



GM CASE STUDY:  
PRACTICAL MEASURES FOR  
AVOIDING ETHICAL PITFALLS  
FOR IN-HOUSE COUNSEL

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## PRESENTATION GOALS

- To offer tips on avoiding common pitfalls for in-house counsel using the ethical rules and the recent GM ignition switch case as an illustrative example.
- Key concepts:
  - Know when to elevate or disclose confidential information.
  - Develop a culture of accountability and responsibility within the legal department.

# GM CASE STUDY: IN-HOUSE COUNSEL UNDER DOJ SCRUTINY

BUSINESS DAY

## *Inquiry by General Motors Is Said to Focus on Its Lawyers*

By BILL VLASIC MAY 17, 2014

Business | Sun May 18, 2014 5:23pm EDT

### GM legal department under scrutiny in company's recall probe: report

WASHINGTON

### GM Atty Testifies He Didn't Warn Execs Of Ignition Defects

By Cara Salvatore

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IN-HOUSE COUNSEL

### 6 attorneys fired by GM after law firm ignition-switch probe are reportedly identified

POSTED JUN 10, 2014 08:05 PM CDT

BY MARTHA NEIL

## CASE SUMMARY

- Systemic problems at GM led to a decade-long failure to issue a recall despite fatal crashes caused by defect.
  - Defective ignition switch moved to “accessory” or “off” position causing steering, brakes, and airbags to lose power.
- Fifteen terminations (including six in-house attorneys).
- Current and former GM attorneys have been under scrutiny in a DOJ criminal investigation.
  - Company settled with DOJ for \$900 million, but lead prosecutor said that investigation of individuals continues.



# CHRONOLOGY OF EVENTS

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## 2005 – 2007

- GM conducted inquiries into ignition switch problems in Chevy Cobalts.
- First ignition switch-related lawsuits filed and reviewed by GM in-house counsel.
  - Early lawsuits included fatalities and severe injuries.
- Multiple reports by outsiders identified the problem, but the reports were not disseminated within GM legal department.
  - Puzzle pieces existed but they were not put together.

## 2008 – 2009

- More fatalities due to airbag non-deployment and more lawsuits.
  - GM lawyers and engineers could not identify cause.
- GM investigation determined ignition switch jumped to “accessory” position while car was running in 7 of 14 crashes.
  - Issue still not elevated within GM.

## 2010 – 2012

- In 2010, 2011, and 2012 outside counsel warned GM lawyers it could face punitive damages.
- Jan. 2011: GM in-house lawyers request a meeting to learn more about the ignition switch issue (i.e., the “anomaly”)
- July 2011: GM in-house lawyers called for investigation by product investigation team.
  - Internal investigation opened but not assigned urgency.
- July 2012: Plaintiff’s expert report identified the defect.
  - Report discussed at roundtable of GM attorneys.
  - New attorney asks: “Why no recall?”
  - Still no recall nor elevation to GC.



## 2013

- April: At civil lawsuit deposition, evidence is disclosed showing GM engineer ordered change of ignition switch part in 2006.
  - New part seemingly fixed problem of loose ignition switch.
  - Engineer failed to get new part number despite change.
- July: Outside counsel warns GM attorneys of substantial adverse verdict because GM has known of defect since 2005.
  - Senior attorneys do not elevate to GC.
  - Still no recall.
- Aug: Lead GM attorneys learn of outside counsel's view of exposure because of defect.
  - Authorize \$5 million settlement

## 2014

- February 6: GC informed of ignition switch issue for first time.
- February 13: GM ordered first series of recalls.
- March: GM ordered internal investigation.
- House and Senate held hearings on recall delay; SEC investigating GM; DOJ launched criminal probe.
- GM fired 15 employees, including 6 in-house lawyers.



# CASE ANALYSIS

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## HOW DID THIS HAPPEN?

- GM operated in silos.
- Tiers of settlement authority:
  - Settlements \$5M or below did not require GC approval.
- In-house counsel failed to follow-up internally.
- In-house counsel failed to inform business line.
  - E.g., litigation reports to Board did not specifically reference claims or settlements related to ignition switches, airbag non-deployments, or moving vehicle stalls.
- No formal written process for how settlement committees should handle safety issues.



