

**STATEMENT 1.301  
GENERAL GUIDANCE  
BOOKS AND PAPERS - OWNERSHIP, DISCLOSURE AND LIEN**

*(Issued July 1987; reviewed March 1991 and September 2004 (name change))*

**INTRODUCTION**

1. This statement has been settled in consultation with counsel and is issued to give guidance to members in practice on two matters:

*Ownership of documents and records*

Consideration under this heading is given to:

- a. what documents or records are or are not owned by members; and
- b. where they are owned by members, in what circumstances must or should a member disclose their contents.

*Lien*

Consideration under this heading is given to what rights by way of lien a member has over documents and records not owned by him (including the exercise of lien in fee disputes).

**OWNERSHIP OF DOCUMENTS AND RECORDS**

**Determination of ownership**

2. Where particular documents and records are not owned by the member they generally belong to the client. In order to determine whether documents and records belong to the member it may be necessary to consider:
  - a. the contract between the member and his client;
  - b. the capacity in which the member acts in relation to his client; and
  - c. the purpose for which the documents and records exist or are brought into being.

**The contract**

3. In *Leicestershire County Council v Michael Faraday & Partners Limited* [1941] 2 K.B. 205, the Court of Appeal stated that if an agent brings into existence certain documents whilst in the employment of his principal, they are the principal's documents and the principal can claim that the agent should hand them over. Some areas of a member's practice involve his acting as agent for his client. Examples of this relationship are where the member is instructed to settle the client's tax liabilities with the Inland Revenue Department or to file accounts with the Registrar of Companies. In such cases the contract is between a principal (the client) and his agent (the member) and the statement of the Court of Appeal applies.

4. Whilst documents belong to the client where they are brought into being by the member acting as agent, this is not usually so where the member acts as principal, for example, where the member is acting as auditor or is giving taxation advice. In such cases the member's working papers belong to the member unless the engagement letter or contract between the client and the member requires otherwise. The contract between the member and his client may set out expressly the agreed position regarding the ownership of documents and records on which the member will work or which are created in the course of that work. Alternatively, the contract may determine the ownership by implication. 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. In the following paragraphs it is assumed that the terms of the contract are silent on the question of ownership.
5. As a general rule where the relationship between the member and his client is that of principal and principal, documents brought into being by the member on the instructions of the client belong to the client. On the other hand, documents prepared, acquired or brought into being by the member solely for his own purpose as principal belong to the member.

#### **Members' working papers**

6. Documents which a member produces in the course of his work as principal, and which are not the end product of his engagement, belong to the member. They are referred to as the member's working papers.

#### **Auditing**

7. In acting as an auditor, the member is acting as a principal. The end product of his work is to give an auditor's report. Documents prepared by the member solely for the purpose of carrying out his duties as auditor belong to the member. The ownership of documents or records is decided without reference to whether the audit is carried out under statutory provisions or not. If the work involved includes both auditing and accountancy, it may be necessary to consider the purpose for which the documents were prepared in order to determine their ownership.

#### **Accountancy**

8. Where the work of the member is solely accountancy the question of ownership will depend on the nature of the work to be done. For example, if the work is to prepare or write up a set of books for the client, the completed books belong to the client. If the work is to prepare for the client a profit and loss account and balance sheet from the client's books, the final accounts belong to the client, while the member's draft and office copy of those final accounts belong to the member. If, however, the client has specifically asked for drafts to be prepared for him, they will belong to the client as the drafts are the "product" which is required by the client.
9. Similar considerations apply in connection with the preparation of other documents such as reports, memoranda and notes. If the final documents are specifically prepared for the client at his request, they belong to the client and the member's drafts and office copy will belong to the member. If, however, the client has specifically asked for drafts to be prepared for him the drafts will belong to the client, as they are the "product" which is required by the client. In *Chantrey Martin & Co v Martin*, [1953] 2 Q.B. 286, the draft items referred to above were held to be the property of the member as they were not documents which the client had required the member to produce for him. On the above principles analyses of banking accounts and correspondence with bankers and stockbrokers for the purpose of producing accounts would normally belong to the member.

