

# Legal ownership of, and rights of access to, books, files, working papers and other documents

This document is issued for guidance purposes only, and has no regulatory status. Nothing contained in this document should be taken as constituting the amendment or adaptation of the *ACCA Rulebook*. In the event of any conflict between the content of this document and the content of the *ACCA Rulebook*, the latter shall at all times take precedence.

Members should be aware that much of the guidance in this factsheet reflects the law applicable in England and Wales. Nevertheless, the underlying principles apply to all members wherever they are based, although they should obtain their own legal advice on the law applicable in their countries.

Relevant provisions in the Companies Act 2006 apply to auditors in the UK in respect of accounting periods commencing on or after 6 April 2008. A person ceasing to hold office as a statutory auditor is required to make available to his successor in that office all relevant information which he holds in relation to that audit. ACCA has provided guidance in technical factsheet 160, Guidance on access to information by successor auditors.

However, this factsheet is concerned only with the question of whether documents and papers belong to members, or whether they belong to members' clients. This is a particularly relevant issue when an engagement ceases, and a member has to distinguish between the records belonging to the client and the records belonging to the former accountant (the member). In addition, the former accountant must provide 'reasonable transfer information' to the new accountants, which is the subject of a separate ACCA factsheet. Therefore, in the case of a change in professional appointment, members are advised to follow the guidance contained within this factsheet and also that entitled 'Transfer information'.

This factsheet also deals with the question of whether members are able to retain documents and papers belonging to clients pending payment of outstanding fees, and whether clients and third parties are able to have access to any documents and papers in members' possession.

The term 'documents and papers' does not just mean documents stored on paper. The term extends to information stored on microfilm, and also to information stored electronically.

The general principles are easy to state:

- a Documents belonging to clients must be given to clients (or their agents) promptly on request, or on ceasing to hold office, except in those cases where members are able to exercise a right of lien.
- b For documents belonging to members, the decision whether to allow clients (or their agents) to inspect them rests with the members. Clients have no rights to demand access.
- c Where clients ask members to disclose documents to a third party and those documents belong to clients, members must disclose the documents unless they are exercising a right of lien. Where documents belong to members they are not obliged to comply with the request.

Although these principles are easy to state, they may be difficult to apply. The following paragraphs give guidance on how to apply the principles in practice.

## DETERMINATION OF OWNERSHIP

Where particular documents and records are not owned by members they generally belong to clients. In order to determine whether documents and records belong to members it may be necessary to consider:

- a the contract between the member and the client, usually evidenced in an engagement letter;
- b the capacity in which the member acts in relation to the clients; and
- c the purpose for which the documents and records exist or have been created.

If members are in any doubt as to the ownership of particular documents they should obtain legal advice.

## CONTRACTS BETWEEN MEMBERS AND THEIR CLIENTS

Any specific agreement reached between members and their clients about the ownership of documents will override any other considerations.

A contract between member and client may set out expressly the agreed position regarding the ownership of documents and records on which the member will work or that are created in the course of that work. The contract may determine the ownership by implication. However, in the interests of certainty, any express agreement with clients should be evidenced in writing. The ownership of documents and records will therefore vary according to the terms, express or implied, of the contract. Where those terms are such that one party owns the documents and records, the nature of the documents and records is irrelevant and it is not necessary to look further. The following paragraphs assume that there is no specific agreement between the member and the client.

## THE CAPACITY IN WHICH MEMBERS ACT

A member may act for a client either as principal or as agent, depending on the nature of the work covered by the engagement. Examples are given below. The distinction is significant in relation to the ownership of documents created by the member during the course of the engagement.

In *Leicestershire County Council v Michael Faraday & Partners Limited* [1941] 2 KB 205, the Court of Appeal stated that documents created by an agent are the principal's documents, and the principal can claim that the agent should hand them over. Some areas of members' practices involve them acting as agents for their clients. Examples of this relationship are where the members are instructed to negotiate clients' tax liabilities with HM Revenue and Customs, or to file accounts with the Registrar of Companies. In such a case, the contract is between the principal (the client) and their agent (the member) and the statement of the Court of Appeal applies.

However, where members act as principals (for example, where members are acting as auditors) the documents they create usually belong to them. In such cases the members' working papers belong to the members.

### **Auditing**

In acting as auditor, a member is acting as principal. The end product of their work is the auditor's report. Other documents prepared by the member during the course of the audit engagement, solely for the purpose of carrying out their duties as auditor, belong to the member. The ownership of documents or records is decided regardless of whether or not the audit is carried out under statutory provisions. If the work involved includes both auditing and accountancy, it may be necessary to consider more carefully the purpose for which the documents were prepared in order to determine their ownership. (Please refer to the comments below regarding the purpose of the documents and records.)

