



The Estate Planning Doctor Is In: Where Are The Physicians?

By: Mark Monasky, MD, JD, FACS, FCLM.



INTRODUCTION:

Physicians are running scared. As a practicing neurosurgeon for seventeen years, I have never seen such low morale among doctors. There exists a foreboding sense of gloom and helplessness among physicians regarding the future of medicine and their personal financial future. While this is true for many other segments of society as well, the physician has a unique perspective. It is important for estate planning attorneys to understand this perspective in order to break into the physician market and provide the needed treatment.

This fatalistic attitude among doctors appears prevalent whether or not they believe “national health care” will be passed. Under either scenario, physicians understand there will be decreased reimbursements, higher taxes, and lack of any meaningful tort reform in a legal system perceived to be run amok.

BACKGROUND:

Physicians have worked too hard and have sacrificed too much to throw it all away with an inadequate estate plan. After undergraduate college, four years of medical school, a grueling residency lasting anywhere from three to eight years, and often a fellowship, physicians enter practice with high debt and have to play catch-up to their college peers, who have already been in the workforce for years and have begun accumulating assets. People working 50 or even 60 hours a week in other occupations feel abused by their employers, even when paid overtime, and if such work is self-imposed, are considered workaholics. Contrast this with resident physicians who have been mandated by the Accreditation Council for Graduate Medical Education (ACGME), which oversees residency programs, to **decrease** their workload to a “mere” 80-hour workweek. Physicians accumulate significant assets over the course of their career and have high liability, and special protections and strategies are needed to pass on and preserve those as-

sets while minimizing the estate tax bite.

The medical profession is privileged on occasion to rescue a patient from the throes of death, but the highs achieved from such experiences go only so far in mitigating the current economic and political milieu physicians face. Physicians are fed up. Many are transitioning into other careers, or are planning for, rather than delaying, early retirement if they can afford it. This is an optimal time for the estate planning attorney to provide the needed treatment their physician clients desperately require. It is a tipping point.

ATTORNEY, KNOW THY CLIENT:

Estate planning attorneys need to be aware of issues that are crucial to physicians and have within their armamentarium the necessary fixes in order to enter the physician’s world. The current economic and political environments, coupled with specific demographics of the physician population, have culminated in a unique opportunity for estate planning attorneys to address physician needs. Many of these issues are inextricably intertwined with the estate planning process. An attorney possessing knowledge of issues that are near and dear to a physician’s heart will have a leg up on other attorneys attempting to capture this lucrative market. Such issues include decreasing reimbursements, increasing patient volumes, protecting assets from an unfair legal system, the growing trend of locum tenens employment, increased governmental regulation, and increased on-call coverage.

Decreasing reimbursements coupled with increased patient volumes and runaway liability with no hope of tort reform for the foreseeable future has created a golden opportunity for attorneys to help physicians in the area of asset protection. Physicians are concerned that the liability situation will get worse with the current Obama administration and the trend of State Supreme Courts overturning state statutes with caps on noneconomic damages. The American College of Surgeons has stated “Many surgeons are being

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forced to retire earlier, stop doing high-risk procedures or move to states where there are strong medical liability reforms.” http://efacs.org/portal/page/portal/ACS_Content/Advocacy/LiabilityReform, visited Dec 6, 2009. The Health Coalition on Liability and Access (HCLA), which has joined with Doctors For Medical Liability Reform (DMLR), states “Medical lawsuit abuse has turned our legal system into a lawsuit lottery where a few win and the rest of us lose.” <http://www.hcla.org/>, visited Dec 6, 2009. Medical Justice, founded by a board certified neurosurgeon, has a goal to “prevent, deter, and respond to frivolous medical malpractice suits”. www.medicaljustice.com, visited Dec 6, 2009.

There exists a growing trend of locum tenens work due to physicians transitioning into other careers or retirement. An attorney armed with the knowledge that locum tenens employment contracts offered to physicians often do not provide for “tail” or occurrence malpractice coverage can negotiate such coverage into the contract, or form a professional corporation to take advantage of tax deductions and allow for qualified retirement planning. Such issues will naturally morph into formal estate planning.

Physicians are bombarded by increasingly complex Medicare and Medicaid regulations, as well as federal statutes such as HIPAA and HITECH. The attorney or firm who has a familiarity with such laws will be able to help the physician avoid sanctions through noncompliance, which will indirectly protect the physician’s assets.

Increased call coverage for physicians has several implications. After salary, this is the second most important issue to physicians when negotiating a contract. It is now the expectation among physicians to be remunerated for call coverage. There exists higher liability exposure for such patients, many of whom have no insurance, as well as the fact a physician may be awake for forty hours without sleep. I have personally known of many surgeons who have left a practice due to call burdens. The concept of being on-call is foreign to attorneys, but it is vital the attorney understand its importance to the physician.

