



SUMMARY OF THE GUIDELINES

## WHEN THE POLICE ARRIVE AT A LAW OFFICE

### Inspect the search warrant

- Ensure that the law office is identified as the place to be searched,
- Ensure that the date the Police have attended at the law office is the date authorized,
- Ensure that the documents sought are identified,
- Ensure that the offence under investigation is identified,
- Ensure that the requisite judicial officer has signed and dated it,
- If there are deficiencies on the face of the warrant, point them out to the Police and assert that the Police should obtain a proper warrant, and

**Do not obstruct the Police**, even if you believe the search warrant or its manner of execution to be invalid.

**Assert Privilege** over all documents to be seized under the search warrant.

### Is a Referee required?

Where the Lawyer may be a target of the investigation, if the Lawyer is in a conflict of interest and where there is no Lawyer present, this should be raised with the Police and either the Police or the Lawyer should make an application to the Court for the appointment of a Referee.

### Is an Independent Forensic Computer Examiner required?

If the documents sought are on a computer or other electronic device/media, the assistance of a Court appointed Independent Forensic Computer Examiner may be required.

### Do I need a Lawyer?

You are the only one who can answer that question. However, you can contact a Lawyer and you may find it helpful to speak with a Lawyer.

**Lawyers should contact the Law Society at 416-947-3963 to speak to Senior Counsel Professional Regulation for assistance when faced with a law office search.**

## Next steps to be taken by the Referee or the non-conflicted Lawyer

- Keep notes of participants, contacts, happenings and timing,
- Identify and **assert privilege** with respect to all documents,
- Offer to, or if requested by the Police, **locate the documents** and, where practicable, make and keep copies of them,
- Comply with the terms of the search warrant and give only what is demanded by the warrant,
- Retain copies of all documents, to the extent that it is possible, time permitting,
- Offer to, or if requested by the Police, **seal the documents in packages** marked for identification and initialed by you and the Police; taking care to ensure that the Police do not see the documents or any client names,
- Ensure that the sealed packages **are delivered to the custody of the Court or an independent third party** as designated by the Court in accordance with the Court order, and
- Make reasonable efforts to contact the Clients whose documents are subject to seizure to advise what is happening and advise that they may wish to obtain independent legal advice.

## The Search Warrant has been executed – Next Steps

If necessary initiate or respond to applications before the Court that may include applications for,

- An order to unseal and access the sealed packages,
- The appointment of a Referee or an Independent Forensic Computer Examiner,
- The determination of objections to the search warrant or its manner of execution,
- The determination of issues of solicitor-client privilege,
- Further searches such as a comprehensive electronic search of an electronic device/media or a forensic image, and
- Direction with respect to the notification of the Clients of the search for and seizure of solicitor-client privileged documents.

This summary has been drafted for ease of reference. It should be read in conjunction with the attached **Guidelines for Law Office Searches**.

## SOLICITOR-CLIENT PRIVILEGE

Solicitor-client privilege is a principle of fundamental justice embodied in section 7 of the *Charter of Rights and Freedoms*<sup>1</sup> and is of supreme importance in Canadian law. Solicitor-client privilege, properly understood, is a positive feature of law enforcement, not an impediment to it<sup>2</sup>. Consequently solicitor-client privileged information is out of reach for the State<sup>3</sup> and investigative necessity does not move it within the reach of the State<sup>4</sup>.

Solicitor-client privilege has been held by the Supreme Court of Canada as all but absolute<sup>5</sup> in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship<sup>6</sup>.

The Client holds the privilege and the Lawyer is the trustee of that privilege. Lawyers are bound in law to protect their Clients' privileged information and are duty bound to act solely in the interests of their Clients in a manner consistent with a Lawyer's professional obligation as an Officer of the Court<sup>7</sup>.

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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 36, (“... In other words, the privilege, properly understood, is a positive feature of law enforcement, not an impediment to it”).

<sup>3</sup> *Lavallee*, paragraph 24, (“...all information protected by solicitor-client privilege is out of reach for the state”).

<sup>4</sup> *Lavallee*, paragraph 36, (“...Sometime, however, the traditional balancing of interests in a s. 8 analysis is inappropriate... Where the interest at stake is solicitor-client privilege – a principle of fundamental justice and civil right of supreme importance in Canadian law – the usual balancing exercise referred to above is not particularly helpful. This is so because the privilege favours not only the privacy interests of a potential accused, but also the interests of a fair, just and efficient law enforcement process.”)

