

Lawyers on disability

Even with a good individual disability policy, expect the carrier to look askance at a lawyer's claim

By Terry Coleman

Surprisingly, adequate disability insurance coverage is too often overlooked as a key component in attorneys' financial planning. According to the U.S. Department of Labor, Bureau of Labor Statistics, only 40 percent of professionals have long-term disability insurance. And yet, the risk of suffering a disability during your working lifetime is significant. Nearly one in three women can expect to suffer a disability that keeps them out of work for 90 days or longer at some point in their working years. For men, the odds are about one in four. One worker in seven can expect to be disabled for five or more years before retirement.

An uninsured disability can wreak financial havoc. It stops income, increases expenses, and prevents building a retirement nest egg. Disabilities have caused nearly half of all mortgage foreclosures.

Obtaining the right coverage

Generally, there are two types of disability insurance marketed to lawyers: (1) group coverage issued to a firm insuring all of the firm's employees; and (2) individual coverage issued to an attorney as the policyholder. If your only source of disability insurance is a group policy obtained through your firm, beware; your coverage likely provides an inadequate level of benefits, and your insurer may have little incentive to pay those benefits in any event.

Group coverage is inexpensive, but you get what you pay for. The coverage usually is not portable, meaning that you will lose your coverage if you change firms. The benefit amount is typically insufficient to adequately cover living expenses. Although group policies purport to provide monthly benefits of 60 to 70 percent of pre-disability earnings, those benefits get reduced by various offsets for other benefits, such as Social Security Disability Income benefits, Worker's Compensation benefits, and third-party recoveries. The severely disabled often see the amount of their benefits significantly eroded by these offsets.

Moreover, group policies issued to private law firms are likely to be governed by the federal Employee Retirement

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Income Security Act (ERISA), which operates to preempt state-law causes of action for insurance bad faith. (*Pilot Life Ins. Co. v. Dedeaux* (1987) 481 U.S. 41, 54-57.) Under California state law, if a disability insurer wrongfully denies benefits, it may be held liable for unpaid past benefits, the present value of future benefits, emotional distress and other consequential damages, attorneys' fees, as well as punitive damages under Civil Code section 3294. But those remedies are wiped out by ERISA preemption, which generally restricts recovery to the amount of past benefits and attorneys' fees. Under an ERISA-regulated policy, there is nothing to deter an insurer from denying claims deliberately, fraudulently or maliciously. As infamously stated by a disability insurance executive in an internal memo, "The advantages of ERISA coverage in litigious situations are enormous: state law is preempted by federal law, there are no jury trials, there are no compensatory or punitive damages, relief is usually limited to the amount of benefit in question, and claims administrators may receive a deferential standard of review." The executive went on to state that his company had paid out $7.8 million to settle 12 state-law cases, but if ERISA had applied, the company's liability would have been "between zero and $0.5 million."

The most valuable and reliable source of coverage is an individual disability insurance policy you purchase on your own. A privately owned policy continues to provide coverage if you change firms; it can, depending upon the definition of disability selected, insure against your ability to work as a trial attorney; and it is regulated by California's robust insurance protection laws. It is, however, more expensive. *Consider obtaining an individual policy as well as group coverage.* There are many benefits to arranging your insurance protection in this manner. It provides the greatest amount of benefits, maintains state law at least insofar as the individual coverage, and keeps premiums at a reasonable level.

Below are some of the important policy features and terms your insurance agent will talk to you about when discussing your disability insurance options. In general, you will want "own-occupation" coverage that pays benefits at least to age 65, with premiums paid for in after-tax dollars to ensure the benefits will be tax-free.

