

BUY/SELL AGREEMENT
ARRANGEMENTS

Buy/Sell Agreements are an essential component of creditor protection and wealth conservation planning for anyone who has partners or fellow shareholders in a significant practice or investment company.

This is discussed in Chapter 25 (“The Biggest Mistakes Doctors Make”) under the category of Failure of Multiple Physician-Owned Practices to Have Appropriate Buy-Sell and/or Shareholder Agreements in Place.

Creditors can be prevented from taking over ownership of corporate interests, or may be bought out at a relatively low value, if Shareholder or Operating Agreements and ownership certificates are appropriately handled.

The design and implementation of Buy/Sell Agreements can also have a very significant impact upon creditor and wealth preservation planning, and we commonly see significant mistakes made in the design and drafting of such agreements and with respect to the ownership and maintenance of life insurance and disability buy-out insurance that has been purchased with hard earned money.

There are several different kinds of Buy/Sell Agreements for physician practices and investment arrangements, and these are commonly set forth in a “Shareholder Agreement”, “Buy/Sell Agreement”, or an “Operating Agreement”. The terminology of the name or names of agreements that provide buy-in and buy-out arrangements vary significantly, and important provisions associated therewith may be found under corporate by-laws, employment agreements, severance pay agreements, and other legal documents.

A LOGICAL GUIDE TO SELECTING A BUY/SELL AGREEMENT
ARRANGEMENTS

"A Logical Guide to Selecting a Buy/Sell Agreement Arrangement: Traditional Choices are Not Always the Best" written by Alan S. Gassman, Copyright © 2009

1. Entity Redemption Arrangements. The company owns the life insurance policy and is the beneficiary thereof. Upon receipt of the life insurance proceeds, the company is to use such proceeds to buy out the deceased owner.

Will there be enough money to (a) buy out the deceased owner and (b) have the deceased owner released from any and all guarantees and obligations associated with the business?

(a) If it is not practical to have the deceased owner released for contractual or other reasons, should the part of the life insurance proceeds that would otherwise be kept by the company as key man insurance be escrowed pending satisfaction or releases of any and all guarantees that the deceased owner may have responsibility for.

(b) How can the deceased owner's family be sure that the monies received from the life insurance policy will actually be used to satisfy contractual buy-out agreements?

(c) What if the company claims that for some reason the agreement is not enforceable or that there are claims against the deceased owner that offset what would be paid to him or her?

(d) What if the company has a major creditor claim against it (what if the deceased owner died in a car accident that he or she caused while driving a company vehicle and the company is now being sued by others who died in the accident?)

(e) What if the company goes into bankruptcy and the family of the deceased owner becomes just another creditor in a bankruptcy proceeding?

(f) For income tax purposes the remaining shareholders do not get a stepped up basis for the stock purchased. The stock simply becomes treasury stock.

2. Cross Purchase Agreements can be considered to avoid the above potential problems.

Each owner may own the policy or policies on the other owners. Thus the policy proceeds should be protected from creditors of the company.

Also, each purchasing shareholder will get a tax basis in the purchased stock equal to the purchase price thereof.

(a) However, policy proceeds will not be protected from creditors of the surviving owner who would receive policy proceeds.

(b) Also, contractual disputes could result in the surviving owner using the funds for other purposes while litigating over the obligation to pay and becoming insolvent.

(c) Further if there are more than 2 shareholders, then on the death of one owner the policies owned on the others would need to be transferred to rebalance between them, thus causing issues under the transfer for value rules. For example, if there are 4 equal shareholders there have to be 4 policies each owned 1/3rd each by each 3 shareholders on the fourth, and if one leaves the company the remaining 3 policies have to be readjusted as to ownership. Under the transfer for value rules this could cause the proceeds of a life insurance policy to be subject to income tax when the insured person dies.

3. Hybrids of the Above Types of Agreements.

Consider a Trusteed Corporate or Cross-Purchase Agreement. Under these arrangements the owner and beneficiary of the policy can be a trust company, a law firm, or another trusted institution as trustee for the benefit of the company in a Trusteed Redemption arrangement, or for the benefit of the other shareholder or shareholders in a Trusteed Cross-Purchase arrangement. The trust agreement can require that the policy proceeds be held safely until sale and used solely for redemption or cross-purchase purposes. This at least assures the surviving family that the life insurance proceeds will not be absconded with.

Generally for tax purposes the policy needs to be considered as owned and payable to the company in a redemption arrangement, or to the surviving owner or owners in a cross-purchase agreement. Could a state court or a bankruptcy court override

the trust agreement where there are creditors of the entity in a redemption arrangement, or creditors of the remaining shareholders in a cross-purchase arrangement?

