Conflict of Laws

Syllabus & Course Requirements

Professor Joseph W. Singer
Fall 2016
Harvard Law School
Syllabus

Here are the assignments for the 24 class days; please do the reading before class but please come even if you have not been able to complete all the reading. Class discussions will prepare you for the moot courts we will be doing later in the semester.

Readings are either in regular course materials or in William M. Richman, William L. Reynolds & Christopher A. Whytock, Understanding Conflict of Laws (4th ed. 2013). Readings in the regular materials are indicated by Singer and the section number; read everything within that section or subsection. The first number tells you the chapter the readings are in; thus §1.1 is the readings in chapter 1, section 1. Readings in the problems are indicated simply by the name of the problem, so you should read everything in the problem packet including the problem itself and the accompanying cases. Readings in the treatise are indicated by Richman/Reynolds/Whytock and the relevant section number(s).

1) First Restatement.
   a) Singer §1.1
   b) Richman/Reynolds/Whytock §§ 56-57, 63-66, 68

2) Second Restatement.
   a) Singer §1.2
   b) Richman/Reynolds/Whytock §§ 69-73, 77

3) Interest analysis: identifying false conflicts.
   a) Singer §1.3.1
   b) Richman/Reynolds/Whytock §78

4) Interest analysis: resolving true conflicts.
   a) Singer §1.3.2
   b) Richman/Reynolds/Whytock §§ 79-80

5) Unprovided-for cases; better law.
   a) Singer §1.3.3, §1.4.1
   b) Richman/Reynolds/Whytock § 81

6) Forum law; choice of law rules.
   a) Singer §1.4.2, §1.5
   b) Richman/Reynolds/Whytock §§ 82-87

7) Contracts.
   a) Singer §2.1, §2.2
   b) Richman/Reynolds/Whytock §§ 66, 74, 88, 92

8) Choice-of-law clauses.
   a) Singer §2.3
   b) Richman/Reynolds/Whytock §74[b]

9) Procedure.
   a) Singer §3.1, §3.5
   b) Richman/Reynolds/Whytock §§ 58-61, 76, 93
10) **Problem 1.**
   a) See Richman/Reynolds/Whytock §§17-40 for background if needed.

11) **Problem 2.**

12) **Problem 3.**

13) **Problem 4.**

14) **Problem 5.**

15) **Property.**
   a) Singer §4.1, §4.2
   b) Richman/Reynolds/Whytock §§ 3-8, 67, 75, 89-90, 114, 115[d]-[e], 117[d]

16) **Marriage.**
   a) Singer §4.3, §4.4
   b) Richman/Reynolds/Whytock § 89[c]

17) **Constitutional limitations on choice-of-law.**
   a) Singer §5 (chapter 5)
   b) Richman/Reynolds/Whytock §§94-102

18) **Tribal jurisdiction.**
   a) Singer §6 (chapter 6)

19) **Problem 6.**

20) **Problem 7.**

21) **Problem 8.**

22) **Problem 9.**

23) **Problem 10.**

24) **Problem 11.**
Requirements for the Course

Materials

The materials for the course include materials collected by Prof. Singer, including six chapters and eleven problems, as well as the fourth edition of the Richman and Reynolds hornbook, William M. Richman, William L. Reynolds & Christopher A. Whytock, Understanding Conflict of Laws (4th ed. 2013). The seventh chapter contains an old article by Prof. Singer that demonstrates the use of modern choice-of-law methodology; you can read this article whenever it is helpful to you.

Overview of the Course

The course includes two different components. The first component is an intensive exploration of the doctrine and policy considerations relevant to choice-of-law determinations. The second component is comprised of simulated appellate litigation through moot court exercises conducted by the students in class. The purpose of the doctrine/policy half of the course is to prepare you for the moot court problems (and ultimately, for the practice of law). The simulated litigation portion of the course will be composed of moot court exercises in which you will be required to participate in oral argument and/or judicial decision making, to do primary legal research to write an opinion in a problem of your choice and a series of bench memoranda in which you propose results for some of the problems that you would recommend to a judge deciding those cases.

