Ethical Issues in Maritime Cases:
A Survey of Recent Developments and Decisions

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New York State Bar Association Updates Guidelines with respect to Social Media

The New York State Bar Association recently revised its Social Media Ethical Guidelines, which, in a nutshell, include the following guidance:

- A lawyer has a duty to understand the benefits, risks, and ethical implications associated with social media, including its use for communication, advertising, research and investigation.

- A lawyer's social media profiles and postings are governed by the Rules of Professional Conduct – including those rules prohibiting a lawyer from making "false or misleading" communications.

- A lawyer cannot falsely claim certification as a specialist on social media platforms if that is not the case.

- A lawyer is responsible for all content that the lawyer posts on the lawyer's own social media profile. However, a lawyer may also have a duty to periodically monitor the lawyer's sites for comments, endorsements, and recommendations to ensure that such third-party posts do not violate ethics rules. "If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer's control and, if not within the lawyer's control, he or she may wish to ask that person to remove it."

- A lawyer's posts on issues and legal developments should not be inconsistent with those advanced on behalf of his or her clients and the clients of his or her firm.

- A lawyer must avoid inadvertently undertaking to represent a person by providing legal advice on social media. Instead, the lawyer should only provide only "general answers to legal questions".

- If a lawyer uses social media to communicate with a client, the lawyer should retain records of such communications.

- A lawyer may view public information on any person's social media – including a juror or potential juror.

- A lawyer may send a truthful "friend" request to an unrepresented person. However, the lawyer may not send such a request to a represented person without the consent of that person's lawyer. The lawyer also may not do so through an agent, such as a paralegal or investigator.

- A lawyer may provide advice to a client as to "taking down" information posted on the client's social media site. "However, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter, such as a statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve."

- A lawyer may not advise a client to post false information on social media.

- "A lawyer may review a represented person's non-public social media information provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain non-public information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person."

- If a lawyer learns of juror misconduct while reviewing social media, (or otherwise), the lawyer must promptly bring it to the court's attention.

- "A lawyer shall not communicate with a judicial officer over social media if the lawyer intends to influence the judicial officer in the performance of his or her official duties." This would not, however, prevent a lawyer from sending a "friend request" to a judge.

See SOCIAL MEDIA ETHICS GUIDELINES, New York State Bar Association (May 31, 2019).

ABA Issues Formal Opinion Regarding Responsibilities of Successor Counsel when Originally Retained Counsel is Discharged in a Contingent Fee Situation

When a client engages successor counsel in a contingent fee matter to replace his or her original attorney, successor counsel must inform the client in writing that the predecessor counsel may have a claim against the contingent fee.

(The Committee notes that the Opinion only applies where the client terminates a lawyer *without*

cause and hires a new lawyer to replace him. When a client terminates a lawyer with *cause*, or when the original lawyer *withdraws*, the first attorney may forfeit some or all of his or her fee.)

The attorneys are not bound by the fee-division requirements of Rule 1.5(e), which are designed to address situations where two lawyers from different firms handle a case *concurrently.* Of course, fee-sharing in proportion to the work performed by lawyers concurrently representing a client is similar to the *quantum meruit* analysis that is frequently used post hoc to divide contingent fees between successive firms. But "joint responsibility" under Model Rule 1.5(e) for some other agreed-to division is not realistic and would ultimately burden the client's ability to discharge the first lawyer and find replacement counsel. [Under Louisiana's unique Rule 1.5(e), it would be similarly non-sensical for the client to "agree in writing to representation by all of the lawyers involved" on a going-forward basis, as it is contemplated that the originally retained law firm will no longer be involved.]

Upon a recovery, successor counsel must obtain the client's agreement before dividing any fee with predecessor counsel. Rule 1.5(a) requires that any fee be reasonable, including the total fees of predecessor and successor counsel, and client consent is required for all disbursements. A client always has the right to challenge the total fee charged or the separate fee claimed by the predecessor counsel. The successor counsel may not disburse fees claimed by that counsel absent the client's consent. As a practical matter, of course, the division of fees to predecessor and successor counsel will often not affect the client's recovery. In these instances, successor counsel may obtain the client's consent to any fee split that does not alter the client's recovery. The client can, after consultation and adequate disclosure, decide that the matter should be worked out between counsel without further need for consent or consultation with the client.

Both predecessor and successor counsel remain bound by their confidentiality obligations to the client, as well as any further confidentiality obligations that might be undertaken by the client in settlement of the underlying matter.

In handling funds that are in dispute, the successor lawyer must, of course, follow the safekeeping requirements of Rule 1.15.

ABA FORMAL OPINION NO. 487 (June 18, 2019).

U.S. Fifth Circuit Rejects Exceptions to Lawyers' Immunity from Suit Brought by Non-Clients (applying Texas Law)

Applying Texas Law, the U.S. Fifth Circuit reviewed a case against the law firm Greenberg Traurig arising out of the R. Allen Stanford Ponzi Scheme. The suit was dismissed by the district court, under Texas' immunity for lawyers facing suits brought by non-clients.

First, the Court rejected a Non-Litigation Exception. The trend among Texas courts "comports with the purpose of attorney immunity to promote loyal, faithful, and aggressive representation in a comprehensive manner. Although not limitless, the doctrine's application is broad. Its underlying rationale is to free attorneys to practice their profession and advise their clients without making

themselves liable for damages. The most likely understanding is that this includes the multitude of attorneys that routinely practice and advise clients in non-litigation matters."

Second, the Court rejected application of a Criminal Conduct Exception. While noting that criminal conduct can negate attorney immunity under some circumstances, the Court pointed out that such analysis turns on "whether that behavior was in the scope of representation and not whether it was criminal."

Finally, the Court rejected the argument that the common law immunity had been abrogated by statute with respect to claims brought under the Texas Securities Act.

Troice v. Greenberg Traurig, 921 F.3d 501 (5th Cir. 2019).

Tennessee Bar Finds Requirement to Destroy Vehicle in Settlement Agreement Unethical

In complex product liability cases, the physical vehicle itself may be the most important piece of evidence in the case. The most compelling evidence when establishing the existence of a defect in a vehicle is the existence of other similar incidents, and the ability to review and re-inspect a similar vehicle, which had previously exhibited a similar defect, can be extremely valuable in prosecuting a potential future case.

In this particular case, the plaintiff's law firm has a policy of acquiring possession of the subject vehicle as part of its initial investigation. This is normally done by purchasing the vehicle directly from an insurance company that has possession of the vehicle post-accident. In the rare case that the firm's client has possession of the vehicle (and title), the firm requests that the client allow the firm to retrieve the vehicle from them. If the client is not in possession of the vehicle, and the firm is unable to purchase the vehicle directly from an insurer, the firm purchases the vehicle at auction if possible.

The firm covers the expense of securing the vehicle, and said expense is treated like any other case expense at that point. During the pendency of the case, the firm and the expert witnesses for the case – or for any other case turning on the same vehicle model / defect – inspect the vehicle, dissemble parts if necessary, etc. It is the firm's practice at the end of the case to request from the client that the firm be allowed to retain ownership and possession of the vehicle.

Here, the parties agreed on a settlement amount, and the requirement that the vehicle be destroyed was brought up only after the plaintiff had agreed to settle. The client simply wanted to be paid, and the lawyer's objections were discarded because the client is the ultimate decision-maker re settlement.

When the lawyer sought direction, the Tennessee Board of Professional Responsibility concluded that: "It is improper for an attorney to propose or accept a provision in a settlement agreement, in a products liability case, that requires destruction of the subject vehicle alleged to be defective if that action will restrict the attorney's representation of other clients."

The firm had assured the defendant that the vehicle will not be placed back on the road, and that when the firm decides to no longer retain the vehicle, it will provide a certificate of destruction – which should satisfy the defendant's purported safety concerns. Given the nature of the defendant's business and the practice area of the inquiring lawyer, demanding the destruction of key evidence can only be viewed as an attempt by the defendant to disadvantage the firm in other current or future litigation. "By requiring destruction of the alleged defective product after settlement in a products liability case, defense counsel would accomplish indirectly what they cannot accomplish directly by precluding the attorney from representing other plaintiffs with similar claims. Further, the firm's file retention policy includes retaining material pieces of evidence as part of the file because it may be evidence in any subsequent malpractice suit against the firm. Without the ability to review the most important piece of evidence in the underlying products liability suit, the law firm would be left essentially defenseless if a former client brought a professional malpractice claim. There is also a public policy consideration. The ability for plaintiffs' firms to act as industry watchdogs is both good public policy and was specifically addressed as a vested responsibility during Congress's enactment of the Federal Motor Vehicle Safety Standards."

TENNESSEE ETHICS OPINION NO. 2019-F-167 (April 15, 2019).

Florida Supreme Court Declines to Recuse Trial Court Judge Based on Facebook Friendship with One of the Attorneys Involved in the Case

The Florida Supreme Court, in a sharply divided 4-3 decision, finds that "an allegation that a trial judge is a Facebook 'friend' with an attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification."

Initially, the majority notes that "the mere existence of a friendship between a judge and an attorney appearing before the judge, without more, does not reasonably convey to others the impression of an inherently close or intimate relationship. No reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on the fact that a judge and an attorney appearing before the judge are friends of an indeterminate nature. It is for this reason that Florida courts — including this Court — have long recognized the general principle of law that an allegation of mere friendship between a judge and a litigant or attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification."

Then, turning to Facebook, the Court observed that: A Facebook "friend" may or may not be a "friend" in the traditional sense of the word. But Facebook "friendship" is not—as a categorical matter—the functional equivalent of traditional "friendship." The establishment of a Facebook "friendship" does not objectively signal the existence of the affection and esteem involved in a traditional "friendship." Today it is commonly understood that Facebook "friendship" exists on an even broader spectrum than traditional "friendship." Traditional "friendship" varies in degree from greatest intimacy to casual acquaintance; Facebook "friendship" varies in degree from greatest intimacy to "virtual stranger" or "complete stranger."

"The overarching concern of the Judicial Ethics Advisory Committee is that a reasonably prudent person would fear that he or she could not receive a fair and impartial trial based solely on the fact that a judge and an attorney appearing before the judge are Facebook 'friends' of an indeterminate nature. For the reasons we have explained, we conclude that concern is unwarranted. The correct approach is that taken by the majority position, which recognizes the reality that Facebook 'friendship', standing alone, does not reasonably convey to others the impression of an inherently close or intimate relationship that might warrant disqualification.

"In some circumstances, the relationship between a judge and a litigant, lawyer, or other person involved in a case will be a basis for disqualification of the judge. Particular friendship relationships may present such circumstances requiring disqualification. But our case law clearly establishes that not every relationship characterized as a friendship provides a basis for disqualification. And there is no reason that Facebook 'friendships' — which regularly involve strangers—should be singled out and subjected to a per se rule of disqualification."