<sup>5</sup> The Court may determine that solicitor-client privilege should yield or does not exist in cases where the Court finds the existence of “criminal purpose.” The Court may determine that solicitor-client privilege should yield in cases where the Court determines that “innocence is at stake” or that “public safety is at stake.”

<sup>6</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, paragraph 53, *per* McLachlin C.J. and Abella J. (“The purpose of this exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship”). See also *Lavallee*, paragraph 36, (“...Indeed, solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance. Accordingly, this Court is compelled in my view to adopt stringent norms to ensure its protection.”) and paragraph 49, (“...When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.”)

<sup>7</sup> *Lavallee*, at paragraph 24, *per* Arbour J., speaking for the Court, (“It is critical to emphasize here that all information protected by solicitor-client privilege is out of reach for 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.”).

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<sup>8</sup>.

Just as solicitor-client privilege has evolved to its present constitutional status so too has its scope evolved. Solicitor-client privilege attaches to documents and communications made in confidence for the purpose of seeking or providing legal advice. Client names may be privileged<sup>9</sup>, Lawyers' accounts are presumed to be privileged<sup>10</sup> and factual information may also be privileged<sup>11</sup>.

### **The Court alone controls the search, seizure and post-execution process and determines issues of privilege**

The Court alone is competent to adjudicate and determine the issue of privilege. The Court controls the entire search and seizure process and post-execution procedures that include the process of unsealing documents seized from a law office and the process of reviewing and determining if solicitor-client privilege attaches to seized documents<sup>12</sup>.

Where there is a concern or dispute about the search warrant, its manner of execution or whether a Referee or Independent Forensic Computer Examiner is required, an application should be made to the Court for the Court to review and determine the issue or issues.

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<sup>8</sup> It is important to note that prejudice to the Client is presumed if solicitor-client privileged documents or information comes into possession of the State. See *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, at paragraph 3, *per* Binnie J. See also *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 and *R. v. Bruce Power Inc.*, 2009 ONCA 573.

<sup>9</sup> *Lavallee*, 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>10</sup> *Maranda v. Richer*, [2003] 3 S.C.R. 193, at paragraph 33, *per* LeBel J., speaking for the Court, (“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>11</sup> *Maranda*, at paragraph 31, *per* LeBel J., (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>12</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.”)

## PURPOSE AND SCOPE

Section 488.1 of the *Criminal Code* set out specific procedures for the search of a law office. This provision 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. As a result, the common law applies to a law office search and where the protection of solicitor-client privilege is at issue<sup>13</sup>.

In *Lavallee*, the Supreme Court of Canada articulated ten principles that govern the legality of searches of law offices. Those principles are reproduced as an Appendix to these Guidelines. Arbour J. speaking for the Court, also said in the same paragraph that the principles “... are not intended to select any particular procedural method of meeting these standards”. These Guidelines are intended to set out best practices to inform lawyers in the event of a search of and seizure from a law office.

Law enforcement officers have the responsibility to maintain the integrity of their investigations and to exercise their own independent judgment about the manner of execution of their duties in relation to searches of law offices, subject to any applicable legislation, the *Charter*, applicable policing standards, and to direction of the Court issuing the warrant and the Court overseeing the post-execution procedures.

After the warrant has been executed on the law office, the Crown will be a party to the proceedings and the Court will determine the issue of privilege. The Court has the sole authority to determine whether a Referee, an Independent Forensic Computer Examiner or any other person is required to be appointed to assist the Court and the precise role and duties of any such appointee; duties which may include who is required to notify potentially affected Clients and what the Clients should be told.

Because solicitor-client privilege has supreme importance in Canadian law as embodied in section 7 of the *Charter*, Crown Counsel, as representatives of the Crown, understand the need to protect solicitor-client privilege and have an important role in the protection of solicitor-client privilege.

Crown Counsel has a duty to ensure that the justice system operates fairly to all: individuals accused of violating the law, complainants, victims, witnesses and the public. The fair conclusion of an investigation may be dependent on the determination of issues of solicitor-client privilege with respect to the seized documents. Consequently, Crown Counsel has a role in the protection of the integrity of the investigation that may include bringing issues of solicitor-client privilege to the attention of the Court for its adjudication and determination in a fair and timely manner.

