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The Accountant-Client Privilege in Multidistrict Litigation: An Efficient Federal Common Law Solution

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NOTES

The Accountant-Client Privilege in Multidistrict Litigation: An Efficient Federal Common Law Solution

KELLY J. BALKIN*

I. INTRODUCTION	833
II. MULTIDISTRICT LITIGATION AND THE JPML	835
III. PRIVILEGE LAWS AND FEDERAL RULE OF EVIDENCE 501	837
A. <i>The Accountant-Client Privilege</i>	838
IV. CONFLICT OF LAWS	839
A. <i>State Choice of Law Rules</i>	839
1. NEW YORK	840
2. VIRGINIA	840
3. CALIFORNIA	841
4. FLORIDA	841
B. <i>Federal Choice of Law Jurisprudence</i>	842
1. <i>ERIE</i>	842
2. <i>KLAXON</i>	843
3. <i>VAN DUSEN</i>	843
4. <i>BYRD</i>	845
V. THE ACCOUNTANT-CLIENT PRIVILEGE IN FEDERAL DISTRICT COURTS: YES, NO, AND MAYBE	847
A. <i>New York</i>	847
B. <i>Virginia</i>	848
C. <i>California</i>	850
VI. A NEW FEDERAL COMMON LAW IN MULTIDISTRICT LITIGATION: BLANKET APPLICATION OF THE ACCOUNTANT-CLIENT PRIVILEGE	850
A. <i>An Analysis of the Blanket Privilege Rule Under Byrd</i>	852
1. "BOUND UP" IN THE RIGHT	852
i. Accountant-Client Privilege: Procedural or Substantive?	853
2. OUTCOME DETERMINATIVE	856
3. COUNTERVAILING AFFIRMATIVE CONSIDERATIONS	857
VII. CONCLUSION	859

I. INTRODUCTION

A Florida-based distributor is being sued by multiple producers

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who each filed suit in their respective district courts of New York, California, Virginia, and Florida. Each producer is suing the distributor for breach of contract, and the Florida producer also filed suit for copyright infringement, which put their suit in federal district court. Because the individual lawsuits share common parties and factual issues, they are ultimately consolidated into a multidistrict litigation (“MDL”). Post-consolidation, the producers now wish to depose the distributor’s accountant, but some of the districts from which the individual lawsuits hail recognize an accountant-client privilege and others do not. How does the MDL court handle the accountant-client privilege in this case? Should it apply the privilege in the consolidated proceedings although the privilege would not have otherwise applied in some of the districts where the suits were originally filed? Would a blanket application or denial of the privilege result in inequities? If so, for whom? These are all questions that have yet to be decisively answered by any court.

This note argues that courts should adopt a new federal common law rule that allows the accountant-client privilege to apply to all litigants in an MDL proceeding when the privilege would have been recognized and applied in at least one of the original lawsuits before consolidation. Such a common law rule would not run afoul of *Erie*¹ or other federalist concerns, would be an easy rule to apply with very little associated costs, and would ultimately streamline the process and advance the efficiency of MDL proceedings.

Part II of this note will provide a general background and history of multidistrict litigation and the Judicial Panel on Multidistrict Litigation (“JPML”). Part III will then discuss federal and state privilege rules, specifically the accountant-client privilege. Part IV will then explore the choice of law rules of New York, California, and Virginia, as well as the Supreme Court’s jurisprudence regarding conflict of law and choice of law questions under *Erie*. Part V will then analyze the likely outcome of the distributor’s hypothetical lawsuits given New York, Virginia, and California choice of law rules, highlighting the disagreement between each state’s approach to another state’s privilege in diversity jurisdiction and illuminating the difficult decision an MDL court would be faced with when determining the rule of law to apply in a proceeding involving all states. Finally, Part VI proposes a new federal common law rule that should be recognized in the context of multidistrict litigation. The new rule would mandate that an accountant-client privilege apply to all parties in an MDL proceeding when at least one party relied on the privilege. This new rule would promote both predictability and efficiency in

1. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

multidistrict litigation, thereby saving courts and litigants both time and money.

II. MULTIDISTRICT LITIGATION AND THE JPML

Multidistrict litigation is the consolidation of discovery proceedings for multiple cases brought in different federal district courts into one large proceeding in a single federal district court.² Multidistrict litigation has become an increasingly important method of efficiently resolving multi-jurisdictional civil disputes because it allows for the consolidation of cases for pretrial proceedings without requiring the “high degree of cohesion to warrant representative litigation” that is mandatory for a class action suit.³ Because differences between the consolidated cases are allowed, MDL cases are “not quite as aggregated as a class action, but consolidated to a significant degree.”⁴ Therefore, multidistrict litigation is regarded as a highly desirable way to consolidate the time and efforts of the already overloaded court system.⁵

The Judicial Panel on Multidistrict Litigation has approval power over requests for MDL consolidation and is staffed by “seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit.”⁶ Panel appointment terms are not strictly defined but are generally staggered terms of seven years.⁷ The consolidation and transfer of pretrial proceedings of an action may be initiated either by a party to such action or by the panel itself,⁸ although the latter is not common.⁹ When the JPML is presented with a motion for consolidation, it will only consider: (1) whether the civil actions currently pending in different districts share one or more common question of fact; and (2) whether the transfer of

2. See *An Introduction to the United States Judicial Panel on Multidistrict Litigation*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <http://www.jpml.uscourts.gov/sites/jpml/files/JPML-Overview-Brochure-10-16-2014.pdf> (last visited Mar. 29, 2015) [hereinafter *Introduction to the JPML*] (discussing the origins and purpose of multidistrict litigation and the Judicial Panel on Multidistrict Litigation, which approves or denies motions for consolidation to multidistrict litigation courts, and the factors the panel considers in those decisions).

3. Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 793 (2012).

4. *Id.*

5. Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 432 (2013) (“MDL litigation has evolved such that it is responsive and flexible to the changing environment, making it attractive to litigants.”).

6. 28 U.S.C. § 1407(d) (2012).

7. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2227 (2008).

8. See 28 U.S.C. § 1407(c).

9. Heyburn, *supra* note 7, at 2231 n.35.

proceedings would be “for the convenience of parties and witnesses and w[ould] promote the just and efficient conduct of such actions.”¹⁰ It is important to understand—particularly for the purposes of this note—that the JPML does *not* consider the law that a transferee court might apply if a consolidated action is assigned to it, nor does it consider if that court’s choice of law rules will create a bias against one party.¹¹ If the JPML determines that consolidation is appropriate, it will assign the centralized action to the court it deems most capable of handling the matters presented in the case, provided that court consents to the assignment.¹² The panel is typically not limited by traditional constraints of jurisdiction or venue and may therefore choose to assign the consolidated matter to any district it deems fit.¹³ The panel’s decisions are effectively binding—a denial of a motion for consolidation is final, and in the history of the JPML’s existence, a decision by the panel to consolidate and transfer a case has never been overturned.¹⁴

If the JPML denies a motion to transfer, there is no appeals process,¹⁵ and if the JPML grants a motion to transfer, that decision is “only appealable via petitions of extraordinary writ to the appropriate circuit court.”¹⁶ Appeals from JPML transfer decisions are therefore extremely rare.¹⁷ It is also important to note that when these cases are consolidated, the MDL court to which the consolidated case is assigned will typically only conduct the pretrial proceedings and then remand each case back to

10. 28 U.S.C. § 1407(a).

