

## Organizing Your Life

*“Finding” time, “finding” enjoyment*

*Carl Younger, President*

At Lawyers Mutual, we often highlight the need to have systems within your firm in order to be safe and efficient in your practice. The skills you use to organize your practice can also be used to organize your life. Relaxation does not mean we "turn off" our mind or body. Relaxation means a change of focus and goals.

1. **Family and Friends.** Once we leave our offices, our first focus should be on family and friends. Dedicate a certain amount of time each day to your children, your spouse and/or your significant other. For family members who are no longer at home, call or email them. During these times, let that person be the center of your attention. Let them know that they are important to you.

2. **Health.** Take time for yourself and exercise each day, at least 30 minutes if possible. You can walk with your spouse, play basketball or soccer with your children, or tennis with friends.

3. **Stay Informed, Especially Professionally.** Dedicate time during your midweek evenings to reading updates on legal issues and current events. You can do this reading while children do homework or while reading together with other members of the family. Consider a subscription to Lawyers Weekly. Read journals from state and local bar organizations. Consider surfing legal websites (law.com; findlaw.com; Lawyers Weekly - both nationally and North Carolina). Limit your watching of television and web searching so as not to place pressure on your "free" time.

### 4. **Stay Connected to Other Parts of Yourself.**

While a spiritual base helps keep me connected to myself and others, you may have another source of staying focused on issues affecting humanity and our world. You may want or need time to reflect or meditate. Take time each day - - mornings and evenings -- to consider the "non-factual matters" that affect you and your relationships with others or to reflect on how to remove the most immediate stresses from you life.



Carl Younger  
President

5. **Keep Exceptions as Exceptions.** Every schedule must be flexible and adapt to unexpected business and family events. However, don't let exceptions become the rule to take dedicated time away from your family, your health, or your other pursuits. Give your spouse or someone close to you the right to remind you if you divert from time dedicated to your core, personal goals. Most importantly, understand the person reminding you cares enough to raise the issue -- accept their "call" with understanding, not hostility.

To enjoy life, we do not need to live life without thought or planning. However, do not be obsessive by establishing absolutes. Follow a process that is flexible and respects your own goals and others. We think use of such a process will make you a better lawyer. More importantly, you will be a better and happier person.

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**2 Report Those Acts and Omissions**

# Report Those Acts and Omissions

*Answer those questions truthfully*

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Legal malpractice insurers, like other insurers who issue claims-made policies, are not prepared to insure against claims or circumstances which are likely to be made under a new policy. The issue is not whether a known claim or circumstance is likely to result in a judgment against the lawyer. The expense of defending a known claim, even a feckless claim, is much greater than the amount of premium paid by an insured in any given year. As one court observed, the situation is "like . . . a loose button - the wearer knows the button will drop, but not just when."<sup>1</sup>

Claims-made malpractice coverage is written on the basis that the proposed insured neither knew of a claim nor could reasonably have foreseen that known circumstances would be expected to form the basis of a malpractice action.<sup>2</sup> Courts that have considered a lawyer's duty to report known claims or circumstances to the malpractice insurer have examined principally two areas: (1) written responses by the lawyer on the policy application,<sup>3</sup> and (2) the terms and conditions of the policy.<sup>4</sup>

Lawyers Mutual's policy application asks:

14. During the past five years has any applicant been made aware of any claims or suits made against the firm or any of its predecessors in business, or any of the past or present partners or employed lawyers?
15. Is any applicant aware of any circumstance, act, omission, or offense which may result in a claim being made against the firm or any of its predecessors in business, or any of the past or present partners or employed lawyers . . . .

## **Failure to Disclose May Eliminate Coverage**

Courts in several jurisdictions have held that a claim asserted against an insured lawyer was not covered because the insured failed to disclose it as a potential claim on an application.<sup>5</sup> As early as 1915, the North Carolina Supreme Court held, "the insurance company is entitled to know the facts about which inquiry is made, in order to decide whether it will enter into the contract or not . . . the company being the judge of what it should know in order to determine whether or not it will issue the policy." *Cottingham v. Maryland Motor Car Ins. Co.*, 168 N.C. 259, 265, 84 S.E. 274, 277 (1915).