The Police provide law enforcement services in Ontario in a manner that recognizes the fundamental rights of all people as guaranteed by the *Charter*<sup>14</sup> and also have an important role in protecting solicitor-client privilege. Crown Counsel may be approached by the Police for legal advice with respect to obtaining a search warrant on a law office which should include advice about how to protect solicitor-client privilege. Such advice could be beneficial because the search warrant and any ancillary orders issued by the Court govern the search.

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.

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<sup>13</sup> *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at page 875, per Lamer J., (“When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising the authority should be determined with a view not to interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.”)

<sup>14</sup> Section 1(2) of the *Police Services Act*, R.S.O 1990, Chapter P.15

A Lawyer whose law office is or has been the target of a law office search may find it helpful to contact and speak with another Lawyer.

**Lawyers should contact the Law Society at 416-947-3963 to speak to Senior Counsel Professional Regulation for assistance when faced with a law office search.**

## DEFINITIONS

“Client” includes a current or former Client of a lawyer whose law office is the target of a search warrant and also includes a current or former Client of the law firm. The Client is the holder of solicitor-client privilege.

“Comprehensive Electronic Search” means a search of an electronic device/media for one or more of the following: active data, operating system artifact data and archival data. Active data are the current files that are visible in directories and available to the operating system, applications and the user. Operating system artifact 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.

A comprehensive search is a search of data in all of the aforementioned areas of the electronic device/media, and may include, but is not limited to, active files, deleted files, slack space, unallocated space, RAM dump, 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” is an interest that could adversely affect the Lawyer’s judgment on behalf of or loyalty to the Client<sup>15</sup>.

“Crown” is any public authority that has a prosecutorial and / or investigative power or authority.

“Document” means any medium on which is recorded or marked anything that is capable of being read or understood by a person or a computer system or other electronic device/media.

“Electronic Devices/Media” means any computers, lap tops, servers, servers used in cloud computing and the like and peripheral media on which data can be found. It may include, but is not limited to, photocopy machines, fax machines, Blackberrys, Palm Pilots, Smartphones, memory sticks, cell phones, mobile phones, GPS devices, iPhones, iPods, USB, CDs, DVDs, zip disks, floppy disks, backup tapes and the forensic image of an electronic device/media.

“Forensic Image” is a forensically sound duplicate of the data of a hard drive or other electronic storage media which is created by a method that does not alter data on the drive being duplicated and which can be authenticated / verified as a true copy through the process of Verification. 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.

“Independent Computer Forensic Examiner” is independent from the Crown, the Police and the conflicted Lawyer. The Independent Computer Forensic Examiner is appointed by the Court as its agent to assist and work with the Referee or the non-conflicted Lawyer to ensure that the search warrant and post-execution procedures are executed in a fashion that will protect solicitor-client privilege and to ensure that the mandate given by the Court is carried out according to its protective conditions<sup>16</sup>.

“Independent Third Party” is a person or an organization that is independent of the Crown, Police and the conflicted Lawyer.

<sup>15</sup> See R. 2.04(1) of the *Rules of Professional Conduct*.

<sup>16</sup> *R. v. Tarrabain, O’Byrne & Company*, 2006 ABQB 14 paragraph 22

“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.

“Police” means any public authority that has an investigative and / or enforcement power or authority.

“Referee” means a licensed Lawyer who is independent from the Crown, the Police and the conflicted Lawyer. The Referee is appointed by the Court as its agent when it issues a search warrant to ensure that the search warrant and post-execution procedures are executed in a fashion that will protect solicitor-client privilege and to ensure that the mandate given by the Court is carried out according to its protective conditions<sup>17</sup>.

“Search Warrant” means a Judge or Justice’s written authorization, based on information received under oath that authorizes a law enforcement officer to search a building, receptacle or place, and seize specific documents or items, or specified categories of documents or items.

“Verification” means the process of comparing a Forensic Image to the data contained on the source electronic device/media, through the use of digital fingerprints, such as MD5 Hash values (a 128 bit value generated by a widely accepted algorithm,) to verify the completeness of the Forensic Image.

## **STEPS TO TAKE WHEN PRESENTED WITH A SEARCH WARRANT**

### **Determine the validity of the search warrant on its face**

When presented with a search warrant by the 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 was issued by or endorsed by an Ontario Court or the Federal Court of Canada.

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

### **Court review of concerns about the search warrant**

Where there is a concern or dispute about the search warrant, its manner of execution or whether a Referee or Independent Forensic Computer Examiner is required, the issue or issues should be pointed out to the Police and referred to the Court for review. If the Police decline to refer the issue or issues to the Court for review or decline to discontinue the search, the Lawyer should not obstruct the Police in its execution of the warrant but should note the objection. Subsequently the Lawyer should refer the matter to the Court for review.

