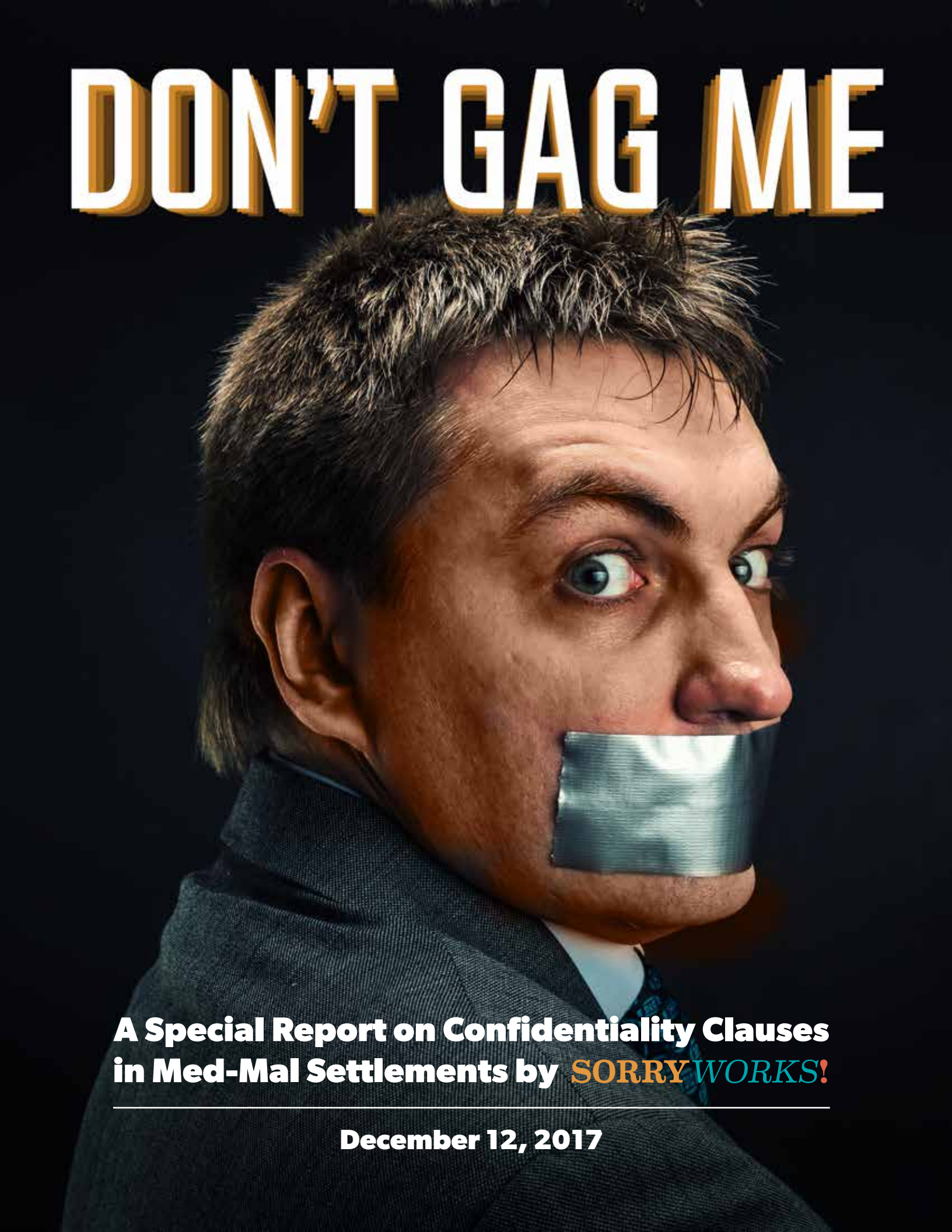
DON'T GAG ME



A Special Report on Confidentiality Clauses in Med-Mal Settlements by SORRY*WORKS*!

