Notice to Patients on the Departure of a Physician

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Texas Medical Board Regulations
When a physician departs a group, the practice should consider the issue of continuity of care for patients. The Texas Medical Board (TMB), in an attempt to address this, adopted regulations that must be followed whenever a physician leaves a group. This applies to physicians who are partners, members, or employees of the group.

Unfortunately, there are a number of ambiguities in the regulation. Despite these ambiguities, physicians — those who depart a group and those who remain in the group — must comply with the regulations.

This white paper offers information on this issue. The law and regulations, as they relate to departure from a group, often require intensive legal interpretation. You should contact your own retained legal counsel for specific legal advice. The laws and regulations do not address all possible scenarios.

When a physician retires, terminates employment, or otherwise leaves a medical practice, he or she is responsible for:

• Ensuring that patients receive reasonable notification and are given the opportunity to obtain copies of their records or arrange for the transfer of their medical records to another physician; and
• Notifying TMB when he or she is terminating practice, retiring, or relocating and no longer available to patients; and specifying who has custodianship of the records and how the medical records may be obtained.¹

What kind of notice to patients does TMB require?
According to TMB regulations, practices must use three types of notification:

• Publishing notice in the newspaper of greatest general circulation in each county in which the physician practices or practiced and in a local newspaper that serves the immediate practice area;
• Placing written notice in the physician’s office; and
• Sending letters to patients seen in the last two years notifying them of discontinuance of practice.²

Do I have to use all three types of notice?
Yes, the regulation states that newspaper, posted written notice, and letters must be used.³

Where in the newspaper must the notice be listed?
The regulations do not give any guidance on this issue. This is left to the physician’s judgment.

I am an employed physician: Do I have to send the letters?
According to the regulation, “the departing physician remains responsible, for providing notification consistent with this section.”⁴

Even if the group from which you are departing agrees to send the letters (something to which you are not required to agree), you remain responsible. If the group negligently provides notice when it agreed to send notice or reneges to send notice entirely, you may have a cause of action against the practice — but you are still responsible and may be subject to TMB review.

¹ 22 Texas Administrative Code §165.5(a).
² 22 Texas Administrative Code §165.5(b)(2) (emphasis added).
³ Id.
⁴ 22 Texas Administrative Code §165.5(a)(3).
The regulations say I have to notify the patients I have “seen” in the last two years. That is many patients. Do I really have to send it to everyone I have seen?

Yes, the regulations state the notice must be sent to patients “seen in the last two years.”

I am an employed physician; isn’t notice my employer’s responsibility?

No, again, the regulations state the departing physician is responsible.

The regulation expressly states, “Employers of the departing physician as described in Section 165.1(b)(6) of this chapter are not required to provide notification.” This likely indicates that employers may voluntarily choose to provide send the notice, but are not required.

Where does the notice have to be posted in the office?

“Notices placed in the physician’s office shall be placed in a conspicuous location in or on the facade of the physician’s office, a sign, announcing the termination, sale, or relocation of the practice. The sign shall be placed at least thirty days prior to the termination, sale or relocation of practice and shall remain until the date of termination, sale or relocation.”

I was an employed physician and my termination was immediate, so I can’t post for 30 days prior to leaving. What can I do?

This is one of the ambiguous areas of the regulation. Unfortunately, there is no guidance for this circumstance. Do your best to try to give the required notices as soon as possible.

Does anyone else get the notice?

Yes, TMB requires a copy of the notice. “A copy of the notice shall be submitted to the Board within 30 days from the date of termination, sale, or relocation.”

Are there any exceptions to the requirement to provide notice?

Yes, in 2014, TMB added an exception to the requirement under Section 165.5 to give notice for certain locum tenens physicians. The regulation states:

A physician is not required to provide notice of his or her discontinuation of practice to patients treated pursuant to a locum tenens position at a practice location, if the physician was treating such patients during a period of no longer than six months at that location.

For the purposes of Section 165.5, locum tenens is defined as “a position in which a physician is employed or contracted on a temporary or substitute basis to provide physician services.”

I am an employed physician for a former partner or member, and the group practice will not give me patient contact information for the mailed notice. Am I entitled to that information?

Maybe. The group runs the risk of violating another provision of the regulation if it continues to refuse to disclose. The regulation states:

A physician, physician group, or organization described in §165.1(b)(6) of this title (relating to Medical Records) [a physician’s employer, including group practices, professional associations, and non-profit health organizations] may not withhold information from a departing physician that is necessary for notification of patients, unless the departing physician is excused from providing notice of his or her departure under subsection (f) of this section [the locum tenens exception].