### **Assert solicitor-client privilege**

The Lawyer must clearly and unequivocally tell the Police that solicitor-client privilege is being asserted with respect to the documents sought pursuant to the warrant and that as a consequence the Police should not be permitted to see these documents. The Lawyer should not obstruct the Police but note the objection if the search warrant or its manner of execution is believed to be invalid or inappropriate.

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<sup>17</sup>Tarrabain, at paragraph 22

Lawyers have a positive duty to protect solicitor–client privilege<sup>18</sup>. When the Police arrive with a search warrant or any other statutory demand, the Lawyer should assume that solicitor-client privilege attaches to the documents and assert privilege on behalf of the Client<sup>19</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.

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

When presented with a search warrant by the Police, the Lawyer should consider whether he or she could be or is a target of the investigation.

Often the Police and the issuing Court will have considered the need for a Referee and a Referee may have been appointed as a condition attached to the search warrant or in an assistance order. In that case, the Referee acts to protect solicitor-client privilege.

A Referee is required if:

- The Lawyer has a conflict of interest in relation to the Client.
- The Lawyer may be or is a target of the investigation, in which case 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>20</sup>.

If an Independent Computer Forensic Examiner has been appointed by the Court and the Lawyer,

- Has a conflict of interest in relation to the Client,
- May be or is a target of the investigation, or
- Is unable or unavailable to act and no other Lawyer in the law firm is available to act to safeguard solicitor-client privilege,

a Referee may be required to be appointed by the Court depending upon the mandate given to the Independent Computer Forensic Examiner by the Court.

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

Often the Police and the Court will have appreciated the need for the appointment of a Referee and the Court will have appointed a Referee as a condition attached to the search warrant or in an assistance order.

If a Referee is needed but has not been appointed, the Lawyer should tell the Police that a Referee needs to be appointed by the Court and the Lawyer should ask the Police to return to the Court to seek the appointment of a Referee before proceeding with or continuing with the execution of the search warrant.

If the Police decline to seek the appointment of a Referee or decline to discontinue their search, the Lawyer should not obstruct the Police in their execution of the warrant and cannot stop the search but should note the objection.

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<sup>18</sup> *Lavallee*, paragraph 24, *per* Arbour J., speaking for the Court, (“It is critical to emphasize here that all information protected by solicitor-client privilege is out of reach for 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>19</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.”)

<sup>20</sup> See, for example, *Tarrabain, O’Byrne & Company*, 2006 ABQB 14



In the meantime, the Lawyer continues to have a duty to safeguard solicitor-client privilege and should contact the Law Society for assistance.

### **The role of the Referee**

The Referee is a licensed Lawyer who is independent from the Crown, the Police and the conflicted Lawyer. The Referee is appointed by the Court to ensure that the search warrant and post-execution procedures are executed in a fashion that will protect solicitor-client privilege and to ensure that the mandate given by the Court is carried out according to its protective conditions<sup>21</sup>. The search warrant or assistance order should set out the duties of the Referee. The Referee reports to and takes direction from the Court.

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

If an Independent Computer Forensic Examiner is appointed by the Court, the Referee, consistent with the order of the Court, advises the Independent Computer Forensic Examiner as required and makes all necessary applications to the Court to report to and to seek directions from the Court on behalf of the Independent Computer Forensic Examiner.

### **Assisting the Police with searching, seizing and sealing documents**

The Referee or the non-conflicted Lawyer should offer to, and if requested by the Police, assist the Police by; locating the documents sought in the search warrant, including locating electronic documents and electronic devices/media, placing them in packages, sealing the packages, initialing and arranging for the Police to initial the packages. Providing such assistance to the Police protects solicitor-client privilege.

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

In accordance with the Court order the Police, the Referee or the non-conflicted Lawyer should deliver the sealed package of seized documents (including electronic devices/media) to the custody of the Court or to the party designated by the Court in a manner that protects solicitor-client privilege.

If the search warrant fails to order custody of the seized sealed packages to the Court or to an independent third party, an application should be made to the Court for an order placing them in the custody of the Court or of an independent third party designated by the Court.

The sealed packages should be kept in the custody of the Court or the Court designated independent third party until the Court directs that the documents (including electronic devices/media) be returned to the Client or to the Lawyer from whose office they were removed or directs that they be given to the Police or the Crown.

