The Federal Rules of Evidence: Rule 501, Klaxon and the Constitution

David E. Seidelson
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Rule 501 of the Rules of Evidence for United States Courts and Magistrates provides:

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 the 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.

It is clear from the second sentence of the Rule that, in diversity cases, federal courts are to resolve privilege issues by the application of state privilege law.


2. FED. R. EVID. 501 (emphasis added).

3. I have used the phrase “diversity cases” because it is easier to express and comprehend than “civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision” and because it is in diversity cases that the second sentence of the rule will have its principal application.

In civil actions and proceedings, the House bill provides that state privilege law applies “to an element of a claim or defense as to which State law supplies the rule of decision.” The Senate bill provides that “in civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different states and removed under 28 U.S.C. § 1441(b) the privilege of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision.”

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to “an element of a claim or defense.” If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state privilege law applies to that item of proof.
tion of state law. What is not entirely clear is, given a choice-of-
law problem applicable to the privilege issue, which state's law
is the federal court to apply? Does the Rule require the federal
court to resolve the choice-of-law problem as it would be resolved
by the highest appellate court of the state in which the federal
district court sits, and apply that state privilege law which that
court would apply, or does the Rule permit the federal district
court to resolve the choice-of-law problem independently and
apply that state privilege law which seems most appropriate to
the federal district court? Put another way, does Klaxon Co. v.
Stentor Electric Manufacturing Co. govern the determination of
a choice-of-law privilege issue under the second sentence of Rule
501?

Let's create a hypothetical situation which will, simultane-
ously, isolate the problem and present the alternatives. P sues D
to recover for personal injuries sustained in a two-vehicle collision
which occurred in State A. The action is initiated in a federal
district court sitting in State A and exercising diversity jurisdic-
tion. During the defense case, W, a psychologist, is called to the
stand. In response to P's request for a side-bar offer of proof, D
makes the following assertions to the court: As a result of the
injuries he sustained, P was admitted to a rehabilitation center
in State B. At the time of admission, P was interviewed by W,
in her capacity as psychologist for the center, for the purpose of
assigning P to an appropriate rehabilitation group. During the
course of that interview, P "assumed responsibility for the
[collision, stating] that he lost control of the vehicle he was

Under the provision in the House bill, therefore, state privilege law will
usually apply in diversity cases. There may be diversity cases, however, where
a claim or defense is based upon federal law. In such instances, federal privilege
law will apply to evidence relevant to the federal claim or defense. See Sola

In civil actions and proceedings, where the rule of decision as to a claim or
defense or as to an element of a claim or defense is supplied by state law, the
House provision requires that state privilege law apply.

The Conference adopts the House provision.

CONFERENCE COMM. REP. NO. 93-1597, 93d Cong., 2d Sess. 7-8 (1974) [accompanying H.R.
5463, the FEDERAL RULES OF EVIDENCE].

note 29 infra.

5. The hypothetical is based on Elliott v. Watkins Trucking Co., 406 F.2d 80 (7th Cir.
1969).

6. In Elliott, the collision occurred in Indiana and the action was brought in a federal
district court in Indiana. Id. at 90-91.

7. In Elliott, the rehabilitation center was in Illinois. Id. at 93.
driving and ran into [D's vehicle]." That assumption of responsibility by P was relevant to W's purpose of assigning P to an appropriate rehabilitation group.¹

State A, in which the federal court sits, has no psychologist-patient privilege.¹⁰ State B, where the interview was conducted and the rehabilitation process effected, has a psychologist-patient privilege¹¹ apparently applicable to P's inculpatory declaration to W. The highest appellate court of State A has embraced interest analysis¹² as the method employed for resolving choice-of-law

8. Id.
9. I have made this conclusion a part of the hypothetical to assure the potential applicability of the psychologist-patient privilege.
10. Plaintiff relies in part on the portion of Sec. 2-1714, Burns' Ind. Stat. which makes physicians incompetent to testify as to matter communicated to them by patients in the course of their professional business. The collision and the trial occurred in Indiana. Plaintiff cites no authority, however, that "physician" in that statute includes "psychologist."

Elliott v. Watkins Trucking Co., 406 F.2d 90, 93 (7th Cir. 1969). The court considered as well an Illinois statute, Ill. Ann. Stat. Ch. 51, § 5.2 (1963), privileging communications to a psychologist acting under the supervision of a psychiatrist. But, finding insufficient evidence that the psychologist-witness had been acting under the supervision of a psychiatrist, the court rejected that statute as well. Elliott v. Watkins Trucking Co., supra.

After the operative facts of Elliott occurred, Indiana enacted a psychologist-patient privilege statute:

No psychologist certified under the provisions of this act... shall disclose any information he may have acquired from persons with whom he has dealt in his professional capacity, except under the following circumstances: (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of said homicide; (2) in proceedings the purpose of which is to determine mental competency, or in which a defense of mental incompetency is raised; (3) in actions, civil or criminal, against a psychologist for malpractice; (4) upon an issue as to the validity of a document as a will of a client; and (5) with the expressed consent of the client or subject, or in the case of his death or disability, of his legal representative.


11. No psychologist shall disclose any information he may have acquired from persons consulting him in his professional capacity, necessary to enable him to render services in his professional capacity, to such persons except only:
(1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in all proceedings the purpose of which is to determine mental competency, or in which a defense of mental incompetency is raised, (3) in actions, civil or criminal, against the psychologist for malpractice, (4) with the expressed consent of the client, or in the case of his death or disability, of his personal representative or other person authorized to sue or of the beneficiary of an insurance policy on his life, health or physical condition, or (5) upon an issue as to the validity of a document as a will of a client.


12. In Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965), the court, exercising diversity jurisdiction, concluded that the Supreme Court of Indiana (the forum state)
problems and, confronted with a similar case in the recent past, determined that the state in which the professional relationship was based had the most significant interest in deciding whether or not that relationship should be privileged. Therefore it applied the dispositive law\(^3\) of that state. Were the present case laid before the highest appellate court of State A, that court would apply State B's psychologist-patient privilege. Relying on that precedent and its application to the present case, \(P\) objects to the offered testimony of \(W\) on the basis of State B's psychologist-patient privilege. \(D\) asserts that the federal district court is free to resolve the choice-of-law problem for itself and that the appropriate resolution would lead to the application of State A's dispositive law, which contains no privilege. Does Rule 501 require the court to apply the dispositive law of State B, as the highest appellate court of State A would, or does it permit the court to make an independent resolution of the choice-of-law problem, followed by the possible application of State A's dispositive law which contains no applicable privilege?

Perhaps one of the most surprising elements of this problem is that it continues to be without definitive resolution. As long ago as 1970, it was characterized as being "among the most difficult questions a federal judge can be called upon to answer."\(^4\)

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would reject the mechanical application of lex loci delicti in all tort actions and, instead, utilize interest analysis; therefore, the diversity court, cognizant of its Klaxon obligation, did just that. The Watts prediction as to the course Indiana's state courts would take seems to have been an accurate one. In Witherspoon v. Salm, 142 Ind. App. 655, 237 N.E.2d 116 (1968), the court stated: "We believe the more logical basis for a choice of conflicting law could be stated: Given a factual and legal situation, involving an actual conflict of law, which state has the greater interest in having its law applied?" Id. at 670, 237 N.E.2d at 124. But see Horvath v. Davidson, 148 Ind. App. 203, 208, 264 N.E.2d 328, 332 (1970) in which the court applied the Indiana statute of limitations, notwithstanding a "Grouping of Contacts" argument aimed at the nonapplication of the forum's limitations statute. For a case in which an interest analysis jurisdiction concluded that that methodology should be employed to resolve a choice-of-law problem as to the applicable statute of limitations see Cornwell v. CIT Corp., 373 F. Supp. 661 (D.D.C. 1974).

13. The phrase "dispositive law" is intended to refer to "those rules of law which are used to determine the nature of rights arising from a fact group, i.e., those which dispose of a claim." Taintor, Foreign Judgment in Rem: Full Faith and Credit v. Res Judicata in Personam, 8 U. Pirr. L. REV. 223, 233 n.58 (1942). I find the phrase "dispositive law" more descriptive and useful than such phrases as "local law," "internal law" or "municipal law."

In Elliott, the court seems never to have made a specific choice-of-law decision. Instead, it simply determined that neither of the privilege statutes (one of Indiana, one of Illinois) asserted by the plaintiff was applicable. Elliott v. Watkins Trucking Co., 406 F.2d 90, 98 (7th Cir. 1969).

into account the number of cases involving significant constitutional issues presented to the Supreme Court each year, the absence of definitive judicial resolution is explicable. What may be more difficult to explain is the absence of explicit resolution in the new Federal Rules of Evidence. That failure seems somewhat more remarkable after examining the history of Rule 501.

In their original proposed form, the Federal Rules of Evidence contained thirteen rules in Article V. Rules 502 through 510 created a series of privileges cognizable in federal court. Rules 511 and 512 dealt with waivers of privilege. Rule 513 provided for the assertion of privileges without jury knowledge and for an ameliorating jury instruction upon request. Proposed Rule 501 read:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or other rules adopted by the Supreme Court, no person has a privilege to:

1. Refuse to be a witness; or
2. Refuse to disclose any matter; or
3. Refuse to produce any object or writing; or
4. Prevent another from being a witness or disclosing any matter or producing any object or writing.

The proposed rule, and particularly the italicized portion, would have had the federal rules govern privilege issues in all federal court litigation, federal causes of action and diversity cases. That proposal was the product of the conclusions of the Advisory Committee:


16. The privileges fashioned were: reports privileged by statute, Prop. R. Evid. 502; lawyer-client, Prop. R. Evid. 503; psychotherapist-patient, Prop. R. Evid. 504; husband-wife, Prop. R. Evid. 505; communications to clergymen, Prop. R. Evid. 506; political vote, Prop. R. Evid. 507; trade secrets, Prop. R. Evid. 508; secrets of state, Prop. R. Evid. 509; and identity of informer, Prop. R. Evid. 510.

17. Prop. R. Evid. 511 provided for voluntary waiver and Prop. R. Evid. 512 preserved the privilege where “disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.”

