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Discovery in Complex Litigation: The Dilemma Faced by the Judiciary

I. INTRODUCTION

"Complex litigation"¹ is a term that is becoming increasingly familiar to the legal profession.² Complex litigation typically develops from situations involving mass torts arising from a single disastrous event, such as an airline disaster.³ Complex cases also may develop from antitrust violations,⁴ securities violations,⁵ toxic or defective products,⁶ or consumer fraud.⁷ In these complex cases, the victims usually are residents of various states. As a result, lawsuits emanating from a particular disaster may be scattered among several federal and state courts.⁸

1. An advisory committee to the American Law Institute stated that "[t]here is no formally accepted definition of complex litigation. Arguably, these cases do not differ significantly from other lawsuits, but merely are larger [T]he defining characteristic of complex cases is their multiparty, multiforum nature." Preliminary Study of Complex Litigation, A.L.I. Rep. 1, 4 (1987) [hereinafter Preliminary Study].

2. Kirkham, *Problems of Complex Civil Litigation (An addendum to "Complex Civil Litigation — Have Good Intentions Gone Awry?")*, 83 F.R.D. 497, 499 (1979) [hereinafter Complex Civil Litigation].

3. See, e.g., *In re Air Disaster at Denver, Colo.*, on Nov. 16, 1976, 486 F. Supp. 241 (J.P.M.D.L. 1980); *In re Air Crash Disaster near Chicago, Ill.*, on May 25, 1979, 476 F. Supp. 445 (J.P.M.D.L. 1979); *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 407 F. Supp. 244 (J.P.M.D.L. 1976).

For other examples of a single disastrous event from which complex cases have developed, see *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986), modified, 809 F.2d 195 (2d Cir. 1987); *In re Bomb Disaster at Roseville, Cal.*, on Apr. 28, 1973, 399 F. Supp. 1400 (J.P.M.D.L. 1975).

4. See, e.g., *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252 (7th Cir. 1984), cert. dismissed, 471 U.S. 1113 (1985); *In re Plywood Antitrust Litig.*, 655 F.2d 627 (5th Cir. 1981), cert. denied, 462 U.S. 1125 (1983).

5. See, e.g., *In re Air West, Inc. Secs. Litig.*, 384 F. Supp. 609 (J.P.M.D.L. 1974); *In re Caesars Palace Secs. Litig.*, 360 F. Supp. 366 (S.D.N.Y. 1973).

6. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263 (E.D.N.Y. 1983); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), vacated, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); *In re Swine Flu Immunization Prods. Liab. Litig.*, 446 F. Supp. 244 (J.P.M.D.L. 1978); *In re Asbestos and Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906 (J.P.M.D.L. 1977).

7. See, e.g., *Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), cert. granted, 456 U.S. 914, cert. dismissed, 459 U.S. 86 (1982).

8. For example, a business entity that is responsible for a disaster that injures thousands of people could be sued simultaneously in state courts where the claimants reside, where the disaster occurred, where the defendant resides, and in federal courts in diversity actions.

Because the involvement of thousands of potential claimants and multiple defendants often results in widespread litigation, procedural complications frequently develop.⁹ The judiciary, therefore, must take an early and active role in managing and controlling this type of litigation.¹⁰ A particular problem facing members of the judiciary in complex cases is the application of privilege.¹¹ Various state and federal courts apply distinct privilege laws.¹² Because the law of the forum will not always govern the application of privilege,¹³ a judge must determine which privilege rule to follow when actions arising from the same incident are pending in other jurisdictions.¹⁴

This Comment first will discuss how the privilege rules relate to the scope of discovery in complex cases, focusing on the differences between federal and Illinois law. Second, this Comment will address the dilemma faced by the judiciary in determining which privilege rule to apply. This Comment will conclude by recommending the adoption of one uniform privilege rule for use in all complex cases.

II. BACKGROUND OF PRIVILEGE IN STATE AND FEDERAL COURTS

To avoid compliance with discovery requests, a litigant may raise the attorney-client privilege and work product doctrine.¹⁵ The purpose of the attorney-client privilege¹⁶ is to promote full and

9. Preliminary Study, *supra* note 1, at 4-5.

10. MANUAL FOR COMPLEX LITIGATION § 20.1 (2d ed. 1985)(supplement to C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1969-1985)).

11. "Privilege" used herein to encompass both work product and attorney-client privilege.

12. See *infra* notes 23-57 and accompanying text.

13. See *infra* notes 61-94 and accompanying text.

14. The issue of which privilege rule to apply has been described "as among the most difficult questions a Federal judge [and, analogously, a state judge] can be called upon to answer." *Mitsui & Co. v. Puerto Rico Water Resources Auth.*, 79 F.R.D. 72, 76 (D.P.R. 1978)(footnote omitted).

15. Sutherland & Deitrick, *The Attorney-Client Privilege and Work Product Doctrine in Federal and Illinois Courts*, 73 ILL. B.J. 448 (1985) [hereinafter Sutherland & Deitrick].

16. The attorney-client privilege covers confidential communications made by a client to the attorney he has consulted for legal advice. *Id.* The privilege applies if:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or

frank disclosure by a client to enable the attorney to render effective advice.¹⁷ The purpose of the work product doctrine,¹⁸ in contrast, is to protect an attorney's privacy and to promote thoroughness in preparing for trial.¹⁹ The work product doctrine gives an attorney a qualified immunity from disclosure; the exemption granted by the attorney-client privilege is absolute.²⁰

The attorney-client privilege and work product doctrine present obstacles particularly in complex litigation involving corporations which control a large amount of information. For instance, when dealing with corporate clients, unique problems develop in determining whether the attorney-client privilege covers consultations between particular officers and employees of the corporation and corporate counsel.²¹ Moreover, the scope and coverage to which each of these privileges may be extended differs significantly between Illinois courts and federal courts.²² How narrowly or broadly the scope of these privileges is defined will determine the amount of information that will be shielded from discovery.

