

Open Issues: Psychotherapist Patient Privilege Under Rule 501

Does the state or the federal psychotherapist-patient privilege apply in a case presenting both state and federal claims? While this is an open issue in some circuits, most circuits apply the federal privilege. Recently the D.C. Circuit noted an open issue regarding whether the state or federal psychotherapist-patient privilege applies in a case involving both state and federal claims.



Two mentally retarded wards brought a civil rights action against a group home operator and case worker alleging another ward sexually assaulted the plaintiffs. The plaintiffs moved to compel production of the “complete files” of the ward who allegedly committed the sexual assault. The trial court ordered the production of medical records and case notes for review by plaintiff’s counsel.

The circuit confronted an open issue concerning the application of privilege law:

“It is thus clear that when a plaintiff asserts federal claims, federal privilege law governs, but when he asserts state claims, state privilege law applies. What is unclear is the proper resolution in a case like this, where the plaintiffs assert both federal and state claims, and relevant evidence may be privileged under one but not the other.” [1212]

The circuit noted that the issue had also been recognized by the Supreme Court but left unresolved, citing *Jaffee v. Redmond*, 518 U.S. 1, 17 n.15 (1996).

While it was unnecessary for the circuit to resolve the issue in part because it had not been addressed or briefed by the parties and by the trial court, the opinion noted that most circuits applied the federal privilege law in conflict with state privilege law. [1212-13 n.7] The case was remanded for further proceedings, including possible resolution of this open issue.

Circuits Applying Federal Privilege Law:

Most circuits have applied the Federal privilege when both state and federal privileges arise in a case:

■ **Second Circuit:** *von Bulow v. von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987) (declaring that, where the evidence sought “is relevant to both the federal and [pendent

] state claims,” courts “consistently have held that the asserted privileges are governed by the principles of federal law”), *cert. denied*, 481 U.S. 1015 (1987)

■ **Third Circuit:** *Pearson v. Miller*, 211 F.3d 57, 66 (3d Cir. 2000) (under Rule 501, applying federal privilege law where the material is relevant to both federal and state claims)

■ **Fourth Circuit:** *Virmani v. Novant Health Incorp.*, 259 F.3d 284, 287 n.3 (4th Cir. 2001) (“We agree with our sister circuits that in a case involving both federal and [pendent] state law claims, the federal law of privilege applies.”)

■ **Sixth Circuit:** *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992) (holding that “the existence of pendent state law claims does not relieve us of our obligation to apply the federal law of privilege”)

■ **Seventh Circuit:** *Memorial Hosp. v. Shadur*, 664 F.2d 1058, 1061 n.3 (7th Cir. 1981) (applying federal privilege law to a complaint asserting a pendent state claim)

■ **Ninth Circuit:** *Religious Tech. Ctr. v. Woltersheim*, 971 F.2d 364, 367 n.10 (9th Cir. 1992) (applying federal privilege law in a case involving both federal and pendent state claims)

■ **Eleventh Circuit:** *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992) (noting that “when the federal and state laws of privilege are in conflict,” courts “have uniformly held that the federal law of privilege governs even where the evidence sought [in discovery] might be relevant to a pendent state claim”)

Circuits Possibly Not Applying Federal Privilege Law

■ **Tenth Circuit:** *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir. 1995) (looking to state privilege law in a state cause of action in a case with both federal and state claims), *cert. denied*, 517 U.S. 1190 (1996)

Resolving Which Privilege Applies In Other Instances

While it remains an open issue regarding application of the psychotherapist-patient privilege, courts have had to try to resolve a similar conflict in other instances when federal law and state law provided different standards concerning the application of a privilege.

For some examples, consider:

■ **Third Circuit:** *Pearson v. Miller*, 211 F.3d 57, 66 (3d Cir. 2000) (after both state and federal claims were made against a state agency arising from the sexual assault of plaintiff’s child, the court noted a potential problem because of “the application of two separate privilege rules” which the court resolved by deciding that the federal privilege law would apply); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 103-04 (3d Cir. 1982) (“[W]hen there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule. The question is one of first impression in this court, but our holding is consistent with the legislative history of Federal Rule of Evidence 501.”)

■ **Six Circuit:** *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992) (court applies federal law on doctor-patient privilege to both state and

federal claims and because there is no such privilege in federal law, court would not apply such a privilege on the state claim, regardless of the state privilege law).

An Approach For Deciding Which Privilege To Apply

The starting point for analysis of this open issue is the text of Federal Rule of Evidence 501 which provides:

“[I]n 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.”

In its report on FRE 501, the Senate Judiciary Committee suggested a possible resolution to the problem: “It is ... intended that the Federal law of privileges should be applied with respect to pendant State law claims when they arise in a Federal Question case.” Senate Report No. 93-1277, at 12 n. 7. However, this authority may be questionable because the congressional Conference Committee that reported the Rules of Evidence for adoption in 1974 adopted House Report 93-650 which did not address the issue. Application of the federal standard would be consistent with how federal courts have dealt with a similar problem in the discovery of evidence in a case involving both federal and state claims. The courts have “uniformly held that the federal law of privilege governs even where the evidence sought might be relevant to a pendent state claim.” *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992).

Case Reference

Cross-Reference: For a discussion of other evidence issues in the case, *see* FRE 501 (p. 35).

Citation: *In Re: Sealed Case (Medical Records)*, 381 F.3d 1205 (D.C. Cir. Aug. 31, 2004) (Nos. 03-7021, 03-7066) (Garland, Sentelle, Tatel).

Type of Action/Claim or Charge: Civil; 42 U.S.C. § 1983 (civil rights action); state claims of negligence. 