



## **Ethics: Speak Up Or Stay Quiet**

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## **SPEAK UP OR STAY QUIET:**

**Ethics in the Aftermath of  
the GM Ignition Switch Debacle**



**GOODELL  
DEVRIES**

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# The GM Situation in a Nutshell

## THE DEBACLE



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"Within GM there were silos, where information was known in one part of the business, for instance in the legal team, but was not communicated to the engineers."

-CEO Mary Barra



# THE DEBACLE

## The GM Situation in a Nutshell

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Engineers identified design issues in 2000; made decisions in order to comply with deadlines

Engineers resolved design issues with a new design in 2006 but did not follow documentation protocol



# THE DEBACLE

## Silos Within Legal Department

Legal department made aware of defect through consumer lawsuits

Settlement authority structure for consumer litigation:

- Up to \$100,000 – in-house product litigation attorneys
- \$100,000-\$1.5M – “Roundtable” Committee’s approval required
- \$2M - \$5M – Settlement Review Committee’s approval required
- Over \$5M – General Counsel’s approval required

Outside counsel’s recommendations not always communicated

## THE DEBACLE

## Silos Within Legal Department

Legal department advised staff to keep information confidential

- Not take notes
- Avoid certain language
- Purge emails?

## THE DEBACLE



## **ETHICAL LESSONS**

## **The Ethics Surrounding Communication**

In the context of corporate regulatory and legal investigations, ethical rules require in-house counsel to

**keep information quiet**

from certain audiences and

**speak up**

to others.

**ETHICAL ISSUES**



**STAYING QUIET**

**Rule of Professional Conduct 1.6:  
"Confidentiality of Information"**

Counsel may not reveal "confidential information" unless

- the client consents;
- the disclosure is impliedly authorized to advance the best interests of the client; or
- the disclosure is subject to one of the enumerated exceptions.

**STAYING QUIET**

**Rule of Professional Conduct 1.6:  
"Confidentiality of Information"**

"Confidential Information" includes

- Attorney-client privileged information
- Information likely to be detrimental or embarrassing to the client if disclosed
- Information the client has requested be kept confidential

**STAYING QUIET**

**Rule of Professional Conduct 1.6:  
"Confidentiality of Information"**

"Confidential Information" does not include:

Counsel's legal knowledge or research

Information generally known in the field

**STAYING QUIET**

**Rule of Professional Conduct 1.6:  
"Confidentiality of Information"**

Rule is necessary to "contribute to the trust that is the hallmark of the client-lawyer relationship"

- Designed to encourage clients to seek legal assistance "even as to embarrassing or legally damaging subject matter"
- Rule recognizes that the lawyer "needs this information to represent the client effectively" and "advise the client to refrain from wrongful conduct"

-Rule of Professional Conduct 1.6, Comment [2]

**STAYING QUIET**

**Rule of Professional Conduct 1.13:  
"Organization as Client"**

**STAYING QUIET**

**Rule of Professional Conduct 1.13:  
"Organization as Client"**

Although in-house counsel interacts with **constituents** (directors, officers, employees, members, etc.), counsel represents the **organization** and must act in the organization's best interests.

**STAYING QUIET**

**Rule of Professional Conduct 1.13:  
"Organization as Client"**

Lawyer may not disclose to constituents information relating to the representation

"except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation."

**STAYING QUIET**

**Rule of Professional Conduct 1.13:  
"Organization as Client"**

**GM Context:**

In-house counsel encouraged workers to keep information confidential from outsiders

But information was also kept confidential from executives, including CEO and general counsel

GM has gotten criticism (and sanctions) for both

**STAYING QUIET**

**Rule of Professional Conduct 1.13:  
"Organization as Client"**

"Mr. Millikin was absolved of wrongdoing in the report. But the very secrecy that his department valued kept him from knowing about a safety crisis that has rocked the company, the report said."