A. The Work Product Exemption

The work product doctrine was recognized by the Supreme Court in *Hickman v. Taylor*²³ and was codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.²⁴ In *Hickman*, the Court

(iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

17. Sutherland & Deitrick, *supra* note 15, at 448.

18. Commentators have recognized that work product embodies "opinion" work product and "ordinary" work product. *Id.* at 449. "Opinion" work product includes the mental impressions, opinions, and legal theories of the attorney. *Id.* "Ordinary" work product includes other factual material developed for trial. *Id.*

19. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

20. Sutherland & Deitrick, *supra* note 15, at 448.

21. *Id.*

22. For examples of the privilege law applied by other states, see *infra* notes 39 and 57.

23. 329 U.S. 495 (1947). The Court defined the "work product of the lawyer" as "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs" *Id.* at 511.

24. FED. R. CIV. P. 26(b)(3). Rule 26(b)(3) provides as follows:

(b) Scope of Discovery

.....

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor,

fashioned a qualified immunity from discovery of an attorney's work product.²⁵ The Court concluded that discovery may be taken only if the material was "essential," "relevant," and "non-privileged."²⁶ The Court created this doctrine to protect the attorney's work product from "undue and needless interference."²⁷ If work product was discoverable, the Court reasoned, much of the attorney's preparation would remain unwritten.²⁸ This would result in inefficient and ineffective representation.²⁹

According to *Hickman*, "opinion" work product is not discoverable in federal court,³⁰ except in rare situations.³¹ Furthermore, "ordinary" work product is immune from disclosure unless the requesting party can show both a "substantial need" for the material and an inability "without undue hardship to obtain the substantial equivalent of the materials by other means."³²

In *Monier v. Chamberlain*,³³ the Illinois Supreme Court constructed parameters to the work product protection which were narrower than those constructed by the United States Supreme Court in *Hickman*. Although the *Monier* court maintained the exclusion of "opinion" work product from discovery, it rejected the exclusion of "ordinary" work product from discovery.³⁴ The court reasoned that the overriding concern favoring broad discovery was the expediting of the "ascertainment of truth and ultimate disposition of the lawsuit."³⁵ It rejected the requirement of showing

insurer, or agent) only upon showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Id.

25. *Hickman*, 329 U.S. at 511.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Sutherland & Deitrick, *supra* note 15, at 449.

31. *Hickman*, 329 U.S. at 513. The Court in *Hickman* did not explicitly define what might constitute such a "rare situation justifying production of these matters . . ." *Id.* Rather, it merely stated that "petitioner's case is not of that type." *Id.*

32. Sutherland & Deitrick, *supra* note 15, at 449. See also FED. R. CIV. P. 26(b)(3).

33. 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

34. *Id.* at 361, 221 N.E.2d at 417. The court distinguished between "conceptual data" reflecting the "attorney's 'mental processes,'" which would be exempt from discovery, and other "relevant and material" factual matter, which would be discoverable. *Id.* at 360, 221 N.E.2d at 416.

35. *Id.* at 361, 221 N.E.2d at 417.

“good cause” before allowing discovery of such material in order to “avoid the need for judicial intervention at the discovery stage.”³⁶

Subsequently, the work product exemption enunciated in *Monier* was codified in Illinois Supreme Court Rule 201.³⁷ Thus, in Illinois, “ordinary” work product is discoverable;³⁸ “opinion” work product is discoverable only in rare circumstances.³⁹

36. Johnston, *Discovery in Illinois and Federal Courts*, 15 J. MARSHALL L. REV. 1, 27 (1982).

37. ILL. S. CT. R. 201, ILL. REV. STAT. ch. 110A, para. 201 (1985). Rule 201 states in pertinent part:

(b) Scope of Discovery

.....

(2) Privilege and Work Product. All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney. The court may apportion the cost involved in originally securing the discoverable material, including when appropriate a reasonable attorney's fee, in such manner as is just.

Id.

38. Sutherland & Deitrick, *supra* note 15, at 457.

39. In *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 110-11, 432 N.E.2d 250, 253 (1982), the Illinois Supreme Court stated that sometimes the only source of factual data may be blended together with “opinion” work product in such a way that it is impossible to separate the two. Notes or memoranda that provide the only source of factual material will not be shielded from discovery by the work product doctrine. *Id.*

The courts of other states also have taken different approaches to the application of the work product doctrine. For example, the Wisconsin courts have set forth a definition of work product which is similar to that set forth by the courts of Illinois. In Wisconsin, work product encompasses material the attorney has compiled and the “mental impressions, the legal theories and strategies that he has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs and other tangible or intangible means.” *State ex rel. Dudek v. Circuit Ct.*, 34 Wis. 2d 559, 589, 150 N.W.2d 387, 404 (1967). In application, however, the Wisconsin privilege extends much further than that of Illinois. In Wisconsin, the work product privilege will shield most material prepared by an attorney for litigation. *Id.* The privilege is not limited to the attorney's subjective theories and mental processes. *Id.* Furthermore, material that has become a part of his file may be privileged even if he has not prepared it himself. *State ex rel. Shelby Mutual Ins. Co. v. Circuit Ct.*, 67 Wis. 2d 469, 475, 228 N.W.2d 161, 164 (1975). Because Wisconsin's privilege law covers more material than does Illinois law, material that falls within Wisconsin's work product privilege may nevertheless be discoverable under Illinois law.

The California courts grant a qualified privilege against the discovery of “ordinary” work product. *American Mutual Liab. Ins. Co. v. Superior Ct.*, 38 Cal. App. 3d 579, 594, 113 Cal. Rptr. 561, 573 (1974). “Opinion” work product, however, is immunized absolutely. *Id.* An attorney's ordinary work product is not discoverable unless it would “unfairly prejudice” the other party, whereas opinion work product is not discoverable *under any circumstances*. CAL. CIV. PRO. CODE § 2016(b) (West 1983) (emphasis added).