More recent North Carolina cases establish that a material misrepresentation in an insurance application, even if innocently made, will prevent recovery on the policy. "Every fact stated will be deemed material which would materially and naturally influence the judgment of the insurance company either in accepting this risk or fixing the premium rate." *Garvey v. Old Colony Ins. Co.*, 153 F. Supp. 755, 757 (D.N.C. 1957), *aff'd*, 253 F.2d 299 (4th Cir. N.C. 1958), citing *Bryant v. Metropolitan Life Ins. Co.*

Lawyers Mutual's application provides, "[a]ny misstatements made in this application could invalidate any policy issued on the basis of this application", and its policy provides, "in material reliance upon the representations of the insured made in the Application and Declarations, incorporated as parts of this policy . . . [Lawyers Mutual]

Cont. on next page



**"We're being sued for filing a frivolous lawsuit!"**

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agrees with the Insured . . . " as thereafter provided. When the person authorized to sign an application on behalf of a company seeking insurance knowingly makes false statements in the application, the carrier is entitled to rescind the policy issued to the company on whose behalf the application was signed. *See, e.g. Manhattan Life Insurance, v. Miller Machine Company*, 60 N.C. App. 155, 298 S.E.2d 190 (1982).

### **Impact of Prior Knowledge**

Even in the absence of material omissions or misrepresentations on applications for claims-made policies, courts have invalidated coverage upon a determination that the insured had prior knowledge of a claim and failed to disclose it at a relevant time to his insurers.<sup>6</sup>

Lawyers Mutual's policy provides:

#### V. Notice of Claim or Suit

As a condition precedent to coverage afforded by this policy, upon any insured becoming aware of any acts or omissions which could reasonably be expected to be the basis of a claim or suit covered hereby, written notice must be delivered to the Company . . . , as soon as practicable . . . .

#### Exclusions

This policy does not afford any coverage or benefits whatsoever with respect to:

- (o) any claim or suit arising out of any acts or omissions occurring prior to the effective date of

this policy if any Insured at the effective date knew, or could have reasonably foreseen, that such acts or omissions might be expected to be the basis of a claim or suit and failed to give the Company written notice of such acts or omissions . . . .

"It is well-established that an insurance policy will be enforced according to the clear and precise terms of the policy. Thus, the exclusion is applicable if: (1) the acts at issue occurred prior to the policy period, and (2) the insured either 'knew' or 'could have reasonably foreseen' that such acts 'might' form the basis of a claim. This language excludes coverage for potential claims, not just asserted claims."<sup>7</sup>

### **Accurate and Complete Answers**

The lesson in all this is that when you answer questions on either your new application or your application for a re-issue of your Lawyers Mutual policy, you need to answer every question accurately, you need to ask every lawyer in your firm to confirm the accuracy of your answers and you need to fully disclose the basis of any affirmative answer. When you first become aware of any facts or circumstances which might give rise to a claim (and not just those which you think would be a valid claim), call a claims attorney at Lawyers Mutual and have a candid discussion of what has happened. The toll-free number is 800-662-8843. Tell them a friend suggested you call.

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\* Jerry Parnell, Cindy Van Horne and Rick Kane are partners at Poyner & Spruill LLP. They are substantially engaged in legal malpractice defense and advising legal malpractice insurers.

<sup>1</sup> *National Union Ins. Co. v. Holmes & Graven, Chtd.*, 23 F. Supp. 2d 1057 (D. Minn. 1998). *See generally* Mallen & Smith Legal Malpractice, § 34.14 (2000).

<sup>2</sup> *Culver v. Continental Ins. Co.*, 1999 U.S. App. LEXIS 16256, 11 Fed. Appx. 42 (1999).

<sup>3</sup> The cases are collected at Annotation: Lawyer's Professional Liability Insurance, 92 A.L.R. 5th 273, § 5 (2002).

<sup>4</sup> 92 A.L.R. 5th 273, § 9 (2002).

<sup>5</sup> *Assicurazioni Generali, S.P.A. v. First State Ins. Co.*, 87 F.3d 1317 (9th Cir. 1996); *Home Indem. Co. v. Toombs*, 910 F. Supp. 1569 (N.D. Ga. 1995).

<sup>6</sup> *Chamberlin v. Smith*, 72 Cal. App. 3d 835, 140 Cal. Rptr. 493 (Cal. App. 1st Dist. 1977); *Coregis Ins. Co. v. Goldstein*, 32 F. Supp. 2d 508 (D. Conn. 1998); Mallen and Smith, § 34.14 n. 16, et seq.

<sup>7</sup> Avoiding Rescission of an Attorney's Professional Liability Insurance Policy, 1998 DRI 4-52 Vol. 1998, No. 4.

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# LMI TODAY

The contents of this newsletter are intended for general information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. It is not the intent of this newsletter to establish a standard of due care for any particular situation. Rather, it is our intent to advise our policyholders to act in a manner that might well be above the standard of care in order to minimize a firm's malpractice risk.

Henry A. Mitchell, Jr.  
Chairman

Carl Younger  
President

# 4

A publication for policyholders of  
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Company of North Carolina

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