

The Estate Analyst

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Diagnosing The Physician's Estate

Estate planning for medical professionals has evolved.

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**“By medicine life may be
prolonged, yet death
will seize the doctor too.”**

– William Shakespeare, Cymbeline

Medical professionals share certain traits and circumstances that affect wealth planning. A business owner, attorney, or other successful individual from a non-medical field who has the same net worth and income level as a doctor may not necessarily have the same set of planning challenges. The arsenal of modern techniques can provide physicians with a variety of solutions.

To assist with the identification of what makes planning for a physician different and explain, we were fortunate enough to review this topic with attorneys Richard A. Oshins and Martin M. Shenkman, and wealth planning advisor Michael W. Halloran each of whom have extensive background in estate planning in general and hands-on experience with the planning of physician estates.

Malignant Threats

Malpractice litigation not only overshadows all planning for physicians but may be the key motivating factor that triggers planning. Malpractice is a personal liability that can't be contained within corporate entity firewalls, nor does not wait for death in the manner of an estate tax—it is an immediate threat.

The threat to physicians is quite real. The statistics are staggering with three quarters of physicians in low risk specialties facing claims and virtually all physicians in high risk specialties facing claims during their careers. A 2011 study of 40,000 doctors that was published in the *New England Journal of Medicine* specifically found that:

- 1) 7.4% of all physicians have a malpractice claim each year

- 2) By age 45, 36% of physicians, generally, will have encountered their first claim. For the higher risk specialties, that number shoots up to 88%.
- 3) By age 65 very few physicians have not been sued. As many as 75% of physicians with low-risk specialties will have been sued by age 65 and approximately 99% of physicians with high-risk specialties will have had malpractice suits by that age.

The reality of colleagues being sued and annual increases in malpractice insurance provides constant reminders to physicians of the threat. And when an actual suit is filed, the expense of the deductible, the increase in insurance premiums going forward, the enormous time consumed and the stress imposed all rivet the physicians attention.

***A doctor's reputation is made
by the number of eminent men
who die under his care.
—George Bernard Shaw***

The prevalence of malpractice actions has created an industry to defend and prosecute such claims. Prompted by the well publicized malpractice awards and the prospect of an immediate payday, many marginal claims are exaggerated and processed. There are large numbers of specious claims, some by unscrupulous patients seeking financial gain and others by any patient or surviving family member who is unhappy with a medical outcome or a physician's bedside manner...even where the best efforts of modern medicine are simply no match for the inevitable conclusion to the human condition.

Physician Objectives

Compared with malpractice claims, the Federal estate tax is far less threatening. In light of the reinstatement of the Federal estate tax with a \$5 million exemption and the portability option enabling a surviving spouse to transfer \$10 million without estate tax, a large percentage of physician estates have broken free of estate tax based planning.

“Even for those persons residing in jurisdictions with death taxes, there is a big difference between the 55% top federal estate tax rate of prior years or the current 45% top rate compared with a 15% state death tax rate,” said Martin Shenkman. “The fear factor just isn't there as a motivator. Instead, clients engage in asset protection oriented planning.”

With the benefit of speaking with hundreds of physicians and medical residents each year, both in groups and individually, wealth planning expert Michael Halloran, CFP, CLU, AEP, ChFC, concurred. “The key priority for physicians is malpractice and minimizing risk,” he said.

Halloran also noted disability income as an additional concern. “A physician who is injured and can work has no other means of making a living,” said Halloran. Putting away money for children’s education and retirement are also key objectives that resemble the standard planning for members of other professions.

Misconceptions and Rumors

Estate planning attorney and author Martin M. Shenkman observes that although physicians are frequently driven to implement financial plans by the threat of litigation, they may overreact or make plans based on misconceptions.

“There are a number of ideas that fall into the category of golf course rumors,” said Shenkman. Some notable ones:

“I can’t be sued for more than the amount of my malpractice insurance.”

A surprising number of physicians don’t realize that claims can exceed insurance limits and then be applied to personal assets.

“Placing my assets in my wife’s name has protected me.”

This approach has some rather obvious flaws. “A physician may be divorced or may survive a spouse,” points out Shenkman.