B. *The Attorney-Client Privilege*

Courts typically have applied one of two tests in determining the scope of the attorney-client privilege in the corporate context.⁴⁰ The two tests applied are the "control group" test and the "subject matter" test.⁴¹ Under the control group test, only communications between corporate counsel and top corporate managers are privileged.⁴² In contrast, the "subject matter" or "scope of employment" test focuses the attention on the reasons why an attorney was consulted rather than on the persons with whom the attorney communicated.⁴³

In *Upjohn Co. v. United States*,⁴⁴ the United States Supreme Court rejected the control group test. The *Upjohn* case involved a request for discovery of documents prepared by Upjohn foreign managers for General Counsel.⁴⁵ The Court ruled that the attorney-client privilege protected these communications from discovery.⁴⁶ It reasoned that, not only was the control group test difficult

40. Sutherland & Deitrick, *supra* note 15, at 448. Because courts have not consistently applied one test for determining the scope of the attorney-client privilege in the corporate context, unique problems develop in complex litigation in which corporations are usually the defending party. The discussion of the attorney-client privilege, therefore, is limited to the corporate setting.

41. *Id.*

42. Note, *The Attorney-Client Privilege in the Corporate Context: The Intersection of Federal and Illinois Law*, 1984 U. ILL. L. REV. 175, 189 (1984). The control group test was enunciated first by the court in *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962). The court stated as follows:

[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

Id. at 485.

43. See *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd* by an equally divided court, 400 U.S. 348 (1971). The Seventh Circuit defined the subject matter test as follows:

[A]n employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

Id. at 491-92.

44. 449 U.S. 383, 392 (1981).

45. *Id.* at 386-87.

46. *Id.* at 392.

to apply, but also, it discouraged corporate employees from divulging relevant information to corporate counsel.⁴⁷ The Court, however, did not create a standard to replace the test.⁴⁸ Rather, the decision of whether the privilege is applicable would be made on a case-by-case basis.⁴⁹

In Illinois courts, however, the control group test will be applied. That test was adopted by the Illinois Supreme Court in *Consolidation Coal Co. v. Bucyrus-Erie Co.*⁵⁰ That case involved the discoverability of both a report by a Bucyrus-Erie employee, and certain notes and memoranda of in-house counsel.⁵¹ Although the court recognized the importance of encouraging full and frank disclosure between client and attorney,⁵² it noted that, in the corporate setting, the attorney-client privilege potentially could shield extensive amounts of relevant and material information from discovery.⁵³ To make the attorney-client privilege more compatible with the Illinois policy favoring broad discovery, the court applied

47. *Id.*

48. *Id.* at 386.

49. *Id.* As a result, "[t]he question of who speaks for a corporation on a privileged basis has created considerable confusion and conflict in the Federal system. . . ." *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 112, 432 N.E.2d 250, 254 (1982). See also Note, *The Attorney-Client Privilege in the Corporate Context: The Intersection of Federal and Illinois Law*, 1984 U. ILL. L. REV. 175, 176 n.5 (1984); *Consolidation Coal*, 89 Ill. 2d at 113-17, 432 N.E.2d at 255-56, for the different tests applied by federal courts in determining whether communications between an attorney and corporate client are privileged.

50. 89 Ill. 2d 103, 432 N.E.2d 250 (1982). In Illinois, the parameters of the control group test were set forth in *Day v. Illinois Power Co.*, 50 Ill. App. 2d 52, 199 N.E.2d 802 (5th Dist. 1964). An employee is a member of the control group if he "is in a position to control or take a part in a decision about any action the corporation might take upon the advice of its attorney, he personifies the corporation and when he makes reports or gives information to the attorney, the attorney-client privilege applies." *Id.* at 58, 199 N.E.2d at 806. Furthermore, in *Golminas v. Fred Teitelbaum Constr. Co.*, 112 Ill. App. 2d 445, 251 N.E.2d 314 (1st Dist. 1969), the court refused to adopt a broad application of the attorney-client privilege for corporate clients. It recognized that the attorney-client privilege should not "encompass all communications made to the attorney representing the corporation by any employee regardless of his rank or corporate responsibilities and duties." *Id.* at 448, 251 N.E.2d at 317. See, e.g., *Archer Daniels Midland Co. v. Koppers Co.*, 138 Ill. App. 3d 276, 280, 485 N.E.2d 1301, 1304 (1st Dist. 1985) (corporation's senior product engineer not within corporate control group because he merely supplied information to top management who ultimately made the decision); *Shere v. Marshall Field & Co.*, 26 Ill. App. 3d 728, 732, 327 N.E.2d 92, 95 (1st Dist. 1975) (director of safety of corporate owner of store was not within corporate control group because he did not have any "actual authority to participate in a decision regarding what action the corporation might take upon the advice of its attorney.").

51. *Consolidation Coal*, 89 Ill. 2d at 107, 432 N.E.2d at 251.

52. *Id.* at 117-18, 432 N.E.2d at 256.

53. *Id.* at 118, 432 N.E.2d at 256-57.

the control group test.⁵⁴

The court emphasized that the test "[struck] a reasonable balance by protecting consultations with counsel by those who are the decisionmakers or who substantially influence corporate decisions and . . . minimiz[ed] the amount of relevant factual material which [was] immune from discovery."⁵⁵ The goal, according to the court, was to prevent the concealment of relevant and material information in the corporate structure, and to retain a reasonable application of the attorney-client privilege among the participants in the actual decision-making within the corporation.⁵⁶

Thus, privilege law in Illinois courts and in federal courts differs significantly.⁵⁷ In Illinois, the scope of the work product doctrine is narrow. The work product doctrine applied by federal courts is more expansive and shields more material from discovery. Further, in the corporate setting, Illinois courts apply the attorney-client privilege only to the "control group." The control group test will not be applied, however, in a federal court which is adjudicating issues of federal law.

III. DISCUSSION OF THE DILEMMA FACED BY THE JUDICIARY

The existence of substantially different discovery practices in Illinois courts, other state courts, and federal courts presents significant problems when complex litigation is pending in multiple jurisdictions. When complex cases are pending simultaneously in various federal and state courts, corporations usually are parties to the action.⁵⁸ A corporation defending itself simultaneously in sev-

54. *Id.* at 118-20, 432 N.E.2d at 256-58.

