacy-based privilege and F does
not, there is little cause for F to honor C's privilege.94

88. The court cited Wexler v. Metropolitan Life Ins. Co., 38 N.Y.S.2d 889 (N.Y. City Ct. 1942), see note 57 supra, and wrote: "The cloak of privilege thrown about the witnesses called by defendant to give testi-
mony in New York cannot deprive the defendant of the right to the benefit and use of that evidence." 10 N.J. Super. at 289, 77 A.2d at 292.

The court also failed to consider whether the New York courts would
allow such a deposition to be taken, given that state's public policy
against disclosure of such information. For a more detailed discussion
of this problem, which is very important in cases involving depositions,
see notes 119-20 & 167-68 infra and accompanying text.


90. See text accompanying notes 27-30 supra.

91. See text accompanying notes 97-106 infra.

92. See note 94 infra and accompanying text.

93. If people do not rely on privacy-based privileges, the existence
or non-existence of the privilege will not alter any behavioral patterns.
*But cf. note 46 supra.

94. Failure of F to recognize C's privilege may, however, lead to
forum shopping. Nevertheless, the reasons for admitting the testimony
The Second Restatement opposes recognition of C's privilege in F when the privilege is based on a privacy rationale. A comment to section 139, however, suggests that when the forum's interest in the parties and the substance of the litigation is relatively small, deference to the privilege of the state of most significant relationship might be appropriate. This is a wise conclusion; as C's interests in fairness to the parties and the outcome of the litigation increase, C's privilege is entitled to greater weight.

The only two important cases on this issue have arisen relatively recently. In R. & J. Dick Co. v. Bass, a plaintiff sought to depose the wife of defendant Bass, a resident of Pennsylvania. The main action was pending in federal court in Georgia. Pennsylvania had both a spousal communications privilege and an absolute ban on anti-spousal testimony, while Georgia had only a communications privilege. The court concluded that even though Georgia law was controlling in the main action, the Georgia courts would probably honor the Pennsylvania privilege are sufficiently persuasive to outweigh the forum shopping objection. See note 74 supra for a similar outcome on slightly different facts.

55. Restatement (Second) of Conflict of Laws § 139, Comment d (1971), says, in part:

Among the factors that the forum will consider in determining whether or not to admit the evidence are (1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved.... If the contacts with the state of the forum are numerous and important, the forum will be more reluctant to give effect to the foreign privilege and to exclude the evidence than it would be in a case where the contacts are few and insignificant. In the latter situation, the forum may feel that the interest of the state of most significant relationship in having the evidence excluded should prevail.

In the case of a privilege designed to encourage open communication, C's great interest in seeing its privilege recognized should always outweigh F's desire to admit the testimony. Therefore, for such privileges, this section of the comment is ill-founded. See note 82 supra. When a privacy-based privilege is involved, however, C's interests are somewhat less significant, and the substantiality of F's contacts with the parties and the transaction assumes greater importance.

96. For example, suppose Smith sues Jones in F for breach of a contract made and scheduled to be performed in C. In his home state, C, Smith has confessed to his wife that he had failed to comply with one of the terms of the contract. F regards this term as imposing an absolute duty on Smith; C interprets it to be only a condition precedent to further performance by Jones. C recognizes a marital communications privilege; F does not. Assuming that C's law is to apply on the contract, and that C considers protection of the privacy of the marital relationship more important than accurately resolving the contract dispute, F should have little reason to upset C's policy determination.

Although this result is contrary to the doctrine outlined above, it is correct on other grounds, involving the role of Pennsylvania as the deposition state. The forum court, anticipating that Pennsylvania would not allow the deposition to proceed because of its strong public policy against invading marital privacy, rightly deferred to Pennsylvania's privilege both to maintain respect for the judicial system and to ensure the availability of deposition information.

In the other recent case, People v. Carter, defendant appealed a murder conviction on the ground that the California trial court had improperly admitted testimony about communications made by defendant to his wife. The facts in the case were somewhat bizarre, but the privilege problem arose because the communications were made in Illinois, while the murder was committed in California. Carter asserted that the communication was privileged under Illinois law, but the court summarily dismissed the contention that Illinois privilege law should apply. Despite the court's unwillingness or inability to articu-

98. The court further concluded, however, that, in the instant case, the Pennsylvania fraud exception to the anti-spousal privilege would probably apply. Accordingly, it allowed the deposition to proceed but held that the communications privilege should still be honored. Id. at 763.

