

## *Accountants and legal services*

*This Handbook Section was issued on 1 September 2006, and was updated to reflect the references in the Legal Services Act as far as possible, in August 2008. However, as the Legal Services Act was not fully enacted at that time this Section makes reference to both law in force at that time and, where appropriate, relevant sections of the Legal Services Act. Members should be aware that the provision of legal services will continue to change as the Legal Services Act is fully enacted.*

*The Section applies to law in England & Wales. Members should be aware that the provision of legal services is subject to reform by the Legal Services Act as noted above. Members in other jurisdictions will need to take into consideration local laws and regulations (including any local restrictions that may govern who can provide legal services) but might find the general principles, set out in this statement, useful.*

*In this Section the masculine gender imports the feminine gender throughout. This Section is not intended to be an exhaustive guide to all areas of law in which accountants might offer services. The following aims to be a guide to the principles that members (and in particular practitioners) need to consider before acting in respect of matters of law commonly encountered by accountants.*

### **1. Introduction**

**1.1** It is part of the ordinary function of the services a chartered accountant provides to their clients that advice is given on business issues. Such business advice may extend to advising the client on their legal rights and obligations. This is particularly true when advising, for example, on corporate reporting requirements, contractual requirements impacting on corporate accounting and other general obligations in relation to employees or trading partners, as well as advice on obligations under tax law. Members will need to identify those areas within their competence in respect of which they can responsibly give advice and those areas which require specialist input (for example from a lawyer). The following guidance sets out those areas which may, by legislation, require a lawyer to be engaged, and points out a member's ethical obligations when seeking to provide services which may extend to legal matters. Members are reminded to ensure that the work they undertake is both within their competence and covered by professional indemnity insurance.

**1.2** Legal services fall into two categories: those that can be undertaken by non-lawyers (known as legal activities) and those which may only be provided

by a specific group of authorised individuals due to legislative restrictions (known as reserved legal activities).<sup>1</sup>

1.3 Reserved legal activities are:

- exercising a ‘right of audience’ (see ‘*Tax advice*’ below);
- the conduct of litigation;<sup>2</sup>
- reserved instrument activities, that is work relating to various types of legal documents in respect of real and personal property and legal proceedings (see ‘*Property, trusts and court documents*’ below);
- probate activities (see ‘*Probate acting as an executor*’ below);
- notarial activities;
- the administration of oaths.

1.4 Members should be aware that performing reserved legal activities (without the specified qualifications) can constitute a criminal offence.<sup>3</sup>

1.5 Other legal activities include any other advice or assistance which includes the provision of advice on the resolution of legal disputes or which provides advice in relation to legal rights, duties or responsibilities.

1.6 This Section contains guidance on and summarises aspects of the law but it should not be treated as an exhaustive explanation of relevant provisions.

## 2. Fundamental principle of professional competence and due care<sup>4</sup>

2.1 Members have a continuing duty to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice and legislation. Members should also act diligently and in accordance with applicable technical and professional standards when providing professional

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<sup>1</sup> The terms used to distinguish between these two categories were ‘reserved’ and ‘unreserved’ legal services. The Legal Services Act identifies the two areas of legal service as ‘reserved legal activity’ and ‘legal activity’ and sets out the meaning in s. 12 of the Act. Section 12 was partially brought into force by a statutory instrument (SI 2008/222) in March 2008.

<sup>2</sup> Section 20, Solicitors Act 1974, prohibits anyone from acting as a solicitor, or as such issuing any writ or process, or commencing, prosecuting or defending any action, suit or other proceeding, in his own name or in the name of any other person, in any court of civil or criminal jurisdiction; or acting as a solicitor in any cause or matter, civil or criminal, to be heard or determined before any justice or justices or any commissioners of Her Majesty’s Revenue and Customs.

<sup>3</sup> Members’ attention is also drawn to the Immigration Asylum Act 1999, which prohibits the provisions of immigration advice and immigration services except by certain persons – see also s. 13(4) of the Legal Services Act 2007 which is not in force as at August 2008.

<sup>4</sup> See Section 3, ‘Code of Ethics’.

services. Thus a member should not undertake work simply because he is not prohibited from doing so but rather he should only undertake work which he is both entitled to carry out and sufficiently competent so to do.

**2.2** Members are reminded that some non-legal services are reserved to individuals or firms holding specific authority to act (such as insolvency work requiring a licence and authorised investment business activities). Members should always seek advice if unsure as to whether the work intended to be undertaken is restricted, regulated or licensed.

