'OFF THE RECORD' – CAN YOU KEEP A SECRET…?

Have you ever had an 'off the record' chat with someone? Perhaps an underwriter sharing his initial views about a client's claim, or a client telling you something happening within his business. No doubt you would treat any such conversation as confidential. But are you obliged to treat it as such and, in some situations, should you? If the underwriter's view on a client's claim, say, was unfavourable, should you not warn the client of a possible problem in store? What if a client's revelations should really be disclosed to underwriters? The client and underwriters may end up in dispute. Do you have to reveal your 'off the record' discussions with either then? In short, what does 'off the record' really mean?

It surprises many to discover that the label 'off the record' has no legal meaning. All it does is confer a moral obligation on parties entering into discussions on this basis to treat the contents as confidential. Herein lies the problem: the gulf between peoples' perception of what this label means and the lack of protection that it actually affords to such discussions. Although there are ways that parties can openly talk through issues, without having to watch everything that they say, partaking in 'off the record' discussions is not one of them.

There are very few categories of information that one can be certain will be treated as 'confidential'. Although people might consider certain types of information to be 'confidential' by their nature, for example details of their company or of business relationships with other companies, in legal terms such information has no special status. Parties may contractually agree with one another, a client with a broker, for example, that certain shared information about their companies, or the business they are dealing with, shall be treated as confidential. This will create an obligation on the contracting parties, that would not otherwise exist, to treat this information in the agreed fashion, with penalties being specified in the contract in the event of breach. However, these agreements usually recognise within their provisions that if called for by a court of law, or by regulatory bodies, any such 'confidential' information would have to be produced.

There are very limited scenarios in which you can talk quite openly, 'off the record' if you like, safe in the knowledge that what you say will remain confidential and cannot subsequently be used against you. The English legal system recognises that parties must be able to talk openly when seeking advice from a legal adviser, without having to worry about anything that they may say. It also recognises that mechanisms are needed to enable parties in dispute to openly discuss their problems. They need to be able to talk candidly not only with their own legal advisers, but with one another, if there is to be any possibility of a settlement being achieved. So what are these mechanisms?

Legal privilege enables a party to discuss matters openly with a legal adviser, without holding back on what is said, or being concerned about what may be recorded. Legal privilege protects documents from having to be disclosed in legal proceedings and the protected documents fall into two categories. The first concerns confidential communications between a client and its lawyers, written for the purpose of giving or obtaining legal advice on the client's rights and obligations. These are protected by legal advice privilege. The second category is documents protected by litigation privilege. This attaches to documents created for the purpose of actual or pending litigation and includes documents prepared by employees and third parties. (Legal privilege was considered in more detail in Griffin Bulletin 2004/02).

Any discussions between parties that are aimed at compromising a dispute, can be held on the basis that they are 'without prejudice' and cannot be used in evidence by either party. This will be the basis upon which any mediation between the parties, aimed at averting the need for a full blown trial, for example, will take place. Any documents recording 'without prejudice' negotiations will also be protected from disclosure by their 'without prejudice' status. It will be the substance of the discussions, rather than any label attached, that will determine whether their status is 'without prejudice'. People may sometimes ask to talk 'off the record' in the context of settlement negotiations. If they really intend the talks to be 'without prejudice' any discussions will be protected as such, since it is the substance of the discussions that will determine their status. However, simply labelling a communication 'without prejudice', if it is not genuinely concerned with settling a dispute, will not afford it any protection at all.

So, if an underwriter tells you something 'off the record' that affects your client, your client can expect you to pass that on. Your client's interest is paramount under agency law and underwriters need to appreciate this. Where a client shares 'off the record' confidences with you, your duty will be to advise them as to what needs to be relayed to underwriters. If the client will not instruct you to pass such information on, you will need a clear record of this. Depending upon the information concerned, you may wish to consider whether you should continue to act. In essence, agreeing to talk 'off the record' is best avoided, unless all concerned fully understand what it means and, more importantly, what it doesn't mean. One could say that the question is not so much can you keep a secret, but should you?

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