AVOIDING THE SAN ANDREAS EARTHQUAKE; LESSONS DRAWN FROM HISTORY FOR CORPORATE COUNSEL

This is the story of three corporate crises which had profound ramifications for the lawyers in the general counsels' offices. It is in chronological order, beginning with Enron, which caused a sea change in the ethical rules and in SEC rules governing lawyers appearing and practicing before the Commission. Following the summaries are excerpts from the ABA Model Rules of Professional Responsibility and several articles and outlines that are relevant. The summaries will be the basis for discussions among the panelists and the audience.

Enron

Starting out as a large natural gas distributor in the mid-1980s, Enron quickly grew into a highly diversified conglomerate that, by the late 1990s, owned and traded in natural gas pipelines as well as in electric power and water plants, pulp and paper plants, and broadband assets. *See* Paul M. Healy and Krishna G. Palepu, *The Fall of Enron,* 17 Journal of Econ. Perspectives 3, 5 (Spring 2003). In December of 2000, its stock prices were soaring and Enron was rated by *Fortune* magazine as one of the most innovative companies in America. Healy and Palepu, *supra,* at 3. Less than one year later, however, its stock prices plunged and Enron filed for bankruptcy, unraveled by disclosures that its chairman, CFO, CEO, and other executives were responsible for numerous accounting irregularities and the existence of complex financial structures involving questionable, related-party transactions designed to hide debt and inflate revenue. *See id.,* at 4, 10-11; *see also Behind the Enron Scandal: Chronology of a Collapse,* Time, available at http://content.time.com/time/specials/packages/article/0,28804,2021097_2023262_2023247,00.html; *see generally Enron Scandal,* at http://en.wikipedia.org/wiki/Enron_scandal.

In congressional hearings investigating the collapse of Enron, one congressman, describing the event as a "systemic failure on the part of Enron's legal and accounting personnel . . . both to discover [the] problems and to warn of their dangers," questioned Enron's general counsel and certain in-house attorneys regarding their responsibility for discovering and/or guarding against wrongdoing within the company. *See The Collapse of Enron—Part 4: Hearings before the Subcomm. On Oversight and Investigations of the House Comm. on Energy and Commerce,* 107th Cong., Serial No. 107-90, at 2 (March 14, 2002) (Statement of Rep. James C. Greenwood). According to the general counsel, he managed a decentralized legal department and primarily was responsible for overseeing litigation and hiring outside counsel. *See* Bethany McLean and Peter Elkind, *No Skilling but plenty of lawyers,* CNN Money (April 7, 2006), at http://money.cnn.com/2006/04/7/06/news/newsmaker/enron_blog_fortune/. Each business unit had its own legal department and its own general counsel who reported to the chief of the business unit and to Enron's overall general counsel. *See In re Enron Corp.,* Chapter 11 Case No. 01-16034, Appendix C to Final Report of Neal Batson, Court-Appointed Examiner, at 17 (Bankr. S.D.N.Y. Nov. 4, 2003). While the general counsel held weekly meetings with each business unit's general counsel, he relied on them with respect to transactional matters and was not involved substantively in Enron's business transactions unless a specific issue was brought to his attention. *See In re Enron Corp., supra,* Appendix C at 190. There were no concerns raised in these meetings as to certain transactions involving partnerships created by the CEO, CFO and other executives to conduct Enron's businesses. *See In re Enron Corp., supra,* Appendix C at 18. The general counsel also attended meetings of the board of directors, at which he updated the board regarding litigation matters but did not provide much legal advice. *See In re Enron Corp., supra,* Final Report of Neal Batson, Court Appointed Examiner, at 52.