December 12, 2017

Executive Summary

We interviewed and surveyed stakeholders in the medical malpractice field to learn about confidentiality clauses in settlements or gag orders with disclosure and apology becoming more prevalent. Stakeholders included plaintiff's and defense lawyers, patients and families, risk managers, doctors and nurses, hospital and nursing homes executives, insurance professionals, and medical/legal reporters. Respondents shared that gag orders are commonly used in settlement negotiations (another check box on the way to a settlement), but not in a uniform manner. Consumers are fearful of violating gag orders, but confidentiality clauses are not realistically enforceable against patients and families and do little to nothing to impede plaintiff's attorneys. Unfortunately, gag orders appear to limit sharing and learning from medical errors, especially between healthcare organizations and across the healthcare industry. Sorry Works! believes gag orders harm patient safety efforts and lead to more preventable medical errors that injure and kill patients. Recommendations include:

1. Settlements with no confidentiality clauses and case details (without names or monetary figures) being shared to improve patient safety.
2. Development of "advocacy clauses" in settlement documents to educate consumers and clinicians about the ways their stories can be used to improve patient safety.
3. Crafting HIPAA waivers so a hospital, nursing home, or clinician is not gagged in responding to a media story.
4. Creation of a voluntary nationwide database of closed claims to further increase learning from medical errors.

About Sorry Works!

Sorry Works! is a 501c3 non-profit and the nation's leading disclosure training organization. Over the last 13 years, Sorry Works! has taught disclosure principles to thousands of healthcare, insurance, and legal professionals. The Sorry Works! content (books, booklets, website, etc) have become the "go to" references for healthcare, insurance, and legal professionals interested in disclosure and apology. For more information, visit our website (**www.sorryworks.net**), call **618-559-8168**, or e-mail **doug@sorryworks.net**.

SORRY*WORKS*!

Introduction

For over 13 years, Sorry Works! has taught disclosure principles to healthcare, insurance, and legal professionals in every conceivable venue around the United States. We believe post-event disclosure and transparency are critical not only for healing and reconciliation among patients, families, and clinicians, but also to increase patient safety in acute and long-term care facilities. Indeed, many of us can remember some version of the following quote from our high school history teachers: *"Those who fail to learn from their mistakes are doomed to repeat them."* At Sorry Works!, we strongly believe disclosure is the gateway to the patient safety movement.

We have had thousands of conversations with stakeholders in the medical malpractice arena, including doctors, nurses, patients, families, risk managers, defense lawyers, plaintiff's lawyers, hospital and nursing home administrators, insurance executives, university researchers, and journalists with popular and trade media outlets. One theme that was constantly raised/mentioned by attorneys (defense and plaintiff's) as well as risk managers was the repetitious nature of cases – the same or very similar fact patterns constantly being litigated. Several attorneys would ask rhetorically, *"When will these doctors learn?"* During numerous conversations with front-line medical staff, many clinicians stated they typically do not learn how adverse events are resolved. One Kansas nurse flatly stated, *"The lawyers sweep in, the family disappears, and the case goes into a black hole. We never hear how anything is resolved."* Many patients and families claimed to having been forced to sign gag orders when settling a case. Some families asserted they could not talk about anything related to their case lest the hospital or nursing home claw back their settlement dollars.

So, what exactly is going on with confidentiality clauses in settlements, or "gag orders" as many people refer to them? Are gag orders a reality, or an urban legend...the proverbial monster under my eight year's old bed? Are non-disclosure agreements impeding the patient safety movement, or not? And with disclosure gaining popularity in hospitals and nursing homes, do we need to think anew about confidentiality clauses in settlement agreements?

In developing this report, Sorry Works! queried and interviewed stakeholders throughout the medical malpractice field, from lawyers (defense and plaintiff's) and patients to doctors, nurses, and healthcare and insurance executives. We directly interviewed dozens of people, and also broadcast our survey questions through Sorry Works! e-newsletters, Sorry Works! blog, and Sorry Works! social media outlets (Facebook, Twitter, LinkedIn). We cast a wide net, and received many responses. We also searched news stories and scholarly articles on this topic. We worked hard to ensure we had a 360 degree look at this issue. We strove to understand all the different perspectives, *including why ethical, well-intentioned people believe non-disclosure agreements are an important component of any settlement process.*

This report will begin with some anecdotes, and then discuss our survey questions and interviews. The report will conclude with results, discussion, and recommendations.