PRESCRIPTION FOR THE INITIAL MEETING:

During the initial meeting, the estate planning attorney needs to create an atmosphere of trust. For the average

physician, an encounter with an attorney is typically an adversarial proceeding. The physician is likely being sued for malpractice. Approximately one-half of neurosurgeons and OB-GYNs, and one-third of trauma surgeons and radiologists are sued annually. The estate planning attorney needs to put him or herself in the shoes of the physician, and be proactive in acknowledging to physicians the out of control legal system. Remember, the physician’s starting point is not a neutral one; it is one of distrust. The estate planning attorney must demonstrate to the physician in their initial conversation that they truly understand the unique obstacles physicians face.

Attorneys need to understand physicians are extremely busy and rarely have any flexible time 9 to 5 Monday through Friday. Physicians frequently see 25-50 patients in a busy clinic, are constantly interrupted by calls from patients and the emergency room, need to schedule emergency procedures or surgeries, often leaving waiting rooms of unhappy patients. The estate planning attorney needs to work around the physician’s schedule and be willing to make house calls.

FOLLOW-UP MEETING: PRIMUM NON NOCERE: FIRST DO NO HARM

Now that you have broken that initial trust barrier with your physician client and have them returning to your office, you must continue to show you are trustworthy, or the physician won’t follow-up. Many attorneys reading this will be saying, “Hey, I got it, now let’s move on.” The level of distrust physicians have against attorneys cannot be overstated. A joint poll administered by the ABA and AMA found that 25% of physicians feel there is nothing positive about working with attorneys. It is the author’s opinion, having conversed with hundreds of physicians and attorneys on this very topic, that this is the most significant reason estate planning attorneys have not been able to penetrate the physician market and why the majority of physicians have grossly inadequate estate plans.

Consider the analogy of an anaphylactic reaction, which is a life-threatening allergic reaction. The initial exposure to the allergen sensitizes the patient and allows the formation of antibodies; the second exposure is the life-threatening one. Once physicians have been sensitized against lawyers, future encounters, even voluntary ones, can be very pain-

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ful. The most innocent comment by the attorney may be misconstrued by the physician as exploitative. The major driver of this lack of trust is the ever expanding medical liability doctors face. The lead article in *AMA Voice*, May/June 2009 was titled "Liability fears putting doctors on the defense." The article referred to "the nation's broken liability system", quoted a 2003 Health and Human Services report that "defensive measures are estimated to cost the health care system anywhere from \$70 billion to \$126 billion a year", and stated "The fear of being sued is driving physicians to defensive medicine." The estate planning attorney needs to constantly reinforce that they are trustworthy and have the physician's best interests at heart and truly understand the highly litigious environment physicians are immersed in. Just imagine how you would feel as an attorney if you were sued once every two years for your entire working career. Wouldn't you be bitter against and distrustful of lawyers? As a practicing surgeon, the number one legal topic surgeons discuss is the liability crisis and how to protect what they have worked so hard for from "those lawyers". It is only when you understand this and can convey this to your physician clients that you will begin to break into the physician culture and obtain and retain physician clients. You need to convince the physician that you are not like "all those other lawyers."

Physicians are highly intelligent and will demand more information than typical clients. I've heard many attorneys express their frustrations at arrogant physicians who ask too many questions, particularly surgeons. Remember, surgeons are the ones with the big estates. The attorney needs to play this to their advantage and should overwhelm the physician with information and give them examples of how drafting or procedural errors can be catastrophic in estate planning. This will convince the physician you really do know your stuff and are highly intelligent yourself. Surgeons are life-and-death decision makers, and even though this sounds counterintuitive, they will respect the attorney who exudes confidence and gives them a couple viable options. Do not tell the physician you will begin charging your hourly rate if the conversation exceeds a specific number of hours. This will reinforce to the physician that you are "one of those lawyers" running the clock to increase fees. Instead, incorporate this extra time into your flat fee.

Physicians are a closely knit group. Surgeons, in particular, face the brunt of the liability crisis head on, and band together. A comment from one surgeon that a particular lawyer provided less than optimal services will spread like the bubonic plague in the surgical community. This reflects a psychological tendency to more readily accept information that comports with one's preconceived convictions. The converse is also true, but to a lesser extent. A highly satisfied surgeon who feels they were treated fairly and competently will spread the news like a common cold.

CONCLUSION:

It is imperative that the estate planning attorney understand the unique issues facing physicians and appreciate the pre-existing strain between the legal and medical professions that predate any attorney-client relationship. This initial hurdle increases the difficulty of getting the physician client into the office since this requires a voluntary act on the physician's part. Furthermore, a physician will not contact an attorney unless the physician perceives there is a problem that needs to be fixed. An attorney armed with an in-depth knowledge of the physician culture, and who understands the obstacles physicians face and their underlying feelings towards attorneys, will position themselves favorably to penetrate this highly refractory but lucrative profession.

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