

The Sarbanes-Oxley Act of 2002 and the Intellectual Property Lawyer

Tennessee Intellectual Property
Law Association

April 21, 2006

Subjects

- Section 307 and 17 CFR Part 205 – Lawyer Conduct
- Section 303 and SEC Rule 13b2-2 – Misleading Auditors
- Audit Letters
- Sections 302, 404, and 409 – disclosing and certifying “tangible” and “intangible” assets
- Loss Prevention Suggestions

Section 307 – Lawyer Conduct – Some Background

- Assisting crime or fraud – M.R. 1.2(d) – Tennessee has it
- Confidentiality – M.R. 1.6 – Exceptions
- Tenn. Rules 1.6 and 4.1 Mandate Noisy Withdrawals in cases of future or past frauds where Economic Loss Actual or Likely
- Representing Organizations – M.R. 1.13 – “Climbing the Corporate Ladder”
- ABA Task Force on Corporate Responsibility – M.R. 1.6 & M.R. 1.13; Tenn. Retains Older Version of Rule 1.13

Section 307 – Lawyer Conduct

- 17 C.F.R. Part 205
- “Climbing the Corporate Ladder”
- Reporting to the SEC

Section 307 – Lawyer Conduct

- Who's Covered? Lawyers Practicing before the SEC
- IP Lawyers? – IP opinions referenced in SEC filings

Section 303 – Misleading Auditors

- Communications with Auditors
- Audit Letter Responses
- ABA/AICPA Treaty
- SEC Position
- Public Company Accounting Oversight Board

Privilege/Work Product

- Communications with Auditors
- Audit Letter Responses
- Other Ways to Lose Privilege or WP
 - Voluntary Waiver
 - Crime Fraud Finding
 - Plea Agreements
 - Disclosures to Regulators (“Selective Waiver”)
 - Bankruptcy Trustees or Examiners
 - Many Others

Valuing IP Assets

- Section 302 – Officer Certification; Section 404 – Internal Controls Report; Section 409 – Disclosure of Material Changes
- IP Lawyers' Involvement

Some Loss Prevention Thoughts

- “Don’t Try this at Home” – Designate an Expert on SOX and Client Misconduct Generally
- Make Sure Everyone Knows about Client Misconduct
- Have Audit Letters Reviewed
- Fight for Adherence to the ABA/AICPA Treaty
- Teach Lawyers and Staff about Inappropriate E-mails and Memos – “The Keyboard Is your Enemy”

END