In congressional testimony and in testimony before the bankruptcy examiner, the general counsel and senior in-house attorneys disclaimed any personal involvement in the questionable transactions, or any knowledge that the CFO and other employees had an interest in some of the partnerships created to conduct Enron's businesses. *See* Dan Ackman, *Enron's Lawyers: If Only We Knew,* Forbes (3/14-2002), at www.forbes.com/2002/03/14/0314vinson.html; *see*

also In re Enron Corp., supra, Appendix C at 18. In his examination of the legal department, however, the bankruptcy examiner concluded that the general counsel could be found negligent in the performance of his duties in several respects, including (1) failing to inform himself and the board as to certain related party transactions, or to ascertain that those to whom he delegated the responsibility were fulfilling their responsibility with respect to these transactions; (2) failing to familiarize himself with the facts or the law underlying certain transactions so as to be able to advise the board on the matter; and (3) failing to inquire further into the content of the anonymous whistleblower letter that alleged accounting irregularities, or the extent of outside counsel's involvement so as to advise the chairman properly of the propriety of retaining outside counsel to conduct any internal investigation. *See also In re Enron Corp., supra,* Final Report at 52, and Appendix C at 190. In addition to the general counsel, the bankruptcy examiner concluded that other senior in-house attorneys could be found negligent, in breach of their fiduciary duties, and/or in violation of Rule 1.12 of the Texas professional conduct rules. These attorneys included: Enron's primary securities attorney, for failing to inform himself about certain transactions involving the partnerships through which the company conducted business so as to be able to advise the board with respect to disclosure issues involving these transactions; Enron's senior attorney within its business unit responsible for structured financial transactions, for failing to advise the board of a related party transaction or to review the company's code of ethics and advise the general counsel regarding a personal conflict of interest; and successive general counsels of the business unit responsible for structured financial transactions, for approving transactions lacking business purposes and failing to inform the general counsel or the board of conflict of interest issues with respect to several related party transactions. *See In re Enron Corp., supra,* Final Report at 52-55, and Appendix C at 192-201. Two of these senior attorneys, the primary securities attorney and the successor general counsel for structured financial transactions, were subject to and settled civil enforcement actions brought by the SEC. *See* SEC Litigation Release No. 20866 (Jan. 26, 2009).

1. WHAT WENT WRONG IN ENRON?

This is a very interesting question. The most important thing to know about Enron was that the conduct at the core of Enron was a series of entirely legal transactions that had substantial financial risk to Enron but could be booked as off-balance sheet transactions that show little if any risk to the financial health of Enron. If done repeatedly, the risk became very very large, and when the markets changed quickly, many of the transactions failed and the balance sheet collapsed. The accounting was handled by Arthur Andersen, then considered the most sophisticated accounting firm in the world, and the transactions were at the tip of the cutting edge. One could clearly argue that the accounting was wrong. One could also argue that the transactions contained so much risk that they should have been stopped by corporate fiduciaries or the inside corporate lawyers, if in fact they understood them. But before passing judgment on the lawyers, keep in mide that the Comments to the Model Rules, Rule 1.13, Comment 3 reads " When constituents of the organization make decisions for it, the decisions must ordinarily be accepted by the lawyer, even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." Thus the distinction is that conduct that the lawyer KNOWs is illegal or a breach of fiduciary duty requires the lawyer to go up the ladder; conduct whose prudence is doubtful and entails serious risk, is not within the lawyer's province. Drawing that line became the biggest problem in these high profile cases.

So, the argument was, " how was the lawyer to KNOW that the transactions were wrong, illegal, a breach of fiduciary duty, etc." If there is no "knowledge" then Model Rules 1.13 or 1.6, as they were drafted then (in 2000) were not implicated. Neither is Model Rule 4.1 (false statements to third parties) or Model Rule 1.2(d), prohibiting a lawyer from assisting a client in transactions the lawyer knows to be illegal or fraudulent.

