

# **Fire Your Patient Without a Costly Abandonment Lawsuit**

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# How to Fire a Patient

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1

## Disclaimer

**This outline is provided as general information only. It does not constitute legal advice and should not be used as a substitute for seeking legal counsel. I am an attorney, but I am not your attorney.**

**Outcomes may differ depending on specific facts.**

2

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## Establishing Physician-Patient Relationship

- Essentially a contract
  - ❖ Needs meeting of minds about what is relationship
  - ❖ Concept of “consent”
  - ❖ Physicians generally not obligated to treat individual unless they choose to
- Based on an understanding that a physician will use proper professional skill to treat the patient
- Physician does not need to have actual physical contact with patient
- Generally speaking, setting first appointment for new patient does not establish relationship
- Note – particulars on establishing physician-patient relationship may be determined by state laws and cases

3

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## Establishing Physician-Patient Relationship

- Consent to contract does not need to be expressed formally or explicitly
    - ❖ Consent can be implied, based on conduct of the parties
    - ❖ Example: laser hair removal technician treated patient “under supervision and control” of physician, who never saw patient. (Stanford v. Cannon, 2011 WL 2518856 (Tex. App.-Texarkana, 2011))
    - ❖ Advice was communicated through another healthcare provider (Thomas v. Hermoso, 110 A.D.3d 984, 2013)
  - Physician may have implied contract, due to other contracts
    - ❖ Examples: on-call contract, hospital bylaws, participating provider contract with insurance company
- NOTE: payment or expectation of payment is irrelevant!

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## Establishing Physician-Patient Relationship

➤ Key questions to ask:

- ✓ Is the relationship for the patient's benefit?
- ✓ Was the relationship established with the express or implied consent of the patient?
- Physician merely offering general advice to colleague ("curbside consult") probably does not establish physician-patient relationship
- Also, merely being on call does not necessarily establish physician-patient relationship. It all depends on exact facts.
  - ❖ Was physician asked to evaluate medical condition and make a medical decision?
  - ❖ Is treatment for same or different condition that was treated while physician on call?
- Courts and medical boards often will look to patient's belief, based on provider conduct

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## AMA Code of Medical Ethics

### Opinion 9.12 Patient-Physician Relationship: Respect for Law and Human Rights

*The creation of the patient-physician relationship is contractual in nature. Generally, both the physician and the patient are free to enter into or decline the relationship. A physician may decline to undertake the care of a patient whose medical condition is not within the physician's current competence. However, physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity, or any other basis that would constitute invidious discrimination. Furthermore, physicians who are obligated under pre-existing contractual arrangements may not decline to accept patients as provided by those arrangements.*

(I, III, V, VI) Issued July 1986. Updated June 1994 and June 2008 based on the report "Modification of Ethics Policy to Ensure Inclusion for Transgender Physicians, Medical Students, and Patients," adopted November 2007.

6

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## AMA Code of Ethics

- Many states require adherence to AMA Code of Ethics, either entirely or in part.
- Check with your state to see if explicitly require physician to adhere to AMA Code of Ethics
- Also remember that even if there is no explicit requirement, AMA Code of Ethics and other codes of ethics serve as evidence of standard of care

7

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## Other AMA policies, opinions

- H-65.983 Nondiscrimination Policy
- G-630.130 Discrimination
- H-160.991 Health Care Needs of the Homosexual Population
- H-65.973 Health Care Disparities in Same-sex Partner Households
- H-65.976 Nondiscriminatory Policy for the Health Care Needs of the Homosexual Population
- D-65.996 Nondiscriminatory Policy for the Health Care Needs of the Homosexual Population
- E-8.11 Neglect of Patient
- CEJA Report 6-A-07 Physician Objection to Treatment and Individual Patient Discrimination

8

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## When there is no patient-physician relationship