The goal of this report is to plant seeds and get people thinking and talking about this issue. We want to spread this report far and wide, including sharing at conferences such as ASHRM, DRI, and others. We are not interested in legislation or regulatory edict because such a path involves too much work, time, money, and is often not successful or effective. Instead, as we have done with the disclosure movement, we hope to change the hearts and minds of some lawyers and healthcare and insurance executives. If we can get a few insurers and healthcare facilities to change the way they address settlements and confidentiality clauses *and share those experiences, others will eventually follow*.

Let's begin.

Some Stories to Consider

What follows are true stories to begin our discussion. Some of these stories will inspire, others will probably make readers want to pull their hair out. Nonetheless, these tales represent both the status quo and possibilities with the gag order issue.

Dr. Christopher Duntsch is a neurosurgeon who was convicted in February 2017 by a Texas jury of maiming patients at several Texas hospitals and sentenced to life in prison. A Google search provides numerous stories about Dr. Duntsch, including ***D Magazine*** (1) which offered the following passage germane to this report:

> ***"But patient advocates and the surgeons that mobilized to rid him of his license say that Duntsch was the perfect storm. Nobody stopped him soon enough. The hospitals didn't do their due diligence until it was too late, and those who could've spoken up didn't. Every patient mentioned in this story who has sued, except for Passmore, has settled. They all signed nondisclosure agreements that prohibit them from discussing their cases or their monetary awards. As one lawyer told me off the record, they faced an almost impossible dilemma: settle and their families have a financial cushion for future medical costs but sacrifice their right to tell their stories."***

Prominent patient safety advocate Christopher Jerry lost his two-year old daughter, Emily, in 2006 to a massive dosing error caused by a hospital pharmacy. According to Fox News ("Beware: Danger at the Doctor") (2), ***"The Jerry family received a marginal settlement from the hospital that was because Chris (Jerry) refused to sign a full non-disclosure agreement. He (Chris) wanted to keep Emily's story alive."*** Fox News also reported that a strong disagreement about the gag order between Chris and wife Kelly led to their divorce.

Today, Chris Jerry leads the Emily Jerry Foundation and uses his daughter's story to advocate for patient safety around the United States. Consider the following post from the foundation's website:

> *"As a nursing student, one of our assignments is to write an essay about medication errors and their dangers. As I sit here reading your story, tears are pouring down my face! I cannot imagine the heartache your family has gone through. That picture of your sweet Emily will stay in my memory forever and I will do everything humanly possible to prevent any medication errors that could occur in my career as a nurse. This story has touched me deeply and I am going to print it out and give it to all my classmates. Hopefully this story will prevent any one of us from making such a tragic mistake. I am so sorry for your loss. I hope that you can find some sort of comfort in the good that you are doing in your sweet daughter's name.* – Ashli. (3)

There are many other inspiring quotes on the website of the Emily Jerry Foundation (www.emilyjerryfoundation.org) and Chris is a frequent speaker before healthcare organizations around the United States.

The Chicago Tribune ran a series of stories entitled *"Unhealthy Hospitals"* which featured a Connecticut hospital with high infection rates among cardiac surgery patients. The Tribune story quoted the widower of one patient and mentioned another patient by name – but both families had signed non-disclosure agreements in settling with the hospital. The hospital sued the two families claiming breach of contract, but dropped the suits after only two days due to a media uproar (4, 5).

A California woman sued a hospital after an alleged botched operation and settled for $3.5 million. When asked for a comment by the media about her case, she replied that *"she, her four children, and her attorneys had signed gag orders, and were not allowed to discuss the settlement."* The interim president of the hospital offered an opaque response, *"Patient care is our highest priority, and we respect the privacy of our patients and legally cannot discuss the specifics of their care....we are pleased to have reached a resolution in this matter."* Despite the closed lips, the media was able to report many facts about the case, including the names of the clinicians, by searching court filings (6).

