

LEE COUNTY MEDICAL SOCIETY

Bulletin



THE VOICE OF LEE COUNTY MEDICINE

VOLUME 27, NO. 02

FORT MYERS, FLORIDA
Daniel R. Schwartz, M.D., EDITOR

APRIL 2003

NO GENERAL MEETING IN APRIL

GENERAL MEMBERSHIP MEETING MAY 15, 2003

at

ROYAL PALM YACHT CLUB
2360 West First Street
Downtown Fort Myers

Speakers will be our very own

RAYMOND KORDONOWY, MD
"HOW I RID MYSELF OF
MANAGED CARE"

&

RONALD CASTELLANOS, MD
"CENTER FOR MEDICARE & MEDICAID
SERVICES CONCEPTS FOR
REIMBURSEMENT"

Please RSVP:

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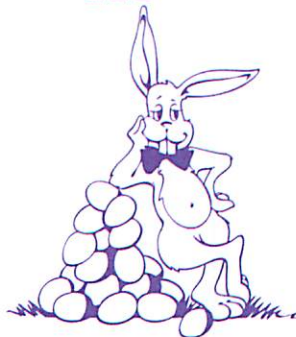
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Happy Easter



President's Message

POSTCARDS FROM THE EDGE

Ralph Gregg, M.D.



As your President, I recently had the opportunity to travel to Washington, D.C. to attend the AMA Presidents' Forum. This Conference allowed me to hear from Washington's leading Legislators and lobby on your behalf. I am happy to bring you the reassuring news that our Federal Government is just as screwed up as ever. Don't get me wrong. Some great things are happening. The Republican leadership in the House and the Senate as well as the President of the United States all spoke at the Conference. Each of these leaders spoke about the need for Medical Tort Reform. Each demonstrated a clear understanding of the issues and pledged his commitment to a \$250,000.00 cap on non-economic damages. This is great stuff and this is from the same group who pushed through the Medicare Reimbursement fix.

Unfortunately, no Democrats spoke to us at the Conference. That's because this issue splits right down party lines. As you know, traditionally, Democratic legislators oppose Tort Reform in general. But, this year, the unfortunate reality is that they are desperate to prevent the Republicans from passing any medical legislation prior to an election year. These legislators feel that Republicans are attempting to hijack a traditionally Democratic strength, Healthcare Policy.

Now, at first this may not seem to be a problem. After all, Republicans are a majority in the House and Senate, and we have a Republican President. All of these people are committed to Tort Reform. Unfortunately, as is typical of Washington politics, there is a catch. The Republicans do not have enough votes to prevent a filibuster in the Senate. The Senate Democratic leadership has stated that they will exploit this gap and not allow a Tort Reform bill to pass the Senate. If we cannot get enough Democratic Senators to cross the aisle on this issue, the game is over for this year. Unlike past years, we have powerful industry and labor allies on this issue as well as the AARP. Therefore, this issue isn't dead, but things look tough.

Now you may wonder, OK, where does the Florida Senate delegation stand? After all, Florida is one of the states most severely affected by the malpractice crisis with a yearly net loss of physicians and trauma centers closing left and right. I personally met with Democratic Senator Bill Nelson (the same Senator who opposed the Medicare reimbursement fix!) Senator Nelson told me "the Doctors just don't get it. They are being ripped off by the Insurance Companies." His Health Care Legislative Assistant later went on to tell me that this is a States' Rights issue and that "things aren't bad enough" that we need to deal with them on a National level. I have been told that Democratic Senator Bob Graham (who is recuperating from surgery and was not available) has similar feelings.

As you can see I found Washington operating business as usual. Unlike what Senator Nelson thinks, it is not the doctors "who don't get it," it is the politicians in Washington, both Democrats and Republicans. This crisis is evolving too quickly to play politics for two more years before doing something. When the system collapses, the patients/voters will suffer. They will demand a solution from the politicians willing to put politics aside and solve problems. Medical Tort Reform will happen, the only question is how bad does it have to get before the voters demand it.