“I need an FLP...and what is an FLP?”

“The irony,” said Shenkman, “is that a physician who would never prescribe a magic pill to patient without a proper diagnosis may hear about a trust or an FLP and immediately want it or assume that it will apply to his or her circumstances.”

“My only liability is from my own work as a physician.”

Unfortunately, even the most careful and diligent physicians face extrinsic legal exposures. Another physician or staff member from a medical practice attends to a patient, some incident transpires, and the careful physician is drawn into a litigation along with everyone else.

Liability may not always come from the treatment of patients. Shenkman points out that a physician who is in a car accident may be presumed responsible by a jury simply because the physician is presumed to have wealth.

A Customized Plan

Shenkman also noted that much of the literature about estate planning that is distributed to physicians presupposes an estate for a married couple with children.

This is a paradigm that is increasingly not applicable,” points out Shenkman.

With a divorce rate hovering around 50% a plan may fail if it is based only on a sustained marriage. Moreover, marital plans are not applicable to all kinds of individuals—people with children from previous marriages, single people, same sex couples, childless couples, etc.

A physician may be working in a small partnership, a professional corporation, or in a large LLC with offices in multiple states. Increasingly, physicians are forming entities with a generic name like “Main Street Medical Group” and creating a business that can be marketed and sold to new partners in the future.

With so many business and personal models, there is a lot more to planning for a physician’s estate than sizing up income and net worth. A customized plan is needed for every physician.

Neglect is Not Benign

Another very common ailment of physician estates arises from basic neglect. “Here is another surprising irony,” Shenkman points out, “a physician whose practice is based on follow-up visits and annual checkups will set up an estate plan, conclude that everything is done permanently and then walk away. It doesn’t work like that.”

This is actually a problem that is not specific to physicians. Any plan needs to be supervised. For example, even a simple plan such as setting up a *Crummey* trust for each child is frequently found with only the first couple of years of funding transfers or the transfers are made but none of the *Crummey* notices are executed or mailed.

Other planning techniques have their own requirements. The designation of beneficiaries must be monitored. Assets must not be commingled. Partnership

formalities must not be disregarded. ILITs and FLPs should not be left unattended for long periods of time.

Ongoing maintenance may involve modest amounts of time and subtle adjustment each year but for every arrangement there are serious potential hazards from neglect and the consequences are serious.

Tax law changes, investment climate shifts, and changes to the physician's family circumstances should be reviewed periodically. Many techniques rely upon the passage of time to have full effectiveness and if the physician or other client waits too long, planning opportunities can be limited.

Without periodic reviews, there is no opportunity to apply the latest techniques and improvements to an existing plan. Such neglect directly jeopardizes wealth planning.

Physician Planning

Michael W. Halloran had additional observations. Physicians have long hours, are often on call, and have to constantly review new information concerning medical studies and drugs. "Physicians are targeted by all kinds of advisers and they don't know who to trust and have little time to find out."

A planner who is able to meet with a physician is now able to engage in more sophisticated planning and problem solving using computers. However, different types of medical specialists approach with their own skill sets.

"A surgeon making rapid operating room decisions makes financial decisions more rapidly than a pathologist who, by nature, wants to conduct research before making decisions," noted Halloran.

Wealth and specialization also influences the type of planning that is undertaken. "A pediatrician may be less likely to engage in sophisticated planning or establish new entities in other jurisdictions than a surgeon who has more income and higher risks to contend with," said Halloran.

Educating Physician Clients

Getting a Physician's attention and trust to be able to set up a customized plan is crucial. During that introductory phase of making a physician aware of the need for planning and the available opportunities, it is also important to impress upon them the need to continually maintain the plan.

“Planning is a process,” explains Shenkman, “and not just signing a piece of paper and walking away. There are no magic bullets. For sound results, the client needs to commit to the ongoing process.”

Shenkman made several additional suggestions based on how so many estate planning experiences have worked out. Because the most satisfactory plans result from interdisciplinary contributions of accountants, insurance agents, investment brokers, retirement plan specialists and attorneys, it is worthwhile establishing how the different professionals will be able to communicate in future.

