A Choice of Law Analysis of Evidentiary Privileges

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Years of work on the part of the Louisiana State Law Institute recently culminated in the legislature's enactment of the Louisiana Code of Evidence. The Law Institute chose to present the new code to the legislature in two parts. The first part, which is analogous to the existing Federal Rules of Evidence, contains rules of general applicability concerning judicial notice, relevancy, witnesses, opinions and expert testimony, hearsay, authentication, and the contents of documents. The Law Institute is currently working on the second part of the code, which will contain the rules of privilege, burdens of proof, and presumptions.

Meanwhile, as part of the continuing revision of the civil code, a separate committee of the Law Institute is drafting what will be the first comprehensive codification of conflict of laws rules in the United States. These articles are intended to replace the outmoded rules currently found in the civil code with new rules that reflect modern thinking in this field. The drafting process is nearing completion, and the conflicts articles should be presented to the legislature during the 1990 regular session.

The fields of evidence and conflicts rarely overlap. Courts and commentators traditionally considered evidence law "procedural" and thus called for the exclusive application of forum law. The same result
is reached under modern conflicts methodologies that call for analysis of relevant state policies.\textsuperscript{15} Sovereigns promulgate rules of admissibility of evidence primarily to facilitate proof of facts in trials in their own courts. Relevancy rules limit prejudice to parties and save time in the courtroom, hearsay rules ensure the reliability of statements by out-of-court declarants, and competency rules ensure that witnesses are capable of testifying truthfully. Insofar as these rules bear solely on the fact-finding process of the forum court, no other state has a legitimate interest in the application of its rules to the exclusion of those of the forum.

In the area of privilege, however, these two bodies of law intersect. Evidentiary privileges are unlike most other rules of evidence. While rules of evidence are generally designed to elicit probative facts, evidentiary privileges conceal these facts in order to protect interests the state deems more important.\textsuperscript{16} Although a state’s interest in eliciting probative facts does not call for extraterritorial application of the general rules of admissibility or exclusion of evidence, the protection of confidences the state finds important may require such extraterritorial effect. Likewise, a forum state's recognition or rejection of the privilege law of another state may unduly limit or expand the legitimate scope of its application.

The contemporaneous codification of these two major areas of Louisiana law presents a unique opportunity to address the proper scope of evidentiary privileges, because the legislature is currently making the fundamental policy decisions that must be considered in resolving this issue. The policies behind the various privileges can be addressed before the ephemeral legislative intent vanishes in the mists of time. These simultaneous efforts also present a more basic question: Should the problem be resolved by statute?\textsuperscript{17}

The goal of this comment is to provide an analytical framework for Louisiana lawyers, judges, and legislators who must confront this problem. In the first section the background of the issue will be discussed with emphasis on where the problem arises, constitutional implications, and modern theories underlying choice of law. In the second section evidentiary privileges\textsuperscript{18} will be analyzed from the perspective of modern

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\item[15.] Restatement (Second) of Conflict of Laws § 138 (1971) [hereinafter Restatement (Second)]; E. Scoles & P. Hay, Conflict of Laws § 12.10 (1982).
\item[16.] C. McCormick, McCormick on Evidence § 72, at 170-71 (E. Cleary 3d ed. 1984).
\item[17.] The American Law Institute chose to include a privilege rule in the Second Conflicts Restatement. See Restatement (Second), supra note 15, § 139. For a discussion of the operation of this section, see infra text accompanying notes 92-96.
\item[18.] This paper limits its discussion to those privileges termed “confidential communication” privileges; that is, those arising from communications between persons. The privilege against self-incrimination is not discussed. This privilege is compelled by the
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conflict of laws doctrine. This involves identification of both the policies underlying the various privileges and the various states that are potentially interested. With these states and their interests in mind, the third section will consider how the issue should ultimately be resolved and will compare solutions offered by the Restatement (Second) of Conflict of Laws, an analogous article of the Louisiana conflicts draft, and the proposed general article of the Louisiana conflicts draft. Finally, the advantages and disadvantages of a statutory rule will be discussed, and a jurisprudential approach will be recommended.

THE PROBLEM IN CONTEXT

Where the Problem Arises

The simplest situation in which a state court must choose between two states' laws of privilege arises when testimony is sought in the forum state regarding a communication that occurred in another state.19 In this situation, the witness may claim that the communication is privileged in the state where it occurred, even though it would be subject to disclosure if made in the forum state. The opposite situation may also arise: a litigant may seek information that would be privileged in the forum state, but is not privileged under the law of the state where the communication was made. As discussed below,20 the problem is not confined to simply the forum state and the place of communication. Other states may also be legitimately interested in the confidentiality or disclosure of the communication. Other potentially interested states include the domiciles of the parties to the communication, the state where the parties' relationship is centered, and the state whose substantive law applies to the case.

