



## **ACCOUNTANTS AND LEGAL SERVICES**

Last updated September 2018

Guidance on those areas that may require a lawyer to be engaged.

This guidance was revised in September 2018 (Paragraphs 2.2.4 Reserved Instruments Activities; 3.4.4 Will Writing and 3.4.5 Deeds)

The ICAEW Business Law department is the professional and public interest voice of business law matters for ICAEW and is a leading authority in its field. Widely recognised as a source of expertise, the Department is responsible for submissions to regulators and standard setters and provides a range of resources to professionals, providing practical assistance in dealing with business law issues affecting ICAEW's members.

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## FOREWORD

This statement was issued in January 2016 (revised September 2018) to provide guidance to Members in practice on the provision of legal services to their clients, whether directly or in conjunction with a law firm, and the legal and regulatory conditions which may apply. The guidance reflects the provisions of the Legal Services Act 2007 (the Act) and other law, as at the date of issue. All previous guidance on this subject has now been withdrawn with immediate effect.

Members should note that there are legitimate differences of interpretation – and therefore considerable uncertainty – with regard to certain definitions in the Act. These mean that some provisions of the Act are subject to clarification by the courts and all Members should be aware of the potential for changes in its interpretation. In the meantime, ICAEW's Professional Standards Department has issued a Regulatory Advisory on when to seek a license for probate services which clarifies the boundaries of ICAEW's regulatory policy on the scope of the reserved activity of Probate, [which is available here](#).

This guidance aims to cover the principles that Members (and in particular practitioners) need to consider before acting for clients by providing legal advice and assistance, in areas commonly encountered by accountants.

Whilst every care has been taken in the preparation of this guidance, ICAEW does not accept any responsibility for any loss occasioned by reliance on it. Nor can it necessarily cover every eventuality and Members should take further legal or professional advice where necessary.

This guidance applies to ICAEW Members in England and Wales. Members in other jurisdictions will need to take into consideration local laws and regulations (including any local restrictions that may govern the provision of legal services) but might find the general principles set out in this guidance useful.

This guidance is intended primarily for Members practising as chartered accountants. Members who are dual qualified may need to seek further advice from the regulatory body, other than ICAEW, that authorises their other professional activities. If in doubt Members should seek guidance from their professional body and where appropriate their legal advisors.

## INTRODUCTION

1. It is part of the ordinary function of the services that chartered accountants provide 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, 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 reasonably give advice and those areas which require specialist input such as from a lawyer.
2. The following guidance sets out professional considerations which may apply when Members seek to provide services which may extend to legal matters, including guidance on those areas which, under the Act, require a lawyer or legal practitioner to be engaged. It also addresses a number of professional issues which may arise when Members work with or for lawyers, or engage lawyers to work with or for them or their clients
3. Legal services fall into two categories under the Act: ‘reserved legal activities’ which may only be provided by a specific group of authorised individuals, and ‘legal activities’ which can be undertaken by non-lawyers. For the purposes of this guidance the latter are referred to as ‘non-reserved legal activities.’ In many cases the boundary between reserved and non-reserved legal activities is unclear and will remain so until tested in the courts.
4. Reserved legal activities are now defined in section 12 of the Act (see also section 3 below). It is a criminal offence for ICAEW Members (and indeed anyone) to undertake reserved legal activities as part of their professional services to clients unless they are authorised in accordance with the Act.
5. ICAEW Member firms, and individual Members in practice, will be entitled to provide the reserved legal activity of Probate, if they are either licensed (as an “Alternative Business Structure”) or authorised to do so by ICAEW (where all their partners are individually authorised as probate practitioners). Guidance on ICAEW’s requirements for both licensed firms and authorised Members/Member firms is available [here](#). Otherwise firms wishing to provide these or other reserved legal activities to clients will be required to obtain a licence from an alternative legal services regulatory body. A full list of approved regulators and licensing authorities is available [here](#).
6. This guidance contains guidance on and summarises aspects of the law but it should not be treated as an exhaustive explanation of relevant provisions.

