

211 CMR: DIVISION OF INSURANCE

211 CMR 90.00: LEGAL SERVICES PLANS

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90.01 : Purpose and Authority

St. 1977, c. 774 authorizes the establishment of legal services plans in Massachusetts. 211 CMR 90.00 implements the statute and creates guidelines and procedures for the establishment and operation of these plans. 211 CMR 90.00 promulgated under the authority of M.G.L. c. 175, §§ 4, 25, 47, 48; M.G.L. c. 175A, § 15(d); M.G.L. 176H, § 17; and M.G.L. c. 176D.

90.02 : Definitions

Commissioner means the Commissioner of Insurance appointed pursuant to M.G.L. c. 26, § 6, or his or her designee.

Division means the Division of Insurance established pursuant to M.G.L. c. 26, § 1.

Insurer means a corporation licensed under M.G.L. c. 175 to write legal services insurance under an insured legal services plan.

Legal Services Plan means a risk-spreading program under which the cost of legal services is not allocated individually to those who actually use the services but instead is pooled and distributed among all those who potentially can use the services. The terms does not include the provision of legal services incidental to other insurance coverages, such as the defense of lawsuits provided under automobile liability insurance, nor the arrangements specifically excluded by M.G.L. c. 176H, § 7. There are three types of legal services plans: insured indemnity; insured service; and membership. The characteristics of each are described in M.G.L. c. 176H.

Membership Plan Sponsor means a corporation formed under M.G.L. c. 180, a corporation formed under general or special law for any of the purposes set forth in M.G.L. c. 180 § 4, or a labor organization, which establishes and operates a membership legal services plan.

Subscriber means a person who has signed an individual contract, or is covered under a group contract, with an insurer or membership plan sponsor.

The terms covered dependents, covered legal services, and participating attorney are defined in M.G.L. c. 176H, § 1.

90.03 : Applicability

Except as provided below, 211 CMR 90.00 applies to all legal services plans established, operated, or sold in Massachusetts. No legal services plan benefits may be offered for sale unless the plan of operation, the benefit contracts, and the rates have been approved by the Commissioner of Insurance.

211 CMR 90.00 does not apply to:

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- (1) An automobile club providing legal fee reimbursement services in conformity with M.G.L. c. 174B.
- (2) A labor organization providing legal services to its members and their dependents.
- (3) A corporation formed under M.G.L. c. 180 providing legal services that do not exceed a limited amount of consultation and advise either alone or in combination with referral services.
- (4) An employee organization or employer which sponsors or co-sponsors an employee benefit welfare plan subject to the provisions of the Employee Retirement Income Security Act of 1974. This exemption does not apply to an insurance company associated with a plan under which benefits of prepaid legal services are provided in whole or in part through the purchase of insurance.
- (5) A program of student-supported legal services established pursuant to M.G.L. c. 175. An organization relying on one or more of the above exemptions must file a statement with the Commissioner which demonstrates that it qualifies for the exemption or exemptions.

90.04 : Plan of Operation and Benefit Contracts Approval

Each insurer and membership plan sponsor must file ~~a two copies~~ of its plan of operation and benefit contracts with the Commissioner ~~and one copy with each member of the Advisory Committee on Prepaid Legal Services~~. An insurer may not file before it has been licensed under M.G.L. c. 175 to write legal services insurance.

In the event the Commissioner determines that a filing is incomplete or that additional information is needed to properly evaluate a filing, he or she will notify the applicant in writing within 14 calendar days of the filing's submission concerning the additional documents or information that is required. Within 30 calendar days after the submission of a complete filing, the Commissioner will review it in accordance with 211 CMR 90.00 and either approve the plan of operation and the benefit contracts in writing or hold a hearing after not less than 15 calendar days written notice to all interested parties. In the event a hearing is held, the Commissioner will within 30 calendar days after the submission of briefs either approve the plan of operation and the benefit contracts in writing or notify the applicant of his or her disapproval and the ground or grounds for disapproval.

90.05 : Plan of Operation

(1) Internal Operations. Membership plan sponsors are not subject to the insurance company licensing process contained in M.G.L. c. 175. Instead, the internal operations of these sponsors will be reviewed under 211 CMR 90.05.