99. See text accompanying notes 167-68 infra.

100. The court clearly feared that Pennsylvania's courts would rule that the anti-spousal privilege would protect the communication sought, and it was not convinced that the Pennsylvania courts should allow such testimony to be taken on deposition within the state:

The Pennsylvania competency statute does not merely establish a rule of evidence; rather it announces a deeply ingrained public policy of that state; and while ordinarily a deposition state would defer to the forum state on a question of evidence, it is not required to do so (and probably would not) where its public policy would be offended thereby.

295 F. Supp. at 761.


102. Defendant was on probation in California from a conviction for receiving stolen property. He obtained permission to travel to Arkansas, but on the way he made an unauthorized stop to see his wife in Chicago. When he found out that deceased and deceased's daughter had helped his wife get to Chicago, he became angry, assaulted his wife, and told her "I'm going to kill them all." Then he went back to Los Angeles, where he allegedly killed the deceased. Id. at 750-51, 110 Cal. Rptr. at 325-26.

103. The court said that "[w]hile the communication was made in Chicago, the question of privilege is determined by reference to the law of California." Id. at 752, 110 Cal. Rptr. at 327. No further explanation was provided, although the court did note that defendant could not have expected confidentiality because in Illinois the privilege would not have
late a reason for its conclusion, the result was clearly correct. Illinois had no interest in encouraging marital communications in this case—defendant had at best a minimal connection with Illinois, and the marital privileges cannot rest on an "encouraging communications" rationale. Furthermore, Illinois's interest in protecting privacy had to be subordinated in this case to the interest of California, which was the forum, the state with the closest connection to the parties, and the state whose substantive criminal law was being applied.

When C honors a privilege that F does not recognize, then, as in the converse situation, the forum court must consider the policy basis of the privilege to determine whether testimony should be compelled in the case before it. If the privilege rests on an "encouraging communications" rationale, C's privilege should always be honored. If the justification rests on a desire to protect personal privacy, the privilege should only be honored when C has more significant contacts with the parties and the subject matter of the litigation than does F. The results under the Second Restatement rule will be correct in most instances; but because it fails to analyze the policies underlying the various privileges and stresses instead factors which are less relevant to the determination, the Restatement provides the courts with only partial, and sometimes confused, advice as to the proper privilege law to apply.

3. Some final comments on privilege claims asserted at trial.

Although choice of law questions about privilege claims almost always involve disputes over whether to apply the law

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been available to Carter in a prosecution for assault on his wife. Id. at 753, 110 Cal. Rptr. at 327.
104. See notes 29-30 supra and accompanying text.
105. It could be argued that California, rather than Illinois, was the state with the most significant relationship to the communication. But since the wife was apparently staying in Chicago at the time of the communication and Carter traveled to Illinois specifically to see her, Illinois was probably the state of most significant relationship. In any event, the court was correct in applying California law.
106. In most circumstances, the source of the law governing substantive issues in the case will not be relevant to the choice of law determination. When the forum's substantive law is not being applied, however, there may be even less reason for the forum not to honor the privileges of another state. See note 95 supra. The source of the substantive law may also be important in deciding whether use of the depecage doctrine is appropriate. See note 52 & notes 76-79 supra and accompanying text.
107. See notes 81-83 supra and accompanying text.
of F or the law of C, there have been cases in which one party asserts that the interests of a third state, generally one whose substantive law governs most elements of the cause of action, require the forum court to apply that state's privilege law.\textsuperscript{108}

The fact that a particular state's law governs most substantive elements of the case, however, is no reason to respect its privilege law.\textsuperscript{109} Early cases dealing with this issue reached the correct result on this point,\textsuperscript{110} although perhaps on an incorrect rationale. Only if a privilege rule is so closely related to the particular substantive law being applied that separation of the two would be grossly unjust, should the court feel compelled to apply them as a unit.\textsuperscript{111}

The preceding discussion of privilege claims asserted at trial has centered on privileges justified either as a means of promoting free and open communication or as a way to protect personal privacy. Most communications privileges are based on one or both of these rationales, but states might recognize certain privileges on other grounds. For instance, a state might justify an attorney-client privilege solely on the ground that procedural fairness during litigation requires it.\textsuperscript{112} If this were the ration-


\textsuperscript{109}. The doctrine of depecage allows a court to apply rules emanating from different jurisdictions to different segments of a single case. For a general discussion of depecage, see Reese, \textit{supra} note 52.

\textsuperscript{110}. Brotherhood of Railroad Trainmen v. Long, 186 Ark. 320, 53 S.W.2d 433 (1932), involved a suit over an Ohio insurance contract in which plaintiff sought admission of testimony consisting of communications with a physician. Both the communications and the trial occurred in Arkansas, and the court applied the old rule that the law of the forum must govern in determining admissibility of evidence. \textit{Id.} at 330, 53 S.W. 2d at 437. In this case, the old rule yielded the correct result.

