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Want to Avoid a Malpractice Lawsuit? Think Like an Attorney

Steven Abernathy and Brian Luster | Wednesday, March 05, 2014

A good asset protection strategy is a must. There are a few simple precautions that could decrease the risk of a successful malpractice claim substantially.

To say physicians should strive to protect themselves from malpractice suits would be an understatement. Simply put, there is no immunity from the threat of patients claiming their body has been unnecessarily damaged. Thus, it's imperative for medical doctors to implement the simple precautions most likely to decrease the chances of a lawsuit—and a large judgment. Knowing what makes plaintiff attorneys' tick, thinking twice about high malpractice limits, and engaging in strategic asset planning are the means to keeping your assets resistant to attack.

Medical practices are generally on constant guard for malpractice suits, as the likelihood a physician will be sued is high (at least once in his or her professional career). Statistics being what they are, it's wise to ensure a practice by preparing for whatever claims may come, and the best defense is a good offence.

Physicians who'll thrive best in the future will be those most prepared for vexing, unwarranted, and time-consuming malpractice suits. To join their ranks, read on about safe, inexpensive, proven malpractice defense strategies.

The sad truth

Mistakes happen—unfortunately, *some* malpractice suits have merit. Yet, a substantial amount of them don't. However, this is cold comfort to the careful doctor since the American justice system provides very little disincentive for patients in the United States to file suit. Consequently, it is the rare physician who does not find him or herself on the business end of a lawsuit at some point in his or her career.

Not surprisingly, malpractice insurance is often insufficient. To begin with, as lawsuits and judgment amounts increase, premiums will continue to rise. To make matters worse, all too often the patient's demand exceeds the policy limits. When that occurs, it is the personal assets of the physician—the home, the brokerage account, the sailboat—that are threatened.

Economics 101: What does the lawyer think?

Surprisingly, paying a huge premium for an abnormally large policy limit is not a great strategy. To understand why, one must consider the attorney's incentive.

A good personal injury lawyer knows his client's (and his) best chance of recovery is to find the "deep pockets": the insurance companies. Thus, having a huge policy limit is akin to wearing a "Kick Me" sign. Worse, it is more likely that the attorney will "gamble" on the case due to the potential payout.

Note that this does not mean he or she must win the case: typically, the insurance company will attempt a summary judgment motion at the beginning of trial. If the case has little merit, it will be

dismissed and the attorney will be out his costs. However, faced with the prospect of a higher payout, he or she may be more prone to roll the dice, hoping for a sympathetic judge or a chance, however thin, of proving causation between the physician's actions and the patient's injury.

Once the proceedings move past the summary stage, the chances of settlement increase: the attorney wants to be paid and save the hassle of a trial while the insurance company wants to avoid the risk of a huge verdict. While this may seem like a good result since the insurance company is on the hook, remember that the doctor's "cost" here was an extremely high premium due to his policy limit—which is exactly what attracted the suit in the first place.

A better approach involves a two-pronged solution of low to medium malpractice coverage coupled with asset protection.

Suppose a (fictitious) heart surgeon, who we'll call Dan, recently found himself served with a malpractice suit related to an aortal valve repair. Discovery conducted by the plaintiff's attorney revealed that Dan's personal assets were worth about $7 million. Dan believes in good faith he was not at fault for the surgical complications. Yet, the suit asks for damages of $3 million; $800,000 of which is for medical bills.

Now, Dan has $1 million/$3 million in malpractice coverage. More importantly, however, the remainder of Dan's personal property and belongings are asset protected. The savvy attorney's wheels start spinning: he knows that the $1 million he would receive from the insurance company in a favorable judgment would first offset the medical bills. The remaining $200,000 would be collectable; however, the attorney would receive only about a third of that (a typical contingency fee agreement), leaving him with about $66,000. After estimating the costs of trial (approximately $90,000 for expert witnesses, opportunity costs, etc.), the lawyer realizes it would not be financially viable to continue—and drops the case. What if Dan's assets were not adequately protected?

The stakes are raised considerably. The attorney knows he can go after Dan's personal assets in excess of the policy limits. Therefore, he sues not for $3 million, but for $5 million. Dan's fate is now in the hands of his own lawyer (an additional cost)—and the jury. And did we mention Dan is being sued in a tort friendly jurisdiction and that opposing counsel went to law school with the judge? Act now It's is crucial not to wait until a suit is filed to be aware of some fundamental points, as waiting will ultimately result in high attorney fees and could increase the chances of a fraudulent transfer or constructive fraud claim. These typically result from a panicked doctor attempting to prevent or conceal his or her assets from a judgment. Even such acts as selling belongings to friends at below market prices ("fire sales") could potentially result in fraud. Do not tempt fate by waiting until it is too late

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Simple and cheap.

A good asset protection strategy is a must. There are a few simple precautions that could decrease the risk of a successful malpractice claim substantially. Among them:

• Hire the right person for the job at hand
Just as you would not recommend someone seeking cataract surgery to visit an orthopedist; never hire a bankruptcy or immigration lawyer for asset protection advice. However well-intentioned, if they are working outside of their "circle of competence," career-ending mistakes may happen.

• Have a clear procedure in the office to obtain informed consent in writing
Patients are much more likely to have realistic expectations of their procedure when both the benefits and risks are explained. Documenting all such communication—in writing—creates an opportunity for an unambiguous and open dialogue with patients.

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• Express empathy and practice compassion
Study after study has shown the most effective tonic for a patient, bereaved loved one, or family member, is to hear the words “I’m sorry” from a doctor.

Event Management Programs expound on this by encouraging physicians to respond quickly and honestly should surgical complications result. In addition, more and more states have adopted “I’m Sorry” laws to allow expression of sympathy and compassion without risking liability.

Castle walls
Malpractice suits are an occupational hazard of every physician. And, unfortunately, like motorists in an interminable DMV license-renewal line, doctors will likely continue waiting in vain for the long-dreamed of “tort reform” movement.

Until then, physicians who wish to thrive over the next 20 years and beyond should endeavor to render their estate both impervious, as well as impractical, to attack. With the right bulwarks, the chances of a disastrous multi-million-dollar judgment dwindle considerably.

Steven Abernathy and Brian Luster co-founded The Abernathy Group II Family Office which counsels affluent families on multi-generational asset protection, wealth management, and estate and tax planning strategies. It is independent, employee-owned, and governed by an Advisory Board comprised of thought-leading business and medical professionals. Abernathy and Luster are regular contributors to several publications and blogs. Contact them here.