Membership plan sponsors must present a complete overview of their organization in their plan of operation, including a description of the organizational framework, the qualifications of management and key personnel, the proposed method of operation, and the financial resources of the enterprise. There shall be four sections of the plan of operation devoted to these internal matters. Each section shall contain the information described below plus any additional information that the membership plan sponsor considers relevant.

The first section shall consist of a copy of the articles or organization and bylaws.

The second section shall provide information on the organization's management and personnel. It shall include biographical sketches of the officers and directors, details of any agreements relating to the corporation to which any officer or director is a party, and the officers' salaries and details of their employment status (full-time or part-time), compensation, and employment history of key management personnel and consultants or contractors involved in administration, marketing, enrollment, benefit procedures, grievance procedures, and financial matters. In addition, the section shall list the names and addresses of the organization's legal, accounting, and actuarial representatives. Finally, the section shall describe any financial relationships among any of the persons mentioned in the section.

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The third section shall describe the proposed method of operation in all the functional areas, including marketing, enrollment, benefit procedures, and grievance procedures. The section shall also contain the outline of a training program and related materials prepared for new members of the organization's board of directors. The program shall be relevant to the duties of a director and shall include information on policy issues relating to legal services plans and the costs of legal service delivery.

The fourth section shall describe the financial resources of the membership plan sponsor and other pertinent financial and contractual information. The section shall include:

(a) The following financial statements for three years, projected on a quarterly basis for year one and annually for years two and three:

1. pro forma balance sheet;
2. statement of income and expense;
3. statement of changes in financial position;
4. cash flow;
5. capital expenditure; and
6. repayment schedule for existing or anticipated loans or alternative financing arrangements.

The financial statements shall be accompanied by detailed statements and justifications of the underlying assumptions used.

(b) A surplus statement, including the amount which will be maintained, the initial source of funding for the surplus, and justification for the surplus amount selected.

(c) A reserve statement, including the types which will be established, their amounts, and the manner in which they will be calculated.

(d) Copies of letters of financial support or credit, bonds, or loan guarantees.

(e) Any contracts with participating attorneys under which the attorneys assume part or all of the risk of claims exceeding revenues.

(f) Copies of any reinsurance, conversion or other agreements under which the covered legal services will be provided in the event the membership plan sponsor is unable or ceases to provide them for any reason.

(g) A copy of the vote of the Board of Directors designating the permissible forms of investments of the corporation's funds.

(h) A detailed statement of the organization's plan for the distribution of retained earnings.

(i) Fidelity bonds for all officers and all employees entrusted with the handling of funds.

The four sections of the plan of operation submitted under 211 CMR 90.05 may not contain any provisions that are unfair or inequitable in the judgment of the Commissioner. The articles of organization and by-laws shall provide that no more than $\frac{1}{2}$ of the directors may be participating attorneys and that at least $\frac{1}{3}$ of the directors will be subscribers who are not attorneys. For purposes of the preceding sentence, "subscribers" shall also include signatories of group contracts and "attorneys" shall include members of an attorney's immediate family and employees of an attorney.

The plan of operation must demonstrate to the satisfaction of the Commissioner that the membership plan sponsor possesses the ability to assure that promised benefits will be provided. In order to establish this ability, a membership plan sponsor must show, among other things, that it can establish and maintain a surplus of at least \$300,000. The Commissioner may reduce the \$300,000 minimum requirement if he or she is satisfied that existing contracts with participating attorneys provide a sufficient source of capital through direct capital contribution and by withholding a portion of the attorneys' fees. The Commissioner may also reduce the surplus amount if he or she is satisfied that reinsurance or other arrangements exist which adequately protect the rights of subscribers.

90.05 : continued

(2) Bona Fide Members. Membership plan sponsors must have a fifth section in their plan of operation which identifies the primary purpose of the corporation and describes the purposes for which the corporation was formed and its present and proposed activities. If the Commissioner determines that the primary purpose of the corporation is other than the establishment and operation of a membership legal services plan, then the membership plan sponsor shall observe the following standards relating to bona fide members of the corporation. First, contracts may be issued only to individuals who have been members of the corporation for at least three months. Second, enrollment in the legal services plan may not be made a condition of membership in the corporation. Finally, separate fees reflecting allocable expenses must be charged for corporate membership and legal services plan membership.

