

RICK GODFREY

The Counsel to Call in the Depths of a Crisis

by Mike Bailey



Richard C. Godfrey, of Kirkland & Ellis LLP, was hoping to slow down a little in 2010. The previous year he tried three large cases, handled several appeals, and settled another large case the day before jury selection was to start. “It was the hardest I had ever worked,” he says. Up until then at least.

So, in late April 2010 when a corporate client called him for representation after an oil rig exploded in the Gulf of Mexico, Godfrey gathered up a half dozen attorneys from the firm and headed to New Orleans.

“I thought it was a mid-sized case,” he recalls. “I knew lives had been lost, that there would be property damage claims from the loss of the rig and maybe some residual pollution. So, I took six or seven lawyers and we went down there to get a sense of what had taken place.”

What he subsequently found was among the largest accidental marine oil spills in the world, and the largest environmental disaster in U.S. history.

Deepwater Horizon was an ultra-deep water, semi-submersible offshore drilling rig owned by Transocean Ltd., one of the world leaders in deep water drilling equipment.

BP (formerly British Petroleum) leased the rig in 2001. At one point, the company drilled the deepest oil well in history at a vertical depth of more than 35,000 feet. The oil field was about 250 miles southeast of Houston, and the rig operated in 4,100 feet of water.

On April 20, 2010, an uncontrollable blowout caused an explosion on the rig and ignited a fireball that could be seen for 40 miles. The explosion killed 11 crew and injured more than a dozen others. Later analysis led

investigators to believe that a giant methane bubble traveled up the shaft, expanding as it went, bypassing several safeguards and igniting via diesel exhaust as it washed over the deck of the rig.

The blaze was virtually inextinguishable. On April 22, the entire rig sank, leaving the well gushing oil at the bottom of the seabed at an estimated rate of 340,000 gallons a day. As the rig was sinking, Godfrey was retained to represent BP shortly after noon that day.

“As the days wore on, the magnitude of what was occurring became obvious,” Godfrey says. “We went from about eight attorneys down there to 170 lawyers from Kirkland & Ellis. By July, we (Kirkland & Ellis) had 300 lawyers there and elsewhere,” he remembers.

Except for long tours of duty in London and Houston, he essentially moved to New Orleans, where he spent much of the next four years. To celebrate his 100th consecutive night as a guest in a New Orleans-area hotel, he received a small gift basket. He remembers going home for Thanksgiving in 2010 before returning for most of the next four years as lead outside counsel—“the general,” as BP’s global head of litigation referred to him.

Although 300 lawyers on site might seem to be overkill, Godfrey explained to the company the scope and magnitude of what was required. It was clear they needed more, so they were hired.

In the first 19 months, from April 22, 2010, to December 2011, the Kirkland team handled innumerable legal matters, Godfrey says. As Federal District Court Judge Carl Barbier, who was overseeing the massive litigation put

it: “The parties engaged in an extraordinary amount of discovery within a compressed time period to prepare for the Phase One Trial.

“This included taking 311 depositions, producing approximately 90 million pages of documents, and exchanging more than 80 expert reports on an intense and demanding schedule. Depositions were conducted on multiple tracks and on two continents. Discovery was kept on course by weekly discovery conferences before Magistrate Judge Shushan. The court also held monthly status conferences with the parties.”

But unlike other litigation, the testimonial phase of the *Deepwater* litigation began immediately, 20 days after the rig exploded. Thus, the administrative trial conducted by the United States Coast Guard and other governmental officials began May 10, 2010, lasted 27 days, and involved more than 80 witnesses.

Godfrey explains that when a casualty occurs at sea, the United States Coast Guard convenes a hearing to determine causation. The official title of the action was United States Coast Guard/Bureau of Ocean, Energy, Management Regulation & Enforcement (f/k/a) MMS—Marine board Investigation into the Marine Casualty, Explosion, Fire, Pollution and Sinking of the Mobile Offshore Drilling Unit *Deepwater Horizon*. It was the first of many legal proceedings.

The ultimate decision in that administrative case was paramount to the defense in the resulting litigation. Testimony and evidence were introduced, facts were presented, and witness testimony was recorded.

Had that tribunal found that BP was solely responsible for having caused the disaster, that evidence and information would have carried over into civil litigation, and it would have influenced the Department of Justice's criminal investigation.