### **Bookkeeping and accountancy**

Where the member's work is to prepare accounting records for a client, the records belong to the client. Where the work is to prepare financial statements from the client's records, the final financial statements belong to the client, while any drafts and office copies of those financial statements belong to the member, unless the client has specifically asked for drafts to be prepared for them. If they have specifically requested draft accounts to be prepared, the drafts become part of the 'product', and are therefore similar to the accounting records prepared during a bookkeeping assignment.

In *Chantrey Martin & Co v Martin* [1953] 2 QB 286, the draft items were held to be the property of the accountant, as they were not documents that the client had requested the accountant to produce. According to the above principles, analyses of bank accounts prepared by the member, and correspondence with third parties for the purpose of producing financial statements, would normally belong to the member.

### **Taxation including VAT**

Where the member's work relates to taxation, the question of ownership will depend on the nature of the work to be done. If the work is of a tax compliance nature, the entire tax file will often be deemed to belong to the client. The preparation and submission of accounts, income tax returns and computations or VAT returns to HM Revenue and Customs, and the agreement of the client's tax liabilities, including those following an 'in depth' investigation, are examples of work of a tax compliance nature. In *Chantrey Martin & Co v Martin*, the Court of Appeal followed its own earlier statement (see above) and held that calculations and correspondence between a firm of accountants and the Inland Revenue about a client's accounts and tax computations (both the copies of the letters sent and the original letters received) were the property of the client. This was on the basis that the accountants had been acting as agents for the client for the purpose of negotiating with the tax authority the client's tax liability.

Where a report is made to a client (for example, for submission to the authorities in connection with an accounts investigation, or a report providing taxation advice), the member will be acting as principal. The report and supporting schedules accordingly belong to the client, while the papers used in preparing the report belong to the member.

### **Consulting and advisory work**

If the work to be done is to give tax or other advice to a client, the member is generally acting as principal. Drafts, internal memoranda and similar documents in connection with that work belong to the member. Only the letters, reports or documents giving the advice belong to the client. Difficult questions may arise in cases where, in the course of dealing with these matters, the member communicates with third parties. These questions

are considered below. If the member combines advisory work with other services (for example, accountancy work) it may be necessary to consider the purpose for which particular documents were produced to determine their ownership.

### **Insolvency**

If members accept appointments as office holders under the Insolvency Act 1986, their duties are regulated by that Act and the Rules made under it. Where questions arise as to the ownership of documents they create, or that come into their possession, in such a capacity, members may wish to take legal advice.

## **THE PURPOSE OF THE DOCUMENTS AND RECORDS**

### **Communications between members and their clients**

Letters received by members from their clients belong to the members, regardless of the capacity in which they are acting. Similarly, members' copies of letters written to their clients are made solely for their own purposes and also belong to the members (*Re Wheatcroft* [1877] 6 Ch D 97). Members' notes of questions and answers between clients and themselves also belong to the members.

### **Communications with third parties**

Ownership of copies of communications between a member and third parties depends on the relationship between the member and the client. Where the member is acting as agent, the copies belong to the client. An example is tax correspondence on behalf of the client (see above). Similarly, where a member seeks specialist advice from a third party such as a valuer or solicitor, they will normally be doing so on their client's behalf. The communications that result will normally belong to the client. On the other hand, where the member is acting as principal it is probable that the courts would hold that the documents belong to the member. These would include documents that are not the end product of the member's work, for example:

- a documents confirming or otherwise the balance of accounts between third parties and the client, such as those in respect of bank balances or custody of securities; and
- b other documents that the member has obtained solely for their own use in carrying out their duties as principal.

### **Internal file notes**

A member is likely to create file notes during the course of an engagement. These notes may, for example, document telephone conversations, internal discussions, or the results of procedures the member has carried out. The ownership of such documents depends on the relationship between the member and the client, as well as the nature of the file notes created.

Where the member is acting as principal, it is likely that such documents would belong to the member. Where the member acts as agent, then the documents may belong either to the member or the client. It is likely that file notes of information and instructions received from the client will belong to the member; file notes of information and advice received on behalf of the client, where the member is acting as agent, are likely to belong to the client.