Two different types of written assignments are required. First, you are required to write six two-page single-spaced memos stating how six of the problem cases should be resolved. These memos will count for thirty percent (30%) of the grade for the course. Second, you are required to write one full opinion of no more than five single-spaced pages deciding one of the problem cases. This opinion will count for forty percent (40%) of the grade for the course. Your oral arguments and activities as judges in the moot court exercises will be graded and count for thirty percent (30%) of your grade for the course. Depending on the number of people in the class, you will have 2 to 4 oral assignments; you will be responsible for at least one oral argument as an advocate and one exercise as a judge. There is no final examination in this course.

Choice-of-Law Doctrine & Policy

Roughly half the class days will be devoted to an intensive study of choice-of-law doctrine and policy. Most assignments include both case materials and excerpts from what I consider to be the best concise hornbook introduction to the law in the area. The Richman, Reynolds, & Whytock hornbook explains the basic approaches which have been proposed by scholars and adopted, usually in
a somewhat different form, by courts adjudicating choice-of-law issues. Classes will be devoted to (1) discussion of the different approaches to adjudicating choice-of-law issues; (2) discussion of problems introduced in class; and/or (3) discussion of the cases in the readings.

The goal of this part of the course is to give you the tools to prepare you for the second part of the course, in which you will apply what you have learned in a simulated practice setting. Because you will need to use what you have learned to analyze complicated problems, you should feel free to ask questions both in and out of class.

The course will start by focusing on tort cases, followed by contracts and procedural issues. We will use the tort context to address the basic approaches to adjudicating choice-of-law questions, including the First Restatement (vested rights), the Second Restatement (most significant relationship), interest analysis, comparative impairment, better law (choice-influencing considerations), forum law (lex fori), and choice-of-law rules. We will then address contracts, escape devices (renvoi, dépeçage, public policy) and the procedure/substance distinction, focusing on statutes of limitation. After this segment of the course, the class will shift to problems (described in the next section) for a number of classes. We will then return to a doctrinal and policy discussion format, addressing property, family property (marriage) issues, constitutional limitations on choice-of-law and tribal sovereignty before returning to more problems based on these topics.

Problems

The second component of the course (roughly half of the class days) will be devoted to problems. For each problem, two or three people will be assigned to represent the plaintiff and two or three people will be assigned to represent the defendant (or third-party defendant) at oral argument (the “oral advocates”). A group of students will be assigned to act as judges at the oral argument and at conference deciding the case (the “judges”). Everyone is expected to participate at least once as an advocate and once as a judge; allocation of oral assignments depends on the number of students enrolled in the class.

Reading. Each problem is followed by some relevant cases. In addition, all the cases you have read earlier in the course also serve as available precedent from which you can argue. Some of the problems are based on actual cases, although some facts or legal doctrines may have been changed to make the problem more challenging or interesting. Other problems are “made up” and the cases are intended to give you material to use for argument by analogy or precedential reasoning.

The problems explain the substantive law (torts, contracts, property) of the two or three states involved in the problem. In some cases, this law is based on the actual law of those states. In other cases, the law has been posited (made up by the professor) to create an interesting choice-of-law problem. You should assume the substantive law stated in the problem is the law you are dealing with regardless of what the actual law is of that jurisdiction. So if the problem states that a contract is enforceable in Massachusetts despite the statute of frauds but not enforceable under the New York statute of frauds, you should
assume those are the laws of the two states regardless of what their law is in the real world.

**Oral argument.** Students will be assigned to make oral arguments for the plaintiff or the defendant. Several cases have a third-party defendant as well. Read the problem carefully to make sure you know which party is the plaintiff and which is the defendant; the end of each problem states clearly which party is in which litigating position. If there is a third-party defendant, then one of the advocates will be arguing for the third-party plaintiff (who is also the defendant on the first question). All advocates for both plaintiff and defendant are expected to prepare for a 15 minute oral argument. This will entail preparing an argument of about 5 minutes or so on how the issues in the case should be resolved and being prepared to answer questions posed by the judges. The questions (and answers) should take up most of the time. Those assigned to act as judges should prepare questions to ask the advocates on each side and intervene in the oral argument as needed to have your questions answered. Follow-up questions are appropriate but the judges should make sure that each judge gets a chance to asks questions. I will be grading both the oral arguments and the judges’ questions.

