

Senza Sordino

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Long-Term Disability Basics for Symphony Musicians

by Sally Mermelstein, Attorney at Law

At the 2007 ICSOM Conference in Minneapolis, delegates were treated to a wonderful presentation on long-term disability insurance by Sally Mermelstein, an attorney and former violinist with the Minnesota Orchestra. Ms. Mermelstein's presentation proved to be one of the most popular sessions of the Conference, and there were many requests from delegates for an article in *Senza Sordino* so that all ICSOM musicians could benefit from her knowledge. Ms. Mermelstein graciously agreed to provide this very informative article.

—Bruce Ridge, ICSOM Chair

Below is an introduction to long-term disability (LTD) insurance provisions as they pertain to the symphony musician. This is by no means an exhaustive discussion of the topic—there are many important provisions that are not covered here—but it should provide musicians with basic knowledge about this much-neglected employee benefit.

What is LTD?

Long-term disability insurance replaces a portion of your income if you are unable to work due to a medical condition for an extended period of time. Just how extended that time must be varies between plans. Usually in order to collect LTD benefits you have to satisfy a benefit-free period known as an *elimination period*, *waiting period*, or *qualifying period*. It can be as short as 30 days but is often as long as 180 days.

Unlike workers' compensation benefits, LTD plans will provide benefits whether or not your medical condition was caused by work. LTD is not just for permanent medical conditions. It can be income replacement that serves as a bridge to recovery and resumption of work, or it can be the income you live on until retirement or for the rest of your life.

Why We Should Care

LTD is important to employees because it insures against the loss of ability to work. For a professional musician, LTD insures against the loss of a set of highly developed skills. Most employees must simply accept whatever level of LTD benefit the employer chooses to provide—as well as any changes, including negative changes, the employer makes. Since symphony contracts guarantee certain benefits, however, symphony musicians have the advantage of being able to bargain over, and perhaps customize, the LTD plan as part of their contract negotiations. Musicians should also care about LTD because, while musicians generally have long careers, musicians can get illnesses that are targeted for claim denial by the insurers. These include repetitive stress injuries, soft tissue problems and chronic pain syndromes. These illnesses can interrupt or devastate a musical career, but they are not popular with insurance companies. Your LTD plan can be shaped to help avoid unreasonable claim denials.

But the biggest reason to care about LTD plans is that they are usually governed by the Employee Retirement Income Security Act (ERISA). ERISA and the judge-made law interpreting ERISA create many obstacles for employees trying to collect benefits and create an un-level playing field if the employee has to challenge a denial of benefits. Musicians can minimize the impact of ERISA with some careful planning.

How ERISA Affects LTD

Many of the ways ERISA affects LTD are encapsulated in *Loucks v. Liberty Life Assurance*, 337 F.Supp. 3d 990, 991 (W.D. Mich. 2004):

Caveat emptor! This case attests to a promise bought and a promise broken. The vendor of disability insurance now tells us, with some legal support furnished by the United States Supreme Court, that a woman determined disabled by the Social Security Administration because of multiple disabilities which prevent any kind of work cannot be paid on the disability insurance she purchased through her employment. The plan and insurance language did not say, but the world should take notice, that when you buy insurance like this you are purchasing an invitation to a legal ritual to which you will be perfunctorily examined by expert physicians whose objective it is to find you not disabled, you will be determined not
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Chairperson's Report by Bruce Ridge



As I sit at my desk to write these thoughts for the next edition of *Senza Sordino*, it is just after midnight on November 16, 2007. The issue that is foremost on my mind this night, and which has, in fact, dominated my thinking all week, is the egregious lockout of the musicians of the Jacksonville Symphony. I'm sure that all of our readers realize that *Senza Sordino* is delivered some weeks after the articles are prepared, and

therefore it is my sincere hope that by the time you read this article the dispute in north Florida will have been resolved and the citizens of Jacksonville will no longer be deprived of their world-class orchestra. But, even if that best case scenario has occurred, the questions that have led to this situation will no doubt remain for many of our orchestras.

The issues in this dispute have been clear throughout the protracted negotiations. Salary, season length, pension—all of the usual subjects of negotiation that are crucial for our musicians to maintain their craft, care for their families, and serve their communities as selflessly as the most dedicated public servant. But I fear that something more nefarious is really at the heart of the dispute. It seems that the very people who are the stewards of the orchestra are the ones responsible for this terrible situation, and they seem content to publicly express contempt for an institution they are charged with protecting.

An article in the November 13 edition of the *Florida Times-Union* contained a most dreadful quote from the Jacksonville Symphony board chair, Mr. Jim Van Vleck. Now, I don't know Mr. Van Vleck. He might be a fine person, and I certainly hope to meet him. Perhaps he found himself befuddled in the middle of an interview and said something hateful and harmful. Certainly that has happened to others when giving interviews, and even experienced politicians and radio shock jocks have uttered ill-informed things.

But, in speaking of the musicians that he is charged with serving, Mr. Van Vleck said, "...there's something about a 37-week year and 20 hours a week that doesn't seem too onerous."

Why would someone who speaks with such contempt for a symphony orchestra ever desire to become chairman of the board of such a great cultural institution?

Let us look at the situation in Jacksonville for a moment. When I first arrived there it was 1987. I had just won an audition for a section bass position, and I was thrilled to be joining the orchestra. I left soon after though, as I won an audition with the North Carolina Symphony, which of course is in the state that I have always considered home.

