



LEGAL BRIEFS

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CONFLICT OF LAWS

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Every state in the United States has its own government, its own governor, legislature, and supreme court. Yet, few of us have any concern about traveling from state to state, going to school in a state that we do not plan to live in, or accepting employment in a state we may never have visited. The law in each state is remarkably similar to the law in each other state. But that it is not always the case. In the US legal system, laws are adopted and changed by the state legislatures. Legislatures often have a different political makeup from state to state. Moreover, some of our law comes not from legislation but from decisions of the courts facing actual parties, trying to do justice, and then trying to find underlying principles. These underlying principles allow courts to be consistent in the future and permit the public to anticipate how the courts will rule.

From time to time, state courts come to different conclusions, and legal doctrines evolve in different ways. While these differences appear small to most of us, these differences sometimes affect the outcome of cases. In the last 200 years, society has become more complex. Commerce within states is not as isolated as it once was. For most of us, our food, cars, banks, books, magazines, drugs, and furniture come from states

other than the state in which we live. When we have disputes with people who come from states that have different legal rules than our own, how do the courts determine which law to use?

The goals of the legal system are fairness, consistency, predictability, and the effectuation of public policy. When our legal system first developed in feudal England, the primitive transportation meant that most interactions from which disputes and lawsuits could arise were of a very local nature. When the legal system was transplanted to the American colonies, the system that evolved recognized separate roles for states as well as for the federal government. States were free to independently develop their own laws in many areas. For a large part of US history, differences in laws and statutes of independent states were not important because the primitive nature of transportation meant that most commerce and, therefore, most litigation involved neighbors, people in the same jurisdiction, governed by the same laws.

As transportation and commerce developed, the people who could be trading partners and the people with whom disputes could arise expanded. This increased disputes among people from states with different laws. Since one of the goals of the legal system was to provide predictability, the legal system had to develop methods of dealing with these conflicts so that people would be aware of what principles would be followed where jurisdictions had different laws. This area of the law, called "conflict of laws," may be the most technical issue that this

column has attempted to address. Oddly enough, it actually can affect the area of anesthesia.

Grover v Isom

In *Grover v Isom* (53 P. 3d 821, Idaho, 2002), a patient was advised by her family dentist that 2 of her teeth had to be extracted in order to reduce her frequent headaches. The patient went to an oral surgeon to have the teeth removed. The surgeon's intake questionnaire did not have any questions concerning headaches. Although the plaintiff testified that she informed the receptionist, the oral surgeon, and the CRNA about her headaches, all of them later testified that they could not remember the patient telling them about her headaches.

After the surgery, the patient took a long time to wake up and was ultimately diagnosed as having suffered a stroke. She brought suit a few months after the operation. While the report of the case does not clearly set forth the basis of the patient's claim of negligence, the jury determined that the CRNA was not negligent, but the oral surgeon was. Nonetheless, the jury did not award the patient anything because the jury found that the patient was solely responsible for the patient's problems. (Apparently, the jury must have believed that the patient did not inform anyone of her headaches and that was the cause of her stroke.)

Whose law applies?

Even though the case is unclear on causation, it is of interest because the court had to figure out whose law would prevail. The oral surgeon's office was in Oregon, but all

of the parties—the patient, oral surgeon, and nurse anesthetist—lived in Idaho. Because all of the parties lived in Idaho, the case was brought in the Idaho courts. It turned out, however, that Idaho and Oregon law differed in several respects, and some of these differences turned out to be important to the outcome. How did the court determine which state's law would apply.

The plaintiff appealed the jury decision challenging 3 of the court's rulings. First, the plaintiff had wanted to amend the complaint to add a claim for punitive damages. While this would have been permissible under Idaho law, Oregon law provided that punitive damages can be claimed only if the plaintiff can show that the defendant acted outside the scope of his or her practice and with malice. Since the plaintiff could not make this showing, a holding that Oregon law governed meant that the court would not allow the plaintiff to amend the complaint to include a claim for punitive damages.

Second, although the court says that Oregon and Idaho law are the same, under Idaho law it was permissible for a CRNA to give testimony on the standard of care in an oral surgeon's office as an expert witness even though the CRNA had not administered anesthesia in an office setting.

Finally, the plaintiff complained that the trial court had instructed the jury on other matters based on Oregon law and not Idaho law.

Obviously, the plaintiff thought it would make a difference to the outcome of the case whether the laws of Oregon or the laws of Idaho were applied. Whose laws should be applied? The court was located in Idaho, and all of the parties were residents of Idaho. Why even worry about Oregon? Both plaintiff and defendant live in

Idaho. When they cross the Idaho-Oregon border, why don't they just take Idaho law with them? Would not that be the easiest way to deal with this? You do not have to worry about laws of any state but yours unless you meet somebody from another state.

