Pacific Admiralty Seminar 2022: Ethics CLE Presentation

Session Name: Navigating Ethics Issues and Conflicts in Maritime Cases

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A. Whose Rules Govern Attorney Conduct in Federal Court?

"Federal courts may adopt state or ABA rules as their ethical standards, but whether and how these rules are to be applied are questions of federal law." *In re American Airlines Inc*., 972 F.2d 605, 610 (5th Cir. 1982). "Lawyers representing clients in federal courts must follow federal rules but most 'federal courts use the ethical rules of the states in which they sit.' (Quoting *Huusko v. Jenkins*, 556 F.3d 633, 636 (7th Cir. 2009)). The federal standard 'may be informed by multiple sources, including state ethical rules.' *Silicon Graphics, Inc. v. ATI Techs., Inc.*, 741 F. Supp. 2d 970, 980 (W.D. Wis. 2010) (citing *In re Snyder*, 472 U.S. 634 (1985))." *Gnaciski v. United Health Care*, 2022 WL 3594061 at *3 (E.D. Wis. 2022).

Typically, district courts adopt the forum state's professional rules of conduct, subject to binding federal law and precedent, *e.g.*, S.D.N.Y. and E.D.N.Y. Joint Local Civil Rule 1.5(b)(5):

> In connection with activities in this Court, any attorney found to have engaged in conduct violative of the New York State Rules of Professional Conduct as adopted from time to time by the Appellate Divisions of the State of New York. In interpreting the Code, in the absence of binding authority from the United States Supreme Court or the United States Court of Appeals for the Second Circuit, this Court, in the interests of comity and predictability, will give due regard to decisions of the New York Court of Appeals and other New York State courts, absent significant federal interests.

The rules that bind counsel barred in the forum state to the forum state's rules of professional responsibility also bind out of state counsel appearing *pro hac vice* to those same rules. For example, N.D. of California LR-4 requires compliance of California Bar

members with California's Rules of Professional Responsibility; LR-3 requires that *pro hac vice* counsel be familiar and comply with those same standards.

Some jurisdictions explicitly state that though the forum state's rules apply, the court may also look to the ABA rules for "guidance." See, *e.g.*, Central District of California Local Rule 83-3.1.2 ("Standards of Professional Conduct"):

> Basis for Disciplinary Action. In order to maintain the effective administration of justice and the integrity of the Court, each attorney shall be familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable thereto. These statutes, rules and decisions are hereby adopted as the standards of professional conduct, and any breach or violation thereof may be the basis for the imposition of discipline. The Model Rules of Professional Conduct of the American Bar Association may be considered as guidance

A prudent attorney, even when practicing in a district which has adopted the forum state's rules of professional conduct, and even one without specific reference to ABA rules, nevertheless should consider the latter, as well as any federal law and precedent that addresses the matter at issue.

B. Navigating Sanction Assessment Authority in Federal Litigation for Discovery and Broader Ethical Conduct.

The federal rules of procedure, as well as federal statute and a federal court's "inherent authority," provide specific authority beyond professional rules of conduct for assessment sanctions and other relief.

1. Discussion and Q&A -- Non-ethical conduct and sanctionable actions: one and the same? It depends? Or a continuum? Points and examples to consider:

- Rule 11 applies to pleadings, written motions, or other papers, whether by signing, filing, submitting, or later advocating for them [note: Rule 11 does not apply to "disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.") Does Rule 11(c)(2)'s twenty-one day "safe

harbor" provision counsel that relevant conduct which is not reversed or withdrawn within the safe harbor period, but subsequently is found sanctionable, becomes an ethical breach almost by definition? But note also that even if the court determines that Rule 11 has been violated, Rule 11(c)(1) provides that the court "may" impose sanctions. [Ed. note: it is submitted that most attorneys would consider a Rule 11 violation, regardless of monetary penalty, a stigma tantamount to an ethical breach or, at the very least, evidence of a subpar level of professionalism.]

