



Strategies to protect against liability

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At one time or another, most AAOMS members have worried about liability – whether from malpractice, employee issues, a business deal gone bad or even car crashes.

Perhaps for you, your concerns occurred when you started practice and first looked at malpractice insurance coverage, when you were served with a lawsuit by a former patient or employee, or learned a colleague had been sued.

Regardless, while most physicians do not obsess over the possibility they will have liability, nearly all oral and maxillofacial surgeons would be wise to acknowledge the potential liability they face and take proper steps to protect against it – especially if those steps can help reduce taxes and build wealth over the long term. Several strategies are available to do this.

Risk management for malpractice liability

The first and most obvious strategy to protect against malpractice liability is to reduce risk and practice the best medicine possible. This begins with a dedication to being the best surgeon you can be, developing your ongoing knowledge through continuing education and maintaining a general approach to meeting the medical standard of care expected in your area of medicine.

Beyond this medicine-centered approach, AAOMS members would be well-served to incorporate non-specialty specific risk management techniques in their practice.

These include learning how both doctors and staff can best communicate with patients, especially when dealing with difficult patients or bad outcomes. Doctors also should consider implementation of methods for handling protected health information (PHI), adhering to constantly changing HIPAA regulations and managing risks of communication technology from blogs and websites to texting and email.

Asset protection

Regardless of how many risk management courses doctors take or how carefully they practice, mistakes will occur. Human error cannot be eliminated from the equation.

Moreover, sometimes bad outcomes will occur even when all best practices were followed – and, occasionally, bad outcomes can lead to potential liability even if the physician believes he or she “did nothing wrong.”

Certainly, our legal system is not perfect and predicting liability is not a perfect science. Given this and other risks from employee claims – to car crashes to business deals gone bad – many doctors have chosen to buttress their practice risk management with asset protection planning.

Asset protection planning has a simple goal: to position a client’s assets in such a way that makes it difficult – and in certain cases, nearly impossible – for a potential future lawsuit plaintiff to have access to them.

If the goal for an OMS is to feel more secure and sleep better at night knowing they will not lose what they have worked hard to build, then asset protection planning is an important part of the solution.

Many AAOMS members may have heard the term “asset protection” before but were unsure what it meant. In fact, the most common misconception doctors have regarding asset protection is to think an asset is either “protected” or “not protected.”

In this endeavor, an asset protection professional approaches a client with unprotected assets much in the way a physician approaches a patient.

Similar to doctors, asset protection professionals will first try to get a client to avoid bad habits. For a medical patient, bad habits might mean smoking, drinking too much or a poor diet. From an asset protection standpoint, bad habits might include owning property in a doctor’s own name, owning it jointly with a spouse or operating any medical practice with business assets exposed.

Beyond bad habits, a client’s assets should be structured so he or she has the best protection that is reasonably possible under the circumstances – possibly ranging from

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how much the client wants to spend and how much the asset is worth to the client's marital status, state of residence and interest in estate planning. Guiding the process is the knowledge that each asset protection tool, similar to any medicine, has certain efficacy and costs/benefits.

An asset protection rating system could range from -5 (totally vulnerable) to +5 (highest level of protection).

The goal of asset protection planning is not to move all assets to a +5 position – this simply is not possible, even in the states that have the most protective laws.

However, too many doctors (including OMSs) have too many of their personal or practice assets in negative positions with little or no shield. At a minimum, nearly all doctors would do well to move the bulk of their practice and personal assets to positive positions:

■ **Practice asset protection** – While the first priority of most doctors is to protect their personal assets, practice protection should not be overlooked. That is because any malpractice claim or employee claim (e.g., sexual harassment, wrongful termination) against any of the doctors threatens all of the assets of the practice. In other words, those in a group practice are underwriting the acts and omissions of their partners to the extent of their practice assets.