11. See Mark A. Hill, Note, *Opening the Door for Bias: The Problem of Applying Transferee Forum Law in Multidistrict Litigation*, 85 NOTRE DAME L. REV. 341, 345 (2009) (“[T]he JPML has stated in clear terms that ‘[w]hen determining whether to transfer an action under Section 1407, . . . it is not the business of the Panel to consider what law the transferee court might apply.’”) (quoting *In re Gen. Motors Class E Stock Buyout Sec. Litig.*, 696 F. Supp. 1546, 1547 (J.P.M.L. 1988)).

12. *Id.*

13. *In re Aircraft Accident at Barrow, Alaska*, on Oct. 13, 1978, 474 F. Supp. 996, 999 (J.P.M.L. 1979) (“The Panel’s discretion under Section 1407 is not limited by venue considerations, . . . and the fact that defendants may not all be amenable to suit in the same jurisdiction does not prevent transfer to a single district for pretrial proceedings where the prerequisites of Section 1407 are otherwise satisfied.”). The requirements of subject matter jurisdiction still apply to MDL courts, but given the nature of the parties who would find themselves in an MDL proceeding—presumably from different states or districts—and the relatively low monetary threshold of only \$75,000 that is necessary for diversity jurisdiction, MDL courts almost always have subject matter jurisdiction through diversity of citizenship. See 28 U.S.C. § 1332 (2012).

14. Williams & George, *supra* note 5, at 427 n.14 (“Based on an extensive search, we failed to locate a single instance where the grant of a transfer motion was overturned.”); see also 28 U.S.C. § 1407(e).

15. 28 U.S.C. § 1407(e) (“There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.”).

16. Hill, *supra* note 11, at 347.

17. See *id.*

its original district for trial.¹⁸ Therefore, unless the consolidated action is terminated in the MDL court or before the conclusion of the pretrial proceedings, litigants will still have their day in court within the district they initially chose to file suit.¹⁹

III. PRIVILEGE LAWS AND FEDERAL RULE OF EVIDENCE 501

After many actions are consolidated into a single MDL proceeding, choice of law issues may arise, especially surrounding the application of state-created privileges. Federal courts look to Federal Rule of Evidence 501 for guidance on claims of privilege, but Rule 501 provides little direction to the MDL court faced with conflicting state laws. Instead, Rule 501 simply states that “in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”²⁰

As a policy matter, excluding confidential communications from evidence “fosters socially desirable confidences” that allows parties in privileged relationships to communicate freely without fear of future disclosure.²¹ Rule 501 provides that “the common law—as interpreted by the United States courts in the light of reason and experience”—governs all claims of privilege unless the United States Constitution, a federal statute, or rules prescribed by the Supreme Court provide otherwise.²² And, as stated above, Rule 501 further provides that in a civil case, “state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”²³ Rule 501 therefore embodies the Rules of Decision Act, which codified federal courts’ reliance on applicable state laws in the absence of a governing federal statute.²⁴ In the absence of a federal statute that clearly enunciates a rule of law regarding privileges, federal courts are therefore bound to follow the applicable state laws or common law as directed in Rule 501. However, the Supreme Court has yet to address the issue of Rule 501’s “glaring omission”—its “failure to identify which state’s law applies to the claim

18. *Introduction to the JPML*, *supra* note 2.

19. *See* *Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach*, 523 U.S. 26, 27 (1998) (“A district court conducting pretrial proceedings pursuant to § 1407(a) has no authority to invoke § 1404(a) to assign a transferred case to itself for trial.”).

20. FED. R. EVID. 501.

21. Jack B. Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535, 536 (1956).

22. FED. R. EVID. 501.

23. *Id.*

24. 28 U.S.C. § 1652 (2012) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

of privilege.”²⁵

A. *The Accountant-Client Privilege*

The accountant-client privilege is statutorily recognized by several states, including Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, and Louisiana, among several others.²⁶ However, no “confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases.”²⁷ The accountant-client privilege is intended “‘to encourage people to make use of professional accounting services and to be frank and candid with such professionals.’”²⁸ But because there is no common law recognition of the accountant-client privilege, and because of the viewpoint that “evidentiary privileges impede the search for truth,” the accountant-client privilege is often construed very narrowly.²⁹

For example, Florida’s accountant-client privilege is codified under the state evidence code at § 90.5055 and provides for a narrow application of the accountant-client privilege contingent upon several requirements.³⁰ The Florida privilege applies only to communications between an accountant who is a certified public accountant and a client who is a “person, public officer, corporation, association, or other organization or entity . . . who consults an accountant with the purpose of obtaining accounting services.”³¹ The privilege is further limited in that it only applies if the communication is confidential, which means that the communication is “not intended to be disclosed to third persons other than . . . [t]hose to whom disclosure is in furtherance of the rendition of accounting services to the client” or those to whom disclosure is “reasonably necessary for the transmission of the communication.”³²

25. Donald W. Price, *A Choice of Law Analysis of Evidentiary Privileges*, 50 LA. L. REV. 157, 160 (1989).

26. See ARIZ. REV. STAT. ANN. § 32-749 (West 2014); COLO. REV. STAT. ANN. § 13-90-107 (West 2014); Fla. STAT. ANN. § 90.5055 (West 2014); GA. CODE ANN. § 43-3-29 (West 2003); IDAHO CODE ANN. § 9-203A (West 2014); 225 ILL. COMP. STAT. 450/27 (West 2013); IND. CODE ANN. § 25-2.1-14-1 (West 2014); KAN. STAT. ANN. § 1-401 (West 2014); LA. REV. STAT. ANN. § 37:86 (2013).

27. *Couch v. United States*, 409 U.S. 322, 335 (1973) (citations omitted).

28. Noah P. Barsky et al., *Protecting a Client’s Confidences: Recent Developments in Privileged Communication Between Attorneys and Accountants*, 28 J.L. & COM. 211, 220 (2010) (quoting *Zepter v. Dragisic*, 237 F.R.D. 185, 189 (N.D. Ill. 2006)).

29. *Pierce Cnty. v. Guillen*, 537 U.S. 129, 130 (2003); see also Barsky et al., *supra* note 28, at 220.

30. See FLA. STAT. ANN. § 90.5055.

31. *Id.* § 90.5055 (1)(a)–(b).

32. *Id.* § 90.5055 (1)(c).

IV. CONFLICT OF LAWS

Because conflicting state laws are a relatively common problem faced by federal courts sitting in diversity, each state also has its own choice of law rules that help federal courts determine what laws should apply to a given case. “Conflict of [l]aws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state.”³³

A. State Choice of Law Rules

Choice of law rules inform federal courts on how “to determine the rights and liabilities of the parties resulting from an occurrence involving foreign elements.”³⁴ Choice of law rules also provide a framework for a court to determine “whether particular issues in a suit involving foreign elements should be determined by its own local law rules or by those of another state.”³⁵ Factors that are often considered relevant in choice of law issues include:

the relevant policies of the forum, the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, the protection of justified expectations, the basic policies underlying the particular field of law, certainty, predictability and uniformity of result, and ease in the determination and application of the law to be applied.³⁶

“Choice of law determinations are . . . made in a ‘horizontal’ setting, i.e., in determining which state’s . . . law to apply to an issue, with respect to a transaction touching on two or more jurisdictions.”³⁷

If there were no MDL consolidation of the hypothetical lawsuits between the distributor and its various producers in Florida, California, Virginia, and New York, each lawsuit would proceed separately in the district courts of those states. But each district court would still need to use its state’s choice of law rules to decide whether the laws of the state in which it sits or the laws of Florida would apply.³⁸ This decision could greatly affect the evidence and testimony procured in each proceeding because Florida law recognizes an accountant-client privilege,³⁹ but Cal-

33. RESTATEMENT (SECOND) OF CONFLICT OF LAWS: SUBJECT MATTER OF CONFLICT OF LAWS § 2 (1971).

34. *Id.* § 2 cmt. a.

