

**Family Practice Management manuscript**

File name: Wall departing

Word count: 1460

Printout date: 11/8/2005 10:12:00 AM

Copyright © 2005 by the American Academy of Family Physicians. All rights reserved.

A Must-Do List for  
the Departing  
Physician

From tail coverage to giving notice, here's how to prepare yourself, your partners and your patients for your departure.

James D. Wall

*Author bio. Mr. Wall is the founder and president of Wall Law Firm, P.C., based in Winston-Salem, North Carolina, where he practice health care and corporate law. Mr. Wall is a graduate of the College of William and Mary (BBA 1986) and the University of Virginia School of Law (JD 1989,) and can be reached at [jwall@wallfirm.com](mailto:jwall@wallfirm.com).*

**[FOR ID ONLY: CME Status OK]**

Physicians are under a tremendous amount of pressure in today's health care environment as costs escalate, reimbursement declines and the malpractice crisis continues. Normal workplace stresses are exacerbated by longer hours, less pay and zero tolerance for error, which can lead to fractured relationships among partners or employed physicians in a group practice.

At the same time, physicians are in high demand and have tremendous professional opportunities, ranging from starting a new practice to joining an existing one. All of this increases the likelihood that you or one of your colleagues will leave your current practice. If you are

planning to make such a move, or to ask one of your partners to leave, follow these steps to avoid getting burned.

**1. Review all documents you have signed.** This will most likely include an employment agreement, a shareholders' agreement (if the practice is a corporation) or an operating agreement (if the practice is a limited liability company) and, in some cases, a deferred compensation arrangement. During your review, pay careful attention to information about advance notice provisions, retirement plan details and noncompete covenants, to name just a few key elements. These policies and others are discussed separately below.

It is critical that you understand what you have promised to do and what has been promised to you via these documents. If you are asking your partner to leave, you need to know the practice's rights and obligations to him or her.

**2. Review the practice's established policies.** In addition to reviewing any documents you have signed, you should review any of the practice's policies applicable to employment and departures. Some employment agreements indicate that the practice's general policies and procedures may be applicable even if they are contrary to the physician's employment agreement.

**3. Develop a plan for patient notification.** Many states require that patients be notified when a physician is departing a practice. Some states even require or suggest 30-days prior written notice before a departure so that patients will have sufficient time to transfer their records if they desire to change physicians. If you are not familiar with your state's requirements, contact a health care attorney in your area for advice. (The AAFP maintains a listing at <http://www.aafp.org/fpassist.xml>.)

In addition to sending letters, think carefully about how you will address this topic when you speak with patients. For example, you would never want to be in a situation where you felt compelled to lie to a patient. Often practices and departing physicians will agree on what to tell patients who inquire about the tenure of the departing physician. Some practices display placards in the waiting room informing patients of a physician's departure. Voice mail systems can also be modified to provide new contact information after the physician has departed.

**4. Review advance notice provisions.** Your contract may require that you give your practice advance written notice of your departure. If you fail to give notice, the practice

could claim breach of contract, with damages equal to the cost of hiring a locum tenens physician to fulfill the remainder of your term. Further, many deferred-compensation arrangements are linked to the amount of notice given. Some require an extraordinarily long notice period (such as one year) before the physician can qualify for deferred compensation payments. A long notice period is often difficult for a non-retiring physician to give, but these issues deserve consideration.

**5. Review your retirement plans.** This will ensure that your departure date does not result in unnecessary forfeitures. For example, some retirement plans require an employee to work the entire year prior to becoming eligible. While it may be convenient to resign shortly before Christmas so that you can spend the holidays at home, it could be a monumental mistake if it results in losing nearly one year's worth of retirement benefits. Further, many retirement plans have vesting schedules that depend on the number of years one has worked with the employer. You should review the details of your plan so that you do not unwittingly forfeit significant amounts of retirement money.

**6. Cover your tail.** Many practices obtain "claims made" malpractice insurance policies that insure you for claims made during your term of employment. This means that if a malpractice event occurs during your employment but the claim is not filed until after you have left the practice, the malpractice insurer will not cover that claim because it was not made during your term of employment. To prevent this, you need to procure a supplemental endorsement policy, commonly referred to as "tail coverage," which appends to the primary policy and insures you for claims made after your employment terminates. While some employers will contractually agree to pay tail insurance in certain events, a thorough review of your employment agreement, and sometimes the shareholders' or operating agreement, will determine who is responsible for procuring tail coverage.

Whether the practice pays for tail coverage often depends on the type of termination effected. For example, practices often agree to pay for tail coverage in the event that employment is terminated by the practice without cause. Likewise, physicians often agree to pay for tail coverage if they terminate their employment without cause.

Generally, tail coverage costs between 1.5 and two times a physician's annual premium. This can be significant, especially if you deliver babies. Thus, regardless of whether the practice or the departing physician is

responsible for procuring tail coverage, the party who is responsible should provide a certificate of insurance to the other party. Do not be seduced into the trap of foregoing the purchase of tail coverage because you practice "clean" and you are aware of no claims. The cost of successfully defending a medical malpractice action is lifestyle altering.

If you determine that you need tail coverage, you may be able to negotiate with your new practice to provide you with sufficient funds to purchase the coverage. Also, in limited circumstances, the new practice may be able to provide coverage for you with a retroactive endorsement date (often referred to as "nose" coverage). Nose coverage does not append to the old policy, but rather is a new policy that has a retroactive effective date so that prior acts are covered.

**7. Understand who owns the chart.** Be aware that patient lists, patient charts and other patient demographic information are property of the practice, not the departing physician. Employment contracts usually reinforce this notion. Rarely do practices agree that patient charts are the property of the employed physician. These assets belong to the practice and cannot be taken by the physician without the practice's consent. You should note, however, that most states allow a patient to request that his or her chart be forwarded to a departing physician, in which case the physician can, at that time, receive the chart from the practice.

**8. Consider patient needs.** When scheduling your departure from the practice, take reasonable steps to ensure that you are not leaving any patients in a bind. For example, you would not want to plan your departure during a week in which you are anticipating five deliveries. The key is to prevent patients from falling through the cracks because of tensions between the physician and the practice. You and the practice have an obligation to provide proper care for your patients.

**9. Determine whether solicitation of employees is prohibited.** Your contract may contain provisions against your soliciting the employment of existing employees of the practice. Even without these prohibitions, you should not actively solicit the employment of existing employees, especially prior to your departure. Some states would recognize a tortious interference with contract claim if a physician were to "raid" the practice for employees. It is, however, not uncommon for employees to solicit the departing physician prior to departure. This creates a

quandary because, although you may need new employees, you do not want to appear to be soliciting from the existing practice. Before you make any decisions, revisit your employment contract and your state's laws regarding the solicitation of employees.

**10. Review noncompetition covenants.** A noncompete covenant may prohibit you from practicing within a certain geographic radius of your current practice for a designated period of time, often two years. The radius is usually determined by your practice's location and could range from five miles in a suburban area to 50 miles or greater in a rural area. Many physicians believe these noncompete covenants will not be enforced; however, the courts in most states will uphold them if they are reasonable. For this reason, you should review the covenant as though it is entirely enforceable in accordance with its terms. Litigating a covenant, either from the employer or employee's perspective, is expensive.

#### **Making your move**

Untying the knot with a practice can be a stressful time in any physician's career. A clean departure will save you headaches and possibly dollars in the immediate future and in the long run. Your careful attention to these details will ensure a smooth transition to a new practice.

*Send comments to [fpmedit@aafp.org](mailto:fpmedit@aafp.org).*