



PRACTICE NOTE

Agreeing to act as a professional attorney – a good practice guide

Summary

This practice note sets out the Public Guardian's guidance to fee-paid professionals who agree to be appointed as an attorney under a lasting power of attorney (LPA).

The note applies to people who work in a wide range of commercial and not-for-profit organisations, including (but not exclusively) solicitors, accountants, will-writers, financial advisers and people working in charities and third sector organisations.

The note covers the period before the attorney begins to act under the LPA. It includes advice on:

- taking instructions from donors
- preparing to act under the LPA
- what happens after the LPA is created
- record-keeping

There's a checklist to refer to at the end of this document covering the main points from the guidance.

The Office of the Public Guardian's purpose and scope

The Public Guardian, supported by the Office of the Public Guardian (OPG), has statutory responsibility for maintaining a register of enduring and lasting powers of attorney and court-appointed deputies.

OPG also investigates concerns about the actions of deputies or attorneys

acting under registered lasting or enduring powers of attorney. OPG's safeguarding policy supports these duties and seeks to ensure that measures are taken to protect adults at risk of abuse. The policy includes preventative strategies that avoid the need for remedial action.

Professional attorney duties and responsibilities

Acting as an attorney is an important responsibility that should be fully understood and prepared for before an individual agrees to accept the position.

Paragraph 7.59 of the Mental Capacity Act Code of Practice states that attorneys who are being paid for their services or hold relevant professional qualifications must demonstrate a higher degree of care or skill than those acting in an unpaid or informal capacity.

It is the Public Guardian's view that, unless the donor of an LPA has specified

that they intend the attorney's duties to be deferred until a future event (such as lack of capacity), then those duties should bind the attorney of a finance and property LPA as soon as the LPA is registered.

The consequences of a failure to act appropriately in the role of professional attorney can be severe for the attorney and their organisation, including regulatory investigation, claims for negligence, financial loss and criminal liability.

Practice note purpose and scope

This guidance applies to organisations, as well as to anyone who is asked to be an attorney in their professional or business capacity rather than as a family member or friend. It applies equally to attorneys acting under finance and

property LPAs and those acting under health and welfare LPAs, although OPG recognises that most professional attorneys are appointed under finance and property LPAs.

Many individuals covered by this guidance already work to professional standards, rules and ethics. However, those rules don't address all the issues this practice note covers. If you consider that anything in this guidance contradicts that of your profession, you should seek further advice from your professional body and/or OPG.

The guidance is intended to ensure that professionals who agree to act as a fee-paid attorney under an LPA have adequately prepared for the role and that they have appropriate discussions with

the donor before loss of capacity. This allows donors to make informed choices about both the appointment itself and the kinds of decisions attorneys can make if the donor loses capacity.

OPG produced this guidance in consultation with the following professional bodies and regulators: the Solicitors Regulation Authority, the Law Society, Solicitors for the Elderly, the Financial Conduct Authority, the Financial Conduct Ombudsman and the Financial Reporting Council.

Preparing to become an attorney

You may be asked to be an attorney in various ways, including through an existing relationship with the donor, via direct advertising or through referrals by other agencies, private companies or intermediaries.

The Public Guardian's position is that, whichever channel you are approached through, the donor should be clearly informed of the significance of the LPA and the powers and responsibilities it invests in the attorney. If you are preparing the LPA yourself, you can inform the donor directly. If you are relying on someone else to prepare the LPA, then you may need to check that they have addressed the five points below on your behalf and made a record of doing so.

You may be asked to draft an LPA by someone acting on behalf of the donor but, if you consent to being appointed as attorney, it is your responsibility to ensure that the points below are addressed.

Before considering these points, you need to be sure that the donor has the necessary mental capacity to create an LPA and to give you instructions. The Mental Capacity Act Code of Practice provides guidance on assessing capacity; further guidance may also be available from your professional body.

1) Individual or trust corporation appointment?

Donors should understand whether they are choosing to appoint an individual

(in which case you will have personal responsibility if you have to act) or a trust corporation. They should be clearly informed that if it is an individual, then your appointment will still apply if you leave your post or your profession or you retire, unless or until you disclaim your appointment.

If someone other than you is preparing the LPA – such as an intermediary or another employee of your firm – then the Public Guardian considers it good practice to offer the donor the opportunity to meet you in person.

2) Conflict of interest

If you are approached for general advice on creating an LPA, you should consider carefully whether there is a potential conflict of interest if you put yourself forward as an attorney. If so, the conflict must be dealt with appropriately. The donor must reach a decision free of any influence.

However, OPG accepts that, provided the advice you give is impartial, there is nothing preventing you from creating an LPA in which you, or a member of your firm, is the named attorney.

3) Your skills and experience

Donors should be told of your relevant skills and any past experience of acting as an attorney, what experience and knowledge you have of mental capacity

and what specialist expertise you may draw on, so that they can be assured of your competence.

