Ethical Questions Raised by the BP Oil Spill Litigation [1]

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by

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As in many multi-district, consolidated, class and other complex cases, the Court's appointment of a Plaintiff Steering Committee raises, from the outset, a number of ethical and professional questions regarding the representation of the plaintiffs. In the *Deepwater Horizon* Multi-District Litigation, (MDL No. 2179), Judge Barbier issued, in October of 2010, Pre-Trial Order No. 8, which appointed a fifteen-person Steering Committee, as well as a four-person Executive Committee (consisting of Co-Liaison Counsel and two Steering Committee Members), to coordinate and manage the litigation. Specifically, the appointed lawyers were asked to: (i) initiate, coordinate, and conduct all pretrial discovery on behalf of plaintiffs; (ii) examine witnesses and introduce evidence at hearings on behalf of plaintiffs; (iii) coordinate the trial team's selection, management and presentation of any common issue, "bellwether" or "test case" trial; (iv) submit, argue and oppose motions; and (v) explore, develop and pursue settlement opportunities.[1] The utilization of such court-appointed attorneys, while for many reasons necessary, can significantly alter the traditional attorney-client construct, and raise questions regarding the extent to which an attorney appointed by the Court "represents" litigants who have never formally retained him or her, and the duties (if any) that are owed to individual plaintiff attorneys who have been hired by such litigants to represent them.

While, of course, the Steering Committee Member's authority emanates from the Court, and can therefore be defined, and limited, as the Court sees fit, as a general proposition, the Steering Committee is traditionally responsible for advancing and protecting the common and collective interests of all plaintiffs, while the individual attorney (or *pro se* litigant) would be responsible for protecting and advancing what is unique or particular to his or her own claim. So, for example, while there will be some bodies of discovery or science that arguably fall into either or both categories, (*i.e.* "common" versus "individual"), as a general proposition, the Steering Committee would be responsible for "liability" and what is commonly referred to as "general causation", while the individual plaintiff attorney (or *pro se* litigant) would be responsible for establishing "specific causation" and his or her own individual damages.

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[1] A previous version of this paper was first presented at the 22nd Annual Admiralty and Maritime Law Conference, at the South Texas College of Law, October 18, 2013.

Does that mean that the Steering Committee Members "represent" all plaintiffs with respect to the common elements of their claims?

Or, perhaps a better way to frame the question: To what extent (if any) do Steering Committee Members "represent" plaintiffs with respect to the common elements of their claims?

One good summary of a partial answer to that question can be found in a presentation by Louisiana Disciplinary Counsel, Charles Plattsmier, and noted Louisiana ethics counsel, Richard Stanley and Leslie Schiff, who paraphrased the general state of the law as follows:

> [W]hile most courts have attempted, with varying degrees of success and stringency of application, to apply traditional rules and paradigms to the class action / mass tort context, almost all agree that said rules are simply not well-adapted for such application. As such, it would appear that the Rules of Professional Conduct, as presently written, are not *strictly* applied to the evaluation of conflicts of interest in class action or mass tort matters.[2]

In my experience, the application of the Rules generally turns on the nature of the duty at issue. For example, as noted in the commentary above, where traditional Rule 1.7 to 1.9 Conflicts of Interest are concerned,[3] a plaintiff in an MDL is not generally considered to be the "client" of the Steering Committee.[4]

On the other hand, where communications with plaintiffs are concerned, Courts have held that, once a case has been formally certified as a class action, the classmembers are generally considered to be "represented" by Class Counsel for Rule 4.2 purposes.[5] (Such communications, by both Class Counsel and Defense Counsel, are also subject to oversight and regulation by the Court, subject to First Amendment limitations, in connection with the formal Class Notice process under Rule 23(c) and/or the Court's authority to enter appropriate orders for the management of the litigation and/or protection of the class under Rule 23(d).[6])

In the *Deepwater Horizon* Litigation in particular, some of the questions which were originally raised relative to the authority of the Steering Committee included:

- To what extent can a private lawyer be appointed by the Court to "represent" or otherwise direct material aspects of litigation on behalf of the United States? [7]
- To what extent can a private lawyer be appointed by the Court to "represent" or otherwise direct material aspects of litigation on behalf of a State? [8]
- To what extent (if any) can a private lawyer appointed by a Federal Court be awarded a common benefit fee on the recovery of a State?[9]

Additional questions raised over the course of the *Deepwater Horizon* Litigation and associated settlement programs are outlined below.