Aside from testimony at trial, witnesses or litigants may invoke foreign states' evidentiary privileges in two situations. The first of these is the discovery deposition taken in a state other than that of the trial.21 In this case, in addition to those states listed above, the state of the

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20. See infra text accompanying notes 82-88 for a discussion of the states potentially interested in the resolution of the privilege issue.
deposition may have an interest in the application of its law.\textsuperscript{22} The second non-trial context for the assertion of a foreign privilege arises when a subpoena duces tecum issues ordering the production of documents either made or stored in another state. Here again, a number of states other than the forum are potentially interested.\textsuperscript{23}

The problem of conflicting laws of evidentiary privileges can arise in both civil and criminal cases. Conflicts problems usually do not arise in criminal cases, because the choice of law is determined by jurisdictional principles.\textsuperscript{24} Nevertheless, it is easy to posit a situation in which a witness in a criminal case could invoke another state’s privilege. While the fact that the case involves the application of the forum’s criminal law may be a factor in favor of the application of forum law, the choice must still be made.\textsuperscript{25}

The issue probably arises most frequently in federal courts sitting in diversity. Rule 501 of the Federal Rules of Evidence provides in part, “[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.”\textsuperscript{26} This rule’s glaring omission is its failure to identify which state’s law applies to the claim of privilege. While the Supreme Court has yet to address this issue, the lower federal courts have applied the reasoning of \textit{Klaxon Co. v. Stentor Electric Manufacturing Co.}\textsuperscript{27} and looked to the conflicts rules of the state in which the federal court sits.\textsuperscript{28} Under

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  \item \textsuperscript{22} Weinstein, Recognition in the United States of the Privileges of Another Jurisdiction, 56 Colum. L. Rev. 535, 536 (1956).
  \item \textsuperscript{23} It is worth noting at this point that the author has found no reported Louisiana decision confronting this issue. It undoubtedly arises in trial courts, however, and the complete lack of guidance in Louisiana law regarding the proper resolution of the issue probably prevents it from being assigned as error on appeal. It has arisen on appeal in a number of other states, see supra cases cited in notes 19 & 21, and it is of constant concern to federal courts in diversity cases under Fed. R. Evid. 501. See infra notes 26-29 and accompanying text.
  \item \textsuperscript{24} R. Cramton, D. Currie & H. Kay, Conflict of Laws, Cases—Comments—Questions 50 (4th ed. 1987).
  \item \textsuperscript{25} In the few reported criminal cases where the question has arisen, courts have uniformly refused to recognize foreign privileges. See Bussard v. State, 295 Ark. 72, 747 S.W.2d 71 (1988); People v. Carter, 34 Cal. App. 3d 748, 110 Cal. Rptr. 324 (1973).
  \item \textsuperscript{26} Fed. R. Evid. 501.
  \item \textsuperscript{27} 313 U.S. 487, 61 S. Ct. 1020 (1941).
  \item \textsuperscript{28} See, e.g., Samuelson v. Susen, 576 F.2d 546 (3d Cir. 1978); Super Tire Eng’g Co. v. Bandag Inc., 562 F. Supp. 439 (E.D. Pa. 1983). This approach follows that of earlier cases that had characterized privilege law as “substantive” for the purposes of the test of Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938). These courts applied the conflicts law of the forum state in accordance with \textit{Klaxon} to determine the applicable privilege law. See, e.g., Hyde Constr. Co. v. Koehring Co., 455 F.2d 337 (5th Cir. 1972).
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this analysis, a Louisiana conflicts rule assumes added importance; it would delineate the scope of privileges not only in Louisiana courts, but in federal courts sitting in diversity cases in Louisiana.29

The Constitutional Limits on Choice of Law

The federal constitution limits a state court's freedom in choosing the law to apply to a particular issue. In the past, the United States Supreme Court has analyzed choice of law issues under both the full faith and credit clause30 and the fourteenth amendment's due process clause.31 In its more recent decisions, the Court has recognized the applicability of both provisions while combining the two separate inquiries into a single test. In Allstate Insurance Co. v. Hague,32 a plurality of the Court stated:

In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation. In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.

The lesson from [the cases] is that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.33

The Court most recently addressed the issue in Sun Oil Co. v. Wortman.34 In that case, the Court upheld the application of the forum

29. This approach can, of course, lead to anomalous results when a reference to the conflicts law of a particular state determines the rights of a person who has no relationship whatsoever with that state. For an argument that the federal courts should instead conduct a "center of gravity" analysis as a matter of federal law, see Kaminsky, State Evidentiary Privileges in Federal Civil Litigation, 43 Fordham L. Rev. 923, 935-37 (1975).
33. Id. at 308, 312-13, 101 S. Ct. at 637-38, 640 (plurality opinion of Brennan, J.) (footnotes and citations omitted).
state's statute of limitations to claims where the forum's only connection with the parties was by virtue of its status as forum for a class action suit. The majority noted that statutes of limitations were historically regarded as procedural rather than substantive, and thus reasoned that neither the framers of the full faith and credit clause nor those of the fourteenth amendment intended to limit the power of a state to apply its own statute of limitations.  

It is not clear whether Sun Oil has changed the law by substituting a new "original intent" test in place of the "minimum significant contacts" analysis set forth in Hague. While it is possible that the Court will ultimately limit Sun Oil to statutes of limitations, it may be highly important in the present context. Like statutes of limitations, the law of privileges has traditionally been regarded as a part of the law of evidence, and thus procedural in nature. Applying the original intent analysis, any application of the forum's law of privileges could be justified as conforming to the practice in the drafters' days. Even under the Hague test, however, most choices of law will be constitutional. As will be shown in the next section, modern choice of law methodologies generally attempt to apply the law of the state with the most significant interest in the particular issue. If this attempt is successful, then by definition the "minimum significant contacts" test is met.

