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First, Do No Harm: The Consequences of Advising Clients About Litigation Alternatives in Medical Malpractice Cases.

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ARTICLE

Katerina P. Lewinbuk

First, Do No Harm*: The Consequences of Advising Clients About Litigation Alternatives in Medical Malpractice Cases

Abstract. This Article addresses whether a lawyer's possible duty to inform and advise his client of potential alternative dispute resolution (ADR) options actually leads to better results for doctors in medical malpractice cases. This Article first explains different theories supporting a potential duty and then argues that all such theories praising ADR rely on the assumption that "valuable" alternatives to litigation always exist and are available to all litigants. That notion is arguably not always true for a physician defending against malpractice complaints; thus, the duty becomes almost meaningless in such cases. With the adoption of the National Practitioner Data Bank and the subsequent enactment of numerous state statutes, physicians are required to report their settlement agreements and that information is now made public and available to potential patients in most states. This Article takes a close look at the conflict faced by an ADR-proponent medical malpractice lawyer who may wish to encourage a client to consider litigation alternatives while knowing that this route is likely to be damaging to his client long-term and, thus, goes against the principle of first doing no harm to the client. Ultimately, this Article determines that in some cases where a doctor has a good chance of prevailing in a lawsuit and avoiding a settlement record, the attorney should prioritize his commitment to the client's best interest and make sure the client does not suffer an unnecessary harm. As such, the lawyer should advise that doctor against an out-of-court settlement of the doctor's malpractice case.

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I. INTRODUCTION

Alternative dispute resolution (ADR) has been defined as a “process ‘other than litigation for management, resolution, and settlement of conflicts and disputes’” that seeks to save money and resolve disputes faster than is possible in litigation.¹ ADR is often touted as a process that permits parties “to resolve their dispute and still amicably continue their relationship.”² ADR has become a standard way of resolving disputes, with a growing number of practitioners, judges, and members of academia subscribing to the process.³ As such, a number of scholars and legal practitioners believe that lawyers should have a general ethical duty to advise their clients about available ADR options,⁴ such as mediation or out-of-court settlement,⁵ before they proceed to litigation.⁶

* “In his work *Epidemics*, Hippocrates instructed the physician to ‘make habit of two things—to help or at least to do no harm.’” Mark Henaghan, *The ‘Do No Harm’ Principle and the Genetic Revolution in New Zealand*, in *FIRST DO NO HARM: LAW, ETHICS AND HEALTHCARE* 511, 513 (Sheila A.M. McLean ed., 2006) (quoting *Epidemics I*, in 1 *HIPPOCRATES* 165 (WHS Jones trans., Harvard University Press 1923–1988)). “Today, when doctors take the Hippocratic Oath, they swear to adopt a regimen ‘for the benefits of the patients according to [his or her] ability and judgment, and not for their hurt or any wrong.’” *Id.* (quoting *Epidemics I*, in 1 *HIPPOCRATES* 165 (WHS Jones trans., Harvard University Press 1923–1988)).

** I would like to express my deep gratitude to my research assistants, Alison Pipitone Henderson and Sarai Sanchez, for their invaluable assistance in preparation of this Article. This Article, along with all of my academic work, is dedicated to the precious memory of my father, Dr. Vladimir Z. Parton. Special thanks go to my husband, Dan, to my children, Alexandra and Michael, and to my mother, Tamara, for their endless love and support.

1. Alma Saravia, Note, *Overview of Alternative Dispute Resolution in Healthcare Disputes*, 32 J. HEALTH L. 139, 140 (1999).

2. *Id.*

3. See Kristin L. Fortin, *Reviving the Lawyer’s Role As Servant Leader: The Professional Paradigm and a Lawyer’s Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 617 (2009) (tracing the recent expansion of ADR proceedings).

4. See generally Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 239 (2004) (urging states to adopt rules requiring attorneys to advise clients about ADR options).

5. See *id.* at 259–263 (promoting mediation as an ADR option and dispelling myths about mediation). But see Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 433 (2000) (explaining that lawyers often have a duty to advise clients about settlement, but rejecting settlement as a method of ADR).

Settlement is drawn from an adversary paradigm; you have to begin formal litigation before you can settle. The ADR process, in theory, requires one to shuck the adversary paradigm to be successful. Thus, the duty to make a good[-]faith effort to settle should not serve as the underpinning of any ADR consultation duty.

Id.

It must be conceded that settlement short of trial is almost always desired by attorneys and that many of the benefits claimed for ADR could arise simply from the one-on-one negotiations

While not explicitly stated, some authors argue that, when reading them broadly, such a requirement is already built into Model Rules of Professional Conduct 1.2 and 1.4(b).⁷ Others make a case for amending the existing professional responsibility codes to incorporate a mandatory provision that would specifically require lawyers to advise their clients of available ADR options.⁸ At a minimum, a number of states currently have an “implied ethical duty,” which boils down to lawyers at least considering the exploration of possible litigation alternatives with their clients.⁹ Such a duty can be found in state statutes,¹⁰ ethics advisory committee opinions,¹¹ court rules,¹² and lawyers’ creeds.¹³ Moreover, some scholars

familiar to attorneys. However, ADR offers a more formal process involving an outside facilitator or evaluator who can bring to bear a wider range of considerations than usually arise out of settlement negotiations.

Edward F. Sherman, *The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process*, 15 REV. LITIG. 503, 509 (1996). Mediation and other ADR options are paths that may lead to a settlement, which is often considered to be a better outcome than pursuing litigation. See Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 21 (Norman Brand ed., 2002) (“[P]ursuing ADR often is part of a settlement proposal, and thus the client, to fully exercise his or her rights, must be told of the benefits and risks of ADR.” (quoting Stuart M. Wildman, *Attorney’s Ethical Duties to Know and Advise Clients About Alternative Dispute Resolution*, 29 PROF. LAW. 31 (1993)) (internal quotation marks omitted)).

6. Cf. Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 433 (2000) (supporting the opinion that lawyers should provide settlement options to their clients prior to engaging in litigation).

7. See *id.* at 434 (suggesting that a “reasonably broad” reading of the rules includes the duty to inform clients of ADR options).

8. See generally Robert F. Cochran Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895 (2001) (suggesting that professional rules be amended to require consultation on ADR options).

9. See Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 464–65 (2000) (providing the language from some states’ ethics opinions that indicates a duty to advise clients of ADR alternatives when such options may appear reasonable).

10. *Id.* app. at 462–466; see Kristin L. Fortin, *Reviving the Lawyer’s Role As Servant Leader: The Professional Paradigm and a Lawyer’s Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 626 n.268 (2009) (discussing an Oregon statute that requires civil-law attorneys to provide their clients with written information about mediation procedures (citing OR. REV. STAT. § 36.185 (2008))).

11. State Bar of Mich. Prof’l Ethics Comm., Advisory Op. RI-262 (1996), available at http://www.michbar.org/opinions/ethics/numbered_opinions/ri-262.htm?CFID=38522518&CFTOKEN=c1a0293060d0e399-DBBE11DE-1A4B-3375-E4D74A153B73B832 (requiring recommendation of an ADR option that is reasonable or desirable for the client); State Bar of Mich. Prof’l Ethics Comm., Advisory Op. RI-255 (1996), available at http://www.michbar.org/opinions/ethics/numbered_opinions/ri-255.htm?CFID=38471819&CFTOKEN=cc2aa98210f3daf5-D099A7F8-1A4B-3375-E4112CF41CF3A12C (requiring disclosure of opposing counsel’s willingness to attempt ADR); Pa. Bar Ass’n Comm. on Legal Ethics & Prof’l Resp., Advisory Op. 90-125 (1991)

find that an attorney's failure to counsel the client about available ADR options amounts to professional malpractice.¹⁴

These views and arguments are based on the assumption that a meaningful alternative to litigation always exists and that the employment of ADR will "yield a better result for *all* parties."¹⁵ In fact, the opinion

(requiring disclosure if opposing counsel proposes mediation per Rule 1.2 and Rule 1.4, read together); Kristin L. Fortin, *Reviving the Lawyer's Role As Servant Leader: The Professional Paradigm and a Lawyer's Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 626 n.268 (2009) (citing State Bar of Mich. Prof'l Ethics, Comm. Advisory Op. RI-255 (1996)) (discussing a Michigan professional responsibility rule requiring disclosure of opposing counsel's willingness to attempt ADR); see also Monica L. Warmbrod, Comment, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791, 813-14 (1997) (discussing a Kansas ethics opinion that stated attorneys should be aware of and advise clients about relevant ADR options).

12. See D. MASS. R. 16.1(d)(3)(b) (requiring certification that a lawyer advised his client regarding available ADR options); MO. SUP. CT. R. 17.02(b) (mandating that filing parties provide notice of available ADR methods and their purposes when the state's ADR program applies); Kristin L. Fortin, *Reviving the Lawyer's Role As Servant Leader: The Professional Paradigm and a Lawyer's Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 626 n.268 (2009) (citing VA. SUP. CT. R. 1.2 cmt. 1) (requiring attorneys to discuss reasonable ADR options with their clients, including the advantages and disadvantages of the alternatives as well as their availability); D. MASS. R. 16.1(d)(3)(b) (1995) (requiring certification that a lawyer advised his client regarding available ADR options); see also Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 454 (2000) (stating that Maryland court rules require attorneys to discuss ADR options at case-management conferences).

13. See Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 452-53 (2000) (commenting on The Texas Lawyers' Creed, which requires lawyers to advise their clients "regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes" (quoting SUPREME COURT OF TEX. & COURT OF CRIMINAL APPEALS, THE TEXAS LAWYER'S CREED sec. II para. 11, available at <http://www.texasbar.com/Content/NavigationMenu/ForThePublic/FreeLegalInformation/Ethics/TheTexasLawyer'sCreed-English.pdf>) (internal quotation marks omitted)); see also Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 26 (Norman Brand ed., 2002) ("In appropriate cases, I will counsel my client with respect to mediation, arbitration[,] and other alternative methods of resolving disputes." (quoting STATE BAR OF NEW MEXICO, CREED OF PROFESSIONALISM, available at <http://www.nmbar.org/Attorneys/creed.html>)).

14. See Monica L. Warmbrod, Comment, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791, 814 (1997) ("While an attorney may run the risk of discipline under the Model Rules if he fails to advise clients of ADR, he may also face an action for attorney malpractice. Although no cases reported have held an attorney liable for failure to advise a client about ADR, courts may be willing to impose liability in the future for a variety of reasons."); see also Nancy Neal Yeend & John Paul Jones, *Legal Ethics and ADR: Do You Pass the Test?*, SAN FRANCISCO ATT'Y, June/July 1998, at 32, 32, available at <http://www.mediate.com/articles/yeendandjones.cfm> ("Some argue that failing to inform a client about ADR options can amount to malpractice."). But see Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 32 (Norman Brand ed., 2002) ("It is unlikely that any attorney would bring a malpractice case based on an attorney not properly informing a client concerning ADR options.").

15. Kristin L. Fortin, *Reviving the Lawyer's Role As Servant Leader: The Professional Paradigm*

that ADR would benefit almost any client, in any case, is increasing in popularity.¹⁶ However, this Article argues that this opinion is not always valid because, in some instances, an out-of-court settlement can actually be detrimental to the client and, thus, attorney encouragement to pursue that route may actually go against the idea of first doing no harm to the client.

This Article will consider the relationship between ADR and typical medical malpractice cases, in which a defendant-physician sued by a patient is faced with the choice of pursuing litigation and putting forth a defense or considering a litigation alternative, such as an out-of-court settlement of the dispute. In these types of cases, this decision is greatly affected by the ramifications imposed by the latter.¹⁷ Medical malpractice cases clearly distinguish themselves from other civil lawsuits because the law in most states requires public disclosure of a physician's settlement record should he choose to settle the claim out of court.¹⁸ Due to the

and a Lawyer's Ethical Obligation to Inform Clients About Alternative Dispute Resolution, 22 GEO. J. LEGAL ETHICS 589, 623 (2009) (emphasis added); see also Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 36 (Norman Brand ed., 2002) ("[L]awyers should always consider ADR options and advise their clients of such options, even if not required and even if it conflicts with the attorney's economic interests. It is simply the right thing to do."). But see Gary B. Charness, *Alternative Dispute Resolution and the Settlement Gap*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 205, 229 (David A. Anderson ed., 1996) ("An important caveat is that settlement may not always be in the best interests of the disputants or the public, so that it may be both unrealistic and inadvisable to attempt to settle all disputes outside of adjudication.").

