

CONFIDENTIALITY AGREEMENTS

This Bulletin focuses on the handling of Confidentiality Agreements by the Membership. Members may recall that this is one of the issues which was considered during the Document Management Thematic Review carried out at the end of last year and reported on in April.

ENTERING INTO A CONFIDENTIALITY AGREEMENT

Members are sometimes required to enter into a Confidentiality Agreement (also referred to as a Non-Disclosure Agreement/NDA) before information concerning a particular client or risk is released to them. We regularly review such agreements on behalf of Members, from an E&O risk management perspective, as part of the Liability Advice service. Some of the common issues which we draw to Members' attention in the course of such a review are as follows:

- The agreements are often based on standard templates which have not been drafted with insurance broking in mind. It is very important that a broker ensures, when signing the agreement, that it is not agreeing to an obligation that it cannot meet, and so exposing itself to complaint or legal action. It is not unusual for such an agreement to provide that the Member is not entitled to share the confidential information received with anyone outside their organisation. If the confidential information is being provided so that a Member can market a risk to prospective insurers, this will need to be amended to enable the Member to carry out the instruction without immediately being in breach of the agreement's terms. In addition, the Member will need to be allowed to make the confidential information available, if required to do so, for legal or regulatory purposes.
- The agreement may also provide that only those handling the account within the Member's organisation should have access to the confidential information. Steps will need to be taken to limit access to those people and to prevent access by others. Anyone who is entitled to handle the information will need to be aware of the agreement's terms to enable them to comply and to guard against any inadvertent breach.
- It is always important to ensure that the agreement clearly defines what will constitute 'confidential information' and that the Member is in no doubt as to exactly what documentation will be subject to its terms.
- The agreement will often specify that the confidential information will remain the property of the party providing it. It may provide that the information must be returned upon that party's request, together with any copies which have been made, and/or that the information should be destroyed upon termination of the agreement. Again, those handling the information will need to be aware of this to ensure that the Member is able to comply.

HANDLING THE CONFIDENTIAL INFORMATION

Once the Confidentiality Agreement has been entered into it is obviously important for a Member to ensure that its terms are observed. One of the aims of the Document Management Thematic Review was to establish the extent to which Members' systems and processes enabled them to achieve this and guard against any breach. We were interested to see how the obligations assumed within a Confidentiality Agreement translated into how information received on the account was handled.

The Review's findings indicated that in many instances Members had no written processes for limiting access to information which it received where a Confidentiality Agreement was in place. We found that many Members focused on preserving the confidentiality of the agreement itself, rather than on the information received pursuant to it.

PRACTICAL GUIDANCE FROM GRIFFIN

Griffin is always happy to review any Confidentiality Agreement which a Member is asked to sign, from an E&O risk management perspective. This can help to ensure that obligations are not being assumed which may interfere with a Member's ability to carry out its instructions. A precedent Confidentiality Agreement is available in the Member Area of Griffin's website, which indicates the sorts of provisions one can expect to see in such an agreement.

Members should have a written process in place, as part of their document management guidelines, setting out how to deal with any confidential information which is received. That process should cater for any obligations which may be assumed concerning the manner in which the information is handled and stored, and also concerning its future return or destruction.

Once any such agreement has been signed, Members need to ensure that:

- anyone involved in handling the account is aware of the terms of the agreement and so in a position to comply; and
- steps are taken to ensure that the confidentiality of the information received pursuant to the agreement is preserved, in accordance with the Member's written process:
 - paper based files will need to be labelled and stored securely so that only those who are authorised under the terms of the Confidentiality Agreement are able to access them; and
 - access permissions for those authorised to see the information will need to be applied to files held electronically.

Griffin is happy to provide further assistance to any Member on this issue, if required.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

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