### **Accountancy working papers**

When considering the capacity in which members act, this factsheet considered the ownership of accounting records prepared under a bookkeeping engagement, and the ownership of final accounts and draft accounts prepared under an engagement to prepare financial statements. When considering the ownership of working papers prepared during the course of an accountancy engagement, it is necessary to consider carefully the purpose for which they were prepared. For example, when a new accountant assumes responsibility for a client's affairs, the former accountant may (unwittingly) be in possession of some of the books and records of the client. Apart from the books of prime entry and the statutory books, there may be schedules on file that now form part

of the property of the client, although to a large extent, this will depend on who the client is. To illustrate this, we shall consider two types of client – a sole trader and a limited company – and we will consider the issue of the accruals schedule being requested by the new accountant:

### **Sole trader**

It will be quite common for the new accountant to expect to receive a breakdown of the accruals figure as part of the transfer information; but if the trial balance used to prepare the accounts does not show each accrual separately, this would not be considered to form part of the 'detailed trial balance'. (See the factsheet entitled *Transfer Information*.) The former accountant was engaged to prepare a set of accounts for the client, and in so doing prepared a schedule of accruals in order to make the relevant postings to the nominal ledger. Therefore, this working paper belongs to the former accountant (and he or she would be entitled to charge for the schedule if it was requested by the client or the new accountant). The schedule could be said to form part of the bookkeeping records of the business. However, with the client's help, the new accountant should be capable of reconstructing the schedule in order to establish the opening balances for the next set of accounts.

### **Limited company**

Most of the above paragraph in respect of a sole trader is also true in respect of a limited company client. However, the Companies Act 2006 requires 'adequate accounting records' to be maintained that are sufficient to show and explain the company's transactions and to:

- a disclose with reasonable accuracy, at any time, the financial position of the company at that time, and
- b enable the directors to ensure that any accounts required to be prepared comply with the requirements of the Act (section 386).

It goes on to state that the records will, in particular, contain a record of the assets and liabilities of the company. Therefore, the schedule that shows the composition of the accruals figure in the trial balance forms part of the 'adequate accounting records' of the company.

It is the duty of each officer of the company to ensure that the company complies with the requirement to keep adequate accounting records. Further, section 388(1) of the Companies Act 2006 states that 'a company's accounting records (a) must be kept at its registered office or such other place as the directors think fit, and (b) must at all times be open to inspection by the company's officers'. Therefore, if a former accountant refused to release the schedule of accruals to the company, he or she would be prohibiting the company from complying with the requirements of the Act. Certainly, such behaviour would be regarded as unethical.

### **Other examples**

In the interests of clarity, let us consider other items that might be requested of the former accountant, and how these would be viewed with regard to the rules concerning transfer information and the legal ownership of books and records:

**Schedule of fixed assets** – One's initial reaction to a request for the client's fixed assets schedule might be that it is one of the working papers that the former accountant prepared in order to produce a set of accounts in accordance with the objective of the engagement, and that therefore it belongs to the former accountant. However, many clients would rely totally on their accountant to recognise fixed assets at the relevant amount, calculate the depreciation charges, deal with disposals appropriately, etc. Therefore, the schedules that the accountant prepares in order to achieve this would often form the fixed assets register, as only the summarised figures from these schedules are

used to prepare the final accounts, and the client is only advised of the adjustments required each year to correct the opening balances in their nominal ledger. In this situation, the records in the client's possession might, in time, cease to hold sufficiently detailed information to 'show and explain' the business's transactions and 'disclose with reasonable accuracy, at any time, the financial position' of the business.

Therefore, in such a situation, the fixed assets schedules in the accountant's files act as the fixed assets register of the business. As such, they would form part of the 'adequate accounting records' of a company. In the case of an unincorporated business, the status of the fixed assets schedules would depend upon whether or not it would be possible to derive the same information from the client's nominal ledger, books of prime entry and retained source documents. The fixed assets schedule would, therefore, be viewed in the same way as a schedule of accruals.

**Aged debtors list** – The balances extracted from the sales ledger support the figure for trade debtors in the trial balance but do not form part of the trial balance. However, the list will clearly form part of the accounting records of a company. The client will usually maintain a sales ledger, and therefore, provided that the former accountant advised them of any adjustments made to the trade debtors figures in order to produce the final accounts, the client will hold all the necessary information, and there will be no requirement for the former accountant to provide information directly to the new accountant.

In each case where information is requested that could be said to form part of the accounting records of a company, one should consider whether the client already has the information requested (including an explanation of any adjustments the accountant has made to the client's records in order to produce the final accounts). If so, the former accountant could not be said to be restricting access to the business's accounting records, and the client is the proper person from whom the new accountant should seek the information.

