



NOVA SCOTIA BARRISTERS' SOCIETY

<b>NAME OF POLICY</b>	<b>Law Office Search and Seizure Guidelines</b>		
<b>APPLICABLE SECTIONS OF THE <i>LEGAL PROFESSION ACT</i> AND REGULATIONS</b>	<i>Legal Profession Act and Regulations and Code of Professional Conduct</i>		
<b>Approved by Council</b>	<b>Effective February 26, 2016</b>	<b>Reviewed</b>	<b>Revised</b>

## INTRODUCTION

The Nova Scotia Barristers' Society prepared Law Office Search and Seizure Guidelines in 2002 in an effort to assist lawyers in dealing with what is likely to be an unexpected and unsettling experience - a law enforcement agency executing a warrant at their law office to search for evidence in relation to one or more of their clients.

Since 2002, a variety of factors have led to the need to update the Law Office Search and Seizure Guidelines in order to provide practical guidance to lawyers that is appropriately responsive to current search and seizure practices. The rise in searches for electronic data, the use of "Referees" to assist in the exercise of search warrants, and the general experience gained by the Society in working with lawyers during search and seizure activities since 2002, together have led to the updating of these Guidelines.

Law office search and seizure is a serious exercise of law enforcement agency power with grave implications for solicitor-client privilege and the administration of justice. Such matters are to be treated by members with the utmost priority. Lawyers should not delegate their responsibility to anyone else in their firm unless they cannot avoid doing so.

These Guidelines have been drafted to assist lawyers in properly discharging their obligations when a law enforcement agency believes a lawyer is in possession of information in the form of files, documents, physical evidence or electronic data relating to a client that will assist the agency in its investigation of the client. Lawyers should carefully and thoroughly review these Guidelines in order to properly discharge all obligations required during law office search and seizure processes or similar process such as responses to production orders.

These Guidelines focus on the provision of advice to lawyers in cases where a current or former client is the target of the investigation. In some instances, the focus of the investigation is the lawyer, rather than the clients of the lawyer. In these circumstances, the lawyer who is the subject of the search should retain independent counsel and take all necessary steps to preserve solicitor-client privilege. It should also be noted that some statutes (e.g., the *Income Tax Act*), give inspection or audit authority to officials. These Guidelines are not intended to specifically address inspection or audit functions, and in the event that

lawyers are asked to respond to such processes with respect to client information, they should contact the Nova Scotia Barristers' Society.

## **DEFINITIONS**

“**client**” means a person who:

- (i) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
- (ii) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf;

“**Crown**” is any public authority having prosecutorial authority;

“**Court**” means the Nova Scotia Supreme Court, unless another court is specified in the Search Warrant;

“**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, Smartphones, Palm Pilots, memory sticks, cell phones, mobile phones, GPS devices, iPods, CDs, DVDs, zip disks, floppy disks, backup tapes and the forensic image of an electronic device/media;

“**Forensic image**” means 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**” means a person who is independent from the Crown, the Police and the lawyer whose office is being searched. The Independent Computer Forensic Examiner is appointed by the Court to assist and work with the Referee or the 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;

“**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, a commercial building or a storage facility used to maintain privileged documents;

“**Police**” means any public authority or law enforcement officer having an investigative and/or enforcement power or authority;

“**Referee**” means a practicing lawyer who is independent from the Crown, the Police and the lawyer who is affected by the search. The Referee is appointed by the Court when it issues a search warrant to ensure that the search warrant and post-execution procedures are executed in a manner that will protect solicitor-client privilege and to ensure that the Referee's mandate is carried out according to its protective

conditions. The scope of the Referee’s mandate is contained in the Search Warrant;

“**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;

“**Society**” means the Nova Scotia Barristers’ Society;

“**Verification**” means the process of comparing a Forensic Image to that contained on the source electronic device/media, through the use of means such as digital fingerprints to verify the completeness of the Forensic Image.