Metropolitan Life Ins. Co. v. Brubaker, 78 Kan. 146, 96 P. 62 (1908), involved litigation over the validity of a clause waiving the physician-patient privilege which had been inserted in a New York life insurance contract. New York did not recognize contractual waiver, while Kansas, the forum and the state where the communication took place, did.

The court, in a confused opinion, first asserted that since both state statutes contemplated the possibility that the patient could waive the privilege by consent, the only question was the procedural one of how that consent could be expressed. \textit{Id.} at 154-55, 96 P. at 65. The court then concluded that Kansas procedure would be followed and the waiver recognized. After labeling this a procedural matter, however, the court commented that the patient would be deprived of a valuable right if contractual waiver in advance of litigation were not allowed. \textit{Id.} at 155, 96 P. at 66. These two positions are somewhat contradictory.

\textsuperscript{111}. See note 52 \textit{supra}.

\textsuperscript{112}. See text preceding note 24 \textit{supra}.
ale, the forum state would always be justified in recognizing its own privilege, and never in recognizing the privileges of C, since, within constitutional limitations, each state should be able to set its own standards to assure fairness in litigation.\textsuperscript{113}

One remaining problem is that a single privilege may be justified on more than one policy ground. A court faced with a choice of law decision concerning the psychotherapist-patient privilege, for example, might determine that this privilege is based both on protecting privacy and on encouraging communications.\textsuperscript{114} The methodology outlined in the preceding sections necessitates different results depending on the underlying policy bases. It is perhaps self-evident, however, that there is no reason to deny application of the privilege where it would be recognized on one ground but not the other. In this situation the court should always resolve the conflict in favor of applying the privilege.

\section*{III. PRIVILEGES CLAIMED TO PRECLUDE EXAMINATION OF WITNESSES OR DOCUMENTS OUTSIDE THE FORUM STATE}

\subsection*{A. ANALYSIS OF THE INTERESTS INVOLVED}

When a litigant seeks to take depositions in another state, the situation becomes more complicated. Choice of law questions about whether to permit depositions tend to arise in two different situations. First, a party may seek permission in the forum state to depose a witness or to obtain records in another state.\textsuperscript{115} The forum court may feel obligated to limit the scope of testimony by ruling that the confidentiality of certain privileged matters should not be violated. Alternatively, the claim of privilege may be asserted in the deposition state itself, and the party who seeks the testimony may apply for an order compelling the witness to testify, forcing the courts in the deposition

\textsuperscript{113} If, on the other hand, C recognized a privilege on this basis and F did not, F should still be able to follow its own policy. In this situation the First Restatement approach makes sense because this is similar to a procedural rule that the law of the forum should govern.

\textsuperscript{114} To make this determination, the court should first examine legislative history and intent. In many cases, if not most, however, these sources are unilluminating, and the court will be forced to find a state policy from the words of the existing statutes and judicial opinions or lack thereof.

state to make a determination on the privilege issue. In either situation, the court must weigh the interests of the parties to the communication, of the litigants, and of the two or more states involved.

The Second Restatement does not mention the deposition situation in either the text of section 139 or the comment. Rather, the Restatement relegates the discussion of depositions to one paragraph in the Reporter's Note, which recommends that the privilege law of the deposition state apply only when that state is also the state of most significant relationship. The deposition problem, however, deserves more complete treatment.

The interests of the communicating parties and of C, which have been detailed in the previous discussion of privileges asserted at trial, do not change merely because the question arises on deposition. F's interests, however, are somewhat different. The actual choice of law decision may be made by the courts of the deposition state, D, in which case F's interest in the administrative ease of applying its own law is irrelevant. When a court of F is determining what privilege law to apply at deposition, there are also good reasons to recognize D's privileges. If D would not permit certain testimony to be taken, there is little point in insisting that F recognizes no privilege. This position would not assist F in procuring the desired testimony; indeed, if F's decision is little more than an empty gesture, it could decrease respect for F's courts and the judicial system in general.

When depositions are involved, D's interests in recognizing its own privilege must also be considered. When D's courts are to

116. See, e.g., Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551 (2d Cir. 1967); In re Walsh, 243 N.Y.S.2d 325 (Sup. Ct. 1963); In re Queen, 233 N.Y.S.2d 798 (Sup. Ct. 1962).

