Non-Disclosure Provisions in Medical Malpractice Settlements: The Silent Killer of Accountability and Patient Safety

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Introduction

Two of the primary goals of medical malpractice litigation are to promote patient safety and deter misconduct by medical professionals. These two goals are of paramount importance as patients are largely without a significant level of control over their outcome(s) once treatment begins. However, today, both of these goals are under fire in a variety of different ways. One of the, if not the most important, ways that they are under fire is by the inclusion of non-disclosure provisions in medical malpractice settlement agreements. These provisions typically condition payment, by means of settlement, on a very strict form of non-disclosure. Additionally, a large number of these provisions even preclude patients, or their families, from speaking to third-party, regulatory bodies about adverse medical outcomes suffered. This Note will first establish background by giving a cursory overview of medical malpractice law, the issues of patient health, and the current status of these types of settlements. The Note will then turn to a discussion of the current debate between medical malpractice plaintiffs' lawyers on this type of settlement in the field of medical malpractice law. Following this, the Note will provide a real-world example of issues with nondisclosure agreements in medical malpractice settlements. Finally, this Note will argue that the goals of medical malpractice litigation, professional ethics, and public policy support the prohibition, or at the very least a restriction on the severity, of medical malpractice settlements that condition payment on silence.

I. Where Are We Now?

Iatrogenic injuries, or avoidable injuries caused by a medical professional, are the third leading cause of death in the United States.[1] To put this in perspective, this means that iatrogenic injuries cause more death than COPD ("Chronic obstructive pulmonary disease"), firearms, suicide, and motor vehicles.[2] In fact, by

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1. Stephen Landsman & Michael J. Saks, Closing Death's Door 1 (2020).

2. Martin A. Makary & Michael Daniel, *Medical Error—The Third Leading Cause of Death in the US*, 353 BMJ i2139 (2016).

estimates, iatrogenic injuries cause only a few thousand less than the number of deaths as all of the aforementioned categories combined.[3] Despite the impact of iatrogenic injuries on American health, this is typically a category that is extremely overlooked when discussing the United States' health landscape. Medical malpractice litigation is one of the most important tools that exist to bring light to these issues in the healthcare landscape and push back against this harm. Medical malpractice litigation is as effective as it is because it advances two of the primary goals of medical malpractice litigation—deterrence against preventable conduct by offending physicians and the promotion of patient safety.[4]

Before an in-depth discussion of non-disclosure provisions in medical malpractice settlements, this Note will summarize the current landscape of medical malpractice outcomes. First and foremost, an essential piece of foundational knowledge is that the majority of medical "adverse events" do not become filed lawsuits.[5] In regard to the suits that are filed, it is estimated that "for every 100 adverse events, 4 malpractice insurer claim files are opened [, and] for every 100 *negligent* adverse events, 17 claim files are opened."[6] One study found that in examining "how nearly 200 patients dealt with medical care that they considered to be seriously unsatisfactory", "26% did nothing, 46% changed doctors, 25% complained to their doctor directly, and 9% contacted lawyers [but did not ultimately file lawsuits]."[7] Once an attorney accepts the case, which is also very unlikely,[8] the case then has the potential to go to trial. If the case reaches this stage, one study found that "of all cases that led to the opening of an insurance company file, 64% were eventually dropped, withdrawn, or dismissed; 27% resulted in a settlement with a payment to the plaintiff; and only about 8% proceeded to trial."[9] Additionally, plaintiffs typically must show moderate-to-strong evidence of medical error to have a high probability of receiving payment.[10]

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3. *Id.*

4. BERNARD S. BLACK, DAVID A. HYMAN, MYUNGHO PAIK, WILLIAM M. SAGE & CHARLES SILVER, MEDICAL MALPRACTICE LITIGATION 1–2 (2021).

5. LANDSMAN & SAKS, *supra* note 1 at 60.

6. *Id.*

7. *Id.* at 61.

8. *Id.* at 62 (discussing a study examining plaintiff's attorney's responses to prospective medical malpractice clients which found that, out of 730 potential client calls over a ten-day period, medical records were only obtained for 90, and out of those 90, 53 were then rejected by a consulting expert (in addition to others being rejected for various reasons). At the end, only 3%, or about 22, of the original 730 potential cases were actually filed.)

9. *Id.* at 63. The study referenced used data regarding the opening and resolution of insurance files from 60 United States medical malpractice insurers.

10. *Id.* at 64 (finding that if there is little or no evidence of physician error plaintiffs have a 19% chance of receiving payment, if there is slight-to-modest evidence plaintiffs have a 32% chance, if it is a close call (but <50–50) plaintiffs have a 52% chance, if it is a close call (but >50–50) plaintiffs have a 61% chance, if there is moderate-to-strong evidence plaintiffs have a 72% chance, & even if the evidence is virtually certain to show medical error plaintiffs only have an 84% chance).