- Rule 37 applies to disclosures and discovery. Legitimate, good faith discovery disputes, such as motions to compel discovery or disclosures, are part of regular litigation practice; indeed, a party who loses an argument in one jurisdiction might have won in another jurisdiction/circuit with other controlling law. Simply losing a motion to compel should not be conflated with an ethical breach. Indeed, Rule 37(a)(5) ("Payment of Expenses") makes an important distinction. The "loser" on a motion to compel under Rule 37(a) (either movant or respondent) "must" pay costs and fees to the prevailing party, subject to certain caveats listed in Rule 37(a)(5)(A)(i)-(iii). But in contrast to payment of "expenses and fees," which are not *necessarily* the same as "sanctions" (fees, after all, are regularly awarded as part of contractual provisions in commercial litigation), Rule 37(b) assesses "sanctions" for disobeying a discovery order, and Rule 37(c)–(e) provides for monetary and other sanctions for other discovery abuses. In addition to monetary sanctions that can be assessed against counsel, client, or both, the sanctions can include evidentiary presumptions, issue preclusion, striking defenses and pleadings, dismissal, default, and contempt. As to these sanctions under Rule 37(b)-(e), one would be hard pressed not to equate them as varying levels of ethical breaches.

2. General Federal Authorities for Litigation Sanctions.

- FRCP 11: Rule 11 provides for a party or a court *sua sponte* to seek sanctions for a "pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it" that fails to satisfy criteria set out in subsection (b)(1)-(4). Pursuant to subsection (b)(4) ("Nature of a Sanction"), "A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction

may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation. Subsection (c)(1) also states, "Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." As stated above, Rule 11 has a twenty-one day "safe harbor" provision during which time (a) the "served" motion cannot be filed and (b) the responding party has the opportunity to rectify the alleged Rule 11 behavior. Rule 11 also does not apply to discovery issues within the scope of Rules 26 through 37.

- FRCP 37: As outlined above, Rule 37 applies to disputes concerning Rule 26 "disclosures" and to discovery pertaining to depositions, interrogatories, requests for production of documents, including electronically stored information, requests for inspection of premises and other things, medical exams under Rule 35, and requests for admission. In addition to costs and fees to the prevailing party on motions to compel disclosures or discovery, other actions can lead to a variety of sanctions, including those under subsection (b)(2)(A):

  (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

  (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

  (iii) striking pleadings in whole or in part;

  (iv) staying further proceedings until the order is obeyed;

  (v) dismissing the action or proceeding in whole or in part;

  (vi) rendering a default judgment against the disobedient party; or

  (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

- 28 U.S.C. § 1927 ("Counsel's liability for excessive costs"): Section 1927 provides, "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." An award of sanctions under § 1927 requires a finding of "bad faith or conduct tantamount to bad faith," namely "recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001).

  Because § 1927 only authorizes sanctions against attorneys who wrongfully multiply proceedings once a case has already commenced, an attorney may not be sanctioned under § 1927 for the filing of a complaint. *Id.* at 435. The decision whether to award sanctions under § 1927 is largely left to the court's discretion. *United States v. Associated Convalescent Enters., Inc.*, 766 F.2d 1342, 1345 (9th Cir. 1985).

  Moreover, there is a split of authority over whether section 1927 sanctions can be levied only against the attorney who is responsible for the case (*e.g.*, *Kaass Law v. Wells Fargo*, 799 F.3d 1290 (9th Cir. 2015)) or against the firm (*e.g.*, *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 147–48 (2d Cir.2012)).

- "Inherent Authority": Federal courts possess certain "inherent powers," not conferred by rule or statute, 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Goodyear Tire & Rubber Co. v. Haeger*, —— U.S. ——, 137 S. Ct. 1178 (2017), including the ability to fashion an appropriate sanction for conduct which abuses the judicial process. It includes the ability to punish conduct before a court, as well as actions beyond the court's confines, regardless of whether that conduct interfered with courtroom proceedings. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123 (1991). "[T]he power of a court over members of its bar is at least as great as its authority over litigants." *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 766, 100 S.Ct. 2455 (1980). Exercising its authority, a district court may, among other things, dismiss a case in its entirety, bar witnesses, exclude other evidence, award attorneys' fees, or assess fines. In *Chambers*, the Court held that although it is preferable that courts use and first consider the range of federal rules and

statutes dealing with misconduct and abuse of the judicial system, "courts may rely upon their inherent powers to sanction bad-faith conduct even where such statutes and rules are in place." *Id.*, 11 S.Ct. at 1136–37.