55. *Id.* at 118-19, 432 N.E.2d at 257.

56. *Id.*

57. Other states also have taken different approaches. Seven states have incorporated the control group test into their rules of evidence: Alaska, Arkansas, Maine, Nevada, North Dakota, Oklahoma, and South Dakota. Stern, *Attorney-Client Privilege: Supreme Court Repudiates the Control Group Test*, 67 A.B.A. J. 1142, 1144 n.4 (1981). See also *D.I. Chadbourne, Inc. v. Superior Ct.*, 60 Cal. 2d 723, 737, 388 P.2d 700, 709, 36 Cal. Rptr. 468, 477 (1964), in which the California Supreme Court rejected the control group test and held that the privilege would apply when "the communicating employee is such a person who would ordinarily be utilized for communicating to the corporation's attorney" or "[w]here the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business" See also *Union Planters Nat'l Bank of Memphis v. ABC Records, Inc.*, 82 F.R.D. 472 (W.D. Tenn. 1979) (federal district court applying the law of that state did not follow the control group test). States that have omitted the control group test from codifications of their rules of evidence include Arizona, California, Florida, Kansas, Michigan, Minnesota, Montana, Nebraska, New Jersey, and New Mexico. Stern, *supra*, at 1144 n.5.

58. For example, a toxic disaster or mass tort involving a defective product produced

eral jurisdictions potentially will face varying and inconsistent privilege rules that may force it to disclose material in one jurisdiction that may be privileged in another. Because of the diversity in state and federal privilege law, corporate attorneys may find it difficult to determine when communications will be privileged.

The law of the forum will not always govern the application of privilege.⁵⁹ Because cases arising from the same incident will be pending in several fora, a judge will face the dilemma of deciding which forum's policy regarding privilege to apply.⁶⁰

by a single corporation may transcend the boundaries of several states. *See, e.g., In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 893 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) (by 1981, approximately 1,573 suits were pending against A.H. Robins); *In re Asbestos and Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 907-08 (J.P.M.D.L. 1977) (Johns-Manville was a defendant in ninety-one actions pending in nineteen districts and in seventy-three state court actions; seven other defendant corporations were named in more than fifty actions.)

59. For a discussion of the difficulty in determining which forum's law will apply in complex cases, see *infra* notes 61-94 and accompanying text.

60. In complex cases, a judge may also face a dilemma regarding the proper disposition of material prepared for terminated litigation or for claims that did not result in litigation. The extent of protection from discovery that this material should be given and whether the work product or attorney-client privilege should be applied to it is a divisive issue among the courts.

One approach courts have taken is that when material prepared for prior litigation has been determined to fall within the attorney's work product, it will be shielded from discovery in all subsequent cases. *See, e.g., In re Murphy*, 560 F.2d 326 (8th Cir. 1977); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); *Duplan Corp. v. Moulinaage et Retorderie de Chavanoz*, 487 F.2d 480 (4th Cir. 1973); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 558 (2d Cir. 1967); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 516 (D. Conn. 1976), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976); *United States v. O.K. Tire & Rubber Co.*, 71 F.R.D. 465 (D. Idaho 1976); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974); *Panther v. Marshall Field & Co.*, 80 F.R.D. 718 (N.D. Ill. 1970); *Fellows v. Superior Ct.*, 108 Cal. App. 3d 55, 166 Cal. Rptr. 274 (1980); *Popelka, Allard, McCowan & Jones v. Superior Ct.*, 107 Cal. App. 3d 496, 502, 165 Cal. Rptr. 748, 752 (1980); *Willis v. Duke Power Co.*, 291 N.C. 19, 35-36, 229 S.E.2d 191, 201 (1976). The policy behind maintaining the privilege for subsequent suits is that, if a party to a subsequent suit may compel discovery of an attorney's work product from prior litigation, an attorney will hesitate to accurately and thoroughly record his full impressions or doubts about a case.

Another approach taken by various courts is that when the prior and subsequent cases are related closely regarding the issues or parties, the materials prepared for the prior litigation will remain privileged. *See, e.g., Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 153 (D. Del. 1977); *Midland Inv. Co. v. Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y. 1973); *Insurance Co. of N. America v. Union Carbide Corp.*, 35 F.R.D. 520, 522-23 (D. Colo. 1964); *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 716 (Del. Ch. 1976).

Under certain circumstances, however, courts have refused to apply the work product privilege to material prepared for terminated litigation. *See, e.g., National Steel Prods. Co. v. Superior Ct.*, 164 Cal. App. 3d 476, 492, 210 Cal. Rptr. 535, 545 (1985); *Shepherd v. Superior Ct.*, 17 Cal. 3d 107, 122, 550 P.2d 161, 169, 130 Cal. Rptr. 257, 265 (1976).

A. *The Procedural-Substantive Dichotomy*

Because rules of discovery typically are viewed as procedural, the forum will apply its own rules governing the scope of discovery.⁶¹ Although the forum generally will follow its own rules governing procedure,⁶² the forum law will not always govern in substantive conflicts.⁶³ Privilege law is treated differently from general rules of discovery,⁶⁴ and there is a divergence of views as to

Material prepared for prior litigation that is only remotely related to a subsequent case may be discoverable. *See, e.g., Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D. Pa. 1970); *Tobacco & Allied Stocks, Inc. v. Transamerica Corp.*, 16 F.R.D. 534, 537 (D. Del. 1954); *cf. United States v. International Business Machs. Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974) (material would be discoverable even if the cases involved "substantially identical issues"). In fact, courts have held that material prepared for terminated litigation may also be discoverable if it is at issue in the subsequent case. *See, e.g., Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 932 (N.D. Cal. 1976); *Truck Ins. Exch. v. St. Paul Fire and Marine Ins. Co.*, 66 F.R.D. 129, 134 (E.D. Pa. 1975).