Kenneth Feinberg and the Gulf Coast Claims Facility ("GCCF")

BP, who had been designated the "Responsible Party" under the Oil Pollution Act of 1990,[10] hired Kenneth Feinberg to serve as the "independent" administrator of an extra-judicial settlement program funded by BP. While the Court ultimately enjoined Mr. Feinberg pursuant to its authority under Rule 23,[11] the arrangement also presented a number of interesting ethical and professional issues:

- Can a licensed attorney effectively "opt out" of the Professional Rules by claiming that he is serving in the capacity of an "independent" "administrator" ?
    - Assuming that the answer is (or might be) yes, what are the legal, contractual, procedural or structural formalities or safeguards (if any) that would be required?
        - The absence of a conflict (or potential conflict) within the compensation structure?
        - A formal trust agreement, with a defined set of benefits and beneficiaries, to whom a fiduciary duty is owed?
- Particularly in dealing with unrepresented claimants, is the lawyer bound by the limitations and requirements of Rule 4.3? [12]
- With respect to represented claimants, can the lawyer contact such claimants directly without the plaintiff lawyer's consent? [13]

Several plaintiff attorneys (as well as some public officials and CPAs) at the very least implied that they had "special relationships" with Mr. Feinberg or others at the GCCF, and could thereby obtain a faster or better result.

- Assuming that the implication were true, is it nevertheless unethical? [14]
- Assuming that the implication were false, and that no "special deals" were actually made:
    - Would Mr. Feinberg fall within the definition of a "judge" or "adjudicatory officer" or "public officer" or "legal officer" within the meaning of Rule 8.2(a)? [15]
    - What if the false implication were made to the attorney's own clients?[16]

- What if the implication were made to someone who was already represented by another plaintiff attorney, in order to induce him or her to switch counsel?[17]

- If the implications were made in the form of "earned media" (*e.g.* appearances or quotes in newspaper, radio or television stories), do they fall within the prohibitions of the Professional Rules on Advertising? [18]

- Can a mere implication or suggestion violate one or more of the Rules, or does there have to be an express representation or mis-representation?

Questions Regarding the Duties (if any) of Non-Steering Committee Member Attorneys Representing Plaintiffs in the MDL

The conduct outlined above raises the question of what, if any, duties or responsibilities a non-Steering Committee Member who nevertheless has clients in the MDL (or class) may have to cooperate with the Steering Committee (or class counsel), in order to protect and advance the interests of his or her own clients?

This inquiry will obviously be fact-specific, but some of the hypotheticals presented by the *Deepwater Horizon* Litigation include:

- What if an attorney purporting to represent numerous individual plaintiffs, and who purports to have retained experts of potential value with respect to common issues, indicates that he will prevent those experts from assisting the PSC if he is not provided with common benefit roles or assignments?[19]

- What if an attorney purporting to represent numerous individual plaintiffs, and who purports to have valuable documents from a prior lawsuit, refuses to make such materials available to the PSC in a usable format unless he is provided with certain common benefit roles or assignments? [20]

- What if an attorney who represents a material witness, and is dissatisfied with his lack of trial participation, encourages the witness not to appear and testify live at trial?

    - Would it matter whether a video deposition were available to be placed into evidence in lieu of live testimony?

    - What if such encouragement were not "unlawful" and/or there were legitimate reasons to discourage the client from testifying?[21]

- What if an attorney were to negotiate an "inventory" or other settlement with the defendant, and either directly or through his clients make it known to the clients of other plaintiffs' counsel that a superficially favorable settlement had been reached, (thereby encouraging other plaintiffs to discharge their own attorneys and hire this counsel), yet omitting a material fact regarding the scope and effect of the release. Assume that this attorney, directly and/or through his clients, were to thereafter attack the class settlement reached by the PSC as purportedly less favorable, (thereby encouraging classmembers to opt out or object to the settlement and presumably hire him to continue to pursue their claims in litigation), without disclosing the scope, effect or significance of the release. Assume that, when pressed for a copy of the actual settlement terms and/or release, (so that a fair and transparent comparison could be made and communicated), the attorney claimed that the settlement agreement(s) and releases were "confidential".

    - Is this unethical if the attorney discloses and explains all material facts to his own clients and (at least in his own professional judgment and view) maximizes his own clients' recoveries?

    - Does it matter whether the attorney actively encourages his clients to publicize the settlement, (or simply expects that they will as a matter of experience and human nature) ?

    - If the settling attorney earnestly believes, in his professional judgment, that he can and will achieve settlement terms that are more favorable to potential clients if they hire him and/or object to the class settlement and/or opt out, does it matter whether he was in express or implied "collusion" with the defendant in cloaking the settlement terms and/or scope of release behind a mask of confidentiality?

        - What if the primary motivation was not the interests of his clients and/or potential future clients, but the settling attorney's own personal hope of financial gain?

<u>Conduct of the Litigation</u>

In some circumstances, there are rules which are clearly intended to apply to a "mass tort" or other complex litigation. For example, Rule 1.8(g) requires the informed consent of all clients, with the disclosure of the existence and nature of all claims and the participation of other clients in the settlement. At the same time, however, it is doubtful that a separately represented or *pro se* plaintiff would be considered a "client" of the Steering Committee Member, and a certified class action settlement approved by the court is expressly exempt from the Rule.