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

If the Lawyer, whose documents are the subject matters of the search, is a target of the investigation or otherwise conflicted, he or she may be directed by the Court to assist the Referee or the Independent Computer Forensic Examiner<sup>22</sup>.

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<sup>21</sup>*Tarrabain*, at paragraph 22; See, for example, *R. v. Law Office of Simon Rosenfeld*, [2003] O.J. No.834 (S.C.J.), 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.”)

<sup>22</sup>*Law Office of Simon Rosenfeld*, at paragraph 17

## **SEARCH WARRANTS AND ELECTRONIC DEVICES/MEDIA**

### **Search for and seizure of easily identifiable documents from a Law Office**

Subject to any terms and conditions of the search warrant, if potentially solicitor-client privileged documents stored on an electronic device/media are easily identifiable<sup>23</sup>, after asserting solicitor-client privilege with respect to the documents, the Referee or the non-conflicted Lawyer should offer to, or if requested by the Police, assist the Police by locating the documents in the electronic device/media, printing or saving an electronic copy of the documents to an electronic device /media provided by the Police and packaging the hardcopy or electronic copy of the seized documents, sealing the packages and ensuring that the sealed packages are delivered to the custody of the Court or to an independent third party designated by the Court, in accordance with the Court order.

### **Search for and seizure of an Electronic Device/Media from a Law Office**

The search warrant may authorize the search for and seizure of one or more electronic devices/media from a law office. The Referee or the non-conflicted Lawyer should assert solicitor-client privilege with respect to all electronic devices/media subject to the search warrant that may contain solicitor-client privileged documents.

The Referee or the non-conflicted Lawyer should offer to, or if requested by the Police, assist the Police by locating the electronic device/media sought in the search warrant, placing the electronic device/media in packages<sup>24</sup>, sealing the packages, initialing the packages and ensuring that the sealed packages are delivered to the custody of the Court or an independent third party as designated by the Court and in accordance with the Court order.

### **Creation of a Forensic Image of an Electronic Device/Media at a Law Office**

A search warrant may authorize the creation of one or more forensic images of an electronic device/media without the removal of the electronic device/media from the law office.

If the search warrant authorizes the Police to create one or more forensic images of an electronic device/media at the law office, the Referee or the non-conflicted Lawyer should assert solicitor-client privilege with respect to all electronic devices/media that may contain solicitor-client privileged documents and should assert solicitor-client privilege with respect to all forensic images created.

The Referee or the non-conflicted Lawyer should ask the Police if the electronic device or the application to be used by the Police to create the forensic images will result in a further forensic image of the electronic device being stored on a Police electronic device/media.

If the Police advise that the electronic device or the application to be used to create the forensic images will result in a forensic image being stored on a Police electronic device/media the Referee or the non-conflicted Lawyer should ask the Police to decline to conduct or to discontinue the imaging process until an electronic device or an application can be utilized that would not result in a forensic image being stored on a Police electronic device/media.

The Referee or the non-conflicted Lawyer may need to tell the Police that an Independent Computer Forensic Examiner needs to be appointed by the Court and to ask the Police to return to the Court to seek such an appointment before proceeding with or continuing with the imaging process of the electronic device/media.

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<sup>23</sup>“Easily identifiable documents” refers to documents that are stored on an electronic device/media that are simple to locate, to retrieve, to identify, to download and to print as a hardcopy without the need for particular computer skill. Often these documents are stored in the active files of an electronic device/media.

<sup>24</sup>Care should be taken to ensure that packaging appropriate for electronic devices/media is used to package seized electronic devices/media.

During the creation of the forensic images the Referee or the non-conflicted Lawyer should take steps to prevent any of the screens, the documents or the data stored on the electronic device/media being visible to the Police.

The process of the verification of a forensic image could reveal solicitor-client privileged documents to the Police. If the Police wish to verify the forensic image of an electronic device/media an Independent Computer Forensic Examiner needs to be appointed by the Court. If an Independent Computer Forensic Examiner has not been appointed the Referee or the non-conflicted Lawyer may need to tell the Police that an Independent Computer Forensic Examiner needs to be appointed by the Court and to ask the Police to return to the Court to seek such an appointment before proceeding with the process of verification of the forensic image.

The Referee or the non-conflicted Lawyer should offer to, or if requested by the Police, assist the Police by placing all forensic images in packages, sealing the packages, initialing the packages, and ensuring that the sealed packages are delivered to the custody of the Court or an independent third party as designated by the Court in accordance with the Court order.

