DRAFT
June 1, 2017

Duties Owed by Appointed Counsel to MDL Litigants Whom They Do Not Formally Represent

Stephen J. Herman

It is well-settled that Courts have the authority to appoint Lead Counsel, Liaison Counsel, and Plaintiffs' Executive or Steering Committees to perform certain functions on behalf of all plaintiffs in an MDL or other similar complex, coordinated or consolidated proceeding. Questions frequently arise, in such cases, regarding the existence, nature and scope of duties that may be owed by such appointed counsel to plaintiffs in the litigation. Some have posited that lawyers in leadership positions have a "fiduciary" duty to each and all litigants. At the opposite end of the spectrum, others have argued that appointed counsel's duties of loyalty remain with those individual plaintiffs whom they personally represent, to the exclusion, and potential prejudice, of other litigants with cases pending in the MDL or other similar proceeding. Looking to common law, the Rules of Professional Conduct, class action jurisprudence, and other analogous frameworks such as ERISA, this paper is intended to explore the duties, if any, owed by appointed counsel in leadership positions to their own clients, to other plaintiffs, and/or to the privately retained counsel who might be representing other plaintiffs in the litigation.

Introduction

It is important to recognize, at the outset, that Lead Counsel's[1] authority in an MDL type proceeding emanates from the Court. This is distinguished from the typical attorney-client situation, in which the lawyer's authority arises from a formal retainer agreement between the attorney and the plaintiff.[2] While, in that situation, the scope of the lawyer's responsibility may be reasonably limited by express agreement between the attorney and the plaintiff,[3] it is generally presumed that the lawyer will undertake any and all actions reasonably necessary to achieve the

[1] The term "Lead Counsel" is being used generically as a shorthand for any lawyer appointed by the Court to act for plaintiffs in the litigation, whether designated "Lead Counsel", "Liaison Counsel", a "Plaintiff Steering Committee" member, a "Plaintiffs' Executive Committee" member, etc. At some point, in some MDLs or other similar proceedings, a formal class may be certified for litigation and/or settlement purposes, and these same or other counsel may be appointed to serve as "Class Counsel". While many of the same principles at least arguably apply in a formal class action, Class Counsel's obligations vis-à-vis absent classmembers may differ from Lead Counsel's duties to plaintiffs in the non-class setting.

[2] *See generally* RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, §14(1) (2000); ABA MODEL RULES OF PROFESSIONAL CONDUCT: PREAMBLE & SCOPE, ¶17 ("Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so"); *see also, e.g.,* ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.5(b) and (c); LA. RULE OF PROFESSIONAL CONDUCT 1.5(b) and (c).

[3] *See, e.g.,* ABA MODEL RULE 1.2(c); LA. PROFESSIONAL RULE 1.2(c).

desired results and objectives of the litigation.[4] In the appointed counsel situation, by contrast, Lead Counsel's authority, and concomitant responsibility, is generally defined, not in terms of the ultimate goals sought by plaintiffs, but in terms of the procedural steps that must be undertaken from the Court's perspective, and are generally set forth in an order of appointment which describes the services that Lead Counsel are asked and directed to perform.[5] While such appointment is intended to generally advance and protect the interests of each plaintiff, its primary purpose is to further the interests of judicial efficiency and economy, for the collective benefit of all plaintiffs, the defendants, any affected third parties, and the Court.[6] To the extent that each plaintiff has his or her own particular facts, circumstances and interests (which may be common to all other plaintiffs in some respects, unique in other respects, and in some ways perhaps even divergent or potentially adverse), it is assumed, in the MDL type setting, that such plaintiffs are being simultaneously represented and protected by privately retained counsel.[7,8] Therefore, to the extent that Lead Counsel can be said to have a "fiduciary" duty or other obligations to plaintiffs whom they do not formally represent, such duties are **(i)** limited to the specific actions that Lead Counsel are appointed and authorized to undertake, and **(ii)** owed, not to any one individual plaintiff, but to the common and collective interests of the plaintiffs as a whole.[9]

---

[4] *See generally* ABA MODEL RULES 1.2(a) and 1.4(a)(2); LA. PROFESSIONAL RULES 1.2(a) and 1.4(a)(2).

[5] *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, FOURTH (Federal Judicial Center 2004) §10.222 ("The functions of lead, liaison and trial counsel, and of each committee, should be stated in either a court order or separate document drafted by counsel for judicial review and approval").

[6] *See, e.g.*, MANUAL FOR COMPLEX LITIGATION §10.22 ("Traditional procedures in which all papers and documents are served on all attorneys, and each files motions, presents arguments, and examines witnesses, may *waste time and money, confuse and misdirect the litigation, and burden the court unnecessarily*") (emphasis supplied).

[7] *See, e.g.*, MANUAL FOR COMPLEX LITIGATION §10.22 (assuming "numerous parties with common or similar interests but *separate counsel*") (emphasis supplied).

[8] This is an important source of potential distinction between a class action, on the one hand, and an MDL-like coordinated or consolidated proceeding, on the other. While, in some class actions, many or perhaps even all of the classmembers are individually represented by counsel, the class action device generally presumes that the absent classmembers will not have their own independent economically viable claims, and are therefore made parties to the litigation only by virtue of the class certification order, without individual representation. In that situation, the only attorneys representing their interests are Class Counsel. The considerations are different, and responsibilities arguably less, where the class action device is employed primarily as a settlement vehicle for existing cases, in which most or all of the absent class members are already represented.

