

Secrecy Agreements in Medical Negligence Cases

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You spend all day in negotiations watching the mediator go back and forth. Progress has been slow and not always steady, but the end is finally in sight. You agree on a number and that your clients will add “hold harmless” language. The mediator comes back and says, “They’ll do it, and they thank you for agreeing to their number, but you must sign a confidentiality agreement.”

Your clients are uncertain what this means, but they want to settle the case. Do you walk away from the whole deal? Do you try to work out a middle-of-the-road compromise? Do you agree to confidentiality of the defendant’s name only? Do you agree to confidentiality of only the amount? These are all tough questions that are better answered at the beginning of the mediation rather than the end.

Pitfalls of confidentiality agreements

Ostensibly, defendants want confidentiality to protect their reputation. Sometimes that may be true, but sometimes this case may be just another in a long string of cases against a particular doctor. Often, the defense does not want publicity regarding the amount of the settlement, especially if it is high. Defendant doctors may also want to hide the facts to allow them to avoid the publicity of egregious cases. If the confidentiality is broad enough it could even prevent a family from reporting the doctor to the state medical quality department, thus preventing an investigation that could improve patient care and keep the same harmful outcome from occurring again.

Attorneys should consider the right of the next patient to know what kind of physician the defendant is. If you were purchasing a car or any other product, you would want to know about its past performance. But if all medical negligence settlements are confidential, the next person selecting a physician knows nothing other than that the doctor is licensed to practice and is apparently in good standing.

A telling example from another type of professional negligence case is the attorney who handled the first Catholic priest abuse cases in Boston and agreed to confidentiality. This was years before everything became public. He reportedly later said it was the worst mistake he ever made because it allowed this priest and others to continue their abuse. It also allowed the Catholic church to avoid scrutiny. The subsequent public pressure on the church from other, highly publicized cases has forced it to deal with a problem that it had not acknowledged and adequately addressed earlier.

There is also a personal risk for the attorney. If a lawyer signs a confidentiality agreement and then does something as innocuous as supplying another attorney a copy of the defendant’s deposition, that arguably is a breach of the confidentiality agreement. Depositions are routinely shared among counsel, and it is troubling that such an innocent act could be the basis of a lawsuit. In *Karuza v. Law Office of Paul N. Luvera*, No. 37004-9-I, 1997 WL 523930 (Wash. Ct. App. 1997), for example an associate who represented a settling plaintiff later sent a copy of defendant’s deposition to another

attorney. The defendant sued the firm for breach of the parties' confidentiality agreement. The appellate court dismissed the case because the plaintiff could not establish damages but agreed with the trial court's finding that the law firm breached a confidentiality agreement.

Is confidentiality a two-way street? The blunt answer is "no." The facts and amount of settlements are routinely discussed among insurance companies. The amount may also be used in negotiations in future cases with that attorney or with other attorneys. Attorneys in settlement negotiations might say, "The insurance company told me you settled a case for \$X. They say the current case is worth less than that, and they will not pay what you previously got." Additionally, the insurance company must make a disclosure of the settlement to the states' licensing departments and to the National Practitioner Databank. Thus, others, but generally not the public, have access to this information.

There is also a significant financial risk to a client who signs a confidentiality agreement. In *Amos v. Commissioner of the IRS*, 86 T.C.M. (CCH) 663, 2003 WL 22839795 (U.S. Tax Ct. 2003), the court addressed this point. In 1997, Dennis Rodman, a professional basketball player, kicked a cameraman, who sued. The case was settled for \$200,000 with a confidentiality agreement. While money for personal injury compensation is not taxable, the amount paid for confidentiality is. The tax court held that 40 percent of the settlement was payment for confidentiality and therefore taxable.

If you agree to confidentiality, and the IRS determines later that a portion of the settlement is for confidentiality and not compensation, your client will pay income tax on that portion of the recovery. Your client should be advised of this, and if the defendant wants confidentiality, the defendant should indemnify the plaintiff from any potential tax consequences.

What to do about confidentiality demands

One way to avoid confidentiality agreements is to obtain your client's support at the beginning. My firm's standard fee agreement includes a statement that we will recommend against and disfavor any request of secrecy. I explain this to my clients when they sign the agreement.

Another step is to make sure the defense understands before mediation that you will not agree to confidentiality. You can do this if your clients are resolute and strong on this point.

One possible action to take if the defendant insists on confidentiality is to hold a press conference after negotiations break down, explaining that the defense offered several million dollars but pulled their settlement offer and walked away when the plaintiffs would not agree to a secrecy agreement hiding the facts of the defendant's negligent care. That likely would be newsworthy.

This is not to say that attorneys should go out of their way to create adverse publicity. Sometimes good doctors make bad mistakes; that is why there is insurance. And it might be better for your client if the settlement amount is not disclosed to the public.

However, overreaching secrecy agreements in medical negligence cases are to be avoided, and you should resist them at every opportunity. At the very least, the client's right to complain to medical disciplinary commissions and to publicly tell the story of what happened should never be infringed.

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