

**Leaving practice: Ways to reduce liability risks for the ophthalmologist and practice**

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**PURPOSE OF RISK MANAGEMENT RECOMMENDATIONS**OMIC regularly analyzes its claims experience to determine loss prevention measures that our insured ophthalmologists can take to reduce the likelihood of professional liability lawsuits. OMIC policyholders are not required to implement these risk management recommendations. Rather, ophthalmologists should use their professional judgment in determining the applicability of a given recommendation to their particular patients and practice situation. These loss prevention documents may refer to American Academy of Ophthalmology Preferred Practice Patterns, peer-reviewed articles, or federal or state laws and regulations. However, our risk management recommendations do not constitute the standard of care nor do they provide legal advice. Consult an attorney if legal advice is desired or needed. Information contained here is not intended to be a modification of the terms and conditions of the OMIC professional and limited office premises liability insurance policy. Please refer to the OMIC policy for these terms and conditions.

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Ophthalmologists leave practices for many reasons, including illness, retirement, changes in employment status, and personal or family needs. Both the individual ophthalmologist and the practice need to take steps in order to promote continuity of care, prevent allegations of abandonment, and ensure that all involved ophthalmologists have access to the medical records if needed. In addition, both parties need to review the terms of their contracts and the requirements of state and federal law.

The information presented in this toolkit addresses the risks posed when an ophthalmologist retires or leaves a practice. Prepare your exit strategy early.Planning well in advance of the departure date helps all involved. While nothing can eliminate the stress of practice changes, much can be done to limit the likelihood of lawsuits.

**1. DECIDE WHEN TO STOP PERFORMING SURGERY**

When to stop performing surgery before leaving a practice or retiring is one of the most complex decisions to make. In addition to its effect on patient safety, this decision can have significant financial and logistical impacts on the departing ophthalmologist and the practice. It is therefore very important for all parties to discuss this issue with each other and their attorneys. OMIC does not have a specific recommendation on when to stop performing surgery. What is best for the patient should drive the decision. Patient preference about when the surgery should be done and who should perform the surgery and provide postoperative care should be accommodated as much as possible.

Here are some additional points to consider:

* Is the postoperative period expected to be long? Is the surgery expected to be complex? Is the patient at higher risk for complications due to medical or ocular comorbidities?
	+ If the answer to any of these questions is “yes,” it may be best for the ophthalmologist to schedule these surgeries well in advance of departure or for another ophthalmologist to perform the surgery.
* Is the departing ophthalmologist a subspecialist?
	+ If so, is there another ophthalmologist in the same subspecialty available in the practice? If not, is one available in the community?
	+ Careful planning and communication with the patient and among the ophthalmologists are needed to ensure that subspecialty care is provided in a timely manner.
* Are there other ophthalmologists or optometrists available in the practice to take over the postoperative care?
	+ Ophthalmologists in a practice where other providers can easily take over care may choose to continue performing surgery until closer to their departure date.
* Is the departing ophthalmologist and/or practice comfortable with shared postoperative care?
	+ Some ophthalmologists regularly provide all of the postoperative care for their patients. They may decide to stop performing surgery months before they leave in order to ensure that they provide all of the expected postoperative care.
* Does the practice have a protocol for shared postoperative care?
	+ If the practice does not have such a protocol, it may be best for the ophthalmologist to schedule these surgeries well in advance of departure or for another ophthalmologist to perform the surgery.
	+ A sample protocol for shared care is available at <http://www.omic.com/?s=coordinating+care+with+optometrists>.

Inform the patient when postoperative care will be shared

Patients need to be informed that the surgeon is leaving and may not be available for all of the postoperative care. OMIC recommends obtaining the patient’s consent before surgery whenever postoperative care will be provided by anyone other than the surgeon.

* Oral consent is sufficient when the postoperative care is provided only by ophthalmologists or optometrists within the practice. This consent should be documented in the medical record. If the practice prefers to obtain written consent, there is a sample form (*Sample Form 1*)at the end of this document.
* Written consent for shared postoperative care should be obtained when an ophthalmologist or optometrist outside the practice will take over the care. Please see *Sample Form 2* at the end of this document.

**2. NOTIFY PATIENTS ABOUT THE PHYSICIAN’S DEPARTURE**

Physicians who want to notify their patients of their departure have reported to us that their practice or employer will not let them do so. A few have arrived at work to find the locks have been changed. Others have been told that the patients “belong” to the practice and do not need to be notified. Failure to notify patients of their ophthalmologist’s departure could lead to allegations of abandonment.

