

Don't Be A D/B/A

A Litigator's Warning To The Unincorporated Health Care Practitioner

BY ADAM J. BASCH

What is as foolish as a person who has emphysema and smokes or a person who rides in a car without a seat belt? Give up? Some of you are doing it right now ... operating a business as a D/B/A.

And what is even more foolish than operating a business in this manner? Doing so while owning real estate. Even for the, "I'll never be sued group," unforeseen events can place you looking down the barrel of a lawsuit. These events can range from another person or entity defaulting on an obligation to you, an honest mistake on your part in fulfilling your obligations to another party, or even serious illness. Should you find yourself in this situation, having a proper business entity is extremely important.

Ask any litigator the first three questions they ask prior to filing suit and you will get the same response:

- Who is the claim against?
- Is there insurance to cover the claim?
- How am I going to collect on any future judgment I may receive?

If you are doing business as a D/B/A, the claim will be against you personally. If you are doing business as a corporate entity, under most circumstances, the claim would be against the corporation, placing your personal holdings outside of what can be looked to for satisfaction of a judgment.

Of course, the nature of a

person's business is a key factor in determining the value the business will gain from incorporating. Some businesses are simply more prone to generating litigation than others. Some typical high-risk fields are construction and related service industries, businesses that buy inventory or supplies on credit, and business that carry a substantial amount of unsecured debt on their books.

One oftentimes-overlooked susceptible industry is health care. While most people in this industry tend to look at liability as the result of a malpractice action, this view overlooks the fundamental fact that the vast majority of health care practitioners are small business owners. As such, they have more similarities than differences when compared with the average small business owner, and they also need to address liability protection.

By way of example, if you were to compare a health care practitioner with a construction company, you would likely notice that they both have obligations under a commercial lease. They both sell 'products' on credit and have large accounts receivables. They both finance equipment and they both have payroll that needs to be funded. If a customer is not satisfied with their 'product' or an obligation to a supplier or lender has not been met, they can both face the same end result, litigation.

When it comes to asset protection, one of the most valuable things a person has is time.

A fundamental fact is that the majority of health care practitioners are small business owners.

This means that the more time between when an asset is transferred and the initiation of a lawsuit, the better. All too often people look to protect their assets on the verge of litigation being initiated. This may be too late. Just as it is wise to begin saving for retirement at a young age, setting up a proper business model at the onset is always best.

The importance of timing is intensified in the event that a person finds himself in the unfortunate position of filing a bankruptcy petition. When one files, the Bankruptcy Court trustee will inquire about assets presently owned as well as assets sold or transferred within the past few years. As a general rule, transfers made within 90 days will be considered a preference, and transfers made within the past few years may be considered a fraudulent conveyance. If the court deems that a transfer is a fraudulent conveyance or a preference, it has the power to undo the transfer and claim the asset for the benefit of the bankruptcy estate. Although a person may not hold legal title to an asset, it may be treated as though he or she does. However, the more time that passes between the asset transfer and the filing of a bankruptcy petition, the less likely it is that the transfer will be

undone.

In addition to protecting personal assets, incorporating may also allow a party to avail itself of certain tax breaks. This is why when one chooses to incorporate a business; he or she needs to work closely with both an attorney and accountant. This will assure utilization of the most advantageous corporate form. Business entity options include corporations, partnerships, limited liability companies and limited liability partnerships. Health care professions, like lawyers and accountants, can take advantage of two other business models, professional corporations and professional associations. These two entities are reserved for those who hold professional licenses. Under most circumstances, the officers, directors, and shareholders of such a business group all hold the same professional license, and the sole purpose of the established business entity must be the practice of the shared profession.

Surviving in today's business environment may be difficult. Incorporating may prevent a mere bump in the road to success from becoming a travesty.

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