Message from the President-Elect

PAIN

Douglas M. Stevens, MD

As in "I feel your pain". After attending the recent AMA leadership conference in Washington DC with Dr. Gregg and Ann Wilke, I can honestly tell you that nothing will improve in medicine until the public demands it. First and foremost, the patients will have to feel the pain of reduced care and reduced access. As long as they are having their healthcare provided no one cares if you are happy or even fairly treated. The public will need to experience pain in a manner that cuts deep enough to compel them to voice it to their congressmen and senators at both the state and federal levels. All of us that continue to take underpaying or non-paying programs (and what program or insurance at this point is not underpaying us — just start at the bottom and work up) must stop covering the failing institutions, government programs and must stop accepting one sided, marginal managed care insurance programs. Let the system fail. Yes, I understand that people will die that might have been saved (think of the Trauma Center). I understand that the public health will be adversely affected. However, I believe this is already happening. As long as we shore up the system and continue to do our best while accepting the worst there will be no public outrage. Without public outcry the injustices of our current system will continue and will worsen. But when the public outcry does occur the politicians will not be able to hide behind "I didn't know." Why — because the AMA is banging on their doors making the issues known.

This leads me to the second point. At the time in our profession where we need to be unified and present one voice on the Hill and in Tallahassee, we have only 33% of physicians in the AMA. No specialty society has the membership numbers, the organization or expertise to handle the issues and take them to the people in power like the AMA. We all need to speak with one voice on the issues at hand — and they are many! Please, stay a member if you are currently one and join now if you are not. Encourage all of our colleagues to become politically active and support their Medical Society at the local, state and federal levels.

I left DC in a state of mixed anxiety. It appeared that everyone knew that the lamp in the barn had fallen but action would not be forthcoming until the roof was heard to crash in and the flames had begun to spread.

Let it burn!

As I Recall...

Roger D. Scott, M.D.

APRIL'S FOOL

Florida law was changed in 1988 to allow for the formation of the Florida lottery; however, the first lotto wasn't conducted until January 1990 with a single drawing each week. In October of 1998, the lottery began play twice a week and continues so to this date. I have just about bought five tickets (\$5) for each drawing & as of this date, it seems (by all my actual accounting) that I have invested about \$5,000 in the lottery. My yield from the lottery has been approximately \$50, so maybe the stock market is not such a bad investment after all! Obviously the lottery will not be my avenue for retirement therefore I have developed a new miracle medicine named SCOTT'S ENRICHMENT ELIXIR #1 that will sell for \$29.95 per ounce in a dropper bottle. This elixir is a panacea for almost all diseases from A to Z, and even some diseases not listed under A to Z. It is indeed a miracle medicine that is formulated in a secret manner that I will disclose to you shortly, but first let's talk about usage. This is a very potent mixture and to begin with, one should take one drop placed on a teaspoon full of pure gypsum daily. If after two weeks you are not relieved of your problems, then you should increase the dosage to a drop twice a day. If after one month you still do not seem improved, then you should go to the stronger ELIXIR #2 which is a more concentrated solution and therefore is more expensive per ounce. The cost of this solution is \$49.95, but use only one drop once a day and repeat as you did with the initial elixir. Incidentally the #2 is purple colored whereas the original is clear. If your complaints are not greatly improved or cured after finishing this bottle, then you must go to ELIXIR #3 (red color) but be warned that this is extremely powerful medicine, and costs \$59.95. Follow the same directions as before. Oh! I forgot to tell you that the shipping and handling for each ounce is \$14.99 (a wonderful source of income). The ELIXIR has had extensive clinical testing and found to be perfectly safe when used following the directions. If you are dissatisfied with the results after you have tried three bottles, then we will gladly refund your purchase price (if you can find us). There will soon be infomercial TV & radio programs with real patient's testimonials as well as stars of stage, screen & radio!

I am planning to sell shares in this company to medical professionals, so I guess you should be entitled to know the method of manufacture before you invest. This ELIXIR is prepared from the urine of a clove-hoofed pregnant white zebra with black stripes (not the black one with white stripes) that is collected on a full moon on the 12th day of conception. The consort must be a black zebra with white stripes (not a white zebra with black stripes) and have one black and one brown eye. The urine is then distilled, concentrated, and mixed with a currently illegal drug (not named, but when you smoke it, it makes you happy and was never inhaled by one of our presidents!). This process is pending patent. Currently there are many "miracle medicines" on the market, but remember you can trust the "SCOTT'S ENRICHMENT FAMILY" as you would your own!

Surely by now you can see that I am preparing a snake oil "medication" which from time in memoriam has been utilized by many suckers — as P.T. Barnum said, "There's a sucker born every day." Anybody wanna buy the Brooklyn Bridge?

We have quite a collection of snake oils in our Museum, and it is extremely interesting to read some of the literature supplied with these "medications".

Somebody also said "Every fool has his day" and now I have had my day!

Hope you will forgive me if I encroached upon your intellect with this foolish article, but I just thought it would be fun. Have a happy HIPAA month!

LEE COUNTY MEDICAL SOCIETY
BULLETIN

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The editors welcome contributions from members. Opinions expressed in the Bulletin are those of the individual authors and do not necessarily reflect policies of the Society.