Policy Feature	Description
Benefit Period	The maximum period of time the insurance company is obligated to pay monthly disability benefits. Common periods are to age 65, or lifetime. Additionally, some policies have different maximum benefit periods for different types of disabilities, e.g., to age 65 for disabilities due to sickness, and lifetime for disabilities due to accident.
Elimination or Waiting Period	Period of time from the commencement of the disability to payment of monthly benefits. Common elimination periods last 30, 60, 90 or 180 days.
Residual Benefits	Pays a partial benefit when the insured is only partially disabled, e.g., can only work half time. Residual benefits are paid based on a formula taking into account the percentage loss of income.
Own Occupation Coverage	Provides for 100 percent of disability income benefits if the insured is unable to work in his or her specific occupation. Policies sold today increasingly limit the duration of own occupation coverage to 24 months, and thereafter require the insured to be disabled from any other gainful and suitable occupation in order for benefits to be owed.
COLA	Total disability and residual benefits each year are increased by a specified percentage or by the increase in the Consumer Price Index.
Future Purchase Options	The right to purchase additional amounts of monthly benefits based only on financial (and not medical) underwriting.

Obtaining the benefits if disaster strikes

If you suffer a disabling sickness or injury, you will be required to submit a formal claim for benefits, generally consisting of a Claimant's Statement that details your occupational duties and how your sickness or injury prevents you from working as an attorney, together with an Attending Physician's Statement that your treating doctor is certifying your diagnosis and resulting restrictions and limitations.

Great care needs to be given to these statements. Any inaccurate or incomplete information may doom the claim from the outset. Moreover, the claim forms supplied by most disability insurers are drafted in such a manner as to discourage claimants from submitting complete and accurate information. For example, every claim form asks the insured to specify an exact "date of disability" within a box only so big as to permit entry of a month, day and year. Often, however, the beginning date of a disability, particularly one arising from a progressive neurological condition, is not readily apparent. Like many professionals, attorneys often try to work through significant medical conditions and avoid having to submit a claim. Consider submitting a narrative statement to accompany the unhelpful claim form if any events or circumstances should be explained.

Do not expect your carrier to understand or care about the true occupational

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demands of being a trial attorney. "Total disability" within the meaning of an insurance policy is not complete helplessness. Instead, for occupation-specific coverage, it is the inability to perform the substantial and material duties of the insured's own regular occupation with reasonable continuity in the usual and customary manner. (*Hangarter v. Provident Life & Acc. Ins. Co.* (9th Cir. 2004) 373 F.3d 998, 1006.)

Trial law: a sedentary occupation

Every trial attorney knows that the work is grueling. It is often physically demanding and is always cognitively demanding. Carriers often try to equate the duties of an attorney to the physical demand characteristics of a general sedentary occupation, in disregard of the cognitive demands of the occupation or the rigors that come with trying a case or traveling for depositions. Consider this extremely generic conclusion from an in-house vocational expert concerning our client's occupational demands: "Based on a review of the above, it is my opinion that the Insured's duties in the above-noted policy correspond most closely with the U.S. Department of Labor *Dictionary of Occupational Titles* occupation of Lawyer (DOT#: 110.107-010) which is in the *Sedentary* strength classification." (Emphasis in original).

What a helpful description. Does the insured have to think clearly in order to actually work as an attorney? Might required high levels of morphine impair her ability to competently and ethically represent her clients in court? In another case, a senior adjuster of a large carrier disputed that our client, a business trial attorney suffering from chronic vocal cord polyps, had to even speak in order to perform his job. Here is a snippet of some actual deposition testimony:

Q. Now, is it your understanding that an attorney has to talk during depositions?
A. If an attorney is taking depositions?
Q. Right.
A. And asking questions?

Q. Right.
A. I would assume he would have to speak to ask the questions, although, he may use sign language.

Q. Do you know if he used sign language in any of his depositions?
A. I don't know.
Q. Do you know if any of the witnesses understand sign language?
A. I certainly don't know.

This case obviously settled favorably. But case law is replete with instances where carriers have indiscriminately tried to minimize the occupational demands of lawyers in order to justify a denial of benefits. (See, *Rosenthal v. The Long-Term Disability Plan of Epstein, Becker & Green, P.C.* (C.D. Cal. 1999) 1999 WL 1567863, *8 ("Rosenthal's physicians recognized the true nature of the important duties of her occupation as a trial attorney; Paul Revere's administrator and medical personnel either ignored or failed to understand them."); *Teicher v. Regence Health & Life Ins. Co.* (2008 D. Or.) 562 F.Supp.2d 1128, 1138-1139 (rejecting the insurer's position that a managing attorney was physically capable of working, noting, "With 28 years of legal experience (in a civil trial practice and as a state and federal trial judge), this Court knows the duties of a trial lawyer who manages a complex commercial law practice.")