(3) Attorney Availability. Legal services plan benefits will be meaningful to subscribers only if they have no difficulty finding attorneys willing to furnish the covered legal services. Free access to attorneys can be assumed for insured indemnity legal services plans since M.G.L. c. 176H provides that subscribers may use any attorney in the United States. In insured service legal services plans and membership legal services plans, subscribers will be seeking the services of a limited number of participating attorneys. The insurers and membership plan sponsors associated with these plans must demonstrate to the Commissioner that a sufficient number of participating attorneys will be available at all times. This presentation in the plan of operation shall include the ratio of full-time equivalent participating attorneys to subscribers which will be maintained during the period of actual operations. The ratio shall be accompanied by a detailed explanation of how it was developed, including the use of projections of utilization of covered legal services by subscribers and covered dependents and projections of the amount of attorney-time required to furnish the covered legal services.

Even the most careful projections cannot guarantee that the panel of participating attorneys will in fact be of sufficient size. The subscribers of insured service legal services plans and membership legal services plans need further protection against an insufficient supply of attorneys.

Specifically, a subscriber of an insured service legal services plan must be permitted to use any nonparticipating attorney so long as the subscriber mails the insurer a written notice before receiving any legal services. In addition, the non-participating attorney must be paid the same benefits as a participating attorney. A subscriber of a membership legal services plan must be allowed to use a non-plan attorney at the membership plan sponsor's expense if the subscriber is unable to find a participating attorney willing and able to handle a non-frivolous matter that is a covered service.

The sponsor may deny access to the non-plan attorney if the subscriber's problem does not require prompt attention and a qualified participating attorney will be available within a reasonable time. The sponsor must, however, have an impartial procedure for settling disagreements about the grounds for demanding a non-plan attorney. Each insurer and membership plan sponsor shall demonstrate to the satisfaction of the Commissioner that the requirements presented above have been met. The plan of operation of insurers shall include the relevant language of the benefit contracts and a description of the manner in which payments to non-participating attorneys will be computed. The plan of operation of membership plan sponsors shall include the relevant language of the benefit contracts, a description of the procedure that will be used for settling disagreements, and the identity of the party selecting the attorney (membership plan sponsor or subscriber).

(4) Participating Attorney Contracts and Performance. The plan of operation for insured service legal services plans and membership legal services plans must contain a copy of all participating attorney contract forms and any documents referred to in the contracts. The Commissioner will disapprove the plan of operation if he or she determines that use of the contract forms will tend to increase the cost of legal services through anti-competitive practices illegal under M.G.L. c. 93, 83A, or 176D. The Commissioner will also disapprove the plan of operation if the contracts do not effectively encourage participating attorneys to utilize all feasible cost saving approaches. Finally, the Commissioner will disapprove the plan of operation if the contracts do not comply with the rules of the Supreme Judicial Court relating to the practice of law or the contracts do not require participating attorneys to carry malpractice liability insurance.

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The plan of operation for insured service legal services plans and membership legal services plans shall also contain a copy of a subscriber satisfaction form and a plan for its distribution. The form must be distributed to all subscribers after they have received a covered legal service. The form must elicit information on the quality of the services received, including the promptness, openness, courteousness, and ability of the participating attorney and his or her clerical and paralegal support personnel. The form shall clearly indicate that the subscriber need not furnish his or her name.

The subscriber satisfaction form required by this section may be provided through electronic media if the customer affirmatively consents to receiving such forms electronically and the form is provided in a format that the consumer may retain by printing or storing in a digital format.

90.06 Benefit Contracts

Each insurer and membership plan sponsor must submit a copy of its group and individual contract forms along with the plan of operation. Each group contract form must be accompanied by the certificate that summarizes the provisions of the contract for the group subscribers. Each certificate and individual contract form must be accompanied by its Flesch scale readability score, computed by the procedure specified in M.G.L. c. 175, § 2B.

The Commissioner will disapprove any certificate or group or individual contract form that contains any provisions which are unfair, inequitable, misleading or deceptive. The Commissioner will disapprove a certificate or contract form under this standard if it permits the insurer or membership plan sponsor to reduce the level of benefits or assess subscribers during the coverage period.

