When Privilege Fails: Interstate Litigation and the Erosion of Privilege Law

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I. INTRODUCTION

In April 2011, the Chief Judge of the United States District Court for the Southern District of Illinois tackled a discovery dispute of unprecedented dimension.1 The case: *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*—a multidistrict litigation combining 5998 lawsuits from nearly every state in the nation, as well as the District of Columbia and Puerto Rico, against various Bayer companies over the prescription drugs Yaz, Yasmin, and Ocella.2 The document production: nearly three million documents—approximately sixty-five million pages—produced by Bayer, with another 12,857 documents withheld by Bayer as privileged.3 The issue: whether the attorney-client privilege and/or work-product doctrine protected 330 of these allegedly privileged documents, which Bayer generated in different states and which related to various underlying lawsuits.4 The Federal Rules of Evidence lack any provision governing privilege in diversity cases such as this one; instead, Rule 501 provides: "[I]n a civil case, state

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2. *Id.* at *1.

3. *Id.*

4. *Id.*
law governs privilege regarding a claim or defense for which state law supplies the rule of decision.” The question: Which state law applies?

One can imagine the dilemma. Suppose an attorney for Bayer offers advice in a state like Connecticut, which defines broadly the communications protected by the attorney-client privilege. The lawsuit moves forward in Illinois, perhaps because the plaintiff filed it there or perhaps because, like the Yasmin case, other district courts transferred their cases to consolidate thousands of suits pending around the country into a single multidistrict litigation. Unlike Connecticut, Illinois has a narrow definition of the attorney-client privilege when a client is a corporation; the privilege only extends to communications between an attorney and employees in the company’s “control group,” generally its officers or directors. Thus, if the legal advice at issue involved communications between a lawyer and an employee of Bayer who was not an officer of the company, Bayer would prefer that Connecticut law apply to protect the communication by privilege. Bayer would have a good argument on its side—the advice was given in Connecticut; by an attorney practicing in Connecticut; and to an employee in Connecticut. Most likely, the attorney and the employee would have assumed that Connecticut law applied and privileged the discussion. The attorney may well have explicitly advised the employee of the Connecticut privilege. But under section 139 of the Restatement (Second) of Conflict of Laws (Second

5. FED. R. EVID. 501.
6. The following hypothetical derives from the In re Yasmin & Yaz fact pattern.
Restatement)—the rule followed by a majority of courts\(^\text{10}\)—this scenario might not end that way at all.\(^\text{11}\)

This privilege issue falls within the boundaries of that nebulous legal field called “conflicts” or, more properly, “conflict of laws” or “choice of law.” The conflicts field covers clashes between states’ laws, ranging from obviously substantive laws (e.g., differences in contract or tort law) to laws that straddle substance and procedure (e.g., statutes of limitation and statutes of fraud).\(^\text{12}\) Some courts have deemed privilege issues substantive,\(^\text{13}\) but other courts have considered them procedural.\(^\text{14}\) “Conflicts” questions arise when contrasting laws of two or more sovereigns may apply

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10. See In re Yasmin & Yaz, 2011 WL 1375011, at *9-11 (noting that thirty-six states have either adopted or referred to section 139 of the Second Restatement).
11. Section 139 of the Second Restatement states:

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

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

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971).


13. See, e.g., Samuelson v. Susen, 576 F.2d 546, 550 (3d Cir. 1978) (holding privilege rules are “substantive for Erie purposes”); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967) (“[A] rule of privilege is ‘unlike the ordinary rules of practice which refer to the processes of litigation, in that it affects private conduct before the litigation arises.’ Rules of privilege are not mere ‘housekeeping rules’ which are ‘rationally capable of classification as either’ substantive or procedural for purposes of [the Erie doctrine]. Such rules ‘affect people’s conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive.’” (citations omitted)); In re Yasmin & Yaz, 2011 WL 1375011, at *6; see also FED. R. EVID. 501 advisory committee’s note (“[F]ederal law should not supersed[e] that of the States in substantive areas such as privilege absent a compelling reason.”).

in a case because the litigants are from different states or nations or the litigated event spanned sovereign borders.\textsuperscript{15} Conflict of laws is complex and untidy—as the \textit{Yasmin} litigation vividly illustrates.\textsuperscript{16} \textit{Yasmin} involved a variety of state and federal claims by numerous parties.\textsuperscript{17} Facing privilege issues, the \textit{Yasmin} court consulted Rule 501 of the Federal Rules of Evidence, which guides federal courts in determining which law governs privilege matters.\textsuperscript{18} Applying this rule, the court concluded federal privilege law would govern privileged matters relevant to a federal defense and that state law would govern privilege matters relevant to a state-law defense.\textsuperscript{19} But which state’s law applied—Illinois (where the court sat); the state that transferred the case; or the state with the most significant relationship to the communication at issue?\textsuperscript{20} Imagine the complexity of charting, first, all the states’ laws that might govern each of the 330 documents at issue in the case and, second, the parameters of the states’ privilege laws to determine whether they conflict with the privilege law of the forum.\textsuperscript{21} The \textit{Yasmin} court found that in this multidistrict litigation, involving thousands of cases, many of which did not originate in its judicial district, Illinois choice-of-law principles should not automatically control.\textsuperscript{22} The court determined that each case’s source of origin should control which choice-of-law rules governed; thus, Illinois choice-of-law rules governed the cases filed directly in Illinois, but the cases transferred into the litigation were governed by rules of the jurisdictions from which the cases were transferred.\textsuperscript{23} The \textit{Yasmin} court then conducted a fifty-state survey that compared states’ choice-of-law principles to determine how

\begin{itemize}
  \item \textsuperscript{15} See \textsc{Restatement (Second) of Conflict of Laws} § 1 (1971).
  \item \textsuperscript{16} See generally \textit{In re Yasmin & Yaz}, 2011 WL 1375011.
  \item \textsuperscript{17} \textit{Id}.
  \item \textsuperscript{18} \textsc{Fed. R. Evid.} 501.
  \item \textsuperscript{19} \textit{In re Yasmin & Yaz}, 2011 WL 1375011, at *7. If the allegedly privileged material related to both federal and state elements, the court determined that the privilege law favoring admission would govern. \textit{Id.} at *8.
  \item \textsuperscript{20} See \textit{id.} at *5.
  \item \textsuperscript{21} See \textit{id. passim}.
  \item \textsuperscript{22} \textit{Id.} at *5.
  \item \textsuperscript{23} \textit{In re Yasmin & Yaz}, 2011 WL 1375011, at *5 (citing Chang. v. Baxter Healthcare Corp., 599 F.3d 728, 732 (7th Cir. 2010)).
\end{itemize}
to resolve a potential privilege conflict.24 Yasmin’s survey demonstrates how onerous choice-of-law privilege disputes can be in multidistrict litigation.

In its fifty-state conflict-of-laws survey, the Yasmin court determined that a majority of states have not established a choice-of-law doctrine regarding privileges, which further compounded the complexity of the court’s task.25 The survey revealed that thirteen states, the District of Columbia, and Puerto Rico have adopted or cited with approval the test articulated in section 139 of the Second Restatement.26 Furthermore, the study found that twenty-three states, which have not considered the subject, look to the Second Restatement for guidance in other choice-of-law questions.27 The court found eight states that follow the traditional choice-of-law principles articulated in the Restatement (First) of Conflict of Laws (First Restatement),28 which does not address specifically how courts should resolve choice-of-law matters concerning privilege.29 Finally, the court determined that, because most states favor the Second Restatement and because the First Restatement does not explicitly address privilege-law conflicts, section 139 of the Second Restatement would govern the choice-of-law decision for state-law privilege issues.30

The court traversed a tricky path to arrive at this result. One can feel the court’s relief as it reached out for the Second Restatement to guide it through this nebulous frontier. But applying the Second Restatement to the hypothetical legal advice given to Bayer’s Connecticut employee could bode ill for the corporate client. The

24. Id. at *10-15.
25. Id. at *8.
26. Id. at *9. These thirteen states are Colorado, Delaware, Illinois, Iowa, Kentucky, Maine, Ohio, Minnesota, New York, Pennsylvania, Texas, Washington, and Wisconsin. Id. at *10-11.
28. Id. at *14. These states are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, and Virginia. Id.
29. See infra Part IV.
Second Restatement generally favors admission of evidence unless some special reason exists for not doing so.\(^{31}\) This tendency often undermines privileges in cases applying the Second Restatement.\(^{32}\)

Luckily for the Bayer defendants, the *Yasmin* court found that a party’s reasonable expectation of confidentiality qualifies as a special circumstance—justifying the court in applying the law of the state with the most significant relationship to the conversation, rather than Illinois law.\(^{33}\) Under this test, our imagined Bayer defendant in Connecticut would prevail, with the communication protected by Connecticut law. But many courts have not interpreted the Second Restatement similar to *Yasmin*;\(^{34}\) therefore, this article argues that the American Law Institute (ALI) must reform the Second Restatement.

Most observers agree that conflict of laws is chaotic. As the *Yasmin* court discovered, courts pursue different approaches; but even with a single approach, conflicts cases are inconsistent and unpredictable.\(^{35}\) One would hope that, at the least, a readily grasped, uniform set of rules and principles could govern issues like testimonial privileges—a comparatively narrow field in which predictability is particularly important. Certainly the *Yasmin* court must have wished such a predictable standard existed. But judicial outcomes fall far short of this ideal.\(^{36}\)

\(^{31}\) *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 139(2) (1971).


