

# LAW OFFICE SEARCH GUIDELINES

## LAW SOCIETY OF UPPER CANADA

### SOLICITOR-CLIENT PRIVILEGE

Solicitor-client privilege is a principle of fundamental justice embodied in section 7 of the *Charter*<sup>1</sup> and is of supreme importance in Canadian law. Solicitor-client privilege is a positive feature of law enforcement and is not an impediment to it. Consequently solicitor-client privileged information is out of the reach for the State<sup>2</sup> and investigative necessity or urgency does not move it within the grasp of the State.

The Client holds the privilege and the Lawyer is the trustee of that privilege. Lawyers are duty bound to protect their Clients' privileged information and are duty bound to act solely in the interests of their Clients.<sup>3</sup>

Solicitor-client privileged documents cannot be disclosed by the Lawyer; only the Client may give informed consent to the disclosure of his or her privileged information.

Just as solicitor-client privilege has evolved to its present constitutional status so too has its scope evolved. Solicitor-client privilege attaches to documents made in confidence for the purpose of seeking or providing legal advice. Client names may be

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<sup>1</sup> *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, paragraph 16, per Justice Arbour, speaking for the Court, (it is a "fundamental civil and legal right" and a "principle of fundamental justice under s. 7 of the *Charter*".)

<sup>2</sup> *Lavallee*, paragraph 24, ("...all information protected by solicitor-client privilege is out of reach of the state".)

<sup>3</sup> *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, paragraph 24, per Justice Arbour, speaking for the Court, ("It is critical to emphasize here that all information protected by solicitor-client privilege is out of reach of the state. .... It is the privilege of the client and the lawyer acts as gatekeeper, ethically bound to protect the privileged information that belongs to his or her client.").

privileged<sup>4</sup>, Lawyers' accounts are presumed to be privileged<sup>5</sup> and factual information may be privileged too.<sup>6</sup>

The Court alone is competent to adjudicate and determine the issue of privilege. The Court controls the entire search and seizure process that includes the process of unsealing documents seized from a law office and the process of reviewing and determining if solicitor-client attaches to seized documents.<sup>7</sup>

## PURPOSE AND SCOPE

Because section 488.1 of the *Criminal Code* was struck down as unconstitutional by the Supreme Court of Canada in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, Arbour J., speaking for the Court in paragraph 49 articulated ten principles that govern the legality of searches of law offices. Those principles are reproduced as an Appendix to these Guidelines. Arbour J. also said in the same paragraph the principles "... are not intended to select any particular procedural method of meeting these standards". The Law Society recognizes the need for Guidelines that represent best practices by which solicitor-client privilege can be protected in the event of a search of and seizure from a law office.

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<sup>4</sup> *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, at paragraph 28 per Arbour J., ("The name of the client may very well be protected by solicitor-client privilege, although this is not always the case.")

<sup>5</sup> *Maranda v. Richer*, 2003 SCC 67 per LeBel J., speaking for the Court in paragraph 33. ("In law, when authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege.")

<sup>6</sup> *Maranda* at paragraph 31, (quoting with approval the statement in Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999, "The distinction between 'fact' and 'communication' is often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated."). See also *Wyoming Machinery Company v. Roch*, 2008 ABCA 433, per Côté J.A., speaking for the Court in paragraph 19 ("Nor can one short-circuit the whole discussion of privilege by saying that it only applies to communications, and so does not apply to a solicitor's bookkeeping or money flows, on the theory that (a) they are information, not communications, or (b) they are acts, not communications.")

<sup>7</sup> *Attorney General v. Law Society*, 2010 ONSC 2150 per Hennessy J. of the Superior Court of Justice at paragraph 27 ("...the court retains control over the entire process of the unsealing of material seized from a law office or subject to solicitor-client privilege". "...at the stage where the material must be reviewed to determine whether it contains solicitor-client privilege, the court controls this process.")

The Law Society believes that these Guidelines represent a shared consensus concerning how Lawyers should conduct themselves when investigatory powers are exercised against their offices.

These Guidelines are intended to inform Lawyers of these practices and are to be used in conjunction with sound legal judgment exercised in the best interests of the Client.

These Guidelines deal with search warrants. Law enforcement and other regulatory authorities have other investigative tools at their disposal. For example, the Canada Revenue Agency has the power to demand or require that certain information be provided. Production orders can be issued pursuant to section 487.012 of the *Criminal Code*. Demands and requirements can arrive by letter. Many of the guidelines and principles pertaining to search warrants are relevant to these other investigatory tools. In the civil law context, *Anton Pillar* orders are akin to criminal search warrants and impose similar duties upon the lawyer to protect privileged information. Should a lawyer's office be the subject of an *Anton Pillar* order, the lawyer should consider the principles herein *mutatis mutandis* and subject to the case law pertaining to the administration of such orders.