The Commissioner will disapprove any certificate or individual contract form that does not meet the standards set out in M.G.L. c. 175, § 2B or that does not state clearly and in understandable style and language:

- (1) The benefits available to the subscriber and his or her covered dependents.
- (2) The limitations and exclusions on the benefits, including an explanation of any deductible, coinsurance, or copayment features and any waiting periods.
- (3) The manner of obtaining benefits, including the type of attorneys that may be used, the procedures, including those of appeal, that must be followed before nonparticipating attorneys may be used and the claims procedure.
- (4) The organization's procedure for the use of the subscriber satisfaction form and its procedure for resolving complaints concerning the operations of the legal services plan and the quality of participating attorneys, including a telephone number for registering grievances.
- (5) The role of the Board of Bar Overseers in regulating attorney conduct and the procedure for submitting complaints to the Board.
- (6) The statutory procedure for obtaining a Division of Insurance hearing on any dispute or controversy arising between the insurer or sponsor and any subscriber or between any attorney and subscriber.
- (7) The conditions upon which the certificate may be extended, renewed, amended, canceled or otherwise terminated.
- (8) The premium which must be paid by or on behalf of the subscriber and the coverage period.
- (9) The number of days of grace (minimum of 30) which will be allowed for making any payment due under the certificate or individual contract.
- (10) A general information telephone number.

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90.07 : Modification of Plan of Operation and Benefit Contracts

No insurer or membership plan sponsor shall change any provision of its plan of operation or benefit contracts without the Commissioner's prior approval. Proposed changes shall be filed and reviewed in the same manner as the original document. Each filing shall include an explanation supporting the need for the change.

90.08 : Rates

No insurer or membership plan sponsor shall use rates which are inadequate, excessive, or unfairly discriminatory. The rates used shall enable subscribers to receive legal services at a reasonable cost and shall tend to restrain any inflation in the cost of legal services attributable to the operation of legal services plans. The burden of demonstrating that proposed rates fall within the standards of this article shall lie entirely with the insurer or membership plan sponsor. To assure reasonable opportunity for the Commissioner to scrutinize rates, insurers and membership plan sponsors must file all proposed rate schedules no less than 15 calendar days prior to their intended effective date. The Commissioner may delay the implementation of any proposed rates for an additional 30 calendar days at his or her sole discretion while the Division conducts an investigation of the proposed rates. The Commissioner may issue a notice of hearing at any time during the period between the filing of a proposed rate schedule and its effective date. The effective date shall then automatically be postponed until the issuance of a decision approving or disapproving the rates.

If the Commissioner does not issue a notice of hearing, the rates shall become effective on the date specified in the filing or, if the Commissioner has delayed their implementation, on the date specified by the Commissioner.

No filing shall be accepted in accordance with this article unless it includes a detailed statement of the procedures used to derive the rates and an explanation by the insurer's or membership plan sponsor's actuary supporting the actuarial assumptions and calculations utilized in the submission.

90.09 : Reporting Requirements

(1) Quarterly Reports. Until such time as the Commissioner notifies an insurer or membership plan sponsor otherwise, each insurer and membership plan sponsor shall file a quarterly report with the Commissioner within 45 calendar days of the close of its fiscal quarter. The report shall contain a balance sheet, a statement of income and expense, and a statement of changes in financial position. The financial statements shall be based on legal services plan operations only. The financial statements shall be comparable and their form and content shall be governed by those procedures and practices prescribed by generally accepted accounting principles. The first four quarterly reports shall compare actual operations against the related projections appearing in the plan of operation. The quarterly report shall also include the total number of subscribers, the number of new subscribers, the number of subscriber terminations, and the number of covered legal services provided.

(2) Annual Grievance Reports. Every insurer and membership plan sponsor shall file with the Commissioner, within 90 calendar days of the close of its first and second fiscal years, a statistical summary by quarter of grievances about participating attorneys, the administration of the plan, and other matters. The report shall be prepared on a form prescribed by the Commissioner.

(3) Annual Audited Financial Reports. Every insurer and membership plan sponsor shall annually file an audited financial report with the Commissioner no later than 120 calendar days after the close of its fiscal year. The filing date may be extended prior to the due date by the Commissioner if an insurer or membership plan sponsor can demonstrate to the Commissioner's satisfaction that an extension is justified. The audited financial report shall be based on legal services plan operations only.

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The audited financial report of insurers shall be prepared in accordance with 211 CMR 19.00, with the following modifications:

- (a) 211 CMR 19.04, 211 CMR 19.08(3), 211 CMR 19.10(1)(g) 211 CMR 19.10(7), 211 CMR 19.13 (first paragraph), 211 CMR 19.16, and 211 CMR 19.17 (second paragraph) do not apply.
- (b) Calendar year references shall be changed to the analogous fiscal year references.
- (c) "The opinions on the financial statements filed pursuant to 19.05(2) shall conform with generally accepted accounting principles." shall be substituted for the third paragraph in 211 CMR 19.09.