- When examination of individual is solely for benefit of third party
  - ❖ Examples – life insurance examination, fitness for work assessment, extent of disability for worker's compensation claim, school screenings
- Be careful at health fairs
  - ❖ What do you do afterward? Making follow-up phone calls increases risk of finding patient-physician relationship.
  - ❖ Include a specific disclaimer that health fair participation does NOT create physician-patient relationship
- If sufficient time has passed. This is state-specific.
  - ❖ Example: New Jersey – presumed to have physician-patient relationship if treated within one year prior
  - ❖ Note: patient may still have expectation of continued care. Physician should be clear if patient calls, that physician is not consenting to continuation of relationship

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## If there is no physician-patient relationship

- Only duty is duty not to injure
    - ❖ Smith v. Welch (Kansas, 1998) – Physician who performed independent medical examination of auto accident victim has a duty to not cause harm or injury to the person being examined.
  - In a number of states, no duty to inform patient of findings
    - ❖ Wilson v. Winsett (Tex. App. - Amarillo, 1992) – Individual went for examination by physician selected by Texas Rehab Commission for purpose of assessing rehabilitative potential. Physician found mass on lung but did not inform individual. Individual later died of cancer. Court held physician's duty to not injure did not include duty to inform her about mass.
- Beware in these situations HIPAA may still apply, so you still need to protect patient privacy!

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## CAVEAT on duty to inform!!

- Physician may still have duty to disclose information to patient, depending on state laws and cases
- Distinction between informing patient and ongoing treatment
  - ❖ The mass on the lung case could have turned out differently

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## When to be extra careful

- Health fairs
- Web-site discussions or social media
- Informal settings (the cocktail party advice and prescription)
  - Don't ever provide an informal diagnosis, and advise the individual to seek medical care from his/her physician

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## What to do if you don't intend patient-provider relationship

1. Control patient expectations – verbally and written
2. If treatment/examination is for limited purpose such as worker's comp assessment, indicate this does not create ongoing patient-physician relationship
3. Use a written disclaimer that no ongoing patient-physician relationship is created
  - ❖ Health fairs
  - ❖ Websites, social media
  - ❖ School screenings
  - ❖ Worker's comp or rehab assessments

13

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## Termination of patient relationship

### ABANDONMENT!

- Beware of state laws and cases regarding patient abandonment. In many states, abandonment can = medical malpractice (e.g., CA, DC, DE, MO, NY, OH, TX)
- Patient can terminate relationship at any time and is always free to seek another provider
- Physician cannot → patient abandonment
- Can result in patient complaints, civil liability/medical malpractice claims and medical board actions
- Beware that staff behavior can create abandonment issue
  - ❖ Example: refusal to book appointment due to large unpaid balance
- Abandonment principles may apply to other healthcare providers – RN, PA, home health, pharmacy, etc.

14

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## Termination of patient relationship

- Example: In Texas and Florida, “abandonment” is defined as “*unilateral severance of professional relationship without reasonable notice at a time when there is still the necessity of continuing medical attention.*” (King v. Fisher, Tex. App – Ft. Worth, 1996)
- Notice similar definition in nursing practice: “*a unilateral severance of the established nurse-patient relationship without giving reasonable notice to the appropriate person so that arrangements can be made for continuation of nursing care by others.*” American Nurses Association, Position Statement, 2009
- American Academy of Physician Assistants provides similar guidance for physician assistants: *A PA...may discontinue their professional relationship with an established patient as long as proper procedures are followed... Discontinuation of the professional relationship should be undertaken only after a serious attempt has been made to clarify and understand the expectations and concerns of all involved parties.*

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## Legal standard vs. Ethical standard

- ☐ Do not forget that providers also have *ethical* duty to patient!
  - Remember the position statements cited earlier
- ☐ Proving elements of ethical breach may not be as hard to do as proving elements of legal breach
- ☐ Breach of ethical standard may be what leads to medical board complaints and licensure actions

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## Criminal abandonment

- Particular circumstances may make abandonment a criminal act
- ***Mack v. Suong***, (California, 2000) – August through September: nursing home patient with cognitive decline developed pressure ulcers, but physician refused adult children's requests for hospitalization, saying care was appropriate. When patient's condition worsened, physician began to communicate with adult children but soon began to call children "troublemakers" after learning that Dept. of Health Services was investigating patient's treatment. October 8 - mailed notice of termination but refused to call children. October 9 – told adult son he was withdrawing in 30 days. October 11 - refused nursing home staff requests to hospitalize clearly dying patient. Because physician approval was required to admit patient to hospital, nursing home staff cut off armbar and told hospital she had no primary physician. October 13 - patient died. Court: physician's behavior constituted "abuse of elderly".

