

The Appropriateness of Toyota's Recall

Is Toyota's widely-publicized gas pedal recall the appropriate remedy that everyone has been waiting for, or is this merely a quick-fix approach to cover up a deeper rooted problem with its runaway cars? One thing is sure: With sales of eight models halted, and its pristine image for quality heavily dented, the manufacturer is desperate to get out of the death spiral that could shake its very core.

Good cause exists to question the manufacturer's actions. Reports indicate that since 1999, Toyota and Lexus vehicles have been involved in 815 accidents related to sudden acceleration, resulting in 19 deaths - more than all other vehicle manufacturers combined. As the problem mounted, Toyota initially blamed the problem on poorly-designed floor mats, resulting in a recall of 5.5 million vehicles. Then, as the problem seemed to continue, Toyota changed its position and blamed a faulty gas pedal design for the problem, resulting in a recall of another 2.3 million vehicles and the suspension of sales for eight of its vehicles altogether.



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But, CTS Corp., the supplier who has manufactured the gas pedals since 2005 and who is the primary recipient of Toyota's blame, casts serious doubt on whether its products are to blame. As CTS points out, the sudden-acceleration problem dates back to 1999, years before CTS began supplying the gas pedal. It is also of note that CTS has been honored three times by Toyota since 2005 for exceeding quality expectations.

More doubt is cast on Toyota's gas pedal fix by reviewing the U.S. vehicle safety records of the runaway vehicles. As reported by the *Los Angeles Times*, of the 2,000-plus complaints of sudden acceleration in Toyota and Lexus vehicles from motorists, only 5 percent cited a sticking gas pedal as the source of the problem. The *Los Angeles Times* further reports that the National Highway Traffic Safety Administration, the U.S. agency that governs federal vehicle safety, has conducted eight investigations into sudden-acceleration problems with Toyota vehicles over the past seven years, and found that none of the incidents were caused by a sticking gas pedal.

So, what is the problem? Some automotive safety experts fear that it is a latent defect in the vehicles' electronic throttle system. And,

this would explain why the problem is identified by vehicle owners as sudden acceleration, as opposed to the vehicle remaining at a constant speed when the gas pedal is no longer depressed. If a vehicle was traveling 65 miles per hour and the gas pedal stuck at that position, the car would continue traveling at that same rate of speed after the driver's foot was removed from the gas pedal.

A problem to be sure, but not the main issue complained of by motorists. Case in point is the August 2009 incident where off-duty California Highway Patrol officer, Mark Saylor's, 2009 Lexus ES 300 accelerated to 120 miles per hour before smashing into the back of a SUV and bursting into flames, killing four occupants of the vehicle. One more important fact: The Lexus ES 300 is not one of the vehicles that are subject to the Toyota stop-sale.

If the actual problem is, in fact, a latent defect in the electronic throttle system, this could prove to be a much more costly and lengthy fix than simply adding a metal shim to the back of a gas pedal. Could Toyota be taking a course of action that puts economics ahead of human life? It would not be the first time a manufacturer has taken such a tact.

In the early 1970's, Ford Motor Co. was accused of knowingly allowing a dangerous gas tank design to be released on its popular Ford Pinto. After several Pintos exploded when struck from behind, resulting