The dissenting judges, on the other hand, felt that "recent history has shown that a judge's involvement with social media is fraught with risk that could undermine confidence in the judge's ability to be a neutral arbiter. For these reasons, I would adopt a strict rule requiring judges to recuse themselves whenever an attorney with whom they are Facebook "friends" appears before them. This rule does little to limit the judge's personal liberty, while advancing the integrity of the judicial branch as the one branch of government that is above politics…. The premise of the majority opinion is that Facebook friendships and traditional friendships are analogous. But, equating friendships in the real world with friendships in cyberspace is a false equivalency. The existence of a Facebook "friendship" may reveal far more information regarding the intimacy and the closeness of the relationship than the majority would assign it. For example, as the majority explains, once a person becomes "friends" with another Facebook user, that person gains access to all of the personal information on the user's profile page—including photographs, status updates, likes, dislikes, work information, school history, digital images, videos, content from other websites, and a host of other information—even when the user opts to make all of his or her information private to the general public. Additionally, the ease of access to the 'friend's' information allows Facebook "friends" to be privy to considerably more information, including potentially personal information, on an almost daily basis…. As a practical matter, it is unrealistic to require discovery into the extent of social media "friendship" as a prerequisite to recusal before a valid motion may be filed. An individual judge's social media, whether it is Facebook, LinkedIn, Instagram, or any other site, is fraught with concerns for the average litigant because it is difficult and intrusive for a litigant to determine with whom the judge has connected, with whom the judge has declined to connect, and what type of communication the judge engages in on these platforms…. Judges in Florida are non-partisan and held to the strictest compliance with the Code of Judicial Conduct to avoid even the appearance of impropriety. Judges, unlike the general public and even other elected officials, accept the responsibility when they take the oath of office and don their black robes that many prior activities may have to be limited for the purpose of maintaining the integrity of our justice system. One of these activities should include the use of social media to communicate, either actively or passively, with attorneys who appear before them. Because public trust in the impartiality and fairness of the judicial system is of the utmost importance, this Court should err on the side of caution. The bottom line is that because of their indeterminate

nature and the real possibility of impropriety, social media friendships between judges and lawyers who appear in the judge's courtroom should not be permitted. Under this rule, the opposing litigant would not be required to delve into how close the Facebook friendship may be, the judge avoids any appearance of impropriety, and Florida's courts are spared from any unnecessary questions regarding the integrity of our judiciary."

Law Offices of Herssein & Herssein v. USAA, 271 So.3d 889 (Fla. 2018).

Louisiana Supreme Court Cautions Attorneys Employing Social Media to Vent Frustrations in Pending Cases

Beginning in November 2007 and continuing through mid-March 2012, an Assistant U.S. Attorney for the Eastern District of Louisiana, under various pseudonyms, frequently posted online comments, which concerned a myriad of subjects, but in pertinent part related to cases which he and/or his colleagues were assigned to prosecute. When discovered, Mr. Perricone's actions caused significant actual harm to the prosecution of the River Birch and Danziger Bridge cases, posed a potential risk to the Jefferson and Gill-Pratt prosecutions, and resulted in profound damage to the reputation of the U.S. Attorney's Office.

Although stipulating to a violation of Rule 3.6, the Court noted that Perricone "did not make the posts with the specific intent to harm the outcome of the various criminal proceedings." At the same time, however, (and having also stipulated to the violation of Rule 3.8(f)), the respondent knew that his online posts were forbidden, and " acted intentionally in that he intended his posts would have the effect of heightening public condemnation of the individuals referenced in the formal charges."

In formulating the appropriate sanction, the Louisiana Supreme Court begins "from the well-settled proposition that public officials (and prosecutors in particular) are held to a higher standard than ordinary attorneys. Respondent was clearly in an important position of public trust. His actions betrayed that trust and caused actual harm to pending prosecutions. Once discovered, his conduct tarnished the reputation of the USAO and brought the entire legal profession into disrepute."

Then, in a general admonishment to all members of the bar, the Court continued:

"In this age of social media, it is important for all attorneys to bear in mind that 'the vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system.' As the U.S. Supreme Court in Gentile v. State Bar of Nevada wisely explained, 'a profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom.' Respondent's conscious decision to vent his anger by posting caustic, extrajudicial comments about pending cases strikes at the heart of the neutral dispassionate control which is the foundation of our system. Our decision today must send a strong message to respondent and to all the members of the bar that a lawyer's ethical obligations are not diminished by the mask of anonymity provided by the Internet."

In re Perricone, 2018-1233 (La. 12/5/2018), 263 So.3d 309.

Mississippi Bar Association Indicates that a Lawyer May Ghostwrite a Pleading for a *Pro Se* Litigant

The Ethics Committee of the Mississippi Bar was asked to respond to two questions: (1) Is it ethical for a lawyer to prepare documents for *pro se* litigants? And, if so (2) Is the preparing lawyer required to disclose either the name of the preparer or that the document was prepared by a lawyer?

The answer to the first question is: Yes. A lawyer is permitted to limit the scope of representation under Rule 1.2. (The Committee notes, at the same time, that Rule 1.4 requires "that the lawyer ensure that the client fully understands what it means to limit the scope of representation to discrete aspects of the representation and the consequences of the limited representation. For example, if the lawyer only drafts a motion for summary judgment but does not appear at the hearing, the client will have to present the motion and respond to questions from the court that the client may be unable to answer.")

The answer to the second question is generally: No. (While sensitive to the concern that the client may receive more lenient treatment by a court who believes the party is proceeding *pro se*, "the Committee does not believe that a lawyer's undisclosed limited representation is a deception as contemplated by Rule 8.4(c). A court presented with a lawyer-drafted document and a *pro se* litigant appearing to defend or argue that document, would be aware of the nature of a lawyer's involvement. If not, the court can always inquire from the litigant whether a lawyer assisted in preparing the document. The unlikely event that a court will be misled into providing leniency to a pro se litigant under these circumstances does not outweigh the strong public policy set out in the Comment to Rule 1.2, encouraging lawyers to provide limited scope representation without having to enter an appearance. The Committee is concerned that lawyers will be dissuaded from providing limited representation if required to disclose their involvement.")

However, the Committee notes that some Federal Courts and a few Ethics Opinions have found the lawyer's failure to disclose his/her involvement to be misleading or dishonest to the court in violation of Rule 8.4(c). In addition, the Committee notes that "a lawyer cannot utilize the limited scope representation to actively and substantially participate in a matter without disclosure. This opinion contemplates that the lawyer is performing discrete aspects of representation. On-going representation of a client without disclosure would be misleading and a violation of Rule 8.4(c)."

MISSISSIPPI ETHICS OPINION NO. 261 (June 21, 2018).

(But see: N.Y. Bar Assoc. Op. 1987-2 (1987); Kentucky Ethics Op. KBA E-343 (Jan. 1991); *Auto Parts Mfg. Mississippi, Inc. v. King Const. of Houston*, LLC, 2014 WL 1217766, *7 (N.D. Miss. 2014) ("The Court cautions that an attorney who ghostwrites motion briefs and pleadings is acting unethically and is subject to sanctions"))

New York City Bar Association Issues Opinion re "Contingent" Loans to Attorneys

The New York City Bar Association opined that: "A lawyer may not enter into a financing

agreement with a litigation funder, a non-lawyer, under which the lawyer's future payments to the funder are contingent on the lawyer's receipt of legal fees or on the amount of legal fees received in one or more specific matters."

Distinguishing from arrangements in which the Client, (as opposed to the Attorney), receives funding, the opinion notes that: "Under typical client-funder arrangements, the funder agrees directly with the lawyer's client to provide funding for a specific matter and the client agrees to make future payments if the client prevails. When the client is the plaintiff in a civil lawsuit, the amount of the client's future payments to the funder may depend on the amount of the client's recovery. Client-funder arrangements of this nature do not implicate Rule 5.4, which forbids a lawyer from sharing legal fees with a non-lawyer, because the lawyer is not a party to the arrangement and payments are made by the client out of the client's recovery and do not affect the amount of the lawyer's fee. *See* NYCBA FORMAL OP. 2011-2 (2011) ("It is not unethical per se for a lawyer to represent a client who enters into a non-recourse litigation financing arrangement with a third party lender"); *see also* NYSBA ETHICS OP. 666 (1994) (lawyer may refer client to lender who will commit to provide financial support during pendency of case).

The opinion also notes that: "Lawyer-funder arrangements do not necessarily involve impermissible fee sharing under Rule 5.4(a). The rule is not implicated simply because the lawyer's payments to a funder come from income derived from legal fees."

However: "Rule 5.4(a) forbids a funding arrangement in which the lawyer's future payments to the funder are contingent on the lawyer's receipt of legal fees or on the amount of legal fees received in one or more specific matters. That is true whether the arrangement is a non-recourse loan secured by legal fees or it involves financing in which the amount of the lawyer's payments varies with the amount of legal fees in one or more matters."

The opinion further noted that "we see no meaningful difference between payments for financing, on the one hand, and payments for goods and services, on the other, that would call for a different interpretation of 'fee sharing' when a lawyer's payments to a provider of funding, rather than a provider of goods or services, are contingent on the lawyer's receipt of fees in a particular matter. Rule 5.4(a) must therefore be read to foreclose a financing arrangement whereby payments to the funder are contingent on the lawyer's receipt of legal fees. A non-recourse financing agreement secured by legal fees in a matter – i.e., an arrangement in which it is contemplated that the lawyer will make future payments only if the lawyer recovers fees – constitutes an impermissible fee-sharing arrangement regardless of how the lawyer's payments are calculated. Likewise, a financing arrangement constitutes impermissible fee sharing if the amount of the lawyer's payment is contingent on the amount of legal fees earned or recovered. Further, Rule 5.4 is equally applicable when the lawyer's payment to the funder is based on the recovery of legal fees in multiple matters (*e.g.*, a portfolio of lawsuits against the same defendant or involving the same subject matter) as opposed to a single matter."

NEW YORK CITY BAR ASSOCIATION FORMAL OPINION NO. 2018-5 (July 30, 2018).

U.S. District Court in California Sanctions Defendant for Bad Faith in Connection with Effort to Compel and then Avoid Arbitration

Plaintiff Kate McLellan sued Fitbit for alleged misrepresentations about the accuracy of heart rate monitoring in its devices. Fitbit told the Court that the Terms of Service McLellan had agreed to required arbitration of her claims at the American Arbitration Association (AAA). Fitbit also said that McLellan's objections to the scope and enforceability of the agreement were delegated to the arbitrator for resolution. Fitbit succeeded on these arguments, but when the time to arbitrate came, it failed to pay its fees in a timely manner and told McLellan it had no intention of arbitrating her claims or the arbitrability issues. Fitbit reversed course and got the arbitration back on track after McLellan raised the matter with the Court at a hearing on another issue in the case.