What are the most important practice assets? Certainly, cash flow and income are most important. The good news is the tools that protect cash flow also typically help save on income taxes and build retirement wealth in addition to protecting it. These include:

- **QRPs:** From 401ks to 403bs and profit-sharing plans to defined benefit plans, QRPs are often protected to an unlimited value under state exemption statutes. IRAs also are typically protected under the same state laws. However, state laws do vary significantly, so what is protected at a +5 level with no limitation in one state may be quite vulnerable in another. Be sure to work with an expert to fully understand the protections or exposures.
- **Non-qualified plans:** These are benefit plans that do not come under the rules of QRPs and are thus taxed differently. Typically, they do not enjoy a tax deduction for contributions but can be structured for tax-free growth and access. Also, they enjoy significant flexibility as compared with QRPs – as an example, they do not have to be offered to employees and, even within the practice owners, not all need to participate. From a

protection perspective, depending on the structure and funding vehicle, these plans also can be shielded at the top +5 level in many states.

- **Captive insurance companies:** Some practices may establish their own captive insurance company to insure risks from malpractice to employee risks to HIPAA violations and more. If risks are managed properly, they can become profitable for the doctor-owners. While funds are in such captives, local state law typically protects them from claims against the insured practice and against the doctor-owners, thereby providing a high level of asset protection as well.

Other important practice assets include the practice real estate, if any, and valuable equipment. If a practice has valuable real estate or equipment, the owner may want to separate these assets from the main practice using limited liability companies (LLCs) to lease them back to the main practice entity. Such a "lease-back" arrangement is often common when applied to real estate but less often for valuable equipment.

■ **Personal asset protection** – The protection of personal assets can be accomplished in several ways:

- **Exempt assets** – OMSs should be sure to leverage the best +5 tool at their disposal – exempt assets. This tool offers the highest +5 level of protection and involves no legal fees, state fees, accounting fees or gifting programs.

In other words, the exempt asset can be owned outright in a OMS's name, yet the OMS has access to any values and it still is 100 percent protected from the typical lawsuit.

Each state law has assets that are exempt from creditor claims, thereby achieving a +5 status. Many states provide exemptions for qualified retirement plans and IRAs. Also, nearly all states have some protections for cash within life insurance policies, annuities and primary homes. Consult an asset protection expert to find out the exemptions in a state.

- **Joint ownership forms** – Joint ownership forms provide top protection for some assets against some creditors in some states.

In about 20 states, there exists an ownership form that can provide +5 level of protection in certain circumstances. Tenancy by the entirety ("TBE"), a form of joint ownership available to married couples in such



states, may provide the top level of protection for claims against only one spouse. In some states, this protection applies only to real estate owned by TBE; in other states, both real property and personal property, similar to investment accounts, can be shielded through TBE.

However, inherent in TBE are several risks, including the fact TBE never provides any protection against joint risks (such as lawsuits that arise from jointly owned real estate and potentially car crashes) and all protections are lost in the event of a divorce. For this reason, even in states where TBE can be protective, it is often recommended to be combined with legal tools.

Bridging the gap: Legal tools

Legal tools – such as limited liability companies (LLCs), family limited partnerships (FLPs) and a variety of trusts – are often used to bridge the gap between the negative positions and the +5 exempt assets (or TBE in limited circumstances).

LLCs and FLPs will provide good asset protection against future lawsuits, allow for maintenance of control by the client and can provide income and estate tax benefits in certain situations. Specifically, these tools will generally keep a creditor outside the structure through charging order protections.

These protections typically allow a doctor to create enough of a hurdle against creditors to negotiate favorable settlements. For these reasons, LLCs and FLPs are often called the building blocks of a basic asset protection plan.

There also are many types of trusts that provide significant protection. These can range from life insurance trusts or charitable remainder trusts to grantor retained annuity trusts and more.

Over the past 20 years, many states have passed statutes allowing domestic asset protection trusts (DAPTs), which can be an ideal trust protection tool for many doctors. Each trust

type has its pros, cons, costs and benefits. Regardless, one rule applies to them all – only irrevocable trusts provide asset protection. Revocable trusts, while often valuable for estate planning, do not provide asset protection.

Obviously, for all these legal tools, asset protection benefits are reliant upon proper drafting of the documentation, proper maintenance, respect for formalities and proper ownership arrangements. If all these are in place, the doctor can enjoy solid asset protection for a relatively low cost. The key, of course, is working with experienced and reasonably priced attorneys.

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The practice of OMS has inherent lawsuit risks. Risk management and asset protection planning go hand-in-hand to help AAOMS members reduce their risk of liability and protect them in case liability does occur. Certain tools also can help build wealth in addition to protecting it.

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