18. “The claim of a privilege . . . is not a proper subject of comment by judge or counsel . . . .” Prop. R. Evid. 513(a). “In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege outside the presence of the jury.” Prop. R. Evid. 513(b). “Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.” Prop. R. Evid. 513(c).


20. Prop. R. Evid. 501, Advisory Comm’s. Note. For a tour de force on the constitu-
Regardless of what might once have been thought to be the command of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), as to observance of state created privileges in diversity cases, Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8 (1965), is believed to locate the problem in the area of choice rather than necessity.

The Committee also stated:

The appearance of privilege in the case is quite by accident, and its effect is to block off the tribunal from a source of information. Thus its real impact is on the method of proof in the case, and in comparison any substantive impact appears tenuous.

In rejecting the totality of proposed Article V and supplanting it with the present Rule 501, the House Committee on the Judiciary reported:

The [House Committee’s amendment] is designed to require the application of State privilege law in civil actions and proceedings governed by Erie R. Co. v. Tompkins . . . . The Committee deemed the proviso to be necessary in the light of the Advisory Committee’s view . . . that this result is not mandated under Erie.

The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy. In addition, the Committee considered that the Court’s proposed Article V would have promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and federal courts. The Committee’s proviso, on the other hand, under which the federal courts are bound to apply the State’s privilege law in actions founded upon a State-created right or defense, removes the incentive to “shop.”

Thus the House Judiciary Committee determined that in diversity cases (1) questions of privilege were “substantive” and,
therefore, should be governed by *Erie*, whether or not that conclusion was “mandated under *Erie,*” and (2) such a decision would diminish the likelihood of forum shopping “among the State and federal courts.”

Quite obviously, both the Advisory Committee, which drafted the proposed rules, and the House Judiciary Committee, which so significantly amended Article V, devoted substantial time and intellectual effort to their conflicting determinations of whether or not *Erie* should be deemed applicable to privilege issues. Given the Advisory Committee’s conclusion that *Erie* was not mandated and should not be utilized electively (a determination in which I would not acquiesce), its failure to consider the applicability of *Klaxon* was entirely consistent and rational. However, the failure of the House Judiciary Committee, once having determined that *Erie* should be utilized, to determine explicitly the applicability of *Klaxon* seems, on the surface at least, to have been unfortunate. At the very least, it compels one to examine the Judiciary Committee’s Report for evidence of a legislative intent implying some resolution to the problem.

If, as its language indicates, the House Judiciary Committee was desirous of “remov[ing] the incentive to ‘shop’” as between a state court and a federal court sitting in that state and capable of exercising diversity jurisdiction, the Committee’s report should be read as implying the applicability of *Klaxon.* If *Klaxon* were deemed inapplicable, and the federal court free to resolve the choice-of-law problem independently, the ultimate result of that independent resolution could well be a determination different from that of the highest appellate state court. In the hypothetical under consideration, for example, the federal court would be free to apply the dispositive law of State *A*, which contains no psychologist-patient privilege, and receive the offered testimony over *P*’s objection, in spite of the contrary conclusion which would be achieved by the highest appellate court of State *A*. That would certainly tend to stimulate the forum shopping intended to be discouraged by the House Judiciary Committee. Assuming that counsel for the litigants contemplated the potentially inconsistent results which might be achieved by the two courts, *P* would be inclined to initiate the action in the state court of State *A* and *D* would be encouraged to remove it to the federal

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23. The explanation for this apparent “oversight” may very well be the constitutional overtones which attach to this issue. See text accompanying note 94 infra.

court on diversity grounds.25 Were the inconsistent results reversed, so that the State A court would receive W's testimony and the federal court exercising diversity jurisdiction reject it, P would be encouraged to initiate the action in the federal court26 and D would be bound by that decision.27 In order to eliminate that incentive for forum shopping as between state and federal courts in diversity cases, it is necessary that the choice-of-law resolution of the state court be made binding on the federal court through the application of Klaxon.

In addition to expressing a desire to discourage forum shopping in diversity cases, the House Judiciary Committee Report explicitly characterized privilege issues as falling within "substantive areas" in which "federal law should not supersede that of the States . . . ."28 While that "substantive" characterization was made specifically for Erie purposes and without explicit examination of the applicability of Klaxon, the former conclusion impels an affirmative response to the latter inquiry. In Klaxon, the Court stated:29

We are of opinion that the prohibition declared in Erie Railroad v. Tompkins . . . against such independent determinations by the federal courts, extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court [exercising diversity jurisdiction] 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 . . . . Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the

26. Id. § 1332.
27. The conclusion stated in the text is based on the assumption that diversity jurisdiction was appropriate.
law of the forum or some other law. . . . This Court's views are not the decisive factor in determining the applicable conflicts rule. . . . And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.

That excerpted language indicates that, when an issue is substantive for *Erie* purposes, the federal court exercising diversity jurisdiction and confronted with a choice-of-law problem as to that substantive issue must resolve the choice-of-law problem as it would be resolved by the highest appellate court of the state in which the federal court sits and apply that dispositive law which would be applied by that highest appellate state court. Thus, in the hypothetical under consideration, the federal court, utilizing the indicative law and precedent of State A, should apply the psychologist-patient privilege of State B.

In the same factual setting, how should the federal court react to the choice-of-law problem if the highest appellate court of State A, while having embraced interest analysis, has not heretofore resolved the specific choice-of-law problem presented? The answer seems obvious as a matter of logic, common sense and precedent. The federal court should make an “educated judicial guess” as to how the highest appellate court of State A, utilizing interest analysis, would resolve the choice-of-law problem and apply that dispositive law indicated by such a resolution.31

So far, so good, and, incidentally, not very difficult, especially in light of the earlier characterization of the problem as “among the most difficult questions a federal judge can be called upon to answer.”32 Of course, the author of that characterization did not have the House Judiciary Committee Report on the new Federal Rules of Evidence from which to infer an answer to the question. Moreover, by changing our hypothetical situation and the judicial context, we can make the problem considerably more complex and difficult to resolve, notwithstanding the present availability of that Committee Report. *Application of Cepeda*33

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30. The Sixth Circuit, finding itself confronted with a diversity case in which the law of the forum state (Michigan) was uncertain, was candid enough to use similar language: “Under *Erie Railroad Co. v. Tompkins*, . . . it is our obligation to make a considered ‘educated guess’ as to what decision would be reached by the Supreme Court of Michigan . . . .” *Ann Arbor Trust Co. v. North Am. Co. for Life & Health Ins.*, 527 F.2d 526, 527 (6th Cir. 1975).


32. *See* note 14 *supra*.


It would appear, from the Court of Appeals decision in the instant case
presents an ideal factual and judicial context in which to confront the problem.

Orlando Cepeda, then “a member of the San Francisco Giants baseball team,” brought a libel action against Cowles Magazines and Broadcasting, Inc. The allegedly defamatory article had been written by Timothy Cohane and published in the “defendant’s bi-weekly magazine, LOOK.” Plaintiff initiated the action “in the Superior Court of the State of California, in San Francisco” and defendant “removed . . . on the ground of diversity of citizenship, to the United States District Court for the Northern District of California, Southern Division.” The federal district court in California “entered an order directing plaintiff to commence taking the deposition of Cohane . . . in New York City, pursuant to a stipulation entered into between the parties.” During the course of the deposition, Cohane was asked and refused to answer questions as to the identity of team officials who were the purported sources of certain statements in the article. “The reason set forth by Cohane for his refusal to answer was that ‘this [information] was given to me under the tacit understanding that it was privileged information, that the source would never be revealed.’” Plaintiff sought an order from a federal district court judge in New York directing Cohane to answer.

California had a newsman’s privilege statute and New York...
The primary issue presented to the federal district court in New York was which state's dispositive law was applicable. The court recognized that the privilege issue was substantive for *Erie* purposes and concluded that *Klaxon* was applicable. The federal district court was to resolve the choice-of-law problem by the application of state indicative law. But which state's indicative law was to be used, that of California, "the place of trial," or New York, "the place of deposition"? The federal court concluded that New York's indicative law governed the choice-of-law problem. In examining and analyzing the New York state court opinions, the federal court concluded that a New York court confronted with this choice-of-law problem would apply the dispositive law of the place of trial (California), unless the privilege asserted was one recognized at the place of deposition (New York), in which case the court would apply the dispositive law of the place of deposition. Since the asserted privilege was not recognized in New York, the place of deposition, the federal court concluded that the applicable dispositive law was that of California, the place of trial. Consequently, the California newsman's privilege statute was potentially available to the deponent Cohane. After examining the statute and California decisions, however, the federal court concluded that "Cohane, a journalist working on a bi-weekly periodical, is not covered by the statute." Therefore, Cohane was ordered to answer the challenged questions.

If the court's ultimate conclusion that the deponent was not covered by the California statute is put aside, there is a surface congeniality to the court's (New York determined) resolution of the choice-of-law problem. As read by the federal court, New

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41. "[The place of trial, namely, California, recognizes a privilege in this area, whereas New York, the place of deposition, does not." Application of Cepeda, 233 F. Supp. 465, 468 (S.D.N.Y. 1964).
42. Id. at 467.
43. Id. at 469-70.
44. The phrase "indicative law" is intended to refer to "those rules which indicate the system of dispositive rules which is to be applied." Taintor, *supra* note 13. I find the phrase "indicative law" simpler and no less descriptive than such phrases as "conflict-of-law laws," "conflict-of-law rules" or "conflicts rules." I am indebted to the late Dean Charles W. Taintor II for his fashioning of the phrases "indicative law" and "dispositive law."
46. Id.
47. Id. at 469-70.
48. Id. at 472.
York's indicative law seems to assure the utilization of a potentially applicable privilege, whether it exists in the dispositive law of the place of trial or in the dispositive law of the place of deposition. That apparent assurance that an applicable privilege will not "slip through the cracks" simply because the deposition is taken in one state and the trial is in another is comforting. To one sympathetically inclined toward the use of interest analysis to resolve choice-of-law problems (as I am), it is even more reassuring to have the federal court corroborate the New York indicative law conclusion that California's dispositive law was applicable by noting that "the State of California is the state with the strongest interest in, and the most contacts with, the pending cause of action." What is a bit discomfiting is the court's identification of that interest and those contacts of California: "It is the residence of the plaintiff and the place where the cause of action is pending." And there is only little consolation to be had in the court's manner of diminishing the significance of New York's concern: "New York, aside from being the place of deposition and perhaps the residence of the witness, does not have the same interest in, or contacts with, the controversy, and as such its [dispositive] law should not apply." There seems to be some absence of a sharply focused examination of the specific issue presented in that judicial demonstration of the superiority of California's interest in the choice-of-law problem. That absence is wholly explicable in terms of the date of the opinion and the then just emerging interest analysis methodology. In the intervening years, a long line of judicial opinions and scholarly works

51. Id.
52. Id.
plaining and applying that methodology should make it possible for us to undertake a somewhat more refined examination of the interests involved.