While the Court felt compelled to enforce the arbitration provision – despite defense counsel's acknowledgement that no rational litigant would bring an individual claim for $162 – held that defense counsel should be sanctioned for its unethical conduct:

"While case law does not support termination of the arbitration, Fitbit and its lawyers at Morrison & Forester must be held to account for their bad-faith litigation tactics. The conduct that necessitated this order amounts to an abuse of the judicial process and a needless waste of the parties' and the Court's resources. To make matters worse, Fitbit has been evasive and misleading in its explanations to the Court. For example, Fitbit says it properly declined to arbitrate because only the $162 price of the device was at stake. That assertion is completely untenable in light of the October 2017 arbitration order…. Fitbit also says that it held up arbitration to wait for 'guidance' from AAA or the Court on next steps. The record, however, is devoid of any evidence that Fitbit ever asked AAA for instructions or guidance. It certainly never sought guidance from the Court. And Fitbit's contention that it can exempt itself from arbitration whenever it 'rationally' prefers to settle is entirely unfounded. Interpreting Fitbit's Terms of Service to give it sole discretion over when it will arbitrate a claim would make it unconscionable and unenforceable.

"This conduct cannot go unsanctioned…. Bad faith that justifies an assessment of fees includes a broad range of willful improper conduct, such as delaying or disrupting the litigation or hampering enforcement of a court order. Fitbit's conduct need not violate the law to fall well within the domain of the sanctionable. As the record has shown, Fitbit delayed and impeded the arbitration on frivolous grounds, and was evasive and misleading after the matter was brought to the Court's attention. This is an 'exceptional' case where for dominating reasons of justice a compensatory award of attorney's fees is appropriate."

McLellan v. Fitbit, No.16-0036 [Rec. Doc. 153], 2018 WL 3549042 (N.D.Cal. July 24, 2018).

U.S. District Court in Illinois Allows Suit Against Professional Objectors to Proceed

In a suit brought by class action attorney Jay Edelson against professional objectors Darrell Palmer and Chris Bandas, the court dismissed the RICO and abuse of process claims, but allowed the claims based on unauthorized practice of law to proceed.

"Bandas does not contest Plaintiff's categorization of his and Palmer's activities in the Gannett litigation as constituting the 'practice of law' — which it almost certainly was. Instead, Bandas states only that Edelson does not allege that Mr. Bandas is an unlicensed attorney. Rather, the amended complaint acknowledges that he is an attorney, but claims that he is not licensed to practice in Illinois and never moved for pro hac vice admission. This clumsy attempt at linguistic gymnastics ignores the text of the statute. The Illinois Attorney Act does not simply prohibit the practice of law by non-attorneys; it prohibits the practice of law by anyone not licensed by the State of Illinois. Bandas is licensed to practice only in Texas, and Palmer is not licensed to practice anywhere."

At the same time, the court noted that: "This is not to say that Plaintiff has already proved its case that either Bandas or Palmer performed the alleged legal services in Illinois as required by the Act…. It may perhaps be important that the mediation session, for example, was conducted telephonically between individuals then-residing in Texas (Bandas), California (Plaintiff's representative), and Florida (Max, the mediator). Plaintiff has alleged that Bandas and Palmer covertly managed the Gannett litigation and drafted all of the pleadings for in-state figureheads (Thut and Stewart) with the explicit purpose of evading the court's jurisdiction. The court concludes only that these allegations are sufficient to state a plausible claim for the unauthorized practice of law."

In conclusion, the court re-emphasized that: "Defendants have engaged in a pattern of reprehensible conduct that has harmed Plaintiff and others and benefits no one other than Defendants themselves. The court is troubled by the fact that until now its decisions appear to leave Plaintiff and those similarly affected without an adequate remedy — and may fail to deter the Defendants from further rent-seeking. This court can only repeat its earlier advice that class counsel facing similar demands may be best served by calling the professional objector's bluff and seeing the objector's appeal through to its conclusion. In cases involving meritless, bad-faith objections, the likelihood of prevailing on appeal and recovering damages would likely be high. The court also notes that the Supreme Court has recently transmitted an amendment of FED. R. CIV. P. 23 to Congress. If allowed to go into effect, the new Rule would require district court approval before any objector can withdraw an objection or appeal in exchange for money or other consideration."

Edelson v. Bandas Law Firm, No.16-11057 [Rec. Doc. 106], 2018 WL 3496085 (N.D.Ill. July 20, 2018).

U.S. District Court in New Jersey Precludes Trial Counsel from Responding to Juror who Reached Out to Explain what Happened During Deliberations

Following a jury verdict in favor of plaintiffs in an employment discrimination case, one of the defense counsel received the following message through the firm's website:

"Hello, This message is for Mr. Carmagnola and not for legal advice. As a member of the jury for the Montone vs. Jersey City case, I was wondering if you'd like to know a few details that pushed

the jury to decide in favor of Montone and the Astriab plaintiffs. I know if I spent as many years as you did on a case I'd want to know what happened!"

The Court held that defense counsel was prohibited from responding to the former jury by Federal Rule of Evidence 606(b) and the Court's Local Civil Rule 47.1(e), which provides that attorneys may not "directly or indirectly interview, examine or question any juror… during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of Court granted upon good cause shown." The Court specifically noted that: "The purpose of Rule 606 is to preserve the privacy of jury deliberations as well as the integrity and finality of the verdict." Although the juror's e-mail did not raise "extraneous" or "outside" influences excepted in Rule 606(b)(2), the defendant nevertheless advanced two broad arguments in favor of responding to the juror, both of which were rejected.

First, the Court found that the prohibition "does not turn on whether counsel or the juror initiates post-trial communication. Rather, the rule broadly states that attorneys are not permitted to 'directly or indirectly interview, examine or question' jurors regarding their deliberation or verdict. It is not possible for counsel for Defendant Troy to respond to the juror's email without violating this stricture."

Secondly, the Court rejected the argument that such prohibition infringed upon the First Amendment rights of the juror. "The Court imposes no restrictions or limitations on First Amendment rights, including the juror's right to send unsolicited post-trial emails. The juror's constitutional rights do not vitiate, however, the prohibition on counsel…. As such, while unsolicited, sua sponte post-trial contact from members of the jury is not barred under the Rules, this Court will bar under these Rules any response by counsel for either party to such unsolicited communication."

Montone v. City of New Jersey, No.06-280, 2018 WL 3377158 (D.N.J. July 11, 2018).

Tennessee and Ohio Boards of Professional Conduct Place Limitations on Settlements Which Include Secrecy Agreements

The Ohio Board of Professional Conduct recently opined that: "A settlement agreement that prohibits a lawyer's disclosure of information contained in a court record is an impermissible restriction on the lawyer's right to practice. A lawyer may not participate in either the offer or acceptance of a settlement agreement that includes a prohibition on a lawyer's disclosure of information contained in a court record. A lawyer is not required to abide by a client's decision to settle a matter if the settlement is conditioned on a restriction to practice and must withdraw from the representation." More specifically: "The apparent intent of a settlement agreement provision prohibiting communication of information contained in a court record is to limit the plaintiff's lawyer's ability to attract new clients based on the lawyer's prior experience against a particular defendant. This type of settlement provision also gives the lawyer less discretion in pursuing claims on behalf of clients than a lawyer who is not subject to a similar agreement. *Colorado Bar Ethics Opinion No.* 92 (1993). More importantly, the prohibition contained in the rule serves to protect the public's unfettered ability to choose lawyers who have the requisite background and

experience to assist in pursuing their claims. Rule of Professional Conduct 5.6(b). It also prevents settlement agreements from being used to "buy off" plaintiff's counsel through an offer of a higher settlement amount in exchange for the lawyer foregoing future litigation against the same defendant. Lastly, the rule prevents the creation of conflicts between the interests of current clients and those of potential future clients. *ABA Opinion No.* 93-171. "For the foregoing reasons, the Board concludes that Rule 5.6(b) prohibits a lawyer from participating in the offer or acceptance of a settlement agreement that includes a prohibition on the disclosure by a lawyer of information contained in a court record. A settlement agreement under which a lawyer is prohibited from disclosing information contained in a court record via the media or otherwise permissible advertising constitutes an impermissible restriction on the lawyer's right to practice." OHIO BOARD OF PROFESSIONAL CONDUCT OPINION NO. 2018-3 (June 8, 2018).

The same day, the Tennessee Board issued an Ethics Opinion which similarly advises that: "It is improper for an attorney to propose or accept a provision in a settlement agreement that requires the attorney to be bound by a confidentiality clause that prohibits a lawyer from future use of information learned during the representation or disclosure of information that is publicly available or that would be available through discovery in other cases as part of the settlement, if that action will restrict the attorney's representation of other clients." More specifically: "If an attorney is bound by a confidentiality clause that prohibits him or her from discussing any facet of the settlement agreement with any other person or entity, regardless of the circumstances; and which prohibits the attorney from referencing the incident central to the plaintiff's case, the year, the make, and model of the subject vehicle of the identity of the Defendants, defense counsel would accomplish indirectly what they cannot accomplish directly by precluding the attorney from representing plaintiffs with similar claims. "There is also a public policy consideration. A confidentiality agreement in long-running personal injury litigation does not create a 'compelling interest' that overcomes the strong presumption in favor of public access to the data. The availability for plaintiffs' firms to act as industry watchdogs is both good public policy and was specifically addressed as a vested responsibility during Congress's enactment of the Federal Motor Vehicle Safety Standards." At the same time, there is no ethical prohibition against "the most common confidentiality provisions, which prohibit disclosure of the terms of a specific settlement, including the amount of the payment." TENNESSEE FORMAL ETHICS OPINION NO. 2018-F-166 (June 8, 2018).

U.S. Fifth Circuit Reverses Jury Verdict in Medical Device Case Due to Attorney Misconduct

Plaintiffs who received metal-on-metal hip implants, suffered complications, and required revision surgery, received jury verdict. On appeal, the U.S. Fifth Circuit held that: (i) metal-on-plastic hip implants were viable alternative design, (ii) design defect claims were not preempted, (iii) reasonable jury could conclude that warnings did not adequately warn patients, (iv) court had personal jurisdiction over manufacturer's parent corporation, and (v) there was sufficient evidence to support the jury's findings against the parent on non-manufacturer seller and voluntary undertaking theories, but (vi) evidence that parent corporation's non-party subsidiary paid bribes was inadmissible character evidence, and (vii) defendants were entitled to new trial based on attorney misconduct.

"The district court allowed these repeated references to Hussein and the DPA because defendants had supposedly 'opened the door' by eliciting testimony on their corporate culture and marketing practices. This justification is strained, given that J&J owns more than 265 companies in 60 countries, and the Iraqi portion of the DPA addresses conduct by non-party subsidiaries. The Rules of Evidence do not simply evaporate when one party opens the door on an issue…. Lanier tainted the result by inviting the jury to infer guilt based on no more than prior bad acts, in direct contravention of Rule 404(b)(1)…. Lanier coupled his impermissible references to Saddam Hussein with hearsay allegations of race discrimination…. As with Hussein, reference to a "filthy … racial email" resurfaced once more during Lanier's closing argument, in his explanation of why J&J had participated in Ultamet's design and knew of its defects. Plaintiffs again suggest defendants placed their character in issue by describing DePuy as an employee-friendly workplace. But even if that were so, the letter is valid impeachment only if introduced to prove the matter asserted: that racism infected DePuy's workplace culture. That is impermissible hearsay….