II. SETTLEMENTS WITH NON-DISCLOSURE PROVISIONS

A. OVERVIEW

Settlements are a common way to end medical malpractice litigation.[11] Importantly, they are the most common way to receive a favorable outcome if you are the plaintiff, or the plaintiff's lawyer, in a medical malpractice case.[12] In fact, settlements comprise around 27% of cases that get past the screening stage.[13] Compare that with the 7% of post-screening stage cases that go to trial, with only 18% of those cases receiving a verdict favorable to the plaintiff,[14] and the picture becomes significantly clearer as to why settlements are the most frequent route for aggrieved patients, families, and their attorneys in the medical landscape.[15]

Within settlements, generally, there are various provisions that need to be agreed upon before payment is given.[16] The specific provisions focused on in this Note are the provisions, in the medical malpractice context, that condition payment on silence, otherwise known as non-disclosure provisions.

Non-disclosure provisions are commonly used in settlement agreements across a variety of different legal categories.[17] In fact, the vast majority of cases that settle in the civil context include these provisions.[18] Settlement agreements in the field of medical malpractice litigation are no different.[19] In 2015, William M. Sage, Joseph S. Jablonski, and Eric J. Thomas conducted a study that looked, retrospectively, at medical malpractice claims filed in the University of Texas System.[20] The study looked at claim files involving 6,000 faculty physicians, dentists, residents, and fellows at six medical campuses in five different cities and spanning five years, including claims closed in the fiscal years of 2001–2002, 2006–2007, 2009–2010, 2010–2011, and 2011–2012.[21] The study found that out

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11. *Id.* at 63.

12. Aaron E. Carroll, Parul Divya Parikh & Jennifer L. Buddenbaum, *The Impact of Defense Expenses in Medical Malpractice Claims*, 40 J.L. MED. & ETHICS 135, 138 (2012).

13. *Id.*

14. *Id.* at 137–39 (elaborating that that 18% of all cases going to trial ending in a positive verdict for the plaintiff ends up compromising only 1% of claims overall).

15. *Id.*

16. *See e.g.,* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Settlement Standards and Procedures*, https://www.eeoc.gov/regional-attorneys-manual/settlement-standards-and-procedures#section2b7 (last visited Apr. 15, 2023) [https://perma.cc/V98Z-V2RC].

17. Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 384 (1999) ("Confidentiality, however, is also critical to the ultimate settlement of many civil lawsuits. Secrecy undoubtedly facilitates the settlement process, and in some cases, compromise could not be reached without some assurance of its confidentiality.").

18. Erik S. Knutsen, *Keeping Settlements Secret*, 37 FLA. ST. U. L. REV. 945, 946 (2009).

19. *See infra* notes 20–27 and accompanying text.

20. William M. Sage, Joseph S. Jablonski & Eric J. Thomas, *Use of Nondisclosure Agreements in Medical Malpractice Settlements by a Large Academic Health Care System*, 175 JAMA INTERN. MED. 1130, 1130 (2015).

21. *Id.* at 1131 (specifying that in fiscal year 2001–2002 there were 244 claims with 60 settlements, in fiscal year 2006–2007 there were 142 claims with 24 settlements, in fiscal year 2009-2010 there were 100 claims

of the 124 settlements that occurred during the five-year study period, 110, or 88.7% of them, included non-disclosure agreements.[22] Although the language in the settlement agreements varied, the most common language regarding non-disclosure was as follows:

> Claimants agree to keep confidential and secret: (1) the facts and events made the basis of this claim, (2) the fact that this settlement has been made, (3) the amount of the consideration paid under the terms of this agreements, (4) the existence, details, or terms of this agreement and any facts regarding the negotiation of this Confidential Agreement of Settlement, Release and Indemnification from any third parties, except for legitimate financial, banking, or accounting purposes, or pursuant to court order, or as required by the Texas Rules of Civil Procedure or Texas law.
>
> The agreement to keep all these matters confidential and secret from "any third parties" specifically means that Claimants agree never to disclose any of this confidential information to any members of the media, any organizations or companies, any governmental entities, the Texas Medical Board (even an anonymous complaint), and any other organization regulating health care in any manner.[23]