In my brief time in Jacksonville I found an orchestra ready for growth in a city of seemingly endless opportunity. For the city, my view has been confirmed. In these 20 years, the downtown has grown to become one of the most beautiful cities of the South, with

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Secretary's Report

by Laura Ross



Welcome Locals!

I recently spent an interesting day and a half entering AFM local addresses. Thankfully, there are already 41 locals representing ICSOM orchestras, which made my job a bit shorter.

Still, 207 addresses later, I have some new impressions about our representation across two countries.

Your first question, I suspect, would be: "Laura, why were you entering all those addresses?"

At the AFM Convention last June, the Governing Board decided to reach out to locals who might not know or understand what ICSOM's role is within the AFM by distributing the then-current issue of *Senza Sordino*. We hoped to show people what we were advocating as representatives of one of the highest dues-paying constituencies in the AFM. We received many nice compliments about our newsletter during and after the AFM Convention.

So, after such enormously positive feedback from locals at the AFM Convention, the Governing Board decided to continue reaching out by putting all AFM locals on our *Senza Sordino* distribution list. This way, when issues of concern to our orchestras need widespread support, everyone involved might have a better understanding of the particulars—with better education and communication before decisions are made.

The Governing Board also wants to expand the list of universities and conservatories that receive *Senza Sordino*. While a number of music schools and libraries are already subscribers to *Senza Sordino*, we thought reaching even more students who might one day be members of our orchestras would be beneficial to everyone.

Our understanding is that most schools retain a copy in their libraries, but our hope is that students might find more accessible copies—in their lounges, in periodical displays, and even from their teachers (as members of ICSOM orchestras). Our goal is to help more people truly understand our issues and, in the case of students, be a bit more prepared for "real life" in an orchestra.

If you are a teacher, we hope you are already sharing information from *Senza Sordino* with your students. We also hope you will promote the importance and relevance of ICSOM and your local. Please let us hear your ideas about how best to reach your students who will be pursuing orchestra careers. Additionally, I would ask that you check with the music library at your schools to see if they are subscribing to *Senza Sordino*. If they are not, send us the appropriate contact name and address, and we will send them a complimentary copy with the hope that they would choose to subscribe.

But, back to those addresses again, it was really interesting to notice how many locals are *protective unions* by name, while others are

associations or musical societies. As I was typing I discovered there were locals with the same name in different states (for example, Pontiac, Michigan and Pontiac, Illinois). I have been aware since my early days in ROPA that many musicians must belong to multiple locals because their orchestras are in different jurisdictions, but I was still surprised to find a number of locals in states I hadn't expected. I also have to admit, as someone who spent hours playing Monopoly as a kid, I got a kick out of typing "Ventnor Avenue" when I got to Atlantic City's address (although the local is actually in Ventnor, not Atlantic City).

I also found that there were many locals with two officers listed at different addresses. In these cases we will send the copy to the local's president. Any local may contact the editor to request additional copies or to change where or to whom *Senza Sordino* is sent.

So, on behalf of the ICSOM Governing Board, I extend a warm welcome to our brother and sister locals as our readership expands, and we encourage you all to share this copy of *Senza Sordino* with your officers and members.

Senza Sordino is the official voice of ICSOM and reflects ICSOM policy. However, there are many topics discussed in *Senza Sordino* on which ICSOM has no official policy; the opinions thus expressed in *Senza Sordino* are those of the author(s) and not necessarily of ICSOM, its officers or members. Articles and letters expressing differing viewpoints are welcomed.

Minnesota Orchestra Composer Institute by Paul Gunther

[Editor's Note: This is the first of what is hoped will be a series of articles highlighting unique, noteworthy, original, creative, and/or successful educational programs of ICSOM orchestras. Readers are invited and encouraged to make submissions.]

"Wonderful new stuff, all of it."

—David Hawley

(Review of *Future Classics!* concert in Saint Paul Pioneer Press)

"Hot damn, there's some good music going on here."

—Jacob Cooper

(On his NewMusicBox.org blog)

At the end of October the Minnesota Orchestra hosted its weeklong Composer Institute, beginning early Saturday and lasting through to the following Saturday. Seven emerging composers were treated to an intensive series of workshops, presentations, mentoring sessions, interviews, seminars, meetings, and rehearsals, all designed to help pave their way along their compositional path. For the second time, the week culminated with a concert dubbed *Future Classics!*

A full year earlier, composers began submitting scores to the Composer Institute judges. This year's panelists were composers Lisa Bielawa, David Dzubay, Aaron Jay Kernis and Roberto Sierra, and Minnesota Orchestra Associate Conductor Mischa Santora. From the 166 eligible submissions, the judges selected seven finalists to be participants based on their works: Daniel Bradshaw, *Chaconne*; Jacob Cooper, *Odradek*; Trevor Gureckis, *Very Large Array*; Wes Matthews, *Terraces*; Elliott Miles McKinley, *Four Moments for Grand Orchestra: A "Pocket" Symphony*; Stephen Wilcox, *Cho-Han*; and Xi Wang, *Above Light: A Conversation with Toru Takemitsu*.

