Protecting Your Practice

NOT USUALLY PART OF YOUR MEDICAL SCHOOL CURRICULUM
I have no relevant disclosures.
Sources of Risk to your Practice

- Unexpected Tax Liabilities (penalties and interest)
- Predatory Lawsuits (Malpractice, Premises Liability, etc.)
- Death or Disability
- Economic Downturn
- Shareholder Disputes
- Employment Contract Disputes
- Workplace Disputes
- Divorce
- Unscrupulous Financial Advisors
- Regulatory and Compliance Violations
SOURCES OF RISK TO MY PRACTICE

YOU!
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ARE YOU PREPARED !?!?!?!
Navigating the Anti-Abuse Provisions

- And it isn’t as straightforward as not violating the Anti-Abuse laws. It is nearly impossible to keep up with them. The following list is not exhaustive, but merely illustrative of some of the laws and regulations every practice must respect:

Another risk for medical professionals, is the danger of a false claim case. A current or former employee, or a competitor practice may find a regulatory violation of one or more Anti-Abuse statutes, possibly resulting in an action on behalf of the government, both civil and criminal.

FOR TREBLE DAMAGES!!!
Possible Ramifications

▪ Treble Damages
▪ Attorneys’ Fees
▪ Exclusion from Government Reimbursement Programs
▪ Loss of License
▪ JAIL TIME!
MEDICAL MALPRACTICE/STARTLING STATISTICS

By some estimates, the median jury award is $5 million and a doctor has a one in four chance of being sued, THIS YEAR.

Above image is an example of actual advertising in use by a local law firm specializing in medical malpractice.
Many doctors think that they will never be sued because they are nice people and are generally careful. This is a myth.

Malpractice often has nothing to do with guilt and everything to do with deep pockets. Perhaps you are innocent. Do you really think your innocence can be proven to a group of 12 people not smart enough to get out of jury duty?
▪ WILL INSURANCE BAIL ME OUT?
Paradox of Malpractice Insurance

- Hardest part of any lawsuit is getting paid.
- Lawyers know this, collection often takes two or three times as much effort as getting the judgment. Malpractice insurance is an attractive target because it does not require any additional litigation to locate and recover personal assets of the physician.
The paradox is that while lower coverage exposes your personal assets to creditor’s claims, it also makes you a less attractive target, particularly when you’ve done the proper planning.
With all the potential dangers and pitfalls, it is no wonder some physicians become overwhelmed and just leave their exposure up to chance.
Physician Practice Planning Goals

- Limit Bad Result from Lawsuits (i.e. Malpractice, Divorce, Practice Compliance, and Business Disputes)
- Ownership Structuring for Asset Protection, Estate Planning and Retirement
- Minimization of Tax Burden
Spectrum of Security-Titling and Selection of Assets

**Own Nothing in your own name**
*Pros*
- Not a target
- Can’t get blood out of a stone
- Assets are safe from your creditors

*Cons*
- Assets at risk from those entrusted to title
- Hard to reach own assets
- More difficult to get financing

**Own Exempt Assets (Florida)**
- Homestead
- Annuities
- Life Insurance
- Wage Account
- Retirement Accounts

**Own Nonexempt Assets**
*Risks*
- Personal creditors
- Business creditors

*Possible solutions*
- Buy insurance
- Strategic Titling of Assets
- Trust Planning
- Keep your Fingers Crossed
It is all about how your assets are titled!
What is the Best Manner of Holding Title to My Assets?

- What form is ideal?
- LLC
- Tenants by the Entirety
- Joint Tenant with survivorship
- Individual
- Tenants in common

- Joint tenants
- S Corp
- C Corp
- Member
- Partner
- Trust Beneficiary
Individual Ownership

- Solely
- Tenants in common
- Joint Tenants
- Joint Tenants with a Right of Survivorship
- Tenants by the Entirety
Tenancy by the entirety contains six unities; the unity of time, title, interest, possession, marriage, and person.

The Creditor of only one spouse cannot attach.

Protection from individual Creditors. While this works well for many of our clients, it does not work well in the event of divorce, death, or joint debt.
Entity Forms of Ownership

- Corporations (both C and S)
- Trusts (Grantor and Non Grantor)
- Limited Liability Companies (taxed as disregarded, S-Corp, C-Corp, or partnership)
- Partnerships (general, limited, limited liability, etc.)
LLC Ownership:

Single Member LLC v. Multi Member LLC

What’s the difference?