4) Appointments made jointly or jointly and severally

You should consider with care requests to be appointed jointly, or jointly and severally, with a lay person (such as a family member or friend of the donor). This kind of appointment means you could be held partly responsible for any misappropriation by the lay attorney.

If the donor chooses a joint or joint and several appointment, you should agree with them in advance what will trigger your involvement. You also need to agree upon the parameters of the expected working relationship with any co-attorneys so that the donor's affairs are managed properly.

5) Certificate providers

A certificate provider is an impartial person who confirms, when the donor creates the LPA, that the donor understands what they are doing and has not been coerced into making the LPA.

OPG reminds professional attorneys that some people are prohibited from acting as certificate providers under regulation 8 of the Lasting Powers of Attorney, Enduring Powers of Attorney, and Public Guardian Regulations 2007.

These people include:

- any business partner or employee of the attorney, or any of the attorney's family members
- a director or employee of the trust corporation, or any connected business, that is being appointed as attorney

OPG suggests that, when a professional attorney is appointed, someone independent of the attorney's organisation is approached to act as certificate provider. This will avoid any potential problems with registration of the LPA or perceived conflict of interest.

Managing workload for multiple LPAs

The Solicitors Regulation Authority says solicitors should take on only as much work as they can handle. It is the Public Guardian's view that all professional attorneys, whether solicitors or otherwise, should consider their resources before agreeing to an appointment under an LPA.

If you are appointed as attorney in many LPAs, consider how you (and your organisation) would cope if every donor needed your help at the same time. You should keep records of the number of LPAs you are appointed in and, before you agree to multiple appointments, have plans in place to allow you to carry out your duties appropriately if you have to act simultaneously under several LPAs.

If you are appointed in multiple LPAs, you will need to consider the office infrastructure that supports you, which should suit the prospective size of the caseload. You will need to consider any scope for expansion and contingency arrangements if multiple LPAs become active at short notice.

Attorney work can be time-consuming and requires a thorough knowledge of mental capacity law, so you need to consider carefully the potential demands on your time and the office resources available to support you.

Professional fees

Remember you have no power to charge for your services if the LPA is silent on fees.

You (or your representative) should:

- detail any retainer fees or fees for storage of the LPA in the LPA itself:
- clearly tell the donor about your fees for acting under the LPA, as well as any one-off fees for drawing it up
- discuss and agree your current fee rates with the donor
- tell the donor that your fee rates are likely to increase over time
- tell the donor that you may charge fees for a considerable length of time if the LPA becomes active
- consider giving the donor examples of typical fees charged in different scenarios to help them to understand the financial commitment they are entering into
- consider exploring with the donor scenarios where large fees may accrue – for example, if the attorney challenges care-funding decisions
- consider geographical distance from the donor and tell them visits are chargeable and the effect their moving house would have on fees

Depletion of the donor's estate

It is the Public Guardian's view that you should consider in advance what you will do if your fees become unaffordable for the donor. It is good practice to discuss this with the donor while they have capacity.

For example, will you disclaim your appointment if the estate can no longer support the fees you are charging – in which case, what will you do to ensure the donor is protected? Or will you continue to act free of charge?

How fees will be structured

Once acting, you may be able to keep fees to a minimum by using administrative staff for routine matters such as regular payments and visits to the donor.

The Public Guardian reminds attorneys, however, that they cannot usually delegate their decision-making authority to someone else. Any arrangements you put in place should reflect the fact that, as named attorney, you remain accountable and responsible for decisions made under the LPA.

Acting in the donor's best interests

A core principle of the Mental Capacity Act 2005 is that any actions taken or decisions made by someone acting for a person lacking mental capacity must be in that person's best interests.

Getting to know the donor

Acting in the donor's best interests includes taking into account their past and present wishes and feelings, and any beliefs or values. It is advisable to record any discussions you have about these at the time of creating the LPA, so that the donor is reassured that you will act as they want if they do not have capacity.

It is particularly important to keep a record if the donor has any views or religious preferences that may be important, for example, about ethical investing or worship or charities they want to support. Some professionals find that a letter of wishes is helpful; others use a checklist to record key points.

Some professionals appointed under finance and property LPAs look at how the donor has invested their funds during their lifetime.

For a health and welfare LPA the donor might wish to create an extensive letter of wishes at the time of making the LPA. If so, this should be updated if the donor's wishes change, and changes should not simply be recorded in telephone notes or correspondence. This

will avoid subsequent disputes over the donor's true intentions.

Professionals should tailor their approach to the donor's circumstances. For example, it is more important to take detailed instructions at the time of creating the LPA if the donor does not identify any trusted family or friends who can be consulted or relied upon to convey their wishes if they lose capacity.

Keeping the donor's preferences up to date

The Public Guardian recognises that many LPAs are created well in advance of a lack of capacity, and a donor's views and preferences may change in the intervening period.

If there is a long gap between the creation of the LPA and the active involvement of the attorney, there are other ways in which you can find out a donor's wishes, feelings, beliefs and values when you need to act, if the donor is no longer able to express their preferences.