\(^{33}\) In re *Yasmin & Yaz*, 2011 WL 1375011, at *15. Interpreting section 139 of the Second Restatement, the court held:

>[V]indication of the parties’ reasonable expectations of confidentiality is a “special circumstance” warranting application of the law of the state with the most significant relationship to the communication. Thus, where the communications at issue are between individuals foreign to the forum, whose relationship is centered outside of the forum, and whose communications regard subject matter not centered in the forum, the forum’s privilege law is not controlling.

*Id.*


\(^{36}\) See *id.*
In recent years, discovery has changed dramatically, raising the likelihood of conflict-of-laws issues relating to privilege. Businesses once located in a single place are now global. Companies from around the country often merge, and then fall apart. People communicate electronically across vast, shifting distances, raising questions about where conversations take place. They forward electronic communications to one another and “copy” other people on communications without considering if these habits affect privilege laws—as they will in some, but not all, states, depending on the recipients. People store these communications, multiplying exponentially the number of communications that are preserved and, thus, the number of documents that could be responsive to a discovery request. In the past, discovery involved junior lawyers reviewing stacks of papers culled from people’s files. While this review still occurs, the name of the game is now electronic discovery—i.e., the use of software to cull potentially responsive documents from an overwhelmingly large field. For all these reasons, lawyers and judges—faced with myriad materials—will frequently encounter communications raising conflict-of-laws issues and will have to decide which law should determine whether a communication is privileged or discoverable.

The problem is vexing because, generally, attorney-client privileges encourage communication by protecting conversations from compelled disclosure. Clients and

40. See Lodge, supra note 37, at 267-68.
42. See id. at 124.
43. See id. at 123.
their lawyers must be able to predict which laws will govern a transaction or an event that may be the subject of litigation. Accurate forecasting is especially important to privilege law because the privilege holder communicates in reliance on privilege protections from compelled disclosure. A court undercuts this reliance if it applies the privilege law of another jurisdiction and orders disclosure. To a surprising degree, interstate litigation presents the risk that a communication made in the context of one sovereign’s privilege law may lose its protected status when a court or other tribunal applies another sovereign’s privilege law.

In recent years, courts have increasingly turned to the Second Restatement for guidance in resolving privilege issues in an interstate context. Recourse to the Second Restatement is understandable because decided cases on the issue are few, and the results of what little caselaw exists are inconsistent. A leading treatise on conflict of laws confirms that “[p]roblems of assessing when the parties in one state court can invoke the privileges of another are not frequently discussed and relevant case law is sparse.” Accordingly, the Second Restatement’s key privilege provision, section 139, which at least proffers a solution, is becoming increasingly important in resolving interstate-privilege issues. But the Second Restatement’s proffered solution subordinates privileges to the goal of fuller evidentiary disclosure, a philosophy that may create issues by upsetting a party’s reasonable expectations of, and reliance on, the attorney-client privilege.

47. See Consolidation Coal Co., 432 N.E.2d at 256.
51. See, e.g., Sec. Serv. Fed. Credit Union, 861 F. Supp. 2d at 1272; Morisch, 2009 WL 6506656, at *2; Gonzalez, 45 S.W.3d at 101-04.
53. Restatement (Second) of Conflict of Laws § 139 (1971).
54. Restatement (Second) of Conflict of Laws § 139(2).
This article proceeds as follows. Section II explains the function and significance of privilege. Section III describes how the Second Restatement analyzes testimonial-privilege issues. Section IV explains how the Second Restatement originated to offer the reader a better understanding of its goals. Section V suggests revisions to the Second Restatement to improve its privilege provisions. Part VI concludes.

II. THE FUNCTION OF PRIVILEGE

Two general purposes exist for creating and preserving privileges.\textsuperscript{55} The first purpose is the traditional, widely accepted utilitarian justification; it rests on the premise that the evidentiary disclosure of privileged communications discourages the free flow of information essential to a private relationship or a governmental interest that society deems worthy of encouraging.\textsuperscript{56} For example, the United States Supreme Court has described the attorney-client privilege as “the oldest of the privileges for confidential communications known to the common law.”\textsuperscript{57} The privilege exists to:

encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer[] being fully informed by the client.\textsuperscript{58}

One has difficulty imagining how any lawyer could properly advise a client if the client were not free to speak candidly. The attorney-client privilege protects: (1) the client, who benefits from the advice; (2) the lawyer, who relies on receiving information from his client to do his or her job properly; and (3) society, which has an interest in the fair administration of justice that, in our adversarial

\textsuperscript{55} See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:13, at 520-21 (3d ed. 2005).

\textsuperscript{56} Id.


\textsuperscript{58} Id.
system, depends upon the giving and receiving of competent and informed legal advice.59

Similarly, the patient-therapist privilege encourages full and frank disclosure between a patient and a therapist.60 The Supreme Court has noted that the "privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." Some privileges also provide protection to the communications between the President and his advisors for similar reasons rooted in the public good:

The expectation of a President to the confidentiality of his conversations and correspondence . . . is [due to] the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.62 Nonetheless, this utilitarian, or instrumental, rationale does not adequately explain all privileges. For example, all jurisdictions privilege private communications between spouses—with variations as to the scope of the privilege—but this marital privilege is difficult to justify on instrumental grounds alone.63 Although society seeks to encourage and sustain the institution of marriage, the existence of the marital privilege is likely unnecessary to facilitate intimate, confidential communications between married partners. Most married couples are probably unaware of the privilege and, in any event, would not deem

59. Id.
61. Id.
the privilege an important determinant of their marital communications. However, a second, more recent privilege rationale explains the marital privilege: Some privileges are supported wholly or in part by a privacy or autonomy principle. That is, certain intimate relationships should be shielded from governmental prying and intrusion.

These two privilege justifications establish that privileges are emphatically designed not to promote accurate factfinding; indeed, they are created purposefully at the expense of accurate factfinding. Our legal system recognizes privileges in situations where some other public good or privacy right trumps the need for evidentiary disclosure.

This article does not argue that all privileges are equally worthy of protection. Instead, it addresses those privileges of which the holder is likely aware and around which the holder may structure his behavior. In particular, the protection of the attorney-client privilege is fundamental to the attorney-client relationship and to the proper functioning of our legal system. A privilege like this one, in which one of the communicants is a professional and has likely advised a client of the protection, sets up expectations of confidentiality on which the client will rely.

Although these expectations extend to relationships with therapists, doctors, priests, and accountants, the attorney-client privilege is unique because of its role in the administration of justice. Before dispensing with a privilege, any conflicts system must consider carefully the effects of upsetting the protections upon which the communicating parties have relied.

65. See id. at 110-11.
66. KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 72, at 466 (7th ed. 2013).
67. See id.
69. See id.
III. TESTIMONIAL PRIVILEGE UNDER THE SECOND RESTATEMENT

The Second Restatement favors evidentiary disclosure over privilege protection and, in some instances, nullifies the attorney-client privilege. Section 139 of the Second Restatement lays out the following test for courts to use when determining whether a communication is privileged:

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

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

To understand the implications of section 139, imagine the aforementioned Yasmin scenario—a privilege dispute over an attorney's advice to a Bayer employee who is not an officer or director. But let us flip the geography from the earlier hypothetical. Imagine that the conversation occurred in Illinois, where any attorney who is a member of that Bar should know that privilege would not protect the advice. Further, imagine that the multidistrict litigation is pending in Connecticut, where the law privileges the conversations. Under subsection 139(1), the Connecticut court would admit the conversation, despite the law of Connecticut, "unless the admission of such evidence would be contrary to the strong public policy of the forum." The court would likely determine that Connecticut's privilege law encourages Connecticut corporate employees to communicate relevant information to corporate attorneys.

70. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971).
71. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139.
72. See supra notes 6-10 and accompanying text.
74. See case cited supra note 7.
75. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(2) (1971).
and that rejecting the privilege would not frustrate the policy of the Connecticut law when the employee and corporate client are not Connecticut citizens.\textsuperscript{76} An employee or attorney in this scenario would likely not think the conversation is privileged because the law of Illinois, where the conversation took place, does not provide the privilege. They would have no reason at the time of the conversation to consider Connecticut’s laws. Applying subsection 139(1) in this instance would not disrupt any reasonable expectation of privilege; therefore, this result is logical. In fact, an opposite result—under which a party would luck into a privilege simply because a multi-litigation forum has a more favorable privilege doctrine—would only encourage forum-shopping, which Connecticut’s courts would likely disfavor. Accordingly, this article takes no issue with subsection 139(1) as a general matter, but rather, it provides suggestions for improvement.

The real problem lies in subsection 139(2).\textsuperscript{77} Let us revert to the geography of our original \textit{Yasmin} scenario. A Connecticut lawyer gives advice in a conversation with a Connecticut Bayer employee who is not an officer or director of the company. Connecticut law justifies the lawyer in advising the employee that the conversation is privileged, and the employee and corporate client would rightfully rely on that advice. But as subsection 139(2) provides: “Evidence that is privileged under the local law of the state which has the most significant relationship with the communication”—in our hypothetical situation, Connecticut, where the communication took place and where the employee and attorney are located—”but which is not privileged under the local law of the forum”—Illinois, in our hypothetical—”\textit{will be admitted} unless there is some special reason why the forum policy favoring admission should not be given effect.”\textsuperscript{78} Courts struggle with deciding what qualifies as a “special reason,” which seems to require more than establishing that another state has a more


\textsuperscript{77} \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 139(2).