PRINTERS

Distinct Impressions 482-6262

MEMBERSHIP ACTIVITY

NEW MEMBERS

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Brian Hanlon, M.D., Cardiology
Stephen Kaskie, M.D., Family Practice
Stephen Laquis, M.D., Orbital/Plastic
Reconstructive Surgery & Ophthalmology
Steven Lee, M.D., Cardiology
Lois Mastrofrancesco, MD, Radiation Oncology
Edward Palank, M.D., Cardiology
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Ira Zucker, M.D.
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MOVED FROM AREA

Antonio Bunker-Soler, M.D.
John Doyle, M.D.

LEE COUNTY MEDICAL SOCIETY ALLIANCE NEWS

Ann Shah, PhD, Corresponding Secretary

"\$5K Reaching Out Race"

Please give to the LCMSAF "Reaching Out" Endowment Fund before May 1, 2003!

We're half way there! With proceeds from the Holiday Basket Raffle and individual donations to date, we have raised \$2,500 towards our Endowment Fund matching grant. If we raise a total of \$5,000 by May (only another \$2,500 to go), an anonymous donor will match that amount. With our initial anonymous donation of \$5,000, this would mean a total of \$15,000 raised in the first year! A great start to this fund, which was established through the Southwest Florida Community Foundation in the summer of 2002!

Please help us reach this goal by sending your donation of \$25, \$50 or more to: LCMSAF, 13300-56 S. Cleveland Avenue, #112, Fort Myers, FL 33907.

The names of all "Founding Friends" will be printed in the May issue of the Alliance newsletter and also appear in the "Best of Times" Gala, 2003 souvenir program.

"Best of Times" Gala, 2003

On May 3, 2003, the LCMSAF will be hosting a major fundraising event — "The Best of Times" Gala, 2003 — on the lush, tropical grounds of the Henry-Ford Winter Estate!

Since 1945, the Alliance has played an active role in improving the health and well-being of our citizens. We are proud to say that more than \$1,000,000 has been raised for local health charities through our annual fundraisers over the past 20 years. As in years past, all proceeds from this event will be used to fund our Foundation's health-related programs and other charitable endeavors in Lee County.

Please help this year's fundraising effort by becoming a Gala SPONSOR by purchasing space in our Souvenir Program for your business promotion, special announcement, or personal message. You'll receive special acknowledgements and other valuable benefits depending on the Sponsorship Level you choose. Your donation is fully tax-deductible and will go directly toward the health-related needs of our community.

Please call Glynn Garramone at 938-0231 before March 15, 2003 to make your Sponsorship Donation. We hope you will help make this a successful and memorable fundraising event.

CASE COULD AFFECT NONCOMPETITION AGREEMENTS

By Jeffrey Cohen, Esq.

A recent case from the First District Court of Appeals may change how noncompetition agreements are enforced. In *University of Florida v. Salahatin*, both parties agreed that the doctor was violating the noncompetition provision of his employment agreement by practicing medicine within the 50 mile restricted area, but they disagreed over whether the contractual violation could be remedied under state law. The court's interpretation of the law could have far reaching effects in the state.

Florida law requires noncompetition provision to protect a "legitimate business interest" in order to be enforceable. Dr. Salahatin was employed as a hem/onc by the University of Florida. He left the University's employment and went to work for a group out of town. The University sued to stop Dr. Salahatin from working in the 50 mile zone but could not demonstrate that Dr. Salahatin had treated a single U of F patient. The University argued that the noncompetition was enforceable because their legitimate business interest would be protected by keeping Dr. Salahatin from treating people who could become U of F patients. Interestingly, the only patients he treated were (i) those he saw due to overflow within the practice, and (ii) those referred to senior doctors in the new group. In other words (and I think this is instructive), the practice did not use Dr. Salahatin as a "draw" to the practice.

The court looked closely at the pertinent statute (542.33), which permits noncompetes that protect the legitimate business interests of the employer. The law gives examples of legitimate business interests, and includes "[s]ubstantial relationships with specific prospective or existing customers, patients, or clients." The court decided, however, that the mere possibility that patients might be treated by Dr. Salahatin is not sufficient to justify enforcement of the noncompetition.

The court's reasoning in this case strikes at the heart of many noncompetition enforcement actions, since most litigation arises out of the fear that the departing employee might take patients of the employer. In short, most noncompetition litigation is preemptive. If the reasoning of the First District is followed by other courts, it may be very difficult to enforce a noncompetition, unless the employer can show that patients are actually being treated or diverted to the former employee. Since the court's interpretation of the law is not binding on other appellate courts, it is too early to tell what effect the case will have.