The Court can also place formal distinctions or other limitations on the authority of the Steering Committee to affect individual claims. In *Deepwater Horizon* Pre-Trial Order No. 8, for example, the Court authorized the Plaintiff Steering Committee to negotiate and enter into "administrative" stipulations, but provided that all substantive stipulations could be objected to by individual plaintiffs or their counsel and would not be binding unless and until ratified by the Court.[22]

A question arises, in this regard, regarding the extent to which the Steering Committee can or cannot agree to the dismissal of a defendant?

- What if the Steering Committee and Trial Team attorneys who are most familiar with the litigation are convinced that a judgement against a minor defendant will have little, if any, legal or practical upside benefit; while continued litigation carries some legal, practical or administrative downside risk?

    - What responsibility, if any, is there to continue to prosecute the case against the minor defendant?

    - What authority is there to dismiss or abandon such claims?

Some attorneys have questioned, for example, the decisions made by the Steering Committee in responding to the claims of Federal Preemption and/or Derivative Sovereign Immunity advanced by the manufacturer of the controversial dispersant, Corexit, as well as other "Clean-Up" or "Responder" Defendants.

- Does the Steering Committee owe individual litigants and their counsel an explanation?[23]

- What if the bases of those decisions stemmed from sensitive strategic work product and/or was provided to the Steering Committee on a privileged and/or confidential basis?

These types of issues raise the question of the extent to which the Steering Committee can, should or must provide information to suing plaintiffs and their individual attorneys.

<u>The Steering Committee's Duties to Disclose Information to Plaintiffs or their Counsel</u>

Individual plaintiffs and their counsel often insist that the Steering Committee is required to provide *all* material information that might affect the status, disposition, or strategic decisions made by the individual plaintiff attorney and/or plaintiff in connection with his or her claim.

- Should such a plaintiff be considered the "client" of the Steering Committee Member? [24]

- What if the information is subject to an express or implied obligation of confidentiality (*e.g.* information shared in the course of mediation or other settlement negotiations; highly sensitive material of a defendant or third party provided under a heightened duty of confidentiality; in-chambers discussions among liaison counsel and the Court) ?

- What if the information is strategically sensitive from an attorney work product standpoint?

- Does the extent (or timing) of the obligation depend on the circumstances of whether, when and/or how an individual plaintiff or his or her counsel could be expected to utilize the information?

  (For example, at this time, for claims that fall outside either the Medical or Economic Settlements, there are, to my knowledge, no individualized, "inventory" or other settlement negotiations taking place; and every trial / appeal on the horizon is either a common issue or a test trial, which will be prepared and prosecuted by the Steering Committee; so (at least arguably) why does anyone need any information at this point in time? What would they do with it? There are few, if any, material litigation or settlement choices to be made.)

- What is the extent to which a Steering Committee Member can, should or must provide information to an attorney or litigant whom he or she reasonably suspects might:

  A. breach a duty of confidentiality?

  B. utilize the information to leverage the personal or financial interests of such attorney?

  C. utilize the information to leverage the interests of such attorney's clients and/or a *pro se* plaintiff?

  D. utilize the information in a way that is detrimental to what the Steering Committee Member believes to be in the best interests of the plaintiffs collectively?

  E. utilize the information in a way that is detrimental to the financial interests of the members of the Steering Committee?

Which raises the overarching question of whether and how the Steering Committee / Class Counsel can properly identify, evaluate and assess the common and collective interests of the plaintiffs or the class as a whole? [25]

Settlement of the Economic Class Claims

While neither the traditional Conflict Rules generally,[26] nor Rule 1.8(g) in particular, have been mechanically applied in the class action context, the U.S. Supreme Court has established a number of general principles that are designed to provide "structural assurances" of adequate representation where class members (or groups of class members) are effectively competing with one another for a limited pot of money.[27]

In the Economic & Property Damages Settlement, this type of potential conflict was avoided by negotiating separate types of damages frameworks that were each uncapped and negotiated separately, at arms length, with the full incentive to maximize recovery for those claimants and claims. (Adequate representation was further assured by the wide cross-section of claimants and claims represented by the members of the Plaintiff Steering Committee, as well as the fact that there were few, if any, identifiable discreet sub-groups, with a lot of cross-over between and among various different claimants with a hodgepodge of various different claims.)