Modern Choice of Law Methodology

Proponents of modern choice of law theories generally call for the examination of governmental interests in order to determine which law applies to a particular issue in a particular litigation context. This requires the court to determine the policies behind a particular rule of law. Once these policies have been ascertained, the court then examines each state's relationship to the issue in light of its policy objectives. While the commentators fall into bitter disagreement over what should be done next, the court must ultimately make a choice between the potentially applicable rules.

The Louisiana conflicts draft steers a middle course between the various competing approaches. Rather than becoming embroiled in academic infighting, the drafters are attempting to establish a fair and workable set of rules based on the general approach of governmental policy analysis. Thus, to construct a rational choice of law analysis

35. Id. at 2123-26.  
36. See, e.g., Metropolitan Life Ins. Co. v. McSwain, 149 Miss. 455, 115 So. 555, 557 (1928).  
37. For detailed descriptions of the major modern approaches to conflicts problems, see E. Scoles & P. Hay, supra note 15, §§ 2.6-2.17.  
that will complement the general conflicts articles, it is necessary to identify both the policies that underlie the law of evidentiary privileges and the states that are potentially interested in the application of their law.

THE BASES OF A CHOICE OF LAW ANALYSIS: POLICIES AND PLACES

A state generally provides an evidentiary privilege to protect interests and relationships that are regarded as more important than the availability of evidence in judicial proceedings. This general policy, however, does not fully account for all evidentiary privileges. Force and Triche have identified seven major confidential communication privileges in Louisiana. These are the attorney-client, husband-wife, physician-patient, priest-penitent, informant, journalist, and psychologist-patient privileges. Although the precise rationales for these privileges are rarely expressed within the statutes themselves, the variety of relationships protected suggests that a number of discrete public policies are at stake in the application or denial of specific privileges. Similarly, the multitude of possible contacts with different states requires a qualitative examination of the possible contacts to determine which states have policy interests at stake in these cases.

40. Force & Triche, supra note 9, at 734. In addition to these, there are a number of other statutes granting various degrees of confidentiality to specific communications. See, e.g., La. R.S. 37:87 (1989) (communications to accountants); La. R.S. 23:1660 (1985) (employment records); La. R.S. 47:1508 (Supp. 1989) (tax records). The major areas of privilege are sufficient for this illustration; practically speaking, other privileges implement similar policies and can thus be analogized to one or more of the major privileges.
42. La. R.S. 15:461 (1981) (criminal cases). This statute establishes two separate privileges: the privilege reserved to the defendant spouse as to private communications, and the privilege that may be invoked by one called to testify against his spouse. Force & Triche, supra note 9, at 735-36. Louisiana probably does not have a spousal privilege for civil cases, see Force & Triche, supra note 9, at 734.
49. The Restatement (Second), and most commentators, refer to the potential applicability of only two states: the forum state and the state with the "most significant
of particular policies, careful analysis is required to determine the public's precise interest in confidentiality. Obviously, this greatly complicates any attempt to analyze evidentiary privileges as a class; however, it is necessary to localize the possible interests at stake in disclosure. This section will examine these individual policies, the privileges to which they apply, and the states whose interests are potentially implicated.

Protection of the Communication

Perhaps the most often cited policy behind confidential communication privileges is the protection of communications thought desirable by society. This is a part of the "utilitarian" view of privileges that was strongly advocated by Dean Wigmore. Under this theory, a state determines that the confidentiality of a particular type of communication is more important than the full ascertainment of truth in litigation.

This policy underlies all of the confidential communication privileges to some extent, but its importance varies from privilege to privilege. For example, the public's strong interest in a free press and the availability of information seems to be the exclusive underpinning of the journalist privilege. The focus of the public interest is on the communication itself; the public is interested in the relationship between a journalist and his sources only to the extent communication occurs between them. A similar situation exists with the informer privilege. Again, society is not interested in the personal relationship between the policeman and his source of information. Society's only interest is in the actual transmission of information.
On the other hand, protection of the communication is of only marginal importance with other privileges. Some commentators have asserted that the spousal privilege is not necessary for open communication between a husband and a wife. They reason that spouses will choose to speak freely or not without reference to any immunity from testifying. Thus this privilege must be primarily justified on other grounds. Similarly, protection of the communication has only a marginal bearing on the priest-penitent privilege. A constitutionally secular society has little interest in an individual's religious decision or obligation to confess his sins.

The remaining privileges fall in various places between these two extremes. Given that protection of the communication is a policy underlying most, if not all, confidential communication privileges, what states are interested in protecting the communication? The most common answer to this question is the state where the communication takes place. This is an acceptable conclusion in most cases, because that state generally experiences most closely the effects of communications within its borders. An informer, for example, generally deals with local police, who then act upon the information in the immediate area. It is easy, however, to posit a situation in which the situs of the communication has no interest whatsoever in the communication or its effects. In the instance of the journalist who visits with his source while on vacation in Florida and receives information regarding political corruption in their home state, the situs of the communication, Florida, experiences no effect from the communication beyond a marginal increase in the tourist trade. A more common problem is the interstate telephone call. Here, it is impossible to determine where the communication is made. Is it made in the state of the speaker, the state of the listener, or somewhere between the two?