## RESERVED LEGAL ACTIVITIES

- 2.1 Schedule 2 of the Act defines the six legal activities which are currently designated as reserved legal activities and so can only be performed by an authorised or exempt person (see Appendix 1 for further details). Note however that the only category of exemption that is likely to apply to Members is that some (but not all) of these reserved activities can be performed without authorisation but without expectation of fee, reward or gain (see generally paragraph 2.5 below and the specific instances mentioned below).
- 2.2 The six activities are as follows:

### 2.2.1 Probate activities

Schedule 2, section 6 (2) of the Act defines probate activities as the preparation of any probate papers on which to found (non-contentious) or oppose (contentious) a grant of probate or a grant of letters of administration. Probate can be 'contentious' or 'non-contentious'. On 14 August 2014 ICAEW became an approved regulator and licensing authority for non-contentious probate activities – but not for contentious probate activities. Contentious probate activities will, accordingly, continue to be limited to other appropriately authorised persons. If the probate activity is performed without expectation of fee, gain or reward, then it can be performed by a Member who is then classified as an exempt person. (See Appendix 1 for further details on exempt persons).

### 2.2.2 Rights of audience

This means the right to appear before or address a court including the right to call and examine witnesses. The concept of 'right of audience' does not apply in certain circumstances, such as in relation to the Small Claims Court and Tax and other Tribunals. (See Appendix 2 for further details). This activity cannot be performed as an exempt person, on the basis that there will be no charge, fee or reward. See also paragraph 3.2.1.

### 2.2.3 Conduct of litigation

This is defined as the issuing of proceedings before any court, the commencement, prosecution and defence of such proceedings and the performance of any ancillary functions. (See Appendix 2 for further details and paragraph 3.4.7 below on the role of a 'McKenzie Friend' in relation to assisting a client that is conducting litigation). This activity cannot be performed as an exempt person, on the basis that there will be no charge, fee or reward.

### 2.2.4 Reserved instruments activities

This covers the preparation of any instrument of transfer or charge for the purposes of, or for making an application or lodging a document for registration under, the Land Registration Act 2002. It also includes the preparation of documents relating to real or personal estate or to court proceedings in England and Wales and specifically to transfers of land. It excludes wills, most agreements not intended to be executed as a deed (which means many contracts are not reserved instruments), powers of attorney and with some exceptions transfers of stock. (See paragraph 3.4.5 below for further details on deeds). If the reserved instrument activity is performed otherwise than for, or in expectation of, any fee, gain or reward, then it can be performed by an individual who is then classified as an exempt person. (See Appendix 1 for further details on exempt persons).

### **2.2.5 Notarial activities**

Notarial activities are the authentication and certification of signatures and documents. Currently this can only be performed by appropriately qualified legal practitioners who are also authorised by the Master of the Faculties and in accordance with the Public Notaries Act 1801. If the notarial activity is performed without expectation of fee, gain or reward, then the person performing it is classified as exempt. (See Appendix 1 for further details on exempt persons).

### **2.2.6 The administration of oaths**

This means the powers conferred on a commissioner of oaths by the Commissioners of Oaths Act 1889, the Commissioners of Oaths Act 1891 and section 24 of the Stamp Duties Act 1891. A commissioner of oaths is a person qualified to administer an oath or take an affidavit for the purposes of a court (usually a solicitor or notary). This activity cannot be performed as an exempt person, on the basis that there will be no charge, fee or reward.

- 2.3 Previously, Members were not authorised to provide any of the six reserved legal activities defined in the Act for reward and in their own right. However, since ICAEW became an approved regulator and licensing authority for non-contentious probate activities, Members and member firms can apply to ICAEW to be authorised or licensed to undertake non-contentious probate.
- 2.4 If a Member is not authorised to provide a reserved legal activity, that Member can still be employed or engaged to do so by an authorised person, such as a solicitor or notary. See also section 6.3 below.
- 2.5 Members will be exempt persons in relation to the reserved activities of probate, reserved instruments or notarial services, where carrying out work for clients otherwise than for, or in expectation of, any fee, gain or reward. Members should be aware, however, that 'reward' can be widely interpreted, and they must not, for example, seek to recover the cost of such work in other fees. Nor should such activities be performed as a component part of a bundle of services for which a single charge is made. See Appendix 1 for further guidance.