### **LIENS**

Having set out the rules regarding ownership of, and access to, accounting information, including 'reasonable transfer information', this factsheet would be incomplete without considering the impact that a lien might have on the former accountant's duty to transfer the records or the information. Firstly, the Code of Ethics and Conduct is clear that the former accountant should 'promptly provide the new accountants with all reasonable transfer information that they request, free of charge', and that 'all reasonable transfer information must be provided even where there are unpaid fees'. Therefore, there is no question of a lien being exercised in this respect.

A lien is a creditor's right to retain possession of the debtor's property until the debtor pays what he or she owes the creditor.

Liens can be of a general or particular nature.

- a A general lien is a lien over property that can be retained until payment of all amounts that the debtor owes the creditor, however arising. Such liens can rarely be established.
- b A particular lien is a lien over property that can be retained only until the debtor pays a particular debt due in respect of that property. The courts favour particular liens as being equitable between debtor and creditor. An accountant has a particular lien over documents belonging to their client in respect of which the accountant has performed work for which they have not been paid the fee due. In *Woodworth v Conroy* [1976] QB 884, in the Court of Appeal, Lord Justice Lawton (with whom the rest of the court agreed) said: 'I would adjudge that accountants in the course of doing their ordinary professional work of producing and auditing accounts, advising on financial

problems, and carrying on negotiations with the Inland Revenue in relation to both taxation and rating have at least a particular lien over any books of account, files and papers which their clients delivered to them and also over any documents which have come into their possession in the course of acting as their client's agents in the course of their ordinary professional work.' He added that accountants may enjoy a wider lien than this but that it was unnecessary for the purpose of the case to deal with that question.

Despite the fact that the point was kept open, it is probable that, in the absence of a special contractual provision, accountants do not have a right of general lien in law. Members are therefore advised that it would not be worthwhile to assert such a right against a client unless they are expressly given that right by their contract with the client.

Where a legal right of lien exists, ACCA supports the exercise of that lien in appropriate circumstances.

Paragraph 14 of section B5 of the Code of Ethics and Conduct states:

'Professional accountants are recommended to obtain legal advice before seeking to exercise a lien in any but the most straightforward of cases. A professional accountant shall advise a client disputing a right of lien of the professional accountant to consult their own solicitors.'

The exercise of a right of lien does not absolve members from the requirement to supply the transfer information required by the ACCA Rulebook in section 210, Professional appointment.

Also, under English law, no lien can exist over:

- a the books or documents of a registered company that, either by statute or by the articles of association of the company, have to be available for public inspection or to be kept at the registered office or some other specified place or be dealt with in any special way;
- b accounting records within section 386 of the Companies Act 2006; or
- c the VAT returns of any business (excluding photocopies).

It follows that a lien may only be exercised over accounting records and documents belonging to an unincorporated client (eg books of prime entry), or documents (such as tax returns) prepared on behalf of a company, which do not form part of the accounting records of the company.

### CONDITIONS FOR THE EXERCISE OF A PARTICULAR LIEN

A right of particular lien will exist only where all four of the following circumstances apply:

- a the documents retained must be the property of the client who owes the money and not of a third party, no matter how closely connected with the client;
- b the documents must have come into the possession of the member by proper means;
- c work must have been done by the member upon the documents and a fee note must have been rendered; and
- d the fees for which the lien is exercised must be outstanding in respect of the work on the documents and not in respect of other unrelated work.

### SPECIAL CASES

There are various special cases where the normal position regarding the existence and enforcement of liens does not apply. Special cases may arise as a result of the provisions of a particular statute, or from considerations of general public policy, and include the following.

### Statutory books of companies

An established line of authority exists in which the courts have held that no lien can exist over books or documents of a registered company that, either by statute or by the articles of association of the company, have to be available for public inspection or to be kept at the registered office or some other specified place or be dealt with in any special way. The main cases are *Re Capital Fire Insurance Association* [1883] 24 Ch D 408 and *Re The Anglo-Maltese Hydraulic Dock Co Limited* [1885] 54 LJ Ch 730. Although those cases concerned solicitors' liens, the same principles apply in the case of accountants. For example, a company's register of members could not become the subject of a lien, as it is required to be kept available at all reasonable times for public inspection.

### Accounting records of companies

In *DTC (CNC) Ltd v Gary Sargeant & Co* [1996] 2 All ER 369, it was held that a lien cannot be asserted over accounting records within section 221 of the Companies Act 1985 (now section 386 of the Companies Act 2006). This is because section 388(1) of the 2006 Act (section 222(1) of the 1985 Act) requires the accounting records to be kept at the company's registered office, or at such other place as the directors think fit, and must at all times be open to inspection by the company's officers. Lord Justice Lawton's general statement as to the accountant's right of lien, quoted above, must be read subject to this qualification.