\textsuperscript{78} \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 139(2) (emphasis added).
significant relationship with the communication than the forum state. 79 Thus, absent a special reason, a conversation loses its privilege, and a court will admit the evidence even if this result disrupts the expectations of both client and counsel. 80 This article takes issue with this result.

The core principle of section 139 is evidentiary disclosure; both of its subsections favor the law of the state in which a privilege does not apply. 81 This principle holds true regardless of the type of privilege at issue. 82 Furthermore, nowhere in section 139—or its accompanying comments—do the drafters consider the specific policy concerns that justify particular privileges. 83 Privileges vary widely in their recognition by courts, their scope, their policy underpinnings, their importance, and the ease with which they can be waived, forfeited, or overridden by courts. 84 But section 139 addresses privileges collectively, ignoring those differences and treating them as if they are fungible. 85

Section 139 also does not distinguish between privileges applying to professionals, such as an attorney, accountant, or priest—all of whom are likely to know about the privilege and to advise of its existence—and privileges involving laypersons, such as a husband and wife, who may be unaware of a privilege. 86 Section 139’s comments

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79. See infra Part V.B.
80. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(2).
81. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139.
82. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139.
83. For example, the psychotherapist-patient privilege exists primarily because it is essential to induce a patient’s free and full disclosure. See Jaffee v. Redmond, 518 U.S. 1, 10-11 (1996). The loss of evidence through recognition of this privilege is modest; if there were no privilege, the patient would simply withhold information. See id. at 11-12. Moreover, the privilege serves important public and private concerns: the privilege usually helps the patient and benefits the public by improving “[t]he mental health of our citizenry, . . . [which] is a public good of transcendent importance.” Id. at 11. Additionally, the attorney-client privilege is sometimes justified on fairness grounds; it would be unjust for the attorney to encourage frank disclosures from the client, and subsequently reveal them in courtroom proceedings. See, e.g., id. (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).
84. See supra Part II.
85. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139.
86. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139. When Congress adopted the Federal Rules of Evidence in 1975, it was unable to agree on the nine privileges contained in Rules 502-510 of the proposed Federal Rules of Evidence. MUELLER & KIRKPATRICK, supra note 55, § 5:1, at 403. However, these proposed rules still serve as a useful reference and are often cited by courts. See id. They
mention briefly party expectation or reliance, but only in connection with broader considerations—such as determining the state with the “most significant relationship with the communication” and the several policy concerns that might convince a forum court to recognize another state’s privilege. In guiding courts’ decisions to recognize privileges, section 139 does not assign an important role to communicating parties’ expectations or reliance interests—especially those of the privilege holders.

Indeed, section 139 suggests privileges are a minor nuisance, and in most cases, courts should brush them aside for the sake of accurate fact-finding. The drafters of section 139 have not justified this core position allowing a general policy of evidentiary disclosure to trump the specific policy concerns that led to recognizing privilege in the first place.

IV. HOW WE GOT HERE—CONTEXT AND BACKGROUND

A. The First Restatement

To understand section 139 of the Second Restatement, one must appreciate the dramatic changes in choice-of-laws issues that occurred over the last half of the twentieth century. The Second Restatement combines the disparate and often incompatible themes of the traditional and modern choice-of-law doctrines, causing much of its weakness and uncertainty.

The story begins with the First Restatement, which a handful of states still use. Under the First Restatement’s territorial, or “vested rights,” approach, courts first
determine whether an issue is procedural \textit{(lex fori)} or substantive \textit{(lex loci)}. The law of the forum governs procedural matters. But the law of the place where certain specified activities took place—e.g., the acceptance of a contractual offer—or where a certain “status” existed—e.g., a person’s domicile, marital domicile, or the location of property—governs substantive matters. For example, the law of the sovereign where one suffers an injury generally governs all substantive aspects of a tort suit, such as liability, recovery, and damages. Courts resolve most contractual issues under the law of the state where the acceptance occurred, with the exception of performance issues—which the court refers to the sovereign where performance occurred. Courts need only isolate the critical event or status that a substantive law might specify and apply the law of the sovereign where the event occurred or the status existed. In short, the First Restatement fashions detailed rules that revolve around territory. The goals of the First Restatement are simplicity; predictability; prevention of forum shopping; and at the very least, conformity with party expectations. Parties presumably expect to be governed by the laws of the place where their activities occur or the place where disputed property is located.

A number of difficulties with this territorial, or vested-rights, regime dominate the First Restatement. First, the substantive contents of competing laws are, at least in theory, irrelevant under the First Restatement. The laws typically instruct courts to isolate the critical event or status, determine its geographic locus—where that parties’ rights “vest”—and \textit{then} consult the law of the appropriate sovereign. Second, the rules of the First Restatement are inflexible, presumably made so for stability, predictability,
and the elimination of forum shopping. The following example illustrates these deficiencies.

Suppose State X grants a corporate charter to a railroad and also passes a statute overriding the fellow-servant rule, thus rendering the railroad vicariously liable for the negligence of an employee who injures a fellow worker. Assume railroad employees E-1 and E-2 both live in State X and that before a particular train leaves that state, E-1 fails to join properly one of the railroad cars destined for distant states. As the train passes through State Y—where neither employee lives, nor where the railroad is incorporated—the improperly joined car breaks free, injuring E-2. E-2 then sues the railroad in a State X court. The railroad’s defense is that State Y—where the injury occurred—retains the fellow-servant rule, which states that employers are not liable for one employee’s negligence that injures another employee. Under the First Restatement’s territorial rules, this defense is valid; thus, the railroad would owe the employee nothing. The fortuitous place of injury supplies the governing legal rule, despite the fact that all interested parties are from State X.

Furthermore, observe that, by passing the hypothetical statute, State X declared that its residents have the right to sue their employers for the negligence of fellow servants engaged in employment activities. In contrast, State Y shields its employers from vicarious liability. Yet the suit does not offend State Y’s protective policy in the hypothetical. A case lodged by a State X citizen against a State X corporation, under the substantive laws of State X, does not offend State Y’s protective policy because no employers or employees of State Y are involved.

Even though the First Restatement often produces defensible results, its shortcomings have grown more apparent with time, especially in the field of torts. Some

104. Id. § 65, at 201.
105. The fellow-servant rule was a common-law rule stating that an employer was not liable to an employee for injuries caused by the negligence of a fellow employee. See Alabama G. S. R. Co. v. Carroll, 11 So. 803, 805 (Ala. 1892).
106. See Alabama G. S. R. Co., 11 So. at 809. Although the Alabama Supreme Court decided Alabama G. S. R. Co. before the 1934 adoption of the First Restatement, application of section 386 of the First Restatement would have yielded the same result. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 386 (1934).
cases, like the illustrative railroad case, yield unsatisfactory results. Other cases would have yielded questionable results, but judicial manipulations at the trial and appellate levels skewed the First Restatement rule at issue. For example, under the First Restatement, a forum court will apply its own procedure. A results-oriented court may declare “procedural” a rule that most observers would deem substantive, thus allowing application of the forum’s law. In effect, a court performs a judicial “recharacterization” of a legal rule. Under this approach, courts have recharacterized legal rules that govern the survival of causes of action and impose a ceiling on damages as procedural rules so the forum law—that allows an action and imposes no ceiling—prevails.

This recharacterization process can also take a case out of one substantive subject matter (e.g., torts) and place it in another (e.g., contracts) when the rules of the latter subject favor the desired result. For example, where a forum state’s statute permits a plaintiff injured by a rental car to sue the rental company—even though the place of the accident does not provide a cause of action—a court may declare that the case before it is contractual in nature, rather than tortious, allowing forum state law (where the parties formed the contract) to apply. The justification for this slight-of-hand is that the forum’s liability-imposing statute is implicit in every car-rental contract made in the forum state, resulting in a plaintiff’s status as a contractual third-party beneficiary.

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108. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (1934).
109. RICHMAN & REYNOLDS, supra note 91, § 67, at 201.
110. See id. § 64, at 183.
111. Grant v. McAuliffe, 264 P.2d 944, 949 (Cal. 1953).
112. Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526, 528-29 (N.Y. 1961). The court in Kilberg also declared that enforcing the damage limitation imposed by the state in which the accident occurred would offend the public policy of the forum state. Id. at 528.
113. Id. at 528-29.
114. See Levy v. Daniels' U-Drive Auto Renting Co., 143 A. 163, 164-65 (Conn. 1928).
115. Id. at 163-65. Haumschild v. Continental Casualty Co. demonstrates a recharacterization that post-dates the adoption of the First Restatement. 95 N.W.2d 814, 815-19 (Wisc. 1959) (applying forum law and recharacterizing wife's tort against husband for injuries she suffered in automobile accident as a family-law suit).
By the middle of the twentieth century, fault lines manifested in the First Restatement. Even judicial manipulations aimed at achieving sensible outcomes eventually fell short of their mark. For example, if a court recharacterized a legal rule from tort to family law, the “family law” rule might produce questionable results in future cases with different facts. Additionally, these escape devices undercut the First Restatement’s major goals—uniformity, predictability, and prevention of forum shopping.