The advocate’s job is to convince the judges that the laws that favor their client should be applied in this case and to suggest a holding for the court to adopt; in other words, you should state what an opinion should say as the holding. What general rule or principle should the court adopt in this fact/law situation to choose the applicable law? Why should the interests of one state prevail over those of the other and why should the claims of one party to the protection of a state’s law prevail over the claim of the other party to the protection of the other state’s law? The job of the judges at the oral argument is to seek guidance on how to assess the competing state interests and party rights and to obtain suggestions about how to respond to arguments on the other side.

**Judging.** After hearing oral argument on both sides with questioning by the judges, we will have a short break to allow the judges to confer with each other. After that, each judge will state publicly how they think the issues in the case should be resolved and why.

**These oral exercises will count toward your final grade and will constitute collectively thirty (30%) of that grade.**
Written Requirements

Two types of written exercises are required, each of which will count toward your final grade. They include one opinion of no more than five single-spaced (5) pages in length and a series of six (6) two-page single-spaced memos. There is no final exam.

You will be posting your written work to the appropriate folders on the course website. All work will be handed in electronically. Please upload Microsoft Word documents (not pdfs) so comments can be inserted by the professor.

The two required written exercises include two page bench memos and a final opinion:

1. Two-page bench memos. You are required to write a two-page, single-spaced bench memorandum on six of the problem cases, stating how they should be resolved. This memorandum should be addressed to the court that must decide the issues in the case, advising that court on which law to apply on each issue and summarizing the reasoning which should be contained in an opinion. There is a strict page limit of two typed single-spaced pages per case and a strict deadline for handing in the memos.

After the introduction to choice-of-law doctrine and policy in the tort and procedure context, the class will turn to the initial set of problems. We will then return to doctrine and policy for a few weeks before concluding the course with a second set of problems.

☞ Please use 11 point Times New Roman font, margins of one inch all around, and paragraphs that are single-spaced.
☞ Everyone is required to write a 2-page memo on Problem #1.
☞ You are required to write a bench memorandum on 2 more of the first 5 problems (2-5) and 3 of the final 6 problems (6-11), for a total of six (6) memos.
☞ In choosing which problems to write about, note that you are required to write a 5-page opinion about one of the 11 problems and that this opinion should be based on a problem in which you have NOT written a bench memo. This opinion must be about one of the problems OTHER than Problem 1 and on OTHER than one of the problems for which you have written a 2 page memo.

The bench memos are due by 12:00 noon on the Wednesday following the day the problem is argued and discussed in class. Thus, if problem 2 is discussed on Thursday and problem 3 is discussed on a Friday, the bench memos for those two cases are due the following Wednesday by 12:00 noon. The only exception is that the memos for problems 8 and 9 are due by 12:00 on the Tuesday following the moot courts (i.e., Nov. 22) so they are handed in before the Thanksgiving vacation begins.

If you write a memo for the problems discussed on the last week of class, (problems 10 and 11), your memos are also due by 12:00 noon the following Wednesday.
Your final opinion is similarly due by 12:00 noon the Wednesday after the last class.

Instructions for handing in memos and the final opinion. You should hand in your memos electronically through the Assignments page on the Conflict of Laws course website. You should post your memos and your final opinion to the appropriate folder. A separate folder is provided for each case and for the final opinion.

Please make a separate memo for each case; do not combine memos to problems 2 and 3 in the same document, for example.

Anonymity. To preserve anonymity in the grading process, do not use your name. At the top of your memo (or in the header), state the problem number and your Exam ID number. For example, if your Exam ID number is 19760, the top of your memo should say:

Problem 1. 19760

Similarly, your final opinion should say:

Final opinion. 19760

Naming convention. In addition, when you save your document, please do not call it by your name or the name of the problem. Instead use the following convention: Use "pr" to designate the problem, then give the problem number, then a hyphen, then your exam ID number (no spaces).

For example, if your Exam ID number is 19760, your document for the problem 1 memo should be called:

pr1–19760

We will use the same convention for the final opinion. If you write an opinion about problem 3, you should name your document:

op3–19760

Research: No outside research is required to write the two-page bench memos. I do expect you to have read carefully the case materials following the problem as well as the cases assigned for the class discussions.

