



Ethical considerations for probate practitioners

Technical Enquiries Service

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This helpsheet is intended for members with an ICAEW probate licence acting in a professional rather than a personal capacity herein after referred to as the probate practitioner. This guidance should be read in conjunction with the guidance on [Accountants and Legal Services](#). Working for no fee, gain or reward in a personal capacity as an executor is permissible without a legal services authorisation.

The personal representative

When someone dies, the personal representative is the person who administers the deceased person's estate.

An executor is named in the will (if there is no will, or they are not named in the will, they are known as the administrator) and stands in the place of the deceased in order to wind-up their estate and distribute it in accordance with the will or the law of intestacy. The fiduciary nature of the role resembles that of the trustee, but executors' powers are wider, as is the scope of their responsibilities. They satisfy claims against the estate, and distribute the estate assets to the beneficiaries. As such they have a duty toward the beneficiaries.

The probate practitioner may have been:

- named in a will and is acting as the or one of the executors; or
- may have been engaged by those entitled to be appointed executors or administrators of an estate to assist with obtaining probate.

If acting as an executor you will need to ensure not only that you are competent to carry out the work but that the will allows for a charge for the work. If acting as agent for the executors or personal representatives of the estate you must still consider the extent to which you are competent to carry out the work. Ensure the terms of the engagement are clear on the scope of the work and what is being charged for.

Professional competence and due care

Members are expected to comply with the ICAEW Code of Ethics when undertaking any professional activities, whether or not these come within the definition of legal activities, including the requirements for professional competence and due care (see [Code of Ethics A section 130](#)). This means members should only undertake work which they are competent to provide, rather than undertake work merely because it is not specifically prohibited. They should maintain professional knowledge and skill at the level required to ensure that clients or employers receive competent professional service and act diligently in accordance with applicable technical and professional standards when providing professional services.

Members may have previously performed elements of a probate engagement such as preparation of estate accounts or inheritance tax work, but would have been unable to complete the entire process without being licensed so to do. Those now taking on the probate application should also ensure competence in the areas of new work, as well as the overall process.

Members should be aware that if they provide advice that would normally be given by a qualified lawyer, on the basis that they hold themselves out to be similarly qualified (ie, that they possess the

expertise of a solicitor or other lawyer), the standard of care against which that duty may be measured at common law could be increased from that of the reasonably competent practitioner acting in accordance with the standards reasonably adopted in his or her profession, to the standard of care expected of a reasonably competent legal specialist.

The fundamental ethical requirement for due care encompasses the responsibility to act in accordance with the requirements of an assignment, carefully, thoroughly and on a timely basis. This is particularly important in a probate engagement given that complaints may arise if there is delay in administration or failure to communicate with the personal representatives or beneficiaries. Good record keeping will also be essential to maintain both security and continuity of service, and avoid any part of the administration from being overlooked.

Due care is of utmost importance in estate administration since executors may be responsible for, amongst other things, keeping insurance on property up to date, investing excess cash and achieving the best possible price when selling estate assets.

Members should ensure that they undertake appropriate training in accordance with the [ICAEW qualification requirements](#), as well as satisfying the general requirement to carry out [CPD](#) (continuing professional development). Without this, quite apart from not satisfying the [ICAEW Probate Regulations](#), you may not be acting in the client's best interests.

An executor can be either:

- a professional, or
- a lay person(s) such as a family member or beneficiary, who could engage a professional if they wished.

When promoting their services members should take this into account. For straightforward estates, a professional executor may not be necessary.

There may be occasion when providing services such as probate, that an executor has the responsibility to run a business of the estate: this may be in the context of achieving a sale or on an ongoing basis pending distribution of the estate. You should check the will carefully, and consider the nature of the business. If you are expected to run the business you will need to assess your ability to do this competently. Some wills give executors power to continue business and be indemnified for any loss, or name a specific individual to deal with the running of the business.

An insolvent estate must be administered in the best interests of the creditors, not the beneficiaries. If legacies are paid before debts are settled, the executors will be liable to refund the value of any legacies improperly paid from the estate. Payments made to the executor by an insolvent estate may also have to be repaid, with interest. It is advisable to seek the advice of an Insolvency Practitioner in such cases.

For further detail on the expectations of an accountant in public practice with respect to considering a duty of care see [ICAEW's Code of Ethics B \(sections 241.2 – 241.8 inclusive\)](#).

Members undertaking tax work should also refer to the following guidance issued on a pan-professional basis, [Professional Conduct in relation to Taxation](#).

Members providing new categories of services to clients will also need to ensure that these are covered within the scope of their [Professional Indemnity Insurance \(PII\)](#).

