

The Difference Between Non-Solicitation and Abandonment Of Patients

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The time for doctors and other healthcare providers to review their employment relationship and their duties to their patients isn't when the doctor is about to leave a medical practice. The time to conduct these reviews is before the doctor joins a new medical practice. Physicians generally enter into written employment contracts with a medical practice, unless the physician is just a sole practitioner.

Doctors who are joining a medical practice are focused on making the new employment relationship work. New doctors often fail to anticipate that the relationship **may not** work. The doctor may be fired from the practice. The doctor may want to go out on his/her own. The doctor may want to join a new practice.

Doctors need to understand that in many cases, the best time to discuss what happens when the employer/employee relationship ends or a partnership relationship ends is right when the relationship begins. An experienced healthcare lawyer can explain the main factors in end-of-employment contracts that need to be reviewed upfront. These main factors are:

- Non-solicitation clauses in the contract.
- Covenants not to compete with the medical practice when the doctor leaves.
- The duty to provide the best care possible for the patient.

In California, the covenant not to compete clause has generally become unenforceable due to legislation passed in 2018. As always, there are exceptions.

The net result is that the main balances that need to be reviewed in the employment contract are the right of the medical practice to keep its patients, the right of the new doctor to develop his/her new practice, and the need to service the patient. In general, doctors can't become so focused on avoiding contact with a patient – so as to avoid non-solicitation complaints – as to forget about their patient.

When and why should a healthcare lawyer review the employment contract for solicitation issues?

A lawyer should review the employment relationship at the following times:

- Before the contract is signed.
- Before the doctor is thinking of leaving or immediately after the doctor is terminated

- If the physician is considering accepting a severance agreement.

The need to review non-solicitation and abandonment issues involves medical centers, wellness centers, integrated medical centers, and other medical employment relationship. The issues apply to physicians, chiropractors, and other healthcare providers.

The aim of legal review is to avoid lawsuits by:

- The employer
- The patient
- Regulatory enforcement agencies such as local and state medical boards

A skilled legal review of your employment contract, before you sign it, will:

- Include an explanation of what actions constitute a breach of the contract
- Explain what the consequences of a breach may be
- Explain what practical issues may arise such as the withholding of your pay by the medical practice if the employer thinks there is a breach
- Review what your ethical duties to your patients are

The lawyer will then work to redraft the contract to remove, limit, or provide clarity as to your legal rights and obligations and how practical attempts to enforce the agreement such as withholding payments can be addressed.

What is a non-solicitation agreement?

The non-solicitation clause is generally a broad promise by the doctor not to solicit patients AND not to solicit employees from the first medical practice so that the patients or employees will follow the doctor into his/her new medical practice. Non-solicitation agreements may also apply to people and companies that do business with the medical practice.

For example, common language in a medical employment contract states:

"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."

Unless the contract specifically defines non-solicitation, just sending a postcard that you've left the practice could constitute solicitation – and lead to a lawsuit for breach of the contract. A breach of contract claim can involve demands for hundreds of thousands of dollars and the cost to pay a lawyer to defend you in court.

How a healthcare lawyer can help

A skilled attorney can help define the definition of non-solicitation to limit its scope and to clarify any ambiguities. The lawyer will also work to limit the penalties for non-compliance with the non-solicitation agreement.

For example, the contract should detail what actions constitute solicitation and what actions will NOT be considered solicitation. Some of the language that explains what acts are NOT solicitation could include:

- Initiation of contact by the employee or the patient with the physician
- Instances where the employee or patient knew or worked with the physician before the employment relationship with the first medical practice began

- Contact initiated by a patient or employee in response to a notice in a newspaper or on an online website that the doctor has opened a new practice

Covenants not to compete

Employers, including medical practices, generally argue the medical practices put a lot of money and time into training doctors and helping them develop their skills and their practices. The non-compete clause, the medical practices assert, protects their investment so the doctor doesn't leave as soon as a better offer comes along. Non-compete clauses generally must be limited in time and geography.

The medical practice can't prevent the employee/doctor from competition forever. The medical practice also can't prevent the doctor from competing in a location that isn't direct competition. For example, non-compete clauses are generally invalid if the clauses prevent a doctor from working in another state.

California has clarified the non-compete issues by effectively declaring that all non-compete clauses are invalid. The California Business and Professions Code Section 16600 provides that *"every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."*

As always, there are exceptions and unique situations that may apply – which you should review with an experienced healthcare lawyer. Even though California's non-compete law is active, it is still best to remove any non-compete clause from an employment contract.

