

Professional conduct in relation to taxation

Extracts relevant for Personal Tax (PLTX) unit AQ2016

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1. Interpretation and abbreviations

Context

Tax advisers operate in a complex business and financial environment. The increasing public focus on the role of taxation in wider society means a greater interest in the actions of tax advisers and their clients.

This guidance, written by the professional bodies for their members working in tax, sets out the hallmarks of a good tax adviser, and in particular the fundamental principles of behaviour that members are expected to follow.

Interpretation

1.1 In this guidance:

- 'Client' includes, where the context requires, 'former client'.
- 'Member' (and 'members') includes 'firm' or 'practice' and the staff thereof.
- For simplicity, 'she' and 'her' are used throughout but should be taken to include 'he' and 'his'.
- Words in the singular include the plural and words in the plural include the singular.

Abbreviations

1.2 The following abbreviations have been used:

CCAB	Consultative Committee of Accountancy Bodies
DOTAS	Disclosure of Tax Avoidance Schemes
GAAP	Generally Accepted Accounting Principles
GAAR	General Anti-Abuse Rule in Finance Act 2013
HMRC	Her Majesty's Revenue and Customs
MLRO	Money Laundering Reporting Officer
NCA	National Crime Agency (previously the Serious Organised Crime Agency, SOCA)
POTAS	Promoters of Tax Avoidance Schemes
SRN	Scheme Reference Number

2. Fundamental principles

Overview of the fundamental principles

2.1 Ethical behaviour in the tax profession is critical. The work carried out by a member needs to be trusted by society at large as well as by clients and other stakeholders. What a member does reflects not just on themselves but on the profession as a whole.

2.2 A member must comply with the following fundamental principles:

Integrity

To be straightforward and honest in all professional and business relationships.

Objectivity

To not allow bias, conflict of interest or undue influence of others to override professional or business judgements.

Professional competence and due care

To maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques and act diligently and in accordance with applicable technical and professional standards.

Confidentiality

To respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the member or third parties.

Professional behaviour

To comply with relevant laws and regulations and avoid any action that discredits the profession.

Each of these fundamental principles is discussed in more detail in the context of taxation services.

3. Tax returns

Definition of tax return (return)

- 3.1 For the purposes of this Chapter, the term 'return' includes any document or online submission of data that is prepared on behalf of the client for the purposes of disclosing to any taxing authority details that are to be used in the calculation of tax due by a client or a refund of tax due to the client or for other official purposes and, for example, includes:
- Self-assessment returns for income or corporation tax;
 - VAT and Customs returns;
 - PAYE returns;
 - Inheritance tax returns;
 - Returns or claims in respect of any other tax or duties where paid to the UK Government or any authority, such as a devolved government.
- 3.2 A letter giving details in respect of a return or as an amendment to a return including, for example, any voluntary disclosure of an error should be dealt with as if it was a return.

Taxpayer's responsibility

- 3.3 The taxpayer has primary responsibility to submit correct and complete returns to the best of her knowledge and belief. The return may include reasonable estimates where necessary. It follows that the final decision as to whether to disclose any issue is that of the client.

Member's responsibility

- 3.4 A member who prepares a return on behalf of a client is responsible to the client for the accuracy of the return based on the information provided.
- 3.5 In dealing with HMRC in relation to a client's tax affairs a member must bear in mind her duty of confidentiality to the client and that she is acting as the agent of her client. She has a duty to act in the best interests of her client.
- 3.6 A member must act in good faith in dealings with HMRC in accordance with the fundamental principle of integrity. In particular the member must take reasonable care and exercise appropriate professional scepticism when making statements or asserting facts on behalf of a client. Where acting as a tax agent, a member is not required to audit the figures in the books and records provided or verify information provided by a client or by a third party. A member should take care not to be associated with the presentation of facts she knows or believes to be incorrect or misleading nor to assert tax positions in a tax return which she considers have no sustainable basis.
- 3.7 When a member is communicating with HMRC, she should consider whether she needs to make it clear to what extent she is relying on information which has been supplied by the client or a third party.

Materiality

- 3.8 Whether an amount is to be regarded as material depends upon the facts and circumstances of each case.
- 3.9 The profits of a trade, profession, vocation or property business must be computed in accordance with GAAP subject to any adjustment required or authorised by law in computing profits for those

purposes. This permits a trade, profession, vocation or property business to disregard non-material adjustments in computing its accounting profits. However, it should be noted that for certain small businesses an election may be made to use the cash basis instead.