10. If the member's work is to produce final accounts from incomplete records, and he is not instructed by the client to work on the records themselves, schedules which he prepares for the purpose of producing the accounts would normally belong to the member. However, in the case of a body incorporated under statutory provisions, the position may be different. For example, section 121 of the Companies Ordinance sets out the accounting records which a company must keep. Where such records have not been kept, a court might well take the view that such schedules were prepared for the client company in order that it should comply with section 121 and that, therefore, they belong to the company.

#### **Taxation**

11. Where the member's work relates to taxation, the question of ownership will depend on the nature of the work to be done. For example, if the work is of a tax compliance nature (such as the preparation and submission of accounts, tax returns and computations to the Inland Revenue Department and the agreement of the client's tax liabilities), the accounts, schedules and computations belong to the client. In *Chantrey Martin & Co v Martin* the Court of Appeal followed its own earlier statement (see paragraph 3) and held that calculations and correspondence between a firm of accountants and the Inland Revenue Department in regard to a client's accounts and tax computations (both the copies of letters sent and the original letters received) were the property of the client on the basis that the accountants had been acting as agents for the client for the purpose of settling with the Inland Revenue Department the client's tax liability.
12. If the work to be done is to give tax advice, the member is acting as principal and letters or documents giving that advice belong to the client. However, drafts, memoranda, notes and correspondence with, for example, solicitors in connection with that work would probably be held by the courts to belong to the member (see paragraph 14).

#### **Communications between a member and his client**

13. Letters received by a member from his client belong to the member. A member's copy of any letter written to his client is made solely for his own purposes and also belongs to the member, (*Re Wheatcroft* (1877), 6 Ch.D.97). A member's notes of questions and answers between the client and the member belong to the member.

#### **Communications with third parties**

14. Ownership of copies of communications between a member and third parties depends on the relationship between the member and his client. Where the member is an agent, the copies belong to his client (see paragraph 11 as to tax correspondence). On the other hand, where the member is acting as principal, it is probable that the courts would hold that the copies belong to the member. This would include documents which are not the end product of the member's work, for example:
  - a. documents confirming or otherwise the balance of an account between a third party and the client, such as those in respect of bank balances or the custody of securities; and
  - b. other documents which the member has obtained solely for his own use in carrying out his duties as principal. These would normally include correspondence between the member and the client's solicitors.

## DISCLOSURE TO THE INLAND REVENUE DEPARTMENT

### Members' working papers

15. Under section 51(3) of the Inland Revenue Ordinance, an assessor may give notice in writing to a client when and as often as he thinks necessary requiring him within a reasonable time stated in such notice to furnish fuller or further returns respecting any matter of which a return is required or prescribed by that Ordinance. And for the purposes of obtaining full information in regard to any matter which might affect any liability, responsibility or obligation of the client under the Inland Revenue Ordinance, an assessor may, under section 51(4), give notice in writing to the member requiring him to furnish all information in his possession respecting any such matter and to produce for examination any documents which the assessor considers are or may be relevant for the purpose.
16. Under section 51B of the Inland Revenue Ordinance, if there are reasonable grounds for suspecting that a client has understated his income or taxable profits, the magistrate may by warrant authorise the Commissioner or authorised officer to enter a member's premises and to take possession of any documents that may be reasonably required for any assessment to be made.
17. The practice of requesting access to members' working papers is followed, in particular, where the member has submitted an investigation report to the Inland Revenue Department in a back duty case. Requests are made as a routine matter and the Inland Revenue Department stress that they are not intended as any reflection on the member's work or his standards.
18. A request for the production of specific working papers for which a reasonable need can be discerned should not therefore be regarded as a challenge to the member's competence or integrity. In particular, there may be doubt concerning the nature and effect of certain transactions involved in a back duty enquiry. Such transactions should be the subject of special comment in the member's report on the investigation and (subject to what is said in paragraph 19) he should be prepared to discuss them with the Inland Revenue Department and, if necessary, to amplify the details. The member should consider the matter from the aspect of what is in the client's best interest in both the short term and the long term. In particular where the client has denied irregularities, the working papers may confirm or deny the information which gave rise to the Department's enquiries.