A sponge was left in a North Carolina woman during surgery which led to a massive infection and additional surgery. The patient signed a confidentiality agreement with the hospital as part of a settlement and she honored that agreement for 20 years before deciding it was time to speak out. The media eagerly shared her story (7).

In late 2016, a Pennsylvania judge refused to seal settlements in two med-mal cases caused by pregnancy complications at Moses Taylor Hospital. In one case, it was alleged that twins were stillborn due to the hospital not properly monitoring preeclampsia (8). In the second case, it was alleged a baby girl was born with severe brain injuries because a Cesarean Section was not performed in a timely manner (9). In refusing to seal the brain injury case, the judge wrote, *"Moses Taylor's amorphous fear regarding the possible loss of obstetrical business does not constitute a 'clearly defined and serious injury,' nor does it outweigh the long-standing presumption in favor of public access to judicial records...to the contrary, the publication of the settlement details may serve the public good by providing consumers with information arguably relevant to their health care decisions."* (9)

In another birth injury case, the $5.5M settlement was sealed and, according to the ***Seattle Times***, the court database used by attorneys referred to the case as, "'Confidential v. Confidential, in county Confidential.'" The Times also reported that the defense attorneys and medical experts in the case were also listed as "Confidential" on the court database. The Times was able to unseal the records and shared their findings in a news article entitled, *"What the state didn't know about doctor, malpractice suit"* (10).

Microsoft designer **August de los Reyes** was paralyzed by a misdiagnosis at a Washington hospital. When searching for an attorney he ultimately chose the Luvera Law Firm because the firm does not accept confidentiality orders in med-mal settlements. According to Robert Gellatly, partner in the Luvera Law firm, gag orders *"do not serve the public interest."* The case settled for $20M but with an unusual twist. Mr. de los Reyes and the hospital are now working together to improve patient safety. As a Microsoft designer, Mr. de los Reyes has skills and knowledge that are very useful in analyzing problems. Attorney Gellatly has never seen a case resolve in this manner (11).

A Toronto hospital actually encouraged a mom to share the story of the near fatal dosing errors that almost claimed her baby. Similarly, a Hawaii hospital held a press conference with a widow to publicly apologize for the medical errors that killed her husband and discuss changes that will be made to improve patient safety (12, 13).

Jack Gentry had recently retired from the Baltimore police force when he was paralyzed from the neck down due to a surgical error at MedStar Health. Not only did MedStar disclose the error, apologize, and provide fair, upfront compensation, but the hospital system and the Gentry family now share their joint story in a very public fashion to improve patient safety (14).

Indeed, disclosure is becoming more prevalent; however, even in healthcare systems where transparency is encouraged, a gag order may be waiting at the end of the settlement process. Sage et. al (15) reported that in the University of Texas Health system, which is committed to disclosure and transparency, 110 out of 124 settled cases included non-disclosure agreements or gag orders.

Surveys Questions & Interviews

We surveyed many different stakeholders in the medical malpractice issue, including plaintiff's and defense attorneys, patients and families, risk managers, executives from insurance companies, hospitals, and nursing homes, and reporters. We sent personalized requests to colleagues around the United States. Our survey questions were also circulated via Sorry Works! e-newsletters (over 2,000 recipients), the Sorry Works! blog, and Sorry Works' social media platforms (Facebook, LinkedIn, Twitter). We cast a very wide net.

Survey questions included:

- How often are non-disclosure agreements or "gag orders" inserted in settlement agreements for medical malpractice claims?
- Are gag orders a reality or simply an urban legend?
- What has been your experience with gag orders?
- Why are confidentiality clauses used? Why do lawyers, clinicians, and insurance/healthcare executives request confidentiality clauses in settlement agreements?
- Do gag orders prevent or inhibit post-event learning with clinicians and medical leadership?
- Realistically speaking, what could happen to a patient or family if they broke the confidentiality clauses in their settlement agreement?
- What are the arguments or reasons for maintaining the status quo with confidentiality clauses?
- Can more cases be settled without gag orders? If so, how would that work?