There are a few rules everyone must adhere to:

- Applicants must be U.S. resident composers at early stages of their professional careers, and previous Composer Institute participants may not reapply.
- Only one work per composer may be submitted, and works may be not be resubmitted unless they were awarded Alternate or Honorable Mention status when previously entered.
- Submitted works may not have received a performance or a reading by a major orchestra (over \$3 million annual budget), with preference given to unperformed works.
- Works may be up to 15 minutes in length (sections of longer works will be considered). Concertos, choral works, and works for strings, winds, or brass only are not eligible.

- Instrumentation must not exceed 4 flute (1 doubling piccolo), 4 oboe (1 doubling English horn), 4 clarinet (1 doubling bass clarinet), 4 bassoon (1 doubling contrabassoon), 4 horn, 4 trumpet, 3 trombone, 1 tuba, 1 timpani, 3 percussion, harp, piano/celesta (no organ), strings. [Editor's Note: Apologies to Paul for my expansion of this instrumentation list, which he gave in the standard format any good librarian would. This was done with great trepidation, solely to help readers not familiar with the standard notation.]

Although the Minnesota Orchestra has presented new music reading sessions for over a decade, the structured and in-depth program that has become the Composer Institute is going into its eighth year of continuing evolution. Last year's Institute was the first to present the compositions in a concert performance, rather than in the informal daytime reading sessions they had been previously. This year's performance was the first to be broadcast live on public radio.

Co-directing the Institute are the Minnesota Orchestra's new Music Advisor Aaron Jay Kernis and Artistic Planning Associate Beth Cowart. In the program notes for this year's *Future Classics!* concert, Cowart and Kernis have this to say about the Composer Institute:

This combination of public performance and the breadth of the training program is utterly unique, the only program of its kind. Our seven visiting composers will expand their understanding of orchestral writing as their works come alive through the artistry of the Orchestra's musicians. Intensive workshops with musicians, one-on-one mentoring sessions, meetings with [Minnesota Orchestra Music Director] Osmo Vänskä and seminars with leaders in the music business will advance the composers' awareness of their own music.

Many composers who have taken part in the program in previous years have gone on to receive major commissions, composition prizes and grants, and they tell us repeatedly that the Institute has played a crucial role in their professional education. It also makes a difference for the Minnesota Orchestra. Two works from the premiere *Future Classics!* concert last year were included on Sommerfest and subscription programs. And for the last five years, a composer participating in the Institute has written a new work annually for the Orchestra's Young People's concerts.

Music Director Vänskä is firmly committed to the importance and success of the program. As he did also for last year's Institute, this year in addition to scheduling and conducting the rehearsals and concert, he met individually with each composer to discuss their work before the first rehearsal, and again after the final rehearsal.

The program is supported in many other ways. The Institute is "Presented by the Minnesota Orchestra and American Composers Forum, in cooperation with the American Music Center and

University of Minnesota School of Music.” These organizations assist further by providing seminar faculty for the Institute. Funding derives from several sources, including the Aaron Copland Fund, Amphion Foundation, Mellon Foundation, and the ASCAP and BMI Foundations, as well as many individual donors. This year’s concert performance was hosted and broadcast by Minnesota Public Radio.

The composers take part in a full schedule of seminars offering subject matter they are unlikely to encounter in any music school classroom. Minnesota Orchestra musicians offer specific instrumental seminars focusing on compositional techniques for strings, horn, percussion and harp. After one of the instrumental seminars, Jacob Cooper, a composer-participant this year, posted this on his *NewMusicBox.org* blog:

The seminar lasted an hour longer than scheduled. Every event today ran long, actually. But for the first time in my life, it was reassuring to be behind. It meant that these musicians care dearly about our work, so much so that they’d give up their own free time to ensure the performance is as successful as possible. You know your music is in good hands when you’re ready to call a session quits, but the performers, who in the end have much less reason to care about the piece than you do, force every drop of energy out of you.

Other practical seminars cover grant writing, self-publishing, computer engraving, and multiple aspects of the business of composing, including licensing, copyright, commissioning contracts, publishing contracts, negotiating, marketing and promotion, and legal issues.

At the same time all this is happening—over the space of a week for ten to twelve hours daily—as the composers become exposed to these practical aspects of composing, they find themselves inspired with further refinements for their scores and parts. (Librarian’s aside: although by this point in time the parts have been “ready” for weeks, such last-minute changes would be precisely the sort to drive an orchestra librarian wild—except that it is just so darn gratifying and downright fun to witness the composers’ eagerness and excitement over all that is happening here. But I digress.)

Finally, if that weren’t enough, there is the daunting actuality of rehearsals with the music director, culminating in a concert before a real, live audience, and a broadcast to an untold number of listeners, with each composer interviewed briefly onstage before his or her work is performed.

Unsurprisingly, the audience for this concert is noticeably different from that for the usual pops or subscription presentation. For what it’s worth, and from my purely subjective viewpoint, they are perhaps overall a bit younger and perhaps a bit hipper—but that’s hard to tell, because Minneapolis is already fairly high on the hip

meter. I certainly witnessed an audience that was extraordinarily receptive to this experience as well as quite vociferous in expressing their acceptance of the music and their pleasure to be part of this event.