Such an examination virtually compels the conclusion that the state in which the assertedly privileged relationship was entered and exclusively sited should be deemed to have the most significant interest in determining whether or not that relationship is privileged. To the extent that the parties to the relationship contemplated the application of any law to that relationship, they presumably contemplated the application (and potential protection) of the dispositive law of the state in which they entered the relationship and where the relationship was exclusively based. That presumed expectation of the parties should not be frustrated, either by some plaintiff's choice of forum or by some court's choice of deposition state. Even if no contemplation of law is imputed to the parties at the time they entered the relationship, application of the dispositive law of the state in which the relationship existed continues to commend itself. So long as that dispositive law is applied, that state's interest in regulating the relationship (either by encouraging those within the state to enter such a relationship because it is privileged or by alerting those within the state that perhaps such a relationship should be eschewed because it is not privileged) would not be frustrated. Presumably, the state in which the relationship is entered and exclusively exists has determined the extent of favor with which it views such relationships, and that determination will be manifested by that state's dispositive law which extends to or withholds a privilege from such relationships. "State legislatures create privileges because a particular relationship is considered so valuable to society that it should be fostered by preserving the confidentiality of the relationship even though evidence which might aid in the quest for truth will be lost."


After Babcock and Griffith [v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964)] lighted the way, other courts rushed to follow. In a short time, the District of Columbia and at least 21 states have rejected the place-of-wrong rule in some context, usually in a court decision revealing general acceptance of the premises of state-interest analysis.

Id. at 234 (jurisdictions, cases and citations are set forth in n.36 to WEINTRAUB's text). See also D. CAVERS, THE CHOICE-OF-LAW PROCESS 139 (1965); R. LEFLAR, AMERICAN CONFLICTS LAW 233 (1968).

decision to extend (or withhold) a privilege with regard to a relationship existing exclusively within that state should not be disregarded by any other state, whether forum or deposition state. Finally, it should be noted that those most likely to enter into such a relationship in the state, and thereby become affected by that state’s view as to whether and to what extent the relationship should be privileged, are citizens of the state. As citizens and potential electors, they have the capacity to influence the state’s view of that relationship. That unique capacity does not exist on their part in a forum or deposition state other than their home state. Consequently, a judicial conclusion that the privileged nature of the relationship entered and existing exclusively in one state should be determined by the application of the dispositive law of some other state 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.

Unfortunately, but not surprisingly, bearing in mind the date of the case, the court’s opinion in Cepeda does not explicitly indicate the state in which the relationships between Cohane and the team officials of the San Francisco Giants existed. It may be appropriate to assume, given the stated facts of the case, that Cohane’s interviews with those team officials occurred in California. Given that assumption, California would be the state with the most significant interests in determining whether or not the relationships between newsmen and sources were privileged. Mindful that the federal court’s conclusion that California’s dispositive law applied was a product of that court’s reading of New York’s indicative law, it is appropriate to consider what conclusion the court might have achieved had New York’s indicative law been different.

Let’s assume that, in a case like Cepeda, New York’s indicative law pointed to the application of the dispositive law of the state in which the deposition was being taken. New York’s dispositive law contained no newsmen’s privilege; therefore Cohane’s

however, the court concluded that a state accountant-client privilege was not available in a federal cause of action. The constitutional propriety of a refusal to recognize a state-created privilege in a federal cause of action (now codified in the first sentence of Fed. R. Evm. 501) is beyond the scope of this article. For an opinion holding a state accountant-client privilege applicable in a diversity case see Lukee Enterprises, Inc. v. New York Life Ins. Co., 52 F.R.D. 21 (N.M. 1971).
assertion of privilege would have been rejected out of hand. Clearly, that would frustrate the potential expectations of the parties to the California interviews, California’s capacity to regulate such relationships existing exclusively in that state, and the political capacity of California citizens to help shape the mode of such regulation. What countervailing interest of New York would be served by resolving the privilege issue by the application of New York’s dispositive law? The only interest of the deposition state would seem to be that of assuring the efficacy of orders of its courts related to the deposition. It could be asserted, of course, that the application of New York’s dispositive law, containing no newsman’s privilege, would serve precisely that interest since it would lead inexorably to the conclusion that the New York court could order the deponent to answer the challenged questions. But there are two troubling and intimately related aspects of such an assertion. First, the mere fact that New York is the deposition state does not require or justify the conclusion that its interests are best served by an affirmative court order, that is, one requiring the deponent to answer. New York’s interests can be discerned only by precisely identifying the specific issue before the court, examining the conflicting dispositive laws of California and New York, determining the reasons underlying each of those dispositive laws and deciding which, if any, of those reasons convert into legitimate interests on the part of each state in having its dispositive law apply. Second, the interests of New York, so determined, may be so patently inferior to those of California that the application of New York’s dispositive law would be manifestly inappropriate.

We have already identified California’s interests in having its dispositive law applied. What are the interests of New York as deposition state? Its dispositive law contains no newsman’s privilege. Presumably, that is the result of a New York determination that the relationship between newsman and source neither requires nor justifies a privileged status. That New York determination was made with principal concern focused upon such relationships in that state. Since, by hypothesis, the relationship before the court existed exclusively in California, the reason underlying New York’s dispositive law does not convert into a New York interest in having its dispositive law applied. There may be another (and, I would suggest, secondary) reason for New York’s dispositive law containing no newsman’s privilege. New York may have determined that the integrity of its judicial process requires the availability as potential evidence of all information
secured by newsmen. Does that reason convert into a significant interest on the part of New York in having its dispositive law applied when New York is the deposition state?

The role of the court in the deposition state is, in essence, ancillary to the role of the trial court. The taking of the deposition in some state other than the forum is generally the product of a decision of convenience by the trial court, as it apparently was in *Cepeda* where “the deposition of Cohane [was taken] in New York City, pursuant to a stipulation entered into between the parties.”57 The integrity of the judicial process in the deposition state would seem to be preserved and protected completely so long as the deposition is conducted in a manner consonant with any orders entered by the court in that state. And it would appear that that complete preservation and protection would exist whether the court directed the deponent to answer, or accepted his asserted privilege. The court in the deposition state has no inherent or self-serving need for the information sought by the litigant taking the deposition. Consequently, the integrity of the judicial process in the deposition state does not require the application of the dispositive law of that state. Indeed, the application of that state’s dispositive law to determine an asserted privilege in circumstances in which the arguably privileged relationship had been entered and existed exclusively in some other state would be, at best, the product of a painfully inept application of interest analysis.

If we may, temporarily and only hypothetically, impute such an inept choice-of-law resolution to the New York Court of Appeals, what would be the effect on the decision of the federal district court sitting in New York in *Cepeda*? Since the federal court concluded that New York’s indicative law would be determinative in resolving the choice-of-law problem, that painfully inept conclusion that New York’s dispositive law applied would be controlling. Or would it?

The obligation of a federal court exercising diversity jurisdiction to apply the substantive law of the state in which it sits has traditionally been limited by this caveat: unless that substantive law is violative of the Constitution.58 That limitation applies

whether the state law which violates the Constitution is dispositive or indicative. Consequently, if the hypothetical New York indicative law which requires the application of the dispositive law of the deposition state (New York) is not only painfully inept but unconstitutional as well, the federal court sitting in New York will not be required (or even permitted) to utilize it. Can that indicative law and the result it produces be characterized as unconstitutional? If our earlier conclusion that New York, as deposition state, has no interest in the privilege issue is correct, an indicative law pointing to the dispositive law of New York would resolve that issue by the application of the dispositive law of a state lacking any interest in the issue, and would, for that reason, violate the due process rights of the party adversely affected by that conclusion. Moreover, the application of New York's dispositive law by a court sitting in New York to an issue in which New York has no legitimate interest would violate the full faith and credit mandate to utilize the dispositive law of that sister state having exclusive legitimate interests in the issue, i.e., the state

that application of New York's (rather than Massachusetts') dispositive law in Rosenthal was unconstitutional, I believe his opinion demonstrates the existence of constitutional restraints upon a purely mechanical application of either Erie or Klaxon.\footnote{See note 58 supra.}

\footnote{See also R. Weintraub, supra note 55, at 378; Martin, Constitutional Limitations on Choice of Law, 61 Cornell L. Rev. 185 (1976).}


\footnote{See Leflar, supra note 55; Weintraub, supra note 55, at 399; Martin, supra note 61; Seidelson, supra note 62.}
in which the relationship exclusively existed. Consequently, both the due process and full faith and credit clauses would preclude the application of New York's dispositive law by a New York state court or a federal district court exercising diversity jurisdiction and sitting as deposition court in New York.

We have concluded, therefore, that if the indicative law of the deposition state refers to the dispositive law of that state, containing no newsman's privilege, when the only contact which the state has with the case is that it is the deposition state, such a choice-of-law resolution would be inept and constitutionally impermissible. Because of its unconstitutionality, that choice-of-law resolution would be neither binding upon, nor available to, a federal district court exercising diversity jurisdiction (ancillary to that of another federal district trial court) and sitting in the deposition state. Thus, if the federal court in New York in Cepeda had found that New York's indicative law pointed to New York's dispositive law, application of that dispositive law would have been constitutionally impermissible, therefore neither required nor permitted by Klaxon.

