

# PAVING THE WAY

## *for* Employee Termination



# Of

BY MARLI MURPHY

ALL THE PROCEDURES A PHYSICIAN PERFORMS, the most painful doesn't involve a scalpel, a sigmoidoscope, or even a patient.

Call it Employee Terminatus. Firing an employee is an excruciating process, made even more painful by the knowledge that even the smallest slip-up can expose your practice to a costly lawsuit.

"Certainly, there's a growing amount of litigation in the employment area," says Courtney Anderson, an attorney at Imani & Associates in Austin, Texas, and an on-line legal expert who teaches business law. "Even though we've had these laws on the books for a long time, employees

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### Survivor: The Office

Physicians' offices can be close-knit work environments, which means an employee termination can have significant emotional impact on remaining workers who look to the physician for an explanation.

"You really need to address the survivors," says Thomas Weida, MD, a 15-year family practitioner and one of the medical directors at Hershey Medical Center at Penn State College of Medicine in Hershey, Pennsylvania. "And the hardest part is protecting the departing employee's privacy while letting the rest of the staff know what's going on."

While employees want the scoop on what happened to their former co-worker, a physician enters a legal minefield by saying anything to employees about why an individual was fired. Defamation suits filed by terminated employees against their former employers are increasing in huge numbers, says Courtney Anderson, JD, an attorney in Austin, Texas, who also conducts personnel law training for [National Seminars Group, Inc.](#) In addition, there are various state privacy laws that physicians can unknowingly violate by disclosing details of termination, she adds. To avoid such lawsuits, legal experts like Anderson recommend that physicians don't say the employee was terminated—or discuss the issue, period.

Instead, she advises gathering the staff together quickly and saying, "You may have noticed Suzy is not here. We wish her all the best in the future, and Janice will handle her duties until we can find a replacement."

Anderson says, "You want to immediately focus on the future, to encourage the staff to get out there and handle patients."

This is precisely the tact taken in Weida's organization. "We don't even ac-

knowledge that we fired anyone," he says.

"We just say they're no longer with the organization. That tends to avoid the blame game." And if employees ask him point-blank whether the individual quit or was fired? He reiterates: "They're no longer with the organization."

Weida finds employees are on top of the story. "Employees know anyway—within the hour, they all know. The person who was fired calls them. And the problem is, the remaining employees hear only that version of the story," he explains.

"I may even say, 'You're going to hear one version of the story, and legally, I can't tell you our version,'" he reports, adding that he has had to ask employees in the past to trust him. "I've said, 'You see me make decisions every day, you see the way I treat people, you know I don't make irrational or snap decisions.' It comes down to trust. If your employees trust you, trust your management style, they'll accept it. If they don't, the situation can snowball into a number of your people looking for other work."

At Southeast Medical Center in Denver, Colorado, where Nancy Wilson Ashbach, MD, is one of five physicians, an employee termination is followed by an impromptu meeting with the staff. "We say, 'We've had a discussion with this person as to whether the job is a good fit, and we have mutually decided it is not.' And we leave it at that," Ashbach explains. If asked directly why an employee was fired, she says, "We don't discuss this with other employees."

"Oh, they're going to talk—you can't stop that," she says of remaining staff members. "But they already knew the person wasn't working out. Usually they know before I do. A physician's office is a really small culture." ■

are becoming more and more aware of their rights, and there's been more coverage in the media of successful employee lawsuits."

As a result, Anderson says, physicians, as well as other business people, "are so petrified of lawsuits that they don't fire people. They let them stay, which drains productivity and ruins morale."

#### To fire or not to fire?

Many managers have taken this cue from human resource professionals, says Anderson, who is also an MBA business consultant. The current trend in human resource circles is to coach, retrain, transfer, or otherwise work with substandard performers and problem employees rather than to terminate them as a strategy for reducing the potential of lawsuits.

But keeping poor performers on staff to avoid termination-related litigation is just plain bad business practice, Anderson stresses, because physicians will still get sued. "No advice anyone can give a physician can be a complete bar to protect against litigation today. A physician can do absolutely everything by the book and still have a disgruntled, angry ex-employee go to the [EEOC](#) (Equal Employment Opportunity Commission) and pursue a lawsuit" on a flimsy charge.

"Nothing you can do will stop all (employee-related) lawsuits, so why keep people who can't or won't perform? Businesses that are most successful are very aggressive about hiring the best people and keeping the best people, and they're very aggressive about getting rid of poor performers," Anderson says.

Granted, terminating employees is uncomfortable, "but you've got to put

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the interest of your organization above” your own discomfort, Anderson advises. “Firing a problem employee isn’t being mean, it’s being a leader.”

