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CHOICE OF LAW OUTLINE FOR TEXAS COURTS

by James P. George*

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INTRODUCTION

Several recent Texas choice of law cases have misapplied the most-significant-relationship test, the basic Texas choice of law test adopted from the Restatement (Second) of Conflict of Laws.¹ The misapplications (none from the Texas Supreme Court) predominantly turn on the courts' improperly focusing on a single element of the seven-factor most-significant-relationship test,² thereby thwarting its function as a balancing test for competing interests. Texas courts are not alone in this misunderstanding of choice of law tests. In recent years most states have moved away from the old rigid choice of law rules—easily applied, but often unfair—to the newer rules based on balancing competing interests. In doing so, many courts have struggled with these new multi-faceted tests.³

This outline offers a simplified but accurate structure for choice

1. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) [hereinafter "Restatement (Second)"]. This outline cites this source as the "Restatement (Second)" to underscore its replacement of its predecessor, the *Restatement, Conflict of Laws* (1934), which many states still follow. The occasional reference simply to the "Restatement" also refers to the Restatement (Second). Texas adopted the most-significant-relationship test for torts only in *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979), and later for all civil cases (except those with an effective choice of law agreement by the parties) in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984).

2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

3. See generally Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585 (1985). In that article, Professor Hill illustrated the current misapplications of choice of law tests, and argued that judges are intentionally fashioning ad hoc choice of law models and rejecting the standard approaches such as the most-significant-relationship test. Professor Hill argued persuasively, but Texas judges do not appear to be intentionally rejecting the most-significant-relationship test. Rather, the trouble-prone Texas choice of law opinions appear to be the result of hasty applications of the most-significant-relationship test, stemming from a lack of familiarity with the Restatement (Second) and with United States Supreme Court opinions on choice of law.

of law analysis, from the constitutional issues in legislative jurisdiction to the balancing factors of the most-significant-relationship test. The result is a relatively simple outline of a complex subject. Although the outline reduces choice of law to its simplest form, it may seem unnecessarily complicated to some readers. Every point in the outline however is a potential issue in any lawsuit with a foreign element. Correctly applied, this outline will facilitate the choice of law process by spotting choice of law issues, directing and narrowing the choice of law analysis, and addressing both constitutional and Texas standards for selecting the applicable law. Thus, in spite of its initial complexity, this outline will enable Texas judges to make most choice of law decisions quickly and accurately. Although the outline is focused on the court's analysis—that is, it is formally directed to judges, as are most choice of law articles—it will no doubt provide insight for advocates.

This outline does not purport to be the exclusive approach to choice of law. However, it does provide an efficient and thorough analysis. Of course, this process cannot assure a reversal-proof choice of law decision, but it can assure consideration of the important choice of law issues, and thus make it more likely that the most appropriate law is chosen. This outline can also simplify the choice of law process by acquainting judges and practitioners with basic presumptions favoring the application of forum (Texas) law in many instances.

While this outline is thorough, it is only a checklist of issues and not a comprehensive discussion. Readers should consult the cited authorities as well as other references when problems arise.

DEFINITIONS

State means a territorial unit with a distinct general body of law. It includes both states of the United States and foreign states. In this article, other states in the United States are denoted by a capitalized "States." Non-capitalized "states" refers generically to all such territorial units, domestic and foreign.

Local law is the substantive law of the forum or another state. The *whole law* of a state is its local law plus its choice of law rules. The forum's choice of law rule—which is always controlling—will usually point only to the local law of the chosen state. In a few special cases the forum's choice of law rule will point to the "whole

law'' of the chosen state, meaning that the chosen state's choice of law rule is applied.⁴

Foreign law means any law other than Texas law or United States federal law. Foreign law includes States' laws and other foreign countries' laws.

I. TRIGGERING THE CHOICE OF LAW INQUIRY

Three distinct acts can trigger a choice of law inquiry. They are:

- (1) a prior choice of law agreements by litigants;⁵
- (2) a pleading for the application of foreign law;⁶
- (3) at the court's discretion, choice of law on the court's own motion (*sua sponte*), without a choice of law request from the litigants, when a significant foreign element appears in the law suit.⁷

A. Choice of Law Agreement by the Litigants

A contractual choice of law must be effective, applicable to the lawsuit under the contract's terms, reasonably related to the lawsuit (within legislative jurisdiction), and not in violation of relevant public policy.

1. Effective Agreement

Have the litigants made an effective choice of law agreement? Look for a prima facie agreement only. If there is any litigable question as to the agreement's validity, it must be resolved by applying the parties' chosen law unless that choice was made in order

4. The process of second-level choice of law is called *renvoi*. For some of the few *renvoi* uses, see *infra* notes 63-68 and accompanying text. The Restatement (Second) section 4 defines "local law" as it is used in this outline, but defines "law" as a state's local law plus its conflict of laws rule (the same as "whole law" in this outline). See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 4 (1971). However, Restatement (Second) section 8 provides that when the forum state's choice of law rule directs the court to apply "the law" of another state, that should ordinarily mean the local law only. *Id.* § 8. The Restatement (Second)'s reporters should consider changing section 4 to use "whole law" to mean local law plus the conflict of laws rule, and "the law" to mean local law only unless there is a reason for a reference to *renvoi* (that is, to create a presumption against *renvoi*). This would align section 4 with section 8. "Whole law" as used in this outline is taken from the Uniform Commercial Code, see *infra* note 33, and from *Richards v. United States*, 369 U.S. 1, 11, 82 S. Ct. 585, 592, 7 L. Ed. 2d 492, 499 (1962).

5. See *infra* notes 8-24 and accompanying text.

6. See *infra* notes 24-25 and accompanying text.

7. See *infra* notes 25-29 and accompanying text.

to evade important forum policy as to contract validity,⁸ or unless there is some other reason to deny the parties' choice. Note that although most choice of law agreements are express, a clearly implied choice of law should also be honored.⁹

2. Applicable to the Lawsuit

Is the choice of law agreement applicable to this lawsuit? The choice of law agreement's applicability may be based on the lawsuit's being one of the following:¹⁰

- a. an action *arising on the agreement* in which the choice of law clause appears;
- b. an action *contemplated by the agreement* in which the choice of law clause appears.

8. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 and comments (1971); E. SCOLES & P. HAY, CONFLICT OF LAWS 637-40 (1982) [hereinafter SCOLES & HAY]; R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 355-63 (2d ed. 1980) [hereinafter WEINTRAUB].

9. See, e.g., *Pritchard v. Norton*, 106 U.S. 124, 137-41, 1 S. Ct. 102, 111-16, 27 L. Ed. 104, 108-10 (1882); SCOLES & HAY, *supra* note 8, at 632-34 & n.7; WEINTRAUB, *supra* note 8, at 354-55. Earlier conflict of laws practice presumed that the parties contracted with reference to the law of the place of the contract's making (*lex contractus*), and issues of contractual validity were therefore determined by *lex contractus* unless a contrary intent was apparent in the contract. See, e.g., *Fidelity Mut. Life Ass'n v. Harris*, 94 Tex. 25, 35, 57 S.W. 635, 638 (1900). This presumption as to the contracting parties' subjective intent appears to have been replaced by the objective rule that the law of the place of the contracting governs validity (with no intent imputed) unless the parties express or imply otherwise. The difference is mostly academic, but it is significant that we no longer impute intent to the parties. Intent now matters only where it is expressly or impliedly present. This move away from imputed intent allows the court to escape the rigid application of *lex contractus*, as illustrated in the Restatement (Second) sections 189-207 which call for the application of a certain situs' law (for example, section 196 calls for the law of the place of performance for service contracts), unless some other state has a more significant relationship to a particular issue. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 189-207 (1971). If the old practice survived and a *lex contractus* intent was imputed to the parties, we could not displace *lex contractus* without violating the rule that the parties' intent has priority even where another state has a more significant relationship. The result would be an inflexible application of *lex contractus* or, if the court wished to evade *lex contractus*, an over-reliance on forum public policy. We avoid these harsh results and awkward escape devices by dropping the practice of imputing a choice of *lex contractus* to the parties. However, as noted above, this abandonment of imputed intent is speculative. It is evident in the Restatement (Second)'s rules and comments, and in the descriptions of state practice from conflicts' treatises, although those sources do not expressly describe the decline of imputed intent. In the courts, however, it is not clear that the old practice of imputing a *lex contractus* intent has been abandoned. The only evidence is the infrequent or total lack of reference to the old practice.

10. See *Austin Bldg. Co. v. National Union Fire Ins. Co.*, 432 S.W.2d 697, 701 (Tex. 1968) (contract's effect determined by the law which the parties' intended to have control).

If neither of the above apply and if no other valid basis exists for applying the parties' choice of law agreement, then the court should disregard the agreement and apply forum law or, if requested by a litigant, a more appropriate foreign law.¹¹

3. Reasonably Related to the Lawsuit (Legislative Jurisdiction)

Is the constitutional requirement of a minimal connection between a legal dispute and the law applied to it satisfied? Legislative jurisdiction governs all choice of law problems, including those of contractually chosen law.¹² This minimal connection is similar to the

11. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971) ("Law Governing in Absence of Effective Choice by the Parties").

12. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-20, 105 S. Ct. 2965, 2978-79, 86 L. Ed. 2d 628, 646-48 (1985); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 and comment d (1971). The minimal connection requirement arises from the due process and full faith and credit clauses of the United States Constitution. Due process protection, U.S. CONST. amend. V, XIV, focuses on the litigants, forbidding the forum to apply an unrelated state's law to their dispute. Full faith and credit, *id.* art. IV, § 1, protects other states' interests by not allowing the forum to apply an unrelated (in some cases, less related) state's law in place of the law of a state with a significant interest in the case. Two important factors determining a state's interest in having its law applied are (1) the state's contacts with the dispute, and (2) the pertinence of the state's laws and policies to the subject matter of the dispute. Readers should note that due process protects all litigants, while full faith and credit protects only those litigants whose claims arose under the laws of another State of the United States. For general background on legislative jurisdiction, see *SCOLES & HAY, supra* note 8, at 79-104; *WEINTRAUB, supra* note 8, at 511-34; *Reese, Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978) [hereinafter "Reese"].

A continuing controversy is whether parties should be allowed to choose a law that lacks legislative jurisdiction, that is, a law unconnected to them or their contract. Although case law requires a connection between the contract and the parties' chosen law, see *SCOLES & HAY, supra* note 8, at 644 n.1, critics view the minimal connection requirement as an unnecessary interference in private contracts. See *id.* at 644. Texas courts have required that the parties' chosen law have a reasonable relationship to their contract. *Teas v. Kimball*, 257 F.2d 817, 823 (5th Cir. 1958); *Dowling v. NADW Marketing, Inc.*, 578 S.W.2d 475, 476 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.); *Securities Inv. Co. v. Finance Acceptance Corp.*, 474 S.W.2d 261, 271 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.). The Texas Business & Commerce Code section 1.105(a) requires a reasonable relationship for UCC contractual choice of law. See *TEX. BUS. & COM. CODE ANN. § 1.105(a)* (Tex. UCC) (Vernon Supp. 1987). Similarly, the Restatement (Second) requires a reasonable relationship between a contract and the contractually selected law. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). In certain cases, such as usury, more than a reasonable relationship may be required between the contract and the governing law. See *id.* § 203 (1971); *Pedersen & Cox, Choice of Law and Usury Limits Under Texas Law and the National Bank Act*, 34 SW. L.J. 755, 764-67 (1980) [hereinafter "Pedersen & Cox"].

The United States Constitution also limits choice of law through its equal protection and privileges and immunities clauses. U.S. CONST. amend. XIV, art. IV, § 1, cl. 1; see *SCOLES & HAY, supra* note 8, at 104-10; *WEINTRAUB, supra* note 8, at 543-47.

minimum contacts requirement for judicial jurisdiction over nonresident defendants.¹³ Unfortunately there is very little guidance as to what constitutes a minimal connection in legislative jurisdiction.¹⁴

If the parties' chosen law appears to lack a minimal connection to them or their dispute, they should be advised of the problem and requested to make arguments on the existence of a minimal connection that justifies their chosen law's application. If either party establishes to the court's satisfaction that the chosen law has legislative jurisdiction, that law should be applied. If the court is not persuaded, or if the parties fail to provide arguments on legislative jurisdiction, the court should either:

- a. apply forum (Texas) law, if there is legislative jurisdiction, or
- b. if Texas lacks legislative jurisdiction but has judicial jurisdiction (which is unlikely but not impossible), the court may raise choice of law *sua sponte*.¹⁵ Another option is for the court to exercise the presumption that by failing to prove the contents of any foreign law, the parties have acquiesced to application of forum law.¹⁶
- c. If Texas lacks legislative jurisdiction and the court fails to find

13. See R. LEFLAR, L. MCDUGAL & R. FELIX, *AMERICAN CONFLICTS LAW* 164 (4th ed. 1986) [hereinafter "LEFLAR"]; J. MARTIN, *CONFLICT OF LAWS* 338-42 (2d ed. 1984); SCOLES & HAY, *supra* note 8, at 82 n.7; Reese, *supra* note 12, at 1589-92. Note that while the minimal connection requirement for legislative jurisdiction resembles the minimum contacts required for judicial jurisdiction, the legal finding of one will not establish the other.

14. See *Phillips*, 472 U.S. at 814-23, 105 S. Ct. at 2977-81, 86 L. Ed. 2d at 643-49 (denying Kansas' legislative jurisdiction for lack of a sufficient connection); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308-14, 101 S. Ct. 633, 637-41, 66 L. Ed. 2d 521, 527-31 (upholding Minnesota's legislative jurisdiction, finding a sufficient connection in the aggregation of Minnesota's contacts even though the contacts were individually insufficient); see also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 9 comment d (1971) (discussing the basic criteria for determining choice of law). In addition, *Restatement (Second) section 188* lists factors influencing choice of law in contract actions. These factors should influence legislative jurisdiction as well (*i.e.*, if the given law satisfies the choice of law factors, those factors should relate to, though not conclusively establish, legislative jurisdiction). *Id.* § 188. Similar connecting factors for tort cases are listed at *Restatement (Second) section 145. Id.* § 145. In addition to minimal connection factors, legislative jurisdiction may depend on legislative intent in cases involving statutory law. Legislative intent, or the lack of it, illustrates the state's regulatory interest in the parties' dispute. If the state has no regulatory interest, or did not intend a statute's application to foreign lawsuits or to the subject matter in the parties' contract, then arguably the statute should not be applied.

15. This option is discussed at Part IC in the outline. See *infra* notes 25-29 and accompanying text.

16. This option is discussed at Part IIIB in the outline. See *infra* notes 45-49 and accompanying text.

the contents of another suitable law, the court should either apply forum (Texas) law, under the presumption that unproven foreign law is the same as forum law, or dismiss the case.¹⁷ This situation will not happen often, but is possible where a plaintiff sues for tortious injury occurring in a foreign country where the laws are not widely published.

Legislative jurisdiction can be complex and difficult. Fortunately, the problem does not arise often. If the forum has judicial jurisdiction, the same underlying contacts between the forum and the defendant will usually create legislative jurisdiction in the forum. Thus forum law is a reliable standby if the parties' requested foreign law lacks legislative jurisdiction.

The court need not address legislative jurisdiction in every choice of law opinion. It requires analysis only when raised by the parties, or by the court in obvious cases.¹⁸ However, while the court's written choice of law opinion may overlook legislative jurisdiction, the court's actual examination of a choice of law problem should not.

4. Public Policy

If the parties' choice of law agreement is valid and applicable to this action, and their chosen law has legislative jurisdiction, it should be applied unless its application would violate the forum's

17. See *Humphrey v. Bullock*, 666 S.W.2d 586, 589 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

18. It is unclear whether courts must raise challenges to legislative jurisdiction *sua sponte* where the parties have failed to object at trial. The United States Supreme Court has ruled that courts may not apply a law that has no connection to the dispute, *see supra* note 14, but it is not clear whether the Supreme Court would so rule where a choice of law objection was not made at trial. If a court is required to challenge legislative jurisdiction *sua sponte* without a litigant's timely objection, then legislative jurisdiction would join subject matter jurisdiction as a non-waivable issue. But legislative jurisdiction has less resemblance to subject matter jurisdiction than it does to judicial jurisdiction, which is waived if not asserted at the outset of litigation. The distinction is clear from FED. R. Civ. P. 12(h)(3): "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Id.* (emphasis added).

The author's guess is that the court is not required to raise legislative jurisdiction *sua sponte*, although it has the discretion to do so. If this guess is correct, litigants wishing to challenge legislative jurisdiction will have to do so in the trial's pleading stage. *See infra* notes 25-29 and accompanying text (discussing the court's *sua sponte* role in choice of law questions).

Note that legislative jurisdiction differs from choice of law. The former asks if a given law has the constitutionally minimal connections to the dispute. The latter asks which, of all the laws with legislative jurisdiction, is the most appropriate to resolve the dispute.

public policy.¹⁹ Public policy concerns must be fundamental and strongly held; mere variance between the foreign law and Texas law is not enough to deny the foreign law's application.²⁰ The federal constitution's full faith and credit clause²¹ encourages application of other States' laws where no forum policy is infringed upon.²² Thus, all but the strongest forum policies must give way to the full faith and credit mandate. Note that section 187 of the Restatement (Second) provides that the pertinent public policy interests include not only the forum's but also those of any other state whose law would be applied in the absence of the parties' choice of law.²³ Of course, in many cases forum public policy may also deny the application of the law otherwise selected by the forum's choice of law rule.²⁴

B. Pleading by One or More Litigants

If any litigant makes a timely request for the application of foreign law, the court should conduct a choice of law analysis as described in Part II of this outline.

C. Sua Sponte Choice of Law

If the lawsuit contains a foreign element suggesting that non-forum law may be appropriate but the parties have not raised a choice of law issue, the court may consider choice of law on its own motion.²⁵

1. If the forum state has legislative jurisdiction and the parties have failed to request the application of any foreign law, the court may apply forum law under the presumptions listed in

19. *Gutierrez v. Collins*, 583 S.W.2d 312, 321 (Tex. 1979); *Castilleja v. Camero*, 414 S.W.2d 424, 427-28 (Tex. 1967); *Means v. Limpia Royalties*, 115 S.W.2d 468, 475 (Tex. Civ. App.—Fort Worth 1938, writ *dism'd*).

20. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment g (1971); COLES & HAY, *supra* note 8, at 637-43; Pedersen & Cox, *supra* note 12, at 777-79.

21. U.S. CONST. art. IV, § 1.

22. *Allstate Ins. Co.*, 449 U.S. at 322-23, 101 S. Ct. at 645, 66 L. Ed. 2d at 536-37 (Stevens, J., concurring); COLES & HAY, *supra* note 8, at 87-94.

23. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971). But section 187 was not adopted in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984); it may or may not be applicable in Texas courts. Though perhaps inapplicable, section 187 is compatible with Texas law.