It should be appreciated that 'accounting records' within the meaning of section 386 cover a wide range of documents. They are not limited to double entry ledgers and journals. In the DTC case, 'accounting records' were held to include sales invoices, purchase invoices, cheque books, paying-in books, and bank statements. It seems to have been assumed that all documents that are accounting records fall within sections 386 and 388. If this is so, the accountant's lien has little practical value in relation to corporate clients.

### Receiverships and administrative receiverships

Where a member has a lien over the accounting records or other documents of a company, it is considered that the appointment of a receiver does not affect the lien. This is because a lien is a charge given by the general law and arises from the company carrying on its business in the ordinary course.

Although a debenture may prevent a company from creating any mortgage or charge in priority to the debenture, a member's lien is not a mortgage or charge 'created by the company'. Debenture holders cannot, therefore, prevent a member from acquiring a lien that the general law allows. A member's lien would be untouched by debenture holders taking possession and by their appointing a receiver (*Brunton v Electrical Engineering Corporation* [1892] 1 Ch 434). Even where a receiver is appointed by the court, the lien will be unaffected unless the court orders otherwise.

### Administration and liquidations

Where a company is the subject of an administration order, or is in liquidation or has a provisional liquidator appointed to it, then a member cannot exercise a lien or other right to retain possession of any of the books, papers or other records of the company to the extent that the enforcement of the lien would deny possession of those items to the administrator or liquidator (section 246 of the Insolvency Act 1986). Therefore, if a member is requested by either an administrator or liquidator to hand over such records as the member may hold, the member is obliged to do so.

The only possible exception is where the lien is on documents that give title to property (for example, title deeds, share certificates or bills of lading pledged or held as security for some liability of the company). This exception is likely to be of practical importance to members in cases where they have obtained documents from a third party (such as a bank) that have been pledged or mortgaged



to that third party. The members must also have obtained these documents in the course of dealing with a client's affairs. In such cases the member will normally have been required to undertake to hold the documents to the order of the third party, and the member will, accordingly, hold them as the third party's agent.

Where an arrangement of this kind exists, the exception to section 246 applies, and the documents should not, without the express consent of the third party, be delivered to the administrator or liquidator. This, however, is a difficult area, and members may wish to take legal advice on the operation of the exception in any particular case.

### **Bankruptcy**

As in liquidations, any lien or other right to retain possession of any books, papers or other records of the bankrupt is unenforceable against the Official Receiver or the Trustee in Bankruptcy, unless the lien is on documents that give a title to property. This is the result of section 349 of the Insolvency Act 1986. The principles that apply are similar to those governing section 246 of the Insolvency Act 1986. As with the situation dealt with in the paragraphs above, this is also a difficult area in which members may wish to take legal advice.

## **RIGHTS OF ACCESS**

### **Duties of members to their clients**

Members are reminded that, regardless of whether particular documents are owned by members or their clients, confidentiality is a fundamental principle and an implied term of every client agreement. In consequence, access by a third party to information or documents should be given only where one of the following applies:

- a the client has given his or her consent before disclosure; or
- b the member's duty of confidentiality is overridden by the powers of a third party to require access; or
- c the member considers himself or herself to be obliged to volunteer information in the circumstances set out in the *ACCA Rulebook*, section B1, Professional duty of confidence in relation to defaults and unlawful acts of clients and others.

### **Requests for access from clients**

#### **Access for the clients themselves**

If a client requests access to documents that belong to them, access should normally be given subject to any considerations of lien.

A member's willingness to grant a client access to papers that belong to the member will depend on the circumstances in which, and the reason for which, access is sought. Members should be alert to the possibility that giving access may increase the potential risks of litigation against the member, even where no obvious likelihood exists. On the other hand, there are circumstances where allowing access can result in the client being better informed, thereby reducing such potential risks.

It is possible that a director, or directors, of a client company may seek access to the member's papers in connection with their personal affairs or interests, rather than in furtherance of the company's interests. In such circumstances, members should obtain authorisation from the board of directors or, where appropriate, from outside shareholders, before permitting access.

#### **Access for the benefit of a third party**

During certain investment and lending transactions, such as flotations, the potential purchasers, investors, lenders, or their agents (called 'purchasers' in the remainder of this factsheet) often instruct investigating accountants to review aspects of the 'target' company's affairs on their behalf. Access to the audit working papers of the target company's auditors will frequently assist the investigating accountants to do this more cost effectively than if they had to perform the audit work again themselves.

