

Welcome Back, Renee!

Former claims counsel returns to the LML family

Lawyers Mutual is pleased to welcome back Renee Riggsbee. Renee returns as one of our Claims Counsel after a six-year absence during which she served the State as a Commissioner on the Industrial Commission.

During her first tenure with Lawyers Mutual, Renee specialized in litigation-related claims and provided assistance to lawyers with questions concerning civil and appellate procedure. With her background as a Commissioner, she is now in a position to assist our policy-holders with questions about workers' compensation law and practice before the Industrial Commission.

Renee is a graduate of Meredith College and the University of North Carolina School of Law at Chapel Hill. Following law school, Renee joined Employment Law Research in Durham and worked

with Arthur and Lex Larson in the areas of workers' compensation and employment discrimination. Renee clerked for two years for the Honorable Jack Cozort of the North Carolina Carolina Court of Appeals. Prior to joining Lawyers Mutual in 1994, Renee practiced with Bailey and Dixon in Raleigh, where she concentrated on legal malpractice and personal injury defense.

We are very pleased Renee has returned to the LML family.



Renee Riggsbee
 Claims Counsel

October 2003

LML TODAY

LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA

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Social Security and Workers' Compensation

Protecting disability benefits in a settlement

Renee Riggsbee, Claims Counsel

Settling a workers' compensation claim involves more than bringing the carrier and your client to a fair and realistic figure – after examining the pros and cons of a lump sum versus continuing payments. If the client's prognosis, medically and vocationally, is poor, and the client is or may become entitled to Social Security Disability Insurance benefits, then a lump sum final settlement may be the appropriate answer. In these circumstances, and others, familiarity with Social Security laws, regulations, and policy statements – along with an advocate's perspective – is essential. This article is no primer on the subject and cannot cover every circumstance, but is intended to serve as a reminder to our policyholders of these important issues.

WHY CONSIDER SOCIAL SECURITY?

An employee who is totally disability under workers' compensation may also be entitled to benefits under Title II for Social Security Disability Insurance benefits (SSDI). Disability payments from some sources do not affect an indi-

vidual's SSDI. Under the Social Security Act, however, there is an offset of SSDI for payments under workers' compensation. When SSDI and workers' compensation are being paid concurrently, there may be nothing that can be done to minimize the offset. If there is a lump sum settlement, however, in a continuing total disability case (and in other circumstances as discussed below), the settlement can be spread over the lifetime of the employee, resulting in a reduction of the SSDI offset.

Under Social Security regulations, the combined SSDI and workers' compensation benefits must not exceed (1) the total amount that would be due from Social Security if not for the offset, or (2) 80% of "average current earnings" as determined by Social Security. Usually the 80% rule applies, and any amount above the 80% figure is withheld from SSDI. The claimant continues to receive full workers' compensation benefits.

("Average current earnings" is not the same as average weekly wage under the Workers' Compensation Act. Rather, wages for Social

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Preserving the Profession

Mentoring young lawyers

Carl Younger, President

In his book, *The Lawyer's Myth*, North Carolina lawyer Walter Bennett considers how regard for lawyers has changed during the 20th and 21st centuries. Mr. Bennett describes several "models" for lawyers and then discards those models as being outdated. Unfortunately, he provides little true guidance on what should be done to "reform" the profession, other than to change the teaching approach of law schools and to create a new sense of mentoring among attorneys.



Carl Younger
President

Mr. Bennett apparently believes that the now diverse student body in our law schools will not accept the moral pronouncements of the current majority of practicing lawyers because new lawyers may differ in their sex or race from older practitioners. A recent Wall Street Journal article partially supports Mr. Bennett's concern over the separation in the business world of the current younger and older generations. However, that separation was highlighted in the article by the failure of mentoring programs. Older workers noted that advice was not appreciated or was used to displace them. Younger workers felt that little advice was forthcoming and, if forthcoming, was not valuable. Do the same viewpoints apply to the legal profession?

