

"IT'S NOT ME, IT'S YOU"

Breaking up is hard to do, but there are ways to leave a position or practice legally and gracefully—with no hard feelings on either side.

by **Thomas A. Lerner**

The romance of recruitment—especially early on in a career, can lead to employment decisions that a physician later regrets. The prospect of stability, an income that allows for a reasonable lifestyle while reducing debt, a professional environment that promises nurturing practice development and professional growth, and possible future partnership all can obscure signs that a practice environment may not be a good fit.

But after you pass the start-up period with its guaranteed salary, perhaps you are shocked by the bite that overhead takes out of your earnings, and maybe you want a more efficient practice. Or perhaps you have instead found that the prospective collaborative mentor turned out to be a controlling, Type A personality. The offices and equipment may look tired, and little effort made to grow patient lists. Rather than share the work, are other members of the practice protective and defensive because their income is precisely tied to their productivity? Is there no reinvestment in the practice, but instead are the physicians like miners, extracting minerals and leaving waste? Or perhaps you are the one with greater ambition for the growth of your practice, and you find that your colleagues' preference for a certain lifestyle has become a drag on the growth potential. Are they content with their lot, while you want to make more of yours?

None of these scenarios—or myriad other variations on them—mean that anyone is in the wrong. It does mean, however, that dissatisfaction and conflict are much more likely to occur. In the absence of the prospect of changes that are more harmonious with your objectives, you have decided it is time to move on.

This article will address what steps you may lawfully take to prepare for the transition in

such a situation without incurring liability to your soon-to-be-former employer.

As an employee, you may have contractual duties. You have a common law duty of loyalty. You have regulatory constraints, such as HIPAA. Your employer also has certain duties that it owes to you and the patients, such as to notify them of your departure and facilitate the transfer of their records at their request so that continuity of care is not impeded. The end of a professional employment relationship is a process that requires all parties involved to conduct themselves well, in an atmosphere that often feels like the middle of a divorce.

Start with your contract.

The termination provisions of your employment contract typically allow either the employer or employee to end the contract without cause, following a notice period. Typically, the notice period is at least 90 days, and often it is 6 months. Longer notice periods tend to reflect the employer's anticipated difficulty in recruitment of a successor; the notice period tends to be longer where the slot is harder to fill. Sometimes the notice period for the employer is shorter than that for the employee, as the employer wants the flexibility of terminating an underproductive or problematic physician more efficiently without having to invoke a "termination for cause" provision. Absent undebatable grounds, employer terminations for cause almost always provoke a fight.

Plan ahead.

Once you have made the decision to leave, you should develop a plan for what will follow, but you cannot take steps to implement that plan while you are in the office. You owe a duty of loyalty to your current employer as long as you are still working for them. All of your efforts

as an employee must still be in service to your employer. There is no impediment to pursuing other positions or even preparing to open your own practice while you are currently employed, and you can also put in a great deal of effort toward that pursuit—but it must be on your own time, not while you are at your current place of employment.

You can make preparations to open a new practice while you are still employed, provided that you do not use any of the current employer's resources or work time to do so. This means that you need to look at new office space when you are off duty and handle all the myriad phone calls and arrangements from your home computer, even though you can just as easily access Gmail and Google Docs from your office computer. The computer on your desk at work and the Internet service (and server) are your employer's assets that you cannot use to prepare to go into competition with the company. Phone calls from real estate brokers and space planners? On your cell phone after hours, not on the office phone. Your work computer will be the first place your current employer will go to see if you have been preparing to open your practice on work time, and the proof will be any electronic bread crumbs you have left behind.

At work, you owe your duty fully to your employer; at home, you can do what you wish.

When you know what's next for you, it is time to have a conversation with your employer about timing. Inside or outside of medicine, few employers want to have unhappy employees working for them. An unhappy employee tends to spread disaffection among the staff, which impairs morale and could provoke other departures. The employer may have a contractual right to



relieve the departing physician of his or her responsibilities, subject to the duty to pay the physician the compensation that the departing physician would have earned during the notice period. Be mindful then, that once you give notice, you may quickly be out of touch with your patients and literally “out of practice” with your skills.¹

“Those are my patients!”

No one owns patients. Patients control who they choose as their provider. Your contract may constrain you from soliciting patients of the practice. After all, no employer wants to hire an employee who will then leave and take business with them. At the same time, Department of Health guidelines obligate you and the

practice to notify patients of your forthcoming departure to give them an opportunity to consider whether they wish to follow you to your new practice or maintain their care with another provider at your current location.