2. Opinion. You are required to write a judicial opinion deciding any one of the problem cases other than Problem 1 and on a problem other than the ones for which you write a 2-page bench memo. You may wish to choose one of the cases to which you have been assigned to act as an advocate or judge; you can also write about other problems.

You should NOT write the opinion about a problem in which you have already written a 2-page memo.
There is a page limit of five pages, single-spaced, for the opinion, using Times New Roman 11 point font.

Outside library research is required to write the opinion, as described below.

The opinion is due by 12:00 noon on the Wednesday following the last class, delivered electronically to the appropriate Assignment folder on the course website.

I expect you to treat the opinion as if you really were writing an actual opinion and you had to act as your own law clerk. Each problem is set in a particular court applying the choice-of-law rules of a particular state.

I expect you to find the relevant recent precedents in the highest court of that state on its approach to choice-of-law matters and apply that approach (and those precedents) to the issues in your case.

If you choose to reject that state’s approach, you must include in your opinion a short statement of why the approach you adopt is preferable, as you would if you were a judge in that jurisdiction.

The cases that follow the problems are intended to give oral advocates and judges enough information to argue and decide the case, assuming that the relevant jurisdiction has adopted some version of the “modern” approach to conflict of laws. They also should serve as a starting place for research for those writing opinions for that case. Some of the cases which follow the problems are directly related to the problems, either because the problem is based on one or more of the cases or because the cases serve as directly relevant precedent. Other cases are indirectly related to the problem in the sense that they concern arguably analogous situations. Some cases are there to help you think through the reasons why each state might adopt the substantive policy it has. It is important to note that the factual contacts and substantive legal issues in the problems have often been structured in ways that may differ in significant respects from the factual contracts and substantive legal issues in the cases. Thus, in many cases, you may want to distinguish the cases rather than apply them to your fact situation.

I do not expect you to do much research job but:

I do expect you to be up-to-date on your state’s approach to conflict of laws and to attempt to look for any other cases in state or federal courts which involve choice-of-law determinations and which involve similar fact patterns, as you would if you were a clerk writing a draft opinion for a judge on the supreme court of that state.

In structuring the case problems, I have often (but not always) “made up” the substantive law of the relevant states. Thus, for example, I did not always research the tort or contract or property law of the relevant jurisdictions to ensure that the substantive conflict was accurate and genuine.
You should assume that the substantive (internal) law is as I have described it in the problem and ignore any state (or federal) law (including statutory law) you find to the contrary.

In developing arguments about the policies behind the competing substantive rules of law, you are free to use your own knowledge and imagination and to cite case law from any jurisdiction on the relevant policies underlying the relevant tort, contract, property, or family law issue in question.

However, when it comes to analyzing the choice-of-law question for the opinion you are writing, I have specified the jurisdiction in which the suit has been brought. In writing your opinion, I expect you to research the relevant case law in that jurisdiction on conflict of law or choice of law and to apply that jurisdiction’s approach to adjudicating choice-of-law issues. For example, the third problem involves a lawsuit in Massachusetts court and concerns a choice between Massachusetts and Maine law. Assume that Massachusetts and Maine tort law are as I have described them to be in the problem. In your opinion, you should apply the choice-of-law approach adopted by the Supreme Judicial Court of the Commonwealth of Massachusetts. You may wish to determine the choice-of-law rules of the state of Maine as well; if Maine courts would be likely to apply the law of Massachusetts, this may give an added reason for the Massachusetts court to apply its own law because it will arguably not be interfering in the internal policies of another jurisdiction.

Although your opinions should be geared to the choice-of-law approach adopted by your jurisdiction, you are free to (and almost certainly should) cite analogous cases from other jurisdictions as persuasive authority, including the cases which follow the problems in the course materials and the cases you read in the doctrine/policy portion of the course.

You are free also to criticize the choice-of-law approach adopted in your jurisdiction and argue that it should be changed to some other approach. If you choose this approach, your opinion should explain what is wrong with the approach previously used in your state and why your alternative is preferable.