In *Goodyear Tire & Rubber Co., supra,* the Court imposed significant limitations on the courts' inherent powers by explaining that when strictly compensatory or remedial sanctions are sought, civil procedures, rather than criminal-type procedures, may be applied. Those types of sanctions can go no further than to redress the wronged party "for losses sustained" and may not impose any additional consequence as punishment for the sanctioned party's misbehavior. But when a penalty or sanction is imposed as a punitive penalty or to punish, "a court would need to provide procedural guarantees applicable in criminal cases, such as a 'beyond a reasonable doubt' standard of proof." *Goodyear*, 137 S. Ct. at 1186. For a lengthy explanation and application of these limitations, see *America Unites for Kids v. Rousseau*, 985 F.3d 1075 (9th Cir. 2015). The Court has held that inherent authority includes the power of a court to disbar an attorney from the jurisdiction encompassed by the court. *In re Snyder*, 105 S.Ct. 2874 (1985). That power now would be subject to the limitations imposed by *Goodyear*.[1]

C. Why Which Rule(s) Apply Matter.

Given the multi-state and/or multi-federal district court practices of many admiralty practitioners, as well as the occasional *pro hac vice* appearance for those whose primary practice is in a single state and district, the potential conflict between various states' rules and the ABA Model Rules can have significant ramifications. Focusing primarily here on the California Rules of Professional Conduct, they were amended in 2018. One of the goals was to bring the California rules on conflicts of interest in line with the "framework" of the ABA Model Rules and the rules of other states. See

[1] Various state courts also claim "inherent powers." See, *e.g., In re Lamb on Disbarment,* 49 Cal.3d 239 (1989); Cal.Bus. & Prof.Code § 6087 ("Effect of chapter on powers of Supreme Court"): "Nothing in this chapter shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline licensees of the bar as this power existed prior to the enactment of Chapter 34 of the Statutes of 1927, relating to the State Bar of California." See also, *Commissioner of Probation v. Adams,* 65 Mass.App.Ct. 725 (2006).

the Executive Summary for the present California Rule 1.7, "Current Clients": "Every other jurisdiction in the country has adopted the ABA conflicts rules framework." Note, however, that "framework" has a different meaning than "identical." An example of the difference in the California and Model Rule approaches deals with how actual or potential representation conflicts may be waived. The ABA Model Rules require "informed consent, confirmed in writing. California requires a more stringent approach, as reflected in the following "Comment" of Rule 1.7's drafters:

> [T]he Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's 'informed written consent,' which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only 'informed consent, confirmed in writing.' That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

California Rule of Professional Conduct 1.7 reads as follows (emphasis added):

(a) A lawyer shall not, *without informed written consent from each client* and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, *without informed written consent from each affected client* and compliance with paragraph (d), represent a client *if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person*, or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows that another lawyer in the lawyer's firm has, a legal, business, financial, professional, or personal

relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows or reasonably should know that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm, or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

(e) For purposes of this rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons, or a discrete and identifiable class of persons.[2]

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[2] For comparison sake, ABA Model Rule 1.7 ("Conflict of Interest -- Current Clients"), states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Discussion and Q&A:

- Under subsection (b), what are the factors in determining when there is a "*significant risk"* that the representation will be *"materially"* limited by the lawyer's responsibilities to or relationships with "*another client, a former client "*or a third person, or by the lawyer's own interests. Point to consider: although the lawyer's own determination will by nature be subjective, it almost certainly will be judged in any potential dispute by an objective standard.

- The Rules were not drafted with the practice of admiralty law in mind. The admiralty bar is relatively small, and even the universe of clients comprises a relatively limited universe, *e.g.*, the International Group of P&I Clubs, Lloyd's syndicates, other marine insurers, ocean carriers, brown water operators, marine terminals, NVOCCs, *etc*.

