Class Schedule:
Class meets Wednesdays from 1:20 to 3:20.

Office hours:
I will be available in my office (433H) on Mondays from 2:00 to 3:00 p.m. Please also feel free to email me at clerner@gmu.edu to arrange an appointment. My phone number is 703-993-8080.

Required course material:
(1) Rhode, Luban, Cummings, and Engstrom, Legal Ethics (7th edition 2016).
(2) ABA Model Rules of Professional Conduct. The Rules can be accessed on the ABA website, http://www.abanet.org/cpr/mrpc/mrpc_toc.html. However, you will be expected to have a printed copy of the rules, which can be purchased from many sources.

Classroom participation:
I will take attendance. Students are expected to be present and prepared. I reserve the option of raising or lowering grades based on class participation. To discourage distractions and encourage participation, the use of laptop computers is prohibited. If you have a disability that would preclude you from taking notes by hand, please contact Christine Malone, Director of Student Academic Affairs.

Recording policy:
Recording of the class in any way is prohibited.

Final exam:
The exam is on December 7 at noon.

Introduction:
Professional Responsibility is a required course. In the background, and often in the forefront, of all the readings and class discussions are fundamental questions: What is a good lawyer? Can a good lawyer be a good person? Must a good lawyer be willing to help bad people in concealing and even advancing their nefarious schemes? How, in so doing, can a good lawyer remain a good person?
Here are some reflections on these questions:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

Henry Lord Brougham, 2 Trial of Queen Caroline 3 (1821)

An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong.

Judge Thomas Goode Jones, Alabama Code (1887)

The one saving attribute for the lawyer, and through him of society, is fidelity to the client. Fidelity is the saving salt of human nature, and ennobles whatever it touches. . . .

It is not the exception, but the rule, for the lawyer to surrender his whole mental, intellectual, and physical power to his client’s cause. There are no sacrifices which he will not make, and no dangers that he will not incur, to advance the success of his employment.

John R. Dos Passos, The America Lawyer As He Was—As He Is—As He Can Be 142-143 (1907)

The duty of the lawyer, subject to his role as an “officer of the court,” is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State. But this representation involves no conflict of interest in the invidious sense. Rather, it casts the lawyer in his honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client, whoever it may be.

Justice Lewis Powell, In re Griffiths, 413 U.S. 717, 724 n.14 (1973)
A lawyer shall act with reasonable diligence and promptness in representing a client.

ABA Rules of Professional Responsibility, Rule 1.3 (adopted in 1983) (An older formulation had provided: “A lawyer shall represent his client zealously within the bounds of the law.”)

None of us who have practiced for any length of time can fail to note the dramatic decline in the level of civility between lawyers. Today we live in a ‘me’ society not a ‘we’ society and that regrettable change has been made manifest by certain of our colleagues. ‘Zealous advocacy’ is the buzz-word which serves to legitimize the most outrageous conduct, conduct which regrettably debases the profession as well as the perpetrator.


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These quotations frame the issues in a general way, so to focus the discussion for our first class, consider the question of whether, in defense of a morally dubious cause, a lawyer can justly raise “technical” defenses. Here is an old-fashioned statement of a now generally repudiated position:

I will never plead the Statute of Limitation, when based on the mere efflux of time; for if my client is conscious he owes a debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery.

David Hoffman, A Course in Legal Ethics (1836)

Were you persuaded by the dissenting judge that it is desirable to “do justice in particular instances.” Please come to class prepared to identify one or more lawyers you admire, either whom you’ve met or simply read about.

**Tentative Reading assignments for the course**

The assignments below are from the Rhode, Luban book. They will be supplemented with additional readings and exercises. The assignments are almost may be adjusted over the course of the semester. For that reason, I would strongly discourage reading ahead. Every Wednesday, I will email the assignment for the following week.


