The What and Why of Mandatory Malpractice Coverage

Insurance Ins and Outs

By Ankur Doshi and Emilee Preble



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Maintaining professional liability coverage is an important part of responsible law practice. Even careful and experienced practitioners may face claims arising from an alleged error, a missed deadline, a misunderstanding or a dissatisfied client. Malpractice coverage helps protect the licensee and the firm from significant defense costs and liability. By carrying adequate coverage, legal practitioners demonstrate sound risk management, safeguard the continuity of their practices and reinforce public confidence in the legal profession.

Mandatory Coverage in Oregon

Oregon is unique in the United States in recognizing the importance of professional malpractice coverage. Currently, Oregon is one of only two states that require attorneys and licensed paralegals practicing in the state to have malpractice coverage. Further, attorneys with their principal office in Oregon must obtain coverage through a captive fund — the Professional Liability Fund (PLF).

In the mid-1970s, the legal malpractice insurance market in Oregon was unstable. Carriers were entering and exiting the market with great frequency and premium rates were unpredictable from year to year. In response to this challenge, Oregon lawyers came together to create a mandated captive fund to provide a stable source of malpractice coverage for lawyers. The Legislature authorized the Oregon State Bar to create a pooled risk fund for malpractice coverage under ORS 9.080(2)(a)(A).

Through this legislation, the Oregon State Bar created the Professional Liability Fund in 1978 to provide this coverage. That legislation also authorized the OSB to require all active members (now licensees) engaged in the private practice of law with a principal office in Oregon to obtain malpractice coverage. The PLF was modeled after other captive bar-related insurance carriers in Canada; the closest aligned fund is the Lawyer's Indemnity Fund in British Columbia.

Most licensees with a principal office in Oregon are required through an Oregon Supreme Court Rule — Rule of Licensure 5.2 — to obtain malpractice coverage through the PLF unless they are otherwise exempt. Rule of Licensure 5.2 states:

> Each active licensee with a principal office in Oregon, and each attorney temporarily admitted to perform legal services under RFA 13.70 who is engaged in the private practice of law with a principal office in Oregon, is required to participate in the mandatory coverage of the PLF unless otherwise exempt under PLF Policy 3.150.

For licensees practicing in Oregon *without* a principal office in the state, Oregon still requires malpractice coverage. That coverage, however, cannot be through the PLF, which is limited to providing coverage to those with principal offices within Oregon.[1] Instead, these attorneys must obtain malpractice coverage that is "substantially equivalent" to the PLF's primary malpractice coverage plan. Rule of Licensure 5.3 governs the malpractice coverage requirements for these licensees:

> Each active licensee with a principal office outside Oregon who engages in the private practice of law within Oregon, and each attorney temporarily admitted to perform legal services who is engaged in the private practice of law in Oregon with a principal office outside Oregon, is required to obtain malpractice coverage substantially equivalent to PLF primary coverage unless otherwise exempt under the PLF Bylaws and Policies for a reason other than their principal office is not in Oregon.

Each year, during the bar's registration, licensees who are engaged in the private practice of law in Oregon but who do not have a principal office in the state have to certify that they have malpractice coverage substantially equivalent to the PLF's coverage. Attorneys file the certification through the PLF website — which requests that licensees indicate their purchase of coverage — or file an exemption under PLF Policy 3.150. Attorneys who select exemption (A) "Principal Office Not in Oregon" must also certify whether they practice law in Oregon, and if so, whether they carry professional liability coverage substantially equivalent to the PLF. Failure to obtain substantially equivalent coverage may result in administrative suspension under Rule of Licensure 3.1.

Exemptions

PLF Policy 3.150 establishes the categories that may exempt licensees from carrying PLF malpractice coverage. In addition to licensees without a principal office in Oregon

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JULY '24 | 8-FIGURE PRODUCTS LIABILITY
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(PLF Policy 3.150(A)), licensees may seek an exemption if they are employed exclusively as government lawyers or judges (PLF Policy 3.150(B)(1)); employees of corporations, businesses, or nonprofit organizations other than law entities (Policy 3.150(B)(2)); and employees or independent contractors of legal aid or public defender offices that provide qualifying professional liability coverage (Policy 3.150(B)(3) and (D)).

Exemptions also apply to licensees who are employed in nonlegal fields (Policy 3.150(B)(4)), retired from practice (Policy 3.150(B)(5)), working only as qualifying law clerks or supervised practitioners (Policy 3.150(B)(6) and (G)(7)), or unemployed (Policy 3.150(B)(7)). A catchall exemption covers other activities that do not constitute private practice or that would be excluded from PLF primary coverage. (Policy 3.150(B)(8)). Lawyers exempt because of qualifying employment may represent third parties when the representation remains within the scope of that employment. (Policy 3.150(G)(12)).