16. See Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 262 (2004) ("There is no indication that mediation should not be employed in any kind of controversy."); see also Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 4 (1992) (stating that some believe "a bad settlement is almost always better than a good trial" (quoting *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986)) (internal quotation marks omitted)); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 8 (1995) ("When parties elect to use ADR, they are both made better off, so that social welfare must rise, other things being equal."); Nancy Neal Yeend & John Paul Jones, *Legal Ethics and ADR: Do You Pass the Test?*, SAN FRANCISCO ATT'Y, June/July 1998, at 32, 33, available at <http://www.mediate.com/articles/yeendandjones.cfm> ("According to Francis McGovern, noted professor at Duke University School of Law, the most important thing among the many reasons for considering ADR is that these processes achieve better results." (citing Francis E. McGovern, *Beyond Efficiency: A Bevy of ADR Justifications*, DISP. RESOL. MAG., Summer 1997, at 17)).

17. See Jeffrey P. Donohue, Note, *Developing Issues Under the Massachusetts 'Physician Profile' Act*, 23 AM. J.L. & MED. 115, 145 (1997) (illustrating that physicians would rather go to trial than settle because litigating the claim is the only way to defend their reputation, whereas settling might lead to losses professionally, such as an increase in negative visibility and a rise in malpractice premiums (citing 1996 Mass. Acts ch. 307, § 5(f) (to be codified at MASS. GEN. LAWS ch. 112, § 2))).

18. The initial creation of the NPDB led to adoption of state statutes that specifically mandate disclosure of settlement information, thereby making settlement a potentially harmful choice for a physician's practice. See Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR*

public's negative perception of the existence of a settlement record, the doctor's business and reputation are likely to be harmed by public display of that information because potential patients may feel wary about visiting the doctor's office.¹⁹ As such, pursuing settlement in these instances may hurt the client so a lawyer should discourage the client from going this route.

Whether a lawyer's duty to inform the client of litigation alternatives is viewed as mandatory or simply a good ethical practice, ADR-proponent attorneys believe that it is their obligation to explore such options and encourage their clients to seriously consider them.²⁰ If a physician has only a slight chance of prevailing in litigation and therefore faces substantial exposure and liability, the risks and repercussions of a long-term settlement record are arguably a low priority and ADR may be a viable option.²¹ However, when it is not clear whether litigation will be

Options?, 13 GEO. J. LEGAL ETHICS 427 app. at 462-71 (2000) (detailing state statutes, codes, and rules that pertain to advising clients of ADR options); see also Steven K. Berenson, *Is It Time for Lawyer Profiles?*, 70 FORDHAM L. REV. 645, 662 (2001) ("[T]he very existence of a single source containing the wealth of information thought to be relevant to issues of physician choice, along with the efforts to open up the data bank, seem to have created a momentum that has helped pave the way for state physician profiles." (citing Julie Barker Pape, Note, *Physician Data Banks: The Public's Right to Know Versus the Physician's Right to Privacy*, 66 FORDHAM L. REV. 975, 983 (1997); Elisabeth Ryzen, *The National Practitioner Data Bank: Problems and Proposed Reforms*, 13 J. LEGAL MED. 409, 455 (1992))); Matthew E. Brown, *Redefining the Physician Selection Process and Rewriting Medical Malpractice Settlement Disclosure Webpages*, 31 AM. J.L. & MED. 479, 480, 484 (2005) (explaining that after many failed attempts to make the NPDB available to the public, many states have statutorily mandated that physician malpractice settlements be disclosed) (citing CAL. BUS. & PROF. CODE § 2027 (West 2005); GA. CODE ANN. § 43-34A-3 (2005)); cf. Jeffrey P. Donohue, Note, *Developing Issues Under the Massachusetts 'Physician Profile' Act*, 23 AM. J.L. & MED. 115, 145-46 (1997) ("Once, the cost of settlement to a physician was a potential increase in malpractice premiums plus a very limited 'cost' to reputation. Now, a physician must also weigh the potentially damaging effect of a highly publicized scar on his profile.").

19. See Jeffrey P. Donohue, Note, *Developing Issues Under the Massachusetts 'Physician Profile' Act*, 23 AM. J.L. & MED. 115, 151 (1997) ("Increased public access to information will change the ways in which consumers view their providers and make decisions about their health."). But see Kristin Madison, *The Law and Policy of Health Care Quality Reporting*, 31 CAMPBELL L. REV. 215, 222 (2009) ("[A] survey of California Internet users found that the percentage who saw physician ratings reached twenty-two percent in 2007, but that only five percent of respondents considered a change of physicians based on the ratings, and only two percent actually did so." (citing CAL. HEALTHCARE FOUND., JUST LOOKING: CONSUMER USE OF THE INTERNET TO MANAGE CARE 10 (2008), available at <http://www.chcf.org/publications/2008/05/just-looking-consumer-use-of-the-internet-to-manage-care>)).

20. Cf. Kimberlee K. Kovach, *The Intersection (Collision) of Ethics, Law, and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way*, 49 S. TEX. L. REV. 789, 808 (2008) ("Today, it is widely accepted that lawyers in litigation should inform clients about ADR options.").

21. Some states disclose settlements that occurred in the past five years. See, e.g., ARIZ. REV. STAT. § 32-1403.01 (LexisNexis 2011) (requiring settlements, awards, and judgments where payment was made to the complaining party in the past five years); IDAHO CODE ANN. § 54-4603

successful, a lawyer may struggle to weigh exploration and encouragement of ADR options with the client against the reality of potential harm that the doctor-client may suffer as a result of a public settlement record.²² Explaining all existing possibilities to one's client, including the pros and

(2007) (disclosing settlement information of professional malpractice claims within five years of continuous practice); N.J. STAT. ANN. § 45:9-22.23 (West Supp. 2011) (requiring disclosure of all settlements of medical malpractice claims reported to the board where payment was made to the complaining party for the most recent five years). Other states disclose settlements that occurred in the past ten years, and some further limit disclosure to those that occur after a certain date. *See*, CAL. BUS. & PROF. CODE § 803.1 (Deering Supp. 2012) (discussing the required disclosure of all settlements that occurred within the past ten years and are in the possession, custody, or control of the California Board of Podiatric Medicine for either a low- or high-risk licensee); *id.* § 2027(c)(1) (requiring “[a]ny malpractice judgment or arbitration award reported to the board after January 1, 1993” to be “posted for a period of [ten] years from the date the board obtains possession, custody, or control of the information”); CONN. GEN. STAT. § 20-13j (West 2008) (stating that the board will disseminate to the public such information concerning “all professional malpractice court judgments and all professional malpractice arbitration awards against the health care provider in which a payment was awarded to a complaining party during the last ten years, and all settlements of professional malpractice claims against the health care provider in which a payment was made to a complaining party within the last ten years” but not “[p]ending professional malpractice claims against a health care provider and actual amounts paid by or on behalf of a health care provider in connection with a professional malpractice judgment”); FLA. STAT. § 456.041 (West 2007 & Supp. 2012) (requiring physicians to report any paid settlement claim in excess of \$5,000 within the past ten years); GA. CODE ANN. § 43-34A-3 (2011) (mandating disclosure of final judgments or arbitration awards in excess of \$100,000 and settlements in excess of \$300,000 that occurred within the last ten years); MASS GEN. LAWS ch. 112, § 5 (LexisNexis 2004 & Supp. 2012) (providing that the physician's profile which is available to the public shall include medical malpractice court judgments, arbitration awards, and settlements where payment is awarded to a complaining party during the past ten years); N.Y. PUB. HEALTH LAW § 2995-a (Consol. Supp. 2012) (mandating that “a statement of any action (other than an action that remains confidential) taken against the licensee” within the past ten years must be provided to the department to create individual profiles of the doctors for the public); TENN. CODE ANN. § 63-51-105 (2010) (noting that all medical malpractice court judgments, arbitration awards, and settlement in which a payment has been made shall be provided but only such information from the past ten years); VT. STAT. ANN. tit. 26, § 1368 (Supp. 2011) (requiring disclosure of settlements, awards and judgments where payment was made to the complaining party in the past ten years); VA. CODE ANN. § 54.1-2910.1 (2005) (mandating that reports be provided which “include all medical malpractice judgments and medical malpractice settlements of more than \$10,000 within the most recent [ten]-year period in categories indicating the level of significance of each award or settlement; however, the specific numeric values of reported paid claims shall not be released in any individually identifiable manner under any circumstances”). A handful of states only report a physician's settlement record if certain informational conditions are satisfied. *See* MD. CODE ANN., HEALTH OCC. § 14-411.1 (LexisNexis Supp. 2011) (requiring creation of a public settlement record only if a physician has settled three or more claims); TENN. CODE ANN. § 63-51-105 (2005) (stating that only settlements greater than \$75,000 must be disclosed); *see also* Matthew E. Brown, *Redefining the Physician Selection Process and Rewriting Medical Malpractice Settlement Disclosure Webpages*, 31 AM. J.L. & MED. 479, 497 (2005) (discussing the various states that impose informational conditions on public settlement information).

22. *See generally* Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 13-14 (1992) (illustrating the decision process when determining whether to file suit or settle).

cons, is certainly worthwhile. Ultimately, however, a lawyer's main priority is determining what is best for the client.²³ As such, in an instance where a lawyer's client has a good chance of prevailing in an impending lawsuit, the lawyer should advise the doctor-client against any type of out-of-court settlement or other litigation alternative to avoid an official settlement record.²⁴

Because laws requiring a public display of settlements seem to undermine the entire rationale for ADR, efforts should be made to lobby for revision or elimination of such a requirement.²⁵ That argument, however, should be explored as a separate topic in a different article. Until such change is adopted, lawyers are fully justified in discouraging their doctor-clients from settling medical malpractice claims in certain instances.²⁶ In fact, a lawyer's potential duty to inform clients of possible litigation alternatives becomes a mere formality in some cases because clients are not only likely, but also entitled, to pursue the course of action that carries with it the least risk.²⁷ This Article submits that the possible benefits of an out-of-court settlement are truly outweighed by the likely harmful effect to clients from the publication of such settlement. Therefore, lawyers must sometimes suppress their support for ADR and discourage doctors from pursuing settlements.

II. ADR AND A LAWYER'S DUTY TO INFORM

A. *ADR and Settlements in General: Purpose and Overview*

Due to the number of suits filed every year, the law and American

23. MODEL RULES OF PROF'L CONDUCT pmbl. para. 9 (2002) ("These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous[,] and civil attitude toward all persons involved in the legal system."); *id.* R. 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

24. See Gary B. Charness, *Alternative Dispute Resolution and the Settlement Gap*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 205, 229 (David A. Anderson ed., 1996) (suggesting that where it is inadvisable to seek settlement due to the best interests of the client, litigation may be the better course for resolving the dispute).

25. Cf. Jeffrey P. Donohue, Note, *Developing Issues Under the Massachusetts 'Physician Profile' Act*, 23 AM. J.L. & MED. 115, 151 (1997) (stressing that states considering the adoption of disclosure requirements ought to consider the interests of physicians and their privacy as well as the connection between settlements and the physician's competence).

26. Cf. at 145 (recognizing a physician's heightened interest in litigation when public profiles disclose settlement records).

27. Cf. at 145-46 (noting that public disclosure of settlement information carries the risks of higher insurance premiums and harm to the physician's reputation).

courts favor compromise and settlement.²⁸ In the past, “courts have invoked this policy to enforce past settlements against unwilling disputants and to approve tentative settlements” when the parties previously agreed upon the terms of the settlements.²⁹ During the last two decades, “this policy preference for settlement has been extended to pending lawsuits in which the parties have not settled or even expressed interest in doing so.”³⁰ Moreover, the courts have implemented a number of procedural steps and innovations to support extension of this policy and to bring an early resolution to numerous civil disputes.³¹ In fact, there are currently a number of court-established ADR programs offering “mediation, arbitration, and early neutral evaluation,” with state and federal courts often requiring the parties to participate in one or more of these programs.³² The courts’ support for the early settlement of civil disputes demonstrates their preference for out-of-court resolution of disputes versus continued litigation. Out-of-court resolutions are said to better serve the parties’ interests by producing a more just outcome between them, protecting non-parties, and improving “the overall health of the civil justice system.”³³

Today various litigation alternatives, such as out-of-court settlement of disputes, are commonly viewed as an “inescapable feature of modern litigation.”³⁴ Studies have shown that, with regards to all cases, less than 3% go to trial,³⁵ and a majority of all civil filings are settled out of

28. Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 3 (1992). In some instances, courts require parties to attempt settlement prior to pursuing litigation. See Theodore J. St. Antoine, *Introduction: What ADR Means Today*, in HOW ADR WORKS 1, 9 (Norman Brand ed., 2002) (“A number of states have already provided for ‘mandatory mediation’ or ‘advisory arbitration’ before trial in almost any civil action for damages.”); Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 24 (Norman Brand ed., 2002) (examining a court rule required attorneys to certify that they discussed ADR options with their clients (citing D. MASS. R. 16.1(d)(3)(b) (1990))).

29. Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 3 (1992).