Material that previously has been shielded from discovery as work product in the prior litigation, however, should not be discoverable in a subsequent action. 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2024, at 200-01 (1970). Material should not lose its status as "privileged" just because the prior litigation has been terminated, particularly because a court has already determined that the interest in shielding that material from disclosure outweighed the considerations favoring disclosure to the public. Allowing this information to be discoverable at a later date would not only defeat the purpose of granting the privilege, but also would undermine the policy of the particular jurisdiction in granting the privilege. Furthermore, it would discourage attorneys from fully committing their thoughts and legal theories about a case to paper. Precluding disclosure of such material is especially imperative in closely related cases in which the same interests and similar issues are involved.

Even if the subsequent action is unrelated, an attorney's work product could end up indirectly in the hands of those representing antagonistic interests. "[A] sufficient community of interest may exist among attorneys . . . in a given locality so that disclosure to one is disclosure to all." Note, *The Attorney's Trial Preparations and Pre-Trial Discovery Under the Federal Rules: Hickman v. Taylor Two Years After*, 62 HARV. L. REV. 269, 274 (1948). Certain corporations frequently may be defendants. In complex cases, in which substantial investigation into the corporation's business may be compelled, material may prove useful to an adversary in an unrelated case.

The threat that certain material potentially could be revealed in some subsequent cases but not in others would diminish a lawyer's expectations of privacy. Thus, precluding discovery of work product in subsequent cases would provide the certainty and predictability necessary to allow the work product doctrine to be utilized effectively and fairly.

61. *See generally* J. FRIEDENTHAL, M.K. KANE, & A. MILLER, *CIVIL PROCEDURE* (1985).

62. *People v. Saiken*, 49 Ill. 2d 504, 509, 275 N.E.2d 381, 385 (1971), *cert. denied*, 405 U.S. 1066 (1972) ("[t]raditional conflict principles prescribe that issues of clearly procedural nature are governed by the internal laws of the forum . . .").

63. *See, e.g., Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1311 (3d Cir. 1978); *Bonn v. Puerto Rico Int'l Airlines, Inc.*, 518 F.2d 89, 91-92 (1st Cir. 1975); *Mitsui & Co. v. Puerto Rico Water Resources Auth.*, 79 F.R.D. 72, 78 (D.P.R. 1978); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 76 F.R.D. 47, 54 (W.D. Pa. 1977).

64. The Restatement (Second) of Conflict of Laws recognizes that the law of the

whether privilege law is procedural or substantive.⁶⁵ If privilege is procedural, then the law of the forum will be applied. If it is substantive, then a choice of law problem may arise regarding the competing interests of the jurisdictions involved.⁶⁶

Various courts have held that privileges are not substantive in nature, but rather, are procedural rules of evidence.⁶⁷ In *McDonald's Corp. v. Levine*,⁶⁸ the Illinois Appellate Court for the Second District stated that "[t]he attorney-client privilege is a rule of evidence, not a substantive right." In *Consolidation Coal*, however, the Illinois Appellate Court for the First District refused to label the privilege as substantive or procedural, and analyzed the case under both scenarios.⁶⁹

Difficulties also arise in federal court in determining which privilege law is to be applied in complex cases. Federal Rule of Evidence 501⁷⁰ authorizes federal courts to apply state privilege law in

forum will not always apply to privileged communications. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 (1971).

65. See *infra* notes 67-69 and accompanying text.

66. See *infra* notes 74-94 and accompanying text.

67. See *Hesselbine v. Wedel*, 44 F.R.D. 431, 433 (W.D. Okla. 1968)("[T]he scope of the asserted privilege is that of the law of evidence."); *McGranahan v. Dahar*, 119 N.H. 758, 764, 408 A.2d 121, 125 (1979) ("The attorney-client privilege is considered an evidentiary one, not a matter of substantive law."); *Mileski v. Locker*, 14 Misc. 2d 252, 255, 178 N.Y.S.2d 911, 915 (N.Y. Sup. Ct. 1958) ("The principle that certain relations are confidential and certain communications privileged against disclosure is a rule of evidence, based upon public policy."). See also 97 C.J.S. *Witnesses* § 252 (1957) ("[The] rule of privileged communications is not a rule of substantive law, but a mere rule of evidence . . .").

68. 108 Ill. App. 3d 732, 744, 439 N.E.2d 475, 484 (2d Dist. 1982).

69. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 93 Ill. App. 3d 35, 39-40, 416 N.E.2d 1090, 1094 (1st Dist. 1980), *vacated on other grounds*, 89 Ill. 2d 103, 432 N.E.2d 250 (1982). The material was held to be discoverable under either standard, and, accordingly the court did not need to resolve the issue of whether the privilege was procedural or substantive. The court stated that "[i]f work product is considered a procedural issue, the forum law would apply. Were we to adopt . . . the most significant relationship test set forth in the Restatement (Second) of Conflict of Laws . . . the forum law again would control." *Id.*

70. FED. R. EVID. 501. Rule 501 states that:

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

Id.

diversity cases.⁷¹ The Rule does not specify, however, which state's substantive law is to apply to the controversy.⁷² In addition, in cases involving both federal and state issues, information may be privileged to one but not the other. Rule 501 requires federal courts to apply federal privilege law to federal claims and state law to the state claims.⁷³ Indeed, the communication may be relevant to both claims but will be disclosed under one body of law and privileged under another. As a result, neither federal courts nor state courts have a consistent and predictable guide to follow in applying privilege law in complex cases.

B. *The Choice of Law Problem*

1. The Restatement's "Most Significant Relationship" Test

The Restatement (Second) of Conflict of Laws offers a solution to the judiciary's predicament of deciding which privilege law to apply in complex cases.⁷⁴ It stresses that evidence which is not privileged under the law of the state which has the "most significant relationship"⁷⁵ with the transaction or communication will be admitted, even though it would be inadmissible under the forum's local law.⁷⁶ This rule is designed to support the expectations of the parties because if the parties were to rely on any law at all, they most likely would rely on the law of the state that has the most significant relationship with the communication.⁷⁷

Evidence which is not privileged under the local law of the forum, but nevertheless is privileged under the law of the state which has the "most significant relationship" with the communication usually also will be admitted.⁷⁸ Because each forum state will strive to reach the proper result in its domestic litigation, each state generally will have "a strong policy favoring disclosure of all rele-

71. See, e.g., *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 76 F.R.D. 47, 53 (W.D. Pa. 1977) ("It is thus clear that federal courts sitting in diversity must apply the state law of privilege.").

