CARLTON FIELDS

# You Keep Using That Word, I Do Not Think It Means What You Think It Means: Accountant-Client "Privileged" Communications May Not Be Privileged as a Conflict of Law Matter

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**Introduction** In Florida, the legislature deemed open dialogue between an accountant and a client so important that, in 1978, it adopted a privilege nonexistent in the common or law: the accountant-client privilege.[1] Akin to the attorney-client privilege, the privilege permits a client "to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications with an accountant when such other person learned of the communications because they were made in the rendition of accounting services to the client."[2] Unlike the attorney-client privilege, however, not every state recognizes the accountant-client privilege. So how do courts resolve situations in which two states' laws conflict on the applicability of the accountant-client privilege? Several courts addressing this question have applied the approach taken by section 139 of the *Restatement (Second) of Conflict of Laws*. *See, e.g.*, *Schaeffer v. Dowling & Hales, LLC*, No. 2018-ca-004190 (Fla. 15th Jud. Cir. May 20, 2019) (resolving conflict between California and Florida law on accountant-client privilege; collecting cases); *see also Janvey v. GMAG LLC*, No. 3:15-cv-0401, 2016 WL 11782223, at *2–5 (N.D. Tex. Oct. 7, 2016); *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 3:09-md-02100, 2011 WL 1375011, at *10–11 (S.D. Ill. Apr. 12, 2011); *Hercules, Inc. v. Martin Marietta Corp.*, 143 F.R.D. 266, 269 (D. Utah 1992); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 117 F.R.D. 292, 295–96 (D.D.C. 1987).[3] **Restatement (Second) of Conflict of Laws *Section 139 Generally*** Section 139 of the *Restatement (Second) of Conflict of Laws* addresses

conflicts involving privileges. Section 139 states: (1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum. (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect. In sum:

- If the forum state (the state in which the lawsuit is filed) deems a communication privileged, but the state with the most significant relationship with the communication does not, then the communication will be admitted.
- If the forum state does not deem a communication privileged, but the state with the most significant relationship with the communication does, then the communication will be admitted.

Although there are exceptions, they are narrow. Indeed, as can be seen through the plain language of section 139, the default is to admit the communication in the conflict of law context, absent some "strong public policy" or "special reason." The fact that a state has chosen to protect a communication as privileged does not appear to constitute a "strong public policy" or "special reason" under section 139's approach because, if it were, the exception would swallow the rule. Section 139 then raises the question: when is there a "strong public policy" or "special reason" for not admitting material that is privileged under at least one state's laws? ***Exceptions to the Default Rule of Admission*** Under section 139, a forum "will admit evidence that is not privileged under its" law but is privileged under the "law of the state which has the most significant relationship with the communication, unless [the forum] finds that its local policy favoring admission . . . is outweighed by countervailing considerations."[4] Section 139 then sets forth four factors to weigh in determining whether to admit the evidence:

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.

The first factor, which looks at the number and nature of the competing contacts, sets up a sliding scale. If the contacts with the forum are numerous and important, then it is *less likely* that the foreign privilege will be recognized. Conversely, if the contacts with the forum are few and insignificant, then it is *more likely* that the foreign privilege will be recognized. The second factor turns on the relative materiality in any given case of the evidence that is sought to be excluded. A forum will be more

inclined to give effect to a foreign privilege "if the facts that would be established by this evidence would be unlikely to affect the result of the case or could be proved in some other way." The third factor addresses the kind of privilege involved and, as with the first factor, sets up a sliding scale. If the foreign privilege is "well established and recognized in many states," then it is *more likely* that the forum will recognize the foreign privilege. If, however, the foreign privilege is "relatively novel and recognized in only a few states," then it is *less likely* that the forum will recognize it. "The forum will also be more inclined to give effect to a privilege" that "is generally similar to one or more privileges found in its local law than to a privilege which is entirely different from any found in the state of the forum." The fourth consideration looks at questions of fairness. A forum is "more inclined to give effect to a privilege if it was probably relied upon by the parties." To show reliance, a party could demonstrate either that it was aware of the privilege's existence under the law of the state with the most significant relationship or that it "made the communication in reliance on the fact that communications of the sort involved are treated in strict confidence in the state of most significant relationship." Moreover, if the privilege belongs to a nonparty, the "forum will be more inclined to recognize the privilege . . . than it would be in a situation where the privilege is claimed by a person who is a party to the action." Before moving on to see how at least one court in Florida applied section 139, we must address how to determine which state will be deemed to have the most significant relationship with the communication. ***Determining the State with the Most Significant Relationship*** We finally come to how to determine which state has the most significant relationship. According to the comments to section 139, "[t]he state where the communication took place will be the state of most significant relationship in situations where there was no prior relationship between the parties to the communication."[5] If, however, there was "a prior relationship between the parties, the state of most significant relationship will be that where the relationship was centered unless the state where the communication took place has substantial contacts with the parties and the transaction." **A Case Study** Cases applying section 139 to a conflict of law regarding the accountant-client privilege, in Florida state court, are nearly nonexistent. In fact, the authors of this article are aware of only one such decision, in which they participated — *Schaeffer v. Dowling & Hales LLC*. In *Schaeffer*, the defendant sought to issue a nonparty subpoena to obtain communications between one of the plaintiffs and his California-based accountants that occurred while the plaintiff resided in California. The plaintiff objected, thereby forcing the court to address what appeared to be an issue of first impression under Florida law. The court began its analysis by noting that a conflict existed because Florida (the forum) recognized the accountant-client privilege while California (the state where the communications occurred) did not. From there, the court noted that Florida applies the "'interest analysis methodology' for determining choice of law questions," and then quoted section 139.[6] The court went on to apply section 139 in the context of the accountant-client privilege, and relied on an example given by section 139 of when *not* to recognize a privilege. According to section 139's example: In state X, A, a business man doing business in X, gives certain information to B, an accountant, which is not privileged under X local law. The information would, however, be privileged under the local law of state Y, and in the trial of an action brought in Y, A claims that evidence of his conversation with B should be excluded. The evidence will be received.[7] The

