Legal Considerations When Making a Practice Change

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Changes in medical practice, such as retiring, selling a practice, and switching employment, have significant legal impacts on physicians. These decisions should be carefully analyzed prior to being made. Physicians who do not make decisions in a well-considered manner may face economic penalties, licensure sanctions, and/or other legal issues. This article explores some key legal issues including (1) timing, (2) patient care continuity, (3) medical records retention, (4) licensure and board certification, (5) professional liability insurance, and (6) postemployment restrictions on practice. Within these topics, sources of physicians’ legal and ethical obligations are examined, including possible resolutions to identified issues. Not all changes affect physicians in the same manner. This article further considers how these important legal issues may impact differently situated physicians, such as retiring physicians vs transitioning physicians and physicians employed by groups or hospital systems vs physicians in solo practice.

For physicians contemplating a major change in their medical practice, whether through retirement, sale of a practice, or leaving their current employer, implementing the decision is not simple. Physicians face legal, economic, ethical, and other issues that should be analyzed and addressed well in advance of the prospective change.

Timing

Physicians in Group Practice or Employed by a Hospital/Health System

Physicians who practice in a private group or hospital setting are often bound by an employment contract (or other legal document governing the terms and conditions of the physician’s practice for the entity, such as an Operating Agreement or a Shareholders’ Agreement, when the physician is an owner of the practice). These contacts generally dictate, among other things, the amount of notice that is required to terminate employment. The time periods required to terminate an agreement without cause may range from at will (employer or employee can terminate at any time for any reason) to a full year or more. Consequences for failing to abide by the requisite notice period may include financial penalties, forfeiture of "buy-out" payments,
and/or assumption of responsibility to pay for malpractice tail insurance.

Consideration must also be given to other agreements to which the physician is a party. Hospital medical directors, for example, generally have contracts with their own termination provisions. Where a physician has an ownership interest in another entity, such as an ambulatory surgical facility or real estate entity, there may be not only timing requirements but also limitations on the ability to terminate or "walk away," or automatic termination of equity in those ancillary entities upon termination of employment. In situations where the physician has an ownership interest in the practice, there may be separate legal documents governing the physician's employment and ownership interests, which may not have the same notice requirements. All such documents should be carefully reviewed to be sure the full notice period is met.

Solo Physicians

For physicians in solo practice, succession planning should begin years in advance of retirement. One possibility is selling the practice to a local hospital or health system. Pulmonology practices do not tend to be one of the specialties that hospitals are currently most interested in acquiring, constituting only 5% of the practice acquisitions that were intended by hospitals in 2013. Even if a physician is able to secure a buyer, these deals may take many months to come to fruition.

Another option for solo practitioners is to bring in an associate years in advance of retirement, on a full-time or part-time basis. The hope is that the associate will be the "right fit" for the practice and, when the time comes, purchase the practice from the physician. Depending on the terms of the purchase, the retiring physician may receive an additional economic windfall. Having a successor in place will ease the burdens for a solo practitioner and will provide assurance that the patients will be cared for after the physician's retirement.

Patient Care

Timing a departure from a medical practice is also important because physicians have an ethical duty and sometimes a contractual duty not to abandon their patients. In some states, this commitment to patient care is regulated by the medical licensing board, which may set forth specific time frames for which a physician must give notice prior to leaving a practice and/or specific methods by which patients must be notified of the departure. For example, the Medical Practice Act in the State Delaware requires any physician discontinuing a medical practice or leaving the state and not transferring patient records to another physician to notify all his/her patients by publishing a notice in the newspaper.

Prior to any departure from an employer (whether retirement from medicine or changing employment), physicians should review all laws, rules, and regulations regarding their patient obligations. Where there are no specific legal, regulatory, or contractual mandates, physicians should address the following issues:

- Provide as much notice as possible, and at least enough for patients to secure new medical providers, if necessary. Continue to provide care in the interim.
- Send written notice to the patients announcing the departure.
- Provide notice to your referring physicians and hospital(s).
- Consider placing a notice in one or more newspapers in general circulation in the area(s) served by the physician.
- Instruct patients on how to find new care and what will happen to their medical records. Provide assistance to help them transition.