We received many responses from various stakeholders. The interview and survey answers netted many common themes. Readers of this report will find the survey responses are summarized in the next section (Results, Discussion, and Recommendations) of this report, but those who wish to take a deeper dive can view a detailed summary of all interviews and surveys in Appendix A of this report.

Results, Discussion, and Recommendations

Confidentiality clauses appear to be the norm for most settled medical malpractice cases, even in some organizations that practice disclosure and transparency. Gag orders seem to be a long time "habit" or standard practice in settling cases for many defense and plaintiff's attorneys, risk managers, and claims managers from insurance companies. Gag orders are not uniform; some confidentiality clauses seal all details of a given case, while others shield names of clinicians and/or settlement figures.

Non-disclosure agreements that prohibit discussion of settlement figures can actually shield claimants from family, friends, and other "advisors" who will want to help them spend the "windfall." However, it appears non-disclosure agreements do not impede plaintiff's lawyers in any manner, including advertising, being knowledgeable for future negotiations, and even sharing details of cases with reporters.

It also appears that enforcing a gag order against a patient or family is counterproductive (from the perspective of the hospital or nursing home) and perhaps legally impossible in today's media climate. Recent news coverage of gag orders in settlements with Harvey Weinstein's victims as well as other scandals involving GM ignition switches, the Catholic Church, and other organizations have cast confidentiality clauses in a very negative light. Traditional media and social media would likely savage a hospital or nursing home for suing a patient/family for discussing the details of an injury or death caused by medical errors. The original case would be rehashed in sordid detail, and then some. Moreover, judges will most likely place safety above the reputational concerns of any hospital, nursing home, or clinician. Still, some risk managers will believe that the threatening language of a gag order will keep people quiet.

Many patients and families want to move on with their lives after a settlement, and they have no interest in discussing the details of their cases (including money or names) with the media or other people, including friends and even family. However, there are some consumers who honestly want to share their stories to improve patient safety.

Patients and families need to learn that naming names can be detrimental to patient safety efforts ***in many instances***. Few people like "ax grinders." However, some experts believe that medical errors are currently (in 2016/17) the third leading cause of death in the United States, and regrettably some injuries and deaths are still caused by repeat offenders such as Dr. Duntsch. Members of the bar – possibly in concert with their clients -- should be encouraged to name names when they start seeing multiple cases from individual clinicians or facilities.

At Sorry Works!, we believe hospitals and nursing homes closely study complaints, claims, and losses more so than 20 to 30 years ago. In fact, many Sorry Works! board members and general members participate (or have participated) in these QI processes. However, while internal learning within organizations is wonderful, *sharing information between organizations and across the healthcare industry is the desired or ideal standard*. Gag orders appear to inhibit or impede sharing of stories between healthcare organizations and across the healthcare industry. Some of the best story tellers are the patients/families who experienced the events. Where would pharmacy safety be today had Chris Jerry taken the bigger check and signed the gag order in his daughter's case?

"Gag orders appear to inhibit or impede sharing of stories between healthcare organizations."

At Sorry Works!, we believe mandatory gag orders are detrimental to learning and improvement across the American healthcare system. Not only do gag orders potentially silence future patient advocates, they also send a broader message to the healthcare industry that closed cases should be forgotten, or at least not shared between healthcare facilities. Gag orders are perceived to be part of the culture of secrecy that has dogged medicine.

The stories found in closed claims need to be widely disseminated. Sharing these stories can save lives...and not only the lives of patients and families, but also the lives of clinicians! Physicians (especially those named in claims) should be educated about the value of sharing these stories. However, with an ever increasing percentage of employed doctors, hospitals should assert themselves during the settlement process by insisting on open settlements; employed physicians should not be able to insist on a gag order to settle a case.