17

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## Criminal abandonment

- Dr. Vincent Ivers – partially paralyzed, non-English speaking patient taken from nursing home to hospital at Dr. Ivers' direction. Patient did not meet criteria for mental health admission, but nursing home refused to take him back. A "well dressed, well spoken man" pushed patient through front door into rescue mission 35 miles away from nursing home. Other reports say patient was left on loading dock. Dr. Ivers charged with felony abuse and neglect of disabled person. Possible penalty – 5 years in prison, \$5,000 fine, and loss of license. State and Dr. Ivers eventually settled (without jail).

Source: [http://www.sptimes.com/2003/07/16/State/State\\_to\\_pay\\_100\\_000\\_.shtml](http://www.sptimes.com/2003/07/16/State/State_to_pay_100_000_.shtml) and  
<http://www.heraldtribune.com/news/20020731/doctor-charged-with-neglect>

18

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## When might physician-patient relationship end?

- Retirement or closing practice
- Moving, whether practice or physician
- Leaving a particular payer or insurance network
- Patient personality conflict / disruptive patient
- Violence or abuse towards staff members
- Non-compliant patient
- Drug-seeking patient
- Financial issues with patient, large outstanding balance
- Repeated or consistent no-shows
- Conflict of interest, such as financial interests

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## When you should NOT terminate relationship

- Crisis situations or acute phase of treatment
  - ❖ Example – mental health, substance abuse, trauma, pregnancy, surgery
  - ❖ May need to provide some time of post-operative care, for example
  - ❖ Is there some other way to treat? Telemedicine?
- No other physician available to immediately take over care
- Highly specialized care
- Sole physician in community / isolated or rural area
- Only provider who accepts Medicare or Medicaid
- Other payer restrictions
- Large balance but no other issues (beware of possible EMTALA issue, especially if emergency)
- HIV/AIDS status, or patient in a protected class
- Disabled patient (unless treatment of or because of disability is beyond provider's skill or expertise)

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## When you should NOT terminate relationship

- If you really, really, REALLY decide you must terminate a patient in one of these categories, contact your state medical association or board, malpractice insurer, and an attorney. You may not be able to avoid abandonment claim, but you can do your best to minimize costs and fall-out.

21

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## Question to ask before you terminate relationship

- Is there any way I can salvage the relationship?
- ❖ If patient is non-compliant, write detailed letter explaining why non-compliance harms patient health. Ask patient to be compliant.
- ❖ Keep copy of the letter in the patient chart/file

22

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## Pregnant patients

- First trimester – OK to terminate relationship if uncomplicated pregnancy and patient has sufficient time to find another physician
- Second trimester – OK to terminate relationship if uncomplicated pregnancy and transfer patient to another OB before you actually stop providing services
- Third trimester – only terminate relationship in extreme circumstances. Also need to provide care through post-partum period
- If patient shows up in active labor, you **MUST** treat her.
  - ❖ EMTALA
- Note: relationship with pregnant patient may extend to her fetus. Nold v. Binyon (Kansas, 2001)

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## Steps to properly terminate relationship

1. Counsel patient about issue and document counseling in chart. Always good to have a witness.
2. Give written notice.
3. Give sufficient notice.
4. Keep notice letter simple.
5. Offer alternatives.
6. Offer to transfer/copy records.