When protection of a communication is an important policy underlying a privilege, the state that most closely experiences the favorable effects of the communication is the state that is most interested in its protection. Unfortunately, no hard and fast rule exists to determine exactly which state this is in a given situation. A court may, however, consider a fairly limited number of alternatives. These include the place

55. Id. § 86; Sterk, supra note 18, at 470-71.
56. C. McCormick, supra note 16, § 76.2.
57. See, e.g., Reese & Leiwant, supra note 48, at 92-93. See also Restatement (Second): The state which has the most significant relationship with a communication will usually be the state where a communication took place, which, as used in the rule of this Section, 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.
Restatement (Second), supra note 15, § 139 comment (c).
of the communication, the domiciles of the parties and the state where
the relationship is centered. From these alternatives, a court can generally
find the state with the most significant interest in the communication.

Protection of the Relationship

A public policy of protecting communications is commonly associated
with a policy of protecting certain favored relationships. Dean Wig-
more's utilitarian analysis of evidentiary privileges combined these two
policies, emphasizing the symbiotic connection between the communi-
cation and the relationship. Nevertheless, the two policies should be
considered analytically distinct. When the state protects the confiden-
tiality of a communication to facilitate the transmission of the substance
of the communication, it seeks to protect the communication. When
the state protects the confidentiality of a communication to facilitate
the maintenance of a socially desirable human relationship, it seeks to
protect the relationship.

The best examples of privileges that protect relationships are the
two spousal privileges. When the state determines that a wife need not
testify against her husband, the state is not only not seeking to encourage
the communication of incriminating evidence, it is forgoing its own
interest in discovering the substance of the communication. The purpose
is to provide an incremental degree of protection to the institution of
marriage. This is the reason that many states grant the defendant spouse
the opportunity to invoke his privilege against the spouse who wishes
to testify. The state is releasing substantively valuable evidence because
it finds distasteful the exploitation of a relationship the state encourages.

This policy also explains, at least partially, the attorney-client priv-
ilege. While the state is interested in the substance of the communications
between the attorney and his client—that is, the state wants the client
to be able to tell the attorney the truth—the state is also interested in
encouraging the relationship itself. This is a function of the adversary
system. Because the attorney is the client's advocate, the state desires
the parties to maintain a relationship that allows the highest possible
quality of representation. Quality representation of both sides in an
adversarial proceeding will then result in the courts doing justice in each
particular case. Thus the state provides the privilege to protect the
relationship of trust between the client and his attorney.

Other privileged relationships are encouraged primarily for the sub-
stance of the communication. The state has little interest in the personal
relations between a journalist and his source, or between a policeman

58. See supra authorities cited in note 50.
59. § Wigmore, supra note 52, § 2285.
60. C. McCormick, supra note 16, § 86; Louisell, supra note 50, at 111.
61. Sterk, supra note 18, at 468.
and his informant. These relationships are neither desirable nor undesirable, but they produce communications that advance the public good. Thus they are protected for the sake of protecting the useful communications.

When a privilege protects a relationship, the state most interested in the application of its law is the state where the relationship's perceived beneficial effects are felt. The problem here, as with contracts, is one of localization, that is, identifying the connecting factors most important in determining the territorial situs of the relationship. In the case of the spousal privilege, this would be the matrimonial domicile if one were ascertainable. Problems arise with interstate relationships. For example, how does a court localize the relationship between a Louisiana resident and his Texas lawyer? The answer may depend upon the scope of the Texas lawyer's representation. Furthermore, it is conceivable that the forum state, by virtue of its status as the forum, would be the state most affected by a specific relationship between a nonresident attorney and his nonresident client. Regardless, states with potential connections to the relationship include the domiciles of the parties, the situs of the communication, and the situs of the center of the relationship.

Protection of Privacy

A third justification for confidential communication privileges is the protection of privacy. Advocates of this rationale argue that some relationships, by their very nature, should be sacrosanct and free from judicial interference. While this argument is built around relationships, the policy asserted is distinguishable from that of protecting relationships. The protection of relationships is justified by the objective social good achieved by maintenance of these relationships. The protection of privacy, on the other hand, is more subjective. Rather than considering the beneficial aspects for society as a whole, the state, in granting a privacy-based privilege, focuses on the benefit of the relationship and its confidentiality to the individuals involved.

In contrast to the utilitarian analyses, the privacy-based rationale has arisen relatively recently. Although one commentator in 1956 spoke of "the right to be left by the state unmolested in certain human relations," the privacy argument did not gain currency until the late 1960s and early 1970s. Perhaps the most important factor in its rise to prominence was the recognition of a constitutional right to privacy by

63. C. McCormick, supra note 16, § 72; Reese & Leiwant, supra note 48, at 88; Sterk, supra note 18, at 467-68; Louisell, supra note 50, at 110-11.
64. Louisell, supra note 50, at 110.
the United States Supreme Court. Since then, some state courts, including the Louisiana Supreme Court, have intimated that certain privileges may be constitutionally compelled.

Protection of privacy is often cited as the policy behind the spousal privileges, but it seems to primarily support the “professional” privileges, such as physician-patient, psychologist-patient, and priest-penitent. These professional relationships' effects on society at large are tenuous at best; the only benefit received by society is that of having healthy citizens. In contrast, the benefit to the individual is much more important. These relationships often involve the communication of potentially embarrassing information. Thus, in order to avoid intruding upon activity that is beneficial to the individual involved, the state grants a degree of confidentiality to the relationship.