Godfrey led BP's defense in that proceeding, splitting duties with partner Carrie Karis and a team of attorneys who crafted their case essentially on the fly since the hearing occurred almost immediately after the disaster.

Godfrey and his team presented evidence to show the responsibility for having caused the accident should be shared between Transocean, owner of the rig, Halliburton, Cameron and other oil service companies—a "multi-party, multi-causal" theory of defense.

At the conclusion of the hearing, BP's theory that Godfrey advocated prevailed, and the Marine Board found causation split among several parties.

Meanwhile, the federal court civil litigation proceeded. It involved approximately 6,000 lawsuits with more than 200,000 separate plaintiffs and millions of potential class plaintiffs.

In addition to the Coast Guard investigatory-administrative trial and representing BP in the multi-district civil litigation in federal court in the Eastern District of Louisiana, Kirkland lawyers also were involved in representing BP in connection with the Presidential Commission investigation, the Congressional investigation and the Department of Justice criminal investigation, as well as defending the company against the claims brought by the five Gulf States, the Civil Division of the Department of Justice and the Securities and Exchange Commission.

Meanwhile, oil continued to gush onto the sea floor for 87 days. Crews tried to clean up the site as best they could while preserving evidence that was under subpoena. Godfrey says that cement and mud samples from the wells had to be preserved. The mud that landed on relief vessels did, too, because it was evidence.

MUDDY EVIDENCE IN THE CASE

So, crews were trying desperately to clean up the site and the debris while working under the knowledge that everything had to be preserved and kept as pristine as possible because of various government subpoenas.

"Thousands of people were trying to cap the well and trying to preserve evidence at the same time. We had lawyers on rigs, ships and around the world trying to comply with subpoenas. Meanwhile, the company was really trying to do the right thing," Godfrey says.

"We had the MMS (Coast Guard) trial, a government investigation, a congressional investigation and subpoenas, a presidential commission, a chemical safety board, the United Kingdom parliament inquiries, and we're trying to preserve all of the physical and

other evidence while the company is trying to get the well capped," Godfrey says of his many challenges as lead outside counsel.

James Neath, recently retired head of global litigation for BP PLC, says Godfrey's work in the *Deepwater Horizon* case was extraordinary. But he says Godfrey had been a trusted adviser and provided dependable legal counsel for BP for nearly 20 years prior to that. He handled many delicate matters, including regulatory issues and environmental litigation.

"We are probably one of (Godfrey's) largest clients and have been for close to 20 years. I am the person with whom he has worked most closely. What sets him apart is his strategic thinking. When we have a complex issue and we aren't sure how to approach it, we will sit at a whiteboard (to plan strategy). There is no one better at getting from point A to point Z than Rick. He is easy to deal with, he's a clear thinker, and he pays attention to every detail like no one else."

Godfrey's role in the *Deepwater Horizon* case was to lead the company's overall defense, including assembling and organizing lawyers into teams to handle the massive number of discovery requests, lawsuits, hearings and depositions—all while participating in a steering committee that reported to BP's senior management.

He coordinated strategy and tactics with BP's general counsel while trying to keep all the litigation teams on track. Discovery cast a wide net, he recalls, as requests were made for drilling procedures the company used across the globe, such as in Egypt, the North Sea, Libya, Angola and other far-flung places. The matter quickly became multi-district litigation in the United States, requiring Godfrey and his team to hire the best experts and additional outside counsel for their client.

The Kirkland & Ellis team left no stone unturned. To fully understand what had occurred and why, Godfrey and a team of lawyers went to an oil well drilling school in a remote part of northern Canada in early 2011 to learn how blowouts are controlled. The school injected hydrocarbons into the well to simulate a blowout and then demonstrated how they are extinguished.

Eventually, the number of Kirkland lawyers involved full-time—after the initial demand spike driven by document and related evidence discovery needs during 2010—settled at approximately 100. That did not include contract lawyers and related legal support personnel. Managing all the discovery requests, hearings, depositions and various claims and suits would seem to be an impossible task. Not for Godfrey.

"Kirkland & Ellis had lawyers here for regulatory matters, trial, discovery (civil claims) and Rick was the general," says Neath. "His

commitment to the company was incredible. He turned (Kirkland & Ellis) inside out. We got whatever we needed when we needed it. I don't think any other firm in America could have done that or would have wanted to do that."