- 3.10 The application of GAAP, and therefore materiality, does not extend beyond the accounting profits. Thus the accounting concept of materiality cannot be applied when completing tax returns (direct and indirect), for example when:
- computing adjustments required to accounting figures so as to arrive at taxable profits;
 - allocating income, expenses and outgoings across the relevant boxes on a self-assessment tax return;
 - collating the aggregate figures from all shareholdings and bank accounts for disclosure on tax returns.

Disclosure

- 3.11 If a client is unwilling to include in a tax return the minimum information required by law, the member should follow the guidance in Chapter 5 Irregularities. 3.12 - 3.18 give guidance on some of the more common areas of uncertainty over disclosure.
- 3.12 In general, it is likely to be in a client's own interests to ensure that factors relevant to her tax liability are adequately disclosed to HMRC because:
- her relationship with HMRC is more likely to be on a satisfactory footing if she can demonstrate good faith in her dealings with them; and
 - she will reduce the risk of a discovery or further assessment and may reduce exposure to interest and penalties.
- 3.13 It may be advisable to consider fuller disclosure than is strictly necessary. The factors involved in making this decision include:
- the terms of the applicable law;
 - the view taken by the member;
 - the extent of any doubt that exists;
 - the manner in which disclosure is to be made; and
 - the size and gravity of the item in question.
- 3.14 When advocating fuller disclosure than is strictly necessary a member should ensure that her client is adequately aware of the issues involved and their potential implications. Fuller disclosure should not be made unless the client consents to the level of disclosure.
- 3.15 Cases will arise where there is doubt as to the correct treatment of an item of income or expenditure, or the computation of a gain or allowance. In such cases a member ought to consider carefully what disclosure, if any, might be necessary. For example, additional disclosure should be considered where:
- a return relies on a valuation;
 - there is inherent doubt as to the correct treatment of an item, for example, expenditure on repairs which might be regarded as capital in whole or part, or the VAT liability of a particular transaction; or
 - HMRC has published its interpretation or has indicated its practice on a point, but the client proposes to adopt a different view, whether or not supported by Counsel's opinion. The member should refer to the guidance on the Veltema case and 3.19.
- 3.16 A member who is uncertain whether her client should disclose a particular item or of its treatment should consider taking further advice before reaching a decision. She should use her best endeavours to ensure that the client understands the issues, implications and the proposed course of action. Such a decision may have to be justified at a later date, so the member's files should contain sufficient evidence to support the position taken, including contemporaneous

notes of discussions with the client and/or with other advisers, copies of any second opinion obtained and the client's final decision. A failure to take reasonable care may result in HMRC imposing a penalty if an error is identified after an enquiry.

- 3.17 The 2012 case of Charlton clarified the law on discovery in relation to tax schemes disclosed to HMRC under DOTAS. The Upper Tribunal made clear that where the taxpayer has:
- (i) disclosed details of a significant allowable loss claim;
 - (ii) declared relatively modest income/ gains; and/or
 - (iii) included the SRN issued by HMRC on the appropriate self-assessment tax return,
- an HMRC officer of reasonable knowledge and skill would be expected to infer that the taxpayer had entered into a tax avoidance scheme (and that fuller details of such scheme would be contained in the relevant AAG1 Form). As a result, HMRC would be precluded, in most cases, from raising a discovery assessment in a situation where the client implemented the disclosed scheme and HMRC failed to open an enquiry within the required time.
- 3.18 It is essential where a member is involved in the preparation of a self-assessment tax return which includes a scheme disclosed under DOTAS that the member takes care to ensure:
- that the tax return provides sufficient details of any transactions entered into (in case the AAG1 Form is incomplete);
 - that the SRN is recorded properly in the appropriate box included for this purpose on a self-assessment tax return; and
 - the SRN is shown for the self-assessment return for each year in which the scheme is expected to give the client a tax advantage.

Supporting documents

- 3.19 For the most part, HMRC does not consider that it is necessary for a taxpayer to provide supporting documentation in order to satisfy the taxpayer's overriding need to make a correct return. HMRC's view is that, where it is necessary for that purpose, explanatory information should be entered in the 'white space' provided on the return. However, HMRC does recognise that the taxpayer may wish to supply further details of a particular computation or transaction in order to minimise the risk of a discovery assessment being raised at a later time.
- 3.20 Further HMRC guidance says that sending attachments with a tax return is intended for those cases where the taxpayer 'feels it is crucial to provide additional information to support the return but for some reason cannot utilise the white space'.