## NON-RESERVED LEGAL ACTIVITIES

- 3.1 Non-reserved legal activities are legal activities which are not reserved, as defined in section 12(3) of the Act.
- 3.2 Legal activities are defined in section 12 (3) of the Act as:
- All reserved legal activities as defined in Schedule 2 of the Act (see Section 2 above) ; and
  - Any other activity which consists of one or both of the following –
    - The provision of legal advice or assistance in connection with the application of the law or legal dispute resolution; and/or
    - The provision of representation in connection with any matter concerning the application of the law or legal dispute resolution.
- 3.3 Non-reserved legal activities do not include any activity of a judicial or quasi-judicial nature, including acting as a mediator. Non-reserved legal activities are not subject to statutory regulation, but may be subject to regulatory or other professional requirements imposed by individual professional or other regulatory authorities.
- 3.4 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.

### 3.4.1 Tax advice and legal representation

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. Members are permitted to represent clients in relation to appeals to tax tribunals at the Tax Chamber of the First-Tier Tribunal and the Tax and Chancery Chamber of the Upper Tribunal without authorisation for the reserved activity of Rights of Audience. The processes involved in listing appeal hearings and the manner in which appeals are conducted may, however, be outside a Member's area of competence

### 3.4.2 Estate administration

3.4.2.1 The type of activities that can be performed by ICAEW Members as a non-reserved legal activity as part of the administration of an estate, include:

- the realisation of assets;
- payment of debts;
- payment of tax and obtaining clearance ;
- distribution and the payment of specific legacies;
- assent of assets to trustees; and
- distribution of the estate's residue.

See the Regulatory Advisory [available here](#), for further guidance.

3.4.2.2 Although estate administration is a non-reserved legal activity it has been included within the scope of ICAEW's regulatory arrangements if carried out by an accredited probate firm or licensed practitioner

### 3.4.3 Acting as an executor

3.4.3.1 Working for no fee, gain or reward in a personal capacity as an executor is permissible in firms without a legal activity authorisation. Members acting without a probate authorisation or licence should not seek to recover the cost of such work in other fees – see paragraph 2.5 and Appendix 1 for further guidance on avoiding this

possibility. A practising accountant who is appointed as executor with power to charge can, irrespective of whether they are instructing a solicitor or applying in person, charge for the accountancy work (but only that work) entailed in the collection of material for the purposes of obtaining probate.

- 3.4.3.2 Firms which have a (reserved legal activity) probate authorisation or licence may include acting as an executor as one of their charged-for professional activities, within the terms of their authorisation or licence.
- 3.4.3.3 When acting as a sole executor a Member should consider their objectivity and whether it would be more appropriate to delegate the work to another firm or member.
- 3.4.3.4 A Member will still owe a client a duty of care, whether or not they are being paid for a particular service. Professional Indemnity Insurance cover is, therefore, strongly recommended even if the service is provided free of charge or for no gain or reward.

#### **3.4.4 Will writing**

- 3.4.4.1 Members are entitled to offer will writing services and to charge for them without a (reserved legal activity) probate authorisation. Members are reminded that drafting wills can be complicated and that this is a specialised area and should therefore only be undertaken where they have sufficient knowledge and competence. The training required by ICAEW Members who wish to offer probate services will cover wills in very general terms but is not sufficient to provide adequate training in will writing. This also applies to drafting codicils to wills and will trusts.
- 3.4.4.2 Members are likewise reminded that the preparation of a document varying a disposition made under a will after the testator's death (even if this is not executed as a deed, as is usually the case (see paragraph 3.4.5 on activities involving deeds)) is a specialised area, which should likewise only be undertaken where the member has sufficient knowledge and competence.
- 3.4.4.3 Further advice on will writing best practice is available from the following organisations:
  - [Solicitors Regulation Authority \(SRA\)](#)
  - [Society of Trust and Estates Practitioners \(STEP\)](#)

#### **3.4.5 Activities involving deeds**

Preparation of deeds is a reserved activity with limited exceptions under the Act (see paragraph 2.2.4 above).

Statute may require a deed to be used or it may be necessary or advisable to use a deed, for instance where a contract might otherwise not be binding for lack of consideration.

Deeds may, therefore, be used in a variety of transactions or activities, including the creation of trusts, covenants to make gifts, forgiveness of loans, waiver of dividends (or other rights), post death deeds varying dispositions under a will and settlement of disputes (eg, with HMRC).

