Courts Apply Privilege Choice of Law Principles: Part I

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In his November 5, 2014 “Privilege Points” release, Tom Spahn discusses the application of federal and state law to privilege issues.

Although both federal and state courts apply their own rules (including the work product rule), they normally must undertake a choice of law analysis when assessing attorney-client privilege claims. This usually results in fairly predictable conclusions — but not always.

Federal courts handling federal question cases apply federal common law privilege principles. East Coast Sheet Metal Fabricating Corp. v. Autodesk, Inc., Civ. No. 12-cv-517-LM, 2014 U.S. Dist. LEXIS 129272 (D.N.H. Sept. 16, 2014) (not for publication) (28 U.S.C. § 1338 patent infringement case). Bankruptcy cases can involve more subtle issues. In Litigation Trust for Trust Beneficiaries of SNTL Corp. v. J.P. Morgan Chase (In re Superior National Insurance GR), an insurance company and several subsidiaries filed for Chapter 11 relief. Ch. 11 Case No. 1:00-bk-14099-GM, Adv. No.: 1:13-ap-01099-GM, 2014 Bankr. LEXIS 3885 (Bankr. C.D. Cal. Sept. 11, 2014). A litigation trust for the debtors' trust beneficiaries sued a bank, which then sought some of the trust's documents. In determining which privilege law applied, the court relied on Federal Rule of Evidence 501, which "states that 'state law governs privilege regarding a claim or defense for which state law supplies the rules of decision.'" Id. at *7. The court concluded that California privilege law applied, because the trust's claims against the bank "are all state law causes of action." Id. However, the court also acknowledged that if "any of the [trust's] claims were governed by federal law, then federal law of privileges would govern the entire proceeding." Id.

Federal courts' privilege choice of law analyses become more complicated in diversity cases. Next week's Privilege Point discusses that scenario.