  The complexity of the issue is exemplified by *Certain Underwriters at Lloyd's London v. Argonaut Insurance*, 264 F.Supp.2d 914 (N.D. Cal. 2003). The defendant moved to disqualify counsel for Lloyd's because one of Argonaut's subsidiaries was a participating insurer – but not lead insurer – in the Lloyd's syndicate. The court granted the motion, ruling that that the fact counsel dealt with and took its instructions from the lead underwriter did not alleviate the conflict under California Rule 3-310 (predecessor to the present Rule 1.7), nor did the fact that the Lloyd's participating underwriter merely was a subsidiary of the defendant insurer alleviate the conflict under the California Rule. In understanding the potential conflict dilemmas for counsel like those in the Lloyd's case, keep in mind that in any given Lloyd's syndicate, as well as with many non-Lloyd's insurers, there can be a relatively large number of participating/following underwriters.

- Issues concerning what constitutes "informed" written consent and written waivers of *future* conflicts can have significant financial consequences – potentially in the millions of dollars. In *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.*, 6 Cal.5th 59 (2018), the California Supreme Court dealt with written conflict waivers, signed by separate entities, that purported to waive both present *and* future conflicts. As described by the Court, *id*. at 428-29:

> A large law firm agreed to represent a manufacturing company in a federal qui tam action brought on behalf of a number of public entities. During the same time period, the firm represented one of the entities in matters unrelated to the [litigation that led to the qui tam suit. Both clients had executed engagement agreements that purported to waive all such conflicts of interest, current or future, but the agreements did not specifically refer to any conflict and the law firm did not tell either client about its representation of the other. This arrangement fell apart when the public entity discovered the conflict and successfully moved to have the firm disqualified in the qui tam action. A fight over the manufacturer's outstanding [approximately $1 million] law firm bills followed, and the dispute was sent to arbitration in accordance with an arbitration clause in the parties' engagement agreement.
>
> The arbitrators ruled in the law firm's favor and the superior court confirmed the award, but the Court of Appeal reversed. That court concluded that the matter should never have been arbitrated because, notwithstanding the broad conflict waiver in the engagement agreement, the law firm's undisclosed conflict of interest violated rule 3-310(C)(3) of the Rules of Professional Conduct. This ethical violation, the court ruled, rendered the parties' agreement, including the arbitration clause, unenforceable in its entirety. The Court of Appeal further held that the conflict of interest disentitled the law firm from receiving any compensation for the [approximately $2 million] work it performed for the manufacturer while also representing the utility district in other matters.

The Court held that a continuing attorney-client relationship existed between the firm and an adverse party at the firm entered into the engagement agreement with J-M, and that that the written waiver of future conflicts was not sufficient to waive the conflict. This was because it was not an "informed" waiver due to its failure to advise the client of the existing representation of the adverse party. The firm therefore forfeited its right to collect the outstanding $1 million in fees. The Court reversed the order for disgorgement of the $2 million in fees already collected and remanded the case for the trial court to determine whether the firm would be able to keep all or a part of those fees on a *quantum meruit* basis.

Takeaways from the case:

- "Informed" consent must inform the client of all relevant facts that potentially would be relevant to determining a conflict. The fact that the firm's partner had only billed approximately twelve hours to the first client by the time J-M engaged the firm did not vitiate to duty to inform J-M of the adverse representation.

- Broad waivers of *future* conflicts are not a guarantee that the requirements of Rule 1.7 will be satisfied.[3] In *Sheppard, Mullin* the Court determined it did not have to reach the validity of broad future waivers because the case could be decided on the basis of a current, existing conflict. But the Court noted, "Several federal courts applying California law have declined to enforce blanket advance waivers on grounds they insufficiently disclosed the conflicts of interest. (*Lennar Mare Island, LLC v. Steadfast Ins. Co.* (E.D. Cal. 2015) 105 F.Supp.3d 1100, 1115, 1118; *Western Sugar Coop. v. Archer-Daniels-Midland Co.* (C.D. Cal. 2015) 98 F.Supp.3d 1074, 1083–1084; *Concat LP v. Unilever, PLC* (N.D. Cal. 2004) 350 F.Supp.2d 796, 801, 819–821.) Because we deal here with disclosure and waiver of a known *existing* conflict, we do not decide whether these decisions are correct." 6 Cal.5th at 87 fn. 9.

