

Observations on Accountability and Improvement from the Vanderbilt Nurse Case

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Disclaimer

- My thoughts on the Vanderbilt case are based on basic media coverage and general conversations with a few relevant experts
- I have not immersed myself in the details of the legal proceedings
- I have no confidential or insider information



Topics for Discussion

- **Private accountability vs. public accountability**
 - Prominent community institutions
- Criminal liability
 - Individual and corporate
 - How unsafe was the Vanderbilt care environment?
 - Crimes and cover-ups
- Licensing boards and hospital regulators
- Disclosure obligations
 - Goals (competition, agency, performance, democracy)
 - Compliance and reputation (penalties for nonreporting)
 - Overhang of tort habits/norms
- Non-disclosure provisions in malpractice settlements
 - Effects on patients and families
 - Relationship to public accountability



Rationales for Disclosure Laws

- COMPETITION (market functioning)
- PRINCIPAL-AGENT PROBLEMS (risks involving private parties)
- PERFORMANCE (intrinsic motivation; benchmarking)
- DEMOCRATIC DELIBERATION (public agency failures)
- DIGNITARY (pure “right to know”)



Information-Based Regulation vs Substantive Rules and Standards

- Privacy and norms (reinforcing, superseding)
- Regulatory learning (setting performance)
- Internet convergence of reporting and disclosure
- First Amendment issues (commercial speech, etc.) – both restricted and compelled/subsidized speech



Non-Disclosure and Tort Settlement

- Sage WM, Jablonski JS, Thomas EJ. Use of Non-Disclosure Agreements in Medical Malpractice Settlements by a Large Academic Health Care System. *JAMA Internal Medicine* 2015; 175(7): 1130-1135.



Confidentiality Clauses in Malpractice Settlement Agreements

Table 3. Restrictions in the 110 Nondisclosure Agreements in the Malpractice Cases With Settlement Payments During the Study Years

<u>Variable</u>	<u>Agreements, No. (%)</u>
Prohibits	
• Disclosure of settlement amount	110 (100)
• Disclosure of settlement terms	110 (100)
• Disclosure to media	75 (68.2)
• Disclosure that settlement reached	61 (55.5)
• Clause explicitly refers to attorney(s)	59 (53.6)
• Disclosure of facts of claim	51 (46.4)
• Reporting to regulatory agencies	29 (26.4)
• Disclosure by physicians and hospitals	10 (9.1)
• Disparagement of settling defendants	3 (2.7)
• Participation in other claims	2 (1.8)



Confidentiality Clauses in Malpractice Settlement Agreements (UT System 2015)

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.



Confidentiality Clauses in Malpractice Settlement Agreements (Plaintiff's firm 2022)

It is further understood and agreed and made part hereof, that the undersigned, their family and representatives and their attorney(s) shall not comment, either directly or indirectly, on any aspect of this case or settlement to any member of the news media, or in any way publicize or cause to be publicized in any news or communications media, including but not limited to newspapers, magazines, journals, radio, television, on-line computer systems and law-related publications, the facts of this case, the existence of this settlement and the terms and conditions of this settlement. If the undersigned, their family, representatives and/or attorney(s) file any court document(s) identifying the terms and/or conditions of this settlement, they shall request that the court immediately seal such document(s) and take whatever reasonable steps are necessary to seek to assure that such document(s) are not accessible or disclosed to anyone.



Thanks for listening....