35. *Id.*

36. RESTATEMENT (SECOND) OF CONFLICT OF LAWS: CHOICE OF LAW PRINCIPLES § 6 (1971) [hereinafter RESTATEMENT: CHOICE OF LAW PRINCIPLES].

37. Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1236 (1999).

38. RESTATEMENT: CHOICE OF LAW PRINCIPLES, *supra* note 36, § 6 (“A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.”).

39. FLA. STAT. ANN. § 90.5055 (West 2014).

ifornia, Virginia, and New York law do not. If the distributor's communications with its accountant are central to the case, whether or not those communications are privileged is a pivotal question that would likely impact the final outcome of the lawsuit. Therefore, it is important to consider each state's choice of law rules and whether Florida's accountant-client privilege would be applied under those rules.

1. NEW YORK

New York's *Jurisprudence on Conflict of Laws* states that "[m]atters of procedure are governed by the law of the forum, and the forum court, subject to constitutional limitations, employs its own law to determine whether a particular matter is to be classified as procedure or substance, for conflict of law purposes."⁴⁰ It goes on to define procedural law as "the mode of enforcing a legal right" and substantive law as a "law that gives or declares the right. Thus, matters dealing with the conduct of the litigation are procedural, and everything else is substantive."⁴¹ The application of Florida's accountant-client privilege in the New York suit would therefore depend on the New York court's classification of the privilege as substantive or procedural. There is also New York case law that supports the proposition that "New York choice of law gives 'controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation,'" which, in that case, meant that New York law applied.⁴²

2. VIRGINIA

Virginia seems to follow "traditional conflict-of-law rules[] when presented with a choice of law question," which means that Virginia courts determine "whether an issue is procedural [*lex fori*] or substantive [*lex loci*] according to [Virginia] conflict of law rules."⁴³ Virginia's conflict of law rules adhere to the "territorial approach" embodied in the *Restatement (First) Conflict of Laws*, which provides that "[t]he law of the forum determines the admissibility of a particular piece of evidence."⁴⁴ Since the accountant-client privilege acts as the gatekeeper of

40. JAMES L. BUCHWALTER & TODD NEILSON, 19A NEW YORK JURISPRUDENCE: CONFLICT OF LAWS § 4 (2d ed. 2014).

41. *Id.*

42. *Tartaglia v. Paul Revere Life Ins. Co.*, 948 F. Supp. 325, 326 (S.D.N.Y. 1996) (citation omitted) (holding that in a breach of contract action in federal court under diversity jurisdiction, New York's conflict of law rules dictated that New York's substantive law of privileges should apply in a discovery dispute between litigants from New York and Ohio).

43. *Hatfill v. N.Y. Times Co.*, 459 F. Supp. 2d 462, 465 (E.D. Va. 2006).

44. E. Todd Presnell & James A. Beakes, *The Application of Conflict of Laws to Evidentiary*

otherwise admissible testimony (i.e., evidence), Virginia would use its own laws to determine the privilege's application.

3. CALIFORNIA

When California courts are presented with a choice of law problem, they “adhere to the governmental interest approach, the objective of which is to determine the law that most appropriately applies to the issue involved.”⁴⁵ A California court “has a definite interest in applying [California] law, which will be displaced only if there is a compelling reason for doing so.”⁴⁶ The “governmental interest analysis” is a three-step process: first, “the foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California.”⁴⁷ Second, and assuming the laws of the foreign state and California are indeed materially different, the court must “determine what interest, if any, each state has in having its own law applied to the case.”⁴⁸ Third, and only if there is truly a material difference between the laws and each state has established an interest in having its own law applied, the court will “select the law of the state whose interests would be more impaired if its law were not applied.”⁴⁹ California's choice of law rules therefore require a fact-intensive inquiry, the outcome of which is difficult to predict.

4. FLORIDA

Of the four hypothetical lawsuits, only the Florida suit would not require a conflict of laws analysis because there would be no diversity of citizenship and therefore no choice of law issue presented. Florida law would unequivocally apply. However, it is worth mentioning as a point of interest that Florida's conflict of laws jurisprudence requires the court to consider “the policies of both the forum state and other interested states[,]” but a Florida court “is not permitted to apply laws of another forum if such action would be repugnant to Florida public policy.”⁵⁰

Privileges, in EVIDENTIARY PRIVILEGES FOR CORPORATE COUNSEL 159, 163 (Def. Research Inst. 2008) (quoting RESTATEMENT (FIRST) CONFLICT OF LAWS § 597 (1934)).

45. NANCY YUENGER, 12 CALIFORNIA JURISPRUDENCE: CONFLICT OF LAWS § 27 (3d ed. 2014).

46. *Id.*

47. *Id.* § 28.

48. *Id.*

49. *Id.*

50. JOY T. COOK CARMICHAEL, 10 FLORIDA JURISPRUDENCE: CONFLICT OF LAWS § 1 (2d ed. 2014).

B. *Federal Choice of Law Jurisprudence*

The United States' current jurisprudence on federal choice of law questions is derived from a combination of several cases that were decided over a span of approximately sixty years. A brief description of the most important cases (at least for the purposes of this note) and their contributions to federal choice of law jurisprudence follows.

1. *ERIE*

The *Erie* Court interpreted the Rules of Decision Act⁵¹ as requiring that a federal court sitting in diversity must apply the substantive law of the state in which it sits.⁵² *Erie* applies “in a ‘vertical’ setting, where the action is being heard in a federal court based on a claim arising under state law, and where it is necessary to determine whether the federal court may apply federal law or whether it must apply state law”⁵³ It was originally believed that *Erie* “commanded the application of state law to substantive issues, but permitted federal courts to handle procedural problems their own way.”⁵⁴ Several years after the decision, *Erie* was described by the Court as “considerably more protective of state prerogatives . . . requiring the application of state law whenever applying federal law instead might generate a different outcome.”⁵⁵ The primary importance of the *Erie* decision was the protection it afforded to state-citizen defendants from non-citizen plaintiffs who might otherwise have used diversity of citizenship to circumvent state laws that were unfavorable to their case.⁵⁶ The *Erie* decision did not, however, address “whether federal courts sitting in diversity would be required to apply state choice-of-law rules.”⁵⁷ Courts interpreting *Erie* have since concluded that a federal court must use the choice of law rules of the forum

51. 28 U.S.C. § 1652 (2012).

52. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

53. Bauer, *supra* note 37, at 1236.

54. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 696 (1974).

55. *Id.*; see also *Guaranty Trust Co. v. York*, 326 U.S. 99, 108–09 (1945) (“[S]ince a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.”).

56. *Erie*, 304 U.S. at 74–75 (“Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson*[, 41 U.S. 1 (1842),] introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen.”).