[9] *See, e.g.*, MANUAL FOR COMPLEX LITIGATION §21.12 ("an attorney acting on behalf of a putative class must act in the best interests of the class as a whole"); Charles Silver, The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation, 79 Fordham L. Rev. 1985, 1989 (2011) ("By subordinating one client's interests to another's without informed consent, a lawyer would act disloyally. Other fiduciaries are allowed to make tradeoffs. Trustees are the exemplars of this group. A trustee may use entrusted assets to send one beneficiary to college even though less money will be available to help another beneficiary as a result. *When making tradeoffs among beneficiaries, trustees need only be reasonable and fair.* The Principles suggests that *lead attorneys resemble trustees more than lawyers or other agents. Their responsibility is to 'pursu[e] the good of all,'* which, if need be, they may do by making tradeoffs that are reasonably 'likely to *maximize the value of all claims in the group*'") (emphasis supplied).

No "Fiduciary" Responsibility in the Traditional Sense

While Lead Counsel clearly have a duty to perform the functions to which they have been appointed in a fair, honest, competent, reasonable, and responsible way,[10] it is, in my view, inappropriate to describe Lead Counsel's obligations to other plaintiffs as "fiduciary" in the traditional sense of the word. For one thing, the origin and nature of the relationship between Lead Counsel and MDL plaintiffs differs in significant respects from the common law fiduciary relationships of agency and/or trust. The imposition, moreover, of strict fiduciary standards to an MDL type situation would be extremely burdensome for Lead Counsel, and/or the Court, to adhere to, and/or enforce. This is, admittedly, somewhat circular logic. But it seems strange that the Courts would knowingly establish a "fiduciary" role in order to enhance judicial economy in a way that could not be efficiently or effectively accomplished by someone working within the strictures typically imposed upon a fiduciary. In any event:

Under the common law, the agency relationship is generally a consensual relationship, under which the principal retains the right to direct and control the agent's actions, as well as the power to terminate the agency.[11] In the MDL type context, however, these hallmarks of a traditional agency relationship are missing. With the exception of Lead Counsel's individually retained clients, there is no underlying offer and acceptance of power of attorney or agency between such appointed counsel and the plaintiffs.[12] (Indeed, as noted, it is generally the case that

[10] *See, e.g.,* MANUAL FOR COMPLEX LITIGATION §10.22 ("Counsel designated by the court also assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel").

[11] *See* RESTATEMENT (THIRD) OF AGENCY, §1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act"); Comment *c* ("A relationship is not one of agency within the common-law definition unless the agent consents to act on behalf of the principal, and the principal has the right throughout the duration of the relationship to control the agent's acts.... A principal's right to control the agent is a constant across relationships of agency.... The requirement that an agent be subject to the principal's control assumes that the principal is capable of providing instructions to the agent and of terminating the agent's authority"); Comment *d* ("Under the common-law definition, agency is a consensual relationship"); Comment *f(1)* ("An essential element of agency is the principal's right to control the agent's actions. Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms. Additionally, a principal has the right to give interim instructions or directions to the agent once their relationship is established"); *see also* RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, §14(1) (2000) ("A relationship of client and lawyer arises when a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person").

[12] While Section 14(2) of the Restatement of the Law Governing Lawyers and Comments *c* and *d* to Section 1.01 of the Restatement on Agency indicate that a fiduciary relationship can also be established when the Court appoints a lawyer, this seems to contemplate the situation where a criminal lawyer is appointed to represent an indigent defendant or, perhaps, where a guardian *ad litem* or other attorney is appointed to represent a minor, incompetent, or absentee. *See, e.g.,* Comment *f* to §14 of the Restatement Governing Lawyers, (which addresses class actions as an exception to sub-Section 14(1), as opposed to an example of sub-Section 14(2)). *See also* Comment *f* to Restatement on Agency §1.01, which explains that: "A relationship of agency is not present unless the person on whose behalf action is taken has the right to control the actor. Thus, if a person is appointed by a court to act as a receiver, the receiver is not the agent of the person whose affairs the receiver manages because the appointing court retains the power to control the receiver."

each litigant will have his or her own privately retained attorney to protect and advance his or her own particular interests.) In carrying out the assigned tasks to which Lead Counsel have been appointed, they are generally left to their own good judgment and discretion, and are not subject to the instruction or control of one or more of the plaintiffs.[13] Nor does any one plaintiff or the plaintiffs collectively have the power to terminate Lead Counsel's authority to act, which can only be altered or rescinded by the Court.

Unlike privately retained counsel who frequently assume a fiduciary relationship of trust with respect to deposits, advances, or the receipt and distribution of settlement proceeds,[14] Lead Counsel in the typical MDL-type situation are rarely in possession or control over plaintiff funds or other property. There exists, in this regard, a common misconception relative to the expenditure by Lead Counsel of litigation costs and expenses. When appointed counsel advance or incur expenses for the common benefit of plaintiffs, they are, at that point, simply spending their own money. It is only at the point that Lead Counsel seek reimbursement out of a successful judgment or settlement that a claim is made against plaintiff funds – which claim is almost always subject to Court approval.[15, 16] As distinguished, moreover, from the typical case, in which judgment or settlement proceeds would be deposited into the attorney's trust account for subsequent accounting and distribution, settlement funds obtained in an MDL type proceeding are generally placed into a QSF, with an independent Escrow Agent, and requiring Court approval for any disbursement, reimbursement, payment or withdrawal.