Would that conclusion of unconstitutionality be appropriate if, in Cepeda, (1) New York had a newsman's privilege statute and (2) California did not? The (New York) federal court's reading of New York's indicative law was that in such circumstances it would refer to New York's dispositive law, so that New York's privilege would have been potentially available to the deponent. To determine the constitutionality of that result, it is necessary to determine if New York as deposition state would have an interest in the asserted privilege issue sufficient to justify the application of its dispositive law. The language of the federal court's opinion laid the foundation for such a determination and began pointing towards its resolution:  

In looking to New York law, I find that as a general principle the law of the place where the testimony is to be heard [the trial state] governs its admissibility. . . . The only cases in New York presenting the specific questions of the validity and scope of a privilege asserted at the deposition state arose in the context of recognition in the deposition state and either non-recognition or different scope in the trial state. . . . Those cases, in disregarding the general rule . . ., applied the law of the deposition state, recognizing the privilege and defining its scope. In doing

so they abided by the well-established doctrine that a state may refuse to apply the law of a sister state when the forum (deposition state) has contacts with the cause of action and has a fundamental policy not in accord with the law of the sister state (trial state).

We must determine if the deposition state (New York) would have “contacts with the cause of action” in *Cepeda* sufficient to justify the application of its own (hypothetical) dispositive law containing a newsman’s privilege.6

Assuming New York to have a newsman’s privilege, what interest would that give New York in the application of its privilege law where New York is simply the deposition state? Presumably, that newsman’s privilege would exist primarily as the result of a New York determination that the relationship between newsman and source should be privileged. That determination would be aimed at protecting those newsman-source relationships in which New York has an interest: those relationships entered or existing in New York. Since the relationships between deponent Cohane and certain officials of the San Francisco Giants team had (by hypothesis) been entered into and existed exclusively in California, New York would seem to lack an interest in affording a privileged status to them. There could be another and, I would suggest, secondary reason for New York’s dispositive law containing a newsman’s privilege. New York may have determined that the integrity of its judicial process did not require the availability as potential evidence of all information secured by newsmen. Does that reason convert into a significant interest on the part of New York in having its protective dispositive law applied when New York is the deposition state? I think the answer is no, for several reasons. First, that determination of lack of judicial ne-

65. *Id.*

66. Some observations about the word “contacts” seem appropriate. First, the contacts presumably should be in addition to the simple fact that New York is the deposition state. The court’s own language corroborates that conclusion. Were the contacts contemplated nothing more than the fact that the forum state was the same as the deposition state, the phrase, “when the forum (deposition state) has contacts with the cause of action,” would be redundant. Even absent that grammatically compelled conclusion, the same result would seem to be required by the full faith and credit clause. If the deposition state qua deposition state were free to disregard the otherwise applicable dispositive law of a sister state simply because that applicable law differed from that of the deposition state, the constitutional mandate of the full faith and credit clause would lose a substantial portion of its efficacy. Second, the contacts necessary to justify the use of the deposition state’s dispositive law should be capable of conversion into a legitimate interest on the part of that state in having its dispositive law applied.
cessity would go essentially to disclosures arising out of those newsman-source relationships of primary interest to New York: those based in New York. Second, even assuming that the determination of lack of judicial necessity would go to disclosures arising out of newsman-source relationships wherever based, it would not be necessary to apply New York’s privilege law where New York is only the deposition state. To say that the New York deposition court does not require the purportedly privileged information is not tantamount to deciding that the integrity of the judicial process would be jeopardized if the information were received. New York’s attitude as deposition state presumably would be that, while the information would be helpful in assuring the integrity of the judicial process, it is not essential. To receive the information would simply enhance the integrity of the judicial process beyond that level which New York deems acceptable. And it should be noted again that New York’s concern with the integrity of its judicial process, in circumstances in which New York is simply the deposition state, would be wholly assured so long as the deposition were conducted in a manner consonant with any orders entered by the New York court, whether those orders recognized the privilege or compelled disclosure. The court in the deposition state has no inherent or self-serving purpose for imposing the New York privilege as to newsman-source relationships existing exclusively in California. Indeed, if the New York (deposition) court were to apply New York’s privilege law to a relationship existing exclusively in California, the party adversely affected by that determination would seem to have persuasive grounds for asserting that the court had violated the due process clause, by applying the dispositive law of a state having no legitimate interest in the issue thus resolved, and the full faith and credit clause, by refusing to apply the applicable law of the sister state.

There is an additional assertion which might be made in an effort to demonstrate that New York, as deposition state and as a state having a newsman’s privilege statute, has a valid interest in the application of its privilege law. We have already noted that the principal reason for such a privilege would be to protect newsman-source relationships entered and existing in New York. The purpose of affording such protection would be to facilitate the flow of information from the (protected) source to the newsman in order to accomplish the ultimate desired end: to assure the existence of a well-informed public. Since a portion of that public is in New York, New York may have an interest in apply-
ing its protective dispositive law as a means of assuring a well-informed New York public, irrespective of the situs of the newsmen-source relationship. Such an assertion is a rather appealing one. If the New York deposition court were to require the newsmen-deponent to reveal his sources, other sources would tend to become more circumspect about making revelations to newsmen, and thus newsmen would have a more limited access to information. As a result, the New York public, the purported ultimate beneficiary of the New York privilege law, would tend to be less well-informed. From New York's perspective, such an undesirable consequence would ensue both where the newsmen-source relationship was sited in New York, and, as well, where the relationship had existed exclusively in some other state, as for example, in California. Therefore, hasn't New York a legitimate interest in the application of its privilege law?

Notwithstanding the immediate appeal of the assertion, I think the answer should be no. The essence of New York's interest, a well-informed New York citizenry, would be by no means unique to New York. That same interest could be imputed to any state having a newsmen's privilege, whether or not it happened to be the deposition state in a particular case. If that were done, then necessarily, in every case in which a newsmen's privilege was asserted in regard to a nationally distributed publication, the court would be free to conclude that the privilege should be sustained even though the newsmen-source relationship had been entered into and existed exclusively in a state having no privilege. That, it seems to me, would usurp from the situs state its legitimate right to determine whether or not such relationships should be privileged. It would, as well, tend to frustrate the secondary interest of a sister-forum state having no newsmen's privilege in having available as evidence all information secured by newsmen. Yet perhaps the one aspect of the assertion which is most troubling (and which is intimately related to the two objections just noted) is its "nationalization" of the issue. If a newsmen's privilege is asserted in regard to a nationally distributed article, and if, in resolving a choice-of-law problem involving an asserted newsmen's privilege, a court recognizes as a legitimate interest the desire of each state having such a privilege to secure thereby a well-informed citizenry, the court would be placed in a position uncomfortably close to that of a national court (such as the Supreme Court of the United States) or of a national legislative body (such as the Congress of the United States). It may well be that the communications media have become so nationally per-
vasive that a newsman's privilege asserted in connection with a nationwide medium should be determined in a manner which takes into account the interests of all the states of the United States, most assuredly including those having newsman's privilege statutes. If that is so, the most appropriate organ for generating that law would seem to be the Supreme Court, through constitutional interpretation, or Congress, through enactment of a newsman's privilege. The Court, however, has not yet demonstrated a willingness to interpret the Constitution in such a way as to effect a nationwide newsman's privilege; nor has Congress, in enacting the new Federal Rules of Evidence, seen fit to fashion legislatively a newsman's privilege having nationwide applicability even in federal causes of action. Moreover, in diversity cases, Congress has explicitly determined that state law should control privilege issues. Against that background, the decision of a state court or of a federal court exercising diversity jurisdiction and confronted with a choice-of-law problem as to an asserted newsman's privilege to weigh the interests of all those states having newsman's privilege statutes would appear to be an arrogation of political or judicial power. It seems to me to be no less presumptuous for New York to consider its interest in an informed citizenry paramount simply because New York happens to be the deposition state.

In Cepeda the (New York) federal court, quoting from a New York state court opinion, asserted:

However much we may desire to assist a sister State, our courts may not go beyond the statutory powers granted by our Legislature.

The implication of that excerpted language is that, if New York had a newsman's privilege statute, its courts would be stripped of the power to direct a newsman-deponent to answer challenged questions regardless of where the newsman-source relationship had existed. Surely that would be an undesirable interpretation of the statute. The more agreeable construction would be one which held the courts barred from compelling disclosure of infor-

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mation secured by a newsman from a source in a New York-based relationship. To impute the broader intention to the legislature would be to call into question the statute's constitutionality, for a legislative body, no less than a court, may not impose its legal conclusions on issues in which the state has no legitimate interest.

We have concluded, therefore, that if the indicative law of the deposition state refers to the dispositive law of that state containing a newsman's privilege, when the only contact which the state has with the case is that it is the deposition state, in circumstances in which that contact does not convert into a legitimate interest on the part of that state in having its own dispositive law applied, such a choice-of-law resolution would be inept and constitutionally impermissible. Because of its unconstitutionality, that choice-of-law resolution would be neither binding upon nor available to a federal district court exercising diversity jurisdiction (ancillary to that of another federal district trial court) and sitting in the deposition state. Thus, still assuming New York to have had a newsman's privilege and California to have had none, if the federal court in New York in Cepeda had found that New York's indicative law pointed to New York's dispositive law, application of that dispositive law would have been constitutionally impermissible, and therefore, neither required nor permitted by Klaxon.

As a result of those conclusions, the determination of the (New York) federal court in Cepeda that the choice-of-law problem would be governed by New York's indicative law because of the applicability of Klaxon must be read in a somewhat restrictive manner. Even to one accepting and advocating the applicability of Klaxon to the second sentence of Rule 501 (as I do), the classic restriction applicable both to Erie and Klaxon is mandatory: the diversity court is neither required nor permitted to apply a state-mandated result which would be unconstitutional.71 Where the diversity court is confronted with a choice-of-law problem and the state-mandated resolution would result in the application of the dispositive law of a state having no interest in the issue involved, the diversity court (and a state court sitting in the state) may not so resolve the issue.