*Schaeffer* court filled in the placeholders in the example from section 139 with the states and parties at issue in the suit pending before it, and concluded it would not apply Florida's accountant-client privilege to communications that occurred between the then-California-resident plaintiff and his California-based accountants.[8] **Conclusion** There is a sizeable body of case law from courts across the country applying section 139 of the *Restatement (Second) of Conflict of Laws*.[9] Importantly, section 139 favors disclosure when there is a conflict. Thus, litigants should be aware of the pitfalls and opportunities presented when faced with privileges arising in a conflict of law context.

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[1] *See* Ch. 78-361, § 12, Laws of Fla.; *Nat'l Union Fire Ins. Co. of Pittsburgh v. KPMG Peat Marwick*, 742 So. 2d 328, 331 (Fla. 3d DCA 1999) (noting that the accountant-client privilege was "unknown at common law"). [2] Fla. Stat. § 90.5055(2). [3] Courts have also applied section 139's framework in a variety of other privilege contexts. *See 3Com Corp. v. Diamond II Holdings, Inc.*, No. 3933–VCN, 2010 WL 2280734, at *5 (Del. Ch. May 31, 2010) (applying section 139 to attorney-client privilege issue); *Saleba v. Schrand*, 300 S.W.3d 177, 181–83 (Ky. 2009) (applying section 139 to peer-review privilege issue); *State v. Lipham*, 910 A.2d 388, 391 n.3 (Me. 2006) (considering section 139 when assessing conflict of law issue regarding spousal privilege); *State v. Heaney*, 689 N.W.2d 168, 175–77 (Minn. 2004) (applying section 139 to physician-patient privilege conflict of law analysis); *Gonzalez v. State*, 45 S.W.3d 101, 103–06 (Tex. Crim. App. 2001) (applying section 139 to clergy-penitent privilege communication issue); *State v. Donahue*, 18 P.3d 608, 611 (Wash. App. Div. 2001) (applying section 139 to physician-patient privilege issue); *People v. Thompson*, 950 P.2d 608, 611 (Colo. App. 1997) (concluding section 139 provided appropriate framework for analyzing spousal privilege issue); *State v. Eldrenkamp*, 541 N.W.2d 877, 881–82 (Iowa 1995) (looking to section 139 for guidance on physician-patient privilege issue); *State v. Kennedy*, 396 N.W.2d 765, 769–70 (Wis. App. 1986) (relying on section 139 and concluding Wisconsin's physician-patient privilege controlled); *Brandman v. Cross & Brown Co. of Fla., Inc.*, 479 N.Y.S.2d 435, 436–37 (N.Y. Sup. 1984) (referencing section 139 and stating attorney-client privilege is substantive for purposes of conflict of law analysis and New York courts will apply the law of the state with the more significant contacts); *Samuelson v. Susen*, 576 F.2d 546, 551 (3d Cir. 1978) (concluding Pennsylvania courts have adopted the "interest analysis" approach to conflict of law questions and therefore would apply the privilege law of the state with the more significant relationship); *Woefling v. Great–West Life Assur. Co.*, 285 N.E.2d 61, 68, n.1 (Ohio App. 1972) (determining that Illinois' physician-patient privilege controlled, citing section 139). [4] *Id.*, Comment on Subsection (2), *cmt. d*. Conversely, in a situation involving a privilege recognized by the forum, but not by the state with the most significant relationship to the communication, and as explained further in the discussion of *Schaeffer* below, "[t]here can be little reason why the forum should exclude evidence that is not privileged under the local law of the state which has the most significant relationship with the communication," even if privileged under the law of the forum. *Id.*, Comment on Subsection (1), *cmt. c*. [5] *Id.*, Comment on Subsection (2), *cmt. e.* [6] *Schaeffer* at ¶ 8. [7] Restatement (Second) of Conflict of Laws § 139, *Illustration 1*. [8] *Schaeffer* at ¶¶ 14–15. [9] *Schaeffer* at ¶¶ 13, 16.

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