

Asset Protection Planning for New Hampshire Attorneys

By Amy K. Kanyuk

Operating your law practice through an entity, such as a professional limited liability company or professional association, does not protect you if you are sued for legal malpractice. You are liable for your own negligent acts, and those of the people you supervise, to the same extent as if you rendered the legal services as a sole practitioner. Your protection against a malpractice claim lies in your professional liability insurance coverage, asset protection provided under state law, and any asset protection planning you have done on your own.

New Hampshire does not require its attorneys to carry professional liability insurance. [Editor's Note: While attorneys are not required to *obtain* professional liability coverage, under Professional Conduct Rule 1.17, attorneys are required to *report* to clients if they do not have such coverage at the minimum level of \$100,000 per occurrence/\$300,000 aggregate.]

However, the high cost of liability insurance may prevent lawyers from purchasing enough insurance to cover a large claim. As a result, some attorneys view asset protection planning as an alternative or supplement to insurance coverage. You can take action on your own to place assets beyond the reach of your creditors. The complexity of such a plan – known as an “asset protection plan” – can range from very simple to extremely complicated, depending on the nature and extent of your assets, your

budget, and your pain threshold for dealing with paperwork and entity administration.

The first step in asset protection planning is avoiding a “fraudulent” transfer. Assets that you transfer fraudulently are still available to your creditors. You can't transfer assets to put them beyond the reach of a known creditor, or to make yourself insolvent. If you're already being sued, or are about to be sued, it's too late to do any legitimate planning.

New Hampshire law affords some automatic asset protection to its residents. The state's “homestead exemption” protects up to \$100,000 of the equity in your home from your creditors. If you're married, your spouse also has homestead rights in your residence, so up to \$200,000 of equity is protected.

New Hampshire law also protects your IRA, 401K and other qualified retirement plan assets from your creditors. This means that creditors cannot reach any of your retirement savings, as long as the assets remain within the retirement plan. Life insurance cash values and commercial annuities generally enjoy unlimited protection too.

Purchasing an umbrella liability insurance policy is a simple way to obtain additional creditor protection. The umbrella coverage applies when you exceed the limits of your primary auto or homeowner's policy. It's important to remember, however, that liability insurance won't cover everything for which you might be sued, including malpractice and “intentional torts” such as sexual harassment. Even if coverage is available, your personal assets will be exposed to the extent a claim exceeds the limits of your policy.

If your spouse doesn't have the same liability concerns that you do, you might consider transferring some of your assets (including your residence) to him or her. If you're sued, your creditors can't reach assets owned solely by your spouse. The downside to this strategy is that you no longer manage or control the property you give to your spouse. If you divorce, the assets will belong to your spouse (subject to a property settlement). However, if divorce isn't a concern, and you expect your spouse to share the use and control of the transferred property, this is a good, low-cost asset protection option.

Establishing a trust, and transferring assets to it, also can put assets beyond the reach of your creditors. For the past decade, “offshore” asset protection trusts have been in vogue. Clients establish trusts in a “debtor friendly” foreign jurisdiction, such as the Cook Islands, and transfer their assets to them. These trusts allow clients to continue to use and enjoy the transferred assets, but (at least in theory) protect the assets from the clients' creditors. However,

administrative complexity (where exactly are the Cook Islands?), expense and recent U.S. judicial attacks on the efficacy of these trusts make them useful only for the adventurous.

In recent years, a handful of U.S. states – but not New Hampshire – have adopted laws allowing individuals to set up “domestic” asset protection trusts. New Hampshire residents can create such trusts in the states that permit them. Domestic asset protection trusts generally are easier and less expensive to establish and maintain than foreign trusts. However, a domestic asset protection trust may not provide the same level of asset protection as an offshore trust.

Finally, two less exotic strategies available to New Hampshire residents include irrevocable trusts and limited liability companies. If you transfer assets to an irrevocable trust, and you neither control the trust as trustee nor retain an interest in the trust as a beneficiary, your creditors can't reach the trust assets. But neither can you. Your spouse, however, can be a beneficiary, and in some cases, the trustee.

A limited liability company is similar to a partnership, except none of an LLC's members is personally liable for the LLC's liabilities. If an LLC member is sued individually, his creditors can't attach any of the LLC's assets. LLCs are now the entity of choice to hold commercial and rental real estate in New Hampshire.

The estate plan of any New Hampshire attorney should include some element of asset protection planning. The nature and extent of the asset protection plan should be based on your liability exposure, income and net worth, and you should integrate the plan with your other financial and estate plans. Using a variety of asset protection strategies will provide the most protection and, hopefully, some peace of mind.

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