### *The member's position*

19. As explained in paragraph 6, working papers belong to the member if he is acting as a principal. It is however an implied term of the members contract with his client that the member will not, as a general rule, disclose to other persons information about his client's affairs acquired during and as a result of their professional relationship, against his client's wishes. The member should therefore not normally produce his working papers to the Inland Revenue Department without the consent of the client. Where the member's own competence or integrity is being challenged it may well be proper for him to produce his working papers in his own defence without his client's consent but save in a straightforward case, the member should consult his solicitors before doing so.

### *Client's agreement to production of particular working papers*

20. In the majority of back duty cases, the client agrees to make a full disclosure and offer full facilities for investigation. He is anxious to clear up the matter and is willing to co-operate. When he is asked to consent to the member's producing working papers, he normally agrees since production of certain types of working papers will speed up the investigation and settlement of the matter. If the member produces his working papers, he will then be able to point to this positive action as a reflection of co-operation by the taxpayer and ask that the taxpayer be given credit for it.

**Clients' documents**

21. To the extent that papers and documents belong to the client and are not the member's working papers, they should normally be produced only if the client agrees. Nevertheless, where there is the possibility of a criminal prosecution, legal advice should be obtained.

**Unwillingness to produce documents**

22. Where the client is unwilling to agree to the production of documents belonging to him or of working papers belonging to the member, the member should consider the documents and explain both the position and the possible practical consequences to his client. In particular he should point out the adverse conclusions which the Inland Revenue Department may draw and the likelihood of the Department using their powers under section 51B of the Inland Revenue Ordinance in relation to the client's documents.

**DISCLOSURE TO THE CUSTOMS AND EXCISE DEPARTMENT**

23. A member's working papers would not normally be required to be produced to the Customs and Excise Department. Where exceptionally a Customs Officer requests the production of working papers in circumstances in which a member considers that he should accede to the request, he must bear in mind that in negotiations with the Customs and Excise Department he is acting as agent for his client. Accordingly he should explain the position to the client and would not be justified in acceding to the request without the client's consent except in rare cases such as where the member's competence or integrity was being challenged in which cases he should consult his solicitors before producing the documents.

**DISCLOSURE TO INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC)**

24. Under the Prevention of Bribery Ordinance powers of investigation are conferred on the Commissioner or a duly authorised investigating officer. Where such powers are properly invoked a member will be compelled under section 14 of the Ordinance to disclose any relevant information or produce any relevant documents. In such circumstances a member has no privilege to withhold the information.
25. Where a member is requested to assist the ICAC by providing information about a client's affairs in connection with enquiries being made and yet the powers mentioned in paragraph 24 above is not available he should decline to give any information until he has obtained his client's authority. If the client's authority is not forthcoming and the demand for information is pressed the member should not accede unless so advised by his solicitor.

**DISCLOSURE UNDER THE DRUG TRAFFICKING (RECOVERY OF PROCEEDS) ORDINANCE 1989**

26. Under the Drug Trafficking (Recovery of Proceeds) Ordinance 1989, wide investigative powers have been given to the law enforcement agencies. Under section 20 the Court can order a person, including a professional accountant, to produce all relevant material, other than those subject to legal privilege, for an authorised officer to take away or to allow access by an authorised officer within seven days. The length of the period may be shorter or longer depending on the circumstances. Section 21 gives the court the power to issue a search warrant allowing an authorised officer to enter specified premises to perform a search and to seize and retain any material, other than privileged materials. Privileged materials include communications between a legal adviser and an accountant representing his client, or legal advice on behalf of his client and may include items enclosed with or referred to in the privileged communications.