The day before this year’s concert, *Minneapolis Star Tribune* writer Larry Fuchsberg, in his article entitled “Their Professional Pairing Is Priceless,” related an anecdote from Aaron Kernis:

Asked about the institute’s impact on previous participants, Kernis cited Missy Mazzoli, an alumna of last year’s program. “She’d had no experience with a professional orchestra, and thought the medium was outdated,” he said. “It was moving to watch her transformation. Meeting the musicians, working with a conductor who has a real commitment to communication and a rich emotional connection to the music—it turned her around.”

Kernis was recalling what Mazzoli wrote in her blog after last year’s Institute: “Participating in this Institute was the single most important thing I have ever done as a composer, not only for the performance but also for the long love affair with the orchestra this week has inspired. Now the real work begins.”

The overall success of the Composer Institute as a program can be measured in many ways: by the continuing fruitful mentoring offered to former participants; by the continuing success of numerous individual participants through the years, in terms of commissions, performances and awards; by the passionate audience and critical reception for the concert performance; by the high-profile seminar presenters from all over the country; by recognition in national media, including articles in *The New York Times* and *American Record Guide*; and by the unprecedented three consecutive annual ASCAP Bernstein Awards for Education. Mostly, the success can be witnessed in the eyes and demeanors of the participating composers. Despite their exhaustion at the weeks’ end, every one seemed elated by this experience, brimming with enthusiasm for the future and for their futures in composing.

Paul Gunther is a current member of the ICSOM Governing Board and the Principal Librarian of the Minnesota Orchestra. He was a founding member in 1983 of MOLA (Major Orchestra Librarians Association) and served two terms as president of that organization. In the Minnesota Orchestra, he has served several terms on the members committee, including as co-chair, and twice on the musicians’ contract negotiation committee.

Electronic Media Summit

by Laura Ross

Approximately 40 or 50 orchestra musicians and local officers met with AFM officers, staff, and counsel for an electronic media summit in Alexandria, Virginia on Monday, November 12, 2007. The discussion centered on radio broadcasting.

ICSOM Chair Bruce Ridge made a few opening remarks and expressed his interest in the opinions of those in attendance. AFM President Tom Lee began with a brief overview of the AFM's recording bargaining history, the use of electronic media guarantees in symphony collective bargaining agreements, and the previous media summits held in 2003 and 2005 in Chicago (both of which, it should be noted, had better participation from ICSOM orchestras). He noted that, over the years, the musician salary costs of both radio broadcast and sound recording have shifted from record labels and radio stations to orchestral institutions.

President Lee spoke about the AFM bylaw that requires Federation approval of any media language negotiated by locals on behalf of their orchestras. In the past few years, a number of new agreements were negotiated that included scales, benefits, and other terms and conditions that were lower than those required in existing AFM national electronic media agreements or agreements promulgated by the AFM. (Promulgated rates are established by the International Executive Board (IEB), generally with the input of the Player Conferences and/or rank and file musicians.) Unfortunately, there have been many times when newly negotiated language has been submitted for approval with little or no time to try to address any problems, leaving the President, and now the entire IEB, with a dilemma: Should they reject the language and force the musicians to return to the bargaining table (assuming that is an option), and, further, should they file charges against the musicians and local officers if the language is ratified without AFM approval?

AFM General Counsel Jeff Freund expounded upon AFM bylaw enforcement and pointed out that the nature of our industry has changed, thanks largely to changes in technology and economic structure. The AFM has had to take a different path.

AFM SSD Electronic Media Director Debbie Newmark explained that the AFM currently has three very successful multi-employer negotiated national agreements. The Symphony, Opera, Ballet Audio-Visual (AV) Agreement has been in existence since 1982 and has 72 signatory orchestras. The Symphony, Opera, Ballet Internet Agreement, which was first negotiated in 2000 to cover audio product on the Internet, has 77 signatory orchestras. The newest of the three, the Symphony, Opera, Ballet Live Recording Agreement, was negotiated in 2005–2006 and was based upon the Radio-to-Non-Commercial promulgated agreement. That agreement, which includes budget review, project approval, and potential revenue sharing once costs are met, already has 66 signatory orchestras. In regard to Counsel Freund's comments about taking a different path, the Internet Agreement and Live Recording Agreement are signifi-

cantly different in nature from past agreements, and both the AV and Internet agreements include local oversight committees.

All three of these agreements are successful and enforceable because they have been directly negotiated with the managers and/or representatives of our managers. These agreements also include joint oversight committees that can help deal with ideas that don't fall within the strict parameters of these agreements.

AFM Associate Counsel Trish Polach spoke about recent discussions with Minnesota Public Radio and American Public Media (APM), which recently acquired *SymphonyCast* and *Performance Today*. Both programs are currently covered by the National Public Radio Agreement, which expires in early 2008. The AFM is committed to negotiating a successor agreement with APM, but that may not be as easy as one would hope. APM does not generally pay for the content they broadcast, so they have concerns about their role in a successor agreement, most importantly regarding the negotiation of wages. As mentioned earlier, broadcasters, like record labels, have abrogated their responsibility for funding recording and have placed the burden squarely on our institutions who must then find the funding to be on the radio or to make recordings. Discussions are ongoing, and APM has invited a couple of orchestra managers to attend the next session in late November.

Ms. Polach also mentioned the wide ranging scales for syndicated radio, which are negotiated locally. Years ago, in response to an ICSOM Conference resolution, the IEB established a floor of 5% of weekly scale for a syndicated radio broadcast. Because that is a promulgated rate, not a negotiated agreement, it has been much harder to enforce these past few years as orchestras have negotiated lower scales.