While the scope of the disaster made legal representation daunting, Godfrey employed a principle taught to him many years earlier by the legendary lawyer Hammond Chaffetz: Attack the problem.

"I knew I wanted to be a lawyer from an early age," Godfrey says, recalling that his grandfather was a prosecutor and president of the Wisconsin State Bar Association. Watching his grandfather in trial piqued his interest at an early age.

"I was a political science and history dual major, but I like to say I majored in college debate," he laughs. He participated in a traveling debate team as part of The National Forensic League, which featured schools of every size. He used the skill he honed to his advantage in law.

"My father would have been a great attorney, but he did not want to practice law. He went to law school, but instead went into marketing." But the pull of law was strong for Godfrey, and he attended Boston University School of Law, graduating in 1979.

Godfrey's gut told him that opportunities for young attorneys often meant long apprenticeships at regional but not national law firms. To get involved in the biggest cases with a national scope, Godfrey realized he needed a large firm. So, was Kirkland & Ellis a natural fit?

"I turned down Kirkland & Ellis three times," he laughs. He wanted a large city practice, and New York was a candidate, as were other firms. But Kirkland & Ellis was persistent.

"I spent two hours with the firm's leaders. They essentially dared me to take it." He says they knew he was competitive and wanted a challenge.

"They said, 'If you're afraid to fail we don't want you here.' I felt they had a strategic vision, so I took the job."

He then met Chaffetz, who in the post-World War II era was on the short list of the leading corporate lawyers in America. "If they are our client, they are right, and the question is, are you smart enough to figure out why?" he used to say. He took on cases other lawyers would not, including one in which he told a large corporate client being sued by the United States Government that if they hired him, they would never pay a nickel," he recalls.

They hired him and never paid a nickel as Chaffetz promised, engendering what is known in Kirkland & Ellis lore as the Chaffetz G-- D--- nickel story.

What Chaffetz taught Godfrey and what guided him through the challenging and at times overwhelming BP *Deepwater Horizon* case was that "attack the problem" strategy. "You attack the problem rather than solely defend the client.

That is a subtle but significant difference.”

Godfrey uses the example of a client charged in an air emission case in which Chaffetz’s defense centered on the belief that the client was in technical compliance with the law. “He single-handedly created an inflection point to create an opportunity to win the case,” he says. “You figure it out. Every case is defensible if you put it in a different (context).”

SLEEPLESS BEFORE SANDRA

He recalls a case in which he represented Deborah Hills, whom he was appointed to represent on appeal pro bono by the federal Court of Appeals. Hills had been convicted of federal tax evasion for filing false tax returns as well as conspiracy to impede the IRS.

Godfrey calls it part of a series of cases involving one of the largest tax conspiracies ever won by the government. After the 7th U.S. Circuit Court of Appeals denied Godfrey’s motion to release Hills from prison on bond pending appeal, she remained in the penitentiary. Enter Godfrey. “It became apparent certain defenses were not raised, namely government prosecutorial misconduct,” he recalls.

In reviewing the record, he discovered that a government attorney in his closing argument had noted that Hills had invoked the Fifth Amendment. Further examination revealed that the trial court had warned the government not to mention that in its closing argument, but the lawyer did it anyway.

Even though Hills’ counsel had not objected at the time, the government lawyer’s comments on Hills’ exercise of her Fifth Amendment right was the lever Godfrey needed. The problem he attacked was the government’s disregard for the judge’s warning. The 7th Circuit scheduled oral arguments during the most pressing and critical period in the disaster, requiring Godfrey to fly up to Chicago to argue the case on virtually no sleep.

The courtroom where his argument was to be heard was filled to capacity. “I walked into the courthouse, and it was packed. I couldn’t figure out what was going on,” he says.

“I found out that U.S. Supreme Court Justice Sandra Day O’Connor was riding the circuit that day,” and so he argued that case in front of a panel including a U.S. Supreme Court Justice.

“She was an active participant,” he smiles. Several months later, the Court of Appeals ruled in favor of Ms. Hills, vacating her convictions and stating: “We cannot permit the government’s comments to pass without consequence under these circumstances.”

For many lawyers, the litigation would be the pinnacle of their careers. For Godfrey, it was just a tile in the vast mosaic of a legal profession marked by several significant victories and noteworthy successes.

