

ASSET PROTECTION: AN ONGOING PRIORITY



The sooner you protect yourself, your practice, and your family, the better.

BY DAVID B. MANDELL, JD, MBA

Physicians of all specialties typically prioritize asset protection—along with tax reduction, retirement modeling, and investment growth—in their wealth planning goals. This is particularly important given the potential liability from employee claims, HIPAA violations, and other risks related to the practice of medicine.

When considering liability risks, medical malpractice liability is typically top-of-mind. This awareness has been even more prominent in the last year due to an enormous medical malpractice judgment that made waves within and beyond the medical profession.

You might have read about this headline-grabbing 2023 malpractice case, in which Chris Maragos, a former captain of the NFL Philadelphia Eagles, sued his orthopedic surgeon and the medical practice itself.¹ After the trial, in which many high-profile athletes testified on behalf of Maragos and several surgeons testified on behalf of the defendants, the jury handed down a verdict that awarded \$43.5 million in damages. Notably, the liability was split—the surgeon owed \$29.2 million and the practice owed \$14.3 million. Thus, the medical practice and its partners (at least through their value in the practice) are now faced with a significant debt, even if they were completely uninvolved with the care of this patient.

Since this verdict was announced, I have seen a sharp uptick in questions from physicians of all specialties about protecting personal and practice assets. In this article, I define the term *asset protection* and highlight the importance of this type of planning for physicians.

ASSET PROTECTION DEFINED

The goal of asset protection planning is to position the physician's assets in a way that makes it difficult, and in certain cases nearly impossible, for a future lawsuit plaintiff to gain access to them. A well-executed asset protection plan will surely help physicians feel more secure knowing that they will not lose what they have worked so hard to build.

A fundamental concept about asset protection planning is that it is a discipline of degrees, not a black-and-white or vulnerable versus protected analysis. We use an asset protection rating system to rank a physician's assets from -5 (completely vulnerable) to +5 (superior protection). The goal is to move as much wealth as possible from the negative, vulnerable positions to the higher, positive, protected positions—ideally with as little cost and interruption as possible.

PERSONAL ASSET PROTECTION PLANNING

Personal asset protection encompasses shielding a physician's home, retirement accounts, other investment accounts, second home or rental real estate, and valuable personal property.

State Exempt Assets

We typically recommend that physicians leverage their state's exempt assets as a priority, because these assets enjoy the highest (+5) level of protection, and these assets involve no legal fees, state fees, accounting fees, or gifting programs. In other words, you can own the exempt asset outright in your name, have access to its value, and still have it 100% protected from lawsuits against you.

Each state law has assets that are absolutely exempt from creditor claims, thereby achieving a +5 protection status. For example, many states provide exemptions for qualified retirement plans and IRAs, cash in life insurance policies, annuities, and primary homes. Make sure you seek an asset protection expert to determine the exemptions that apply to your situation.

In some states, tenancy by the entirety (TBE) can be a valuable ownership form for married physicians, as certain assets in such states are protected completely from a claim against only one spouse. Approximately 20 states have TBE protections for some types of assets. As is the case with all exemptions, the rules vary widely among the states, and expertise is needed here.

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Other Asset Protection Tools

Beyond exempt assets and TBE, basic asset protection tools such as family limited partnerships (FLPs), limited liability companies (LLCs), and certain types of trusts should be considered. FLPs and LLCs provide good asset protection against future lawsuits as well as potential income and estate tax benefits, and they allow the LLC/FLP manager or general partner (typically the physician and/or their spouse) to maintain control. Specifically, these tools will usually keep a creditor outside the structure through charging order protections, which often create enough of a hurdle against creditors to allow the physician to negotiate a favorable settlement. For these reasons, we often call FLPs and LLCs the *building blocks* of a basic asset protection plan.

There are many types of trusts that also provide significant protection for physicians. These can range from life insurance trusts and charitable remainder trusts to grantor retained annuity trusts and domestic asset protection trusts. Each type of trust has its own set of pros and cons, costs, and benefits. For now, it is important to understand that only irrevocable trusts provide asset protection benefits. Although revocable trusts are valuable for estate planning and incapacitation planning (and many physicians have implemented such trusts for these reasons), they do not provide any asset protection benefits, at least while you are alive.

For all FLPs, LLCs, and trusts, the asset protection benefits rely on proper drafting of the documentation, proper maintenance and respect for formalities, and proper ownership arrangements. If all these are in place, a physician can typically enjoy solid asset protection for a relatively low cost.

THE IMPORTANCE OF TIMING

The timing of asset protection plays a fundamental role in its effectiveness. This is because federal law and the laws of every state have what are called *fraudulent transfer laws*, *fraudulent conveyance laws*, or, most recently, *voidable transaction laws*. These laws can be used by a judgment creditor to undo any transfers made after liability is reasonably foreseeable. Thus, the longer the time between the implementation of asset protection planning and the occurrence of a liability situation, the better.

PROTECT YOURSELF AND OTHERS

Practicing medicine comes with inherent risks, primarily from medical malpractice. Asset protection planning can help all physicians protect their assets in the event liability does occur. ■

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1. Grez M. Former Philadelphia Eagles captain Chris Maragos awarded \$43.5 million in medical malpractice case. CNN. February 15, 2023. Accessed January 22, 2024. bit.ly/4828jBg

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