The one potential exception was the $2.3 billion Seafood Compensation Program. Once BP insisted that the Fund, though guaranteed, would also be limited, the Steering Committee faced a number of potential choices to provide structural assurances of adequate representation. For a number of reasons, the attorneys negotiating for the Steering Committee felt that traditional sub-classes would not work, and opted, instead, for the appointment of an independent neutral who determined how to allocate the fund among eligible claimants.[28]

Discontinuation of the Gulf Coast Claims Facility

When the Agreement-in-Principle between the Steering Committee and BP was reached, BP discontinued its Gulf Coast Claims Facility. BP agreed to convert existing GCCF offers into "transition payments" of 60%, without the requirement of a release, and thereafter affording eligible Class Members with the opportunity to collect either the remaining 40% of the GCCF offer or what he or she would be entitled to under the Court-Supervised Class Settlement, whichever is higher. BP, however, apparently withdrew Mr. Feinberg's authority to negotiate with personal injury plaintiffs (who were excluded from the Economic Class) and discontinued the "Quick Pay" option under which the GCCF would pay some individuals $5,000 and businesses $25,000 with essentially "no questions asked".

- Some claimants and plaintiffs' counsel raised the question of whether the Steering Committee may have "violated" its (alleged) duties to personal injury or "Quick Pay" or other plaintiffs or claimants who allegedly would have or might have received better offers from the GCCF?[29]

Objections to the Settlement by Counsel Representing Other Clients with Claims in the Settlement

Unlike most class action settlements, BP agreed that the *Deepwater Horizon* Economic & Property Damages Court-Supervised Settlement would begin to accept, process and pay claims during the class approval process. Therefore, many attorneys found themselves in the unusual position where some of their clients were making claims in the Settlement Program, while other clients were formally objecting to (and/or appealing) final approval of the settlement.

- Is that a conflict of interest under Rule 1.7?
    - If so, is such conflict cured or mitigated by the fact that, in the event the class settlement is not fully and finally approved, the Settlement Program will nevertheless continue to process and pay settlement claims submitted prior to that time?[30]
        - What about classmember clients who might not be able to get their claims submitted to the Settlement Program before the entry of an order rejecting the class settlement?

Professional Objections

What about the general ethics of a "professional objector" who lodges an objection with at least some motivation of attempting to leverage a "pay off" from one of the settling parties in return for withdrawing the objection? Even assuming *arguendo* that this conduct is not *per se* unethical, some of the objections asserted in connection with the two BP Class Settlements raise two significant questions in this regard:

- First, is the objecting attorney constrained by the objectors' actual interests and desires, in terms of only objecting to those elements of the settlement that the objectors actually oppose? And/or that the objectors would actually be affected by?[31]
    - Or, once being engaged to lodge an objection to the settlement, is the objecting attorney free to advance any and all objections that he or she believes may be legally supportable and/or may advance the overall leverage of the objectors?
        - For example, can an attorney object to an alleged "*cy pres*" distribution that the objector actually supports?
        - Can an attorney object to an alleged "conflict" within the Seafood Compensation Program on behalf of an objector who only has a Coastal Property Claim (and no Seafood Claim) ?
        - Can an attorney object to the alleged "insufficiency" of a proposed settlement payout where the objector himself has no intention of

making a claim or availing himself or herself of even what the objector contends to be a "sufficient" pay-out on the claim? [32]

- Secondly, the ethical and legitimate bases to assert an objection – even a "professional objection" – would be to presumably either (i) advance the interests of the class as a whole by encouraging the defendant to improve the settlement by enhancing the benefits, and/or (ii) advance the financial interests of his or her own particular clients by leveraging a "pay off". But what if, at some point, it becomes reasonably apparent (and in the case of the BP Settlements, in particular, abundantly clear) that the defendant will not increase the relief in order to save the settlement, either for the class as a whole or for the benefit of the individual objectors?

    - Can the objecting attorney continue to place the objectors' rights and interests in the settlement at risk?

    - What if the objector actually desires the settlement benefits?

    - What about the downside litigation risk to his or her own objector clients if the objection is successful in vacating the settlement?

Mass Opt Outs (or Objections)

Some attorneys seemed to admit in their filings that they could not obtain informed consent from some of their clients to either make claims in, object to, or opt out of the class action settlement. Purporting to act on behalf of a number of clients, (and contrary to a Court Order which required individual signatures on Opt Out Requests), at least one attorney first opted out, and then objected to, the class settlement *en masse*.

- Is the decision of whether to Opt Out of (or Object to) a Class Settlement governed by the requirements of Rule 1.2(a)? [33]

    - Does the attorney have the obligation to communicate the "settlement offer" to the client under Rule 1.4?

Post-Settlement Conduct by BP

During the months after the Economic & Property Damages Settlement was finalized, executed, and preliminarily approved, BP supported the settlement and moved to have it finally approved. In these filings, and in connection with administrative discussions and proceedings regarding the implementation of the Settlement Agreement, BP consistently and repeatedly represented to the class, the public, and the Court that losses resulting from the spill would be determined objectively by mathematical formula, and without any inquiry into potential alternative causes of the loss.[34] Thereafter, however, BP's lawyers and accountants apparently realized that they had under-estimated the value of the uncapped settlement by several billion dollars.