Family practitioner Nancy Wilson Ashbach, MD, of Southeast Family Practice in Denver, Colorado, agrees whole-heartedly. “Not making the decision to fire (a poor performer) is worse than the pain of firing,” she says. “You end up with either an incompetent employee, a dangerous employee, or an employee who is so discontent that he or she poisons the whole atmosphere, creating much bigger problems.”

Three strikes and you’re out  
Ideally, Ashbach explains, an employee

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**Nancy Wilson Ashbach, MD, a family practitioner with Southeast Family Practice in Denver.**

on her staff is terminated only after Ashbach has had a fair amount of time to “coach them, document them, and give them the opportunity to improve. The employee should know at several points along the way that they’re not accomplishing the goals they’re supposed to be accomplishing. That way, the termination should not come as a surprise.”

She says she considers herself fortunate to have had to fire fewer than a handful

of people over her 26 years as a physician, and she attributes this low firing rate to her flexibility as an employer, a 30-day “no-fault” separation policy for new hires, and a structured policy of two warnings before termination.

“I put a very high value on people being happy at work,” Ashbach says. “If employees aren’t really happy here, I don’t think they should be here.” Therefore, she hires on a 30-day trial

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basis, which gives both physician and employee time to see if the arrangement is a good fit.

Beyond that, Ashbach believes “termination is much easier for people if it doesn’t blindside them.” To give the employee opportunity to improve—or the opportunity to move on—she handles performance issues with two warning meetings, with termination on the third meeting, if necessary.

Typically, she says, she or the office manager meets with the employee, outlines the problem, sets three or four specific, written goals for improvement, then schedules a meeting in two weeks to re-assess employee performance.

“Once you decide to intervene, you must be very clear with the employee so they understand that this is an intervention. I’ve seen cases in other offices where an employee walks out of the meeting saying, ‘Hmm. Wonder what that was all about?’ They still don’t realize how poor their performance is,” Ashbach says.

“You want to be compassionate, but also firm and direct. Say, ‘Your performance is not up to the standards needed for this job.’ We don’t make the first meeting too long, because we don’t want to get into something that bruises their ego.”

During the two weeks between the first and second meetings, Ashbach provides any coaching she thinks may help, as in, “Here’s a way you can accomplish this more effectively.”

At the second meeting, Ashbach gives another written warning if performance or behavior goals have not been met. Then she makes it clear that if the problem is not corrected within two more weeks, a third meeting will be held to terminate the employee. She is candid in admitting she’s had little luck in seeing employees improve between meetings, with one exception in which an employee was transferred to a department not dealing

directly with patient care.

And that third meeting, when the ax drops? Ashbach acknowledges that even when employees know it’s coming, “it’s always a hard message for people to hear. There’s a fair amount of pain on both sides that occurs, and I think you can convey that, can say you understand it’s hard for them, but it’s hard for you, too. You don’t ever hire someone thinking you’re going to have to fire them,” she says.

### Plan from a defensive position

You don’t hire someone thinking you’ll have to fire them, and you don’t think you’ll ever be sued, but a physician manager today is likely to experience both and should plan accordingly, Anderson advises. The best strategy for minimizing termination-related litigation is to “plan for the inevitability of a lawsuit from a defensive position. Legal strategic planning is analogous to any other type of business planning a physician does.”

The costs of facing employee-related litigation have become so high and the amount of a physician’s time required to do so can be so enormous, she adds, that physicians should make it a priority to develop a plan for terminating employees in a way that reduces legal risk to the practice.

### To fire legally, have a plan

Such a plan requires a holistic approach, Anderson emphasizes, one that must start long before employees are told to clean out their desks and turn in keys.

### She recommends an eight-point plan:

✓ 1) Understand employment law, including protected categories of employees—and make sure all your managers understand personnel laws, as well. Anderson outlines employment laws that deal in part with termination:

- Physicians cannot fire employees based on their race, color, gender, religion, or

national origin, according to [Title VII of the 1964 Civil Rights Act](#).

- Physicians cannot fire employees 40 and older because of their age, according to the [Age Discrimination Act of 1978](#), and cannot force retirement in an office setting.
- Physicians cannot demote or fire a female employee because she is pregnant, according to the [Pregnancy Discrimination Act of 1978](#).
- Physicians cannot fire disabled workers because they are disabled, according to the [Americans with Disabilities Act](#) in 1990, and must make reasonable accommodations for the employee to do the job.

Of these protected classes, “the booming area of litigation” is age discrimination, Anderson notes. “In other words, if you lay off a 45-year-old nurse making a high salary because you can replace her with a younger, less expensive nurse, you are violating federal law.”

✓ 2) Create an employee handbook that clearly spells out personnel policies, including possible causes for termination and the termination process.