The audited financial report of membership plan sponsors shall be prepared in accordance with 211 CMR 19.00, with the following modifications:

- (d) "Membership plan sponsor" shall be substituted for "insurer."
- (e) 211 CMR 19.04, 211 CMR 19.08, 211 CMR 19.10(1)(9), 19.10(2), 19.10(3), 19.10(5), 19.10(6)(a), 19.10(7), 211 CMR 19.13, 211 CMR 19.16, 211 CMR 19.17 do not apply.
- (f) Calendar year references shall be changed to the analogous fiscal year references.
- (g) References to the annual statement shall be ignored.
- (h) "Statement of income and expense" shall be substituted for 211 CMR 19.05 (2)(b).
- (i) "Statement of changes in surplus" shall be substituted for 211 CMR 19.05(2)(d).
- (j) "The opinions of the financial statements filed pursuant to 211 CMR 19.05(2) shall conform with generally accepted accounting principles." shall be substituted for the third paragraph in 211 CMR 19.09.

(4) Reporting on Changed Circumstances.

Each insurer and membership plan sponsor shall inform the Commissioner within five calendar days of any extraordinary loss or claim which has the potential to render it unable to meet its obligations, any impairment of its capital or surplus, or any change in its control. "Control" exists if a person, group of persons, or entity possesses the power to direct or cause the direction of the management and policies of an insurer or membership plan sponsor, whether through ownership of voting stock, by contract, or otherwise. "Control" shall be presumed to exist if any person or entity owns, controls, holds with the power to vote, or holds proxies representing 10% of the voting stock of an insurer.

(5) Additional Reports.

An insurer or membership plan sponsor shall submit reports in addition to those required under 211 CMR 90.09(1) through 90.09(4) if requested to do so by the Commissioner.

90.10: Examinations

Examinations of insurers will be conducted in accordance with M.G.L. c. 175, § 4 of and 211 CMR 19.15. Examinations of membership plan sponsors will be conducted in accordance with

M.G.L. c. 176H § 13 and 211 CMR 19.15, with "M.G.L. c. 176H, § 13" substituted for M.G.L. c. 175, § 4.

90.11: Books and Records

Every insurer and membership plan sponsor shall keep its books of account and other records current.

In addition, every insurer and membership plan sponsor shall maintain a file of all its advertising and marketing materials, with a notation attached to each describing the manner and extent of its distribution. This file shall be furnished to the Commissioner upon his or her request - This file will be reviewed periodically by the Division of Insurance in order to ensure that no materials are unfair or deceptive in violation of M.G.L. c. 176D.

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Every insurer and membership plan sponsor shall collect and maintain data which will permit it to readily determine for any given period the total number of covered legal services provided, the total hours of attorney time involved, the total amount of attorneys' fees, the total amount of attorneys' fees paid by the insurer or membership plan sponsor, and the total deductible payments, coinsurance payments, and copayments made by subscribers. In addition, every insurer which writes legal services insurance under an insured service legal services plan and every membership plan sponsor shall maintain in summary form the results of the subscriber satisfaction forms. This information shall be furnished to the Commissioner upon his or her request.

~~All books and records must be kept in an easily accessible place at the main office of the insurer or membership plan sponsor for three years. After that time, they may be stored or microfilmed, but the original records or microfilm copies must remain available to the Commissioner for at least two more years.~~ All books and records must be accessible at the main office of the insurer or membership plan sponsor for three years. After that time, they may be stored in any retrievable format as long as original records or copies thereof remain available to the Commissioner for at least two more years.

90.12 : Agents

Persons selling the benefit contracts of insurers shall be licensed under M.G.L. § 163 of c. 175. Persons selling the benefit contracts of membership plan sponsors shall register with the Commissioner on a form prescribed by him or her.

90.13 : Severability

If any provision of 211 CMR 90.00 is held invalid such invalidity shall not affect any other provisions.

REGULATORY AUTHORITY

211 CMR 90.00: M.G.L. c. 176H, § 17; M.G.L. c. 175A, § 15(d);
M.G.L. c. 175, § 4, 25, 47, 48; M.G.L. c. 176D.