

Protecting Your Assets in Times of Crisis

Being prepared at the practice level and personal level;
how to manage crisis when it occurs

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Physicians frequently ask their advisors, "What happens if a malpractice judgment is entered against me that exceeds the limits of my malpractice insurance?" That's a great question, which sparks intense conversation, and which has many answers. Proper asset protection planning goes far beyond planning for malpractice suits. Asset protection planning can involve planning for everything from death and disability, to the exit of a partner, to responding to a government subpoena. Asset protection planning involves planning at both the practice level and at the individual level. Proper planning may involve interaction between attorneys, accountants, financial planners, insurance professionals and the partners of the practice. Here are some practice considerations:

Asset Protection Planning at the Practice Level:

Here are some general considerations regarding asset protection planning at the practice level:

- Use a professional corporation or limited liability company to shield physician from business liabilities of the practice or acts of other health care professionals and employees in the practice. Use of a professional corporation or limited liability company does not, however, protect a physician from his/her own negligence.
- Create a separate entity for ownership of medical office building.
- Regularly review existing professional liability, general liability, workers' compensation, disability, business interruption and umbrella policies.
- Adopt formal claims management, risk management, billing, compliance and workplace policies.
- Communicate and enforce the policies.
- Create a culture of compliance; a culture of compliance is probably more important than the paper on which compliance policies reside.
- Draft Shareholder/Ownership Agreements that address death, disability, termination of employment and non-compete issues to reduce surprises upon one of these events.
- Negotiate tail insurance and/or retroactive coverage issues



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at the outset of the practice relationship.

- Consider regular internal billing audits.
- Provide continuing education for billing personnel.

Asset Protection Planning at the Individual Level:

Every physician can benefit from personal estate planning and asset protection planning, but the degree of planning must be tailored to the individual situation. One rule of thumb is that as the level of tax planning and creditor protection increases, control and flexibility are diminished. Here are some general questions that

physicians should discuss with their advisors:

- What happens to my assets if a judgment is entered in excess of my insurance limits?
- Who will pay my bills if I become disabled?
- Who will make my medical decisions if I cannot make them for myself?
- What resources will my family need to survive/thrive if I die?
- Who will receive my assets if I die?
- Who will manage my assets at my death?
- Do my beneficiaries have special needs (e.g., minors, health needs)?
- What are the estate tax implications?
- What is probate? How can I avoid it?

What are some basic estate planning tools to be discussed with advisors by physicians?

- Revocable Living Trusts, which can address issues such as distribution and management of assets, probate avoidance, tax planning and special needs of beneficiaries.
- Wills, which name guardians for minor children.
- Durable Powers of Attorney, which allow others to make decisions on your behalf while you are alive, typically during periods of incapacity.
- Medical Directives, which spell out your wishes regarding end-of-life decisions.
- Beneficiary Designations, Pay-on-Death Accounts, Transfer-on-Death Accounts, which allow certain forms of property to pass to a named beneficiary(ies) without going through probate.

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What are some additional considerations to be discussed between physicians and their advisors?

- Annual gifting of assets; \$13,000 per year/per recipient of gift.
- Transfer of assets to another person; if done when there are no creditors looming, the asset may be outside of the reach of the creditor. The trade-off is relinquishment of control of the asset. Transfers to a spouse may have additional implications if there is a subsequent divorce.
- Assets owned jointly in Missouri between husband and wife are currently off-limits to creditors (such as a plaintiff in a malpractice suit) of just one spouse.
- Qualified Retirement Plans and IRAs are generally off-limits to creditors.
- If a physician owns rental property, consider transferring the property to a limited liability company.
- There are no absolutes in this area, and if a claim already exists, it may be too late to implement some planning techniques.

Crisis Management:

Asset protection planning issues come to the forefront in times of crisis. Many physicians ask the question, “How do I respond if . . .?” Here are some common scenarios and some very basic response plans:

How do I respond if the government arrives at my practice?

- Stay calm, be polite, cooperate.
- Ask the agent to come into a private area, outside of waiting room.
- Ask if the agent can provide something in writing so the physician can understand the scope of investigation.
- Ask for the agent’s identification, copy it.
- Ask for name of government’s attorney and contact information.
- If possible, ask for time to respond.
- Call your attorney.
- Assure your staff.

How do I respond if the lender or landlord wants a personal guarantee?

- Sometimes, this request is unavoidable.
- Try to negotiate so that you avoid a guarantee by your spouse.
- Avoid placement of deed of trust on your principal residence.
- Ask for cap on personal exposure, e.g., a dollar limit, pro rata guarantees among partners etc.

- Ask for declining guarantees, e.g., 100%-year 1; 80%-year 2, etc.
- If new partners are added after loan is made, ask the lender to add new partners and reduce guarantees of existing partners.
- Consider other security such as equipment, accounts receivable, etc.

How do I respond if I am served with a malpractice suit?

- Stay calm; statistically, it could happen.
- Contact your insurance company immediately and ask for defense counsel information.
- Resist the urge to re-hash the case with everyone in the office.

How do I respond if an employee steals my DEA/BNDD number for his/her own use?

- Establish that this was an intentional act and not due to your bad habits (i.e., leaving prescription pad out/unattended).
- Report to DEA/BNDD.
- Have your attorney craft a written statement.
- Educate employees.

How do I respond if there is a death in my family/practice?

- Take care of personal, emotional, spiritual needs first.
- Initial contact with attorney, CPA, financial planner within 10 days.
- If professional dies, patient care should be continued by rest of practice.

Although this article has summarized many methods of asset protection planning, none of the methods will provide the intended results if the first consideration of the topic is during the time of crisis. Proper planning can help protect assets in times of crisis.

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