Pro Hac Vice

For pro hac vice applicants, Uniform Trial Court Rule (UTCR) 3.170 governs admission to the Oregon State Bar. UTCR 3.170 requires that the attorney seeking pro hac vice admission establish good standing and provide evidence of malpractice coverage. UTCR 3.170(1)(e) states:

> If the attorney will engage in the private practice of law in this state, provide a certificate of insurance covering the attorney's activities in this state and providing professional liability insurance substantially equivalent to the Oregon State Bar Professional Liability Fund plan.

As part of the application process,[2] applicants submit to the bar for review a certificate of insurance establishing that the attorney has substantially equivalent coverage. The certificate of insurance is mandatory for the bar to issue a certificate of compliance to allow the applicant to submit a motion to appear in front of an Oregon tribunal.

Substantially Equivalent

Coverage "substantially equivalent" to the PLF's malpractice coverage is not defined in either the UTCRs or the Rules of Licensure. In reviewing whether coverage is substantially equivalent, the bar compares coverage available in other states with the coverage offered by the PLF at the primary

level. As a starting point, it is helpful to review the details of what PLF coverage entails.

Generally, the PLF Primary Coverage Plan is intended to cover licensees for the work they do in the private practice of law. This includes the concepts of professional negligence and failure to meet the standard of care. The limits for PLF Coverage are $300,000 per claim with a $300,000 aggregate of all claims. A $75,000 defense allowance is also available for investigation and defense of claims apart from the indemnity limit. Unlike insurance coverage on the commercial market, PLF coverage does not impose any deductibles or sublimits, nor is there any underwriting based on practice areas.

While the plan is robust, it is not intended to cover all claims that can be made against licensees of the bar — limits, exclusions and conditions may apply. For example, the plan does not cover investment advice, cyber losses, wrongful or fraudulent conduct, or defense of bar complaints. A full list of exclusions is found in Section VI of the plan.

Other things not covered under the plan include general liability (think slip and fall coverage), employment practices, property insurance, etc. These would be covered under other insurance products a lawyer or law firm can purchase on the commercial market. PLF Coverage is limited to covering lawyers for the work they do in the private practice of law because that is the prescription the Legislature provided for in ORS 9.080.

Evaluation of Substantially Equivalent Coverage

One question that lawyers pose to the bar is whether their private insurance coverage deductible is disqualifying. "Substantially equivalent" coverage does not mean identical to coverage offered by the PLF. Indeed, as noted above, PLF coverage is unique in the United States. The lack of underwriting based on practice area as well as the lack of a deductible are characteristics that do not exist in other insurance products offered for legal malpractice coverage. The bar therefore evaluates coverage submitted for review on a case-by-case basis to determine whether it provides adequate financial coverage in the event of a claim for legal malpractice.

The bar evaluates coverage and the monetary reserves of a firm to pay any potential deductibles. At a minimum, the bar expects that the lawyer's private carrier will cover the $300,000 per claim and $300,000 total for all claims made by a party in a given year. Most private carriers offer coverage

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that exceeds those requirements. However, coverage deductibles vary and can impact whether coverage would be seen as substantially equivalent.

For instance, two firms could both have $10 million in coverage, with a required $500,000 deductible. One firm, consisting of 50 lawyers with cash reserves of $1 million, would be easily able to cover the deductible. This firm's coverage would likely be considered substantially equivalent to PLF coverage. Another firm, consisting of a solo practitioner with an operating reserve of $100,000, would not be able to cover the deductible on a claim in excess of $100,000. The bar would likely request that the firm seek additional coverage through a different insurance product that would allow for a $100,000 deductible, or show additional evidence of reserves to pay for the higher deductible. Absent additional coverage or higher reserves, the bar would likely consider this policy not substantially equivalent to the PLF's coverage.

Ultimately, "substantially equivalent" means that, viewed as a whole, the private carrier's policy provides coverage comparable to PLF primary coverage in the event of a malpractice claim. Policy limits, deductibles, exclusions, defense costs and the lawyer's or firm's ability to satisfy any obligation that occurs if a malpractice claim arises all affect that determination. The substantially equivalent language seeks to ensure that lawyers practicing in Oregon are adequately covered for potential claims of malpractice and that their clients are protected because their attorney has malpractice coverage. ■





Ankur Doshi is general counsel for the Oregon State Bar. Emilee Preble is director of administration and underwriting for the Professional Liability Fund.

ENDNOTES

1. ORS 9.080(2)(a)(A) limits the coverage provided under the PLF to those licensees who maintain a principal office in Oregon.
2. Applications for pro hac vice can be found at *osbar.org/prohacvice.*