**Week 2 (September 4):** 69-105, 110-116

**Week 3 (September 11):** 133-153, 158-168, 171-183

**Week 4 (September 18):** 189-213, 216-248, 259-262

**Week 5 (September 25):** 263-304

**Week 6 (October 2):** 305-331

**Week 7 (October 9):** 331-362, 367-374

**Week 8 (October 16):** 375-406, 412-433

**Week 9 (October 23):** 469-497, 503-516

**Week 10 (October 30):** 527-565, 584-590

**Week 11 (November 6):** 594-598, 601-607, 613-617, 637-641, 650-657, 671-681, 687-692

**Week 12 (November 13):** 693-727 and negotiation exercise

**Week 13 (November 20):** 739-769, 801-811, 815-828
Appendix: Siegelman v. Cunard White Star, 221 F.2d 189 (2nd Cir. 1955)

HARLAN, Circuit Judge.

Plaintiff, in his own right and as administrator of his wife's estate, brings this action to recover for injuries suffered by his wife on the defendant's vessel, the R.M.S. Queen Elizabeth. The action was begun in a New York state court on December 14, 1951, and removed on diversity grounds to the federal district court for the Southern District of New York on January 3, 1952, the requisite jurisdictional amount being present.

On September 9, 1949, the Compass Travel Bureau, Inc., Cunard's New York agent, issued to Mr. and Mrs. Elias Siegelman document describing itself as a 'Contract Ticket.' It was a large sheet of light green paper, about 13 inches long and 11 inches wide. On the back were certain notices to passengers, relating to baggage, time of collection of ticket, location of the company's piers and offices, etc. On the front was printed in black Cunard's promise to provide specified transportation, in this case from New York to Cherbourg, subject to certain exceptions, and to 22 'terms and conditions,' also printed in black. Printed in red in heavier type was a notice directing the attention of passengers to these 'terms and conditions.' Also printed in red, and in capital letters, was a statement that 'it is mutually agreed that this contract ticket is issued by the Company and accepted by the passenger on the following terms and conditions.' The paper also contained a space where the departure time, the names of the passengers and of the ship, and other data were typed in. The paper was stated to be non-transferable. In a space provided for the signature of the company, the name of the Compass Travel Bureau was typed. The paper was not signed by either of the passengers.

On September 24, 1949, when the Queen Elizabeth had been at sea four days, Mrs. Siegelman was injured. While she was seated in a dining room chair, she and the chair were overthrown. Her chair was alleged to be the only one in the dining room which was not bolted to the floor. Upon returning to New York, the Siegelmans retained an attorney to prosecute their claim against Cunard. On August 31, 1950, after Cunard's doctor had examined Mrs. Siegelman, Cunard offered $800, the approximate amount of medical expenses stated to have been incurred by the plaintiff and his wife, in settlement of the claim. This offer was made to the Siegelmans' lawyer over the telephone by Swaine, a claim agent of Cunard. Noticing that the ticket required suits for bodily injury to be brought within a year of the injury, and that the injury had occurred barely less than a year ago, the lawyer asked Swaine whether it would be necessary to begin suit in order to protect his clients' rights. Swaine is said to have stated that no suit was necessary, that the filing of an action would be futile in view of the prospect
of early settlement, and that Cunard's offer would stand open.

Subsequently Mrs. Siegelman died. Then, on January 4, 1951, Cunard withdrew its offer, which had not yet been accepted, stating that it could not be tendered to any one other than the injured party.

On December 14, 1951, this suit was begun, claiming on behalf of the deceased damages for pain and medical expenses, and on behalf of her husband, damages for other medical expenses and for loss of consort. Cunard denied legal responsibility for the accident, and set up as a further defense the plaintiff's failure to bring the action within a year of the date the injury was suffered.

In January, 1953, the defendant moved to dismiss the action on the latter ground.Treating the motion as one for summary judgment, and having received affidavits from the attorneys and from the plaintiff, the court found the issues for the defendant, and dismissed the complaint.

On this appeal appellant asserts that Cunard is barred from using the period of limitation as a defense, because of Swaine's statement that suit was unnecessary. The provisions of the ‘Contract Ticket’ relevant to the appeal are as follows:

‘10. * * * No suit, action or proceeding against the Company or the ship, or the Agents of either, shall be maintainable for loss of life of or bodily injury to any passenger unless * * * (b) * * * the suit, action or proceeding is commenced within one year from the day when the death or injury occurred.