A number of issues were raised that afternoon. Before discussion from the floor began, ICSOM Electronic Media Chair Bill Foster said he believed a comprehensive radio agreement was necessary. Some raised concerns that a national agreement not undercut local agreements that could potentially be better than what might be negotiated nationally. Others opined that the mindset has changed and that media should be thought of and used primarily as marketing and publicity to enhance our core mission—providing live classical performances to our communities. Many spoke in favor of a national agreement, though what it would encompass was only lightly touched upon. Some orchestras worried about how a national agreement would impact their orchestras if wages were significantly lower, similar to the significant scale differences between the Live Recording Agreement and the Sound Recording Labor Agreement.

By the end of the afternoon, it appeared that there was some consensus from those in attendance that it would be a good idea to seek a national radio agreement. ICSOM President Brian Rood pointed out that each of these media summits over the years has

included shifts in attitudes. He said we all had to be mindful of what is occurring within our orchestras and that we need to leave our orchestras in better shape for future generations.

President Lee wrapped up the session with his observations that he heard that the groups was in favor of a national radio agreement that did not include a loss in salary, that would not harm local agreements, and that would require local/orchestra approval. He assured everyone that he and SSD would work with the ICSOM and ROPA electronic media committees in discussion and negotiation of a national agreement.

LTD Insurance Basics

(continued from page 1)

disabled by the insurance company principally because of the opinions of the unfriendly experts, and you will be denied benefits.

In this case the disabled plaintiff won, but many plaintiffs are not so lucky. Below is a list of some of the reasons that ERISA has a negative impact on your LTD plan:

1. If you have to resort to federal court after an unfair denial of benefits, your remedies are generally limited to the benefits owed, interest, and your attorney fees. Even if you've lost your home or your health insurance because of the unfair denial, the insurer will not have to make you whole. Insurers are not liable for punitive damages or mental anguish. Therefore, they don't have much to lose in denying your claim.
2. You are not entitled to a jury trial as you might be in other insurance disputes.
3. If your LTD plan contains "discretionary language," a federal court will review the insurer's decision with deference and will only reverse it if the decision was arbitrary and capricious (read "preposterous"). Therefore, an insurer has little incentive to approve a claim if it can come up with even a weak reason to deny it.
4. In general, once the claimant is in federal court, the court will base its decision exclusively on the record that was before the insurer when it denied the claim. No new evidence is allowed (even where it might be helpful, and even where new, illuminating medical information has developed).
5. ERISA plan participants (musicians) can't rely on oral representations—even from HR or the insurer—about their benefit plans. Courts adhere strictly to the written language in plan documents.
6. The insurer doesn't have to defer to your doctor's opinion or even to the Social Security Administration's determination on inability to work.
7. The insurer *is* permitted to hire a conflicted doctor to review a claim and decide you are not disabled based on your medical records.
8. When you appeal a denial of your benefits, the insurer, the same entity that denied your claim and who has a stake in the outcome, will review it.
9. Although you should always hire an attorney to do your appeal to the insurer, it is expensive to do so, and you cannot recover the attorney fees for this pre-litigation legal work.

Below are some important LTD provisions that affect the amount of benefits, LTD eligibility, or duration of benefits:

Provisions Affecting the Amount of Benefits

Percentage of Income. Disability plans usually provide for income replacement up to a certain percentage of your pre-disability income. 60% of your monthly income is quite typical. But it is possible to get higher percentages for a higher premium. No one will provide 100% of your income because to do so would make it too attractive to be disabled.

Definition of Income. Insurance policies deal with income in different ways. Sometimes they use their own terms, such as *monthly earnings*, to describe the concept of income. Definitions vary by how much of your income they capture. It is important to know, for instance, whether EMG or overtime is included. Some policies are tricky and will calculate your income after pre-tax deductions for such things as 403(b) or cafeteria account money. This can drastically reduce your benefits, so beware.

Maximum Benefit. LTD benefits are usually expressed in a percentage up to a certain maximum. If the cap or maximum benefit amount is too low, overscale wages may not be captured at all. Because there is a great disparity in income among players in a given orchestra, it is important to think about how overscale players are being covered by LTD. 60% of base pay is not a good benefit for a player whose pre-disability income is double scale. The bargaining unit can certainly make the decision to advocate only for insurance for base pay, but it should only do so consciously.

Offsets and Deductible Sources. Although your policy promises to provide a certain percentage of your income as a benefit, this is somewhat misleading. The insurer will subtract from the benefit amount various other payments that you may receive

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LTD Insurance Basics

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during your disability. But you may be able to negotiate over the offsets allowed by your policy. Workers' compensation and Social Security Disability Insurance ("SSDI") benefits are typically deducted. Many claimants who have children are shocked to discover that the SSDI benefits that their children receive by virtue of the parent's disability are taken as an offset by the LTD insurer. This may be of dubious legality, and certainly is of dubious morality, but it is written into many policies. The policy may or may not contain offsets for tort recoveries (think income replacement from a car accident), severance pay, other income you earn while disabled (such as teaching income), retirement benefits and other group disability benefits.