Members of the public and law enforcement personnel are invited to read and use these Guidelines in order to avoid unnecessary court challenges.

The online version of these Guidelines contains hyperlinks to cases and authorities in order to facilitate Lawyers' ability to obtain necessary information.

The Law Society would like to work with the Federal and Provincial Attorneys General to develop a roster of lawyers who have agreed to act as Referee. If agreement on the roster cannot be reached the Law Society, at the request of the Court, shall propose the names of appropriate lawyers for the Court's consideration.

Lawyers are encouraged to contact the Law Society at 416-947-3300 and to ask to speak to Senior Counsel to the Director of Professional Regulation for assistance when faced with a law office search.

## **DEFINITIONS**

"Client" means a current or former Client of a Lawyer whose law office is the target of a search warrant. The Client is the holder of solicitor-client privilege.

"Comprehensive Electronic Search" means a search of an electronic device for one or more of the following; active data, latent data and archival data. Active data are the current files that are visible in directories and available to applications. Latent data are the deleted files (including memory "dumps") that can be retrieved. Archival data are the data that have been transferred or backed up to peripheral media such as CDs, DVDs, floppy disks, zip disks, network servers or the internet. The search is for data stored in areas of the electronic device such as active files, deleted files, slack space, unallocated space, RAM space, recycle bin, history files, temporary internet directory, unallocated clusters, swap files, temporary files, printer spool files, metadata, shadow data, network servers or the internet.

"Conflict of Interest" means an interest that could adversely affect the Lawyer's judgment on behalf of or loyalty to the Client.

"Document" means any paper, parchment, information, data or other material, whether in hardcopy or softcopy, on which is recorded or marked anything that is capable of being read or understood by a person, computer system or other device, and includes a credit card, but does not include trademarks or articles of commerce or inscriptions on stone or metal or other like materials;

"Electronic Devices" means any computers, servers and peripheral media on which data can be found. It includes but is not limited to BlackBerrys, Palm Pilots, memory sticks, cell phones, iPhones, iPods, USB, CDs, DVDs, zip disks and floppy disks.

"Forensic Image" means a forensically sound duplicate of the hard drive which is created by a method that does not alter data on the drive being duplicated and which can be authenticated. This duplicate contains a copy of every bit, byte and sector of the source drive, including unallocated space and slack space precisely as the data appears on the source drive relative to the other data on the drive. The duplicate will not contain any data other than which was copied from the source drive.

"Law Office" means any place, receptacle or building where privileged materials may reasonably be expected to be located and may include, although not limited to, a personal residence, or a storage facility used to maintain privileged documents;

## STEPS TO TAKE WHEN PRESENTED WITH A SEARCH WARRANT

### Assert solicitor-client privilege

The Lawyer must clearly and unequivocally tell Police that solicitor-client privilege is being asserted with respect to the documents sought pursuant to the warrant and that as a consequence Police should not be permitted to see or take possession of these documents.

Lawyers have a positive duty to protect solicitor–client privilege.<sup>8</sup> When Police arrive with a search warrant or any other statutory demand the Lawyer should assume that solicitor-client privilege attaches to the document and assert privilege on behalf of the Client.<sup>9</sup>

It is the Court’s responsibility to decide if solicitor-client privilege attaches to a document; it is not the responsibility of the Lawyer or the Police.

### Determine the validity of the search warrant

When presented with a search warrant by Police the Lawyer should inspect the search warrant to ascertain it is a valid search warrant and ensure that,

- The Law Office is identified as the place to be searched,
- The date that the Police attend at the law office is the date authorized,
- The documents sought are identified or described,
- The offence under investigation is identified, and
- The search warrant is authorized by a Court of competent jurisdiction.

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<sup>8</sup> *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, paragraph 24, *per* Justice Arbour, speaking for the Court, (“It is critical to emphasize here that all information protected by solicitor-client privilege is out of reach of the state. .... It is the privilege of the client and the **lawyer acts as gatekeeper, ethically bound to protect** the privileged information that belongs to his or her client.”).

<sup>9</sup> *Lavallee*, paragraph 49, principle 4. (“Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, **all documents in possession of a lawyer must be sealed** before being examined or removed from the lawyer’s possession.”)