Physicians transitioning employment may desire to continue to care for their patients at their new job. The physician's employment agreement, if any, should be reviewed for any restrictions on the physician's ability to notify existing patients of his/her new practice location.

Medical Records Issues

Retention

There are requirements for physicians to maintain medical records for a designated period of time. In most states, the licensing board prescribes a time for which records must be maintained, which varies from state to state. Physicians also have an ethical duty to maintain medical records, and some federal regulations mandate document retention periods. Physicians participating in Medicare Advantage must keep their records for 10 years. The Health Insurance Portability and Accountability Act of 1996 requires retention of certain documents for at least 6 years. Because malpractice claims may be brought against the physician years after an act or omission, the medical records should be retained for at least as long as the state's statute of limitations for medical malpractice claims. In many states, for minors this may not be until after the minor reaches the age of majority. The full age of majority is different in different states. The physician should maintain the records for
the time period mandated by the lengthiest requirement.

**Transitioning Records**

**Physicians in Group Practice or Employed by a Hospital/Health System:** When a physician in a private group or hospital setting retires or moves far away (at least beyond the expected distance patients will travel), maintenance of the medical records is relatively straightforward, as the employer will assume care of the records. A physician remaining relatively close by, however, may desire to retain the records to continue care for his or her patients. The employment contract will generally state who owns the medical records and/or the circumstances under which the physician may access those records after termination of employment. Patients have individual rights to have their medical record sent to any physician of their choosing.8

**Solo Physicians:** For solo physicians, an automatic successor to care for the medical records is not in place. The physician will need to arrange for someone to assume custody of the records to fulfill his or her legal obligations. A local competitor practice or hospital system may be willing to do this. Like any transition, this takes planning, notice, and cooperation. An agreement will likely be entered into between the parties relative to the custody arrangements.

**Licensure and Board Certification Issues**

**Retiring Physicians**

Retiring physicians should consider changing their medical licensure status. Some states require that a form of notice of retirement be provided to the licensing board. Massachusetts is one state requiring such notification.9 Likewise, the physician’s certifying board may require notice of retirement.

States differ on their categories of licensure. Some only have “active” or “inactive,” whereas others have several forms of “retirement” status that allow the physician to continue to perform certain limited medical activities (such as for immediate family members or volunteer activities).10 Physicians should understand the scope and requirements of each category of licensure available in the state(s) in which the individual holds a medical license. Considerations should include the scope of services permitted to be provided, the necessity of malpractice insurance, and continuing medical education obligations. If a physician is considering the return to medicine, be aware that, although there may not be a requirement to maintain continuing medical education credits while “inactive,” the credits might have to be made up as a condition to return to “active” status.

**Relocating Physicians**

Physicians may have notification responsibilities when relocating. State licensing boards generally require that the licensee notify the board within a certain period of time of a change of address. If moving to another state, the physician should consider whether to keep his or her license active in the state he or she is departing. Board certifying organizations, such as the American Board of Internal Medicine, also generally require notice of an address change.11

**Professional Liability Insurance**

When a physician terminates his or her employment for any reason, consideration must be given to the professional liability insurance coverage. There are two primary forms of professional liability insurance policies: occurrence or claims made. If a physician was covered by an occurrence policy, no reporting endorsement or tail professional liability insurance policy will generally need to be purchased after termination of employment. This is because occurrence insurance covers a physician’s acts or omissions that occurred during the term of the occurrence policy, regardless of when the claim is reported. A claims-made policy, conversely, will cover only those claims against the physician that are reported during the policy period. Malpractice policies, typically, are terminated concurrently with employment. Thus, any claims reported after the termination of the policy, even if the alleged acts or omissions occurred while the physician was employed, will not be covered by a claims-made policy. In such cases, an additional tail policy would need to be obtained to cover acts and omissions during the employment period.