The guidelines provide that:

When a physician leaves a group or hospital practice, patients of the physician must be notified. The group or hospital should provide the new address of the departing physician if requested by the patient. If the departing physician, rather than the group or hospital, is responsible for notifying patients, the group or hospital should not interfere with the discharge of these duties by withholding

patient lists or other necessary information to accomplish this notification.

This MQAC Policy Statement² recommends that notice be given 90 days before closing or moving a practice and, in any event, no less than 30 days prior to leaving a practice. The notice should be sent to active patients as well as those seen within the preceding three years.

So while notice should be given to patients, the departing physician can’t simply pull

1. Whether you can keep your skills tuned up through locums work during this hiatus will be influenced by your contract terms and other particularized considerations based on individual circumstances.

together a patient contact list from the employer's records and take it with him or her. Doing so would bring a host of claims, and taking the patient information would also constitute a HIPAA violation. When you leave a position, there is a meaningful risk that you will end up leaving behind many patients you have treated. For some patients, the convenience of a familiar or convenient facility will outweigh any relationship they have with you. Other patients, however, may follow you to whatever zip code in which your new office is located.

It is appropriate to tell your patients that you will be leaving so they know that they cannot schedule a follow-up appointment with you at that office after you have left. In keeping with the Department of Health guidelines, you can advise them that they can request the staff to provide them with your new location information, however. This has the advantage of keeping the communication about your departure aboveboard. You should be free of any possible allegations of improper solicitation, because the key information as far as where you have gone should come from the employer's staff. When employers balk about providing that information, their attention should be called to the Department of Health guidelines, and they should be cautioned that their recalcitrance may interfere with a patient's continuity of care.

"From my office on Venus, must I now move to Mars?"

Your contract likely also contains a noncompete covenant in some form. Such covenants are enforceable in Washington as long as they are reasonable in time and geographic scope. The reasonableness of the geographic scope is based on what is reasonably necessary to protect the employer's interests. If 80 percent of your employer's patients come from within a 7-mile radius, then a 15-mile restriction is likely overbroad, and a court may narrow the restriction to 7 to 10 miles. Some restrictive covenants use geographic markers—a primary care practice in West

Seattle doesn't need a restrictive covenant that would prevent you from working across Lake Washington, regardless of mileage, for example. If you have an unusual specialty, public policy considerations may also come into play to ensure that patients can access appropriate care without being overly burdened.

"I can hire my MA, right?"

You may have a contract provision that precludes you at least from soliciting other employees of your current employer. If that is all the provision says, your medical assistant may come to his or her own conclusion, choose to leave independently, and apply for a position at your new office. That decision should begin and end with the staff person rather than be because you have induced them to take that step, however. That said, an MA may look around and realize that if he or she is not supporting your practice in the current office, the position may soon become redundant at your current office and therefore be at risk. As long as the staff person makes that decision rather than because you dangled a job offer in front of him or her, you should not have any liability arising out of such a departure.

In reality, these are somewhat subtle distinctions, so your employer will look suspiciously at how it all unfolds. However, if the departure of a single assistant is the only issue about which your current employer is unhappy in connection with your departure, it is unlikely to be enough to trigger a lawsuit. Keep in mind that you may have a more effectively written restriction in your contract that does not hinge on your solicitation, but in which you have agreed to not employ anyone who worked for your employer at the same time you did, or at least without some "cooling-off period." For the length of the restrictive period, this would prevent you from hiring an individual regardless of whether you solicited the person or if he or she made an independent decision to change jobs.

Last-day dos and don'ts.

When you do leave, take only the things that you brought with you. Take your family pictures and the potted plant that has followed you to every office you have ever worked in, but do not load up a USB drive with forms, policies, and patient or vendor information. Do not email information to yourself that belongs to the employer or is HIPAA protected belonging to patients.

Finally, remember that this is a small town. Set aside all the things that went wrong enough to make you want to change jobs. The kind words you leave with staff, the expressions of appreciation for the opportunity you leave with your former employer, and the recognition you give to the office manager for having a tough job will be the things that they remember. Whatever disagreements existed will be softened. Leave with grace and dignity, and allow others to do the same. After all, who knows what the future will bring? ■

About the Author



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2. "Guidelines on Retention of Medical Records when Closing a Practice," Washington State Department of Health Policy Number MD2013-08, [http://www.doh.wa.gov/Portals/1/Documents/3000/MD2013-08RetentionofMedicalRecords\(signed\).pdf](http://www.doh.wa.gov/Portals/1/Documents/3000/MD2013-08RetentionofMedicalRecords(signed).pdf).