*"G.M. Lawyers Hid Fatal Flaw, From Critics and One Another,"* B. Vlasic, New York Times (June 6, 2014)

**STAYING QUIET**

**Rule of Professional Conduct 1.13:  
"Organization as Client"**

**Criticisms of GM's secrecy:**

Banning of note-taking

"Audits" and deletion of emails

Departmentalizing the decision-making

**STAYING QUIET**



## **SPEAKING UP**

**Rule of Professional Conduct 1.13:  
"Organization As Client"**

## **SPEAKING UP INTERNALLY**

**Rule of Professional Conduct 1.13:  
"Organization As Client"**

If in-house counsel knows an employee is  
violating a legal obligation to the organization;

or

acting in a way "likely to result in substantial  
injury to the organization" . . .

**SPEAKING UP INTERNALLY**

**Rule of Professional Conduct 1.13:  
"Organization As Client"**

. . . then counsel must:

proceed in the best interest of the organization;

which may include

disclosing to the "highest authority that can act  
on behalf of the organization"

**SPEAKING UP INTERNALLY**

## Advising the Right People

Who needs to be told?

- Those who own the risk
- Those who oversee the risk

**SPEAKING UP INTERNALLY**

## Line of Sight

Keeping corporate compliance representatives in the "line of sight"

Okay for individual risk areas to be managed by separate departments (e.g., Legal or HR)

But compliance folks must be kept informed

Silos are too obstructive

**SPEAKING UP INTERNALLY**

## Line of Sight

Compliance reps should have **unfettered access** to relevant information needed to oversee and form opinions

The department that owns the risk should not stand outside compliance rep's line of sight

**SPEAKING UP INTERNALLY**

## Line of Sight

How to achieve line of sight:

Provide direct access to Compliance Dep't all key risk-area information;

Report periodically to Compliance Dep't regarding risk areas or provide information on request;

Empower Compliance Dep't to require improvements in risk-area activities;

Ensure Compliance Dep't has visibility with the Board.

**SPEAKING UP INTERNALLY**

## Line of Sight

What if the Compliance Department  
or “highest authority”  
doesn’t step to the plate?

**SPEAKING UP EXTERNALLY**

**Rule 1.13** permits the lawyer to “reveal information relating to the representation” to the extent the lawyer “reasonably believes it necessary to prevent substantial injury to the organization.”

-Rule of Professional Conduct 1.13

**SPEAKING UP EXTERNALLY**

**Rule 1.6** permits counsel to reveal information when necessary to prevent “reasonably certain death or substantial bodily harm.”

Disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes is necessary to the purpose.

-Rule of Professional Conduct 1.6 ,Comments [6], [7a] and [13]

## **SPEAKING UP EXTERNALLY**

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**Note: this is permissible, not mandatory**

-Rule of Professional Conduct 1.6 ,Comments [6], [7a] and [13]

## **SPEAKING UP EXTERNALLY**

“Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure.”

-Rule of Professional Conduct 1.6 ,Comments [16]

## **SPEAKING UP EXTERNALLY**

### **Reporting Misconduct Aimed at Counsel**

Employed lawyers are entitled to report misconduct aimed at them and are not precluded from filing suit simply because of their confidentiality obligations.

*See, e.g., Sinclair v. Charter Communications, Inc.*, 2013 WL 5707872, (E.D. Mo. 2013); *Carroll v. California Com'n on Teacher Credentialing*, 2013 WL 4482934, (E.D. Cal. 2013).

## **SPEAKING UP FOR YOURSELF**

## Lessons Learned From GM

**CONCLUSION**

## Lessons Learned From GM

Best interests of the organization dictate most ethical obligations concerning internal and external communication

Compartmentalization of functions may result in breaches of legal and ethical disclosure responsibilities

“Line of Sight” is not just a best practice, but a legal and ethical requirement

Restrictions on internal communications and destruction of documents can violate both legal and ethical obligations

**CONCLUSION**



New York Times | Business Day

# G.M. Lawyers Hid Fatal Flaw, From Critics and One Another

By [BILL VLASIC](#)

JUNE 6, 2014

DETROIT — To the legal department at General Motors, secrecy ruled.