BP, at that point, challenged the interpretation of "variable profit" under the Business Economic Loss (BEL) Framework, arguing – *not* that the Program should undertake an inquiry or evaluation into potential alternative causes for a loss other than the Spill, but – that expenses from outside of the Benchmark and/or Compensation Periods should be "matched" to the Benchmark and/or Compensation Period revenue associated with those expenditures. Initially, the District Court ruled against BP on that issue,[35] at which time BP: (i) appealed virtually every individual BEL determination made to a construction, professional service or agricultural business and/or in excess of $100,000; (ii) filed a series of complaints, motions and appeals against the Claims Administrator and the Class to reverse the Court's ruling and/or to stay or suspend all payments or all BEL payments by the Program; and (iii) launched a full scale public media attack in the form of both earned media and paid ads, in which the company implicitly and/or explicitly criticized the Claims Administrator, the District Court, Class Counsel, the Claimants, Plaintiff Lawyers, and the American civil justice system, (in some cases with confidential, false, misleading and/or materially incomplete information), establishing a "fraud hotline" and complaining about allegedly "fictitious" claims.

BP's conduct, in this regard, raises a number of potential ethical questions, including, for example:

- Was it unethical for BP to continue to appeal settlement program claims on the basis that the damages were allegedly not caused by the spill, even though that issue had been repeatedly conceded by BP on a number of occasions?

- Was it unethical for BP, in its earned media and/or paid ads, to represent that losses which BP had agreed would be deemed to have been caused by the Spill were somehow "fraudulent" or "fictitious"? And/or to represent or imply that Class Members with eligible claims would or might be subject to prosecution?

- Was it unethical for BP, in its earned media and/or paid ads, to represent (or at least imply) that BP was appealing the "no alternative causation" issue, even though, that issue had already been conceded, and as Mr. Olsen expressly acknowledged before the Fifth Circuit, was not even before the Court?

- Was it unethical for BP counsel to press the causation issue before the U.S. Fifth Circuit and the United States Supreme Court after initially representing and acknowledging to the Court of Appeal that the causation issue was not being challenged on appeal?

- Was it unethical for BP to represent to the press, (or, at the very least, refuse to correct), material factual mis-statements regarding the Claims Administrator, his background, or how he was selected?

- Was it unethical for BP to accuse the Claims Administrator and/or the Court of "high-jacking" the Settlement?

- Was it unethical for BP to accuse the Claims Administrator and/or the Court of "willfully misinterpreting" the Settlement? [36]

- Was it unethical for BP to file into the record – and actively publicize – frivolous actions and motions against the Claims Administrator for alleged "breach of fiduciary duty"?

- Was it unethical of BP to suggest (falsely) in one of its ads that the allegedly "fictitious" or "excessive" recoveries of some claimants would have an adverse effect on the rights or the claims of others?

- Do "Fraud Hotline" communications directly between BP and Class Members raise ethical concerns under Professional Rules 4.2 and/or 4.3?

- Was it unethical of BP to seek Rehearing *En Banc* from the U.S. Fifth Circuit and/or *Certiorari* from the U.S. Supreme Court on class settlement approval, after expressly warranting and representing that BP would take all reasonable steps to support the settlement thru final approval and to defend it on appeal?

- Was it ethical of BP's counsel to instruct independent medical institutions administering public health grants made through the Medical Benefits Settlement not to file an *amicus* brief in support of the Medical Benefits Settlement?

- Was it ethical of BP to suggest that the Phase One Trial Findings would be reversed based on an "impartial" review of the record? [37]

- Was it ethical of BP's counsel to suggest (falsely, and somewhat absurdly) that the Claims Administrator "mislead" and/or "actively concealed" an alleged 'conflict of interest' from Special Master Freeh? [38]

While some of this conduct was undertaken or accomplished by and through non-lawyers, and while the company and its employees have rights under the First Amendment, it could be argued that some of this conduct might raise potential questions under not only Sections 9.1, 16.1 and 17.1 of the Settlement Agreement,[39] (which appear to have been pretty clearly violated), as well as Federal Rules of Civil Procedure 11 and 23, but also a number of the Rules of Professional Conduct, including, potentially, Rule 3.1, Rule 3.3, Rule 3.6(a), Rule 4.1, Rule 4.2, Rule 4.3, Rule 7.2(c)(1), Rule 8.2(a) or Rule 8.4(d).[40]

Another interesting question is raised by the *amicus* briefs filed in the U.S. Fifth Circuit and the U.S. Supreme Court by the U.S. Chamber of Commerce on BP's behalf, purporting to speak for "more than three million U.S. businesses and organizations of every size, in every industry, and from every region of the country" – while refusing to disclose to either Court that at least hundreds if not thousands or tens of thousands of affiliates of the Chamber and business members of those Local Chamber affiliates had submitted claims for business economic losses in reliance on the Economic Settlement Agreement.[41]

Notes

1. *See generally,* PRE-TRIAL ORDER NO. 8 [Doc 506] (Oct. 8, 2010). [*Note* - Unless otherwise indicated, all Doc references are to Civil Action No. 10-md-2179 pending in the U.S. District Court for the Eastern District of Louisiana.]