"Now, to the question whether Lanier, knowingly or unknowingly, misled the jury in representing repeatedly that the Morreys had neither pecuniary interest nor motive in testifying. The facts speak pellucidly: The pre-trial donation check, Morrey Jr.'s expectation of compensation, and the post-trial payments to both doctors are individually troubling, collectively devastating. Consider first the check to St. Rita's. In December, Lanier and Morrey Sr. met at the latter's house, they discussed the contents of his testimony, and Lanier made a donation to a charity of Morrey Sr.'s choosing, all before trial. Plaintiffs had already designated Morrey Sr. as a non-retained expert who might testify, and they had been priming the jury for his appearance as early as opening statements. Once it was 'formally' decided that Morrey Sr. would testify, Lanier's failure to disclose the donation, and his repeated insistence that Morrey Sr. had absolutely no pecuniary interest in testifying, were unequivocally deceptive. In his defense, Lanier asserts the date of the donation 'confirms it was a "thank you" for time spent with plaintiffs' counsel rather than a promise by [Lanier] to make a charitable contribution in exchange for Dr. Morrey's testimony.' Before interrogating this story, let us speak plainly: Lawyers cannot engage with a favorable expert, pay him 'for his time', then invite him to testify as a purportedly 'non-retained' neutral party. That is deception, plain and simple. And to follow that up with post-trial 'thank you' check merely compounds the professional indiscretion."

In re DePuy Pinnacle Hip Implant Lit., 888 F.3d 753 (5th Cir. 2018).

ABA Issues Formal Opinion Regarding an Attorney's Duty to Inform the Client of a Material Error in Representation

Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

More fully:

"A lawyer's responsibility to communicate with a client is governed by Model Rule 1.4. Several parts of Model Rule 1.4(a) potentially apply where a lawyer may have erred in the course of a current client's representation. For example, Model Rule 1.4(a)(1) requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent may be required. Model Rule 1.4(a)(2) requires a lawyer to 'reasonably consult with the client about the means by which the client's objectives are to be accomplished.' Model Rule 1.4(a)(3) obligates a lawyer to 'keep a client reasonably informed about the status of a matter.' Model Rule 1.4(a)(4), which obliges a lawyer to promptly comply with reasonable requests for information, may be implicated if the client asks about the lawyer's conduct or performance of the representation. In addition, Model Rule 1.4(b) requires a lawyer to 'explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.' More broadly, the 'guiding principle' undergirding Model Rule 1.4 is that 'the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.' A lawyer may not withhold information from a client to serve the lawyer's own interests or convenience.

"Determining whether and when a lawyer must inform a client of an error can sometimes be difficult because errors exist along a continuum. An error may be sufficiently serious that it creates a conflict of interest between the lawyer and the client…. Where a lawyer's error creates a Rule 1.7(a)(2) conflict, the client needs to know this fact to make informed decisions regarding the representation, including whether to discharge the lawyer or to consent to the conflict of interest. At the other extreme, an error may be minor or easily correctable with no risk of harm or prejudice to the client….

Several state bars, including the North Carolina State Bar, have issued opinions that provide guidance to practicing attorneys. For example: "Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client's objectives for the representation, or material disadvantage to the client's legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing, or direction of the representation, the lawyer may not withhold information about the error."

The ABA does not "purport to precisely define the scope of a lawyer's disclosure obligations." But believes more specific guidance should be available.

"With these considerations in mind, the Committee concludes that a lawyer must inform a current client of a material error committed by the lawyer in the representation. An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice."

Regarding Former Clients:

"If a material error relates to a former client's representation and the lawyer does not discover the

error until after the representation has been terminated, the lawyer has no obligation under the Model Rules to inform the former client of the error…. Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules."

ABA FORMAL OPINION NO. 481 (April 17, 2018).

Superior Court Judge in Arizona Grants Center for Auto Safety's Motion to Unseal Records from Goodyear G159 Tire Cases

The Center for Auto Safety (CAS) intervened into a wrongful death suit against Goodyear arising from defects in its G159 tire. The Court granted CAS's motion to unseal a large portion of the records that had been previously subject to a protective order, in that case and in several other similar cases.

"In the course of the ruling adopting the Protective Order, the Court found that 'Goodyear has a legitimate interest in keeping its trade secrets and other confidential research, development and commercial information confidential from business competitors.' The Court did *not* find that any of the information that Goodyear sought to protect was in fact a trade secret or commercially sensitive information. The plaintiffs did not object to the proposed protective order, so specific findings on that point were unnecessary."

Protective orders were entered at Goodyear's initiative in each case arising from the failure of a G159 tire in which Goodyear disclosed allegedly 'confidential, proprietary technical and business information'. "The protective order in this case, and all of the protective orders in the other G159 cases from which the parties collected information in discovery, are 'blanket' protective orders. A blanket protective order is entered without requiring the proponent of confidentiality to show that specific discovery documents contain information that would satisfy the 'good cause' standard of Rule 26(c). Though the parties may stipulate to a 'blanket' protective order without a particularized showing of good cause, they cannot rely on such an order to hold records in confidence indefinitely."

"The interests of comity do not call for this Court to defer to the other courts on issues concerning the merits of the protective orders. The orders were virtually all entered by agreement or without opposition, as opposed to being entered after an adversarial proceeding…. The interests of comity do not require this Court to send the litigants back to the issuing courts to seek modification, either. Goodyear is the only party to any of the cases that has a real stake in the outcome. All of the orders were entered at Goodyear's request, on Goodyear's template, to protect information disclosed by Goodyear. Requiring CAS to seek modification of each protective order in the jurisdiction in which it was entered would create an unreasonable burden. All of the underlying cases except *Haeger I* are closed, so sending this litigation to the courts that entered the orders would burden them, too, by requiring them to reopen their cases."

"Goodyear's legitimate need for confidentiality of the adjustment information relating to the G159 tire is reduced substantially, if not entirely eliminated, by the circumstances surrounding the tire. As noted in the Findings of Fact, the value of adjustment data for Goodyear's competitors lies in its use as a marketing tool. Normally Goodyear would have the right to keep the data away from the competitors for that reason. **But when the data could be interpreted to suggest that a product is dangerous, as it can here, non-disclosure becomes damage control, and the interest being protected is not competitive advantage but rather avoiding bad publicity and potential liability.** That observation applies especially to the lists of personal injury and property damage claims and the reports concerning those claims. Goodyear characterizes that information as 'customer use data' or 'warranty data' or 'marketplace performance data.' The plaintiffs would describe it as evidence of the number of people killed or injured by a defective tire.

"Goodyear's need for confidentiality of information, whether or not directly related to the G159 tire, weighs less heavily than it otherwise might because of the breadth and lack of specificity of Goodyear's confidentiality claim. As discussed generally in the Findings of Fact, Goodyear has demonstrated how the disclosure of various *kinds of information* can be competitively harmful. It has also shown which documents contain those kinds of information, though in some instances (particularly transcripts and court filings) it has not specified what kind of information appears where in the document. But what Goodyear has not done, anywhere, is to explain exactly how it stands to be harmed by the release of *any specific identifiable document or piece of information.* For example, Goodyear has not identified anything about its tire testing procedure that is proprietary or unique. In that sense Goodyear has failed to particularize its showing concerning its need for confidentiality. Goodyear's need for confidentiality was recently diminished further by the decision of NHTSA to deny Goodyear's request for confidential treatment of [plaintiff counsel's] submission. Mr. Kurtz's submission includes much of the information, and many of the documents, for which Goodyear is claiming a right of confidentiality. As to that information and those documents, the proverbial cat is out of the bag. Goodyear's need to maintain the confidentiality of the information or materials produced pursuant to the protective order does not come close to outweighing the public's need for access (through CAS) with respect to information that relates specifically to the G159 tire. That information – primarily concerning the tire's design, its testing, the decision to market it for use on motor homes, and the adjustment data generated by consumer experience with it – should be made public because it relates to and reveals a substantial potential risk to public health or safety. Moreover, by comparing the information that was disclosed in different cases, the public will be able to judge for itself whether the misuse of protective orders enabled the misconduct described by Judge Silver.***** Goodyear's need to maintain the confidentiality of the information or materials produced pursuant to the protective order does not outweigh the public's need for access (through CAS) with respect to information concerning Goodyear's internal policies and procedures, and its interactions with NHTSA. Disclosure of that information is necessary to enable the public to understand G159-specific information, such as the adjustment data. The information will also help the public understand how and why this happened at Goodyear, and what measures (if any) should be taken to ensure it does not happen again."

*Estate of Haeger v. Goodyear Tire & Rubber Co.***,** No.2013-052753 (Ariz. Super. Ct. Maricopa County April 3, 2018) (**bold** added) (*italics* in original).

Alaska Bar Provides Guidance to Lawyers Sending or Responding to E-Mails in Which Clients are cc:d or bcc:d

The Alaska Bar Association recently issued an opinion to address two questions: (i) Under what circumstances, if any, may a lawyer "cc" or "bcc" the lawyer's client in e-mail correspondence with opposing counsel? and (ii) What are the ethical responsibilities of opposing counsel in responding to an e-mail where the e-mail includes a "cc" to opposing counsel's client?

First, the opinion advises that, recognizing the obligation to protect a client's secrets and confidences, it is not advisable for a lawyer to "cc" their client in a message to opposing counsel concerning any matter that may elicit a reply-to-all that could reveal a client confidence.

Secondly, from a Rule 4.2 point of view, "it should be obvious as well that a lawyer cannot 'cc' opposing counsel's client in a communication without the consent of the opposing lawyer." The more difficult question is whether an opposing lawyer who receives a communication where the sending lawyer has cc:d his or her own client. Following an opinion by the North Carolina Bar, the Alaska Bar Opinion concludes that "a lawyer who copies their client in an e-mail communication with opposing counsel is not, merely by copying the client, giving consent to the receiving lawyer." While the easiest and most direct way to determine whether the receiving lawyer can ethically reply-to-all is to ask the sending lawyer, the opinions recognize that "there may be circumstances where the sending lawyer has given implied consent" and sets forth the factors which should be considered: (1) how the communication is initiated; (2) the nature of the matter (transactional or adversarial); (3) the prior course of conduct of the lawyers and their clients; and (4) the extent to which the communication might interfere with the client-lawyer relationship. The opinion notes that the Rules only apply to the subject of the representation or other client confidences, so it is likely not problematic to cc: a client on a scheduling or other purely administrative matter. The Bar recommends that lawyers establish early on whether they may reply-to-all communications, and that lawyers not cc: their clients on electronic communications with opposing counsel, but rather, forward the communication to their client.