Employees were discouraged from taking notes in meetings. Workers' emails were examined once a year for sensitive information that might be used against the company. G.M. lawyers even kept their knowledge of fatal accidents related to a defective ignition switch from their own boss, the company's general counsel, Michael P. Millikin.

An internal investigation released on Thursday into the company's failure to recall millions of defective small cars found no evidence of a cover-up. But interviews with victims, their lawyers and current and former G.M. employees, as well as evidence in the report itself, paint a more complete picture: The automaker's legal department took actions that obscured the deadly flaw, both inside and outside the company.

While Mr. Millikin survived the dismissals this week of 15 G.M. employees tied to the delayed recall, his department was hit hard.

At least three senior lawyers are among the employees who lost their jobs as a result of the investigation conducted by the former United States attorney Anton R. Valukas.



Michael Millikin, G.M. counsel, and Mary Barra, chief executive, testified on Capitol Hill in April. Credit Kevin Lamarque/Reuters

Mr. Millikin was absolved of wrongdoing in the report. But the very secrecy that his department valued kept him from knowing about a safety crisis that has rocked the company, the report said.

One of the lawyers dismissed this week was William Kemp, who had been orchestrating G.M.'s legal strategy and in-house investigations of the defective ignition switch for more than two years before the recall.

Yet it was not until early February, days after a high-level committee finally ordered the switch recall, that Mr. Kemp informed Mr. Millikin of the deadly consequences of the flawed part. G.M. has linked 13 deaths and 54 crashes to the defect.

In his report, Mr. Valukas said he interviewed Mr. Kemp about his failure to tell Mr. Millikin that people were dying in G.M. vehicles because of the switch.

“He could not explain why he did not raise it with Mr. Millikin earlier,” Mr. Valukas wrote. “And in hindsight says he probably should have.”

That seemingly casual response to a life-threatening safety problem is at the heart of what G.M.'s chief executive, Mary T. Barra, denounced as a “pattern of incompetence and neglect” at the company that allowed a defective part to exist in its vehicles for more than 10 years.

The legal department's role in the switch crisis is expected to be a prime topic of congressional hearings on the recall.

While legal departments seek to defend a corporation, that mission appeared to go too far in G.M.'s case — to the point that the department's actions ultimately worked against the automaker.

At a hearing in April, Senator Claire McCaskill, Democrat of Missouri, said she hoped to question G.M. lawyers, including Mr. Millikin, about the testimony of the chief switch engineer, Raymond DeGiorgio, in a wrongful-death lawsuit last year.

Mr. DeGiorgio testified under oath in the case that he did not order improvements to the switch in 2006. But internal G.M. documents given to federal investigators later revealed that he did approve a change to the switch but kept it secret by retaining the part identification number.

His actions, according to Mr. Valukas's report, prevented others at G.M. from discovering that the original, faulty switch could suddenly cut engine power and disable air bags.

Moreover, the case involving Mr. DeGiorgio was settled by G.M. lawyers when an engineer hired by the victim's family proved that the switch had indeed been changed. That revelation prompted one G.M. lawyer, Philip Holladay, to call the case a “very poor trial candidate” and say it “needs to be settled.”

And, according to the internal investigative report, it led to a meeting last Aug. 7 of Mr. Kemp and three other G.M. lawyers on the company's “settlement review committee.”

The case, Mr. Valukas wrote, was settled for \$5 million, which was the maximum amount allowed “without the approval of the general counsel.”

It was the fifth settlement made by G.M. lawyers of a fatal accident case tied to the switch.

Last month, federal regulators imposed a \$35 million penalty, the maximum allowed, on the company for its failure to report the defect in a timely manner.

Mr. Kemp’s dismissal is an indication of the legal department’s role in helping keep the switch problems secret from the public and regulators, said Richard Zitrin, a professor of legal ethics at the University of California’s Hastings College of the Law.

“That says to me that the G.M. lawyers were involved in keeping the ignition failure secret case by case,” said Mr. Zitrin, who has helped draft new federal legislation that would make it difficult for corporations to enter into confidential settlements.