The authors found that, among the varying language in the nondisclosure agreements, 100% of settlements prohibited disclosure of the dollar amount of the settlements, and 100% of the settlements prohibited disclosure of the terms of the settlement itself.[24] Additionally, a majority, the actual number being around 68%, of the cases prohibited any disclosure to the media, and around 55% of cases prohibited disclosure of the fact that a settlement was even reached.[25] Other clauses in these agreements were prevalent as well.[26] Regarding these other clauses, 46.4% prohibited disclosure of the facts of the claim by the attorney, 29% prohibited reporting to regulatory agencies, and 10% prevented disclosure by physicians and hospitals as well as the individual claimant.[27]

B. CURRENT DEBATE

Two different camps naturally emerge when thinking about the debate surrounding medical malpractice settlements with non-disclosure provisions. The two natural camps are a "Pro-Nondisclosure" side and an "Anti-Nondisclosure side."[28] In this framework, the "Pro-Nondisclosure" side stands for the proposition

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with 17 settlements, in fiscal year 2010–2011 there were 114 claims with 25 settlements, in fiscal year 2011–2012 there were 115 claims with 24 settlements).

22. *Id*. at 1132.
23. *Id*.
24. *Id*. at 1133.
25. *Id*.
26. *Id*.
27. *Id*.
28. *See infra* notes 31, 36.

that the benefits of non-disclosure provisions outweigh the negatives.[29] Contrarily, the "Anti-Nondisclosure" side stands for the proposition that the negatives of non-disclosure provisions outweigh the benefits.[30]

The "Pro-Nondisclosure" side argues there are a variety of benefits that outweigh the cost of potentially decreased patient safety and loss of deterrence opportunities.[31] One argued benefit is that it can lead to greater payouts for plaintiffs seeking restitution for alleged injuries.[32] This argument works in tandem with another alleged benefit—the benefit that without disclosing certain things about the settlement or even the settlement itself, physicians and hospitals can settle claims that they believe may not truly have been the fault of the defendant.[33] The reasons for doing so are numerous, but without the specter of future, frivolous litigation due to the non-disclosure provisions, defendants can do so without opening themselves up to future liability.[34] Another benefit that "Pro-Nondisclosure" advocates argue is that "defendants may be willing to pay extra and settle more quickly."[35]

However, the "Anti-Nondisclosure" side argues that these benefits cannot measure up to the cost of loss of future patient safety and deterrence.[36] One of the significant overarching principles behind "Anti-Nondisclosure" arguments is that "patients should not be forced to choose between compensation and acting on a perceived ethical obligation to try to prevent harm to others . . . ."[37] Regarding deterrence, "Anti-Nondisclosure" advocates believe, at the very least, that settlement agreements should not be able to prohibit disclosure to third-party, regulatory bodies.[38] The argument works in tandem with the argument that without transparency behind settlements, defendants are less likely to face pressure that may cause them to reevaluate their standard of care.[39] Furthermore, "Anti-Nondisclosure" advocates argue that the lack of transparency impedes attempts to increase patient safety.[40]

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29. *See infra* note 31.

30. *See infra* note 36.

31. *See, e.g.*, *Should Medical Malpractice and Other Personal Injury Settlements Be Confidential*, Nelson MacNeil Rayfield Trial Attorneys PC https://nelsonmacneil.com/blog/should-medical-malpractice-and-other-personal-injury-settlements-be-confidential/ [https://perma.cc/6D7W-YVCN] (last visited Apr. 3, 6:37 PM).

32. *See* Michelle M. Mello & Jeffrey N. Catalano, *Should Malpractice Settlements Be Secret?*, 175 JAMA INTERN. MED. 1135, 1135 (2015).

33. *Id.*

34. *Id.*

35. *Id.* at 1136.

36. Nelson MacNeil Rayfield Trial Attorneys PC, *supra* note 31; *See also Secret Settlements – Our Stand*, Patrick Malone & Associates, P.C. https://www.patrickmalonelaw.com/about-us/secret-settlements-our-stand/ [https://perma.cc/A593-YV4L] (last visited Mar. 20, 11:54 PM).

37. Mello & Catalano, *supra* note 32 at 1136.

38. *Id.* at 1135–36.

39. *Id.*

40. Sage et al., *supra* note 20 ("There is increasing consensus, even among early proponents of protected peer review, that greater transparency to patients and the public is necessary for safety to improve.").

III. REAL-WORLD IMPACT

There are various instances that have encapsulated the problem with non-disclosure provisions in medical malpractice settlements. One example is the case of "Dr. Death," a Texas neurosurgeon who was recently found guilty of maiming a woman during surgery.[41] The aforementioned "Dr. Death" evaded potential prior legal issues as a result of the fact that a series of lawsuits against him culminated in the signing of non-disclosure agreements.[42] However, one of the clearest examples that embodies the problem of non-disclosure agreements in medical malpractice settlements is the relatively unknown story of a New Hampshire cardiac surgeon named Dr. Yvon Baribeau.