It might be helpful to subject those constitutional conclusions to additional stress. We can do that while still retaining the

71. See note 58 supra and accompanying text.
operative facts of *Cepeda* by effecting a change of forum. Let's place the trial before a federal district court sitting in New York and exercising diversity jurisdiction and have that court direct that Cohane be deposed in New York before trial. Now New York is not simply the deposition state; it is the trial state as well. Let us retain our hypothesis that the newsman-source relationships between Cohane and team officials of the Giants existed exclusively in California and let’s work with the actual state of the law as it existed in *Cepeda*: (1) California’s dispositive law contains a potentially applicable newsman’s privilege, (2) New York’s dispositive law contains no newsman’s privilege and (3) New York’s indicative law (as discerned by the federal court in *Cepeda*) (a) points to the application of the dispositive law of the trial state (b) unless the dispositive law of the deposition state contains an applicable privilege, (c) in which case that dispositive law is to apply. Since New York is now the trial state (as well as the deposition state), New York’s indicative law would refer to New York’s dispositive law, which contains no applicable privilege. Does *Klaxon* require (or permit) the federal court sitting in New York to reject out of hand the deponent’s asserted privilege? If New York has an appropriate interest in the issue to be resolved, the answer should be yes. If New York lacks such an interest, the application of its dispositive law would be constitutionally impermissible, thus neither required nor permitted by *Klaxon*.

The very fact that New York is the trial state could be said to give it an interest in the issue presented. New York’s dispositive law contains no newsman’s privilege. As we noted earlier, there are two probable reasons for that dispositive law. First, New York has determined that the newsman-source relationship neither requires nor justifies a privileged status. Presumably, that New York determination was made with principal concern focused upon such relationships existing in that state. Since, by hypothesis, the relationships between deponent-newsman and his sources existed exclusively in California, the primary reason underlying New York’s dispositive law does not convert into a New York interest in having its dispositive law applied. A second and, I would continue to suggest, secondary reason for New York’s dispositive law containing no newsman’s privilege may be a New York determination that the integrity of its judicial process requires the availability as potential evidence of all information secured by newsmen. Since New York is the forum, and the integrity of its judicial process is, therefore, necessarily involved, that reason for New York’s dispositive law converts very nicely into a

http://scholarlycommons.law.hofstra.edu/hlr/vol5/iss1/3
New York interest in having its dispositive law (no newsman’s privilege) applied. This will tend to assure the availability of the information secured by deponent, including the identity of his sources, to the court sitting in New York. With the availability of that relevant evidence, the court will have an enhanced assurance that the result achieved in this libel action will be the most appropriate one attainable.

Were this the usual choice-of-law context, the conclusion that New York had an interest (albeit secondary) in the issue to be resolved would provide a satisfactory constitutional basis for the application of New York’s dispositive law. When the forum finds itself confronted with a choice-of-law problem in which the forum state and some other state have conflicting dispositive laws, a determination that the forum has an interest in the issue to be resolved justifies constitutionally the forum’s application of its own dispositive law, even in circumstances in which some, or even most, might conclude that a painfully inept choice-of-law resolution might result. While most might conclude that the other state’s interests were clearly superior and, therefore, its dispositive law should have been utilized, the forum remains con-

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72. See, e.g., Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968). See also Weintraub, supra note 55 where it is stated:

An Illinois guest passenger sued an Illinois host driver for injuries sustained in Wisconsin on an automobile trip that began and was to end in Illinois. Illinois had a guest statute requiring “willful and wanton misconduct” by the host in order for the guest to recover, while Wisconsin would permit recovery for the host’s ordinary negligence. It was clear that the possible policies underlying the Illinois guest statute, to protect the Illinois host from the ingratitude of the Illinois guest and to prevent a collusive suit in order to keep down insurance rates, were, whether one regards them as silly and benighted or wise and enlightened, fully applicable to the crash in Wisconsin. The Conklin court then proceeded to convince itself that Wisconsin had policies that would be significantly advanced in this case if the guest was permitted to recover under Wisconsin’s ordinary negligence rule. Wisconsin’s policy was that the wrongdoer should bear the cost of the injury, not the injured party, and not the taxpayers or medical creditors, if the victim is afforded care for which he cannot pay. Furthermore, “[t]he deterrent effect that it is hoped our negligence laws exercise upon driver misconduct will be defeated by allowing negligent misconduct to go unpunished.” Then, having decided there was “a serious conflict” between the Illinois and Wisconsin policies the court went on to resolve this conflict in favor of Wisconsin’s “better law”, remarking that “guest statutes are anachronistic.”

At the heart of the analysis in Conklin is the court’s finding that Wisconsin had policies that would be significantly defeated if Illinois law were applied—compensation of the injured, protection of taxpayers and medical creditors, and deterrence of negligent driving. It is submitted that Wisconsin had only an officious and hypothetical interest in applying any of those policies. Id. at 245-46 (footnotes omitted).
stitutionally free to determine otherwise and apply its own dispositive law, provided only that the forum state has an interest in the issue so resolved. And in most choice-of-law contexts, that broad constitutional latitude available to the forum is probably acceptable and, arguably, even desirable.

When the choice-of-law problem presented involves an asserted privilege, however, that extensive room for maneuver, generally available to accommodate the forum's view of competing state interests, seems to me to become undesirable, unacceptable and, most significantly, unconstitutional. We have already noted that the Advisory Committee which drafted the proposed Federal Rules of Evidence, in support of its conclusion that *Erie* should not be deemed applicable to privilege issues in diversity cases, stated, in part: 73

The appearance of privilege in the case is quite by accident, and its effect is to block off the tribunal from a source of information. Thus its real impact is on the method of proof in the case, and in comparison any substantive impact appears tenuous.

We have seen, too, that the House Judiciary Committee rejected the conclusion that *Erie* should not be deemed applicable to privilege issues in diversity cases, finding "that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason." 74 Like the House Judiciary Committee, I would reject the Advisory Committee's conclusion and its supporting rationale excerpted above. Indeed, I would suggest a directly contrary rationale: because the appearance of privilege in the case is quite by accident, the real impact of a judicial determination of the availability of a privilege is on all of those assertedly privileged relationships of the same class and, in comparison, any direct litigation result is of limited significance.

It is axiomatic that the number of assertedly privileged relationships requiring a judicial determination of the availability of the asserted privilege represents only an infinitesimal portion of the total number of such relationships, whether the area of privilege be that of psychologist-patient, newsman-source, physician-patient, husband-wife, clergyman-penitent or even attorney-client. The numbers alone imply the conclusion that the litiga-

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73. PROP. R. EVID. 501, Advisory Comm's Note, as amended.
tion impact of such a determination will be substantially less significant than the impact on all relationships similar to the one before the court.

More significant than mere numbers, however, is the nature and extent of the impact on all relationships similar to the one before the court, bearing in mind that no party to such a relationship can predict with certainty that his relationship will never be the subject of a judicial determination. How a court reacts to a privilege asserted in the course of litigation is likely to become common knowledge within a reasonably short period of time. If there is an apparent conflict between the judicial reaction and the dispositive law of the state in which the assertedly privileged relationship existed, those within that state who are parties to similar relationships face a dilemma. If the dispositive law of the situs state protects the relationship by an applicable privilege, but the judicial determination refused to apply that privilege, how are parties to similar relationships in that state to respond? If parties to the relationship continue to rely on the privilege, they may be adversely affected by a subsequent similar judicial ruling. If they abjure the privilege and either withdraw from the relationship or remain in it but with declaratory circumspection, they will simultaneously frustrate the basic right of the situs state to regulate and protect the relationship, and their own state-based right to rely on the confidentiality of the relationship, with all of the adverse effects on the relationship which such reticence will cause, at least in the view of the situs state which privileged the communications of the relationship. If the dispositive law of the situs state contains no privilege, but the judicial determination affirmatively applies the privilege law of some other state, the adverse consequences would be nearly as serious. The basic right of the situs state to control the relationship would be frustrated and those within that state who are parties to such relationships might be induced into a reliance on such confidentiality which may prove to have been misplaced when the same issue is resolved by another court in another case. And in both instances, those citizens of the situs state would have lost a portion of their political capacity to determine whether and to what extent such relationships within that state are to be privileged. Once the existence of the privilege becomes a matter for a judicially fashioned choice-of-law determination, and the forum is not required to apply the dispositive law of the state in which the relationship was exclusively sited, the certainty of parties to such relationships within that state as to their privileged status, the
right of the situs state to regulate such relationships and the political capacity of citizens of that state to affect its view of the relationships are all adversely affected. Those concerns seem to me to be of a magnitude so far greater than the forum's decision as to the relative need of the information for litigation purposes, that I believe the forum should be precluded constitutionally from applying any dispositive law other than that of the state in which the assertedly privileged relationship existed. Both the due process and full faith and credit clauses seem meet for the purpose.

Where California is the situs state, a New York forum (whether a state court or a federal court exercising diversity jurisdiction) should be deemed to have no interest, even in the availability of admittedly relevant evidence, sufficient to outweigh the interest of the situs state. Therefore, the New York forum should be compelled to apply the California dispositive law. Should the New York forum instead apply New York dispositive law, its choice-of-law determination should be deemed to be without an appropriate basis of interest and, for that reason, violative of the due process rights of the party adversely affected thereby and of the full faith and credit mandate to utilize applicable sister state law. If those constitutional clauses are utilized as restraints upon the forum required to resolve a choice-of-law privilege issue, and if the clauses are deemed to require the forum to apply the dispositive law of the state in which the assertedly privileged relationship exclusively existed, neither the accident of forum nor the accident of deposition state will adversely affect the expectations of the parties to the relationship, the right of the situs state to regulate the relationship or the political capacity of citizens of the situs state to influence that state's view of the relationship.

Thus, even where New York is the trial state and even where the forum's interest in securing all potentially relevant evidence is acknowledged, that interest of the forum state should be deemed inadequate to justify the forum's nonapplication of the privilege law of the state where the assertedly privileged relationship was entered into and exclusively existed, California. Consequently, a federal district court sitting in New York and exercising diversity jurisdiction as trial court should (1) recognize the applicability of *Klaxon* to the second sentence of Rule 501 and look to New York's indicative law, but (2) if the court finds that that indicative law refers to the dispositive law of New York (the trial state) rather than the dispositive law of California (the exclusive situs of the newsman-source relationship), the court
should eschew that result as prohibited by the due process and full faith and credit clauses, and (3) fashion an indicative law which will lead to the potential application of California’s newsman’s privilege statute.

