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## **Ethical Questions Raised by the BP Oil Spill Litigation**

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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.<sup>1</sup> 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", and the individual plaintiff attorney (or *pro se* litigant) would be responsible for establishing "specific causation" and his or her own individual damages.

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.<sup>2</sup>

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,<sup>3</sup> a plaintiff in an MDL is not generally considered to be the “client” of the Steering Committee.<sup>4</sup>

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.<sup>5</sup> (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).<sup>6</sup>)

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? <sup>7</sup>
- 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? <sup>8</sup>
- 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?<sup>9</sup>

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

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