[3] The waiver is quoted in the Court's opinion, 6 Cal.5th at 69-70:

"Conflicts with Other Clients. [Firm] has many attorneys and multiple offices. We may currently or in the future represent one or more other clients (including current, former, and future clients) in matters involving [J-M]. We undertake this engagement on the condition that we may represent another client in a matter in which we do not represent [J-M], even if the interests of the other client are adverse to [J-M] (including appearance on behalf of another client adverse to [J-M] in litigation or arbitration) and can also, if necessary, examine or cross-examine [J-M] personnel on behalf of that other client in such proceedings or in other proceedings to which [J-M] is not a party *provided* the other matter is not substantially related to our representation of [J-M] and in the course of representing [J-M] we have not obtained confidential information of [J-M] material to representation of the other client. By consenting to this arrangement, [J-M] is waiving our obligation of loyalty to it so long as we maintain confidentiality and adhere to the foregoing limitations. We seek this consent to allow our Firm to meet the needs of existing and future clients, to remain available to those other clients and to render legal services with vigor and competence. Also, if an attorney does not continue an engagement or must withdraw therefrom, the client may incur delay, prejudice or additional cost such as acquainting new counsel with the matter.

- The Court left open the issue of whether factors such as a client's size, sophistication, and the presence of general or outside counsel advising it in the execution of a future waiver would satisfy Rule 1.7. The Court stated, 6 Cal.5th at 85 fn. 7:

> On May 10, 2018, this court approved comprehensive amendments to the Rules of Professional Conduct, to take effect November 1, 2018. As part of this revision, current rule 3-310 will be replaced by a new provision governing conflicts of interest involving current clients, rule 1.7, which does take some of its language from rule 1.7 of the Model Rules. Like the current rule 3-310, new rule 1.7 will require informed written consent for concurrent representation of adverse interests. But in approving this rule, we did not adopt the comment to rule 1.7(a) of the Model Rules upon which the *Galderma* court relied [*Galderma Laboratories v. Actavis Mid Atlantic LLC*, 927 F.Supp.2d 390 (N.D. Tex. 2013)]. We instead noted that the client's experience and sophistication and the presence of independent representation in connection with the consent are 'relevant' to the effectiveness of that consent, and that the new rule 'does not preclude an informed written consent[ ] to a future conflict in compliance with applicable case law.'

- Tactical Considerations – handing a potent tactical weapon to a client turned foe: The conflict in *Sheppard, Mullin* handed one client a potent weapon, *i.e.*, getting the firm disqualified, which can be a weapon deployed in order to weaken a litigation opponent for reasons potentially having little to do with ethics. As for the other client, and wholly aside from ethics, the weapon can be used to avoid payment of outstanding fees or even force disgorgement of fees already paid. It is worthy to note that the Court in *Sheppard, Mullin* held as it did without even rendering a conclusion that the firm's conflicts caused actual harm. See, 6 Cal.5th at 94: "…at this point, questions as to whether Sheppard Mullin's conflict may have affected the value of its work or led to a loss or default in the qui tam litigation have not yet been litigated."

- If counsel has a client relationship with an insurer, is the fact the insurer is an indemnity provider relevant? Yes. The easiest example is by looking to P&I Clubs. As summarized in Norman J. Ronneberg, Jr., *An Introduction to the*

Protection & Indemnity Clubs and the Marine Insurance They Provide, 3 U.S.F. Mar. L.J. at 6 (1991) (emphasis in original): "[T]he coverage they provide is *only* for indemnity. It is not standard liability insurance. The Clubs are not ordinarily obligated to indemnify their members for covered losses unless and until the member has actually paid out a claim, judgment or settlement. The Steamship Mutual Club Rule Book states: '...it shall be a condition precedent of a Member's right to recover from the funds of the Club in respect of any liability, costs, or expenses that he shall first have paid same.' This provision is generally known as the "pay to be paid" clause.

