Examination of nondisclosure agreements in medical malpractice settlements

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A review of medical malpractice claim files at an academic medical center found that while most settlements included nondisclosure clauses there was little standardization or consistency in their application, according to article published online by *JAMA Internal Medicine*.

Transparency is a core principle in efforts to improve the safety and quality of health care, according to background information in the study.

William M. Sage, M.D., J.D., of the School of Law at the University of Texas at Austin, and coauthors examined restrictions on information in malpractice settlements reached on behalf of University of Texas physicians before (fiscal year 2001-2002), during (fiscal year 2006-2007) and after (fiscal years 2009-2012) enactment of tort reform legislation in Texas. The University of Texas System self-insures malpractice claims for 6,000 physicians at six medical campuses in five cities.

The authors found that during the five years of the study, the University of Texas System closed 715 malpractice claims and paid 150 settlements. In the 124 cases that met the study selection criteria, the average compensation paid by the university was $185,372. A total of 110 settlement agreements (88.7 percent) included nondisclosure provisions.

Among the nondisclosure clauses:

- All of them prohibited disclosure of the settlement terms and amounts
- 61 (55.5 percent) prohibited disclosure that a settlement had been reached
- 51 (46.4 percent) prohibited disclosure of the facts of the claim
- 29 (26.4 percent) prohibited reporting to regulatory agencies; a practice the health system has since changed in response to these findings
- 10 (9.1 percent) prohibited disclosure by the settling physicians and hospital, not only by the claimant

Study results indicate that the 50 settlement agreements signed after tort reform took full effect (2009-2012) had stricter nondisclosure provisions than the 60 signed in earlier years.

The authors note the use of nondisclosure agreements should be reviewed elsewhere.

"We found that nondisclosure agreements were used in most malpractice settlements, but with little standardization or consistency. The agreements selectively bind patients and patients' representatives, making them hard to justify on privacy grounds. The scope of nondisclosure agreements is often far broader than seems needed to protect physicians and hospitals from disparagement by the plaintiff or to avoid the disclosure of settlement amounts that might attract other claimants," the study concludes.

In a related commentary, Michelle M. Mello, J.D., Ph.D., M.Phil., of Stanford University, California, and Jeffrey N. Catalano, Esq., of Todd & Weld, Boston, write: "Some types of nondisclosure provisions can never be justified, and others should remain subject to negotiation. Because patients should not be forced to choose between compensation and acting on a perceived ethical obligation to try to prevent harm to

others, settlement agreements should not restrict reporting to regulatory bodies. Adopting state statutes that prohibit these provisions involves less burden and uncertainty for plaintiffs than requiring plaintiffs to challenge them in court."

"Restrictions on public disclosure of the facts of the event, without identifying the health care professional(s) or institution, are also hard to justify. Defendants ordinarily should not insert them. ... Other types of nondisclosure provisions may be justified in a broader range of cases and should remain negotiable, including restrictions on disclosing the health care professional's or institution's name and the settlement amount," they continue.

"Preserving some latitude for confidential resolution of malpractice claims may create a safe space for the most important kind of transparency - open communication about error within health care organizations - to occur," they conclude.

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