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Shades of Enron: the Legal Ethics Implications of the General Motors Scandal

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Legal Ethics Forum

June 09, 2014

Professor Michele Benedetto Neitz - "Shades of Enron: the Legal Ethics Implications of the General Motors Scandal"

[This is a guest post by Michele Benedetto Neitz on one of the more important topics of the year: the role of lawyers in the GM matter. JJS]



Here we go again. "Where were the Lawyers?" is becoming a predicable refrain in response to any wide-ranging corporate scandal. General Motors is battling a rising deluge of lawsuits, investigations, and government fines in the wake of its February 2014 recall of millions of cars for a safety defect. The defect, a faulty ignition switch, is allegedly responsible for 13 fatalities and hundreds of injuries.

The sorrow of the tragic loss of life in this case is now joined by growing public anger about a cover-up at the company to avoid liability for the defect. GM's engineers and managers may have known of the problem as early as 2004, and GM's in-house lawyers apparently knew about the defect in 2013 or earlier. The facts are still developing in this story, and the release of an internal investigation report last week directed by Anton Valukas answered significant questions. The actions of GM's lawyers clearly raise significant legal ethics ramifications.

The Michigan State Bar, legal ethicists, and in-house counsel should take note of potential violations of the following rules.

1. Perjury

GM is defending multiple high-profile lawsuits related to the defect. One Georgia case, brought by the family of crash victim Brooke Melton, included depositions of GM engineers to identify the precise nature of the defective switch. During his deposition testimony in the Melton case, GM engineer Raymond DeGiorgio testified that he had never approved any modifications to the design switch. Documents later revealed that Mr. DeGiorgio had in fact personally signed off on the changes to the switch in 2006.

GM's lawyers, from the law firm King & Spaulding, may or may not have known about Mr. DeGiorgio's apparently perjurious testimony during the deposition. The Valukas internal investigation revealed that soon after the deposition, the K&S lawyers told GM "This case needs to be settled." If they did know about perjurious testimony, Georgia Rule 3.3 (a)(3), like the ABA and Michigan Rules, would have required them to refuse to offer the testimony. After the deposition, lawyers who learned that the testimony was false should have followed remedial measures, including reporting the testimony to the court if necessary. Although the Melton family's case was settled one day before a GM executive was scheduled to testify, the Melton family's lawyer is now petitioning to reopen the case in light of Mr. DeGiorgio's perjurious testimony.

2. Reporting up the Ladder and Confidentiality

When did the lawyers know about the defect? The answer is still unclear, with observers noting that GM's lawyers have had a pattern of settling cases related to the defect before GM executives could be deposed. An amended class action complaint filed on Wednesday argued that it is "inconceivable" that GM's lawyers did not know about the defect before the company's 2009 bankruptcy. The Valukas internal investigation report disclosed that outside counsel warned GM in July 2013 that a "compelling" case could be made for knowledge of the defect as early as 2005, but "no GM lawyer apprised the General Counsel." CEO Mary Barra stated that she did not know about the defect on Chevrolet, Pontiac and Saturn vehicles until January 20, 2014, and the board learned immediately after she did. GM was fined \$35 million in May for failing to comply with a federal law requiring automakers to report any safety defect within five days.

GM lawyers' apparent knowledge about the defect, which was directly responsible for fatal injuries, triggered at least two ethical rules. First, any corporate counsel with knowledge of a violation of law that would harm the lawyers' organization must report up the ladder under Michigan Rule 1.13. If a GM lawyer reported this to GC Michael Milliken, and his response was inadequate, the lawyer should have gone to the CEO and ultimately (if necessary) the board of directors. If there was still no progress, Rule 1.13 would have permitted GM's lawyers to report the defect outside of the company.

An exception to the general attorney-client confidentiality rule also applies here. Under Michigan Rule 1.6(b)(3), GM's lawyers could have revealed confidences and secrets to the extent reasonably necessary to rectify the consequences of GM's illegal actions in the furtherance of which the lawyer's services have been used. Indeed, the outcome of the GM scandal is the type of result this exception was arguably designed to prevent. Even in California, where the only exception to confidentiality is the prevention of a criminal act likely to cause death or substantial bodily harm, the GM lawyers would have been permitted to break confidentiality and reveal information that might have saved lives.

Congress, are you listening? Since GM is a public company, the Sarbanes-Oxley Act would also apply. Under SOX, lawyers should have gone up the chain of command and would have been allowed to report outside the company. We can expect the GM case to serve as a useful case study the next time Congress considers mandating outside reporting under SOX.

3. Conflict of Interest

As the cover-up scandal reached a crescendo, GM hired Anton Valukas to co-direct an internal investigation with GM Michael Milliken. Valukas is chairman of Jenner & Block, a firm serving as current outside counsel for GM. Lawyers from King & Spaulding, a firm that has represented GM in cases since the 1970s, assisted with the investigation.

GM released the detailed report last week, and its stark assessment of GM's failures caused numerous GM employees to be fired. Even so, the existing relationship between the firms and GM raised questions about whether this internal investigation was credibly independent. As Professor Monroe Freedman noted, "A reasonable person might question whether the firm wants to curry favor with GM, so it can maintain a good relationship or obtain future work." The report cleared the top officers, including the CEO and General Counsel, of any wrongdoing. Senator Richard Blumenthal called the report "the best money can buy," noting that it "absolves upper management, denies deliberate wrongdoing, and dismisses corporate responsibility." Whether an actual conflict exists, the appearance of a conflict is overwhelming and caused more bad press for General Motors.

The parallels to the Enron case are obvious: Corporate officials are lying about the company's actions. In-house attorneys are staying mute about corporate wrongdoing. A law firm with a potential conflict of interest is conducting an internal investigation. With these resemblances, General Motors' shareholders should hope the end result is not an Enron-style collapse. At least the Michigan Bar examiners will have an easy PR fact pattern for July's bar exam.

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