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5 22 Texas Administrative Code §165.5(b)(2)(C).
6 22 Texas Administrative Code §165.5(a)(3).
7 22 Texas Administrative Code §165.5(b)(4) (emphasis added).
8 22 Texas Administrative Code §165.5(b)(3) (emphasis added).
9 22 Texas Administrative Code §165.5(f)(1).
10 22 Texas Administrative Code §165.5(f)(2).
11 22 Texas Administrative Code §165.5(c)(2) (emphasis added).
If a practice does not turn over a patient list with contact information and does not send out notice letters, then the group may be in violation of this provision of the regulation.

If a practice does not turn over a patient list with addresses, but does send out notice letters on behalf of the departing physician, then the group may not be in violation of this provision. This is because the information was not “necessary for notification of patients.” Notice was arguably accomplished. However, the regulation places the duty of notification upon you, the departing physician, not the practice. Further, TMB will hold you responsible for seeing that appropriate notice was made even if the practice sends the notices. The regulation does not require you to delegate the satisfaction of your duty to the practice or remaining physicians. Thus, you may continue to demand the information necessary to notify patients of your departure. Remaining physicians may be in violation of the regulation when they withhold the information in the face of continued demands.

This is a circumstance where both employer and employee are at risk of a medical board sanction. Both parties should work to see that the patients obtain the information they are entitled to receive.

There is nothing expressly written in the regulation that requires a practice to inform patients of where the departing physician is relocating. However, physician ethics require that when a patient asks, the group practice “must inform that physician’s patient of the departing physician’s new address.” (See TMA Board of Councilors Ethics Opinion at the end of this white paper).

In another ambiguity of the regulation, some may argue the regulation is designed so, and anticipates that, the departing physician’s new address be part of the notice requirement. Unfortunately, this is unclear, but it is very possible TMB intended the new location to be included in the notification.

Again, both the departing physician and the group are at risk of sanctions where continued disagreement prevents notice.

**Practice/Employer Physician Risks**

As alluded to previously, employer/group practices also risk sanctions in the following situations.

**I run the group practice or I am the owner of the practice, and a departing physician is demanding I provide a patient list. Am I required to turn over the list?**

The answer is that you may be required to turn over the list. The regulation states:

> A physician, physician group, or organization described in §165.1(b)(6) of this title (relating to Medical Records) [a physician’s employer, including group practices, professional associations, and non-profit health organizations] may not withhold information from a departing physician that is necessary for notification of patients, unless the departing physician is excepted from providing notice of his or her departure under subsection (f) of this section [the locum tenens exception].

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If you (or the group practice) are unwilling to perform the notification by mail and refuse to provide information that will permit the departing physician (even if he or she is a former employee) to provide notice, you may be in violation of this provision. Continued refusal to turn over information in this circumstance has extreme legal risk.

If you (or the group practice) are unwilling to furnish the contact information necessary for notification, but you send the notifications on behalf of the departing physician, you may be in compliance with the regulation. This is because the notices were sent and the information was arguably not “necessary for notification.” However, the departing physician need not agree to this arrangement.

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12 Id. (emphasis added).
As noted previously, the duty to notify patients is a personal duty of the departing physician. *The regulation does not require the departing physician to delegate the satisfaction of that duty to the practice or remaining physicians.* Thus, the departing physician may continue to demand the information necessary to notify patients of his or her departure. Withholding the information in the face of continued demands by the departing physician likely may violate the TMB regulation.

As Texas places the responsibility of notice upon the departing physician, ethics may demand disclosure of the patient list to the departing physician.\(^{13}\)

Even if the departing physician allows the practice to provide notice, the practice continues to face *extreme legal risk* because the practice has voluntarily taken upon itself the duty of notification for the departing physician. If the practice does not send a notice that complies with TMB expectations, the departing physician may have a cause of action to sue the practice for any legal injury. Also, as the practice has voluntarily taken upon itself the duty of notification, when a patient accuses the departing physician of abandonment, the practice may find itself liable for any injury to the departing physician. Thus, if TMB disciplines the departing physician or a patient accuses the departing physician of abandonment and wins at trial — the group *may* be liable to the departing physician for the damages (which can include TMB or trial defense costs and any award or fine the departing physician must pay). Further, such awards owed to former group members or employees may not be covered by professional medical liability insurance. Check with your liability carrier for riders to your policy that may cover this situation.