I would ask each reader to consider those individuals who have helped them in their profession and in their life. Many of those individuals provide guidance simply by their actions. The individuals who are our true mentors, however, are those who do two things: (1) they give of their time and of themselves, and (2) they are willing to take risks to give or receive assistance.

I have been fortunate to have received legal mentoring from some great people and lawyers: Hubert Humphrey, Jim Williams, Earl Huntington, Lucius Pullen, John Hampton. Members of the Lawyers Mutual Board and staff have provided new insights and their own type of mentoring. My greatest mentor, however, was not a lawyer: he was my father. He gave me his time and gave practical, straight forward advice on what I should consider doing. On rare, probably needed occasions, he even allowed me to fail (a course of action not recommended for our insureds). When I failed he did not preach but asked me to explain what had happened and what I had learned.

We cannot be parents or children of others in the profession. We can, however, take the time to give and receive help. We must also remember that how we give, and receive, is important. When we give, do not preach or pontificate. When we receive, first listen to the entire suggestion, then ask questions. If one's first attempt does not succeed, do not abandon the effort. We can also mentor indirectly. In giving, we can simply ask if the other attorney has considered a particular course of action; and in receiving, we can listen and respond politely, without anger or annoyance.

Earlier I asked if the perceived problems of mentoring in the 21st century were affecting the legal profession, particularly in North Carolina. I unfortunately believe that the legal profession does not differ substantially from the rest of our society in this regard. I am, however, an optimist about our profession. I have the highest regard for my fellow lawyers. I strongly believe that we can make mentoring work both formally and informally. WE only need to make the effort and to be patient. That's a lesson I learned from my dad.

Lawyers Mutual Risk Management announces the new Family Law Malpractice Traps handout. Please contact Samantha Cruff at 800.662.8843 or riskmgt@lmlnc.com to request your copy.

A Disturbing Trend

Real estate fraud on the climb

Wayne Stephenson, Claims Counsel

The spread of any disease or infestation - whether SARS, fire ants or killer bees - carries with it a strange mixture of fear and relief: fear that the problem will someday arrive and relief that the difficulty is currently not at hand. Over the past several years, claims counsel for title companies have warned North Carolina lawyers of a growing trend of real estate based fraud claims. Not heeding the "symptoms", we were passively interested. Today, we are alarmed. The infestation has arrived.

ATTORNEYS AT RISK

Stagnant or declining legal fees, increased staff salaries and overheads, and higher real estate values, accompanied by greater liability exposure, are putting the financial squeeze on real estate attorneys in North Carolina. As our State's economy continues to struggle, some individuals with whom attorneys work - from staff to clients - have discovered they can make more money in fraudulent real estate schemes than by robbing the local convenience store. There is less of a chance of being shot, and the criminal penalties for being caught are not as severe as those for "armed" robbery.

The individuals at true risk are often the attorneys. Title Insurance insured closing agreements generally provide coverage only to a lender for fraud. That coverage is typically limited to title issues only and normally has a short (e.g. one year) claims period. Professional liability policies cover failures of the attorney to properly provide legal services and normally exclude criminal, malicious, dishonest or fraudulent acts, whether by the attorney or staff. Where a fraud is perpetrated, the attorney can be a victim, and like many other plaintiffs may have a valid claim, but against a now bankrupt or departed defendant. However, the attorney's fellow victims often blame the attorney for not discovering the fraud.

HOW DOES THIS HAPPEN?

Reports of fraudulent real estate transactions, previously a once-a-year occurrence, have become at least a monthly event. The following are examples of actual reported cases:

- Seller provides a loan number so the attorney can get a payoff. The number is for a real loan with the correct lender, but it is for a loan that is not secured by the property being sold. After closing, Seller continues to make payments on the loan, but eventually files bankruptcy. Buyer's property remains subject to Seller's mortgage.
- A long-time client/developer informs Attorney that the lender has verbally agreed to accept a substitution of collateral instead of a release fee. The substitutions successfully continue for some time. As a result, Attorney stops confirming that the substitutions have been recorded at the Register of Deeds office. The developer quits the substitution process and files bankrupt-

cy. Attorney learns that he certified clear title on numerous transactions when, in fact, the houses are subject to a large developmental loan.