The First Restatement’s privilege law evidences some of the same recharacterization tensions appearing in the laws of torts and contracts. The First Restatement never explicitly discusses how courts should resolve privilege conflicts; instead, it provides that the law of the territory where the activity took place should determine substantive matters and that the law of the forum should determine procedural matters. Courts have disagreed about whether privilege is a substantive or procedural matter. Some courts declare privilege issues procedural and apply the forum’s law, rather than the law of the state where the communication took place. Others refuse to follow this approach, recognizing that the place of the communication, or the locus of the relationship, is extremely important.

117. See Scoles et al., supra note 52, §§ 2.7-14, at 18-59.
118. Suppose, for example, the forum court holds that a tort suit by a passenger-wife against her driver-husband is not related to the substantive rules of tort but to those of family law and, hence, is governed by the law of the marital domicile. See Hauenschild, 95 N.W.2d at 814-19. In a subsequent case, the court may find that applying the law of marital domicile leads to an undesirable result in family-law cases.


120. See Restatement (First) of Conflict of Laws §§ 7-8, 311, 378-379, 585 (1934).


123. See, e.g., Republic Gear Co., 381 F.2d at 555 n.2.
These courts understand parties will likely believe that the law of the place where they acted will determine whether their communication is protected. As the Court of Appeals for the Second Circuit explained in Republic Gear Co. v. Borg-Warner Corp.:  

[A] rule of privilege is 'unlike the ordinary rules of practice which refer to the processes of litigation, in that it affects private conduct before the litigation arises.'

Rules of privilege are not mere "housekeeping" rules which are "rationally capable of classification as either" substantive or procedural for purposes of [the Erie doctrine]. Such rules 'affect people's conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive.'

In an effort to resolve issues raised by conflict-of-laws difficulties in torts, contracts, and domestic relations cases, the Second Restatement dramatically changed the landscape for all conflicts cases.

B. Breaking Away from the First Restatement: Alternative Approaches to Choice-of-Law Disputes

Babcock v. Jackson memorably illustrated the shift away from the First Restatement. In Babcock, the New York Court of Appeals broke with the place-of-injury rule of the First Restatement. The issue in Babcock was whether an Ontario, Canada, "guest statute" defeated the suit of a New York passenger against a New York driver. A single-car accident occurred during a short trip by two New Yorkers—the plaintiff and defendant—into Canada in
a car registered and insured in New York.\textsuperscript{130} Ontario’s
guest statute would have prohibited a suit by the nonpaying
guest-passenger against the host-driver.\textsuperscript{131}

On the assumption that the purpose of a guest statute
was to defeat collusive suits between friendly litigants, the
New York Court of Appeals refused to apply the territorial,
or vested-rights rule, of the First Restatement.\textsuperscript{132} The court
reasoned New York had an interest in providing a means of
compensation for the injured plaintiff, but the suit did not
implicate Ontario’s interest in preventing collusion because
it was between two New Yorkers and involved a New York
insurance company’s coverage.\textsuperscript{133}

The \textit{Babcock} court purported to apply a choice-of-law
approach called “grouping of contacts,” or “center of
gravity,” under which the forum court examines the number
and nature of contacts that the parties and the underlying
transaction have with each of the affiliated states.\textsuperscript{134} Under
this approach, some contacts may be more important than
others; however, in the end, the court chooses the law of the
state in which the most \textit{meaningful} contacts predominate.\textsuperscript{135}

Some scholars have suggested alternative approaches
to resolving choice-of-law disputes. For example, Professor
Robert A. Leflar proposed that courts should choose the
proper law based on “choice influencing” considerations,
such as predictability of results; ease of judicial
administration; advancement of the policy interests of the
states involved; and importantly, an assessment of which
state has the better rule of law in light of social, economic,
and jurisprudential considerations.\textsuperscript{136} Five states have

\begin{itemize}
  \item \textsuperscript{130} \textit{Id.} at 280, 284.
  \item \textsuperscript{131} \textit{Id.} at 280. Guest statutes, now largely repealed, were once popular,
especially during the early and mid-twentieth century. See 2A STUART M. SPEISER
\textit{et al.}, \textit{AMERICAN LAW OF TORTS} § 9:36, at 892-94 (2009). The statutes either
disallowed a suit by the guest-passenger or made recovery more difficult—for
example, by making a passenger prove gross negligence. See John P. Ludington,
Annotation, \textit{Modern Status of Choice of Law in Application of Automobile Guest
  \item \textsuperscript{132} \textit{Babcock}, 191 N.E.2d at 281, 285.
  \item \textsuperscript{133} \textit{Id.} at 284-85.
  \item \textsuperscript{134} \textit{Id.} at 282-83.
  \item \textsuperscript{135} \textit{Id.} at 283.
  \item \textsuperscript{136} Robert A. Leflar, \textit{Conflicts of Law: More on Choice-Influencing
\end{itemize}
adopted this system—which has no “rules,” but only broad criteria—and this approach has influenced judicial outcomes in several other states.

Another approach, developed and refined by the late Professor Brainerd Currie, examines only the interests of the involved states. To discover the interest of each affiliated state, one must first identify the policy or objective undergirding the competing laws in question. This step informs the next step: determining whether each of the involved states has an interest in applying its own law to the interstate case before the court. This critical determination of whether an involved state has an interest usually produces one of two patterned responses: (1) State X and State Y each have an interest in the application of their own law (a “true” conflict); or (2) only one state, State X, has an interest in the application of its own law (a “false” conflict). On relatively rare occasions, a third pattern emerges: neither State X nor State Y has an interest in providing the governing law (the “unprovided for,” or “no interest,” case). This interest-analysis approach, although adopted in only a few states, has become a major factor in choice-of-law decisions across the United States.

This brief overview of the principal approaches to conflict of laws brings us to the most popular system for resolving conflicts, and the most influential one in resolving privilege issues in an interstate context—the Second Restatement.

C. The Rise of the Second Restatement

1. The “Significant Relationship” Test

The ALI drafted the Second Restatement in the midst of great upheaval concerning the proper approach to

137. SCOLES ET AL., supra note 52, § 2.25, at 104 (noting that Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin follow Professor Leflar’s system).
138. Id.
139. Id. § 2.9, at 26.
140. Id. § 2.9, at 28.
141. Id. § 2.9, at 27.
142. SCOLES ET AL., supra note 52, § 2.9, at 28.
143. Id.
144. Id. § 2.9, at 34.
145. Id. § 2.15, at 68.
choice-of-law issues. The First Restatement received a barrage of academic criticism. Courts also demonstrated their displeasure with the First Restatement’s vested-rights theory by either refusing to recognize the governing territorial principle or by creating escape devices to achieve desired results. This displeasure was especially evident in torts cases. The heated controversy and the many disparate voices favoring different “modern” systems of choice of law dragged the Second Restatement’s drafting process from 1953 to 1972 when, at last, the ALI concluded the project—perhaps due to sheer exhaustion.

The final product was a vast compromise—a composite of almost every choice-of-law theory, past and present. The drafters heard and heeded every academic and judicial voice. Although the Second Restatement, like the First Restatement, has clusters of rules and principles grouped by legal subject matter—such as torts, contracts, and property—its overriding theme seems straightforward: A court should apply the law of the state which has the “most significant relationship” to the particular issue in play.

Assuming no statutory directive exists to guide a court, the judge first characterizes the conflicts issue by subject matter. The judge then examines the contacts of the parties and the disputed transaction—such as contacts generated by the design, manufacture, distribution, purchase, and failure of a defective product. For some

146. See generally id. §§ 2.15-.17, at 68-78 (discussing the erosion of the well-established lex loci delicti and lex loci contractus rules, which dominated conflict-of-laws issues before the ALI drafted the Second Restatement).

147. SCOLES ET AL., supra note 52, § 2.8, at 22.

148. One such method courts employed to “escape” the territorial principle was to classify one or more issues in the case as procedural rather than substantive. See, e.g., Grant v. McAuliffe, 264 P.2d 944 (Cal. 1953) (en banc).

149. SCOLES ET AL., supra note 53, § 17.83, at 943.

150. See generally id. § 2.14, at 58-68 (providing a full account of the drafting process, including the influence of scholars not mentioned in the preceding background summary).


152. See id. at 1250.


154. SCOLES ET AL., supra note 52, § 3.2, at 120.

155. Id. § 3.3, at 123.
legal areas, the Second Restatement provides a non-exclusive list of connecting factors or contacts that are likely relevant to the choice-of-law decision; for example, in torts cases, these factors may be the place of injury, the place of the conduct in question, the parties' domicile or place of business, and the place where the parties' relationship is centered. In other legal areas, the Second Restatement does not enumerate the relevant connecting factors; thus, the court must identify them.

Scattered throughout the Second Restatement, but not uniformly provided, are various tentative or "presumptive" choices of jurisdictions whose law will usually control. Generally speaking, a court may displace these presumptive choices if, under the facts of a particular case, another connected sovereign has a stronger claim—a more "significant relationship"—for application of its law over the presumptive sovereign.

