WEALTH PROTECTION PLANNING
For Orthopaedic Surgeons and Sports Medicine Specialists

As a busy surgeon, I know time is a physician’s most valuable asset. That is why my co-authors and I have created a short book focusing on four concise lessons that can have a significant impact on your practice efficiency and long-term financial well-being. Featuring strategies for practice structure, tax and cost reduction, asset protection and building wealth in up, down and sideways markets, we wrote the book in a Challenge-Solution format that allows you to focus on the areas you find most valuable. Thank you in advance for taking the time to read it. – Peter J. Millett, MD, MSc

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Dr. Peter Millett is an orthopaedic surgeon and partner at the internationally renowned Steadman Clinic in Vail, Colorado. His focus includes advanced shoulder arthroscopy, arthroscopic stabilization surgery and the treatment of arthritides with shoulder injuries.

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WEALTH PROTECTION PLANNING
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Four Quick Lessons on Asset Protection, Tax Reduction and Developing a Thriving Practice in Sports Medicine

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WEALTH PROTECTION PLANNING FOR ORTHOPAEDIC SURGEONS AND SPORTS MEDICINE SPECIALISTS: FOUR QUICK LESSONS ON ASSET PROTECTION, TAX REDUCTION AND DEVELOPING A THRIVING PRACTICE IN SPORTS MEDICINE

By Peter J. Millett, MD, MSc, David B. Mandell, JD, MBA, Jason M. O’Dell, MS, CWM

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—From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers.

ISBN: 978-0-9892163-6-4
Manufactured in the United States of America.
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As you likely know by now, the practice of medicine brings with it a host of risks, especially for us surgeons. The risks are especially heightened for those of us in private practice. I'll give you my thoughts on a few areas that I have seen create risk and liability over the years—for my practice, colleagues, friends, and family.

**HIPAA**

If you are not careful, HIPAA laws in effect can create traps. In fact, there was a doctor I know who had a HIPAA breach. The patient actually filed a lawsuit against him. I was also involved in a HIPAA-related claim.

In our situation, a disgruntled employee whom I had seen for a workers’ compensation injury accused our practice of an alleged HIPAA violation because we shared the patient’s records with the employer’s attorneys. The rule under these circumstances is that an employer is permitted to receive all documentation, so it wasn’t a breach. Still, the claim opened my eyes to the seriousness of the HIPAA-related issues. I had to file a response with the state board because of the accusation. And while my practice was completely absolved, it nevertheless made me realize how easily a breach could occur. It also forced me to recognize the litigious environment we all practice in.

Obviously, HIPAA violations must be taken seriously as a real category of risk that can impact our practices. Ignorance is not an excuse—we have to be familiar with what appropriate patient protection is, and what it is not. Of course, this may add to the...
overhead burden of the practice and impact profitability, but you must have compliance officers and you need to do appropriate auditing within your own practice. If you have the right checks and balances in place, it can help mitigate things if there is a breach.

Employee Liability

One area that varies from state to state is employment law. In Colorado, where I practice, this is not as big an issue as in other states because Colorado is an “at will” employment state. This means employers like medical practices have more leeway to fire people than in other states, where wrongful termination lawsuits are more common. I know some colleagues who have had to deal with these types of lawsuits, and I have heard their horror stories.

We all want to avoid these headaches. And as is the case with medicine, consulting an expert in the field sooner rather than later is always recommended. The experts will tell you that documentation is key—similar to medical record keeping.

It seems like common sense, but if you have an employee who is not performing at their appropriate level, I think it is always advisable to document their deficiencies and performance. This is important so that when you do eventually terminate them, you have a paper trail demonstrating the rationale and reasoning for the termination. Getting appropriate guidance by an employment attorney should always be part of the plan.

Malpractice

Malpractice is something that concerns me, as it does most physicians in all specialties. Luckily, I have only been named in one lawsuit, which involved Vioxx. My patient was taking Vioxx for a separate issue unrelated to what I was treating her for. She had a simple knee arthroscopy, but afterwards she resumed Vioxx. Then several weeks later, she developed a GI bleed that her attorney attributed to the medication. All the doctors and hospitals that had ever cared for her were named in the suit.

Fortunately, after I wrote a report for my attorney and spent weeks agonizing about the case, the lawsuit was found to be meritless and the case was dropped.

However, I remember how I felt when I was notified of the
lawsuit. My stomach sank and I felt awful about it. In addition to the extra time it took away from my family and my practice, and the stress of thinking about a worst case scenario in a lawsuit, I also didn’t like the feeling of being financially exposed to a lawsuit—even a meritless suit.

The suit motivated me to find out more about asset protection planning as an additional “insurance” plan against a worst case scenario.

What should you do regarding malpractice claims? I think the most important thing is to try to prevent it in the first place, by practicing within the standard of care for your profession, by maintaining your technical proficiency, by maintaining your certification and continuing medical education, and by developing excellent communication skills. If you are trying a new procedure, tell the patient the risks and clearly inform them ahead of time.