## KEY LEGAL CONCEPTS AND AUTHORITIES

### Solicitor-Client Privilege

The Supreme Court of Canada in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209 (*Lavallee*) held that solicitor-client privilege is protected under the *Charter* and is a principle of fundamental justice in Canadian law. The Court noted that the privilege favours not only the rights and interests of a potential accused, but also the interests of a fair, just and efficient law enforcement process. The Court stated that solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance. Constitutional imperatives compel the adoption of stringent norms to ensure the protection of the privilege.

Justice Arbour described the guidelines as reflecting the present day constitutional imperatives for the protection of solicitor-client privilege, and governing the search authorization process and the general manner in which the search must be carried out. Her guidelines are as follows:

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 as 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 the 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.

A lawyer must advise his or her staff of the importance of maintaining solicitor-client confidentiality and privilege. If during a search the lawyer is not available and reachable, a partner, associate or senior member must assert privilege over all documentation.

Following *Lavallee*, the British Columbia Court of Appeal ruled in *Festing v. Canada (A.G.)*, [2003] B.C.J. No. 404 that the *Lavallee* guidelines should apply to searches of any place where privileged documents may reasonably be expected to be located. This was held to include, for example, a lawyer's home, a lawyer's office in multi-disciplinary business premises, the offices of in-house counsel for a business, and storage facilities where lawyers store their files.

Subsequently, the Supreme Court of Canada held in *Maranda v. Richer*, [2003] SCC 67 that as a general rule in the context of the purposes of law office search and seizures, lawyers' fees and disbursements must be presumed to fall within the category of information protected by solicitor-client privilege.

In addition to this common-law authority, lawyers should be familiar with the variety of statutes that provide search and seizure authority. The specific statute that forms the authority for the issuing of a warrant will be referenced in the warrant itself and should always be carefully reviewed by the lawyer. Some examples of statutes including search and seizure authority include the following:

- *Criminal Code*, R.S., c. C-34, s.1
- *Controlled Drugs and Substances Act*, S.C. 1996, c.19
- *Income Tax Act*, R.S.C. 1985, c.1
- *Customs Act*, R.S.C. 1985, c.1
- *Excise Act*, 2001. S.C. 2002, c.22

## **HOW ARE SEARCH WARRANTS OBTAINED FOR LAW OFFICE SEARCHES?**

Given the variety of statutes under which search warrants may be obtained, there are variations in the circumstances leading to the issuing of search warrants. Generally, the steps involved to obtain a search warrant for a law office search include the following:

- Police receive information to the effect that an offence has been or will be committed and that there are reasonable grounds to believe there are items or information, including electronic data, at a law office that will afford evidence of the offence;
- Police will normally consult with the Crown when considering the potential for issuing a search warrant of a lawyer's office, as issues involving the safeguarding of solicitor-client privilege are inherent in such a search;
- The police, usually in consultation with the Crown when a law office search is involved, will prepare an Information to Obtain a Search Warrant ("ITO"). The ITO contains the grounds for the belief that there are items in a particular location that will afford evidence of the offence;
- The ITO for a law office should include reference to the appointment of a Referee by the Nova Scotia Barristers' Society. A full description of the role of the Referee is set out in the next section of these Guidelines;
- Where there are reasonable grounds to believe that electronic data may need to be accessed as part of the search, the Information to Obtain a Search Warrant should include reference to the appointment of an Independent Computer Forensic Examiner;
- When applying for a search warrant, police may also seek an order to seal the ITO in cases where disclosure of that document may be problematic – for example, in cases where it would identify a confidential informant or jeopardize an ongoing investigation;
- The ITO is presented to a Judge or a Justice of the Peace who reviews it to determine whether to issue the requested Search Warrant;
- The Referee, where named in the warrant, should be provided with copies of the ITO and the Search Warrant, unless the ITO is sealed.
- The Search Warrant should provide that the seized materials that are subject to privilege should be delivered to the Court or an independent third party as designated by the Court, in the presence of the Referee at the conclusion of the search;
- At the conclusion of the search, police will file a Report to Justice, which is addressed to the Judge or Justice of the Peace who issued the warrant and which lists the items that were seized and how they were dealt with, including those items subject to privilege. Once the Report to Justice is made, police may hold the property seized that was not subject to privilege for the earlier of three months, or until a charge is laid.