Under the Second Restatement, all paths eventually lead to section 6 and its criteria for selecting the state that has the most important relationship to the particular issue before the court. A presumptive choice is typically only a tentative selection of the "most significant" state relationship; a court will conduct its search without the benefit of this tentative selection if no presumptive choice exists. Section 6—the centerpiece of the Second Restatement—lays out the factors that determine which state has the "most significant relationship" to the issue before the court. These factors, accompanied by the authors' brief editorial comments, include:

156. Restatement (Second) of Conflict of Laws § 145(2) (1971).
158. See, e.g., Restatement (Second) of Conflict of Laws § 156 (1971) (stating that the applicable law determining if an "actor's conduct was tortious . . . will usually be the local law of the state where the injury occurred").
159. See, e.g., Restatement (Second) of Conflict of Laws § 146 (1971) (stating that the court may apply the law of the state that "has a more significant relationship . . . to the occurrence and the parties" in a personal-injury case).
160. Restatement (Second) of Conflict of Laws § 6 cmt. e (1971).
161. Scoles et al., supra note 52, § 2.14, at 63. Occasionally, courts may use the "most significant" state standard as a restraint on the operation of another Second Restatement rule. See, e.g., Restatement (Second) of Conflict of Laws § 187 (1971) (governing party autonomy in choosing the law that will govern contractual validity, rights, and duties).
162. Scoles et al., supra note 52, § 2.14, at 59.
(1) "[T]he needs of the interstate and international systems."\(^{163}\) Courts rarely cite this factor; its obvious vagueness makes it difficult to apply. Presumably, the forum should take a broad view of the operation of its choice-of-law system, deferring to another affiliated sovereign when doing so would promote such values as comity, predictability, and recognition of the superior interest of states other than the forum.

(2) "[T]he relevant policies of the forum."\(^{164}\) The forum may have general policies, such as compensation to the injured, fulfillment of party expectations, and ease of judicial administration. But the forum may also have specific policy concerns that arise by reason of the particular case before the court—for example, safety in product design and manufacture; foreseeability of the litigated event; or protection of its domiciliary (or business enterprise) from excessive liability.

(3) "[T]he relevant policies of other interested states and the relative interests of those states in the determination of the particular issue."\(^{165}\) The comments accompanying the second factor are relevant here. The second and third factors—subsections 6(2)(b) and 6(2)(c)—as well as, to a lesser extent, the fourth factor—subsection 6(2)(e)—introduce interest analysis into the Second Restatement. However, one must note that under the textual terms of the Second Restatement, interest analysis is not the exclusive means of resolving choice-of-law issues.

(4) "[T]he basic policies underlying the particular field of law."\(^{166}\) A basic policy of torts, for example, is to make whole a victim who was injured through the fault of another. Likewise, a basic policy of contracts is to validate private arrangements that do not violate a public policy.

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163. Restatement (Second) of Conflict of Laws § 6(2)(a) (emphasis added).
164. Restatement (Second) of Conflict of Laws § 6(2)(b) (emphasis added).
165. Restatement (Second) of Conflict of Laws § 6(2)(c) (emphasis added).
166. Restatement (Second) of Conflict of Laws § 6(2)(e) (emphasis added).
and to fulfill the expectations of the contracting parties.

(5) "[C]ertainty, predictability and uniformity of result."\(^{167}\) Certainty, predictability, and uniformity are lofty goals, yet they are basic to any enduring choice-of-law system. The implementation of these goals poses a difficult challenge.

(6) "[E]ase in the determination and application of the law to be applied."\(^{168}\) This factor tends to favor the application of the forum’s substantive law and certainly counsels that courts should ordinarily apply a forum’s routine procedural law, such as pleading and motion practice.

Section 6 is difficult to apply in a concrete case.\(^{169}\) Typically, some of the factors in section 6 will point toward State X’s law while others point to State Y’s law.\(^{170}\) Section 6 makes the judge’s task more difficult because it does not have a hierarchy or order of preference for the factors.\(^{171}\) Furthermore, the definition of “most significant relationship” remains unclear.\(^{172}\) Accordingly, one could imagine a court giving great, or even decisive, weight to the section 6 considerations that suggest using a state-interest analysis—particularly subsections (b) and (c). Indeed, many courts have viewed the interests of competing states as decisive.\(^{173}\) This interest-analysis dominance, however, often impairs or defeats other goals of section 6, such as protecting justified expectations, predictability, and uniformity.\(^{174}\) The reason for this impairment is that the state-interest analysis, as a singular or predominate choice-of-law system, only functions well in the easy cases where only one state is interested or where one state’s interest is overwhelming. But where two or more states have significant interests—a “true conflict”—such interest

\(^{167}\) Restatement (Second) of Conflict of Laws § 6(2)(f) (emphasis added).

\(^{168}\) Restatement (Second) of Conflict of Laws § 6(2)(g) (emphasis added).

\(^{169}\) See Scoles et al., supra note 52, § 2.14, at 66.

\(^{170}\) See id.

\(^{171}\) Restatement (Second) of Conflict of Laws § 6 cmt. c.

\(^{172}\) Scoles et al., supra note 52, § 2.14, at 62.

\(^{173}\) Id. § 2.14, at 64.

\(^{174}\) Id. § 2.9, at 33.
WHEN PRIVILEGE FAILS

analysis often produces unpredictable, questionable outcomes that frustrate party expectations. Indeed, the number of unsatisfactory results under an interest analysis rivals the undesirable results of the much-maligned First Restatement.

An illustrative case will convey the point. In Lilienthal v. Kaufman, the defendant, an Oregon businessman, traveled to California where he sought out the plaintiff for purposes of securing a loan. The plaintiff issued the loan in California; the defendant was to repay the loan there; and all related business dealings between the parties occurred in that state. Unbeknownst to the California plaintiff, Oregon law declared the defendant a “spendthrift,” a status that empowered the defendant’s conservator to void his contracts. The defendant defaulted on the loan, and the plaintiff sued him in Oregon. The conservator voided the contract, and the Oregon Supreme Court held in the defendant’s favor. The two states had competing interests. California had interests in protecting the creditor, fulfilling party expectations, and encouraging a stable contractual and business environment. Oregon, on the other hand, had an interest in protecting the assets of spendthrifts, presumably for the ultimate protection of those dependent on the debtor. Had the court taken full account of territorial considerations, party expectations, and fairness to the plaintiff, it would have ruled in the lender’s favor; instead, the Oregon court gave more weight to the purposes of the spendthrift law—its own state’s interests. Lilienthal is a case with a true conflict and an outcome that disrupts party expectations.

In Bernhard v. Harrah’s Club—another famous, or perhaps infamous, interest-analysis case—the California Supreme Court imposed civil liability on a Nevada casino for serving “excessive” alcoholic beverages to one of its

175. 395 P.2d 543, 545 (Or. 1964) (en banc).
176. Id. at 545-46.
177. Id.
178. Id. at 544.
179. Id. at 549.
180. Lilienthal, 395 P.2d at 546, 549.
181. Id. at 548-49.
182. Id. at 549.
customers. After consuming several drinks, the customer drove his car on a California highway and struck the California plaintiff. Unlike Nevada, California had a dram shop law imposing liability on a tavern for serving drinks to an intoxicated patron. Nevada had an interest in protecting its business from dram shop liability; California had an interest in protecting highway users from risks posed by intoxicated drivers. Weighing the competing interests, the *Bernhard* court concluded that California’s policies and interests would suffer the greater impairment if the court did not apply California law. Recognizing the gravity of its decision and the potential for interstate disharmony, the court limited its decision to Nevada establishments that actively solicit business in California. Nonetheless, the proximity of Nevada to heavily populated California suggests that such solicitation of California customers is frequent, if not commonplace. Thus, under the banner of state-interest analysis, *Bernhard* subjected Nevada businesses to a dram shop act.

The interest analysis illustrated by *Lilienthal* and *Bernhard*—although only one of a number of choice-of-law theories embedded in the Second Restatement—has generally been an influential component in determining which of several states has the “most significant

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185. *Id.* at 721.
186. *Id.* at 721-22.
187. *Id.* at 725.
188. *Id.* The California Supreme Court also noted a Nevada statute declared that serving an intoxicating beverage to an inebriated customer constituted a misdemeanor. *Bernhard*, 546 P.2d at 725. However, three years prior to the court’s decision, the Nevada legislature repealed the statute. See NEV. REV. STAT. § 202.100 (repealed 1973). Thus, this Nevada law could no longer serve as a justification for the court’s choice of California law.
189. *Bernhard*, 546 P.2d at 727. One will never know the potential impact of *Bernhard* because the California legislature abrogated the court’s decision—at least for future cases. See CAL. BUS. & PROF. CODE § 25602 (West 2013).
190. Note that some sections of the Second Restatement rely on territorial principles. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 223-240 (1971). The Second Restatement also lends itself to the choice-of-law approach under which a court examines the various contacts and attempts to identify the greater number of important contacts, thus yielding the “most significant relationship.” See, e.g., Johnson v. Spider Staging Co., 555 P.2d 997, 1000-01 (Wash. 1976) (emphasizing the importance of contacts relevant to a state interest).
relationship” to an issue. The major contribution of the interest analysis is that it exposes the false conflict where only one state has an interest in applying its law. However, other patterns, such as true conflicts, emphasize the deficiencies in interest analysis. One often has difficulty identifying the interests of a given state. Moreover, legislative histories are notoriously vague and conflicting, and judicial pronouncements are often shifting and unreliable.

For example, courts have advanced at least three separate policies as the “policy” underlying guest statutes: (1) a reluctance to permit an ungrateful, nonpaying guest to recover against the host-driver; (2) prevention of collusive suits against the insurance company covering the driver’s liability; and (3) preservation of the insurance proceeds for the protection of the parties occupying the other car(s) involved in the accident. A court can determine the state interest by choosing a particular policy or rationale. Thus, if a driver and passenger from State X—which does not have a guest statute—collide with a third party in State Y—a guest-statute state—State Y is a disinterested state under the first two policy assumptions, at least if we assume the driver registered and insured his car in State X. Under the third policy assumption, State Y would have an interest in applying its guest statute if one or more occupants of the other car were State Y residents. The situation arguably would be different if the occupants of the other car were from State Z, in which case State Y may not have an interest in preserving the host-driver’s insurance proceeds. But suppose the occupants of the State Z car sustain serious injuries and are treated for a protracted period by State Y healthcare providers. Would State Y now have an interest in protecting its medical creditors? A forum-court judge would have to decide this difficult question.