Dr. Yvon Baribeau was an "innovative" and "accomplished" cardiac surgeon at the Catholic Medical Center ("CMC") in Manchester, New Hampshire.[43] Born and trained in Canada, Dr. Baribeau was one of the hospital's "busiest and best-paid" surgeons.[44] Even after his retirement in 2019, CMC and its hospital officials would continue to describe him glowingly.[45]

However, Dr. Baribeau carried a very dark secret through the three decades that he worked for CMC.[46] As a Boston Globe investigation team found out in 2022, Dr. Baribeau had "one of the worst surgical malpractice records among all physicians in the United States."[47] Throughout his time working for CMC, he settled twenty-one medical malpractice claims connected to his work, including "14 in which he is accused of contributing to a patient's death."[48] To put this in comparison, a study of "125 current, retired, and other non-practicing cardiac surgeons affiliated with the city's top teaching hospitals" found that out of the 125 cardiac surgeons only twelve had malpractice settlements, and only two of those had multiple.[49] Patients to CMC also had no way of discerning this record of Dr. Baribeau due to the New Hampshire Medical Board's website showing his record to be clean.[50] Although his record, on its face, appeared to be clean, the medical staff at CMC knew about his surgical issues, even to the point where one

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41. Travis Andrews, *Texas Neurosurgeon Nicknamed "Dr. Death" Found Guilty of Maiming Woman During Surgery*, The Washington Post (Feb. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/16/texas-neurosurgeon-nicknamed-dr-death-found-guilty-of-maiming-woman-during-surgery/ [https://perma.cc/2XDT-EGT6].

42. *Id*. at 3.

43. Deirdre Fernandes, Liz Kowalczyk, Rebecca Ostriker & Jonathan Saltzman, *A Celebration Surgeon, A Trail of Secrets and Death*, The Boston Globe (Sep. 7, 2022), https://apps.bostonglobe.com/2022/09/07/metro/investigations/spotlight/trail-of-secrets-and-death/yvon-baribeau-malpractice-manchester-new-hampshire/ [https://perma.cc/3FYC-V4TL].

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

former cardiologist at CMC actually filed a federal whistle-blower suit about Dr. Baribeau's misconduct in various cases.[51]

However, the numbers are only one side of the story. The cases themselves highlight the problem of Dr. Baribeau much more than statistics alone.[52] In one case, a patient of Dr. Baribeau died after losing enough blood to warrant transfusions equal to nearly five times her own blood volume due to the alleged surgical errors of Dr. Baribeau.[53] In another case, Dr. Baribeau allegedly sawed his patient's sternum off-center at the beginning of an open-heart procedure which led to severe complications and a months-long stint for the patient in the hospital's Intensive Care Unit ("ICU").[54]

One may ask how a prominent surgeon such as Dr. Baribeau's record remained spotless until the Boston Globe's investigation in 2022, a full three years after his retirement.[55] Some may say that the responsibility lies with Dr. Baribeau or the hospital as they swept under the rug reports of his misconduct throughout his tenure at CMC. Although this is true, and both CMC and Dr. Baribeau share a large amount of the blame for the lack of transparency regarding issues arising from his medical care, non-disclosure provisions in settlements that Dr. Baribeau entered into with the patients are a major culprit.

Many families that brought medical malpractice claims against Dr. Baribeau during his quarter of a century at CMC agreed to settlements that conditioned payment upon the signing of a non-disclosure provision.[56] Not only did this prohibit them from speaking to the Boston Globe about their experience(s), but these settlements also precluded them from speaking out to alert other potential patients and their families of Dr. Baribeau's conduct.[57] Liz Kowalczyk, one of the reporters and writers of the Boston Globe article about Dr. Baribeau, highlighted the major issues with non-disclosure provisions in settlements both in this case and on the whole, saying:

> I think it's one of the things that contributes to secrecy around medical errors. Most plaintiffs law firms who are representing patients and families will agree to these nondisclosure agreements because often the families just want to get this done. They want to settle. The law firms are also money on the line. They get a portion of that settlement. But there are some law firms who do resist this. But I think that this is a problem, and it certainly was a challenge in our reporting because there were a lot of families that wanted to talk about what happened, but they were bound by these non-disclosure agreements and non-disparagement agreements. And that really limited in fact, it basically

51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*

> prohibited them from talking to us. And so we had to get our information other ways.[58]

The case of Dr. Yvon Baribeau highlights, in very clear ways, the reasons that non-disclosure provisions hamper the two primary goals of medical malpractice litigation. Regarding deterrence, when a doctor is able to sweep instances of settled malpractice suits under the proverbial rug, they face no adverse effects, such as discipline or loss of patient trust, that would deter them from future medical misconduct. Further, the goal of promoting patient safety is significantly hindered in instances such as these, as prospective patients are unable to protect themselves without seeing the entire picture of who their potential future physician is as a medical professional.

