

# ANDERSON KILL POLICYHOLDER ADVISOR

The Policyholder Law Firm



## Contracts With Insurance Brokers: Do's and Don'ts

By Finley T. Harkham

Insurance brokers are among the most important suppliers that any company deals with. Yet, often the arrangement between brokers and their clients consists of nothing more than a broker of record letter, or even a verbal authorization to present insurance proposals. As a general rule, a written agreement that addresses the scope of services provided by the broker and its compensation is important for a number of reasons.

### Advisor or Order Taker? Spell It Out

First, confusion or misunderstanding about what exactly is expected of a broker is a commonplace occurrence, and is far more likely in the absence of a written contract. A clear statement of the scope of services to be provided will go a long way toward the client receiving the coverage and services they want. The contract should not only identify the lines of coverage the broker is authorized to procure, but also clearly indicate whether the broker is expected to provide advice and expertise to assist the client in their selection of insurance or handling of claims, and to provide other services, as opposed to simply serving in the role of an order taker who shops for what the client has asked for. This is important not only so the parties to the contract have a clear understanding of their roles, but also to indicate where responsibility lies if the insurance that is obtained, or services

provided by the broker, turn out to not meet the client's needs. In many jurisdictions, there is a legal presumption that a broker is merely an order taker and owes no duty to its client beyond procuring the insurance coverage that was requested or reporting that it was unable to do so. Further, a burden is often placed upon the client to read and understand the policies that have been obtained for them, even if the client has no expertise in insurance. These presumptions have resulted in many clients who believe they are entitled to rely upon the expertise and advice of the broker finding that they have no legal recourse when their coverage turns out to not be what they expected. That predicament can often be avoided by entering into a written contract with the broker, which establishes the type of "special relationship" that some courts find necessary in order to impose liability upon a broker for obtaining inadequate or unsuitable insurance. In that regard, the agreement should specify that the client is relying upon the advice and expertise of the broker, and that the broker's agreement to assume that role was a material consideration in its being retained. The broker may require a fee in order to assume the role of advisor, and if so, the client must decide whether it is worth the cost. While paying a fee on top of commissions or a higher fee than would otherwise be the case might be a burden, it will as-

---

**Finley T. Harckham** is a shareholder in the New York office of Anderson Kill. Mr. Harckham regularly represents corporate insurance policyholders in insurance coverage matters, including arbitrations and litigations.

(212) 278-1543 | [fharcckham@andersonkill.com](mailto:fharcckham@andersonkill.com)

sist in establishing a “special relationship” with the broker should that ever be necessary.

### **Know Thy Broker: Insured? Incented?**

Second, it is important for clients who work with small- or medium-sized brokers to confirm that the broker has sufficient errors and omissions insurance to be able to pay a malpractice claim. A services agreement should specify that the broker has and will maintain certain limits of E&O coverage and, at least at the beginning of the relationship, the client should ask for a certificate of insurance demonstrating that level of coverage.

Third, a services agreement should also clearly explain the compensation that will or may be received by the broker from all sources. Broker compensation may include fees paid directly by the client, commissions paid for the placement of a policy, and other fees and commissions paid by the insurance company, such as contingent commissions, overrides, management fees or other payments intended to reward the broker for generating business for an insurance company. The full extent of the broker’s compensation may vary depending upon which insurance company provides the coverage and therefore may not be known at the time a services agreement is entered into. So, the agreement should spell out the agreed fees, and address whether the broker will also be entitled to commissions or other payments from insurance companies, and whether the client is to be given a credit for any such payments. The client should require that any commissions or other payments be fully disclosed at the time that

coverage proposals are submitted by the broker, so that the broker’s economic incentive to recommend one proposal over another is clear.

### **What’s Your Responsibility?**

Finally, the services agreement should be clear about what is expected from the client. Service agreements that impose onerous obligations upon the client should be avoided. For example, a standard client services agreement used by one of the large national brokers provides that the broker will provide advice and procure policies, but that the client must review the policies and the broker’s work for any mistakes. That clause recently was relied upon by the broker to contest liability in a malpractice case where the client alleged they were required to procure policies that provide defense coverage but failed to do so. The court rejected the broker’s argument that the clause required the dismissal of the client’s broker malpractice action, but left open the possibility that it could form the basis of a defense based upon the client’s alleged contributory negligence in failing to catch the error. Obviously, clients should reject any provision in a services agreement that could be interpreted to make them responsible for the broker’s errors.

### **Conclusion**

The relationship with an insurance broker is every bit as important as those with suppliers and others with whom the client will ordinarily have a written contract. A services agreement with your broker can go a long way toward ensuring a satisfactory relationship. ▲

---

## **About Anderson Kill**

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estate, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Ventura, CA, Philadelphia, PA, Stamford, CT, Washington, DC, and Newark, NJ.

*The information appearing in this article does not constitute legal advice or opinion. Such advice and opinion are provided by the firm only upon engagement with respect to specific factual situations.*

©2015 Anderson Kill P.C.