## **THE ROLE OF THE REFEREE**

The Referee is a practising lawyer who is independent from the Crown, the police and the lawyer whose office is the subject of the search. The Referee is not there to provide legal advice to the lawyer who is the subject of the search. Prior to drafting the ITO, the police should ask the Society to propose a Referee, and then name that Referee in the ITO, and in the Search Warrant itself. The Referee is then appointed by the Court to ensure that the search warrant and post-search 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. The search warrant should set out these duties of the Referee, and the Referee should be provided with a copy of the Search Warrant and any other relevant documents.

The Referee must ensure that the directions given and orders made by the Court with respect to the search and post search procedures are complied with. Normally, this will require the Referee to take all necessary steps to protect solicitor-client privilege, unless the Referee has obtained the consent of clients to waive the privilege. Where privilege has been waived, the Referee may release non-privileged materials to the police in accordance with the Search Warrant.

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 to protect solicitor-client privilege.

The Referee may be called as a witness in a court proceeding to address relevant matters.

### **Assisting the Police with searching, seizing and sealing material that is seized**

The Referee should assist the police by locating the materials sought in the search warrant, placing them in packages, sealing the packages, initialing and then arranging for the police to initial the packages. Providing such assistance to the police protects solicitor-client privilege.

The material that is obtained should be sealed in envelopes or boxes and a label affixed showing:

- The date of the search;
- The name of the lead investigator;
- The location of the seizure;
- Broadly identifying information that will assist the Court in navigating through potentially large volumes of information. (eg, “File folder found in desk drawer with name ‘Interview Notes’ on it”)

Where the material seized includes electronic documents or electronic devices/media, the steps set out in the attached Appendix “*Special Considerations for Electronic Devices/Media*” should be followed.

### **Delivery to Court**

Where consistent with the search warrant, the Referee should deliver the sealed material, including electronic devices/media into the custody of the Court or as otherwise directed by the Court in a manner that protects solicitor-client privilege.

The sealed packages should be kept in the custody of the Court or as directed by the Court until the Court directs that the seized items 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.

## **THE ROLE OF A LAWYER WHEN PRESENTED WITH A SEARCH WARRANT FOR A LAW OFFICE**

### **Contact the Society**

A lawyer who is presented with a search warrant for a law office search should contact the Society at 422-1491, Ext. 307 or Ext. 308, as soon as possible before or during the search. The Society will provide the lawyer with information and advice about:

- The application of these Guidelines;
- The lawyer’s obligation to assert solicitor-client privilege;

- The rights and roles of all parties, including the Referee.

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

Search warrants are presumptively valid. While not all lawyers are experienced in reviewing search warrants, when presented with a search warrant, the lawyer should inspect the search warrant to attempt to ascertain whether it is a valid search warrant by ensuring that:

- The authority under which the warrant is issued is noted;
- 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 the appropriate Court.

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.

### **When a Referee has not yet been appointed**

Usually 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.

However, if a Referee has not been appointed, the lawyer should advise the Society. Together, the lawyer and the Society should advise the Police that a Referee needs to be appointed by the Court. Where the Police agree to the appointment of a Referee, arrangements will be made 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 to wait for the arrival of the Referee, the lawyer should not obstruct the Police in their execution of the warrant and cannot stop the search but should note the objection. In the meantime, the lawyer continues to have a duty to safeguard solicitor-client privilege and should contact the Society for assistance.

Where a Referee is not appointed, the lawyer should follow the instructions for sealing documents as set out on page 6 of this document.