57. Bradt, *supra* note 3, at 769.

in which it sits, pursuant to the subsequent case of *Klaxon Co. v. Stentor Electric Manufacturing Co.*⁵⁸

2. KLAXON

Klaxon was a breach of contract suit filed in Delaware federal court on the basis of diversity in which the Supreme Court faced the question of whether federal courts sitting in diversity “must follow conflict of laws rules prevailing in the states in which they sit.”⁵⁹ The respondent was a New York corporation that had been awarded a \$100,000 jury verdict and then moved to correct the judgment amount to include interest accrued, citing a New York state statute which required that interest be added to the principal sum of damages in contract actions.⁶⁰ The district court granted the motion, and the circuit court of appeals affirmed,⁶¹ but the Supreme Court disagreed and reversed and remanded the case for a decision consistent with Delaware’s conflict of law rules.⁶² The Court reasoned that under *Erie*, “the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be,” and as such “[t]he conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware state courts.”⁶³

3. VAN DUSEN

Nearly two decades later, in *Van Dusen v. Barrack*,⁶⁴ the Supreme Court ironed out the “final wrinkle in choice-of-law analysis under the *Erie* and *Klaxon* cases”⁶⁵—the question of what state’s law applies after transfer or change of venue pursuant to 28 U.S.C. § 1404.⁶⁶ The plaintiffs in *Van Dusen* were personal representatives—qualified as such

58. 313 U.S. 487 (1941).

59. *Id.* at 494.

60. *Id.* at 494–95.

61. *Id.* at 495–96 (“[T]he rules for ascertaining the measure of damages are not a matter of procedure at all, but are matters of substance which should be settled by reference to the law of the appropriate state according to the type of case being tried in the forum. The measure of damages for breach of a contract is determined by the law of the place of performance . . .”).

62. *Id.* at 498. “The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware’s state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.” *Id.* at 496.

63. *Id.* at 496–97.

64. 376 U.S. 612 (1964).

65. CHARLES ALAN WRIGHT ET AL., 19 FEDERAL PRACTICE & PROCEDURE JURISPRUDENCE: JURISDICTION AND RELATED MATTERS § 4506 (2d ed. 2014).

66. 28 U.S.C. § 1404 (2012) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . .”).

under Pennsylvania law—of the victims of a 1960 plane crash who brought wrongful death actions against the defendants, including the responsible airline and manufacturers, the United States, and the Massachusetts Port Authority.⁶⁷ The defendants moved to transfer the actions filed from the Eastern District of Pennsylvania to the District of Massachusetts⁶⁸ under 28 U.S.C. § 1404(a).⁶⁹ The potential recovery for a wrongful death action under the Massachusetts Death Act was significantly restricted in comparison to the Pennsylvania law on recovery of damages—therefore, a transfer to the District of Massachusetts and application of its laws would have been beneficial to the defendants and detrimental to the plaintiffs' potential recovery.⁷⁰

The district court granted the motion to transfer, but on a writ of mandamus the court of appeals subsequently found that the transfer was prohibited because “a § 1404(a) transfer could be granted only if at the time the suits were brought, the plaintiffs had qualified to sue in Massachusetts, the State of the transferee District Court.”⁷¹ Because the plaintiffs were not qualified as personal representatives under Massachusetts law, transfer to the District of Massachusetts was not allowed. The Supreme Court reversed the court of appeals, finding that the § 1404(a) requirement of “might have been brought” referred to the capacity to file suit as dictated by federal law and did not refer to the capacity of a personal representative to bring suit under a transferee state's laws.⁷² The Court reasoned that the “‘accident’ of federal diversity [should] not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed.”⁷³ The Court concluded that when a defendant seeks transfer of an action, the transferee court is “obligated to apply the state law that would have been applied had there been no change in venue,” so that “[a] change in venue under § 1404(a) . . . , with respect to state law, [is merely] a change of courtrooms.”⁷⁴ The Court was careful to construe its holding narrowly and declined to comment on the outcome of a case in which the plaintiff was the party to seek transfer.⁷⁵ However, the case of *Ferens v. John Deere Co.* later extended the *Van Dusen* rule to plaintiffs' motions to transfer as well.⁷⁶

67. *Van Dusen*, 376 U.S. at 614.

68. *Id.*

69. 28 U.S.C. § 1404(a).

70. *Van Dusen*, 376 U.S. at 627.

71. *Id.* at 614.

72. *Id.* at 624.

73. *Id.* at 638.

74. *Id.* at 639.

75. *Id.* at 640.

76. *See Ferens v. John Deere Co.*, 494 U.S. 516 (1990).

4. *BYRD*

The Supreme Court's "most comprehensive and cogent effort in vertical choice of law"⁷⁷ came in the case of *Byrd v. Blue Ridge Rural Electric Cooperative*,⁷⁸ which is "the only Supreme Court case since *Erie* itself to discuss all three of the core interests balanced, expressly or not, in every vertical choice of law case."⁷⁹

Byrd was initially filed in a South Carolina district court based on diversity of citizenship jurisdiction.⁸⁰ The plaintiff was a North Carolina resident and a "lineman in the construction crew of a construction contractor" who was hired by the defendant—an electric company and South Carolina corporation—to erect new power lines, convert existing power lines to higher capacity lines, and build new substations and breaker stations.⁸¹ The plaintiff sustained injuries while on the job and sued the defendant for negligence, receiving a jury verdict in his favor at the district court level.⁸² The Fourth Circuit Court of Appeals reversed and directed entry of judgment for the defendant, after which the Supreme Court granted certiorari and ordered reargument of the issues.⁸³

Central to the dispute was the factual determination of whether or not the plaintiff was a statutory employee of the defendant, and whether the judge or the jury should make that determination.⁸⁴ The defendant cited as an affirmative defense the South Carolina Workmen's Compensation Act, which barred a statutory employee from suing his employer and "obliged [the employee] to accept statutory compensation benefits as the exclusive remedy for his injuries."⁸⁵ The defendant then argued that a previous South Carolina State Supreme Court decision, *Adams v. Davison-Paxon Co.*,⁸⁶ which held that it was "for the judge and not the jury to decide on the evidence [who] was a statutory employer," should control in the case under *Erie* in order "to secure uniform enforcement of the immunity created by the State."⁸⁷

The Court established and followed a three-part analysis in its consideration of the issues of the case. First, under the direction of *Erie*, the Court found that it was required to "respect the definition of state-cre-

77. Richard D. Freer & Thomas C. Arthur, *The Irrepressible Influence of Byrd*, 44 CREIGHTON L. REV. 61, 62 (2010).

78. 356 U.S. 525 (1958).

79. Freer & Arthur, *supra* note 77, at 62.

80. *Byrd*, 356 U.S. at 526.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 528.

85. *Id.* at 527.

86. 96 S.E.2d 566 (S.C. 1957).

87. *Byrd*, 356 U.S. at 534.

ated rights and obligations by the state courts.”⁸⁸ The Court thus examined the rule enunciated by the South Carolina Supreme Court in *Adams* “to determine whether [the rule] is *bound up* with these rights and obligations in such a way that its application in the federal court is required.”⁸⁹ From this the Court found that the requirement that a judge, rather than a jury, determine the factual question of immunity under the South Carolina Workmen’s Compensation Act was “merely a form and mode of enforcing the immunity . . . and not a rule intended to be bound up with the definition of the rights and obligations of the parties.”⁹⁰ Second, the Court acknowledged that the *Erie* doctrine

evinced a broader policy to the effect that the federal courts should conform as near may be—in the absence of other considerations—to state rules even of form and mode where the state rules may bear substantially on the question of whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule.⁹¹

On this point, the Court noted that the issue of immunity was not one in which it was clear that the result would be substantially affected by whether the determination was made by a judge or a jury.⁹² Because of this, the Court did “not think that the likelihood of a different result [was] so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome.”⁹³

Finally, the Court ended its analysis by noting that even if application of the state rule was clearly outcome determinative, there were “affirmative countervailing considerations at work”—specifically the independence of the federal system and the command of the Seventh Amendment to “assign[] the decisions of disputed questions of fact to the jury”—which weighed heavily against application of the state rule in federal court.⁹⁴ The Court thus held that the federal district court was not obligated to follow the South Carolina state rule, because “[t]he policy of uniform enforcement of state-created rights and obligations . . . cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury.”⁹⁵

88. *Id.* at 525.