On the other hand, some privileges do not protect any significant privacy interests. The journalist’s privilege promotes publicity, the antithesis of privacy. While a source may desire anonymity, this desire is arguably provoked by more practical considerations than the right to be left alone. Similarly, the informant does not seek confidentiality as protection from the encroachment of society; he seeks it as protection from the encroachment of specific individuals.

Because privileges based upon privacy protect individuals rather than relationships, the domicile or residence of the holder of the privilege is the state primarily interested. The doctor, for instance, would not be embarrassed by testifying to his diagnosis; his privacy is not at stake. Therefore, the domicile of the other party to the protected relationship is immaterial to this analysis, as are the places of the communication and the center of the relationship. Another state with a potential interest, however, is the state where the evidence will be disclosed, whether this is the forum state, the state where the deposition is taken, or the state where confidential documents are produced. Because the testimony will be heard in that state, that state will be the situs of the intrusion upon the privilege holder's privacy.

Protection of the Communicatee

The policies discussed above all protect, either directly or indirectly, the person making the confidential communication. For instance, al-

67. C. McCormick, supra note 16, § 72; Reese & Leiwant, supra note 48, at 88-89; Sterk, supra note 18, at 470-73.
though the informant privilege is designed to elicit useful information from the informant, it does so by protecting the informant. Similarly, the client in an attorney-client relationship is protected by the policies that encourage the relationship to ensure procedural fairness.

One aspect of the confidential communication privileges that is often overlooked, however, is the policy of protecting the person to whom the information is communicated. This is accomplished in several ways. First, in contravention of the principle that every man owes his evidence, the confidential communicatee is absolved of the responsibility of testifying. This is a side effect of the exclusion of the evidence, but it might also reflect the view that “it is unseemly for a man to divulge what another was compelled to tell him by the nature of their relationship.”

This attitude is partially a reformulation of the original theory of the attorney-client privilege as being necessitated by the “oath and honor” of the attorney.

A similar situation exists with regards to the journalist’s privilege. Because this privilege springs from the desirability of a free press, the reporter is freed from being required to divulge his sources. This not only frees the reporter from the courtroom, it enhances his ability to gather news by allowing him to pledge confidentiality.

Another way in which privileges protect the communicatee is somewhat less noble. A privilege against testifying carries a certain professional cachet, and thus organized groups that wish to add to their occupational prestige routinely seek to secure a privilege from the legislature. This has led to a plethora of statutory privileges that have the primary purpose of aggrandizing their holders.

To the extent a privilege protects the holder of the confidence, rather than the holder of the privilege, the primary state with an interest in enforcing that protection would be the state of the communicatee’s domicile. Another potentially interested state is the state of disclosure, because the communicatee will at least be present in that state at the time of disclosure. The place of communication is irrelevant, as is the place of the center of the parties’ relationship, because these interests are not implicated. Thus, if a purpose is the protection of the communicatee, the law of his domicile must be considered.

**Prevention of Perjury**

Another possible policy behind the granting of a confidential communication privilege is the prevention of perjury. This is an accepted

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68. Weinstein, supra note 22, at 536. See also Dunham, supra note 49, at 44 (naming “the distaste courts have for the forced disclosure of information” as a potential policy basis for the spousal privilege).
69. C. McCormick, supra note 16, § 87.
70. Id. § 76.2, at 185.
71. Id. § 75.
justification of privileges in continental European systems. The Europeans reason that if confidentiality is important to a witness, he may perjure himself rather than reveal the truth of the communication. In light of common law procedure's reliance upon cross examination to reveal the truth, some have questioned the applicability of this policy. Nevertheless, this policy seems to be at least partially behind a number of privileges, particularly the spousal witness's privilege. If a court were to find this applicable, the only interested state would be that where the testimony was being taken, either the state of trial or the state of the deposition.

Pursuit of Truth in Litigation

The final policy applicable to evidentiary privileges is the policy advanced by a refusal to grant a privilege. By not granting a privilege, a state makes a policy decision favoring the more complete ascertainment of facts in litigation over claims to confidentiality. The only state with a true interest in not granting a privilege is the state that must find the facts: the forum state. Any other states with contacts to the litigation that deny privileges are, at best, disinterested, because the integrity of their courts' fact-finding processes are not implicated.

Considerations of a Rational Choice of Law System

In addition to considering the policies applicable to the issue of evidentiary privileges, it is also necessary to examine the policies behind a rational choice of law system. These systemic considerations focus on the choice of law approach's effects on the workings of the federal system. For instance, comity might require a court to choose the law of another state, even though its own state's law is potentially applicable, out of deference to the strongly held policies of the sister state. As one commentator has argued, an unprincipled refusal to recognize other states' privileges "fetters the operation of our multi-state system of government" and "fosters a vindictive reciprocity."