30. *Id.*

31. See *id.* (discussing the federal courts’ “revision of the rule governing pretrial conferences to emphasize the court’s role in settlement negotiations, . . . more frequent appointment of special masters for settlement purposes,” and many other things (citations omitted)).

32. Jacqueline M. Nolan-Haley, *Introduction: Lawyers’ Ethics in ADR*, 28 FORDHAM URB. L.J. 891, 892 (2001).

33. Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 5 (1992). The courts’ emphasis on settlement “reflects a darker vision of adversary justice, a vision that might be described as ‘pathological adversariness.’” *Id.*

34. Blanca Fromm, Comment, *Bringing Settlement out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 664 (2001).

35. *Id.*

court.³⁶ Yet, interestingly, very little information is available about settlements because many are confidential.³⁷ “[C]onfidentiality is generally considered a fundamental hallmark of ADR,”³⁸ and settlements are commonly characterized as invisible since many agreements are drafted with some sort of provision for confidentiality.³⁹ Settlements represent a contractual agreement that is voluntarily entered into by the parties; therefore, the parties normally “have great freedom to write confidentiality clauses into [their] settlements.”⁴⁰ Although not set in stone, parties typically agree not to disclose settlement information. Furthermore, the “settlement can mandate sealing of discovery, judicial records, or the entire case file” as long as the parties receive court approval.⁴¹ Ultimately, the main purpose of settlement is amicable resolution of a dispute without any assignment of liability, negative consequences, or punishment to either party.⁴²

As shown above, ADR plays a substantial role in the legal system and process today. Indeed, according to one author, “[w]e are already in the dispute resolution age, not the litigation age.”⁴³ This raises the issue of whether a lawyer actually possesses a duty to advise the client of alternatives to litigation, specifically ADR,⁴⁴ and, if so, where that duty

36. *Id.*

37. *See id.* (“[G]iven that so many settlements are confidential, it is surprising that we know anything about them at all.”).

38. Greg Dillard, Note, *The Future of Mediation Confidentiality in Texas*, 21 REV. LITIG. 137, 139 (2002).

39. Blanca Fromm, Comment, *Bringing Settlement out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 664–65 (2001). “Settlements . . . happen when cases lack unusual characteristics and, therefore, offer a more precise picture of what the typical case is worth.” *Id.* at 670–71.

40. *Id.* at 676–77.

41. *Id.* at 677.

42. *See* Alma Saravia, Note, *Overview of Alternative Dispute Resolution in Healthcare Disputes*, 32 J. HEALTH L. 139, 140 (1999) (noting that the main ADR objectives are saving money, resolving disputes faster than a parties can pursuing litigation, and allowing parties to continue an amicable resolution after a resolution is reached); *see also* Jay L. Hoecker, *Guess Who is Not Coming to Dinner: Where are the Physicians at the Healthcare Mediation Table?*, 29 HAMLIN J. PUB. L. & POL’Y 249, 249 (2008) (“The goal of mediation is to resolve conflict by negotiating a solution that is amicable, efficient, sustainable, and acknowledges the identity, individuality[,] and integrity of all parties.” (citing Charles B. Rodning, *Coping with Ambiguity and Uncertainty in Patient-Physician Relationships: III. Negotiation*, 13 J. MED. HUMAN. 212, 215 (1992))).

43. Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 461 (2000).

44. “For over a decade, academics and ADR proponents have been arguing that lawyers should talk about ADR options with their clients.” Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 246 (2001) (citing Marshall J. Breger, *Should*

comes from and how far it extends. Although various theories exist to explain or propose the implementation of such a duty, a consensus has arisen among legal scholars “that lawyers have some form of duty to discuss ADR with their clients.”⁴⁵ In fact, even in the absence of an official duty, many scholars argue that lawyers need to “educate themselves about what ADR processes are available, counsel clients about ADR options, and represent clients in various ADR proceedings.”⁴⁶ A lawyer’s responsibility as it relates to ADR is often compared to a doctor’s duty to obtain informed consent from their patients (i.e., to allow each patient to make the final decision concerning a course of treatment after having been introduced to all possible options).⁴⁷ The lawyer’s responsibility to the client regarding ADR is also similar to the doctor’s duty to the patient to first do no harm.⁴⁸

an Attorney Be Required to Advise a Client of ADR Options?, 13 GEO. J. LEGAL ETHICS 427, 461 (2000); Robert F. Cochran, Jr., *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183 (1999); Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990); Frank E. Sander & Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options?*, A.B.A. J., Nov. 1990, at 50, 50; Carol VanAuken-Haight & Pamela Chapman Enslin, *Attorney Duty to Inform Clients of ADR?*, 72 MICH. B. J. 1038 (1993); Monica L. Warmbrod, Comment, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791, 813–14 (1996/1997)).

45. Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 249 (2001); cf. Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR Mediation*, 31 W. ST. U. L. REV. 239, 244 (2004) (“[S]ome find that the language [in the Model Rules of Professional Conduct] creates an implicit obligation to advise clients regarding the ADR option.”).

46. Kristin L. Fortin, *Reviving the Lawyer’s Role As Servant Leader: The Professional Paradigm and a Lawyer’s Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 613 (2009).

47. See Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 32–33 (Norman Brand ed., 2002) (“An attorney malpractice cause of action would be based, as is medical informed consent, on the individual’s dignity. To the extent possible, individuals should control decisions that affect them.” (quoting Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?*, 48 ARB. J. 8, 10 (1993))); Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR Mediation*, 31 W. ST. U. L. REV. 239, 252 (2004) (“This duty to inform is . . . a duty to volunteer the information that the patient needs to make an intelligent decision. The legal profession is still in a paternalistic mode with respect to providing full disclosure regarding alternatives to litigation, mediation[,] and arbitration.”). *But see* Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 33 (Norman Brand ed., 2002) (disagreeing with the analogy because attorneys are not required to obtain informed consent from their client for all decisions like doctors are required to do).

48. Both lawyers and doctors have ethical and legal obligations, including fiduciary duties, to their clients and patients respectively. See Charity Scott, Special Feature, *Doctors As Advocates*,

Specifically, “[t]he controversy is not whether an attorney should discuss the advantages and disadvantages of ADR with the client but whether a professional rule should *require* an attorney to do so.”⁴⁹ One source outlines the duty in the following way: “A lawyer has a duty to understand ADR sufficiently to be able to explain and recommend the appropriate process, to identify the ideal time for ADR use, and to assist in the selection of the best qualified neutral for a given matter.”⁵⁰ Needless to say, it is crucial that the lawyer provide all relevant information to the client because this helps the client understand the pros and cons of selecting a certain process of dispute resolution, as well as promoting the “development of ADR as a public good.”⁵¹ However, despite the assertion by many legal scholars and practitioners that “every lawyer ought to have an ethical obligation to counsel clients about . . . [ADR] as an alternative to adversarial proceedings,”⁵² the origin, and even the actual existence, of such a specific duty is currently in dispute.

Lawyers As Healers, 29 HAMLINE J. PUB. L. & POL’Y 331, 357–58 (2008) (describing lawyers as healers). “It has often been said that the law is one of the great healing professions, that while medicine heals the body and the clergy heals the soul, the law heals societal rifts.” *Id.* at 358 n.54 (quoting STEVEN KEEVA, TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN LEGAL LIFE 102 (1999)). “[Therapeutic jurisprudence] suggests that people’s encounters with the legal system, like their encounters with the health care system, ideally should leave them better off, not worse off, than they were before the encounter. In other words, like medicine, law should strive first to ‘do no harm.’” *Id.* at 367 n.68 (quoting Charity Scott, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts*, 25 J. LEGAL MED. 377, 379 (2004)).

49. Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR Mediation*, 31 W. ST. U. L. REV. 239, 239 (2004) (emphasis added).

50. Nancy Neal Yeend & John Paul Jones, *Legal Ethics and ADR: Do You Pass the Test?*, SAN FRANCISCO ATT’Y, June/July 1998, at 32, 34, available at <http://www.mediate.com/articles/yeendandjones.cfm>.

51. See Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 247 (2001) (encouraging attorneys to advise clients about ADR so they can make a more informed choice and because ADR is often beneficial for the public, the litigants, and the justice system).

52. Kristin L. Fortin, *Reviving the Lawyer’s Role As Servant Leader: The Professional Paradigm and a Lawyer’s Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 592 (2009); see also Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR Mediation*, 31 W. ST. U. L. REV. 239, 241 (2004) (pointing out a recommendation to the Ethics 2000 Commission to create a duty to inform clients about ADR options under the Model Rules of Professional Conduct (citing Kimberlee K. Kovach, Chair, Section of Dispute Resolution, Testimony at the Montreal Public Hearing of the Ethics 2000 Commission (May 29, 1998), available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/kovach.html). “The task force or commission of each state should ensure the client’s fundamental right to be advised about ADR.” Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR Mediation*, 31 W. ST. U. L. REV. 239, 258 (2004) (citing Gerald F. Phillips, *A Client’s Bill of Rights*, CAL. LAW., Feb. 2003, at 72).

B. *Lawyers' Duty to Inform of ADR Options: "Implied in the Rules" Theory*

At the outset, this debate regarding a lawyer's duty to notify the client of alternatives to litigation—i.e., ADR—is based primarily upon a lawyer's general obligation to counsel the client about all available legal options.⁵³ The ethical component of this duty "is arguably inherent in the fiduciary duty owed by an attorney to his principal."⁵⁴ Yet the question is whether such an obligation already exists implicitly through a broad reading⁵⁵ of Model Rules 1.2,⁵⁶ 1.4(b),⁵⁷ 2.1,⁵⁸ or 3.2,⁵⁹ or, if not, whether such an

53. Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 246 (2001) (suggesting that most of the reasons for advising a client about ADR are based on the obligation attorneys have to inform their clients of all legal options).

54. *Id.* at 246–47 (citing Frank E. Sander & Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options?*, A.B.A. J., Nov. 1990, at 50, 50).

55. See Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 434 (2000) (discussing the implications of broadly reading the Model Rules' requirement that a lawyer explain the situation as is "reasonably necessary" for the client to make an informed decision).

56. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002); see Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 21 (Norman Brand ed., 2002) ("Model Rule 1.2 also requires an attorney to give his client adequate information to understand and accept, or reject, a settlement proposal."); Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 434 (2000) (proposing that if the Model Rules were read broadly, inherent obligations might be found to require attorneys to provide an explanation to their clients sufficient to allow them to make an informed decision about whether to pursue ADR); Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 248 (2001) (citations omitted) ("Model Rule 1.2(a) is another possible source for an implicit duty. Rule 1.2(a) requires attorneys to consult with the client as to the 'means' by which the objectives of representation are pursued. Arguably, ADR processes are procedural 'means'; therefore, in support of client decision-making autonomy, attorneys should consult with clients about ADR.").

57. MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2002); see Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 433 (2000) ("Some commentators have suggested that a reasonable reading of state rules based on Model Rule 1.4 reveals such an implicit duty."); see also Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 249 (2001) ("In contrast to the advisory nature of Model Rule 2.1 and the consultative nature of Rule 1.2(a), Model Rule 1.4(b) rests on the notion of informed consent. Rule 1.4(b) requires an attorney to 'explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.'").

In order for the client to make an informed decision, it may be necessary to explain ADR. Read together, Model Rules 1.2(a) and 1.4(b) could be interpreted as requiring consultation on ADR in the context of a settlement offer. As offers to settle must be communicated to clients, similarly, offers to engage in an ADR process could be construed as offers to settle. Other authoritative sources could also be read in combination with Model Rule 1.4(b) to infer an obligation to advise on ADR.

obligation should be imposed explicitly or implicitly in the future.⁶⁰

An examination of the actual language of the above-stated rules demonstrates that the Model Rules currently do not contain an explicit provision requiring a lawyer to engage in mandatory client counseling regarding available ADR options.⁶¹ Rather, the language contained in these rules is more general in nature, stating that a lawyer shall: (1) “abide by a client’s decisions concerning the objectives of representation and . . . *consult with the client as to the means by which they are to be pursued*”;⁶² (2) “explain a matter to the extent *reasonably necessary to permit the client to make informed decisions* regarding the representation”;⁶³ and (3) “make reasonable efforts to expedite litigation consistent with the interests of the client.”⁶⁴ Furthermore, “[i]n representing a client, a lawyer shall *exercise independent professional judgment and render candid advice . . . [by referring] not only to law but to other considerations[,] such as moral, economic, social[,] and political factors, that may be relevant to the client’s situation.*”⁶⁵ These guidelines clearly leave room for a lawyer’s discretion to be based on independent judgment, allowing the lawyer to

Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 249 (2001) (citation omitted).

58. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2002). “Model Rule 2.1 requires an attorney to give ‘candid advice,’ referring to relevant ‘moral, economic, social and political factors’ in addition to law.” Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 248 (2001) (citing MODEL RULES OF PROF’L CONDUCT R. 2.1). “To imply an affirmative duty to advise in this rule, ‘candid advice’ must include ADR, either because the prevailing law relevant to the client’s situation in the jurisdiction concerns ADR or because ADR would have some moral, economic, social, or political relevance.” *Id.*

59. MODEL RULES OF PROF’L CONDUCT R. 3.2 (2002).

60. Kristin L. Fortin, *Reviving the Lawyer’s Role As Servant Leader: The Professional Paradigm and a Lawyer’s Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 612 (2009) (urging that lawyers should have an ethical duty to advise clients about ADR options, but even without such duty, lawyers should do so to meet client expectations and in the interests of judicial efficacy). For a more detailed discussion, see *infra* Part II.D.

61. See Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 430–31 (2000) (pointing out that the text of the Model Rules does not explicitly mandate counseling regarding ADR options). Although many scholars agree that the duty is implicit in the Model Rules, some of them disagree as to which exact rule constitutes the most appropriate origin of the duty. Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 22 (Norman Brand ed., 2002); Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 244 (2004).

62. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2002) (emphasis added).

63. *Id.* R. 1.4(b) (emphasis added).

64. *Id.* R. 3.2.

65. *Id.* R. 2.1 (emphasis added).

offer guidance that the lawyer believes is vital to the representation of the client. However, as stated earlier, many believe that counseling one's client about various alternatives to litigation actually includes explaining the matter to that client so that client can make "informed decisions" about the case, consulting with the client about available means of representation in a pending lawsuit, making "reasonable efforts" to expedite the proceeding, or rendering "candid advice" by referring to means other than just law.⁶⁶

A broad reading of the current rules shows that the extent and mandatory component of this implicit duty, if any, is certainly a matter of opinion. Whether a lawyer must advise the client about ADR in every case or whether it is a discretionary matter based upon exercise of the lawyer's independent judgment is unclear and is likely to be determined on a case-by-case basis. Moreover, it is also unclear how far the lawyer must go in this exploration of available ADR options and how that information should be presented to the client (i.e., whether barely mentioning the option is sufficient or whether presenting the client with, or even asking the client to sign, a certain legal document such as a client advisory letter is necessary). For example, Professor Frank Sander issued a proposal that would require lawyers to distribute "a brochure that describes the most common alternatives and to discuss these options with their clients and opponents" or "write a letter canvassing the possible options, and then have this letter signed by the client, much as is now done with contingent fee agreements."⁶⁷ To that end, some states have enacted statutes providing specific ethics guidelines on this matter.⁶⁸

C. *Lawyers' Duty to Inform of ADR Options: Recommendation by State Statutes*

Through state statutes, court rules, state ethics codes, and federal district local court rules, states across the country have enacted a number of rules

66. Many people agree that a broad reading of the Model Rules of Professional Conduct implicitly contains the duty to counsel clients of ADR options. See, e.g., Frank E. Sander & Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options?*, A.B.A. J., Nov. 1990, at 50, 50 (stating that students in Professor Sander's Legal Profession class thought a lawyer's duty to counsel clients about ADR was implied in the Model Rules).

67. *Id.*

68. See Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427 app. at 462-65 (2000) (listing the states that impose a duty to advise clients of ADR options). Additionally, attorneys may be subject to malpractice liability if they fail to discuss ADR options with their clients. Monica L. Warmbrod, Comment, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791, 814 (1997).

addressing a lawyer's duty to advise the client of ADR options.⁶⁹ These provisions vary, from suggesting that lawyers should advise their clients about ADR options to making it mandatory for the lawyers to do so. Specifically, lawyers in the following states have a mandatory, explicit duty to counsel their clients about ADR alternatives: California, Connecticut, Georgia, Minnesota, Missouri, New Hampshire, Texas, and Virginia.⁷⁰ That same duty is simply implied in the rules in Kansas, Michigan, and Pennsylvania.⁷¹ In contrast, lawyers are merely encouraged to advise their

69. For a detailed survey of the fifty states, see Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427 app. at 462-71 (2000).

70. See Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427 app. at 463-64 (2000) (providing a list of the states along with the applicable duties to advise in each). The Massachusetts Supreme Court mandated that attorneys discuss ADR with their clients, while the Massachusetts Rules of Professional Conduct only suggested that attorneys help clients make informed decisions by discussing ADR. Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 23-24 (Norman Brand ed., 2002) (citing MASS. SUP. JUD. CT. RULES R. 1:18, RULES OF DISPUTE RESOLUTION R. 5 (1999); MASS. SUP. JUD. CT. RULES R. 3:07, MASS. RULES OF PROF'L CONDUCT R 1.4 cmt. 5 (1997)). "By statute, Oregon courts must provide all civil litigants with written information about the mediation process and the court's mediation opportunities." *Id.* at 26 (citing OR. REV. STAT. § 36.185 (Supp. 1993)). The Texas Lawyers' Creed requires attorneys to advise clients about ADR options. *Id.* Although Georgia's Canon of Ethics was deleted in 2000, Georgia's ethical rules explicitly stated a lawyer's duty to inform his client of reasonable ADR alternatives to litigation. *Id.* (citing RULES & REGS. OF THE STATE BAR OF GA. R. 3-107, ETHICAL CONSIDERATION 7-5). "Minnesota court rules require a certificate of disclosure by the attorney that he gave the client ADR options 'within sixty days after an action is filed.'" *Id.* (quoting MINN. RULES OF PRACTICE FOR DIST. CT. R. 111.02(j) (1994)). In California, some local jurisdictions require attorneys to advise clients about ADR options early on and to use 'simple language' to explain the possible effects of ADR on the case. *Id.* at 27 (citing LOCAL RULES FOR THE SACRAMENTO SUPER. AND MUN. CTS., app. A § 8 (2001)); see also Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 246-47 (2004) (discussing Virginia's mandatory obligation for a lawyer to advise his client about appropriate ADR by adding comments to Model Rules 1.2, 1.4, and 2.1). *But see* Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 24-27 (Norman Brand ed., 2002) (citations omitted) (characterizing Michigan, Pennsylvania, New Mexico, Tennessee, and Illinois as states which also require a mandatory duty to inform clients about ADR options).

71. See KA. STAT. ANN. § 60-216 (Supp. 2009) (noting that during mandatory pretrial conferences a court may consider and take appropriate action concerning matters such as alternative dispute resolution of the claim in dispute therefore attorneys should advise clients of this); 42 PENN. CONS. STAT. ANN. R. 2.1 cmt. 1 (West 2008) ("Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront."); State Bar of Mich., Standing Comm. on Prof'l & Jud. Ethics, Op. RI-255 (1996) (discussing rules 1.2(1), 1.4, and 2.1 and providing that "[b]y offering to settle the dispute through means other than the public forum of trial, the proposal is akin to an offer of settlement which must be conveyed to the client . . ."); Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427 app. at 464-65 (2000) (discussing Kansas, Michigan, and Pennsylvania as states that have an implied duty to inform clients of ADR). *But see* Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 25 (Norman Brand ed., 2002) (citations omitted) (characterizing

clients of ADR options in Arkansas, Colorado, Delaware, Hawaii, Louisiana, Massachusetts, New Jersey, New Mexico, Ohio, and Virginia.⁷²

Despite these existing mechanisms, a number of ADR proponents continue to advocate for the inclusion of specific language requiring lawyers to counsel their clients on ADR into the Model Rules, thus making a mandatory rule for the legal profession as a whole.⁷³

D. *Proposed Shift Toward Mandatory Duty to Inform*

Professor Sander, an ADR pioneer, is a strong proponent of the “explicit professional obligation to canvass [ADR] options with clients.”⁷⁴ Like Professor Sander, many scholars believe that existing regulations should incorporate specific language setting forth a mandatory duty to counsel clients about available ADR options; however, there seems to be a lack of consensus regarding the exact wording and placement of such a requirement.⁷⁵

Michigan and Pennsylvania as states that require lawyers to inform clients about ADR options).

72. See Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 27–28 (Norman Brand ed., 2002) (characterizing Arkansas, Colorado, Hawaii, and New Jersey as four of eight states that merely suggest than an attorney advise clients about ADR possibilities); Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, app. at 462–63 (2000). In addition to encouraging lawyer to discuss ADR with their clients, the Virginia Rules of Professional Conduct also mandate lawyers to advise their clients regarding ADR that might be “more appropriate to the client’s goals.” VA. RULES OF PROF’L CONDUCT R. 1.4 cmt. 1 (2009); see Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 463 (2000) (summarizing the duty the Virginia Rules of Professional Conduct place on attorneys in regards to advising clients of ADR options). In January of 2012, the Supreme Court of Ohio passed amendments to the Rules for Stark County Common Pleas that changed the mandatory duty to inform clients of ADR alternatives to merely a recommended duty to inform clients. See STARK CTY. (OHIO) CT. C.P., GEN. R. 16.03 (amending the language of Rule 16.03 to state “it is recommended that before the initial pre-trial conference in a case, counsel shall discuss the appropriateness of ADR in the litigation with their clients . . .”).

73. See Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 457 (2000) (noting that many believe explicit language is in order to make ADR consultation a requirement).

74. Frank E. Sander & Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options?*, A.B.A. J., Nov. 1990, at 50, 50.

75. See Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 35 (Norman Brand ed., 2002) (stating that while Professor Berger argues for “an explicit mandatory obligation,” he believes it should still be flexible); Gerald F. Philips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 241–42 (2004) (discussing recommendations to amend Model Rules 1.2 and 2.1 to include a duty to inform clients about ADR). Many who advocate for the inclusion of specific language to set forth this duty refer to Model Rules 1.2, 1.4, or 2.1 and the comments associated therewith. The Commission of Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission), for example, has “proposed an addition to Comment 5 of [Rule 2.1], which reads: ‘Similarly, when a matter is likely to involve litigation, it may

Professor Robert Cochran proposed an amendment to the existing Model Rules that would require attorneys to inform clients of ADR possibilities.⁷⁶ To that end, some scholars argue for incorporating the express, desired language into Model Rule 1.2,⁷⁷ while others believe such addition would “understate the legal significance of ADR by equating it with amorphous extra-legal considerations and would furthermore be logically inconsistent with any duties enumerated in [Model Rule] 1.4(b).”⁷⁸ As such, a number of scholars instead advocate for placing this newly proposed requirement in the context of Rule 1.4(b).⁷⁹

No matter how the specific language is incorporated, its inclusion in the Model Rules would certainly lead to legal malpractice and grievance claims against lawyers if and when they fail to comply with such a duty.⁸⁰ This potential outcome has led to a debate between legal scholars and practitioners. Some advocate for such a result because the client has a right to be compensated if the lawyer’s failure to advise the client of available litigation alternatives resulted in a wrong,⁸¹ while others “vigorously

be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.” Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS 17, 22 (Norman Brand ed., 2002); see also Gerald F. Philips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 241–42 (2004) (identifying recommendations from different groups to amend Model Rules 1.2 and 2.1).

76. Robert F. Cochran, Jr., Essay, *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895, 897 (2001); Gerald F. Philips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 242 (2004).

77. Gerald F. Philips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 241 (2004) (stating that “[a] Joint Initiative of the CPR-Georgetown Commission and ABA Dispute Resolution Section . . . recommends that Rule 1.2(a) be amended to read: A lawyer shall . . . consult with the client as to the means by which [the client’s objectives] are to be pursued, including discussion of the process by which those objectives are to be achieved”).

78. Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 459 (2000).

79. *Id.* The current version of Model Rule 1.4(b) reads: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” MODEL RULES OF PROF’L CONDUCT R. 1.4(b) (2002). A proposed alternative to incorporating explicit language in the rules is to include a discussion of a lawyer’s duty to counsel his clients about ADR in one of the comments to the Model Rules. Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 460 (2000). However, comments merely provide guidelines rather than setting forth mandatory obligations, thus making this type of addition merely suggestive. *Id.*

80. *Cf.* Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 448 (2000) (explaining that although the Model Rules are not intended to be a basis for civil suit, many states allow evidence of a breach of such rules to be used in malpractice cases).

81. Monica L. Warmbrod, Comment, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV.

oppose” it as “overkill and unfair micromanagement of the practice of law”⁸² that “would increase greatly malpractice liability and run up the meter on client expenses.”⁸³ Practicing lawyer Michael Prigoff, for example, goes so far as to claim that the “real availability of many of these [ADR] options is illusory, given their voluntary nature and the unwillingness of many parties to explore such options.”⁸⁴ Supporters of such malpractice actions, on the other hand, compare the duty to the concept of informed consent in medical malpractice cases, in which a doctor would be subject to liability for failure to inform a patient of all available treatment options.⁸⁵ Despite these arguments and comparisons, the adoption of a mandatory duty to counsel the client about ADR options is inadvisable because the ADR process that is meant to provide alternatives to litigation will instead create a “new cause of action for attorney malpractice,” which, ironically, will “result in more litigation.”⁸⁶

III. ANALYSIS OF A MEDICAL MALPRACTICE CASE

A. *Explanation of Mandatory Reporting Requirement*

1. National Practitioner Data Bank (NPDB)

The Health Care Quality Improvement Act of 1986 established the

791, 818 (1996). Professor Frank E. Sander is a strong proponent of the “explicit professional obligation to canvass [ADR] options with clients.” Frank E. Sander & Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options?*, A.B.A. J., Nov. 1990, at 50, 50.

