
Law Society practice note on legal professional privilege: call-to-arms or helpful restatement?

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This article considers the Law Society practice note on legal professional privilege (LPP) published on 23 February 2017, in the light of public statements by the UK's Serious Fraud Office (SFO) that companies under investigation should structure their internal investigations in such a way as not to attract LPP or waive well-made-out claims to LPP to evidence co-operation.

Legal professional privilege and co-operation

On 23 February 2017, the Law Society issued a practice note offering guidance to solicitors in respect of legal professional privilege (LPP) (see [Law Society: Practice note: Legal professional privilege](#) (LPP note)). The LPP note's stated aims are:

- To remind solicitors of the essential elements of LPP.
- To help solicitors navigate the challenges that arise in investigations where pressures to waive LPP are frequently encountered.

The LPP note was developed in consultation with the Law Society's LPP working group of expert practitioners as a response to what it describes as "growing attempts by some parts of government to encroach upon the sacrosanct nature of LPP".

This article considers the LPP note in the light of public statements by the UK's Serious Fraud Office (SFO) that companies under investigation should structure their internal investigations in such a way as not to attract LPP or waive well-made out claims to LPP to evidence co-operation.

This article also discusses the seemingly wholesale adoption of this approach by Rolls-Royce in securing its recent Deferred Prosecution Agreement (DPA). For more information, see [Legal update, Third deferred prosecution agreement approved between SFO and Rolls-Royce \(Crown Court\)](#).

LPP: the current landscape

LPP has been squarely in the SFO's crosshairs over recent years, most notably in respect of

"witness first accounts", that is, the accounts of individuals interviewed, often by external lawyers, during a company's internal investigation and usually before the start of the SFO's own investigation. According to the SFO, the disclosure of witness first accounts is deemed necessary to allow it to understand the facts as quickly as possible and to test the integrity and credibility of the accounts of potential witnesses who it may want to call as part of any subsequent prosecution. The SFO's concern is that sometimes LPP is being asserted over these accounts in bad faith, in order to frustrate its attempts at investigation.

In a much cited speech made in March 2016, Alun Milford, the SFO's General Counsel, made it clear that the SFO does not regard itself as constrained from asking for witness first accounts even if they are privileged. Although Milford sought to reassure companies that if their assertion of LPP is well-made-out, then the SFO will not hold that against them, he also confirmed that the SFO will, "view as a significant mark of co-operation" a company's decision to:

- Disclose witness accounts benefitting from a well-founded claim to LPP.
- Structure its investigation in such a way as not to attract privilege claims over witness interviews.

The inference of Milford's comments is that companies who, quite properly, choose to resist disclosure of witness first accounts by asserting a well-founded claim to LPP will be viewed as uncooperative and thereby run the risk of being denied the opportunity to negotiate a DPA. (For more information, see [Legal update, SFO speech to compliance professionals.](#))

This inference was lent weight by Sir Brian Leveson's judgment in the recent Rolls-Royce DPA. When illustrating those steps taken by Rolls-Royce which amounted to the "extraordinary co-operation" and which weighed so heavily as a public interest factor in favour of resolution by DPA (as opposed to criminal prosecution), Sir Brian Leveson noted:

- The disclosure of all interview memoranda (on a limited waiver basis) despite Rolls-Royce's belief that the material was capable of resisting an order for disclosure.
- Deferring interviews until the SFO had first completed its interview.
- Obtaining from Rolls-Royce complete digital repositories of in excess of 100 key employees, without filtering the material for potential privilege, but, instead, permitting issues of privilege to be resolved by independent counsel.

It does not seem too much of a stretch to see Sir Brian Leveson's judgment as giving effective judicial approval to the SFO General Counsel's public comments made some ten months earlier. Nor is it difficult to see how, following such statements and that judgment, companies could feel pressured into waiving their perfectly proper claims to LPP over witness first accounts.

The LPP note

The LPP note is a timely rejoinder to this seemingly inexorable drift towards the waiver of LPP being regarded a prerequisite for companies looking to benefit from co-operation credit.

Among other items, the LPP note reminds solicitors that:

- LPP is a fundamental common law right and a human right.
- They should advise their clients when proper grounds for asserting LPP exist. If clients justifiably assert their privilege, no adverse inference should be drawn, namely "they should not in any way be criticised or penalised for doing so, nor regarded as being uncooperative—and nor should their legal advisers".
- They, "do not have to satisfy enforcement agencies or a regulator that claims to LPP are well-founded".
- The Law Society considers it an improper form of pressure to suggest that clients conduct their affairs in such a way that LPP does not arise in the first place. Where pressure to waive LPP is applied by public bodies, it could breach their obligations under section 6(1) of the Human Rights Act 1998 to act compatibly with convention rights (LPP has been recognized as an aspect of Articles 6 and 8 of the European Convention on Human Rights).
- The Law Society is unaware of, "any support for a general position that law enforcement agencies or regulators must always request privileged material in order to fulfill their investigatory function".
- No regulator or investigator is entitled to pressure a client to waive LPP and, "no client can be criticised, let alone treated detrimentally" if the client decides to assert its LPP, "however helpful a waiver might be to the regulator or investigator".
- Other than in circumstances where a solicitor suspects or believes that their client has a fraudulent, criminal or otherwise iniquitous purpose in seeking legal advice, "unless and until the client waives LPP, the solicitor is professionally obliged to assert it".

More a helpful restatement than a call-to-arms

It is important to acknowledge that the LPP note is not legally binding and solicitors are not required to follow it. It is issued only for the benefit of solicitors and represents the Law Society's view of good practice in respect of LPP. What it is, however, is a formal consolidation of the views of expert practitioners in the area and, crucially, it has an expressly referenced legal basis. Notably, the same cannot be said for the SFO's approach in requiring companies to waive LPP to evidence co-operation. While the DPA Code of Practice requires that co-operation will include identifying relevant witnesses and disclosing their accounts, it also expressly acknowledges that "the [Crime and Courts] Act [2013] does not, and this DPA Code cannot, alter the law on legal professional privilege".

That companies may elect to waive well-founded claims to LPP to properly advance their defence, notwithstanding the difficulty of losing control over its own investigation and the risk of disclosed material being used against it (not only by government regulators and prosecutors but potentially also by adverse parties in parallel civil proceedings), is not at issue. What is at issue, and what the LPP note helpfully reminds us of, is that such a decision ought to be made in a balanced and well-thought through manner by a company in consultation with its legal advisers, free from the pressure of prosecutors.

For more information, see Practice notes:

- [*Legal professional privilege in civil litigation: an overview.*](#)
- [*Legal professional privilege: overview for criminal lawyers.*](#)

- *Legal professional privilege for in-house lawyers: toolkit.*

Authors



Lloyd Firth

COUNSEL

✉ lloyd.firth@wilmerhale.com

☎ +44 (0)20 7872 1014