This argument prevailed. I know. I made it on behalf of the outside counsel but the same principles largely applied to inside counsel. In general, the fact that lawyers were not required by prevailing law and by the then prevailing ethics rules to take

action at Enron did cause considerable changes in the law and ethical rules. There is little doubt that the modifications of Model Rules 1.6 governing confidentiality and 1.13 governing going "up the corporate ladder" giving lawyers much more leeway to act, were the result of Enron. In addition, the Sarbanes Oxley act required the SEC to promulgate regulations for lawyers appearing and practicing before the Commission, which you are all now knowledgeable about, and which unquestionably resulted from Enron. See attached analysis of Sarbanes Oxley regulations. In substance, the SEC rules now have much lower thresholds for inside counsel to begin "reporting up the corporate ladder" than existed in 2000. These new regulations, however, have seldom if ever been used by the SEC and they are not routinely followed by many inside lawyers, thus exposing them to great risks if the SEC enforcement approach changes quickly.

That said, Enron was a major professional problem for those inside counsel who were involved in it. What went wrong and how could it have been avoided? Some speculate that the problem was that the inside lawyers never learned enough about the risks to realize that it was important to say "no" even if the obligations of lawyers did not require them to step in because the conduct was illegal or fraudulent. This is perhaps the ultimate legacy of Enron. Even if it is not per se illegal or fraudulent, does it entail such great risks that the lawyers should step in? That is the most difficult line to draw.

2. CAN THESE PROBLEMS OCCUR ON A SMALLER SCALE?

Aggressive businesspeople push their lawyers every day – "is this illegal if so, I won't do it, can you say its illegal?" It happens. The fallacy in this analysis I think is that the lawyer is not there only to call legal v. illegal. She also has fiduciary duties, etc.

3. WHAT CAN BE DONE TO AVOID THE PROBLEMS?

I think this is a culture issue. Tone at the top, however you package it.

4. WAS ANYTHING DONE HERE BY INSIDE COUNSEL THAT WAS A VIOLATION OF LAW, REGULATION OR ETHICAL RULE?

5. IS THE LAW ANY DIFFERENT TODAY THAN IT WAS IN 2000 AND IF SO, HOW?

Sarbanes Oxley changed the law in order to impose obligations on lawyers that were not there before. See the Sarbanes Oxley information attached.

Hewlitt-Packard (HP) Spying Scandal

HP had enjoyed a reputation of having a solid, corporate ethics system, known as the "HP Way." *See* Markkula Center for Applied Ethics, *Reconstituting the Ethical Culture at Hewlett Packard* (Nov. 2007), www.scu.edu/ethics/practicing/focusareas/business/renewing-hp.html. When it became apparent that someone on the board of directors was leaking confidential board deliberations to the media, the chairwoman of the board asked the general counsel's office to conduct an investigation into the source of the leaks. Under the direction of the senior counsel, who was also HP's director of ethics, HP retained independent security experts who, in turn, enlisted private investigators to investigate the board members. Through the use of pretexting – i.e., posing as HP directors and journalists– the private investigators were able to obtain from phone companies the home and mobile phone call records of the board members, company employees, and reporters for certain media organizations. According to news reports, the senior counsel/chief ethics officer was told of the use of pretexting and, after expressing concerns as to the legality of this investigative tactic, was informed that it was above board, though barely. *See HP ethics officer questioned spying tactics*, www.nbcnews.com/id/14919183/ns/business-us_business/t/hp-ethics-officer-questioned-spying-tactic/#.VV3n143blcA (updated 9/20/2006). The use of pretexting continued, but the senior counsel/chief ethics officer did not participate in the practice. *See* Robins Kaplan, *The Truth Behind Pretexting: In-house Investigations and Professional Responsibility Concerns* (April 2007), available at www.robinskaplan.com/resources/articles/the-truth-behind-pretexting-in-house-investigations-and-professional-responsibility-concerns (citing *Tracking the H-P Controversy*, The Wall Street Journal Online,

http://online.wsj.com/public/resources/documents/info-hptime0609.html?pringVersion=true). Shortly after public disclosure of the investigation and its use of pretexting, the purported source of the leaks refused to resign from the board, while another board member resigned because of his anger with the techniques used in the investigation. Soon thereafter, HP's chairwoman, who disclaimed any knowledge of the pretexting, *see* Steve Shankland, *HP Chairman: Use of pretexting 'embarrassing',* CNET News (9/8/2006), at www.cnet.com/HP-chairman-Use-of-pretexting-embarrassing/2100-1014_3-6113715.html, resigned from the board. *See Tracking the H-P Controversy*, The Wall Street Journal Online, http://online.wsj.com/public/resources/documents/info-hptime0609.html?pringVersion=true).