---

[13] In some cases, the Court's appointment of Lead Counsel will, at the same time, expressly limit Lead Counsel's ability to bind the plaintiffs. In the *Deepwater Horizon* MDL, for example, the Court's Order appointing the Plaintiff Steering Committee provided that: "All stipulations entered into by the PSC, except for strictly administrative details such as scheduling, must be submitted for Court approval and will not be binding until the Court has ratified the stipulation. Any attorney not in agreement with a non-administrative stipulation shall file with the Court a written objection thereto within five (5) days after he/she knows or should have reasonably become aware of the stipulation." PRETRIAL ORDER NO. 8, *In re: Oil Spill by the Oil Rig "Deepwater Horizon"*, MDL No.2179, Civil Action No. 2:10-md-02179, Rec. Doc. 506 (Oct. 8, 2010), at p.4.

[14] *See, e.g.*, Charles E. Rounds, Jr., Lawyer Codes are Just About Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles that Regulate the Lawyer-Client Fiduciary Relationship, 60 Baylor L. Rev. 771, 813 (2008).

[15] Even where so-called "shared expenses" are reimbursed to a Lead Counsel firm in advance of a judgment or settlement, such reimbursement is not made from *plaintiff* funds, but from a pool of money put up by the Lead Counsel firms themselves. In the event that a judgment or settlement is reached, such collective expenses may ultimately be reimbursed out of plaintiff funds, but generally subject to interim and/or final Court approval.

[16] In some cases, the defendant, as part of a "global" or other settlement, will agree to reimburse litigation expenses, over and above the corpus of settlement proceeds made available to the plaintiffs. While, in at least the class action setting, the Court must be mindful of the possibility of "structural collusion" during the class settlement approval process, from a fiduciary standpoint, Lead Counsel are never even making a claim for common benefit expenses against *plaintiff* funds.

As a practical matter, moreover, it would be impossible to impose a strict traditional common law duty of loyalty upon Lead Counsel, and, as a policy matter, it would be unwise.[17] First of all, it would require an endless series of inquiry and dispute over the extent to which a potential or actual "conflict" might exist. Which would largely undermine, if not eliminate entirely, the judicial efficiencies and economies sought to be gained. Secondly, it would often actually work to the detriment of the very plaintiffs whom such rules are ostensibly designed to protect, by depriving them of the most knowledgeable, skilled and/or experienced counsel,[18] and by "balkanizing" the plaintiffs into so many sub-groups that cooperative and effective progress and/or resolution is prevented.[19]

At most, it would seem appropriate to think of a privately retained counsel as analogous to a "named fiduciary" under ERISA,[20] whereas Lead Counsel would be more analogous to a "functional fiduciary" – who is only a fiduciary to the extent that he or she actually exercises

[17] It has been widely recognized, in this regard, that the traditional conflict-of-interest proscriptions embodied in Professional Rules of Conduct 1.7 and 1.9 cannot and should not be mechanically applied to Class Counsel with respect to each and all classmembers. *See, e.g.,* Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 588-591 (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 Agent Orange, 800 F.2d 14, 18-19 (2d Cir. 1986); In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 162-165 (3d Cir. 1984) (Adams J., concurring). As discussed in Footnote 8 *supra*, there is even a less compelling basis to impose Professional and fiduciary rules upon Lead Counsel than Class Counsel, as MDL plaintiffs are generally represented by their own privately retained counsel to advance and protect their own particular interests, in addition to the Lead Counsel attorneys appointed to represent the common interests of plaintiffs collectively.

[18] *See, e.g.*, Lazy Oil, supra, 166 F.3d at 590; White v. NFL, 822 F.Supp. at 1405; Agent Orange, 800 F.2d at 18-19.

[19] *See, e.g.*, In re Deepwater Horizon, 910 F.Supp.2d 891, 920 (E.D.La. 2012) ("the use of a multitude of subclasses – each with separate class representatives and counsel – would have greatly complicated both the settlement negotiations and the overall administration of the litigation") (*citing* In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 271 (3d Cir. 2009) ("Subclassing can create a 'Balkanization' of the class action and present a huge obstacle to settlement if each subclass has an incentive to hold out for more money") (*quoting* In re Cendant Corp. Sec. Litig., 404 F.3d 173, 202 (3d Cir. 2005)), *aff'd*, Deepwater Horizon II, 739 F.3d 790, 813 (5th Cir. 2014) ("there is no need to create subclasses to accommodate every instance of 'differently weighted interests'"), *cert. denied*, 135 S.Ct. 754 (2014). An overzealous sub-grouping or balkanization of the MDL Lead Counsel structure and responsibilities in the non-class setting would create similar impediments, both in terms of judicial efficiency and in terms of advancing the common and collective interests of the plaintiffs as a whole.