Comment 3 to Rule 1.7 of the California Rules of Professional Conduct states and clarifies:

> In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that paragraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

D. Q&A: Complex Ethics Issues Arising in Maritime Environmental Litigation.

Maritime environmental litigation, particularly because of the not infrequent existence of parallel civil, criminal, administrative, and investigatory issues, and oftentimes the simultaneous interests by the federal government, state government(s), local government(s), and even sometimes foreign governments (*e.g.*, flag states for non-U.S. vessels), poses highly complex ethical issues that confront the maritime practitioner. See, for example, the following:

> If the stakes for the parties are high, the ante required of the hypothetical attorney is also great [an attorney/P&I Club "correspondent" called to respond to a marine casualty involving an oil spill]. If mistakes by counsel are made in

the critical, initial stages of the investigation and response, the price can possibly be much greater than she, her firm, the firm's Errors & Omissions carrier, and the client(s) are willing or can afford to pay. Lest the reader think the risk to client *and* counsel is overstated, one should first place him/herself in the position of our hypothetical attorney and then ask the following questions:

• Who is your client? [Vessel Owner/Operator] and Vessel? Club? Master, who requested your assistance? All of the above? Some of the above?

• If you have more than one client (*e.g.*, [Vessel Owner/Operator] and Club, the latter of whom is not merely an insurer, but a direct action defendant [under provisions of the Oil Pollution Act of 1990]), is there a *potential* conflict of interest underlying representation of the two clients? Is there an *actual* conflict of interest?

• Are you providing representation in merely a civil matter? Or also in what may become a criminal action against Master, [Vessel Owner/Operator], and possibly even [Vessel Owner/Operator's] corporate officers? Both a civil and criminal matter?

• If the answer to the previous question includes the possibility of criminal liability, are you qualified to render advice?[1]

• Even if you are qualified to provide advice to a potential criminal defendant such as Master, would that advice (*e.g.*, recommending that he assert his Fifth Amendment rights and refuse to talk to Coast Guard investigators) conflict with the long-term legal interests of your clients, whether or not Master himself is one of them?

• If you fail to advise Master of his Fifth Amendment rights and he later is convicted based in part on his incriminating statements to the Coast Guard, might Master show his displeasure by suing for malpractice?

• Regardless of whether Master is your "client," under principles of *respondeat superior* [Vessel Owner/Operator] is responsible for his actions. If [Vessel Owner/Operator] is hit with civil and/or criminal liability as a

result of your failure to advise Master of his Fifth Amendment rights (or your failure to advise him that he should seek independent advice as to his rights), how might [Vessel Owner/Operator] react?

• By becoming involved in spill response and cleanup planning, have you stepped outside your role as counsel and become a witness? Can you and your firm then represent *any* party? Can you be called to testify in deposition and at trial? Can you be forced to divulge what otherwise would be considered privileged or work-product information and documents? If so, how will your client(s) react?

• If a plaintiff (private or governmental) takes the position that the tortious and/or strict liability act went beyond the moment of allision and continued throughout the entire 48-hour discharge, and if you were perceived to have been making operational decisions as [Vessel Owner/Operator's] on-scene representative, have you stepped outside your role as counsel and become more than a mere witness? Have you also become a party defendant in a multi-million dollar case?[4]

Detailing the issues and potential answers is beyond the scope of this outline. The issues have been addressed in detail in a series of articles and attendees are directed to those for additional information. See, R. Michael Underhill & Brian J. Hickman, *Between A Rock and A Hard Place: Ethics Issues in the Context of Defense Counsel's Immediate Response to A Marine Oil Spill*, 7 U.S.F. Mar. L.J. 163 (1994); W.L. Rivers Black III, *A P&I Club's Expectations, and an Admiralty Lawyer's Approach for Responding to Marine Casualty Investigations*, 24 U.S.F. Mar. L.J. 225 (2010-2011); Guy C. Stephenson, *On Board Investigations: Authorities, Immunities and the Need for Separate Counsel*, 13 U.S.F. Mar. L.J. 55 (2000-2001).

[4] R. Michael Underhill & Brian J. Hickman, *Between A Rock and A Hard Place: Ethics Issues in the Context of Defense Counsel's Immediate Response to A Marine Oil Spill*, 7 U.S.F. Mar. L.J. 163, 164-65 (1994).