Departing physicians will want to consider the possibility that, should a practice fail to provide notice that complies with the regulation, he or she will be held responsible by TMB, not the practice. Although one can delegate the task of notification, one cannot disclaim the responsibility to comply with the regulation. It is best if the practice and the departing physician can agree on how patients will be notified.

There is *little legal risk* posed by turning over the contact information for patients seen in the last two years. Also, as indicated earlier, if a patient asks, the remaining physician may not ethically withhold the new location of the departing physician. Although TMB has the authority to discipline for unprofessional or dishonorable acts, it is unclear if feigning ignorance of the departing physician's location or refusing to furnish that information would fall under this authority.

Simply put, all parties — the departing physician and the remaining physicians — are at risk of TMB scrutiny when continued disagreement over the disclosure of information prevents notice.

**I run the group practice [or I am the owner of the practice]. Am I required to send out notices for the departing physician?**

No. The regulations expressly state: “Employers of the departing physician as described in §165.1(b)(6) of this chapter are not required to provide notification…” \(^{14}\)

You are free to elect to do so, but please read the answer to the previous question for insight into the risk this may entail when you also refuse to provide patient contact information or do not fully fulfill your agreement to do so.

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14 22 Texas Administrative Code §165.5(a)(3).
I run the group practice [or I am the owner of the practice]. Am I required to allow the departing physician to post a notice in our waiting room?

Yes. The regulations expressly state: “Other licensed physicians remaining in the practice may not prevent the departing physician from posting notice and the sign, unless the departing physician is excepted from providing notice of his or her departure under subsection (f) of this section [the locum tenens exception].”

TMB’s Regulatory Scheme and Notification of Patients

TMB has drafted regulations that place the departing physician and the remaining physicians at risk of discipline to ensure that patients are notified upon the departure of a physician from a group. Continued disagreement may lead to a circumstance where all physicians involved may face disciplinary sanctions. Although it may seem the regulation is ambiguous, the regulation clearly is intended to ensure that all parties have an interest in compliance.

Covenants Not to Compete

The enforceability of covenants not to compete is affected by the refusal to allow access to a list of patients to departing physicians. The law states:

A covenant not to compete relating to the practice of medicine is enforceable against a person licensed as a physician by the Texas Medical Board if such covenant complies with the following requirements:

1. the covenant must:
   (A) not deny the physician access to a list of his patients whom he had seen or treated within one year of termination of the contract or employment;
   (B) provide access to medical records of the physician’s patients upon authorization of the patient and any copies of medical records for a reasonable fee as established by the Texas Medical Board under Section 159.008, Occupations Code; and
   (C) provide that any access to a list of patients or to patients’ medical records after termination of the contract or employment shall not require such list or records to be provided in a format different than that by which such records are maintained except by mutual consent of the parties to the contract;
2. the covenant must provide for a buy out of the covenant by the physician at a reasonable price or, at the option of either party, as determined by a mutually agreed upon arbitrator or, in the case of an inability to agree, an arbitrator of the court whose decision shall be binding on the parties; and
3. the covenant must provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness even after the contract or employment has been terminated.

TMA Policy

TMA Board of Councilors Ethics Opinion

PATIENT’S RIGHTS UPON PHYSICIAN’S DEPARTURE FROM A GROUP

When a physician leaves a group practice, the physician is responsible for complying with Texas Medical Board rules regarding Transfer and Disposal of Medical Records. The physician is responsible for ensuring that the patient receives reasonable notification and is given the opportunity to obtain copies of his or her records, or arrange for the transfer of the patient’s medical records to another physician. The physician is also responsible for notifying the Texas Medical Board when he or she is terminating practice, retiring, or relocating, and no longer available to patients, and must specify who has custodianship of the records and how the medical records may be obtained. If requested by the patient of that physician, the group practice must inform that physician’s patient of the departing physician’s new address, and that copies of the patient’s medical records may be forwarded to the departing physician’s new practice. It is unethical for any remaining physician member of the group to withhold, or allow to be withheld, such information upon request of a patient. Additionally, the fact that a physician leaves a group practice

15 22 Texas Administrative Code §165.5(c)(1).
16 Texas Business & Commerce Code §15.50(b).
should not cause any patient to be neglected or abandoned. It is unethical to interfere with the relationship between the departing physician and his or her patients by withholding information, even when there are others physicians remaining in the group who are qualified to render the necessary care. (Modified May 2011)

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