In order for a document to be a deed, it must be made in writing, must specify that it is a deed and must be signed and witnessed by the relevant parties. 'Preparation' may include completing or amending documents intended to be executed as a deed and members may wish to seek legal advice if they are unclear whether or not any particular activity might constitute preparation.

A member who is not an authorised or exempt person (see Appendix 1) is not permitted to prepare deeds, with the limited exceptions noted above.



### 3.4.6 Mediation and arbitration

The statutory restrictions on the ability to conduct litigation and exercise a right of audience do not apply to mediation and arbitration. These and other forms of Alternative Dispute Resolution (ADR) should be treated as non-reserved legal activities.

### 3.4.7 McKenzie Friends

3.4.7.1 Acting as a 'McKenzie Friend' is a professional service that Members sometimes offer. A McKenzie Friend is a representative of a litigant in person (in civil or family proceedings) who does not need to be legally qualified but can charge a fee. As no qualification is required, it is not a legal activity but simply another professional service that Members can choose to offer. The role of the McKenzie Friend is usually limited to the following activities:

- Providing moral support;
- Taking notes;
- Helping with case papers; and
- Giving advice (quietly) during any legal proceedings.

3.4.7.2 The Civil and Family Courts have published **Practice Guidance: McKenzie Friends (Civil and Family Courts)** which covers the rights to, and of, McKenzie Friends and the limits imposed on their activities. These advise that a McKenzie Friend does not have a right of audience or the right to conduct litigation. The grant of a right of audience or a right to conduct litigation to lay persons who hold themselves out as professional advocates or professional McKenzie Friends or who seek to exercise such rights on a regular basis, whether for reward or not, will only be granted in exceptional circumstances. The Practice Guidance also gives guidance on restrictions to the fees that can be recovered both from the client and from the losing party, even if the litigant client wins the case.

**PROFESSIONAL COMPETENCE, INSURANCE AND OTHER REGULATORY REQUIREMENTS**

- 4.1 Many non-reserved legal activities are technically complex, requiring a detailed understanding of the relevant law. Members should ensure that they undertake adequate and appropriate training for any professional service they may wish to provide, in order to ensure continued competence, in addition to any qualification requirements which may be imposed by the relevant regulatory body. Members should also consider whether the client's best interests would be served by appointing someone who has more appropriate legal training and experience.
- 4.2 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).
- 4.3 Even with non-reserved legal activities, some activities are nonetheless reserved to individuals or firms holding a specific authority to act. Examples of such activities include insolvency work requiring a licence and authorised investment business activities. Requirements for the regulation of these activities are outside the scope of this guidance. It is each Member's responsibility to check that they hold appropriate authorisation to provide any such activities.
- 4.4 Where appropriate a Member should make clients, employers or other users of their professional services aware of the limitations inherent in the service provided by Members who are neither authorised nor exempt under the Act (see Appendix 1 below for further clarification). Furthermore, Members should be aware that 'holding oneself out' as authorised, where one is not, can constitute a criminal offence. This includes for example pretending or implying that one is a solicitor, an ICAEW authorised probate practitioner or any other legal practitioner.
- 4.5 Members should be aware that if they provide advice that would normally be given by a legally qualified specialist, on the basis that they possess expertise equivalent to that 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. For further detail on the expectations of an accountant in public practice see [ICAEW's Code of Ethics B](#) and [TECH 06/14BL Guidance on managing conflicts of interest](#).
- 4.6 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.
- 4.7 Members offering services which require 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, such as [APB Ethical Standard 5 \(revised\) Non-audit services provided to audited entities](#) may prohibit. See also [ICAEW's Code of Ethics B \(section 290\)](#) which gives further guidance on independence.
- 4.8 Members undertaking tax work should follow the principals set out in [Professional Conduct in relation to Taxation](#) which is guidance issued on a pan-professional basis.