Taxability. The taxability of your benefits depends on who pays the premiums and in what manner. There are two ways to avoid the tax on benefits. If the management pays the premium and treats the payments as income to you (you are taxed on the premium), the benefits are tax-free. If you pay the entire premium with post-tax dollars, the benefit will also be tax-free. Taxability has great impact, particularly for musicians who will be in a high tax bracket even when they are on LTD.

Cost of Living Adjustments. Benefits do not always come with a cost of living adjustment (COLA). However, COLA is huge advantage to the disabled person. Without it the disabled person is on a fixed income, and his standard of living is likely to go down with time. COLA is an expensive add-on but it may be worth the expense.

Provisions Affecting Eligibility or Duration of Benefits

Definitions of Disability. It is important to remember that LTD insurers do not pay benefits just because you have a serious diagnosis or because your doctor says you are disabled. Disability benefits will only be paid if you satisfy the plan's definition of disability. And different definitions have different legal meanings under ERISA case law. Some states have state-approved definitions of disability, and if the policy definition appears to slip below the state standard, the policy may not be approved for sale in that state.

For the most part, disability policies pay benefits based on a two-tiered definition of disability. You must be disabled from your *own occupation* for a period of time. After that, benefits will usually depend on satisfying a more stringent definition of disability—disability from *any occupation*.

There are a variety of definitions of own occupation disability, and some are more onerous than others. For instance, a definition that requires the musician to be disabled from *all the material duties* of his occupation can be harder to satisfy than one that requires the musician to be unable to perform *one or more material duties* of his occupation.

The federal courts have told insurers that they need to take the claimant's actual job into consideration when deciding own

occupation claims, but insurers don't always abide by this rule. It is best to enforce this rule through plan language rather than a trip to federal court. The Minnesota Orchestra's CBA wisely states that "[t]he insurance policy's definition of 'disability' shall relate to an inability to perform the Musician's regular job...." This clarifies that the *job* is the point of reference and not the *occupation* which is obviously a much broader concept. It is also wise to make sure that the employer portion of an application for LTD benefits correctly states your job and its duties.

The duration of the own occupation period is a crucial decision. It is more costly to have a longer "own occ" period, but it may be worth a great deal. Many claimants are denied benefits once a 24-month own occupation period has expired. Often, a medical condition has not been properly diagnosed within this two-year period. It is certainly difficult to find a new career within this period. Extending the own occupation period may be a wise use of available dollars.

Any occupation benefits are harder to get because they will not only depend on a medical determination but will also depend on a vocational determination. You can only collect any occupation benefits if you cannot perform any job for which you have transferable skills that would provide you with a gainful wage. Transferable skills will vary from musician to musician. Some have had other careers or jobs whereas others have never done anything other than play an instrument.

Where any occupation definitions are concerned, the gainfulness standard can be decisive. This standard commonly is expressed in terms of a percentage of your pre-disability income. If you can do jobs that will pay you this percentage, you are not disabled from any occupation. But too the definition of "gainfulness" is a secret kept by the insurer. I feel it is better to codify a gainfulness standard in the plan. A higher percentage will mean there are fewer jobs the insurer can invoke to deny benefits. In no case should the percentage be lower than 60% of your pre-disability wage. 85% is obviously better.

Limitations. By far the most dangerous terms in disability policies are the *self-reported symptoms* limitation, the *mental illness* limitation, the *objective medical evidence* standard, and limitations for musculoskeletal problems. All of these are used by insurers to limit the duration of or to deny claims that are valid but for which there is not specific diagnoses or no specific test to measure your discomfort. Where pain or fatigue is disabling, you are vulnerable if the LTD plan includes any of these features. This includes disabilities from very serious illnesses that can be chronic or even fatal. Try to eliminate these provisions. Often they are put into the LTD policy without the purchaser's knowledge. Your management may be appalled to discover them and may want to help eliminate the provisions.

Discretionary Language. There are many provisions in LTD plans that can affect your chances of receiving LTD benefits.

However, from the perspective of an ERISA attorney, the discretionary language referred to above is critical. It gives the insurer the discretion to decide your benefit claim—so much discretion that a federal court will rarely reverse the decision. It allows the court to affirm the insurer’s decision, even if it is wrong. For this reason, if you can, you should get rid of this language. If your plan doesn’t include it, keep it that way.

Discretionary language can take many forms, and many billable hours are expended arguing over whether given language actually gives the insurer discretion. However, typical discretionary language will read something like this:

The Insurer has full discretionary authority to determine eligibility and interpret the plan.

But beware that, depending on your jurisdiction, other language can pass as discretionary language even when it doesn’t mention discretion. Some state departments of insurance have tried to make discretionary language illegal. Theoretically, if the language is illegal to begin with, the insurer should not be able to charge more for removing or omitting it.

Special Advisory

You may be tempted to change carriers as part of the collective bargaining process if a new carrier is offering more favorable plan terms. However, it will be necessary to avoid the imposition of a new pre-existing-condition exclusion through plan language that guarantees “continuity of coverage.” In some states continuity of coverage is required by the insurance code, but make sure you know whether this is so in your state. Continuity of coverage could also be incorporated into the CBA.

CBA Provisions That Affect Disabled Musicians

Even where the disabled musician is receiving disability benefits, there are other provisions of a typical CBA that may affect the fate of the disabled musician. I often feel that these provisions are as critical as the LTD plan itself. At a minimum, the CBA should answer the following questions regarding the disabled musician:

1. For how long is the musician entitled to participate in the health plan at the employee rate when he becomes disabled?
2. For how long will the musician be retained as an employee if he becomes disabled?
3. Does “just cause” provide the management with a way to fire the disabled musician?
4. How will disability affect pension service credits?