Under current Florida law, noncompetes will generally be enforced if the terms are reasonable as to time, area and line of business. Noncompetition covenants should at least:

- be in writing
- be entered into before the employment relationship commences
- track the wording of the Florida law
- be signed by the parties

Florida law also contains clear guidelines about the duration of a noncompetition agreement. If the noncompetition is, in general, not based on protecting trade secrets, it will be presumed to be reasonable if it lasts for no more than 6 months. It will be presumed to be unreasonable if it lasts more than two years. A "trade secret" generally means a formula, pattern, device, combination of devices, or compilation of information that is used in a business and that provides the business an advantage over those who do not know or use the trade secret.

If the agreement is to be enforced against a seller of a business or professional practice, shares of a corporation, a partnership interest, limited liability company membership, or an equity interest in a business or professional practice, then three years duration is presumed to be reasonable, and more than seven years will be presumed to be unreasonable.

CONCLUSION

The laws in Florida that pertain to noncompetes evolve every few years. The First District's interpretation of the existing law make the area even more confusing than it was.

Mr. Cohen is a partner with the Delray Beach/Ft. Lauderdale law firm of STRAWN, MONAGHAN & COHEN, P.A. He is Board Certified by the Florida Bar as a Specialist in Health Law. He may be reached at (561) 278-9400.

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CONGRATULATIONS
TO JAMES
RUBENSTEIN, M.D.

On February 28, 2003
James Rubenstein, MD
was installed as
President of the
American College of
Radiation Oncology
(ACRO) for a 2 year
term.

The Lee County
Medical Society would
like to express our
congratulations and
our best wishes to Dr.
Rubenstein.

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ODDS AND ENDS

PRESIDENT BUSH SIGNS BILL TO FIX MEDICARE PHYSICIAN PAYMENT — With a stroke of a pen, President Bush signed on February 20 the budget bill containing the Medicare payment fix adding \$54 billion to fix physician payments over the next 10 years. On February 13, Congress passed the budget bill (H. J. Res. 2), which includes language authorizing the U.S. Department of Health and Human Services to correct the 1998 and 1999 projection errors. The House approved the measure by a vote of 338 to 83, and the Senate passed it by a vote of 76 to 20.

"This bill comes just in the nick of time for Medicare patients and the physicians who care for them," said AMA President Yank D. Coble Jr., MD. "Instead of a 4.4 percent cut, there will be a 1.6 percent increase in Medicare physician payments for 2003."

At a recent House Ways and Means hearing, Centers for Medicare and Medicaid Services Administrator Thomas Scully indicated that the resulting congressional action allows for the increase to take effect beginning in March.

2003 MEDICARE FEE SCHEDULE — The new revised physician fee schedules were published February 28, 2003 and were posted on the Centers for Medicare and Medicaid Services website at www.cms.hhs.gov and the First Coast Service Options, Inc website at www.floridamedicare.com. Payment amounts are available in downloadable files on both sites. In order not to print the whole set of codes you can print the page numbers that you want.

AMA APPLAUDS HOUSE JUDICIARY COMMITTEE PASSAGE OF HEALTH ACT — In an action highly applauded by the AMA, the House Judiciary Committee this week passed the bipartisan HEALTH ACT (H.R. 5). "This critical legislation will bring common sense back to our nation's medical liability system and bring much-needed relief to patients throughout the country who are struggling to find physicians because of America's medical liability crisis," said AMA President Yank D. Coble Jr., MD.

Introduced in February by Rep. Jim Greenwood (R-Pa.), the Health Act safeguards patients' access to care through the following common sense reforms: 1) allowing injured patients to recover unlimited economic damages; 2) limiting attorneys' contingency fees on a sliding scale; 3) capping non-economic damages at \$250,000; and 4) allocating damages by holding defendants liable only for their portion of responsibility.

NEW AMA ANALYSIS SHOWS 18 STATES NOW IN FULL-BLOWN MEDICAL LIABILITY CRISIS — The ill effects of a broken medical liability system have put six more states in crisis, according to a new AMA analysis released this week. Arkansas, Connecticut, Illinois, Kentucky, Missouri and North Carolina are the latest states where the current liability system is affecting patient care. "How many more patients will have to lose access to medical care before lawmakers decide to act and pass proven reforms, including a cap on non-economic damages?" asked AMA President Yank D. Coble Jr., MD. "There is something terribly wrong when dedicated professionals, who have trained for years, want to give up the work of a lifetime and retire, move to another state or stop offering high risk procedures such as delivering babies."