Mr. Valukas’s report details multiple meetings in 2012 and 2013 in which G.M. lawyers took a lead role in the company’s futile investigations of the switch.

Mr. Kemp chose certain executives to “champion” inquiries into the switch problems and air bag issues, the report said.

Beyond that, Mr. Valukas said employees he interviewed told him they had refrained from taking notes in safety meetings “because they believed G.M. lawyers did not want notes taken.”

Mr. Zitrin said banning note-taking was not a standard practice in corporate law offices.

The secrecy factor extended to how some employees kept or discarded old emails. According to two former G.M. officials, company lawyers conducted annual audits of some employees’ emails that could be used as evidence in lawsuits against the company.

The audits were part of a larger program called “information life-cycle management,” used primarily to downsize data in the company’s computers, a common practice in companies.

A G.M. spokesman, Greg Martin, declined to comment on the program and the legal department’s involvement in it.

The impact of Mr. Valukas’s report on the department has been swift and severe.

A person briefed on the employee dismissals said they included Mr. Kemp and Lawrence Buonomo, head of product litigation. A third lawyer, Jennifer Sevigny, was also dismissed.

All three lawyers were part of the team that handled the confidential settlement in which Mr. DeGiorgio, who has also been fired, was involved.

Even after being expunged from G.M., the lawyers are keeping quiet about the events leading up to the ignition-switch recall in February.

Mr. Kemp could not be reached for comment, and Mr. Buonomo did not return a call at his home. When reached by telephone, Ms. Sevigny declined to confirm or deny that she had been fired, and asked that any further questions be directed to her lawyer.

In the report, Mr. Kemp looked back on one of the settled cases with a certain regret. Years before, a police trooper in Wisconsin identified the switch defect and filed documents to prove it with G.M.'s legal department. They sat on the company's servers as early as February 2007.

For seven years, nobody read them.

When asked last month about that evidence and how G.M.'s legal department overlooked it, Mr. Kemp said, it is "always disappointing when someone outside the company knows more about your product than you do," according to Mr. Valukas's report.

*Hilary Stout, Rebecca R. Ruiz and Danielle Ivory contributed reporting from New York.*

<http://www.nytimes.com/2014/06/07/business/gm-lawyers-hid-fatal-flaw-from-critics-and-one-another.html>

## ***Faculty Biography: Nikki Nesbitt***

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Ms. Nesbitt is a partner with the firm. Her current practice concentrates on professional liability defense, complex commercial litigation, and employment law.

Ms. Nesbitt handles cases primarily before the United States District Courts for Maryland and the District of Columbia, the Superior Court for the District of Columbia, and the Circuit Courts of Maryland. Ms. Nesbitt has taken a special interest in the technological aspects of litigation and is often called upon to assist with cases in which electronically-stored information plays a significant role. Outside of the litigation context, Ms. Nesbitt is called upon regularly to counsel clients on risk management and litigation avoidance issues in both the healthcare and employment contexts.

### **Practice Areas**

- Commercial and Business Tort Litigation
- Employment Litigation
- Medical Malpractice
- Medical Institutions Law
- Professional Liability
- Insurance Law
- Hospitality Law

### **Publications**

- Associate Editor, Practice Manual for the Maryland Lawyer, Maryland Institute for Continuing Professional Education of Lawyers, Inc., 2002 – 2009
- “Greater Than the Sum of Its Parts: Integrating Trial Evidence and Advocacy,” Clinical Law Review, Fall 2000 (assistant to authors Alan D. Hornstein and Jerome E. Deise)

### **Activities**

- Mentor to first year law students at the University of Maryland School of Law (2002 – Present)
- Judge, Regional Intercollegiate Mock Trial Tournament (1999 - Present)
- Secretary, Juvenile Diabetes Research Foundation, Greater Chesapeake and Potomac Chapter

### **Education**

- University of Maryland (B.A., cum laude, 1996)
- University of Maryland, School of Law (J.D. 1999) Order of the Coif