Lay out the rules from the very beginning, Anderson advises. The employee handbook should outline expected conduct for employees, explain progressive discipline measures that will be taken when rules are not followed, list all behaviors and actions that could lead to termination, and cover the termination process.

✓ 3) Develop legal, specific job descriptions for every position on staff.

“If you don’t have written job descriptions, you’re asking for trouble,” Anderson says. This point is the absolute key to the overall plan, because physicians can refer to the job description in disciplinary discussions with an employee, during the termination meeting, and if

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necessary, in court. The job description should be specific, covering all aspects of the position, from what time the employee is supposed to be ready to work to how patients are to be treated to how many times the phone can ring before someone must pick it up—down to how quickly a nurse should be able to take a throat culture. Once an all-encompassing job description is in place, a physician or office manager has something solid to go on when an employee's performance doesn't meet standards outlined in that document.

✓ 4) Train employees on appropriate workplace behavior, including types of remarks that will not be tolerated.

"It's sad that you have to train people how to treat each other at work, but you do," Anderson says. The employer is legally held accountable for the actions of all employees, so all staff members must be made aware that any comments—even in jest—concerning race, color, gender, religion, age, or national origin will be subject to disciplinary action.

✓ 5) Monitor your workplace for abuses in policies and take disciplinary action as outlined in your handbook—treating all employees consistently.

Physicians and other managers must be alert to employee abuses of policies, procedures, and expected behavior—and must apply disciplinary measures fairly and consistently. "When you overhear Becky, a wonderful nurse who has been with you forever, make a racial joke in the break room, there may be the tendency to let it go. But that's a BIG no-no," Anderson says. "The number one thing I hear again and again from former employees who want to sue is, 'It wasn't FAIR! So-and-so did the very same thing I did and they didn't fire HER!'"

Letting the actions of certain favored



**"You don't squeeze this in between patient care. You've really got to make sure you have enough time to sit down with them and talk, to let them feel they've been heard. What you're trying to do is let employees keep their respect." — Thomas Weida, MD, a family practitioner and the medical director for a subgroup of 15 physicians at Hershey Medical Center in Hershey, Pennsylvania.**

employees slide can come back to haunt you in court, and the line of reasoning goes like this: If Becky can tell racial jokes in the break room and nothing happens, but John is fired for making racial jokes, then you must have fired John because he was Native American since others have done the same thing John did and haven't been fired.

✓ 6) Document, document, document.

Documentation is how you build a paper trail that supports your personnel decisions. "Physicians should document

EVERY interaction with an employee, in the same way they document every interaction with a patient," Anderson explains. "You have a conversation, jot a note, date it, and put it in the employee's file. The employee file is analogous to a patient record." All paperwork involving the employee should be kept and put into the file, including his or her job application.

✓ 7) Use progressive discipline to weed out poor performers and bad attitudes early on.

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Consistently disciplining and then terminating under-performers not only sets high standards for the practice, it sends a message to all employees: If you don't do your job well, you don't stay here, Anderson says. This strategy will "increase the opportunity to have a peaceful, productive practice and decrease the chances of employee lawsuits stemming from unhappiness, because you'll have created a better work environment for them." What's more, it's easier on the physician, the employee, and other staffers to make the decision to terminate sooner rather than later, when the employee has become an integral part of the office and has established relationships with co-workers and patients.

✓ 8) Conduct well-planned separation meetings in a calm, professional manner.

The separation meeting should never be left to chance, Anderson says. In fact, she advises physicians to write a script for themselves if they've had little experience with terminating employees. Map out the meeting in advance and conduct it from a checklist so that you follow the termination procedure outlined in your employee handbook to the letter. If your organization has an HR department, check in there for assistance. A brief letter should be prepared outlining the reason for termination, a severance check should be ready if applicable, and all paperwork concerning benefits should be in a packet. She advises having another employee in the room as a witness during the meeting, ideally one who can explain benefits, severance, and the appeals process, if one exists.

"Be courteous, but get right to the point," she recommends. "Keep the meeting brief. You preserve the employee's dignity by keeping it professional and going by the book." Collect keys and ID, walk with the employee to collect belong-

ings, and walk him or her to the door. When the separation meeting is handled in this manner, the individual has no reason to return to your office.

*It's not what you say,  
but how you say it*

When it comes to delivering the bad news that an employee is being let go, it's not what you say as much as how you say it, says Thomas Weida, MD, a family practitioner and the medical director for a subgroup of 15 physicians of the approximately 600 at Hershey Medical Center at Penn State College of Medicine in Hershey, Pennsylvania.

