



The Bar Council

## **Barristers instructed as “Independent Counsel” to advise upon legal professional privilege in relation to seized material**

<b>Purpose:</b>	To guide barristers instructed as Independent Counsel to advise on legal professional privilege in relation to seized material
<b>Overview:</b>	Meaning of “Independent Counsel” – Counsel’s Role – Counsel’s Instructions – Some Practical Issues – the “Fraud/Crime Exception” – Checklist for Counsel
<b>Scope of application:</b>	All practising barristers
<b>Issued by:</b>	The Ethics Committee
<b>Originally issued:</b>	2010
<b>Last reviewed:</b>	September 2021
<b>Status and effect:</b>	<b>Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.</b>

### **Introduction**

1. Warrants to permit the search of premises are frequently obtained from the courts by UK law enforcement agencies. The search of such premises will be conducted with a view to seizing relevant material.
2. The power to seize property during such a search does not (save for the statutory ‘seize and sift’ exception<sup>1</sup>) extend to material that is subject to legal professional privilege (hereafter “privilege” or “LPP”).

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<sup>1</sup> The ‘seize and sift’ power under Part 2 of the Criminal Justice and Police Act 2001 (“CJPOA”): the investigator may remove something that contains both material that he is entitled to seize and material that he has no power to seize where it is not reasonably practicable (a) for it to be determined into which category the item falls, or (b) for the item to be separated at the scene (‘mixed material’).

3. Law enforcement agencies therefore routinely instruct counsel to advise them in relation to material where privilege may exist or has been claimed. As counsel play no role in the conduct of the investigation or any subsequent prosecution they are referred to as “Independent Counsel”. This title has become almost universally applied despite it not being entirely accurate: counsel is instructed by and acting for the investigating agency.

4. The use of independent counsel has become commonplace, particularly in relation to the seizure of mixed material and the search of solicitors’ premises.

5. You may be instructed to assist an investigating agency either at the time of the execution of a warrant or at a later date, such as where material has been seized for later sifting or if it has been obtained as a result of a Production Order.

6. This process has been considered with approval by the courts – see e.g. *R. v Middlesex Guildhall Crown Court Ex p. Tamosius & Partners* [2000] 1 W.L.R. 453, *R. (Rawlinson & Hunter Trustees & Others) v. Central Criminal Court, the Director of the Serious Fraud Office* [2013] 1 WLR 1634 and *R. (on the application of McKenzie) v Director of the Serious Fraud Office* [2016] 1 W.L.R. 1308. In particular, in the *Rawlinson & Hunter Trustees* case (followed on this point in the *McKenzie* case) the Divisional Court made it clear that the person assessing whether LPP applies should be a lawyer who is “independent” of the public authority performing the search (in that case the SFO), and who is therefore not an employee of that authority. The rationale for the rule, and its distinction from the rules on ‘ethical walls’ where a solicitor has been instructed in the past by the other side, is also somewhat expanded on in the *McKenzie* case. However, the precise details of the nature of the independent counsel’s role and duties has not, to the Bar Council’s knowledge, been subject to detailed consideration. As a result, this guidance can only be based on the Bar Council’s current understanding and appreciation of the issues involved.

### **Counsel’s role**

7. Independent counsel’s role is to assist the investigating authority in maintaining the proper protections of privilege. Accordingly where it is believed that material the investigators wish to seize, or mixed material that has been seized, might contain privileged information, or where a claim of privilege is made, the opinion of independent counsel may be sought. If you are instructed, you will be asked to consider the material and give an opinion as to whether or not its contents are privileged.

8. Independent counsel should not normally expect to be required to advise upon wider issues in relation to the search, for example whether the seizure of any item would comply with the terms of the warrant.

9. The decision whether to inspect material over which a claim of privilege has been made, or which counsel has advised is privileged or contains privileged information (or, indeed, what to do with such material), is for the investigating agency; as counsel you can only provide your opinion.

10. You must consider carefully whether given your expertise, experience and the scope of the information provided to you, you are competent to provide, and capable of providing, such an opinion.

11. Your opinion is wholly dependent upon the material provided to you, and if you feel that you have been provided with insufficient information to be able to advise properly you must decline to do so and inform the law enforcement agency accordingly.

### **Counsel's instructions**

12. Prior to acting independent counsel should obtain clear written instructions from the investigating authority. Those instructions should contain sufficient information to permit you to make an informed assessment of the content of any material provided to you for consideration. Your ability to provide an opinion is dependent upon the amount and quality of information that you have been provided with.

13. Your instructions should set out clearly that you are being instructed to act solely in the role of independent counsel as explained in this guidance, i.e. to provide your opinion in relation to whether material shown or given to you for review is subject to privilege.

14. The statutes that grant a power of search and seizure do not have a uniform approach to the issue of privilege. Your instructions should set out in clear terms the test that the law enforcement agency is asking you to apply in relation to the existence of privilege, and should identify the statutory provisions under which the search will be, or has been, carried out. You should ensure that you are familiar with those provisions, particularly the limitations on the power of search and seizure as regards privileged material, before reviewing any material.

15. As the role of independent counsel is to ensure that privilege is not encroached upon, you should ensure that you are instructed on the basis that you would not be permitted to divulge to the investigators or those who instruct you any information seen by you or disclosed to you in the course of your duties that is subject to the privilege of someone other than the investigating agency.

