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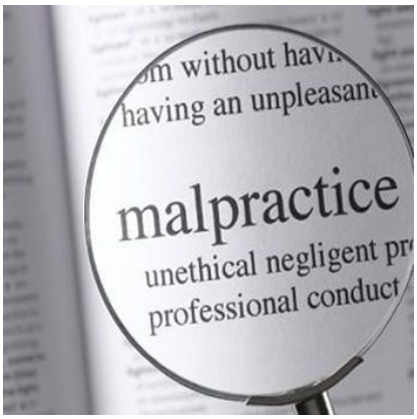
Medical Malpractice Nondisclosures - Fit for Purpose?



According to an article published by JAMA Internal Medicine, most medical malpractice settlements include nondisclosure clauses but there is little standardisation or consistency in their application.

The review was conducted by William M. Sage, MD, JD, of the School of Law at the University of Texas at Austin, and co-authors who 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 analysis showed that 715 malpractice claims were closed during the five years of the study and 150 settlements were paid out by the University of Texas System. The average compensation paid by the University for the 124 cases that met the study selection criteria was $185,372. A total of 110 settlement agreements included nondisclosure provisions:

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

The results also show 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.

“We found that nondisclosure agreements were used in most malpractice settlements, but with little standardisation 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, JD, Ph.D, M.Phil, of Stanford University, California, and Jeffrey N. Catalano, Esq, of Todd & Weld, Boston point out that there are some types of nondisclosure provisions that can never be justified while there are some that remain subject to negotiation. They suggest that settlement agreements should not restrict reporting to regulatory bodies because this puts patients in a difficult position where they have to choose between compensation and acting on a perceived ethical obligation. By adopting state statutes, there would be less burden and uncertainty for plaintiffs.

“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.

Source: JAMA Internal Medicine

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