IV. IMPLICATIONS

Although, on the whole, this Note disagrees with the use of nondisclosure agreements in medical malpractice settlements and recommends for their use to be discontinued, various concerns must be addressed in order for this recommendation to be seen, even if slightly, to be more practical. To start, a central implication to be discussed regards ethical considerations. Ethical considerations are important to be discussed, as a lawyer's responsibilities and duties to the represented patient and/or their families should be of the deepest concern. Further, public policy concerns, as in most legal fields regarding civil remedies, must also be addressed. To be specific, the most relevant public policy concerns are patient health and transparency in the healthcare process.

A. ETHICAL CONSIDERATIONS

Various ethical considerations underpin the complexities of issues surrounding medical malpractice settlements. As this Note focuses on the attorney-client side of debates on non-disclosure agreements, the question turns to a lawyer's responsibilities and duties. The *Model Rules of Professional Conduct* ("*Model Rules*"), a list of national guiding rules regarding the ethical conduct of legal professionals[59], provide guideposts for this discussion. The most pertinent rules regarding discussions surrounding non-disclosure agreements in the context of medical malpractice representation are the Preamble of the *Model Rules*, Rule 1.1, and Rule 1.2.[60]

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58. Julia Furukawa, *The N.H. surgeon who had the worst record for malpractice death settlements in the nation*, NEW HAMPSHIRE PUBLIC RADIO, at 4:53 (Sep. 16, 2022), https://www.nhpr.org/nh-news/2022-09-16/new-hampshire-nh-surgeon-who-had-the-worst-record-for-malpractice-death-settlements-in-the-nation [https://perma.cc/4Z32-4BFP].

59. Nathan M. Crystal, *The Incompleteness of the Model Rules and the Development of Professional Standards*, 52 Mercer L. Rev. 839, 841 (2001).

60. *See infra* notes 61–67 and accompanying text.

The Preamble of the *Model Rules* lays out a lawyer's responsibilities.[61] The relevant provision in the *Model Rules* states that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[62] As the *Model Rules* lay out, these goals are typically harmonious with one another but have the potential to stand in conflict with each other.[63] Here, if one agrees with the proposition that non-disclosure provisions in medical malpractice settlement agreements are a blight on the medical malpractice legal landscape, or at the very least are a net negative, this conflict is readily apparent. The lawyer faces a conflict between their duties as a public citizen, which would compel them to attempt to change the landscape of these provisions in medical malpractice settlements or, at the very least, attempt to persuade their clients and/or practice to stray away from their use, with their duties as a representative of clients, which would seem to compel them to adhere to an individual plaintiff's probable goal of compensation for their injury. However, this conflict may be nonexistent if a plaintiff's attorney, or attorney group, chooses to make a policy that prohibits clients from entering into these nondisclosure provisions while also advocating for the elimination of them on the whole.

The Model Rules' Rule 1.1 presents issues in a similar vein as the Preamble. Rule 1.1 says that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[64] This Rule has the potential to come into conflict with a lawyer's opposition to non-disclosure provisions as one could argue that a lawyer's duty of competence in the medical malpractice context would compel them to find the best route of success for their client, and thus, as doctors and hospital systems are more likely to settle in agreements that contain nondisclosure provisions,[65] a competent lawyer would advise a client to look for the best chance of a positive outcome for recovering for the injuries suffered in their individual case. However, similar to the previous section, this ethical concern can be mostly avoided by maintaining a practice that makes clear that they do not support the implementation of these settlements from both the onset and throughout the entirety of legal representation.

Similarly, Rule 1.2 provides, at first glance, issues for a lawyer who disagrees with non-disclosure provisions in medical malpractice settlement agreements. Model Rule 1.2 states, in the pertinent section, that "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . [and a] lawyer

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61. MODEL RULES OF PROF'L CONDUCT pmbl. (2018) [hereinafter MODEL RULES].

62. MODEL RULES pmbl. ¶ 1; *see also* MODEL RULES pmbl. ¶ 6 ("As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.").