Talking to relatives and carers, looking at photographs, visiting the donor at home to see their surroundings and understand their lifestyle and analysing past financial transactions are examples of ways in which the donor's preferences can be established if they have lost capacity to express their views to you as attorney.

After the LPA is created

You should discuss with the donor what they would like to happen once they have created the LPA. The Public Guardian recommends that donors register their LPA as soon as it has been created, so that any mistakes can be corrected while they still have capacity.

Once registered, below are some points to consider and discuss with the donor where appropriate.

Immediate use of a property and finance LPA

A property and finance LPA can be used once registered, unless the donor has specified otherwise in the document. Therefore, you will need to consider what protective measures can be put in place to prevent it being misused for any reason, especially if the donor has appointed a co-attorney.

Judging a donor's mental capacity

Consider how you will know if the donor's capacity is declining, so that you can make a decision about when you need to start to act. For example, if the donor has become vulnerable to exploitation or scams, you may need to step in.

Telling others about your role

How will other people know that there is an LPA and that you are appointed as attorney? Some professionals give the donor a card or letter to put in a safe place. This means that anyone caring for the donor can be alerted to the fact that an LPA has been registered if there is a sudden loss of capacity. Others suggest telling a trusted friend who can get in touch with the attorney if necessary.

Keeping in touch

Will there be any keeping in touch arrangements and, if so, will you charge for them? Some attorneys choose to make contact with the donor on a six-monthly or yearly basis, in order to refresh any instructions or record changes in circumstance. Others send a keeping in touch newsletter or other communication aimed at making sure that the donor makes contact if necessary.

You may consider adopting a tailored approach depending on the donor's needs. It might be more important to keep in regular touch with a donor who is vulnerable or has a dementia diagnosis and declining capacity, than a donor who currently has no expectation of losing capacity.

Access to important paperwork

How will you find the practical information you need if you begin to act under the LPA? For example, will you have access to account and investment details if appointed for property and finance, and GP and consultant details if appointed for health and welfare? Could the donor keep a file of useful information that will be accessible to you if you need to act?

Changes in attorney's circumstances

Professional attorneys named in an LPA are appointed in a personal capacity. You should consider what happens if you change employment, leave or retire from your profession or become unable to act for any other reason, such as ill-health.

You should review whether you are still able to act as attorney if your own circumstances or professional status changes or if you disclaim the appointment.

The Public Guardian considers that a professional attorney should also ensure that their organisation is aware of all appointments and has succession plans in place if the attorney is suddenly and unavoidably unable to act.

It is good practice to notify donors of such changes in circumstance. Depending on the change, donors who retain capacity may be offered the option of making a new LPA or be given reassurance of the attorney's continuing ability to act if necessary.

Further help and guidance

[Mental Capacity Act Code of Practice](https://gov.uk/opg/mca-code)
(GOV.UK/opg/mca-code)

[How to act under a lasting power of attorney](https://gov.uk/government/publications/how-to-be-an-attorney)
(GOV.UK/government/publications/how-to-be-an-attorney)

[How to act under an enduring power of attorney](https://gov.uk/enduring-power-attorney-duties)
(GOV.UK/enduring-power-attorney-duties)

[Standards for professional deputies](https://gov.uk/deputy-standards)
(many of these standards also apply to professional attorneys)
(GOV.UK/deputy-standards)

Summary checklist

Choice of attorney

- ☐ Does the donor understand who is being appointed?
- ☐ Has the donor chosen the attorney free from any influence?
- ☐ Has the donor met the named attorney or been given the option of meeting the attorney?
- ☐ Have the attorney's skills and experience been discussed with the donor?
- ☐ If the appointment is joint or joint and several with family members, has the attorney's personal liability been considered?
- ☐ Has the appointment been discussed with any co-attorneys and ways of working agreed?
- ☐ Is a record being kept of the number of LPAs the attorney is named on?
- ☐ Does the attorney have the resources and capability to act under the LPA if needed?

Capacity and execution of the LPA

- ☐ Have you assessed the donor's capacity to execute the LPA and give instructions?
- ☐ Have you taken steps to ensure that the donor understands the nature of the LPA?
- ☐ Is the certificate provider someone who is independent of the attorney's organisation?

Fees

- ☐ Have you discussed fee arrangements with the donor and communicated them in writing?
- ☐ Has a fee clause been included in the LPA?

Relationship management

- ☐ Have you taken steps to record the donor's wishes, feelings, beliefs and preferences?
- ☐ Have you discussed and agreed upon keeping-in-touch arrangements with the donor?

- ☐ Have you agreed with the donor upon means of notifying the attorney of a need to act?
- ☐ Have you agreed with the donor how the attorney will access practical information if they need to act?
- ☐ Have you considered what will happen if the attorney retires, changes employer or leaves their profession?

For further advice:

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Our helpline number is **0300 456 0300**