There are two factors that must be considered in this context. The first is any possible interest on the part of the state whose law is applicable to the merits of the action. There is an intuitive appeal to

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73. Reese & Leiwant, supra note 48, at 90.
74. C. McCormick, supra note 16, §§ 72, 73.2.
75. Seidelson, The Federal Rules of Evidence: Rule 501, Klaxon and the Constitution, 5 Hofstra L. Rev. 21, 51 (1976). In the nineteenth century, Justice Story theorized that the sole reason for applying another state's law was comity. See E. Scoles & P. Hay, supra note 15, § 2.4.
76. Dunham, supra note 49, at 47.
this approach, especially since it would avoid depeçage, the mixture of applicable laws. A close examination, however, shows that the fact that a state's substantive law applies, without more, does not justify the application of its law to the collateral issue of privilege. A privilege is invoked by a witness; he need not be a party. Thus, it is entirely possible that the use of the applicable substantive law would subject the witness to the law of a state he had never even visited. Unless there is some other connection between the witness, the communication, the protected relationship, or the forum, the fact that a particular state's law applies to the merits is irrelevant.

The second factor, however, is more important. In considering the law to apply to the claim of privilege, a court must determine whether the parties to the communication legitimately relied upon any particular state's law. Parties can be presumed to know of at least the major privileges, such as attorney-client, husband-wife, and physician-patient. To the extent that privilege rules affect behavior, the parties could have relied upon an expectation of confidentiality. Denying effect to that expectation on a post hoc basis would be unjust. One respected commentator has called reasonable reliance "the only feasible test" for recognition of privileges. Further, where one or more of the parties is a citizen of the state whose law grants the privilege, that party has a political stake in the application of a law that he at least marginally approved through the democratic process.

CHOOSING THE LAW

Isolating the Interested States

One of the major problems of choosing the law to be applied is determining which of a number of interested states is the one most interested in the resolution of the issue. While many conflicts problems offer relatively straight-forward choices between two states, the number of potentially interested states in this context is equal to the number of potentially significant contacts.

As a preliminary matter, it is safe to assume that the forum state is always at least residually interested in the outcome of the issue. Even when its primary interest is in the protection of its citizens, and it has no citizens to protect, it still has a residual interest in ascertaining the

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77. Reese & Leiwant, supra note 48, at 91-92.
79. Dunham, supra note 49, at 47.
80. A. Ehrenzweig, supra note 78, § 125, at 356.
81. Seidelson, supra note 75, at 34.
truth in litigation in its courts. Thus the forum may always be considered an interested state.

The problem is the ascertainment of the other most interested state. The Restatement (Second), and most of the commentators, refer to the state with "the most significant relationship with the communication." An immediate problem with this construction is its reference to the communication. As discussed above, in many instances the communication itself is irrelevant to the policy issues at stake. Thus a broader scope is required.

At the same time, however, a narrower scope is needed. Assuming that the state with the most significant relationship to the communication is the other most interested state, a second problem is the determination of this state. The comments to section 139 of the Restatement (Second) offer little guidance beyond the suggestion that this state will generally be the state where the communication occurs. This, of course, is often not the case. Presumably, a court applying the Restatement approach would revert to the general principles found in section 6. The problem

82. See Restatement (Second), supra note 15, § 139; E. Scoles & P. Hay, supra note 15, § 12.12; Reese & Leiwant, supra note 48, at 91-92; Sterk, supra note 18, at 475; Dunham, supra note 49, at 36-37.
83. See supra text accompanying notes 55-56.
84. Restatement (Second), supra note 15, § 139 comment (e). Section 139, the section on testimonial privileges, provides:
(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.
85. See supra text accompanying note 57.
86. Section 6 provides:
(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Restatement (Second), supra note 15, § 6.
here is that, unlike the specific provisions governing torts and contracts, for example, section 139 provides no listing of significant contacts to be considered in applying the general principles of section 6. Thus each court facing the issue must undertake a de novo examination of the relevant policies and the resulting significant contacts.

The selection of the other most interested state cannot be made without looking to the policies underlying the specific privilege at issue. Because these policies vary, contacts that are significant can be compiled. These potential contacts include the place where the communication has its greatest effect, the place where the relationship has its greatest effect, the domicile of the parties, and the place where the evidence is disclosed, if different from the forum. The court can then evaluate these contacts qualitatively, in light of the underlying policies, rather than simply counting contacts.

**Analyzing the Competing Interests**

Under traditional conflicts analysis, courts distinguished rules of substance, which were controlled by the *lex loci*, from rules of procedure, which were governed by the *lex fori*. While this rule has been discredited, the categories are still useful descriptions for issues that justify looking outside for the applicable rule, as opposed to those that are exclusively governed by the *lex fori*.

The substance/procedure distinction was suppressed largely because of mischaracterization; courts had a tendency to apply their own law

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87. After referring to the state with the most significant relationship under § 6, the torts section provides:

Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second), supra note 15, § 145(2).

88. The contracts section refers to the state with the most significant relationship to the transaction under § 6, and provides:

In the absence of an effective choice of law by the parties (see § 187) the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second), supra note 15, § 188(2).

89. E. Scoles & P. Hay, supra note 15, § 3.8.
by miscategorizing an issue as procedural. The characterization of evidentiary privileges presents a similar opportunity to misconstrue the function of the rule. This is because evidentiary privileges have both substantive and procedural aspects. A state's granting of a privilege involves a substantive policy decision. The state decides that the protection of a particular class of relationships, communications, or individuals is sufficiently important to warrant a certain sacrifice of judicial efficiency and certainty. On the other hand, a state's refusal to grant a privilege elevates procedural policies over the substantive protective policies. The state in this instance decides that it prefers accuracy and expediency in its judicial processes to the increased social protections afforded by the privilege.