‘11. The price of passage hereunder has been fixed partly with reference to the liability assumed by the Company as defined by this contract, and no agreement, alteration or amendment creating any other or different liability shall be valid unless made in writing and signed for the Company by its Chief Agent at the port of embarkation.

‘20. All questions arising on this contract ticket shall be decided according to English Law with reference to which this contract is made.’

Before reaching the merits of the plaintiff's claim, we must deal with a number of preliminary questions: (1) Are federal or state choice-of-law rules to be applied here? (2) What is the applicable choice-of-law rule of the proper authority? (3) If the applicable choice-of-law rule points to the use of English law, what difference is made by the facts that English law was not pleaded or proved below, and that the plaintiff made no attempt to supply affidavits of experts on English law, after the trial Judge had offered him an opportunity to do so?

* * * *

II.

Our next question is: under the federal choice-of-law rule, what law governs the issues here? We are not concerned with the law applicable to the accident. Instead we must decide what law applies to the validity and interpretation of certain provisions of the ‘Contract Ticket,’ and to the effect of Swaine's conduct upon Cunard's right to resort to the one-year limitation
period in the contract.

The ticket stipulated that ‘All questions arising on this contract ticket shall be decided according to English Law with reference to which this contract is made.’ Considering, as we do, the ticket to be a contract— see *Foster v. Cunard White Star, 2 Cir., 1941, 121 F.2d 12*— the provision that English law should govern must be taken to represent the intention of both parties. Therefore, this provision, if effective under the federal choice-of-law rule, renders English law applicable here, even though, absent the provision, some other law would govern under the applicable federal conflicts rule.

Our issue, then, involves two lines of inquiry: (1) What questions did the parties intend to be controlled by English law? and (2) Will the federal conflicts rule give effect to their intention? In pursuing the first inquiry, we must examine more closely the provision of the ticket quoted above.

Three questions as to the scope of this provision arise under its language. First, are questions to be decided by the ‘whole’ English law, including its conflicts rules, or just by the substantive English law? That is, are questions to be decided according to the law of England, or instead, as an English court might decide them, applying where appropriate the law of some other country?

We think the provision must be read as referring to the substantive law alone, for surely the major purpose of including the provision in the ticket was to assure Cunard of a uniform result in any litigation no matter where the ticket was issued or where the litigation arose, and this result might not obtain if the ‘whole’ law of England were referred to. Second, does the provision intend that questions of validity of the contract and its provisions, as well as questions of interpretation, are to be governed by English law? The language of the clause, covering ‘all question,’ indicates that validity as well as interpretation is embraced. Third, is the recital meant to require the application of English law to the question of what conduct may amount to a waiver of its provisions? Although the wording of the clause— relating to questions arising ‘on’ the contract— may indicate that such a question was not meant to be covered, it appears unnatural to hold that all questions of validity and interpretation were intended to be governed by English law but that this question was not. We therefore consider that the question of what conduct was sufficient to operate as a waiver of the ticket's provisions was also meant to be determined by English law.

We now come to the inquiry as to the extent to which this provision, so construed, is to be given effect in deciding the particular issues before us. Those issues are: (1) Is the one-year limitation period provided in the contract for the bringing of suits valid? (2) Does Swaine’s conduct prevent Cunard from using the period as a defense? and (3) How is this matter affected by the clause requiring alterations of the contract to be in writing? It appears not to be contested that the ticket should be treated as a contract and that failure to bring the action within the contract limitation period would be a defense
under English law—see Jones v. Oceanic Steam Navigation Co., (1924) 2 K.B. 730, but since the same result would follow under American law—see 46 U.S.C.A. § 183(b); Scheibel v. Agwilines, Inc., 2 Cir., 1946, 156 F.2d 636—we need not decide whether English law is applicable to the first of these issues. As to the second and third issues—where English and American law may differ—in the view which we take of the case, we need really only deal with applicability of English law to the second issue—via., whether Swaine's conduct prevents Cunard from using the one-year limitations provision as a defense—although in light of what we say below we think that English law would clearly control the third issue—viz., the effect of the 'alterations' clause.