89. *Id.*

90. *Id.* at 536.

91. *Id.* at 536–37.

92. *Id.* at 539.

93. *Id.* at 537–40.

94. *Id.* at 537.

95. *Id.* at 537–38.

V. THE ACCOUNTANT-CLIENT PRIVILEGE IN FEDERAL DISTRICT COURTS: YES, NO, AND MAYBE

Given the precedential backdrop of *Erie*, *Klaxon*, *Van Dusen*, and *Byrd*, would one state's accountant-client privilege apply to all litigants in a multidistrict litigation? The answer to that question is answered in part by whether the privilege would apply in the district courts of each state, which is dictated by each state's choice of law rules. In the four hypothetical lawsuits, the Florida accountant-client privilege would likely apply in New York and California district court proceedings, but would likely not apply in a Virginia district court.

Under Federal Rule of Evidence 501, "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."⁹⁶ But Rule 501 does not provide guidance on *which* state's substantive law will apply in a controversy between parties in a federal court sitting in diversity. Under the rule of *Klaxon*, a federal court sitting in diversity must apply the choice of law rules that would have applied had the suit been filed in state court—subject of course to the rules of *Van Dusen* and *Ferens*.⁹⁷ Therefore, the "federal rule" of privilege for a federal court sitting in diversity depends in large part on the choice of law rules of the state in which it sits, provided that application of the rules does not defeat the vertical uniformity required by *Van Dusen*.

Returning once again to the hypothetical breach of contract suits in New York, California, Virginia, and Florida, we must analyze the likelihood that the Florida accountant-client privilege would be applied to the lawsuits in each state's district courts under their respective choice of law provisions. The outcome under each state's choice of law rules will provide a standard against which we can then compare the outcome under an MDL consolidation, and thus determine if MDL consolidation would affect the application of the privilege.

A. *New York*

According to the *New York Jurisprudence on Conflict of Laws*, New York choice of law rules turn on a substantive versus procedural analysis of the foreign law to be applied.⁹⁸ "Matters of procedure are

96. FED. R. EVID. 501.

97. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (upon a defendant's motion for change of venue, the transferee court must apply the state law that would have been applied in the transferor court); *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (extending the *Van Dusen* rule to also apply in cases where the *plaintiff* filed a motion for change of venue).

98. BUCHWALTER & NEILSON, *supra* note 40, § 4.

governed by the law of the forum,” and the law of the forum court is used to define what is procedural or substantive.⁹⁹ Although New York attempts to define the terms,¹⁰⁰ in practice it is often the case that a rule is both procedural and substantive because the two categories are not always mutually exclusive. But in New York, “matters dealing with the conduct of the litigation are procedural, and everything else is substantive.”¹⁰¹ The accountant-client privilege arguably deals with the conduct of the litigation, since it bars the disclosure of information during discovery. But in truth, the accountant-client privilege acts as both “the mode of enforcing [the] legal right”—by protecting the confidentiality of communications between the accountant and client—and as the “law that gives or declares the right”—by providing the assurance of future confidentiality that allows for such confidential communications to take place at all.¹⁰²

There is also some New York case law that supports using an “interest analysis,” in which “the governing law is that ‘of the jurisdiction which, because of its relationship or contact with the parties, has the greatest concern with the specific issues raised in the litigation.’”¹⁰³ Under this analysis, Florida has an interest in protecting its citizens that have relied upon a privilege, but New York has an arguably equal interest in providing its citizens with a fair opportunity to seek the truth. In practice, at least according to *Lego v. Stratos Lightwave, Inc.*, when New York courts are faced with “a choice of privilege law, the interest analysis usually has led New York courts to apply the law of the jurisdiction in which the assertedly privileged communications were made, which in most of the cases was also the jurisdiction in which the party that made the communications resided.”¹⁰⁴ Therefore, a Florida corporation’s communications with its Florida-based accountant would likely be protected by the Florida accountant-client privilege even in New York federal court.

B. Virginia

In *Hatfill v. New York Times Co.*, the Eastern District Court of Virginia—sitting in diversity—was faced with the question of whether a newspaper reporter’s privilege—statutorily recognized in New York and Maryland, but not in Virginia—would apply in Virginia court proceed-

99. *Id.*

100. *See id.* (defining procedural law as “the mode of enforcing a legal right” and substantive law as “law that gives or declares the right”).

101. *Id.*

102. *Id.*

103. *Lego v. Stratos Lightwave, Inc.*, 224 F.R.D. 576, 578 (S.D.N.Y. 2004).

104. *Id.* at 579.

ings.¹⁰⁵ The court noted that “Virginia courts ha[d] not spoken specifically on the issue of whether the law of privilege is procedural or substantive,”¹⁰⁶ but after considering Virginia Supreme Court precedent that provided guidance on how to approach the question,¹⁰⁷ the court found that the reporter privilege was procedural.¹⁰⁸ Therefore, Virginia law applied to the issue, and because Virginia did not recognize a reporter privilege, the privilege did not apply.

The court rejected the defendant’s argument that the privilege was in fact substantive by distinguishing the reporter privilege from other recognized substantive privileges.¹⁰⁹ For example, in Virginia, the physician-client privilege was a “qualified statutory privilege” because it not only established a rule of evidence but also “provide[d] grounds for a cause of action.”¹¹⁰ Meanwhile, Virginia had no statutory recognition of the reporter privilege nor was there a cause of action available under Virginia law for a reporter’s disclosure of a source’s identity.¹¹¹ Thus, the reporter privilege was procedural rather than substantive.

Given this jurisprudential backdrop, a district court in Virginia would likely also classify the Florida accountant-client privilege as procedural rather than substantive because Virginia does not statutorily recognize its own accountant-client privilege, nor is there a cause of action for a breach of an accountant-client privilege under Virginia law. Furthermore, a reporter privilege and an accountant-client privilege are so analogous that it is reasonable to assume Virginia courts would treat them similarly. Although a reporter privilege protects the source of information while the accountant-client privilege protects the information itself, both function to prevent the admission of certain evidence into a legal proceeding. Because the law of the forum governs matters of procedure, Virginia law would apply. And because Virginia’s choice of law standards dictate that Virginia law be used to determine the admissibility of evidence,¹¹² in a Virginia district court the accountant-client communications would probably be admitted, and the Florida privilege would not be upheld.

105. *Hatfill v. N.Y. Times Co.*, 459 F. Supp. 2d 462, 464–66 (E.D. Va. 2006).

106. *Id.* at 465.

107. The court specifically relied on the 1932 Virginia Supreme Court case of *Baise v. Warren*, which held, in part, that the admissibility of evidence in an automobile tort action was governed by the laws of Virginia, even though the tort occurred in North Carolina, and North Carolina law governed the plaintiff’s right of recovery. *See Baise v. Warren*, 164 S.E. 655, 656 (Va. 1932).

108. *Hatfill*, 459 F. Supp. 2d at 466.