117. After discussing the general problems of choice of law involving privileges, the Note simply says:

An analogous problem may arise when a deposition is sought to be taken in a state other than the state of trial. To date, the courts of the deposition state have refused to admit evidence of a communication privileged under their local law, but it would appear that in all of these cases the deposition state was also the state of most significant relationship with the communication. [citations omitted].

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139, Reporter's Note (1971).

118. See text accompanying notes 44-47 supra.


determine whether to honor the privilege, ease of administration would support a decision by $D$ to apply its own privilege law. But even when $F$'s courts decide whether to allow the depositions, $D$ retains an interest in assuring that no deposition taken within its borders violates a strong state policy. Thus, if $D$ recognizes a privilege on the ground that certain relationships are sacrosanct and should be protected from intrusion, $D$ might be justified in refusing to allow a deposition that would violate confidences made within the scope of those relationships.

The following discussion of the resolution of choice of law problems involving depositions will focus only on situations in which $F$'s policy conflicts with $D$'s.\textsuperscript{121} Where $F$ and $D$ have uniform policies on the issue in question, problems should be resolved within the framework of the previous discussion, since $F$ and $D$ in combination have the same interests in the deposition situation as $F$ alone has at trial.

B. $F$ recognizes the privilege; $D$ does not

1. Cases where the deposition state is also the state with the most significant relationship to the communication

In most situations involving depositions, the deposition state will also be the state with the most significant relationship to the communication. Since the communicating parties are likely to be most closely connected with $C$, that is often the state to which the litigants must go to take depositions.

The conflict centering around a privilege designed to encourage open communication is easy to resolve. It has already been

\textsuperscript{121} In some situations, a potential choice of law problem is avoided because the privilege rules of the two states are not significantly different. Although a court faced with such a situation might discuss the choice of law question, there is obviously no need to decide which state's law should apply.

For example, in one older case, Metropolitan Life Ins. Co. v. Kaufman, 104 Colo. 13, 87 P.2d 758 (1939), the Colorado court seemed to rest its decision on the rule that the forum state's law should govern, but the opinion then noted that the choice of law determination was unimportant because the statute of the forum state, Missouri, was almost identical to the statute in Colorado, the deposition state. \textit{Id.} at 15, 87 P.2d at 759.

A more recent case, Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551 (2d Cir. 1967), took an even more cautious approach. The main action was brought in Illinois, and plaintiff sought to depose a New York attorney in New York. Although the communications were made in New York, the court refused to express an opinion on which state's attorney-client privilege should apply, noting only that application of either privilege would mandate the same result. \textit{Id.} at 556-57.
demonstrated that F has no legitimate interest in applying its own "encouraging communications" privilege at trial in a situation where C would not honor the privilege claim. F is even less justified in recognizing the privilege when the testimony is to be elicited on deposition in D. In this case, then, there is no reason for F to honor the claim.

The situation is a little more complicated when the justification for the asserted privilege is the protection of privacy. If the privilege claim were made at trial in F, the court would, in most circumstances, be correct in recognizing it. In the present situation, however, since the testimony will be taken on deposition in D, F's strong policy of not interfering with the sanctity of certain relationships may not be as seriously offended by allowing the deposition to proceed as it would be if the testimony were admitted at trial. On the other hand, if the court in F permits the testimony to be elicited, it will be sanctioning an intrusion into the privacy of a relationship in violation of F's public policy. Thus, when F has a strong privacy-based privilege, the court should not be expected to ignore F's own privilege rules.

The result should be the same if the question is before D's courts rather than F's. D has no strong public policy against compelling disclosure; but then D also has little interest in assuring accurate adjudication. On this basis alone, D should honor F's privilege. The practical value of compelling disclosure in this situation might also be minimal. At trial, F may refuse to admit evidence procured in violation of its own confidential communications privilege, making the effort to obtain the testimony useless. This reaction on F's part would be appropriate, for

122. See text accompanying notes 53-55 supra.

123. Similarly, when the deposition state is not the state of most significant relationship, but neither state recognizes a privilege, there is no reason to apply F's privilege.

124. Note, however, that whether F would recognize it would depend on the strength of F's policy against intrusion into privileged relationships. See text accompanying notes 70-71 supra. If F would not be justified in applying its own privilege at trial, it cannot extend its privilege to testimony received on deposition in D. Thus, the issue addressed in the text is a difficult one only when F has a strong policy against violating confidences transmitted within the scope of the privileged relationship. When the policy is weak, F's privilege should give way, and testimony should be compelled.

