

# Ensuring secrets stay that way

Allegations that a Bay Street lawyer leaked imminent corporate deals highlight the need for action, critics say



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“Call me I have a tip,” reads the e-mail allegedly sent to one of Toronto investment dealer Howard Jeffrey Miller’s clients in November, 2004. It went on to say that a TSX-traded company was about to be the subject of a takeover.

“Timing should be before xmas [sic] but you never know with lawyers,” said the e-mail, which is cited in the Ontario Securities Commission’s statement of allegations against Mr. Miller, who at the time was with TD Waterhouse Group Inc., and three other men, including former Bay Street lawyer Mitchell Finkelstein.

The allegations that an illegal insider-trading ring relied on tips from Mr. Finkelstein – until last week a partner at Davies Ward Phillips & Vineberg LLP – have shocked Bay Street.

They have also thrown open questions about whether law firms and the legal profession are doing enough to stop people tempted to use or leak confidential knowledge about upcoming corporate deals.

The allegations against Mr. Finkelstein and others allegedly involved in the case have not been proven. His former law firm, Davies, as well as CIBC World Markets Inc. and TD Waterhouse – where others facing allegations worked – say they are co-operating with the OSC. Two employees with CIBC named in the allegations have been suspended.



Prosecutions would act as a deterrent, Ilana Singer says. JENNIFER ROBERTS FOR THE GLOBE AND MAIL

Canada’s poor reputation for failing to bust illegal insider trading is well known, said Ilana Singer, a lawyer and the deputy director of the Toronto-based Foundation for the Advancement of Investor Rights, which advocates for reforms to improve the integrity and fairness of Canada’s capital markets. But she does see some hopeful signs.

Regulators are now bringing more cases forward, she said. And proposed federal legislation that would create a new national securities regulator includes enhanced powers to investigate and prosecute such cases. “I would say we’re moving in the right direction,” Ms. Singer said.

Still, recommendations in a report issued seven years ago about illegal insider trading that were aimed at toughening the rules on lawyers appear to have gone nowhere, although subsequent blue-ribbon reports have repeatedly raised the issue.

The problem of lawyers leaking the details of deals they are working on that have not been disclosed to the markets was singled out in the 2003 report by the Canadian Securities Administrators, the umbrella group for provincial regulators.

The report noted that although lawyers or their staff were often the source of leaked information for illegal insider trading, there

were “no national or provincial rules or practices for lawyers that address directly the containment of inside information.”

It called on the Canadian Bar Association and the provincial law societies to draw up national “best practices.” The report also said stock markets should tell companies to use only lawyers who agreed to follow those best practices.

In 2004, however, the bar association issued a report dismissing the ideas, saying there were already well-established confidentiality rules for lawyers, who can be punished by their law society and even thrown out of the profession for violating them.

The Law Society of Upper Canada said it has published practice-management guidelines on confidentiality and file management for lawyers.

Most big Bay Street law firms have some sort of “information containment” provisions in place, although partners usually have broad access to a range of files. One former Davies partner said his old firm allowed wide access to files, but was very strict about the ethical requirements of the job: “It was pounded into you.”

Ms. Singer, who has also worked for the OSC, said a national standard for “best practices” for all law firms, big or small, would help set the right tone.

Securities lawyer Joe Groia, a former director of enforcement for the OSC, said even more could be done. For example, law firms need to impose the same kind of strict monitoring of staff investments that brokerage firms impose on their staff, he argued.

“Yes, it’s an invasion of privacy and won’t stop the determined wrongdoer. ... But over time it will make things a whole lot more difficult,” Mr. Groia said.

The case involving Mr. Finkelstein and the three other men is now before the OSC, which can only levy fines or other sanctions (but not a jail term) if the allegations are proven.

Prosecuting illegal insider-trading cases in the courts and imposing longer sentences would be a good deterrent, Ms. Singer said.

“I don’t think ... there have been enough big-time convictions to have a big deterrent effect,” she said. “[The effect on one’s] reputation is a whole other matter. That’s very damaging.”

With files from reporter Janet McFarland