One approach to consider is to have the physician provide the attorney with permission to consult with the other professional team members directly. By establishing this at the outset, the attorney can then contact other professionals at appropriate times.

“Having a few minutes of direct contact with the client’s accountant, for example, can be extremely valuable and efficient,” said Shenkman. “We can speak in technical jargon and quickly establish how the client’s plans need to be constructed or modified. We can establish which assets are going to be in which entities so that everyone is on the same page. It doesn’t take much communication, but it is essential. This way everyone from the team participates and it is the client who benefits the most.”

Planning Techniques

There are certainly many physicians with estates of about \$2 million to \$7 million who will gravitate to simple and effective plans such as an irrevocable trust, a qualified retirement plan, some insurance and perhaps a family limited partnership. These techniques may be sufficient for some estates with the right supervision and the right assets and lifetime transfers.

On the other hand, needs change over time and there may be valuable new approaches that can improve a plan. For example,

- The “tax burn” technique by structuring an irrevocable trust to be taxed as a grantor trust for income tax purposes is a simple but powerful wealth shifting strategy that has been employed more in recent years and which can be highly
- A new day has dawned in asset protection planning and separate assets can be established as LLCs or other entities in owner friendly jurisdictions that leave creditors with potential charging orders and a lot less leverage.

- For the physician who has so much potential exposure to malpractice claims, the precaution of planning for those assets which are likely to be inherited is especially important. Estate planning innovator Richard Oshins has become associated with the Inheritor's Trust and this technique may be of particular interest to many physicians who fit the profile of being wealthy individuals who have an expectation of inheriting wealth.

**When I told my doctor I
couldn't afford an operation,
he offered to touch-up my X-rays.**

—Henny Youngman

Note that in contrast to such techniques, the traditional approach of qualified retirement plans (QRPs) may not be desirable to a physician who has attained a level of financial security that can otherwise finance life after retirement.

“Minimum required distributions leak assets out of the QRP’s tax deferred growth and asset protected environment,” points out Oshins. “Moreover, the QRPs may end up as income in respect of a decedent (“IRD”) and therefore are subject to both income tax and estate tax.” By comparison, cash value life insurance may be a favorable alternative for physicians to consider.

Discretionary Trust Protections

To best protect the assets of physicians from the onslaught of claims, Oshins looks to trust arrangements.

“A fully discretionary trust with an independent distribution trustee, domiciled in a state with preferable tax and asset protection laws, is the ultimate wealth protection tool available,” he said.

In such trust, the trustee can acquire assets for the benefit or enjoyment of the beneficiary and permit the beneficiary to use the trust assets. Thus, instead of the physician personally acquiring a vacation home, the trust can purchase the property and permit the physician and his family (i.e., trust beneficiaries) to use it.

For future flexibility, the trust should have broad powers of appointment so that the physician can make changes in the disposition of assets to adjust to new legislation or changes in the family.

“Not advising a client about asset protection trusts may constitute legal malpractice,” noted Oshins, “yet assisting a client in strategies to avoid current liabilities would constitute a fraudulent transfer.”

Chicken Soup

A final word to the wise from our distinguished panel concerns the use of traditional trusts.

Considering the sophisticated approaches that are available, it may surprise some people to learn that trust arrangements continue to have important roles and may still be of great value to physicians regardless of what other arrangements or business alignments they are utilizing. Old fashioned trust arrangements continue to work in the modern world and provide a comfort level to professionals and beneficiaries alike.

Trusts are not the only approaches, of course, nor the best in certain circumstances, but they provide a reliable frame of reference and an effective mechanism that continues to work. They are the chicken soup of estate planning; there for you when you need them.

NOTES: Richard A. Oshins, Esq. is a member of The Law Offices of Oshins & Associates, LLC located in Las Vegas, Nevada. His website is Oshins.com. Martin M. Shenkman, Esq. has authored dozens of books and hundreds of articles on estate and financial planning. He has law offices in New Jersey and New York and his website is shenkmanlaw.com. Michael W. Halloran, CFP, CLU, AEP, ChFC is a wealth management advisor with offices in Jacksonville, Florida. His email is mike.halloran@nmfn.com.

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