The auditors' working papers are their legal property, and they have the right to restrict or decline access to them. The decision as to whether to grant access will depend upon balancing the wish to be of assistance to the client with the auditors' need to protect themselves from possible litigation. In many cases it may be appropriate to grant access subject to the terms of a 'release letter'. (See below.)

### **Client authorisation letters**

A member should first obtain written authority from the client to permit access by the purchasers to the audit working papers and to allow the member to provide explanations of them to the purchasers. When requesting such written authority the member should ask the client to acknowledge that:

- a the working papers were created for the particular purpose of the audit of the client's accounts and not for the purpose of the proposed transaction; and
- b the information in them may not be suitable for the purpose of the proposed transaction.

Written confirmation should also be obtained from the client that the member will not be held responsible for any change to the proposed transaction, or any action against the client that results from permitting access to the working papers or from explanations or representations made by the member to any of the parties involved in the proposed transaction. Where the proposed transaction involves the sale of a subsidiary, such confirmations should be obtained from both the parent company and the subsidiary concerned. If the client authorises access to only part of the working papers, this should be recorded in the letter.

### **Release letters**

Members are recommended not to provide access to their audit working papers or to provide explanations until they have obtained from the potential purchasers and their investigating accountants signed release letters that agree that the member does not assume any duties, liabilities or obligations as a result of permitting access. Such letters may also provide for an indemnity against any claims from third parties arising out of permitting access. Occasionally the request will extend to papers concerning dealings with HM Revenue and Customs. In this case, the release letters should also specifically cover these papers.

The release letter should identify the proposed transaction in connection with which access has been requested, and record the fact that the working papers were not prepared or obtained with that transaction in mind. It is appropriate to reflect in the letter the parties' agreement that:

- a neither the papers nor any information provided by the member will be used for any purpose other than the proposed transaction;
- b access to the papers and information will be restricted to the purchasers, the investigating accountants and the purchasers' other professional advisers;
- c any reliance that the purchasers or their investigating accountants may wish to place on the papers is entirely at their risk;
- d the member disclosing the papers accepts no duty or liability resulting from any decisions made or action taken consequent upon access to the working papers or the provision of information, explanations or representations by the member; and
- e the purchasers will indemnify and hold harmless the member disclosing the papers against any claims from third parties arising out of permitting access or providing information, explanations or representations.

In providing any explanations of the working papers, members should take care to restrict their explanations to the working papers and should avoid giving oral representations or warranties about their audit or aspects thereof, or about any matters arising after the date of the audit report. Members should also recognise an obligation to make it known to the investigating accountants if the audit working papers are not, or may not be, all the relevant papers that exist.

The release letter should not include a requirement for the investigating accountants to bring to the member's attention points that they intend to pass on arising from the review of the working papers. This term does not give members any added protection and may serve to confuse their role in the transaction.

Normally no charge would be levied by the member to the purchasers for grant of access to the working papers. Should the member receive consideration from the purchasers this may affect the perceived 'reasonableness' of the exclusion clause in the release letter. A real risk exists that the exclusion clause would be declared unreasonable if the member charges on a profit basis for access. Nominal costs for copying charges are unlikely to invalidate the clause.

The purchasers may try to resist agreeing to release letters, but experience has shown that frequently the greatest resistance arises in situations in which the member is most at risk. Members should explain that the use of such letters is common practice and has been endorsed by ACCA. Their use is reasonable in any acquisition situation or when accountants are reporting for the purpose of prospectus type documents. Members are not being uncooperative in insisting that they will provide access to their files and give explanations only on the receipt of signed authorisation and release letters.

### Requests from third parties

This part deals with the principles that apply where a member is approached by a third party who requests access to documents or information held by the member relating to a client. It does not address the rights and obligations of a member to disclose to third parties documents or information that indicate that a client (or an officer or employee of a client) may have been guilty of some default or unlawful act. Guidance on reporting suspected defaults or unlawful acts to third parties is provided in the *ACCA Rulebook*, section B1, Professional duty of confidence in relation to defaults and unlawful acts of clients and others.

The general principle remains that a member should not disclose information about a client's affairs unless the client consents to disclosure. In certain circumstances, however, third parties may have rights of access that override this principle. The paragraphs below note some examples.

### Holding or investing company auditors

Where a member acts only as a component auditor in a group, the group auditor may request access to the member's audit working papers. Guidance on the relationship between the group auditor and the component auditor is set out in the Auditing Standard ISA 600.