24. See *infra* note 37 and accompanying text.

25. See *supra* note 18.

Part IIIA of this outline.²⁶ However, the court is not required to follow the presumptions favoring forum law; it may instead conduct a full choice of law analysis to determine the most appropriate law.²⁷

2. If the forum state lacks legislative jurisdiction and the parties have failed to request the application of foreign law, then the parties should be advised of the inappropriateness of forum law and requested to provide arguments on the identity and content of applicable foreign law(s). If the parties provide arguments and evidence for the application of only one foreign law that has legislative jurisdiction, then it should be applied. If the parties argue for more than one foreign law with legislative jurisdiction, then a choice of law analysis should be conducted as described in Part II of this outline. If the parties fail to provide any sufficient choice of law arguments, then:

a. apply forum (Texas) law under the presumption that it is the same as the unproven foreign law, or that the parties have acquiesced to forum law;²⁸ or

b. dismiss the case if the pertinent Texas law (hypothetically lacking legislative jurisdiction) is unsuited or unintended for the presumptions stated above; or

c. consider choice of law *sua sponte* by determining which states have a minimal relationship to the action, then choosing the most appropriate state's law as will be explained in Part II. These three options are discretionary.²⁹ Generally option (a) is preferable because it resolves the dispute instead of dismissing it, and does so under the substantive law the court presumably prefers.

26. See *infra* notes 43-44 and accompanying text.

27. The full analysis is described in Part II of this outline. See *infra* notes 30-42 and accompanying text.

28. See *infra* notes 43-44 and accompanying text.

29. In cases where Texas lacks legislative jurisdiction and the parties have failed to suggest applicable foreign law(s), the options of applying Texas law, dismissal, or *sua sponte* choice of law are within the court's discretion because the court must do one of the three, and Texas law is silent as to which is proper. New York courts have held that *sua sponte* choice of law is mandated under N.Y. CIV. PRAC. L. & R. 4511 (McK. 1963), which requires the court to take judicial notice of foreign law "without request." See *Government Employees Ins. Co. v. Sheerin*, 65 A.D.2d 10, ____, 410 N.Y.S.2d 641, 643 (App. Div. 1978). The dissent in *Government Employees* argued that N.Y. CIV. PRAC. L. & R. 4511 was not self-executing and that it required judicial notice without request only where the parties had suggested the application of a foreign law, but had failed to ask the court to recognize the contents of that law. 65 A.D.2d at ____, 410 N.Y.S.2d at 645 (Hopkins, J., concurring in part and dissenting in part). But the majority held that N.Y. CIV. PRAC. L. & R. 4511 requires a *sua sponte* choice of law analysis anytime the pleadings indicate the possible application of another law, whether the parties have raised the issue or not. See 65 A.D.2d at ____, 410 N.Y.S.2d at 642-44. At present, the only time a Texas court arguably must engage in *sua sponte* choice of law (or dismiss the case) is when the parties have pleaded under Texas substantive law but Texas lacks legislative jurisdiction. See *supra* note 15 and accompanying text. As explained in

II. CHOICE OF LAW ANALYSIS

A. *Identify the Choice of Law Problem*

Note whether it relates to an entire claim or just one issue in the claim, as directed by the Texas Supreme Court in *Duncan v. Cessna Aircraft Co.*³⁰ See the characterization and *depeceage* discussions at Part IV of this outline.

B. *Identify the Potentially Applicable Laws for the Claim or Issue, as Requested by the Litigants*

If the choice of law analysis is made on the court's own motion, identify the potentially applicable laws apparent in the pleadings. Include forum law as a potential choice, whether the litigants request it or not and whether it is suggested by the pleadings or not (although forum law may be eliminated at the legislative jurisdiction stage).

C. *Eliminate All Choices from Part IIB that Lack Legislative Jurisdiction*³¹

If only one law remains, apply it to the case. If more than one law remains, conduct a choice of law analysis giving preference to forum law.

D. *Determine the Appropriate Choice of Law Rule*

Consider only the forum's choice of law rules (unless directed by a forum choice of law rule to apply another state's choice of law rule).³²

note 15, *supra*, it is likely that the court is not required to raise the issue if the parties fail to, but it is within the court's discretion. If the court decides to raise choice of law *sua sponte*, it should request the parties to submit arguments as to which laws apply and to submit copies of those laws as required by Texas Rule of Civil Procedure 184. See *supra* text accompanying note 28. It may be apparent from the pleadings that the dispute is connected to a specific state, but the court should nonetheless request the parties' arguments as to which law controls in order to elicit choices that may not be apparent in the pleadings. In particular, some issues may be controlled by the law of a state that is not obvious in the pleadings. See *depeceage* discussion, *infra* note 62 and accompanying text.

30. In *Duncan*, the Texas Supreme Court stated that "in all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue." 665 S.W.2d at 421 (emphasis added). See *Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1352 (N.D. Tex. 1985), *aff'd*, 799 F.2d 1000 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1295 (1987) for a good example of setting up the choice of law analysis by focusing on the particular substantive issues.

31. See *supra* notes 12-18 and accompanying text.

32. Some readers will disagree that only the forum's choice of law rules apply, recalling

1. Apply a statutory choice of law rule if the forum has one. Statutory choice of law rules are directed to specific substantive law, such as negotiable instruments, wrongful death, and so on. They are usually found in the particular substantive statute. As legislative law, they have priority over the Texas Supreme Court's most-significant-relationship test.³³ In addition to these statutory

the *renvoi* doctrine. *Renvoi* is the conflict of laws practice calling for the application of choice of law rules of other states. But *renvoi* is appropriate only when authorized by forum law. Thus the forum's choice of law rule is still in control. *Renvoi* is also practiced in cases under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982), where the controlling substantive law is "the whole law of the State where the act or omission occurred." *Richards v. United States*, 369 U.S. 1, 11, 82 S. Ct. 585, 592, 7 L. Ed. 2d 492, 499 (1962). But here again *renvoi* is practiced only because it is designated by forum (federal) law. For further *renvoi* discussion, see *infra* notes 63-68 and accompanying text. See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971).

33. The Restatement (Second) provides that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971). The most-significant-relationship test from the Restatement (Second) section 6(2) applies only where there is no specific statutory directive. *Id.* § 6(2). Specific statutory choice of law rules in Texas include:

(1) TEX. BUS. & COM. CODE ANN. § 1.105(a) (Tex. UCC) (Vernon Supp. 1987), honoring the parties' choice of law in a UCC-governed contract, subject to the exceptions in § 1.105(b).

(2) TEX. BUS. & COM. CODE ANN. § 1.105(b) (Tex. UCC) (Vernon Supp. 1987), stating that the parties' choice of law in § 1.105(a) does not override the contrary provisions in sections 2.402, 4.102, 6.102, 8.106, and 9.103, which are also choice of law statutes. Section 1.105(b) also provides that the law indicated by those subsequent UCC choice of law rules will include the "whole law" of the referent state, including its choice of law rule (*i.e.*, § 1.105(b) calls for *renvoi*).

(3) TEX. BUS. & COM. CODE ANN. § 2.402 (Tex. UCC) (Vernon 1968), applying, at the creditor's option, the [whole] law of the state where the goods are situated to certain issues involving creditors' rights against sold goods.

(4) TEX. BUS. & COM. CODE ANN. § 3.509 (Tex. UCC) (Vernon 1968), applying the law (substantive law only) of the place of dishonor to the payee's protest of a commercial paper's dishonor.

(5) TEX. BUS. & COM. CODE ANN. § 4.102 (Tex. UCC) (Vernon 1968), applying the [whole] law of the place where the bank is located to issues involving bank liability for action or non-action regarding presentment, payment or collection.

(6) TEX. BUS. & COM. CODE ANN. § 6.102 (Tex. UCC) (Vernon 1968), applying the forum's [whole] law to cases involving bulk transfers of goods located in Texas.

(7) TEX. BUS. & COM. CODE ANN. § 8.106 (Tex. UCC) (Vernon Supp. 1987), applying the whole law of "the jurisdiction of organization of the issuer" in cases involving the validity, effectiveness of registration, and issuer's rights and duties regarding investment securities.

(8) TEX. BUS. & COM. CODE ANN. § 9.103 (Tex. UCC) (Vernon Supp. 1987), applying the [whole] law of various designated jurisdictions in cases involving the perfection of security interests in multi-state transactions.

The "whole" law in the above UCC sections means the substantive law plus the choice of law rule of that state (*i.e.*, *renvoi*). Where "whole" is bracketed, it is unexpressed in that section but imposed by § 1.105(b). In § 8.106, where "whole" is not bracketed, it is express in the statute.

choice of law rules, Texas courts should give priority to several

(9) TEX. BUS. & COM. CODE ANN. § 33.09 (Vernon Supp. 1987), providing that the rights and duties of a corporation and its transfer agents in registering a security or in making a transfer of a security pursuant to a fiduciary's assignment are governed by the law of the jurisdiction under whose laws the corporation is organized, and providing further that for the purposes of this Act, a National Banking Association is deemed to have been organized in the state in which its principal banking house is located.

(10) TEX. CIV. PRAC. & REM. CODE ANN. § 16.066 (Vernon 1986), providing that a Texas action on a foreign judgment is barred if the action would be barred under the laws of the rendering jurisdiction.

(11) TEX. CIV. PRAC. & REM. CODE ANN. § 16.067 (Vernon 1986), providing that a person may not bring a claim against a person who has moved to Texas if the claim is barred by the statute of limitations of the state or country from which the person came.

These last two statutes are examples of "borrowing statutes," that is, Texas limitations statutes that borrow the limitations rule of another state. See WEINTRAUB, *supra* note 8 at 360-67.

(12) TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.003, 71.031 (Vernon 1986), providing for choice of law in wrongful death actions involving acts or deaths outside of Texas.