"Our system has evolved into a 'lawsuit lottery,' where select patients and their lawyers get astronomical awards, and many patients suffer access-to-care problems because of it," Dr. Coble said. "California's law works, and we have the facts to prove it."

CPT EDITORIAL PANEL NOMINATIONS NOW ACCEPTED

— The AMA Board of Trustees will consider nominations to the Current Procedural Terminology (CPT) Editorial Panel at its June meeting. The CPT Editorial Panel is responsible for maintaining CPT, and is authorized to revise, update or modify CPT. The Panel is comprised of 16 members, 11 nominated by the AMA and one each from the Blue Cross and Blue Shield Association, the Health Insurance Association of America, the American Hospital Association and the co-chair of the Health Care Professionals Advisory Committee.

Committee members are physicians primarily nominated by the national medical specialty societies represented in the AMA House of Delegates. The Committee's primary objectives are:

- to serve as a resource to the CPT Editorial Panel, by giving advice on procedure coding and appropriate nomenclature as relevant to the member's specialty;
- to provide documentation to staff and the CPT Editorial Panel regarding the medical appropriateness of various medical and surgical procedures under consideration for inclusion in the CPT code;
- to assist in the review and further development of relevant coding issues and in the preparation of technical education material and articles pertaining to CPT coding; and
- to promote and educate its membership on the use and benefits of the CPT Code.

The deadline for receipt of nomination letters, curriculum vitae and signed nomination form is April 30. Email Michael Beebe, Director, CPT Editorial Information Services

LCMS STATS

February 12, 2003 - March 11, 2003

	Current	YTD
PHONE CALLS RECEIVED	494	1622
From Physicians and Office Staff	101	340
For Referrals	201	635
For Background Checks	23	78
Filing Complaints	5	15
Regarding Non-Members	17	61
Regarding Alliance	9	25
Regarding CMS, FMA, and AMA	24	68
Miscellaneous Calls	114	400
APPLICATIONS SENT TO PHYSICIANS	15	27
MEETINGS	7	22
Attended on behalf of LCMS	2	4
Society Meetings	5	17
DIRECTORIES DISTRIBUTED	24	55

USING ASSET PROTECTION TO SAFELY REDUCE MALPRACTICE COVERAGE-THREE CAVEATS AND THREE RECOMMENDATIONS

by Tyler B. Korn, Esq.

As a result of medical malpractice insurance rates rising to historically unprecedented levels, physicians across the country (but particularly in Florida) have recently been bombarded by solicitations for asset protection planning as a tool that allows physicians to safely reduce costly malpractice insurance coverage. Asset protection planning is indeed a prudent necessity for most physicians, even for those not seeking to reduce their malpractice insurance coverage. A properly structured asset protection plan will place your assets beyond the reach of potential future creditors while at the same time permitting you to retain control over the assets and their income. A superior asset protection plan will do the same, but will also deter potential future creditors from ever seeking to attach your assets in the first place.

You should beware of the most popular and heavily advertised asset protection "products," offshore trusts and Alaska or Delaware trusts. At best, these offer no advantages over garden-variety irrevocable trusts found in most estate plans. More commonly, they simply do not work.

CAVEATS

◆ **Preventive Medicine.** Asset protection is generally effective only as preventive medicine. (Florida's generous homestead protection is the principal exception to this rule.) Under the Uniform Fraudulent Transfers Act adopted by Florida, any conversion or transfer by a debtor with the intent to hinder, delay, or defraud a creditor is invalid and voidable.

◆ **One Size Does Not Fit All.** Much like traditional estate planning, asset protection planning must be tailored to your particular needs and situation. This entails a review of your assets and financial situation, and an evaluation of the nature of your practice and its business structure, as well as of your lifetime and testamentary disposition goals.

◆ **Offshore and Alaska or Delaware Trusts.** The most popularly advertised forms of asset protection are offshore trusts and Alaska or Delaware trusts. Certain foreign jurisdictions, most notably the Cook Islands, have developed extremely protective asset protection laws which (1) unlike most states in the U.S., allow a trust created for oneself (a "self-settled trust") to provide asset protection, and (2) specifically do not recognize or enforce U.S. judgments. States such as Alaska and Delaware have in the last five years enacted similar statutes in order to compete with the offshore jurisdictions for the lucrative asset protection business. The concept underlying both offshore trusts and Alaska or Delaware trusts is that you can reserve your assets for yourself in a trust domiciled in a debtor-friendly foreign jurisdiction (whether offshore or domestic) that will refuse to recognize or enforce a creditor's judgment against you. Furthermore, the trust must use a foreign trustee over whom your creditors would not be able to obtain jurisdiction.

