

RECORD-KEEPING REQUIREMENTS

Part I

This series of articles will address the question of how long insurance agents and other insurance licensees must keep the records generated by them in the conduct of their insurance business and in what form those records may be kept. In Part I, the general provisions of the Georgia Insurance Code and the regulations issued by the Insurance Commissioner's Office regarding the type of records that must be kept and by whom will be discussed. Part II will discuss the specific recordkeeping requirements imposed on agents, subagents, and counselors. Part III will discuss the type of records that should be kept by Association members in light of the provisions of certain other Georgia statutes and the Internal Revenue Code and the question of in what medium required records may be kept.

The record-keeping provisions of the Insurance Code apply to every person who holds a license of any kind issued by the Insurance Commissioner's Office. This includes agents, subagents, counselors, and adjusters, as well as the holders of limited, temporary, probationary, and out-of-state licenses of any kind. All such persons are required to maintain "a record of all transactions consummated under [their] license." These records must be kept at the address shown on their license or at the Georgia regional or home office of any insurance company that may be involved in such a transaction. For agents and subagents, this requirement can also be satisfied if the insurance agency for which the transaction in question was undertaken keeps the required records of that transaction.

All such records must be kept for at least five years after the completion of the insurance transaction in question or the term of any contract involved in the transaction, whichever is greater.

The record-keeping provisions of the Insurance Code permit the Insurance Commissioner to require the maintenance of a record of "such other and additional information . . . as may be reasonably required" by the Commissioner in the exercise of his or her discretion. The Insurance Commissioner has issued a requirement that all licensees keep a record of any "complaint" made against them. A "complaint" is defined as any "written complaint that alleges any violation of state or federal law, or of any regulation, directive or bulletin of the Department." The record to be kept must "identify the complaint and the file [its related to], if any, the nature of the complaint and the steps taken to resolve the complaint, all in such detail

as may be necessary to reconstruct the matter.” There is nothing in this regulation that indicates how long a record of a “complaint” must be kept, but the safe course of action would be to keep it for at least five years after the “complaint” is resolved.

Part II

The information that must be kept concerning each consummated insurance transaction in which an agent or subagent is involved is specified in O.C.G.A. § 33-23-34. The record that must be kept of such a transaction must include, at a minimum, the policy number of each insurance contract procured or issued by or through the agent or subagent, along with the names of the insurer and insured under each contract, the amount of premium paid or to be paid for each contract, and a description of the subject of each contract. The above statute also requires that agents and subagents maintain a record of the names of any other licensees under the Insurance Code from whom they accept business and of those persons to whom they pay or promise to pay "commissions or allowances of any kind."

There are currently no regulations issued by the Insurance Commissioner that specify the format for keeping a record of the above information. It should be sufficient to keep copies of any insurance policies or other documents that contain the required information on the transactions in which the agent or subagent was involved and contracts covering any dealings between an agent or subagent and other licensees or persons, or any other documents generated by those dealings that contain the required information. The passage by Congress in 2000 of the Electronic Signatures in Global and National Commerce Act and the adoption of the Uniform Electronic Transactions Act by Georgia in 2009 permits all such information to be kept in an electronic format that complies with the requirements of those Acts, which are essentially the same. The electronic record must accurately reflect the information contained in the original document or other record and must remain accessible to all those with a right to see the information for the time period required by the applicable law.

Neither the statute nor any regulations issued by the Commissioner specify the information that must be contained in the record of consummated transactions to be kept by a counselor. By analogy to the statutory requirements concerning agents and subagents, it would appear that such a record must contain, at a minimum, the name of each insured to whom counseling services are provided, a description of the subject of those services, and the amount of compensation received for them, as well as the names of any other persons to whom

compensation of any kind is paid or promised to be paid by the counselor in connection with those services. It would also be prudent for counselors to keep the documents that they are required to provide to and obtain from their customers in the event they receive a commission, as well as a fee, for the placement of a particular insurance policy. See O.C.G.A. § 33-23-1.1 and O.C.G.A. § 33-23-46. As with the information required to be retained by agents and subagents, the information required of counselors can be kept in an electronic format that satisfies the requirements of the two statutes discussed above.

Part III

As noted in Part I, the licensing provisions of the Georgia Insurance Code require that certain information concerning all insurance-related transactions in which a licensee is involved must be kept for a minimum period of five years after the completion of the transaction or the term of any contract entered into in connection with it, whichever is greater. Where such a contract exists and it is in writing, Georgia law permits the bringing of a lawsuit for its breach at any time within six years after the breach allegedly occurred, unless the contract provides for a shorter period of time within which any such lawsuit must be filed.

If a written contract is executed "under seal", the time period within which a lawsuit for its alleged breach may be filed is extended to 20 years from the date the alleged breach occurred. Any written contract that makes reference to its having been signed "under seal" and has signature blocks containing the word "seal", the letters "L.S.", or to which a seal is actually affixed, is included in this category of contracts. Many insurance policies may well satisfy these requirements for a contract to be executed "under seal". You may want to review any employment agreements and other contracts to which you or your agency is a party to see whether they may also satisfy these requirements.

Finally, as a general rule, the Internal Revenue Code permits claims to be made by the IRS for additional taxes owed for a period of three years after the filing of a tax return for the year in which such taxes are claimed to be owed. There is no statute of limitations for such claims where the IRS alleges the existence of fraud in the preparation or filing of a particular tax return. In between these two extremes, there are other statutes of limitation for specific claims by the IRS.

A prudent course of action would be to keep any documents that may be relevant to breach of contract lawsuits or claims by the IRS against a licensee or the licensee's agency for at

least the period of time in which such lawsuits or claims could be filed or made. It is likely that these documents will contain most, if not all, of the information required to be kept by the Insurance Code's record-keeping statute and related regulations. Therefore, it should be possible to satisfy this obligation at the same time you are ensuring the availability of the documents necessary to prosecute or defend breach of contract lawsuits or claims made by the IRS.

Although the Electronic Signatures in Global and National Commerce Act and the Uniform Electronic Transactions Act both state that the mere fact that a document is in electronic format will not prevent its introduction into evidence, the person attempting to introduce an electronic version of a document will bear the burden of proving that it is an exact replica of the original document. Depending on the format in which the electronic version of the document has been kept that may be a difficult thing to do. For this reason, it would be a good idea to keep the originals or hard copies of those documents that may be relevant to breach of contract lawsuits or the making of claims by the IRS. After the time periods within which any such lawsuits or claims could be filed or made have expired, any such documents could be kept in an electronic format, if they were not disposed of. To the extent the information required to be kept by the Insurance Code and related regulations is not contained in any of these documents, it may be kept in any electronic format that is accessible and preferably, from which hard copies of it could readily be made.

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