16. Equally, both in providing your opinion and in the course of communications with the investigators or your instructing solicitors, as independent counsel you must be careful not to disclose the content of any privileged material seen by you.

17. You should ensure that your instructions address the issue of communications made to you on behalf of someone asserting privilege, including:

a. Whether you may or may not receive communications from such persons,

b. If you are permitted to receive such communications, whether they are confidential as between that person and you or are to be communicated to those who instruct you, and

c. Your obligations to explain to persons making representations to you the basis on which you are receiving those representations and whether they are confidential or not.

18. Where it is proposed that independent counsel should enter the premises being searched this should be expressly stated in your instructions and confirmation should be provided that the warrant authorises such entry.

19. Where there is any potential safety issue for those conducting the search, the investigating authority's risk assessment must include consideration of the role of independent counsel and confirmation of this should be in your instructions.

20. Where entry upon premises is required your instructions should also contain an indemnity for you against any damages arising out of the lawfulness of the warrant or the conduct of the search.

### **Some practical issues**

21. Where you are present at the execution of a warrant you will be asked to examine material that the investigators wish to seize either because the investigators believe that it may contain privileged information or because a claim to privilege has been raised.

22. There is no bar to independent counsel being informed by the person making a claim to privilege their reasons for making such a claim. You will be required to make a determination as to the existence of privilege as a result of all the information provided to you. If the person claiming privilege does not accept your opinion, you can expect that the disputed items will be 'blue bagged' for later determination, whether by agreement or by the appropriate

court under section 59 of the CJPOA (although this is a matter for those instructing you, and not for you).

23. Where you as independent counsel are present at the execution of the warrant you will be required to give an oral opinion to those conducting the search. You should keep a careful written record of all documents provided to or seen by you and the opinion that you have provided in relation to the same. You should reduce that opinion into writing and provide it to your instructing solicitors as soon as practicable thereafter.

24. You may also be asked to examine material, for example 'mixed material', on a date after a search has taken place. Again you should keep a careful written record of all documents provided to or seen by you and the opinion that you has provided in relation to them; recording that opinion in writing and providing it to your instructing solicitors as soon as practicable thereafter.

25. Independent counsel remains at risk of being called as a witness in the event that the seizure of material becomes contentious. However, instructions to act as independent counsel during or after a search do not offend rC21.10 of the BSB Handbook (which, in conjunction with gC73, includes the prohibition upon accepting instructions in a matter where you are likely to be called as a witness).

### **R. v. Cox & Railton: the 'Fraud/Crime Exception'**

26. As independent counsel you may well be asked by the law enforcement agency to advise as to whether, in your opinion, the principle in *R. v. Cox & Railton* (1884) 14 QBD 1532<sup>2</sup> applies to material in relation to which a claim of LPP has been made. Even where you are not expressly instructed in relation to this issue the point may arise. Accordingly you must be familiar with the relevant principle and have it in mind when carrying out your instructions and providing your opinion. If you do not have the information necessary in order to be able to advise on this, then you should say so, and if the necessary information is not provided to you or if insufficient information is available, then you should either refuse to give such advice or should qualify your advice (as appropriate).

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<sup>2</sup> Privilege does not apply to communications with a legal adviser where the advice was obtained in contemplation or furtherance of a criminal purpose, whether the legal adviser knew of that criminal purpose or not: *R. v. Central Criminal Court, ex p. Francis & Francis* [1989] AC 346.

## Checklist for Counsel

1. Have you ensured that:
  - a. You are competent to advise on the doctrine and case law on privilege as it applies to search warrants and seized material (BSB Handbook rC21.8)
  - b. If you are asked to attend at premises, the warrant specifically authorises you to enter the premises? If not, has written permission for you to enter been obtained from the owner or occupier of the premises?
2. Are you in receipt of written instructions?
3. Do your instructions:
  - a. Make clear that you are being instructed only to act as 'independent counsel', i.e. to provide your opinion in relation to whether material that is shown to you or given to you for review is subject to privilege?
  - b. Set out what test the law enforcement agency is asking you to apply in relation to a claim of privilege, and identify the statutory provisions under which the search is being conducted?
  - c. Address the issue of communications made to you by a person making a claim of privilege, including:
    - i. Whether you may or may not receive communications from such a person or their representative,
    - ii. If you are permitted to receive such communications, whether they are confidential or are to be communicated to those who instruct you, and
    - iii. Your obligation to explain to the person making such representations the basis on which they will be received, and whether they may be communicated to those who instruct you or not?
  - d. Make clear that you must not divulge to the investigators or those who instruct you any information seen by you that is subject to the privilege of someone other than the investigating agency?
  - e. Where you are to enter premises being searched, demonstrate that the investigating authority's risk assessment included consideration of independent counsel's attendance?

- f. Contain an indemnity for you against any damages arising out of the lawfulness of the warrant or the conduct of the search?
4. If you are unsure of the status of the material inspected or unable to provide the advice sought of you, you are entitled to ask for further information from those who instruct you.
5. You should bear in mind that you may be asked to provide evidence in relation to your role as independent counsel.
6. If you have concerns as to the content of your instructions or how you are being asked to conduct your duties then you should consult the Bar Council's Ethical Enquiries Service on: 020 7611 1307 or by email: [Ethics@BarCouncil.org.uk](mailto:Ethics@BarCouncil.org.uk).

### **Important Notice**

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not "guidance" for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see [here](#).