**2.3** Where appropriate, a member should make clients, employers or other users of the professional services aware of limitations inherent in the services provided to avoid the misinterpretation of an expression of opinion as an assertion of fact. Furthermore members should be aware that holding oneself out as authorised, where one is not, can constitute a criminal offence (for example pretending or implying that one is a solicitor).

**2.4** Members should be aware that if they provide advice that would normally be given by a solicitor or other lawyer they may increase the scope of the duty of care they owe to their clients. Accordingly, if a member falls short in the service provided, and the client suffers loss, the courts may judge the conduct of that member against the standard expected of a solicitor rather than that of an accountant.

**2.5** Members may have an entitlement to undertake work, which is otherwise the preserve of lawyers, by virtue of other qualifications, for example members who are dual qualified as barristers or registered patent agents. Such activities may be subject to practising restrictions and members holding dual qualifications should ensure they hold the relevant authorities from the relevant professional body.

### **3. Formation of companies**

**3.1** Members are entitled to prepare memorandum and articles of association including clauses relating to accounts. Members should ensure that sufficient expert input to the drafting process has been obtained before such documents are settled.

### **4. Probate/acting as executor**

**4.1** Under the Solicitors Act 1974 ('the Act')<sup>5</sup> it is an offence for anyone without the specified qualifications to, directly or indirectly, draw or prepare

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<sup>5</sup> Section 23 as amended. (When in force, it will be an offence under s.14, Legal Services Act 2007 to carry out such an activity without being entitled under that Act.) Under the Courts and Legal Services Act 1990 certain entities other than the Law Society have been permitted to license their members to undertake probate activities.

any papers on which to ‘found or oppose a grant of probate or letters of administration’, unless he proves that the act was not done for or in expectation of any fee, gain or reward.

**4.2** With regard to the expression ‘papers on which to found or oppose a grant of probate’ such papers consist of writs, notices of and cases on motion, pleadings and affidavits and their exhibits.

**4.3** Members may be employed to undertake such work by someone entitled to provide these services under the Act. Therefore accountants employed by solicitors can, for reward, be involved in such work. In many cases the papers will be the tax returns and supporting schedules required by HMRC and others.

**4.4** Work for no fee, gain or reward in a personal capacity would be permissible. Members should not seek to recover the cost of such work in other fees and are reminded that reward can be widely interpreted. A practising accountant who is appointed as executor with power to charge can, whether instructing a solicitor or applying in person, charge for the accountancy work entailed in the collection of material for the purposes of obtaining probate. However, members are reminded that they cannot charge, notwithstanding a charging clause, for actually drawing or preparing any of the documents necessary to the grant irrespective of whether they consider the appointment to be personal rather than professional.

**4.5** Where there is no power to charge, the executor must not charge. It is immaterial whether the work done falls within his professional competence, or not, or whether a solicitor is instructed.

## **5. Property, trusts and court documents**

**5.1** Under the Act, section 22 (as amended)<sup>6</sup>, it is an offence for a member, who is not also a solicitor, to:

- draft documents intended to transfer or create a charge in relation to the Land Registration Act 2002;
- make any application or lodge any document for registration under that Act at the Land Registry;
- draw or prepare any other instrument relating to real or personal estate including the contract, conveyance and mortgage in a land transaction; or
- draw or prepare instruments relating to legal proceedings

unless either he can prove the work was not undertaken for or in expectation of any fee, gain or reward or else that it was at the direction and under the

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<sup>6</sup> When in force, it will be an offence under s.14, Legal Services Act 2007, to carry on a reserved legal activity if not entitled under that Act.

supervision of a solicitor or other legally qualified employer or fellow employee who is authorised to perform such services. In the latter case, the instructing solicitor or legally qualified individual will be able to give reassurances. Members in any doubt should seek advice.

**5.2** A member, who is not also a solicitor, cannot draft a trust deed for fee, gain, or reward. However, a member can draft a document which gives rise to a trust as part of a testamentary instrument, for example as part of a will or codicil to a will<sup>7</sup>. Members are reminded to undertake only work if they are sufficiently competent.

**5.3** The Act also includes various other exceptions to the rule which allow non-solicitors to draft stock transfer forms (where there is no trust), powers of attorney and general agreements (to the extent that they are not specifically excluded). Details are not provided in this statement and members should refer to the Act and seek advice as appropriate.

## **6. Will writing**

**6.1** Will writing is not a reserved legal activity. It is therefore permissible for members to offer will writing services and to charge for them. However, members are reminded that drafting wills can be a complicated and specialised area and should therefore only be undertaken where the member has sufficient knowledge and competence. Members should also establish whether such work is covered by their professional indemnity insurance.