Those asserted Klaxon and constitutional conclusions are by no means intended to be limited to the newsman-source privilege. They are intended to be applicable to all privilege issues which arise in federal courts in diversity cases. The emphasis on the newsman’s privilege arose (and was taken advantage of) because that was the privilege asserted before the federal court in Cepeda. Both a similar judicial problem and, not surprisingly in view of the date of the decision, a somewhat similar judicial insensitivity to the methodology of interest analysis, manifested themselves in regard to an asserted husband-wife privilege in R. & J. Dick Co. v. Bass.75

In Bass, as in Cepeda, separate trial and deposition states were involved. Plaintiff, R. & J. Dick Co., sued defendants Bass and Belting, Inc., alleging that they had conspired to damage the plaintiff’s business, and seeking injunctive relief and money damages. The diversity action was brought in a Georgia federal court. Plaintiff sought to depose “the estranged (though not divorced) wife of defendant Bass, presumably for the purpose of establishing the alleged conspiratorial negotiations between Bass and Habegger [controlling party of Belting, Inc.],”76 with the deposition to be taken in Pennsylvania, deponent’s state of residence.77 Defendants objected to the deposition on the basis of a Pennsylvania statute which “appears on its face to absolutely prohibit husband and wife [from] testifying against each other in civil cases.”78 “Georgia law, on the other hand, contains no

76. Id. at 760.
77. Id.

Nor shall husband and wife be competent or permitted to testify against each other, except in proceedings brought by a wife to be declared a feme sole trader, and except also in those proceedings for divorce in which personal service of the subpoena or of a rule to take depositions has been made upon the opposite party, or in which the opposite party appears and defends, in which case either may testify fully against the other, and except also that in any proceeding for divorce either party may be called merely to prove the fact of marriage.

In addition, Pennsylvania has a statute prohibiting disclosure of interspousal confidential communications:

Nor shall either husband or wife be competent or permitted to testify to confidential communications made by one to the other, unless this privilege be waived upon the trial.
such absolute prohibition as the Pennsylvania statute . . . referred to, but does exclude confidential communications between husband and wife.\footnote{R. & J. Dick Co. v. Bass, 295 F. Supp. 758 (N.D. Ga. 1968). GA. CODS ANN. § 38-418 (1959) provides: There are certain admissions and communications excluded from consideration of public policy. Among these are: 1. Communications between husband and wife . . . .}

The defendants' objection was directed to the Georgia federal trial court. "Initially, [because] Georgia [had] no objection to the deposition, and because it was to be taken in Pennsylvania, the court was tempted to defer to the Pennsylvania courts and let them decide whether the taking of the deposition was permissible under their law."\footnote{R. & J. Dick Co. v. Bass, 295 F. Supp. 758, 760 (N.D. Ga. 1968).} Because the question was raised in Georgia, however, "the court . . . reluctantly concluded it should decide it."\footnote{Id. at 760-62 (footnote omitted). The lengthy excerpt from the court's opinion is quoted in the text to demonstrate the agonizing judicial scrutiny of the conflict between trial state and deposition state—even after a determination of the applicability of \textit{Erie} and \textit{Klaxon}—with little judicial recognition of the underlying basis for the Pennsylvania dispositive law: preservation of the marital status. Ultimately, the court permitted the taking of the deposition of Mrs. Bass, noting, in part: [T]here are many matters as to which the wife may be examined without being called upon to testify ― against‖ her husband. It is obvious that she is acquainted with the Swiss manufacturer, Habegger. She may very well have had conversa-} Acknowledging that the admissibility of evidence is governed by the law of the forum state and "that matters of privilege and competency are ordinarily considered as being substantive within the meaning of \textit{Erie},"\footnote{Id. tit. 19, § 683.} the court decided which law to apply in the following manner:\footnote{Id. § 316.}
All this would seem to indicate that Georgia law controls; and so it must—but the situation here may very well be one where Georgia courts themselves would apply the law of Pennsylvania. For example, the Pennsylvania competency statute previously mentioned does not merely establish a rule of evidence; rather it announces a deeply ingrained public policy of that State; and while ordinarily a deposition state would defer to the forum state on a question of evidence, it is not required to do so (and probably would not) where its public policy would be offended thereby. See Palmer v. Fisher, 228 F.2d 603 (7th Cir., 1955), cert. denied 351 U.S. 965 . . .; Ex Parte Sparrow, 14 F.R.D. 351 (N.D. Ala., 1953). Georgia recognizes this rule, and if the situation were reversed (that is, if a Pennsylvania court was seeking a deposition in Georgia which offended the public policy of Georgia), it is very doubtful whether Georgia would permit the deposition to be taken. Ga. Code Ann. § 102-110; Ulman, Magill & Jordan Woolen Co., Inc. v. Magill, 155 Ga. 555, 117 S.E. 657 (1923).

The question then is one of comity. Shall this court, bound as it is by the Georgia rule as to conflict of laws, nevertheless honor the public policy of Pennsylvania; and if so, may the deposition be taken under Pennsylvania law? Although the question seems to be one of first impression in Georgia, the court concludes that on the very narrow question of whether the deposition shall be taken, Pennsylvania law should control, and that, if called upon to decide the question, the Georgia court would so hold. The court reaches this conclusion for several reasons: First, the court arrives at this result as a matter of practical necessity, for here the witness resides in Pennsylvania, and if a Pennsylvania court would prohibit her deposition, certainly neither the Georgia courts nor this court could compel it to be taken. Second, the Pennsylvania privilege, embodying the public policy of that state, relates to a matter of substance, not of form, and on such a matter Pennsylvania law would be given controlling effect in Georgia. The transaction here in contemplation is, of course, the taking of a deposition, and on this subject Georgia law provides that:

"Matters of substance or right, and those of procedure or remedy are to be distinguished. The former are to be

Id. at 763. The likelihood that Mrs. Bass' testimony would tend to "exonerate" Mr. Bass seems extraordinarily slim, bearing in mind that her deposition was sought by the adverse party and, in the words of the court, "presumably for the purpose of establishing the alleged conspiratorial negotiations between Bass and Habegger." Id. at 760.
controlled by the law of the place of the transaction while the latter are controlled by that of the forum." 5 Encyclopedia of Georgia Law, "Conflict of Laws", § 21. (Emphasis supplied.)

Again, bearing in mind that the "transaction" in question is the taking of the deposition, Pennsylvania becomes the forum state, and its law would apply whether the question be regarded as substantive or procedural.

Finally, the conclusion that Pennsylvania law should control seems to represent the better reasoning in those cases from other states which have considered the general question:

"* * * [W]here a deposition is being taken in a state whose declared public policy has carved out a privilege in favor of a certain class of communication, a federal court sitting in that state will apply that pronounced public policy to questions propounded on a deposition of an out-of-state suit, even though the trial state does not recognize the privilege." Application of Cepeda, supra, 233 F. Supp. at 469.

As in Cepeda, the language of the court in Bass has the surface appeal of suggesting that, despite trial in one state and deposition in another, a potentially applicable privilege will not be lost in transit. But, as in Cepeda, the opinion in Bass seems to overlook the essence of the interests of the two states in the choice-of-law problem presented, an oversight probably explicable again in terms of the date of the opinion and the relatively recent judicial acceptance of interest analysis.

In Bass, as in Cepeda, the "competing" jurisdictions are identified as trial state and deposition state. While those characterizations are factually accurate, they are less helpful than a characterization based on the state of marital domicile. Presumably, the reason for Pennsylvania's statute prohibiting husband and wife from testifying against each other in civil cases was Pennsylvania's conclusion that to permit one spouse to testify against the other would generate interspousal animosity and thus threaten the marital relationship. 84 Pennsylvania's interest in

84. Closely allied to the disqualification of parties, and even more arbitrary and misguided, was the early common law disqualification of the husband or wife of the party. This disqualification prevented the party's husband or wife from testifying either for or against the party in any case, civil or criminal. Doubtless we should classify the disability of the husband or wife as a witness to testify for the party-spouse as a disqualification, based upon the supposed infirmity of interest, and the rule enabling the party-spouse to prevent the husband or wife from testifying against the party as a privilege.
preserving the marital status is most significant in those instances in which the marital domicile is in Pennsylvania. Had the Bass marital domicile been in Georgia, or any state other than Pennsylvania, Pennsylvania's interest in the application of its statute would have been insignificant, notwithstanding the fact that Pennsylvania was the deposition state. The focus of the Bass court's attention, therefore, should have been on the state of marital domicile, not on the competing interests of a trial state versus a deposition state. Unfortunately, the court's opinion does not precisely identify the marital domicile and a determination of the situs of the marriage in Bass is complicated by the fact that deponent and defendant were estranged. The estrangement raises this preliminary question: does the Pennsylvania interest in preserving the marital status by prohibiting one spouse from testifying against the other exist when the spouses are living separate and apart? The answer apparently provided by Pennsylvania decisions is yes; so long as reconciliation seems feasible, Pennsylvania's interest in preserving the marriage exists.\(^5\) Now the principal question: with the spouses separated, and Mrs. Bass residing in Pennsylvania, does the Pennsylvania interest in preserving the marital status apply? Presumably, that question too should be answered in the affirmative, even if Mr. Bass resided in some state other than Pennsylvania. Given the long judicially recognized interest of each state in the marital status of its own domiciliaries,\(^6\) it seems appropriate to conclude that, so long as


Thus, while the Pennsylvania statute states that neither spouse shall be "competent," since the prohibition applies only to testifying "against" the other spouse, it is clear that the legislative purpose was not to create "the early common law disqualification" based on interest, but, rather, a privilege intended to preserve the marriage.