2. Richard C. Stanley, "Ethical Issues in Class Action / Mass Tort Litigation" (for presentation by Stanley, Plattsmier and Schiff, "Complex Litigation Creates Complex Ethical Issues" LSBA 9th Annual Class Action / Mass Tort Symposium) (Oct. 16, 2009), p.8. Stanley references, in particular: *Lazy Oil Co. v. Witco Corp.,* 166 F.3d 581 (3d Cir. 1999); *In re Agent Orange,* 800 F.2d 14 (2d Cir. 1986); *Pettway v. Am. Cast Iron Pipe Co.,* 576 F.2d 1157 (5th Cir. 1978); *In re M&F Worldwide Corp. Shareholder Litig.,* 799 A.2d 1164, 1167 (Del. Ch. 2002); Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road,* 80 Cornell L. Rev. 1159 (1995). See also, for example: *White v. National Football League,* 822 F.Supp. 1389, 1405 (D. Minn. 1993), *aff'd*, 41 F.3d 402, 408 (8th Cir.1995), *cert. denied,* 515 U.S. 1137 (1995); *In re Corn Derivatives Antitrust Litigation,* 748 F.2d 157, 162-165 (3rd Cir. 1984) (Adams, J., concurring); NEWBERG & CONTE, *Newberg on Class Actions* (3rd ed. 1992) §9.34. See also, generally: Newberg & Conte, NEWBERG ON CLASS ACTIONS (4th ed. 2002) §15.3.

3. All references to Rules of Professional Conduct refer to the Louisiana Rules.

4. *See, e.g., Lazy Oil Co. v. Witco Corp.,* 166 F.3d 581 (3d Cir. 1999); *White v. National Football League,* 822 F.Supp. 1389, 1405 (D. Minn. 1993), *aff'd*, 41 F.3d 402, 408 (8th Cir.1995), *cert. denied,* 515 U.S. 1137 (1995); *In re Argent Orange*, 800 F.2d 14 (2d Cir. 1986); *In re Corn Derivatives Antitrust Litigation,* 748 F.2d 157, 162-165 (3rd Cir. 1984) (Adams, J., concurring).

5. *See generally,* MANUAL FOR COMPLEX LITIGATION, FOURTH (Federal Judicial Center 2004) §21.33; Newberg & Conte, NEWBERG ON CLASS ACTIONS (4th ed. 2002) §15.18; *see, e.g., Kleiner v. First National Bank of Atlanta,* 751 F.2d 1193, 1206-1207 (11th Cir. 1985); *Blanchard v. EdgeMark Financial Corp.,* 175 F.R.D. 293, 300-301 (N.D.Ill. 1997).

6. *See generally,* MANUAL FOR COMPLEX LITIGATION, FOURTH (Federal Judicial Center 2004) §§21.12 and 21.3 - 21.313; Newberg & Conte, NEWBERG ON CLASS ACTIONS (4th ed. 2002) §§7:32, 15:5 - 15:14, and 15.19; *Gulf Oil v. Bernard,* 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981) (a district court has both the duty and the broad authority to exercise control over a class action, and to enter appropriate orders governing the conduct of counsel and parties; however, where restricting communications, the court's order must be based upon a specific record establishing particular abuses or potential abuses, and must be narrowly tailored to protect the interests of respective parties consistent with the policies of Rule 23).

7. *See, e.g.,* 28 U.S.C. §516.

8. *See, e.g.,* L.A. Const. Art. IV, §8.

9. *See, e.g., Meredith v. State ex. rel. Ieyoub,* 700 So.2d 478 (La. 1997) (limiting the Attorney General's authority to pay a contingency fee to outside counsel in the absence of a Legislative Act), which, of course, does not answer the question of whether a Federal Court has the inherent, equitable, in

some cases statutory, or other power or authority to make a common benefit fee award, (whether under the Supremacy Clause and/or arguably before the net recovery that is not subject to the fee award becomes "the property, funds, and revenues of the state").

10. *See* 33 U.S.C. §2701, *et seq.*

11. *See* ORDER AND REASONS [Doc 1098] (Feb. 2, 2011), pp.11-13; citing, *In re School Asbestos Litigation,* 842 F.2d 671, 680 (3d Cir. 1988); *Kleiner v. First Nat'l Bank of Atlanta,* 751 F.2d 1193, 1204-1206 (11th Cir.1985); *Hampton Hardware, Inc. v. Cotter & Co.,* 156 F.R.D. 630 (N.D. Tex. 1994).