(13) TEX. INS. CODE ANN. art. 21.42 (Vernon 1981), providing that Texas law governs certain local insurance contracts notwithstanding the contract's designation of execution or performance in another state.

(14) TEX. INS. CODE ANN. art. 21.43(e) (Vernon Supp. 1987), providing that a foreign casualty insurer does not have to make the deposit required by Texas law if it had made a similar deposit in any other State, under that State's law, and in a manner that secures equally all policyholders who are citizens and residents of the United States.

(15) TEX FAMILY CODE ANN. §§ 14.71, 21.21 (Vernon 1986), providing for choice of law in enforcement of foreign child support decrees.

(16) TEX. REV. CIV. STAT. ANN. art. 852a, § 9.03 (Vernon 1964), providing that any contract made by any foreign savings and loan association with any Texas citizen shall be deemed a Texas contract and construed under Texas law.

(17) TEX. REV. CIV. STAT. ANN. art. 2370c-3, § 7 (Vernon Supp. 1987), providing for the applicable law in various situations in the joint two-state operation of justice centers in border counties, and providing in particular that if it is impossible for a person to conform his or her conduct in the justice center to the laws of both states, that person may choose which state's law governs that conduct.

(18) TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (Vernon Supp. 1987), providing for choice of law in workers compensation actions for injuries outside of Texas.

Federal law also has specific choice of law statutes, including:

(19) 28 U.S.C. § 1346(b) (1982), providing for choice of law and *renvoi* in claims under the Federal Tort Claims Act. The Supreme Court imposed *renvoi* by statutory construction in *Richards v. United States*, 369 U.S. 1, 11, 82 S. Ct. 585, 592, 7 L. Ed. 2d 492, 499 (1962).

(20) 33 U.S.C. § 905 (1982), providing for choice of law in injury claims under the federal Longshoremen and Harbor Workers' Act.

To the extent these Texas statutory choice of law rules are inadequate in certain cases (other than the federal claims), they should be supplemented with Texas' general choice of law rule, the most-significant-relationship test. This list of statutes was principally prepared by Chris Kourou, a 1986 graduate of Southern Methodist University Law School, as a term research project in the Conflict of Laws course.

specific choice of law rules found in the Restatement (Second).³⁴ These rules, designed to be used with the most-significant-relationship test, are arguably controlling in Texas under *Duncan v. Cessna Aircraft Co.*,³⁵ and if not controlling, are at least persuasive.

2. If the forum has no statutory choice of law rule, apply Texas' general choice of law rule: the most-significant-relationship test.³⁶ It comprises seven factors, set out in section 6 of the Restatement (Second):

- (a) the needs of the interstate and international system;
- (b) the relevant policies of the forum;³⁷
- (c) the *relevant policies* of other interested states and the *relative*

34. Specific choice of law rules for torts are set out at Restatement (Second) sections 145-55 for various tort claims, and sections 156-85 for various tort issues. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145-85 (1971). Specific rules for contract claims are found at sections 186-97, and for contract issues, at sections 198-221. Specific property rules are stated at sections 222-66; trusts at sections 267-82; status at sections 283-90; agency and partnership at sections 291-95; business corporations at sections 296-313; and estate administration at sections 314-423. *Id.* §§ 198-423.

35. 665 S.W.2d 414, 421 (Tex. 1984).

36. *See id.*

37. One function of this factor is to deny the application of an otherwise controlling foreign law that violates a strongly-held public policy of the forum state. Just as the parties' contractual choice of law may be denied for violating forum policy, *see supra* notes 19-24 and accompanying text, so may forum policy deny the application of the law selected by the forum's choice of law rule. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971); SCOLES & HAY, *supra* note 8, at 72-75; WEINTRAUB, *supra* note 8 at 481-85. But as with the parties' contractual choice of law, the displacing public policy must be strongly held and not mere legislative preference.

Note the distinction here between the forum's dismissing the lawsuit, and its retaining the lawsuit and applying forum law. The court may retain the lawsuit and apply its law if (1) forum law has a sufficient connection to the dispute (*i.e.*, there is legislative jurisdiction), and (2) no other State has a special connection to the dispute that compels the application of its law. If forum law lacks a sufficient connection to the dispute, then the court has the choice between applying the obnoxious law or dismissing the lawsuit. *See* *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 376-77, 38 S. Ct. 337, 340-41, 62 L. Ed. 772, 783 (1918); *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209, 214, 42 S. Ct. 467, 468, 66 L. Ed. 900, 907 (1922); *Home Ins. Co. v. Dick*, 281 U.S. 397, 408-09, 50 S. Ct. 338, 341-42, 74 L. Ed. 926, 933-34 (1930). Similarly, if there is a special connection between a sister State's law and the dispute, the full faith and credit clause, U.S. CONST. art. IV, § 1, may compel the application of the obnoxious sister State's law. Again, the court has the choice of applying the obnoxious law or dismissing the lawsuit. *See* *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820-23, 105 S. Ct. 2965, 2980-81, 86 L. Ed. 2d 628, 648-49 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307-08, 101 S. Ct. 633, 637-38, 66 L. Ed. 2d 521, 527-28 (1981).

Public policy exclusion of other states' laws is not this factor's only function. It also interacts with section 6(c) to balance the interests of the forum state with competing interests of other affected states. *See infra* note 38 and accompanying text.

interests of those states . . . ;³⁸

- (d) the protection of justified expectations;
- (e) the basic policies underlying the particular field of law;
- (f) certainty, predictability, and uniformity of result;
- (g) ease in the determination and application of law.³⁹

If any of the Restatement (Second)'s specific rules are applicable, use them with the seven factors of the most-significant-relationship test.

These factors are not exclusive and may be supplemented as justice requires.⁴⁰ Moreover, the factors are not listed in order of importance, but will have varying significance in different cases. In all but the simplest cases the factors will point in different directions, that is, to different choices of law. These factors are meant to reflect competing interests, and some choices may be difficult.⁴¹ But if the court considers all factors in these difficult cases, and gives them the weight it deems appropriate, a fair result will likely occur.

Only the hardest cases should involve all seven factors. In most cases, where some of the seven factors are insignificant, the court's opinion need not acknowledge the insignificant factors. On the other hand, the court should not short-circuit the most-significant-relationship test by picking only one of the seven factors, as some Texas courts have done recently.⁴² Although one factor may stand out in a choice of law problem, the court should not allow that one factor's prominence to undermine a fair consideration of the other factors which may, when fully considered, reveal interests competing with the interests in the prominent factor. Basing a choice of law decision on one factor alone is, at best, narrow reasoning and, at worst, a manipulation of the choice of law process.

38. Although another state may have a strong policy relating to the lawsuit (such as a strict usury law), that state's interest in the particular lawsuit itself may be minor compared to the interests of other states and of the forum, thus making the strong usury policy of the first state less important in this dispute. For additional discussion, see *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6, comment f (1971).

39. *Id.* § 6. Texas adopted section 6 in *Duncan*, 665 S.W.2d at 421.

40. The Restatement (Second) specifically describes the listed factors as "include[d]" among those relevant. *RESTATEMENT (SECOND) OF CONFLICTS OF LAWS* § 6(2) (1971).

41. *See id.* comment c.

42. *See, e.g., Christensen v. Integrity Ins. Co.*, 709 S.W.2d 724, 730 (Tex. App.—Houston [14th Dist.]) (seemingly applying the relative interests of the states and ease in determining applicable law while ignoring the other considerations), *rev'd on other grounds*, 719 S.W.2d 161 (Tex. 1986).

E. Choose the Applicable Law by Applying the Appropriate Texas Choice of Law Rule

The following process should indicate which choice of law rule is appropriate in a given situation: (1) Use specific choice of law rules, if any, first. If the specific rule is inadequate or incomplete for the problem at hand, supplement it with the most-significant-relationship test. (2) If no specific rule exists, use the most-significant-relationship test. (3) In the choice of law analysis, apply the presumptions to be discussed in Part III where appropriate.

III. PRESUMPTIONS AND PREFERENCES IN CHOICE OF LAW

A. Preference for Forum Law

Forum law should be applied in Texas courts unless another law is shown to be more appropriate by the parties' agreement or a Texas choice of law rule. Forum law is favored by presumption in two situations. First, the parties may request application of a foreign law but fail to prove its contents. It may then be presumed that either Texas law is the same as the unproven foreign law or that the parties have acquiesced in the application of Texas forum law by failing to meet the burden of proving their requested foreign law.⁴³ Second,