72. The Committee comments also fail to give any indication of which state's law to apply.

73. FED. R. EVID. 501.

74. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971) [hereinafter Restatement].

75. The state with the "most significant relationship" is typically that in which the communication took place or where the prior relationship between the parties was centered. *Id.* at comment (e). See, e.g., *Hill v. Huddleston*, 263 F. Supp. 108 (D. Md. 1967).

76. Restatement, *supra* note 74.

77. Restatement, *supra* note 74, at comment on subsection (1).

78. Restatement, *supra* note 74.

vant facts that are not privileged under its own local law."⁷⁹

The Restatement, therefore, endorses a policy in favor of admitting allegedly privileged material. This section directs the forum to admit the evidence in the absence of "strong public policy"⁸⁰ or "some special reason"⁸¹ to the contrary.⁸²

2. The "Interest Analysis" Test

Interest analysis methodology is another approach which courts have used to resolve conflict of law problems in the area of privileges.⁸³ This approach takes into account not only the interests of the state in which the communication occurred and of the forum state, but also, it considers the interests of both the parties involved and the deposition state.⁸⁴

When confronted with conflict of law problems in privileged communications, the court considers four factors under the interest analysis test. First, the court must give weight to the policy of the forum state where the communication occurred and the relation of the parties to that state.⁸⁵ Second, the court must examine the public policies underlying the particular privilege.⁸⁶ Third, the interest in the situs state in maintaining the privilege must be considered.⁸⁷ Finally, the court must consider the forum state's

79. *Id.*, comment on subsection (2).

80. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(1) (1971).

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

82. The factors to be considered in determining whether the information will remain privileged or not include:

(1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved, (2) the relative materiality of the evidence that is sought to be excluded, (3) the kind of privilege involved and (4) fairness to the parties. . . . If the contacts with the state of the forum are numerous and important, the forum will be more reluctant to give effect to the foreign privilege. . . . [T]he forum will take such steps as may be necessary to prevent a party to the action from taking an inequitable advantage of the privilege.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139, comment on subsection (2) (1971).

83. See, e.g., *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 161, 583 P.2d 721, 723, 148 Cal. Rptr. 867, 869 (1978); *Bonn v. Puerto Rico Int'l Airlines, Inc.*, 518 F.2d 89, 91-92 (1st Cir. 1975); *Mitsui & Co. v. Puerto Rico Water Resources Auth.*, 79 F.R.D. 72, 78 (D.P.R. 1978); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 76 F.R.D. 47, 54 (W.D. Pa. 1977); cf. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1311 (3d Cir. 1978) (adopting "a flexible methodology" combining the approach taken by the Restatement (Second) of Conflict of Laws with the interest analysis approach).

84. *Mitsui*, 79 F.R.D. at 78.

85. *Id.*

86. *Id.*

87. *Id.*

interest in preserving the confidentiality of the out-of-state communication.⁸⁸

The forum should apply the law of the state which will most significantly promote the interests and policies of the involved states and litigants. Typically, the state whose law will determine whether the communication will be privileged will be that state in which the parties allegedly entered the privileged relationship.⁸⁹

Legal scholars examining the problem from an "interests" approach have argued that, generally, the law of the forum should be applied when the forum has a policy interest in maintaining its own law. One scholar suggested analyzing conflict-of-law problems on a case-by-case basis; thus, the forum's law would be displaced only when its use would defeat the reasonable expectations of the parties or particularly violate the interests of the other jurisdiction.⁹⁰ Justice Traynor, however, recommended interpreting the policy behind the state's own statutory law to see if it was intended to be applied to interstate situations.⁹¹ In cases in which it cannot be determined whether the particular law was intended to apply to interstate situations, he would "invoke the aid of such tests as which state has the most substantial connection with the issue,⁹² the five principles of Leflar⁹³ . . . and any other principle" that would aid in making the determination.⁹⁴ As a result of such anal-

88. *Id.*

89. The theory behind this test is that "[a] state's decision to extend (or withhold) a privilege with regard to a relationship exclusively within that state should not be disregarded by any other state, whether forum or deposition state." Seidelson, *The Federal Rules of Evidence: Rule 501, Klaxon and the Constitution*, 5 HOFSTRA L. REV. 21, 33-34 (1976).

The application of the law of a state other than the one in which the privileged communication exclusively existed "would frustrate (1) the potential expectations of the parties to the relationship, (2) the interest of the situs state in regulating the relationship and (3) the political capacity of citizens of the situs state to determine the nature of the relationship in that state." *Id.* at 34.

90. See *Conflict of Laws Round Table: The Value of Principled Preferences*, 49 TEX. L. REV. 211, 224 (1971) [hereinafter Round Table] (comments of Professor Robert A. Sedler, University of Kentucky).

91. Round Table, *supra* note 90, at 240 (comments of Roger J. Traynor, Chief Justice of California, retired).

92. See *supra* notes 74-82 and accompanying text.

93. Professor Leflar compiled lists prepared by other scholars of policy factors that affect choice-of-law determinations and developed considerations that he believed reflected pertinent policy factors: "A. Predictability of results; B. Maintenance of interstate and international order; C. Simplification of the judicial task; D. Advancement of the forum's governmental interests; E. Application of the better rule of law." Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 563 (1983).

94. Round Table, *supra* note 90, at 240. See, e.g., Restatement (Second) of Conflict of Laws § 6 (1971). The Restatement provides as follows:

ysis, substantial deference is given to a broad application of the local law of the forum.