Hospitals, nursing homes, and insurers may consider developing "advocacy clauses" in settlement agreements which literally will educate consumers – as well as physicians -- about possible ways their stories can be shared and used. The advocacy clauses (and educational efforts around those clauses) *may* include some frank language/discussions that sharing dollar figures does not benefit anyone (especially patients & families) and naming names can actually diminish the learning value of a story. Moreover, drafters of advocacy clauses may consider including language saying HIPAA will be waived (to a degree) should a patient/family name the facility or clinicians in a news story or social media post. The HIPAA waiver language could be of great benefit to hospitals and nursing homes which are currently gagged with little recourse should a family go to the media.

If done right, advocacy clauses could be a constructive process to get patients/families thinking about sharing their story, including working with the hospital or nursing home to educate clinicians inside and outside the organization.

The development of a voluntary nationwide database of closed claims (without names and dollar figures) should also be contemplated. Not only would this database/website be a repository of cases for healthcare organizations and teaching professionals, but it would also pro-actively share stories of lessons learned from medical errors.

At Sorry Works!, we've worked hard to teach people that not every patient/family wants to file a lawsuit and hit the jackpot. That is the old way of thinking. Sure, there are some greedy patients and families, just like there are some truly awful clinicians, but the vast majority of patients and families want healing (and most clinicians want to provide that healing). When something goes wrong, most consumers want empathy, information, connectivity, and accountability, and will respond in a positive fashion when given these treasures. We've taught this new way of thinking to healthcare, insurance, and legal professionals, and many hospitals and nursing homes have benefited greatly with decreased litigation and improved safety.

We now need to encourage a new way of thinking with settlements. Not every family wants to run to the media and trash the doctor. Hospitals, nursing homes, and insurers have to stop assuming the worst about patients and families during the settlement process. Most consumers simply want to move on with their lives, but a few earnest souls will want their stories shared to make the world

a better place. Let's meet these emotions head on in a constructive fashion. Real story sharing without names or dollars should be encouraged to improve safety and quality. Families should be invited to participate in safety improvements with their hospital or nursing home, and cases that have the potential to help other facilities should be widely disseminated. Disclosure-orientated hospitals are already providing some great examples of open settlements that should be emulated.

Looking at this issue another way...you can have an ethical disclosure process followed by a quick and fair settlement process, but then literally spoil everything by requiring a patient or family to sign a gag order. We need to think anew, especially with disclosure taking hold.

"Not every family wants to run to the media and trash the doctor. Hospitals, nursing homes, and insurers have to stop assuming the worst about patients and families during the settlement process."

Specific Recommendations:

- ✓ Approach every settlement negotiation with the mindset that the final agreement will be open and the case details (without names or dollar figures) can be used to improve patient safety.
- ✓ Consider developing advocacy clauses for settlement documents that educate consumers and clinicians about the ways their stories can be shared to improve quality across the American healthcare system.
- ✓ Consider including HIPAA waivers in advocacy clauses so hospitals and nursing homes are not gagged with the media.
- ✓ Closed claims without names and dollar figures should be widely disseminated *between* healthcare organizations to improve quality and safety.
- ✓ Consider the development of a voluntary nationwide database of closed claims (without names or dollar figures) to help share stories and learning across the healthcare system.

Acknowledgments

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Support SorryWorks!

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Footnotes

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Appendix A

Many respondents indicated that confidentiality clauses or non-disclosure agreements seem to be used most of the time in settlement agreements for medical malpractice claims, *but not in every case*. Moreover, respondents shared that the scope of the gag orders can vary, from including all the details of the case, to only the settlement figures, or only the names of the defendants. There is no uniformity, except that gag orders seemed to be used more often than not in closing claims.

One respondent described confidentiality clauses as the "custom" in many regions of the United States. Many risk managers as well as some defense and plaintiff's attorneys literally described non-disclosure agreements as "just another check box" on the way to a settlement. Finally, a professional who worked in the court system dealing with medical malpractice cases describes gag orders as "lawyers' 'inside the box thinking.'"