24

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## Written notice

- Have simple, straightforward letter notifying patient of end of relationship on practice letterhead
  - Many state medical boards or medical associations have sample letters. Use these!
- Do not get into “argument” or war of words with patient or lengthy explanations. Most states don’t require a reason, and better not to offer one or keep it very generic
- Tell patient how long they have to arrange new physician (i.e., notice period)
- May wish to offer to give patient referral to other physicians or just tell patients to contact insurer or state/county medical society
  - Payer contract may require giving information about other physicians
- Offer to confer with new physician to ensure continuity of care
- Give patient options for obtaining or transferring records

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## Give Sufficient Notice

- Most states require 30 days before termination is effective
- Date of notice letter starts clock
  - ❖ Make sure to put date on letter!
- Tell patient period starts on date of letter and give termination date as well (don’t require patient to do the math)
  - ❖ Treatment relationship “will end in 30 days from the date of this letter or on \_(insert date)\_”
  - ❖ Suggestion – build in an extra couple of days to allow for mail delivery, etc.
  - ❖ Want to demonstrate that you have really adhered to notice period
  - ❖ Removes risk of complaint that you abandoned patient by actually giving less than 30 days notice
- Don’t forget to check your payer contracts for differing notice periods
- Send termination letter first class mail, certified mail and by email. Place return receipt in chart.
- If patient refuses certified letter, place returned letter along with envelope in chart/file

26

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## Other key aspects - Records

- Transfer records promptly
  - Remember patient data belongs to patient under most states
  - Suggestion: include release authorization with termination letter
- Records fees
  - State law vs. HIPAA
    - HIPAA does not permit some types of costs that state laws do permit. So, HIPAA would override those state laws. Costs must be same type as permitted by HIPAA and be reasonable. So labor and retrieval not chargeable.
  - OCR states that an entity may calculate actual allowable fees or utilize a schedule of fees, based on average allowable costs.
  - For electronic copies of PHI held electronically, entities may choose to simply charge a flat fee of \$6.50 (inclusive of all labor, supplies, and postage).
- Do **NOT** hold records because patient has an unpaid balance

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## Other key aspects - Billing

- You may continue to send bills/invoices for care rendered to date and attempt to collect on outstanding bills
- Theoretically OK to require cash from patient treated during the notice period
  - ❖ But do you really want to risk it?

28

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## Prescriptions, Lab tests, etc.

- During notice period, physician **MUST** continue to provide care, including:
  - Medication refills
  - Interpretation and reporting of any diagnostic tests
    - ❖ Labs
    - ❖ Radiology
  - Referrals for further testing, treatment

29

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## Emergencies

- Emergencies – beware of refusing to treat patient because “it isn’t really an emergency” (the boy who cried wolf syndrome)
    - ❖ If treating emergent patient, document in chart that treatment was done due to patient’s claim of emergency
    - ❖ Do not state that you disagree with patient’s claim of emergency but agreed to see them anyway. This could be used to argue you re-established regular patient-physician relationship.
  - Be careful not to just send patient to ER
    - Could be used to argue that you perceived emergency and thus abandoned patient by failing to treat
    - Also, if this was care you could have provided but failed to do so, again opens up argument for abandonment
  - Reinforce to patient that termination process is still ongoing
    - ❖ Inform patient verbally and document discussion/warning in chart
    - ❖ Send another letter
- ✓ NOTE: EMTALA may come into play here. Be very careful!!

30

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## Patient Termination / Dismissal policy

- Develop and implement standardized patient termination policy
- Outline when you will terminate relationship. Evaluate each patient on case-by-case basis, considering patient situation and care needed
- Describe steps you will take
  - ❖ Notice letter
  - ❖ Notice time periods
  - ❖ Emergency treatment
  - ❖ Continuity of care
  - ❖ Referrals
  - ❖ Records
- Use sample policy from state medical board or medical association as basis
  - Make sure to tailor policy to your practice!

31

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## Questions / Other considerations

- If group practice, will termination of relationship with one physician terminate relationship with group?
  - Recommendation: yes. Otherwise may have on-call issue.
  - Problem – what if a physician in a multi-specialty group is specialist that patient must see?
- Patient complaint with medical board or lawsuit does not automatically terminate physician – patient relationship. Still need to go through formal termination process.