Independence and conflicts of interest

Code of Ethics B Section 220.1 states:

'A professional accountant in public practice shall also take reasonable steps to identify circumstances that could pose a conflict of interest. Such circumstances may create threats to compliance with the fundamental principles. For example, a threat to objectivity may be created when the interests of two clients differ. A threat to objectivity or confidentiality may also be created when a professional accountant in public practice performs services for clients whose interests are

in conflict or the clients are in dispute with each other in relation to the matter or transaction in question.

Subject to the specific provisions, there is, however, nothing improper in a professional accountant in public practice having two clients whose interests are in conflict.'

However, Code of Ethics 220.2 also provides that *before accepting or continuing a client relationship or specific engagement, the professional accountant in public practice shall evaluate the significance of any threats created by business interests or relationships with the client or a third party.*

Members already offering services which require independence from the client should consider the impact of providing other services to that client. See ICAEW's [Code of Ethics B \(section 290\)](#) which gives further guidance on audit and review engagement independence and legal services.

Below are some examples of conflicts that may arise during a probate engagement.

Conflict 1

I have been asked to act by a personal representative of the deceased who is also one of the beneficiaries. Do I have a conflict of interest?

A conflict may arise here as executors have a legal duty to manage the estate for the benefit of the beneficiaries as a whole. The member must act objectively and on the instructions taken from the executors as a body and not individual executors.

It will be helpful for the member to make clear their obligations and in what capacity (or role) they are acting. If the executor appears to be acting to his own interest, and not that of the other beneficiaries, then the member is advised to explain the obligations of an executor, and if necessary should withdraw from the engagement, first considering who else should be informed.

The circumstances may be difficult and emotions running high. A family feud may arise if beneficiaries disagree over the distributions or the content of the will even if it appears to be clear. However, if the engagement becomes contentious you may not be in a position to continue to act as the ICAEW Probate License only covers non-contentious probate. The probate practitioner must cease to act as soon as the probate becomes contentious and should refer to a practitioner licensed to perform contentious work such as a solicitor.

The probate practitioner would evaluate the significance of any threats and apply safeguards when necessary to eliminate the threats or reduce them to an acceptable level. These may include safeguards such as clear communication in the engagement letter that you are only acting for the executor(s) in their capacity as such, the executors obtaining third party advice for matters such as asset valuation or investment and ensuring transparency and recommending open lines of communication vis a vis the other beneficiaries, particularly when it comes to unassigned property but this is a matter for the executors to determine. See Confidentiality and Legal Privilege (below).

If in the circumstances adequate safeguards are not able to reduce any threat to an acceptable level the probate practitioner should decline to act.

Conflict 2

I have been asked to take on a probate engagement by a client who is one of the executors of an estate which includes shares in the family business for which I have previously acted in another (non-assurance) capacity. The client is now the sole director for the family business and the shares in the estate are to be put on trust under the will. Are there any issues here?

If dealing with a family business with which you have been previously engaged it will be important to consider your pre-existing relationships with the various family members. When considering objectivity, matters may be complicated if one particular family member was your key point of contact, as you may be perceived as being more likely to favour that individual.

In addition to the safeguards in Conflict 1 (above) a further possible safeguard could be the agreed sharing of detailed information regarding previous dealings with the family members (subject to confidentiality requirements) by the executor. If, ultimately, you can't be, and be seen to be, impartial then you should not act.

Conflict 3

During the initial stages of my engagement I realise that one of the creditors of the deceased's estate is a client of my firm. Am I still able to act?

As long as you can remain objective then there is nothing to prevent you from acting but be aware of the perceived threat and the safeguards you can deploy Code of Ethics 220.2. There are various factors and legislative provisions that a personal representative must take into account in deciding the order of payment of debts and so to a certain extent this will act as an in-built safeguard. The situation should also be disclosed to the clients.

Conflict 4

The relationship between the executors and the beneficiaries is breaking down. What can I do?

Encourage the executors to talk to the beneficiaries to resolve their differences or seek the advice of a professional mediator. If non-contentious probate becomes contentious then you may need to resign but will need to cease to act and recommend the appointment of a legal practitioner licensed to perform contentious work (such as a solicitor) in such circumstances. See Conflict 1.

Conflict 5

I am the sole executor for the owner of a business that I audit. Can I continue to act?

There is a significant conflict of interest here in that you can't be responsible for running a business (or holding shares in a business) that you audit. APB Ethical Standard 2 would require immediate resignation if the auditor found themselves holding a financial interest and or management role with the audited entity. Alternatively the probate practitioner should renounce their right to be appointed executor. Hopefully this status will be spotted before the individual passes away, such that someone else can be identified to act as executor or administrator to continue to hold the shares and run the business without impairing the audit independence. Interestingly, with adequate safeguards following APB Ethical Standard 5 you can be appointed as probate practitioner to assist an executor.