Learning of HP's use of pretexting from its SEC filing and from its own inquiries, the U.S House of Representative's Committee on Energy and Commerce, which had been investigating Internet-based data brokers who used pretexting to obtain personal information, requested HP to appear at an upcoming hearing and to provide certain documents, records and reports regarding its investigation. Prior to her appearance at the hearing, at which she invoked the Fifth Amendment, HP's general counsel resigned from the company. At the hearing, several other HP employees also invoked the Fifth Amendment, including HP's former senior counsel/chief ethics officer who directed the investigation. *See generally Hewlitt-Packard spying scandal,* at http://en.wikipedia.org/Hewlett-Packard_spying_scandal. State criminal proceedings were subsequently brought against the HP's chairwoman, the former senior counsel/chief ethics officer, and the investigators; the court dismissed the charges against HP's chairwoman and, after his completion of community service following a plea of no contest, dismissed the charges against the former senior counsel/chief ethics officer. *See* K.C. Jones, *Lessons Learned From HP's Pretexting Case,* Information Week (6/29/2007), at www.informationweek.com/lessons-learned-from-hps-pretexting-case-/d/d-id/1056656.

As a result of the pretexting scandal, HP hired a new chief ethics and compliance officer who has made a number of changes to restore HP's tradition of corporate integrity. These changes include the following: a revision of the ethics and compliance structure and the code of conduct; a new screening program and guidelines for outside investigators; and an enhanced case management and reporting system. *See* Markkula Center for Applied Ethics, *Reconstituting the Ethical Culture at Hewlett Packard* (Nov. 2007), www.scu.edu/ethics/practicing/focusareas/business/renewing-hp.html; Anne Broache, *HP execs: Spy scandal was ethical wake-up call,* CNET News (March 1,

2007), http://news.cnet.com/HP-execs-Spy-scandal-was-ethical-wake-up-call/2100-1014_3-61635.

QUESTIONS FOR PANEL

1. FROM A PRACTICAL STANDPOINT, WHY DID THE HP PROBLEM OCCUR?

This is the place for the panelists to advance their views. For example, you could conclude that HP failed to have clear signals to its lawyers about what was inbounds and out-of-bounds. You might conclude that HP failed to recognize the difference between conduct that is barely legal and conduct that is terrible for the company. You might conclude that HP attempted to delegate too much responsibility downward without proper oversight, possibly because of trying to have deniability. You could conclude that HP should have brought in outside counsel with experience rather than venturing out to private investigators, an inherently very dangerous. You might conclude that this was a mistake in judgment in that a direction from the Chairwoman was taken as approval of any course of action without reflection. I think that the panelists should offer their observations about what went wrong from a practical matter.

2. CAN THESE PROBLEMS OCCUR ON A SMALLER SCALE? HOW?

The answer of course is yes. For example, looking at employees' emails, or using undercover operatives to engage in investigations of employees, competitors, etc. I am sure that you all can think of a half dozen examples of where legal-but-stupid-conduct has been proposed and you have nixed it. There are a number of articles attached reflecting areas where the law is unclear – deceptive conduct by investigators, reading employee emails, chasing down whistleblowers and corporate moles.

3. HOW DOES A COMPANY AVOID THESE PROBLEMS

This is the flip side of the coin from #1. Once you realize that problems like this can arise, what can a general counsel do to help identify and avoid these problems? This is the 'practical suggestions' portion of the presentation that other general counsel often seek.

4. THERE IS NO DOUBT THAT THE INSIDE COUNSEL'S OFFICE DID NOT ACTUALLY ENGAGE IN PRETEXTING, SO WHY ARE THEY BEING HELD LIABLE? WHAT ARE THE BASIC PRINCIPLES THAT ARE APPLICABLE?