Other difficulties with state-interest analysis exist. Modern interest-analysis courts shun Professor Currie’s

192. Id.
193. Id. at 1048.
admiration that the solution to a true conflict is applying the forum’s law. If identification of the underlying state policies and resulting interests is difficult, weighing their respective strengths is even more daunting. Note also that dispensing with territorial concerns—such as where the parties acted with respect to the litigated transaction—as a principal determinant for resolving a conflict of laws discards a factor that bears heavily on both party expectations and predictability of judicial outcomes.

Indeed, after unsuccessfully experimenting with modern conflict theories—primarily interest analysis—the New York Court of Appeals returned to a system that emphasizes rules instead of an open-ended approach. In addition to recognizing the interests of the affiliated state, New York values the domicile of the parties and the physical location of the events in question—i.e., the law of the state in which the contested events occurred. New York’s approach may not be the best solution to the intractable problem of choice of law, but it does incorporate territorial concerns, party expectations, and policy considerations. Any system that completely ignores one of these fundamental features is unlikely to survive.

2. Privilege Law Under the Second Restatement

Based on the Second Restatement’s theme that a court should apply the law of the state with the “most significant relationship” to the particular issue, one would think the Second Restatement would simply state that the law of the state with the most significant relationship governs the existence of a privilege. That position is consistent with the central thrust of the Second Restatement’s drafters and, in many situations, would address issues about preserving reliance on, and expectations of, the attorney-client

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195. See, e.g., Dowis v. Mud Slingers, Inc., 621 S.E.2d 413, 418 n.7 (Ga. 2005).
196. Smith, supra note 191, at 1048.
198. See id. The New York Court of Appeals addressed the rules it formulated in Neumeier to guest statutes. Id. Subsequently, this court extended the principles contained in the rules to another area of torts. See Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 687 (N.Y. 1985). Nevada has also turned its attention to rules of the Neumeier variety. See Motenko v. MGM Dist., Inc., 921 P.2d 933, 935 (Nev. 1996).
199. Neumeier, 286 N.E.2d at 458.
privilege. Nevertheless, determining the state with the "most significant relationship" may prove problematic with electronic communications.200

Alternatively, the Second Restatement might say that the law of the state where the privileged communication originates ordinarily applies, unless the holder of the privilege could not have reasonably expected the privilege to apply and another connected state has a more significant relationship to the communication than the originating state. Such an approach would also protect the parties’ reasonable reliance on the privilege laws of the place where they communicated or established the relationship. But again, electronic communications complicate this approach.201

Despite the benefits of this approach, the Second Restatement surprisingly favors disclosure over privilege—even in situations where the state with the most significant relationship to the communication would not disclose.202 Under section 139 of the Second Restatement, courts will admit evidence even if it is "privileged under the local law of the state which has the most significant relationship with the communication," absent a “special reason why the forum policy favoring admission should not be given effect."203 Thus, section 139 is inconsistent with the general approach of the Second Restatement and, as this article argues, inconsistent with the policies and concerns that should govern the recognition of privileges.

D. Further Complications: The Second Restatement in Federal Courts

Wrestling with section 139 of the Second Restatement is daunting enough for state courts. But federal courts have a more difficult task. Under Rule 501 of the Federal Rules of Evidence, federal courts craft the privilege rules for cases arising under federal law.204 However, in civil proceedings in which state law controls “a claim or defense,” “state law

200. See infra Part V.A.
201. See infra Part V.A.
203. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(2) (emphasis added).
204. FED. R. EVID. 501.
governs [the] privilege." In other words, because the privilege law has "substantive" outcomes, federal courts defer to state privilege law when the source of a claim or defense is state law. Rule 501's deference includes state conflict-of-laws rules governing privilege in civil suits with interstate features.

Since more states have adopted the Second Restatement than any other choice-of-law approach, federal courts will frequently turn to section 139. Often, the state precedent applying section 139 will not offer a clear answer, and section 139 itself will not offer clear guidance. Thus, a federal court must make an educated guess as to how a state supreme court would respond to issues arising under section 139—particularly subsection (2)—which the state court may not have confronted. The practical effect is to cast doubt on the durability of any privilege that may exist. The communicants have no assurance that their privilege will endure because, at some future date, interstate litigation in a state or federal court could easily result in its nullification.

205. FED. R. EVID. 501.


V. SUGGESTIONS FOR AMENDING THE SECOND
RESTATEMENT'S TREATMENT OF PRIVILEGE

A. Subsection 139(1)

Subsection 139(1) of the Second Restatement addresses cases where a communication is not privileged under the law of the state having the "most significant relationship" with the communication. This subsection directs the forum court to admit evidence of such a communication unless its admission "would be contrary to the strong public policy of the forum." This article takes no issue with the general thrust of subsection 139(1) when parties would not have expected a privilege to protect their communication at the time they made the communication, but the authors recommend amending subsection 139(1) to comport with the reality of today's digital world, where many communications occur electronically and across state lines.

A court would rarely reject on public policy grounds the admission of evidence that is not privileged in the dominantly affiliated state but is privileged in the forum state. The comment to subsection (1) provides that "[s]uch a situation may occasionally arise when the state of the forum, although it is not the state which has the most significant relationship with the communication, does have a substantial relationship to the parties and the transaction and a real interest in the outcome of the case." In the vast majority of cases, once the presiding judge in the forum state concludes that a privilege does not exist in the state with the most significant relationship to the communication, the court will nearly always admit the evidence. The justifiable premise for this ruling is that subsection 139(1)'s core principle is sound; usually, no sufficient reason exists for a forum state to apply its privilege when the state with the most significant relationship to the communication has declined to do so. In short, a privilege will usually yield to

208. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(1).
209. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(1).
210. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(1) cmt. c.
211. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 cmt. c.
the general principle of evidentiary disclosure. Typically, the communicating parties cannot claim persuasively that they expected protection or relied on the privilege in question.

Of course, the judge must determine that a state other than the forum state is the jurisdiction with the most significant relationship to the privilege issue and that this state does not confer a privilege. This task, difficult enough when only two states are involved, is likely more complicated when three or more states are affiliated. Nonetheless, comment e to section 139 provides some guidance for the forum court judge: “The state which has the most significant relationship with a communication will usually be the state where the communication took place, which . . . is the state where an oral interchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing.”

One feature of comment e is troublesome—its assertion that the state where one receives a written statement is the state with the most significant relationship. If the holder of a privilege, domiciled in State X, sends a privileged written communication to a recipient in State Y, which does not recognize the privilege, State X has a strong claim that a forum should recognize the privilege. The claim is especially compelling if the holder reasonably relied on the privilege—a reliance a court can presume if a professional advised the holder that the privilege applied. This scenario becomes increasingly likely with the rise of electronic communication, which enables people to correspond instantly across state lines and which preserves communications so that discovery will inevitably deal with them should litigation ensue. Imagine a situation

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213. See, e.g., Rawat, 2012 WL 37110, at *6; Heaney, 689 N.W.2d at 176-77; Donahue, 18 P.3d at 611.

214. For an illustrative case, accompanied by a thorough appellate discussion, see State v. Heaney, where the Minnesota Supreme Court held that although alcohol test results were subject to the physician-patient privilege in Minnesota—the forum state and where the car accident occurred—the results were, nonetheless, admissible because they were not privileged in Wisconsin—the state where the physician took the blood sample and the state with the most significant relationship. 689 N.W.2d at 174, 176-77.

215. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139.

216. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 cmt. e.

217. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 cmt. e.
where an attorney, located in State X, e-mails advice to a client who happens to access that e-mail while he is traveling in State Y. Why should the law of State Y prevail? The ALI drafted comment e before one could even imagine electronic communication, but the comment seems ill advised even for that time. Today, the ALI should amend comment e to appreciate the realities of contemporary modes of communication.

Comment e also qualifies its tentative identification of the most significantly related state: If “a prior relationship [exists] between the [communicating] parties, the state of most significant relationship will be that where the relationship was centered unless the state where the communication took place has substantial contacts with the parties and the transaction.” To illustrate: If a husband and wife, domiciled in State X, exchange a confidential, marital communication while temporarily visiting State Y, then their home state, State X, would have the most significant relationship to the disclosures between them. This result is a sensible solution for the husband-wife privilege. But would the answer be the same if the married couple consulted a physician, accountant, or attorney in State Y? Imagine a married couple living in New Jersey who travel a short distance to visit a therapist or attorney located in Manhattan, where the therapist or attorney may assume, and possibly advise the couple, that New York law privileges the conversation. The Second Restatement is silent about this fact pattern. Nonetheless, the correct response is that the professional relationship is centered in New York (State Y), and the fact that the couple is domiciled in New Jersey (State X) is of marginal importance. The parties could reasonably expect the application of New York law. New York, not New Jersey, has the superior interest in designing a policy to facilitate the acquisition of pertinent information by its licensed professionals. Put otherwise, New York has “substantial contacts with the parties and the transaction,” and thus, it is the state with the “most significant relationship.”

218. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 cmt. e.
219. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 cmt. e.
220. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139.
221. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 cmt. e.
Other important concerns arise when choosing the state with the dominant relationship. The following sections address those concerns in connection with the troublesome subsection 139(2). Nevertheless, evaluating subsection 139(1) demonstrates that tying the “most significant relationship” to the laws of the state in which the communication was “made” might have worked adequately in 1971—when the ALI published the Second Restatement—but it falls short today.222 In today’s climate, interstate litigation is common, and communications routinely cross interstate and international boundaries—often in wired and wireless forms unknown in 1971.223 Determining the jurisdiction where the communication “took place” will not always be a simple task in this contemporary environment.

B. Subsection 139(2)

Subsection 139(2) continues the preference for disclosure over privilege.224 Moreover, under subsection (2), section 139’s approach is much more problematic. Subsection (2) assumes that if a forum state declines to grant a privilege, another affiliated state, “which has the most significant relationship with the communication,” should yield its privilege.225 The Second Restatement’s solution admits the contested evidence “unless there is some special reason why the forum policy favoring admission should not be given effect.”226 This article identifies three problems with subsection 139(2): (1) the difficulty in identifying which state has the most significant relationship with the communication; (2) the murkiness of what constitutes a “special reason”; and (3) the fact that subsection 139(2) will likely disrupt a party’s reasonable expectation of privilege.

222. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139.
224. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(2).
225. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(2).
226. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(2).
As noted above, comment e declares that the state in which a communication took place will “usually be” the state with the “most significant relationship.” Comment e elaborates: “[T]he state where the communication took place... is the state where an oral interchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing.” If the linked activities of communicative expression and sensory reception take place in a single state, the reference to the “significant” jurisdiction is straightforward. But in the modern world, communications in various modes often originate in one sovereign and are received in another. Unclear is why the state in which one receives a written communication should usually be the state with the dominant relationship.

A point generally overlooked by courts and the Second Restatement is the importance of identifying the holder(s) of a privilege. Since privileges primarily benefit their holders—such as a client or patient—identifying the holder should be an important indication of which state has the most significant relationship to the communication. A holder’s affiliation with competing states is of paramount importance. For example, a holder, domiciled in State X, may have given or received a privileged communication in that state; or by analogy, a business with its principal place of business in State X may have generated or received statements upon which State X confers a privilege. Since privileges exist for the benefit of their holders, with whom the right to claim or waive the privilege vests, a holder’s relationship with the competing states should be a primary factor in determining which state has the most significant relationship to a communication. Arguably, a holder’s...

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227. Restatement (Second) of Conflict of Laws § 139 cmt. e.
228. Restatement (Second) of Conflict of Laws § 139 cmt. e. For example, a physician might examine a patient or a client might take financial statements he has prepared to his accountant for the latter to analyze.
230. See supra Part II.
231. See supra Part II.
relationship should carry greater weight than other relevant factors, such as the state in which one received a "privileged" communication.

When a privilege covers a professional relationship—such as attorney-client, accountant-client, source-reporter, physician-patient, or clergyman-penitent—courts should focus primarily on the privilege law of the state where the relationship was formed or, in some instances, centered because of frequent communicative activities, rather than focus on the state where one sent or received a particular communication. For example, if the communicants formed a professional relationship entitled to "privileged status" in a transient environment—such as where a doctor initially treats a patient while both are attending a conference in a distant state—the jurisdiction having the most significant relationship should be the state of the physician’s practice, where the patient continued receiving treatments. If there were no subsequent consultations, neither the state of the initial treatment nor the state of the patient’s residence is likely to have a strong claim to a dominant relationship. However, if the physician and patient live in the same state and, under the circumstances, reasonably relied on the privilege law of this state, a forum court should consider this state as the jurisdiction with the most significant relationship to the physician-patient exchange.

Courts have grappled to conform the "most significant relationship" test of the Second Restatement to the realities of present-day litigation. For example, in 3Com Corp. v. Diamond II Holdings, Inc., 3Com entered into a merger agreement with Diamond II Holdings (Newco), a company Bain Capital formed for the purpose of acquiring 3Com. The merger fell apart, and 3Com sued Newco to recover a termination fee prescribed by the merger agreement. 3Com claimed privilege over a number of communications with its attorneys and Goldman Sachs personnel. The communications took place in Massachusetts, but the merger agreement designated Delaware as the governing

233. Id.
234. Id. at *2.
235. Id. at *3.
law. Under Massachusetts law, 3Com’s disclosure of the communications to Goldman Sachs personnel destroyed any privilege; Delaware law, however, privileges communications made in the presence of investment bankers if the circumstances surrounding the communication show that the person making the disclosure intended it to remain confidential.

The court applied Delaware law even though “the commentary to the Restatement favor[ed] Newco’s position.” Newco’s position was that Massachusetts had the more significant relationship to the communication because employees in Massachusetts made or received the communications; the relationship between 3Com, the attorneys, and the investment bankers was centered in Massachusetts; 3Com was headquartered in Massachusetts; and the parties negotiated and finalized the merger agreement in Massachusetts. The court reasoned: “Delaware is the state with the most significant relationship to the challenged communications because it has considerable interest in vindicating the reasonable expectations of those parties that engage in a merger under Delaware law.” In the face of the realities of the modern-day business world, the court brushed aside the significance of where a communication took place, stating:

3Com’s Board of Directors met in Texas and California in addition to Massachusetts. 3Com claims that “[m]any other relevant Board of Directors and Board of Directors sub-committee meetings were telephonic; Board members participated from separate locations, including from outside Massachusetts[,]… and [e]lectronic mail communications were ‘received’ wherever 3Com personnel happened to be located at the time they read the communications, which again included locations outside of Massachusetts given personal residences and travel schedules.”

More significant to the court was the fact that:

236. Id.
237. 3Com Corp., 2010 WL 2280734, at *4.
238. Id. at *5-6
239. Id.
240. Id. at *6.
241. Id. at *5 n.28.
The parties selected Delaware law to govern the Merger Agreement, and chose Delaware as the forum for any disputes arising out of the Merger Agreement. Delaware has a considerable interest in ensuring that corporate entities seeking a business combination under its laws may expect consistent and predictable treatment when appearing before its Courts.\(^\text{242}\)

In many circumstances, a determination of the state with the most significant relationship to a communication will be difficult and unpredictable—just as it is under subsection 139(1). This article suggests reformulating section 139 to focus generally on the *locus of the relationship*—particularly, where professional relationships confer a privilege and, in addition, to consider places where the communicants sent and received a communication.

2. Difficulty in Defining a "Special Reason" to Preserve the Privilege

Even more troublesome is subsection 139(2)'s preference for consulting the forum's law when the state with the most significant relationship recognizes a privilege, but the forum state does not.\(^\text{243}\) Subsection 139(2) states that, in such a situation, the forum state's law should prevail absent a "special reason" justifying the recognition of the dominant state's privilege rule.\(^\text{244}\) The Second Restatement, in comment d, offers a laundry list of considerations bearing on whether a forum court might discover "a special reason" not to disclose the communication.\(^\text{245}\) Comment d offers a non-exclusive list of factors "the forum will consider in determining whether or not to admit the evidence."\(^\text{246}\) The relevant concerns are: (1) the number and nature of the contacts that the forum state has with the parties and the transaction involved; (2) the relative materiality of the evidence the parties seek to exclude; (3) the type of privilege involved; and (4) fairness to the parties.\(^\text{247}\)

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\(^{242}\) 3Com Corp., 2010 WL 2280734, at *5.
\(^{243}\) Restatement (Second) of Conflict of Laws § 139(2) (1971).
\(^{244}\) Restatement (Second) of Conflict of Laws § 139(2).
\(^{245}\) Restatement (Second) of Conflict of Laws § 139(2) cmt. d.
\(^{246}\) Restatement (Second) of Conflict of Laws § 139(2) cmt. d.
\(^{247}\) Restatement (Second) of Conflict of Laws § 139(2) cmt. d.
Comment d’s discussion of these factors shows, first, that they are flexible guidelines and, second, that no preference or hierarchy of importance exists among the factors.248 Clearly, however, this analysis does not end by establishing that the state with the most significant relationship favors privilege; judges must find something more for a “special reason” to sustain the privilege in a forum that does not recognize it.

Understandably, many courts applying the Second Restatement struggle with this “special reason” analysis because privilege law is an area in which predictability, party expectations, and reliance should be the dominant considerations. Accordingly, courts dance around the Second Restatement to reach just results by treating the “special reason” analysis as nothing more than a duplication of the “significant relationship” test. For example, in Harrisburg Authority v. CIT Capital USA, Inc., the District Court for the Middle District of Pennsylvania held: “[S]ince the instant dispute involves a New York litigant seeking to protect primarily New York-based communications, we believe that it is beyond question that the state of New York has an interest in applying its attorney-client privilege law to the dispute.”249 The District Court for the Northern District of Illinois, in Equity Residential v. Kendall Risk Management, Inc., engaged in a similar analysis.250 In Equity Residential, Connecticut residents made the communications in Connecticut; thus, the court deemed the same factors as establishing that Connecticut was the non-forum state with a “significant relationship” and that a “special reason” protected the privilege.251

The Equity Residential court noted another justification for finding the existence of a “special reason” to preserve the privilege: “[M]ost importantly, the individuals making these communications likely relied on the privilege.”252 Disruption of parties’ expectations of privilege has also

248. Restatement (Second) of Conflict of Laws § 139(2) cmt. d (“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 . . .”).
251. Id.
252. Id. at 566.
concerned other courts, which have pointed to this disruption as a "special reason" to preserve the privilege. For example, in *Compuware Corp. v. Moody's Investors Services, Inc.*, the District Court for the Eastern District of Michigan, under New York's Reporter's Privilege Statute, protected communications made to Moody's, a company that provides credit-ratings services. The court found:

New York is the center of the financial publishing industry, and the New York companies who gave these materials to Moody's, also a New York company, surely relied on the protections of New York law. A willingness to provide materials that contain sensitive financial information to a financial rating service is key to the functioning of the ratings system (and its reliability). Therefore, the companies justifiably relied on New York law in their transactions. To apply Michigan law now to subject those materials to disclosure would not be in the interests of justice or fairness.