## ALTERNATIVE BUSINESS STRUCTURE (ABS)

5.1 Members or Member firms may apply to become an ABS, or to set up an ABS as a subsidiary. Applications may be made to any of the front line regulators who are able to licence firms for an appropriate reserved legal activity. [A full list of approved regulators and licensing authorities is available here.](#)

5.2 All licensing bodies must impose comprehensive application procedures and rules, covering inter alia:

- Qualification and training requirements for authorised individuals;
- Procedures for dealing with complaints and relationship with the Legal Ombudsman (LeO);
- Compensation schemes and client money rules;
- The appointment of a Head of Legal Practice (HoLP) and a Head of Finance and Administration (HoFA).

ABSs are required by law to inform their clients, in writing, that if they have a complaint about the probate or other legal service provided and the firm or individual does not resolve this to their satisfaction or within the appropriate time frames, then the client can ask LeO to resolve the matter on their behalf. This is in addition to the right of clients to seek compensation from professional firms or their regulatory bodies. [LeO has issued Guidance for accountants, which is available here.](#)

5.3 Setting up an ABS as a subsidiary may isolate the work of most of the firm from some of the requirements of the Act. However, licensing bodies may also place conditions on the owner of an ABS, as well as on the ABS.

5.4 ICAEW's requirements for licensing firms and the application process are set out in '[ICAEW – Probate Regulations](#)'. So far as possible, these have been made to be consistent with existing requirements on member firms. Firms exploring the possibility of obtaining a licence from the SRA or another legal services regulator are referred to their respective web sites.

5.5 Under ICAEW rules, a Member firm which is an ABS will be able to offer the same range of professional services as any other Member firm in addition to whatever reserved legal activity the ABS is expressly licensed to provide. In an ABS, reserved legal activities will be provided by an accountant who has been expressly authorised to provide a reserved legal activity (eg, an ICAEW Member with a probate licence), by a legal practitioner working within a firm who is already qualified to provide them or by any person who meets ICAEW's qualification standards and other requirements. Similarly under ICAEW rules a Member working in a law firm (whether or not an ABS) will be able to provide professional accountancy services to that firm's clients, subject to ICAEW's practice requirements and any requirements imposed by the law firm's regulator.

5.6 Other licensing authorities, such as the SRA, may require an ABS licensed by them to obtain a waiver of certain of its regulations in order for it (or its parent firm) to provide some activities which it interprets as a legal activity. It may also place conditions on the ABS licence.

5.7 Legal practitioners working in any ABS (such as an accountancy led ABS that is licensed for probate by ICAEW) cannot offer any reserved legal activity for which their firm is not licensed, whilst an employee of that ABS.

5.8 [Further advice on ABSs is available here](#)

## WORKING WITH LAWYERS

- 6.1 Whether or not member firms are authorised or licensed to provide legal services, there are likely to be circumstances where they will work with or for lawyers on behalf of their clients or for their own purposes. This section of the guidance examines some of these circumstances and any special considerations that may apply.
- 6.2 Instructing barristers or working with them on client matters
- 6.2.1 Under 'Public Access' rules anyone has the right to instruct a barrister direct, that is without having to instruct them through the medium of a solicitor first. [Further details are available here.](#)
- 6.2.2 Members are also entitled to instruct Counsel direct, rather than via a solicitor under the 'Licensed Access Scheme'. Further information on the operation of this scheme, which is less onerous than the requirements for public access, [is available from the Bar Council.](#)
- 6.2.3 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 arrangements from the Tax Faculty here.](#)
- 6.2.4 Members should be aware that the Court of Appeal has decided that a litigant whose tax case had been conducted by tax advisers (and not by solicitors) is 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. This means that fees for the cost of providing general assistance to counsel in the conduct of litigation are likely to be irrecoverable. However, it may 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. Where the barrister with whom a Member is acting is authorised for the reserved legal activity of conduct of litigation, then the costs of a Member working under the instruction of that barrister will become recoverable from the losing party.
- 6.3 Working with solicitors
- 6.2.5 Members are entitled to accept instructions from solicitors who work in separate legal firms and to provide assistance to lawyers in relation to litigation or to provide advice on matters within their competence. Members should ensure that the instructions received are clear and seek clarity (especially if instructed as an expert witness under the Court Rules) if in any doubt as to their entitlement to undertake specific engagements. As in these circumstances the Member is providing services under contract to the solicitor (and under the latter's general oversight), and providing services specifically within their own competence as an accountant, these services will be treated not as unreserved legal activities but as 'other professional activities'.
- 6.2.6 Members may also accept contracts of employment within law firms, acting in an administrative or financial accounting capacity, including taking the position of HoFA for an ABS, or the equivalent position of Compliance Officer for Finance and Administration (CoFA) in a traditionally structured law firm. They may also provide any services within their competence to the clients of the firm, under the supervision of a lawyer. If their firm is an ABS, they may carry out either of these functions as a partner in the firm, provided that they do not provide reserved legal activities for which they are not authorised as an individual. Members working in these capacities will be bound by both ICAEW's ethical requirements in relation to their personal conduct and any other ethical and regulatory requirements which apply to the firm and to them personally.

