

In a diversity action in federal court, the plaintiff seeks to have a drug abuse counselor from an employee assistance program testify about her communications with the defendant. The communications are privileged against disclosure under the relevant law of the state where the plaintiff's cause of action arose.

What should govern the court's determination of the admissibility of the counselor's testimony?

- A. Federal common law as interpreted in the light of reason and experience.
- B. Federal statutory law.
- C. The court's sound discretion in the interest of justice.
- D. The state's privilege law.

Correct

Collecting Statistics

52 secsTime Spent

2023Version

## Explanation:

### Law of privilege in federal court

(FRE 501)

<b>Diversity cases</b>	State law supplying rule of decision governs claims of privilege
<b>All other federal cases</b>	Federal common law governs claims of privilege unless otherwise provided by: <ul style="list-style-type: none"><li>federal constitution</li><li>federal statute</li><li>U.S. Supreme Court rule</li></ul>

**FRE** = Federal Rule of Evidence.

**Federal common law typically governs** claims of privilege in federal proceedings. However, **state law governs privilege** regarding a claim or defense for which **state law provides the rule of decision**. This typically arises in cases that fall within a federal court's **diversity jurisdiction**. As a result, the state's privilege law should govern the court's determination of the admissibility of the counselor's testimony in this federal diversity case.

**(Choices A & B)** Federal common law governs claims of privilege in federal proceedings—other than those arising under diversity jurisdiction—unless the federal constitution, a federal statute, or a U.S. Supreme Court rule provides otherwise.

**(Choice C)** The court's use of sound discretion in the interest of justice does not govern the application of privilege in federal proceedings. Instead, the applicable rule of privilege turns on whether a state law supplies the rule of decision.

### Educational objective:

Federal common law typically governs claims of privilege in federal proceedings. But state law governs privilege when state law provides the rule of decision for a claim or defense (eg, in federal diversity cases).

### References

Fed. R. Evid. 501 (claims of privilege in diversity cases).

Copyright © 2021 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.