Tail policies can be very costly, running in the tens of thousands of dollars. For example, in the State of Maryland, the tail premium for a mature pulmonary/critical care physician may cost between $45,000 and $55,000, according to a professional liability insurance broker who does business in Maryland. In states where tail coverage is not statutorily required, a physician may be tempted not to purchase the tail insurance. Although this may save premium costs in the short term, if a claim is filed against the physician, the physician will be responsible for his or her legal defense fees and the costs of any judgment or settlement out of pocket.12 This is potentially an enormous individual liability.
A fundamental question about tail insurance is, “Who will pay for it?” In many states, it is the individual physician’s legal obligation to obtain the coverage. Contracts to which a physician is a party (such as an employment agreement) may dictate whose responsibility it is to pay for the tail. Depending on the circumstances of the departure, the allocation of responsibility between employer and employee may vary. A physician should review his or her employment contract well in advance, preferably with an experienced health-care attorney.

Options for Retiring Physicians
Some insurance policies provide a tail free of charge to retiring physicians who have been covered by the insurer for a certain minimum period of time and who have an acceptable claims history. Physicians should review their individual policies with their insurance brokers to see if this option is available and, if so, if they qualify.

Options for Transitioning Physicians
If a physician leaves one medical practice to join another employer, the new practice’s malpractice insurer may issue a new policy that is retroactive to the commencement date of the physician’s former policy (sometimes referred to as “nose” coverage), thereby negating the need for a tail. A physician should inquire prior to joining a new practice if this sort of coverage will be available and who will pay the costs of such coverage. If the nose coverage is not available, the new employer may be willing to pay for the tail or pay the physician a signing bonus to cover the costs. This is generally a negotiation point.

Postemployment Restrictions on Practice
For a physician changing employers, another issue is whether his or her future plans will be affected by any postemployment restrictions. The term “restrictive covenant” is used to refer to postemployment restrictions and, for physicians, generally refers to (1) noncompetition clauses, (2) nonsolicitation clauses, and/or (3) confidentiality provisions.

Noncompete clauses restrict a physician’s ability to practice medicine for a defined period of time within a prescribed radius after he or she leaves the employer. Penalties for violating these restrictions are generally set forth in the employment contract or, if the physician is an owner of the practice, other legally binding agreements (such as an operating agreement, partnership agreement, shareholders’ agreement, or other similar agreement, depending on the entity’s structure) and may include liquidated damages, injunctive relief, payment of the employer’s attorneys’ fees, assumption of responsibility to purchase tail insurance, and/or forfeiture of buy-out payments or the physician’s accounts receivable. As no two noncompete clauses are exactly alike, physicians should consult with a knowledgeable health-care attorney to understand the precise implications of their particular contract and its postemployment restrictions. By way of further explanation, some contracts may include exceptions for which the noncompete clause will not apply. Common examples of exceptions include if the employer terminates the contract without cause; the physician-employee terminates the arrangement with cause; the employer fails to make the physician a partner; or the physician leaves to practice in another form of setting, such as academic vs private practice. Furthermore, although noncompete clauses are valid in most states, some have ruled them unenforceable. Similarly, because most states require that the postemployment restriction be reasonable, a knowledgeable attorney will be able to opine on the reasonableness and enforceability of the restriction.

Nonsolicitation provisions refer to restrictions on the ability to interfere with the employer’s relationship with others. Such a clause may prevent a physician from soliciting patients (even his or her own), employees, and/or contractual arrangements of the employer. Penalties for violation generally include the same options as those for violating noncompete clauses. Despite nonsolicitation provisions, physicians are, typically, permitted to place general advertising in a newspaper or send out announcements that are not targeted in any way to former patients of the employer, as part of their First Amendment Constitutional rights.

Confidentiality clauses prevent an employee from taking or using assets of a former employer, such as patient lists, pricing guides, marketing plans, and other proprietary data. Contracts with these types of provisions often require that any such information or data be returned to the employer prior to the final date of service. Even when a contract does not specifically contain a confidentiality provision, patient lists have been held by courts to be trade secrets of an employer under state law. Therefore, physicians should carefully consider what, if any, information they may permissibly take and reuse when leaving a practice.
Conclusions
The decision to retire or change employment is complicated for physicians. There are business and practical considerations that go into such a decision along with legal issues, some of which are discussed in this article. Physicians need to protect themselves and their patients. Skilled advisors can be invaluable in navigating the ethical, legal, financial, and practical impacts relating to these decisions.

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