As we have said, we construe the contract as establishing the intention of the parties that English law should govern both the interpretation and validity of its terms. And we think it clear that the federal conflicts rule will give effect to the parties' intention that English law is to be applied to the interpretation of the contract. Stipulating the governing law for this purpose is much like stipulating that words of the contract have the meanings given in a particular dictionary. On the other hand, there is much doubt that parties can stipulate the law by which the validity of their contract is to be judged. Beale, Conflict of Laws § 332.2 (1935). To permit parties to stipulate the law which should govern the validity of their agreement would afford them an artificial device for avoiding the policies of the state which would otherwise regulate the permissibility of their agreement. It may also be said that to give effect to the parties' stipulation would permit them to do a legislative act, for they rather than the governing law would be making their agreement into an enforceable obligation. And it may be further argued that since courts have not always been ready to give effect to the parties' stipulation, no real uniformity is achieved by following their wishes. See Beale, op. cit. supra, at page 1085.

Here, of course, the question is neither one of interpretation nor one of validity, but instead involves the circumstances under which parties may be said to have partially rescinded their agreements or to be barred from enforcing them. The question is, however, more closely akin to a question of validity. Nevertheless, we see no harm in letting the parties' intention control. Instead of viewing the parties as usurping the legislative function, it seems more realistic to regard them as relieving the courts of the problem of resolving a question of conflict of laws. Their course might be expected to reduce litigation, and is to be commended as much as good draftsmanship which relieves courts of problems of resolving ambiguities. To say that there may be no reduction in litigation because courts may not honor the provision is to reason backwards. A tendency toward certainty in commercial transactions should be encouraged by the courts. Furthermore, in England, where much of the litigation on these contracts might be expected to arise, the parties' stipulation would probably be respected.
Where the law of the parties' intention has been permitted to govern the validity of contracts, it has often been said (1) that the choice of law must be bona fide, and (2) that the law chosen must be that of a jurisdiction having some relation to the agreement, generally either the place of making or the place of performance. The second of these conditions is obviously satisfied here. The fact that a conflicts question is presented in the absence of a stipulation is some indication that the first condition is also satisfied. Furthermore, there does not appear to be an attempt here to evade American policy. We have no statute indicating a policy contrary to England's on this subject. And there is no suggestion that English law is oppressive to passengers. We regard the primary purpose of making English law govern here as being not to substitute English for American policies, but rather on the one hand, to achieve uniformity of result, which is often hailed as the chief objective of the conflict of laws, and on the other hand, to simplify administration of the contracts in question. Cunard's employees need be trained in only one set of legal rules.

This is not to suggest that English and American policies on this subject are identical. Any difference in law reflects some difference in policy. Consequently, to the extent English and American policies may differ on this question, we would consider that the parties may choose to have the English policies apply. But we express no opinion on what result would follow if we had stronger policies at stake, or if the parties had attempted a feigned rather than a genuine solution of the conflicts problem.

* * *

IV.

Finally we come to the substantive question whether Swaine's conduct prevents Cunard from successfully invoking the contractual limitation period as a defense.

Upon argument of the motion to dismiss the complaint as untimely, the plaintiff submitted affidavits opposing the motion. One of these was an affidavit of the lawyer retained by the Siegelmans to press their claim against Cunard. The lawyer described the Circumstances of Cunard's offer of settlement:

'I had made a demand for $5,000 to settle these claims and Mr. Swaine advising me that he would have to take the matter up with his committee. Thereafter on August 31, 1950, three weeks before the limitation on the commencement of action expired, Mr. Swaine countered with an offer of $800.00.

'In that conversation Mr. Swaine told me that such offer was predicated to cover plaintiffs' special damages but from the tenor of the conversation, it appeared to me that such offer might be somewhat increased.

'I told Mr. Swaine that I would communicate this offer to my clients and that I would thereafter call him to advise him of their wishes in the matter. However, I told him that it might take sometime for my clients to
consider such offer in view of the fact that at this time my clients were living apart. Mr. Swaine replied that there was no rush on the offer because it would stand open on the file and that the defendant believed our special damages should be paid as a matter of good will.

