

Medical Practice Departure: Non-Solicitation vs Abandonment vs Non- Compete

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By Michael H. Cohen

In today's video, we talk to the physician or chiropractor some more about what to do and **NOT** to do when you are leaving someone else's medical group, medical practice, integrative medicine center, functional medicine center, health and wellness group, whatever it's called, where you've been, up until now, gainfully employed.

By the end of today's video, you'll be able to think much more clearly about three different legal issues you might face as that physician or chiropractor: the risk of getting sued for violating the non-solicitation clause in your employment agreement, the risk of violating a non-compete, and the ethical obligation of non-abandonment. In fact, all three might hit at once.

Navigating among these three hazards can be tricky, but we've helped physicians and chiropractors and other providers stare down the dragon before, without getting fried by fire.

I'm Michael H. Cohen, founding attorney of the Cohen Healthcare Law Group. It's been our distinct pleasure to serve hundreds and hundreds if not thousands of clients on healthcare and FDA legal and regulatory issues. These include physicians in all types of medical and healthcare centers, as well as chiropractors, nurses, dentists, psychologists, life coaches, other practitioners. We've helped our clients navigate so they can avoid the multi-headed Hydra of patient lawsuits, litigation from medical employers, and, regulatory enforcement – that might be three heads there.

The first tip is to have your healthcare lawyer review (yes, actually review) your employment agreement (don't just sign it) and laser focus in on the promises that you are making in that contract, NOT to do certain things. More specifically, there are two different provisions in the physician employment agreement we're going to talk about. One is called Non-Solicitation and the other is called Non-Compete or Non-Competition.

The non-solicitation clause typically is a very broad promise. Typically it spells out that you cannot solicit employees from your medical group or medical practice employer; and also, importantly, that you cannot solicit patients.

Here is some typical language: "Physician Employee acknowledges that any solicitation he makes of any patients or employees of Medical Practice will involve misappropriation of Medical Practice's confidential information, and constitute a breach of this agreement." You don't want to do that: liability.

What that means is that if you simply send your existing patients, we talked about a little post card – "*Hey I've left my medical practice employer*", the Medical Practice could sue you for violating the non-solicitation clause. We've seen demand letters and claims going into the hundreds of thousands of dollars and it costs a lot to get out of.

The non-solicitation provision could be paired with provisions prohibiting theft of trade secrets and other confidential

information.

The non-compete typically generates a lot of attention, because employers are quick to insert it and just as fast to lawyer up and get a demand letter out when you, as the departing clinician, decide to open a practice in violation of the non-compete, whether that is enforceable or not.

So even if that non-compete appears overly broad and unreasonable, and even if your lawyer or best friend or best friend physician colleague's son's, wife's lawyer told you the clause is unenforceable, still, if you agree to such a provision, you won't be surprised if and when you receive a nasty demand letter alleging that you breached the non-compete. So let me be very clear, you can get advice, but there's still practical realities.

And then there is your ethical obligation, the third regulatory triangle to not abandon your patients. Here you are under scrutiny from the medical board. The Board wants you to notify patients that you're leaving; and if you do, then you can get blowback from the medical practice ... and, it could hurt. So, there's a kind of catch-22 here.

Now here's another thing to consider, too: as you're giving notice, the medical practice might suddenly start withholding payment, arguing that there is some issue with collections from your patient.

Alternatively, you might be giving notice BECAUSE the medical practice has been monkeying with your paycheck for months, causing financial hardship. So now you are tens of thousands of dollars in the hole and to quote a kid's book I'm reading, the anger spot in your brain is telling you that you want to lawyer up yourself and sue.

But then again, it can cost a lot of money to sue and your employer will lawyer up to the hilt. They probably have greater resources, and you know they probably will, because otherwise they would not have been so bold as to monkey with your checks in the first place.

Check. It's your move. What do you do?

For one thing, it would be better to handle some of these issues before, perhaps by making an agreement as to how existing patients of the practice will be notified when an upcoming physician departs from the practice. So, getting work ahead of time here in better shape.

We'll have more tips ahead in the coming video and other videos we've done.

Thanks for watching. Here's to the success of your healthcare venture, we look forward to speaking with you soon.

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