63. MODEL RULES pmbl. ¶¶ 8–9.

64. MODEL RULES R. 1.1.

65. Carroll et al., *supra* note 12.

shall abide by a client's decision whether to settle a matter."[66] This would seem to preclude lawyers from disagreeing with a client when the client wants to receive compensation through a settlement agreement that prohibits disclosure. However, Comment 6 to Rule 1.2 provides an answer to this perceived issue. Comment 6 says that "[t]he scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client."[67] Thus, similar to the previous solutions to apparent tension between a lawyer's duties to the individual client, a lawyer could mostly avoid these ethical issues by making it clear at the offset where they stand in regard to nondisclosure provisions prior to representation.

Additionally, one interesting path that can be embarked upon in discussions regarding the ethical implications of non-disclosure provisions in medical malpractice settlement agreements comes from looking at the American Medical Association Principles of Medical Ethics and Code of Medical Ethics. The Principles of Medical Ethics begins by stating that:

> The medical profession has long subscribed to a body of ethical statements developed primarily for the benefit of the patient. As a member of this profession, a physician must recognize responsibility to patients first and foremost, as well as to society, to other health professionals, and to self. The following *Principles* adopted by the American Medical Association are not laws, but standards of conduct that define the essentials of honorable behavior for the physician.[68]

This preamble helps to clarify the scope and purpose of the AMA's Principles of Medical Ethics. Similar to the *Model Rules of Professional Conduct*, the Principles of Medical Ethics help to define a proper course of conduct for medical professionals. Pertinent sections of the Principles read:

> I. A physician shall be dedicated to providing competent medical care, with compassion and respect for human dignity and rights.
> II. A physician shall uphold the standards of professionalism, be honest in all professional interactions, and strive to report physicians deficient in character or competence, or engaging in fraud or deception, to appropriate entities.
> III. A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient.
> IV. A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law.

66. MODEL RULES R. 1.2(a).
67. MODEL RULES R. 1.2, cmt. 6.
68. PRINCIPLES OF MEDICAL ETHICS, Principles (AM. MED. ASS'N. 2001).

> V. A physician shall recognize a responsibility to participate in activities contributing to the improvement of the community and the betterment of public health.[69]

These sections help to define the role of medical professionals not only in the context of their duties owed to their individual patients on a case-by-case basis, but also regarding their duties to the communities in which they collectively operate as well.[70]

Standing alone, the aforementioned sections of the Principles of Medical Conduct seem to support advocating against non-disclosure provisions in medical malpractice settlements. In regard to Principle 1, a physician promoting competent medical care with compassion and respect should be advocating for transparency in the medical process, as this is a way in which they can ensure their dedication. Regarding Principle II, professionalism and honesty would seem to find the same conclusion as above regarding transparency. Similarly, Principles III, IV, and VII would support the conclusion that not only should a physician oppose non-disclosure provisions in their own conduct, but they should additionally advocate for the ending of them in the profession as a whole. Opinion 8.6 of the Code of Medical Ethics can additionally be shown as supporting the above arguments as it says, "[o]pen communication is fundamental to the trust that underlies the patient-physician relationship, and physicians have an obligation to deal honestly with patients at all times, in addition to their obligation to promote patient welfare and safety."[71]

B. PUBLIC POLICY

There are a myriad of public policy concerns surrounding the debate on non-disclosure provisions in medical malpractice settlements. The two most significant of these concerns relate to patient health and transparency in health care.

The first major category of public policy pertains to the issue of patient health. As the real-world example of Dr. Yvon Baribeau[72] showcases, repeat offenders can become a significant issue in the current landscape of medical malpractice settlements and non-disclosure provisions. Opponents of reform regarding non-disclosure provisions will likely highlight the aforementioned benefits of the inclusion of these provisions, especially in regard to compensating plaintiffs for medical injury.[73] Opponents to reform would also likely argue that regardless of the number of non-disclosure settlements entered into, the plaintiffs that are entering into these agreements are always receiving some form of compensation for their injuries. However, the sole focus on the goal of compensation removes

69. *Id.* §§ I, II, III, IV, & VII.
70. *Id.*
71. AMERICAN MEDICAL ASSOCIATION, Code of Medical Ethics, Op. 8.6 Promoting Patient Safety.
72. *See* discussion s*upra* Section III.
73. *See* discussion s*upra* Section II.B.

one of the biggest priorities of medical malpractice litigation— the promotion of patient safety. Patient safety requires that doctors and hospitals promote the highest degree of care possible. This is especially important as patients have no control over their outcomes once they submit themselves to the care of a medical professional. If we allow for these types of settlements, doctors similar to "Dr. Death" and Dr. Baribeau are allowed to further risk patient safety with no clear indicator for future patients that would allow them the ability to assess the likelihood of a potential adverse outcome.