[20] *See* 29 U.S.C. §1102(a) (requiring "named fiduciaries" who "jointly or severally shall have authority to control and manage the operation and administration of the plan").

control over the plaintiffs' funds or undertakes some action or decision with respect to their substantive rights and interests in the litigation.[21, 22]

The GM Ignition Switch Litigation

In the *GM Ignition Switch Litigation,* Professor Silver filed a declaration in support of plaintiffs' attorneys who argued that Lead Counsel owed, and had breached, his fiduciary duties to plaintiffs in the MDL, relying, in part, on the ALI's Principles of the Law of Aggregate Litigation.[23] Professor Miller, on the other hand, explained that the quoted language is was not formally adopted by ALI, but is contained within a Reporter's Note, and simply expresses the opinion of one of the reporters.[24] This dispute received a lot of attention in the legal community. But was, in my view, greatly overblown and exaggerated.

---

[21] *See, e.g.*, Pegram v. Herdrich, 530 U.S. 211, 225-226 (2000) (an administrator is a fiduciary "only 'to the extent' that he acts in such a capacity in relation to a plan"); *citing* 29 U.S.C. §1002(21)(A) ("a person is a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice…, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan") (emphasis supplied); *see also, e.g.*, Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) (the statute "defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan").

[22] ERISA is also a useful analogy in that it draws a distinction between the obligations that are owed to an individual plan participant or beneficiary and the fiduciary duties that are owed, not to any particular plan participant or beneficiary, but to the plan as a whole. *See, e.g.*, Massachusetts Mut. Life Ins. Co. v. Russell, 437 U.S. 134, 140-142 (1985) ("It is of course true that the fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan," but any recovery under Section 409(a) of ERISA, entitled Liability for Breach of Fiduciary Duty, "inures to the benefit of the plan as a whole").

[23] MOTION TO REMOVE THE CO-LEADS AND RECONSIDER BELLWETHER SCHEDULE, *In re: General Motors Ignition Switch Litigation,* MDL No.2543, Civil Action No.1:14-md-02543, Rec. Doc. 2179 (S.D.N.Y. Jan. 25, 2016) at p.5 fn.7 (citing PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, §1.04 (2010) ("[c]lass counsel is a [] fiducairy to a client[, the named plaintiff,] who is also a fiduciary [to other class members]," and that "[a] similar relationship obtains between lead attorneys and other lawyers in a multidistrict litigation"). *See also, generally* DECLARATION OF CHARLES SILVER, *In re: General Motors Ignition Switch Litigation,* MDL No.2543, Civil Action No.1:14-md-02543, Rec. Doc. 2243-2 (S.D.N.Y. Feb. 5, 2016). In his 2011 law review article, (which is quoted in the declaration), Professor Silver noted that there was a "dearth" of admittedly "scare" "solid authority" for the proposition that Lead Counsel are "fiduciaries". *See* Silver, Responsibility of Lead Lawyers, supra, 79 Fordham L. Rev. at 1987-1988 and 1989. Notably, Professor Silver starts from the proposition that Lead Counsel, like Class Counsel, resemble trustees, as fiduciaries, more than lawyer-agents, (*see* 79 Fordham L. Rev. at 1987 and 1989), but, in making the argument that Lead Counsel should be considered "fiduciaries", relies primarily on the lawyer-agency model: "lead attorneys displace disabled lawyers" and thereby "assume disabled lawyers' duties." Silver, Responsibility of Lead Lawyers, 79 Fordham L. Rev. at 1989.

[24] *See* DECLARATION OF GEOFFREY PARSONS MILLER, *In re: General Motors Ignition Switch Litigation,* MDL No.2543, Civil Action No.1:14-md-02543, Rec. Doc. 2200-1 (S.D.N.Y. Feb. 1, 2016) p.5, ¶16. Professor Miller further distinguishes a Restatement, which is intended to reflect the current state of existing law, from Principles, which contain recommendations. *See* MILLER DECLARATION, at p.5, ¶15.

First off, it is important to recognize that the opinions regarding "fiduciary duty" were not advanced in a vacuum, but within a specific factual and procedural context. The issue was raised in a Motion to Remove Lead Counsel, in which the movants cited the Principles' comment, among other things. Professor Miller's declaration was submitted in opposition to that motion. And Professor Silver's declaration was submitted, in turn, as a response to Professor Miller, in reply. But the precise question before the Court was not the extent to which Lead Counsel owed, or had breached, a fiduciary duty to plaintiffs in the litigation, (either with respect to the selection of bellwether plaintiffs and/or with respect to the "inventory" settlement of Lead Counsel's own cases), but rather, whether Lead Counsel should continue to serve in that capacity to other plaintiffs in the MDL.[25]

More fundamentally, the disagreement between the two professors is largely semantic. Professor Silver's Declaration, in this regard, does not suggest that Lead Counsel owes a fiduciary duty to each and all MDL plaintiffs in the traditional context, but that Lead Counsel must put the common and collective interests of all plaintiffs first.[26] Professor Miller does not appear to disagree.[27]

The points of departure (if any) appear to revolve, not around the existence of a general duty to plaintiffs with cases pending in the MDL, but around the fact that Professor Silver **(a)** retrospectively, appears to infer from the circumstances that Lead Counsel likely compromised the common interests of plaintiffs collectively, while at least protecting if not enhancing his own

[25] *See* ORDER NO.95, *In re: General Motors Ignition Switch Litigation*, MDL No.2543, Civil Action No.1:14-md-02543, Rec. Doc. 2263 (S.D.N.Y. Feb. 10, 2016), denying Motion to Remove Co-Lead Counsel, (and an associated Motion to Reconsider the Establishment of a Qualified Settlement Fund), while noting that the moving plaintiffs "do not even come close to providing a legal basis for the drastic step of removing Lead Counsel in the middle of MDL proceedings that, all things considered, have proceeded remarkably smoothly and swiftly to date."

