

What Do You Expect Your Insurance Broker To Be: Intermediary Or Fiduciary?

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As many companies are reaching their insurance policy renewal date, your company might have questions about the role of your insurance broker. Your company should expect its insurance broker to be a valued intermediary between your company and its insurer, who helps get claims paid. The broker's role is to build and maintain relationships with carriers so your company gets the best available policies, and to persuade them to pay covered claims even when (and perhaps especially when) there is a reasonable dispute over coverage. The right broker leverages these relationships for your company's benefit and is able to elevate a coverage dispute to the insurer's management. The right broker is able and willing to ask a carrier to accommodate the policyholder in the event of a questionable claim, on the assumption that the broker with a satisfied client is more likely to drive more premium revenue to the insurance company. The wrong broker works at arms' length from the policyholder, unable to offer options in policy procurement. The wrong broker does not communicate with the policyholder about reasonable expectations of coverage. The wrong broker is unwilling or unable to intervene at a high level within the insurance company to press for a claim resolution driven by business considerations and the scope of coverage. To have reasonable expectations of the broker, it is important to understand what it is not. Under the law of certain states, your communications with the broker might not be privileged and might be discovered by an adversary in litigation. The broker will tell you what he or she thinks the policy is supposed to cover, but will not give you legal advice about what a court might rule if asked to interpret coverage. If the broker is included in a call or meeting between you and your coverage counsel, his or her presence could result in a waiver of the attorney-client privilege, depending on the state law that applies to the question of privilege. The broker may even have agency relationships of varying scope with the insurance company with which coverage is placed. **Advocate and Intermediary** The broker's best role is that of an advocate who has access to the insurer's decision-makers and is willing to strongly argue your coverage position. But don't expect the broker to be devoted solely to your company's interests. This often is why companies have coverage counsel. The broker is uniquely situated as an intermediary, more or less, between your company and the carrier. Even though your company is the broker's client, it is the broker's relationships with and access to insurance company higher-ups that create value for the policyholder. If you expect the broker to be entirely adverse to the opposing insurer, you will be disappointed. What

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the broker brings to the table is access, which necessarily means the ability to go back and forth between two camps. Cutting off the broker's access to the insurance company camp would substantially reduce his or her effectiveness. Your insurance coverage lawyer does not have the same kind of relationship with opponents at insurance companies. Coverage counsel's job is to do what it takes to accomplish the policyholder's objectives. He or she can't back away from an aggressive stance to protect a relationship with a carrier without breaching a lawyer's duty of complete and unconflicted loyalty to you, the policyholder.

Responsibility as Fiduciary The different duties of care owed to the policyholder by the broker and coverage counsel reflect the lawyer's duty of undivided loyalty to the client, and the broker's less polarized status. Under the professional liability law of certain states, an insurance broker might assert that it should not be considered a fiduciary and, accordingly, not have a duty to volunteer an opinion on any topic. The broker frequently is obligated by the standard of care to answer client questions correctly, and if he or she offers an opinion, it must be right. But if he or she isn't asked whether, for example, the proposed policy limits are adequate, the broker in certain states might not have a duty to speak up and say so – even if the proposed limits are obviously insufficient. These standards, a broker likely would assert, could be seen as reflective of his or her role as intermediary. The broker has to be able to sell the policyholder's position in a way that convinces the carrier that if it pays the disputed claim, the broker will bring more business its way. By contrast, in most states one's lawyer is considered a fiduciary. The scope of insurance coverage counsel's professional duty of care can include an obligation to advise the client on an issue generally within the scope of the engagement but on which no opinion has been specifically requested. Your company's dealings with its insurance companies can be improved by having a broker and coverage counsel who understand their different jobs – one an intermediary (who might assert that it should not be considered a fiduciary), the other a fiduciary – and work well together. If you ask the broker and coverage counsel to do their very different jobs in tandem, with the same strategic aim of getting a difficult claim paid, you will be deploying the expertise available to your company effectively – and maximizing your chances of success.