The determination of the appropriate privilege law to be applied is thus one of the most difficult decisions a judge will face. The judge must weigh not only the interests of the parties in disclosure or non-disclosure, but also the relevant policies of the interested fora involved. Hence, issues of fairness, predictability, and uniformity all become intertwined in the judge's decision-making process.

IV. PROPOSAL FOR A UNIFORM APPLICATION OF PRIVILEGE IN ALL COMPLEX CASES

Although several tests have been applied to help resolve conflicts over privilege laws, each state nevertheless maintains a strong interest in applying its own law.⁹⁵ For instance, in Illinois, the judge's decision will probably be influenced by the policy favoring broad discovery. The *Monier* decision, which laid the groundwork for current discovery policy in Illinois, emphasized the strong interest Illinois has in maintaining wide discovery.⁹⁶ With competing interests involved, the tests applied by the courts will not solve the problem of conflicting rules of privilege being applied in complex litigation.

Even though a particular jurisdiction may apply the "most significant relationship" test and ultimately determine that another state has the most significant relationship, it nevertheless may undermine that other state's policy by deciding that its own interests

Choice of Law Principles

- (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.

Id.

95. See, e.g., *Application of Walsh*, 40 Misc. 2d 413, 413, 243 N.Y.S.2d 325, 326 (N.Y. Sup. Ct. 1963) (involving a deposition to be taken in New York for use in an action pending in Connecticut. Because New York law granted a privilege, the court held that applying Connecticut law which required production would violate the public policy behind its privilege).

96. 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

outweigh those of that state.⁹⁷ Thus, notions of comity and full faith and credit may be overridden by a state's interest in maintaining its own policy.

A viable, yet difficult, solution to this problem would be to coordinate a joint discovery plan between the various courts involved on the federal and state level. This approach seeks to establish one flexible rule, which is easy to follow, and which will produce uniform results in complex cases. Indeed, Congress can provide the leadership by passing one uniform rule for federal courts to follow in all cases.⁹⁸ The state courts then may follow by adopting a uniform rule that can be applied consistently.

The American Law Institute ("ALI") must provide the impetus for a new rule. In 1985, the ALI appointed a committee to examine the problems associated with complex litigation and to make recommendations.⁹⁹ The committee recommended that the ALI create a federal choice-of-law rule for purposes of selecting a single law to govern complex cases.¹⁰⁰

97. See, e.g., *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 93 Ill. App. 3d 35, 416 N.E.2d 1090 (1st Dist. 1980), *supra* note 69 and accompanying text. In that case, the court had to decide whether to apply the privilege law of Wisconsin (the location of the defendant's principal place of business) or that of Illinois (where the accident occurred). *Id.* at 39, 416 N.E.2d at 1093. It ruled that Illinois law governing work product was to be applied. *Id.* at 40, 416 N.E.2d at 1094. The court concluded that although Wisconsin had the "most significant relationship," its considerations did not outweigh the Illinois policy favoring broad discovery. *Id.* See also *Hare v. Family Publications Serv., Inc.*, 334 F. Supp. 953 (D. Md. 1971) (court refused to apply the law of the state with the most significant relationship when comity to the sister state which required disclosure would violate its own public policy of maintaining the privilege).

98. See, Note, *The Attorney-Client Privilege in the Corporate Context: The Intersection of Federal and Illinois Law*, 1984 U. ILL. L. REV. 175 (1984) (arguing for one uniform, codified federal privilege rule to be applied by federal courts in all cases).

99. Distinguished judges, lawyers, and academicians were appointed to serve on the Advisory Committee. Arthur R. Miller, Bruce D. Bromley Professor of Law at Harvard Law School, served as the Reporter for the study. This committee expressed its concerns over the inadequacy of existing mechanisms to resolve issues arising in complex cases.

[A]s society grows increasingly dependent upon mass enterprises and potentially dangerous technologies and products, the incidence of highly complex lawsuits is likely to continue to increase and thereby pose an even greater threat to the viability of our system. Currently existing mechanisms for consolidating, coordinating, and resolving related actions were designed in a different age, and for much simpler litigation; they simply are not adequate for many of today's problems. The development of effective procedures for handling complex litigation therefore may be necessary if a crisis in the courts is to be averted.

Preliminary Study, *supra* note 1, at 5.

100. Preliminary Study, *supra* note 1, at 239. Specifically, the Committee recommended that the A.L.I.:

Study the possibility of establishing a federal choice of law rule that would make possible the selection of a unitary governing law, or a manageable number

In addition to the committee's recommendation, the ALI also should create a uniform privilege rule to be applied when a complex case is pending in two or more states (or in a state and federal court) and the potential for the application of conflicting privilege rules is created. Although each state has a valid interest in not compelling disclosure of the contents of relationships it has deemed to be privileged, complex litigation is an exceptional situation. Because so much is at stake in complex litigation, and because vast amounts of information are involved, there is great potential for abuse of privileges. An expansive privilege rule could lead to the shielding of extensive amounts of relevant and material information from discovery. Accordingly, a new rule should favor a narrow application of privilege so as to not unduly limit disclosure in these situations.¹⁰¹

of different laws, to apply to common questions in a consolidated multiparty, multiforum case by either:

- (a) determining governing law in consolidated actions; or
- (b) authorizing the development of a federal common law of choice of law in complex multiparty, multiforum cases.

Id.

101. It is generally recognized that the privilege is an exception to the general duty to disclose. 8 J. WIGMORE, EVIDENCE § 2291, at 554 (McNaughton rev. ed. 1961). Therefore, "[i]t ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *Id.* In fact, the Supreme Court recognized that rules of discovery

are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

Hickman v. Taylor, 329 U.S. 495, 507 (1947) (footnote omitted).

The advantages of liberal discovery include the reduction of surprise at trial, the facilitation of trial preparation, the encouragement of settlement, the narrowing and simplification of issues, and the introduction of new issues. 4 J. MOORE, J. LUCAS, & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 26.02[2] (2d ed. 1987). By fully informing the parties of the validity of their claims and defenses, a just and effective determination of the issues is promoted.