12. Louisiana Rule of Professional Conduct 4.3 provides that: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

13. *See* Professional Rule 4.2 (communications with persons represented by counsel).

14. *See, e.g.,* Professional Rule 8.4(d) (conduct prejudicial to the administration of justice).

15. Professional Rule 8.2(a) prohibits knowingly false or reckless statements regarding the integrity of a judge or "adjudicatory officer", etc.

16. *See, e.g.,* Professional Rule 1.4 (requiring the lawyer to keep the client reasonably informed about the material aspects of his or her case).

17. *See, e.g.,* Professional Rule 4.2.

18. *See, e.g.,* Professional Rule 7.2(c)(1) (prohibiting false, misleading or deceptive communications about the lawyer, the lawyer's services, or the law firm's services).

19. Of course, a question would arise in such a case as to whether the attorney had actually retained these experts; whether any such experts would have, in fact, been helpful to the common benefit effort; and/or whether the attorney could have actually prevented the experts from working with the PSC had the PSC attempted to retain them. Nevertheless, the ethical and professional questions presented by the hypothetical remain.

20. Particularly given the time constraints under which the PSC was operating to review millions of pages of newly produced Macondo Well documents and to conduct over 200 fact witness depositions over a relatively short period of time, the PSC always doubted whether documents produced in prior litigation could be effectively utilized in the *Deepwater Horizon* Litigation, and, in fact, the Court granted a BP pre-trial Motion *in Limine* which largely prevented inquiry into the facts and specifics of this prior incident during the Phase One Trial. [*See* Doc 5634]

21. *See* Professional Rule 3.4(a), which provides that a lawyer shall not "unlawfully" obstruct another party's access to evidence, and Professional Rule 3.4(f), which prohibits a lawyer from requesting that a person "other than a client" refrain from voluntarily giving relevant information.

22. *See* PRE-TRIAL ORDER NO. 8 [Doc 506], Miscellaneous No. 2, pp.3-4.

23. At least some of the reasoning behind the Steering Committee's decisions can likely be gleaned from the MOTION FOR LEAVE TO AMEND MASTER COMPLAINT [Doc 5718], (as well as the PSC's expectation that the Medical Benefits Class Settlement with BP would be finalized and approved).

24. *See* Professional Rule 1.4.

25. *See, e.g., Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1176-78 (5th Cir. 1978); *In re M&F Worldwide Corp. Shareholders Litig.*, 799 A.2d 1164, 1167 (Del. Ch. May 13, 2002).

26. *See generally,* Professional Rules 1.7, 1.8 and 1.9.

27. *See generally, Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997); *see also, e.g., In re Literary Works,* 654 F.3d 242 (2d Cir. 2011); *Central States v. Merck-Medco Managed Care, L.L.C.,* 433 F.3d 181 (2d Cir. 2005).

28. *See In re Oil Spill by the Oil Rig Deepwater Horizon,* 910 F.Supp.2d 891, 916-920 (E.D.La. 2012), *aff'd,* 739 F.3d 790 (5th Cir. 2014), *rehearing en banc denied,* 756 F.3d 320 (5th Cir. 2014), *cert. denied,* 135 S.Ct. 734 (2014). *See also, generally,* Plaintiffs' FINAL APPROVAL BRIEF [Doc 7104] pp.14-16, 43-46; Plaintiffs' REPLY BRIEF [Doc 7727] pp.8-11, 42-48.

29. In point of fact, classmembers were given several weeks to decide whether they wanted to either participate in the Class Settlement, continue to litigate, or accept the "Quick Pay" – and that time period was extended on Motion of Class Counsel [Doc 6413] an additional month to June 11, 2012. While the PSC argued to BP that the "Quick Pay" option should be treated on the same 60/40 basis as other final GCCF offers, and available throughout the entire Transition period, BP refused. Ultimately, the PSC had no control over the authority extended (or not extended) by BP to Mr. Feinberg and the GCCF. That is one of the inherent problems with a unilateral settlement program: promises and policies are often difficult to enforce. As to the specific ethical issue, the notion that the PSC had some "obligation" to reject the entire Economic & Property Damages Settlement over this issue seems a little silly and absurd.

30. *See* SETTLEMENT AGREEMENT, Section 21.3.

31. While Federal Rules 23(e)(5) and (h)(2) facially afford statutory standing to all class members, Article III standing requirements of injury and redress arguably preclude or constrain the specific objections that can be advanced by specific objectors, based on the settlement terms and the circumstances. It would seem, at the same time, that the Professional Rules would also limit the scope of objections that can be advanced by an attorney to those elements of the settlement to which the objector himself or herself actually did not agree. *See, e.g.,* Professional Rule 1.2(a) (abiding by the client's wishes regarding the objectives of the litigation); Rule 3.1 (meritorious claims and contentions); Rule 3.3 (candor toward the tribunal).