The approaches taken in *Compuware Corp.*, *Equity Residential*, and *Harrisburg Authority* are problematic because they contradict the Second Restatement and, thus, create confusing law. The problem is that any litigant grappling with subsection 139(2) who was aware of the privilege at the time of a communication—such as a party advised by an attorney or other professional—could claim a "special reason" for keeping the privilege because the party had a significant relationship with the place where he or she made the communication and relied on the laws of that state. If these circumstances were sufficient to establish a "special relationship," it would mean that more often than not the privilege would hold under the Second Restatement. Although this application is a preferred and just result, it is not what the framers of the Second Restatement intended. By reading subsection 139(2) to reach results directly contrary to the plain language of the provision, courts are emphatically demonstrating that

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254. Id. at 133.
255. See *Equity Residential*, 246 F.R.D. at 564.
256. See id.
WHEN PRIVILEGE FAILS

section 139(2) is inconsistent with the needs of the parties and with the states whose laws offer privilege protection.

3. Subsection 139(2) is Likely to Disrupt a Party’s Reasonable Expectation of Privilege

Read in its most straightforward manner, subsection 139(2) favors disclosure of information that a party may have believed was privileged. Courts have not ignored the Second Restatement’s bias in favor of admitting “privileged” evidence. In Sterling Finance Management, L.P. v. UBS PaineWebber, Inc., for example, the issue before the Illinois Appellate Court was the admissibility of communications (contained in a compliance opinion) between a corporation and its New York counsel. The court conceded that the communications, made in New York, would fall within New York’s attorney-client privilege. Illinois, however, had a more restrictive corporate attorney-client privilege, and the communications fell outside its protective boundaries. Applying subsection 139(2), the court admitted the challenged evidence. Although the court conceded that New York was the state with the most significant relationship to the communications, it found that several features of subsection 139(2) supported applying Illinois’s narrower attorney-client privilege. After noting that comment d acknowledges a forum court’s “strong policy” in disclosing “all relevant facts that are not privileged under its own local law,” the court inquired whether some “special reason” would override this policy in the case before it. The court’s examination of the factors listed in comment d yielded a negative answer. Indeed, the judges added: “[W]e cannot foresee any situation where a special reason would [defeat this state’s broad disclosure policies]... in

257. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(2) (1971).
259. Id. at 903.
262. Id. at 903-05.
263. Id. at 904.
264. Id. at 905.
favor of another state's broader corporate attorney-client privilege." 265

Similarly, in *Kuhn & Kogan, Chtd. v. Jeffrey Mensh & Associates*, the District Court for the District of Columbia determined whether a Maryland accountant must produce documents over the plaintiff's objection that Maryland's accountant-client privilege protected the documents. 266 Although Maryland recognized this privilege, the District of Columbia did not. 267 The named plaintiff, Kuhn & Kogan, was a District of Columbia corporation. 268 However, at the time of the suit, Dr. Israel Kogan, a Maryland resident, was the sole corporate owner. 269 Both Dr. Kogan and the corporation employed the same Maryland accountant. 270 The court had little difficulty denying the corporation's claim of privilege; the district court judge correctly emphasized that the accountant-client privilege was created for the benefit of the client and that the client was a District of Columbia corporation. 271 The fact that the records were located in Maryland was of only marginal importance. 272

Nevertheless, as the court acknowledged, some of the records sought might have contained information provided by Dr. Kogan, in his individual capacity, to his personal accountant. 273 On this assumption, the individual client, a Maryland resident, passed the information to his accountant, who was located in the same state. Attempting to rule as it believed the local courts of the District of Columbia would rule, the court turned to the Second Restatement, which local courts of the District had embraced in other contexts. 274 Although Maryland clearly was the jurisdiction with the most significant relationship to the communications between the two Maryland residents,

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265. Id.
267. Id. at 54.
268. Id. at 55.
269. Id. at 53.
270. Id. at 55.
272. Id. at 54-55.
273. Id. at 53.
274. Id. at 55. Federal courts entertaining a diversity case, or any case governed by state law, apply the conflict-of-laws rules of the jurisdiction—here, the District of Columbia—in which they sit. See *supra* Part III.
the trial court concluded that D.C. law should apply. The court reasoned the Second Restatement’s policy of disclosure should prevail because a “special reason” did not exist to apply Maryland’s privilege law.

These results, embraced and directed by the Second Restatement, disrupt a party’s justifiable expectation of privilege protections. Beyond that, subsection 139(2) impedes attorneys’ ability to counsel their clients reliably about whether communications will remain protected in subsequent litigation. Subsection 139(2) also discourages the forthright communications necessary for the functions of many relationships—such as attorney-client, doctor-patient, and priest-penitent. Finally, this subsection replaces judgments of legislatures and courts proving privilege protections with the judgments of the Second Restatement’s drafters, which gives only the barest justification for preferring disclosure to privilege.

This article argues subsection 139(2) should establish that, when a jurisdiction with the most significant relationship to a communication confers a privilege, the forum should honor the privilege unless special reasons strongly justify applying the forum’s no-privilege rule. Such a commitment to honor the privilege is especially strong when the holder has reasonably relied on the existence of a privilege. Subsection 139(2) should presume this reliance exists when one of the communicants is a professional in the position to advise the other communicant of the privilege. Countervailing considerations should include factors such as a strong forum policy, coupled with the forum’s substantial, though not dominant, relationship to the holder and the communication in question; an absence of reasonable expectation or reliance by the communicating parties; and the nature, underlying policy, and degree of acceptance of the privilege. Another important concern should be whether the privilege was subject to judicial nullification.

276. Id.
277. See, e.g., VA. CODE ANN. § 8.01-399(B) (West 2013) (subjecting physician-patient privilege to judicial override if “necessary to the proper administration of justice”); Commonwealth v. Edwards, 370 S.E.2d 296, 301 (Va. 1988) (holding otherwise privileged attorney-client communications not subject to compelled disclosure for the purpose of administering justice).
in the state with the strongest relationship to the communication. Under the general scheme proposed by this article, applying a forum's "no-privilege" law would be an exceptional ruling; ordinarily, the privilege rule of the state with the most significant relationship to a communication will apply. A party seeking disclosure should have the burden of convincing the forum court to negate the putative privilege of the communication.  

VI. CONCLUSION

Perhaps the conflict-of-laws field will never have the stability, predictability, and fairness that have, to date, eluded courts and rule makers. Experience, thus far, teaches that the bright promise of any given conflicts methodology falls far short of fulfillment as new factual patterns test its boundaries and challenge its premises. A single-minded approach—in which one factor, such as territory or state interests, is the sole, decisive criterion—will not work satisfactorily across a broad array of cases. Furthermore, significant deficiencies undermine both the First Restatement's regime of supposedly intractable, hard-and-fast rules and the methodologies that have no rules, but only broad criteria employed in an approach to resolving conflicts—the "Better Rule" approach and Interest Analysis. Perhaps courts need specific rules articulating—in some order of preference—the broad principles that should govern a particular field. Indeed, the ALI could recast the Second Restatement within its present framework to

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278. This approach applies to non-forum depositions and subpoenas for written materials. These discovery proceedings are typically conducted near the home or business of the discoveree, and attorneys are usually present to give advice. Thus, in most cases, the state in which an attorney takes a deposition or issues a subpoena will be the state with the most significant relationship to the communication in question. See Restatement (Second) of Conflict of Laws § 139 reporter's note (1971). In any event, if the state with the most significant relationship to the communication does not have an applicable privilege, the communication sought should ordinarily be admissible in the forum state under subsection 139(1). Restatement (Second) of Conflicts of Laws § 139(1). However, a forum should generally honor an applicable privilege in the deposition or subpoena state if that state has the most significant relationship to the communication—especially if the holder has relied on the existence of a privilege. In the unusual case, where the deposition state is not the state with the most significant relationship to the communication, yet has an applicable privilege, the forum state should ordinarily defer to the privilege law of the state with the most significant relationship.
approximate this model. Specifically, the ALI could amend section 139 to secure most privileged communications.

However, section 139’s overriding principle is a preference for disclosure in pursuit of more accurate factfinding. The drafters implemented this principle with several tentative rules, such as the tentative selection of the state with the most significant relationship. But beneath this simple text lies a quicksand of uncertainties. More importantly, the “rule” contained in subsection 139(2) is the wrong rule, for it invites the disruption of privileged relationships and defeats the ability of counselors to provide assurances that courts or other agents of a sovereign state will not invade “privileged” communications. In essence, subsection 139(2) takes the law of privilege—founded on privacy, assurances, predictability, and the facilitation of candor—and turns it on its head.