82. Frank E. Sander & Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options?*, A.B.A. J., Nov. 1990, at 50, 51.

83. *Id.* at 50.

84. *Id.* at 51.

85. Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 449 (2000) (citing Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?*, 48 ARB. J. 8, 10 (1993)); see also Gerald F. Philips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 254 (2004) (“The courts nevertheless have determined that the doctor must inform the patient about alternatives to an operation and have rejected the argument that because medicine is a profession a doctor has no duty to advise the patient as to various alternatives available and require the patient’s informed consent.”).

86. Monica L. Warmbrod, Comment, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791, 818 (1997) (“Although increased litigation may be the wrong means to force lawyers to inform clients of ADR, lawyers will quickly conform after a few malpractice verdicts and will begin to inform clients about ADR options. Requiring attorneys to advise their clients of ADR procedures so that their clients ‘may make an informed decision is not an unfair burden to place on attorneys.’”). *But see* Gerald F. Philips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 253 (2004) (referencing letters from Colorado and Virginia, and stating: “There is no evidence of any claims filed or lawsuits initiated in those states with similar mandatory rules”).

need for a national mechanism to monitor physician performance and shortly thereafter the National Practitioner Data Bank (NPDB or Data Bank) was codified by federal statute.⁸⁷ Title IV was drafted in an effort “to improve the quality of health care by encouraging [s]tate licensing boards, hospitals and other health care entities, and professional societies to identify and discipline . . . unprofessional behavior.”⁸⁸ The Legislature was originally concerned that “incompetent physicians” who committed medical malpractice in one state were able to move to a different state without disclosure of this critical information to appropriate authorities, such as hospitals and licensing boards, in their new state of residence and practice.⁸⁹ The Data Bank was created with the intent of remedying this potential problem by functioning as a reporting system for “adverse licensure actions taken against health care practitioners and entities” as well as “any negative action or finding which a [s]tate licensing authority, peer review organization, or private accreditation entity has concluded against a health care practitioner or entity.”⁹⁰ The goal behind this legislation was to allow medical boards and hospitals to use this information to determine whether a physician should be granted a medical license or clinical privileges in the new state of residence.⁹¹ “Listing’ in the NPDB can, and

87. See 42 U.S.C. § 11101 (2006) (finding the need for a medical peer review system); The National Practitioner Data Bank, 45 C.F.R. § 60.1 (2011) (noting the creation of the National Practitioner Data Bank and referencing that the Social Security Act “requires each [s]tate to adopt a system of reporting to the Secretary adverse licensure actions taken against health care practitioners and entities”). The Data Bank opened on September 1, 1990. Virginia H. Hackney, *The National Practitioner Data Bank: A Step Toward More Effective Peer Review*, 24 J. HEALTH & HOSP. L. 201, 201 (1991).

88. NAT’L PRACTITIONER DATA BANK, NPDB GUIDEBOOK A-2 (2001), available at <http://www.npdb-hipdb.hrsa.gov/resources/NPDBGuidebook.pdf>.

89. 42 U.S.C. § 11101(2); NAT’L PRACTITIONER DATA BANK, NPDB GUIDEBOOK A-2 (2001), available at <http://www.npdb-hipdb.hrsa.gov/resources/NPDBGuidebook.pdf>; see also Gail Daubert, *Comparative Health Law: National Repositories of Information: A Comparison of the National Practitioner Data Bank in the United States and the National Confidential Enquiry into Perioperative Deaths in the United Kingdom*, 5 ANNALS HEALTH L. 227, 230–31 (1996) (indicating the impetus behind the passage of the Data Bank). “There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician’s previous damaging or incompetent performance.” 42 U.S.C. § 11101(2); see also Ronald L. Scott, *Cybermedicine and Virtual Pharmacies*, 103 W. VA. L. REV. 407, 430 (2001) (asserting that the NPDB is intended to “prevent incompetent practitioners from moving between states without discovery of the practitioners’ incompetent performance”). However, an argument can be made that “medical licensure [already] protects the public from incompetent medical care and deception regarding practitioner qualifications.” William P. Gunnar, *The Scope of a Physician’s Medical Practice: Is the Public Adequately Protected by State Medical Licensure, Peer Review, and the National Practitioner Data Bank?*, 14 ANNALS HEALTH L. 329, 340 (2005).

90. 45 C.F.R. § 60.1.

91. See *id.* (authorizing the collection of information regarding the competence of

is in fact designed to, stigmatize the practitioner against whom the review action is taken.”⁹²

The NPDB compiles information on judgments, settlements, and other relevant adverse actions against practitioners.⁹³ It does not state a minimum dollar amount that must be met before a settlement payment should be reported⁹⁴ but the requirements are rather specific otherwise. The NPDB legislation serves two main functions: (1) it requires appropriate entities, such as medical licensing boards, to report information to be included in the database;⁹⁵ and (2) it collects queries and releases information to eligible parties.⁹⁶ For instance, out-of-court

practitioners).

92. Guillermo A. Montero, Comment, *If Roth Were a Doctor: Physician Reputation Under the HCQIA*, 30 AM. J.L. & MED. 85, 85 (2004). In fact, hospitals are likely to be reluctant to hire a doctor with an adverse malpractice record. *Id.* at 86. “In extreme cases, practitioners may effectively be precluded from practicing at all.” *Id.* Overall, “the NPDB is likely to result in the deprivation of a practitioner’s liberty interest in good reputation.” *Id.* But see Gail Daubert, *Comparative Health Law: National Repositories of Information: A Comparison of the National Practitioner Data Bank in the United States and the National Confidential Enquiry into Perioperative Deaths in the United Kingdom*, 5 ANNALS HEALTH L. 227, 244 (1996) (“The Data Bank system, however, is not valued by all and has its share of critics.”).

93. Virginia H. Hackney, *The National Practitioner Data Bank: A Step Toward More Effective Peer Review*, 24 J. HEALTH & HOSP. L. 201, 202 (1991); N. Jean Schendel, *Banking on Confidentiality: Should Consumers Be Allowed Access to the National Practitioner Data Bank?*, 27 J. HEALTH L. 289, 289 (1994).

94. Virginia H. Hackney, *The National Practitioner Data Bank: A Step Toward More Effective Peer Review*, 24 J. HEALTH & HOSP. L. 201, 202 (1991). The Department of Health and Human Services Office of Inspector General explains that “all malpractice payments must be reported, regardless of amount.” RICHARD P. KUSSEROW, DEP’T OF HEALTH & HUMAN SERVS., OEI-01-90-00521, NATIONAL PRACTITIONER DATA BANK: MALPRACTICE REPORTING REQUIREMENTS i, available at <http://oig.hhs.gov/oei/reports/oei-01-90-00521.pdf>. The NPDB website cites the following as reportable information: “Medical malpractice payments; adverse licensure and certification actions; adverse clinical privileging actions[;] adverse professional society membership actions[;] health care-related criminal convictions and civil judgments and other adjudicated actions[;] Medicare/Medicaid exclusions[;] other adjudicated actions against practitioners, providers, and suppliers[;] any negative action or finding against a health care practitioner or entity.” U.S. Dep’t of Health & Human Servs., *Health Care Organizations: Reporting, THE DATA BANK*, <http://www.npdb-hipdb.hrsa.gov/hcorg/whatYouMustReportToTheDataBank.jsp> (last visited May 14, 2012).

95. Karen Cutts, *Medical Malpractice Payments Made by Risk Retention Groups and Purchasing Group Insurers Must Be Reported to National Practitioner Data Bank*, in RISK RETENTION REP. 1 (1990). For a full listing of the entities required to submit information to the Data Bank and for information on querying, see U.S. Dep’t of Health & Human Servs., *Health Care Organizations: Reporting, THE DATA BANK*, <http://www.npdb-hipdb.hrsa.gov/hcorg/whatYouMustReportToTheDataBank.jsp> (last visited May 14, 2012).

96. See Karen Cutts, *Medical Malpractice Payments Made by Risk Retention Groups and Purchasing Group Insurers Must Be Reported to National Practitioner Data Bank*, in RISK RETENTION REP. 1, 2 (1990) (“The statute requires that all hospitals must query the Data Bank every two years Others who may query the Data Bank include: State licensing boards . . . ; health care

settlements of malpractice claims by physicians must be reported and should include information about the complaint and the settlement amount, even if the settlement provides no admission of liability by the physician.⁹⁷ Five main sources are responsible for reporting the information: “(1) professional societies with formal peer review; (2) hospitals; (3) HMOs and other health care entities with formal peer review; (4) state licensing boards; and (5) medical malpractice insurers.”⁹⁸

Consistent with its initial purpose, the NPDB grants limited access to the information it contains.⁹⁹ As such, the public is not able to access the NPDB directly; on the contrary, only specific parties, such as state licensing boards and hospitals, have a right to make queries about physicians and access available information.¹⁰⁰ A few authors have made

entities . . . ; an attorney who has filed a medical malpractice action or claim . . . ; individual physicians, dentists[,] and other health care practitioners concerning themselves.”); *see also* Jeffrey A. Lovitky, *The National Practitioner Data Bank: Coping with the Uncertainties*, 33 J. HEALTH L. 355, 358 (2000) (“Pro se plaintiffs or plaintiffs’ attorneys in medical malpractice actions may also query the Data Bank under a very limited set of circumstances.”).

97. *See* Virginia H. Hackney, *The National Practitioner Data Bank: A Step Toward More Effective Peer Review*, 24 J. HEALTH & HOSP. L. 201, 203 (1991) (noting that “settlement payments are sometimes made even when liability is uncertain”); *see also* Jeffrey A. Lovitky, *The National Practitioner Data Bank: Coping with the Uncertainties*, 33 J. HEALTH L. 355, 359–61 (2000) (providing a detailed discussion of the reporting and querying process of the NPDB and the problems associated therewith).

98. Karen Cutts, *Medical Malpractice Payments Made by Risk Retention Groups and Purchasing Group Insurers Must Be Reported to National Practitioner Data Bank*, in RISK RETENTION REP. 1 (1990).

99. 45 C.F.R. § 60.1 (2011); Virginia H. Hackney, *The National Practitioner Data Bank: A Step Toward More Effective Peer Review*, 24 J. HEALTH & HOSP. L. 201, 206 (1991); *see* Kristin Baczynski, Note, *Do You Know Who Your Physician Is?: Placing Physician Information on the Internet*, 87 IOWA L. REV. 1303, 1307 (2002) (“[T]he HCQIA mandates that the NPDB be kept confidential and that the general public not be provided access to physician information.”); Julie Barker Pape, Note, *Physician Data Banks: The Public’s Right to Know Versus the Physician’s Right to Privacy*, 66 FORDHAM L. REV. 975, 1011 (1997) (“[W]hile physicians do not have a clear right to keep all information out of the public sphere, they nonetheless have an interest in protecting and governing how information about them is collected and used.”); *cf.* Patient Protection Act, H.R. 5122, 106th Cong. (2000) (seeking to amend the Health Care Quality Improvement Act to allow access by the public to all information reported to the NPDB).