In an effort to bring predictability to the law, the courts initially adopted certain rigid principles that governed cases where there was a conflict in state laws. Contracts would be enforced in accordance with the laws of the state where the contract was made. For torts (the area of law that includes malpractice) the law of the state where the injury occurs would govern. Although this rigid approach created predictability, it turned out to be so rigid that people became very unhappy with it. The rigid approach interfered with the ability of states to carry out comprehensive regulatory plans. Too much depended on arbitrary events such as who last signed a contract and where cars involved in a wreck ended up. What replaced this rigid approach (and even now the change is not complete) is a process of looking for the state with the most significant relationships.

In *Grover v Isom*, the court seemed to take both approaches. The court considered the traditional rigid tests: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered (53 P. 3d 821). At this point the court was leaning in favor of Oregon where the negligence occurred. It then looked at the more modern view for resolving conflicts by considering: (a) the

needs of the interstate and international systems, (b) the relative policies of the forum, (c) the relative policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability, and uniformity of result, and (g) the ease and the determination and application of the law to be applied.

In *Grover v Isom*, what state had the more significant interest? The suit was brought in the Idaho court between Idaho citizens. As between Oregon and Idaho, would not Idaho be more concerned about the welfare of its citizens than Oregon? "No," said the Supreme Court of Idaho, Oregon law should govern the relationship between the parties. The place of the injury and the negligence (tests under the old fashioned rules) both occurred in an oral surgeon's office in Oregon. The relationship of the parties was also centered in Oregon. However, the most important consideration was that the oral surgeon practiced and was licensed in Oregon. While Idaho was concerned about its citizens, Oregon had the more significant interest in making certain that practitioners who practiced in Oregon met Oregon's requirements and standards. Even though the parties were Idaho residents, the important fact was that the defendants practiced in Oregon, and Oregon law should determine the standard of care for persons who practice in Oregon.

Substantive law and procedural law

Did the determination that Oregon law would govern end the inquiry? Not quite! Law is divided into 2 basic components. There is

“substantive” law (“...a licensed professional nurse who has graduated from a nationally accredited nurse anesthesia program, passed a qualifying examination recognized by the board, and has current initial certification or current recertification from a national group recognized by the board...” may administer anesthesia [Section 54-1402 Idaho Code]). And there is “procedural” law, a series of rules that explain how one practices in a particular court. (A defendant has 20 days in which to answer a complaint filed against it. A brief amicus curiae shall not be longer than 35 pages in length). Both examples are “laws,” but one governs practice in the court and the other determines behavior in society. When most people think about “law,” they are referring to “substantive” law. Few people, other than lawyers, care how much time a defendant has to file an answer. That is, they do not care unless the procedural law can affect the outcome of a case.

As an accommodation to courts, it is generally agreed that in conflict of law situations, a court is allowed to use the procedural law of its own state even though it is applying the substantive law of the state with the most significant relationships.

In *Grover v Isom*, suit was brought in Idaho, and the procedural rules of Idaho, will be applied even though the Idaho court will apply the “substantive” law of Oregon. The problem, however, is that the distinction between “substance” and “procedure” turns out to be a lot more difficult to draw than anybody would think. Is the statute of limitations “procedural” or “substantive”? If the statute has expired in one state but not in the other, the “procedural” statute plays a major “substantive” role in determining the outcome of

the case. What about provisions that govern the making of a claim for punitive damages? Oregon allows punitive damages only if the defendant acted outside the scope of his practice and with malice. The plaintiffs in *Grover v Isom* claimed that the availability of punitive damages was a matter of “procedure,” and Idaho law should have been applied. The court ruled that they were incorrect. It quoted one of its recent decisions: “Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated” (53 P. 3d 825).

Damages and punishments stated the court are “substantive” law, and Oregon law was correctly applied. Of course, like so many things in the law, the court merely provided a more detailed definition of “substance” and “procedure.” Saying that the availability of punitive damages is “substantive” is a conclusion, not an explanation. Oregon law prescribes a standard of care (a “norm for societal conduct”). Why is the availability of punitive damages “substantive”? The court provides no further guidance.

Why are punitive damages more “substantive” than who can testify as an expert witness? A plaintiff cannot bring a malpractice case without an expert witness to testify that the standard of care was breached. The more restrictions a state puts on who can qualify as an expert witness, the more difficult it will be for a plaintiff to bring a suit for malpractice. In *Grover v Isom*, the court did not have to decide if rules governing qualifications of expert witnesses were “substan-

tive” or “procedural” because the CRNA would have been allowed to testify as an expert under either Oregon or Idaho law even if he had not worked in an office setting. Finally, given the court’s conclusion that Oregon law prevailed, it was not incorrect for the judge to give jury instructions based on Oregon substantive law.