Finally, the Alaska Bar, following New York State Bar opinion, addresses the separate question of whether a a lawyer should bcc: his or her own client. The opinions note that a client who receives an e-mail as a bcc: may reply-to-all without realizing that he or she is communicating directly with opposing counsel, and thereby inadvertently disclose information that is privileged or confidential. Therefore, as with cc:s, it is generally not advisable for a lawyer to bcc: his or her client relating to the matter of the representation or that may give rise to a response that could reveal client secrets or confidences.

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2018-1 (Jan. 18, 2018).

N.Y. State Bar Prohibits Marketing Fees to Avvo

A lawyer who wished to participate in Avvo Legal Services sought an Ethics Opinion from the New York State Bar Association. Legal services would be offered through Avvo's website, based

on marketing fees that Avvo charges. "Because" the Committee said, "Avvo's method of operation is crucial to our response, we will devote several paragraphs to describing the Avvo Legal Services product:

"Avvo allows potential clients to choose participating lawyers in various practice areas for a fixed (i.e. flat) fee. The Avvo website says: 'Experienced lawyers on demand. Hire yours' and 'Work with highly rated, local lawyers near you,' and it contains a guide called 'How to find and hire a great lawyer.' Avvo assigns every lawyer in a jurisdiction an 'Avvo rating.' The rating is calculated based on information Avvo collects from lawyer websites and other public sources (such as the type of work the lawyer does and the number of years the lawyer has been engaged in that work), as well as on information the lawyer has chosen to add to the lawyer's Avvo profile (such as publications, CLE presentations, speaking engagements and positions with bar associations and their committees). Avvo's website says that each attorney's rating 'is calculated using a mathematical model, and all lawyers are evaluated on the same set of standards. … At Avvo, all lawyers are treated equally.' Avvo does not seek or accept any payment for an Avvo rating. However, lawyers who supply more information may receive higher ratings than lawyers who supply less information. Avvo says it scores all information objectively, and does not use subjective data such as client reviews. Although Avvo assigns a rating to all lawyers in a jurisdiction, lawyers cannot offer their services through Avvo unless they meet Avvo's minimum criteria and sign up with Avvo to be listed on the site and agree to Avvo's pricing schedule and marketing fees. According to Avvo, the criteria for participation include a minimum Avvo Rating, a minimum client review score, and a clean disciplinary history…. Avvo's website does not say 'We recommend that you choose this lawyer' or 'This lawyer is the best fit for your situation.' Rather, Avvo furnishes information about lawyers (including client reviews, peer reviews, and Avvo ratings) and allows clients to choose the lawyer. Avvo describes its service as simply 'facilitating a marketplace' where consumers can choose from among all of Avvo's participating lawyers. Once the prospective client has chosen a lawyer (or opted for 'have a lawyer contact me now') and selected a specified legal service, the client clicks on a button that says 'Buy now'. The lawyer then contacts the client. (Phone calls from a participating lawyer to a client initially go through an automated Avvo 'switchboard' so that Avvo can time the calls, but Avvo asserts that it cannot listen to the calls.) Once the lawyer and client have completed a phone call of at least eight minutes, Avvo charges the client's credit card for the full amount of the fee for the selected legal service."

The Committee was therefore called upon to decide whether Avvo is "recommending" a lawyer or "implying or creating a reasonable impression" that it is making a recommendation, under (New York) Rule of Professional Conduct 7.1.

"As noted earlier, Avvo allows clients to choose from among all of the lawyers in a geographic area who have listed themselves as practicing the field of law in which the client wants legal services. Avvo says that it does not analyze (or even inquire about) a client's individual situation. No human being at Avvo talks directly to any prospective client to find out the facts or studies the prospective client's documents and then picks out a particular lawyer who is 'right' for that client. Nor does Avvo's website suggest that a client hire any particular lawyer. Avvo is not 'recommending' lawyers in that sense.

"But Avvo does more than merely list lawyers, their profiles, and their contact information. Avvo also gives each lawyer an Avvo rating, on a scale from 1 to 10. As Avvo explains on its website, 'It's as simple as counting to 10. Ratings fall on a scale of 1 (Extreme Caution) to 10 (Superb), helping you quickly assess a lawyer's background based on our rating.' The Avvo ratings suggest mathematical precision – the rating for each lawyer is calculated to a decimal place (e.g., a rating of 6.7 or 8.4). Moreover, some Avvo ads expressly state that the Avvo Rating enables a potential client to find "the right" lawyer, and Avvo's website claims that its ratings enable potential clients to choose the right lawyer for their needs…."

While they did not believe that a bona fide professional rating alone were a recommendation, assuming, arguendo, that Avvo ratings were "bona fide professional ratings," the Committee concluded that "the way Avvo describes in its advertising material the ratings of participating lawyers either expressly states or at least implies or creates the reasonable impression that Avvo is 'recommending' those lawyers.

In *N.Y. State Ethics Opinion No.* 799 (2011), discussing "the difference between an internet-based directory and a recommendation, we said that the line between the two was crossed when a website purports to recommend a particular lawyer or lawyers based on an analysis of the potential client's problem. Other jurisdictions also focus on the 'particular lawyer' distinction. *See, e.g., South Carolina* 01-03 (lawyer may pay internet advertising service fee determined by the number of 'hits' that the service produces for the lawyer provided that the service does not steer business to any particular lawyer and the payments are not based on whether user ultimately becomes a client); *Virginia Advertising Op.* A-0117 (2006) (lawyer may participate in online lawyer directory in which publisher does not recommend or steer business to particular lawyers). We believe Avvo's advertising of its ratings, in combination with its statements about the high qualifications of lawyers who participate in Avvo Legal Services, constitutes a recommendation of all of the participating lawyers.

"Our conclusion is bolstered by Avvo's satisfaction guarantee, by which the full amount of the client's payment (including Avvo's portion of the fee) is refunded if the client is not satisfied. This guarantee contributes to the impression that Avvo is "recommending" the lawyers on its service because it stands behind them to the extent of refunding payment if the client is not satisfied."

The Opinion made it clear that it "does not preclude a lawyer from advertising bona fide professional ratings generated by third parties in advertisements, and we recognize that a lawyer may pay another party (such as a magazine or website) to include those bona fide ratings in the lawyer's advertisements.

"But Avvo Legal Services is different. It is not a third party, but rather the very party that will benefit financially if potential clients hire the lawyers rated by Avvo. Avvo markets the lawyers participating in the service offered under the Avvo brand, generates Avvo ratings that it uses in the advertising for the lawyers who participate in Avvo Legal Services, and effectively 'vouches for' each participating lawyer's credentials, abilities, and competence by offering a full refund if the client is not satisfied. As noted earlier, Avvo says: 'We stand behind our services and expect our clients to be 100% satisfied with their experience.' Accordingly, we conclude that lawyers

who pay Avvo's marketing fee are paying for a recommendation, and are thus violating Rule 7.2(a)."

In conclusion, the Committee noted that: "The questions we have addressed here have generated vigorous debate both within and outside the legal profession. The numbers of lawyers and clients who are using Avvo Legal Services suggest that the company fills a need that more traditional methods of marketing and providing legal services are not meeting. But it is not this Committee's job to decide policy issues regarding access to justice, affordability of legal fees, or lawyer quality. Our job is to interpret the New York Rules of Professional Conduct. Future changes to Avvo's mode of operation – or future changes to the Rules of Professional Conduct – could lead us to alter our conclusions, but at this point we conclude that, under Avvo's current structure, lawyers may not pay Avvo's marketing fee for participating in Avvo Legal Services."

N.Y. ETHICS OPINION NO. 1132 (Aug. 8, 2017).

U.S. Supreme Court Reverses $2.7 Million Discovery Sanction Against GM Where Not Causally Related to the Misconduct

Plaintiffs sued Goodyear, alleging that the failure of a G159 tire caused the family's motorhome to swerve off the road and flip over. After several years of contentious discovery, marked by Goodyear's slow response to repeated requests for internal G159 test results, the parties settled the case. Some months later, the plaintiffs' lawyer learned that, in another lawsuit involving the G159, Goodyear had disclosed test results indicating that the tire got unusually hot at highway speeds. In subsequent correspondence, Goodyear conceded withholding the information, even though the plaintiffs had requested all testing data. The plaintiffs then sought sanctions for discovery fraud, and the District Court found that Goodyear had engaged in an extended course of misconduct, and, exercising its inherent authority, awarded $2.7 million — the entire sum they had spent in legal fees and costs since the moment, early in the litigation, when Goodyear made its first dishonest discovery response. The court said that in the usual case, sanctions ordered pursuant to a court's inherent power to sanction litigation misconduct must be limited to the amount of legal fees caused by that misconduct. But it determined that in cases of particularly egregious behavior, a court can award a party all of the attorney's fees incurred. As further support, the District Court concluded that full and timely disclosure of the test results would likely have led Goodyear to settle the case much earlier. Acknowledging that the Ninth Circuit might require a link between the misconduct and the harm caused, the court also made a contingent award of $2 million. The Ninth Circuit affirmed the full $2.7 million award, but the U.S. Supreme Court reversed.

"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. That authority includes the ability to fashion an appropriate sanction for conduct which abuses the judicial process. And one permissible sanction is an assessment of attorney's fees — an order, like the one issued here, instructing a party that has acted in bad faith to reimburse legal fees and costs incurred by the other side. This Court has made clear that such a sanction, when imposed pursuant to civil procedures, must be compensatory rather than punitive in nature…. That means, pretty much by definition, that the court can shift only those attorney's fees incurred because of the misconduct at

issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong. So as we have previously noted, a sanction counts as compensatory only if it is calibrated to the damages caused by the bad-faith acts on which it is based. A fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned. But if an award extends further than that—to fees that would have been incurred without the misconduct — then it crosses the boundary from compensation to punishment. Hence the need for a court, when using its inherent sanctioning authority (and civil procedures), to establish a causal link — between the litigant's misbehavior and legal fees paid by the opposing party. That kind of causal connection, as this Court explained in another attorney's fees case, is appropriately framed as a but-for test….

"In exceptional cases, the but-for standard even permits a trial court to shift all of a party's fees, from either the start or some midpoint of a suit, in one fell swoop…."

The Court noted that both sides essentially agreed with the applicable law. All the parties really argued about was how the law should be applied. Goodyear took the position that the trial court's fee award needed to be vacated in its entirety. The plaintiffs argued that the entire $2.7 million award was supported under the but-for analysis. Which the Supreme Court rejected.

As to whether the contingent $2 million award should then stand, the plaintiffs argued that the award was suppoerted under the but-for standard, but, in any event, should stand because Goodyear had waived any objection thereeto. The Court found that the contingenct $2 million award was not clearly supported under the correct standard, but nevertheless remanded for consideration of the waiver issue.