\(^6\) See, e.g., Commonwealth v. Wilkes, 414 Pa. 246, 199 A.2d 411, cert. denied, 379 U.S. 939 (1964). In affirming the conviction of husband-defendant of the second-degree murder of his adult son, the court concluded that receipt in evidence of incriminatory letters written by defendant to his apparent paramour and accidentally discovered by his estranged wife, who gave them to the mortician, who, in turn, gave them to the police, did not violate the husband-wife privilege because wife had neither testified against husband nor secured the letters through confidential interspousal communications. Obviously, if estrangement alone terminated the privilege, there would have been no need for the court's rationale. The statute involved in Wilkes, Pa. Stat. Ann. tit. 19, § 683 (1887), prohibited one spouse from testifying against the other in criminal proceedings. Given the enhanced state interest in criminal prosecutions, the court's tacit conclusion that separation does not terminate the marital privilege assumes an a fortiori application to civil proceedings.

Mrs. Bass is domiciled in Pennsylvania, that state's interest in preserving her marital status by prohibiting her from testifying against her husband remains significant.

Georgia's interest in the Bass litigation also deserves analysis. As trial state desirous of preserving the integrity of its judicial process, Georgia has the interest of assuring that all potentially relevant evidence is available. The asserted privilege, if recognized, would serve to deny potentially relevant evidence to the forum, thus undermining Georgia's interest in assuring the full availability of evidence. As noted earlier, in most choice-of-law contexts, simultaneous conclusions that the legal issue presented has the capacity of frustrating the integrity of the judicial process and that the forum's dispositive law does not permit such frustration would provide the forum with a legitimate interest in the issue presented and enable the forum constitutionally to apply its own dispositive law. Were the issue one not related to an asserted privilege, the application of Georgia's dispositive law would be entirely acceptable. Because, however, the issue arises directly out of an asserted privilege, greater circumspection on the part of the forum seems desirable and, I would suggest, constitutionally compelled.

Pennsylvania, the state of domicile of one of the parties to the protected relationship (the marriage), has concluded that preservation of that relationship is so critically important that neither spouse should be permitted to testify against the other. Were Georgia dispositive law, rather than Pennsylvania dispositive law, applied, that significant interest of the state of marital domicile (or, at least, the domicile of one of the parties to the marriage) would be frustrated. It is true that Georgia's law prohibits one spouse from testifying to confidential communications made by the other, and presumably for a similar purpose: to facilitate interspousal communications thus to preserve the marital status; but that privilege is not as broad and, therefore, not as protective as the Pennsylvania privilege. As the domicile of one of the spouses, Pennsylvania's concern with preserving the marital status transcends any single litigation. Whatever the outcome

87. See notes 40-58 supra and accompanying text.

88. Communications between husband and wife are protected forever. This is necessary to the preservation of that perfect confidence and trust which should characterize and bless the relation of man and wife. Each must feel that the other is a safe and sound depository of all secrets.

of the *Bass* case, Pennsylvania wants to preserve the Bass marriage. Whatever the economic impact of any judgment ultimately entered in the *Bass* case, that impact will be less significant than Pennsylvania's continuing desire to preserve the Bass marriage, with all of the ongoing personal, social and economic consequences such preservation would imply. Therefore, the conceded interest of Georgia (the forum) should be deemed insufficient to justify the nonapplication of that marriage-protective law of Pennsylvania which prohibits one spouse from testifying against the other. In my opinion, the concern of the state of the marital status in attempting to preserve that status is more significant than the limited and transitory concern of the forum in securing all potentially relevant evidence, and the protection of the more significant interest should be assured by determining that the nonapplication of Pennsylvania's protective dispositive law is not only undesirable but unconstitutional as well. If the interest of the state of marital domicile is recognized as being so significant that no other state as forum, even with the forum's conceded interest in preserving the integrity of its own judicial process, has a sufficient interest in the application of its own dispositive law, then nonapplication of the dispositive law of the marital domicile in favor of the application of the dispositive law of the forum would be deemed violative of both the due process and full faith and credit clauses of the Constitution. That constitutional assurance that the dispositive law of the situs of the protected relationship will be applied is both desirable and justified. It alone provides assurance that the rights of the parties to the relationship, the interest of the situs state in regulating the relationship and the political capacity of citizens of the situs state to affect that state's view of such relationships will be preserved, despite the accident of forum. Additionally, it alone assures recognition of the greater significance which attaches to all such relationships than to an evidentiary ruling on admissibility in a particular trial. Therefore, the (Georgia) federal district court should have concluded that *Klaxon* was applicable to the choice-of-law problem presented in *Bass* but that a Georgia indicative law pointing to the nonapplication of Pennsylvania's protective dispositive law would have been constitutionally impermissible.

Let's take a factual liberty with *Bass*89 and assume that Mr.

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89. The court's opinion states that Mrs. Bass was a Pennsylvania resident, but makes no explicit mention of Mr. Bass' state of residence.
Bass was a Georgia domiciliary (making Georgia the forum and domicile state of one of the parties to the marital relationship). Under such circumstances, would it be constitutionally permissible for a Georgia federal district court to conclude that *Klaxon* required the utilization of Georgia's indicative law, which pointed to the application of Georgia dispositive law, and thereby precluded the application of the more protective dispositive law of Pennsylvania?

Where the parties to an existing marriage are separated and each is domiciled in a different state, presumably each state's interest in the marital status of its domiciliary is precisely equal to that of the other state. Given that equilibrium of interests, and bearing in mind that the privilege laws of the two states are different, there is a certain temptation to conclude that, if the indicative law of the forum-domicile refers to that state's dispositive law, that dispositive law should be deemed constitutionally available to the federal diversity court through *Klaxon*.

Ideally, it seems to me, the temptation should be resisted through judicial restraint. That is, I would hope that the highest appellate court of Georgia, confronted with such a choice-of-law problem, would conclude that, even assuming the constitutional propriety of the application of Georgia's less protective law and even recognizing the interest of Georgia as forum in the potentially relevant (nonconfidential communication) testimony of Mrs. Bass when offered against Mr. Bass, that court would simultaneously recognize Pennsylvania's interest in preserving the marital status of its domiciliary (on a par with Georgia's similar interest) and conclude that comity compelled the application of the more protective Pennsylvania law. If that were the reaction of the Supreme Court of Georgia, a federal court sitting in Georgia and confronted with *Bass* could simply follow the mandate of *Klaxon* and avoid any constitutional complications. But both the possibility of a different reaction from the Supreme Court of Georgia and a personal sense of obligation to pursue the constitutional issue to its conclusion impel me to confront and attempt to resolve that constitutional problem.

The constitutional problem raised by changing the facts in *Bass* arises with respect to the newsman-source privilege asserted in *Cepeda*, if certain facts are altered for the sake of discussion.

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If the relationships between Cohane and San Francisco Giants team officials had been initiated in California but pursued in New York, would it have been constitutionally permissible for the federal district court in New York to conclude that (1) *Klaxon* pointed to New York's indicative law, (2) New York's indicative law referred to New York's dispositive law, (3) New York's dispositive law contained no newsman's privilege, and therefore, (4) Cohane's assertion of the California newsman's privilege should be rejected summarily? That admittedly difficult question may be approached by attempting to resolve some relatively easier and alternately subsumed factual situations.

If California remained the basic and almost exclusive situs of the newsman-source relationships, the earlier conclusion that summary rejection of the California newsman's privilege would be constitutionally impermissible would appear to be continually appropriate. The significant interests of the parties to the relationships, the situs state and citizens of that state would be virtually unchanged. Preservation of the integrity of the California-based newsman-source relationship would clearly outweigh preservation of New York's forum-based interest in securing potentially relevant evidence. If, on the other hand, the New York relationships were as substantial as the California relationships, and the information revealed in each state was easily severable, it would seem perfectly appropriate to require the application of California dispositive law to the California-based relationships and to permit the application of New York dispositive law to the New York-based relationships. Application of New York's dispositive law to that severable portion of the relationship which existed in New York would do no violence to the expectations of the parties who volitionally entered the relationships in New York and would be wholly consistent with permitting the situs state (New York) to regulate the relationships and its citizens to affect politically the mode of regulation.

Suppose, however, that the relationships existed substantially in both states and the revelations made by sources to newsmen were totally inseparable. Which state's law should determine the asserted privilege? Since the parties to the relationships volitionally carried into New York the relationships initiated in California, none could assert successfully that his expectation of privilege would be unduly frustrated by a determination that New York's dispositive law (no newsman's privilege) applied. Such a result would be wholly consonant with what the parties should have contemplated; no well-based reliance on the
California privilege could be assigned to that substantial portion of the continuing relationships which existed in New York. New York's interest in regulating the relationships would be as significant as the analogous California interest and the political capacity of New York citizens to affect the mode of control would be as significant as the analogous interest of California citizens. Therefore, application of New York dispositive law would be entirely appropriate and certainly constitutionally permissible. Consequently, if that were the result which the New York Court of Appeals would achieve, that result would be binding through *Klaxon* on a federal court exercising diversity jurisdiction in New York.

Does such reasoning imply that, given a Pennsylvania domicile for Mrs. Bass, a Georgia domicile for Mr. Bass and a Georgia forum, Georgia should be free to apply its less protective dispositive law and compel Mrs. Bass to testify against Mr. Bass? I think not.

It is true, of course, that the state of domicile of each of the spouses is deemed to have jurisdiction to hear and determine a divorce action brought by its own domiciliary.\(^9\) Indeed, that jurisdiction grows out of the interest which each state has in the marital status of its domiciled spouse.\(^9\) So long as the divorce-action plaintiff is a bona fide domiciliary of the forum state, that state's court may hear and determine the action, and, if a divorce is granted, that decree will be entitled to full faith and credit recognition in all sister states, including the domicile state of the other spouse.\(^9\)

In *Bass*, however, neither state was asked to assert its jurisdiction to hear and determine an action to terminate the marriage. Rather, each state presented a dispositive law intended to preserve the marital status. That distinguishes *Bass* not only from a divorce proceeding but also from the newsman-source situ-

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ations discussed above. In the “newsman-source” cases only one state had a dispositive law intended to protect the relationship; the other state’s law offered no protection. In Bass both Georgia and Pennsylvania had dispositive laws prohibiting disclosure and intended to protect the relationship. It was to serve that interest that Georgia prohibited either spouse from testifying to confidential communications between the spouses, and Pennsylvania prohibited either spouse from testifying against the other (in addition to prohibiting testimonial revelations of confidential interspousal communications). Both states (each the domicile of one of the spouses, given our hypothesis that Mr. Bass was a Georgia domiciliary) wished to preserve the relationship but each had its own view of the better means of achieving that goal. Of the two views, Pennsylvania’s was the more protective. Application of that more protective Pennsylvania dispositive law prohibiting either spouse from testifying against the other would do nothing to frustrate Georgia’s discerned interest in preserving the marriage. On the other hand, application of Georgia’s dispositive law prohibiting only the revelation of confidential communications but otherwise permitting one spouse to testify against the other would clearly frustrate the interest in preserving the marriage as perceived by Pennsylvania. Georgia’s other interest, that of the forum in securing potentially relevant evidence, is, it seems to me, patently of only secondary significance when compared with the basic interest of both states in preserving the marital status.