There are many levels of liability, starting with criminal liability. First, are they criminally liable for the conduct of subordinates? This is a question of criminal law which will turn on a number of issues and factual questions. Does the statute require "scienter"? Some criminal statutes are strict liability (not many but some in the corporate context such as involving food, drug and cosmetics). Others require "intentional" conduct, which means something other than accidental or inadvertent, but not necessarily knowing or believing that the conduct is wrongful or illegal. Finally, some statutes require "wilfull" conduct which generally means understanding what you are doing is illegal. The "intent" can be proven by circumstantial evidence and does not need to be proven by an admission. Thus, one who acts suspiciously, or hides his or her conduct, or denies having done it, or covers it up, might raise enough of a jury question for some prosecutors to charge them criminally.

Similarly, there is a "knowing" standard in some criminal statutes. "Knowing" or "knowledge" usually is defined to mean 'actual subjective knowledge' but in many jurisdictions, knowledge can be inferred from wilfull blindness, which is in effect refusing to see what is obvious to the observer or in extreme situations, deliberately failing to investigate a suspicious situation.

Second, civil liability. Invasion of privacy, negligence or other civil wrongs can lead to liability for the individual wrongdoer and the company. Hire a known drunkard to drive a school bus, or illiterate person to fill drug prescriptions or direct a private investigator to act without concern for civil rights – all could subject the corporate employee or officer and the company, to liability to third parties. Some of these bases of liability are negligence, the breach of a duty to a third person, others may require intentional conduct.

Third, we can consider the rules of professional ethics. What rules are implicated? Most obviously, false statements were made to phone companies to secure phone records. Had a lawyer done that, it would be a violation of Model Rule 4.1, which prohibits making false statements. Here, investigators did it. So, how can lawyers be held ethically liable? In general, the rules apply on a person-by-person basis. One lawyer in a group is not liable for an ethical violation perpetrated by another or by non-lawyer employees. That is not universally true, however, as Model Rule 5.1 provides authority for a supervisory lawyer to be liable for the conduct of a subordinate. Would the GC be liable for failure to direct the lower lawyers?

Even with respect to non-lawyers, such as investigators or others, there is vicarious liability for failure to supervise. See Model Rule 5.3. Would the GC or the lawyers be liable for failure to supervise or direct the investigators?

Another rule that is applicable is Model Rule 8.4(a) which provides that it is an ethical violation to cause a third party to engage in an act that would be a violation of the ethical rules for a lawyer to do. Can you send out investigators or detectives to take actions that a lawyer cannot do, such as making a false statement to a phone company to get information?

If one knows that corporate officials are conducting themselves in a fashion to violate the law, what is a lawyer required to do? Most obviously, the lawyer must go up the corporate ladder to superiors first inside the general counsel's office and then to the highest authority in the company, the board. See Model Rule 1.13. But did anyone "know" that pretexting, then in the gray area of the law according to some, was misconduct which was required to be taken up the ladder?

The key point for the lawyer is the word "know" – how can you "know" a disputed legal proposition?

'Knowledge" but "knowledge" or "knowing" is defined in the Model Rules in 1.0(f) which indicates subjective knowledge but knowledge may be inferred from the circumstances. Did the lawyers "know" that there was a violation of law.

Fourth, is the question of fiduciary duties to the corporation. As a corporate officer or employee, are you subject to a duty to avoid, report and/or rectify conduct that might be contrary to the corporation's policies or that might expose the corporation to potential adverse consequences, even if it is not illegal or unethical? This might, for example, derive from the general fiduciary duties of corporate fiduciaries or from a code of ethics that is incorporated by reference into the corporate rules of conduct.

Fifth, and finally, allowing or directing something that is permissible under 1-4 might still show such poor judgment that it results in termination where "cause" is not required or, where cause is required, with contractually-required severance.