"You don't squeeze this in between patient care," he says, adding that he usually targets the end of the workday. "You've really got to make sure you have enough time to sit down with them and talk, to let them feel they've been heard. What you're trying to do is let employees keep their respect."

A separation meeting involving a layoff is obviously much different in tone than one concerning performance issues, he notes. Having been through a company merger in the past that required layoffs, Weida says in those instances he provides letters of recommendation and any assistance he can to help the individual become re-employed.

But when the issue is substandard performance or a violation of policies, Weida has found that the best way to handle the difficult conversation is to keep the focus on "I" instead of "you." "Rather than saying to the employee, 'You're fired because you did this wrong, or you did that,' I say, 'It's my perception that ...' or 'My feeling is that ...' or 'I felt this way about what was going on.' They can't argue with that," he explains. "They may not agree with your decision, but they can't argue with your feelings."

This tact works well with employees

who are upset and those who are angry, he says. "I acknowledge their anger, saying, 'I understand that you're angry, but I feel this is what I have to do for the organization.' What can they say? 'No, you don't feel that way.'"

Weida adds, "You want to give the person the opportunity to express their feelings and concerns, but you still have to guard your organization."

Anderson agrees that the conversation requires a combination of psychology and empathy. "I get lots of calls first thing Monday mornings from people who've been fired on Friday, and they say things like, 'You know, it's not so much that they fired me, it's the way they did it! It's the way they talked to me!'"

"They're angry, and anger is what motivates litigation," she says. She cautions physicians that no matter what the employee may have done, "this is not the time to get it off your chest. Do not use any derogatory language or make negative comments." No matter what the individual says to you, "do not engage them in any event. Keep it professional," Anderson says.

"People can get very emotional, so if someone becomes upset, talk in a low pitch, in low, calming tones," she says. "If they cry, offer a tissue, but stick to the script and keep the meeting on track." You may have to stand and open the door to indicate that the meeting is over.

Should the individual become angry and begin threatening you or other employees, continue speaking in low, calming tones, but call security or 911. "Ideally, you'll have someone else in the meeting with you, and you outnumbering (the employee being fired) adds psychological strength."

From experience, Weida advises that if security people are deemed necessary during the termination process, they should be kept in the background. "One time

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when we brought in security, they were very visible. The employee didn't seem to have a problem with that, but other employees had a tremendous problem with it," he remembers. "They didn't think it was right. What we learned was to keep security in those instances at a much lower profile, maybe out in the car, not prancing around the waiting room."

### Firing without documentation

While proper documentation and thorough preparation are essential to a successful separation meeting, what if an employee's actions are so egregious or their behavior so insubordinate that you want to fire them immediately—and you have no supporting paperwork?

"I'm asked all the time if you can fire an employee without documentation," Anderson says. "Can you? Yes. Should you? No. With no documentation, you have a very weak case because it's simply what you said against what they said."

Firing an employee on the spot is not legally advisable, in Anderson's opinion, because the physician isn't properly prepared to terminate by the book, which increases legal risk. In addition, the physician in that situation is often angry. "You never, ever, ever fire someone when you're angry," Anderson says. If necessary, suspend the employee or send him or her home for the day.

Her advice on firing without documentation is, simply, don't do it. Begin documenting the employee from that day forward, instead. However, if you believe immediate termination is your only option, then document the incident fully and include statements from any witnesses, have the employee's paperwork processed, and set up the separation meeting for the next day, when both you and the employee are calm. If you aren't absolutely certain you can remain calm and professional during the session, have

someone else handle the meeting, Anderson says.

She adds that when no documentation exists, it's often not because a serious offense suddenly came to light, but because the physician showed poor leadership in not confronting an ongoing performance problem or behavior issue.

Weida has seen this happen. "A physician may hate to give someone a bad review, to have to say, 'You aren't doing the job.' So they take it, take it, take it until they've had it and decide the employee has to be fired right then. You've got to be careful you don't fall into that trap, but that you document performance along the way," he says. (See "[How to Give Great Performance Reviews](#),")

### Employees 'fire themselves'

Keeping employees in jobs they don't do well and aren't happy in does a disservice to your patients, your practice—and the employees themselves, Ashbach and Weida both believe.

"It's important to realize that you as a manager are not firing the person, the person is firing himself," Weida says. "Realizing that takes a burden off you. You're saying, 'Hey, this type of performance doesn't work with our type of work.'"

Anderson agrees. "An employee chooses, by their own actions, to be separated or terminated. Through progressive discipline, you give an oral warning, you give a written warning, you give them the opportunity to turn around their behavior. If they don't, then they've chosen to leave. ■

*Marli Murphy is a regular contributor to UO.*

*Her last article, "[Communicate Conflict Away](#)," appeared in November/December 2000.*