

Health Information Compliance Alert

Practice Privacy: Pocket These Medical Nondisclosure Agreement Basics

Hint: They may not offer the protections organizations count upon.

Many industries utilize nondisclosure agreements (NDAs) more and more frequently. Allegedly constructed to protect "trade secrets," there are many instances of people using NDAs to maintain employer privacy, keep information surrounding a business's practices out of reach of journalists or other people digging around, or even as a roadblock to cover or distract from mistakes or intentional misdeeds.

Know How NDAs Can Be Used

However, in the medical community, NDAs have been adopted by some organizations looking to frame HIPAA requirements in ways that make the potential consequences easier to understand. Other organizations have utilized NDAs as an attempt to mitigate litigation over potential malpractice.

The medical ethics traditionally surrounding the vow to "do no harm" seem to be at odds with the litigious reality of many medical malpractice suits brought about after medical errors. But some believe that disclosure of medical error or negligence is crucial to ethical medicine, and the NDAs that some physicians, organization employees, or even patients are supposed to sign can get in the way of that transparency.

Distinguish Respective Medicine, Law Priorities

It probably does not surprise you: Lawyers' interests sometimes differ from those of medical professionals. The difference in priorities is sometimes especially stark when a large organization is involved.

Lawyers representing an organization, especially in a malpractice case, draw on "adversarial traditions that resist transparency when resolving and preventing medical errors," said **William M. Sage, MD, JD**, professor at the **School of Law, The University of Texas at Austin**; **Joseph S. Jablonski, JD**, attorney; and **Eric J. Thomas, MD, MPH**, director of the **University of Texas Houston- Memorial Hermann Center for Healthcare Quality and Safety** in their study "Use of Nondisclosure Agreements in Medical Malpractice Settlements by a Large Academic Health Care System" in *JAMA Internal Medicine*.

This strategy is an active dismantling of the transparency that physicians generally try to uphold in medicine, and a nod toward the tightlipped reality of high-stakes litigation and the power of reputation to impact future patient visits. While physicians may not personally be proponents of NDAs, they are often at the mercy of their employers, and organizations that rely on their reputations to draw patients - and drive profits - may find the NDAs quite handy.

"A deny and defend mentality is deeply entrenched among attorneys who represent hospitals, healthcare professionals, and liability insurers. When claims are settled, payment to the plaintiff is usually conditioned on a signed release that often includes a nondisclosure provision or 'gag clause,'" Sage, Jablonski, and Thomas say.

Here's How Silencing Patients Incurs Costs

When settlements prevent patients from discussing their experiences, patients are obviously silenced - but so is the medical community at large, as information that could help prevent or forestall future medical errors is kept mum, Sage, Jablonski, and Thomas say. Fears about being sued or subject to other litigation play into the use of NDAs, too.

Settlements requiring NDAs may underscore a "belief, or rationalization, that medical care was not truly negligent in

many cases in which payment was made,” Sage, Jablonski, and Thomas say.

State laws vary; some states have crafted legislation that effectively bans medical nondisclosure agreements. Other states have laws on the books that say that a patient involved in a medical malpractice settlement must sign some version of an NDA in order to be paid, says **Paulson & Nace PLLC**, in Washington, D.C., in an online analysis.

“Under federal law, all settlements that physicians pay must be disclosed on their physician's profile, which is maintained by each state's board of medicine. The plaintiffs and financial terms of each settlement are not listed, however the number of claims that each physician has paid in the past ten years is listed,” Paulson & Nace say.

Physicians' and patients' hands may be tied if they live in a state that requires a confidentiality clause for malpractice settlements.

In their study, Sage, Jablonski, and Thomas concluded that the “scope of nondisclosure was often broader than seemed needed to protect physicians and hospitals from disparagement by the plaintiff or to avoid publicizing settlement amounts that might attract other claimants.”

NDAs sometimes prohibit reporting to a regulatory agency; this clause was utilized by the University of Texas health system until Sage, Jablonski, and Thomas released their findings.