5. Is the disabled musician covered by sick pay or STD for the period during which he has to wait to collect LTD?

What To Do If Denied Disability Benefits

First, if your claim is denied you should immediately request your claim file from the insurer before you appeal. It should contain lots of information about the insurer’s thought process in denying your claim. It is a serious mistake to appeal the denial without the benefit of the file.

Next, request all the applicable plan documents *in writing* from both your employer and the insurer. This includes the applicable summary plan description, the underlying formal plan including any amendments and modifications, other guidelines used to administer your claim, and any administrative services agreement. The plan administrator (whoever that is under your plan) should provide these, because it can incur ERISA penalties for not doing so within 30 days. Also, obtain your CBA, as it is an ERISA plan document.

Once you have set the above requests in motion (or even before your do), *hire an attorney specializing in ERISA!* Appealing your denial is a requirement before you bring a federal court action. Insurers are more skilled at denying than you are at appealing denials. To level the playing field somewhat, you will need an ERISA attorney who handles employee claims.

Remember that if the insurer has discretion, the appeal is your last, best chance to get benefits. Since no new evidence will be considered in court, the ERISA attorney will be able to advise you of how to build a record that will: a) be likely to convince the insurer to reverse the decision; and b) provide you with the best possible record if the decision is upheld and you have to go to court. ERISA attorneys turn away many truly disabled clients because the client has appealed himself, ruining the possibility of a successful lawsuit.

Not only should you get an ERISA attorney, but you should do so quickly. There are strict deadlines in ERISA plans that enforced very rigorously by the courts, especially against claimants.

Lastly, do not sign a separation agreement with your management without seeking legal advice from an attorney with knowledge of ERISA. Many employees inadvertently waive ERISA employee benefit rights in signing employment releases, and the courts can be very hard on employees who try to recover benefits that were arguably waived in a separation agreement.

Sally Mermelstein was a violinist in the Minnesota Orchestra for about 15 years. She resigned due to disability and is now an attorney in Minneapolis. Much of her practice is devoted to ERISA employee benefits.

Orchestra Newslets

Newslets are compiled with the help of ICSOM delegates and ICSOM Members at Large from sources that include direct submissions, member orchestra websites, and topical news items. The editor encourages input and submissions.

Oregon Symphony delegate Dolores Daigle reports that Elaine Calder has been appointed President of the Oregon Symphony Association. Calder actually arrived last season from Canada, where she was managing director of the Edmonton Symphony Orchestra. At that time, however, she was only able to work as a consultant because of immigration issues. OSO musicians are generally pleased with Calder's dynamic leadership and the changes she has made, and audiences already seem to be returning.

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The **North Carolina Symphony** was presented the City of Raleigh Medal of Arts, the city's highest arts award, in a ceremony on November 14 held at Fletcher Opera Theater. North Carolina Symphony harpist and past Medal winner Anita Burroughs-Price performed at the ceremony. The Medal of Arts program was established by the City of Raleigh Arts Commission in 1984 to honor extraordinary achievement of both individual artists and arts organizations.

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The Florida Orchestra recently faced an extended period of play and talk negotiations while they operated under the terms of an agreement that expired on August 31. Before the season opened, there were very contentious negotiations in which the board proposed severe cuts in weeks, wages, and orchestra size.

Orchestra committee chair Harold Van Schaik relates that, as the deadline loomed, TFO was visited by ICSOM's Dynamic Duo, Bruce Ridge and Brian Rood. Bruce and Brian met with TFO orchestra, board, and management leadership, were keynote speakers at a crucial orchestra meeting where the musicians of TFO unanimously passed a strike authorization motion, and later visited with musician leadership of the newly organized Orlando Philharmonic. Their visit to TFO was instrumental in solidifying committee resolve, raising orchestra awareness, and serving notice to the board that others outside west central Florida were aware of events.

A few weeks after the visit, TFO musicians were given a highly objectionable "last, best, and final" offer which, when presented to

the orchestra, received a nearly unanimous rejection. When the results of the vote were conveyed to board leadership, the result was an offer to play and talk—an offer *they* had rejected the prior week. After the musicians' rejection of the board's final offer, there was a notable change in the tenor of the dialog.

After continuing to play and talk while new (as of October 1) CEO Michael Pastreich settled in and began to acquaint himself with Tampa's resources and the orchestra's finances, both sides reached agreement on a three-year contract that is retroactive to September 1, 2007. TFO musicians ratified the contract on December 9.

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While widespread wild fires devastated much of San Diego County in late October, **San Diego Symphony** musicians were called together to rehearse for a scheduled Halloween-themed subscription series that included *Night on Bald Mountain* and *Symphonie Fantastique*. No one knew how many or which musicians would be able to perform when the decision to try to proceed with the concerts as scheduled and as programmed was made. The skies, dark from soot, were colored by an eerie, orange sun, and it was difficult if not dangerous to breathe the outside air. Mandatory evacuations were being announced constantly, many roads were closed, and countless homes, including those of musicians, were threatened.