Grading

The opinion will constitute forty (40%) of your final grade and the six written 2-page memos will collectively count for thirty (30%) of your grade. The remaining thirty (30%) of your grade will be based on your oral presentations as lawyer and judge.
Important: Notice on Deadlines

No extensions will be granted for the two-page memos unless you are ill or have a family problem, such as illness or death in the family. You should treat the memos as if they were exams due by the deadline.

The reason for the refusal to grant extensions is to ensure that you do not spend too much time on the memos and to replicate the experience you will face on the job being required to write a memo of this sort within a specified time period, without fail. Of course, you could do better if you had more time. The point is to do what you can within the time allotted. If this means that you must budget your time and do the assignment early in the week, you should do so. **The fact that you are very busy that week is not an excuse or a reason for an extension.**

Collaboration

You are **free to discuss the cases** and problems outside class with anyone, including me. I invite you to meet with me before your oral arguments and before you write your memos if you want to try out arguments and get my feedback on them. You are also free to discuss your opinions with others in the class and outside. However, I expect you to **write your bench memos and the opinions by yourself.**

Supervision

I will be available during the semester to answer questions or to advise you about your opinions and memos and your moot court exercises. I am happy to meet with you if you like before your oral arguments to give you advice about how to shape them. I can also meet with you to discuss your papers before you write them. **I will not have time to read drafts but you are free to run your ideas by me in person** and in an oral form to get my reactions and suggestions.

I will give feedback by giving you grades on your oral exercises and your first three bench memos. To the extent possible (and depending on the number of students in the class) I will also provide comments on your work. This feedback should give you some sense of how you are doing and an idea of whether you need to change what you are doing to improve your final grade.

Note on Editing of the Cases

**The cases are deliberately unedited.** You may find your assignments longer than you are used to in other courses – in some cases, much longer. **There is a pedagogical reason for this.** The theory of the course is to provide you a learning environment that is mid-way between law school and the real world of law practice. Thus, instead of the usual law school discussion class led by the teacher, roughly half the classes are hands-on litigation exercises run by the class members. Instead of the usual final exam, you are doing memos and a longer writing assignment closer to the actual writing you will do on the job.
In addition, the cases are left unedited because **in the real world no one edits cases for you.** You will have to learn to read cases faster and with more attention to operative facts, results, and key reasoning. You will have to learn to skim what does not matter for your purposes and to read carefully what does matter. Further, many of the cases in a particular day’s reading assignment are either very similar or identical in their fact/law patterns but represent either different forms of reasoning or opposite results. It is up to you to assimilate the material the way you would as a lawyer in the so-called “real world.”

This may take a little getting used to, but it is easier still than what happens in actual practice where it is you – and not the professor – who has to find the cases in the first place. At least I have found the cases for you!

**Those who are involved in the oral component of the problems (acting as attorneys or judges) are expected to read the supporting case material very carefully.** You will know sufficiently in advance of the classes at which you will be arguing to enable you to read these longer assignments thoroughly. **You should be aware of the length of the reading materials, however, and plan accordingly.** Pretend you are an associate in a law firm preparing for a meeting with the partners to do a mock oral argument or pretend you are actually preparing to appear in court. Either way, you should take special efforts when you are presenting the case as an advocate or judging it.

---

**A Pragmatic Guide to Conflicts**

Included in your course materials is an article I wrote many years ago explicitly addressed to law students, as well as practicing attorneys. The article does not explain fully my views on how choice-of-law issues should be decided. Rather, it provides a framework for constructing arguments on both sides of contested cases that raise real conflicts issues. In effect, it explains how to go about constructing a persuasive brief on each side. To draft a persuasive opinion, you should acknowledge and respond to the arguments on the other side.

The article will be most helpful to you after the doctrine/policy classes. You may wish to read portions of the article to help prepare you for oral argument or your judging role in class. I will not assign the article, but I believe it will be helpful to you if you read it after being introduced to conflicts law in class. I highly recommend reading it before you draft your opinion. If nothing else, it explains what I am likely to view as a minimally competent set of arguments for a choice-of-law determination and thus should help you get a better grade.

I will also post a more recent article of mine on Property Law Conflicts that may be helpful to you when we get to that portion of the course.