32. *See generally* SUBMISSION BY CLASS COUNSEL ON REMAND OF MEDICAL SETTLEMENT (with Incorporated Motion to Strike, Motion to Dismiss, and Motion for Sanctions) [Doc 11869] (Nov. 19, 2013).

33. *See, e.g., In re Diet Drugs Prod. Liab.Litig.*, 282 F.3d 220, 237-241 (3rd Cir. 2002); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-1024 (9th Cir. 1998).

34. *See generally,* ORDER AND REASONS [Doc 12055] (Dec. 24, 2013) at pp.6-43; Plaintiffs' OPPOSITION TO MOT FOR EMERGENCY INJUNCTION, No.13-30315 [5th Cir. Doc. 00512450441] (Nov. 22, 2013) pp.7-28; Plaintiffs' OPPOSITION TO BP'S MOTION FOR RECONSIDERATION [Doc 8963-54] pp.20-23; ORDER AND REASONS [Doc 11890] (Nov. 22, 2013) pp.10-11 ("BP accuses the Claims Administrator of 'rewriting' and 'systematically disregarding' the Settlement Agreement. To the contrary, when it talks about causation, if anyone is attempting to rewrite or disregard the unambiguous terms of the Settlement Agreement, it is counsel for BP. Frankly, it is surprising that the same counsel who represented BP during the settlement negotiations, participated in drafting the final Settlement Agreement, and then strenuously advocated for approval of the settlement before this Court, now come to this Court and the Fifth Circuit and contradict everything they have previously done or said on this issue. Such actions are deeply disappointing, especially considering that the Court has previously appreciated and complimented the excellent cooperation and professionalism exhibited by all counsel in this extremely complex and difficult litigation").

35. *See* REVIEW OF ISSUE FROM PANEL [Doc 8812] (March 5, 2013). Ultimately, the U.S. Fifth Circuit reversed the District Court on this "variable expense" issue. *See In re Deepwater Horizon,* 732 F.3d 326 (5th Cir. 2013) ("*Deepwater Horizon I*"). However, the Fifth Circuit did **not** agree with BP on causation. *See In re Deepwater Horizon,* 744 F.3d 370 (5th Cir. 2014) ("*Deepwater Horizon III*"), *rehearing denied,* 753 F.3d 509 (5th Cir. 2014), *rehearing en banc denied,* 753 F.3d 516 (5th Cir. 2014). (*See also, In re Deepwater Horizon,* 739 F.3d 790 (5th Cir. 2014) ("*Deepwater Horizon II"*), *rehearing en banc denied,* 756 F.3d 320 (5th Cir. 2014), *cert. denied,* 135 S.Ct. 734 (2014).)

36. Rob Davies, "BP suffers revolt as executive pay packages are rejected by 32pc of investors" *MailOnline* (April 10, 2014) (http://www.dailymail.co.uk/money/markets/article-2601955/BP-suffers-revolt-executive-pay-packages-rejected-32pc-investors.html) (last visited Oct. 14, 2014).

37. "Statement on Gulf of Mexico" (Sept. 4, 2014) (http://www.bp.com/en/gobal/corporate/press/press-releases/statement-on-the-gulf-of-mexico.html) (last visited Oct. 14, 2014).

38. BP APPELLANT'S BRIEF, U.S. Fifth Cir. No. 14-31299 [5th Cir. Doc. 00512881374] (Dec. 23, 2014) pp.2, 20. ***But see:*** CLASS RESPONSE TO BP'S MOTION TO REMOVE THE CLAIMS ADMINISTRATOR [Doc 13496] (Oct. 15, 2014) at pp.19-21.

39. Section 9.1 of the Economic & Property Damages Settlement Agreement provides that: "Communications by or on behalf of the Parties and their respective Counsel regarding this Agreement with the public and media shall be made in good faith, shall be consistent with the Parties' agreement to take all actions reasonably necessary for preliminary and final approval of the Settlement." Section 16.1 provides that: "The Parties agree to take all actions necessary to obtain final approval of this Agreement and entry of a Final Order and Judgment." Section 17.1 provides that: "The Parties agree to support the final approval and implementation of this Agreement and defend it against objections, appeal, or collateral attack." Sections XIII and XXVI of the Medical Benefits Settlement Agreement contain similar provisions.

40. *See generally,* CLASS RESPONSE TO BP'S MOTION TO REMOVE THE CLAIMS ADMINISTRATOR [Doc 13496] (Oct. 15, 2014) at pp.19-21 and fn.60-66.

41. *See, e.g., Amicus* Brief submitted by the Mobile Area Chamber of Commerce, et al, in opposition to the BP Petition and the U.S. Chamber *Amicus* Brief in the U.S. Supreme Court, No.14-123 (Oct. 2014).