

PRODUCING YOUR FILE

It is increasingly common for a broker to be asked to produce his file for inspection. These requests can come from a number of sources such as the insurer, a regulator, a reinsurer exercising rights of inspection under a reinsurance contract, or simply the client himself. Although it is by no means always the case, a request to inspect the file can be the first sign that there is a potential problem. For this reason all such requests should be treated as matters of priority and approached with care.

CLIENT AUTHORITY

When dealing with a request for inspection, the first step should be to consider whether you are authorised to comply. Where the request comes directly from the client the position is straightforward. Under general agency law the broker is the agent of the client and holds documents created, whilst carrying out the client's instructions, on behalf of that client. The client is therefore entitled to call upon the broker, at any time, to make these documents available for inspection. Where the request comes from a regulator the broker, generally, will be obliged by the regulatory regime to comply. Other than that, where the request comes from a party other than the client, the general rule is that the client's consent must be obtained before the inspection proceeds.

However, if a request for inspection of documents comes from an insurer, then following the *Goshawk v Tyser* judgment there are certain circumstances where the broker does not need the client's consent to disclose placing and claim documents that have already been seen by that insurer (see Griffin [Bulletin 2006/1](#) "Goshawk v Tyser – Production of Documents to Insurers"). However, a broker should still, as a matter of good practice, advise its client of any such request and seek its consent. If consent is not given the broker will have to explain to the client the extent of the obligation to disclose documents in accordance the *Goshawk v Tyser* decision.

If the broker has agreed as coverholder under a binding authority, or under a TOBA with a managing agent, to allow access to records, the client's consent still should be sought before access is allowed. If a request for inspection is made pursuant to some contractual right of inspection the client's consent should be sought. This is to ensure that there has been no change to the contract or the relationship between client and underwriter, of which, as broker, you are unaware. Such a request may be more routine in nature than a request to see the placing file, but it nevertheless concerns a file of documents which you hold on behalf of another. Always check with your client that they are happy before you proceed.

DOCUMENTS HELD ON THE CLIENT'S BEHALF

Having obtained any requisite authority from a client to a file inspection, you will then need to consider what documents you are required to produce. Documents held on the client's behalf will include contractual documentation, correspondence, notes of telephone calls with third parties and so on. It will not include a broker's own working papers, notes of internal meetings and conversations with colleagues which you will be entitled to remove before inspection if you choose to do so. The distinction between these two categories of documents can sometimes become blurred with internal comments being written on underwriter documents, conversations with clients being recorded on internal meeting notes

and so on. The consequence of this is that the opportunity may be lost for the broker to separate out his own papers and withhold these from inspection.

DISCLOSURE OF DOCUMENTS IN LEGAL PROCEEDINGS

The other scenario in which a broker may find himself obliged to produce his documents is if a dispute arises between parties that cannot be resolved without resorting to litigation. The broker may have to disclose documents in the context of proceedings between a client and underwriter, or may himself be the target in legal proceedings brought by a dissatisfied client. The scope of documentation required to be produced in this scenario is far wider than that outlined above. The broker may have to disclose all documents which he holds that are relevant to the matters in issue between the parties, regardless of whether they are helpful or detrimental to his position and regardless of whether they are internal documents or documents created on behalf of the client. It is therefore essential to have a good document management system so that such key documents can be readily identified.

Broadly, the only documents a broker will not have to disclose are those covered by legal professional privilege. This covers correspondence and documents between a party and their legal adviser created for the purpose of obtaining legal advice. In addition it covers documentation created where legal proceedings are reasonably contemplated. Legal professional privilege will therefore enable you, as broker, to consider a dispute frankly with your legal advisers without worrying that records of your discussions will subsequently have to be produced. Nevertheless, it is very important to be aware of its limitations. This privilege will only apply to documents that are created for the dominant purpose of seeking advice or in contemplation of litigation.

It is a mistake to presume that once a dispute has arisen, and legal advice has been sought, any written record of the problem will be immune from production. A memorandum reporting to the board of directors on an E&O problem, for example, will not have been created for the dominant purpose of obtaining legal advice and so will not be covered for this reason. Such documents must be kept to matters of fact and the temptation to record in-house opinions on the problem resisted. Likewise, if E&O matters are discussed at board meetings, any minutes taken should be limited to recording that the matter was discussed, rather than any opinions proffered in the course of that discussion. A report to the Griffin created for the purpose of obtaining legal advice on a problem may be privileged, but copies of that report, circulated to directors for risk management purposes, will not be: they were not created for the dominant purpose of obtaining legal advice from a professional adviser. Great care must therefore be taken to avoid creating prejudicial documents once a dispute has surfaced since those documents may then have to be disclosed.

RISK MANAGEMENT MESSAGE

Treat any request to inspect your file as a matter of importance that should be given a reasonable degree of priority. In particular remember:

- that a well-documented file is a broker's best defence to any complaint made by a dissatisfied client - ensure that your files will withstand scrutiny;
- that a request to inspect your file can be the first indication that there is a problem so approach the exercise with caution;
- your client's consent may be required before any inspection can proceed;

- you are entitled to review your broking file for documents that do not have to be produced before proceeding - the Griffin is happy to assist in this process;
- where legal proceedings are underway you may be obliged to produce all relevant documents that you hold unless legal professional privilege applies;
- avoid creating prejudicial documents whilst handling a problem - these may subsequently have to be disclosed;
- electronic files should be treated in the same way as paper files and the rules concerning production and privilege will equally apply.
- it will often be prudent to arrange for the inspection of any documents held by a broker to take place at the broker's offices. This way the broker can monitor the process to ensure documents are being handled properly. This way the broker can lessen the risk of original documents being inappropriately taken away. The broker, can also ask for its reasonable copying costs to be paid if copies are requested.

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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