Can you prevent an unscrupulous carrier from dumbing down the physical and cognitive demands of trial work in order to justify a denial of benefits? Perhaps not, but providing the carrier accurate and complete information regarding those demands is essential.

As in claims submitted by other professionals, carriers scrutinize the financial and medical records of attorney-claimants in order to find a basis to dispute payment of benefits.

He chooses to be disabled

With respect to an analysis of financial information, carriers often place their insureds in a no-win situation. In the carrier's view, either the insured was so successful as a practicing attorney that the decision to stop working was an early retirement, or the insured was not successful enough, such that the decision to stop working was the product of a desire to make money without having to work. In either case, the disability is one of choice and not the result of a disabling sickness.

There is no one-size-fits-all approach to overcoming these defense themes. At bottom, however, they are based on the argument that the disability insurer cannot trust the clinical evidence supporting disability, the opinions from the insured's treating physicians supporting disability, the observations of the insured's colleagues, co-workers, friends and family members supporting disability, and should instead accept that the insured suddenly chose to become an insurance fraud.

Disability insurers hire legions of doctors in every field of medicine to do one thing – read through medical records to seize upon inconsistencies between what the treating physician states in her "Attending Physician's Statement" and what she memorialized in her contemporaneous chart notes. Moreover, the disability insurer will not simply rely on your treating physician's opinion that you are disabled. Instead, if the precise statements that are subsequently made by the treater are not borne out in the chart notes, those statements are ignored. If it's not in the chart notes, it doesn't exist, in the mind of the carrier. Consider this statement from a recent denial of benefits to an insured-attorney: "We acknowledge that Dr. [X] may want to advocate for his patient, and we carefully considered the statements made in his September 10, 2013, letter. However, the contemporaneous chart notes from Dr. [X] do not provide documentation which would support that Mr. [Z] was impaired from

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performing the important duties of his occupation." An insurance company, however, "may not ignore evidence which supports coverage. If it does so, it acts unreasonably toward its insured and breaches the covenant of good faith and fair dealing." (*Mariscal v. Old Republic Life Ins. Co.* (1996) 42 Cal.App.4th 1617, 1624.) Moreover, an insurer cannot rely on its own interpretation of ambiguous medical records without asking the doctor that created them for clarification regarding any uncertainty. (*Miller v. National American Life Ins. Co*. (1976) 54 Cal.App.3d 331, 339.)

Stress doesn't cause heart attacks?

Cardiac claims comprise a significant percentage of the disability claims submitted by attorneys. In a typical scenario, following a near-fatal heart attack and successful bypass surgery, the insured's cardiologist recommends a change to a less stressful occupation in order to prevent a further cardiac event. Carriers notoriously dispute the effect of occupational stress on cardiac disease in spite of overwhelming medical literature supporting the fact that stress plays a major role in increasing the risk of a cardiac event:

- "Psychological Stress and Disease," an article published in the October 10, 2007, issue of the Journal of the American Medical Association (JAMA) cited a meta-analysis that estimated an approximate 50 percent increase in cardiovascular disease risk associated with high levels of work stress;
- "Job Strain and Risk of Acute Recurrent Coronary Heart Disease Events," also published in the October 10, 2007, edition of JAMA, detailed a study of patients who returned to work after a first myocardial infarction and found that "chronic job strain remained an independent predictor of recurrent CHD…";
- "Overtime Work and Incident Coronary Heart Disease: the Whitehall II Prospective Cohort Study," published in the May 12, 2010, issue of the European Heart Journal, described a survey of over six thousand British civil servants and found that 3 to 4 hours of overtime work per day was associated with a 60 percent greater risk of incident coronary heart disease.

In all claims, it is important that the insured's treating physicians are well-versed in the literature supporting their treatment recommendations, particularly where the recommended treatment includes cessation of trial work.

Hopefully, you will never have the need to submit a disability claim. But if you do, review your coverage carefully before submitting a claim, complete the paperwork with great care, follow the recommendations of your treating physician, and be sure to consult with a specialist if any questions or concerns arise.


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