Defense attorneys, healthcare and insurance executives, and even some plaintiff's attorneys insisted non-disclosure agreements are a necessary settlement tool. One insurance executive flatly said, *"Doctors are a species that don't like their dirty laundry aired."* The same executive said sometimes even marginal claims can be settled only if the patient/family agree not to share the details of the case. Some risk managers and defense attorneys worried that the absence of confidentiality clauses will reduce the number of pre-trial settlements.

Many physicians do not admit fault when participating in a settlement. Often insurers will estimate that the cost of litigating with the potential that a verdict could go beyond the physicians limit of coverage makes it prudent for the physician to agree to settlement. Many of those physicians feel that a settlement without admission of fault should demand that it remain out of the public perusal.

Several respondents said that plaintiff's attorneys willingly agree to gag orders because it leads to a settlement and a pay day. Several patient advocates reported incidents of patients/families being bullied into a gag order by a plaintiff attorney wanting to close a case. Still, some patient advocates reported not agreeing to a confidentiality clause and still settling their cases for perceived fair value. One advocate exclaimed, *"Families must know it is OK to fight a gag order!"*

Several defense attorneys, risk managers, and physicians stated gag orders have two primary purposes: 1) Prevent the patient/family from going to the media, and 2) Prevent personal injury lawyers from advertising and filing more lawsuits against their facilities.

One defense lawyer bluntly declared, *"We can't have lawyers shouting from the roof top about their latest settlement."* Another lawyer asserted he could see no benefit to plaintiffs by making a settlement open or public.

A plaintiff's lawyer stated that some defendants insist on gag orders or there is no settlement. The personal injury lawyer further shared that most patients/families don't have a strong stance on the issue because they simply want the money and to move on with their lives. The plaintiff's lawyer said the terms of gag orders do vary, from concealing the settlement amount to the names of the clinicians and even the facts of the case.

One risk manager flatly stated that during her career gag orders helped settle many cases with physicians. *"Doctors don't want to be front page news,"* said the risk manager. However, the same risk manager candidly admitted that such "hiding" does inhibit learning and improvement across our nation's healthcare system.

Some hospital and nursing home respondents claimed gag orders are pushed by insurance companies. Respondents said insurance companies are "extremely concerned" about the value of cases being made public and setting a benchmark value for future claims.

One patient safety advocate responded that a publicly available database showing the average value of settled claims for different injuries and deaths could be a useful tool for the public to understand when they are receiving a fair offer from a hospital or nursing home during a disclosure process --- and not be persuaded by a plaintiff's attorney to litigate a case for more dollars that realistically are not available.

Many respondents stated that not talking about settlement figures was important for not only the physician, hospital, or nursing home, *but also for plaintiffs* who might attract unwanted attention from family and friends eager to help spend the "financial windfall." Many respondents, including patient advocates, said talking about money acquired from a claim is similar to discussing what people earn from their jobs --- nobody wants to talk about it.

A couple of defense attorneys explained concealing settlement amounts is not problematic for plaintiff's attorneys. One defense attorney insisted that personal injury lawyers can *"still advertise they collected X bucks for such and such an injury"* without violating any gag orders. Moreover, several defense attorneys admitted that plaintiff's attorneys are very sophisticated, communicate with each other about cases and settlement figures, and already know the value of injuries and deaths before engaging in any settlement negotiations.

One legal reporter said that he often writes about settled cases, including many cases that presumably include gag orders. Yet the reporter claimed that plaintiff's attorneys willingly share the medical details of cases so long as the defendant names are not published.

Some risk managers firmly believe that many families simply want to move on with their lives, and a non-disclosure agreement keeping all sides quiet can facilitate the healing process.

One patient advocate firmly stated that the emotional harm from medical errors can often be greater than the physical harm, and a gag order increases the psychological damage inflicted on patients and families.

Several plaintiff's attorneys and patient advocates forcefully stated that gag orders have been used in other types of cases, from sexual abuse in the Catholic Church to the GM ignition switch malfunctions and the Harvey Weinstein sexual abuse scandal. These respondents said that gag orders in these situations allowed harm causing practices to continue, and they believe the same forces are at work within healthcare systems when non-disclosure agreements are required to complete the claim process.