6.2.7 Some Members act for firms of solicitors or sole practitioners as external advisers, including as Reporting Accountants under the SRA Accounts Rules. This is a specialist area of practice, and Members will need to ensure that they have the necessary competence.

6.4 Solicitors Working for Members as Employees or Partners

6.4.1 ICAEW regulations allow solicitors to become principals in non-ABS licensed accountancy practices as in-house counsel. Under the SRA rules in place at the time of issue of this statement, in-house counsel cannot offer legal services or provide legal activities to clients of such practices, whether they are reserved or unreserved.

6.4.2 If a solicitor is employed by an ABS or is a principal within it, that solicitor can provide unreserved legal activities, as well as any reserved legal activity the ABS is authorised to provide in a client facing role, subject to any restrictions imposed by the ABS's licensing authority.

6.4.3 Where a solicitor working in a member firm which is not an ABS wishes to provide legal services direct to the client, they can do so and retain their status as a solicitor, but will be required by the SRA to do so other than as a 'practising solicitor'. In such circumstances, they will not be able to generate legal professional privilege and will need to take care that they do not imply in any way that their advice is given as a practising solicitor. This is because, other than in exceptional circumstances, a solicitor cannot act as a practising solicitor other than in a body that has been authorised by the SRA or another front line legal services regulator. For further Guidance, see the [SRA guidance available here](#).

6.4.4 Any legal practitioner working in an ABS licensed by ICAEW needs to ensure that they comply with the requirements of their own regulator or professional body, as well as those of ICAEW.

**CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE (LPP)**

- 7.1 Confidentiality is one of ICAEW's fundamental ethical principles. However, confidentiality can be over-ridden by the operation of law, or by other ethical or professional considerations. In contrast, legal professional privilege gives a higher order of protection to certain types of confidential communications involving lawyers or certain legal processes. In broad terms, this privilege has been carefully preserved by the Courts as a constitutional right of the clients of legal practitioners, and should be respected as such by Members.
- 7.2 The main categories of legal professional privilege are legal advice privilege and litigation privilege. Members should be aware, though, that the law relating to both is complex, and advice should be taken in any circumstances where the position may be subject to doubt.
- 7.3 Legal advice privilege (LAP) protects communications relating to the seeking or giving of any legal advice or related assistance on any legal topic irrespective of whether that topic is concerned with advice relating to litigation or a non-contentious matter. However, it is limited to communications between the client (or their agents) and their lawyer, and thus not a Member, except as set out below.
- 7.4 However, under the Act, LAP also extends to 'relevant lawyers and authorised persons', when acting within their area of authorisation. This means that, within a Member firm licensed by ICAEW for probate, LAP applies in relation to legal advice provided by:
- Members or other individuals authorised by ICAEW for probate - but only in relation to probate services and related services, including estate administration,
  - A solicitor, barrister or foreign lawyer, in relation to probate and related services, and legal advice or assistance in relation to any unreserved legal service,
  - Any person acting under the supervision of the authorised person or lawyer, in relation to the areas where the supervisor is authorised to provide legal advice (whether as a reserved legal activity or in relation to any unreserved legal service).
- 7.5 Solicitors or other lawyers working within a member firm licenced for probate will neither be able to provide, nor generate, LAP in relation to any other reserved service for which the firm is not licensed. As noted in paragraph 6.4.3, neither will solicitors or other lawyers working within a member firm which is not licensed to provide any reserved services be able to generate LAP in relation to any advice given to clients.
- 7.6 Litigation privilege can protect confidential communications between a professional adviser (including a Member) and a client, or between a lawyer and professional adviser in relation to litigation. In broad summary, litigation privilege is only available to protect communications between these parties where they are made for the dominant purpose of being used in relation to actual or pending contentious proceedings. It cannot be used to protect advice or other information given where the possibility of litigation is remote. Litigation privilege is however a complex concept to apply so Members must take care and should be appropriately trained on the scope of this privilege before asserting it.
- 7.7 Where Members are working for solicitors and under their supervision as a professional engagement or under a contract of employment (see section 6.3 above) their work may be covered by their solicitor clients' right to communicate with the protection of LAP, but members are strongly recommended to ask the solicitor and/or lawyer for whom they are working, to clarify and instruct them on whether the work they are doing will be within the scope of, and the steps necessary to preserve, LAP. Members are advised to ensure that this point is covered within the terms of their Engagement Letter or terms of employment.
- 7.8 Without Prejudice Privilege is analogous to LPP, but has a number of differences. It is a rule of law which prevents information which has been exchanged with a genuine wish to reach a settlement of an on-going dispute from later being produced as evidence in court. It is less strong a protection than LPP, in that it may not be protected from statutory powers of