- A "White Knight" approaches a party about to be foreclosed upon claiming that if the borrower conveys the property to the "White Knight," the property will then be leased back to the borrower with an option to purchase. The "White Knight" then refinances the mortgage in foreclosure, but then he defaults on his new loan after all the equity has been withdrawn from the property.

- A long-time client/developer assures his attorney that he will directly tender the release fee to the developmental lender. For many years he does just that. During tough economic times, the developer fails to make the release payments. The attorney continues to certify that the developmental loan has been released until the error is finally discovered.

- A loan broker or similar party, usually in the name of a shell entity, records a fictitious lien against the property just before closing in an attempt to skim off some of the proceeds from the closing.

- Husbands, grandsons, nieces, etc. ask the attorney to prepare a deed transferring a relative's interest in real property to himself or herself. The party asks the attorney to let them take the deed from the office for execution. The document is forged and notarized, then brought back to the attorney for recordation. At the same time, or shortly thereafter, the party has the attorney close a loan where all of the equity in the property is withdrawn.

- A husband brings in his girlfriend with a fake driver's license identifying her as his wife. The girlfriend forges the wife's signature on the closing documents. They withdraw all the equity from the property and skip town.

- Long-time and trusted employee make transfers from the trust account into the operating account, then pay themselves bonuses or even, unknown to the attorney, help cover his or her draw.

- Seller buys a property at its real value, and then shortly thereafter "flips" it to Buyer at an inflated price. Often, Buyer is an investor and Seller promises to locate a tenant for Buyer's home. Buyer thinks the property is rented since Seller is returning a portion of the excess sales proceeds from this or other similar flips back to Buyer as a "return" on the "rental" income. This is basically a pyramid scheme which is discovered when Seller



Wayne Stephenson
Claims Counsel

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Social Security, cont. from pg. 1

Security purposes are generally determined on an annualized basis and not necessarily on the last year worked. Average current earning may be less or may be more than wages computed under workers' compensation.)

WHY USE "OFFSET LANGUAGE"?

An example of how offset language can benefit your client, the employee, is as follows: Assume that the employee's average current earnings determined by Social Security are \$2,250; the workers' compensation settlement is \$100,000; the workers' compensation rate (2/3 of average weekly wages) is \$400 per week, or \$1,600 per month; and the SSDI award is \$1,300. Taking 80% of the \$2,250 figure, the maximum amount that the employee can receive is \$1,800, including workers' compensation and SSDI. If the employee qualified for SSDI but the lump sum settlement did not include lifetime spread language (*i.e.*, what is commonly called "Social Security offset language"), then the following calculation would take place:

Of the \$100,000, less attorney's fees of 25%, the claimant will receive \$75,000. Social Security will consider the entire net lump sum of \$75,000 to be paid at the prior worker's compensation rate of \$1,600 per month. As the claimant's maximum benefits are \$1,800, the claimant's SSDI benefits will be reduced to \$200.00 per month for approximately 47 months (\$75,000 divided by \$1,600). Social Security applies the offset until the entire net amount received under the clincher has been offset against SSDI. (When the employee reaches retirement age and receives Social Security retirement benefits, the offset ends.)

If, however, you prorate the \$75,000 over the client's lifetime, the effective monthly benefit for workers' compensation would not be \$1,600, but would be the \$75,000 divided by the years of life expectancy. For example, with a remaining life expectancy of 40 years, or 480 months, the effective workers' compensation benefit would be \$156.25. Only \$156.25 would be included in the \$1,800 allowable benefit amount from both SSDI and workers' compensation. Accordingly, in this scenario, there would be *no* reduction of SSDI on account of the lump sum settlement (\$1,300 + \$156.25=\$1456.25, which is less than the \$1,800 maximum).

Attorney's fees, litigation expenses, and medical expenses paid under the clincher are excludable in calculating the offset for workers' compensation.

