

Long Term Disability Calls

Will You Answer?

By Richard Rizk



**Jamie Yu**

Attorney Jamie Yu rubs her eyes, deeply inhales then sighs as she gazes past computer glare. It's is Friday afternoon Yu is almost finished for the week.

Bzzz. Bzzz. Bzzz. (papers shuffle) "Where is it?" Yu mutters.

**Susan Calls**

**Jamie:** Hi, hey how are you, Susan?

**Jamie:** Yes, it's a good time

**Jamie:** Just a second. Let me put this aside.

**Jamie:** Okay, what's up?

**Jamie:** Just say it. What's wrong Susan? You sound stressed...

**Jamie:** Slow down. Slow down ... easy. Now, start from the beginning.

**Jamie:** Don't worry. That was a long time ago. I forgive you. It was not your fault.

**Jamie:** Forget about it... its ancient history now. I could have handled it differently.

**Jamie:** What?! You have cancer? I had no idea...Uh, how can I help?

**Jamie:** First thing, take care of yourself.

**Jamie:** I see.

**Jamie:** Surgeries?

**Jamie:** You know Carol.... Chemo was hard for her but she's fine now.

**Jamie:** He's one of the best... You're in good hands then.

**Jamie:** People kick this .... you will too, Susan.

**Jamie:** I know, I know. And I care too. I really do, Susan.

**Jamie:** You are fine. Don't worry. I want to help you. In fact, I'm flattered you called me.

**Jamie:** It's good you have disability insurance through your company, then.

**Jamie:** You know it's not my area of prac-

tice. Frankly, Uh, I'm not sure. But let's think this through. Uh, uh ... hmm.

**Jamie:** Let me think. Okay, you have a copy of the insurance policy, right?

**Jamie Yu to herself:** Susan is in real trouble... She is looking to me for help. I've heard this can be complicated. I think this is an ERISA matter.<sup>1</sup> What should I tell my old friend Susan?<sup>2</sup>

**Jamie Tells Susan**

Seek Professional Psychological Help

Once engaging, witty and sometimes hilarious, Susan now rarely speaks. Last year she captained dragon boat and Hood to Coast teams. Now Susan mostly sleeps, watches TV and visits doctors.

Four years ago at the height of the recession, Susan, then the head of her department of a prominent advertising firm, was heavily recruited by competitors. Now, her home is underwater, she is unable to work, her disability claim is "pending approval" and her life is in jeopardy. Susan is lost.

Susan despises pity and does not enjoy bringing others down. "It's easier on everyone if I just stay home," Susan explained to Yu.

Disability is Susan's nightmare. Susan just wants her life back. Jamie suggests Susan seek immediate psychological evaluation and care.<sup>3</sup>

• **Get Certain Documents**

Most long term disability insurance in the United States is employer- provided pursuant to a plan. If that is the case, ERISA probably applies (see footnote 1) and the disability plan administrator, usually the insurance company or employer, is obliged to provide the plan, policy and claim file to the claimant or claimant's attorney at no charge.

An Oregon trial legend teaches that true caring is the heart of effective advocacy. Perhaps, that should be obvious. Although true caring is emphasized by trial experts and marketing gurus, true caring, at essence, is not a tactic. In fact, at its core, true caring is not about lawyering at all. And, true caring cannot be faked. Sadly too often what should be obvious is elusive.

Closing the door on matters outside a lawyer's main practice area may be tempting. But, *being there* for family, friends and of course clients, is the best way to generate good will. A basic truth is humans in crisis respond to love and genuine caring.

Consider the following fictional story of attorney Jamie Yu and her old friend Susan who calls on Jamie after receiving devastating news. This article sets out some specific steps and strategies to consider when long term disability impacts someone you know.

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Since Susan's disability insurance is employer provided and her claim is pending approval, Yu suggests Susan immediately fax her insurance company and/or employer to request the applicable disability plan, disability policy and personnel file.

Should Susan's claim be denied, Susan will probably have only 180 days<sup>4</sup> to perfect her initial appeal.<sup>5</sup> If and when Susan's disability claim is denied, Susan or her attorney should request a complete copy of the entire claim file, which the claim administrator is also obliged to supply, free of charge. Whether Susan can perform her "own occupation" is usually the initial, primary issue deciding whether she will be awarded disability benefits. Susan's personnel file may reveal job duties not apparent from the official job description.<sup>6</sup> That is why Jamie suggests Susan immediately contact her employer (by fax) to request her personnel file.

- **Don't Attempt Work if Unable**

Disability and "ability to work" are polar opposites. As a result, should Susan attempt to work when unable, she may unwittingly help justify a claim denial. Should Susan work even a short while during her disability, the insurer may argue, "You worked with the same condition then, you must not be disabled now."