Godfrey successfully represented Aon

Insurance Co. in a complicated case in which New York Attorney General Elliot Spitzer sued Aon, alleging breach of fiduciary duty, constructive trust and claimed violations of consumer fraud. Cameron Findlay was Aon’s general counsel at that time.

“Not that it’s seared in my memory or anything, but we were served with a subpoena by Spitzer’s people at 5 p.m. on April 21, 2004,” he remembers. The allegation concerned several insurance brokers, claiming they received contingent commissions for placing clients with certain companies and that some of those commissions constituted a conflict of interest.

“When we were pretty close to settling with Spitzer, one of his assistants said, or we were later told, that the plaintiffs did not want us to settle because it would cut the legs out from under the class action suits that were pending,” he says.

“We walked out of the meeting and went to the Aon offices in lower Manhattan and got Rick on the phone. He was in Oklahoma trying a case for another big client, but he agreed to break out of that to speak with us. He approached the matter in a linear, logical way and sketched out a way we could settle while keeping our reputation intact.”

Findlay says Godfrey quickly synthesized the information and found a practical way to allow a settlement to move forward. “He did this on the fly,” Findlay says. “I was astounded by that. He found a way to get us and Spitzer’s people out of a jam. And more importantly, to keep our reputation. That was the table stakes. Large firms like Aon cannot afford to (be tarnished by innuendo).”

Godfrey’s resume is brimming not only with victories crafted through creative solutions but also with a wide spectrum of cases and issues.

In 2003-2004, General Motors’ retiree health care obligations had grown astronomically and were clearly unsustainable. Godfrey was retained to reorganize the retiree health plans in a way that would be acceptable to the future of the company and the unions at issue.

“You have to be sensitive to the counterparty’s needs and understand what it takes to find a solution,” he says of the tricky discussions.

Through creative negotiations and the ultimate acquiescence of the United Auto Workers, Godfrey was able to fashion an agreement that was acceptable to both. The UAW filed a class action suit against GM, and the pre-packaged agreement was approved in 2007. Unfortunately, the vicious recession of 2008-2009 forced GM into bankruptcy. Still, being able to fashion an agreement with so much at stake and in such a potentially hostile arena was noteworthy.

He also successfully represented General Motors LLC in product liability and economic loss litigation relating to vehicle recalls concerning malfunctioning ignition switches.

Anton Valukas, former U.S. Attorney and now a partner at Jenner & Block, worked with Godfrey on the case. Valukas handled the criminal complaints and Godfrey, civil matters.

SEES FOUR OR FIVE STEPS AHEAD

“I’ve worked closely over the years with a lot of attorneys, but in all my years of practice I’ve never met a better lawyer than Rick,” Valukas says. “It’s the way he gathers facts and then strategizes toward the long-term goals.”

Valukas says Godfrey is an amazing lawyer and a deep thinker. “He takes steps early to put his clients in position to prevail. He’s always thinking four or five steps ahead. He makes decisions and gets issues resolved that loom large later in a case. He’s always thinking about the consequences later on. Some lawyers look at short term wins because of publicity or pressure, but he realizes that kind of thinking can preclude longer term gains.”

When Godfrey is not involved in complex litigation, he and his wife of 35 years, Alice, enjoy skiing and spending time with their children, John, 32, a lawyer in New York, and Polly, 29, a doctor in her residency at the University of Minnesota.

He enjoys the occasional game of golf, but his skills have suffered over the past few years as case after case has drawn him deeper into the legal world.

Instead, he reads history when he can and is an active member and trustee of several cultural and educational institutions, including Boston University, the Chicago Symphony Orchestra, Augustana College, The Newberry Library and the American Air Museum in Britain, among others. He also serves as chancellor for the Northern Illinois Conference of the United Methodist Church.

Why is he so active as his legal career nears a point where many would begin to slow down? “I would be bored,” he says simply. “I need to be challenged. I’m interested in solving and attacking problems to reach creative solutions, like the work I have been lucky enough to do.”

As Godfrey reflects on his career, he says he has been blessed with great mentors who taught him patience and how to create opportunities for clients.

“I have been fortunate in having such wonderful challenges and such great partners. I think I have been good at identifying great talent among young lawyers. I believe in giving them an opportunity and showing faith in them and then seeing how far they can go.”

That, says Neath, is part of what he admires most about Godfrey, away from the legal matters.

“He is a man of high integrity, and you can count on his word. He is truthful and principled. He gives sage advice while always trying to do the right thing.” ■