### Opponent of a client in litigation

If a client is involved in litigation relating to their business affairs, their opponent may seek to obtain access to, and copies of, documents held by the client's advisers, including their accountant or auditor. In civil litigation in England and Wales the opponent is entitled to see all documents relevant to the dispute that are or have been in the 'control' of the client (subject to documents covered by privilege) – a process known as 'disclosure'. A client will, therefore, have to disclose only those documents held by a member that it is within the client's power to demand.

Notwithstanding that some documents held by a member may not be within the client's power to demand, the member may come under pressure from the client to disclose those documents, as they may be thought to assist the client's case. In such circumstances, the wish to assist the client should be balanced against the member's own interests and the potential consequences for the member from making disclosure to the client and third parties.

### Subpoenas and witness summonses

An opponent (or, indeed, the client) may issue a subpoena requiring a member to attend trial as an alternative to seeking disclosure of documents. The subpoena would be in one of two forms: either requiring the member to attend in person and give oral testimony, or requiring the member to attend and to bring certain specified documents with them. The member would be in contempt of court if they failed to attend court at the time specified, although they should seek legal advice as to whether the categories of documents included in the subpoena can be challenged on the grounds of relevance or admissibility. Any challenge to the terms of a subpoena should be made before the trial date. In complying with the terms of a subpoena to produce documents, the member should take the documents with them to court, although the power to order production of them ultimately rests with the court alone.

If a member is served with a subpoena by a third party, the member should inform their client. Where the person serving the subpoena is seeking documents and not testimony, the client may consider it appropriate to authorise the member to disclose the information referred to in the documents in advance of the trial date, if to do so would reduce the inconvenience to the member and would not otherwise prejudice the client's interests.

In criminal proceedings, a member may be served with a witness summons requiring attendance at court to give evidence and/or to bring specified documents. The considerations applying in such circumstances are similar to those relating to subpoenas in civil proceedings referred to above. The member would be held to be in contempt of court if they failed to comply with the summons. Similarly, the ultimate right to require production to the court of documents rests with the court, although the client may authorise the member to produce documents confidential to the client in advance of compliance with the witness summons. If a member is in any doubt, they should seek legal advice as to their obligations.

### Auditors of companies in liquidation

Although the appointment of an auditor of a company is made by the shareholders in general meeting (or in the case of a newly formed company by the directors) the auditor's engagement is with the company as a legal entity, and his or her duty of confidence is to the company as distinct from the individual shareholders. If the company goes into liquidation the company's rights remain vested in the company as an entity. It is therefore still the company to which the auditor has a duty of confidence. The liquidator will, however, normally be the proper agent of the company for the purpose of enforcing any right that the company could have enforced, including the company's right to permit its auditors to provide information to others.

The auditor of a company that is in liquidation may be approached by the police for assistance in enquiries that may lead to a director or other individual being prosecuted. In such circumstances, the guidance in the paragraphs above will be applicable (the liquidator being the person who could exercise the right of the company to release the auditor from their duty of confidence).

The liquidator may consider it their duty to make a report to the Director of Public Prosecutions under section 218 of the Insolvency Act 1986 (to the effect that a past or present officer or member of the company may have been guilty of a criminal

offence in relation to the company). If the Director of Public Prosecutions institutes proceedings following such a report, the auditor is one of the persons having the statutory duty to give assistance to the Director of Public Prosecutions. In these circumstances the auditor's duty of confidence is overridden.

#### **Liquidators, administrators and administrative receivers**

Liquidators, administrators, and administrative receivers (referred to in the following paragraphs as 'office holders') have the statutory right under section 234 of the Insolvency Act 1986 to require delivery to them of any documents belonging to the company. A member should therefore release such documents to the office holder (subject to any limited right of lien as discussed above).

Under section 235 of the Insolvency Act 1986, office holders have a statutory right to call for 'such information concerning the company and its promotion, formation, business dealings, affairs or property as the office holder may ... reasonably require'. Such information may be required from directors and other officers of the company (which the courts have held includes auditors), or from anyone who has been in its employment (including under a contract for services) within a year before the liquidation, administration or administrative receivership.

The powers of the office holders under section 235 are extremely wide. Further, under section 236, an office holder is entitled to apply to the court for an order requiring any person considered 'capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company' to submit an affidavit or produce relevant documents. A member should normally comply with a request from an office holder unless the member considers that the information or documentation that is being sought is for a purpose unrelated to the office holder's duties or is otherwise beyond the powers of the office holder. None of these things should be lightly assumed. A member dealing with an office holder in good faith is ordinarily entitled to assume that the office holder is acting within their powers. The member may find it helpful to discuss a request for information or documentation with the office holder seeking it with a view to identifying the particular items sought.