The General Motors (GM) Ignition Switch Problem

Between 2003 and 2007, GM manufactured two vehicles that had defective ignition switches – the Chevrolet Cobalt and the Saturn Ion. Specifically, the ignition switch would slip from the "run" to the "accessory" position when inadvertently jostled by the driver's knee or by some other object, such as the key chain, thereby resulting in a loss of electrical power for the steering and the deployment of the air bags. Despite numerous claims for injuries and deaths arising out of the failure of the air bags to deploy in accidents, and despite the existence, since at least 2007, of reports and studies connecting the non-deployment of the airbags with the ignition switch problem, GM failed to make the connection until 2013, and failed to issue a recall for the Cobalt and the Ion until February of 2014. *See* Greg Gardner, *GM ignition switch deaths hit 104,* USA Today (May 19, 2015), available at www.usatoday.com/story/money/cars/2015/05.

In an internal investigation into the cause for GM's delay in issuing the recall, the law firm, Jenner & Block, concluded that multiple failures contributed to the delayed recall, including the failure of GM personnel to share or gather basic facts, their failure to move with urgency in investigating the problem, and their failure to raise significant issues to the key decision-makers within the company. *See* Anton R. Valukas/Jenner & Block, *Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls,* at 143, 211, 253 (May 29, 2014) [J&B Report]. With respect to the legal department, for example, the report notes that staff attorneys handling product claims involving airbag non-deployment occurrences were not aware, until 2012, of a 2007 study done by a state trooper that suggested a connection between the non-deployment of the airbags and the ignition switch problem, even though there was a copy of the study in the legal department files and the study was publicly available on the National Highway Traffic Safety Administration's website. *See* J&B Report, at 115-118. In addition, the report notes that, although the legal department finally requested the Product Investigation team to look into whether the mounting non-deployment cases involved a safety issue, it failed to convey the urgency of the situation by waiting six months to initiate the meeting with the Product Investigation team and over two and one-half years for completion of the team's investigation. *See* J&B Report, at

212. The report further states that senior attorneys never elevated the non-deployment/ignition switch cases to the general counsel, even after having been warned by outside counsel on more than one occasion of the risk of punitive damages. *See* J&B Report, at 143-144, 253.[1]

In recommendations to the GM Board of Directors regarding the role of lawyers, the report emphasized that the legal staff "should play a critical and unique role in assisting with the identification, analysis, and resolution of safety issues." *See* J&B Report, at 264. The report suggested several steps that the legal staff could undertake to fulfill this role, including: (1) regular discussions between product litigation attorneys and the senior litigation attorney as to trends or potential safety issues in lawsuits or claims; (2) the designation of an attorney to act as a liaison to the global vehicle safety group on safety-related issues; (3) regular meetings between the legal staff and field performance engineers to discuss trends and potential safety issues with respect to the engineers' respective specialty; (4) at the onset of litigation, the generation of a list of all issuances—safety bulletins, recalls, investigations, reports—relating to the vehicle at issue; (5) creation of a process to elevate unresolved technical issues in an expeditious manner; (6) development of specific guidance as to safety issues that should be elevated to the general counsel; (7) guidance that makes both in-house and outside counsel aware of the expectation that safety issues are matters subject to "up-the ladder" reporting responsibilities; (8) written guidance setting forth the expectation that in-house and outside counsel will report to appropriate legal staff possible violations of law or GM policy, such as policies relating to the recall decision-making process; and (9) guidance for product liability attorneys as to recognizing and communication safety issues. *See* J&B Report, at 264-265.