100. Virginia H. Hackney, *The National Practitioner Data Bank: A Step Toward More Effective Peer Review*, 24 J. HEALTH & HOSP. L. 201, 206–07 (1991). The NPDB website identifies parties that may potentially access NPDB information. “Hospitals, [s]tate licensing boards and other health care organizations, professional societies, certain federal agencies[,] and others” may access the Data Bank if they are eligible and register to do so. U.S. Dep’t of Health & Human Servs., *Health Care Organizations: How to Get Started*, THE DATA BANK, <http://www.npdb-hipdb.hrsa.gov/hcorg/howToGetStarted.jsp> (last visited May 14, 2012). Additionally, “practitioners, providers, [and] suppliers may access their own information.” *Id.* Plaintiff’s counsel and pro se plaintiffs may be provided some information under limited circumstances. *Id.* Members of the general public are very limited in their access to the information and can only “request data that does not identify any

the argument that Congress should go even further and pass legislation granting members of the public access to the information contained in the federal Data Bank.¹⁰¹ One author goes so far as to compare the public's desire for information regarding malpractice actions to the importance the public places on obtaining a national list of registered sex offenders.¹⁰² Although the public is unable to access the NPBD, many states have circumvented this ban by statutorily mandating that this type of information be available to the community.¹⁰³ These statutes have extended the use of information contained in the NPDB far beyond that for which it was initially intended.¹⁰⁴ As a result, a serious contention between physicians and the public has ensued, particularly with regard to who should have the right to obtain the information and how it should be used.¹⁰⁵

particular organization or practitioner." *Id.*

101. See Patient Protection Act, H.R. 5122, 106th Cong. (2000) (seeking to allow public access to all information reported to the NPDB); Ronald L. Scott, *Cybermedicine and Virtual Pharmacies*, 103 W. VA. L. REV. 407, 430 n.153 (2001) (examining a bill proposed by former House of Representatives member Thomas Bliley); Kristin Baczynski, Note, *Do You Know Who Your Physician Is?: Placing Physician Information on the Internet*, 87 IOWA L. REV. 1303, 1305 (2002) (arguing that physician information should be publicly available by comparing it to information about sex offenders); Laura A. Chernitzky, Note, *Constitutional Arguments in Favor of Modifying the HCQIA to Allow the Dissemination of Physician Information to Healthcare Consumers*, 63 WASH. & LEE L. REV. 737, 776 (2006) (stating that Congress should allow public access to the NPDB for constitutional reasons, as well as to benefit the public); Julie Barker Pape, Note, *Physician Data Banks: The Public's Right to Know Versus the Physician's Right to Privacy*, 66 FORDHAM L. REV. 975, 1015-16 (1997) (asserting that access to federally compiled physician information is necessary to maintain consistency across the nation).

102. See Kristin Baczynski, Note, *Do You Know Who Your Physician Is?: Placing Physician Information on the Internet*, 87 IOWA L. REV. 1303, 1317 (2002) (providing an analysis of the "similarities between the justifications offered for and against publishing sex offender information" and physician information on the Internet).

[T]he reason members of both groups are included in their respective databases is that they did something wrong or illegal. . . . Both the physician and the sex offender, because of their respective positions in society, are highly scrutinized individuals. Finally, it is shattering, both physically and emotionally, when a physician or a sex offender commits a wrong against an individual.

Id. at 1313.

103. For a detailed discussion, see *infra* Part III.A.ii.

104. Congress authorized the creation of the NPDB through 42 U.S.C. § 11101 of the United States Code. 45 C.F.R. § 60.1 (2011). This creation illustrates the intent of Congress to facilitate peer review rather than to allow the public full access to the information within NPDB. See 42 U.S.C. § 11101 (2006) ("There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance. . . . This nationwide problem can be remedied through effective professional peer review.").

105. See Kristin Baczynski, Note, *Do You Know Who Your Physician Is?: Placing Physician*

2. Public Disclosure of Information by States

Although the bills attempting to grant public access to the NPDB information did not pass,¹⁰⁶ a number of states have specifically enacted statutes requiring state medical boards to compile malpractice-related information and publish it for public access.¹⁰⁷ In addition, following the

Information on the Internet, 87 IOWA L. REV. 1303, 1317–33 (2002) (considering arguments on both sides and concluding that the arguments in favor of the public's ability to obtain physician information outweigh concerns over possible invasions of physician privacy); Julie Barker Pape, Note, *Physician Data Banks: The Public's Right to Know Versus the Physician's Right to Privacy*, 66 FORDHAM L. REV. 975, 985–92 (1997) (discussing the competing concerns of allowing public access to the NPDB); see also Lawrence E. Smarr, *Medical Malpractice: External Influences and Controls: A Comparative Assessment of the PIAA Data Sharing Project and the National Practitioner Data Bank: Policy, Purpose, and Application*, 60 LAW & CONTEMP. PROBS. 59, 64–72 (1997) (comparing the PIAA Data Sharing Project and the NPDB). “Many hospitals claim that obtaining information from the Data Bank makes them more secure in their decisions to appoint or reappoint physicians, as the information may confirm a positive evaluation or reveal information a physician has failed to report.” Gail Daubert, *National Repositories of Information: A Comparison of the National Practitioner Data Bank in the United States and the National Confidential Enquiry into Perioperative Deaths in the United Kingdom*, 5 ANNALS HEALTH L. 227, 244 (1996). Some organizations argue that reporting requirements should be altered to cap payments above certain amounts to avoid listing settlements of “nuisance suits,” while others argue for the extension of current reporting requirements to include pending lawsuits. See RICHARD P. KUSSEROW, DEP'T OF HEALTH & HUMAN SERVS., OEI-01-90-00521, NATIONAL PRACTITIONER DATA BANK: MALPRACTICE REPORTING REQUIREMENTS 1–2 (2004), available at <http://oig.hhs.gov/oei/reports/oei-01-90-00521.pdf>.

106. See Laura A. Chernitsky, Note, *Constitutional Arguments in Favor of Modifying the HCQIA to Allow the Dissemination of Physician Information to Healthcare Consumers*, 63 WASH. & LEE L. REV. 737, 744–46 (2006) (discussing the Health Security Act, H.R. 3600, 103d Cong. § 5005(d)(1) (1994), Health Care Quality Improvement Act Amendments, H.R. 4274, 103d Cong. § 6(c) (1994), Health Care Liability Reform and Quality Assurance Act, S. 454, 104th Cong. § 203 (1995), Health Care Quality Improvement Act Amendments, S. 2004, 104th Cong. § 8(c) (1996), and the Patient Protection Act, H.R. 5122, 106th Cong. (2000)).

107. See ARIZ. REV. STAT. ANN. § 32-1403.01 (LexisNexis 2011) (requiring each physician licensed in the state to have a public profile available); GA. CODE ANN. § 43-34A-3 (2011) (providing for the dissemination of physician profiles to the public through the Internet); MASS. GEN. LAWS ANN. ch. 112, § 5 (LexisNexis Supp. 2012) (mandating the creation of individual public profiles for physicians); N.Y. PUB. HEALTH LAW § 2995-a (Consol. Supp. 2012) (requiring physician profiles to be made available to the public); N.C. GEN. STAT. § 90-5.3 (2011) (identifying the procedure for publishing medical judgments and settlements); R.I. GEN. LAWS § 5-37-9.2 (2009) (providing for profiles to be available to the public and including a disclaimer); VT. STAT. ANN. tit. 26, § 1368 (2006 & Supp. 2011) (listing the information that must be reported within a health care professional's individual public profile); see also Kristin Baczynski, Note, *Do You Know Who Your Physician Is?: Placing Physician Information on the Internet*, 87 IOWA L. REV. 1303, 1311 (2002) (citing CAL. BUS. & PROF. CODE § 2027 (West Supp. 2000); FLA. STAT. § 456.041 (2005)) (referencing Florida, California, and Maryland statutes that include settlement information in physician profiles); MD. CODE ANN., HEALTH OCC. § 14-411.1 (West 2000)). The information available to private citizens includes out-of-court settlement of malpractice cases, which is similar to the information contained in the NPDB. See Carolyn Krupa, *States Eye Public Access to More Doctor Disciplinary Records*, AM. MED. NEWS, May 9, 2011, <http://www.ama-assn.org/amednews/2011/05/09/prl20509.htm> (reporting the recent legislation or proposed legislation to create more

lead of Massachusetts,¹⁰⁸ a number of states have developed a comprehensive physician profile database that is available to the public via the Internet.¹⁰⁹ Also, public websites, such as www.healthgrades.com¹¹⁰ and www.docfinder.org,¹¹¹ combine the information obtained from different states and make it available for public access.¹¹²

The outcomes achieved through these state actions have certainly

“transparency in the medical profession”). Some states require complete disclosure of all malpractice-related information, while others have more specific disclosure requirements. For example, California defines an out-of-court settlement as an action in the amount of \$30,000 or more. CAL. BUS. & PROF. CODE § 803.1(b)(2)(A) (Deering Supp. 2012). “Starting in the mid-1990s, seventeen states began posting information on a doctor’s specific history of medical malpractice claims on state-run websites.” Eric Helland & Gia Lee, *Bargaining in the Shadow of the Website: Disclosure’s Impact on Medical Malpractice Litigation*, 12 AM. L. & ECON. REV. 462, 462 (2010). For a list of state websites providing physician profile information, see Kristin Baczynski, Note, *Do You Know Who Your Physician Is?: Placing Physician Information on the Internet*, 87 IOWA L. REV. 1303 app. at 1334–35 (2002) (listing 41 states with websites out of the 50 states).

108. See Jon H. Sutton, *Physician Data Profiling Proliferates*, BULL. AM. C. SURGEONS, May 2001, at 20, 23 (reporting that Massachusetts implemented a physician profiling website in 1998); see also Paul R. Cirel, *Responding to the Board of Medicine: Don’t Go It Alone*, MASS. MED. L. REP., Autumn 2005, at 9, available at <http://mamedicalaw.com/wp-files/edition/092605.pdf> (stating that liability insurers in Massachusetts must report settlements for any malpractice claim or action, even when no lawsuit was formally filed).

109. See Kristin Baczynski, Note, *Do You Know Who Your Physician Is?: Placing Physician Information on the Internet*, 87 IOWA L. REV. 1303, 1311 (2002) (examining Florida, California, and Maryland statutes that include settlement information in physician profiles (citing CAL. BUS. & PROF. CODE § 2027 (West Supp. 2000); FLA. STAT. § 456.041 (2005); MD. CODE ANN., HEALTH OCC. § 14-411.1 (West 2000)). These states provide free websites where physician information can be found. *Id.* at 1312 n.76 (citing MED. BOARD OF CAL., <http://www.mbc.ca.gov/lookup.html> (last visited May 14, 2012); *Search for Practitioner Profile Information*, FLA. DEP’T OF HEALTH, <http://ww2.doh.state.fl.us/IRM00profiling/searchform.asp> (last visited May 14, 2012); *Maryland DocFinder*, MD. BOARD OF PHYSICIANS, <http://www.docboard.org/md/df/mdsearch.htm> (last visited May 14, 2012) (enabling searches for physicians licensed in Maryland); Mass. Board of Registration in Med., *Physician Search*, MASS.GOV, <http://206.40.174.22/Profiles/Pages/FindAPhysician.aspx> (last visited May 14, 2012) (providing information to the public on physician profiles)). For a more complete listing of state Internet websites that post physician profiles, see Kristin Baczynski, Note, *Do You Know Who Your Physician Is?: Placing Physician Information on the Internet*, 87 IOWA L. REV. 1303 app. at 1334 (2002).

110. This website contains profiles of doctors across the country in various states and specialty areas, providing respective patient ratings, malpractice history, sanction history, and board action history. *Find a Doctor*, HEALTH GRADES, <http://www.healthgrades.com/find-a-doctor/> (last visited May 14, 2012).

111. The DOCFINDER website is operated by the Association of State Medical Board Executive Directors and offers links to web pages for various state medical boards. Jon H. Sutton, *Physician Data Profiling Proliferates*, BULL. AM. C. SURGEONS, May 2001, at 20, 21. Among its participants are the states of Alabama, Arizona, California, Colorado, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Texas, and Vermont. *Id.* Although not a participant in this program, the state of Idaho “provides profiles on a number of health care professionals besides physicians.” *Id.* at 22.

112. HEALTH GRADES, www.healthgrades.com (last visited May 14, 2012).

sparked a discussion in both the medical and legal communities as to their implications. For example, the Department of Health and Human Services Office of Inspector General acknowledged that small medical malpractice claims “can often cost more to litigate than to pay outright,”¹¹³ but that doctors “may have an incentive not to settle” because they “may fear that Data Bank queries will interpret any report as a blemish on the doctor’s record, and that queries may not distinguish between claims that were settled for convenience as opposed to cause.”¹¹⁴

Interestingly, an expansive study of the disclosure’s impact on medical malpractice litigation in general revealed evidence “that defendants value confidentiality and are willing to pay plaintiffs a premium for their silence” but that some are now inclined to pay less due to their awareness of existing websites disclosing settlement outcomes.¹¹⁵ To that end, the amicable, speedy, and low-cost, confidential out-of-court settlement of disputes is no longer an easy way out for physicians because they must now weigh the downsides of a published settlement record against their desire to resolve the matter out of court. In reality, only if certain types of accusations are made is it worthwhile for physicians to even consider the risks of a published settlement record. Moreover, it is prudent for physicians to take their chances to continue litigation and, in fact, it is rather common for such defendants to at least go through discovery and see where that might lead. For these reasons, this study found that “website disclosure” had a tremendous effect on malpractice litigation and caused “changes in the overall composition of cases.”¹¹⁶

B. *Negative Perceptions of a Settlement Record by the Public*

A number of organizations and individuals have proposed amendments to the law that, among other things, would permit public access to the Data Bank.¹¹⁷ Representative Ron Wyden of Oregon, for example, has

113. RICHARD P. KUSSEROW, DEP’T OF HEALTH & HUMAN SERVS., OEI-01-90-00521, NATIONAL PRACTITIONER DATA BANK: MALPRACTICE REPORTING REQUIREMENTS 1–2 (2004), available at <http://oig.hhs.gov/oei/reports/oei-01-90-00521.pdf>.