Patient abandonment occurs when a physician fails to provide necessary medical care to a current patient without adequate justification. In general, once a physician-patient relationship is established, a physician has an ongoing responsibility to the patient until the relationship is terminated. To terminate the relationship, the physician must notify the patient and give the patient enough time to secure the services of another physician. You may need to terminate the physician-patient relationship if you retire from practice or leave the geographic area, or if your patient stays with the practice rather than remain your patient.

Your practice agreement may affect the choices you and the patient have regarding your continued relationship if you leave the practice. Ideally, patients of the departing physician should be offered the choice of following the treating ophthalmologist to his or her new practice or obtaining care from a different ophthalmologist in the original practice. In general, the patient’s choice should be honored.

Get legal advice when drafting or considering a practice agreement. Common terms of agreements include:

* Which party is considered to be the patient’s ophthalmologist (it may be against your state’s law for the practice to be the patient’s ophthalmologist).
* Who owns the patient’s medical records (see “Protect the Medical Records” below).
* The patient’s right (or restrictions) to choose his or her own ophthalmologist.
* What and how notice will be given to patients upon an ophthalmologist’s departure.
* A non-compete clause that prohibits you from soliciting patients upon your departure (you should consult with your attorney to help you determine if this clause is enforceable).

How to notify patients

Check with your medical board to see if there are any state laws that specify how to notify patients. Different types of notification are needed for high-risk, active, and inactive patients. ***See the end of this document for sample letters.***Keep a copy of the letter in the patient’s medical record. If the ophthalmologist is leaving a continuing practice, a joint letter from the departing ophthalmologist and the practice is ideal. Check with your local post office about free options that help ensure delivery if the patient has moved, such as “address service requested” (see <https://pe.usps.com/text/qsg300/Q507.htm> for details and instructions).

* **High-risk patients**
* High risk patients might include those who risk serious, imminent vision loss if they do not get necessary treatment in a timely manner, those likely to experience adverse outcomes, or those who may allege abandonment if their ophthalmologist is unavailable for ongoing care.
* Send the letter both certified and via regular mail; some patients aren’t home to sign, or refuse to sign, a certified letter.
* You may also want to call certain high-risk patients.
* **Active patients**
* Some practices define active patients as those seen within the last 12 to 18 months. Others who treat a large number of patients with chronic or complicated conditions may extend the time frame. Some follow the CMS billing guidelines: a new patient is one whom you have not seen in the last three years (<https://questions.cms.gov/faq.php?id=5005&faqId=1969>).
* Send a letter via regular mail.
* **Inactive patients**
* These patients are usually not sent a letter.
* Provide a script for receptionists detailing what they will say to patients and how to contact the departing ophthalmologist.
* Announce the ophthalmologist’s departure and provide information on how to obtain care or records by one or more of the following methods:
	+ A sign posted in the lobby
	+ A handout given to patients
	+ Orally to patients who call the office

Explain options when the departing ophthalmologist will not be available for ongoing care

* Inform patients if a new ophthalmologist is taking over the practice or other ophthalmologists will be available to provide care at the same practice location, or if instead they will need to find a new ophthalmologist at another practice.
* *See sample letters 1, 2, and 3 at the end of this document.*

Explain options when the departing ophthalmologist will be available for ongoing care

* Tell patients that they can choose to stay with the practice under the care of a new ophthalmologist or continue to see the same ophthalmologist at his or her new location.
* *See sample letter 4 at the end of this document.*

Explain how to obtain a copy of the medical record

* Instruct patients who will follow the ophthalmologist or switch to an ophthalmologist outside the practice:
	+ How to obtain a copy of their medical record for themselves.
	+ How to have a copy of their medical record forwarded to the departing or new ophthalmologist.
* Consider including a records release or HIPAA authorization form with the letter to expedite transfer of records (see “Protect the Medical Records” below).
* Inform the patient of any fees for copying and sending the record and the timeframe/conditions for completion of the request. Check state law as well as HIPAA guidance from the Department of Health and Human Services <https://www.hhs.gov/hipaa> for more information.