LLC: the Limited Liability Company

The Charging Order: A Remedy without a Reward

Single Member LLCs are fairly easy to pierce in Florida; however, a multi-member LLC is nearly impenetrable.

The only remedy available to a creditor of a single member for non LLC liabilities is a Charging Order.
In Olmstead the owner of a single member LLC owed a judgement to the FTC.

The Supreme Court of Florida observed that normally the managerial interest in an LLC is not freely transferable without the consent of the other members.

However, in a Single Member LLC, the sole Member can transfer without the consent of anyone.

Therefore, the Court ruled that a court could order such sole Member to transfer his or her interest for the benefit for a creditor.
A charging order allows the creditor to attach distributions made by the LLC to that member, but does not allow the creditor to force distributions from the LLC, cause liquidation, or make managerial decisions.

The LLC agreement could cause the creditor to be on the hook for income taxes of undistributed income attributable to the debtor/member’s interest.

Disproportionate distributions to members.
If your holdings are limited to exempt assets, they can be titled in your individual name.
Each State is Different!
FLORIDA EXEMPT ASSETS

- Homestead
- Wage account
- Life insurance policy, annuity contracts (limited to citizens and residents of Florida – not available for entities)
- Pension, profit sharing plans, IRAs
- 529 qualified tuition program
- Health Savings Account, Medical Savings Account
- Hurricane Savings Account
- Motor vehicle up to $1,000
- Personal property up to $4,000
Wage Garnishment Exemption: State and Federal

Florida Exempt Wages  
(Fla. Stat. 222.11)

- Head of Household
  - provide more than 50% of the support of a child or dependent
  - All Wages Exempt unless agreed otherwise in writing
- If not Head of Household
  - May not garnish in excess of amount allowable under Consumer Credit Protection Act
- Wages are safe from garnishment in a financial institution for 6 months

Federal Consumer Credit Protection Act (USC 1673)

- Limits the amount a creditor can garnish
- A judgment creditor can only garnish the lesser of:
  - 25% of your disposable earnings, or
  - your weekly disposable earnings less 30 times the federal minimum wage (currently $7.25 per hour).
Bankruptcy is Federal law, not state law, so Federal law controls.

- Exemptions in Bankruptcy Proceedings are different than in Non-Bankruptcy Proceedings (both state or federal).
Bankruptcy Exemptions (11 U.S.C. §522)

▪ You cannot elect federal exemptions if you qualify for Florida Exemptions

▪ To qualify for Florida exemptions you must meet the Federal Bankruptcy Code’s definition of resident:
  ▪ Be domiciled in Florida for at least 730 days before filing; or,
  ▪ If you were not living in any one state during the two year period before filing, you may use Florida if you primarily lived in Florida during the 180 day period prior to the two-year period.
Homestead in Bankruptcy

**Florida**
- Half acre in municipality or 160 acres elsewhere
- Must have owned property for at least 1,215 days prior to filing
  - If you can’t meet this requirement, you are capped $160,375
  - No investment property
- Must live in the dwelling

**Federal**
- $23,675 of equity in principal place of residence
- No investment property
- Must live in the dwelling
Florida Bankruptcy Exemptions Compared to Federal Bankruptcy Exemptions

**Florida**

- $1,000 personal property
- Education savings, health savings, and hurricane savings. (Fla. Stat. Ann. § 222.22)
- Prepaid medical savings account and health savings account deposits (Fla. Stat. Ann. § 222.22(2))
- Tax credits and refunds (Fla. Stat. Ann. § 222.25(3))
- Particular partnership property (Fla. Stat. Ann. §§ 605.0503)
- $1,000 automobile exemption (or $2,000 joint)
- $4,000 wild card if no Homestead
- Pensions and retirement accounts
- Alimony or child support
- Life Insurance and Annuities
- Public Benefits

**Federal 11 USC 522**

- $3,775 for your motor vehicle
- $1,600 for jewelry
- $12,625 aggregate value ($600 per individual item) on household goods (furnishings, appliances, clothes, books, animals, crops, musical instruments)
- $2,375 for tools of the trade including implements and books
- $12,625 in loan value, accrued dividends, or interest in a life insurance policy.
- Child support and Alimony that is reasonably needed
- Public Benefits
- Retirement Accounts capped at $1,283,025 on IRAs and Roth IRAs
No one size fits all!
Structuring for Success

▪ Planning does not end with Insurance

▪ Not all businesses look the same, and not all Business Structures offer the same level of protection

▪ Some Business Structures offer asset protection and estate planning benefits

▪ Some Business Structures are designed for an easier sale

▪ Some leave your personal assets at risk

▪ What structure is best for your practice?
Structure to Avoid for Practice Owners

Don’t put all your eggs in one basket!
A Broken Model
Cross Contamination: An Easy Mark

All assets are owned directly by a single.