There would be a purchase price tax basis for the other shareholders if the Trustee is appropriately characterized as an agent for the other shareholders.

4. The Optimal Solution: Use of a Related Partnership to Facilitate Purchase.

Because of the above concerns, oftentimes a separate limited partnership or limited liability company is established to own and facilitate the life insurance buy-out arrangement.

This entity will be taxed as a partnership to avoid the transfer for value rules that would otherwise be problematic if there are more than 2 owners and shifts of ownership in the policy would apply if there was a redemption arrangement.

The transfer for value rules do not apply when there is a reapportionment of entitlement to the proceeds of life insurance for use in a Buy/Sell arrangement between partners under a federal tax partnership. The partnership may have an additional investment besides the life insurance to help assure that it is recognized as a partnership for federal income tax purposes.

If the separate partnership is purchasing the interest in the entity on behalf of its surviving partners, who are the surviving owners of the operating entity, then a creditor of the company would have no claim against the policy proceeds, and a creditor of an individual "partner" in the partnership entity might have a claim against the member or partnership interest of the individual partner, but this would not permit the creditor to reach into the partnership to have a claim against the policy proceeds if appropriate charging order protection applies.

The above strategy was blessed by the IRS in Private Letter Ruling 200747002, which discussed having term insurance held under an LLC taxed as a partnership to facilitate the Buy-Sell arrangement. Under this Private Letter Ruling the manager of the LLC was a trust company that was required to use monies contributed to the LLC to purchase and maintain life insurance to fund a separate cross-purchased Buy-Sell agreement between three related shareholders. It would be possible to have permanent life insurance and to have special allocations of entitlement as to policy values under an LLC/partnership agreement. See *The Advanced Tax Planner* Volume 5, Issue #1 May-June 2008 at www.zelllaw.com and the ING publication entitled *Buy-Sell Planning Using Life Insurance/Buy-Sell Arrangements Using a General Partnership*.

CREDITOR PROTECTION
FOR FLORIDA PHYSICIANS

*A Comprehensive Handbook for
Physicians and Their Advisors*

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TABLE OF CONTENTS

INTRODUCTIONxxv
 The Painful Phone Call.xxv
 A Common Errorxxv
 Take Precaution to Reduce Concernsxxvi

QUALIFICATIONS OF THE LAWYER WHO HELPS YOU.xxvii

QUALIFICATIONS OF THE ACCOUNTANT WHO HELPS YOU.xxix

PART I - Wealth Challenges and Walls of Defense. 33
 The Six Phases of a Doctor's Life from a Creditor Protection Standpoint 34

Chapter 1 - Malpractice Insurance and Going Bare Considerations 35
 I Heard They Will Always Settle for My Limits of Liability,
 So I Don't Need to Worry About Creditor Protection 36
 Malpractice Insurance Issues. 36
 Tail Malpractice Insurance 47
 Financial Components of Malpractice Coverage 47
 Going Bare 49
 Settling a Suit: The Personal Financial Statement and
 Disclosures Plaintiff Lawyers May Require. 53

**Chapter 2 - What To Do (and Not Do) if You Know You
 Will Be Defending a Lawsuit 55**
 The Moment You Get Wind of a Lawsuit. 59
 The Bad Faith Rules and How They Can Impact the Defense
 of a Medical Malpractice Claim 59
 What Else Can a Personal Lawyer Do When a Lawsuit is Expected or Filed? 61

Chapter 3 - Automobile Liability 63

Chapter 4 - Other Causes of Liability and Potential Financial Devastation 69
 Catastrophes in the Making 69
 Corporate Firewall Protection: Using Corporations and
 Other Entities to Provide Liability Protection 72