Deciding not to try to work is counterintuitive to Susan, but Susan's doctors are certain that, because of the cancer and treatment for it, she is simply unable perform the essential duties of her job. Jamie suggests Susan take paid vacation and/or sick time and then unpaid leave pursuant to the Family Medical Leave Act (FLMA).

- **Beware of Social Security and Workers' Comp Overpayments**

Most employer-provided disability insurance coverage supplements amounts paid by workers' compensation or Social Security. Not aware of this, some disabled persons receive and spend disability benefits from multiple disability sources for the same lost wage. Doing so may result in over payment claims asserted by one more insurers. Jamie alerts Susan to the possibility of an overpayment claim if she is receiving disability payments from multiple sources such as Social Security and long term disability.

- **Consider Help with Forms and Correspondences**

Disability claims present claimants with a potentially confounding dilemma. On the one hand, the disability policy will require the claimant to cooperate with the long or short term disability insurer by, for example, completing questionnaires, providing medical information and attending "independent" examinations. Failure to cooperate may prompt a claim denial. On the other hand, cooperating too well may also undermine a claim. Consider the following scenario:

*Susan completes and submits disability claim forms provided to her by her Human Resource manager. Susan is on sick time while her claim is considered.*

*Meanwhile, Phil sits in his cubicle at Kindness Mutual Insurance, catching up on paperwork. Phil writes to Susan, her employer and Susan's doctors asking questions about Susan's cancer, job, earnings and abilities.*

*Four days later Susan receives a letter and questionnaire from Phil. Determined, Susan completes one page of the questionnaire each day for the next 10 days. "It took forever," Susan recalls...but her questionnaire responses are just about, perfect. Over the next two months responses trickle in to Phil. First, Susan's employer and then ... drip by drip, Susan's medical service providers.*

*Two months later, Susan receives a denial letter from Phil on behalf of Kindness Mutual. Phil explains that "the content and manner in which the questionnaire was completed" evidences Susan's ability to perform her sedentary job.*

*Susan gasps as she reads the Kindness Mutual denial letter, remembering that Jamie suggested she should ask a friend to help her complete these forms.*

- **Consider Help with Errands**

Supposing Susan's disability claim is accepted, consider the following scenario:

*It's winter now. Receiving mail is the highlight of Susan's day. In a light sweater Susan dashes to the mailbox abruptly shutting the front door behind her to keep cold out. "That's weird, Susan thinks. That van is still parked in front."*

*The next day, Susan realizes she has lost nearly 15 pounds. Her clothes no longer fit and she needs to get out of the house. Susan drives to Lloyd Center to buy clothes and then visits her mom who lives near the*

mall. Exhausted, Susan naps at her moms', returning home 6 hours later.

Three weeks later a denial from Phil on behalf of Kindness Mutual arrives. According to the denial, surveillance films show Susan "shopping, socializing, traveling overnight and running short distances without limitation". These activities, the denial alleges, are incompatible with Susan's claims of disability on the completed questionnaire. Realizing insurer surveillance tactics, Jamie suggests Susan seek help with errands outside the home.

#### • Take Movies

As the above example illustrates, disability insurers sometimes hire private investigators who surreptitiously photograph and film disability claimants in public places. Should insurer investigation purport to reveal abilities not tracking a claimant's representations, the insurer may present such investigatory evidence to physicians in hopes of generating medical opinions undermining the disability claim.

ERISA civil litigation usually does not involve jury trials, live testimony or discovery beyond the claim file. A claimant-produced movie is a great opportunity to humanize a sterile claim file and illustrate disability. Movies in support of disability should be organic, clearly demonstrate everyday limitations and be narrated by a significant other.

Claimant movies should never overstate disability. Jamie suggests Susan document her disability and story through motion pictures taken and narrated by a significant other.

#### • Don't Quit

Susan's employer may pressure her to quit. Quitting is tempting Susan. She feels guilty not working while others, she perceives, pick up her slack.

Should Susan quit before her disability claim is perfected, Susan may forfeit many employment benefits including health and disability insurance. Without health insurance or income, Susan may encounter delays and resistance receiving needed treatment and generating medical reports necessary to overturn a denial.

Suppose Susan is receiving short term disability benefits. Depending on plan and policy terms, Susan may forfeit long term disability benefits if she quits before a long

term disability claim is perfected through compliance with plan and policy terms.

Disability policies often contain a 90-day waiting period after short term disability expires before an employee is eligible for long term disability benefits. Jamie suggests Susan not quit her job before she is fully aware of the interplay of various employee benefits.

#### • Don't Sign

Some severance agreements attempt to eliminate an employee's disability rights. One well-known international employer with a strong presence in Oregon routinely seeks severance agreements from employees with potential long term disability claims. Such releases purport to release rights under "ERISA." Sadly, the exiting employee may not know what ERISA is. Jamie encourages Susan not to sign any severance agreement before and unless Susan is fully aware of all severance implications.