All practice assets are exposed to any practice liability, including:

* Premises Liability
* Malpractice Liability
* Employment Practice Liability
* Contractual Claims
* Bankruptcy
* Regulatory/Compliance Liability
Many Practices own the real property they occupy and very expensive equipment required to operate.

By owning the Real Property and Equipment in separate entities, they may be removed from the reach of the creditors of the Practice.

The Practice pays rents to holding entities who in turn make distributions to either the owner or an asset protection entity owned by the physician and his or her family.
Management Services Entity

You can further remove value from your Practice by forming a Management Services Entity to manage your office and nonprofessional staff.

Profit of the practice is reduced, making the practice a less attractive target to creditors.

Isolates liability arising from nonprofessional services personal to assets of Management Services Entity.

May allow greater flexibility in retirement planning by limiting eligible employees.
Accounts Receivables Financing

Note: Possible tax consequences of distribution of loan proceeds.

- Owner buys Exempt Assets or contributes to Family Asset Protection Entity
- EXEMPT ASSETS
- Family Asset Protection Entity
- You
- Loan
- Assignment of Accounts Receivables
- The Practice
- Lender/Bank
- Note
- Accounts Receivables
- Distributes to Owner

EXEMPT ASSETS
Family Asset Protection Entity
You
Assignment of Accounts Receivables
Lender/Bank
Loan
Note
Distributes to Owner
The Practice
Accounts Receivables
A Solution in a Structure
Segregating Practice Assets to Insulate Against Catastrophic Loss

By using separate entities to hold practice related assets, the potential liabilities of any one asset is limited to the value of that asset, making it much more difficult for any defendant to collect and much less attractive a target for an aggressive attorney.
WHAT IF YOU ARE AN EMPLOYEE?

Is strategic structuring necessary?
HOW ARE YOUR ASSETS TITLED?

The same considerations would apply to employees as to a Practice Owners.

If your assets are not titled in your name, or are all exempt, than no further planning may be necessary.

If you have a low tolerance for creditor risk, there are strategies you may want to consider to protect your savings.
Multi-Member LLC for Savings and other Investments

Whether you buy real estate, securities or make other investments title can be held in a multi member LLC or other entity with more than one member, partner or shareholder.
Trust Owned Physician Services Entity

Protection of Savings
Possible 199A QBI Deduction

Note: Florida – Third Party Owner of Medical Practice is permitted – No Corporate Practice of Medicine Doctrine
WHAT ELSE CAN BE DONE TO REMOVE NON-EXEMPT PERSONAL ASSETS FROM THE REACH OF YOUR CREDITORS?

Planning with Non-Exempt Assets.

Strategies to Protect Non-Exempt Assets
ENTITY PLANNING FOR NON-EXEMPT ASSETS

- DAPT (Domestic Asset Protection Trusts)
- Double LLC Structure with a side of DAPT
- FAPT (Foreign Asset Protection Trusts)
An irrevocable Trust where the settlor is a discretionary beneficiary set up in one of 17 jurisdictions that allow a self settled trust to be free of creditors access, except for some exceptions and special creditors.

For example: an ex-spouse can reach self-settled trusts in most jurisdictions for alimony or child support.
DAPT

General Rule: Do not transfer more than 50% of assets to an Asset Protection Trust

Not available in every state
MODIFIED DAPT

- A DAPT which is created for the benefit of a third party (usually the grantor’s spouse or children).
- Superior asset protection.
- Sometimes the grantor may be added as a future beneficiary.
Which jurisdiction should be used for my DAPT?