However, since January 23, 2002, the date of a landmark ruling by the Eleventh Circuit, it is now clear for two reasons that Florida will not respect offshore or Alaska or Delaware asset protection trusts.

First, the protective laws of offshore jurisdictions, as well as of Alaska and Delaware, will not be respected to the extent that they are inconsistent with Florida law.

Second, even if by virtue of the protective laws in effect in the trust's jurisdiction the foreign trustee of an offshore or Alaska or Delaware trust cannot be compelled to release or distribute assets to your creditors, you would personally still be subject to the jurisdiction of a U.S. and/or Florida court. As a result, you will be held in contempt of court and likely imprisoned for an indeterminate amount of time if you refuse to instruct your foreign trustee to release the trust's assets to your creditors.

RECOMMENDATIONS

Fortunately, effective and legitimate asset protection options do exist. The following are your best options:

◆ **Maximize Statutory Protections.** With proper advice and guidance, you can maximize your statutory protections from creditors. Florida provides some very generous protections for homestead, ownership in tenancy by the entirety, tax-qualified pension plans, and proceeds from life insurance and annuity policies. These statutory protections may not provide the complete "answer" to asset protection for most physicians, but can serve as an important part of the solution.

◆ **Family Limited Partnership.** Family limited partnerships can provide significant asset protection. Under state law, there is a distinction made between a limited partner's investment in the partnership and the partnership's ownership of partnership property. As a result, a creditor's rights under state law are limited to the rights available to assignees of limited partnership interests. This means that a creditor would only have the right to receive partnership distributions that are made to the limited partners, and would not have a right to the underlying assets of the partnership. If the general partner does not order any distributions of cash or property, then the creditor has no right to any partnership property. This is analogous to the shutting off of a faucet.

◆ **The Poison Pill.** If you want to protect your assets but are reluctant to have your assets relatively "shut off" for an indeterminate amount of time while waiting for your creditor(s) to lose interest, you should consider using a poison pill defense.

A "poison pill" is a type of defense that has been used for the last twenty years by most publicly traded companies to protect themselves from being acquired in a hostile takeover and having their assets looted. Adapted to the realm of personal asset protection, a poison pill plan protects your assets but also deters potential creditors by "poisoning" your assets. Specifically, the poison pill forces creditors to incur impossibly burdensome obligations, making it financially suicidal for them to target you in the first place.

Over the last ten years, accountants and trust companies have

transformed asset protection into a veritable industry. Unfortunately, misinformation is unusually prevalent in the field. But with sound advice and proper structuring, you can indeed effectively protect your assets from potential future creditors.

Mr. Korn, a tax attorney and Managing Partner of Korn, P.L. in Naples, is the inventor of the Asset Poison PillSM. He received his J.D. from the University of Pennsylvania and is admitted to practice in Florida, New York, and before the U.S. Tax Court. Mr. Korn may be reached at (239) 254-0400.

Rx



Triage

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NEW MEMBER APPLICANTS

Application for Membership

Active members are requested to express to the Committee on Ethical and Judicial Affairs or Board of Governors any information or opinions they may have concerning the eligibility of the applicants.



BARRY F. BLITZ, M.D. - UROLOGY

Medical School: University of South Florida College of Medicine, Tampa, FL (1986-90)

Internship: University of Chicago, Chicago, IL (1990-91)

Residency: University of Chicago, Chicago, IL (1991-95)

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THE KEYS TO DOCUMENTING PHONE CALLS

by Cliff Rapp, LHRM, Vice President of Risk Management, FPIC

The most important phone call a physician ever receives may be the one you or your staff forgets to document. In today's legal climate it has become even more important to document all medically relevant phone calls. All phone conversations need to be documented in the patient's chart regardless of whether the call is received by you or your staff. Your office should have an established procedure for dealing with all calls. Failing to document a call is tantamount to forfeiting evidence in the event a defense becomes necessary.

When a patient calls your office with a problem, have your staff document the phone call in the patient's chart. Be sure they include important details of the conversations, including the time and date that the call was received, who called, the person who received the call, when the call was returned to the patient, and what was discussed. In addition, vital patient information and the condition or clinical status of the patient should be noted at that time.

It does not matter what your office procedure happens to be, what matters is that the phone call gets documented in the patient's chart. Without documentation, in the event of a claim, it is extremely hard to defend details of discussions and specific instructions. In most cases, if a phone call is not documented and a claim is made and goes to court, it becomes your word against the patient's word. Without documentation, the patient's memory may carry more credibility than that of you or your staff who may have seen 20, 30, or more patients that day.