125. The cases indicate that the forum might refuse to admit the testimony. See, e.g., In re Meyer's Estate, 206 Misc. 368, 132 N.Y.S.2d 825 (Surr. Ct. 1954), a case in which the court refused to allow certain interrogatories to be submitted to an out-of-state physician on the ground
it would tend to discourage other states from improperly compelling disclosure in the future.

D-C, then, should honor F's privilege when it is based on a privacy rationale, but not when the privilege only encourages communications. The case law, however, is not settled on these points. If a court errs in its preliminary determination that the privilege would apply if the claim were made at trial in the forum state, its final holding that the privilege claim should also be honored on deposition loses significance, because the reasoning supporting the holding is based on a false premise. For this reason, several seemingly relevant cases provide little guidance on privilege claims at the deposition stage.\(^{126}\)

_Levy v. Mutual Life Insurance Co._\(^{127}\) by contrast, illustrates the situation in which D and C coincide and neither recognizes the physician-patient privilege. In that case, the court of the forum, New York, which did recognize the privilege, granted a motion for an order directing issuance of a commission to take testimony in Georgia. This was entirely proper,\(^ {128}\) because New York's interest in encouraging communications in Georgia was slight\(^ {129}\) and was heavily outweighed by its interest in obtaining relevant and otherwise admissible evidence.

_In re Franklin Washington Trust Co._\(^ {130}\) is another case in which the court reached a desirable result. Plaintiff, in a New Jersey action, sought to take testimony in New York from lawyers who claimed an attorney-client privilege. The New York court denied the claim on the ground that under New York law no privilege would apply because the testimony fell within the

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\(^{127}\) _56 N.Y.S.2d 32 (Sup. Ct. 1945). The case is discussed in notes 58-59 supra and accompanying text.

\(^{128}\) For some of the complications in the case, see note 59 supra.

\(^{129}\) The _Levy_ case predated the privacy justification of privileges; thus the privilege at issue here was almost certainly based on an "encouraging communications" rationale. See note 86 supra.

\(^{130}\) _1 Misc. 2d 697, 148 N.Y.S.2d 731 (Sup. Ct. 1956)._
fraud exception to the privilege. Since New York was not interested in encouraging communications in furtherance of fraud, and since the parties could not have relied on the privilege, there was no reason to suppress the testimony.

The result in *Hill v. Huddleston*, a more recent federal case, is questionable. While a personal injury action was pending in Tennessee, defendant sought to take the deposition of a psychiatrist who had treated plaintiff in Maryland. The psychiatrist declined to testify, and the defendant sought the assistance of the Maryland federal district court to compel disclosure. Under Maryland law, there had apparently been a waiver of the privilege, while under Tennessee law, the communication would have remained protected. The court, citing a tentative draft of the Second Restatement, concluded that no privilege should be recognized. If the sole justification for the privilege here was the desire to encourage open communication with one's physician, the decision would have been beyond reproach. If, on the other hand, there was a privacy aspect to this privilege, the claim should have been honored.

2. *Cases where the state of the most significant relationship is the same as the forum state*

In the much more unusual case in which $C$ coincides

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131. Id. at 699, 148 N.Y.S.2d at 734.
132. Since the communications were apparently made in New York, and New York recognized no privilege, there could have been no justifiable reliance.
133. If New Jersey's attorney-client privilege existed to assure procedural fairness in litigation, see notes 22-24 supra and accompanying text, even for communications made in furtherance of a fraud, the New York court would have been less justified in compelling testimony. However, there is no evidence in the opinion that the Court thought New Jersey's privilege was so broad.
136. In the absence of a controlling Maryland decision, this court believes that the proper conflicts rule and the rule which would be adopted by a Maryland court is that the court of the deposition state should apply the law of the state which has the most significant relationship with the communication; in this case that state is Maryland.
137. See text accompanying notes 53-55 supra.
138. This privilege is supportable on a privacy basis, see note 35 supra. It is possible, however, that the Tennessee courts did not recognize that basis for the privilege.
139. See text following note 69 supra; text accompanying notes 75-76 supra.
140. The situation is rarely presented because if the forum is also
with $F$, $D$ should honor $F$-$C$'s "encouraging communications" privileges. It has already been established that $F$ should recognize $C$'s privileges when they are justified by $C$'s policy of encouraging open communications within the scope of certain relationships, because $C$'s interests in encouraging communications, combined with the reliance interests of the communicating parties, outweigh $F$'s interest in facilitating accurate fact-finding. This argument also applies when $D$, rather than $F$, must decide whether to respect the privilege claim, for $D$'s interests are no greater than $F$'s. In fact, $D$ has much less interest in assuring accurate factfinding than does $F$ because it has no real stake in the outcome of the litigation. Hence, when both $C$ and $F$ recognize a privilege, $D$ should defer to $F$-$C$'s position.