Another major topic when discussing public policy relates to discussions of increased transparency in the broader healthcare landscape. As improving any system requires problems to be seen and noticed by others, anything that prohibits problems from seeing the "light of day" by their very nature impede progress. Non-disclosure provisions are one of the starkest examples of this issue, and it is important to remove the cover that they place over the gravity of the problem of adverse medical outcomes. Referring again back to Dr. Yvon Baribeau, a lack of transparency is a major part of what allowed for the volume of malpractice cases to accrue under his medical care.[74] With increased transparency, patient safety can improve when hospitals and individual doctors are forced to confront issues that may have lied beneath the surface previously. Additionally, transparency, by its nature, has the potential to have a deterrent effect on medical professionals who have had prior issues with adverse outcomes for their patients. Without a shield over their conduct, they could then be forced to reassess their quality of care and how to prevent adverse outcomes from happening to the best of their ability.

V. RECOMMENDATIONS

Any discussion of recommendations regarding non-disclosure agreements in medical malpractice settlements requires a reminder of two of the primary goals of medical malpractice litigation: deterrence and promotion of patient safety. There is also a potentially conflicting partner goal: compensation. This Note suggests three primary, but not exclusive, recommendations that help to advance these two goals. These recommendations are to limit the scope of the non-disclosure agreements themselves, to attempt to level the "playing field" in terms of the bargaining power between the future plaintiff and the future defendant, and/or to place a cap either administratively or legislatively on the amount of non-disclosure settlement agreements that a doctor and/or hospital system can enter into.

The first recommendation is to limit the scope of the actual non-disclosure provisions in medical malpractice settlement agreements. There are two different paths that this recommendation can take. The first is limiting the scope of non-disclosure provisions in general. This would consist of effectively removing non-

74. Fernandes et al., *supra* note 43.

disclosure agreements from medical malpractice settlements so that the resulting settlements would have no provisions prohibiting disclosure. This solution may seem too jarring to be practical in an actual reforming capacity, but, in fact, it is one that is being carried out in other fields in which non-disclosure provisions are prevalent in settlement agreements.[75] This solution has the potential to promote the two goals of medical malpractice litigation in different ways. It seeks to promote patient safety by allowing prospective patients, and their families, to have access to any pertinent information about a doctor's and/or hospital system's paid-out cases of medical malpractice. This will allow prospective patients and/or families to make an informed decision about the amount of risk that they may be undertaking by consenting to a procedure by that specific doctor and/or hospital system. This solution additionally promotes the goal of deterrence by, as a byproduct of reducing transparency by virtue of the non-disclosure provision(s), forcing doctors to be even more careful in their healthcare actions to prevent unwanted paid-out claims to patients. Another route is to limit certain non-disclosure provisions in medical malpractice settlements. This solution may be more legislatively practical as instead of removing all secrecy from medical malpractice settlements— it would only prohibit certain, potentially severely harmful, provisions such as a prohibition on reporting to third parties (such as regulatory bodies) anything about the settlement and/or the existence of the settlement itself. This would promote both goals of medical malpractice litigation in a similar way as the above suggestion. However, the downside is that without full transparency regarding settlements, both goals, deterrence and the promotion of patient safety, may not be fully promoted. Importantly, to understand the practicality and/or impact of the aforementioned recommendations, there would first need to be studies on the efficacy of cutting against nondisclosure provisions in the medical malpractice context, and additionally, if the more severe solution does, in fact, actually promote the goals of patient health and deterrence more than the less strict solution.

Another recommendation would be to try and find ways to level the proverbial playing field in terms of bargaining power between the patient and/or their families and the defendant healthcare party. As it is very unlikely for a plaintiff's claim to pay out[76], patients and/or their families often are faced with the unsavory prospect of either having to choose between an actual, if not perceived, unfair settlement and leaving the litigation receiving no compensation at all for their injuries. As elaborated by a paper authored by Philip G. Peters entitled "The Fairness of Malpractice Settlements":

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75. *See e.g.,* S.B. 331, 2021 Cal. Senate, Reg. Sess. 2021-2022 (Cal. 2021) (bill signed into law prohibiting provisions in settlement agreements that restrict disclosure of certain factual information); S.B. 0075, 101st Gen. Assemb., 2019 Leg. Service (Ill. 2019) (bill signed into law generally prohibiting employers from entering into agreements that contain nondisclosure clauses); S.B. 6577, 2019 NY Senate, 244th Leg. Sess. (NY 2019) (bill signed into law prohibiting nondisclosure agreements related to discrimination).