109. *Id.* at 466 n.4.

110. *Id.*

111. *Id.*

112. *Presnell & Beakes*, *supra* note 44, at 163.

C. *California*

Under the California “governmental interest analysis,” once a California court sitting in diversity determines that California and Florida privilege laws differ regarding the accountant-client privilege, it would then “carefully evaluate[] and compare[] the nature and strength of the interest of each jurisdiction in the application of its own law ‘to determine which state’s interest would be more impaired if its policy were subordinated to the policy of the other state.’”¹¹³ The state whose interests would be most damaged if its laws are not applied is then ultimately the state whose laws would prevail.¹¹⁴

The first prong of the analysis is fairly simple—Florida statutorily recognizes an accountant-client privilege while California does not. Therefore, the laws are indeed different. But a comparison of each state’s interests in the application of its own law is where complications arise. California arguably has an interest in denying the privilege in order to avail its citizens of full discovery for their claims, but Florida also has an interest in protecting its citizens who conducted their business in reliance on the privilege. The balance of these interests could also be tipped by other factors such as the context in which the case arose, the facts of the case, and the number and type of litigants involved from each state. California’s choice of law rules therefore provide a flexible analysis that leads to some unpredictability.

Under the bare facts presented in our hypothetical lawsuit, a California district court would likely find Florida’s interest in having its privilege applied to be greater than California’s interest in applying its own law because denying the privilege would irreversibly deny protection to Florida citizens who had relied upon that privilege. Therefore, this note proceeds under the assumption that Florida’s accountant-client privilege would apply in California district court. However, it is important to note that where there are extenuating circumstances or additional facts surrounding the case, California’s interest balancing analysis might just as easily lead a district court to apply California law over Florida law, thereby denying protection of the privilege.

VI. A NEW FEDERAL COMMON LAW IN MULTIDISTRICT LITIGATION: BLANKET APPLICATION OF THE ACCOUNTANT-CLIENT PRIVILEGE

“[T]he constitutional dicta of *Erie* suggests . . . that regardless of what Congress might say, federal courts [are] bound to follow state priv-

113. *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006) (quoting *Bernhard v. Harrah’s Club*, 546 P.2d 719, 723 (Cal. 1976)).

114. *Bernhard*, 546 P.2d at 723.

ilege law in diversity cases.”¹¹⁵ If a federal court is bound to follow a state privilege in a diversity case where the parties are before the court solely because of the accident of diversity, it is only logical that a court would follow a state privilege in a case where the parties are before the court only by the “accident” of consolidation. In fact, a litany of cases support the proposition that the substantive law of the transferor court be applied in the transferee court¹¹⁶—which is of course the essence of the *Van Dusen* Court’s holding.¹¹⁷ If a new federal common law were adopted in which the accountant-client privilege would be applied across the board when at least one party had relied on the privilege, this would allow the MDL court to circumvent difficult choice of law questions and more expeditiously complete the consolidated pretrial proceedings.

Byrd “controls the analysis [when] there is no federal rule directly on point.”¹¹⁸ An analysis under *Byrd* combines a contemplation of the policy considerations that informed the Court’s decision in *Erie* plus a consideration of balancing state and federal interests. Given that there is no federal law specific to the application of an accountant-client privilege, the “federal rule” in a simple diversity case in federal court would be determined by Rule 501 and *Erie*. Rule 501 demands that “state law govern[] privilege regarding a claim or defense for which state law supplies the rule of decision.”¹¹⁹ In the course of amending Rule 501 to read as it does today, “the House Judiciary Committee noted that in diversity cases . . . questions of privilege were ‘substantive’ and, therefore should be governed by *Erie*”¹²⁰ Assuming that questions of privilege are indeed substantive,¹²¹ the state law regarding that privilege must apply. Consequently, the next question is: When many states are involved, which state’s substantive law applies?

Klaxon mandates that a federal court must apply the choice of law

115. Thomas G. Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 624 (1976).

116. See, e.g., *Volkswagen Grp. of Am., Inc. v. Peter McNulty Law Firm*, 692 F.3d 4 (1st Cir. 2012); *In re Dow Co. “Sarabond” Prods. Liab. Litig.*, 666 F. Supp. 1466 (D. Colo. 1987); *In re Air Crash Disaster at Boston*, 399 F. Supp. 1106 (D. Mass. 1975); *In re Four Seasons Sec. Laws Litig.*, 370 F. Supp. 219 (W.D. Okla. 1974); *Phila. Housing Auth. v. Am. Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1053, 1055 (E.D. Pa. 1969) (“The applicable law to be applied in Section 1407 transfers is the law of the transferor state.”).

117. *Van Dusen v. Barrack*, 376 U.S. 612, 638–40 (1964) (requiring a transferee district court to apply the rules that would have been applied in the transferor district court but for the change of venue or transfer).

118. Kelly Amanda Blair, Note, *A Judicial Solution to the Forum-Selection Clause Enforcement Circuit Split: Giving Erie a Second Chance*, 46 GA. L. REV. 799, 817 (2012).

119. FED. R. EVID. 501.

120. David E. Seidelson, *The Federal Rules of Evidence: Rule 501, Klaxon and the Constitution*, 5 HOFSTRA L. REV. 21, 26–27 (1976).

121. For an analysis of the accountant-client privilege as a substantive rule, see *infra* Part VI.A.1.i.

rules of the state in which it sits. New York and California's choice of law rules would probably lead to the application of the Florida accountant-client privilege,¹²² so it can be inferred from *Klaxon* that the Florida accountant-client privilege would probably apply in the federal courts of those states. But Virginia's choice of law rules are not quite as solicitous as New York's and California's, and so the Florida privilege would likely not apply in a Virginia district court.¹²³

Therefore, in a simple diversity of jurisdiction case, the current federal rule of law—Rule 501 as interpreted under *Erie* and *Klaxon*—would mandate application of the accountant-client privilege in the federal courts of California, New York, and Florida, but contemporaneously mandate the denial of that privilege in the federal courts of Virginia. So when cases from each state's respective district courts are consolidated into one pretrial proceeding, the MDL court is faced with directly conflicting approaches to the privilege. This predicament could easily be avoided if a new federal common law were adopted that mandated blanket application of a state's accountant-client privilege to *all* parties in an MDL proceeding when *any* party to the proceedings had relied upon that privilege. An analysis of this proposed federal common law under *Byrd* supports its application over state law in multidistrict litigation.

A. *An Analysis of the Blanket Privilege Rule Under Byrd*

Under *Byrd*, if the rule in question is bound up in the right at issue, so long as that rule is not outcome determinative—i.e., it would neither encourage forum shopping nor cause inequitable administration of the law—the federal rule on point should apply. Even if the rule in question *is* outcome determinative, if there are countervailing affirmative considerations that support applying the federal rule, *Byrd* dictates that federal law should still apply.

1. “BOUND UP” IN THE RIGHT

At issue in the context of the accountant-client privilege in an MDL proceeding is the right to candid and confidential communication between an accountant and his client. The first question to consider under a *Byrd* analysis is whether the protection of an accountant-client privilege is “bound up with th[is] right[] . . . in such a way that its application in the federal court is required,”¹²⁴ or whether the state law is merely a “form and mode” of enforcing the right.¹²⁵

122. See discussion *supra* Parts V.A, V.C.

123. See discussion *supra* Part V.B.

124. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 535 (1958).

125. *Id.* at 536.