When $F$-$C$'s privilege is based on a protection of privacy justification, $D$ should also recognize it. Since $D$ should honor $F$'s privacy-based privilege even when $C$ recognizes no privilege, because the trial court in $F$ will probably refuse to admit the testimony, the case for recognition is even stronger when $F$'s policy is also $C$'s. Therefore, when the forum state is also the state of most significant relationship, the deposition state should always defer to the forum state's privilege.

In re Cepeda, the only case relevant to this point, reached this result in a well reasoned opinion. Orlando Cepeda, the baseball player, responded to media criticism of his baseball performance by instituting a libel suit in California. He then sought to depose Cohane, a reporter who had played a major role in assembling the allegedly defamatory material, in order to obtain evidence on Cohane's sources of information. Although the relevant communications apparently took place in California, which had a journalist-source privilege, Cepeda sought to take the state of most significant relationship, the parties to the communication will be available at trial, and there will be no need to take depositions in another state.

141. This analysis also applies where $C$ and $F$ are different states, both of which would honor a privilege claim under these circumstances.

142. See text accompanying notes 78-80 supra.

143. See text accompanying notes 124-25 supra.

144. Thus, even when $F$'s privacy-based privilege does not rest on a particularly strong public policy, see notes 70-71 supra, if $F$ is also the state of most significant relationship, its privilege should be honored. Although the deposition state might wish, for the sake of ease of administration, to allow the deposition, its interest is rather small in comparison to the combined $F$-$C$ interest in protecting the privacy of the communicants.

the deposition in New York, a state which had no such privilege. The court refused to accept the argument that New York's privilege law should apply, noting:

To apply the law of New York merely because of the fortuitous circumstance that it happens to be the place of the taking of the deposition, would merely encourage forum-shopping in the sense of attempting to take a deposition in a state which does not recognize the privilege.\textsuperscript{146}

Although on the facts of the case, the court concluded that California could not recognize a privilege either,\textsuperscript{147} that does not diminish the importance of the court's analysis.\textsuperscript{148}

C. $D$ recognizes the privilege; $F$ does not

In the usual case the deposition state is also the state in which the communications took place, and $D-C$ must honor its own privileges, whether they are based on promoting open communication or on protecting privacy. Clearly, if $D-C$'s own courts refused to enforce its privileges designed to encourage communications, people would be deterred from communicating openly, thus undermining the state's policy.\textsuperscript{149} $D-C$ courts would also

\begin{footnotesize}
\begin{enumerate}
\item[146.] Id. at 471.
\item[147.] Id. at 473. In construing a California privilege statute that granted immunity to persons associated with a "newspaper" or "press association," the New York court found it necessary to rule that the defendant was not covered by the statute since he worked for a bi-weekly periodical.
\item[148.] In fact, the holding of the Cepeda case may be much broader. The court almost seems to indicate that whenever there is a conflict between the privilege laws of $F$ and $D$, the law which recognizes the privilege should be applied. As Judge Tenney commented:

I submit that the law of the place of the trial should also, save in the situation where the deposition state recognizes a privilege, govern the validity and scope of the privilege asserted. . . .

[It] is a state's affirmative action in carving out a privilege creating an exception to a general rule of testimonial compulsion which constitutes the enunciation of a strong public policy in favor of the protection of certain communications, whereas the refusal to recognize a privilege is merely the application of the general rule of compulsion to testify to all facts affecting a specific controversy.

Id. at 470.

This is an overgeneralization. When a state has a strong public policy favoring testimonial compulsion, how can it express that policy except by omission of a privilege statute? If the court's words are taken literally, they would compel recognition of privileges in many inappropriate situations.
\item[149.] When $D$ and $C$ are separate states with the same privilege policy, this factor is less important. Nevertheless, since $F$ would honor $C$'s "encouraging communications" privileges, see text preceding note 80 supra, $D$ should honor the privilege as well.
\end{enumerate}
\end{footnotesize}
violate the state's policy if they participated in an intrusion on a privacy right that the state carefully protected.\footnote{150} In either case, D-C's interest in recognizing the privilege outweighs F's interest in obtaining the testimony.

Where D is not the state of most significant relationship but is only, by happenstance, the residence of the party to be deposed, the situation is somewhat different. As long as neither C nor F recognize the privilege, D should not apply its own privileges designed to promote open communications. D has only a minor interest, if any, in encouraging communications in C, and the combined interests of F and C in having the testimony admitted are weighty.\footnote{151}

When D's privilege is based on a privacy rationale, D has better reason for honoring it. The question is close, however, because D has little interest in the litigation, and F's interest in accurate factfinding may be significant enough to override D's interest in honoring the privilege.\footnote{152} In any event, this situation is unlikely to arise in practice, for when the forum is also the state of most significant relationship, the parties are likely to be available in F, and there would be no need for a deposition in D.