Dill v Scuka

Conflict of law issues have appeared in other cases involving anesthesia. In *Dill v Scuka*, 279 F. 2d 145 (US Ct. of App. 3d Cir. 1960), the plaintiff, a trouble-shooter for a gas company, had fallen asleep with his feet on his desk while working the midnight shift. When he awoke he had pain in the calf of his leg that was diagnosed as a blood clot. While being treated, he suffered 2 pulmonary embolisms. To get a better diagnosis of the blood clotting, his physician asked a urologist to perform an aortogram. After anesthesia was given, the urologist attempted to inject dye into the aorta but was not satisfied with the color of the plaintiff’s blood and stopped the procedure. Nonetheless, following the attempted aortogram the patient suffered a good deal of pain and had nerve damage. He brought suit claiming it was negligence to order an aortogram while he was receiving anticoagulation medication.

The plaintiff’s suit was brought against the physician who had ordered the aortogram. The operation had taken place in Wichita, Kan, but the defendant had since moved to Pennsylvania. The trial was held in the federal courts in Pennsylvania. One of the requirements was that expert testimony establish a breach of the standard of care by the defendant, the ordering physician. The plaintiff had called the urologist who actually administered the aortogram as a

witness. Not surprisingly, the urologist was not happy to be testifying against the referring physician, and some of the urologist's testimony suggested that ordering the aortogram, even when the patient was receiving anticoagulation medication, was within the standard of care. If the plaintiff was bound by the urologist's testimony, the case would be dismissed. The plaintiff argued that even though he had called the urologist as his own expert he should not be bound by everything that the urologist had said. The federal appeals court applied Pennsylvania law, not the law of Kansas, in overlooking the self-serving testimony of the urologist. Whether a plaintiff had to be responsible for all of the testimony of every witness called, even one who was hostile, was a question of "procedural" not "substantive" law. Although the operation occurred in Kansas before the defendant moved to Pennsylvania, the court applied Pennsylvania law on a "procedural" point even though a Kansas court might have dismissed the lawsuit.

Hardin, Rodriquez and Boivin v Paradigm Insurance Company

Finally, in *Hardin, Rodriquez and Boivin v Paradigm Insurance Company* (962 F.2d 628, 1992), the US Court of Appeals for the 7th Circuit upheld the holding of a federal district court in Illinois that a suit by an Illinois anesthesiology group against a Kentucky insurance company was governed by Illinois law. A representative of the anesthesiologist group traveled to Kentucky and met with representatives of the Kentucky insurance company to obtain malpractice insurance for their practice in Illinois. The anesthesiologist was concerned about the financial lia-

bility of the insurance company and asked for a copy of its financial statement. Believing that delivery of the financial statement had merely been delayed, the anesthesiology group paid for a 3-month binder (a temporary insurance contract). Upon the expiration of the binder, the insurance company sent a bill for another 3-month binder. The anesthesiology group objected to the insurance company's failure to provide financial statements and refused to pay the premium for an additional 3-month binder. The insurance company, it turned out, was not qualified to write insurance in Illinois. However, the insurance company sued for the premium that had not been paid.

Despite the fact that the plaintiff was a Kentucky insurance company, that Illinois had very little contact with the insurance company, and that the only meeting of the parties had occurred in Kentucky, the court determined that Illinois law should prevail. Illinois' interest in making sure that insurance companies insuring Illinois residents were properly regulated was the most significant relationship. The court upheld the determination of the lower federal trial court that under Illinois law, the anesthesiologists' insistence upon receipt of the financial statement was a condition precedent for the insurance agreement. It held, under Illinois law, that there was no agreement between the parties. The insurance company claimed that because it had issued a binder, it had exposed itself to the anesthesiologists' potential malpractice claims during the period for which it was entitled to be compensated. The court held that the binder, referring to "the terms of the policy in ordinary use by the company" was meaningless because the com-

pany was not authorized to write insurance in Illinois and, thus, there were no "terms of the policy in ordinary use by the company."

Conclusion

To some extent, at least when parties in different states contract with each other, the parties can choose to have their relationship governed by a particular state. But, even so, some situations will still have to be resolved by a court. The cases we have just discussed, involving parties in different states or parties who live in one state but work in another, demonstrate once more the difficulties courts have reconciling the goals of fairness with consistency and predictability. In each of the cases, simpler rules were available that would have provided more predictable outcomes. But the courts traded simplicity and predictability for fairness and the effectuation of public policy. In *Grover*, the court applied the law of the state with an interest in regulating the professionals who practiced in its borders even when all of the parties lived in a different state. In *Dill*, the court determined that rules governing responsibility for testimony was procedural, and in *Paradigm* the court found that Illinois' interest in making sure its residents were properly insured outweighed the interest of the state where the contract was made.

As society became more complex and commerce among citizens of different states increased, the states reached new accommodations based on public policy rather than ease of decision. This entire area will again be challenged as the Internet and electronic commerce increase their impact on our lives. For example, what state has the most significant interest in regulating contracts made on the Internet by parties who never meet.