Goodyear Tire & Rubber Co. v. Haeger, 137 S.Ct. 1178 (2017).

U.S. Fifth Circuit Affirms Sanction of Attorneys Who Withheld Material Evidence from Rule 26 Disclosures

The plaintiff in the underlying lawsuit claimed she was sexually assaulted on multiple occasions while incarcerated at the Maverick County Detention Center, operated by the defendant, GEO Group. During the plaintiff's deposition, she was confronted with recordings of telephone calls which had not be identified or produced as part of the initial disclosures under Rule 26. The plaintiff filed a motion for sanctions, and the underlying case settled; nevertheless, sanctions of $1,000 per attorney were imposed.

The sanctioned attorneys argued on appeal that they used the recordings "solely to impeach Olivarez's credibility; therefore, they were not required to disclose the recordings under Rule 26(a)(1), which specifically states evidence need not be disclosed if 'the use would be solely for impeachment.'"

The Court found, however, that "the recordings of Olivarez's phone calls likely had some impeachment value because they were at least arguably inconsistent with Olivarez's testimony during the deposition regarding her conversations with her mother and her friend Juan. But the recordings also had substantive value because they seemed to suggest that Olivarez may have

consented to the sexual encounters with Valladarez. The recordings tended to establish the truth of a key issue Defendants raised as a defense in the case — that Olivarez had 'initiated consensual sex' with Valladarez. Accordingly, the recordings were, at the very least, in part substantive, and the district court did not abuse its discretion in concluding that Appellants were required to disclose the recordings under Rule 26(a)(1)."

Olivarez v. GEO Group, 844 F.3d 2000 (5th Cir. 2016).

U.S. Seventh Circuit Says Wife's Unauthorized Access to Husband's E-Mails Could Violate Federal Wiretap Act

A husband embroiled in an acrimonious divorce brought suit against his wife claiming a violation of the Electronic Surveillance Act by surreptitiously placing an auto-forwarding "rule" on his e-mail accounts that automatically forwarded the messages on his e-mail to her. He also alleges that the wife's divorce attorney violated the Act by "disclosing" the intercepted emails in response to his discovery request. The district court dismissed the case on the pleadings. Reversing, in part, the U.S. Seventh Circuit noted as follows:

The Wiretap Act makes it unlawful to "intentionally intercept or endeavor to intercept any wire, oral, or electronic communication." The Act also prohibits the intentional "disclosure" or "use" of the contents of an unlawfully intercepted electronic communication. "The parties' briefs are largely devoted to a debate about whether the Wiretap Act requires a 'contemporaneous' interception of an electronic communication — that is, an interception that occurs during transmission rather than after the electronic message has 'come to rest on a computer system.' The Seventh Circuit noted the "trend" towards requiring a contemporaneous interception, but "do not need to take a position today. Even if the Wiretap Act covers only contemporaneous interceptions, Barry has stated a Wiretap Act claim against Paula, and dismissal of the claim against her was error."

First, the district court assumed that the time the wife received the forwarded emails was the moment of interception, but "we do not know how Paula's auto-forwarding rule worked. For example, we cannot tell if a server immediately copied Barry's emails — at which point the interception would be complete — even though Paula's email client may not have received them until later.

"Second, the judge mistakenly conflated the emails Barry received and those he sent…. Putting aside the general problem of determining precisely when an interception occurs, for the emails Barry received from the other women, it seems reasonable to compare the time Barry received the message and the time the email was successfully forwarded to Paula. But that logic doesn't apply to emails Barry sent to the other women. The time markings on those emails tell us nothing about when transmission of the emails was complete. To know that we would need to know when the intended recipients — the women Barry was corresponding with — actually received the emails.

"Finally, it's highly unlikely that the exhibit attached to the complaint contains all the emails that were forwarded to Paula's email addresses…. Barry alleges that Paula's auto-forward rule was in

place for as long as five years; it's more likely that these few dozen emails are only a small fraction of a much larger volume."

At the same time, the dismissal of the claims against the wife's lawyer were affirmed: "The disclosure theory fails because Barry already knew the contents of the intercepted emails and indeed invited their disclosure by requesting them in discovery in the divorce action…. The use theory fails for a more prosaic reason: The complaint doesn't identify any use Frank actually made of the emails. Rather, it alleges that Frank intended to use the emails to embarrass Barry during the divorce litigation — in cahoots with Paula and with the aim of extracting a favorable financial settlement. But the Wiretap Act does not prohibit inchoate intent."

Judge Posner, concurring, agreed that "under the existing understanding of the Federal Wiretap Act Paula Epstein violated it if she searched her husband's computer for evidence of adultery by him that she could use against him in divorce proceedings, without having obtained his consent to her accessing his computer" but wrote separately "to raise a question that neither party addresses and is therefore not before us on this appeal — whether the Act should be thought applicable to such an invasion of privacy…. Her husband's suit under the Federal Wiretap Act is more than a pure waste of judicial resources: it is a suit seeking a reward for concealing criminal activity. Had the issue been raised in the litigation, I would vote to interpret the Act as being inapplicable to—and therefore failing to create a remedy for—wiretaps intended, and reasonably likely, to obtain evidence of crime, as in this case, in which the plaintiff invoked the Act in an effort to hide evidence of his adultery from his wife."

Epstein v. Epstein, 843 F.3d 1147 (7th Cir. 2016).

Louisiana Lawyer "Specializing in Maritime Personal Injury and Death Cases" May Have Technically Violated Former Rule 7.4, but Was Not Sanctioned by the Supreme Court

In 2011, the Office of Disciplinary Counsel brought charges against a lawyer who had characterized his law firm as "specializing in maritime personal injury and death cases" on his former website from 2007 to 2009. Respondent, rejecting the charges, argued that the website did not claim a particular expertise or legal specialization as contemplated by the Rule, but simply used the term "specializing" to convey the focus of his law practice, in its ordinary meaning and use. (Respondent also challenged the charges on Constitutional grounds.) Although the Hearing Committee and Board each found a violation of the version of Rule 7.4 that had been in effect during the relevant time period, because the respondent's actions were based "upon inexperience with the advertising rules rather than a dishonest or selfish motive," only a public reprimand was recommended. (The Board also recommended that respondent be ordered to attend a CLE on lawyer advertising.) The Louisiana Supreme Court, after a review of the record, nevertheless held that "respondent's actions were not taken with a culpable mental state" and "caused no harm to the public. Considering these factors, we do not find respondent's actions rise to the level of sanctionable misconduct." *In re Loughlin,* No.2014-0923 (La. 9/26/2014), 148 So.3d 176, 178. The Rules have since been amended, (most recently in June of 2016 – discussed more fully *infra*), to specifically allow an attorney to state that he or she is a "specialist", practices a "specialty", or

"specializes in" a particular field, so long as the representation is truthful.[1]

Judge in Northern District of Illinois Strikes Portions of Answer, Affirmative Defenses Not Made in Good Faith

A number of recent decisions call into question a defense lawyer's obligations under Rule 11 in responding to allegations in the plaintiff's complaint, as well as the substantive question of whether the *Iqbal/Twombly* pleading standard applies to affirmative defenses.

For example, Judge Milton Shadur, sitting in the Northern District of Illinois, recently struck repeated aversions that a document "speaks for itself" and that the defendant is without sufficient information regarding the allegations, "and, therefore, denies them." The Court said: "It is of course oxymoronic for a party to assert (presumably in good faith) that it lacks even enough information to form a belief as to the truth of an allegation, then to proceed to deny it. Because such a denial is at odds with the pleader's obligations under Rule 11(b), the quoted language is stricken from each of those paragraphs of the Answer." *Zorba v. Wells Fargo,* No.15-8387 (N.D.Ill. Nov. 16, 2015); *citing State Farm Mut. Auto. Ins. Co. v. Riley*, 199 F.R.D. 276, 279 (N.D.Ill. 2001) (unacceptable to answer that a document "speaks for itself") (also finds insufficient the aversion that an allegation "states a legal conclusion"); *see also Racick v. Dominion Law Associates*, 270 F.R.D. 228 (E.D.N.C. 2010) (applying *Iqbal* and *Twombly* to the pleading of affirmative defenses).

Louisiana Supreme Court Sanctions Attorney Who Used On-Line Social Media Campaign to Attempt to Influence Legal Proceedings

Rejecting the notion that attorney's actions were protected by the First Amendment, the Louisiana Supreme Court sanctioned an attorney for "using the internet and social media to elicit outrage in the general public and to encourage others to make direct contact with judges in an effort to influence their handling of pending cases" in violation of Rules 3.5(a) and (b),[2] as well as 8.4(c), to the extent that some of the information disseminated about the two presiding judges was false and misleading,[3] and 8.4(d).[4]

> We disagree and take strong exception to respondent's artful attempt to use the First Amendment as a shield against her clearly and convincingly proven ethical

---

[1] *See* La. Rule of Professional Conduct 7.2(c)(5) (eff. June 2, 2016).

[2] Louisiana Rule of Professional Conduct 3.5(a) prohibits a lawyer from seeking "to influence a judge, juror, prospective juror or other official by means prohibited by law." Rule 3.5(b) prohibits *ex parte* communications "with such a person during the proceeding unless authorized to do so by law or court order."

[3] Louisiana Rule of Professional Conduct 8.4(c) prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation."

[4] Louisiana Rule of Professional Conduct 8.4(d) prohibits a lawyer from engaging in "conduct that is prejudicial to the administration of justice."

misconduct. As the United States Supreme Court noted in *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991):

> It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal. ….

By holding the privilege of a law license, respondent, along with all members of the bar, is expected to act accordingly. This is particularly so when a lawyer is actively participating in a trial, particularly an emotionally charged child custody proceeding. Respondent in this instance "is not merely a person and not even merely a lawyer. She is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." And as such, her "obedience to ethical precepts required abstention from what in other circumstances might be constitutionally protected speech," to preserve the integrity and independence of the judicial system. The appropriate method for challenging a judge's decisions and evidentiary rulings, as respondent even conceded, is through the writ and appeal process, not by starting a social media blitz to influence the judges' and this Court's rulings in pending matters and then claiming immunity from discipline through the First Amendment. Rather than protected speech, the evidence clearly and convincingly shows respondent's online and social media campaign was nothing more than an orchestrated effort to inflame the public sensibility for the sole purpose of influencing this Court and the judges presiding over the pending litigation. As such it most assuredly threatened the independence and integrity of the courts in the underlying sealed domestic matters. Moreover, the testimony irrefutably establishes both presiding judges perceived the campaign as a threat to their personal security and as an attempt to intimidate and harass them into ruling as the petitioners wanted.

In re McCool, 2015-0284 (La. 6/30/2015), 172 So.3d 1058.

Louisiana Supreme Court Excludes Negotiated Discounts from Collateral Source Rule

In a case where the plaintiff attempted to recover the full customary charge for medical services from the tortfeasor, the Louisiana Supreme Court agreed with the lower courts that the plaintiff was only allowed to recover the discounted cost that had been negotiated between the plaintiff's attorney and the medical provider.