The case law, not unexpectedly, deals exclusively with the situation in which D-C recognizes a privilege and F alone does

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\footnote{150}{Even if C's status as the state of most significant relationship is not always sufficient to support application of its privacy-based privileges at trial in F, see text accompanying notes 92-94 supra, when the testimony is to be solicited in C as well, the balance of interests shifts. Since D-C's privilege is based on a desire to protect privacy rights within the scope of a given relationship, D-C has a particularly strong interest in recognizing its privilege when both the original communication and the deposition take place in the state.}

\footnote{151}{The situation facing the court is analogous to the case of a trial in F in which the court is faced with a choice between its own privilege and C's lack of privilege. See text accompanying notes 53-55 supra.}

\footnote{152}{This situation is different from the one in which F applies its own privacy-based privilege when C would not honor one. In the latter situation, see text preceding note 70 supra, F has determined, as a matter of state policy, that the value of maintaining confidentiality outweighs whatever positive effect on accurate factfinding admission of the testimony would have. Here, on the other hand, D has a policy favoring confidentiality. The court must weigh D's policy favoring confidentiality against F's interest in accurate factfinding. These interests have not been weighed by the legislature or courts of either state.}

In the unlikely event that D, although not the forum state or the state of most significant relationship, does have substantial contacts with the litigation, it will have a somewhat stronger interest in applying its own privacy-based privilege.
not. Only in the previously criticized case of *Abety v. Abety* was a clearly undesirable result reached. There, it will be recalled, a New Jersey court ruled that defendant could obtain hospital records on deposition in New York despite a New York statute that protected such information. This type of ruling invites a clash with a court of the deposition state, which might decide to permit the records to be withheld. In *Abety*, New York's privilege policy should have been respected.

Other cases have taken a more enlightened approach. In *Ex parte Sparrow*, plaintiff brought a libel action in New York, which, at the time, recognized no journalist's privilege. Sparrow's deposition was to be taken in Alabama, the state of most significant relationship, which did protect such information. The court felt that in the absence of any federal privilege rule, Alabama public policy in favor of recognition should prevail.

In *Palmer v. Fisher*, the main action was pending in

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153. The opinions in these cases do not always specifically identify the state of most significant relationship. *Palmer v. Fisher*, 228 F.2d 603 (7th Cir. 1955), involved an Illinois accountant's assertion of the accountant-client privilege, but the opinion does not explicitly identify where the communication took place or where the accountant-client relationship was centered. Presumably, the relationship was centered in Illinois, the deposition state.

*In re Queen*, 233 N.Y.S.2d 798 (Sup. Ct. 1962), involved a New York psychologist's assertion of a New York privilege on deposition in New York for use in a Massachusetts action. Again, the assumption appears to be that the communication and the relationship were centered in New York, but that is not made explicit.

154. See notes 87-88 supra and accompanying text.


156. N.Y. Civil Rights Law § 78-h (McKinney Supp. 1975), now provides a journalist-news source privilege.

157. Although the result was proper, the court displayed less wisdom in the following excerpt: "It is 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." 14 F.R.D. at 353. New York should have honored the Alabama privilege as well. The court in *Sparrow* had not yet entirely departed from the old rule that the law of the forum governed in evidentiary matters; rather, it concluded that the deposition state was actually the forum for purposes of the privilege determination. *Id.*

Another interesting facet of the *Sparrow* case was the court's unwillingness to characterize privileges as substantive for *Erie* purposes, although it did decide to apply state law. *Id.* See generally Korn, supra note 1.

158. 228 F.2d 603 (7th Cir. 1955). In this diversity case, the Seventh
Florida, but Fisher sought to secure the testimony of Pierce, an Illinois accountant, on deposition in Illinois. Pierce asserted the Illinois accountant-client privilege and the court held that Illinois law applied. The communications in question were apparently originally made in Illinois, but, from the tone of the opinion, that fact was not particularly important to the court's decision.

Even though Palmer and Sparrow illustrate somewhat dogmatic approaches to this situation, hinting that the deposition state should always apply its own privilege rules, the ultimate results are obviously appropriate. As long as these cases are read for their holdings, rather than for their language and reasoning, they are unobjectionable.