Deficiencies in the search warrant should be pointed out to Police by the Lawyer and the Lawyer should suggest to Police that a proper warrant be obtained. If Police decline to seek a further search warrant the Lawyer should not obstruct Police in its execution but must note the objection.

### **Assess the potential for conflict of interest; determine if a Referee is needed**

A Referee is required if,

- The Lawyer has a conflict of interest in relation to the Client. If the Lawyer is named in the search warrant as the target of the investigation the Lawyer has a conflict of interest in relation to the Client,
- The Lawyer is unable or unavailable to act and no other Lawyer in the law firm is available to act to safeguard solicitor-client privilege,<sup>10</sup> or
- An Independent Computer Forensic Examiner is appointed.

### **A Referee is required but has not been appointed**

Often the Police will have appreciated the need for a Referee and will have asked the Court to appoint a Referee as a condition attached to the search warrant.

If a Referee is required but has not been appointed the Lawyer should tell Police that a Referee needs to be appointed by the Court and ask Police to halt their search until the appointment and arrival of the Referee.

If the Police decline to seek the appointment of a Referee or decline to halt their search the Lawyer should not obstruct Police in their execution of the warrant but must note the objection. In the meantime the Lawyer continues to have a duty to safe guard solicitor-client privilege and it is recommended that the Lawyer contact the Law Society for assistance.

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<sup>10</sup> See, for example, *R. v. Tarrabain, O'Bryne & Company*, 2006 ABQB 14

## **The role of the Referee**

The Referee is a licensed Lawyer who is at arm's length from the Crown, Police and the conflicted Lawyer. The Referee is appointed by the Court to act as trustee of the solicitor-client privileged information belonging to the Client.<sup>11</sup> The Referee reports to and takes direction from the Court.

The Referee takes all necessary steps to protect solicitor-client privilege and ensures that the directions given and orders made by the Court with respect to the search and post search procedures pertaining to the law office are complied with. The Referee is responsible for any notification of the Clients (the owners of solicitor-client privileged documents) with respect to the law office search.

When an Independent Computer Forensic Examiner is appointed by the Court the Referee advises the Independent Computer Forensic Examiner as required and makes all necessary applications to the Court for directions on behalf of the Independent Computer Forensic Examiner.

## **Assist Police with searching, seizing and sealing documents**

The Referee or the non-conflicted Lawyer should help Police by locating the documents sought in the search warrant, placing them in packages and sealing the packages. Providing such assistance to Police protects solicitor-client privilege.

## **Bring the sealed documents to the Court or to an independent third party designated by the Court**

With the Police, the Referee or the non-conflicted Lawyer should bring the sealed package of seized documents to the custody of the Court or to an independent third party designated by the Court. They should be kept in the custody of the Court or the Court designated independent third party until the Court directs their return to the Client

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<sup>11</sup> See, for example, *R. v. Law Office of Simon Rosenfeld*, 2003 CanLII 13453 (ON S.C.), *per* Nordheimer J. in paragraph 15 (where the Court appointed “a referee to examine the documents and to notify all clients who can be identified for the process that will be followed respecting the documents so that those clients can, if they wish, participate in the process for the purpose of protecting their solicitor and client privilege over the documents.”)

or the Lawyer from whose office they were removed or directs that they be given to the Crown.

### **Assistance from the conflicted Lawyer**

If the Lawyer, whose documents are the subject matters of the search, is the target of the investigation or otherwise conflicted he or she may be requested, but is not required, to assist the Referee or the Independent Computer Forensic Examiner.

## **SEARCH WARRANTS AND ELECTRONIC DEVICES**

### **Seizure and search of Electronic Devices**

If easily identifiable documents which can be readily downloaded from an electronic device are the subject of the search warrant, after asserting solicitor-client privilege with respect to the documents, the Referee or the non-conflicted Lawyer should download the documents, package the hard copy seized documents, seal the package and, with the Police, bring the sealed package to the custody of the Court or to an independent third party designated by the Court.

### **The Need for the appointment of an Independent Computer Forensic Examiner**

The Referee or the non-conflicted Lawyer should tell Police that an Independent Computer Forensic Examiner should be appointed by the Court when the search warrant authorizes,

- The search of and seizure from an electronic device that may contain solicitor-client privileged documents and the documents sought are not readily identifiable or downloaded, or
- The comprehensive electronic search of and seizure from an electronic device that may contain solicitor-client privileged documents, or
- The creation of a forensic image of an electronic device that may contain solicitor-client privileged documents.