Rejecting the argument that such negotiated advantages fall within the Collateral Source Rule, the court adopted a bright line, noting that "to do otherwise would invite a variety of evidentiary and ethical dilemmas for counsel. For example, an evidentiary hearing inquiring into the details of the attorney-client relationship to uncover a 'diminution in patrimony' resulting from

the attorney negotiated medical discount might intrude upon the privilege surrounding the employment contract and communications as to fee arrangements."

Additionally, the Court opined, "a lawyer who negotiates a discount with a medical provider and then attempts to recover the undiscounted full 'cost' from the defendant might run afoul of Rule 4.1 of the Rules of Professional Conduct, entitled 'Truthfulness in Statements to Others,' which provides in Subsection (a) that a lawyer in the course of representing a client shall not knowingly make a false statement of material fact to a third person."

Hoffman v. 21st Century N. Am. Ins. Co., 2014-2279 (La. 10/2/2015), 209 So.3d 702.

Several Bar Associations Support the Proposition that a Client May be Advised to Hide or Remove Social Media, as Long as the Materials Are Preserved

Both the Florida State Bar Association and the North Carolina State Bar Association have issued advisory opinions indicating that a lawyer may advise a client to "clean up" his or her Facebook or other social media pages by changing the privacy settings so that they are not publicly accessible and/or by removing photos, posts or other information. *However,* where potentially relevant and/or discoverable, the underlying materials must be preserved, in accordance with the substantive law (and/or any applicable court orders) regarding preservation and/or spoliation. *See* NORTH CAROLINA FORMAL ETHICS OPINION 5 (July 25, 2014) *and* FLORIDA BAR PROFESSIONAL ETHICS OPINION NO. 14-1 (Oct. 16, 2015). *See also* NEW YORK COUNTY LAWYERS ASSOCIATION ETHICS OPINION 745 (2013).

Louisiana Attorney Sanctioned for Reckless Criticism of Lower Courts in Brief

An attorney seeking writs from the Louisiana Supreme Court regarding the refusal of a district court to recuse itself in a family law matter accused the trial court judge of manipulating the transcript and the court of appeal of a cover up. Sanctioning the attorney for a year and a day (with all but six months suspended), a divided Louisiana Supreme Court found a violation of Rule 8.2(a)[5]:

> Respondent relies heavily on the purportedly corrupted audio tape from the *Hunter* hearing as providing support for her assertions of incompetence and corruption of the legal profession. We acknowledge there is evidence in the record of these disciplinary proceedings indicating that the court reporter's tapes may have been spliced as a result of a malfunction of the court reporter's machine. However, we see no evidentiary support for respondent's implication that Judge Keaty or any person, either through incompetence or corrupt intent, added substantive statements to the official transcript which were not contained in the original hearing. Ordinary

[5] Louisiana Rule of Professional Conduct 8.2(a) prohibits a lawyer from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

> experience suggests that equipment can often malfunction without any underlying incompetence or intentional corruption. Thus, in the absence of any objective supporting evidence, respondent acted with a reckless disregard for the truth when she referred to "incompetence and/or corruption" of the members of the legal profession in pleadings filed in this court.
>
> Even more disturbing is respondent's statement that the court of appeal "wants to cover up the egregious actions of the trial court so it cannot be used in the current election." Through the testimony of the judges of the court of appeal panel, the ODC proved this statement was objectively false. Respondent points to no evidentiary support whatsoever for her contention that the judges of the court of appeal intentionally altered their judgment to protect Judge Keaty. Regardless of the genuineness of respondent's belief, the objective facts in the record support the conclusion this statement was made with either knowledge of its falsity or reckless disregard for the truth.

In re Mire, No.2015-1453 (La. 2/19/2016), 197 So.3d 656.

ABA Provides Guidance to Attorneys Who Receive Subpoenas Seeking Client File Materials

The ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion addressing a lawyer's "Obligations Upon Receiving a Subpoena or Other Compulsory Process for Client Documents or Information," which offers the following guidance and advice:

> The lawyer's obligations of notice and consultation upon receiving a demand for client files and information are essentially the same for current and former clients.
>
> First, the lawyer must notify—or attempt to notify—the client. For former clients, the lawyer must make reasonable efforts to reach the client by, for example, internet search, phone call, fax, email or other electronic communications, and letter to the client's last known address. The specific efforts required to reach particular clients will depend on the circumstances existing when the lawyer receives the demand. But these efforts must be reasonable within the meaning of Model Rule 1.0(h), and should be documented in the lawyer's files.
>
> The content of the consultation will depend on the circumstances. It should include, at a minimum, (i) a description of the protections afforded by Rule 1.6(a) and (b), (ii) whether and to what extent the attorney-client privilege or work product doctrine or other protections or immunities apply, and (iii) any other relevant matter. Other relevant matters include, for example, "to the extent that the disclosure of confidential client information in a civil proceeding may raise potential criminal liability for the client, the consequences should be explained to the client during the consultation process."
>
> If, after consultation, the client wishes to challenge the demand, the lawyer should, as appropriate and consistent with the client's instructions, challenge the demand on any reasonable ground.

> If, after making the challenge, the court or other tribunal rules against the motion to withdraw or modify the order or demand for production, "the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4."
>
> If the client decides not to appeal and gives informed consent to disclosure, the lawyer must produce the documents and information consistent with the client's instructions….
>
> The lawyer has several options and some obligations if the lawyer and client disagree about how to respond to the initial demand or to an adverse ruling, or if the client wishes to retain new counsel. For a current client, where the initial demand or the appeal is within the scope of the retention, for example, the lawyer may seek to withdraw in compliance with Model Rule 1.16. Where the initial demand or the appeal constitutes a new matter for a current client or relates to a former client and the client wishes to seek other counsel, the lawyer should take reasonable steps to protect the client's interest during the client's search for other counsel….
>
> Where the client is unavailable for consultation after the lawyer has made reasonable efforts to notify the client, the lawyer "should assert on behalf of the client all non-frivolous claims that . . . the information sought is protected against disclosure by the attorney-client privilege or other applicable law." The lawyer has this obligation to assert all reasonable objections and claims when the lawyer receives the initial demand.

ABA FORMAL OPINION NO. 473 (Feb. 17, 2016).

New Jersey Committee on Lawyer Advertising Issues a Notice to the Bar re "Superlawyers" "Best Lawyers" etc

Lawyer advertising that mentions awards such as "Super Lawyers," "Rising Stars" and "Best Lawyers" has spurred the filing of many complaints with the New Jersey Supreme Court Committee on Lawyer Advertising, which recently issued a reminder:

> Lawyers may refer to such honors in their advertising "only when the basis for comparison can be verified" and the group bestowing the accolade "has made adequate inquiry into the fitness of the individual lawyer."
>
> The inquiry into fitness has to be more rigorous than a simple tally of years in practice and lack of disciplinary history. Honors that don't involve a bona fide fitness inquiry include popularity contests that tally votes by telephone, text or email. When an award meets this preliminary test, lawyers who want to use it must provide a description of the award methodology, either in the advertising or by reference to a "convenient, publicly available source." When the name of the award includes a superlative such as "super," "superior," "best" or "leading," the advertising "must state only that the lawyer was included in the list with that name,

and not suggest that the lawyer has that attribute."

The Notice gives this example of language that could be included with a reference to the "Super Lawyers" accolade:

> "Jane Doe was selected to the 2016 Super Lawyers list. The Super Lawyers list is issued by Thomson Reuters. A description of the selection methodology can be found at www.superlawvers.com/about/selection process detail.html. No aspect of this advertisement has been approved by the Supreme Court of New Jersey."

See NEW JERSEY SUPREME COURT COMMITTEE ON LAWYER ADVERTISING NOTICE TO THE BAR (May 4, 2016).

Judge in W.D. Arkansas Sanctions Attorneys who Dismiss Putative Class Action to Effectuate Settlement in State Court

A putative class action was filed in the Circuit Court of Polk County, Arkansas, and properly removed under the Class Action Fairness Act of 2005 (CAFA). An answer was filed, followed by a motion for partial judgment on the pleadings. Then the court stayed the action on joint motion of the parties. At the initial mediation session, the possibility of dismissing this action and refiling in Arkansas State Court was discussed. A second mediation was scheduled, and the Federal District Court continued the stay. On March 16, 2015, the parties notified the court that they had reached agreement on almost all material terms and moved for a one-month extension to resolve outstanding issues. The U.S. District Court denied the motion, lifted the stay, and directed the parties to file an updated Rule 26(f) report. Shortly thereafter, the parties reached an agreement in principle. The terms included dismissal of the Federal Court action and refiling the case in Arkansas State Court. Defense counsel then withdrew the motion for partial judgment on the pleadings, and the parties filed a joint Rule 26(f) report proposing several dates for continued litigation, and the Federal Court entered a final scheduling order on the basis of the Rule 26(f) report. A few weeks later, the parties executed a settlement agreement identifying the reviewing court as the Circuit Court of Polk County, and then jointly dismissed the Federal Court action by stipulation. The District Court then sanctions both class counsel and defense counsel under both Rule 11 and the inherent authority of the Court:

> At least as early as the September 2014 mediation, at which dismissal and return to state court was a term in negotiations, Respondents treated the federal court system and its rules for class actions as a bargaining chip. A return to Arkansas state court for settlement purposes allowed Respondents to certify a settlement class in a court whose precedent prevented it from rigorously analyzing whether the class should have been certified, and to insulate the class settlement in that court both from reasonable objections by class members and from any substantive appellate review. All Respondents are complicit in this conduct. Plaintiffs' counsel have embraced the practice of negotiating lucrative attorneys' fees from various defendants using

> the threat of class action as leverage, as evidenced by their willingness here to negotiate a settlement that primarily benefits Plaintiffs' counsel and USAA. Despite this Court not having certified a class, and knowing they would not ask this Court for an appointment as class counsel, while proceeding in this Court Plaintiffs' counsel negotiated and signed a class settlement agreement before stipulating to dismissal of this action. Plaintiffs' counsel used the lesser scrutiny of Arkansas state courts to entice defendants to stipulate to dismissal for refiling in a forum where it is possible to certify a potentially overinclusive and indeterminate class and settle on terms that will take less money from the defendants. Defense counsel removed this action to federal court and then took advantage of the more difficult certification and settlement process in this forum to negotiate a settlement designed to result in a lower payout to an overinclusive class in exchange for a high attorney's fee.
>
> The result of Defense counsel invoking federal jurisdiction and then all Respondents treating that jurisdiction as a bargaining chip during pending litigation is that the Court was not treated as a forum in which to resolve a dispute but as leverage in negotiations that benefited everyone but the class members….
>
> Respondents have jointly abused the federal court system through their conduct in this case. That abuse was committed in a way designed to insulate Respondents' actions from federal judicial scrutiny. When the terms of the return to state court were decided, Defense counsel withdrew the pending motion for partial judgment on the pleadings, perhaps concerned that the pending motion would call the Court's attention to the case, or might otherwise impede their dismissal of the action, as occurred when the district court in *Hamm* converted a 12(b)(6) motion to a motion for summary judgment. *See Hamm*, 187 F.3d at 949 (affirming district court's conversion of the motion); *Id.* at 950 (explaining that a converted 12(b)(6) motion precludes a plaintiff's unilateral voluntary dismissal). In their last status report and request for continuance filed in this Court, the parties represented that they had "made substantial progress toward resolving this action", not some future action to be filed in state court. After the agreement was reached to stipulate to dismissal and refile in Arkansas state court for certification and settlement, Respondents also jointly submitted a Rule 26(f) report in which they proposed several litigation deadlines to this Court, implying their intent to continue to litigate in this forum. This conduct—knowingly aimed at evading properly-invoked federal judicial scrutiny and gaming the system established by the Federal Rules of Civil Procedure to dismiss for a purpose Respondents knew or should have known to be improper under those Rules—reveals some degree of bad faith on the part of Respondents.

