



Evidence obtained illegally in civil and family proceedings

Purpose:	To advise barristers in relation to illegally obtained evidence
Overview:	General approach - Claims to privilege in illegally obtained evidence - <i>Imerman</i> , breach of confidentiality and computers - Conclusion
Scope of application:	All practising civil and family barristers
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Status and effect:	Please see the notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.

General approach

1. It is increasingly common for counsel to have to advise in cases where evidence has, or may have been, obtained illegally.
2. Whilst it will be for you to decide, in each particular case, whether or not the evidence falls into the category of illegally obtained evidence, this ethical assistance is designed to assist in any situation in which it appears that the evidence has, indeed, been so obtained.
3. It should go without saying that it would be serious professional misconduct for counsel, knowing or reasonably suspecting that such evidence was illegal:
 - a. To advise that such evidence should be obtained; or
 - b. Otherwise participate in the obtaining of information illegally.

In this respect your attention is drawn to the BSB Handbook CD1, CD3 and CD5:

"CD1 - You must observe your duty to the court in the administration of justice."

"CD3 - You must act with honesty and integrity."

"CD5 - You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession."

4. Clearly advising or participating in any criminal act would be in breach of these provisions. Depending on the precise factual circumstances, it may be that advising or otherwise participating in some non-criminal but otherwise unlawful action - such as breach of confidence - could also be in breach of these provisions.

5. Furthermore, you may find yourself in professional difficulties simply by having sight of improperly obtained documents. In this respect your attention is drawn to gC11 and gC13:

"gC11 - If there is a risk that the court will be misled unless you disclose confidential information which you have learned in the course of your instructions, you should ask the client for permission to disclose it to the court. If your client refuses to allow you to make the disclosure you must cease to act, and return your instructions: see Rules C25 to C27 below. In these circumstances you must not reveal the information to the court."

"gC13 - Similarly, if you become aware that your client has a document which should be disclosed but has not been disclosed, you cannot continue to act unless your client agrees to the disclosure of the document. In these circumstances you must not reveal the existence or contents of the document to the court."

And rC25 and rC26:

"rC25 - Where you have accepted instructions to act but one or more of the circumstances set out in Rules C21.1 to C21.10 above then arises, you must cease to act and return your instructions promptly. In addition, you must cease to act and return your instructions if:

.2 - the client refuses to authorise you to make some disclosure to the court which your duty to the court requires you to make, or

.3 - you become aware during the course of a case of the existence of a document which should have been but has not been disclosed, and the client fails to disclose it or fails to permit you to disclose it, contrary to your advice."

"rC26 - You may cease to act on a matter on which you are instructed and return any instructions if:

.6 you become aware of confidential or privileged information or documents of another person which relate to the matter on which you are instructed..."

6. If the improperly obtained confidential material about which you have become aware relates to a child and there are family court proceedings in progress, you may be under a duty to disclose the material to the court regardless of your instructions and regardless of whether you cease to act for your client. This important topic is covered in the [Disclosure of unhelpful material in family proceedings \(children\)](#) document on the Bar Council website.

Claims to privilege in illegally obtained evidence

7. In *Dubai Aluminium -v- Al Alawi* [1999] 1 WLR 1964, Rix J ruled that legal professional privilege did not apply in relation to any relevant documents unlawfully obtained. It follows that all such data obtained, the source of the data and the letters of instruction to the person who obtained them, will have to be disclosed to the other side in any case in which data has

already been so obtained. This will be the case whether or not so doing will assist the client or prejudice him and his sources, by revealing unlawful activity. However, see Neuberger MR's comments in *Imerman -v- Tchenguiz* [2010] EWCA Civ 908 [2011] 2 WLR 592 at paragraph 42 as to the possibility of claiming privilege from self-incrimination to avoid explaining how documents have been acquired, but not the fact that such documents have been acquired. See also *Hildebrand -v- Hildebrand* [1992] 1 FLR 244, as considered in *Imerman* for when such documents must be disclosed.

***Imerman*, breach of confidentiality and computers:**

8. The case of *Imerman* (supra) has highlighted three particular issues that counsel should be aware of in this area:

- a. Breach of confidence,
- b. The Computer Misuse Act 1990, and
- c. The Data Protection Act 1988.

9. *Imerman* has underlined the fact that documents obtained in breach of confidence, at least when they are not yet disclosable, must be returned to the owner, although this ought to be subject to any available defences as a matter of law or equity. If they must be returned, then it appears almost inevitable that they would fall within the issues covered by the BSB Handbook set out above.

10. It may or may not be professionally embarrassing to continue to act in such a situation. Whether this is so will depend on the circumstances.

11. *Imerman* also gives a helpful example of where copying data from a computer for the purpose of helping in legal proceedings at least raised the possibility of criminal offences having occurred under the two statutes.

12. The Computer Misuse Act 1990 s.1 provides that it is an offence for a person to cause "a computer to perform any function with intent to secure access to any program or data held in any computer", where "the access ... is unauthorised" and "he knows at the time ... that that is the case". Securing access includes taking copies of any data or moving any data to "any storage medium" or using such data. And an act is "unauthorised, if the person doing [it] ... is not [and does not have the authority of] a person who has responsibility for the computer and is entitled to determine whether the act may be done".

13. The Data Protection Act 1988 s.55(1)(a) states that "a person must not knowingly or recklessly" and "without the consent of the data controller obtain or disclose personal data". Section 55(2) exempts from the ambit of section 55(1) cases where (a) the obtaining or disclosing was "necessary for the purpose of preventing or detecting a crime" or "required ... by any rule of law", (c) the person reasonably believed that he had the consent of the data controller, or (d) the action was "justified as being in the public interest". Section 55(3) provides that a person who breaches section 55(1) "is guilty of an offence". In this respect clients often seek to argue that their case was 'justified as being in the public interest'. In such cases it may be useful to refer to Neuberger MR's comments at paragraph 103 of *Imerman* on one such

attempt.

Conclusion

14. The following principles therefore apply:
 - a. You must never advise that evidence be obtained illegally
 - b. If evidence has already been so obtained, you must advise the client of both (a) the client's disclosure obligations and (b) where applicable, counsel's own disclosure obligations, including the ramifications of the decision in *Dubai Aluminium*, and
 - c. If the client is in breach of the consequent disclosure obligations, you will almost invariably have to return the case.

Important Notice

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