## DISCLOSURE TO AUDITORS OF HOLDING COMPANY

27. Section 133 of the Companies Ordinance provides for the powers of auditors in relation to subsidiaries. The law requires the subsidiary and its auditors to give to the auditors of the holding company such information and explanation as those auditors may reasonably require for the purpose of their duties as auditors of the holding company.
28. It is therefore incumbent on a member to make available, when requested, his working papers and other documents to the auditors of the holding company for the purposes of section 133 of the Companies Ordinance.

## LIEN

### General and particular liens

29. A lien is a right of a person to retain possession of the owner's property until the owner pays what he owes to the person in possession. A general lien is a lien over property which can be retained until payment of the whole of the indebtedness of the owner to the person in possession on any account whatsoever. However, such liens can rarely be established. A particular lien is a lien over property which can be retained only until payment of a particular debt due in respect of it is paid. The courts favour particular liens as being equitable between debtor and creditor. The normal position and the conditions for the exercise of a lien are set out in paragraphs 30 and 31. Reference is made in paragraphs 32 to 42 to special cases where the normal position is affected.
30. It has long been thought, and it is now established by a decision of the Court of Appeal, that an accountant has a particular lien over documents belonging to his client in respect of which the accountant has performed work for which he has not been paid the fee due. In *Woodworth v Conroy* [1976] Q.B. 884, 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 Department 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 purposes of the case to deal with that question. Despite the fact that the point was kept open, counsel advises that in the absence of a special contractual provision accountants do not have a right of general lien in law and members are advised not to assert such a right against a client unless they are expressly given that right by their contract with the client.

### Conditions for the exercise of a lien

31. A right of lien will only exist 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
  - d. the fees for which the lien is exercised must be outstanding in respect of such work and not in respect of other unrelated work.

Accordingly, where a member does work for a company and also for the directors of that company in their private capacities, if the fees for work done for a director in his private capacity are unpaid, no right of lien exists over the company's documents in the light of a and d above.

**Special cases**

32. 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*

33. 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 which, 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 to 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 L.J. Ch. 730. Although those cases concerned solicitors' liens, the same principles should apply in the case of accountants. Examples of documents which those cases held could not become the subject of a lien are the register of members and directors' minute books which the articles of association would almost certainly, expressly or impliedly, require to be kept available at all material times for the use of directors.

*Books of account of companies*

34. Counsel advises that a lien would probably not be upheld in relation to the books of account which a company must keep in order to comply with section 121 of the Companies Ordinance. Such records are documents which must by reason of that section be kept by the company, must be kept at the registered office of the company or at such other place as the directors of the company think fit and must at all times be open to inspection by the directors. It should be appreciated the "books of account", within the meaning of section 121, covers a wide range of documents.
35. If accounting records were informally entrusted to a member so that he had them in his office, counsel considers that it could not be successfully argued that his office was "such other place as the directors of the company think fit" within the meaning of section 121(3). In any event the directors' right to inspect the records would destroy the purpose for which a lien was sought to be exercised.
36. One of the plaintiffs in *Woodworth v Conroy* was a limited company and Lord Justice Lawton referred to the fact that the plaintiffs had a statutory obligation to produce and file accounts and wanted their papers from the accountants for this purpose. In making the general statement as to the accountants' right to a lien which is quoted in paragraph 30, the judge added no qualification as to the position of companies. However, during the case, the court was not referred to the authorities cited in paragraph 33 concerning lien in relation to companies. Those authorities were accordingly not considered by the court. Counsel advises that in a future case involving a company, *Woodworth v Conroy* would not be regarded as overriding those earlier authorities when read in conjunction with section 121 of the Companies Ordinance (see paragraph 34).

*Receivers for debenture holders*

37. Where a member has a lien over documents of a company, counsel considers that the appointment of a receiver does not affect the lien as a lien is a charge given by the general law and arises from the company's carrying on its business in the ordinary course.
38. 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 which the general law allows. A member's lien would be untouched by debenture holders taking possession and by their obtaining the appointment of a receiver, (*Brunton v Electrical Engineering Corporation*, [1982] 1 Ch.434). Even where a receiver is appointed by the court, the lien will be unaffected unless the court orders otherwise.

