OVERVIEW OF MANDATORY MALPRACTICE INSURANCE PROPOSAL UTILIZING EXISTING OPEN MARKET - “OPEN MARKET MODEL”

A. Applicability of Mandatory Malpractice Insurance Rule

This proposal would involve renaming and amending “Paragraph 18 Financial Responsibility” (as stated in the Organization & Government of the VSB). The new “Paragraph 18 Mandatory Malpractice Insurance Rule” would require every active member of the Virginia State Bar engaged in the private practice of law representing clients (either individuals or entities) drawn from the general public to maintain professional liability (malpractice) insurance coverage written by an insurance company authorized by state or federal law to offer such insurance in the jurisdiction in which the member practices.

Comments

The Committee takes the position that any mandatory malpractice insurance rule (“the Rule”) should apply to all active members meeting the above description seeking the privilege of holding a Virginia license regardless of whether the member’s practice is full time or part time and regardless of whether the member is located in Virginia or specifically serves Virginia clients. The Rule would not apply to associate members, judicial members, disabled and retired members, emeritus members, in-house corporate counsel, or counsel employed by governmental entities. The Committee acknowledges that some members may allege that compliance with the Rule imposes a significant hardship and may result in their inability to practice law, but the Committee concluded it would not be advisable to establish a protocol for obtaining a “good cause shown” waiver.

The Committee recognizes that the status of insurers may vary including those organized as mutual companies, risk retention groups, surplus line carriers, etc. The Committee’s only limitation therefore is that members obtain insurance from an insurance company generally allowed by law to sell malpractice insurance in the jurisdiction in which the member practices.

B. Minimum Policy Coverage Standards

The policy covering the member would need to provide minimum policy limits of EITHER $100,000 per claim with a claim expense allowance of at least $50,000 costs outside the policy limits OR $200,000 per claim where claims expenses are inside the policy limits. An extended reporting endorsement (tail coverage) is insufficient to satisfy this requirement.

Comments

The prescribed minimum coverage standards mirror the basic (lowest) policy currently offered by the two insurance companies insuring the majority of the solo and small firm practitioners in Virginia. The Committee opted not to impose any maximum deductible limit. Under an open market model, insurers would continue to determine appropriate deductibles on an individual case basis and in accordance with their own underwriting standards and the insured’s preferences.

While higher levels of per claim coverage would be desirable in most instances, as would an aggregate limit reflecting some multiplier of the per claim limit, the Committee’s focus was on making the transition from uninsured to insured as economical as possible. The present proposal, while minimal, arguably would afford an alleged victim of legal malpractice a greater opportunity to be compensated than would obtain without the insurance, and would afford the member the benefit of experienced claims handling and defense.
C. Reporting Requirements and Verification of Insurance

Each active member subject to the mandatory malpractice insurance provision would be required to certify to the Bar on or before July 31 of each year that he or she is covered by a professional liability insurance policy meeting the specified minimum standards and would be required to provide the name of the insurance company (not the agent) and the policy number. By signing the required certification, a member would authorize the Virginia State Bar, in its discretion, to verify with the named insurer the existence of the disclosed policy. Each active member shall submit the required certification upon admission to the Bar, as well as with each application for renewal thereof. A member would be required to notify the Bar within thirty days if the member becomes engaged in the private practice of law offering legal services to clients drawn from the general public. Additionally a member would be required to notify the Bar within thirty days if the member’s coverage lapses, is no longer in effect or terminates for any reason, unless the policy is replaced with another policy and no lapse in coverage occurs.

Comments

To be fully in compliance with the Rule, members who currently certify that they have insurance coverage need only to provide the name of the carrier and the policy number. Large firms who currently “batch” the required annual renewal paperwork can simply have the firm administrator supply (or even input) the name of the insurance carrier and policy number prior to the member’s certification. New bar members currently must fill out an official registration form which includes a malpractice insurance certification. New admittees who are not yet employed or have not yet established a practice, would simply indicate that they are not currently engaged in practice and would be instructed to notify the bar within thirty days of any change in that status bringing them under the Rule. Other members who in a given bar year previously certified they were not subject to the Rule, would also have an affirmative obligation to report a change in status bringing them under the Rule within thirty days of its occurrence.

There is no change proposed to the existing requirement that members notify the bar in writing within thirty days if their malpractice insurance policy is no longer in effect. Members would then be required to provide the name of the carrier and policy number of any replacement policy. Members making lateral transitions during the course of a year would have an obligation to confirm and report their coverage under the new firm’s policy. An extended reporting endorsement or “tail coverage” would not satisfy this requirement. The Committee considers the benefits of this Rule to outweigh any minimal burden it imposes on the approximately ninety percent of affected Bar members who currently report having malpractice insurance coverage.

The Committee opted to forego requiring any documentation in the form of a certificate of coverage or copy of a declaration page because of its trust that Virginia lawyers are truthful. If a question arises as to the accuracy of a member’s certification, the Committee considered it appropriate to specify that a member’s certification of insurance would be deemed authorization for the Bar to verify with the named insurer the policy’s existence and authorize the insurer to provide the information. It is not anticipated that this authority would be invoked with any frequency.

If a mandatory malpractice insurance requirement were adopted, the need for the current attorney record search option related to disclosure of lack of malpractice insurance would be obviated. The Committee’s proposal also eliminates the current provisions in Paragraph 18 related to the disclosure of “the date, amount, and court where rendered, of any unsatisfied final judgment(s) against such member, or any firm or professional corporation in which he or she has practiced, for acts, errors or omissions (including, but not limited to, acts of dishonesty, fraud, or intentional
wrongdoing) arising out of the performance of legal services by such member.” The current requirement has not yielded particularly useful information and has contributed to the underestimation of situations where a member of the public has suffered an uncompensated loss as a result of the actions of an attorney’s professional actions.

D. Failure to Comply

If a member fails to comply with the requirements of this Rule, he or she shall be subject to the penalties set forth in the “Paragraph 19 Provision for the Administrative Suspension of a Member.” It is recommended that the delinquency fee for a member who does not timely comply with the requirements of amended Paragraph 18 shall be $100, and the reinstatement fee shall be $250. An untruthful certification or unjustified failure to notify the bar of a lapse or termination of coverage shall subject the member to appropriate disciplinary action.

Comments:

The Committee determined that the consequences for failure to comply with a requirement for mandatory malpractice coverage should be the same as the consequences for failure to comply with the requirement for mandatory continuing legal education.

E. Implementation

It is recommended that the proposed changes to Rule 18 become effective on July 1 following approval of the rule change by the Supreme Court of Virginia provided that such an effective date allows for at least a six month period to promote member education and compliance.

Comments

The Committee anticipates that the effective date of any rule change would coincide with the commencement of the Bar’s fiscal year. (While the Rule would be effective July 1, the certification itself would not be due until July 31.) The Committee believes that a period of at least six months would be necessary to promote member education and to allow sufficient time for previously uninsured lawyers to apply for insurance, satisfy underwriting requirements, and obtain an insurance policy meeting the prescribed standards.

Respectfully submitted,

_______________________________
Darrel Tillar Mason, Chair
Special Committee on Lawyer Malpractice Insurance

February 21, 2008

Attachments:

Current and proposed mandatory certification regarding professional liability insurance
Current and proposed Paragraph 18
Current and proposed Paragraph 19