Following issuance of the report, GM announced that it would implement changes to improve the safety of its vehicles, such as enhanced communications between the engineering and legal departments in order to track patterns of potential safety issues and address them more efficiently. *See* Mike Colias, *GM employees are 'owning' Valukas report, Barra says,* Automotive News (May 20, 2015). The Justice Department has closely scrutinized the report and may soon file

[1] Even though staff attorneys were advised to elevate certain issues to their superiors, such as statutory or regulatory violations, not all attorneys believed safety issues were included in this directive. *See* J&B Report, at 109-110.

criminal charges against GM, and possibly individual employees, for misstatements regarding the ignition switch problem. According to news reports, while federal prosecutors have investigated whether GM employees within the legal department concealed evidence from regulators regarding the ignition switch problem, it is doubtful that individuals within that department will face charges. *See* Christopher M. Matthews and Mike Spector, *GM is Set to Face Criminal Charges Over Ignition Switches,* The Wall Street Journal, www.wsj.com/articles/gm-is-set-to-face-criminal-charges-over-ignition-switches-1432393035 (updated May 23, 2015).

1. FROM A PRACTICAL STANDPOINT, WHY DID THE GM PROBLEM OCCUR?

Once again, here is the softball for the panel. Was it because the general counsel's office was not deeply involved in the oversight? Was there a system failure in which the warning signs were not immediately recognized by the technical people and percolated up? Was there a culture problem where no one wanted to identify what was going to be a difficult and expensive problem? Was there a lack of sensitivity to the public reaction from foot-dragging? Was this a basic problem of corporate culture more than one of the general counsel's office? Was this a failure to raise the problem high enough in the general counsel's office that no one with real judgment saw it until very late?

2. CAN THESE PROBLEMS HAPPEN ON A SMALLER SCALE AS WELL?

Of course, most of these problems are not bet-the-company or life-and-death but they occur in all kinds of areas. A lawyer figures out that some mistake has been made in a government filing, or in a contract, and ignores it, hoping that the problem will never arise.

3. WHAT CAN BE DONE TO AVOID THESE TYPE OF PROBLEMS?

Honestly, I think this is 99% a culture problem. The bigger the organization, the less anyone wants to own bad news.

4. WHAT ETHICAL OR LEGAL STANDARDS ARE APPLICABLE TO JUDGING THE CONDUCT OF GM'S GENERAL COUNSEL'S OFFICE?

The basic allegations against GM is non-feasance, i.e. identifying a problem but taking no action to address or correct it. While the identification of the problem was arguably tardy, there is little doubt that once the problem began emerging, no one wanted to "own" it. Thus, the issue was never pushed up the line to the most senior lawyers who might have realized the problems. Non-feasance such as this is often not independently a violation of law, regulation or ethical standard unless one can characterize it as "willful blindness" which is the equivalent of knowledge under many legal regimes.

Here, was there wilfull blindness? If one reads the long excerpts of the Jenner Report, one can draw his or her own conclusion. At the very least, there was an institutional failure to acquire knowledge which is likely to be described as at least negligent.

So, what legal consequences flow from non-feasance or negligence? There may well be reporting requirements applicable to automakers that GM failed to fulfill, reporting of accidents caused by preventable defects which should have led to a recall. These requirements may apply even if there was no one person at the company that had all of the knowledge. This could be charged as a failure to file a necessary document or even a false statement under 18 USC 1001.

Another possible problem that GM may face is some sort of state law tort criminal statute based upon negligence, such as negligence homicide or

something like that. While the history of state law criminal prosecutions of corporations is relatively sparse, the notoriety of these events may spark such an investigation. The question could be – what was the wrongful act – failure to notify owners and recall?

Under the ethical rules, the standards are less clear. The obligations of lawyers to report information "up the ladder" under 1.13 or, in an exceptional case, to report it to the victims of the conduct under 1.6, is predicated upon knowledge of corporate misconduct. Was there knowledge here? Probably not. Thus, the lawyers' exposure would arguably not be to violations of 1.13 or 1.6.

MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.0: Terminology

(d) "Fraud" or "Fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the laws.

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial

interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Rule 1.13: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law; and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Rule 1.16: Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
    (1) the representation will result in violation of the Rules of Professional Conduct or other law;
(b) Except as stated in paragraph (c), a lawyer may withdraw from representing client if:
    (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
    (3) the client has used the lawyer's services to perpetrate a crime or fraud;
    (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such a moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
  (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
  (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.2: Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
  (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.