[26] SILVER DECLARATION, p.13, ¶21 ("an attorney who serves as lead counsel in an MDL is a fiduciary *to the following extent*: the attorney must manage the common benefit workload in a manner that is calculated to maximize the gains for all plaintiffs") (emphasis supplied); *see also* ¶22 (*quoting* Charles Silver, The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation, 79 Fordham L. Rev. 1985, 1989-1990 (2011) ("*To the extent that* lead attorneys displace [other] lawyers [by controlling common benefit work], they assume [other] lawyers' duties, including the fiduciary duty to refrain from exploiting clients")) (emphasis supplied). *See also* Silver, The Responsibilities of Lead Lawyers, supra, 79 Fordham L. Rev. at 1989 (quoted in Footnote 9 *supra*) (Lead Counsel's responsibility is to "pursue the good of all" and, in so doing, may make trade-offs, so long as they are reasonably likely to "maximize the value of all claims") (*citing* Principles of the Law of Aggregate Litigation §1.05 Comment *f*) (also citing MANUAL FOR COMPLEX LITIGATION §21.12).

[27] *See* MILLER DECLARATION, p.6, ¶17 (despite the insinuations of counsel for the moving plaintiffs, "the quotation on which he relies is consistent with the principles that I set forth above. The quoted language indicates that attorneys performing common benefit work should act fairly, efficiently and economically in the interests of all plaintiffs - hardly a controversial proposition").

clients' interests, in the bellwether and/or settlement process,[28] and/or **(b)** prospectively, believes that it is unwise to retain Lead Counsel in that position after settling most, if not all, of his or her own cases.[29]

Lead Counsel's Duty to Provide Information to MDL Plaintiffs (and/or their Attorneys)

Both traditional fiduciary responsibility and the Professional Rules of Conduct impose affirmative obligations to inform clients about significant developments or decisions affecting their interests, as well as a general duty of full disclosure regarding any and all facts and circumstances regarding the representation, when asked.[30] However, as with the duty of loyalty, it would be both impractical and unwise to require Lead Counsel to reveal sensitive strategic issues, confidential settlement negotiations, and/or other information provided under a condition of confidentiality to all plaintiffs in the litigation (or their counsel) on a periodic basis, or when asked.

[28] Professor Silver emphasizes that, (with one possible exception), he is not saying that Lead Counsel did anything that was knowingly or intentionally "improper"; but only that a "serious" and untenable "conflict of interest" exists when Lead Counsel negotiate a side-settlement of his or her own firm's inventory of cases while retaining a leadership position in the MDL. *See* SILVER DECLARATION, p.6, ¶¶8-9 (*see also* ¶¶10-20). Whether this is correct, either as a legal proposition or as a matter of policy, is discussed *infra*. But the risk that Professor Silver identifies is a risk that the interests of other MDL plaintiffs will be compromised during the settlement negotiations; the resignation by Lead Counsel "who wants to negotiate a side-settlement" contemplated by Professor Silver would occur before the negotiations begin. And, since the inventory settlement at issue in the *GM Litigation* had already occurred by the time the motion was being considered, it would only justify removal if there was an actual concern of a collusive agreement to compromise the MDL plaintiffs' interests in some way on a going forward basis.

[29] SILVER DECLARATION, pp.15-16, ¶26 (questioning "the wisdom of allowing lawyers with few cases to control MDLs") (*citing* Charles Silver and Geoffrey P. Miller, The Quasi-Class Action Method of Managing Multi-District Litigation: Problems and a Proposal, 63 Vand. L. Rev. 107, 161 (2010)). To the extent Professor Silver (and/or Professor Miller) suggest that MDLs should be controlled by those with the largest or most valuable inventory of cases, I strongly disagree, as a matter of practice and policy. While there are, of course, potential benefits to the inclusion of such attorneys within the leadership structure, as well as potential risks in assigning Lead Counsel positions to attorneys with few or no cases, the successful management of complex multi-plaintiff litigation requires a unique skill set of knowledge, experience, strategic vision, resources, the ability to work well with others, and both the capacity and the willingness to ascertain and advance the common and collective interests of all plaintiffs – placing them before Lead Counsel's own interests, and, perhaps, at times, even the interests of his or her own individually retained clients. Some lawyers with large inventories have these skill sets. But many don't. (And/or won't.)

[30] *See, e.g.*, Rounds, Lawyer Codes, supra, 60 Baylor L. Rev. at 791 ("the lawyer-agent has an ongoing affirmative duty to furnish the client-principal with all material information that is in the lawyer-agent's possession and relevant to the agency, whether or not the client-principal asks for the information"); RESTATEMENT (THIRD) OF AGENCY §8.11 (2006) ("An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when ... subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal"); ABA MODEL RULE 1.4(a) and LA. PROFESSIONAL RULE 1.4(a) (requiring a lawyer to promptly inform the client of any decision or circumstance requiring his or her informed consent; reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; and promptly comply with reasonable requests for information).