#### • Order Medical Records

Kindness Mutual has a right and duty to investigate Susan's disability claim. Phil, on behalf of Kindness Mutual has written every medical provider Susan has ever seen, many times. Phil's letters usually request medical opinions and testing results concerning Susan's ability/inability to perform the occupation Susan performed when she first claimed disability.

Susan's primary care physician is Dr. Donne. Dr. Donne has been Susan's physician for 15 years. But, Dr. Donne sometimes conducts "independent" medical exams on behalf of insurers. Needing support for her disability claim, Susan asks Dr. Donne for a written opinion. Dr. Donne quips, "I became a physician to practice medicine, not to write reports." Susan has never felt so alone. She thought Dr. Donne was on her side.

Even well-intentioned physicians eventually conclude that agreeing with the insurer is the quickest way to stop a perceived endless stream of insurer queries. Physicians with poor bedside manner or low paperwork tolerance should be avoided. Jamie suggests Susan order her medical records to better determine which doctor(s) to trust.

#### • Get the Right Work Release

Susan's oncologist, Dr. Luv, cares

deeply for Susan and initially wrote an eloquent letter supporting Susan's inability to work. Dr. Luv's letter may not be enough because, "disability" as Dr. Luv sees is not "disability" as the policy requires.

Typically, ERISA-governed disability policies contain two definitions of "disability." In most cases during the first 24 months of disability the claimant must show she cannot perform the essential duties of her "own occupation" and/or earn a certain percentage of what she earned at her "own occupation." Requirements may differ when a mental illness is the disabling condition.<sup>7</sup> The policy may also require that inability to work be supported by objective findings or medical testing.

After the initial 24 months of disability many ERISA based policies elevate from an "own occupation" disability standard to an "any occupation" disability threshold. Under the more stringent "any occupation" disability hurdle, a claimant must usually prove she cannot perform any occupation for which she is reasonably qualified considering education, experience and training.

Obviously, proving inability to perform "any occupation" is more difficult than proving inability to perform one's "own occupation". Disability insurers know this. As a result, many claims initially accepted under the "own occupation" disability criteria are denied after 24 months when the new "any occupation" standard is usually triggered under employer provided disability plans.

*Warning:* policy terms differ from insurer to insurer, among classes of employees and from employer to employer. "Own occupation only" policies exist, and some policies switch to "any occupation" after only six months. Careful expert analysis of disability policy and plan terms is an early must.

A favorable medical opinion as applied to the "own occupation" standard may later form the basis for an adverse claims decision when the "any occupation" requirement takes hold. To complicate matters, ERISA is not consistently applied among federal circuits.

Jamie suggests Susan consult with an attorney in the judicial region where Susan works. The attorney Jamie suggests solicits medical evidence, correctly track-

ing policy requirements while anticipating insurer concerns. The attorney cares about Susan.

## Conclusion

This writing was designed to light a candle to ERISA disability claim basics and the empathy required when desperation calls.

We lawyers are a thoughtful, logical lot. Our family and friends recognize this so they seek us out when stuck in a life jam. Most of us became lawyers because we want to help people. When faced with an unexpected long term disability call, listen with a true heart, open mind and help as you can.

*Lawyer Richard Rizk lives and works in Portland. For more information, visit [www.rizklaw.com](http://www.rizklaw.com).*

## Endnotes

1. ERISA (Employee Retirement Income Security Act of 1974) regulates employee disability benefits provided by employers pursuant to a qualified plan. ERISA is a group of federal laws initially intended to protect worker pensions and other employee benefits. In the disability context, ERISA is now generally viewed as a pro-insurance law. For example, employer-provided disabilities plans frequently bestow the plan administrator (usually the insurer or employer) with discretion to administer disability plans. Critics suggest this arrangement is tantamount to the "fox guarding the hen house". Unlike employer provided disability policies/plans, most employee-purchased individual disability insurance policies are governed by state, not federal law.
2. The names and circumstances of this article are fictional. Suggestions made are general in nature and not intended as legal advice.
3. Psychological conditions are typically limited to 24 months of coverage or less. Sometimes insurers attempt to couch non-objectively verified physical conditions as purely psychological to limit coverage.
4. One hundred eighty days is not a long time as new physician reports may be needed for the appeal.
5. Most ERISA governed plans require an administrative appeal of one or more "independent" administrative review(s) by a new disability claims examiner. Not completing all administrative appeals prior to litigation may result in suit dismissal for "failure to exhaust administrative remedies."

The deadline to administratively appeal the initial denial is usually 180 days from date of denial. After the appeal is perfected, the plan administrator has 45 days to notify the claimant of an adverse decision and then two 30-day extensions if made before