Remember to treat after-hour calls the same as any telephone conversation. If you are on-call you may want to consider establishing a procedure for these phone calls to be documented in the patient's chart as part of the communication process. You may want to consider designating one staff person to follow-up with these patients and the on-call physician. Be sure your staff documents the salient portions of each conversation and what treatment was rendered to each patient. Protocols should also ensure that the communication loop is completed such that each patient receives a follow-up call.

The following are suggested elements to include when documenting phone calls:

- Date and time of the call
- Patient's name
- Chief complaint or concern
- Brief history
- Assessment
- Disposition/advice
- Necessary follow-up by advice-giver
- Symptoms that develop which require the patient to call back
- Signature or other information to determine advice-giver
- Date and time of call to the patient, if applicable

Information in this article does not establish a standard of care, nor is it a substitute for legal advice. The information and suggestions contained here are generalized and may not apply to all practice situations. FPIC recommends you obtain legal advice from a qualified attorney for a more specific application to your practice. This information should be used as a reference guide only.

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THE AMERICAN MEDICAL ASSOCIATION'S CLARIFICATION OF GIFTS TO PHYSICIANS FROM INDUSTRY

Guideline 5

Subsidies from industry should not be accepted directly or indirectly to pay for the costs of travel, lodging or other personal expenses of physicians attending conferences or meetings, nor should subsidies be accepted to compensate for the physicians' time. Subsidies for hospitality should not be accepted outside of modest meals or social events held as a part of a conference or meeting. It is appropriate for faculty at conferences or meetings to accept reasonable honoraria and to accept reimbursement for reasonable travel, lodging and meal expenses. It is also appropriate for consultants who provide genuine services to receive reasonable compensation and to accept reimbursement for reasonable travel, lodging and meal expenses. Token consulting or advisory arrangements cannot be used to justify the compensation of physicians for their time or their travel, lodging, and other out-of-pocket expenses.

(a) If a company invites physicians to visit its facilities for a tour or to become educated about one of its products, may the company pay travel expenses and honoraria?

This question has come up in the context of a rehabilitation facility that wants physicians to know of its existence so that they may refer their patients to the facility. It has also come up in the context of surgical device or equipment manufacturers who want physicians to become familiar with their products.

In general, travel expenses should not be reimbursed, nor should honoraria be paid for the visiting physicians time since the presentations are analogous to a pharmaceutical company's education or promotional meetings. The Council recognizes that medical devices, equipment and other technologies may require, in some circumstances, special evaluation or training in proper usage which can not practically be provided except on site. Medical specialties are in a better position to advise physicians regarding the appropriateness of reimbursement with regard to these trips. In cases where the company insists on such visits as a means of protection from liability for improper usage, physicians and their specialties should make the judgment. In no case would honoraria be appropriate and any travel expenses should be only those strictly necessary.

(b) If the company invites physicians to visit its facilities for review and comment on a product, to discuss their independent research projects or to explore the potential for collaborative research, may the company pay travel expenses and an honorarium?

If the physician is providing genuine services, reasonable compensation for time and travel expenses can be given. However, token advisory or consulting arrangements cannot be used to justify compensation.

(c) May a company hold sweepstakes for physicians in which five entrants receive a trip to the Virgin Islands or airfare to the medical meeting of their choice?

No. The use of a sweepstakes or raffle to deliver a gift does not affect the permissibility of the gift. Since the sweepstakes is not open to the public, the guidelines apply in full force.

(d) If a company convenes a group of physicians to recruit clinical investigators or convenes a group of clinical investigators for a meeting to discuss their results, may the company pay for their travel expenses?

Expenses may be paid if the meetings serve a genuine research purpose. One guide to their propriety would be whether the NIH conducts similar meetings when it sponsors multi-center clinical trials. When travel subsidies are acceptable, the guidelines emphasize that

they be used to pay only for "reasonable" expenses. The reasonableness of expenses would depend on a number of considerations. For example, meetings are likely to be problematic if overseas locations are used for exclusively domestic investigators. It would be inappropriate to pay for recreation or entertainment beyond the kind of modest hospitality described in this guideline.

(e) How can a physician tell whether there is a "genuine research purpose?"

A number of factors can be considered. Signs that a genuine research purpose exists include the facts that there are (1) a valid study protocol, (2) recruitment of physicians with appropriate qualifications or expertise, and (3) recruitment of an appropriate number of physicians in light of the number of study participants needed for statistical evaluation.