Indeed, the *Complex Manual* explicitly admonishes Lead Counsel to "use their judgment" in advising MDL plaintiffs and/or their attorneys of progress of the litigation, as "too much communication may defeat the objectives of efficiency and economy."[31]

Taking the existence, nature, scope and/or particulars of confidential settlement discussions as a recurring example, individual MDL plaintiffs (or, more often, their privately retained counsel) frequently take the position that they are entitled to updates and/or other disclosures. At the same time, however, Defendants are frequently only willing to engage in such discussions under a veil of confidentiality, and will discontinue the negotiations in the event of a breach.[32] To be sure, a proposed settlement negotiated by Lead Counsel must be structured in such a way that neither a privately retained client nor any other plaintiff is bound to its terms until *after* there has been full and transparent notice and/or other disclosure.[33] Prior to the point of decision, however, the value of the information is of limited utility, whereas the risks and consequences of compromise are considerable and potentially severe.

From a legal or fiduciary standpoint, complex multi-plaintiff litigation is perhaps subtly, yet fundamentally, distinct from single-party litigation, in (at least) two respects. First, the source of the information. In the typical case, the attorney is retained to act at the agent of the principal. And whatever information he or she acquires in the course of the representation generally "belongs" to the client.[34] In the MDL type situation, on the other hand, Lead Counsel are acquiring information, not as an agent of a particular plaintiff, but because he or she has been authorized or directed to undertake a certain function by the Court. Secondly, because of the security of the information. In the typical case, the client generally has no interest or incentive to reveal privileged or confidential information relayed by his or her attorney. And if the plaintiff does divulge such confidences, he or she is generally only hurting himself. In the MDL type situation, by contrast, there will often be individual litigants – and privately retained counsel – who, whether acting in good or bad faith, will perceive some advantage to the plaintiffs collectively or some leverage to a particular plaintiff or sub-group of plaintiffs (or perhaps to the privately retained lawyer himself), in disseminating the information more broadly. When such confidences are compromised, whether inadvertently or intentionally, the consequences are visited upon not just the plaintiff or lawyer who divulges the information, but upon other plaintiffs with cases pending in the

[31] COMPLEX MANUAL, §10.222.

[32] Particularly when dealing with publicly-traded companies, it is frequently essential that discussions remain confidential in light of SEC and/or other regulatory issues and requirements, and/or the potential for undesirable market fluctuations in the stock or corporate bond prices due to speculative trading.

[33] *See generally* ABA MODEL RULES 1.2(a) and 1.8(g); LA. PROFESSIONAL RULES 1.2(a) and 1.8(g); FED. RULE CIV. PRO. 23(e).

[34] *See, e.g.,* ABA FORMAL OPINION NO. 471 (July 1, 2015); RESTATEMENT (THIRD) LAW GOVERNING LAWYERS (2000) §46 ("On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse"); LA. PROFESSIONAL RULE 1.16(d) ("Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter").

litigation.[35] While different circumstances will call for different levels of disclosure to the plaintiffs and their privately retained counsel, so that they can appropriately protect their interests and/or make material decisions when a decision is to be made,[36] it seems absurd that Lead Counsel would be "required" to disseminate sensitive information on an unlimited and ongoing basis to lawyers and/or litigants who will predictably prejudice the interests of the very plaintiffs whose collective interests Lead Counsel were appointed by the Court to advance.

The more difficult question, in my view, is the level of disclosure owed to Lead Counsel's own individually retained clients. Both traditional fiduciary standards and the Professional Rules recognize exceptions to the general duties of disclosure where such revelations would violate a superior duty owed to another.[37] The question of which duty is "superior" is naturally going to be somewhat subjective, and will largely depend on the particular facts and circumstances, but my personal view is that Lead Counsel is generally not obligated to share – and, for the reasons outlined above, generally should refrain from sharing – confidential and sensitive information gained in the context of his or her Lead Counsel functions with even his or her own privately retained clients, absent some compelling reason to do so. Because the reality is that Lead Counsel is not privy to the information as the representative of his or her own clients, but rather, because the Court has placed Lead Counsel into that role; and the Court, in making such appointment, is not attempting to advance the interests of Lead Counsel's clients in particular, but to advance the interests of all parties, by asking Lead Counsel to prosecute and protect the common and collective interests of plaintiffs as a whole.

Duties of Lead Counsel at the Negotiating Table

It must be recognized, at the outset, that one of the primary difficulties in successfully navigating the ethical and/or fiduciary landscape surrounding settlement stems from the fact that resolution efforts are largely driven and defined by defendants, while the ethical and/or fiduciary

[35] As well as, potentially, other would-be plaintiffs, putative class members, the defendants, parties with similar cases pending in other jurisdictions, and/or affected third parties.

[36] In my paper on *Ethical Questions Raised by the BP Oil Spill Litigation*, I suggested that the extent – and, particularly, the timing – of the obligation to disclose likely depends 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 [October 18, 2013], 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." [Available at: http://gravierhouse.com/ethical-questions-raised-by-the-bp-oil-spill-litigation1/ (updated as of Nov. 11, 2016).]