POTENTIAL MALPRACTICE CLAIMS

Without the offset language in the initial agreement approved by the Industrial Commission, it is unclear whether a subsequent amended or "new" agreement and Order from the Commission will suffice to protect the maximum SSDI benefits. Lawyers Mutual is currently handling claims in which we are exploring repair options along these lines. Although defense counsel and the Industrial Commission will be cooperative in revision efforts, the Social Security Administration is another matter. A recent successful claims repair along these lines is encouraging.

A typical claim might involve a relatively modest settlement of \$30,000.00 in which the offset language was not included in the clincher, and the attorney believed the client would be successful in a job search after settlement. The attorney was then caught by surprise when the client later qualified for SSDI benefits and the client's new attorney contacted her with a claim for lost benefits due to the Social Security offset.

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Typical offset language might be the following:

"Employee contends that he has suffered a significant injury to his _____, which may possibly permanently and totally disable him from any further gainful employment.

Employee's date of birth is _____, and he is currently _____ years old, which calculates to a statutory life expectancy under N.C.G.S. 8-46 of _____ years, or _____ months, or _____ weeks.

Employer agrees to pay or cause to be paid to Employee the lump sum of \$_____ in full and final settlement of all compensation due or to become due under and by virtue of the North Carolina Workers' Compensation Act and this is the only payment to which the employee will be entitled for his entire life for the injury described hereinabove. Accordingly, the payments described herein below are deemed and intended by the parties to be lifetime payments pro-ratable over the employee's expected remaining lifetime beginning the day after this agreement is approved by the Industrial Commission*; and

It is anticipated that \$_____ of this \$_____ sum shall be paid to employee's counsel, leaving a total net recovery to Employee of \$_____.

This sum of \$_____ shall be paid in lieu of all wages which may have been earned by Employee over the remaining _____ years, or _____ months, or _____ weeks of his life, resulting in benefits under workers' compensation at an effective rate of \$_____ per month, or \$_____ per week."

*Note the asterisk in the third paragraph of the language above. The date when remaining life expectancy begins may vary with the facts of the case. In an accepted claim, when payments have been made to the date of approval of the agreement, the above language is appropriate. In other words, the start date should be the date of last payment. In a denied case, however, where there have been no payments, the start date should be the date the employee was first entitled to compensation.

The Fall 2003 Seminar Series Kickoff

Practical risk management: loss prevention skills for your firm

Program Highlights:

The Duty of Loyalty

- ❖ Overview of Conflicts of Interest Rules
 - ❖ Emphasis on Latest Revisions to Ethics Rules
- ❖ Case Summaries
- ❖ Conflict of Interest Checking System

Presented by Louise Paglen
Vice President of Risk Management
Lawyers Mutual

Managing Your Office, Your Time and Your Attitude

- ❖ Control Your Time
- ❖ Tap Into Law Office Best Practices
- ❖ Let Each Do What They Do Best

Presented by William Stroud
President
Lawyers Insurance Agency

Analyzing a Legal Malpractice Claim

- ❖ Is There an Attorney/Client Relationship?
- ❖ Has the Duty Been Breached?
- ❖ Did the Breach Produce a Loss?
- ❖ What is the Amount of the Loss?

Presented by Carl Younger
President
Lawyers Mutual
and
Judge Gerald Arnold
Senior Vice President of Claims
Lawyers Mutual



Seminar Calendar:

October 24, 2003
Asheville - Holiday Inn Sunspree

November 7, 2003
Greenville - Hilton Greenville

December 5, 2003
Charlotte - Embassy Suites

All Programs:

9:00 am to 12:30 pm

Continental Breakfast:

8:30 am

FREE!

To Register:

Please mail this form to Lawyers Mutual or fax to 919.677.0131.