## **7. Tax advice**

**7.1** The provision of advice relating to compliance with taxation law is a normal part of the practice of accountancy for those with the necessary competence. Representing clients in relation to appeals to tax tribunals is permissible at the General/Special Commissioners and the VAT & Duties Tribunal. However, members should bear in mind that the processes involved in listing appeal hearings and the manner in which appeals are conducted could be outside of the member's area of competence (see also paragraph 2.3 above). Members should consider whether the client's best interests would be served by appointing someone who has appropriate legal training and the necessary experience of appearing before tax tribunals. Members in any doubt as to their position should seek advice. Furthermore, members should be aware that no costs in respect of anything done by a person, who does not

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<sup>7</sup> Section 22 of the Solicitors Act 1974 excludes from the definition of 'instrument' a will or other testamentary instrument and an agreement not intended to be executed as a deed. The Legal Services Act 2007 does not alter this position; wills and other testamentary instruments remain unreserved activities.

hold the relevant qualification, acting as a solicitor are recoverable in any court proceedings<sup>8</sup> (see also 9.3 – Direct access to the Bar).

## 8 Working with solicitors

**8.1** Members are entitled to accept instructions from solicitors and to provide assistance to lawyers in relation to litigation or to provide advice on matters within their competence. Members should ensure that instructions received are clear and seek clarity if in any doubt as to their entitlement to undertake specific engagements.

**8.2** Acting as a forensic accountant is a specialised area and members are reminded to provide services only in matters in which they have sufficient competence. Members may be interested in the Institute's Forensic Accounting Special Interest Group.

**8.3** Under current Solicitors' Regulation Authority (the Law Society's regulatory arm) rules members are prohibited from becoming partners in solicitors' practices. However, the Legal Services Act 2007 will permit non-lawyer managers, initially in 'legal disciplinary practices' where lawyers make up at least 75% of the managers, and in due course (under Part 5 of the Legal Services Act 2007) as managers in Alternative Business Structures (ABS). ABS are not anticipated to be available until at least 2011. The details of these developments and new business vehicles is presently beyond the scope of this Section.

**8.4** Institute regulations allow solicitors to become principals in accountancy practices. However, such principals cannot, under current Solicitors' Regulations Authority rules, offer legal services to clients, whether they are reserved or unreserved, in the capacity of a solicitor. Members who employ solicitors within their practices should ensure that both the solicitor and they are familiar with the appropriate rules regarding 'in house' practice and the provisions of legal activities to the public/clients. Similar consideration will apply to other types of lawyers.

## 9. Direct access to the Bar<sup>9</sup>

**9.1** Members are entitled to instruct Counsel direct, rather than via a solicitor, under the 'Licensed Access Scheme'. Further information on the operation of this scheme is available from the Bar Council's website ([www.barcouncil.org.uk](http://www.barcouncil.org.uk)).

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<sup>8</sup> Section 28, Solicitors Act 1974.

<sup>9</sup> The Bar Standards Board (the Bar Council's regulatory arm) is currently in the process of reviewing the ways in which barristers may be instructed other than by other members of the legal profession. Members are recommended to familiarise themselves with the relevant rules before seeking to instruct counsel.

**9.2** In addition, the Tax Faculty has made special arrangements under which their members can obtain advice and advocacy direct from barristers with a recognised specialism in tax law, for a fixed fee, in certain cases. Further information is available on these schemes from the Tax Faculty website.

**9.3** Prior to incurring costs for engagement under the Licensed Access Scheme, members are advised to consider their ability to recover such costs at law and seek legal advice where appropriate.<sup>10</sup>

## 10. General

**10.1** Members offering services which require an element of or total independence from the client should consider the impact of providing other services to that client. For example, representing an audit client before a tax tribunal creates an advocacy threat which guidance for auditors, contained in the APB ethical standard 5, may prohibit. Members who are concerned as to matters of independence may seek advice from the Institute's Ethics Advisory Services (01908 248258).

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<sup>10</sup> The Court of Appeal has ruled that a litigant whose tax case had been conducted by tax advisers (and not by solicitors) was not entitled to recover the costs incurred by those advisers in respect of work which would normally have been done by a solicitor who had been instructed to conduct the case. That means that fees for the cost of providing general assistance to counsel in the conduct of litigation are likely to be irrecoverable. However, it might be appropriate to recover at least part of a tax adviser's fees in such cases as a disbursement on the basis that their specialist services are those of an expert. See *Agassi v Robinson* [2005] EWCA Civ 1507.