[37] RESTATEMENT ON AGENCY, §8.11(2); *see also, e.g.*, ABA FORMAL OPINION NO. 471 ("Commonly recognized exceptions to surrender include: materials that would violate a duty of non-disclosure to another person"); Restatement of the Laws Governing Lawyers §16 Comment *e* ("a lawyer's duty of confidentiality to another client may prohibit some disclosure").

implications fall largely, if not exclusively, on counsel for the plaintiffs.[38] As a practical matter, neither Lead Counsel nor any individual plaintiff's counsel can either compel the defendant to negotiate "globally" with respect to similarly-situated or all of the plaintiffs on a uniform or transparent basis, nor prevent a defendant from making favorable "inventory" settlement offers to some but not all firms; from making offers to bellwether or test plaintiffs whose cases are set for trial; or from otherwise making offers or refusing to make offers to any one or more individual plaintiffs and/or plaintiff's counsel on any seemingly arbitrary or inconsistent basis. On the other hand, when faced with certain types of offers, it is the plaintiffs' counsel who is generally placed in a potential "conflict" and/or otherwise subject to fiduciary standards and/or ethical proscriptions or limitations. To the extent, therefore, that the goal is to prevent certain types of aggregate settlements, potentially harmful secrecy agreements, restrictions on the right to practice, or other types of settlement arrangements that might pose some risk or harm to the settling parties, non-settling parties, or public health and safety, the legal or ethical restrictions must also apply to defendants and/or defense counsel, as it is generally the offer that creates the conflict; after that, it is often too late.[39] Having said that:

The question arises, when Lead Counsel is negotiating an individual settlement for his or her own client, and/or a multi-plaintiff proposed settlement on behalf of his or her own clients and other plaintiffs in the MDL, what duties are owed to the Lead Counsel's own privately retained clients vis-à-vis other plaintiffs in the litigation?

To be sure, a proposed settlement negotiated by Lead Counsel must, like any other settlement, be structured in such a way that neither a privately retained client nor any other plaintiff is bound to its terms absent either affirmative and fully informed consent from each participating plaintiff or a transparent class proceeding wherein the settlement agreement is filed into the public record and absent parties are protected, generally by notice and the right to opt out, and in all cases by approval of the Court.[40] Yet questions are frequently raised with respect to:

a. Lead Counsel's negotiation of an "inventory" settlement on behalf of his firm's own clients, in the absence of similar settlements being offered to all, or virtually all, other plaintiffs' counsel and/or plaintiffs;

[38] *See, e.g.*, ABA MODEL RULES 1.7, 1.8(g) and 1.15(e); LA. PROFESSIONAL RULE 1.7, 1.8(g) and 1.15(e).

[39] Notably, the Rules that govern restrictions on the right to practice make it unethical to "participate in *offering* or making" such a settlement, as contrasted with the Rules on aggregate settlements, which only make it unethical for a "lawyer who represents two or more clients" to "participate in *making* an aggregate settlement" without adhering to certain requirements on disclosure and consent. *Contrast* ABA MODEL RULE 5.6(b) and LA. PROFESSIONAL RULE 5.6(b) (emphasis supplied), *with* ABA MODEL RULE 1.8(g) and LA. PROFESSIONAL RULE 1.8(g) (emphasis supplied).

[40] *See generally* ABA MODEL RULES 1.2(a) and 1.8(g); LA. PROFESSIONAL RULES 1.2(a) and 1.8(g); FED. RULE CIV. PRO. 23(e)(1) (requiring notice of the proposed class settlement), (c)(2)(B)(v) and (e)(4) (allowing classmembers to opt out of at least settlements involving claims for damages), and (e)(2) (requiring Court approval of any class release).

b. Lead Counsel's negotiation of an "inventory" settlement on behalf of his firm's own clients, separate from a "global" settlement being negotiated by Lead Counsel on behalf of other plaintiffs;

c. Lead Counsel's negotiation of a "global" settlement that arguably seems to favor Lead Counsel's own clients;

d. Lead Counsel's negotiation of a "global" type settlement that excludes some of Lead Counsel's own clients or affords them with less compensation than otherwise arguably could have been attained.

The question of what Lead Counsel should or shouldn't do in these situations is naturally going to depend on the particular facts and circumstances, and is likely going to be somewhat subjective, particularly since, as noted, his or her ability to act is largely constrained and/or dictated by the willingness, desire and/or strategies of the defendant. Nevertheless, some bright-line type approaches have been suggested:

In the first situation, Professor Silver, as noted, suggests that, before engaging in such "inventory" settlement negotiations, Lead Counsel should resign.[41] It seems fairly self-evident that, having been appointed to faithfully carry out certain functions and responsibilities on behalf of all plaintiffs, Lead Counsel cannot consciously trade off the interests of other plaintiffs in an attempt to secure an advantage for Lead Counsel's own clients (and/or Lead Counsel himself and/or herself).[42] However, in my view, Professor Silver's prophylactic disqualification goes too far. The potential that Lead Counsel may be susceptible to conscious or even only "structural" collusion must be weighed against loss to the plaintiffs of knowledge, skill, experience and insight possessed by Lead Counsel, both generally and as uniquely gained in that particular litigation. Indeed, such automatic disqualification would likely encourage defendants to try to successively "buy off" Lead Counsel in order to deprive the rest of the plaintiffs of the attorneys best suited to lead the litigation – precisely the type of conduct sought to be avoided.