Should something adverse happen, deal with it as soon as possible. As one of my mentors said, “When you spot trouble, get close to it.” Call the patient, see the patient more frequently, be available to speak on the phone, and then carefully document everything you do. Patients and juries understand that what we do is not a perfect science. You will, however, find little understanding if you do not communicate with your patient or properly document the treatment plan.

I have served as an expert witness in a number of cases, and I have seen the same pattern over and over again. First an adverse outcome occurs, followed by a breakdown in communication with some, but not adequate, documentation. If the case comes to trial, without proper documentation, it becomes a “he said, she said” scenario—one that is much more difficult to defend.

**Asset Protection**

Asset protection planning is very important in our profession. It is more important in certain regions of the country where litigation is more prevalent. For example, I am from Pennsylvania, a state where a few years ago malpractice litigation became so prevalent that orthopaedic surgeons had a hard time getting appropriate malpractice coverage at reasonable rates. Even today, in states like Florida, some physicians choose not to carry malpractice insurance because of the cost. Obviously, these physicians have to shield
themselves with planning beyond insurance.

Even though one might have malpractice coverage at a reasonable rate, I don’t think that is enough. Remember, malpractice coverage has limits to it (and exclusions). For those of us who handle high-profile clients, professional athletes or other prominent patients, a poor outcome and an adverse judgment could result in damages that could go well beyond what insurance will provide.

We are also exposed to business risks as practice-owners and small businessmen. Many of these additional risks are not covered by malpractice. Risks like employment issues, small business liabilities, and HIPAA or Medicare violations all need to be considered and ideally insured against. But gaps in coverage and the potential for exposure that exceeds your coverage limits makes asset protection crucial.

The bottom line is none of us wants to be sued, but it could happen—and for some it may happen more than once. It is very stressful to be named in a lawsuit and it creates a lot of personal tension. Your personal integrity, your ability, your judgment, and your professionalism all come into question, and it is easy to get distracted. By having a good plan in place before you have a problem, you know that if something happens, your home, your investments, your retirement, and your education funds will be protected, so that your financial future will be stable no matter what happens.

Disability
Disability insurance is critical for a sound financial plan. I know of several surgeons who have become disabled and could no longer earn an income. One of my co-residents during my training became disabled when he slipped on a wet floor, suffered a head injury, and was permanently unable to operate. Unfortunately, he was also at a stage of his career where he could not yet obtain a good disability policy because his income as a resident was too low to justify an adequate policy.

It is important, particularly for younger physicians, to get adequate disability insurance. Your biggest risk is the potential loss of earning power through injury or illness. When you are early in your career, you are healthy and your practice starts to ramp up—that is the time to get a very good disability policy and try
to get the maximum you can afford or the maximum coverage allowable. It is important to think about this when you are in your 30s because as we age, we are more susceptible to developing health problems that could affect our ability to practice medicine. Whether it’s an orthopaedic issue, a problem with your vision, a neurologic condition, or some other ailment (all of which I have seen in my colleagues), there are health risks that could affect one’s ability to practice orthopaedic surgery. Many of these conditions we don’t think about when we are young, yet they can pose significant risk to our livelihood.

Most orthopaedic surgeons and sports medicine doctors lead pretty active lifestyles (skiing, cycling, surfing, driving race cars, or flying planes). Couple this activity with the stress and long hours of practicing surgery, and it becomes apparent how important it is to obtain a good disability policy. A disability that keeps us from working is probably our greatest personal financial risk. Disability can come from injury or illness and at any time. In my opinion, a good disability insurance plan is an extremely important cornerstone of any surgeon’s financial plan.
TRIAGE SUMMARY: There are a variety of tools that can shield practice assets, cash flow, and personal wealth from potential lawsuits. We discuss their asset protection effectiveness in terms of a (-5) to (+5) sliding scale and examine just a few in depth here—especially those tools that can also help you reduce taxes and build wealth. We also examine the specific issues around divorce protection and protecting income against disability.
The Sliding Scale of Asset Protection

The most common misconception among all doctors, including orthopaedic surgeons, regarding asset protection is the idea that an asset is either “protected” or “unprotected.” This black or white analysis is no more accurate in the field of asset protection than it is in the field of medicine. In fact, asset protection advisors are very similar to physicians in how they approach any client or patient. In this chapter, we will discuss the way in which advisors measure a client’s assets by using a sliding scale. Then we will suggest ways in which orthopaedic surgeons can protect assets, avoid high-risk assets, and achieve a high level of protection.

The Sliding Scale and Scores

To measure the assets of a client, advisors use a sliding scale that indicates the client’s good and bad financial habits. Like 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 maintaining a poor diet. For a client of ours, bad habits might include owning property in their own name, owning property jointly with a spouse, or failing to maximize the percentage of exempt assets in an investment portfolio.