‘Since the time to commence this action was going to expire three weeks later, on September 24, 1950, I told Mr. Swaine it appeared that I would have to commence my action in order to protect my clients’ interests. Mr. Swaine answered that said suit was not necessary and that there was no point to commencing an action at this time since it appeared to both of us that there was an excellent chance of settling the matter.’

On the basis of these assertions, which were uncontroverted, the plaintiff sought to establish either waiver of the limitation or that the defendants were estopped from relying upon it.

* * *

It appears true that in England a promise, supported by consideration, not to plead the statute of limitations is a sufficient answer to a defense based on the statute. And if there were a promise here, the plaintiff’s forbearance from suit within the limitations period might be good consideration. But it is not possible to treat the statements said to have been made by Swaine as a promise. The most reasonable interpretation of his remarks is that because of the excellent chances of settlement, filing suit would turn out to be wasted effort. Under this view of the matter, Swaine’s statement cannot be regarded as even a statement that Cunard intended not to plead the limitations period as a defense in the event that efforts at settlement proved unfruitful. But even if his statements could be regarded as a statement of what Cunard’s intention was at that time, and if it could be shown that Cunard’s intention then was otherwise, still there would seem to be no right to recovery.

Furthermore, even if Swaine’s conduct were held to suspend the running of the limitations period, we do not think that under English law, the running of the period would never resume. At the time of the statements in issue, about three weeks remained in the one-year period. After the withdrawal of Cunard’s offer on January 4, 1951, it could no longer be thought that Cunard would not use the defense of untimeliness to any action thereafter brought. Even if the limitations period was tolled, therefore, while the offer was outstanding, this lawsuit should have been commenced within three weeks of the receipt of the January 4 letter. The situation is analogous to that obtaining in fraud cases, where the English rule is that the period of limitations is neither suspended altogether nor begins at the time the fraudulent acts were committed, but begins instead at the time fraud is discovered or could be discovered with reasonable diligence.

The plaintiff states that he was delayed for six months in obtaining letters of administration. But this delay apparently would not toll the statute of limitations under English law. Again, though, even if the running of the
period were suspended, this lawsuit was begun too late, for letters of administration appear to have been granted on June 7, 1951, and this action was not commenced until December 14, 1951.

On this view of the case it is not necessary to decide the effect English law would give to the provision requiring all alterations to the contract to be in writing and over the signature of Cunard’s chief agent at the port of embarkation.

Affirmed.

FRANK, Circuit Judge (dissenting).

This case presents an important question relative to the rights of American passengers travelling from American ports on English vessels. Here a ticket, covering a voyage from New York to Cherbourg, was purchased by an American in New York. (As I think its very form and appearance important, I have attached a facsimile of the ticket as an Appendix to this opinion.) The injury to the passenger occurred on the high seas on September 24, 1949. This suit was brought on December 14, 1951. The statute of limitations had not then run. But the district court granted a summary judgment, dismissing the suit, on the ground that clause 10 of the passenger's ticket provided that no suit should be commenced except within one year. The plaintiff's undisputed affidavit showed that, in New York, on August 31, 1949, about three weeks before the year expired, defendant's claim agent, in connection with an offer of settlement made by him to the passenger, told the latter's lawyer that it would not be necessary to file suit within the year. On January 4, 1951, after the year had elapsed, defendant withdrew the settlement offer.

1. The first question is as to the legal effect of the claim agent’s conduct as a waiver or estoppel with reference to the one-year period of limitations contained in clause 10. As the ticket was a contract made in New York, it may be that this question is to be solved by reference to New York law. On the other hand, as it was to be primarily performed on the high seas, it may be that ‘maritime law’ governs. Since, however, there appear to be no decisions concerning ‘maritime law’ on this subject, I think we may assume that pertinent federal decisions, dealing with cases of intra-mural waiver or estoppel, will tell us the ‘maritime law.’

Disregarding for the moment clause 20 of the ticket (referring to ‘English law’), I think it clear that, under federal and New York decisions, the defendant waived (or is estopped to assert) the one-year provision (clause 10) and thereby completely abandoned it.

