
The Law Society: Restoring Balance in Criminal Investigations?

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On 12 May 2017, the Law Society President Robert Bourns wrote to the editor of the Financial Times describing the recent High Court decision in *The Serious Fraud Office v Eurasian Natural Resources Corporation*¹ as “deeply alarming”.² Bourns observes that the judgement appeared to “narrow the scope of legal professional privilege”.³ In recent months, the Law Society has been very active in addressing the apparent erosion of important protections in criminal investigations, both in its guidance on legal professional privilege (“LPP”) and in its more recent guidance on the conduct of section 2 interviews.

Practice Note on Legal Professional Privilege

On 23 February 2017, the Law Society issued a practice note offering guidance to solicitors in respect of LPP (see [Law Society: Practice Note: Legal Professional Privilege](#) (the “LPP Note”). 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”.⁴

We discussed the LPP Note in a previous Wilmer W.I.R.E. [post](#), so it is not discussed in detail in this article. However, it was a timely reminder to solicitors that LPP is a fundamental right and that clients should be advised of when they are entitled to assert LPP.

Practice Note on Representing Clients at Section 2 Interviews

More recently, on 4 May 2017, the Law Society issued a practice note on a solicitor’s role when representing clients at compelled interviews under section 2 of the Criminal Justice Act 1987 (see [Law Society: Practice Note: Representing Clients at Section 2 CJA Interviews](#) (the “S.2 Note”).

The S.2 Note followed [Operational Guidance](#) published by the Serious Fraud Office (“SFO”) in June 2016, which sought to severely limit the role of lawyers when representing clients at s.2 interviews.

The guidance sets out a series of conditions that the defence lawyer must abide by in order to participate in the s.2 interview process. First, the lawyer’s firm must give a number of undertakings significantly restricting the use of information that the SFO discloses during the s.2 interview process. Second, the lawyer must undertake to abide by certain “ground rules” and “parameters”

during the interview itself, including that the lawyer will “not do anything to undermine the free flow of information which the interviewee, by law, is required to give”.⁵

The S.2 Note once again reminds solicitors of their professional obligations and notes that “the SFO’s guidance does not override”⁶ those obligations.

The S.2 Note is split into three sections:

1. Conditions under which a lawyer will be permitted to attend an SFO interview

The S.2 Note reminds solicitors that, in considering whether they can agree to act within the “parameters” set by the SFO, they must bear in mind their duty to act in good faith and act in the best interests of their client. This may include ensuring that their client has an adequate opportunity to answer questions; that any questions asked are clear, fair and adhere to the s.2 notice; and that their client’s answers are not misconstrued. It also reminds solicitors that the areas that they may advise on in a section 2 interview might not be foreseeable and that, if the solicitor is excluded by the SFO in circumstances where they feel they have legitimately intervened during questioning, the solicitor should ensure that they have time to consult their client in private before leaving, in order to advise on the circumstances under which it would be proper not to answer questions. There is also an important reminder to the SFO that, whilst they can compel someone to answer questions, they cannot compel that person to be cooperative or helpful.

2. Undertakings sought by the SFO

The S.2 Note provides a number of practical points that solicitors should consider before agreeing to any undertakings requested by the SFO. This includes carefully considering the implications of agreeing to any undertaking and, where necessary, seeking to amend the terms of an undertaking before agreeing to it. The S.2 Note goes on to provide some of the key points to consider before agreeing to any of the standard undertakings sought by the SFO. This is a welcome acknowledgement of the issues that the required undertakings, taken at face value, raise in terms of lawyers complying with their professional obligations to clients. Those representing the subjects of section 2 Notices should have the Law Society’s guidance firmly in mind when presented with draft undertakings, as it is likely that in practice there will be considerable scope for negotiating their terms.

3. Conflicts of Interest

This section of the S.2 Note reminds solicitors that it is for them to determine in each case whether or not there is a conflict or a substantial risk of conflict and refers its readers to the relevant Chapters of the SRA’s Code of Conduct.

Unprecedented Action

In writing to the Financial Times and issuing the LPP Note and S.2 Note the Law Society’s actions are unprecedented. This may be attributable to a change in policy at the Law Society but, more likely, is a response to a concerning trend of hitherto accepted principles being eroded. In formally reminding solicitors of their professional obligations in the context of section 2 interviews, the Law

Society has provided a welcome tool for resisting attempts by the SFO to deprive compelled witnesses of protections. It remains to be seen how far the Law Society will go in the defence of privilege. Mr Bourns' letter to the Financial Times concludes by noting that *"The Law Society has vigorously opposed other recent attempts to undermine legal privilege — always supposedly for some "greater good". We will be studying this decision closely with the same view."*⁷ We wait to see if the Law Society will intervene in any appeal of the ENRC judgment. Either way, it is encouraging to see the Law Society voicing opposition where it matters and it is to be hoped that the trend will continue.

¹ The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2017] WLR(D) 317

² The text of the letter to the Financial Times can be found on the Law Society's website here: <http://www.lawsociety.org.uk/news/letters/legal-professional-privilege-and-sfo-criminal-investigation/>

³ <http://www.lawsociety.org.uk/news/letters/legal-professional-privilege-and-sfo-criminal-investigation/>

⁴ <https://www.lawsociety.org.uk/support-services/advice/practice-notes/legal-professional-privilege/>

⁵ <https://www.lawsociety.org.uk/support-services/advice/practice-notes/representing-clients-at-section-2-cja-interviews/>

⁶ <https://www.lawsociety.org.uk/support-services/advice/practice-notes/representing-clients-at-section-2-cja-interviews/>

⁷ <http://www.lawsociety.org.uk/news/letters/legal-professional-privilege-and-sfo-criminal-investigation/>