43. In Texas, this presumption applies both to foreign country law and to the law of other States and territories in the United States. Texas Rule of Civil Procedure 184 governs the determination of laws of other States, territories and jurisdictions in the United States. TEX. R. CIV. P. 184. It imposes a burden of proof on the moving litigant to provide (but not prove) the contents of the desired law. Rule 184 states, in pertinent part, that the requesting party "shall furnish the judge with sufficient information to enable him properly to comply with the request" to apply another state's law. *Id.* Before rule 184a was adopted in 1943, the absolute burden was on the moving party to prove the contents of the desired foreign law by furnishing copies of that law and by offering supporting testimony or other proof. The 1943 addition to the rules required the court to take judicial notice of the requested law. But this change is evidentiary only. The movant still has the duty to furnish copies of the law, but now may request that the court take judicial notice of these copies. (The judicial notice requirement did not shift the burden to the court to find copies of the desired foreign law.) Texas Rule of Civil Procedure 184a governs the determination of foreign country law. Its main difference from rule 184 is the absence of judicial notice. The movant not only must provide the contents of the foreign country law, but must also offer supporting testimony. TEX. R. CIV. P. 184a. For the purposes of this outline, the distinction between rules 184 and 184a is an irrelevant evidentiary matter. The only relevant point is that the moving litigant must furnish copies of both foreign country law and the law of other States and territories in

there may be no stronger reason to favor a foreign law over the forum law. All other things being equal, forum law applies. That is, where forum law has a relationship to the dispute as significant as other potentially applicable law, forum law is applied. This rule does

the United States. Failure to do so should result in the application of Texas law under the presumption that Texas law is the same as the unproven foreign law, or that the parties have acquiesced in the application of Texas law. See *Humphrey v. Bullock*, 666 S.W.2d 586, 589 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (foreign law presumed to be the same as Texas law). See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 comment h (1971) (forum will apply its law when the parties have failed to prove foreign law). The risky presumption that forum law is the same as foreign law is safest where the applicable foreign law is the common law of another State in the United States. The presumption is also frequently applied to statutes of another State in the United States and sometimes to foreign legal systems based on common law. In unusual cases, the presumption has been extended to non-western law under the presumption that all legal systems share certain fundamental legal principles. This presumption allowed a California court to presume that California community property law was the same as unproven Chinese law, *Louknitsky v. Louknitsky*, 123 Cal. App. 2d 406, _____, 266 P.2d 910, 911 (1954), allowed the equating of Turkish and Oklahoma law, *Tidewater Oil Co. v. Waller*, 302 F.2d 638 (10th Cir. 1962), and the equating of Hungarian law and Ohio law, *Mastics v. Kiraly*, 26 Ohio Op. 2d 266, _____, 196 N.E.2d 172, 179-80 (P. Ct. 1964). A Texas court applied the presumption to assume that Mexico had a divorce residency requirement identical to that of Texas. See *Webb v. Webb*, 461 S.W.2d 204, 205 (Tex. Civ. App.—San Antonio 1970, no writ). On the other hand, most courts would reject these unlikely analogies of dissimilar laws. Many courts have refused to equate their own law with civil law systems. Cases are set forth in Annotation, *Presumption as to Law of Foreign Countries*, 75 A.L.R.2d 529, 530-41 (1961), and Annotation, *Pleading and Proof of Foreign Law*, 75 A.L.R.3d 177, 185-219 (1977). Of course, where the court declines the presumption of similarity with forum law, it may still use the presumption that the parties have acquiesced in forum law by failing to prove the contents of foreign law.

An interesting 1985 Texas case rebuked the presumption of similarity between Texas and California law. *McFadden v. Farmers & Merchants Bank*, 689 S.W.2d 330, 331-32 (Tex. App.—Fort Worth 1985, no writ), dealt with the Texas enforcement of a California default judgment. Judgment debtor *McFadden* had also defaulted in Texas and execution had issued. *Id.* at 331. At the execution stage, *McFadden* appeared and defended on the grounds that the California court lacked subject matter jurisdiction over the original debt. *Id.* The California court was a municipal court which in Texas would lack subject matter jurisdiction over debt collections. See *id.* at 332. Plaintiff bank failed to present California law providing subject matter jurisdiction in the initial judgment to the Texas court. *Id.* *McFadden* argued that the Texas court must presume the unproven California law to be the same as Texas law regarding the subject matter jurisdiction of municipal courts. The Texas court refused, noting the stronger presumption under full faith and credit that the judgments of other States are valid until proven otherwise. *Id.* The court also noted that only California law could disprove a California court's subject matter jurisdiction, and since *McFadden* failed to rebut the presumption of validity, she lost. *Id.* For a general discussion of Texas rule 184, see *McConnico & Bishop, Practicing Law with the 1984 Rules: Texas Rules of Civil Procedure Amendments Effective April 1, 1984*, 36 BAYLOR L. REV. 73, 103 (1984). For a discussion of Texas Rule 184a, see *Bishop, International Litigation in Texas: Texas Rules of Evidence and Recent Changes in the Texas Rules of Civil Procedure*, 36 BAYLOR L. REV. 131, 145-47 (1984).

not apply where the parties have made a valid pre-lawsuit choice of law agreement.⁴⁴ In those cases, the choice of law analysis is never reached, so it is never determined which state's laws are equally or more significant for the lawsuit.

B. *Situs Presumptions*

The Restatement (Second)'s specific subject matter choice of law rules⁴⁵ presume the applicability of certain foreign laws related to the situs of the event giving rise to the cause of action. For example, Restatement (Second) section 146 states that in an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless some other state has a more significant relationship to the occurrence and the parties.⁴⁶ These presumptions reflect many of the old mechanical choice of law rules—*lex locus delicti*, *lex locus contractus*, and so on—that were the basis of common law choice of law and the first Restatement of Conflict of Laws.⁴⁷ In the Restatement (Second) these situs presumptions retain the ease of application of the old mechanical rules without their sometimes harsh, inflexible results.⁴⁸ The Restatement (Second) accomplishes this by providing that a certain state's law will apply unless another state has a more significant relationship under the factors set out in section 6 of the Restatement (Second).⁴⁹

C. *Preference for the Parties' Chosen Law in Contractual Lawsuits*

Restatement (Second) sections 187 through 197 governing choice of law in particular contracts, give the parties' contractually chosen

44. See *supra* notes 8-24 and accompanying text.

45. See *supra* notes 32-35 and accompanying text.

46. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971).

47. See SCOLES & HAY, *supra* note 8, at 12-16.

48. The harsh results were caused by the old conflicts' rules' inflexibility. In personal injury cases, for example, the rule that the applicable law was that of the site of the injury was generally fair, and prevented forum shopping. But it was an absolute rule that allowed no exceptions. See, e.g., *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 96 S. Ct. 167, 46 L. Ed. 2d 3 (1975). *Zimmerman* involved a personal injury action against a Texas manufacturer of an artillery round that prematurely exploded in Cambodia. *Id.* at 3, 96 S. Ct. at 167, 46 L. Ed. 2d at 4. On appeal, the United States Supreme Court required the Texas federal court to apply the Texas choice of law rule, which was the inflexible *lex locus delicti*—the law of the place of the wrong. *Id.* at 4-5, 96 S. Ct. at 168, 46 L. Ed. 2d at 5. That was Cambodian law, which had no system of products liability law. *Id.* at 3, 96 S. Ct. at 167, 46 L. Ed. 2d at 5.

49. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

law priority over (1) forum law, (2) the presumptive choices noted in Part III B, and (3) any other choice of law determined by the forum state's statutory or general choice of law rules.⁵⁰ This preference for the parties' chosen law in contract actions is also reflected in Texas statutes,⁵¹ and in the seminal choice of law holding in *Duncan v. Cessna Aircraft Co.*⁵²

The parties' choice is merely a presumptive preference, however. It can be displaced if the choice lacks legislative jurisdiction,⁵³ if the results are contrary to strongly-held forum state policy,⁵⁴ or if the results are contrary to a strongly-held policy of the state whose law would be applied if not for the parties' choice of law.⁵⁵

IV. OTHER FUNCTIONAL CONSIDERATIONS

A. Characterization

Characterization is the process of labeling, defining, or categorizing the facts and legal concepts in a lawsuit. It exists in all lawsuits, but has two special functions in choice of law situations. First, characterizing a claim as, for example, a tort rather than a contract may change the forum's choice of law.⁵⁶ Similarly, characterizing an issue as procedural rather than substantive may bring that issue under forum law instead of a foreign substantive law.⁵⁷

Characterization's second special function for choice of law is just that—choice of law. Which law controls the characterization of a lawsuit's facts and issues? The Restatement (Second) provides that forum law controls the characterization of "the form of the action"

50. *Id.* §§ 187-97.

51. See TEX. BUS. & COM. CODE ANN. § 1.105(a) (Tex. UCC) (Vernon 1968). *But see* TEX. REV. CIV. STAT. ANN. art. 852a, § 9.03 (Vernon 1964). See *supra* note 33 for a synopsis of both statutes.

52. 665 S.W.2d 414, 421 (Tex. 1984).

53. This is discussed in Part I A 3 of this outline. See *supra* notes 12-18 and accompanying text.

54. See *supra* notes 19-24 and accompanying text.

55. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

56. Texas has, of course, adopted the most-significant-relationship test for all civil cases except those where there is an effective choice of law agreement by the parties. *Duncan*, 665 S.W.2d at 421. Applying that test may, nevertheless, result in different results depending on how the claim is characterized.

57. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7 comments & illustrations (1971) (discussing "characterization" and the range of the term's use).

(law versus equity, contract versus tort, and so on) and the conflict of laws issues.⁵⁸ Forum law also controls several traditionally procedural issues, especially those regarding the conduct of the litigation.⁵⁹

All other issues, concepts, and legal terms are characterized by the law governing that issue (that is, the law chosen by the forum state's choice of law rule).⁶⁰ The Restatement (Second) prefers this flexible approach to characterization, and avoids rigid labels that would determine choice of law without considering the particular issue's function in the lawsuit. This approach allows foreign law to play a determining role to insure that foreign-based claims are

58. Section 124 discusses form of action. *See id.* § 124. Section 7(2) prescribes forum law for conflict of laws issues, including which of the forum's choice of law rules to apply, which facts control the choice of law process, whether to use *renvoi* and whether to use *depeage*. *See id.* § 7(2) (1971).

59. *Id.* § 122 (1971) (creating a presumption favoring forum law for "rules prescribing how litigation shall be conducted"). The Restatement (Second) also designates several traditionally procedural issues that are to be governed by forum law. *See, e.g., id.* §§ 126, 136, 137 (service of process and notice and proof of foreign law witness competence).