Several risk managers and hospital and nursing home executives said if a patient/family shares their side of the story with the media, they (the hospital/nursing home) are prohibited from defending themselves due to HIPAA. Two risk managers suggested that settlement agreements should be crafted whereby if a patient/family feels the need to talk with the media (or even social media), then HIPAA is waived (to a degree) and the hospital or nursing home has the opportunity to share their side of the story with reporters.

One risk manager said that under the current system if a patient/family goes to the media, then the physician, hospital or nursing home are basically gagged. *"In the end, my hospital or nursing home is the only one that is truly gagged. The plaintiff and their attorney can say whatever they want, and we are defenseless,"* exclaimed the risk manager.

A few risk managers and defense attorneys suggested the development of "advocacy clauses" in settlement agreements whereby patients/families can share the details of their case without money or names of defendants while simultaneously providing a HIPAA waiver for the facility.

A MD/JD legal reporter stated that too many insurers and attorneys are burying the details of cases and inhibiting learning. This same reporter posed questions such as *"Can the system be changed?"…. "Do confidentiality clauses lead to more errors, more litigation, and greater cost?"… "How would greater transparency affect settlements?"*

A prominent patient safety advocate called gag orders a "weapon of mass destruction," while a retired nurse described gag orders as a "hole" where cases disappear.

Several risk managers and defense attorneys candidly admitted that if a patient/family broke the non-disclosure agreement by talking with the media, social media, or simply blabbered all over town, the hospital or nursing home could not do much. Suing the patient/family would generate a lot of negative publicity, including drudging up details of the original case. Moreover, the lawsuit would probably be laughed out of court. Patient safety will trump reputational concerns for most judges, they said.

One risk manager flatly stated that she knew plaintiff's attorneys who told clients to sign gag orders but not to worry about it if they share the details of their cases with others. *"They didn't treat the confidentially clause in a serious manner,"* said the risk manager. One plaintiff attorney explained that if a patient/family signs a contract they should honor it, but, it is ultimately up to the patient/family.

Some risk managers stated that when it comes to learning from a case, names and dollar figures are not important. The details of the case – the story – are what matters. Moreover, several respondents noted that patients/families who share names of doctors and facilities can be seen as "ax grinders" and the value of their stories is often diminished. Various stakeholders said true patient safety advocates don't name names.

Several physicians, nurses, risk managers, and defense lawyers said gag orders do not prohibit or impede internal learning (within organizations) from events. In fact, several risk managers were adamant that they learn from cases/events long before any claims are filed. Nonetheless, some risk managers conceded and many patient safety advocates forcefully stated that learning *between organizations* (hospital to hospital, nursing home to nursing home) can be impeded by gag orders. Patient safety advocates insisted that some of the most significant advances in quality improvement have come from families broadly sharing their stories and changes being implemented in facilities within a region or even across the United States.

Some risk managers stated even with confidentiality clauses, a hospital or nursing home could invite the patient/family back to be part of the quality improvement process.

Several insurance executives and risk managers firmly stated that they are now looking very closely at settled claims. These respondents insisted that the culture is changing (or has changed significantly) versus, say, 20 years ago. One risk manager firmly stated that even though the public is right to be concerned about mistakes being swept under the carpet, "rest assured if a large claim is paid, you can be fairly sure that somebody – especially the 'bean counters' – will be very interested to make sure the mistake is not repeated."

One colleague stated that in the last five years med-mal insurers are beginning to look more closely at closed claims. Some insurers are conducting closed claim studies to better understand where quality improvement measures need to be implemented.

One defense attorney firmly stated that clear-cut cases must be talked about in a public fashion to increase learning across the industry. However, this same attorney admitted that "gray cases" (where presence or absence of error can honestly be debated) could be a different issue. However, this attorney said he and his colleagues are often powerless to override a risk manager or claims manager insisting on a gag order.