Where Lead Counsel is negating a "global" type settlement for all or a majority of the plaintiffs, some have taken the position that Lead Counsel, while attempting to achieve the best possible settlement for plaintiffs generally, continue to owe an undivided duty of loyalty to their own clients, and must, within that framework, seek to maximize the recoveries of his or her own clients, even if that might arguably work to the prejudice of other plaintiffs. In my view, it is

[41] *See* SILVER DECLARATION, pp.6-13, ¶¶8-20.

[42] While declining, for lack of jurisdiction, to address the duties owed by Lead Counsel to other MDL plaintiffs and their attorneys generally, the Seventh Circuit once noted that "a side-agreement is not of itself intrinsically improper, though … parties, like those in the case before us, with dual and potentially conflicting loyalties, like Smith [the MDL Lead Counsel] toward both the Fentress [a State Court client] and MDL-907 plaintiffs, *see Manual for Complex Litigation (Second)* §20.222, might be well advised in crafting any side-agreement to proceed in such a manner that all interested parties, including the court, could rely on their good faith and integrity." Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1205 (7th Cir. 1996).

incumbent upon Lead Counsel to clearly define the nature and scope of the discussions, and therefore his or her concomitant role, at the outset of the negotiation. Where the defendant desires to explore a proposed settlement of claims beyond the firm's own clients, then Lead Counsel is participating in those negotiations, not by virtue of his or her own clients' cases, but because he or she was appointed to participate in such discussions on behalf of all plaintiffs by the Court. While Lead Counsel, in such negotiations, would certainly be expected to draw upon the knowledge and perspectives gained from the representation of his or her own clients, Lead Counsel is, in my view, obligated, in that capacity, to maximize the common and collective interests of the plaintiffs as a whole.[43]

The goal, from an overall policy standpoint, would be to allow the clients of Lead Counsel to obtain the full benefit of such representation, (including any potential premium that might be warranted, in the defendant's eyes, based on Lead Counsel's knowledge, skill, experience, commitment, and/or reputation), without conferring an undue advantage arising solely and directly from their attorney's appointment as "Lead Counsel" – particularly in the event that such premium

[43] While such Lead Counsel should, of course, be mindful of the interests of other attorneys who are representing plaintiffs in the MDL under individual retainer agreements, the notion that some "fiduciary duty" extends to such individually retained counsel, in my view, goes too far. As noted by the Louisiana Supreme Court, albeit in a different context: "It would be inconsistent with an attorney's duty to exercise independent professional judgment on behalf of his client to impose upon him a fiduciary obligation to take into account the interests of co-counsel in recovering any prospective fee." Scheffler v. Adams and Reese, LLP, 2006-1774 (La. 2/22/2007), 950 So.2d 641, 652–653 (as a matter of public policy, no cause of action will exist between co-counsel based on the theory that co-counsel have a fiduciary duty to protect one another's interests in a potential fee). Where it has been suggested that Lead Counsel have duties or responsibilities directly to other MDL attorneys, (*e.g.*, within the context of a Court-appointed Fee Committee), the fact that Lead Counsel's interests may be, to some extent, in "conflict" with the interests of some or all other plaintiffs' counsel, such inherent structural conflict does not lead to disqualification, but is simply a factor to be considered when reviewing the recommendation. *See, e.g.*, ORDER AND REASONS, *In re Chinese Drywall Litigation*, MDL No. 2047, Rec. Doc. 20789 (E.D.La. May 25, 2017) pp.5-6 (denying objecting counsel's Motion to Disqualify Lead Counsel and the Fee Committee, while noting that the objecting attorneys "misunderstand the role of the Fee Committee's recommendation in the overall process.... At the core of this misunderstanding seems to be contract counsel's belief that the Court will view the Fee Committee's recommendation as more significant, or accord it more weight, than the position of contract counsel during the final determination of the fee award.... In formulating its ruling on the fee allocation issue, the Court will consider all the evidence anew, including the Fee Committee recommendation, the objections of the contract attorneys, the recommendation of the Special Master, and the evidence of time submissions gathered and reviewed by [the Court-appointed CPA]. Only after considering all this evidence will the Court be prepared to issue a ruling on the fee allocation issue") (*citing* In re High Sulfur Gasoline Prods. Liab. Litig., 517 F.3d 220 (5th Cir. 2008) (in which the Fifth Circuit acknowledged the court's authority to appoint a committee of plaintiffs' counsel to recommend how to divide up an aggregate fee award, (although disagreeing with the process employed by the district court in that particular case), so long as the court takes those attorneys' interests into account in its independent review of the record, including the recommendation)). In this respect, ERISA again provides a helpful analogy: Courts allow a plan administrator to make fiduciary decisions regarding a beneficiary's right to plan benefits while acting under an inherent conflict of interest, but take such conflict into account when deciding what level of deference should be accorded the decision in question. *See, e.g.*, Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105 (2008) (a reviewing court should consider the conflict of interest arising from the dual role of an entity as an ERISA plan administrator and payer of plan benefits as a factor in determining whether the plan administrator has abused its discretion in denying benefits, with the significance of the factor depending upon the circumstances of the particular case).

will come at the expense of other plaintiffs in the litigation. The best way for Lead Counsel (and/or the Court) to achieve that balance will be constrained somewhat by the defendant's approach, will carry a subjective element, and will depend on the particular facts and circumstances.