This distinction is important because it highlights a major difficulty in choosing the applicable law of privilege. Without deciding which other state's law could apply, there are two basic situations to consider. In the first situation, Case A, the forum state $F$ provides no privilege while $I$, another interested state, does grant a privilege. In the second situation, Case B, $F$ provides a privilege while $I$ does not.

An examination of Case A reveals that because $F$ has provided no privilege, it has made a procedural choice, in which $F$ as the forum is strongly interested. On the other hand, the interested state $I$, by providing a privilege, has made a substantive choice in which it is strongly interested. Thus, because the policy objectives of both $F$ and $I$ are affected by the decision, this is a classic "true conflict."90

Case B, however, is a different story. By providing a privilege, $F$ has substantively decided to forgo its court's factfinding abilities. If, however, it is unconnected to the relationship, communication, or individual to be protected, then it obviously has no interest in providing that protection. By denying a privilege, $I$ has decided that factfinding in its courts is more important than the incremental protection provided by a privilege. Where $F$'s courts are not involved, however, this procedural policy is inoperative. Since neither state's policy choice would be furthered by application of its law, this is the "unprovided-for case."91

The privilege issue thus presents the two problems that governmental interest analysis finds most intractable. In Case A, a choice must be made between two potentially applicable rules, each of which serves an interested state's legitimate policy objective. In contrast, Case B requires a choice between two rules that will not further either state's policy choices. To illustrate possible resolutions of this issue, the next sections

90. Id. § 2.6.

91. The "unprovided-for case" in interest analysis is that in which neither of two competing states has an interest in the application of its law. See R. Cramton, D. Currie & H. Kay, supra note 24, at 282-87.
will consider the solutions offered by the Restatement (Second) and by
the Louisiana conflicts draft's treatment of the analogous situation of
prescription.

Restatement (Second) Section 139

The Restatement creates a rule of presumptive admissibility.92 In
Case A, in which the forum denies the privilege while the other state
recognizes it, section 139 provides that the evidence shall be admissible
"unless there is some special reason why the forum policy favoring
admission should not be given effect."93 The comments indicate that
the court, in deciding whether to recognize the foreign privilege, may
consider the forum's contacts with the parties and transaction, the relative
materiality of the evidence, the privilege involved, and fairness to the
parties.94

In Case B, where the forum recognizes the privilege but the other
state does not, the section provides that the evidence is admissible "unless
the admission of such evidence would be contrary to the strong public
policy of the forum."95 The comments cite the general principle that
the forum should not exclude evidence not protected by the law of the
most interested states. Examples of situations where the evidence would
be excluded are those in which the forum has a substantial relationship
to the parties and the transaction, and those cases which involve privileges
representing a strong policy of the forum.96

The problem with these rules is the showing required to invoke the
privilege. Under either rule, the party seeking the protection of the
privilege must overcome a presumption against its application by making
a strong showing of the policy favoring exclusion. While this is under-
standable in Case A, in which the party would have to overcome the
interest of the forum state in applying its own law, it is a questionable
rule in Case B, where the policy of the forum favors the privilege
invoked over its residual interest in ascertaining the truth.

The Louisiana Conflicts Draft Article on Prescription

Prescription, like privilege, has both substantive and procedural as-
pects. Generally speaking, shorter prescriptive periods represent a pro-
cedural policy of avoiding stale claims and crowded dockets, while longer
prescriptive periods represent a substantive policy of favoring redress of

92. See supra note 84 for the text of § 139.
93. Restatement (Second), supra note 15, § 139(2).
94. Id. comment (d).
95. Id. § 139(1).
96. Id. comment (c).
injuries. Thus, in drafting the article on prescription, the Louisiana State Law Institute has faced issues and interests similar to those asserted here.

One major dissimilarity between prescription and privileges is prescription’s relationship to the law governing the merits of the action, the lex causae. Thus the draft article’s initial determination that forum prescription law applies whenever forum law applies to the merits has no counterpart here. The second paragraph’s treatment of the issue when another state’s law applies, however, does offer guidance in this area.

The second paragraph makes a major distinction between those actions barred by prescription in this state and those not barred. These cases are analogous to Case A and Case B, respectively, in that the former situations represent a procedural policy while the latter implement a substantive policy of the forum. When the action is barred by local law, it will be dismissed unless it is not barred by the lex causae and maintenance of the action is warranted by compelling considerations of remedial justice. When the action is not barred by local law, it will be maintained unless it is barred by the lex causae and maintenance is not warranted by either the relationship of this state to the parties or compelling considerations of remedial justice.

Thus the draft prescription article solves the problem of mixed substantive and procedural policies by creating a presumption in favor of the application of local law. This is justified because in both instances

98. It should be noted that prescription does not offer the multitude of potential policies at stake in privileges, nor does it present the number of potentially interested states.
99. The proposed article provides:

   When the substantive law of this state would be applicable to the merits of an action brought in this state, the prescription and peremption law of this state applies.

   When the substantive law of another state would be applicable to the merits of an action brought in this state, the prescription and peremption law of this state applies, except as specified below:

   (a) If the action is barred by prescription or peremption under the law of this state, the action shall be dismissed unless: (1) the action would not be barred in the state whose law would be applicable to the merits of the action; and (2) maintenance of the action in this state is warranted by compelling considerations of remedial justice.