Approval of tax returns

- 3.21 It is essential that the member advises the client to review her tax return before it is submitted.
- 3.22 The member should draw the client's attention to the responsibility which the client is taking in approving the return as correct and complete. Attention should be drawn to any judgemental areas or positions reflected in the return to ensure that the client is aware of these and their implications before she approves the return.
- 3.23 A member should obtain evidence of the client's approval of the return in electronic or non-electronic form.

4. Tax advice

Introduction

- 4.1 Giving tax advice covers a variety of activities. It can involve advising a client on a choice afforded to her by legislation, for example, whether to establish a business as a sole trader, partnership or company. It could be advising on the tax implications of buying or selling an asset or business, or advising on succession planning.
- 4.2 For the most part clients are seeking advice on how to structure their affairs, either personal or commercial, in a way that is tax efficient and ensures that they comply with their legal and regulatory requirements. Transactions based on advice which are centred around non-tax objectives are less likely to attract scrutiny or criticism from stakeholders and are much more likely to withstand challenge by HMRC.
- 4.3 Some tax strategies have been the subject of heated public debate, raising ethical challenges. Involvement in certain arrangements could subject the client and the member to significantly greater compliance requirements, scrutiny or investigation as well as criticism from the media, government and other stakeholders and difficulties in obtaining professional indemnity insurance cover.
- 4.4 The definition of 'avoidance' is an evolving area that can depend on the tax legislation, the intention of Parliament, interpretations in case law and the varying perceptions of different stakeholders and is discussed further below.
- 4.5 A member should consider the contents of this Chapter carefully when giving tax advice and the potential negative impact of her actions on the public perception of the integrity of the tax profession more generally.
- 4.6 Clearly a member must never be knowingly involved in tax evasion, although, of course, it is appropriate to act for a client who is rectifying their affairs.

Tax planning vs tax avoidance?

- 4.7 Despite attempts by courts over the years to elucidate tax 'avoidance' and to distinguish this from acceptable tax planning or mitigation, there is no widely accepted definition.
- 4.8 Publicly, the term 'avoidance' is used in the context of a wide range of activities, be it multinational structuring or entering contrived tax-motivated schemes. The application of one word to a range of activities and behaviours oversimplifies the concept and has led to confusion.
- 4.9 In a 2012 paper on tax avoidance, the Oxford University Centre for Business Taxation states that transactions generally do not fall into clear categories of tax avoidance, mitigation or planning. Similarly, it is often not clear whether something is acceptable or unacceptable. Instead the paper concludes that there is:
'a continuum from transactions that would not be effective to save tax under the law as it stands at present to tax planning that would be accepted by revenue authorities and courts without question.'

Member's responsibility in giving tax planning advice

- 4.10 A member is required to act with professional competence and due care within the scope of her engagement letter.

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- 4.11 A member should understand her client's expectations around tax advice or tax planning, and ensure that engagement letters reflect the member's role and responsibilities, including limitations in or amendments to that role. The importance of this has been highlighted by the Mehjoo case.
- 4.12 A member does not have to advise on or recommend tax planning which she does not consider to be appropriate or otherwise does not align with her own business principles and ethics. However, in this situation the member may need to ensure that the advice she does not wish to give is outside the scope of her engagement. If the member may owe a legal duty of care to the client to advise in this area, the member should ensure that she complies with this by, for example, advising the client that there are opportunities that the client could undertake, even though the member is unwilling to assist, and recommending that the client seeks alternative advice. Any such discussions should be well documented by the member.
- 4.13 Ultimately it is the client's decision as to what planning is appropriate having received advice and taking into account their own broader commercial objectives and ethical stance. However, the member should ensure that the client is made aware of the risks and rewards of any planning, including that there may be adverse reputational consequences. It is advisable to ensure that the basis for recommended tax planning is clearly identified in documentation.
- 4.14 Occasionally a client may advise a member that she intends to proceed with a tax planning arrangement without taking full advice from him on the relevant issues or despite the advice the member has given. In such cases the member should warn the client of the potential risks of proceeding without full advice and ensure that the restriction in the scope of the member's advice is recorded in writing.
- 4.15 Where a client wishes to pursue a claim for a tax advantage which the member feels has no sustainable basis the member should refer to Chapter 5 Irregularities for further guidance.
- 4.16 If Counsel's opinion is sought on the planning the member should consider including the question as to whether, in Counsel's view, the GAAR could apply to the transaction.
- 4.17 It should be noted that any legal opinion provided, for example by Counsel, will be based on the assumptions stated in the instructions for the opinion and on execution of the arrangement exactly as stated. HMRC and the courts will not be constrained by these assumptions.