**3. TAKE OVER CARE FROM THE DEPARTING PHYSICIAN**

Here are a few points to consider when determining who will take over the patient’s care:

* Verify that the patient’s clinical needs can be safely met if the care will be provided by a practitioner with a different subspecialty.
* Identify an ophthalmologist in the community to whom the patient can be referred if subspecialty care not available from your group is needed.
* Review state law if an optometrist will be the new provider to ensure that the care to be provided is consistent with the provider’s legal scope of practice.
* Develop and/or clarify the protocol on when the optometrist needs to consult with an ophthalmologist or ask an ophthalmologist to examine the patient (see “Coordinating care” for a sample protocol).

Avoid allegations of failure to diagnose or follow up.

* Obtain and review the medical record from prior treating ophthalmologists.
* Make an entry in the medical record after the review, noting pertinent history and the current plan. Here is an example: “8/4/17. Taking over care from Dr. Sanchez. Chart reviewed; continue medical management of glaucoma; follow-up appointment scheduled in one month; consider laser surgery if pressure does not respond.”
* Thoroughly evaluate and document the patient’s current condition at the time of the first visit.

Exercise caution when discussing prior care

Numerous malpractice lawsuits are generated by comments made by other treating ophthalmologists about prior care. Subsequent treating ophthalmologists have become defendants themselves after offering an opinion. Reduce the likelihood of this scenario:

* Refrain from making negative comments about a departing ophthalmologist in front of staff, patients, or other third parties.
* Restrict your input when needed to the known medical facts, and refrain from speculation or blame.
* Respond carefully when a patient asks you to render an opinion about a prior ophthalmologist’s decision-making process or care. Say, for example:
	+ “I was not involved in your care at that time, so I do not have all the information.”
	+ “It would be best to talk to that ophthalmologist about your concerns.”
* Explain without criticizing the prior care when a patient asks why you have a different approach:
	+ “There are several ways to treat this condition.”
	+ “I would like to try a different treatment now.”
* Focus your attention—and the patient’s—on the current treatment needs.

**4. PROTECT THE MEDICAL RECORDS**

Practices and departing ophthalmologists have many questions about ownership and sharing of medical records. Practices need to work in good faith with departing ophthalmologists to provide access to their current or former patients’ medical records as allowed by law. Patient safety is at risk if ongoing members of the healthcare team are not given copies of medical records in a timely fashion. Former members of the healthcare team may also need copies of the records for their healthcare operations, which include responding to medical professional liability claims.

There is a plethora of federal and state laws protecting health information. They can be confusing and sometimes seem to conflict. *A comprehensive discussion of federal and state law governing use, disclosure, access, and retention of medical records is beyond the scope of this document.* The following information touches on some of the major considerations. We have chosen to provide conservative risk management recommendations.

Section 164.506 of the HIPAA Privacy Rule permits healthcare providers to share patient records without patient authorization for treatment, payment, or healthcare operations *(if your state law is stricter than HIPAA, you must follow the state requirements).*

Providing the medical record to a patient’s new ophthalmologist for future treatment or the departing ophthalmologist for ongoing treatment would not seem to require authorization. Some experts argue, however, that this provision of HIPAA does not provide blanket permission to transfer all patient medical records when a physician leaves a practice. For this reason, and because some state laws do require authorization in these situations, it may be advisable to have patients sign a written authorization. Further, patients may appreciate your asking their permission to disclose their PHI, even if it is not legally required.

HHS has provided clear guidance to physicians who are retiring or selling their practice. The definition of “health care operations” includes “the sale, transfer, merger, or consolidation of all or part of the covered entity with another covered entity, or an entity that following such activity will become a covered entity …” (Section 164.501 Definitions, health care operations (6)(iv)). The HHS Fact Sheet dated August 9, 2002, explains that this definition of health care operations allows a covered entity (CE) who sells or transfers assets to or merges with another CE to use and disclose PHI in connection with such transaction, including transferring records containing PHI.

Have a written agreement on medical records

If a written agreement on medical records is not already in place at the time the ophthalmologist joins the practice, one should be drafted prior to departure. Consult an attorney in your state who is familiar with healthcare, medical insurance, and contract law for assistance in drafting the agreement. The agreement should:

* Prioritize patient safety and continuity of care.
* Explain the process for acquiring records and any associated charges.
* Specify the contents of the records to be provided or copied.
* Determine who keeps the original records and/or studies, and who gets a copy.
* Provide the timeframe in which records must be provided.
* Provide that each party receive a list of the patients treated by the departing ophthalmologist in order to simplify requests for access to and copies of the records and specify the date of the ophthalmologist’s departure in the list.