There is a second relevant distinction between the newsman-source relationship and the marital status cases. That difference is evidenced by the ease with which newsman and source can eliminate or substantially reduce the interest of the original situs of the relationship simply by continuing the relationship in another state, while still retaining their original domiciles. Neither party to a marriage has the capacity to eliminate or even substantially reduce the interest of his or her domicile state in preserving the marital status simply by effecting a temporary change in locale. In fact, even if both parties to the marriage were to leave the marital domicile only temporarily, they would not eliminate or diminish the domicile state’s interest in preserving the marital relationship. And, as we have noted, that interest would subsist even if one of the spouses (but not the other) were to acquire a new bona fide domicile of choice. Each state’s interest in preserving the marital status of its domiciliary is “deeply ingrained”\textsuperscript{94}.

because of the basic and significant personal, social and economic consequences affiliated with the marital relationship.

Taking into account that in Bass both states were interested primarily in preserving the marital relationship and that preservation of that relationship is of unique significance to each of the spouses' domicile states, I would suggest that the rejection of Pennsylvania's dispositive law intended to preserve the marital status of one of its own domiciliaries in favor of the less protective Georgia dispositive law having a similar purpose, would not be justified in terms of any appropriate countervailing Georgia interest. Where each state is the domicile of one of the spouses, each state's interest in the marital status (as manifested by the state's dispositive law) is one of preservation, the dispositive law of one of the interested states is more protective in that regard than the other state's, and the application of that more protective law will not frustrate the basic protective interest of the other state, the forum should be required to apply that more protective dispositive law. In that manner, the primary interest of each domicile state would be served and neither state's protective interest would be frustrated. Where the domicile state having the less protective dispositive law is also the forum, its secondary interest as forum in securing all potentially relevant evidence should not be deemed to be of sufficient significance to justify nonapplication of the other state's more protective law. If the due process and full faith and credit clauses are read as compelling that result, neither a litigant's choice of forum nor a forum's designation of the most convenient deposition state will have the capacity of exposing the protected relationship to the vulnerability of diminished protection. Consequently, still assuming that Mrs. Bass was a Pennsylvania domiciliary and Mr. Bass a Georgia domiciliary, the federal court in Georgia should have concluded that, in that diversity case: (1) Klaxon applied, so that Georgia indicative law was applicable; but (2) if that Georgia indicative law referred to Georgia dispositive law, rather than the dispositive law of Pennsylvania; (3) it produced a result precluded by the due process and full faith and credit clauses; therefore (4) that result was neither binding upon nor available to the federal court, so (5) Pennsylvania's dispositive law applied.

Both Cepeda and Bass presented the litigation phenomenon of different trial and deposition states and, for that reason, served as uniquely appropriate vehicles for an examination of the applicability of Klaxon and potential constitutional inhibitions on a purely mechanical Klaxon-produced result. When a diversity
Rule 501, Klaxon and the Constitution

court is confronted with different trial and deposition states, the judicial process of determining which state's indicative law is applicable and why tends to be relatively exposed and, therefore, available for analysis. But it should not be assumed that the applicability of Klaxon or those potential constitutional inhibitions come into play only in those diversity cases involving different trial and deposition states; each is equally critical in those diversity cases in which the totality of the litigation process occurs in one state. We can demonstrate that—and simultaneously come full cycle—by returning to our original psychologist-patient hypothetical, with one legal distinction.

Let's assume that State A, site of the two-vehicle collision and forum state, has rejected interest analysis and determined to retain lex loci delicti as its indicative law in tort cases. When the diversity court, confronted with the challenged testimony of the psychologist who interviewed P at the rehabilitation center in State B, examines State A's indicative law, as Klaxon requires, it finds that the highest appellate court of that state would apply the dispositive law of State A (no psychologist-patient privilege) and receive the offered testimony. Is that result constitutionally permissible?

Let's indulge in the assumption that, although the result is simply the mechanical product of State A's indicative law (lex loci delicti) and Klaxon, when its constitutional propriety is challenged the result will enjoy the benefit of any appropriate interest. The most apparent interest of State A in the application of its own dispositive law (no privilege) is that of the forum in preserving the integrity of its judicial process by securing all potentially relevant evidence.

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95. SCOLÉS & WEINTRAUB, supra note 54, at 487, list ten states which have achieved that judicial determination, with appropriate citations. For a suggestion that one of those decisions, Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1969), may have violated the due process clause see Seidelson, Interest Analysis: For Those Who Like It and Those Who Don't, 11 Duq. L. Rev. 283 (1973).

96. That raises a subsidiary question to which, so far, we have supplied a tacit affirmative answer. Is the forum-based interest of State A relevant when trial is in a federal court exercising diversity jurisdiction and sitting in State A? Arguably, State A's interest in preserving the integrity of the judicial process, and the State A dispositive law intended to serve that interest, are wholly irrelevant when the court is a federal one and, therefore, beyond the state's interest in preserving (state) court integrity and beyond the state's sovereign reach, whether the dispositive law of the state be legislative or judicial. The argument is overcome, I think, by two considerations. First, since the case is state-based (hence, the diversity jurisdiction) and does not involve a federal cause, there may indeed be a continuing state interest in maintaining the integrity of the judicial process.
Does that interest, attributable to State A and the diversity court sitting in that state, provide an appropriate justification for the nonapplication of State B's dispositive law containing a psychologist-patient privilege? The relationship existed exclusively in State B where the interview occurred and the rehabilitation process was effected. To the extent that the parties to the relationship contemplated the application of any law to that relationship, presumably they contemplated the application of State B's protective dispositive law. As the exclusive situs of the relationship, State B has a unique interest in regulating that relationship (in this case, by protecting it and thereby encouraging those within the state to enter such relationships without declaratory circumspection, thus enhancing the efficacy of those relationships). Those most interested in determining that mode of regulation and having some political capacity to affect it, are the citizens of State B. Each of those basic interests would be frustrated by the application of State A's dispositive law. While State A has an interest in the application of its dispositive law (to secure potentially relevant evidence), that purely litigation-based interest seems to me to lack sufficient significance to justify the nonapplication of State B's protective dispositive law. Therefore, I believe, the due process and full faith and credit clauses should be deemed to preclude the nonapplication of State B's dispositive law. Consequently, in this diversity case, the federal court should recognize the applicability of Klaxon to the second sentence of Rule 501 and look to the indicative law of State A. However, when the court finds (as I think it should) that State A's indicative law refers to State A's dispositive law in circumstances where State A lacks an appropriate interest to justify the nonapplication of State B's dispositive law, the court should conclude that that result is constitutionally impermissible, and therefore, neither

of the state which will hear and resolve the case. Second, Congress seems to have acquiesced, at least impliedly, in having that state interest reach diversity cases in federal courts. As we have seen, the HOUSE JUDICIARY COMMITTEE REPORT (pages 8-9) in having Erie apply to privilege issues in diversity cases, offered, as one reason, a desire to discourage forum shopping as between state and federal courts. Were the state interest in preserving the integrity of the judicial process deemed inapplicable to diversity cases, the competing interests of forum state and sister state could be affected substantially by counsel's selection of a state or federal court. Since affecting those interests could influence the resolution of all choice-of-law problems in the case, counsel on either side would have an incentive for preferring one of the two available courts. That would frustrate the legislative intent manifested in the Committee's report. Therefore, it should be concluded that State A's interest in preserving the integrity of the judicial process is relevant in this diversity court.
binding upon nor available to the court through \textit{Klaxon}. Thus, the court should apply the dispositive law of State \(B\) and reject the offered testimony of the psychologist.

The explicit language of Rule 501 requires that a federal court exercising diversity jurisdiction is to resolve privilege issues by the application of state law. The House Judiciary Committee Report implies strongly that, confronted with a choice-of-law problem as to a privilege issue, the diversity court is to resolve the choice-of-law problem as it would be resolved by the highest appellate court of the state in which the diversity court sits; in other words, \textit{Klaxon} is applicable. As we have seen, however, a purely mechanical application of \textit{Klaxon} could produce results which are antithetical to the very essence of and reason for the privilege, and thus vulnerable to successful attack as being violative of the due process or full faith and credit clause of the Constitution. Those potential constitutional impediments to a purely mechanical application of \textit{Klaxon}, each requiring careful judicial analysis in each individual case, may explain why the House Judiciary Committee did not explicitly mandate the application of \textit{Klaxon}.\footnote{Congress seems to have followed the lead of the Advisory Committee in avoiding the codification of constitutional principles, probably a wise decision both for the drafters and the enactors of the rules of evidence. "No attempt is made in these rules to incorporate the constitutional provisions which relate to the admission and exclusion of evidence, whether denominated as privilege or not." \textit{Prop. R. Evid.} 501, Advisory Comm's Note.} They also suggest that federal courts hearing diversity cases and finding themselves confronted with choice-of-law privilege issues should, simultaneously, recognize the applicability of \textit{Klaxon} but remain sensitive to the possibility that the choice-of-law resolution which might be achieved by the highest appellate state court could, in the absence of significant countervailing interests, unduly intrude upon an applicable privilege, and, for that reason, be unconstitutional, thus neither binding upon nor available to the diversity court.