Name _____

State Bar No. _____

Firm _____

Address _____

City/State/Zip _____

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Seminar Date _____

Seminar Location _____

**Confirmations will be mailed
approximately 30 days before the seminar.**

8000 Weston Parkway ♦ Suite 340 ♦ Cary, NC 27513 ♦ Post Office Box 1929 ♦ Cary, NC 27512-1929
Tel: 919.677.8900 or 800.662.8843 ♦ Fax: 919.677.0131 ♦ E-mail: riskmgt@lmlnc.com

Social Security, cont. from pg. 4

PROTECTING YOUR CLIENT AND YOURSELF

The lesson learned from these claims is to include the offset language when the client is out of work, it is reasonably possible that he will be for the indefinite future, or the return to work is not going well. With these facts, you must assume that he might at some point qualify for SSDI, and the interests of Social Security and Medicare** must be considered in any lump sum settlement agreement. You must know your client and the facts of his case well, and draft a settlement agreement that reflects the specific facts of the case.

Should you include Social Security offset language in virtually all of your workers' compensation clincher agreements? While some might argue that such a practice is an abuse of the system, including this language may be the only way to protect the client – and yourself – against unanticipated circumstances. On the other hand, not every claim that is settled is reasonably likely to involve future receipt of SSDI. There is no question that offset language should be used when the client is already receiving SSDI, has been turned down for SSDI and plans to appeal, or in any catastrophic case where SSDI is likely to be awarded. In addition, when there is a reasonable possibility of future SSDI – an out of work client, depression, unsuccessful surgery or other unresolved medical/pain issues, or a rocky return to work – you must include the offset language to maximize your client's possible future benefits.

**Medicare issues: In addition to attorney's fees and other documented legal and medical expenses, Social Security also excludes, in calculating the offset for workers' compensation, the amount of the lump sum that is allocated specifically for future medical expenses. *This "Medicare set-aside" raises an entirely*

different and complex set of issues outside the scope of the present article. These issues must be considered and discussed with the client during the settlement process. Proceed cautiously in this area, because a set-aside may not in most cases be in the client's best interests. Legal expertise in this area is essential. Setting aside an amount specifically for future medical expenses (which Social Security must determine to be reasonable and justified, and not merely an attempt to reduce the SSDI offset or shift the cost of medical expenses from workers' compensation to Medicare), requires exhaustion of the allocated amount before any payment by Medicare. Medicare is a secondary payor. Any set-aside must be reasonable (*i.e.*, documented by history, physician letter, *etc.*), and take into account whether anticipated medical needs are likely to be covered by Medicare (*e.g.*, prescription drugs are generally not). Of course, no amount can be set aside for future medical expenses if this cannot be negotiated with the carrier, and this fact, and why, should be set forth in the agreement. The agreement should not state that the lump sum intends to compensate for future medical expenses, because Medicare will take the position that the entire lump sum must be exhausted for medical expenses before Medicare pays. Statements from CMS (Centers for Medicare and Medicare Services) indicate that Medicare will review the reasonableness of the workers' compensation settlement with respect to Medicare when the amount of the settlement is at least \$250,000 and the individual is expected to be covered by Medicare within 30 months of the date of the settlement, or the individual is currently receiving Medicare. (Note that these are policy "statements," not law, and are subject to change). Several members of the N.C. Academy of Trial Lawyers have written papers on Medicare issues and workers' compensation. Please contact Lawyers Mutual for additional information.

Disturbing Trends, cont. from pg. 3

stops making both the mortgage payments and the "dividend" payments to Buyer who discovers he owns a home with no tenant in place and with a mortgage in excess of the fair market value of the property.

- A long-time employee continuously delays tendering premiums to the Title Insurance Company. This creates a float in the trust account enabling the employee to withdraw money for his or her own benefit.

- Loan brokers or others enable unqualified buyers to purchase real estate. Contracts, closing statements and other documents are created with the assistance of the attorney's staff with the price of the home artificially increased. The unaware lender makes a loan in excess of its traditional underwriting guidelines and possibly in excess of the property value.

WHAT CAN YOU DO?

Develop and follow office procedures for identifying and confirming what is and is not to be done relative to real estate trans-

actions. Separate functions so that not all title activities or financial duties are concentrated in one person - even if that person is the most trusted member of your staff. Actions of all third parties should be verified and documented as part of the firm's closing procedures.