The accountant-client privilege would likely fall within the former category.¹²⁶ A privilege is meaningless unless it is inextricably entwined (or bound up) with the right to confidential communications. The accountant-client privilege is not merely the mode by which communications are protected; it is also the means by which those communications are made in the first place.¹²⁷ Modern interpretations of John Henry Wigmore's standards of privilege¹²⁸ assume that a privilege should be recognized if the communication it is intended to protect would be chilled but for that privilege.¹²⁹ The logic behind this theory is that the recognition of such a privilege does not deny the court evidence or communications that would have otherwise been available to it because, had the privilege not existed, the communication would not have taken place at all.¹³⁰

The phraseology of "bound up" versus "form and mode" closely mirrors the familiar comparison of substantive versus procedural rules. Therefore, an analysis of the accountant-client privilege under a substantive versus a procedural framework is an appropriate tool in predicting whether the accountant-client privilege might be "bound up" in the right or whether it is merely the "form and mode" of the right.

i. Accountant-Client Privilege: Procedural or Substantive?

Privilege rules are technically evidentiary rules, and "[e]videntiary rules were once considered purely procedural"; however, due to modern scholarship, courts now recognize that "a rule phrased in terms of evidence may in fact be a rule of substantive law."¹³¹ Privileges have been

126. This is merely a hypothesis given the fact that there is no case law regarding the "bound up" language used in *Byrd*; "The *Byrd* concept of 'bound up' [was] never defined in so many words and [was] ignored in subsequent cases." Freer & Arthur, *supra* note 77, at 64.

127. See generally EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 3.2.3 n.82 (2014) ("In multiple Supreme Court decisions regarding privileges, it has been accepted as true that privileges encourage and allow for confidential communication that would otherwise not occur without said privilege.").

128. John Henry Wigmore, renowned legal scholar and expert in the field of evidence, urged the courts to construe existing privileges strictly and narrowly, and in doing so proclaimed an oft-cited test for the creation of new privileges and the assessment of existing ones. Wigmore's test demands:

(1) The communications . . . originate in a confidence that they will not be disclosed[;] (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties[;] (3) The relation must be one which in the opinion of the community ought to be sedulously fostered[;] (4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

Id. § 3.2.3.

129. *Id.* § 3.2.3 n.82.

130. *Id.*

131. Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical*

said to be “the paradigm” of this kind of rule because “[t]hey are intended to protect certain societal relationships and values, even though such protections may impose significant costs upon the litigation process.”¹³² Because of the tension between a privilege and “the promotion of accurate fact-finding, privilege rules often create difficult choice-of-law problems.”¹³³

When the Federal Rules of Evidence were initially proposed, the draft of Rule 501 promulgated by the Advisory Committee required that “state-created privileges . . . be disregarded in diversity cases.”¹³⁴ However, an “impressive number of comments poured in” opposing the Advisory Committee’s approach, all of which “collectively reflected a basic premise that state privilege laws represented a substantive legal determination with respect to how certain relationships are to be regulated or promoted.”¹³⁵ In response to the overwhelming criticism, the Advisory Committee subsequently changed Rule 501.¹³⁶ The Rule now reads:

The common law—as interpreted by the United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of reason.¹³⁷

The last sentence of the Rule has been interpreted to require that federal courts sitting in diversity cases follow state-created privilege laws, under the reasoning that “federal law should not supersede that of the States in substantive areas such as privilege absent compelling reason.”¹³⁸

The prevailing view of state-created privileges is that they are “substantive rather than procedural in nature, and hence affect private conduct and not merely the process of litigation.”¹³⁹ Accountant-client privilege laws affect the prelitigation conduct of clients and accountants who will act in accordance with the protections they believe that their state will afford them. Therefore, the “public policy under th[e] theory

Choice of Law, 82 GEO. L.J. 1781, 1781 (1994) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 cmt. c (1971)).

132. *Id.*

133. *Id.* at 1803.

134. Krattenmaker, *supra* note 115, at 639.

135. *Id.* at 640.

136. *Id.*

137. FED. R. EVID. 501.

138. Krattenmaker, *supra* note 115, at 640.

139. Martin I. Kaminsky, *State Evidentiary Privileges in Federal Civil Litigation*, 43 FORDHAM L. REV. 923, 931 (1975) (internal quotation marks omitted).

[of excluding privileged communications] is effective at the point where the communication takes place and not during the litigation.”¹⁴⁰ Given the professional nature of the relationship, accountants and their clients are likely to be aware of the limits of the protection afforded to their relationships by their state’s legislature and will be careful to work within the confines of that protection. In some instances, clients might not seek the advice of an accountant unless they know that their communications will remain privileged even if litigation ensues. When a court is put in the position to choose to apply either the privilege rules of the forum state that has no accountant-client privilege, or the law of a transferee state which has chosen to regulate the accountant-client relationship, the “latter . . . seems to accord best with the federalism values underlying the state privilege rules in the first place: deference to the sovereign whose interest and expertise in regulating the underlying relationship is implicated by enforcement of the privilege rule.”¹⁴¹ Alternatively, a refusal to apply the transferee state’s privilege would undermine the authority of that state whose legislature chose to regulate the accountant-client relationship. A usurpation of one state’s positive law and expressed interest in the regulation of a professional relationship by another state’s lack thereof would otherwise yield a clearly inequitable result. As previously stated, the purpose of the accountant-client privilege is to encourage the use of accounting professionals and promote candid conversation with those professionals.¹⁴² Uncertain or inconsistent application of that privilege would defeat its purpose entirely.

The privilege is only effective if it is reliably employed to protect state citizens who rely on the laws of the state in which they do business for protection of confidential conversations, regardless of the state of pretrial proceedings. If the privilege is not applied when a case happens to be consolidated, the privilege is essentially useless. The same logic applies to citizens who are considering bringing suit but are concerned about their own accountant-client privilege being honored. If a potential litigant sees that their case has the potential for consolidation at some point, they may be hesitant to file suit if the application of the privilege they relied upon is uncertain. The accountant-client privilege should thus be treated as a substantive rule—or “bound up” in the right—and as such should be adhered to for the entirety of an MDL pretrial proceeding, even when the forum state and the other transferee states do not recognize such a privilege.

140. Weinstein, *supra* note 21, at 536.

141. Dudley, *supra* note 131, at 1837.

142. See Barsky et al., *supra* note 28, at 219.

2. OUTCOME DETERMINATIVE

“Under *Byrd*, the outcome-determinative nature of the conflict between federal versus state law and the absence of any overwhelming federal policies on point dictate that . . . state law controls.”¹⁴³ As already noted, there is no singular federal policy on the point of the accountant-client privilege in multidistrict litigation.¹⁴⁴ However, the application of such a privilege is not outcome determinative in the context of multidistrict litigation because the privilege would only apply to the pretrial proceedings—litigants would still be free to pursue the protected information at a later time in the proceedings after the cases were sent back to their respective states for trial. Application of the privilege would only *delay* the gathering of certain information—not ban it. For example, litigants whose states would not otherwise apply the privilege could call the accountant to testify at trial in their filing state or depose him after the consolidated discovery ends. A blanket privilege would therefore only prevent those parties from garnering such information during pretrial discovery, prevent those litigants who would not otherwise be permitted to gain such information from doing so, and protect from exposure those parties that reasonably relied on the privilege. In fact, the Coordinating Committee for § 1407 contemplated the potential need for additional discovery after an MDL case was remanded to its original district and concluded that such discovery should be permitted.¹⁴⁵ Although the committee was specifically concerned with the parties’ ability to conduct discovery surrounding issues of fact that were not common to the MDL proceedings, the expectation that further discovery would take place after remand bolsters the assumption that the parties who would not otherwise be subject to the accountant-client privilege would still have ample opportunity to discover in their district courts the information that was protected during the MDL proceedings.