If the Referee or the non-conflicted Lawyer ask the Police and the Police decline to conduct or discontinue the imaging process that would result in a forensic image being stored on a Police electronic device/media, or decline to conduct the verification of the forensic image or decline to return to Court to seek the appointment of an Independent Computer Forensic Examiner, the Referee or the non-conflicted Lawyer should not obstruct the Police in their execution of the warrant but should note the objection. Subsequently the Referee or non-conflicted Lawyer should make an application to the Court for the Court to review and determine the issue or issues.

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

The seized electronic devices/media and all forensic images should be packaged, sealed, initialed, brought and kept in the custody of the Court or an independent third party designated by 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 ask the Police to return to Court to seek the appointment of an Independent Computer Forensic Examiner before continuing with the search. If the Police decline to do so, the Referee or the non-conflicted Lawyer should not obstruct the Police in the execution of the warrant but should note the objection and should make an application to the Court to review and determine the issue.

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

Whenever an Independent Computer Forensic Examiner is appointed and the Lawyer,

- Has a conflict of interest in relation to the Client,
- May be or is a target of the investigation, or
- Is unable or unavailable to act and no other Lawyer in the law firm is available to act to safeguard solicitor-client privilege

the Court should 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 Computer Forensic Examiner is independent from the Crown, the Police and the conflicted Lawyer and is appointed by the Court. The Independent Computer Forensic Examiner assists and works with the Referee or the non-conflicted Lawyer to ensure that the search warrant is executed in a fashion that will protect solicitor-client privilege and to ensure that the mandate given by the Court is carried out according to its protective conditions<sup>25</sup>.

<sup>25</sup>Tarrabain, at paragraph 22

As ordered and directed to by the Court, the role and duties of the Independent Computer Forensic Examiner could include,

- Creating the forensic images of, or otherwise preserving an electronic device/media subject to a search warrant,
- Verifying the forensic image of an electronic device/media,
- Conducting the search, including any comprehensive electronic search, of and seizure from the electronic device/media or the forensic images, and
- With the assistance of the Referee or the non-conflicted Lawyer reporting to and taking directions from the Court.

## **THE WARRANT HAS BEEN EXECUTED – NEXT STEPS**

### **Comprehensive electronic searches, applications to unseal and other proceedings**

#### **Comprehensive electronic search of the forensic image**

After the search warrant has been executed at the law office the Court may order that a comprehensive electronic search of a forensic image of an electronic device/media take place. The Court should be asked to appoint an Independent Computer Forensic Examiner to conduct all comprehensive electronic searches of and seizures from any forensic image or any electronic devices/media that may contain solicitor-client privileged documents.

#### **Initiate and respond to applications; participate in hearings before the Court**

The Crown, the Referee or the non-conflicted Lawyer may initiate and respond to applications to the Court for adjudication, direction, orders or to report to the Court in relation to:

- Concerns about the search warrant including its manner of execution,
- The appointment of a Referee or an Independent Computer Forensic Examiner,
- The custody of the sealed packages to the Court or an independent third party,
- Issues about Client notification,
- Issues of solicitor-client privilege,
- Unsealing the sealed packages of seized documents or seized electronic device/media,
- Access to seized documents, forensic images or electronic device/media,
- The examination or search of; seized documents, a forensic image or an electronic device/media,
- The return of seized documents, forensic images or electronic devices/media,
- Searches, post search and seizure processes, including timelines with respect to and management of the process, and
- Concerns about non-compliance with its orders.

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

The Referee or the non-conflicted Lawyer, subject to any Court order, 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, subject to any Court order, 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 Court, 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.

## Fees and disbursements

The Court will determine who is to bear the fees and disbursements of the Referee and any Independent Forensic Computer Examiner appointed by the Court. It is the Law Society of Upper Canada's position that such fees and disbursements should be borne by the Attorney General or the investigating agency<sup>26</sup>.

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<sup>26</sup>*Law Office of Simon Rosenfeld, per Nordheimer J.* in paragraphs 18 and 20 ("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." ... "The administration of justice is a matter of public interest and the costs of the administration of justice is a matter of public expense. The Crown represents the public in the enforcement of the criminal law and it is the Crown who should, therefore, bear the costs of ensuring the protection of this fundamental principle.") See also *R. v. Harrington*, 2006 ABQB 378, *per Veit J.* at paragraphs 25-28

## 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.