The different roles of a Tax Adviser

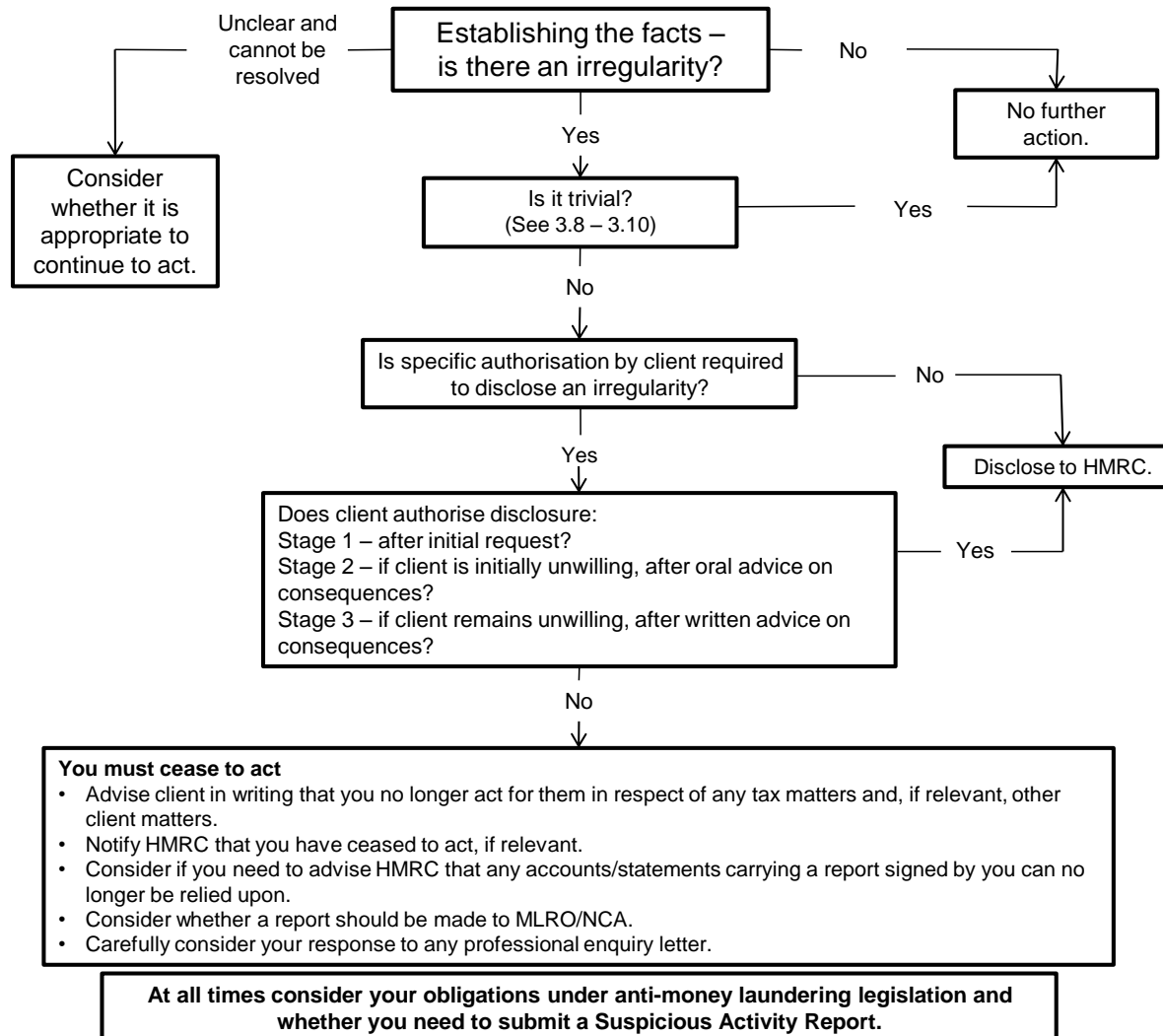
- 4.18 A member may be involved in tax planning arrangements in the following ways:
- Advising on a planning arrangement.
 - Introducing another adviser's planning arrangement.
 - Providing a second opinion on a third party's planning arrangement.
 - Compliance services in relation to a return which includes a planning arrangement.
- A member should always make a record of any advice given.