(f) May a company compensate physicians for their time and travel expenses when they participate in focus groups?

Yes. As long as the focus groups serve a genuine and exclusive research purpose and are not used for promotional purposes, physicians may be compensated for time and travel expenses. The number of physicians used in a particular focus group or in multiple focus groups should be an appropriate size to accomplish the research purpose, but no larger.

(g) Do the restrictions on travel, lodging and meals apply to educational programs run by medical schools, professional societies or other accredited organizations which are funded by industry, or do they apply only to programs developed and run by industry?

The restrictions apply to all conferences or meetings which are funded by industry. The Council drew no distinction on the basis of the organizer of the conference or meeting. The Council felt that the gift of travel expenses is too substantial even when the conference is run by a non-industry sponsor. (Industry includes all "proprietary health-related entities that might create a conflict of interest.")

(h) May company funds be used for travel expenses and honoraria for bona fide faculty at educational meetings?

This guideline draws a distinction between attendees and faculty. As was stated, "[i]t is appropriate for faculty at conferences or meetings to accept reasonable honoraria and to accept reimbursement for reasonable travel, lodging, and meal expenses."

Companies need to be mindful of the guidelines of the Accreditation Council on Continuing Medical Education. According to those guidelines, "[f]unds from a commercial source should be in the form of an educational grant made payable to the CME sponsor for the support of programming."

(i) May travel expenses be reimbursed for physicians presenting a poster or a "free paper" at a scientific conference?

Reimbursement may be accepted only by a bona fide faculty. The presentation of a poster or a free paper does not by itself qualify a person as a member of the conference faculty for purposes of these guidelines.

(j) When a professional association schedules a long-range planning meeting, is it appropriate for industry to subsidize the travel expenses of the meeting participants?

The guidelines are designed to deal with gifts from industry which affect, or could appear to affect the judgment of individual practicing physicians. In general, a professional society should make its own judgment about gifts from industry to the society itself.

(k) May continuing medical education conferences be held in the

Bahamas, Europe or South America?

There are no restrictions on the location of conferences as long as the attendees are paying their own travel expenses.

(l) May travel expenses be accepted by physicians who are being trained as speakers or faculty for educational conferences and meetings?

In general, no. If a physician is presenting as an independent expert at a CME event both the training and its reimbursement raise questions about independence. In addition, the training is a gift because the physician's role is generally more analogous to that of an attendee than a participant. Speaker training sessions can be distinguished from meetings (See 5b) with leading researchers, sponsored by a company, designed primarily for an exchange of information about important developments or treatments, including the sponsor's own research, for which reimbursement for travel may be appropriate.

(m) What kinds of social events during conferences and meetings may be subsidized by industry?

Social events should satisfy three criteria. First, the value of the event to the physician should be modest. Second, the event should facilitate discussion among attendees and/or discussion between attendees and faculty. Third, the educational part of the conference should account for a substantial majority of the total time accounted for by the educational activities and social events together. Events that would be viewed (as in the succeeding question) as lavish or expensive should be avoided. But modest social activities that are not elaborate or unusual are permissible, e.g., inexpensive boat rides, barbecues, entertainment that draws on the local performers. In general, any such events which are a part of the conference program should be open to all registrants.

(n) May a company rent an expensive entertainment complex for an evening during a medical conference and invite the physicians attending the conference?

No. The guidelines permit only modest hospitality.

(o) If physicians attending a conference engage in interactive exchange, may their travel expenses be paid by industry?

No. Mere interactive exchange would not constitute genuine consulting services.

(p) If a company schedules a conference and provides meals for the attendees that fall within the guidelines, may the company also pay for the costs of the meals for spouses?

If a meal falls within the guidelines, then the physician's spouse may be included.

(q) May companies donate funds to sponsor a professional society charity golf tournament?

Yes. But it is sensible if physicians who play in the tournament make some contribution themselves to the event.

(r) If a company invites a group of consultants to a meeting and a consultant brings a spouse, may the company pay the costs of lodging or meals of the spouse? Does it matter if the meal is part of the program for the consultants?

Since the costs of having a spouse share a hotel room or join a modest meal are nominal, it is permissible for the company to subsidize those costs. However, if the total subsidies become substantial, then they become unacceptable.

This article was continued from the March 2003 issue of the Bulletin. Gifts to Physicians from Industry will be an ongoing series of articles that was taken from the AMA's Council on Ethical and Judicial Affairs Clarification on Gifts to Physicians from Industry (E-8.061). Issued 1992. Updated December 2000 and June 2002.

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