60. *Id.* § 7(3). In its "Procedure" sections (sections 122-44), the Restatement (Second) designates several traditionally procedural issues that should be characterized and governed by the law chosen by the forum state's choice of law process for that issue. *See, e.g., id.* §§ 140-41 (parol evidence and statute of frauds). Some issues lean toward control by forum law, but have exceptions calling for a foreign law. *See, e.g., id.* § 135 (sufficiency of evidence controlled by forum law, with exceptions stated in sections 133-34). Readers should note that when the Restatement (Second) directs the application of the law chosen by the forum state's choice of law process for these issues, that does not necessarily mean the substantive law governing the major substantive issues in the case. Rather, it means the appropriate law for *that* issue.

Statutes of limitation are a particularly troublesome area for substance/procedure characterization. The Restatement (Second) section 142 (1986 Revisions, April 15, 1986) replaces the former Restatement (Second) sections 142-43, addressing statutes of limitation. The new section 142 states that "[a]n action will be maintained if it is not barred by the statute of limitations of the forum unless the action would be barred in some other state which, with respect to the issue of limitations, has a more significant relationship to the parties and the occurrence." *Id.* § 142 (1986 Revisions). The reporter's note following the new section 142 reprints the pertinent text of the new UNIFORM CONFLICT OF LAWS-LIMITATIONS ACT, 12 U.L.A. 50-53 (Supp. 1986), which has now been adopted by Arkansas, Colorado, North Dakota, and Washington. The Uniform Limitations Act differs from the Restatement (Second)'s position in that the Uniform Act presumes the applicability of the foreign statute of limitations any time a foreign claim is brought to the forum, except where its application would result in unfairness to the plaintiff. The Restatement (Second) does not automatically assume that a foreign claim will carry the foreign statute of limitations with it. If Texas adopts the Uniform Limitations Act, however, it will not contradict Texas' adherence to the Restatement (Second). The Uniform Limitations Act would become a borrowing statute, which the Restatement (Second) gives priority to over its own rules. *See RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6(1), § 142 comment b (1986 Revisions).

not cut short on their substantive content by the forum's contrary characterizations. However, the Restatement (Second)'s flexible characterization can be difficult in some cases. If the court finds it too difficult to characterize a particular issue under foreign law, it should use forum law for practicality.⁶¹

Characterization is the first step in any choice of law analysis, indeed in any lawsuit. Thus characterization could have been the first step in this outline; it is not because in most cases characterization is effortless. Difficult cases, however, may require some work to characterize key issues within the choice of law process.

B. Depechage

Depechage is the practice of splitting multiple claims in a lawsuit, or multiple issues in a claim, and applying different states' laws to the separate issues or claims. *Depechage* is controlled by forum law, and is largely within the court's discretion.⁶²

C. Renvoi

In certain cases, forum law may direct the application of the "whole law" of the chosen state, that is, the other state's local (substantive) law plus its choice of law rule. This practice of second-tier choice of law is called *renvoi*, and is appropriate in certain limited cases where the forum wants the same legal result that would

61. Two examples of problems with the Restatement (Second)'s characterization approach are: (1) Choice of law for contract cases sometimes turns on whether the dispute relates to the contract's validity or its performance. If the issue is validity, the law of the place of the contract's making is preferred (though not mandated). See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 199 (1971). If the issue is performance, the law of the place of performance is preferred. See, e.g., *id.* §§ 202(2), 206. The Restatement (Second) section 7 provides that the most appropriate substantive law ought to govern the characterization of validity and performance separately. *Id.* § 7. But how can the appropriate substantive law be applied to characterize the dispute as being validity or performance, when the appropriate substantive law cannot be selected until the characterization is completed? It seems that only forum law will allow the case to proceed at this point. The same circularity problem exists in some instances of substance/procedure characterization. (2) A second characterization problem is that once the court has chosen the appropriate law for characterizing an issue, that law may be vague or incomplete for characterizing the particular issue. Even if the foreign law has sufficient information for characterizing the issue, that information may be difficult for the court to find. As with the first problem, forum law is the practical alternative.

62. See WEINTRAUB, *supra* note 8, at 72-79.

be reached by the courts of the chosen state. Sometimes *renvoi* is intended by the forum's statutory instruction to apply "the law" of the other state, instead of the clearer term "whole law."⁶³ In these ambiguous cases, the court must decide if the intent is to reach the same result as the other state's court would reach, or merely to apply the substantive law of the other state.

Texas requires *renvoi* in some portions of the Texas Business and Commerce Code.⁶⁴ The Restatement (Second) suggests *renvoi* in certain cases involving real property, personal property, succession of decedents' interests in movables, and trusts.⁶⁵ The Restatement (Second) also notes the practice of *renvoi* in certain domicile issues.⁶⁶ The Restatement (Second)'s *renvoi* sections are at least persuasive, but may not be controlling in Texas unless they are officially embraced by the Texas Supreme Court, which has thus far only adopted the Restatement's most-significant-relationship test and not the entire Restatement.⁶⁷ Federal law uses *renvoi* to select the applicable law for claims under the Federal Tort Claims Act.⁶⁸

Courts should presume against *renvoi*. It should be used only when forum law expressly indicates, or when the forum's choice of law rule seeks the same results that a court in the chosen state would reach by applying its own choice of law rule.

D. False Conflicts

A false conflict occurs when the laws of two or more states are the same, or produce the same result. If there are identical laws in all states being considered, then there is no choice of law problem. The one law is applied. If there are identical laws in two or more states, but not all the states being considered, the states with identical laws should be treated as one state, adding their choice of law

63. See, e.g., TEX. BUS. & COM. CODE ANN. §§ 2.402(b), 4.102(b), 6.102(b) (Tex. UCC) (Vernon 1968).

64. See *supra* note 32.

65. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 223-26, 228, 230-42 (real property), §§ 245, 248-49, 253, 255 (personal property), §§ 260-63, 264(2), 265 (decedents' movables), §§ 269, 274-75, 277-82 (trusts) (1971).

66. *Id.* § 13 comment c.

67. See *supra* note 1 and accompanying text.

68. 28 U.S.C. § 1346(b) (1982); see *supra* note 31.

contacts and interests.⁶⁹ Remember that Texas choice of law is done on an issue-by-issue basis. Thus there may be false conflicts in some issues and real conflicts in other issues in the same case. In fact, this mix will appear in most choice of law cases.

V. FEDERAL COURTS

The fundamental choice of law problem in federal courts is whether state or federal law will govern a particular issue in a case. The *Erie* doctrine attempts to resolve this.⁷⁰ This outline does not discuss *Erie* problems in depth because *Erie* analysis differs from traditional territorial choice of law, with quite distinct analytical elements. Because *Erie* problems are distinct, they are excluded from the Restatement (Second)'s choice of law rules.⁷¹ While this outline does not provide an *Erie* analysis, the following generalizations apply to federal court choice of law where the *Erie* problems are already resolved. These generalizations are directed only to substantive law, as is this entire outline.⁷²

69. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 comment i, § 186 comment c (1971). For a comprehensive discussion of false conflicts, including other meanings, see LEFLAR, *supra* note 13, at 270-73; see also SCOLES & HAY, *supra* note 8, at 603-04. For the United States Supreme Court's view of false conflicts, see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23, 105 S. Ct. 2965, 2977-81, 86 L. Ed. 2d 628, 643-49 (1985). Note particularly Justice Stevens' dissent. 472 U.S. at 823-29, 105 S. Ct. at 2981-84, 86 L. Ed. 2d at 650-63 (Stevens, J., dissenting). For discussion of false conflicts in the Supreme Court, see WEINTRAUB, *supra* note 8, at 517 (discussing *Allstate*), 527-29 (discussing *Phillips Petroleum*); see also Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?* 10 HOFSTRA L. REV. 17, 18-24 (1981) (further discussing *Allstate*).

70. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). The source for *Erie*-type problems is the Rules of Decision Act, adopted in 1789. 28 U.S.C. 1652 (1982). Although seldom cited, it is the primary federal choice of law rule, providing that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.* From this premise, the *Erie* doctrine now controls the conflict of federal and state law in federal courts. 304 U.S. at 71, 58 S. Ct. at 818-19, 82 L. Ed. at 1190. There are several other significant cases in the development of the *Erie* doctrine. See *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958); *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945).

71. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 comment c (1971).

72. Traditional choice of law inquiry focuses on substantive law, assuming that forum law will govern procedure. (But see Part IVA of this outline for the role of procedural issues in choice of law.) This traditional practice is followed in courts of general jurisdiction in the

A. Diversity Cases

Substantive issues in diversity cases are usually governed by State or foreign country law, and not federal law. The applicable State or foreign country law is determined in Texas federal courts by the appropriate Texas choice of law rule.⁷³ The one exception is for diversity cases transferred to Texas from a federal court in another state under 28 U.S.C. 1404;⁷⁴ in these cases the first State's choice of law rule is used.⁷⁵

B. Federal Claims

Substantive issues in federal claims (based on the Constitution, federal statutes, federal common law, or public international law) are usually governed by the appropriate federal law, or by the law chosen by any available federal choice of law rule.⁷⁶ Some substantive issues in these cases may be governed by State law because of an *Erie* ruling and not because of a territorial choice of law rule.

CONCLUSION

This outline does not attempt to cover everything there is to know about choice of law in Texas courts. But its author is unaware of any reported Texas choice of law decision for which this outline is insufficient. It will spot the majority of choice of law issues that can arise when a foreign element appears in a case. While the outline spots many issues, it does not resolve them all. In particular, legislative jurisdiction can be a thorny problem and is not fully addressed in this outline. Fortunately, problems the outline does not resolve

United States, but not in federal courts. There, the Federal Rules of Civil Procedure govern all appropriate issues. Federal procedural issues not covered by the Federal Rules of Civil Procedure are subject to *Erie* analysis. The issue is then determined by the law selected by the *Erie* process. See 19 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE & PROCEDURE §§ 4501-15 (1982) [hereinafter "WRIGHT, MILLER & COOPER"].