5. Irregularities

Introduction

- 5.1 For the purposes of this Chapter, the term 'irregularity' is intended to include all errors whether the error is made by the client, the member, HMRC or any other party involved in a client's tax affairs.
- 5.2 In the course of a member's relationship with the client, the member may become aware of possible irregularities in the client's tax affairs. Unless already aware of the possible irregularities in question, the client should be informed as soon as the member has knowledge of them.
- 5.3 Where the irregularity has resulted in the client paying too much tax the member should advise the client about making a repayment claim and have regard to any relevant time limits. With the exception of this paragraph, the rest of this Chapter deals solely with situations where sums may be due to HMRC.
- 5.4 On occasion, it may be apparent that an error made by HMRC has meant that the client has not paid tax actually due or she has been incorrectly repaid tax. Correcting such mistakes may cause expense to a member and thereby to her clients. A member should bear in mind that, in some circumstances, clients or agents may be able to claim for additional professional costs incurred and compensation from HMRC.
- 5.5 A member must act correctly from the outset. A member should keep sufficient appropriate records of discussions and advice and when dealing with irregularities the member should:
- Give the client appropriate advice;
 - If necessary, so long as she continues to act for the client, seek to persuade the client to behave correctly;
 - Take care not to appear to be assisting a client to plan or commit any criminal offence or to conceal any offence which has been committed; and
 - In appropriate situations, or where in doubt, discuss the client's situation with a colleague or an independent third party.
- 5.6 Once aware of a possible irregularity, a member must bear in mind the legislation on money laundering and the obligations and duties which this places upon him.
- 5.7 A member should also consider whether the irregularity could give rise to a circumstance requiring notification to her professional indemnity insurers.
- 5.8 In any situation where a member has concerns about her own position, she should take specialist legal advice. This might arise, for example, where a client appears to have used the member to assist in the commission of a criminal offence in such a way that doubt could arise as to whether the member had acted honestly and in good faith.
- 5.9 The irregularity steps flowchart (5.10) summarises the recommended steps a member should take where a possible irregularity arises.

5.10 Steps to take if there is a possible irregularity



6. Access to data by HMRC

Introduction

- 6.1 For the purposes of this Chapter the term 'data' includes documents in whatever form (including electronic) and other information. While this guidance relates to HMRC requests, other government bodies or organisations may also approach the member for data. The same principles apply.
- 6.2 A distinction must be drawn between a request for data made informally and those requests for data which are made in exercise of a power to require the provision of the data requested ('statutory requests').
- 6.3 Similarly, requests addressed to a client and those addressed to a member require different handling.
- 6.4 Where a member no longer acts for a client, the member remains subject to the duty of confidentiality.
- 6.5 A member should comply with reasonable statutory requests and should not seek to frustrate legitimate requests for information. Adopting a constructive approach may help to resolve issues promptly and minimise costs to all parties.
- 6.6 Whilst a member should be aware of HMRC's powers in relation to the access, inspection and removal of data, given the complexity of the law relating to information powers, it may be appropriate to take specialist advice.
- 6.7 Revenue Scotland will have separate powers under the Revenue Scotland and Tax Powers Act 2014.

Informal requests addressed to the member

- 6.8 Disclosure in response to informal requests not made under any statutory power to demand data can only be made with the client's permission.
- 6.9 Sometimes the client will have authorised routine disclosure of relevant data, for example, through the engagement letter. However, if there is any doubt about whether the client has authorised disclosure or about the accuracy of details, the member should ask the client to approve what is to be disclosed.
- 6.10 Where an oral enquiry is made by HMRC, a member should consider asking for it to be put in writing so that a response may be agreed with the client.
- 6.11 Although there is no obligation to comply with an informal request in whole or in part, a member should advise the client whether it is in the client's best interests to disclose such data.
- 6.12 Informal requests may be forerunners to statutory requests compelling the disclosure of data. Consequently, it may be sensible to comply with such requests or to seek to persuade HMRC that a more limited request is appropriate. The member should advise the client as to the reasonableness of the informal request and likely consequences of not providing the data, so that the client can decide on her preferred course of action.