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information gathering. However, since the privilege only applies in negotiations between parties in dispute with each other, the consent of both is needed before the privilege can be waived.

- 7.1 Members should also be aware of the 'Exemption from Reporting in Privileged Circumstances' which applies in relation to making Money Laundering Suspicious Activity Reports. Further guidance is available on this in [ICAEW's AML Guidance available here](#).



## APPENDIX 1

### Authorised and Exempt Persons

An authorised person is either:

- A person who is authorised to carry on a reserved legal activity by an approved regulator; or
- A licensable body that is authorised to carry on a reserved legal activity by a licensing authority.

### Approved regulators and licensing authorities consist of the following 'listed bodies':

- The Law Society
- The General Council of the Bar
- The Chartered Institute of Patent Attorneys
- The Institute of Trade Mark Attorneys
- The Association of Law Costs Draftsmen
- Institute of Legal Executives
- The Council for Licensed Conveyancers
- The Master of the Faculties
- ICAEW (from 14 August 2014).

Members of the above are not authorised to undertake every reserved legal activity, only the activities for which the listed body is an approved regulator and for which they are specifically licensed.

An individual is exempt if they are not an authorised person in relation to a particular legal activity but are classified as 'exempt' under Schedule 3 of the Act. Schedule 3 of the Act defines the exempt persons for each of the reserved legal activities. For the most part the exemptions will not apply to ICAEW Members unless they are dual qualified as a lawyer.

One exception to this is that if the reserved legal activities of probate, reserved instruments and notarial activities are provided 'otherwise than for or in expectation of a fee, gain or reward' then the person providing this is classified as an 'exempt person.' It is, however, hard to quantify what can be classed as a 'gain' or 'reward' and both terms can be very widely interpreted. Furthermore, if the activity is provided as part of a bundle of activities for which a fee is charged, then it is likely to be very difficult to separate out the component parts to determine that no fee was charged for any particular activity. Members must not seek to recover the cost of such work in other fees nor perform such activities as a component part of a bundle of services for which a single charge is made. Members should be clear, in their engagement letter and elsewhere, that when such activities are carried out for clients, they are provided as a personal favour and not as part of the professional services covered by their terms of engagement.



## APPENDIX 2

### Rights of Audience / Conduct of Litigation – Exemptions and Exclusions

In addition to the rules regarding working with lawyers there are a number of rules regarding who can appear, and in what capacity, before the various courts and tribunals.

Although rights of audience and the conduct of litigation are both reserved legal activities (see section 3 above for their definition), the rules of certain courts/proceedings do not require rights of audience to be exercised only by an authorised person. Accordingly, in the absence of specific authorisation a person who is not authorised by one of the bodies listed above in Appendix 1 may exercise a right of audience and/or conduct litigation in certain circumstances.

Members are advised to check the rules of the specific court/proceeding before acting on behalf of a client as well as checking any procedural requirements, such as whether permission from the adjudicator is required and when. Members in ABS licensed practices should also check the terms of their ABS licence and the impact of the regulatory framework applicable to their business as a consequence of their being licensed.