A phone tree message asking musicians to come to the rehearsal if they were able also let them know that management had made the hall available to musicians and their families who were displaced. It was heartwarming when, at the first rehearsal, nearly everyone somehow appeared, including some who had already been evacuated from their homes. Television and radio news announced that all schools would remain closed, but that the symphony concerts would go on as scheduled. Although San Diego remained in a state of emergency, the orchestra performed the series of concerts without incident to large and appreciative audiences—a reminder to those in attendance and to musicians alike just how important an orchestra is to a community in times of crisis.

In the end, San Diego Symphony musicians and staff were all lucky to have escaped losing any of their own homes, though family and friends were not so fortunate. A few weeks later, the San Diego Symphony, joined by many community groups and civic leaders, presented a free concert event for the residents of Rancho Bernardo, one of the communities hardest hit by the firestorm. The concert, conducted by Music Director Jahja Ling, along with speeches and a tribute video accompanied by the orchestra, honored the many fire fighters, police officers, utility workers, and other neighbors and volunteers who helped in the time of need. The event was broadcast locally on television and radio.

Jacksonville

(continued from page 2)

its riverwalk, shopping districts, and, yes, the beautiful home of the Jacksonville Symphony, the Times-Union Performing Arts Center. I have read reports that speak of a 36% growth in the economy there in just the past five years.

And yet, seemingly in defiance of the growth around them, the Jacksonville Symphony has not found leadership that could harvest the opportunities surrounding the streets of their concert hall.

No, instead, those charged to lead the orchestra have embraced the negative rhetoric that has been promulgated throughout the field, and now at this time of crisis they have uttered the absurd assertions that so many of us have heard across the table. It is impossible to believe that so many boards and so many managers stumble across the exact same words by accident.

Those who fail to lead their orchestras always recite the same lines of structural deficit and greedy musicians, as if they fall back on negativity as a last refuge. They must justify their failures in light of all the positive news that is being reported across the country. They must justify their inability to raise funds for an orchestra even though the nonprofit culture industry in America accounts for \$166 billion in economic activity every year.

Across America, cities are recognizing the positive financial impact the arts and their orchestras can have in their communities. Inspirational leaders are finding new donors and innovative ways for orchestras to serve their communities.



Photo by Patrice Evans

Jacksonville Symphony musicians have been out of work since they were locked out at midnight on November 12. An unfair labor practice charge has been filed with the National Labor Relations Board against the Jacksonville Symphony Association, which allegedly did not give the mandatory 60-day notice.

But, not in Jacksonville. No, in Jacksonville, the musicians are told they should just be happy with partial employment and a nearly 60% cut in their pension. In Jacksonville, they should allow their part-time musicians to suffer losses of as much as \$21,000. In Jacksonville, they should just accept the words of a board chair who declares this “not too onerous.” Is there any doubt that this statement will have a negative impact on fundraising for the orchestra in the years to come?

My mood is hard to describe as I write this. I have a sense of dejection, prompted by a little bit of “Googling” as I sought out new information on the situation. I stumbled across a page on the *Times-Union* website where readers can post anonymous comments to recent news events. Many of you have seen these pages, and as you know, the tone of debate can sink to a level that would make the even most ardent mudslinger cringe.

On this night, November 16, there are 22 postings already, some of them hate-filled attacks on musicians who don’t work “real jobs.” There are references to the “ethereal arts and croissants world of concert musicians.” There are ignorant statements that the symphony is a “second job” for all of the musicians.

It is the world we live in, I suppose, where discord seems more valued than debate. It would be easy to ignore the unrefined rhetoric of an anonymous blogger, but it is disheartening that it seems to have been inspired by the words of a respected member of the community, indeed a person who supposedly cares so much about having a professional orchestra in Jacksonville that he sought to become chairman of the board.

It is even more disheartening to hear the reports from our delegates stating that they have heard the very same words from their board leaders and their managers.

Our orchestras should inspire visionary leaders to speak words of aspiration for the citizens of their community, and not false words of contempt from anonymous bloggers.

George Orwell wrote: “In a time of universal deceit, telling the truth is a revolutionary act.”

Here is some truth: there are some excellent managers in our field, as well as some wonderful boards and board chairs who are dedicated servants of the community. Even with those leaders who are the very best, it is natural that we have some disagreements. The musicians of ICSOM embrace that, and we welcome positive debate.

But when we hear a board chair mock the work week of a symphonic musician, we are not talking about well-meaning disagreements. We are talking about an attempt to justify a failure of leadership.

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Jacksonville*(continued from page 11)*

I am always fascinated by board members. Most of them are extraordinary citizens and successful business people who would not tolerate failure of leadership in any division of the companies they run. But when it comes to symphonies, they seem all too ready to accept excuses for underperformance. This simply defies all logic to me.

As the crisis has unfolded this week, it has been uplifting to watch our musicians and friends respond with positive messages of support. Our communities will hear the positive message of ICSOM, and our colleagues in Jacksonville will prevail.

But on this sleepless night, Mr. Van Vleck's words echo in my head—a literal echo, as we have heard them before. Let us resolve to challenge them until we never have to hear them again.

“I respect our musicians, but there's something about a 37-week year and 20 hours a week that doesn't seem too onerous to me.”

Surely, Mr. Van Vleck was misquoted. Nobody who respects musicians would utter such mindless palaver. I hope to have the opportunity to meet with him so he can tell me what he really meant to say.