PROTECTING AGAINST MALPRACTICE LIABILITY: A THREE-PART SOLUTION

Find the best insurance to protect you and your practice.

BY DAVID B. MANDELL, JD, MBA

Most ophthalmologists at one time or another have worried about malpractice liability, as it is a reality of practicing medicine. In this article, I lay out a three-part solution to the challenge of shielding wealth from potential malpractice claims.

RISK MANAGEMENT

The first 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 physician you can be and maintaining your ongoing knowledge through education and continuing medical education (CME).

Beyond this medicine-centered approach, ophthalmologists would be well-served to incorporate nonspecialty-specific risk management techniques. Learning how best to communicate with patients, especially when dealing with difficult patients or bad outcomes, is essential. Other techniques include how to handle protected health information and how to manage the risks of communication technologies, from blogs and websites to texting and email. This has become even more important in 2020 with the increased need for telemedicine.

Many of these techniques are covered in the eighth edition of my CME monograph, *Risk Management for the Practicing Physician*.

MEDICAL MALPRACTICE INSURANCE

Perhaps the most obvious way to protect against malpractice claims is to purchase medical malpractice insurance. This will typically cover both defense costs and any judgments that might be rendered against the defendant physician—within policy limits, of course. Although a comprehensive treatment of malpractice insurance goes beyond the scope of this article, I will highlight two salient issues.

Claims-Made Versus Occurrence-Based

A claims-made insurance policy provides coverage only for incidents that occur and are reported while you are insured with that carrier. Both the incident and the filing of the claim must happen while the policy is in effect. By contrast, occurrence-based coverage provides lifetime coverage for incidents that occurred while the policy was in effect, regardless of when the claim is filed. Thus, if you had an occurrence-based policy in effect for the calendar year 2017 and a patient files a claim in 2020 for an incident that happened during 2017, the policy covers you for that claim, even if you no longer have insurance with that carrier.

Claims-made policies are typically cheaper than occurrence-based policies for the first several years because the potential for claims builds slowly as policy years accumulate. In comparing costs of malpractice insurance policies, be sure to ask how much the premium will increase after the first year.

Coverage Limits

All policies have coverage limits, with “$1 million/$3 million” being quite common. The first number is the maximum amount the insurance company will pay per claim during the policy period, which is usually 1 year. The second amount is the maximum the company will pay for all claims during the same policy period. If there are claims or judgments against you, you will be personally responsible for any damages that exceed your insurance policy limits.

Reasonable coverage limits for your practice may depend on several factors, including the litigation award history in your area, whether or not your state has caps on noneconomic damages in malpractice actions, and what acts it covers. Be sure to work with an experienced agent to determine the right coverage limits and type of policy for your practice.

ASSET PROTECTION

Mistakes will happen, and bad outcomes will occur even when all best practices are followed. Bad outcomes can lead to liability, even if the physician believes he or she did nothing wrong, and malpractice awards can exceed even significant malpractice insurance limits.

For these reasons, many ophthalmologists have chosen to buttress their practice risk management and malpractice insurance with asset protection planning.

The goal of asset protection planning is to position a client's assets in a way that makes it difficult, and in certain cases nearly impossible, for a potential future lawsuit plaintiff to gain access to them.

If the goal for an ophthalmologist is to feel more secure and sleep better at night knowing that what he or she worked hard to build will be safe, then asset protection planning is an important part of the solution.

Practice Asset Protection

The first priority of most physicians will be to protect their personal assets, but practice protection should not be overlooked. The most important practice assets are cash flow and income.

The good news is that the tools that protect your cash flow also typically help you save on income taxes and build retirement wealth. These include qualified retirement plans such as defined benefit plans, 401(k)s and combination plans, nonqualified plans, and captive insurance arrangements.

Other important practice assets include the real estate, if any, and valuable equipment. If your practice has valuable real estate or equipment, you can separate these assets from the main practice and use a limited liability company or companies (LLCs) to lease them back to the main practice entity.

Personal Asset Protection

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

We typically recommend leveraging your state's exempt assets as a priority because (1) they enjoy the highest level of protection and (2) they involve no legal fees, state fees, accounting fees, or gifting programs. In other words, you can own the exempt assets outright in your name, have access to any values, and still have the assets 100% protected from lawsuits against you.

Each state law specifies assets that are absolutely exempt from creditor claims. These may include qualified retirement plans and IRAs, cash within life insurance policies, annuities, and primary homes. Make sure you seek an expert on this to determine your state's exemptions.

Beyond exempt assets, basic asset protection tools such as family limited partnerships (FLPs) and LLCs, along with certain types of trusts, can be used. FLPs and LLCs can provide good asset protection against future lawsuits, allow you (the client) to maintain control, and provide estate and income tax benefits in certain situations. For these reasons, we often call FLPs and LLCs the building blocks of a basic asset protection plan. Irrevocable trusts can also play an important role in asset protection planning.

Obviously, for all these legal tools, their asset protection benefits are dependent upon proper drafting of the documentation, proper maintenance and respect for formalities, and proper ownership arrangements. If all of these are in place, the physician will have solid asset protection for a relatively low cost.

CONCLUSION

The practice of ophthalmology has inherent lawsuit risks, including those from medical malpractice. Risk management, malpractice insurance, and asset protection planning can be combined to help physicians reduce the risk of and offer protection against liability. ■

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