ETHICAL RULES

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# ETHICAL RULES AT PLAY

- When must in-house counsel report up inside the organization?
  - Model RPC 1.13(b)
    - If counsel knows that person associated with organization intends to act or refuses to act in manner that violates a legal obligation to the organization or a law that reasonably might be imputed to organization; AND
    - That violation is likely to result in substantial injury to organization; UNLESS
    - Counsel reasonably believes not necessary in the best interest of the organization.
  - Texas DRPC 1.12(b)
    - If counsel learns or knows that an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization
    - The violation is likely to result in substantial injury to the organization; and
    - The violation is related to a matter within the scope of the lawyer's representation of the organization.

## ETHICAL RULES AT PLAY, CONT'D.:

- What happens if report up but no action taken to prevent injury to the organization?
  - Model RPC 1.13(c) :
    - If attorney reports up to the highest possible authority within the organization, and the highest authority fails to timely address the violation, and
    - If attorney reasonably believes the violation is reasonably certain to result in substantial injury to the organization,
    - Then attorney may reveal confidential information outside the organization, but only if and to extent attorney reasonably believes necessary to prevent substantial injury to organization.

# SEC REPORTING REQUIREMENTS

- Sarbanes-Oxley added reporting requirements for attorneys who practice before the SEC as part of a directive to “set[] forth minimum standards of professional conduct . . . .”
- **17 CFR 205.3(b): *Duty to report evidence of a material violation.*** If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith.
- Alternatively, under **17 CFR 205.3(c)**, the attorney may report to the qualified legal compliance committee.



## SEC REPORTING REQUIREMENTS, CONT'D.:

- **17 CFR 205.3(b)(2)**: General counsel or chief legal officer is required to investigate reports of potential material violations OR to forward such reports to a qualified legal compliance committee for review.
- **17 CFR 205.3(b)(3)**: If the reporting attorney does not believe appropriate action has been taken within a reasonable time, he/she is required to report the evidence to the company's audit committee (or equivalent body).

## ETHICAL RULES AT PLAY, CONT'D.:

- When must in-house counsel reveal confidential info to outside entities of alleged business misconduct?
  - Some states require attorneys to reveal confidential information under particularly serious circumstances. E.g.:
    - Texas DRPC 1.05(e): disclosure required when confidential info clearly establishes client is likely to commit criminal or fraudulent act likely to result in death or substantial bodily harm.
    - Washington RPC 1.6(b)(1): disclosure required to prevent reasonably certain death or substantial bodily harm.
    - Wisconsin RPC 1.6(b): disclosure required to prevent client from committing a criminal or fraudulent act that lawyer reasonably believes is likely to cause death, substantial bodily harm, or substantial injury to another's financial interest or property.
  - In other jurisdictions, this rule is permissive, not mandatory.
    - E.g. New York, Michigan.

## ETHICAL RULES AT PLAY, CONT'D.:

- When may in-house counsel reveal confidential info to outside entities of alleged business misconduct?
  - Model RPC 1.6(b)
    - » To prevent, mitigate, or rectify substantial injury reasonably certain to result from client's commission of a crime or fraud in furtherance of which the client has used lawyer's services;
    - » To secure legal advice about lawyer's compliance with the ethics rules;
    - » To comply with other law or a court order.
  - Texas DRPC 1.05(c)(7)
    - » "When a lawyer has reason to believe it is necessary to prevent the client from committing a criminal or fraudulent act."
  - Texas DRPC 1.05(c)(8)
    - » "To the extent revelation reasonably appears necessary to rectify the consequences of client's criminal or fraudulent act in the commission of which the lawyer's services had been used."



LESSONS LEARNED

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## LESSONS OF GM

- Ensure effective communication and integration between counsel and business line.
- Have a process in place to identify recurring issues and spot patterns early.
- Have a reporting system in place for in-house counsel.
- Elevate or disclose confidential information when appropriate and/or required.
- Foster a culture of accountability and responsibility.



QUESTIONS?

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# PRESENTERS



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Stephen focuses predominantly on matters arising in the energy industry (including representing developers and producers, commodity traders, and suppliers to the energy industry), disputes involving alleged violations of securities laws (including representing public companies, officers and directors, and special committees), and large-scale construction disputes. In the past ten years, Stephen has tried or arbitrated more than twenty matters to verdict or final award. He has first chair jury and non-jury trial experience representing plaintiffs and defendants in state and federal district courts.



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