Informal requests addressed to the client

- 6.13 From time to time HMRC chooses to communicate directly with clients rather than with the appointed agent.
- 6.14 HMRC recognises the significant value which tax agents bring to both their clients and to the operation of the tax system. However, HMRC has also made it clear that on occasions it may deal with the taxpayer as well as, or instead of, the agent.
- 6.15 Examples of where HMRC may contact a member's client directly include:
- where HMRC is using 'nudge' techniques to encourage taxpayers or claimants to re-check their financial records or to change behaviour;
 - where HMRC has become aware of particular assets, such as offshore investments, and the taxpayer is encouraged to consider whether a further tax disclosure is required;
 - where the taxpayer has engaged in what HMRC considers to be a tax avoidance scheme, as HMRC considers that this will better ensure that the client fully understands HMRC's view.
- 6.16 HMRC has given reassurances that it is working to ensure that initial contact on compliance checks will normally be via the agent and only if the agent does not reply within an appropriate timescale will the contact be direct to the client.
- 6.17 When the member assists a client in dealing with such requests from HMRC, the member should apply the principles in 6.8 – 6.12.

Statutory requests addressed to the client

- 6.18 In advising the client a member should consider whether the notice is valid, how to comply with the request and the consequences of non-compliance. Specialist advice may be needed, for example on such issues as whether the notice has been issued in accordance with the relevant tax legislation, whether the data requested is validly included in the notice, legal professional privilege and human rights.
- 6.19 Even if the notice is not valid, in many cases the client may conclude that the practical answer is to comply. If the notice is legally effective the client is legally obliged to comply with the request.
- 6.20 The member should also advise the client about any relevant right of appeal against the statutory request if appropriate and of the consequences of a failure to comply.

Statutory requests addressed to the member

- 6.21 The same principles apply to statutory requests to the member as statutory requests to clients.
- 6.22 If a statutory request is valid it overrides the member's duty of confidentiality to her client.
- 6.23 In cases where the member is not legally precluded by the terms of the notice from communicating with the client, the member should advise the client of the notice and keep the client informed of progress and developments.
- 6.24 The member remains under a duty to preserve the confidentiality of her client, so care must be taken to ensure that in complying with any notice the member does not provide information or data outside the scope of the notice.

- 6.25 If a member is faced with a situation in which HMRC is seeking to enforce disclosure by the removal of data, the member should consider seeking immediate advice from a specialist adviser or other practitioner with relevant specialist knowledge, before permitting such removal, to ensure that this is the legally correct course of action.
- 6.26 Where a Schedule 36 notice is in point a member should note that it does not allow HMRC to inspect business premises occupied by a member in her capacity as an adviser. Specialist advice should be sought in any situation where HMRC asserts otherwise.

Privileged data

- 6.27 Legal privilege arises under common law and may only be overridden if this is expressly or necessarily implicitly set out in legislation. It protects a party's right to communicate in confidence with a legal adviser. The privilege belongs to the client and not to the member. If a document is privileged:
- The client cannot be required to make disclosure of that document to HMRC and a member should be careful to ensure that her reasons for advising a client nevertheless to make such a disclosure are recorded in writing.
 - It must not be disclosed by any other party, including the member, without the client's express permission.
- 6.28 There are two types of legal privilege under common law, legal advice privilege covering documents passing between a client and her legal adviser prepared for the purposes of obtaining or giving legal advice and litigation privilege for data created for the dominant purpose of litigation. Litigation privilege may arise where litigation has not begun, but is merely contemplated and may apply to data prepared by non-lawyer advisers (including tax advisers) if brought into existence for the purposes of the litigation.
- 6.29 Communications from a tax adviser who is not a practising lawyer will not attract legal advice privilege but other similar protections exist under statute law, including:
- a privilege reporting exemption which applies to the reporting of money laundering in certain circumstances.
 - a privilege under Schedule 36 whereby a tax adviser does not have to provide data that is her property and which constitute communications between the adviser and either her client or another tax adviser of the client. Information about such communications is similarly privileged. However, care should be taken as not all data may be privileged.
- 6.30 Whether data is or is not privileged and protected from the need to disclose is a complex issue, which will turn on the facts of the particular situation.
- 6.31 A member who receives a request for data, some of which she believes may be subject to privilege, should take independent legal advice on the position, unless expert in this area.