17 Possibilities and Growing
The Nevada and South Dakota Options  
(Depends who you are talking to)

- Nevada and South Dakota have favorable exception creditor laws.
- Even in the other 15 jurisdictions which allow for creditor protection for self-settled trusts, special exception creditors may be able to access the funds.
- In Nevada, even an ex-spouse cannot penetrate a properly formed and funded DAPT for child support.
- Typical third party Trustee fees to set up and administer DAPTs:
  - Set up fee: ($750-$1,250)
  - Annual Administrative Fee: ($2,250-$4,000)
Multiple Entity Strategies

Double LLC with a Side of DAPT

Practice Entity

- 50% Ownership
  - Everyday LLC
    - 50% Ownership
      - Reserve LLC
        - 1% Ownership
          - Reserve LLC
        - 99% Ownership
          - Physician

- 50% Ownership
  - Reserve LLC
    - 1% Ownership
      - Reserve LLC
    - 99% Ownership
      - Domestic Asset Protection Trust
        - Spouse/Kids/Self
Foreign Asset Protection Trust (FAPT)

- **Full faith and credit** of United States Courts not required to be recognized in foreign jurisdictions.
- In USA, you can have a judgment entered in Georgia domesticated and enforced in any other state.
- In many foreign jurisdictions, you must relitigate the debt before a judgment can be enforced.
- Effective when property transferred to FAPT is outside of the United States with foreign grantor.
ASSET PROTECTION BEYOND THE PHYSICIAN (Pre-Sale Strategies)

▪ Gifts to Family Members (Outright or in Trust)
▪ GRAT (Grantor Retained Annuity Trusts)
▪ Installment Sales to Defective Grantor Trusts
You've built your practice over many years and are considering the final sale. Before a high price is established for your practice, there is an opportunity to take advantage of the arbitrage between a reasonable valuation and the ultimate sale price.

This technique enables the practice owner to remove a large portion of the value of the practice from the practice owner’s potential creditors.

GRATs work best with highly appreciating assets.
Installment Sale to Defective Grantor Trusts

Installment Sales allow you to remove future appreciation from your estate and from the reach of your creditors while retaining access to the revenue stream for a period of time.

Asset suitable for this planning include personally owned real estate housing your practice or a portion of your ownership interest in the Practice.
Asset Protection Interrelation with Estate Planning

- Strategies to extend Asset Protection to future generations
- Minimize Estate Tax liability
Trump Tax Law

- The Tax Cuts and Jobs Act: An Opportunity with an Expiration Date

- Doubles the Transfer Tax (Gift, Estate & GST Tax) Exemption from:

  - For Individuals: $5,600,000 to $11,200,000
  - For Married Couple: $11,200,000 to $22,400,000

- Without further Congressional action, this increased exemption sunsets in the year 2025.

- This creates a window of opportunity to take advantage, make gifts now up to $22.4 million mark to dynasty trusts to get those assets outside of the transfer tax system forever.
Pigs get Fat, Hogs get Slaughtered

- Take care to plan well in advance of a problem and do not get greedy
- The closer to an incident you plan, the less likely it will work
- If you get too extreme, your planning may be disregarded
Fraudulent Transfers

Florida has adopted the Uniform Fraudulent Transfers Act – Fla. Stat. §726.101

- 2 main tests:
  - First, for present creditors (Fla. Stat. § 726.106)
    - (a) whether the debtor received reasonably equivalent value; and
    - (b) whether the debtor was insolvent or became insolvent
  - Second, for present and future creditors (Fla. Stat. § 726.105)
    - (a) intent to defraud, or
    - (b) without receiving reasonably equivalent value and:
      - Debtor’s assets after transfer were too small in relation to the business he was engaged (or about to be engaged) in; or
      - Debtor knew, or reasonably should have known that he would have debts greater than he could pay
What is a Fraudulent Loan?

- A loan is presumed to be fraudulent when there is no payment or demand on a loan for two years. Fla. Stat. § 726.201.
  - Most common in family situations

- Example: My Uncle lent me money to start my business. I never paid him back. But now that I have a creditor trying to collect from me, I want to pay my Uncle back.
Lawrence S. Klitzman, Esquire

Degrees & Affiliations

▪ JD and LLM in Taxation, University of Miami
▪ Admitted in Florida and New Jersey
▪ 30+ years experience
▪ Member National Academy of Elder Law Attorneys
▪ Member Florida Academy of Elder Law Attorneys
▪ Member Florida Bar Real Property, Probate and Trust Committee
▪ Member Florida Bar Elder Law Committee
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