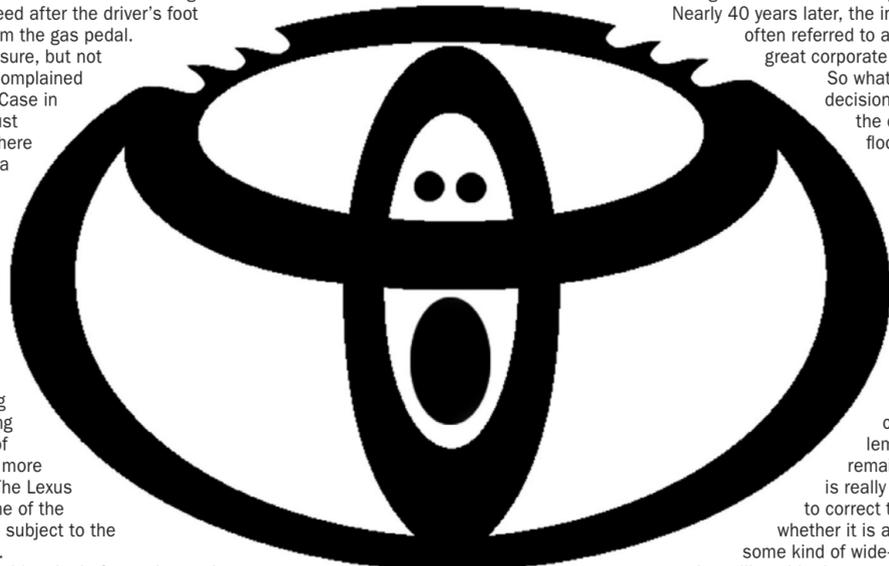
in numerous fatalities, Ford came under attack for not issuing a recall. However, concern turned to anger when it was alleged that Ford was said to have conducted a cost-benefit analysis, weighing the cost to repair the known faulty vehicles versus the cost of paying out the damage claims that were expected to arise.

Nearly 40 years later, the incident is still often referred to as an "episode of great corporate malfeasance."

So what of Toyota's decision to lay blame at the doorstep of the floor mat and gas pedal? Well, it's highly questionable. While this may address the situation, much of the evidence points to a contrary - and potentially much more costly - problem. The question remains whether this is really a genuine effort to correct the problem, or whether it is an effort to show some kind of wide-scale solution that will enable the company to start selling cars again.

This would certainly not be the first time Toyota has distorted the facts in favor of economic gain.

Whatever the case with the gas pedal fix, one thing is certain: If Toyota gets it wrong, it could very well turn a significant problem into a catastrophic one. One can only hope that all of the evidence pointing to this being an inappropriate wrong fix is wrong, and that this dark episode in consumer safety will be closed forever.



Could Toyota be taking a course of action that puts economics ahead of human life?

Legal Outsourcing: Ethical Compliance

The outsourcing of legal work raises specific issues in relation to the outsourcing lawyer's obligations to his client. Six Bar Association Ethics Committees and the American Bar Association Standing Committee on Ethics and Professional Responsibility have released opinions discussing the outsourcing of legal work. All of the opinions have concluded that a lawyer in the U.S. can outsource legal work and, at the same time, satisfy his ethical obligations. Arguably, the opinion that carries the most weight is the one released by the American Bar Association in August 2008. One novel point about the ABA Opinion, as opposed to those by the individual bar associations, is the noticeably conciliatory tone with regards to outsourcing both generally and specifically within the legal profession. The opinion comments that: "The outsourcing trend is a salutary one for our globalized economy."

It is the digest to the New York Opinion, however, that most succinctly consolidates the major ethical issues for consideration:

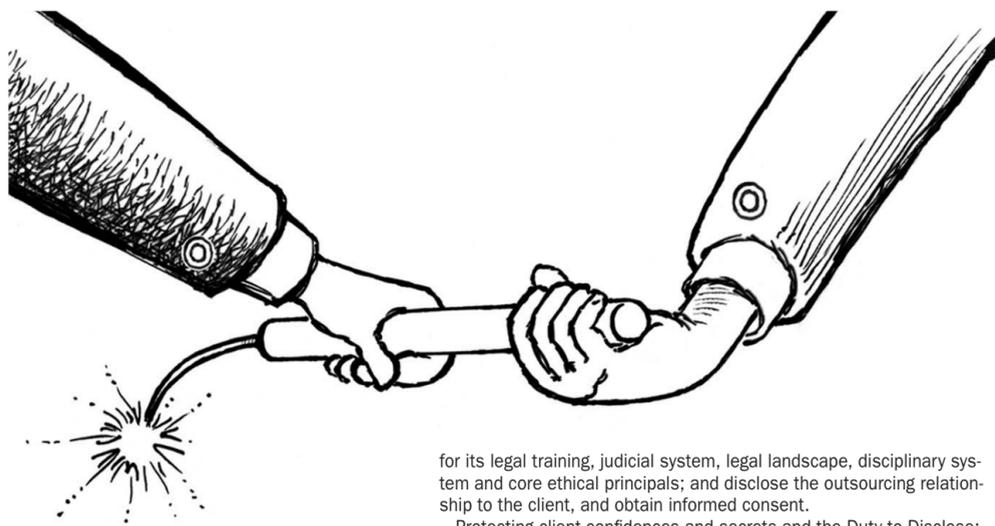
"A New York lawyer may ethically outsource legal support services overseas to a non-lawyer, if the New York lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserves

the client's confidences and secrets when outsourcing; (c) avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) when necessary, obtains advance client consent to outsourcing."

A number of issues prevail across the opinions. These relate to: the unauthorized practice of law; competent representation; conflicts of interest; client confidences and secrets; the duty to disclose; and billing appropriately.

While individual states reference their own particular rules of conduct, there is sufficient overlap that, for the purposes of understanding a lawyer's ethical obligations when outsourcing legal work overseas, reference to the ABA's Model Rules of Professional Conduct (MRPC) is sufficient. The following are some of the most crucial areas of concern.

Unauthorized Practice of Law: MRPC, Rule 5.5 (a): "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction."



for its legal training, judicial system, legal landscape, disciplinary system and core ethical principals; and disclose the outsourcing relationship to the client, and obtain informed consent.

Protecting client confidences and secrets and the Duty to Disclose: MRPC, Rule 1.6: "(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)."

The outsourcing lawyer in virtually all instances will be under a duty to disclose the nature of the outsourcing relationship to his or her client. If any client confidential information is to be disclosed, then the client must be informed. The implied authorization Rule 1.6(a) relates to the disclosure of client confidential information within a law firm. The ABA Opinion comments that where the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, no client confidential information may be revealed without the client's informed consent. It is difficult to envisage a legal outsourcing engagement that does not involve client confidential information, and thus in each and every situation, it is recommended that the client provides informed consent.

The San Diego County Bar Association Ethics Opinion 2007-1 comments that an additional duty of a lawyer who outsources work, whether within the U.S. or abroad, is to "maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, of his or her client" (see California Business & Professions Code Section 6068(e)). This additional duty extends beyond the requirements as set out in Rule 1.6(a), and compels the outsourcing lawyer to take proactive steps to ensure the preservation of client confidential information. These proactive steps can include requiring potential providers to demonstrate compliance with and/or certification by independent facility and security auditing bodies, such as SAS 70, ISO 27001, HIPAA or EU Safe Harbor. Ensuring that potential providers' internal information and facility security procedures meet the stringent standards imposed by the aforementioned organizations, assists in compliance with this additional duty.

Billing for outsourced legal support: Model Rules of Professional Conduct, Rule 1.5: "(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."

The issue of how to bill appropriately for outsourced legal support services has not been determined definitively as yet. There is consensus across the ABA and individual State Bar Association Opinions, that a simple pass-through of the cost of the services together with appropriate billing for supervision and overhead are permissible. However, the issue of whether a reasonable mark-up of the cost of the outsourced support is allowed warrants further debate. In Formal Opinion No. 00-420, the ABA concluded that a law firm that engaged a contract lawyer could mark-up the cost, provided that the total charge represented a reasonable fee for the services provided to the client. The ABA Opinion 08-451 comments that the overarching requirement is that the fee charged should not be unreasonable. What is abundantly clear is that in the absence of a prior agreement with the client authorizing a mark-up on the cost of the services, then the lawyer may only bill the client the actual cost in addition to a reasonable allocation of associated overhead.



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