Conflict 6

I already hold power of attorney for my client. Does taking on executorship present a conflict?

The existing power of attorney will end when the client dies. Presumably the probate practitioner had considered and safeguarded against any threats to the fundamental principles when taking the power of attorney. On death, any assets held will now belong to the estate and therefore be the responsibility of the executor. For convenience this might well be the same person.

Further Guidance on Conflicts

More general guidance on conflicts of interest can be found in the [Code of Ethics B \(section 220\)](#). You should always keep file notes of your advice and the decisions you have made. Even where family relationships appear cordial at first this may change.

Always think about perception and be particularly cautious where you have undertaken work involving valuation, unequal shares or unusual disposals. When acting as a sole executor a member should be especially alert to objectivity issues and consider whether it would be more appropriate to delegate the work to another firm or member.

[APB ethical standard 5 \(revised\), 'Non-audit services provided to audited entities'](#), gives guidance on, and may prohibit, the carrying out of certain work where there is a pre-existing audit relationship. Also mention ES2 financial interests as the estate may contain shares in a company the firm audits.

The terms of the engagement

If you are a named executor in a will then you will want to ensure that the testator includes appropriate clauses about charging, recovery of costs from the estate and estate administration in the will itself. You should refuse nomination or renounce rights after death if they are not included unless you intend to act in person without reward. This is not just an exercise in risk management but also ensures that there is clarity upon the testator's death.

If you are acting in the capacity of agent then it is the executors who are the client and your engagement letter should therefore be addressed to them. It may be helpful to agree what information and progress updates can be shared with beneficiaries by the executors. Where there are under-age beneficiaries, any discussions should take place with their representatives or guardians.

Even where you are appointed under the will as sole executor we recommend that the beneficiaries receive a copy of a letter of engagement addressed to oneself so that they understand the basis on which the work is being carried out, despite them not having any contractual right to interfere or rights to the information. As usual, terms should be clear and unambiguous with the scope of your services clearly defined. For example your work might include all or some of the following:

- Tax advice/compliance
- Estate administration
- Some executorships might include a continuing role as trustee (please see our guidance on Acting as a Trustee for more information).
- Valuation services
- Sale or transfer of property
- Investment activity connected with the estate
- Estate accounts
- Services directive disclosures
- Complaints ICAEW and LeO

The above is not an exhaustive list and the precise scope of your work should be discussed. In particular, and if possible, it would be useful to discuss and confirm the scope of the work and your current terms and basis for charging with the testator prior to death acknowledging these may change over time.

Fees should be fair and reasonable and clear. A fixed fee or hourly rate might be appropriate.

The engagement letter should also detail provisions regarding document retention (see below).

Confidentiality and legal privilege

As discussed above the personal representatives are the client (including the probate practitioner if appointed) and as such information relevant to the engagement should only be shared with them. They decide what to disclose to the beneficiaries. However, it may be helpful to agree with the client what information and progress updates can be shared with beneficiaries so as to facilitate cordial resolution of the engagement.

[Code of Ethics A \(section 140\)](#) discusses confidentiality in more detail.

It is also important for the member to distinguish between information that is confidential and that which is legally privileged.

Legal advice privilege preserves the confidentiality of communication between clients and their legal practitioner when seeking advice on legal issues, including legal rights or obligations. It is an important constitutional right of the clients of legal practitioners, which should be respected by members while complying (to the extent that they can) with any possibly conflicting legal requirements on themselves.

Legal advice privilege extends to 'relevant lawyers and authorised persons'. This means that firms accredited by ICAEW for probate will be classified as an authorised person under the Act. As such legal advice privilege will apply in relation to probate services and related services, including estate administration, provided by them or under their supervision.

By way of example, whilst a court order can compel the disclosure of confidential information, it cannot compel the release of a legally privileged communication. Legal advice privilege is an absolute right and cannot be overridden by any other interest.

Document retention

This guidance should be read in conjunction with [Documents and Records: Ownership, Lien and Rights of Access regulations](#), and ICAEW's [Document retention](#) and [Data Protection](#) helpsheets.

- An original will is the property of the estate and there is no set time limit for which it should be retained by an executor, which might be indefinitely. The engagement letter should be specific. An original will should not be destroyed without first consulting the client;
- Documents prepared for the client which have been paid for belong to the client;
- Documents prepared by the firm for its benefit belong to the firm. These will generally be internal documents for which the client has not been charged, for example protective records drafted by the firm.

When considering whether documents should be disposed of you should note that claims on the personal estate of a deceased person can be brought within 12 years from the date which the right to receive the share or interest accrued ([s.22 Limitation Act 1980](#)). Documents should therefore be retained until the risk of a claim has passed.

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