### **Other concerns about the search warrant**

Apart from situations where a Referee may not have been appointed, a lawyer may also have a concern about the search warrant itself, its manner of execution, or the need for the appointment of an Independent Forensic Computer Examiner. When any of these issues arise, they should be pointed out to the police. If the police decline to discontinue the search, the lawyer should not obstruct the Police in the execution of the warrant but should note the objection. Subsequently the lawyer should refer the matter to the Court for review and should contact the Society for assistance.

**Assert solicitor-client privilege**

The lawyer and Referee 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.

Lawyers have a positive duty to protect solicitor–client privilege. When the Police arrive with a search warrant, the lawyer should assume that solicitor-client privilege attaches to the documents and assert privilege on behalf of the Client. It is the Court’s role to make any final determination as to whether solicitor-client privilege exists.

**Electronic Information**

Electronic information requires special consideration. Please see Appendix “A” for a description of how these principles apply to electronic information.

**PROCEDURE TO BE FOLLOWED AFTER SEARCH IS COMPLETED AND MATERIAL SEIZED****Initiate and respond to applications; participate in hearings before the Court**

Those affected by a Search Warrant may seek to initiate or respond to applications to the Court for adjudication or direction on matters relating to the Search Warrant.

**Steps to be taken by Lawyer**

When the Lawyer is not in a conflict of interest, the lawyer should set up an appointment to meet with the affected client(s) and discuss the issue of solicitor-client privilege and seek instructions. If the client instructs the lawyer to proceed and assert solicitor-client privilege then the lawyer must take appropriate steps to continue to assert the privilege until the Court determines the matter.

If not familiar with the relevant provisions of the applicable statute under which the search warrant was issued, the lawyer should consult, on behalf of the client, another lawyer familiar with this area of the law. This lawyer will examine the validity of the search warrant to see whether or not an application should be made to quash the warrant or other related procedures should be taken to protect solicitor-client privilege.

If unable to contact/locate the client, the lawyer should assert solicitor-client privilege, and take whatever steps are needed to protect the client’s solicitor-client privilege interests before the Courts.



## APPENDIX “A”

### **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>1</sup>, after asserting solicitor-client privilege with respect to the documents, the Referee or 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 as otherwise directed by Court order.

#### **Search for and seizure of the 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 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 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>2</sup>, sealing the packages, initialing the packages and ensuring that the sealed packages are delivered to the custody of the Court or as otherwise directed by 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 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 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 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 Lawyer may need to tell the Police that an Independent Computer Forensic Examiner

---

<sup>1</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>2</sup> Care should be taken to ensure that packaging appropriate for electronic devices/media is used to package seized electronic devices/media.

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.

During the creation of the forensic images the Referee or the 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 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 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 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 Lawyer should not obstruct the Police in their execution of the warrant but should note the objection. Subsequently the Referee or Lawyer should make an application to the Court for the Court to review and determine the issues 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 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 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.

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

The Independent Computer Forensic Examiner is independent from the Crown, the Police and the Lawyer and is appointed by the Court. The Independent Computer Forensic Examiner assists and works with the Referee or the 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.

As ordered and directed by the Court, the role and duties of the Independent Computer Forensic Examiner will generally require the Examiner to verify what was seized, preserve the continuity of what may become evidence in a criminal prosecution, safeguard that material from unauthorized access, and create

and work from mirror images using generally acceptable procedures. More specifically, the role of the Independent Computer Forensic Examiner may 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,
- With the assistance of the Referee or the Lawyer reporting to and taking directions from the Court; and
- Attending in Court as a witness on relevant matters.

**The Nova Scotia Barristers' Society relied on the "Guidelines for Law Office Searches" prepared by the Law Society of Upper Canada (the "Law Society") on or around March 29, 2012 in the preparation of this document. The Law Society owns copyright in the excerpts of the "Guidelines for Law Office Searches" reproduced and modified herein. Such excerpts are reproduced and modified with permission of the Law Society. This document should not be reproduced, in whole or in part, without obtaining permission from the Nova Scotia Barristers' Society and the Law Society.**