114. *Id.* (citing U.S. GEN. ACCOUNTING OFFICE, HRD-87-55, MEDICAL MALPRACTICE: CHARACTERISTICS OF CLAIMS CLOSED IN 1984 (1987)).

115. See Eric Helland & Gia Lee, *Bargaining in the Shadow of the Website: Disclosure’s Impact on Medical Malpractice Litigation*, 12 AM. L. & ECON. REV. 462, 474 (2010) (studying defendants’ willingness to pay more for a confidentiality agreement when they anticipate disclosure of the settlement).

116. See *id.* at 505–06 (finding that website disclosure “led to a substantial increase in litigation” that changed the case composition).

117. See Gail Daubert, *National Repositories of Information: A Comparison of the National Practitioner Data Bank in the United States and the National Confidential Enquiry into Perioperative*

specifically stated: “[It is] paternalistic to suggest consumers [cannot] understand this information. Consumer choice is the hallmark of every serious health reform proposal on the table.”¹¹⁸ Additionally, Gail Daubert has claimed that “[t]his would allow the ‘buyers of health care’ to select high quality physicians and reject those of poorer quality. This market force approach could drive the poor ‘performers’ out of business and improve the overall quality of health care.”¹¹⁹ In response, those in “[t]he medical profession argue[] that exposing physicians to such publicity threatens both their reputation and privacy.”¹²⁰

Interestingly, Representative Wyden’s argument in support of public disclosure of malpractice information demonstrates why public disclosure of settlement information actually causes more harm than good. Representative Wyden states that the argument against disclosure is that “consumers [cannot] understand this information,” but counters that they actually can understand it and should therefore have access to it because only members of the public can “select high quality physicians and reject those of poorer quality.”¹²¹ Moreover, Representative Wyden claims the public will make its decisions based on the information available in the federal Data Bank or, at this point, made available by different states.¹²²

Deaths in the United Kingdom, 5 ANNALS HEALTH L. 227, 245 (1996) (discussing proposed amendments to the Health Care Quality Improvement Act to make Data Bank information accessible to the public).

118. *Id.* (quoting *Wyden/Klug Introduce Bill to Open Data Bank Information to the Public*, 5 MEDICARE REP. (BNA) No. 468 (1994)).

119. *Id.*

120. William P. Gunnar, *The Scope of a Physician’s Medical Practice: Is the Public Adequately Protected by State Medical Licensure, Peer Review, and the National Practitioner Data Bank?*, 14 ANNALS HEALTH L. 329, 356 (2005) (quoting Julie Barker Pape, Note, *Physician Data Banks: The Public’s Right to Know Versus the Physician’s Right to Privacy*, 66 FORDHAM L. REV. 975, 989 (1997)) (internal quotation marks omitted). Physicians are also concerned “that consumers would not understand the complexities of the civil justice system, especially malpractice information, and would think that because a physician had a number of malpractice settlements during a certain time period that doctor was a ‘bad’ or incompetent physician.” Jon H. Sutton, *Physician Data Profiling Proliferates*, BULL. AM. C. SURGEONS, May 2001, at 20, 23 (citing AMERICAN MEDICAL ASSOCIATION INTERIM HOUSE OF DELEGATES, BOARD OF TRUSTEES REPORT 31-I-00 (2000)).

121. Gail Daubert, *National Repositories of Information: A Comparison of the National Practitioner Data Bank in the United States and the National Confidential Enquiry into Perioperative Deaths in the United Kingdom*, 5 ANNALS HEALTH L. 227, 245 (1996).

122. See 140 CONG. REC. E757-01 (daily ed. Apr. 21, 1994) (statement of Hon. Ron Wyden) (arguing that “[t]he public has a tremendous and justifiable appetite for information” regarding their physicians and quality of health care); cf. Gail Daubert, *National Repositories of Information: A Comparison of the National Practitioner Data Bank in the United States and the National Confidential Enquiry into Perioperative Deaths in the United Kingdom*, 5 ANNALS HEALTH L. 227, 245 (1996) (implying that better public access to physician information will cause consumers to select only those physicians of high quality, therefore improving healthcare overall).

The problem with this argument does not stem from the assertion that consumers are smart enough to make a determination of whether a doctor is competent. Rather, the problem is that, in many instances, settlement records are interpreted incorrectly and fail to provide a true indication of the competency of a physician because they often contain incomplete and ambiguous information. Furthermore, the information contained in these records is often misleading and may cause a stereotypical assumption that settlement means fault or liability, while in reality it does not.¹²³ When it comes to malpractice cases, the public is known to have a preconceived notion that a settlement is a reflection of the doctor's error or incompetence. For this reason, after seeing that a physician acquired a settlement record, consumers are unlikely to research further in an effort to fully understand the meaning and implications of a settlement (i.e., by obtaining statistics on the number of claims for a certain medical specialty per year or any other helpful information).¹²⁴ In sum, consumers are inclined to view a settlement as a defendant's fault or liability and, as a result, the publication of settlements involving physicians serves to negatively impact this professional field.

Numerous contemporary examples of settlements, even outside the field of medicine, support this contention regarding public perception of settlements. One such example is a private, confidential¹²⁵ settlement

123. "The mediation process does not focus primarily on which party is 'right' or 'wrong' or which side should 'win' or 'lose,' as do judicial or arbitral proceedings. It instead considers what terms the participants need to satisfy their underlying interests." CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 300 (6th ed. 2009) (citing GARY GOODPASTER, A GUIDE TO NEGOTIATION AND MEDIATION 213–15 (1997); KATHLEEN M. SCANLON, MEDIATOR'S DESKBOOK (CPR Institute for Dispute Resolution 1999); Fredrike P. Bannink, *Solution-Focused Mediation: The Future with a Difference*, 25 CONFLICT RESOL. Q. 163, 165–67 (2007)). "[I]t is often cheaper to settle a case than to defend the allegations." Gail Daubert, *National Repositories of Information: A Comparison of the National Practitioner Data Bank in the United States and the National Confidential Enquiry into Perioperative Deaths in the United Kingdom*, 5 ANNALS HEALTH L. 227, 244 (1996).

124. Cf. Matthew E. Brown, *Redefining the Physician Selection Process and Rewriting Medical Malpractice Settlement Disclosure Webpages*, 31 AM. J.L. & MED. 479, 489 (2005) ("[S]killed physicians often accept the most difficult cases with the highest possibility of a bad outcome" (citing Dorsey Griffith, *Malpractice Disclosure Bill Passes in California*, SACRAMENTO BEE, Aug. 30, 2002, at A3)). "Common sense indicates that the statistical odds of high-demand physicians being sued is . . . greater than a doctor who operates a very small practice." *Id.* (quoting Ruth E. Flynn, *Demand for Public Access to the National Practitioner Data Bank: Consumers Sound Their Own Death Cry*, 18 HAMLINE J. PUB. L. & POL'Y 251, 278 (1996) (internal quotation marks omitted)).

125. One professor explains that the desire for keeping settlement information confidential usually comes from a "paying defendant." Lance P. McMillian, *The Nuisance Settlement "Problem": The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 235 (2007). "Such defendants fear that if word spread about the terms of a particular settlement, other potential

agreement between Wang Xiaoning and Yahoo!, which international media interpreted “as an acknowledgment of the company’s moral liability, if not its legal liability.”¹²⁶ Similarly, the recent ten million dollar settlement involving Toyota sparked heated debate because the company claimed the “settlement was not an admission of liability,”¹²⁷ while prosecutors stated that “[t]en million dollars is a strong indication of admission of liability by Toyota.”¹²⁸ Bearing these examples in mind, a substantial settlement amount arguably appears to be an admission of liability. Yet this argument is not sound; a large settlement amount alone is merely an incomplete and ambiguous snapshot of the case and not a clear indicator of fault. Indeed, no matter what dollar amount parties agreed to as part of a settlement, the likelihood of whether or not the plaintiff would have been able to meet the burden of proof required in order to establish liability and prevail in court is never clear, nor are the

plaintiffs would become emboldened to file their own cases, thereby forcing a settling defendant to defend or pay off, or both, even more claims.” *Id.*

In a nuisance situation, a defendant’s worries on this point are magnified. If a defendant develops a reputation for rewarding those who file frivolous cases, the likely result would be more meritless complaints filed against that defendant. Confidentiality guards against the floodgates opening up in this manner. For their part, plaintiffs are quick to agree to this restriction in order to receive their money, especially if the absence of confidentiality would otherwise preclude settlement.

Id. (citations omitted).

126. Theresa Harris, *Settling a Corporate Accountability Lawsuit Without Sacrificing Human Rights: Wang Xiaoning v. Yahoo!*, 15 NO. 2 HUM. RTS. BR. 10 (2008).

Yahoo! Chief Executive Officer Jerry Yang’s personal apology to the plaintiffs’ families only a week earlier, during a hearing before the U.S. House of Representatives Committee on Foreign Affairs, reinforced this interpretation. Amnesty International and Reporters Without Borders, along with other human rights and free speech advocates, applauded the settlement as a long-overdue acceptance of corporate social responsibility principles, but expressed apprehension for the future since the settlement has no binding effect on any other Internet communications company. Furthermore, these groups pointed out, there is no clear indication that Yahoo! or other Internet technology providers will change their business practices to prevent other customers from being arbitrarily arrested in the same way as Shi and Wang.

Id.

127. Ken Bensinger & Ralph Vartabedian, *Toyota Settlement May Set Bar for Sudden-Acceleration Payouts*, LA TIMES, Dec. 24, 2010, <http://www.latimes.com/business/la-fi-toyota-settlement-20101224,0,5017649.story>.

128. *Id.* (internal quotation marks omitted); see Abigail Field, *Goldman Sachs Settlement: Immediate Win for Goldman, Long Term Victor Unclear*, DAILY FINANCE, July 16, 2010, <http://www.dailyfinance.com/2010/07/16/goldman-sachs-settlement-immediate-win-for-goldman-long-term-v/> (discussing high-profile settlements and their effect on public perspective); cf. Todd W. Blanche, Note, *When Two Worlds Collide: Examining the Second Circuit’s Reasoning in Admitting Evidence of Civil Settlements in Criminal Trials*, 67 BROOK. L. REV. 527, 528 (2001) (addressing how settlement can lead to a guilty verdict in trial).

exact reasons for the defendant's willingness to settle at that amount. In the end, the arguments supporting a mere prediction of the potential outcome of a lawsuit that actually never went to trial amounts to pure speculation and, therefore, should not be used as a source of judgment with regard to liability or professional competency.¹²⁹

Due to the negative perception surrounding malpractice settlements, some states have now included specific language in their websites explaining that settlements do not necessarily amount to an admission of liability.¹³⁰ In essence, this language is akin to a jury instruction stating that the information the jury just heard is inadmissible and should not be considered in their decision. However, these types of explanations may not fully nullify the public's preconceived notions that settlement is a reflection of incompetence or fault and, thus, some people may remain unwilling to see a doctor who has a public settlement record, especially if there are other choices. What is most interesting, and potentially ironic, about this possible outcome is that in opting against a doctor who has a public settlement record, patients may be "misinformed" in a different way because they might unknowingly choose a doctor who has a number of

129. Another example of such an assumption involves a patient who underwent a breast reduction surgery that went badly. Fred Schulte, *Doctor Profiles Veiled in Secrecy*, BALTIMORE SUN, Dec. 19, 2005, <http://www.saynotocaps.org/newsarticles/sun%20series/doctorprofiles.htm>. The patient suggested that her problems may have been avoided if the state's website had contained complete settlement information. *Id.* This, however, was not the case because all of the previous claims against her doctor were below the statewide "threshold amount," which permits settlements below this amount to remain unpublished on the Maryland Medical Board's website and, therefore, confidential. *Id.*

130. See Jeffrey P. Donohue, Note, *Developing Issues Under the Massachusetts 'Physician Profile' Act*, 23 AM. J.L. & MED. 115, 126 (1997) (discussing the disclaimer Massachusetts uses when disclosing settlement information). Massachusetts requires information regarding settlement amounts to include the following statement:

Settlement of a claim may occur for a variety of reasons which do not necessarily reflect negatively on the professional competence or conduct of the physician. A payment in settlement of a medical malpractice action or claim should not be construed as creating a presumption that medical malpractice has occurred.