Chapter 5 - The Importance of Proper Umbrella Liability Coverage 75

Chapter 6 - The "D" Word: Creditor Protection and Divorce 81

Chapter 7 - Prenuptial and Postnuptial Agreements 85

Chapter 8 – A Few Words on Confidentiality	89
Legitimate Uses of Confidentiality Structures.	91
Keeping Ownership or Control of an LLC Confidential.	91
How to Find Out About Ownership of Real Estate and Companies.	94
Identity Theft.	95
Buying Gold and Other Collectibles.	95
 PART II - Using Creditor Protected Assets and Creditor Protection Techniques	97
 Chapter 9 – Key Asset Protection Planning Concepts	99
Florida Residents – Primary Creditor Protection Rules: The Two Minute Overview	102
 Chapter 10 – Important Asset Protection Definitions.	103
 Chapter 11 – The Bankruptcy Conversation: More Than You Will Hopefully Ever Need to Know About Bankruptcy	109
How to Stay Out of Bankruptcy	111
How Can You Make Sure That You Will Not Be Forced Into Bankruptcy?	112
Recent Changes to Bankruptcy Law	112
 Chapter 12 – Primary Asset Protection Planning Rules: A 30,000 Foot View and Summary	115
 Chapter 13 – Steps in Designing and Implementing Your Creditor Protection Plan.	125
 Chapter 14 – More About the Fraudulent Transfer Rules	131
How the Fraudulent Transfer Rules Apply to Exempt Assets.	131
 Chapter 15 – Essential Estate Planning Concepts	135
 Chapter 16 – Common Sense Talk About Primary Exempt Assets	141
Section A: Waiving Exemption Status	141
Section B: Tenancy by the Entireties.	142
Frequently Asked Questions:	144
Section C: Life Insurance and Annuity Contracts	147
Section D: Permanent Life Insurance: Run the Numbers on Any Proposed Permanent Life Insurance Product.	149
Section E: Term Life Insurance	150
Section F: Confidentiality With Respect to Your Insurance Physical.	152
Section G: Homestead.	153
Protecting More Than 1/2 Acre of Homestead Within City Limits.	154
How to Best Situate Houses You Buy for Others.	157
Comparison of Methods to Purchase Homes for The Children	161
Section H: Wages and Wage Accounts.	169
A Florida Physician’s Guide to the Protection of Wages and Wage Accounts.	171

Section I: Qualified Pension Planning	174
Optimize Qualified Plan Contributions	175
Section J: Florida Prepaid Tuition Fund and 529 Plans	177
Section K: Personal Assets.	179
Chapter 17 – Quasi-Exempt Assets	181
Introduction	181
Charging Order Protection	182
Asset Protection Trusts.	182
Domestic Asset Protection Trust.	186
Combining Asset Protection Trusts/LLCs and Limited Partnership Structures	187
What Do Asset Protection Trusts Cost to Form and Implement?	187
What About Offshore Companies?.	188
A Note on Owning Foreign Real Estate	190
PART III - Estate and Creditor Protection Coordination	193
Chapter 18 – Estate Planning Meets Asset Protection Basics	195
Protecting Your Inheritance	195
An Orientation Tour of Estate Planning	198
Strategies and Structures Can Vary Widely.	205
PART IV - Medical Practice, Business, and Investment Entities and Management	207
Protecting the Medical Practice Assets.	207
Chapter 19 – The Medical Practice	209
Checklist for Medical Practice Entity Creditor Protection Arrangements	210
Chapter 20 – Building Block Concepts for Business, Investment, and Professional Asset Entity Use And Planning - The Very Basics of Business Law	211
Corporation	211
Limited Liability Company (LLC)	212
Professional Association (PA)	212
Professional Service Limited Liability Company (PLC or PLLC).	212
General Partnerships (GP)	212
Limited Partnerships (LP)	213
Limited Liability Partnership (LLP)	213
Limited Liability Limited Partnership (LLLLP)	213
Entity Selection for Physicians	213
The Taxation of Business and Practice Entities	214
Disregarded Entity Status	215
Partnership Tax Status	215
Partnerships of S Corporations	216
Regular Corporations Cannot Be Treated as Partnerships	216

S Corporations Explained	217
Cautionary Advice	218
Regular Corporation Tax Treatment	219
Summary of Tax Treatment Choices	219
Common Medical Practice Structures	220
Medical Practice Entity Planning	221
Wages vs. Dividends vs. Other Choices	222
A Sample Memo to a Client: "Choosing the Right Business Structure for Your Practice"	223
Debt is the Debtor's (and the Doctor's) Friend	227
Chapter 21 – The Partnership of S Corporations Model.	229
Chapter 22 – A Fable on Creditor Protection Planning for a Group Medical Practice.	231
Chapter 23 – Protecting Letters of Protection and Accounts Receivable – The Extended Letter of Protection Enhancement System ("ELOPE").	235
Chapter 24 – Buy/Sell Agreement Arrangements	241
A Logical Guide to Selecting a Buy/Sell Agreement Arrangements	242
Chapter 25 – The Biggest Mistakes Doctors Make.	245
Chapter 26 – When to Call Your Lawyer	257
Chapter 27 – Conclusion.	261
APPENDIX A - A Special Chapter for the CPA	263
The CPA's Checklist for Florida Creditor Protection Planning and Maintenance.	265
APPENDIX B - A Chapter for the Single Physician	267
Creditor Protection for the Single Floridian	267
Partial Checklist for the Single Physician Creditor Protection	280
Disclaimer of Warranty and Limit of Liability	283
Index	285