**5. REVIEW YOUR PROFESSIONAL LIABILITY INSURANCE POLICY**

Whether changing practices or retiring, ophthalmologists need to ensure that their medical professional liability (MPL) insurance provides coverage for the care rendered in both their prior and future practice settings. Discuss your options for continued coverage with the Underwriting Department at your current and/or new MPL carrier. Groups need to confirm that the departing ophthalmologist has such insurance since the group can be held liable for the ophthalmologist’s prior care even after he or she is no longer with the practice.

**6. NOTIFY THIRD PARTIES**

Provide your new contact information to physicians who regularly refer patients. Dependent upon the provisions of contracts and state law, the ophthalmologist and practice may need to notify other third parties of changes in address or employment status. Consult your legal counsel for assistance as needed. Some third parties that may need notification include:

* Insurance and managed care companies with whom you have contracts
* CMS (Centers for Medicare and Medicaid Services)
* The medical staff committee of hospitals and surgery centers where you have privileges
* The Emergency Departments of hospitals where you are on-call
* The state board of medicine
* The Drug Enforcement Agency
* Other state agencies if required, such as controlled substances reporting systems or the state board of pharmacy

This “Leaving Practice” toolkit provides answers to questions we are frequently asked on our Hotline. Each situation poses unique challenges, so ophthalmologists should seek assistance for concerns that are not addressed here.

**OMIC policyholders are invited to call OMIC’s confidential Risk Management Hotline at 800- 562-6642, option 4 or to email us at** **riskmanagement@omic.com****. They should also notify OMIC’s Underwriting Department of practice changes by calling 800-562-6642, option 1 or emailing** **underwriting@omic.com****.**

**SAMPLE FORM ONE: POSTOPERATIVE CARE SHARED WITHIN THE SAME PRACTICE**

**Postoperative care**

**Patient Name:**

Dr. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (name of surgeon) will be performing \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (type of surgery)on me. Dr. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (name of surgeon) informed me that he is leaving the practice on \_\_\_\_\_\_\_\_ (date).

Dr. \_\_\_\_\_\_\_\_\_\_ (name of ophthalmologist or optometrist in the practice) will provide my postoperative follow-up care.

Patient: Date:

**SAMPLE FORM TWO: POSTOPERATIVE CARE PROVIDED OUTSIDE THE PRACTICE**

**Postoperative care**

**Patient Name:**

Dr. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (name of surgeon) will be performing \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (type of surgery)on me. Dr. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (name of surgeon) informed me that he is leaving the practice on \_\_\_\_\_\_\_\_ (date).

Because of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (state reason), I would like Dr. \_\_\_\_\_\_\_\_\_\_ (name of community optometrist or ophthalmologist) to perform my postoperative follow-up care.

**I understand that I can contact \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (name of practice) at any time after the surgery.**

I understand that I can ask Dr. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (name of community optometrist or ophthalmologist) to contact the practice immediately if I experience any complications related to my eye surgery.

Patient: Date:

**SAMPLE LETTER ONE: PATIENT NEEDS TO FIND ANOTHER OPHTHALMOLOGIST**

Your Letterhead

Date

Dear Patients:

I am writing to inform you that I am retiring from active practice/leaving \_\_\_\_\_\_ **(name of practice/region).** My last day will be \_\_\_\_\_\_ **(date)**. I have enjoyed taking care of your eyes and want to make sure you get the care you need going forward.

You must select a new ophthalmologist. Please contact your insurance company to obtain a list of ophthalmologists in the area who accept your insurance. You can also contact the local medical society at **[insert phone number]** for a list of ophthalmologists in our area.

[Consult your attorney regarding disclosure of medical records and provide instructions to the patient on how to obtain them or have them forwarded to the new ophthalmologist. Here is sample language: “In order to protect the confidentiality of your medical records, please provide written authorization for me to send a copy of your records to your new ophthalmologist. For your convenience, I included the form with this letter. Return it to the office once you have selected a new ophthalmologist.”]

The practice \_\_\_\_\_\_ **(does/does not)** charge a fee for copying and sending your record. **[You need to pay \_\_\_\_\_.]**

It has been my pleasure and honor to be your ophthalmologist. I wish you continued health and wellness.