By the time In re Queen was decided in 1962, the appeal of the rigid principles set forth in Palmer had apparently diminished. In that case, during a child custody action in Massachusetts, plaintiff-husband sought testimony from his wife's psychologist on interrogatories in New York. New York had a psychologist-patient privilege, while Massachusetts did not. The initial communications appear to have taken place in New York, and the court held that the New York privilege applied. Although the court's discussion of the choice of law

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159. See note 153 supra.
160. For example, the court reasoned:
The state legislature had declared it to be public policy . . . that public accountants shall not be required to testify about information obtained in their confidential capacity as accountants. This policy would be defeated if any court, state or federal, sitting in Illinois should require an accountant to testify as to such information. This would be true whether the testimony was to be used in a court sitting in Illinois or in any other state.
228 F.2d at 608.

Furthermore, the court sought to reconcile its position with the old rule that the law of the forum determines admissibility by noting that a proceeding to suppress a deposition (the procedural posture of this case) was an independent action, thus making Illinois the forum state. Id. at 608-09.

161. To the extent that the reasoning assumes relevance as a guide to later judicial decisions, it is important to expose its faulty basis.
164. See note 153 supra.
issue was not lengthy, its decision properly emphasized an evaluation of the rights of citizens\(^\text{165}\) instead of the old rule that the law of the forum governed questions of evidence.\(^\text{166}\)

*R. & J. Dick Co. v. Bass*\(^\text{167}\) also adopted a well-reasoned approach. There, the court of the forum state, Georgia, was willing to defer to the anti-spousal privilege of the deposition state, Pennsylvania. The court noted that the anti-spousal privilege reflected a strong Pennsylvania policy, and that, in light of this, the Pennsylvania courts would probably not allow the deposition to proceed.\(^\text{168}\) This case is particularly important because here the forum state, rather than just the deposition state, recognized that *D*'s interests were paramount and that the privilege should be honored. The case thus represents a direct repudiation of the rule of *Abety v. Abety*.\(^\text{169}\)

Although the introduction of a third state, *D*, complicates the analysis, the court asked to decide whether to recognize a particular privilege for purposes of a deposition should proceed as outlined above. When the forum state and the deposition state have the same policies toward a privilege, the previous framework developed for the trial stage of the litigation should be applied. When the deposition state is, or has the same policy as, the state with the most significant relationship to the parties and the litigation, *D* should recognize both encouraging communications and privacy-based privileges when it recognizes them and *F* does not, but it should only honor privacy-based privileges that *F* recognizes and it does not. If *D* is neither the forum nor the state of most significant relationship, it should honor all *F*'s privileges even if it does not recognize them. It should also defer to *F* when it recognizes privileges and *F* does not, although application of *D*'s own privacy-based privileges may sometimes be justified.

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165. The court declared that "it is obvious, that to grant the relief presently sought would be violative of the rights of a citizen of our state." 233 N.Y.S.2d at 799. One year later, *In re Walsh*, 243 N.Y.S.2d 325 (Sup. Ct. 1963), took substantially the same approach as *Queen* in a case involving the attorney-client privilege.

166. It should be noted that the court did not explicitly reject the *First Restatement* position, but, instead, shifted emphasis to other considerations.


168. Id. at 761.

169. 10 N.J. Super. 287, 77 A.2d 291 (Super. Ct. 1950). The weaknesses of this case are discussed at text accompanying note 154 supra and at note 88 supra.
IV. CONCLUSION

Different testimonial privileges further different societal goals. When deciding whether to apply the privilege law of a foreign state or of the state in which it sits, a court must look at the policies underlying the privilege laws. The court must balance the various individual and state interests involved. This balancing process will not always yield clear-cut, easy results, but neither will it create the inequities that flow from the use of a rigid rule like the First Restatement's edict that the law of the forum must determine the admissibility of evidence.

The Restatement (Second) of Conflict of Laws has brought a more flexible approach to this area of law and is a significant step in the right direction. The Second Restatement formulation, however, is not without its flaws. Its phraseology tends to minimize the importance of privileges as reflections of basic state policies.

In the future, courts should consider more carefully the individual interests and public policies involved in any privilege determination. It is crucial to ascertain the rationale for the privilege rule at issue. Once this has been done, courts should seek to protect reliance and general expectation interests of the parties to the communication. Similarly, when a privilege rule is an expression of a state's strong public policy, this factor, too, must be considered.

This Article has sought to provide guidance to the courts for making difficult choice of law decisions. Such decisions cannot be made by simple application of an arbitrary rule. Only careful consideration of all the interests involved in each type of privilege claim can provide fair answers to choice of law questions relating to testimonial privileges.