Given this guaranteed second chance that litigants will have to garner information after remand, it is unlikely that an MDL court’s application of a state privilege would cause forum shopping or result in the inequitable administration of the law.¹⁴⁶ Therefore, the proposed federal

143. Blair, *supra* note 118, at 817.

144. See *supra* Part V.

145. *A Proposal to Provide Pretrial Consolidation of Multidistrict Litigation: Hearing on S. 3815 Before the Subcommittee on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 89th Cong. 56 (1967) (statement of Sen. Joseph D. Tydings) [hereinafter *Hearing on Proposal to Provide Pretrial Consolidation*] (“The intent of the coordinating committee . . . is that the necessary additional discovery with regard to issues of fact not national or not common to other cases in the transferee district could be conducted once the case was remanded to the transferor district for trial.”).

146. Sergio J. Campos, *Erie as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573, 1584 n.59 (2012).

common law of a blanket application of the privilege is not outcome determinative and would be properly applied to MDL litigants under a *Byrd* analysis.

3. COUNTERVAILING AFFIRMATIVE CONSIDERATIONS

Even if, *arguendo*, the proposed federal common law rule were outcome determinative, it would still be properly applied under *Byrd*. Under *Byrd*'s three-part analysis, even when a law is both bound up in the right and outcome determinative, if there is a countervailing affirmative federal consideration that supports applying the federal rule rather than the state rule, the federal rule still applies. The only countervailing affirmative consideration actually discussed in *Byrd* was the command of the Seventh Amendment, which "assigns the decisions of disputed questions of fact to the jury" and was contrary to the state's rule of tasking the judge instead of the jury with the job of determining immunity under the state statute.¹⁴⁷

However, I would argue that in the context of multidistrict litigation, efficiency of pretrial proceedings should be recognized as a *new* countervailing affirmative federal consideration. The federal government has a strong policy interest in promoting efficient and effective pretrial proceedings in multidistrict litigation. Inefficient pretrial proceedings in multidistrict litigation would in fact be contrary to the central purpose of multidistrict litigation, as reflected by the text and legislative history of § 1407.

A desire to promote efficiency was central to the first multidistrict litigation proceedings. In the 1960s, over 1,800 related civil actions against electrical equipment managers flooded the federal court system.¹⁴⁸ In an attempt to consolidate discovery efforts between the dozens of federal courts involved in those actions, Supreme Court Chief Justice Earl Warren established the Coordinating Committee for Multiple Litigation of the United States District Courts.¹⁴⁹ In 1968, Congress enacted 28 U.S.C. § 1407, which created the Judicial Panel on Multidistrict Litigation—a formal successor to the Coordinating Committee—and the formal process by which civil actions can be consolidated for pretrial proceedings today.¹⁵⁰ In addition to promoting the "convenience

147. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536 (1958). *See also* *Gasperini v. Ctr. for Humanities Inc.*, 518 U.S. 415, 432–35 (1996) (recognizing the command of the reexamination clause of the Seventh Amendment as a countervailing affirmative federal consideration as well).

148. Heyburn, *supra* note 7, at 2226.

149. *Id.*

150. 28 U.S.C. § 1407(a) (2012) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district

of parties and witnesses” as well as the “just and efficient conduct of such actions,” centralization of discovery proceedings also “avoid[s] duplication of discovery . . . prevent[s] inconsistent pretrial rulings, and . . . conserve[s] the resources of the parties, their counsel, and the judiciary.”¹⁵¹

The concept of efficiency is omnipresent throughout the history of multidistrict litigation: it was the driving force behind the establishment of the original Coordinating Committee, it is specifically mentioned in the text of § 1407,¹⁵² and the legislative history of § 1407 is rife with references to efficiency as a necessity and how multidistrict litigation would create such efficiencies in a system that was rapidly being overwhelmed by mass litigation.¹⁵³ Even the name of the subcommittee in charge of proposing the multidistrict litigation legislation—the Subcommittee on Improvements in Judicial Machinery¹⁵⁴—implies a focus on the importance of efficiency in approaching the problem of uncoordinated mass litigation.

If MDL courts applied a blanket privilege to all parties, a certain element of predictability—and thus efficiency—would be added to MDL proceedings. No time would be wasted by the court in conducting convoluted and potentially incongruent choice of law analyses, and the parties would not be forced to waste their time or resources in preparing arguments as to why the privilege should or should not apply. Parties’

for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district court from which it was transferred . . .”).

151. *Id.*; see also *Introduction to the JPML*, *supra* note 2.

152. 28 U.S.C. § 1407(a) (2012) (“Such transfers shall be made by the judicial panel on multidistrict litigation . . . upon its determination that transfers for such proceedings will . . . promote the just and efficient conduct of such actions.”).

153. See, e.g., *Hearing on Proposal to Provide Pretrial Consolidation*, *supra* note 145, at 16 (statement of Hon. William H. Becker) (“The proposed new Section 1407 of Title 28, United States Code . . . is calculated to increase the efficiency of the United States Courts in processing multi-district litigation. Under the new Section 1407 the disposition of multi-district litigation can be accelerated, and much time and expense of litigants, witnesses, and courts saved.”); *id.* at 17 (statement of Hon. William H. Becker) (“[C]entral coordinated management for pretrial purposes is not only highly desirable but necessary in the interests of efficiency, economy, and the administration of justice.”); *id.* at 29 (statement of Charles A. Bane, Esq.) (“[A] coordinated program for national discovery will enable pretrial discovery to be carried out efficiently and economically and permit the cases to be prepared for and brought to trial without delay.”); *id.* at 55 (statement of Sen. Joseph D. Tydings) (“This legislation has to do with the orderly procedure and efficiency of the operation of the courts in a type of litigation which, at least to date, is primarily in the antitrust field, but . . . in the future [may involve] patent cases or aircraft disaster cases, or many types of litigation other than antitrust.”).

154. See *supra* note 145.

expectations will also be tempered in terms of what they might garner from the discovery process, and they will be better situated to more efficiently allocate their resources during the MDL proceedings if they know that an important part of their discovery will occur after remand.

Given the origins and history of multidistrict litigation, it seems clear that efficiency was a driving force behind the enactment of § 1407. The federal government therefore has a countervailing affirmative interest in maintaining that efficiency through a streamlined application of the accountant-client privilege in MDL proceedings.

VII. CONCLUSION

Multidistrict litigation presents an opportunity for efficiency in otherwise complex and complicated mass litigation actions. However, MDL consolidation can also present new complications—such as when multiple litigants in a single pretrial proceeding have relied on conflicting state privilege laws. Although the choice of law rules of the majority of states, including New York and California, would probably lead to the application of the privilege regardless, a minority of states, such as Virginia, would not. A new federal common law rule whereby a state privilege is applied to all litigants in MDL proceedings when at least one party to the action relied on said privilege would both ensure the reliability and integrity of a state's privilege laws and eliminate uncertainty and inefficiency in MDL courts. The doctrine of *Byrd* supports such a rule's application: although the rule may be bound up in the right, it is not outcome determinative, and even if it were, a new countervailing affirmative consideration—efficiency—supports application of a blanket privilege to all litigants in a multidistrict litigation proceeding.