Kindest regards,

**[Signature of ophthalmologist]**

**SAMPLE LETTER TWO: ANOTHER OPHTHALMOLOGIST WILL TAKE OVER PRACTICE**

Your Letterhead

Date

Dear Patients:

I am writing to inform you that I am retiring from active practice/leaving \_\_\_\_\_\_ **(name of practice/region)**. I have enjoyed taking care of your eyes and want to make sure you get the care you will need going forward.

As of **(date)**, Dr. **(name)** will be taking over my practice. Dr. **(name)** graduated from **(name)** Medical School. He/she served his/her internship at **(name)** Hospital in **(city)** and completed his/her residency at **(name)** University.

Of course, you may choose a different ophthalmologist. Please contact your insurance company to obtain a list of ophthalmologists in the area who accept your insurance. You can also contact the local medical society at **[insert phone number]** for a list of ophthalmologists in our area.

[Consult your attorney regarding disclosure of medical records and provide instructions to the patient on how to obtain them or have them forwarded to a new ophthalmologist. Here is some sample language: “In order to protect the confidentiality of your medical records, please provide written authorization for me to share your records with the new ophthalmologist. For your convenience, I included the form with this letter. Return it to the office once you have decided on your new ophthalmologist.”]

The practice \_\_\_\_\_\_ **(does/does not)** charge a fee for copying and sending your record. **[You need to pay \_\_\_\_\_.]**

It has been my pleasure and honor to be your ophthalmologist. I wish you continued health and wellness.

Kindest regards,

**[Signature of ophthalmologist]**

**SAMPLE LETTER THREE: OTHER OPHTHALMOLOGIST IN PRACTICE CAN SEE PATIENT**

**Note: you can also use this for a joint letter from the ophthalmologist and the practice. Add the name of the ophthalmologist.**

Your Letterhead

Date

Dear Patients:

We are writing to inform you that Dr. **(name)** is leaving/no longer with our practice. We are pleased to tell you, however, that Dr. **(name)** will be taking over his/her patients. Dr. **(name)** graduated from **(name)** Medical School. He/she served his/her internship at **(name)** Hospital in **(city)** and completed his/her residency at **(name)** University.

Of course, you may choose a different ophthalmologist from our practice or the community. Contact your insurance company to obtain a list of ophthalmologists in the area who accept your insurance. You can also contact the local medical society at **[insert phone number]** for a list of ophthalmologists in our area.

[Consult your attorney regarding disclosure of medical records and provide instructions to the patient on how to obtain them or have them forwarded to a new ophthalmologist. Here is some sample language: “In order to protect the confidentiality of your medical records, please provide written authorization for us to share your records with the new ophthalmologist. For your convenience, I included the form with this letter. Return it to the office once you have decided on your new ophthalmologist.”]

The practice \_\_\_\_\_\_ **(does/does not)** charge a fee for copying and sending your record. [**You need to pay \_\_\_\_\_.]**

We greatly value our relationship with you, and hope that you will choose to continue receiving your care from us.

Kindest regards,

**[Signature of practice representative]**

**SAMPLE LETTER 4: OPHTHALMOLOGIST AVAILABLE AT ANOTHER PRACTICE IN AREA**

**Note: you can also use this for a joint letter from the ophthalmologist and the practice. Add the name of the person signing on behalf of the practice.**

Your Letterhead

Date

Dear Patients:

I am writing to announce that I am leaving **[name of current practice]** and will be joining/starting another practice, **[name of new practice],** on **[date].** My new practice is located at **[location].** I hope that you will choose to continue to receive your care from me. Please contact my new office at **[phone]** to schedule an appointment.

You may also choose to stay with **[name of current practice]**. If so, please call **[number]** to let the practice know that you wish to transfer your care to one of their ophthalmologists. You may decide to find another ophthalmologist. Please contact your insurance company to obtain a list of ophthalmologists in the area who accept your insurance. You can also contact the local medical society at **[insert phone number]** for a list of ophthalmologists in our area.

[Consult your attorney regarding disclosure of medical records and provide instructions to the patient on how to obtain them or have them forwarded to a new ophthalmologist. Here is some sample language: “Please send **[name of current practice]** written authorization to share your records. For your convenience, I included the form with this letter”].

It has been my pleasure and honor to be your ophthalmologist, and I hope that you choose to continue as my patient. I wish you continued health and wellness.

Kindest regards,

**[Signature of ophthalmologist]**