Unpredictability in Privilege Law Creates Practical Challenges

By: Joe Richie

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Since the elimination of general federal common law in 1938,[1] federal courts have sought to avoid the specter of "two conflicting systems of law controlling the primary activity of citizens."[2] But there remains an area of federal common law that sometimes diverges sharply from state law, with little predictability as to which will control: the law of privilege.

When Congress enacted the Federal Rules of Evidence in 1975, it rejected a proposed codification of privilege law, instead enacting Rule 501, which provides that "common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege," except for that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."

It is often impossible, especially when litigation is not imminent, to anticipate whether any future claims might arise under state or federal law. Rule 501, moreover, leaves open what law applies in federal cases that include both state and federal claims.[3] And a case that begins its life with both federal and state claims (and is likely to apply federal privilege law) may ultimately have the federal claims dismissed, presumably then requiring application of state privilege law.

This uncertainty creates real problems for parties trying to structure their affairs when federal and state privilege rules conflict, as illustrated by the so-called common-interest privilege. Something of a misnomer, the common-interest privilege is best thought of not as an independent privilege but as an exception to the typical rule that the attorney-client privilege and work-product protection are waived if privileged materials are shared with third parties.

The Eighth Circuit has embraced a broad conception of the common-interest privilege:

> If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons.[4]

This formulation is notable for allowing the shared interest to be "either legal, factual, or strategic in character"[5] and not requiring the parties' shared interest to be "identical."[6] It also extends to both "litigated [and] non-litigated matter[s]."[7] That allows, for example, parties to commercial transactions to exchange privileged information without waiver, even without immediately foreseeable litigation.[8] A licensee and licensor may have a shared interest in defending the validity of a patent or obtaining FDA approval of a drug; parties to an acquisition may have a shared interest in regulatory compliance or avoiding the triggering change-of-control provisions in existing contracts.

In 1942, the Minnesota Supreme Court became the first court to apply a common-interest privilege in a civil case.[9] But that decision provided little guidance on the privilege's scope, and there has been a dearth of reported decisions on the issue in the intervening 78 years. Minnesota's privilege law, codified by statute, makes no mention of common-interest privilege,[10] and the legislature has restricted Minnesota courts' ability to modify privilege rules.[11] The scope of the privilege in Minnesota is unclear at best.

So what are two Minnesota parties to do to avoid waiving privilege while pursuing a shared goal? Any comfort given by the Eighth Circuit's broad view turns to unease in the face of uncertainty in whether federal privilege law will apply, particularly when litigation is not impending, given the difficulty in predicting whether it might involve state or federal claims (or both).

The result is what Justice Harlan said in 1965 we must aim to avoid: "a debilitating uncertainty in the planning of everyday affairs."[12] Perhaps someday privilege law will develop greater uniformity. Until then, be wary of relying too heavily on any particular jurisdiction's privilege law.

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

[2]Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

*[3]The Supreme Court has recognized this ambiguity but not resolved it. See Jaffee v. Redmond, 518 U.S. 1, 36 n.15 (1996) ("We note that there is disagreement concerning the proper rule in cases such as this in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not federal law.") While the Eighth Circuit has not resolved this question either, district courts typically apply federal privilege law in cases involving both state and federal claims. See, e.g., Tiarnan Rumble v. Fairview Health Servs., 2016 WL 3509221, at *2 (D. Minn. May 18, 2016); Lykken v. Brady, 2008 WL 2077937, at *3–4 (D. Minn. May 14, 2008).*

[4]In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922 (8th Cir. 1997) (quoting Restatement (Third) of the Law Governing Lawyers § 126(1)) (omission in the original).

[5]Id.

[6]See, e.g., Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 964 (N.D. Ill. 2010) ("Parties may assert a common interest where they have an identical—not merely similar—legal interest in the subject matter of a communication . . . .").

[7]In re Grand Jury Subpoena, 112 F.3d at 922.

[8]The application of the common-interest privilege to non-litigated matters is a developing area of law. In 2016, the New York Court of Appeals held that the privilege was waived with respect to communications shared while two parties merged, finding that the common-interest privilege applies only to communications that "relate to litigation, either pending or anticipated." Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 57 N.E.3d 30, 32 (N.Y. 2016).

[9]See Schmitt v. Emery, 2 N.W.2d 413, 417 (Minn. 1942), overruled on other grounds by Leer v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 308 N.W.2d 305 (Minn. 1981).

[10]See Minn. Stat. § 595.02 subd. 1(b).

[11]See Minn. Stat. § 480.0591, subd. 6; Minn. R. of Evid. 501 committee comment.

[12]Hanna, 380 U.S. at 747 (Harlan, J., concurring).

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