76. Carroll et al., *supra* note 12, at 138.

> The superior bargaining power possessed by malpractice defendants probably has several sources. Those sources include superior risk tolerance, better access to information, more experienced attorneys and insurance representatives, easier access to expert witnesses, and the incentive to fight low-odds claims vigorously. Defendants probably gain additional bargaining power from the fact that malpractice claims are very hard to win at trial, even with strong evidence of negligence.[77]

"Leveling the playing field" could take a variety of forms. The most likely to succeed in a practical sense would be to increase the incentive to fight medical malpractice claims that have seemingly lower odds of success vigorously. This could take the form of removing damage caps, thus incentivizing more plaintiffs to take advantage of medical malpractice litigation. In doing this, plaintiffs would be able to bring a higher volume of claims. As a result, this means that those more likely to succeed could have a lessened burden in their respective litigation because the defendant is also facing the potential of other incoming litigation. However, a natural argument against this solution would be that in doing this, the medical malpractice landscape would open itself up to a tremendous amount of frivolous litigation.

Finally, another proposed solution would be to place a legislative or administrative (on a hospital-by-hospital basis if the legislature is not inclined) cap on the number of settlements with non-disclosure provisions that a doctor and/or hospital system can enter into. This would advance both goals of increased patient safety and deterrence. Regarding patient safety, a cap on the amount of nondisclosure settlements might force hospital systems to reevaluate doctors after they have entered into their first settlement agreement to determine whether they are at a higher risk for, if they were actually at fault, causing more injury to patients further down the road. Additionally, regarding deterrence, doctors will be far more cautious when undertaking their normal duties as they know that they only have a certain number of instances in which they could make their alleged case of medical malpractice secret. They will also be forced to reevaluate their own standards of practice if they are near the cap for non-disclosure agreements, as any future agreements may significantly impede their ability to continue in their practice and harm their reputation as a medical professional.

VI. LIMITATIONS

It is important to recognize that non-disclosure is a uniquely difficult area of research. As most of the information needed to accurately analyze and understand the problem is hidden within previously signed non-disclosure provisions, there is not a lot of data and evidence in any substantive discussion on their impact. Thus, there is more research that needs to be conducted and studied before the

77. Phillip G. Peters Jr., *The Fairness of Malpractice Settlements*, 30 REGUL. 30, 31 (2007).

gravity of this problem can be truly defined. One important future point of research is on the statistical likelihood of doctors who have been a part of settlements with non-disclosure provisions reoffending. This point of research is both necessary and valuable as, in order to determine the level of deterrence that the prohibition of non-disclosure agreements would have in the medical malpractice litigation context, we must first know the level of offending doctor recidivism post-settlement. Another important question to ask is if there is a connection between general deterrence and medical malpractice settlements that do not include non-disclosure provisions. Similarly, this point of research is important simply because we need information on deterrence to organize a more substantive discussion of the impact of settlements with non-disclosure provisions. A third and final important point of research would be to study the connection between the prevalence and strictness of provisions within the non-disclosure provisions and the race, gender, and/or socioeconomic status of the patient, or patient's family, agreeing to the settlement. In discussions regarding medical malpractice settlements, this is a relatively, and unfortunately, under-discussed area of study. However, the under-discussion of the above factors is a major disservice in this field, as in order to begin to discuss solutions that balance the proverbial playing field in terms of bargaining power, we must first understand the varying level of disparities that occur across the spectrum of settlements regarding patient adverse health outcomes. Additionally, this point of research would help significantly in discussions regarding the reformations of non-disclosure agreements and provisions.

VII. CONCLUSION

Iatrogenic injuries are one of the most prevalent causes of death in the United States.[78] In fact, iatrogenic injuries are the third leading cause of death in the entire United States.[79] This fact alone means that these issues need to be urgently addressed. As settlements are the most common way for legal issues regarding patient safety to end in a manner that allows patient compensation, it is important to assess the settlements and the various provisions that exist inside of them.[80]

Nondisclosure provisions in medical malpractice settlements have a net-negative effect on two of the primary goals of medical malpractice litigation—deterrence and compensation. Although it could seem that the benefits of individual compensation may outweigh the potential costs, there is no place in the legal or medical field to place a plaintiff in a position in which they are deciding between individual compensation and making sure others are safe in the future. The

78. LANDSMAN & SAKS, *supra* note 1.
79. Makary & Daniel, *supra* note 2.
80. LANDSMAN & SAKS, *supra* note 1 at 63.

potential lack of deterrence and the hindrances to progress regarding patient safety are very strong when analyzing the impact of non-disclosure agreements in medical malpractice settlements. By allowing non-disclosure agreements to run rampant in both the amount and severity of their provisions, it is only a matter of time before the next Dr. Baribeau starts accruing secret medical malpractice settlements, if they have not already.