*Liquidators*

39. A member is not deprived of an existing lien by the appointment of a liquidator, although he cannot acquire a lien over documents which come into his possession after the commencement of the liquidation. In a compulsory liquidation, however, the court has power to require a member to produce any books and papers in his custody or control. Where the member claims any lien, the production is to be "without prejudice to that lien, and the court shall have jurisdiction in the winding up to determine all questions relating to that lien" (section 221(3) of the Companies Ordinance). The court would have similar power in a voluntary liquidation in the event of the liquidator applying to the court under section 255 of the Companies Ordinance.
40. A useful precedent was established on 15 November 1962 in the Companies Court in the Chancery Division of the High Court in the unreported case of *D.M. Carr & Company Limited - Case No. 1172 of 1961*. On a summons by the liquidator of a company for the delivery by the auditor of the company's books of account and other documents which were in the possession of the auditor, the Registrar ordered:
- a. that the auditor should produce to the liquidator all the books and papers of the company in his possession, without prejudice to the lien claimed by him;
  - b. that the liquidator should pay out of the assets of the company, in priority to his own remuneration but after all creditors ranking above the liquidator, so much of the fees claimed by the auditor as related to work carried out before the commencement of winding up (in this case the whole sum); and
  - c. that the auditor's taxed costs of the liquidator's summons should be paid out of the assets of the company.

It does not appear to have been suggested that there could be no lien over the company's books of account, but see paragraph 36.

*Bankruptcy*

41. The Official Receiver or Trustee in bankruptcy is entitled to the books of account, any document or paper belonging to the debtor and no lien can exist over them (Bankruptcy Rules, Rule 201).
42. Where an application is made to the court by the Official Receiver or Trustee after a receiving order has been made against a debtor, the court has power to require a member to produce any document relating to the debtor, his dealings or his property which is in the custody or control of the member (section 29 of the Bankruptcy Ordinance). It has been held that under this provision the Official Receiver or Trustee cannot obtain possession of documents. He can only inspect them. (*In re Toleman and England* (1880), 13 Ch.D.885). However, the right to inspect may render the lien of little use in practice.

**Exercise of lien in fee disputes**

43. Where a legal right of lien exists, the Hong Kong Institute of Certified Public Accountants supports the exercise of that lien in appropriate circumstances.
44. When a member is about to render a bill which is substantially different from bills rendered to the same client on earlier occasions for which the work is, or may appear to the client to be, comparable, it is good practice to explain to the client the reason for the variation. Where the increase is caused by extra work being necessary, the reason for the extra work can be explained. Where the increase is caused by increased costs, this also can be explained. In many cases both factors will affect the total fee and any explanation will be mutually helpful.



45. Cases do, however, arise where a member presents a bill to a client which the client considers to be excessive. In such cases the client may be prepared to pay a smaller sum and may tender that amount. There is no legal disadvantage in accepting the amount offered provided it is made clear by the member, preferably in writing, at the time of acceptance, that the sum is accepted as a part payment only and not in full discharge of the debt.
46. When a client behaves in this manner it is possible that he has genuine doubts as to the propriety of the fee, and is not actuated by malice or lack of means. In this connection, members are reminded that the President is prepared, on the written application of both parties to the dispute, to appoint an arbitrator.
47. Where arbitration is resorted to or where a writ has been served for the fees, it is clear that, in due course, the matter of the fees will be settled. In these circumstances, the member may consider abandoning his lien if the sum in dispute were placed in the hands of a third party with instructions not to release the sum until the matter has been settled.
48. The exercise of a lien in fee disputes is perfectly legal, but members should remember that its nuisance value is likely to promote ill-will not only between the parties, but also towards the profession as a whole.
49. Members should consult their solicitors before seeking to exercise a lien in any but the most straightforward of cases. Similarly a client disputing the right of lien of a member might be persuaded to consult his own solicitors. Where the member's right is well-founded the advice the client receives may change his attitude both to the lien and the bill.