

Solicitor-Client Privilege — *Sarbanes-Oxley Act*

BACKGROUND

- In response to the WorldCom and Enron affairs, in July 2002 the US adopted the *Sarbanes-Oxley Act* (Act). Section 307 calls on the US Securities and Exchange Commission (SEC) to adopt minimum standards of conduct for lawyers who practice before it.
- In November 2002, the SEC issued Proposed Rule 8130 which would apply to all lawyers, both American and “foreign” who “appear and practice” before the SEC. The Rule would cover any lawyer involved, to any degree, in an SEC filing. Its provisions would dramatically alter the lawyer-client relationship and the independence of the legal profession.

CURRENT STATUS

- In December 2002, the [CBA filed a submission](#) with the SEC, objecting to the Proposed Rule on the following grounds:
 - The “noisy withdrawal” rule would have a dramatic negative impact on the solicitor-client relationship and, far from achieving the objectives of the Act — the protection of investors and the strengthening of capital markets — it would do them great harm;
 - The proposed “up-the-ladder” reporting requirements trigger the lawyer’s obligation to report up-the-ladder on too objective a basis, and subjects the lawyer’s judgment to hindsight evaluation which could result in disciplinary action;
 - The proposed rule threatens the independence of the legal profession in that it contemplates that lawyers will be disciplined by the SEC, a regulatory authority distinct from the law society or bar to which the lawyers answer on professional ethics. In addition, the rule would place Canadian lawyers in direct conflict with their domestic rules of conduct which require them to keep all matters relating to the business and affairs of their clients confidential; and
 - The initiative is premature as the World Trade Organization signatory states are currently in negotiations towards new international disciplines to govern rules which apply to international trade in legal services.
- The CBA called on the SEC to rely on the fact that Canadian lawyers are already subject to rules which ensure their ethical conduct, and that, if the SEC must implement the proposed rule, to either restrict its application to US lawyers or recognize that Canadian ethical standards for lawyers are sufficient.
- Section 307 required the SEC to adopt the Rules by January 2003.
- In January 2003 the SEC issued a revised rule, which dropped “noisy withdrawal” in favour of a different reporting-out scheme. In response to the SEC’s call for feedback on the new proposal, the [CBA wrote, in March 2003](#), that the rule still posed serious concerns for Canadian lawyers in that even a threat of a reporting obligation will “inhibit candour in the solicitor-client relationship and will thus undermine the traditional role of lawyers as a motor towards compliance with the law.”

- A June 2003 Senate Banking Committee Interim Report, *Navigating through 'The Perfect Storm' Safeguards to Restore Investor Confidence*, does not address lawyer conduct issues.
- Proposals issued by the Ontario Securities Commission in June 2003, intended to be the Canadian version of Act, do not call for lawyers to “whistle blow” on their clients.
- In August 2003, the SEC finalized its “up the corporate ladder” rules. Action on the alternate “noisy withdrawal” provisions was deferred as a result of resolutions adopted by the ABA in August 2003. The ABA amended its Model Rules of Professional Conduct to allow lawyers to divulge confidential attorney-client information if necessary to prevent serious financial injury to a third party, to require corporate lawyers to report illegal activity “up the corporate ladder” unless they believe it is not in the client’s interest. ABA also adopted several corporate governance reforms, including one to encourage corporate counsel to take a more active role in ensuring their client complies with the law by reporting regularly to the company’s independent director.
- In [February 2004](#), the Canadian Corporate Counsel Association (CCCA) commented on the proposed amendments to Law Society of Upper Canada’s Rules of Professional Conduct on “up the ladder” reporting. The CCCA proposed clarifications to the concept of “withdrawal” for in-house counsel. CCCA also commented on the confidentiality, duty of loyalty and knowledge aspects of the Law Society proposals, and their impact on in-house counsel.
- In March 2004, the Law Society of Upper Canada approved amendments to its *Rules of Professional Conduct*, including new rules on a lawyer's obligation to report organizational misconduct “up the ladder” within the organization. If necessary, lawyers would be required to report to the highest authority in the organization, and to resign representation if the wrongful conduct continued. These amendments were prompted by US developments in response to the Act and discussions between the Law Society and the Ontario Securities Commission. The Law Society’s commentary to its rules states a lawyer shall not assist or encourage dishonesty, fraud, crime or illegal conduct, but it does not follow that a lawyer should “blow the whistle” on its client. Rather, the general rule is the lawyer shall maintain strict confidence of the clients’ information and this rule is subject to only a few exceptions.
- CBA amended its [Code of Professional Conduct](#) in August 2004 to address whistle blowing by a lawyer employed or retained by an organization. The rule and commentary are similar to those adopted by the Law Society of Upper Canada.

NEXT STEPS

- CBA will monitor further Canadian and SEC developments that would attempt to limit the independence of the legal profession.