

Health Law

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What Every Litigator Needs to Know About Medical Non-Disclosure Agreements

As internet and social networking use has increased, members of the public have gained the power to widely disseminate a message or opinion about a topic. While disappointed patients in previous generations were limited in that they were only able to complain and voice their concerns to relatives and friends, today's patients are able to post a message on the internet, whether on Facebook, Twitter, blogs, or a personal website. Depending on the popularity of the individual or the site on which the message was posted, that message could potentially reach hundreds to thousands of readers.

This increased ability to disseminate messages about doctors and health care professionals has caused health care professionals to worry about one patient's ability to cause them severe reputational injury. Through the internet and social networking, one upset patient may be able to unfairly (or fairly) criticize a health care professional and harm that professional's reputation substantially.

To guard against the online dissemination of harmful reviews of doctors and other health care professionals, several have begun using medical non-disclosure agreements (NDAs), which prohibit patients from posting negative reviews on the internet. Medical NDAs have become more popular in recent years and, although they have not yet been legally challenged, they have become a controversial news topic.

What are Medical Non-Disclosure Agreements?

Medical NDAs are agreements in which a patient agrees in writing to refrain from posting negative reviews of the medical professional on the internet.

Medical NDAs vary greatly, just like any other type of contract. First, medical NDAs take different forms in that some are a provision of a larger contract while others are a separate contract. Second, medical NDAs differ in that the reach of the prohibition may vary. Some NDAs may only restrict patients from posting reviews to online review websites. Others may prohibit the patient from negatively commenting on any internet site, including social networking sites such as Twitter and Facebook. Third, some medical NDAs are limited in duration of the prohibition while others are unlimited in duration.

Health care professionals find the use of medical NDAs desirable because the NDAs provide some protection against upset patients who publicly express their dissatisfaction. Those opposed to medical NDAs do not approve of their use because they feel that NDAs take away the First Amendment free speech rights of vulnerable patients who are likely to sign NDAs because they are in need of care.

What are the Benefits of Medical Non-Disclosure Agreements?

Medical NDAs have obvious benefits for health care professionals. If NDAs are complied with, they have the effect of protecting the professional from the online dissemination of any negative patient reviews. This prevents potential patients from being scared away by online reviews, whether true or untrue.

NDA's can be especially beneficial to health care professionals and to the general public in that they may prevent angry patients from posting false statements about the doctor online. This is beneficial to doctors because it protects them from the spread of rumors and lies, which could have serious consequences for their career. Medical NDAs are also beneficial to the public's interest in obtaining truthful information about health care providers. Medical NDAs protect the public by ensuring that only truthful information is disseminated.

Moreover, medical NDAs provide health care professionals protection from attacks to which they are legally unable to respond. Health care professionals are generally legally prohibited from sharing private health information about individuals by the physician-patient privilege and provisions of the Health Portability and Accountability Act (HIPAA). Aside from NDAs, patients are under no such restriction. This means that doctors and other providers are often unable to defend themselves publicly from false or misleading accusations made publicly by the patient. Medical NDAs help to mitigate this injustice by prohibiting the online dissemination of negative reviews.

What Concerns are there about Medical Non-Disclosure Agreements?

Although there are many benefits to using medical NDAs, there are several concerns as well. The main concern to those opposing medical NDAs is that NDAs restrict the First Amendment rights of patients to free speech. Medical NDAs have the effect of limiting the ability of patients to criticize health care professionals, even when the criticism is true and deserved. Critics also explain that medical NDAs take advantage of prospective patients by threatening to withhold needed care in the absence of a medical NDA.

Because courts have yet to rule on the enforceability of medical NDAs, it is unclear whether they actually have any legal effect. Decisions filed in challenges to the enforceability of other types of contracts have called into question whether medical NDAs will withstand similar legal challenges. *See, e.g., White v. Village of Homewood*, 256 Ill. App. 3d 354, 628 N.E.2d 616 (1st Dist. 1993) (holding that an exculpatory agreement between an employer and employee was unenforceable because the difference in the bargaining power between the two parties was such that the agreement did not represent the free choice of the employee); *Service Centers of Chicago, Inc. v. Minogue*, 180 Ill. App. 3d 447, 535 N.E.2d 1132 (1st Dist. 1989) (holding unenforceable an employee confidentiality agreement because it was unlimited in duration and scope).

The fact that many medical NDAs are unlimited in duration makes their enforceability questionable because many courts have held contracts of unlimited duration unenforceable. Additionally, in light of other decisions, the earlier discussed difference in the bargaining position and power of the medical professional and patient may have the effect of making the medical NDA unenforceable. Lastly, many courts have been understandably concerned about allowing restrictions of patients' rights. Therefore, some courts may be reluctant to enforce medical NDAs, which do restrict the speech rights of patients.

Another concern with medical NDAs is whether lawsuits brought against violators of the NDA would provide the affected health care professional with an adequate remedy. Any remedy sought would come after a negative review had already been posted on the internet. Therefore, the damage would have already been done. Any monetary damages would be difficult to prove because it would be unclear how many potential patients the health care professional had lost due to the negative review. Therefore, medical NDAs may not have the effect that health care professionals imagine them to have.

Because patients are increasingly able to widely disseminate reviews concerning their medical care, doctors and other health care providers have begun to make use of non-disclosure agreements. These agreements have several benefits, such as protecting professionals from the wide dissemination of harmful reviews and protecting consumers from false information. However, the legality of these agreements is far from settled, and therefore, medical professionals and others who use or are considering using NDAs need to be aware that these agreements may have no legal effect. As NDAs become more popular and widespread, it is likely that they will be challenged and that the questions about their enforceability will be answered. Until then, their use will remain controversial and their enforceability will remain unclear.

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