MASS. GEN. LAWS ch. 112, § 5(f) (2004 & Supp. 2012). Arizona, Florida, Georgia, and Idaho also use a similar disclaimer. See ARIZ. REV. STAT. ANN. § 32-1403.01 (2011) (outlining what information regarding a physician's malpractice claims shall be included on the medical board's website); FLA. STAT. § 456.041(4) (Supp. 2012) (stating that any information in a practitioner's profile regarding malpractice settlement must include a statement negating any assumption of medical malpractice or liability on the part of the practitioner); GA. CODE ANN. § 43-34A-3(17)(D) (2011) (proclaiming that any malpractice settlements that are included in a physician's profile must be accompanied with a statement that denies wrongdoing by the practitioner); IDAHO CODE ANN. § 54-4603 (2007) (providing a similar statement to accompany information about malpractice settlements and also including additional information that malpractice can vary by specialty, therefore some specialties may be more likely to be subject to litigation than others).

pending lawsuits since this information is not disclosed to the public until the suit is resolved.¹³¹ Because it is not possible to obtain complete information about settlements, the best and most fair solution is to only make public the type of information that objectively and clearly offers a true indication of the doctor's competence and status.

Many scholars and legal practitioners agree that the "contentions that malpractice settlement information is unhelpful are not unfounded; it is often cheaper to settle a case than to defend the allegations."¹³² To that end, one frustrated physician complained that doctors are treated differently than other professionals, stating: "When other professionals screw up, it is not reported.¹³³ Why should doctors be singled out? It is unfair. The Data Bank should be abolished."¹³⁴ This doctor echoes

131. See Jeffrey P. Donohue, Note, *Developing Issues Under the Massachusetts 'Physician Profile' Act*, 23 AM. J.L. & MED. 115, 126 (1997) ("[T]he Board [of Registration in Medicine in Massachusetts] does not disseminate information on pending malpractice claims." (citing MASS. GEN. LAWS ANN. ch. 112, § 5(f))).

132. Gail Daubert, *National Repositories of Information: A Comparison of the National Practitioner Data Bank in the United States and the National Confidential Enquiry into Perioperative Deaths in the United Kingdom*, 5 ANNALS HEALTH L. 227, 244 (1996).

Perhaps few, small settlements against a practitioner are meaningless. However, when hospital staffs are determining whether or not to grant privileges to a doctor, it is helpful to know how many times the physician has settled cases, including nuisance cases. Certainly, the staffs making these decisions are in the position to evaluate the utility of the information. . . . Hospitals should be entitled to make staffing decisions with full knowledge, weighing the value of such information as they choose.

Id. at 244–45.

133. *Id.* (quoting Interview with Anesthesiologist at Michael Reese One Day Surgery, Chicago (Jan. 19, 1995)) (internal quotation marks omitted). Although no other professionals appear to have a national database similar to the NPDB, one professor advocates for the creation of a similar federal database containing information regarding police officers. See Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541, 575 (2001) ("[F]ederal legislation should be introduced that would link the data currently collected by state [Peace Officer Standards and Training Commissions] so that 'problem' or abusive officers are not allowed to obtain law enforcement employment in a neighboring state." (quoting HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 73–74 (1998))). Another legal scholar explores the possibility of creating a national database, similar to the NPDB, for lawyer profiles so that consumers may be assisted in their search for an attorney. See Steven K. Berenson, *Is It Time for Lawyer Profiles?*, 70 FORDHAM L. REV. 645, 683–88 (2001) (suggesting that information such as licenses and specialty certifications should be included, but that substance abuse problems should not be included in lawyer profiles).

134. Gail Daubert, *National Repositories of Information: A Comparison of the National Practitioner Data Bank in the United States and the National Confidential Enquiry into Perioperative Deaths in the United Kingdom*, 5 ANNALS HEALTH L. 227, 244 (1996) (quoting Interview with Anesthesiologist at Michael Reese One Day Surgery, Chicago (Jan. 19, 1995)) (internal quotation marks omitted). To illustrate his point further, the doctor explained that "some surgery departments routinely reimburse patients' dental bills if they claim something happened to their teeth during

criticisms that have been raised by other physicians who complain "that information about settlement payments is not useful[;] . . . [t]hus, 'if these settlements are reported, they are meaningless.'"¹³⁵ Both sides of the argument show that settling cases and creating a public record is clearly disadvantageous to a physician, and often it is hard to predict how much damage the record may cause.

C. *A Malpractice Lawyer's Conflict Regarding Duty to Inform Doctor of Litigation Alternatives*

In theory, it is understood that methods of ADR, such as out-of-court settlements, constitute "an adequate substitute for litigation."¹³⁶ In fact, ADR is not meant to take anything away from the legal system, but rather it is intended to recognize the diverse goals and interests of different parties.¹³⁷ Moreover, ADR proponents actually believe that it presents no disadvantages, instead thinking that it offers only tremendous benefits to both parties by allowing them to resolve their conflict in an amicable, timely, and cost-efficient manner without any admission of fault or punishment.¹³⁸

This understanding and expectation creates a challenging conflict for an ADR-proponent lawyer who represents doctors in medical malpractice

surgery. In fact, the claims are rarely investigated. Thus, 'if these settlements are reported, they are meaningless.'" *Id.*

135. *Id.* (quoting Interview with Anesthesiologist at Michael Reese One Day Surgery, Chicago (Jan. 19, 1995)).

[T]he AMA believes that since serious problems exist in correlating lawsuits with physician competence or negligence and some studies indicate lawsuits seldom correlate with findings of incompetence, only a state licensing board should determine when lawsuit settlements and judgments should result in a disciplinary action, and public disclosure of lawsuit settlements and judgments should only occur in connection with a negative state medical board licensing action.

Jon H. Sutton, *Physician Data Profiling Proliferates*, BULL. AM. C. SURGEONS, May 2001, at 20, 24 (citing the AMERICAN MEDICAL ASSOCIATION INTERIM HOUSE OF DELEGATES, BOARD OF TRUSTEES REPORT 31-I-00 (2000)).

136. Monica L. Warmbrod, Comment, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791, 818 (1997).

137. *Id.* at 818-19.

138. The Federal District Courts and the Federal Circuit Courts of Appeal, for example, refer to ADR "as a method of resolving disputes that is concerned with serving the interests of the parties as well as managing the court's docket" and which "minimizes the time and resources necessary to come to a resolution" that "resembles more of a group effort," rather than creating winners and losers. Thomas Hitter, Note, *What Is So Special About the Federal Circuit? A Recommendation for ADR Use in the Federal Circuit*, 13 FED. CIR. B.J. 441, 442-43 (2004) (citing Mori Irvine, *Better Late Than Never: Settlement at the Federal Court of Appeals*, 1 J. APP. PRAC. & PROCESS 341, 364 (1999)).

cases because the lawyer understands that if a doctor settles the case, the settlement record will likely result in great harm to the doctor's career in the future. In fact, the lawyer will have tremendous difficulty discussing the concept of ADR and its benefits with the doctor-client because the lawyer must then further explain how all the core benefits of a settlement procured through ADR, such as a speedy and amicable resolution of the dispute with lower cost and no assignment of fault, do not really apply to malpractice cases that settle. As such, almost any settlement of a medical malpractice case involving a doctor presents itself as a failure and not something that can be described as a no-fault amicable conflict resolution.

Accordingly, when it comes to a lawyer's duty to counsel a client about ADR options, the lawyer here has very few options. The lawyer cannot exercise independent judgment to explore and counsel about these ADR options because they are likely to contradict the client's best interest. Of course, the lawyer can easily satisfy any duty that may arise to counsel the client of these options by treating it as a formality and merely briefly mentioning settlement and ADR as options available to a doctor-client to avoid a potential legal malpractice claim. However, the lawyer must then explain the negative consequences of an out-of-court settlement record and steer the client away from even considering that option.

The problem with this approach, however, is that for ADR-proponents, including some malpractice lawyers, merely placing a piece of paper on the table or simply glossing over this topic of discussion in order to avoid a possible legal malpractice or grievance claim does not adequately introduce a client to the world of ADR and present it as the viable option that it has come to be. This group of attorneys believes that a client's introduction to the world of ADR involves the diligent exploration of a number of no-fault solutions and alternatives to litigation rather than merely the aforementioned brief and unconvincing discussion. Indeed, a serious conflict for ADR-proponent malpractice lawyers is created when the responsibility of doing what is best for one's client results in the discouragement out-of-court resolution methods. This presents a quandary for these lawyers, rendering them frustrated, discouraged, and conflicted.

D. Lawyers Should Advise Doctors Against Settlement in Most Cases

In light of the foregoing discussion, the question is posed: What should a lawyer do in such instances to resolve this conflict? To answer this question, one needs to go back to the core of lawyering in the United States by focusing on the lawyer's role, which is primarily to act in the

client's best interests.¹³⁹ As such, the lawyer should realize that their role as an attorney means being the client's agent by acting in the best interests of the client first and putting their commitment to any other cause, including ADR, second. In the end, anything that disadvantages the client is not a worthwhile result.

Nonetheless, some may argue that attorneys need only list the options available to clients, explain the pros and cons associated with each, and leave the ultimate decision up to the client.¹⁴⁰ However, the client looks to the lawyer as an advisor and often relies on the lawyer's judgment and expertise and, therefore, certainly expects a lot more from the lawyer than merely providing a general list of options.

Throughout the course of an attorney's practice, a lawyer develops legal experience that, together with independent judgment, aids the lawyer in exploring, consulting, and advising the client of various solutions, consequences, and outcomes. Today, this has come to include consideration of various ADR-related options. However, discussion of the option to settle in medical malpractice cases should be short because it would merely address the disadvantages associated with it for defendant-doctors. In most cases, particularly those in which the facts are such that the doctor appears to have a good chance at prevailing at trial, this is exactly what a lawyer should do in a discussion of the various options available to the doctor-client.

Notwithstanding this discussion, it is important to caution that all cases are different and that the expression "one size fits all" almost never works. As such, a lawyer may justifiably decide to explore and pursue ADR options in certain medical malpractice cases. Indeed, such a course of action might be best where the doctor's liability seems to be substantial and the likelihood of a large verdict after trial is very high. In those cases, the alleged malpractice may be so serious that the potential consequences and repercussions to the doctor that may result from a public settlement record pale in comparison to possibly losing a medical license or receiving a costly verdict. In such cases, a lawyer is certainly justified in advocating for ADR after closely examining and analyzing its pros and cons. However, as discussed earlier, when the risks presented by a public

139. See MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002) (requiring a lawyer to represent a client zealously and diligently). Lawyers in countries other than the United States, however, must balance their obligation not only between the clients but also between court and society as a whole. See CODE OF CONDUCT FOR EUROPEAN LAWYERS R. 4.3 cmt. (2008), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf.

140. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002); *id.* R. 1.4(b).

settlement record appear to be greater than those presented by trial, lawyers should dissuade their doctor-clients from settlement to protect them from a public settlement record.

IV. CONCLUSION

A lawyer should do no harm to the client and should always prioritize the client's best interest. Applying this notion to medical malpractice cases, this Article concludes that, to avoid the establishment of a public settlement record, an ADR-proponent attorney representing a doctor should advise the doctor-client against an out-of-court settlement if the lawyer believes the doctor has a good chance of prevailing in litigation. This result is mandated by the public's known negative perception of a physician's settlement record, specifically the preconceived notion that settlement is a reflection of the doctor's error or incompetence, which is likely to cause harm to the doctor's business and reputation in the future. Unfortunately, this approach renders a lawyer's potential duty to counsel the client about ADR options a mere formality. Clients are not only likely, but also entitled, to pursue the course of action that carries with it the least risk and, thus, a lawyer should discourage out-of-court settlements in these types of cases due to negative repercussions associated therewith. This leaves an ADR-proponent lawyer frustrated when weighing the conflicting duty to ensure the client's best interests against the lawyer's desire to diligently explore and encourage ADR.

While ADR is often touted as a theoretical no-fault amicable resolution of disputes, it does not always work this way in medical malpractice cases. To date, numerous theories have been advanced advocating for the explicit requirement that lawyers counsel their clients about ADR options. This mandatory duty carries with it the possibility of expanding legal malpractice litigation should the lawyer fail to meet this obligation.¹⁴¹ However, none of these theories are able to resolve an ADR-proponent attorney's conflict in medical malpractice cases. Accordingly, unless a specific case falls within the exception to this generalization,¹⁴² a lawyer is duty-bound to advise a doctor-client to forego any method of ADR in medical malpractice cases. While this arguably deprives the litigants of the purported benefits offered by alternative methods to litigation, which now

141. See Monica L. Warmbrod, Comment, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791, 813-14 (1997) (discussing the ethical rules adopted by Colorado, Georgia, and other states requiring or encouraging lawyers to counsel their clients about ADR).

142. See *supra* Part III.D.

represent a “standard way of resolving disputes” in American courts,¹⁴³ this outcome is, on balance, more favorable in these particular cases.

143. Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 461 (2000).