73. This is the *Klaxon* doctrine. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941).

74. 28 U.S.C. § 1404 (1982).

75. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 243 n.8, 102 S. Ct. 252, 259 n.8, 70 L. Ed. 2d 419, 428 n.8 (1981).

76. See *supra* note 33, subheadings (18) & (19) for two examples of specific federal choice of law rules; see also 19 WRIGHT, MILLER, & COOPER, *supra* note 72, at §§ 4501, 4513-15 (discussion of federal choice of law problems in non-*Klaxon* cases).

do not occur often, although the issue of legislative jurisdiction occurs at least passively in every case.

This outline does provide a formula approach to a difficult, multi-tiered problem that courts and lawyers have often hoped to avoid for lack of a systematic approach. Within this outline's formula approach are answers to many potential issues.

Most of the points in this outline are accepted legal solutions. Some, however, are mere suggestions for problems having no specific answers. One example is the suggestion for the court's *sua sponte* actions in Part IC. This area is virtually without rules; there are neither mandates nor proscriptions for the court's self-initiated choice of law.

Another speculative area is the extent to which the entire Restatement (Second) of Conflict of Laws is controlling in Texas choice of law problems. *Duncan v. Cessna Aircraft Co.* adopted only the most-significant-relationship test from the Restatement (Second), and not the Restatement (Second) as a whole.⁷⁷ Texas courts have cited other portions of the Restatement (Second),⁷⁸ but it is unclear whether these are controlling or merely persuasive. The Texas Supreme Court should clarify the extent of the Restatement (Second)'s applicability in Texas.

The most convenient clarification would be the adoption of the entire Restatement (Second). Adopting the Restatement (Second) in its entirety would not interfere with Texas' ability to modify the Restatement's rules; the Texas legislature may enact a specific choice of law rule for any issue it desires. The Restatement (Second) gives such specific statutory choice of law rules priority over its own rules.⁷⁹ Adopting the entire Restatement (Second) would not undermine Texas' substantive law by promoting foreign law. The Restatement (Second) tends to protect the forum's substantive law by strong deference to forum public policy and state interest. In any event,

77. 665 S.W.2d at 421.

78. *E.g.*, *First Commerce Realty Investors v. K-F Land Co.*, 617 S.W.2d 806, 809 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 228 comment c, 229 comment e, 254 comment e (1972)); *Perry v. Ponder*, 604 S.W.2d 306, 315 (Tex. Civ. App.—Dallas 1980, no writ) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971)); *Wickware v. Session*, 538 S.W.2d 466, 470 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 287(2) (1971)).

79. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971).

whether the court wishes to adopt the entire Restatement (Second) or not, its role should be clarified by the Texas Supreme Court.

To the extent the suggested resolutions for speculative problems are valid, they offer the same advantage as the many verified solutions stated in this outline—a clear direction for judges and litigants when a foreign element creates an issue of legislative jurisdiction or choice of law.

APPENDIX

The following three examples illustrate the outline's operation. The examples focus on some of the more common choice of law problems.

*Example One: Contractual Choice of Law; False Conflicts*⁸⁰

Dr. William McLean developed and patented a device for space satellites, to which the United States government had a nonexclusive, royalty-free license because of McLean's federal employment. McLean mistakenly believed that the United States' license was exclusive. In 1975, Hughes Aircraft Company became interested in McLean's device and told McLean that the federal government's license did not prevent his making an agreement with Hughes Aircraft. Hughes and McLean made a licensing agreement that year in which McLean was to receive certain royalties and Hughes would obtain a reissuance of the patent and pay the costs of any resulting infringement lawsuits.

In 1980, having received minimal royalties on his license agreement with Hughes, McLean proposed that Hughes Aircraft buy his patent. Hughes agreed and the sale occurred. After McLean died in 1983, his attorneys and heirs reviewed McLean's two contracts with Hughes (the 1975 license and the 1980 sale). McLean's heirs decided that Hughes had intentionally misrepresented the potential royalties to McLean. They sued Hughes Aircraft in 1985 for rescission of the two contracts based on fraudulent inducement; they added a second claim for damages for breach.

McLean was a Texas resident, had developed the patented device in Texas, and had negotiated the two Hughes contracts while in Texas. Hughes Aircraft was a Nevada-based company and had used

80. This example is based on *Finch v. Hughes Aircraft Co.*, 57 Md. App. 190, 469 A.2d 867 (1984).

McLean's device at their Nevada location. McLean's heirs argued that Texas law should control both the contract and the tort claims because Texas had the most significant relationship to the claims. Hughes argued that Nevada law should control both claims: the tort claim because Nevada had the most significant relationship (as the site of the alleged fraudulent conduct), and the contract claim because of a clause in both contracts stating that "it is the intention of the parties that this Agreement shall be construed, interpreted, and applied in accordance with the laws of the State of Nevada."

Which State's law should control each claim?

Analysis

The breach of contract claim

This choice of law problem involves a contractual choice of law agreement by the litigants. To test the agreement's validity, the criteria in Part IA of the outline is applied.

Have the parties made an effective choice of law agreement?

(1) *Prima Facie Agreement*: There appears to be a prima facie agreement because the contracts were written (not essential, but helpful, as proof), the choice of law clauses are express and clear, and the contracts were in force for several years. (These are not exclusive elements, but are surely sufficient in this case for prima facie validity.) (2) *Applicable to Lawsuit*: This is an action arising on the contracts, so the choice of law clauses do apply to this lawsuit. (3) *Reasonably Related to the Lawsuit*: There is a sufficient connection between Nevada and the parties' contracts in that Hughes Aircraft is a Nevada-based company that contracted with McLean to use his device in Nevada. (4) *Public Policy*: There is nothing apparent on the face of the proffered Nevada law, nor have McLean's heirs offered any evidence of any Texas public policy conflict with Nevada law on these issues. Thus Texas public policy will not block the application of Nevada law to this breach of contract claim.

Because this four-part test is satisfied, the parties' choice of law agreement should be honored by applying Nevada law to the breach of contract claim, as mandated by *Duncan v. Cessna Aircraft Co.*⁸¹ and the Restatement (Second) section 187.⁸²

Note that the parties' choice of law agreement is honored even though the contracts' validity is questioned in the accompanying

81. 665 S.W.2d at 421.

82. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

fraud claim. If a contract has initially apparent validity, its ultimate validity should be litigated under the law chosen by the parties unless that choice violates the four-part test.

If there had been no choice of law agreement in the contract (and if none were implied), or if the parties' choice of law had been disallowed by the four-part test, then the court would have to conduct a regular choice of law analysis as described in Part II of the outline.

The fraud claim

This tort choice of law problem would ordinarily require a complete analysis under the most-significant-relationship test discussed in Part II of the outline. However, in the case on which this problem is based, the court noted that there was no material difference between the two competing laws.⁸³ Thus, the conflict was false and no choice of law analysis was necessary. The court did not reveal which State's law it then applied, but the custom is to apply forum law (if forum law is one of the choices). That is, the court would then look to the forum's statutes and case law rather than the other State's law because forum law is more readily available to the court.

Example Two: Specific Statutory Choice of Law Rule

In 1983 the plaintiff received a money judgment against the defendant in California, which was enforceable for two years under California law. The plaintiff was unable to find assets to execute the judgment on in California; but in 1986, three years after the California judgment, the plaintiff found such assets in Texas. The plaintiff filed an action in a Texas state district court based on the California judgment.

The defendant responded that the prior judgment had expired in California and that California law was controlling on this point in the Texas action. Plaintiff argued that judgment limitations are procedural and are thus governed by forum (Texas) law. In Texas, judgments are enforceable for ten years.

Analysis

This choice of law problem is created by the litigants' pleadings, as noted in Part IB, which leads immediately to Part II of the outline. The following analysis is suggested:

83. 57 Md. App. at _____, 469 A.2d at 888. In the actual case, the choice was between the law of Maryland, the forum, and of California. *Id.* at _____, 469 A.2d at 887.

Identify the choice of law problem: The choice of law issue is the enforceability under Texas law of a California judgment that has expired under California law.

Identify the potential choices: California law or Texas law.

Eliminate those laws lacking legislative jurisdiction: Both California and Texas have a sufficient connection to this action—California as the forum for the original judgment and Texas as the current forum addressing an arguably procedural issue.

Determine the appropriate choice of law rule: Consider only forum choice of law rules (unless directed by a forum choice of law rule to apply another state's choice of law rule). Is there a specific Texas statutory choice of law rule? Yes. Texas Civil Practice and Remedies Code section 16.066⁸⁴ directs that California law control Texas' action on this California judgment. California bars enforcement of this judgment and so must Texas. The case should be dismissed.⁸⁵

Example Three: The Most-Significant-Relationship Test

This is a defamation lawsuit in Texas over an allegedly defamatory statement made in Nebraska by the head football coach at Nebraska State University. His statement that "in Texas, football coaches carry checkbooks in their sweatpants" was picked up by the Associated Press and carried in several newspapers, including major Texas newspapers. Nine Texas coaches jointly filed a defamation action in a federal district court in Texas against the Nebraska State

84. TEX. CIV. PRAC. & REM. CODE ANN. § 16.066 (Vernon 1986).

85. The plaintiff had an alternative to filing a new court action in Texas. He could have filed an administrative request under the Uniform Enforcement of Foreign Judgments Act [hereinafter "UEFJA"]. TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-35.008 (Vernon 1986). The UEFJA provides an administrative procedure for filing an authenticated judgment from any State in the United States (or from any court entitled to full faith and credit). *Id.* § 35.003. The Texas court then authorizes local execution, to which only Texas law applies. *Id.* Interestingly, if the plaintiff had filed the three-year-old California judgment under the UEFJA in Texas, Texas choice of law rule section 16.066 would not apply because it governs only *actions* on foreign judgments. But the result under the UEFJA would probably be the same as in our example. The reason is that Texas Civil Practice and Remedies Code section 31.006 requires that all Texas judgments over one year old be novated by scire facias or an action of debt. *Id.* § 31.006 (Vernon 1986). With scire facias, the California debtor could probably raise an equitable issue of the invalidity of the judgment in California. With an action of debt, the California debtor could raise section 16.066, the Texas choice of law statute applied in Example Two. Nonetheless, it seems an oversight that an invalid foreign judgment might be enforced administratively in Texas when it could not be enforced in a legal action.