Like a surgeon who judges the severity of a patient’s illness, asset protection specialists use a rating system to determine the protection or vulnerability of a client’s particular asset. The sliding scale runs from \(-5\) (totally vulnerable) to \(+5\) (superior protection). As you have probably already guessed, our goal is to
bring a client’s score closer to (+5) for each of their assets (see diagram below).

![Diagram showing asset protection levels]

When most clients initially come to see us, their asset planning scores are overwhelmingly on the negative side of the scale. The reason for this score varies. Typically, personal assets are owned jointly (-3) or in their individual name (-5). Both of these ownership forms provide little protection from lawsuits and may also have negative tax and estate planning implications.

Many medical practices themselves also have asset planning scores that are overwhelmingly negative. For practices, the worst way to operate a business or title assets is a general partnership (-5). For all other business entities, liability from operations is always a concern. For this reason, owning any business assets within an operating business is extremely unwise (-5).

Before asset protection specialists can achieve a high level of protection for their clients, they must first eliminate the high risk assets. There are many ways to protect assets, but the most efficient way to avoid high risk assets and achieve a high level of protection is to utilize exempt assets. This is mentioned briefly in the next section and then discussed in greater detail later in the Lesson.
The Best Protection:
Federal and State Exempt Assets

Each state’s law identifies assets that are absolutely exempt from creditor claims in that state. Federal law also exempts certain assets. Because these assets are inherently protected by law, they enjoy the highest level of protection, a (+5) score on the sliding scale.

At the federal level, bankruptcy law affords (+5) protection for qualified retirement plans, such as pensions and 401(k) plans. At the state level, the rules vary widely between states. Please contact us to discuss how your state may shield certain assets as exempt (+5).

Basic Domestic Legal Tools

In many states, the list of state exemptions is not very generous. Even in those states where the exemptions are broad, we need to make sure that the asset protection goals are balanced with wealth accumulation and investment goals. For these reasons, there will almost always be non-exempt assets in a client’s asset mix. For these assets, we must use other protection tools.

In such a situation, the basic asset protection tools are family limited partnerships (FLPs), limited liability companies (LLCs), and certain types of trusts. FLPs and LLCs provide good to excellent asset protection against future lawsuits, allow you to maintain control, and can provide income and estate tax benefits in certain situations. Trusts are quite varied in their ability to protect assets and factors in terms of tax treatment and access, but there are many solid options as well. For these reasons, we call FLPs and LLCs (and to some degree, trusts) the building blocks of a basic asset protection plan.

FLPs and LLCs (and properly structured trusts) afford asset protection scores somewhere between (+1) to (+4), depending on the circumstances. It may be possible to increase these scores for some of your assets by employing the laws of other states to protect them.

Other Protection Strategies

Most orthopaedic surgeons can achieve most of their asset protection planning with a combination of exempt assets and legal
tools like FLPs, LLCs, and certain types of trusts. However, specialists who are worth more than $3,000,000, or who earn more than $500,000, almost always need additional planning strategies to help them protect their assets. More successful orthopaedic surgeons may utilize advanced techniques like:

**Non-Qualified/Hybrid Plans**
Certain Non-Qualified or Hybrid Benefit Plans used in a medical practice may provide asset protection benefits vis-à-vis creditors of the physician. In addition, these tools can offer tax-deferral and estate planning benefits. Most doctors find these tools attractive because employees need not be covered in these plans to be successful.

**Captive Insurance Companies**
Captive Insurance Companies can also reach the (+5) status when the shares are owned by a second entity like an irrevocable trust. Successful businesses can use such insurance companies to provide superior asset protection and risk management, efficiently fund a partner buy-out, and potentially reduce income and estate taxes.

**Debt Shields and Collateralization**
Debt Shield and Collateralization strategies are ideal for protecting equity in real estate, especially the personal residence and the medical practice’s Accounts Receivable (AR). This technique helps achieve a (+1) to (+5) rating. The exact score depends on the funding vehicles used in this technique. When structured properly, after-tax wealth can be built while protecting the real estate equity or Accounts Receivable in a superior way.

**The Diagnosis**
Asset protection planning, like any sophisticated multi-disciplinary effort, has degrees of success. Nothing in life is 100% certain (except perhaps death and taxes—both of which are discussed in depth in our book *For Doctors Only*). For asset protection planning, this adage holds true. You can protect each personal or practice asset to different levels. Exempt assets offer the greatest level of protection with the least cost. Legal tools generally fill in the rest of the plan.
for many orthopaedic surgeons. Successful surgeons may choose to add Debt Shields, Captive Insurance Companies, or Non-Qualified/Hybrid Plans to complete the planning.

In your asset protection plan, make sure you understand the benefits and consequences of the various tools you employ. Your asset protection advisor can help you weigh the pros and cons of each potential strategy. Your advisory team can help explain how each asset protection strategy or tool may be integrated into your comprehensive financial plan. By addressing your asset protection concerns as part of a comprehensive planning process, you will not only protect the wealth you have already built, but you may find more efficient ways to build greater after-tax wealth for your retirement and for future generations.