The California law may also help limit or remove the employer's request for a non-solicitation clause. The argument is that California courts may consider non-solicitation clauses as non-compete clauses in disguise, so it's in the best interest of the employer to be reasonable.

Abandonment of patients

Physicians who begin to treat a patient owe that patient a duty of competent medical care. That duty generally includes properly informing the patient that the physician can no longer treat the patient. Patients, especially patients who have a continual treatment plan with their physician, rely on that continuity. Delays in finding out the doctor can no longer treat the patient and the time needed to find a new physician can be harmful or even deadly. To avoid the time needed for new oral examinations and medical tests, patients need to have access to their medical records.

The California Medical Board provides the following minimal requirements for termination or ending the physician/patient relationship:

"Terminating/Severing Physician/Patient Relationship"

"Although a physician is allowed to sever or terminate the patient/physician relationship, in order to avoid allegations of patient abandonment (unprofessional conduct), a physician should notify patients of the following in writing when the physician wishes to discontinue care:

- *The last day the physician will be available to render medical care, assuring the patient has been provided at least 15 days of emergency treatment and prescriptions before discontinuing the physician's availability.*
- *Alternative sources of medical care, i.e., refer patient to other physicians, by name, or to the local medical society's referral service.*
- *The information necessary to obtain the medical records compiled during the patient's care (whom to contact, how and where)."*

Doctors do have the right to terminate the relationship for many reasons including:

- Non-payment of bills
- The need to have the patient treated by a specialist because the doctor doesn't have the necessary skills and training
- Not having the necessary medical equipment
- Any situation where continued treatment would violate the doctor's code of ethics or duty of competent medical care

Doctors who abandon a patient may be subject to:

- A lawsuit for negligence if the patient suffered injury because he/she couldn't find a suitable replacement doctor in time.
- Disciplinary action by the state or local medical board

The intersection of non-solicitation and abandonment

It can be quite confusing for a doctor who is leaving a practice or is fired from a medical practice to know how the doctor is supposed to inform their patients. If the doctor doesn't properly inform their patients, the doctor can be sued for negligence and be faced with disciplinary action by the appropriate medical boards. On the other hand, if the doctor does inform their patients of their new status, the employer may claim that the contact constitutes solicitation and a breach of the employment contract. It's a real Catch-22.

Doctors who are leaving a medical practice or are fired will naturally wonder:

- When can I tell my patients I'm leaving?
- What can I tell my patients?
- Who should control the patient records? Can I take the original records with me? Can I take copies of the records?

There may also be issues involving HIPAA that need to be addressed when electronic patient information is exchanged.

Whether a patient is abandoned may also depend on whether the patient has finished his/her treatment or is still receiving treatment.

Some of the factors that may favor a settlement of the non-solicitation and abandonment issues

Unless there is a negotiated agreement between the physician and the medical practice, the decisions about solicitation and abandonment will depend on many ambiguous factors.

It helps to detail what solicitation means. Generally, broad appeals such as newspaper ads, mailings to people in a certain zip code, and broad website postings are less likely to be considered solicitations than targeted specific mailings such as direct letters mailed to each patient's address. Letters mailed to each patient advising the patient the doctor is leaving the old practice and giving the address of the new practice are likely to be considered solicitation.

There are solutions which depend on the original contract and the desire of the employer and employee to resolve their differences. Just as the employee has a duty not to abandon a patient, the employer has a duty not to abandon their patient. While employees can't be solicited, employers generally don't function well when employees are unhappy. The employer may not be able to handle the caseload of the doctor who left and may not be interested or have the time to find a replacement.

The solutions may include having the employer send out the notice that the employee is leaving. This notice, depending on the terms of the negotiation, may/may not include the location of the doctor's new practice.

Another factor is the view of the courts. Because the position of a judge is uncertain, employers and employees may both benefit from reaching a settlement rather than risk having a judge decide whether the solicitation does or doesn't constitute abandonment.

Physicians need to work with experienced health care lawyers before they sign any employment or severance contracts and before they are considering leaving a medical practice. Doctors need to understand they have the right to negotiate the terms of non-solicitation agreements. They need to properly balance their duty to comply with non-solicitation agreements and their duty to prevent patient and regulatory complaints that the non-solicitation constitutes abandonment of the patient.

Contact Cohen Healthcare Law Group for legal counsel for a broad range of healthcare providers and a variety of specialties. Our experienced healthcare attorneys negotiate non-solicitation agreements so that doctors can serve their patients while protecting their right to start a new medical practice.

Contact our healthcare law and FDA attorneys for legal advice relevant to your healthcare venture.