   (b) If the action is not barred by prescription or peremption under the law of this state, the action shall be maintained, unless: (1) the action would be barred in the state whose law is applicable to the merits of the action; and (2) maintenance of the action in this state is not warranted by the policies of this state and its relationship to the parties or the dispute nor by any compelling considerations of remedial justice.

100. See supra text accompanying note 77.
Louisiana has an interest in the action. If Louisiana is not interested, then the article allows the applicability of foreign law.

**The General Article of the Louisiana Conflicts Draft**

The Law Institute has drafted a general and residual article intended to apply to those situations in which there is no specific rule. If enacted, this article would provide the theoretical framework for any resolution of the problem. Even if it is not passed, it offers the courts guidance in determining the proper outcome.

The article begins with the principle that cases in which conflicts arise are governed by the law of the state whose policies would be most seriously impaired if its law were not applied. This is the general policy behind the entire conflicts draft. The second paragraph goes on to provide standards for the ascertainment of that state.

Applying this article to the privilege problem raises difficulties similar to those with the Restatement (Second). The article speaks in broad generalities and offers little guidance in determining which contacts are legally significant. Furthermore, the article would lend little certainty to this area, because it ultimately calls for a fact-intensive inquiry to be undertaken on an *ad hoc* basis.

Nevertheless, the article is useful because it embodies a basic approach. While it leaves much to the judge's discretion, it does embody a standard, that of the "most serious impairment," against which the facts of a particular case can be measured. Perhaps most significantly, it offers an approach that can be jurisprudentially adopted, even in the absence of action on the part of the legislature.

**STANDARDS FOR CHOOSING THE LAW OF PRIVILEGE**

**Is a Statute Needed?**

Given the difficulties set forth above, and having found at least general standards for the resolution of these choice of law issues, the

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101. The proposed general and residual article provides:

Except as otherwise provided in this Title, cases having contacts with other states are governed by the law of that state whose policies would be most seriously impaired if its law were not applied to the particular issue.

That state is determined by:

(a) considering the policies embodied in the particular rules of law claimed to be applicable as well as any other pertinent policies of the involved states; and

(b) evaluating the strength and pertinence of these policies in the light of: (1) the relationship of each involved state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of the parties and minimizing the adverse consequences that might follow from subjecting the parties to the law of more than one state.

Proposed Conflicts article 2.
question now becomes whether a statutory rule is required. A statute would clarify matters and offer some guidance to both state and federal courts. Such a statute could conceivably make the law of privileges more predictable, and it would help protect both the legitimate expectations of nonresidents and Louisiana's interest in finding the facts in its courts.

Despite these advantages, a statutory rule should not be enacted. Because the area of privilege is so broad, any statute that comprehensively covered the area would be unworkable. Conversely, a manageable statute would be either too general to be helpful or too blunt to be fair. In addition, it would provoke further cries for relief to already overworked appellate courts. Finally, a statute would be an attempt to fix what may not be broken. As has been noted, this problem has not been addressed in a Louisiana appellate decision. This may indicate that it is not a problem, and tinkering with it invites trouble.

A Jurisprudential Approach

The same multitude of possible combinations that makes legislative action unwise similarly makes it impossible to recommend any jurisprudential "solution" that is anything more detailed than an approach. Such an approach, however, should be clarified by the examination of relevant policy considerations in this comment. Despite the complexity of the field as a whole, choices can be made in individual cases by simply following a standard choice of law approach, while paying attention to the very specific policies underlying each privilege.

Any choice of law approach, whether statutory or jurisprudential, must initially consider the policies behind the individual privileges. This requires a closer scrutiny of privileges than is needed in most other issues, because the distinctions are so fine. Next, there should be an examination of both Louisiana law and that of any other potentially interested state. This is a task uniquely suited to the judiciary. Once the policies are isolated, the court has a method of ascertaining the states with potential interests in the application or denial of the privilege. This can be done by a qualitative, rather than quantitative, evaluation of the relevant contacts.

Actually determining whether to apply a particular jurisdiction's rule is more problematic. The approach of the prescription draft suggests that in cases such as these a presumption in favor of Louisiana law may be useful. In addition to protecting Louisiana's interest as the forum, this would provide an easy and predictable resolution of those cases that are too close to call. If such a presumption is necessary,

102. See supra note 23.
however, it should be enacted by the legislature. In the absence of such action, the diversity of the potential situations makes it impossible for courts to formulate a rule of general applicability. Therefore, the courts should undertake an extensive factual inquiry in every case and determine the applicable law by reference to the policies discussed above and the "most serious impairment" approach of the conflicts draft. This will often involve choosing between two rules that are seemingly equally applicable, but this is the essence of the judicial function.

**Conclusion**

Because it is simultaneously drafting both an evidence code and a conflicts code, Louisiana has an unprecedented opportunity to clear the cobwebs from a neglected area of intersection between the two areas of law. Choice of law analysis of evidentiary privileges has long been hampered by an imperfect understanding of the policies behind a legislative grant of privilege. Through the Law Institute's drafting of the new privileges section of the code of evidence, Louisiana courts can undertake a considered analysis of those policies. This new understanding will open the door to a modern analysis of the complex concerns implicated by the extraterritorial invocation of evidentiary privileges.

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