Courts Wrestle with Privilege Choice of Law Issues

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Although most jurisdictions agree on the basic elements of the attorney-client privilege, some differences among the jurisdictions’ standards could be important. For instance, some states take a narrower view than others about client agents/consultants deemed inside privilege protection. Because of these differences, and for obvious other reasons, lawyers should know what privilege law a court will apply — which implicates the court’s choice of law rules.

Federal courts sitting in diversity should apply their host state’s choice of law approach. This can lead to some odd results. In Wellin v. Wellin, the court applied its host state South Carolina’s choice of law rules in selecting South Dakota privilege law — because the trust at issue "contains a choice of law provision specifying that South Dakota law applies." C.A. Nos. 2:13-CV-1831 & -3595-DCN, and 2:14-CV-4067-DCN, 2016 U.S. Dist. LEXIS 5364, at *13 (D.S.C. Jan. 8, 2016). Federal courts handling federal question cases apply federal common law to federal issues, but under Fed. R. Evid. 501 apply state law to "a claim or defense for which state law supplies the rule of decision." Taking it a step further, in Hunt v. Schauerhamer, Case No. 2:15-CV-1-TC-PMW, 2016 U.S. Dist. LEXIS 1744, at *6 (D. Utah Jan. 6, 2016), the court handling a § 1983 action applied Utah privilege law to the "discrete issue now before the court concerning . . . requiring application of the rules of state contract law." But in analyzing the scope of waiver, the court concluded that it "must consider Rule 502 of the Federal Rules of Evidence, which provides some federal limitations on the scope of the waiver, even if state privilege law controls." So the court applied Utah privilege law in analyzing waiver but returned to federal law to determine the waiver’s scope.

Many litigants and even some judges do not undertake this sort of technically proper choice of laws analysis, and instead apply generic privilege law. But in some situations, the laws and rules must be pieced together to be properly applied.