Larger firms should rotate responsibility for different activities; providing cross training and staff backup when needed. Other staff members have discovered several schemes when the "bad egg" employee is on vacation. A sole practitioner should review each file prior to and at closing. Periodically handle an entire closing file from start to finish. Schedule quarterly audits of operating and trust accounts by an outside auditor.

Lawyers Mutual recognizes that it may seem operationally or economically burdensome to adopt these recommendations. However, having seen the impact of real estate fraud on our fellow practitioners, we strongly believe that "extermination" of sloppy practices can help avoid "fraud infestation."

The North Carolina Bar Association Health Benefit Trust

A great fit for Lawyers Mutual policyholders

William Stroud, President, Lawyers Insurance Agency

We invite your firm to consider the benefits of the North Carolina Bar Association Health Benefit Trust. This self-insured plan was established as an alternative to the commercial health insurance market to allow law firms to pool premiums to cover health claims. Any law firm whose attorneys are members of the NC Bar Association are eligible, and currently over 5,400 lawyers, their staff and family members enjoy these benefits. Claim service and physician networks are provided by Blue Cross and Blue Shield of North Carolina.



William Stroud
President, LIA

The plan is a great fit for Lawyers Mutual policyholders because it serves the small to medium size firms that obtain their liability coverage from Lawyers Mutual (the average number of lawyers per firm is identical for the Trust and for Lawyers Mutual, and 82% of health plan members are Lawyers Mutual policyholders). Also like Lawyers Mutual, this health plan allows smaller firms to enjoy the strength and buying power of a very large group, and thereby avoid many risks inherent in being on their own as a small player in a large, impersonal insurance market.

Health costs are expensive and going up. In the North Carolina Bar Association Health Benefit Trust, you are combined only with other North Carolina law firms, and your premiums are dedicated to the Trust's claims, administration and a reasonable surplus whose sole purpose is to provide the plan long-term security and stability. When you deal with a health insurance company, part of your premiums go to cover the healthcare costs of the general buying public and a satisfactory profit for the insurance company.

For many years, the NC Bar Association has provided a health plan that has been very competitive in terms of price and coverage. In the long run, are you better off shopping for health insurance year after year, constantly looking at other plans and hoping that one year of high claims will not drive your rates through the roof? Or should you unite with your fellow Bar members in a plan dedicated only to your and their health benefit needs?

Below is a brief description of the plans available through the North Carolina Health Benefit Trust. We invite you to take a look and decide for yourself.

Health Benefit Plans Offered:

Plan 1	Plan 2	Plan 3
<ul style="list-style-type: none">• 100% coverage for hospital services after \$500 deductible• \$20 copay for primary care; \$30 for specialist (no referral needed)• \$10/\$20/\$30 prescription drug plan (31-day supply)	<ul style="list-style-type: none">• 90% coverage for hospital services after \$500 deductible• \$25 copay for primary care; \$40 for specialist (no referral needed)• \$15/\$30/\$45 prescription drug plan (31-day supply)	<ul style="list-style-type: none">• 80% coverage for hospital services after \$750 deductible• \$25 copay for primary care; \$40 for specialist (no referral needed)• \$15/\$30/\$45 prescription drug plan (31-day supply)

Understanding Underwriting . . .

Q: CAN YOU GIVE ME A QUOTE FOR A REISSUE OF MY POLICY WITHOUT A COMPLETED APPLICATION

A: No. It is necessary for you to complete a new application each and every year because your policy is not an automatic reissue.

Q: WE JUST ADDED ANOTHER ATTORNEY TO OUR FIRM, CAN YOU GIVE US A QUOTE ADDING THE NEW ATTORNEY TO OUR POLICY?

A: No. You must complete a supplemental application for all new attorneys to be added to your existing policy before a quote may be issued.

Call us at 1-800-662-8843, and we'll be happy to fax or mail you an application.

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

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SPECIAL EXTENDED ISSUE!

**A publication for policyholders of
Lawyers Mutual Liability Insurance
Company of North Carolina**

LMI TODAY

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