Furthermore, there are procedural safeguards in place to protect against abuses and thus mitigate the inconvenience and unfairness that would support the argument for applying a broad privilege standard. For example, see Illinois Supreme Court Rule 201 which provides in pertinent part as follows:

(c) Prevention of Abuse

(1) Protective Orders. The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.

(2) Supervision of discovery. Upon the motion of any party or witness, on notice to all parties, or on its own initiative without notice, the court may supervise all or any part of any discovery procedure.

The Illinois approach, in this respect, presents a favorable model for the uniform privilege law.¹⁰² The narrow scope of work product fashioned by *Monier* and codified in Supreme Court Rule 201 is aimed at facilitating the acquisition of all relevant information to expedite the "ultimate disposition of the lawsuit."¹⁰³ Relevant and material evidence that might otherwise be privileged will be released to fully "educat[e] the parties in advance of trial as to the real value of their claims and defenses . . . ;"¹⁰⁴ thereby encouraging the early resolution of disputes and settlement.¹⁰⁵ This is particularly critical in complex cases because of the potential for time consuming litigation that clogs the court systems, and drains the parties of astronomical sums of money and other resources.¹⁰⁶

Similarly, in the attorney-client privilege context, the control group test adopted by the Illinois Supreme Court in *Consolidation Coal* provides a favorable model to be followed in all complex cases. The control group test reduces the ability of the corporation to insulate large amounts of information from discovery.¹⁰⁷ Fur-

ILL. S. CT. R. 201, ILL. REV. STAT. ch. 110A, para. 201 (1985). See also FED. R. CIV. P. 26(c) (Rule 26(c) governs protective orders in federal courts).

102. See *supra* notes 33-39 and accompanying text.

103. *Monier v. Chamberlain*, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966).

104. *Id.* (quoting *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231, 236, 145 N.E.2d 588, 592 (1957)).

105. *Monier*, 35 Ill. 2d at 357, 221 N.E.2d at 415.

106. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 513 F. Supp. 1100 (E.D. Pa. 1981), *aff'd in part and rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd*, 475 U.S. 574 (1986). That case was filed in 1974 against twenty-two Japanese manufacturers of consumer electronic products and two American companies. The case was transferred to the Pennsylvania court after two of the previous judges assigned to the case had died before any substantial progress was made. *Matsushita*, 723 F.2d at 250 n.1. Discovery lasted several years, and "[t]he clerk inform[ed] us that from January 1, 1980 to October 1, 1980, the parties filed some 114 briefs or memoranda, two of which (filed by plaintiffs) were roughly five hundred pages in length. We have not counted, but estimate the total brief pages alone filed during 1980 to be in excess of 7500." *Matsushita*, 513 F. Supp. at 1118 n.2. The United States Supreme Court acknowledged the judicial resources exhausted by the case:

The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long. Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a forty-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

Matsushita, 475 U.S. at 576-77 (citations omitted).

107. See Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 955-56 (1956) ("Where corporations are involved, with their large number of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large."). See also *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 118, 432 N.E.2d 250, 257 (1982), in which the court stated that the "potential to insulate so

thermore, the control group test is predictable and easy to apply.¹⁰⁸ The case-by-case approach adopted by the United States Supreme Court in *Upjohn* requires the judiciary to independently review each assertion of the attorney-client privilege. The already overcrowded court dockets would be delayed further due to pretrial hearings, interlocutory appeals, or mandamus actions on the asserted privilege.

As federal and state courts continue to take such different approaches, attorneys face uncertainty as to when communications are privileged. Corporations doing business in various states are subjected to several different privilege laws. As a result, determining when a communication is privileged becomes difficult, if not impossible. This difficulty could have a tremendously chilling effect on full and frank communications between attorney and client. There is a need, therefore, for one uniform rule in complex cases.¹⁰⁹ Although each state arguably has a significant interest in maintaining its own privilege law, without a uniform rule, each state's privilege law stands to be frustrated and undermined by other states.

V. CONCLUSION

In Illinois, privilege rules are applied very narrowly to facilitate the policy of broad discovery. In federal court and the courts of other states, however, privilege law may shield more material from discovery. As a result, parties involved in complex cases may be forced to disclose information in one jurisdiction that is immune from discovery in another.

much material from the truth-seeking process convinces us that the privilege ought to be limited for the corporate client to the extent reasonably necessary to achieve its purpose."

108. *Consolidation Coal*, 89 Ill. 2d at 119, 432 N.E.2d at 257.

109. Another recommendation set forth by the Advisory Committee to the A.L.I. is to "[c]onsider means of increasing the consolidation of related cases dispersed among the federal courts for common adjudication, perhaps by: (a) expanding transfer under Section 1407 to include trial as well as pretrial" or "[e]valuate the possibility of encouraging the consolidation of related actions dispersed among state courts as well as federal courts in a single federal or state court . . ." Preliminary Study, *supra* note 1, at 238-39. Section 1407 authorizes the "judicial panel on multi-district litigation" to transfer "civil actions involving one or more common questions of fact . . . pending in different districts, . . . to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a) (1982). Although the creation of a forum to consolidate complex cases for trial has the advantages of saving time, reducing litigation costs, preventing duplication, and avoiding conflicting rulings, it is not preferable to the proposed adoption of one uniform privilege rule. Due to the substantial number of potential claimants involved, the interest in choosing their own forum, and the hardship of forcing them to travel (along with witnesses and evidentiary matter) to a foreign forum, reason and fairness dictates that having each forum apply a uniform privilege rule is preferable.

Because of the direct conflict of privilege law between various state and federal courts, there is a need for the adoption of a uniform privilege rule to be applied in all complex cases. Without a uniform rule, attorneys will face uncertainty as to when communications will be privileged. As a result, the ultimate goal of encouraging full disclosure between attorney and client is undermined, and the attorney-client privilege is frustrated. Communications between attorney and client will be chilled by the threat of public disclosure in another jurisdiction. The American Law Institute, therefore, must present a uniform privilege rule for adoption by the states to be applied by all courts involved in complex cases pending in two or more jurisdictions.

BRIAN HAVEY