* * *

2. My colleagues, in holding that there was no waiver or estoppel, rely principally on that English decision and on clause 20 which reads: ‘All questions arising on this contract ticket shall be decided according to English Law with reference to which this contract is made.’
I think this clause does not import ‘English law’ concerning a waiver after the injury occurred. For, at best, as my colleagues apparently concede, the words ‘on this contract’ are ambiguous, i.e., do not (to say the least) unambiguously cover the post-injury conduct, in New York, of defendant’s claim agent.

Because the contract was made in New York, for a journey beginning in New York, the usual rule is that its provisions must be interpreted according to New York ‘law, or by the ‘maritime law’ which, as previously noted, must (absent decisions on the subject) be learned from federal ‘law’ as to internal transactions. What, then, of a provision, clause 20, which ambiguously refers to ‘English law?’ Surely, in interpreting that ambiguous provision, we should not look to English decisions. Thus to consult ‘English law,’ in interpreting an American contract ambiguously referring to ‘English law,’ would indeed be a pulling-yourself-up-by-your-own-bootstraps device. Especially is this true here, since the interpretation of a clause in a contract like this involves an important internal public policy. For, since the document was a fixed printed form prepared by defendant and tendered to the passenger, clause 20, under New York and federal decisions, must be construed most strongly against defendant. (Verbius fortuis accipuntur contra proferentum.)

This rule is given special emphasis when, as here, the contract contains a multitude of complicated provisions relative to a subject matter with which the tendering party is peculiarly familiar and the other party is not.

3. Although I think the foregoing sufficient to render ‘English law’ inapplicable to the issue before us, the following factors are also pertinent:

(a) The New York and federal courts, in holding that there is a waiver in circumstances like those here, rest their decisions on the ground that ‘it would be contrary to justice’ (or the like) to rule otherwise. Accordingly, we have here an important public policy of the forum which, I think, precludes the application of contrary English decisions. In short, I do not agree with my colleagues’ statement that, if the English ‘law’ concerning waiver is as they report it, it is not ‘oppressive to passengers.’

5. My colleagues seem to concede that, on the motion for summary judgment, it must be assumed that the defendant’s claim agent had actual or implied authority to waive the time limitation in clause 10. As, however, I may, in this respect, misunderstand my colleagues, I think it well to discuss the effect of clause 11 of the ticket. It reads: ‘The price of passage hereunder has been fixed partly with reference to the liability assumed by the company as defined by this contract, and no agreement, alteration or amendment creating any other or different liability shall be valid unless made in writing and signed for the Company by its Chief Agent at the point of embarkation.’ Defendant contends that this clause precluded any waiver or estoppel, by acts
of defendant's claim agent, of the time limitation in clause 10.

I cannot agree. Once more I refer to the rule of strict construction, against defendant, of any ambiguity in such a printed form prepared by defendant. Now it will be noted that clause 11 relates solely to 'liability.' The ticket contains five clauses each of which specifically states circumstances in which the defendant shall have 'no liability' or shall not be 'held liable.' In other words, in those five clauses we find what clause 11 means when it refers to written modification by the Chief Agent of 'the liability assumed by the Company as defined by this contract.' Significantly, clause 10, fixing the one-year time-limit for bringing suit, makes no mention of 'liability.' It reads, so far as pertinent: 'No suit, action or proceeding against the Company or the ship, or the Agents of either, shall be maintainable for * * * bodily injury to any passenger; unless * * * (b) the suit, action or proceeding is commenced within one year from the day when the * * * injury occurred.'

I think, then, we must interpret clause 11 as having no application to clause 10. The former was obviously designed to cover no more than pre-voyage alterations of the company's 'liability,' since it provides for dealing with the Chief Agent 'at the point of embarkation.'

6. I call attention to another factor which, while unnecessary to my conclusion, I think supports it: The ticket is what has been called a 'contract of adhesion' or a 'take-it-or-leave-it' contract.

7. I grant that, in this context, I am stressing the need to do justice in particular instances. I do so unashamedly. For it is generally agreed that the decisions of conflict-of-laws cases by mechanized rules, without regard to particularized justice, cannot be defended on the ground that they have promoted certainty and uniformity, since such results have not been thus achieved. Several wise commentators have urged that the element of justice should have a dominating influence.