A receiver, as opposed to an administrative receiver or administrator, has no general statutory right to obtain information. Moreover, although the extent of their powers will depend upon the terms of the deed or court order pursuant to which they were appointed, it is unlikely that their powers would extend to requiring information to be disclosed by a member without the specific consent of the company or an order of the court.

#### **ACCA**

ACCA, as a statutory regulator in respect of auditors, insolvency practitioners, and those who undertake investment business or exempt regulated activities, and in relation to its disciplinary functions, has extensive powers over its members. The proper exercise of those powers in appropriate cases will override the principle of confidentiality.

#### **HM Revenue and Customs**

HM Revenue and Customs have wide powers, principally under the Taxes Management Act 1970 and the Value Added Tax Act 1994, to gain access to documents that are relevant to enable them to ascertain or verify the liability, or amount of liability, of a taxpayer to tax. These powers extend to obtaining documents from persons other than the taxpayer, which might include members.

#### **Police/Serious Fraud Office**

Members should act with caution when approached by the police, the Serious Fraud Office or other public authority making enquiries in connection with the possible prosecution of a client or former client. Members should have regard to the guidance in the *ACCA Rulebook*, section B1, Professional duty of confidence in relation to defaults and unlawful acts of clients and others.

#### **Department for Business Innovation & Skills (BIS)**

Inspectors may be appointed by BIS to report on the affairs of a company. Under section 434 of the Companies Act 1985, the inspectors may require the auditor of the company to produce any relevant documents in the auditor's custody or power, to attend before the inspectors when required to do so, and to give assistance to inspectors. Further, the section enables inspectors to require such documents or assistance from any person whom they consider is, or may be, in possession of relevant information. A member having a professional relationship with a company other than that of auditor may, therefore, be required to provide information to inspectors, or provide other assistance to them. By section 436 of the Companies Act 1985, refusal to comply with a request made under section 434 of the Act is punishable as a contempt of court.

The Secretary of State for Business Innovation & Skills, and any officer or other competent person authorised by the Secretary of State, are also given wide powers by section 447 of the Companies Act 1985. The Secretary of State, or authorised person, may at any time, if they think there is good reason to do so, require any documents to be produced forthwith by a company, or without the company's prior consent by any person who appears to the department or officer to be in possession of them. The Secretary of State, or authorised person, may take copies of or extracts from any documents produced, or require the documents to be explained. If the documents are not produced, the Secretary of State, or authorised person, may require the person who was required to produce them to state, to the best of their knowledge and belief, where the documents are. Where the person who is ordered to produce documents claims a lien on them, the production is without prejudice to the lien. Failure to comply with a requirement imposed by virtue of section 447 is an offence although, where a person is charged with an offence in respect of a requirement to produce any documents, it is a defence to prove that they were not in their possession or under their control, and that it was not reasonably practicable to comply with the requirement.

The Companies Act 1985 also contains provisions relating to the entry and search of premises (section 448), penalties for destroying, mutilating or falsifying company documents (section 450), and penalties for furnishing false information (section 451). The security of information obtained under sections 447 and 448 is provided for in section 449 of the Act. It should be emphasised that a member who provides documents in compliance with one of the requirements mentioned above does so under a statutory duty that overrides the member's duty of confidence to their client.

#### **Regulators in the financial services sector**

The Financial Services Authority has been the single regulator for financial services in the UK since December 2001, when the Financial Services and Markets Act 2000 came into force. Inspectors may require personal attendance or production of relevant information or documents from connected persons of the person being investigated. (This term includes auditors.) A member who fails, without reasonable excuse, to comply with a request from an inspector will be guilty of an offence.

#### **Foreign law**

If a member becomes aware of contraventions by a client of foreign law, the member is under no duty in English law to disclose the matter to the relevant foreign authority. However, a member may be under a duty to disclose under foreign law. Furthermore, if the member is specifically requested by the foreign authority to provide information relating to possible contraventions of foreign law, the member should make disclosure only:

- a if compelled to do so by the process of law; or
- b where the member's own interest requires such disclosure (see the *ACCA Rulebook*, section B1, Professional duty of confidence in relation to defaults and unlawful acts of clients or others); or
- c by way of qualification (in appropriate cases) of the audit report.

In any event, a member should seek legal advice before making any disclosure.

**FURTHER INFORMATION**

Further information is available from the ACCA website at [www.accaglobal.com](http://www.accaglobal.com), or by telephoning ACCA's technical advisory service on 020 7059 5920.