OPINION AND ORDER, *Adams v. USAA*, No. 2:14-cv-02013 [Rec. Doc. 61] (W.D. Ark. April 14, 2016).

U.S. Fifth Circuit Affirms *En Banc* District Court Suspension of Attorney Who Hired Co-Counsel in Order to Prompt District Court Judge's Recusal

The U.S. Fifth Circuit Court of Appeals affirmed a one-year suspension (six months deferred) of an attorney who was found to have hired a close friend of the presiding judge as co-counsel in order to obtain judge's recusal.

Rule 2 of the Eastern District of Louisiana's Rules for Lawyer Disciplinary Enforcement states that "the court *en banc* may impose discipline upon a lawyer authorized to practice before this court if it finds clear and convincing evidence that … the lawyer has committed 'misconduct' as defined in the Louisiana Rules of Professional Conduct." Rule 7.4 states that "at the conclusion of all necessary proceedings, the [allotted] judge must submit written findings and recommendations to the court *en banc* for determination of the disciplinary sanctions, if any, to be imposed." Rule 7.5 states that "after consideration of the allotted judge's findings and recommendations, the court *en banc* must enter an order either dismissing the complaint or imposing appropriate discipline."

In this case, the allotted judge recommended dismissal of the complaint against Mr. Mole, but the *en banc* court disagreed and imposed discipline based on professional misconduct. The *en banc* court stated that "although Judge Berrigan held the evidentiary hearing in this matter, these Findings are based on an independent review of the entire record, including the transcript of the evidentiary hearing, the transcript of the testimony before the Senate, the memoranda of counsel, and the applicable law." The Fifth Circuit affirmed:

> The *en banc* court found that Mole hired Gardner to prompt [Judge] Porteous's recusal after reviewing testimonial evidence derived from both the Senate hearings and Mole's own disciplinary hearing before Judge Berrigan, as well as documentary evidence such as the retention letter between Mole and Gardner. The *en banc* court found the "testimony that the terms of the letter agreement were not drafted in an attempt to secure the recusal of Porteous to be incredible." The *en banc* court highlighted Mole's testimony before the Senate, where Mole admitted that "getting the judge to recuse himself would be the only way to get a fair outcome"; "getting Judge Porteous to recuse himself was a priority with [him], and one of the things [he] hoped Mr. Gardner's presence in the case … would accomplish"; and that he "certainly considered that maybe if [Gardner] got involved … Porteous didn't have a legal responsibility to recuse himself because of that but that he might." The *en banc* court also noted that it "did consider evidence presented at the [hearing before Judge Berrigan], but also gave weight to the sworn testimony before the Senate …. given at a time when the witnesses had no personal stake in the outcome." The *en banc* court thus concluded that, "taken as a whole, the evidence provided clear and convincing evidence that Mr. Mole's intent was to prompt former Judge Porteous's recusal." …
>
> Even if we find Mole's version credible, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier

> of fact, it would have weighed the evidence differently." And "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Because the *en banc* court's determination that Mole hired Gardner to obtain Porteous's recusal is plausible in light of the record as a whole, we cannot set aside that finding.

In re Mole, 822 F.3d 798, 804-805 (5th Cir. 2016).

Louisiana Second Circuit Affirms Dismissal of Legal Malpractice Action Based on Testimony Supported by Disengagement Letter

In *Watson v. Franklin*, the plaintiff initially suffered a slip-and-fall on May 12, 2013, and thereafter retained an attorney. The retainer agreement reserved the right to terminate the agreement at any time following investigation, discovery, and legal research. The attorney informed Watson by letter, dated March 18, 2014, of several issues with her case, and his decision to terminate the attorney retainer agreement. In the letter, the attorney advised the plaintiff to seek the advice of another attorney, and that her claim would prescribe on May 12, 2014. No petition for damages arising from the slip-and-fall was ever filed on the plaintiff's behalf, and her claim stemming from that incident prescribed. Ms. Watson then sued her prior attorney for malpractice, which was dismissed by the district court on an Exception of No Right of Action, and the Second Circuit Court of Appeal affirmed: "At the hearing on Franklin's exceptions, Franklin testified that he personally mailed the disengagement letter terminating the attorney-client relationship to Watson and never received it back. Watson did not testify at the hearing and the trial court found that her affidavit stating that she did not receive the letter was insufficient to rebut the evidence submitted by Franklin. We find the trial court's factual determination that Franklin terminated his representation of Watson by letter reasonable, and thus, not manifestly erroneous. An attorney-client relationship between Franklin and Watson did not exist at the time Watson's claim prescribed. Thus, Watson did not have a right of action against Franklin for legal malpractice, and the trial court did not err in dismissing Watson's claim." *See Watson v. Franklin,* No. 50,730 (La. App. 2nd Cir. 6/22/2016), 198 So.3d 177.

Louisiana Rules Amended to Expressly Allow an Attorney to State that He or She "Specializes" in a Particular Area of the Law, as Long as the Statement is Truthful

On June 2, 2016, the Louisiana Supreme Court amended Rule of Professional Conduct 7.2(c)(5) to expressly allow a lawyer to "communicate the fact that the lawyer does or does not practice in particular fields of law." Specifically:

> A lawyer may state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields….

However, such representations are, at the same time, subject to the "false and misleading" standard

applied to communications concerning a lawyer's services generally.[6]

The Rule then delineates the limited circumstances under which an attorney can state or imply that he or she is "certified" or "board certified", specifically:

> *(A) Lawyers Certified by the Louisiana Board of Legal Specialization.* A lawyer who complies with the Plan of Legal Specialization, as determined by the Louisiana Board of Legal Specialization, may inform the public and other lawyers of the lawyer's certified area(s) of legal practice. Such communications should identify the Louisiana Board of Legal Specialization as the certifying organization and may state that the lawyer is "certified," or "board certified in (area of certification)."
>
> *(B) Lawyers Certified by Organizations Other Than the Louisiana Board of Legal Specialization or Another State Bar.* A lawyer certified by an organization other than the Louisiana Board of Legal Specialization or another state bar may inform the public and other lawyers of the lawyer's certified area(s) of legal practice by stating that the lawyer is "certified," or "board certified in (area of certification)" if:
>
> > (i) the lawyer complies with Section 6.2 of the Plan of Legal Specialization for the Louisiana Board of Legal Specialization; and,
> >
> > (ii) the lawyer includes the full name of the organization in all communications pertaining to such certification. A lawyer who has been certified by an organization that is accredited by the American Bar Association is not subject to Section 6.2 of the Plan of Legal Specialization.
>
> *(C) Certification by Other State Bars.* A lawyer certified by another state bar may inform the public and other lawyers of the lawyer's certified area(s) of legal practice and may state in communications to the public that the lawyer is "certified," or "board certified in (area of certification)" if:
>
> > (i) the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Plan of Legal Specialization, as determined by the Louisiana Board of Legal Specialization; and,
> >
> > (ii) the lawyer includes the name of the state bar in all communications pertaining to such certification.

See LA. RULE OF PROFESSIONAL CONDUCT 7.2(c)(5) (eff. June 2, 2016).

[6] *See* LA. RULE OF PROFESSIONAL CONDUCT 7.2(c)(1). *See also* Rule 7.2(c)(3) ("A lawyer or law firm shall not state or imply in advertisements or unsolicited written communications that the lawyer or law firm currently practices in an area of practice when that is not the case").

Louisiana Establishes / Clarifies Professional Rules Applicable to the Sale of a Law Practice

Effective July 1, 2016, the Supreme Court of Louisiana amended the Rules to specifically proscribe the purchase of a law practice (or area of a law practice) by another lawyer or firm. In particular, Louisiana Rule of Professional Conduct 1.17 expressly authorizes the purchase or sale of a law practice, (or an area of a law practice), including good will, where, generally:

- The selling lawyer has not been disbarred or permanently resigned from the practice of law in lieu of discipline, and permanently ceases to engage in the practice of law, or has disappeared or died;

- The entire law practice, or area of law practice, is sold to another lawyer admitted and currently eligible to practice in this jurisdiction;

- Actual notice is given to each of the clients of the law practice being sold;[7]

- Published notice; and,

- The fees or costs charged clients shall not be increased by reason of the sale.

The Rule then sets forth a process intended to balance the would-be purchaser's ability to conduct due diligence with the privilege and confidentiality obligations that are owed to the clients of the seller.[8]

Finally, the Rule makes clear that "any necessary notice to and permission of a tribunal shall be given/obtained"[9] and that "the client shall retain unfettered discretion to terminate the selling or purchasing lawyer or law firm at any time," and, in the event of termination, the lawyer in possession shall return such client's file(s) in accordance with Rule 1.16(d).[10]

At the same time, Rule 5.4, (generally regarding the professional independence of a lawyer), was amended to expressly provide that "a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price."[11]

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[7] Specific notice requirements are promulgated in sub-parts (1)-(4) of Rule 1.17(c).

[8] *See* La. Rule of Professional Conduct 1.17(f).

[9] *See* La. Rule of Professional Conduct 1.17(g).

[10] *See* La. Rule of Professional Conduct 1.17(h).

[11] *See* La. Rule of Professional Conduct 5.4(a)(4).

Amendment to ABA Model Rule 8.4 to Explicitly Prohibit Harassment and Discrimination

On August 12, 2016, the ABA amended Model Rule 8.4 to expressly prohibit a lawyer from engaging "in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." The Rule expressly clarifies that it is not intended to "limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16,"[12] nor to "preclude legitimate advice or advocacy consistent with these Rules." *See* ABA MODEL RULE OF PROFESSIONAL CONDUCT 8.4(g).

[12] Louisiana Rule of Professional Conduct 1.16(b)(4) allows an attorney to withdraw from representation where "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

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

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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.

[1] A 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. It has evolved a bit over time.

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?

Conduct of the Litigation

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. 754 (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).