Examples of the rules of some bodies are set out below:

#### Small Claims Court

Part 27 of the Civil Procedure Rules sets out the procedure for handling claims that have been allocated to the small claims track.

Parties to proceedings allocated to the small claims track can be represented by lawyers (barrister, solicitor or legal executive employed by a solicitor) or lay representatives (ie, non-lawyers), the hearings are informal and no expert evidence is allowed without the permission of the court.

#### Tax and Other Tribunals

The general reservations for the Rights of Audience or Conduct of Litigation apply to court proceedings, not to hearings before any tribunal. However, tribunals may have their own Rules as to which category of person may undertake these functions in relation to their hearings.

A party to proceedings in either a First-Tier Tribunal or the Tax and Chancery Chamber of the Upper Tribunal can be represented and otherwise assisted in presenting the case at a hearing by a non-legal practitioner with the permission of the Tribunal. The representative can do anything the party is permitted or required to do under the Tribunal Rules, a practice direction or court direction, except sign a witness statement.

#### Family Proceedings

Part 27 of the Family Procedure Rules sets out the procedure for hearings and directions appointments. Attendance at hearings that are held in private is limited and may include a 'litigation friend' for either party, or a legal representative instructed to act on that party's behalf'. A 'litigation friend' in this context is a person appointed to represent a protected party and is entitled to conduct proceedings on behalf of the protected party. The family court has published guidance about who may be appointed as a litigation friend and in what circumstances (available here). See also paragraph 3.4.7 above, on McKenzie Friends.

## GLOSSARY

Accredited probate firm	a firm accredited by ICAEW to conduct probate work
Accreditation	the process by which a regulatory body authorises or licenses a person to undertake reserved legal activities
The Act	the Legal Services Act 2007
Alternative Business Structure (ABS)	the term used in the Act to describe firms licensed to provide reserved legal activities, but where not all the owners or principals of the firm are authorised to provide those activities
Approved Regulator	a body designated under schedule 4 of the LSA in respect of one or more reserved legal activities
Authorised firm / person	a firm / person authorised to undertake a reserved legal activity. In an authorised firm all the principals (and shareholders in the case of a company) are individually authorised to undertake the applicable reserved legal activity
Compliance Officer for Finance and Administration (CoFA)	the individual required by the SRA to be appointed by a law firm as responsible for ensuring that the firm complies with the regulations regarding client assets
Estate Administration	following a grant of probate or letters of administration, collecting in the assets of an estate, settling the liabilities and distributing the remainder in accordance with a will or letters of administration
Exempt person	as defined in Schedule 3 of the Act. A person is exempt if they are not an authorised person in relation to a particular activity but are classified as 'exempt' under Schedule 3 of the Act
Head of Finance and Administration (HoFA)	the individual responsible for ensuring that a licensed firm complies with the regulatory requirements for client assets
Head of Legal Practice (HoLP)	the authorised individual responsible for ensuring that a licensed firm, its principals and employees comply with the regulatory requirements which apply to it
ICAEW authorised probate practitioner	an individual authorised by ICAEW to undertake the reserved legal activity of probate
Lawyer	solicitors, barristers and registered foreign lawyers
Legal Practitioner	traditionally limited to solicitors and barristers, this term now includes those members of other bodies who are authorised practitioners for one or more of the reserved legal services
Licensing Authority	a body designated under Part 1, Schedule 10 of the Act in respect of one or more reserved legal activities
Licensed firm	a firm licensed to conduct a reserved legal activity as an ABS. In a licensed firm not all of the firm's principals (or shareholders in the case of a company) are individually authorised to undertake the reserved legal activity/activities for which the firm is licensed

## ABBREVIATIONS

ABS	Alternative Business Structure	HoLP	Head of Legal Practice	MDP	Multi-disciplinary Practices
Act	Legal Services Act 2007	LAP	Legal Advice Privilege	OLC	Office for Legal Complaints – which has delegated its functions to LeO
ADR	Alternative Dispute Resolution	LeO	Legal Ombudsman	PII	Professional Indemnity Insurance
CoFA	Compliance Officer for Finance and Administration	LPP	Legal Professional Privilege	SRA	Solicitors Regulation Authority
HoFA	Head of Finance and Administration	LSB	Legal Services Board		

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