University coach, asking for actual damages of \$100,000 each, and punitive damages of \$100,000 each.

The defendant coach's Answer argued that Nebraska law should govern the action because the allegedly defamatory statement was made there. Nebraska does not allow punitive damages. Accordingly, the Texas plaintiffs responded that Texas law should control because Texas had the most significant relationship to the issue of damages, all of which were suffered in Texas where the plaintiff-coaches lived and worked.

Analysis

This choice of law problem is expressly raised in the parties' pleadings, which, according to Part IB, leads us directly to Part II, the choice of law analysis.

Identify the choice of law problem: This choice of law problem relates only to the *issue* of punitive damages, not to the entire claim. Because there is no other known variance between Texas and Nebraska law in this case, no other issue or claim requires a choice of law analysis. Once it is decided which law governs punitive damages, the law of the forum (Texas) should be applied to the remaining issues.

Identify the potentially applicable laws: Nebraska or Texas.

Eliminate those laws lacking legislative jurisdiction: Nebraska has a sufficient connection to the lawsuit as the State where the allegedly defamatory statement was made and also as the defendant's domicile. (Being the defendant's domicile may itself be insufficient, but it cumulatively strengthens the first factor.) Texas has a sufficient connection to the lawsuit because it is the plaintiffs' domicile and the site of publication of the statement.

Determine the appropriate choice of law rule: Is there a specific statutory choice of law rule? No; therefore, an application of the general choice of law rule is necessary. Texas uses the most-significant-relationship test adopted from the Restatement (Second).⁸⁶ However, before applying the most-significant-relationship test, it should be noted that the Restatement (Second) has other specific rules for this problem. Section 145 (the general tort principle) invokes the most-significant-relationship test, and adds the following factors to supplement the test: the place where the injury occurred; the place

86. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation, and place of business of the parties; and the place where the relationship, if any, between the parties is centered.⁸⁷

Section 150 (multi-state defamation) invokes the most-significant-relationship test, and adds that “[w]hen a natural person claims that he has been defamed by an aggregate communication, the state of the most significant relationship will usually be the state where the (plaintiff) was domiciled at the time, if the matter complained of was published in that state.”⁸⁸

Section 171 (tort damages) provides that the law selected under section 145 determines the measure of damages.⁸⁹ Comment d to section 171 specifies that exemplary (or punitive) damages are governed by the law selected under section 145.⁹⁰

These Restatement (Second) rules are not necessarily controlling in Texas but have been followed in recent Texas defamation and invasion of privacy cases.⁹¹ If used, they must be considered in light of the most-significant-relationship test of section 6. The rule most on point is section 171 (tort damages), but it merely refers to section 145. Another highly pertinent rule is section 150 (multi-state defamation), which creates a presumption that the law of plaintiffs’ domicile should be applied. Turning to a somewhat less specific rule, section 145 (general tort rules) offers four points to consider in conjunction with the section 6 analysis: (1) *the place where the injury occurred* was Texas; (2) *the place where the conduct causing the injury occurred* was Nebraska; (3) *the parties were domiciled* in Texas and Nebraska, although many more parties were in Texas than Nebraska; and (4) *the place where the parties’ relationship was centered* is irrelevant here.⁹² Although it is true that the plaintiffs had certain common associations with the defendant (for example, the National Collegiate Athletic Association), those commonalities were not the basis of this lawsuit.

87. *Id.* § 145.

88. *Id.* § 150.

89. *Id.* § 171.

90. *Id.* § 171 comment d.

91. See, e.g., *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1087 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 783 (1985); *Ritzmann v. Weekly World News, Inc.*, 614 F. Supp. 1336, 1338 (N.D. Tex. 1985); *Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1352 (N.D. Tex. 1985), *aff’d*, 799 F.2d 1000 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1295 (1987).

92. This section is often appropriate and relevant in cases involving the breach of duty of care, such as the care owed by a driver to a guest or paying passenger.

These section 145 factors are to be weighed according to their relative importance in this case. One indication of importance is section 150's emphasis on the plaintiffs' domicile. Thus, section 145 favors Texas both in the quality of factors (plaintiffs' domicile) and in the number of factors. Although the section 145 factors favor Texas, this conclusion should be considered in light of the factors in section 6.

Section 6 has seven factors, known as the most-significant-relationship test:⁹³

a. *The needs of the interstate and international systems.* The international system is probably disinterested (and uninterested) in the availability of punitive damages in an American defamation lawsuit between football coaches. But the interstate system has a large interest because of the importance of multi-state communications and of the constitutional rights of free press and free speech, and because of the plaintiffs' due process rights to litigate their complaint under the appropriate State's law. This factor has no clear resolution in this case. The interstate-system factor favors neither Nebraska nor Texas law. It is neutral.

b. *The relevant policies of the forum* include compensating resident tort victims and punishing intentional tortfeasors (the latter policy being evident in the availability of punitive damages for this action in Texas). The factor is important in this case, and obviously favors Texas, but must be weighed against the following factor.

c. *The relevant policies of other interested states and the relative interests of those states.* Nebraska's policies in limiting tort damages to actual losses are presumably to prevent the plaintiffs' unjust enrichment, and to protect the defendant's arguable due process right to avoid penal damages in a civil action. Although these policies may be strong in Nebraska, they must be weighed according to Nebraska's relative interest in this case. Nebraska's interest is that its resident—the defendant football coach—may lose more money if punitive damages are allowed.

How does this compare to Texas' interest? If punitive damages are not allowed (assuming that defendant is found liable), the defendant will not be penalized as intended by Texas law. Subsequent defamers may feel free to cause such injuries in Texas. Nebraska's interest has seemingly less importance, even though the tortious

93. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971).

conduct occurred in Nebraska. Moreover, because Texas is the forum and its determination is binding, equivalent factors may be determined in its own favor. Of course, if the Texas court favors forum interests over another state that has clearly superior interests, the court risks violating Texas law and the United States Constitution.⁹⁴ But in this case, the court can favor Texas' interests over Nebraska's because Nebraska's interests are at best equal to (and probably less than) those of Texas.

d. *The protection of justified expectations.* The plaintiffs and the defendant probably had no expectations regarding punitive damages in this matter.⁹⁵ This factor is irrelevant.

e. *The basic policies underlying the particular field of law.* There are no clear-cut "basic policies" underlying punitive damages in defamation cases because of the variations from state to state.⁹⁶ This factor is irrelevant.

f. *Certainty, predictability, and uniformity of result.* The current trend is to apply the law of the plaintiffs' domicile at the time of the defamation.⁹⁷ Applying this rule may not cause uniformity of substantive results (because the applicable law will vary in each case with the plaintiffs' domiciles), but it will promote uniformity as to choice of law analysis. This factor favors Texas.

g. *Ease in determination and application of the law.* This factor is unimportant because the only issue in this case is the availability of punitive damages. This factor would be important if non-forum law were unfamiliar or difficult to apply.

The application of the most-significant-relationship test confirms the earlier indications for Texas law under sections 145 and 150. In section 6, parts b, c and f favor Texas; the other parts are neutral

94. See *supra* notes 12-14 and accompanying text. There is no apparent constitutional problem with determining that Texas' law applies, particularly in light of Restatement (Second) section 150 which favors the plaintiff's domicile. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 (1971). Note that the forum priority applied to competing states' interests is probably inappropriate for the needs of the interstate system. The reason is that while the forum can, within limits, favor its own policies over those of other interested states, it cannot as easily resolve interstate impasses (those within the United States federal system) in its own favor. The needs of the interstate system are national concerns. Those national concerns may yield to forum policy in some cases, but not as quickly as another State's purely local interests.

95. This factor is more appropriate where the defendant bases his conduct on a standard set by law, or where the plaintiff is exposed to risk while relying on a legal standard.

96. There is a current challenge to punitive damages in many States, but no clear policy has emerged.

97. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 149-50 and comments (1971).

or irrelevant in this case. None of the factors clearly favors Nebraska, although its interests are reflected in factors a and c. This is a balancing test. The interests of Nebraska and the defendant coach are weighed in this analysis, even though they do not prevail. Some cases will be more difficult to weigh, but when the court has considered all pertinent factors of this balancing test, its choice of law is more likely to be appropriate.

Note that in an actual case many of the conclusions reached here could be disposed of in a sentence or less, with several factors being resolved in a paragraph. The neutral and irrelevant factors might be omitted from the court's written opinion, although their inclusion would assure a reviewing court or critic that all factors were considered.

One example of an adequate choice of law analysis is *Moorhead v. Mitsubishi Aircraft International, Inc.*,⁹⁸ an aviation wrongful death action. If Example Three were reduced to its essentials—as it should be in the court's written order—and if the non-issues were omitted, the result would resemble *Moorhead's* efficient analysis. The finished product will usually be concise. The analysis leading to that finished product, however, should involve, at a minimum, a consideration of the pertinent issues in this outline.

98. 639 F. Supp. 385, 390-91 (E.D. Tex. 1986).