32

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## After termination of relationship

- Review the patient chart
- Make sure all of the T's are crossed and I's dotted
- But don't manufacture records!

33

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## Recap – What does a lawsuit alleging abandonment look like?

### Allegations:

1. Must have patient-physician relationship
2. Treatment relationship was unreasonably ended or discontinued
  - Patient still needs care or medical attention
3. End of relationship was without patient's knowledge or consent
4. Provider failed to arrange another appropriately skilled provider to take over care or patient did not have enough time or resources to arrange for another provider to take over
5. Provider should have reasonably foreseen harm that would result from end of relationship or termination of care.
6. Patient must actually suffer harm, injury or loss as result of discontinuing care.

34

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## Sample situation # 1:

**Q:** Some time ago, I terminated a patient for abusive behavior. While I was on call, I treated him in the ER. But he needs follow-up care in the office. Did I inadvertently establish a new physician-patient relationship? Do I have to go through the termination process again?

**A:** Yes, you probably established a new relationship, unless you clearly told him you were simply treating him in the ER, that you were not establishing a physician-patient relationship again, and you advised him to seek follow-up treatment with another physician. Yes, go through the termination process again.

35

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## Sample situation # 2:

**Q:** I agreed to perform surgery on a patient and did all the pre-op work. The night before the surgery, I found out that he had sued my new partner while she was in her previous practice. The next morning, I refused to perform the surgery and told the patient to find another surgeon. Am I at risk?

**A:** Yes. A state medical board will likely find that you abandoned the patient during an acute phase of treatment. You should have gone ahead with the surgery and terminated the relationship after the post-operative period.

(Tierney v. University of Michigan Regents (Michigan, 2003))

36

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### Sample situation # 3:

**Q:** I admitted a patient to the hospital for treatment. After two days, he left the hospital against medical advice. Now, four weeks later, he called my office to make an appointment. Am I obligated to treat him?

**A:** It depends. Why did the patient leave the hospital? Did the patient intend to discharge you as his physician by leaving the hospital? Did he leave the hospital for reasons unrelated to your treatment or care of him? You need to talk to the patient. Ask why he left the hospital and if he intended to discharge you as his physician. If he did not intend to discharge you, you probably still have an obligation to treat him.

37

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### Sample situation # 4:

**Q:** A new patient was rude and abusive to my staff at her first appointment. She felt she was left waiting too long in the waiting room. So, I decided not to accept her as a patient. Is this OK? Do I need to send her a termination letter?

**A:** Probably no physician-patient relationship was created, especially if you did not examine or treat her. But this may depend on specific facts and on state law. However, it is probably a good idea to send her a termination letter.

38

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## Final Tips

- Make sure you know your state laws on patient records, patient termination, and patient abandonment.
- Draft and implement a patient termination policy, with standardized actions.
- Know your payer contracts – they may have restrictions, limitations on when you can terminate patients and required notification periods.
- Review your malpractice insurance – are your limits enough? When and how is coverage triggered?
- Send written notification to the patient, by certified mail.
  - Idea – send second letter at end of notification period, confirming termination of relationship.
- Allow extra time for mailing.

39

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## Final Tips (cont.)

- Document mailing of letter and termination in patient chart.
- Document, document, document all interactions with patient, including phone calls and emails.
- Do not engage in a war of words with the patient and don't let anger or emotion take over.
- Don't engage on social media.
- Provide continuity of care after sending the termination letter.
  - ❖ Refills
  - ❖ Labs and diagnostics
  - ❖ Emergency care

40

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## Final Tips (cont.)

- Don't forget to train staff on policy!
- Make sure staff knows of termination and doesn't set new appointment after.
- Be sure to send on the patient's records to the new provider promptly!
- Don't hold records for unpaid balance.
- Consult an attorney and malpractice insurer before terminating a pregnant patient or patient in a protected class to ensure that you are not terminating because the patient is in protected class.

41

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41

## Questions?



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42

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42