### **Need for a Referee to assist the Independent Computer Forensic Examiner**

Whenever an Independent Computer Forensic Examiner is appointed, the Court should also be asked to appoint a Referee in order to maintain the independence of the forensic examination process subject to Court direction.

### **The role of the Independent Forensic Computer Examiner**

The Independent Forensic Computer Examiner is at arm's length from Crown, Police and the conflicted Lawyer and is appointed by the Court to,

- Create all forensic images of the electronic devices subject to a search warrant,
- Conduct the search of and seizure from the forensic images as authorized by and directed to by the Court, and
- With the assistance of the Referee, report to and take direction from the Court.

### **An Independent Computer Forensic Examiner is required but has not been appointed**

If an Independent Forensic Computer Examiner is required but has not been appointed the Referee or the non-conflicted Lawyer should tell Police that one needs to be appointed by the Court. The Police should be asked to halt their search and any forensic imaging of the electronic devices until the appointment and arrival of the Independent Forensic Computer Examiner.

If the Police decline to seek the appointment of an Independent Forensic Computer Examiner and to halt their search the Lawyer should not obstruct Police in their execution of the warrant but must note the objection. In the meantime the Lawyer continues to have a duty to safe guard solicitor-client privilege and it is recommended that the Lawyer contact the Law Society for assistance.

### **Custody of seized Electronic Devices and Forensic Images**

The seized electronic devices and all forensic images should be sealed, brought and kept in the custody of the Court or to an independent third party designated by the Court unless the Court orders the release of one of the forensic images to the custody of the Independent Forensic Computer Examiner for purposes of analysis.

## POST LAW OFFICE SEARCH PROCEDURES

### **Respond to Crown applications to examine or conduct further searches**

The Referee or the non-conflicted Lawyer should advise Police and Crown Counsel that, unless advised otherwise, the Referee or the non-conflicted Lawyer will be responding to any application by the Crown to conduct further searches or to examine the seized documents.

### **Notify Clients about the execution of the search warrant**

The Referee or the non-conflicted Lawyer is responsible for notifying the Clients who have been affected by the execution of the search warrant or whose documents have been seized pursuant to the search warrant.

The Referee or the non-conflicted Lawyer should advise the Clients of,

- The seizure of any of their documents,
- The risk to their privilege interests by the investigative or prosecutorial authorities,
- The existence of a conflict of interest if one has arisen,
- The right to seek and obtain legal advice and legal representation;
- How solicitor-client privilege may be asserted,
- How to require a hearing to determine any issue of privilege by the Superior Court of Justice, and
- Any other information to assist them in protecting their interests as a result of the search for and seizure of their documents.

### **Difficulty in notifying Clients**

The Referee or the non-conflicted Lawyer should seek direction from the Court about who is to be notified and the manner of notification in cases where it is not readily apparent who the Clients are that require notification or how notification can take place. The Referee or the non-conflicted Lawyer may also seek direction from the Court as to the information that is to be conveyed as part of the notification process.

### **Clients cannot be notified**

Ultimately, if efforts to contact the Clients fail, the Referee or the non-conflicted Lawyer should take steps that will afford continued protection of the Client's solicitor-client privilege, including responding to the Crown's application to gain access to the seized material, or bringing a motion to have the privilege issues adjudicated by the Court.

### **Initiate applications and participate in hearings before the Court**

The Referee or the non-conflicted Lawyer should initiate applications and participate in hearings when the Court is required to,

- Provide direction,
- Address concerns of non-compliance with its orders,
- Adjudicate issues of privilege,
- Decide on issues about Client notification, and
- Receive reports pertaining to the search and post search and seizure processes.

### **Fees and disbursements**

All fees and disbursements of the Referee and any Independent Forensic Computer Examiner appointed by the Court should be borne by the Attorney General or the investigating body.<sup>12</sup>

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<sup>12</sup> *R. v. Law Office of Simon Rosenfeld*, 2003 CanLII 13453 (ON S.C.), *per* Nordheimer J. in paragraph 18 ("It seems evident to me that the proper party upon whom to place the burden of the costs of this process is the party who has caused the need for the process in the first place, that is, the Crown. It is the Crown who has instituted the charges and it is the Crown who sought and obtained the search warrant for the documents.")

## APPENDIX

### **General Principles governing the legality of searches of law offices as articulated by Arbour J. in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209**

1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.
2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.
4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.
5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.
6. The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.
7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.
8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.
9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.
10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

